

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH: 'F' NEW DELHI**

**BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER  
AND  
SHRI O.P. KANT, ACCOUNTANTMEMBER**

ITA No.7751/Del./2018  
Assessment Year: 2014-15

Shri Ramesh Kumar Agarwal, 599, 2 <sup>nd</sup> Floor, Gandhi Cloth Market, New Delhi	<b>Vs.</b>	ITO, Ward-46(3), New Delhi
<b>PAN :AADPA0736C</b>		
<b>(Appellant)</b>		<b>(Respondent)</b>

Appellant by	Shri Ajay Wadhwa, Adv. Ms. Bharti Sharma, CA
Respondent by	Shri Umesh Takyar, Sr.DR

Date of hearing	25.02.2020
Date of pronouncement	29.05.2020

**ORDER**

**PER O.P. KANT,A.M.:**

This appeal by the assessee is directed against order dated 26/09/2018 passed by the Ld. CIT(Appeals)-16, New Delhi [in short 'the Ld. CIT(A)'] for assessment year 2014-15 raising following grounds:

- 1. That the order of the Commissioner of Income Tax (Appeals), New Delhi [the learned CIT(A)] dated 26.09.2018 is bad in law and on facts.*
- 2. That the learned CIT(A) has erred in law and on facts in sustaining the disallowance of business loss of Rs.56,53,550/- made by the learned Assessing Officer.*
- 3. That the learned CIT(A) sustained the disallowance of business loss of Rs.56,53,550/- on the basis of surrounding circumstances, preponderance of probability of human conduct.*

4. *That the learned CIT(A) has erred in law and on facts in sustaining the disallowance of business losses on the basis that the appellant has failed to produce any evidence to prove that the loss claimed by the appellant was genuine despite the fact that the appellant has furnished all the evidences to establish the genuineness of business transactions of purchase and sale of design fabrics.*
5. *That the learned Assessing Officer and learned CIT(A) has erred on facts and in law in this regard regarding the statements of proposed by recorded by CIT(A) himself and thereby violating the well settled principles of natural justice.*
6. *That the learned CIT(A) has erred in law in sustaining the disallowance of business loss of Rs.56,53,550/- by alleging that these business transactions are sham transactions for the purpose of evading Tax without any basis or documentary evidence.*
7. *That the learned AO and the learned CIT(A) has erred in law in disregarding the fact that the Assessing Officer cannot step into the shoes of the Businessman so as to determine how the business is to be conducted [SA builders Limited. (2007) 288 ITR1 (SC)].*
8. *That the appellant craves leave to add alter, amend, substitute, delete and modify any or all the grounds of appeal which are without prejudice to one another, before or at the time of hearing to the appeal.*

2.1 Briefly stated facts of the case at that the assessee was engaged in running the proprietary concern namely M/s Anky Clothing. The assessee filed return of income for the year under consideration on 25/11/2014 declaring total income of ₹ 7,29,670/-. The return of income filed by the assessee was selected for scrutiny assessment for the reason of “large business loss set-off against other heads of the income”. The statutory notices under the Income-Tax Act, 1961 (in short the Act) were issued and complied with. In the assessment completed under section 143(3) of the Act, the Assessing Officer disallowed business loss of ₹ 56,53,550/- claimed by the assessee, holding that the impugned business loss was not genuine and was as a result of meticulously planned events and the entities involved were part of this exercise in an effort to create documentary evidence for preplanned scheme for creating business loss just to adjust the short-term capital gain, which the assessee had from

sale of his plot in Noida. On further appeal by the assessee, the Ld. CIT(A) carried out further enquiry in the matter and upheld the disallowance made by the Assessing Officer. Aggrieved with the finding of the lower authorities, the assessee is in appeal before the Tribunal raising the grounds as reproduced above.

3. The grounds raised by the assessee are in relation to the business loss of ₹ 56,53,550/- disallowed by the Assessing Officer and confirmed by the Ld. CIT(A).

