IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "E", MUMBAI

BEFORE SHRI RAJESH KUMAR, ACCOUNTANT MEMBER AND
SHRI RAM LAL NEGI, JUDICIAL MEMBER

ITA No.5552/M/2017
Assessment Year: 2010-11

DCIT 3(2)(1), Room No.608, Aayakar Bhavan, M.K. Road, Mumbai - 400020	Vs.	M/s. The Indian Express Ltd., 2nd Floor, Express Tower, Nariman Point, Mumbai – 400 021 **PAN: AACCT 1148F**
(Appellant)		(Respondent)

Present for:
Assessee by : Shri Amit Pratap Singh, A.R.
Revenue by : Shri V Mohan, D.R.

Date of Hearing : 23.01.2020
Date of Pronouncement : 18.02.2020

O R D E R

Per Rajesh Kumar, Accountant Member:

The present appeal has been preferred by the Revenue against the order dated 30.06.2017 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2010-11.

2. The issue raised in ground No.1 & 2 is against the deletion of disallowance of share issued expenses of Rs.5,65,404/- by Ld. CIT(A) by holding that there has been expansion/extension of the unit thereby allowing the claim of the assessee under section 35D(2) of the Act without appreciating the fact that assessee has not established the business.

3. The facts in brief are that during the course of assessment proceedings the AO observed that assessee has incurred Rs.5,65,404/- for the purpose of increasing the authorised and paid up share capital. According to AO, these expenses are of capital nature and accordingly called upon the AO to show cause as to why the same should not be disallowed. The assessee replied that the expenses were incurred for increase of authorised and paid up share capital are eligible to be allowed under section 35D. The AO added the same to the income of the assessee by rejecting the claim of the assessee by holding that no extension of undertaking or setting up of new unit was approved during the assessment year 2010-11 and thus assessee is not eligible for deduction under section 35D.

4. In the appellate proceedings, the Ld. CIT(A) allowed the appeal of the assessee by observing and holding as under:

> "**5.1 Ground No. 1**
>
> 5.1.1 This ground relates to disallowance of claim of Rs. 5,65,4047- u/s. 35D of the Act. The assessing officer has discussed this issue at para 4 of his order. The assessing officer has not disputed the amount claimed but has denied the claim by observing *"no extension of undertaking or a new unit has been set up during the year relevant to Assessment Year 2010-11."*
> 5.1.2 A perusal of the audited accounts of the appellant clearly reveals that addition of Rs. 23,18,99,4967- was made to the fixed assets including land, factory and plant & machinery. The assessing officer has not disputed this and has also allowed depreciation on the same. This act in itself accepts that there has been expansion/setup during the relevant period. With these undisputed facts, the observation of the assessing officer referred to above does not seem to have any basis. The impugned amount is also eligible u7s. 35D(2) of the Act. Therefore, disallowance of Rs. 5,65,404/- claimed u/s. 35D is deleted. This ground is allowed."

5. After hearing both the parties and perusing the material on record, we observe that the Ld. CIT(A) has passed a very reasoned order by holding that there was expansion of the existing unit. During the course of hearing also we required the

Ld. A.R. of the assessee to produce the necessary documents which were filed before us and after examination of the same we are of the view that assessee has expanded the existing unit in order to carry out its operation more economically and accordingly we are inclined to uphold the order of Ld. CIT(A) by dismissing the ground No.1 & 2 of the issue raised by the Revenue.

6. The issue raised in ground No.3 is against the order of Ld. CIT(A) allowing the claim of bad debts of Rs.7,19,96,655/- incurred in connection with sale of property as long term capital loss to be carried forward to the next year without appreciating the fact that no such claim was made either in the return of income or in the assessment proceedings and therefore not allowable.

