

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'C' BENCH  
MUMBAI**

**BEFORE: SHRI M.BALAGANESH, ACCOUNTANT MEMBER  
&**

**SHRI AMARJIT SINGH, JUDICIAL MEMBER**

**ITA No.305/Mum/2019  
(Assessment Year :2014-15)**

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|--|-----|---|
| Dy. Commissioner of Income Tax,<br>Central Circle – 5(2),<br>Room No.1908, 19 <sup>th</sup> Floor<br>Air India Building<br>Nariman Point<br>Mumbai – 400 021 | Vs. | M/s. Cello Pens and Stationery Pvt. Ltd.,<br>Cello House Corporated Avenue<br>B-Wing, Sonawala Road<br>Goregaon (E)<br>Mumbai – 400 063 |
| <b>PAN/GIR No. AABCC1808J</b>  |     |   |
| <b>(Appellant)</b>   | ..  | <b>(Respondent)</b>   |

|                              |                   |
|------------------------------|-------------------|
| Revenue by                   | Shri R.A.Dhyani   |
| Revenue by                   | Shri Nitesh Joshi |
| <b>Date of Hearing</b>       | <b>20/10/2021</b> |
| <b>Date of Pronouncement</b> | <b>22/10/2021</b> |
|                              |                   |

**आदेश / O R D E R**

**PER M. BALAGANESH (A.M):**

This appeal in ITA No.305/Mum/2019 for A.Y.2014-15 arises out of the order by the Id. Commissioner of Income Tax (Appeals)-53, Mumbai in appeal No.CIT(A)-53/IT-254/DCCC-5(2)/2016-17 dated 28/11/2018 (Id. CIT(A) in short) against the order of assessment passed u/s.143(3) of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 30/11/2016 by the Id. Deputy Commissioner of Income Tax, Central Circle-5(2), Mumbai (hereinafter referred to as Id. AO).

2. The only issue to be decided in this appeal is as to whether the Id. CIT(A) was justified in deleting the disallowance of loss claimed by the assessee in the sum of Rs.4,78,87,051/- towards purchase cost of amounts paid to NSEL for commodities in the facts and circumstances of the instant case.

3. We have heard rival submissions and perused the materials available on record. We find that assessee company is engaged in the business of manufacturing and writing instruments and allied products thereon. The assessee company derives its income from business, long term capital gain and income from other sources. The return of income for the A.Y.2014-15 was electronically filed by the assessee company on 27/11/2014 declaring total income at Rs.57,37,14,130/-. During the course of scrutiny assessment proceedings, the Id. AO observed from the profit and loss account of the assessee company under the head 'other expenses', that assessee had shown a sum of Rs.4,78,87,051/- as 'advances written off' and claimed the same as deduction. The assessee was asked to explain the eligibility of the same to claim as deduction. The assessee vide letter dated 07/11/2016, submitted before the Id. AO which is reproduced hereunder:-

*"1) The assessee had entered into contract(s) for purchase and sale of commodities during the year. The said contracts were with respect to the purchase of commodities (paddy rice) totaling to Rs. 4,78,87,051- through the platform of National Spot Exchange (NSE), We are enclosing herewith copies of contract notes along with copies of ledger accounts duly reflecting the said transactions for your ready reference.*

*2) The assessee had also entered into corresponding contract(s) for sale of the said commodities (paddy rice) on the same date with a scheduled delivery on a later date. Payment was to be received by the assessee on delivery of goods.*

3) We are enclosing herewith the methodology of transactions entered on National Spot Exchange (NSEL) for your ready reference. As evident, the entire transaction is based on the receipt of goods in the NSEL warehouse, issuing of warehouse receipt by the NSEL, retaining the original receipt by the NSEL and then allocating the warehouse receipt to buyer. This allocation is done through delivery allocation report which is issued by NSEL and provided by the broker i.e, Anand Rathi Commodities Ltd in the case of the assessee, to the assessee for its transactions.

4) Before the assessee could received the amount due against sale of goods, NSEL scam was out and the assessee couldn't receive money against its sale in spite having entered into contract for sale (contract note enclosed herein above). Result, the assessee had to write off the amount of Rs.4,78,87,051/- as bad debts in the relevant assessment year u/s 36(1)(vii) u/s 37 of the Act.