3.1 Regarding the business loss, the assessee before the Assessing Officer stated as under:

- (i) During the year under consideration, there was short term capital gain of ₹ 55,60,703/-from sale of plot of land
- (ii) The assessee purchased design fabric of ₹ 1,79,50,040/-from M/s Shylgo Textile P. Ltd., 633, Shivaji Road , Azad market, Delhi -110006( in short 'Shylgo textile') and sold to four parties for a total sum of ₹ 1,22,96,490/-thereby incurring a loss of ₹ 56,53,550/-.
- (iii) The assessee claimed to have engaged in trading of grey fabric for the last many years but ventured in trading of design fabric for the first time. The reason for entering in the venture has been stated as trading of the design fabric was more profitable.
- (iv) Initially during the assessment proceedings, the assessee submitted that by the time it received the delivery of design fabrics, the design had gone out of the fashion and he could not find any buyer for the same and, therefore, sold the goods on loss.

- (v) Subsequently, submitted that the assessee received certain purchase orders of design fabrics from two parties namely M/s Cotton Collection and M/s SathakApparels Private Limited and for supplying the said fabric to these parties, the assessee further placed order of the fabric to 'Shylgo textile'. The samples received from 'Shylgo textile' were forwarded to those two buyers, however the samples were not approved and they cancelled the purchase orders. Due to cancellation of purchase orders by them, the assessee was forced to sell the design fabric at discounted price to the parties viz., (1) India Fashion (2) Say My Choice Inc. (3) Achiever Apparels Pvt. Ltd., and (4) Amit Sales Corporation.

The above submission of the assessee was rejected by the Assessing Officer due to following reasons:

- (i) Both M/s. Cotton Collection and M/s Sarthak apparels had not only given the purchase order on same date i.e. 25/10/2013 but pattern and language of the orders by both the buyer was strikingly similar.
- (ii) The assessee in letter dated 23/08/2016 stated the reason of the loss as design of the fabric had become outdated due to late delivery of goods but in letter dated 21/09/2016 and 26/12/2016 the reason for loss was claimed as due to cancellation of the order by the above referred to parties compelling the assessee to sell the design fabric to other parties in the open market at heavy discount. According to the Assessing Officer this story

was afterthought of the assessee to explain the said alleged loss.

- (iii) The assessee was not dealing with the above referred two parties prior to the alleged orders, still the assessee did not take any security from those parties for delivery of the goods. The party on whom the assessee placed order i.e. Shylgo textile was also not in business with the assessee prior to this alleged deal and that party had also not taken any security from the assessee while accepting the order. According to the Assessing Officer this alleged behaviour/conduct of the assessee was against business practice and normal human behaviour and probabilities.
- (iv) The assessee did not file any suit for legal action against those parties for cancelling the orders, which resulted into alleged huge losses to the assessee.
- (v) The assessee claimed that M/s Cotton collection cancelled the order on 2/11/2013 due to sample provided by the assessee being different from the item that was ordered. In view of this claim the assessee was aware that fabricsupplied by M/s shylgo textile was not as per order and rejected by M/s cotton Collection, still the assessee kept on buying the fabric from M/s shylgo Textile. Despite not providing goods as per order, no legal or otherwise action taken against shylgo Textile.
- (vi) The said business of trading in designed fabric was stopped from next year onward, which shows that business loss of Rs. 56,60,703/- was created only to adjust the short-term capital earned in the year under consideration.

- (vii) The Assessing Officer issued notice u/s 133(6) of the Act to M/s Cotton Collection, M/s Sarthak apparel and M/s shylgo Textile but the notice sent to M/s shylgo returned undelivered. In the replies received from M/s Cotton Collection and Sarthak Apparel, the AO found striking similarity in pattern and language. According to the AO, it could not be coincidence and letters must have been written by the one person or under the guidance or instructions of the same person.
- (viii) The Assessee was asked to produce those three parties vide order sheet entry dated 7/12/2016;16/12/2016 and 26/12/2016 but none were produced by the assessee. The AO also issued summons u/s 131 of the Act on 6/12/2016 to M/s Shylgo Textile and on 8/12/2016 to all the three parties for personal attendance , but no compliance was made.
- (ix) The inspector of the office of the AO visited the address of M/s cotton Collection but he found ,the address to be of a residential building and no entity was found to be operating from that address.

