

IN THE INCOME-TAX APPELLATE TRIBUNAL "F" BENCH MUMBAI
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER AND
SHRI RIFAUR RAHMAN, ACCOUNTANT MEMBER
ITA No. 5375/Mum/2016 (Assessment Year 2012-13)

Manoj Shivyag Singh Babubhai Gaikwad Compound, Trikam Das Road, Kandivali (West), Mumbai-40067. PAN: ASJPS4147D	Vs.	DCIT Central Circle- 5(1) Aayakar Bhavan, Mumbai.
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Appellant

Respondent

Appellant by : Shri V.G. Ginde with Kumar Kala
(AR)

Respondent by : Miss Sumantha Mullamudi (Sr.DR)

Date of Hearing : 17.02.2020

Date of Pronouncement : 27.05.2020

ORDER UNDER SECTION 254(1) OF INCOME TAX ACT

PER PAWAN SINGH, JUDICIAL MEMBER;

1. This appeal by assessee under Section 253 of Income-tax Act (the Act) is directed against the order of Id. CIT(A)-53, Mumbai dated 30.06.2016 for Assessment Year 2012-13. The assessee has raised the following grounds of appeal:

Being aggrieved by the Order u/s.250 of the Income-tax Act, 1961 ("Act") dated 30.06.2016 passed by the Ld. Commissioner of Income-Tax (Appeals)-53, Mumbai ["CIT(A)"], the appellant prefers this appeal petition, among others, on the following grounds of appeal, each of which is independent of, and without prejudice to, the others:

1. Disallowance of Expenses claimed in M/s. Raunak Agency:

1.1 On the facts and in the circumstances of the case, and in law, the Ld CIT(A) erred in sustaining the disallowance of all expenses aggregating to Rs.83,72,085/- (inclusive of bad debts written off of Rs.76,11,276/-) debited to the profit & loss account of M/s. Raunak Agency ('RA'), a proprietary concern of the appellant, made by the Ld. AO on the ground that the business of RA was closed.

1.2 The Ld. CIT(A) failed to appreciate, and ought to have held, that RA was a part of the same business of running lottery agency carried on by the appellant at different locations, though in different names; and thus, the appellant continued to carry on the business that entitled the appellant to claim the aforesaid legitimate business expenses (including bad debts written off).

In view of above, the appellant prays that deduction be allowed for the expenses of Rs.83,72,085/- (including for bad debts of Rs.76,11,276/-) in accordance with the law.

2. Disallowance of Debit Balances written off in M/s. Amber Agency:

2.1 On the facts and in the circumstances of the case, and in law, the Ld. CIT(A) erred in sustaining the disallowance of Rs.1,10,42,315/- out of the debts of Rs. 1,32,41,948/- (wrongly taken as Rs.56,30,671/- by the Ld. AO) written off by the appellant in the books of account of M/s. Amber Agency, a proprietary concern of the appellant.

2.2 The Ld. CIT(A) erred in holding that the aforesaid debt of M/s. Mainstar Lotteries Pvt. Ltd. ('MLPL') written off was not a debt arising out of sales, but was on account of loan, and therefore, not deductible u/s.36(1)(vii) r/w s.36(2) of the Act.

2.3 The Ld. CIT(A) erred in not considering the appellant's revised claim for the bad debts of Rs.71,39,414/- u/s.36(1)(vii) r. w. s. 36(2), and claim for business loss of Rs.39,02,901/- in respect of debt due from MLPL.

2.4 The Ld. CIT(A) also erred in rejecting the appellant's alternative claim for deduction of Rs.1,10,42,315/- as business loss.

In view of above, the appellant prays that -

(a) the revised claim for bad debts of Rs.71,39,414/- in respect of MLPL be allowed u/s. 36(1)(vii) r/w s. 36(2) of the Act and the balance amount of Rs.39,02,901/- be allowed as business loss; or

(b) without prejudice to above, the whole of the sum of Rs.1,10,42,315/- be allowed as business loss.