5) According to the provisions of section 36(1)(vi) of the Act, "The deductions provided for in the following clauses shall be allowed in respect of the matters dealt with therein, in computing the income referred to in section 28-"(vii) subject to the provisions of sub-section (2), the amount of any bad debt or part thereof which is written off as irrecoverable in the accounts of the assessee for the previous year"

6) In the case of the assessee, the assessee had rightly claimed deduction u/s 36(1)(vii) of the Act w.r.t. this amount written off in the books of account as bad debts.

7) According to the provisions of section 37(1) of the Act-

"Any expenditure (not being expenditure of the nature described in sections 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee) laid out or expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head 'profit and gains of business or profession"

8) The assessee is squarely covered by the provisions of section 36(1)(vii) of the Act and/or section 37(1) of the Act.

9) The assessee would like to mention that is neither a broker nor a NBFC. The assessee is domestic company engaged in the business of dealing in bullion and finance. It saw an opportunity in buying and selling of commodities-paddy rice and entered into the transactions to earn profit in ordinary course of business and that's the reasons it entered into corresponding sales contract immediately after entering of the purchases contract.

10) The assessee had paid the said amount from his income which has already been offered for tax in the past. As no income has been earned on this transaction yet, no income could be offered for tax on this transaction.

11) *There is no acid test to determine whether an amount has become bad or not? When an assessee writes off an amount there is prima fade evidence that the amount is not recoverable.*

12) *The Central Board of Direct Taxes (CBDT) had vide circular dated 12/2016 dated May 30, 2016 clarified the provisions w.r.t. admissibility of claim of deduction of bad debts u/s 36(1)(vii) r.w.s. 36(2) of the Act. We are enclosing herewith a copy of the said circular for your ready reference.*

13) *The Hon'ble Apex Court have in the case of TRF Ltd V/s CIT, CA nos 5292 to 5294 vide judgement dated February 9, 2010 held that, 'After 01.04.1989, for allowing deduction for the amount of any bad debt or part thereof under section 36(1)(vii) of the Act, it is not necessary for the assessee to establish that the debt, in fact has become irrecoverable; it is enough if bad debt is written off as irrecoverable in the books of accounts of the assessee' 190 Taxman 391.*

*The Hon'ble Apex Court has mentioned that even in cases where the assessee in unable to establish that the debt has in-fact become bad, the claim of 'bad-debts' should be allowed, whereas in the case of the assessee, the debt has become bad is well in public domain.*

14) *The Hon'ble jurisdictional High Court of Bombay has in the case of Commissioner of Income Tax Vs Pudumjee Pulp & Paper Mills Ltd., ITA No. 1590 of 2013, held that so far as Section 36(1)(vii) of the Act is concerned, it is a settled position in law that after 1<sup>st</sup> April, 1989, it is not necessary that the debt itself must be proved to be irrecoverable. The only requirement is that the amounts claimed as bad debts should be written off as irrecoverable in the account of the assessee (see TRF Ltd V/s CIT-323 ITR 397 - date of order 05-08-2015).*

15) *The Hon'ble Delhi High Court, has held in the case of CIT Vs Samara India (P) Ltd (2013) 2016 Taxrnan 93, 'that for an assessee to claim deduction in relation to bad debts it is, now, no longer necessary to establish that debt had become irrecoverable and it is sufficient if assessee forms such an opinion and writes off debts as irrecoverable in its accounts. '*

16) *Section 36(1)(vii) has been amended w.e.f 01.04.1989, to remove the obligation on the part of the assessee, to prove that bad debts written off were actually bad debt and mere writing off the bad debt is sufficient. The wisdom of the assessee cannot be questioned and no demonstrative or infallible proof of bad having bad is required. "*

3.1. The Id. AO accepted the fact that the advances written off represent advance paid by the assessee for purchase of commodities (paddy) through the platform of NSEL. The Id. AO however, did not agree

to the contentions of the assessee for claiming deduction on account of write off of the same for the following reasons:-

*“The litmus test to claim any expense as bad debt is whether the same was offered to tax in the AY under consideration or in any other previous year. In the instant case, the assessee has claimed the amount for the purchase contracts in the profit and loss account. Hence, it was never offered for taxation. It remained the item of the balance-sheet.*

*Further, it is stated that such activity of the assessee cannot be classified as money lending activity by the assessee.*

*The recovery process has been initiated by NSEL and various agencies including EOW, Mumbai and high court committee appointed by Hon'ble Bombay High Court. EOW, Mumbai has confiscated assets worth over Rs. 5600 crores. All the aforesaid details indicate that ultimate deficiency in the amount recoverable cannot be arrived at immediately and hence claim of bad debts cannot be concluded in AY 2014-15 till the final deficiency amount is arrived at. Since, recovery is an ongoing process, the ultimate recovery shall take longer time and hence any claim earlier to that shall be, prima facie considered as premature claim liable for rejection.*

*The principle laid down in the case of CIT Vs Pudumjee Pulp & Paper Mills Ltd. (supra) cannot be applied to the case of assessee company. In that case Hon'ble Bombay High Court ruled that the principal part of the Intercompany Deposits (ICDs) can be claimed as bad debts if the interest therein has been offered to tax in some years, which is not a case of assessee. In the case of assessee, it was the contract for purchase and sales of the commodities during the year and therefore, what has been claimed by the assessee is in fact an advance only.”*

3.2. Accordingly, a sum of Rs.4,78,87,051/- was disallowed by the Id. AO on account of bad debts.

3.3. The Id. CIT(A) narrated the entire facts of the assessee and took cognizance of the fact that pursuant to demerger in A.Y.2013-14, in subsequent year, the assessee had started new business of trading in bullion along with business of finance and that the transactions of NSEL were first of its kind for the assessee. He observed that the assessee's decision of making investment in commodities market through the

platform of NSEL was well conceived and reasoned decision in the light of its diverse portfolio of investments, loans and advances. The assessee explained before the Id. CIT(A) that in respect of the first transaction of purchase, it would make the payment at the time of receiving the delivery and in respect of the second transaction of sale, it would receive payment at the time of giving delivery. The deliveries were received and given by the exchange of warehouse receipts. The warehouse receipts represented stocks of the commodity. It was further stated that the commodities purchased were stored in a warehouse and the warehouse receipts were as per practice kept in the custody of the Exchange. What the assessee received was "client-wise delivery allocation report" issued by the Exchange to the broker, listing details of commodities stored on behalf of the assessee. The payments were made through banking channels. However, due to sudden suspension of the trading activity by the Ministry of Corporate Affairs, the outstanding contracts remained unsettled. Due to suspension of the commodity market, the amount recoverable from the said brokers became bad and hence, has been claimed as deduction on write off of the same.

3.4. The alternative argument was made that the claim of write-off can be allowed u/s. 37(1) of the Act. The payments were made for purchase of commodities on NSEL. Owing to the irregularities in breach of contract by NSEL, the appellant has faced loss. Such loss is in nature of expenditure for the purpose of Section 37 of the Act. The expenditure is not in the nature of capital expenditure or personal expenses and is laid out or expended wholly and exclusively for the purpose of the business or profession. The claim of the deduction should therefore be allowed.

3.5. The Id. CIT(A) observed that NSEL had stood as the guarantor for trade settlement and lucrative returns of 13% to 16% per annum for all the parties trading in commodities exchange through them. This promise had apparently induced the assessee to invest in commodity markets through NSEL platform. He observed that these transactions are spot transactions settled by delivery and actually squared off by exchange of warehouse receipts. The warehouse receipts represent stock of the commodity. The Id. CIT(A) categorically gave a finding that there was a crisis in operations of NSEL due to suspension of trading of NSEL / MCX by Ministry of Corporate Affairs on 06/08/2013, pursuant to which the NSEL had closed down. Hence, the payments made by the assessee to NSEL for purchase of commodities could not be recovered and accordingly, had become bad. The Id. CIT(A) however, held that the same is allowable as deduction u/s.37(1) of the Act and not as bad debt u/s.36(1)(vii) of the Act. The Id. CIT(A) also observed that there is nothing on record brought out by the Id. AO to indicate that the assessee was involved or had connived in orchestrating the NSEL scam. This finding of the Id.CIT(A) has not been controverted by the Revenue before us.