3.3 It is under above circumstances; the Assessing Officer was of the view that assessee has created documentary evidence in preplanned manner for creating business loss to offset the short-term capital gain. According to the Assessing Officer Income-tax liability is ascertained on the basis of the material available on record, surrounding circumstances, human conduct and preponderance of the probabilities and in such clandestine

operations and transactions, it was impossible to have direct evidence or demonstrative proof of every move.

3.4 Before the Ld. CIT(A), the assessee attempted to rebut the factual observations made by the Assessing Officer, while disallowing the business loss. The submission of the assessee before the Ld CIT(A) are summarized as under:

- (i) The assessee and his family has been in the business of the trading of the grey fabric since more than 25 years.
- (ii) The assessee ventured into dealing of design fabric for the first time looking to possibility of high profit however, the goods supplied by the supplier were notfound as perspecifications,and hence rejected by the buyers and fetched very low value on sale in open market.
- (iii) For maintaining a reputation in the market, a businessman may not choose for litigationand instead of spoiling relations with the person, it is better to get more business from him in the future.
- (iv) Not accepting security from buyers or not filing legal suit against them are subjective consideration and should not be main stake in making in addition to income.
- (v) Striking similarity in letters of M/s Cotton collection and M/s Sarthak Apparels might be due to deputing same person by them and they might have responded in their own way and manner and nothing must be read into the language or pattern of correspondence.

- (vi) The assessee had numerous verbal and telephonic conversation with M/s Cotton Collection and M/s. Sarthak Apparels and pleaded them to honour their commitment. The legal action would not have yielded any result and the assessee was always resisted from taking any legal recourse as it would have spoiled his reputation.
- (vii) This was assessee's first venture into this form of fabric which unfortunately resulted into loss and compelled the assessee not to pursue this any further. After a loss of ₹ 55 lakh, the assessee would have been 'full hardy' to continue this business. After this loss he stopped business and went to carry on its core business of dealing in grey fabric.
- (viii) In this trade no securities are taken for this magnitude of the order and generally orders regulated on words and mouth.

3.5 The assessee requested the Ld. CIT(A) to confront the third-party evidences. On being asked by the Ld. CIT(A), the assessee produced the main persons of M/s Cotton collection and M/s. Sarthak Apparel before him. Both persons stated that entire transaction were on verbal communication. No documents were placed on record to prove the genuineness of the export order received by M/s Cotton Collection and order received from Vishal Mega Mart by M/s Sarthak apparels. According to the Ld. CIT(A), once the assessee was made aware of the result of the examination of the documents which proved the transaction was not genuine, the onus was on the assessee to prove that he

incurred the loss. According to the Ld. CIT(A), in view of the decision of the Hon'ble Supreme Court in the case of Sri Charan Singh Vs Chandra Bhan, AIR 1988 SC 637, the burden of proof lies on the party who substantially assert the affirmative of issue and not upon the party who denies it. The observation of Ld. CIT(A) on the burden of proof of the assessee are reproduced as under:

*"The appellant's insistence that the transactions are genuine supported by certain documents cannot be accepted in view of the fact and circumstances of the case brought on record by the assessing officer after proper examination of the material facts. Once the appellant was made aware of the result of examination of the documents which proved that transactions is not genuine, the onus was on the assessee to prove that he has incurred genuine loss under section 101 of the Indian Evidence Act, 1972 as it is the assessee who is asserting a claim that he was engaged in genuine business transactions. It is relevant to note here that Hon'ble Supreme Court in the case of Sri Charan Singh versus ChandrabhanSingh, AIR 1988 SC 637 has clarified that the burden of proof lies on the party who substantially asserts the affirmative of the issue and not upon the party who denies it. It has been further held that the party cannot, on failure to establish a prima facie case, take advantage of the weakness of his adversary's case. The party must succeed by the strength of his own right and the clearness of his own proof. Since in this case the appellant had made the claim of loss, all the facts were especially within him knowledge. Section 102 of Indian Evidence Act makes it clear that initial onus is on person who substantially asserts a claim. If the onus is discharged by him and a case is made out, the onus shifts on to deponent. It is pertinent to mention here that the phrase "burden of proof" is used in two distinct meaning in the law of evidence viz., 'the burden of establishing a case', and 'the burden of introducing evidence'. The burden of establishing a case remains throughout trial where it was originally placed, it never shifts. The burden of evidence may shift constantly as evidence is introduced by one side or the other. In this case, once the evidence that assessee has claimed bogus loss was introduced by the AO, the burden of evidence shifted to the assessee. During the assessment proceeding and even during the appellate proceeding, the assessee has failed to produce any evidence to prove that the loss claimed by him was genuine.*