3. On the facts and in the circumstances of the case, and in law, the Ld. CIT(A) erred in not directing the Ld. AO to consider the appellant's alternative claim for business loss in the event the claim for bad debt is not allowed in respect of various debit balances written off by the appellant aggregating to Rs.21,99,633/- (other than MLPL's debt) for which the issue was restored to the file of the Ld. AO.

In view of above, the appellant prays that the Ld. AO be directed to consider the appellant's alternative claim for business loss if the claim for bad debt qua these debit balances written off is not to be allowed by the AO.

2. Brief facts of the case are that the assessee is proprietor of two concerns namely (i) M/s Raunak Agency (RA) and (ii) M/s Amber Agency (AA) and also Director in a Private Limited Company namely M/s Mainstar Lotteries Pvt Ltd (MLPL), all three concerns were dealing in lottery business. The assessee filed its return of income for Assessment Year 2012-13 on 29.09.2012 declaring total income at Rs. 8,58,781/-. The assessee claimed business expenses and bed debts in Raunak Agency (RA) of Rs.83,72,085/-. The assessing officer after issuing show cause and considering the reply of the assessee, disallowed business expenses and bed debts by taking view that RA stopped its business activity in financial year 2010-11 and that in absence of business activity the assessee is not entitled of deduction under Chapter IV of Income tax Act. Hence, entire expenses and the bed debts aggregating of Rs. 83,72,085/- was disallowed. The assessee also claimed bed debts in Amber Agency (AA) of Rs. 1,32,41,948/- out of which a sum of Rs. 1,10,42,315/- was in respect of MLPL, a company wherein the assessee hold 95% of shares. The assessing officer after issuing show cause and considering the reply of the assessee also disallowed the entire claim in Amber Agency by taking view that the assessee has substantial interest in MLPL and the assessee developed camouflage device. The assessing officer while disallowing the claim of assessee relied on the decision of Hon'ble Supreme Court in McDowell (154 ITR 148 SC). On appeal before first

appellate authority / learned CIT(A), the action of the assessing officer on both the claims was confirmed. Thus, further aggrieved by the order of Id CIT(A) the assessee has filed present appeal before this Tribunal.

3. We have heard the submissions of the learned authorised representative (Id. AR) for the assessee and the learned Senior Departmental Representative (Id. DR) for the revenue and with their assistance gone through the order of lower authorities. Ground No. 1 relates to disallowances of expenses claimed in Raunak Agency (RA). The Id. AR for the assessee submits that Raunak agency and Amber agency constitutes one single and composite business carried on by the assessee and thus, it was the same business in both the entities. The closure of one limb of business in Raunak Agency cannot be construed a cessation of business itself, so far as other limb of business in Amber agency is continued by the assessee. The assessee being an individual was in total control of both these proprietary concern. There was a complete unity of control in common management having interlinking, interlacing and interconnection embracing these two concerns to constitute the same business. The learned AR for the assessee further submits that the case laws relied by learned CIT (A) in C.L. Mehra versus ITO (59 ITD 99 Delhi), is not applicable on the facts of the present case. The facts of that case are quite different. In the said case the assessee started another proprietary concern at different place after closing of its proprietary concern at different place, whose license was transferred to new concern.

Thus, both these concerned did not co-existed and carry on the activities simultaneously. However, in the assessee's case both the entities were carrying its business the business until one was closed. The ld AR for the assessee also filed the following documents on record;