3.6. We find that there is no dispute that assessee had indeed made payment towards purchase cost of commodities, (paddy) through NSEL platform amounting to Rs.4,78,87,051/- as under:-

|               |   |                   |
|---------------|---|-------------------|
| On 19/06/2013 | - | Rs.3,03,83,841.89 |
| On 06/07/2013 | - | Rs.1,75,03,208.79 |
|               |   | =====             |
| Total         |   | Rs.4,78,87,050.68 |
|               |   | =====             |

3.7. The Id. CIT(A) had categorically stated that NSEL trading operations were suspended on 06/08/2013 by Ministry of Corporate Affairs. Admittedly, the assessee had made payment towards purchase cost of commodities prior to 06/08/2013 as could be seen above. What the assessee possessed was merely 'Delivery allocation reports' for the payments made by it. When there are no sufficient goods physically available in the warehouse which came to light through independent audit conducted by independent auditors at the NSEL warehouse at the behest of the Government, there is no scope for the assessee to sell those commodities and recover its cost of purchase. What the assessee received was only delivery allocation report according to which stock was in possession of NSEL warehouse though title of the goods was with the assessee. Therefore, as stock of goods purchased was not found in the warehouse of NSEL and operations of NSEL getting suspended from 06/08/2013 by Ministry of Corporate Affairs, the assessee completely lost its chance of recoverability of amounts paid from NSEL. Since purchase cost was paid in the normal course by the assessee, the irrecoverability of the same either in cash or in kind would only result in regular business loss for the assessee. We also find that NSEL being involved in the scam by deceiving various investors had been duly accepted by the Id. AO himself in his assessment order and various complaints were filed before the Economic Offences Wing (EOW) jointly with other traders explaining the fraud committed by NSEL by not having the requisite quantity and quality of commodities at its accredited warehouses. We find that since the NSEL acts as a counter party to the transaction executed on its exchange platform and further stands as the guarantor for settlement of all the contracts traded on its platform, it was the legal obligation of the NSEL to settle the contracts. The NSEL has failed to pay the outstanding amounts under the contracts of the assessee company through its broker-

member, due to which assessee has suffered loss. Infact, the NSEL has failed to honour / settle the contracts and for which the NSEL had issued allocation reports depicting the quality and quantity of specified commodities located in NSEL certified warehouses despite there being no commodities of the stated quantity and quality. Since, the assessee could not receive any sums from NSEL, the assessee company sought to write off the same as a regular business loss arising in the course of its business and claim the same as deduction in the return of income. The Id. AR also made a statement at the Bar stating that on 01/11/2018, the assessee company had received a sum of Rs.6,85,614/- from NSEL which was duly offered to tax in A.Y.2019-2020 as business income. It is not in dispute that NSEL had not handed over the commodities to the assessee to enable the assessee to sell the same and realize its sale proceeds. Hence, the purchase cost of the commodities became irrecoverable which was written off and claimed as deduction by the assessee. We find that this aspect has been duly appreciated by the Id. CIT(A) while granting relief to the assessee. The Id. AR also placed reliance on the decision of the Hon'ble Jurisdictional High Court in the case of CIT vs. Wackhardt International Ltd., reported in 314 ITR 11 (Bom) wherein the question raised before the Hon'ble High Court was as under:-

*" (1) Whether, on the facts and in the circumstances of the case and in law, the hon'ble Income-tax Appellate Tribunal was justified in allowing the assessee's claim of non-refund of customs duty paid under section 20 of the Customs Act, 1962, as business loss under section 37(1) without appreciating the fact that the assessee had not submitted any documentary evidence, either before the Assessing Officer, the Commissioner of Income-tax (Appeals) or the Income-tax Appellate Tribunal, in respect of re-export of consignment and claim for refund of customs duty filed before the customs authorities ?*

3.8. The Hon'ble High Court disposed off the aforesaid questions as under:-

*“2. A few facts may be set out. The assessee is exporter. He had exported certain goods which were returned and thereafter re-exported the goods. However, it was not in a position to furnish necessary documents as in the meantime the records of the assessee were lost on account of collapse of the building where the assessee maintained his records. It is the case of the assessee that they made attempts to reconstruct the records. However, as they were not in a position to reconstruct the records, they treated the said amount as bad debt for the assessment year 1996-97. The Assessing Officer disallowed the same against which an appeal was filed to the Commissioner of Income-tax (Appeals). The learned Commissioner (Appeals) considering the facts on record allowed the claim of the assessee. The Revenue preferred an appeal. That appeal came to be dismissed. Consequently, the present appeal and the questions as framed.*