*In the present case, I find that the plant has failed to discharge its burden of proof and the AO, on the other hand, has proved that the business loss of the appellant was incorrect. Further, the production of the main persons of Cotton Collection and Sarthak Apparel Pvt. Ltd. further strengthened the case of the AO and goes against the appellant, Sh. Sunil Kumar Balooni Proprietor of Cotton collection admitted that no approval of design before placing his order has been given to the appellant. If the appellant wants to venture into new business that too of*

*customized fabrics for export, the appellant should have at least given a specific design or requirement to the party. Both persons stated that the entire transactions are on verbal communications. No Documents are placed on record to prove the genuineness of the export order received by Cotton Collection & order received by Vishal Mega Mart by Sarthak Apparel Private Ltd. In view of the facts and circumstances borne out of the assessment order and legal precedents as discussed by the AO, I am of the view that transactions leading to business loss by the appellant are sham transaction entered into for the purpose of evading tax. I do not find any infirmity in the order of the AO. These grounds of appeal of the appellant are dismissed."*

4. Before us, the assessee filed a paper-book containing pages 1 to 130 and submitted that loss incurred by the assessee is a genuine business loss.

4.1 The Ld. Counsel of the assessee referred to copies of the statement of Sh. Sunil Kumar Balooni, proprietor of M/s Cotton collection and Mr Rajesh Kumar Garg, director of M/s Sarthak Apparels Private Limited (available on page K-M of the paper-book), who attended the office of the Ld. CIT(A) on 12/04/2018 and were examined by the Ld. CIT(A) himself. According to the learned Counsel, both the parties in their statement confirmed that they had placed order to by the design fabric from the assessee and also explain the reasons for cancelling the order systematically sought to be purchased was rejected by the customer. The learned Counsel submitted that both the parties had filed the replies and requisite documents in response to notice under section 133(6) issued by the Assessing Officer, copy of which were placed on page 119 to 123 of the paper-book.

4.2 Thus, according to him, the Ld. CIT(A) confirmed the disallowance merely on the basis of subjective consideration or unsubstantiated allegations levelled by the Assessing Officer i.e. fabric sold at loss before the cancellation of the orders is merely a story and afterthought; the assessee had not taken or given any security at the time of receiving or giving orders; the assessee had

not filed any legal suit against parties; the assessee stopped its business from the next year; the assessee should have given a specific design requirement to the party etc.

4.3 The learned Counsel submitted that the assessee had furnished invoices and ledger-cum-confirmation in respect of purchase transaction of design fabric from M/s Shylgo Textile and replies filed by M/s Cotton collection and M/s Sarthak apparel in response to notice issued under section 133(6) issued by the Assessing Officer along with the return of income for assessment year 2013-14 and 201415.

4.4 The learned Counsel further submitted that assessee had also furnished his affidavit wherein he stated on oath that M/s Shylgo textile through the accountant appeared before the learned Assessing Officer in response to summon under section 131 of the Act alongwith summoned records on 31/12/2016, but the Assessing Officer refused to examine him and even did not record attendance. The counsel submitted that later on , M/s Shylgo Textile had submitted the summoned documents by speed post dated 31/12/2016. The learned Counsel referred to affidavit of the assessee, a copy of which is placed on page 128 to 130 of the paper-book.

4.5 The ld. Counsel of the assessee relied on the decision of the Hon'ble Supreme Court in the case of SA builders Ltd vs CIT (2007) 158 Taxman 74(SC) and other decisions in support of the proposition that the Assessing Officer should not seek to conduct business by sitting on the armchair of the businessmen and the businessmen knows best how to do his business.

4.6 The Learned Counsel also relied on the submission made by the assessee before the Ld. CIT(A). The learned Counsel also

submitted that the Inspector's report with the finding that M/s Cotton collection did not exist at the address, was not provided to the assessee which is in violation of the principle of the natural justice and same cannot be used against the assessee. In support of the contention the Learned Counsel relied on the decision of the Hon'ble Supreme Court in the case of Andman Timbers Industries Vs CCE Civil Appeal No. 4228 of 2006 in other decisions.