- Copy of ITR acknowledgement and statement of total income for AY 2012-13
- Tax audit report of Amber agency for AY 2012-13 with Audited balance sheet and profit and loss account,
- Copy of tax audit report of Raunak Agency with consolidated balance sheet and profit and loss account of Amber agency and Raunak agency with Schedules for FY 2011-12.
- Copy of ITR of MLPL with statement of Income for FY 2011-12 with audited balance sheet and profit and loss account and
- Copy of ledger account of Amber agency in the books of MLPL for FY 2011-12,
- Copy of ledger account of MLPL (sales account) in the books of Amber agency for FY 2011-12,
- Copy of ledger account of MLPL (loan account) in the books of Amber agency for FY 2011-12,
- Copy of revised Ledger account of MLPL(sales account) in the books of Amber agency for FY 2011-12,
- Copy of revised ledger account of MLPL (loan account) in the books of Amber agency for FY 2011-12,
- Copy of purchase account of MLPL for FY 2010-11 and 2011-12 reflecting purchased made from Amber agency,
- Copy of sales register of Amber agency for FY 2010-11 and 2011-12 reflecting sales made from MLPL.
- Copy of ledger account of MLPL in the books of Amber agency for FY 2010-11,

- Copy of ledger account of MLPL in the books of Raunak agency for FY 2010-11 and
 - Copy of various written submissions furnished before assessing officer and Id CIT(A).
4. To buttress his submission, the learned AR of the assessee relied upon the decision of following decisions;
- Shreyas S Morakhia Vs DCIT (ITA No. 198/Mum/2009) dated 27.11.2011,
 - Gujarat High Court in Bansidhar (P)Ltd versus CIT (1981 5 Taxman 158 Gujarat),
 - DCIT Vs Patidars Ginning and Pressing Company (2000) 108 Taxman 476(Guj),
 - Madras High Court in CIT versus Ranji Investment. Ltd 319 ITR 433 (Madras),
 - CIT versus late TS Srinivasa Iyer 192 ITR 50 (Madras) and
 - CIT versus Western Bengal Coal Fields Ltd 233 ITR 139 (Calcutta).
5. The learned AR for the assessee submits keeping in view the aforesaid decisions of various High Courts the assessee is entitled for all expenses including bad debts written off in the books of Raunak agency while computing business income.
6. On the other hand the learned DR for the revenue submits that the assessee closed its business in one the concern in respect of which the bad debts was claimed in another concern. The assessee failed to prove that he was running common business in both the concerns. The assessee failed to substantiate its claim before the lower authorities. In absence of any business activities the assessee is not entitled to claim expenses of ne concern in other concern as claimed by the assessee. In support of her submissions the ld. DR for the

revenue relied on the decision of Bangalore Tribunal in Karnataka Intrade Corporation Limited Vs ACIT 127 ITD 74 (Bang).

7. We have considered the rival submissions of both the representative and deliberated on the various case law relied by the ld. AR for the assessee. The assessing officer disallowed the total expenses claimed by the assessee with regard to Raunak agency by taking view that no business was carried out by Raunak agency during the year as it was discontinued in earlier years. The learned CIT (A) while affirming the action of assessing officer also held that Raunak agency and Amber agency are two different and distinct business carried by assessee and therefore, they did not constitute the same business. It was also held that only stoppage of the business activities of Raunak agency no deduction was admissible for an expenditure including the bad debts. It was further held that merely recovering dues and discharging liability after discontinuance of business activity does not amount to carry on business. And that deeming provision of section 41 (1) cannot be extended merely income was offered to tax under section 41.
8. The Coordinate bench of Mumbai Tribunal in Shreyas S Morakhia Vs DCIT (supra) while considering the allowability of bed debts and in alternative as business loss with regard to the one limb of business which was closed, under the second limb of his business, held as under;

“10. Rival contentions heard. On careful consideration of the facts and circumstances of the case and on perusal of the papers on record, orders of

the authorities below as well as the case laws cited before us, we hold as follows:-

11. The business of the assessee is that a share trader and was trading both in his own behalf as well as on behalf of third parties. In earlier year, the assessee sold Stock Exchange Membership Card and discontinued trading in shares on behalf of third parties. Trading in shares on own account was continued. On these facts, we have to see as to whether it can be said that the assessee is continuing with his business. We examined the case laws relied upon both the parties. 12. The Hon'ble Supreme Court in Standard Refinery & Distillery Ltd. (supra), was considering the case of a company which owned distilleries and had also acquired a sugar factory. It had a business of sugar manufacturing and distilleries as well as business of dealing in shares. The assessee sold certain shares and the loss after being set-off was sought to be carry forward as unabsorbed loss in the sale of shares and set-off was claimed against income from sugar manufacturing and distilleries. The Hon'ble Supreme Court held as follows:-

“Held The Tribunal has now submitted the second supplementary statement of case called for by this Court. The facts found by it are as follows: (1) There is a single trading and profit and loss account. In the same account the sales of spirit, sugar and molasses as well as stock and shares appear; (2) The share transactions as well as the business has been dealt with by a common organisation, though the sale of shares is a single transaction and the purchase of those shares is also more or less of the same character; (3) The business of the company as well as the transaction relating to the shares were attended to as part and parcel of the assessee-company; (4) A common fund was utilised both for business purposes as well as for the purchase of shares. A part of the overdraft of Rs. 6,80,046 taken from the bank on 31st Dec., 1947, has been discharged from out of the income of the business; and (5) the share transaction work as well as the other business of the assessee- company were carried on in the same place of business. From the facts found by the Tribunal, it is clear that the share transaction as well as the other business of the company were dealt with by a common management, common

business organization, common administration, common fund and common place of business. The business of the company of dealing in shares and the business of manufacturing sugar and other commodities constitute the same business within the meaning of s. 24(2).— Standard Refinery & Distillery Ltd. vs. CIT (1965) 55 ITR 139 (Cal) : TC 45 R.502 reversed.”

13. In B.R. Limited (supra), the Hon'ble Supreme Court was considering the case where import business was closed down and export business of cotton textile commenced in the next year and the assessee sought set-off of losses of import business as against profit from export business. In such a situation, the Hon'ble Supreme Court held that the decisive test for determining "same business" within the meaning of 24(2) of 1922 Act is unity of control and not the nature of two lines of business. The fact that one business cannot conveniently be carried on after the closure of other may furnish a strong indication that the two businesses construed a same business. When there is common management and common control in business, it was held that the assessee was entitled to carry forward the loss in import business and set it off against the profits of export business in the subsequent year.

14. The Hon'ble Jurisdictional High Court in Principal Officer, Laxmi Surgical Pvt. Ltd. (supra), was considering the case of an assessee which manufactures a surgical cotton. The manufacturer, on own account, was discontinued by the assessee but the production of surgical cotton was continued on job basis from another manufacturer. The Hon'ble Court held that the same business continues and loss and depreciation of the earlier year can be carry forward and set-off.

15. The Hon'ble Jurisdictional High Court in Shri Laxmi Printing & Dyeing Works Pvt. Ltd. (supra) was considering the case of an assessee which was carrying on the business of processing of cloth with the aid of his own machinery. For the year ended 1957-58, there was carry forward unabsorbed depreciation. In the year 1956, the assessee company entered into an agreement with "B" Limited for processing the goods of the latter on certain terms and conditions and by use of special kind of machinery. "B" Limited imported this machinery and installed the same in the business premises of the assessee company. Due to want of space, the assessee company sold its

machinery. Thereafter, the entire share capital of the assessee company was purchased by "B" Limited and, hence, the assessee company became the wholly owned subsidiary of "B" Limited, the issue was whether the assessee is entitled to claim of set-off of carry forward depreciation. The Hon'ble Court held that the activity carried on by the assessee namely the activity of processing remained the same and the business is the same business.

16. The Hon'ble Kerala High Court in V.P. John, Janatha Medicals (supra), held that the assessee was having a composite business and mere discontinuance of one activity will not disentitle the assessee to the benefit of set-off of carry forward loss. 17. Now, coming to the judgment of Hon'ble Supreme Court in L.M. Chabda & Sons (supra) relied upon by the Learned Departmental Representative, wherein the Court held that for the purpose of ascertaining of profit, if an assessee carries on several distinct and independent businesses, and one of such businesses is closed before the previous year he cannot claim allowance under s. 10, of an outgoing attributable to the business which is closed, against the income of his other businesses in that year. It is held that the head of income may be one i.e., "business", whereas the components are different. It held that the expenditure is a component inherent in the process of ascertaining the profits referable to a particular independent activity of business. The Hon'ble Madras High Court in I.S. & C. Machado (supra) was considering a case where the assessee had two different businesses and when one business was closed, it held that expenditure of discontinued business cannot be set-off against profits of another business. 18. The judgment relied upon by the learned Departmental Representative, does not apply to the facts of the case, as the finding of the Tribunal was that two different business was carried on by the assessee and the one which was discontinued in the year 1947 had nothing to do with each other and there was no inter-dependence between them. Applying to the proposition laid down in the other cases discussed above, we are of the considered opinion that the assessee's business of trading in shares is a composite business which had two limbs, (i) trading on own account and (ii) trading on account of third parties. Discontinuing of trading in shares on behalf of third parties, in our opinion, cannot be considered discontinuance of business of share trading. The test of unity of

control and common management are fulfilled in this case, as this is a case of an individual. The test to determine whether two different ventures can be considered to constitute the same business are not is to see whether there was any interconnection, inter-lacing, inter-dependence, embracing the ventures and whether different ventures were so inter-laced and so dovetailed into each other as to make them into the same business. 19. In our view, the test is fulfilled in this case and, hence, the claim of the assessee of bad debts from brokering business is to be allowed. Coming to the second limb of disallowance, admittedly, the issue whether the conditions under section 36(2) are fulfilled or not, is decided in favour of the assessee by the decision of Mumbai Special Bench in assessee's own case for earlier assessment year. Respectfully following the same, we set aside the order of the Commissioner (Appeals) and allow this ground of appeal."

9. The Hon'ble Gujarat High Court in Bansidhar (P) Ltd Vs CIT (supra)

while considered the questions of laws; (i) whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that Steel-O-Style Unit of the assessee and the units (a) carrying on business of purchase and sale of cloth (b) processing and manufacturing of colours and chemicals in the name o: M/s. Ban Dyes, did not constitute the same business and hence the retrenchment compensation of Rs. 9,603 paid ' to the workers of Steel-O-Style unit after its closure was not an allowable deduction and (ii) whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the activities of steel rolling mill and machinery manufacturing units which were closed in 1961 and 1962 respectively, did not constitute the same business as purchase and sale of cloth and manufacturing of chemicals

and dyes and that the appellant was not entitled to deduction of bad debts of Rs. 34,617 (Rs. 18,772 relating to machinery department and Rs. 15,845 relating to steel rolling mill) against the income of the assessee for the assessment year 1967-68. The Hon'ble High Court held as under;

“-----, the assessee's board of directors had an overall control over the assessee's entire business activity. There was a common fund from which the necessary capital and working funds were supplied to the various business activities. The ultimate gain or loss of business was also worked out by a consolidated profit and loss account and balance sheet. Merely because there was a separate staff, which was not inter-transferable, the unity of control was not affected since, at the apex, there was a common management and administration in view of the overall control of the various businesses vesting in its board of directors. Though some or most of the businesses were carried on at different places, the ultimate control was exercised at its registered office and that circumstances also, therefore, did not detract from the unity of control. The emphasis on the widely different nature of the business activities, though not altogether irrelevant, was not by itself decisive. The fact that manufacturing business was combined with trading activities was again a matter of no consequence because that, by itself, or coupled with the other circumstances present herein, will not lead to the conclusion that there was no inter-lacing or inter-dependence inasmuch as there was a unity of control. Even if different books of account were maintained and the transactions inter se between the different business units were recorded in those books of account, once it was found that ultimately there was a common profit and loss account and balance sheet, that circumstance would pale into insignificance because such a method of accounting would be more for convenience of business than for the purpose of maintaining different identities. The fact that the closure of one business did not affect or lead to the closure of the other businesses was also not of such consequence because no decisive inference could be drawn therefrom. In fact, the closure of two

businesses in two years in succession and the third within five years thereafter was circumstance which leads to a reasonable inference that the various businesses were in all probability so closely interconnected that one could not bear the impact of the death of another. Therefore, the conclusion was inevitable that there was complete inter-connection, inter-lacing, inter-dependence and dovetailing of the different businesses activities carried on by the assessee and that all those activities really constituted one and single business.”

10. Further, Hon'ble Gujarat High Court in CIT Vs Patidar Ginning & Pressing Co.(supra), while considering the facts that the assessee-company had a ginning mill. Due to financial difficulties the assessee stopped its activities of ginning and pressing and before commencement of the year engaged itself in purchasing and selling of cotton. However, the selling of cotton was not different from the activity of selling cotton after ginning and pressing. Both the activities were conducted by the same management with the help of the same funds under the same control. The assessee claimed the fact that closure of one business did not affect or lead to closure of other business, was not of much consequence when different activities were carried out by the assessee. The case of the assessee was that all activities constituted one and the same business and the write off of its outstanding dues as bad debts were allowable deductions. The Assessing Officer, disallowed the assessee's claim by taking view (i) that the assessee had stopped its ginning and pressing business and after sometime as new business activities had commenced, and (ii) that suits had been filed for recovery of amount. The Tribunal allowed the deduction claimed on the ground that old business

should be deemed to continue despite its closure, as per the resolution of the board of directors, and that it was enough if the assessee wrote off the debt as bad in its books of account and the assessee need not establish the debt to have become bad. On further appeal by the revenue before High Court, the Hon'ble Court while referring the decision of Hon'ble Apex Court in *Veecumsees v. CIT* [1996] 220 ITR 185(SC)/ 86 Taxman 243 , held that the fact that a particular part of the business for which the loan had been obtained had been transferred or closed down, did not alter the fact that the loans, when obtained, had been for the purpose of the assessee's business and dismissed the appeal of revenue.

11. Before us, the Id. AR for the assessee vehemently submitted that Raunak agency and Amber Agency constituted one and single and composite business carried out by the assessee. Both the concerns were engaged in the business of lottery. The assessee was having complete control over both the proprietary concern. The lower authorities disallowed the claim of deduction under chapter IV of the Act only on the ground that no business activity was Raunak Agency. The Id CIT(A) affirmed the action of assessing officer by taking view that the assessee carried two distinct business. We have noted that the status of both the concerns being proprietary concern of assessee and business their activities is not disputed by the lower authorities. Both the entity was engaged in the lottery business. The control over the business of both the concern by assessee is also not

disputed by the lower authorities. No contrary fact that the assessee was not having control over the business of both the concern or the business of both the entity was different was brought on record by the lower authorities.

12. Considering the test of unity of control and common management as held by coordinate bench in Shreyas S. Morakhia (supra), by following the decision of Hon'ble Supreme Court in Standard Refinery & Distillery Ltd Vs CIT (1971) 79 ITR 589(SC), the assessee is entitled for the deduction expenses in Raunak agency. The case law relied by Id CIT(A) in CL Mehra Vs ITO 59 ITD 99 (Delhi) is not applicable on the facts of the present case. In the said case the business in two entities was not carried by assessee simultaneously, moreover two separate accounts were maintained by assessee in the said case. The case law relied by Id. DR for the revenue in Karnataka Intrade Corporation Ltd. vs. ACIT (supra) is also not helpful to the revenue. In the said case it was held that in order to allow business loss under section 72(1)(i) condition is that assessee should carry on business in year under appeal and it is only against profits of such business that brought forward loss can be set off. Where assessee's profits were assessed under section 41(1) as business income, said profits did not represent profits and gains of any business carried on by assessee and therefore, brought forward business loss was not allowable against profits assessed under section 41(1). However, in the case in hand the assessee throughout the proceedings is claiming that he is carrying his lottery business under two limbs and is

entitled for the deductions of bed debts and other expenses. In the result the Ground No. 1 of the appeal is allowed.

13. Ground No. 2 relates to disallowance of Debit balances written off in M/s. Amber Agency. The ld. AR for the assessee submits that MLPL was acting as a sole stockist of Amber agency in Kolkata for marketing the lotteries through a network of its customer. Due to high rate of Sales tax in the State of West Bengal, and thereafter a ban was imposed by the State Government; MLPL had to stop its business operation. Due to which MLPL could not recover dues from its customer and consequently could not pay dues to the assessee because it was essentially a back-to-back sale arrangement. MLPL used to get small commission on overall sales affected by it. MLPL write off its sundry balances receivable as well as payable during the relevant years. It also closed its business and transferred its fixed asset mainly Computers and Printers to the assessee at the Written Down Value (WDV) as per Income-tax Act, at Rs. 24,14,546/-, though its books value was Rs. 60,08,593/-. It was argued by ld. AR for the assessee that under these circumstances, the assessee had to write off the beds debts due from MLPL. The learned AR further submits that the circumstance that leads to such situation was totally beyond the control of assessee. The financial transaction between assessee and MLPL were composite in nature, in that apart from sale of lotteries to MLPL. At that time MLPL had also paid for certain expenses on behalf of the assessee and the assessee had also

transferred funds partly for reimbursing those payments and partly by way of financial assistance. Two separate ledger accounts were maintained, at the time payments made by the MLPL on behalf of the assessee were wrongly posted to the credit of ledger account (sales), while payments made by the assessee towards reimbursement were posted in loan accounts thereby increasing the debit balance in the loan account, which was transferred to ledger account (sales) at the time of write off. When these facts were examined by learned CIT (A), the assessee submitted the recast ledger accounts to bi-furcate the debit balance written off on account of sales transaction and on account of loan account. The learned CIT(A) brushed aside this explanation by taking view that it is an afterthought and self-serving evidence and that assessee did not project the correct balance in these two accounts by projecting rectified ledger accounts before him.

14. The learned AR further submits that there is no dispute that assessee had affected sales to MLPL and therefore the extent debit balance written off was on account of sales, the same was clearly allowable as a bad debts under section 36(1)(vii).

15. With regard to alternative claim for business losses, the learned AR of the assessee submits that there was a close business connection between the assessee's business and MLPL business and therefore where the assessee had advanced loan it was clearly incidental for carrying out of his business. The assessee has deep interest in the business of MLPL and thus the amount

advanced by way of business experiences was allowable on account of business advances. In support of his submission the learned AR of the assessee relied upon the decision of Hon'ble Apex Court in case of SA Builders Ltd versus CIT (2007) 288 ITR1 (SC).

16. The learned AR of the assessee prayed that the assessee is entitled for deduction on account of bad debts or in alternative as a business loss. To buttress his submissions the learned AR of the assessee also relied upon the following decisions;

- CIT versus Mysore Sugar Co Ltd (1946) 46 ITR 469 (SC),
- T.J. Lalwani versus CIT (1970) 78 ITR 176 (Bom),
- IBM World Trade Corporation (1990) 186 ITR 412 (Mum) and
- Lord's Dairy Farms Ltd versus CIT (1958) 27 ITR 700 (Bom).

17. Finally, the ld AR for the assessee would submit that the ld CIT(A) has not examined the alternative claim of the assessee and prayed that this issue may be restored to the file of assessing officer or ld. CIT(A) to examine it afresh.

18. On the other hand the learned AR for the revenue supported the order of lower authorities. The learned DR for the revenue further submit that assessee has taken inconsistent stand before the assessing officer as well as before first appellate authority and failed to prove its contention regarding the claims of bad debts as well as its business expediency. The assessee has not furnished evidence to substantiate his claim of business loss under

section 28(iv). The onus was on the assessee to establish that the loss has been occurred in the course of business carried out by the assessee.

19. We have considered the submissions of both the representative and deliberated on the various case law relied by the Id. AR for the assessee. The assessing officer disallowed the assessee's claim by taking view that assessee write off of debts is claimed to reduce the taxable income by taking reliance on the decision of case law in McDowell (supra). The learned CIT (A) affirmed the action of assessing officer by taking view that amount written off of ₹ 1.10 Crore did not represent debts towards the sales effected, but actually, it represents the loan advanced by the assessee to MLPL. It was also held that the same did not represent money lent in ordinary course of business of money lending and therefore deduction under section 36(1)(vii) could not be allowed. It was further held that, though MLPL written back this sum as advance in its books, it did not pay any tax thereon because he did not claim similar deduction in written off in the sundry balances to the tune of about Rs. 2.00 crore and thereby has suffered losses thus the assessing officer was rightly invoked the case law in McDowell (supra).

20. The alternative claim of assessee was also not accepted by the learned CIT(A) by taking view that no cogent evidence was furnished by the assessee to substantiate his claim. The assessee has not proved that the loss has occurred in the course of business carried out by him or incidental to

such business or that it was a trading loss and not a capital loss. Further there is nothing on record to show that loan advanced was utilised by MLPL for the purpose of business and that assessee has not explain how the said loan was to be treated as business loss incurred during the current year. The learned CIT(A) also held that assessee ought to have ascertained the fair market value of the fixed assets which consist of mainly Computer and Printer of MLPL directly transferred to his capital account.

21. Before us, the Id AR for the assessee vehemently submitted that the there was a close business connection between the assessee's business and MLPL business and therefore where the assessee had advanced loan it was clearly incidental for carrying out of his business, and the assessee has deep interest in the business of MLPL and thus the amount advanced by way of business experiences was allowable on account of business advances and relied upon the decision of Hon'ble Apex Court in case of SA Builders Ltd versus CIT (supra). We have noted that the alternative plea of the assessee was not accepted by Id CIT(A) by taking view that no cogent evidence is furnished by the assessee, the assessee not proved that loss occurred in the course of business or it was a trading loss and not capital. It was also held that there is no evidence that advance given to MLPL was utilised for the purpose of business. The assessee has also filed various documentary evidences, which we have recorded in para -3 *supra*. The assessee has certified that all these evidences were furnished before the lower authorities. We have noted the

alternative plea of business loss was raised for the first time before Id CIT(A) and it was rejected summarily without reference to the aforesaid evidence. Therefore, we deem it appropriate to restore the alternative claim of business loss to the file of assessing officer to consider it afresh. Needless to direct that before passing the order afresh the assessing officer shall grant reasonable opportunity of hearing to the assessee and will pass the order in accordance with law. In the result the ground No. 2 of the appeal is allowed for statistical purpose.

22. Ground No. 3 relates to disallowance of various debit written off and to treat the same as business loss. As we have restored the ground No. 2 to the file of assessing officer, therefore, the ground No.3 is also restore to the assessing officer for fresh adjudication.

23. In the result, appeal of the assessee is partly allowed.

Order pronounced in the open court on 27/05/2020.

Sd/-
RIFAUR RAHMAN
ACCOUNTANT MEMBER

Sd/-
PAWAN SINGH
JUDICIAL MEMBER

Mumbai, Date: 27.05.2020

SK

Copy of the Order forwarded to :

1. Assessee
2. Respondent
3. The concerned CIT(A)
4. The concerned CIT
5. DR "F" Bench, ITAT, Mumbai
6. Guard File

BY ORDER,
Dy./Asst. Registrar
ITAT, Mumbai