*3. The contention as urged on behalf of the Revenue is that the loss have been shown as bad debt for the financial year 1993-94 and not for the assessment year 1999-2000. In our opinion, the issue is squarely covered by the judgment of this court in Lord's Dairy Farm Ltd. v. CIT [1955] 27 ITR 700. In that case also there was defalcation between May, 1946, and April, 1947. The amount actually embezzled in the relevant accounting year 1st April, 1947, to 31st March, 1948. The assessee therein claimed deduction in the assessment year 1947-48. The learned Bench of this court was pleased to hold that as the assessee wrote of this amount in the year of account, the court was entitled to presume that the amount became irrecoverable when the assessee wrote it off in its books of account and that, therefore, the assessee was entitled to claim the amount. In our opinion, therefore, even if duty drawback was available for the previous assessment year, what will be relevant was when the same is treated as bad debt by the assessee in his books of account. Considering the ratio of that judgment, in our opinion, there is no infirmity in the view taken by the Commissioner of Income-tax (Appeals) and the Income-tax Appellate Tribunal. That question, therefore, would not arise.”*

3.9. We also find that trading in electronic exchange platform is anonymous order driven trading system i.e. the buyer does not know the seller in the say way, the seller does not know the buyer and that the Id. AO had also not brought any adverse material on record to show that the assessee company or its broker have manipulated online trading system. Infact, this finding is also given by the Id. CIT(A) which has not been controverted by the Revenue before us.

3.10. We find that the Id DR vehemently argued that the advance made for purchase of goods can be allowed as deduction u/s 37 of the Act only

in the year in which such loss was incurred and not in the year in which it is written off. In this regard, he placed reliance on the decision of Cochin Tribunal in the case of Mehta Spices Co. vs DCIT in ITA No. 366/Coch/2009 dated 21.10.2011. This is duly rebutted by the Id AR by placing reliance on the decision of Hon'ble Jurisdictional High Court in 314 ITR 11 referred to supra and hence the decision relied by the Id DR would not advance the case of the revenue.

3.11. We also find that the Id DR also placed reliance on the decision of Mumbai Tribunal in the case of M/s Jimtex Pvt Ltd vs DCIT in ITA Nos. 7021 & 7022/Mum/2010 and ITA No. 5944/Mum/2011 dated 21.9.2012 to drive home the point that the onus is on the assessee to establish that the advance paid to parties had become irrecoverable in order to claim the same as business loss. We have no quarrel with the proposition laid down in this decision. The fact that NSEL was involved in an organized scam and has been impleaded by various regulatory authorities is a point staring on us and their exchange trading operations had been suspended by Ministry of Corporate Affairs with effect from 06/08/2013. These points conclusively prove that the amounts paid to NSEL through the registered broker had become completely irrecoverable for the assessee. Admittedly the amounts were paid by the assessee for purchase cost of commodities to NSEL. Since NSEL could not either supply the commodities to the assessee or pay back the monies to the assessee, the same become irrecoverable for the assessee, which prompted the assessee to write off the same in its books and claim as deduction. Hence we hold that the advance paid by the assessee to NSEL had indeed become irrecoverable. Accordingly the decision relied upon by the Id DR does not advance the case of the revenue.

3.12. In view of the aforesaid observations, we do not find any infirmity in the order of the Id. CIT(A) granting relief to the assessee by allowing the deduction for the regular business loss claimed on account of purchase cost of commodities arising out of NSEL scheme. Accordingly, the grounds raised by the Revenue are dismissed.

**4. In the result, appeal of the Revenue is dismissed.**

Order pronounced on 22/10/2021 by way of proper mentioning in the notice board.

**Sd/-**  
**(AMARJIT SINGH)**  
**JUDICIAL MEMBER**

**Sd/-**  
**(M.BALAGANESH)**  
**ACCOUNTANT MEMBER**

Mumbai; Dated 22/10/2021

KARUNA, *sr.ps*

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)  
ITAT, Mumbai