7. The facts in brief are that the assessee claimed Rs.7,19,96,655/- as bad debt in the books of account during the year. A note was appended to the final accounts of the assessee stating that the company had entered into a memorandum of understanding in respect of property at Lalbaug and accordingly an agreement to sale was entered into with M/S Uppal Housing Ltd which was managed by Industrial Estate Ltd. A notice as required under the terms of the lease and MOU was given to Industrial Estate Ltd. Thereafter, part possession of the property was given and transaction was recognized in the books of account accounting for the resultant gain of Rs. 15,47,33,888/- during the financial year ended 31.03.2007. Thereafter, a member of Industrial Estate Ltd. exercised his preemptive right to buy the property. The assessee could not fulfill the terms of

the MOU and the said party backed out from the MOU and by that time the prices of the property had fallen and thus the assessee realised the sale consideration short by Rs.7,19,96,655/- and claimed this under section 36(1)(vii) of the Act and earlier the initial consideration was fully shown as recoverable in the books of the assessee. According to the AO, since the said loss is resulting out of capital asset and therefore assessee is not entitled to write off this amount as bad debt as there is a separate and distinguished head to deal with the capital loss. The AO also observed that since the loss was arising out of capital assets therefore the same could not be allowed as bad debt and thus rejected the claim of the assessee.

8. In the appellate proceedings, the Ld. CIT(A) partly allowed the claim of the assessee by observing and holding as under:

> "5.2.2 In a nutshell, the appellant owned a property in Lalbaug Industrial Estate, Mumbai and entered into an agreement to sale with M7s Uppal Housing Ltd. (UHL) on 30709/2006 for a sum of Rs. 43 cr. The appellant offered capital gain of Rs. 15,47,33,888/- in its computation of income for AY 2007-08. After entering into the above mentioned agreement for sale, UHL paid certain amounts to the appellant from time to time. However, due to non-fulfillment of certain conditions on part of the appellant, delay etc. UHL decided against purchase of the property. The appellant found a new buyer, Shri Hemant B. Vyas who was willing to buy the impugned property for a lower rate of Rs. 33.40 cr. Thus, there was a reduction of Rs. 9.60 cr. from the previously expected Rs. 43 cr. Accordingly, a deed of assignment was entered into by the appellant, UHL and Shri Hemant Vyas on 01/09/2009. Out of the sums so far paid by UHL, the appellant retained Rs. 2.40 cr. The net reduction in rate now stood at Rs. 7.20 cr (9.60 - 2.40) approximately. The appellant calculated the exact figure at Rs. 7.19 cr and wrote it off as bad debt for FY relevant to the year under appeal, AY 2010-11 claiming deduction u/s. 36(1)(vii). These facts are not in dispute. In fact, the appellant calculated excess capital gain for AY 2006-07 by wrongly taking sale price at Rs. 43 cr. whereas, actually, it received only Rs. 33.40 cr. and retained Rs. 2.40 cr out of sums paid by UHL. This has resulted in an excess receipt of Rs. 7.19 cr pertaining to AY 2006-07 and consequent effect on the declared income for that AY and effect on subsequent income, including for the instant AY. Due to the unique facts of the case, the dispute is whether the excess capital gain calculated should be allowed as deduction to the appellant and if so, under which section of the Income Tax Act.

5.2.3 At the outset, it is to be noted that section 36(1) unambiguously refers to "in computing the income referred to in section 28", viz. "profits and gains of business or profession". In the Instant case, the "excess" of Rs. 7.19 cr originated on account of sale of capital asset and was part of the appellant's computation of "capital gains". Therefore, by a plain reading of section 36(1), the appellant cannot get benefit of s. 36(1)(vii) as the shortfall has not arisen on account of any debt in relation to the business of the appellant that became irrecoverable and hence had to be written off.

5.2.4 At the same time, it cannot be denied that the appellant has suffered loss in respect of its own expected sale price of the asset. The occurrence of this loss took place on the date of execution of the deed of assignment between the appellant, UHL and Shri Hemant Vyas, i.e. 01/09/2009, in the Financial Year relevant to AY 2010-11. If the appellant did not have business losses against which it set of capital gains in AY 2006-07, it would have had to pay tax. In the instant case, the appellant carried forward lower business loss on account of "excess" capital gain calculated. Any way the facts and circumstances are seen, the appellant has suffered some form of loss and that loss is quantifiable at Rs. 7.19 cr.

5.2.5 On the date of execution of deed of assignment, the appellant possessed certain rights in the impugned property that may be termed as the rights of an "Assignor". Without transferring/relinquishing that right, the impugned property could not lawfully be purchased by Shri Hemant Vyas. Such a right in any property has to be treated as capital asset. Any act in respect of such asset including sale, exchange, transfer or relinquishment is defined as "transfer" of capital asset under Income Tax Act, 1961. This is clear from a plain reading of definition of capital asset u/s. 2(14) r.w.s. 2(47). For ready reference, section 2(47) is reproduced below:

> (47) "transfer", in relation to a capital asset, includes, -
> (i) the sale, exchange or relinquishment of the asset; or
> (ii) the extinguishment of any rights therein; or
> (iii) the compulsory acquisition thereof under any law; or
> (iv) in a case where the asset is converted by the owner thereof into, or is treated by him as, stock-in-trade of a business carried on by him, such conversion or treatment; or
> [(iva) the maturity of a zero coupon bond; or]
> (v) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4of1882);or ;
> (vi) any transaction (whether by way of becoming a member of, or acquiring shares in, a co-operative society, company or other association of persons or by way of any agreement or any arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, any immovable property.
>
> [Explanation 1].- For the purposes of sub-clauses (v) and (vi) "immovable property" shall have the same meaning as in clause (d) of section 269UA;

[Explanation 2.-For the removal of doubts, it is hereby clarified that "transfer" includes and shall be deemed to have always included disposing of or parting with an asset or any interest therein, or creating any interest in any asset in any manner whatsoever, directly or indirectly, absolutely or conditionally, voluntarily or involuntarily, by way of an agreement (whether entered into in India or outside India) or otherwise, notwithstanding that such transfer of rights has been characterised as being effected or dependent upon or flowing from the transfer of a share or shares of a company registered or incorporated outside India;"

5.2.6 By executing the deed of assignment, the appellant relinquished certain right in the impugned property, the result of which was reduction of Rs.7.19 cr from its books of account. Had it resulted in an increase/gain, the same would be subject to capital gain in the year under consideration. Legal right of any form in a property has been held as capital asset by jurisdictional ITAT in several cases. Development rights were held as capital asset in /TO vs Bharat Raojibhai Patel in IT APPEAL NO. 5038/MUM/2010 vide order dt. 31/05/2016 wherein the Hon'ble Bench onserved

"The term 'property' as stated in the definition of 'capital asset' under section 2(14) does not merely mean physical property but also includes rights, title or interest in it and that ownership of land carried with it bundle of rights attached to it, of which the right of development is most important one. [Para 10]"

5.2.7 Similar interpretation was done by Hon'ble Bombay High Court in the case of Chaturbhuj Dwarkadas Kapadia of Bombay v. CIT 260 ITR 491/129 Taxman 497. The principles of above ratio provide guidance in the instant case and in my opinion, the appellant possessed rights of an "Assignor" and by relinquishing/transferring those rights, it suffered a loss that should not be denied in the interest of natural justice.

5.2.8 The claim of appellant in respect of s. 36(1)(vii) was rightly rejected by the assessing officer. However, in view of the discussion above, the assessing officer is directed to allow Rs. 7.19 cr as long term capital loss to be carried forward. Accordingly, these grounds of appeal are partly allowed."

9. The Ld. D.R. vehemently submitted before the Bench that the order passed by the Ld. CIT(A) is without jurisdiction as this was not the claim or plea of the assessee before the AO that the said loss may be allowed to be carried forward as long term capital loss. The Ld. D.R. submitted that it was for the first time it was taken before the Ld. CIT(A) and thus the stand was changed before the Ld. CIT(A) by the assessee. The ld DR contended that Ld. CIT(A) has wrongly relied on the decision of Hon'ble Bombay High Court in the case of Chaturbhuj

Dwarkadas Kapadia of Bombay v. CIT 260 ITR 491/129 Taxman 497. The Ld. D.R. submitted that the facts of the case before the Hon'ble Bombay High Court in the case of "CIT vs. Pruthvi Brokers and Shareholders Pvt. Ltd." (2012) 349 ITR 336 (Bom.) are clearly distinguishable and therefore submitted that order of Ld. CIT(A) may be revered and that of the AO be restored.

10. The Ld. A.R., on the other hand, strongly opposed the arguments of the Ld. D.R. by submitting that the Ld. CIT(A) has passed a very reasoned and detailed order discussing and dealing with all the aspects of the issue and therefore the same may kindly be affirmed. The Ld. A.R. submitted that the assessee has suffered genuine loss when the preemptive right was exercised by member of Lalbaug Industrial Estate Ltd. and by which time the price agreed by the assessee with the original buyer M/S Uppal Housing Ltd in A.Y. 2007-08 who cancelled the MOU when the assessee could not fulfill the terms of the MOU . By that time the market value of the property had already fallen and the shortfall in the recovery of sale consideration was recognised as bad debt. The Ld. A.R. submitted that in A.Y. 2007-08 the gain on the said sale of land was recognised and offered to tax though it was set off against the business losses and net business losses were carried forward but submitted that there is a loss which has arisen on account of exercise of pre-emptive right by a member of Lalbaug Industrial Estate Ltd. and therefore has to be recognised as long term capital loss arising as a result of transfer of the property the gain whereof was already offered to tax in A.Y. 2007-08. The Ld. A.R. therefore prayed that the Ld. CIT(A) has very fairly and legally considered the claim of the assessee and allowed the

carry forward of the long term loss to the subsequent years to be set off against the long term capital gain. The Ld. A.R. relied strongly on the decision of CIT vs. Pruthvi Brokers and Shareholders Pvt. Ltd. (supra) wherein the Hon'ble Bombay High Court has held that appellate authorities have power / jurisdiction to consider any claim not made in the return of income. The Ld. A.R. pointed out that while passing the order the decision of Goetz India Ltd. vs. CIT (2006) 284 323 SC was also referred to. The Ld. A.R. therefore prayed that ground no.3 raised by the Revenue may kindly be dismissed by upholding the order of Ld. CIT(A).

11. After hearing both the parties and perusing the material on record including the impugned order, we observe that the Ld. CIT(A) has rightly entertained the claim of the assessee and allowed the long term capital loss to be carried forward to the subsequent years. The Revenue has relied on the decision of Hon'ble Supreme Court in the case of Goetz India Ltd. vs. CIT 284 ITR 322, however, the Hon'ble Bombay High Court in the case of "CIT vs. Pruthvi Brokers and Shareholders Pvt. Ltd." (supra) has held that appellate authorities can entertain a claim of the assessee which is not made in the return of income after considering the decision of Hon'ble Supreme Court in the case of Goetz India Ltd. vs. CIT (supra). We, further, find that the loss has genuinely arisen due to fall in prices of property during the period when preemptive right by member of Lalbaug Industrial Estate Ltd. was excercised. Needless to mention that assessee has already returned the gain on this property resulting from the transfer of the property through MOU and part handing over the possession to the prospective buyer and thus are recognised the

the transaction of sale in the books of accounts. In our opinion, this is a genuine short fall in recovery of the sale consideration originally agreed to and recognized in the books of accounts by the assessee. Therefore, the action of Ld. CIT(A) in allowing the carried forward of the said loss is as per the provisions of Income Tax Act. Accordingly, we do not find any infirmity in the order of Ld. CIT(A) and same is upheld by dismissing the ground raised by the revenue.

12. The issue raised in ground No.4 is against the deletion of disallowance of Rs.44,264/- by Ld. CIT(A) as made by the AO under section 14A read with rule 8D2(iii) of the Act.

13. The facts in brief are that the AO during the course of assessment proceedings observed that assessee has made investments of Rs.88,32,058/- and received exempt income of Rs.28,965/- on the said investments. However, no corresponding expenses were disallowed which were incurred in relation to earning of said income and accordingly worked out the disallowance by applying provisions of section 14A rule 8D at Rs.7,17,024/- comprised interest of Rs.6,72,760/- under rule 8D2(ii) and Rs.44,264/- under rule 8D2(iii) of the Act

14. In the appellate proceedings the ld CIT(A) partly allowed the appeal by deleting the disallowance under rule 8D(2)(iii) by observing that assessee's own capital and reserves were more than the investments by following the decision of Hon'ble Bombay High Court in the case of HDFC Bank vs. DCIT 383 ITR 529 . As regards the second limb of the disallowance under rule 8D2(iii) of the Act, the Ld. CIT(A) observed that the proportionate

disallowance was made in a routine and mechanical manner without recording any objective satisfaction having regards to the books of the assessee warranting no disallowance under section 14A of the Act. According to Ld. CIT(A) the dissatisfaction has to be recorded by the AO having regard to the accounts of the assessee and by following the decision in the case of CIT vs. Hero Cycles Ltd. 323 ITR 518(P&H) and also various decisions of the Tribunal deleted the disallowance under rule 8D(2)(iii). The revenue has challenged the deletion of disallowance under rule 8D(2)(iii) by CIT(A) before us.

15. After hearing both the parties and perusing the material on record, we observe that Ld. CIT(A) has given a correct finding on the issue that no disallowance is required to be made under rule 8D2(iii) where no satisfaction has been recorded having regard to the books of accounts of the assessee as to how the claim of the assessee that no expenses are to be disallowed is wrong. We note that in point No.17(1) of 3CD report the assessee has worked out the expenses at nil. Accordingly, we are inclined to uphold the order of Ld. CIT(A) by dismissing the appeal of the Revenue.

16. The issue raised in ground No.5 & 6 is against the order of Ld. CIT(A) deleting the disallowance of Rs.38,563/- as made by the AO on account of bogus purchases from M/s. Raj Tool Corporation.

17. The facts in brief are that the AO made the addition of Rs.38,563/- after receiving information from the Sales Tax Department that the party from whom the purchases were made

is a bogus and hawala operator and is not doing any business and finally disallowed and added the same to the income of the assessee. The Ld. CIT(A) deleted the addition after the assessee produced before the appellate authority copies of invoices, transport received, inward register entry, stock movement register, bank statement, PAN number and TIN of the supplier and finally deleted after relying on various decisions that addition can not be made on the basis of presumption and assumptions.

18. After hearing both the parties and perusing the material on record, we observe that in this case the assessee is engaged in the business of printing and publication of newspaper and other publications. The assessee has turnover of Rs.500 crores during the year. We observe that the disallowance made by the AO on account of bogus purchases is only Rs.38,563/- despite the fact that the assessee has produced all the necessary bills, vouchers, transport receipts, inward and outward stock entries along with the payment through banking channel. The AO has not carried out any enquiry despite assessee filing all these informations before the AO. Moreover this being a petty expense which having regard to the turnover of the assessee is not even worth consideration. In our view, the Ld. CIT(A) has taken a balanced and correct view of the matter. After considering all the facts and circumstances of the case, we are inclined to uphold the order of Ld. CIT(A) on this issue by dismissing the appeal of the Revenue.

19. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open court on 18.02.2020.

Sd/-	**Sd/-**
(Ram Lal Negi)	**(Rajesh Kumar)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai, Dated: 18.02.2020.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.