4.7 The learned Counsel also referred to copy of sales invoices issued by the assessee in respect of the sale of design fabric to 4 parties available on page 56 to 90 of the paper-book and copy of invoices issued by M/s Shyalgo Textile, available on page 91 to 102 of the paper-book. He also referred to copy of ledger accounts of those four parties to whom fabric was sold, available on page 104 to 118 the paper-book.

5. The Learned DR, on the other hand, relied on the order of the lower authorities and submitted that the assessee has failed to discharge his onus of justifying the business loss and, therefore, the order of Ld. CIT(A) might be upheld.

6. We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. According to the assessee, main reason for business loss in trading of designed fabric is cancellation of purchase orders by M/s Cotton collection and M/s Sarthak apparels. The assessee produced both these parties before the Ld. CIT(A). Statement of both the parties are available on page K to M of the paper-book. Sh. Sunil Kumar Balooni, proprietor of M/s Cotton Collection stated that he received an order of export from Australia of Scarf and for supply of that order, he placed order for purchase of customized fabrics to the assessee, but the order was cancelled because the assessee

shown him a small piece of the ordered fabric, which was not as per the design order and rejected by his buyer.

6.1 Similarly, Sh Ramesh Kumar Garg, Director of M/s Sarthak Apparel Private Limited, submitted that in the business of manufacturing ready-made garments, he received an order of ready-made garments of customised fabrics from Vishal Mega Mart and for supply of that, he placed an order for purchase of customised fabric to the assessee, but later on that order was cancelled by M/s Vishal Mega Mart.

6.2. The assessee has produced above two parties to prove that he has received orders from those parties which were later on cancelled. Both the above parties have confirmed the aforesaid transaction with the assessee in their statement made before the Ld. CIT(A) as well as confirmed in reply to the notice under section 133(6) of the I.T. Act before the A.O. In the business transactions it is not necessary that all the transactions should be proved by documentary evidences. The business orders are placed orally as well and particularly when transactions have been confirmed by the parties, there is no reason to doubt the statements of the above persons as well as their reply under section 133(6) of the I.T. Act. The sale and purchase of the items under reference from independent parties have not been doubted by the authorities below. If as per A.O. the pattern and language of the correspondence assessee and these parties are similar is no ground to reject their explanation. It is also not necessary that for each and every business cancellation orders, the parties shall have to resort to litigation before the Civil Court by filing a Civil Suit. The assessee shall have to maintain business relation with the parties and for business interest some times shall have to

suffer the losses, therefore, it is always not advisable to resort to civil litigation for a small amount for the betterment of the business activities. PB-15 is P & L A/c of the assessee proprietorship concern which shows assessee has turnover of Rs.8.82 cores which shows the bonafide of the assessee in carrying the business activities. Therefore, for a small amount the authorities below should not have doubted the explanation of the assessee and others. The reasons given by the A.O. are merely a presumption which could not reject the explanation of assessee that he has suffered genuine business loss. The assessee furnished copy of the invoices and ledger account in support of the above explanation. Therefore, the documentary evidences which have not been rebutted by the A.O. could not have been disbelieved by the A.O. on irrelevant reasons. The A.O. did not examine the parties from whom assessee has purchased the items under reference which were later on sold to other parties when the above two parties refused to accept the goods from the assessee. Considering the totality of the facts and circumstances, we are of the view that the A.O. has failed to establish that loss suffered by the assessee is not genuine. Thus, there is no reason to sustain the addition of Rs.56,53,550/-. In view of the above, we set aside the Orders of the authorities below and delete the entire addition. In the result, appeal of the assessee is allowed.

7. In the result, appeal of the assessee is allowed.

***Order pronounced in the open court on 29<sup>th</sup> May, 2020.***

**Sd/-  
(BHAVNESH SAINI)  
JUDICIAL MEMBER**

**Sd/-  
(O.P. KANT)  
ACCOUNTANT MEMBER**

Dated: 29<sup>th</sup> May, 2020.

RK/- (D.T.D.S)

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi