

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

SHRI M. BALAGANESH, ACCOUNTANT MEMBER  
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER

ITA No. 7647/MUM/2019  
(ASSESSMENT YEAR: 2013-14)

Deputy Commissioner of Income Tax-  
11(3)(1), Mumbai,  
Room No. 204, Aayakar Bhavan, M.K. Road,  
Marine Lines, Mumbai - 400020

..... Appellant

M/s Tirumal Trading & Investment-  
Pvt. Ltd.,  
Knowledge House, Shyam Nagar,  
Jogeshwari Vikroli Lind Road,  
Jogeshwari (E), Mumbai - 400060  
[PAN: AACCT8054E]

Vs

..... Respondent

Appearances

For the Respondent/Department : Shri B.K. Bagchi

For the Appellant/Assessee : Shri Vipul Joshi &  
Ms. Dinkle Haria

Date of conclusion of hearing : 06.06.2022

Date of pronouncement of order : 02.09.2022

**ORDER**

**Per Rahul Chaudhary, Judicial Member:**

1. By way of the present appeal the Revenue has challenged the order, dated 30.09.2019, passed by the Ld. Commissioner of Income Tax (Appeals)-18, Mumbai, [hereinafter referred to as 'the CIT(A)'] for the Assessment Year 2013-14, whereby the Ld. CIT(A) had partly allowed the appeal filed by the Appellant against the Assessment Order, dated 29.03.2016, passed under section 143(3) of the Act.

2. The Revenue has raised the following grounds of appeal:
- “1. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in allowing short term capital loss claim of assessee of Rs. 276,00,000/- without considering the fact that the existence of shares itself were not proved by assessee during the course of assessment proceedings.*
  - 2. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in allowing the short term capital loss claim of assessee of Rs. 276,00,000/- without considering the fact that the valuation of shares and its consequent change of ownership was not proved by assessee during the course of assessment proceedings.*
  - 3. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in accepting the claim of short term capital loss of assessee of Rs. 276,00,000/- without considering the fact that in absence of existence, valuation and change in ownership of shares the receipt of fund on shares are unexplained and resulting outcome of the transaction being short term loss needs to be disallowed” .*
3. The Assessee filed return of income for the Assessment Year 2013-14 on 30.09.2013 declaring ‘Nil’ income and claiming short term capital loss of INR 2.76 Crores arising from sale of shares of Skechers South Asia Private Limited. (‘SSA’ for short). The case of the Assessee was selected for scrutiny. The Assessing Officer completed the assessment under Section 143(3) vide order, dated 29.03.2016, at total income of INR 2,81,32,423/- after making, inter alia, disallowance of Short Term Capital Loss of INR 2.76 Crores.

4. Being aggrieved, the Assessee carried the issue in appeal before the CIT(A), who was pleased to allow the claim of the Assessee and allow Short Term Capital Loss of INR 2.76 Crores.
5. Being aggrieved, the Revenue is in appeal before us.
6. The Ld. Departmental Representative appearing before us submitted that during the course of assessment proceedings, the Assessee was asked to furnish details to substantiate the claim of Short Term Capital Loss arising from sale of equity shares of SSA. Relying upon paragraph 5 of the Assessment Order the Ld. Departmental Representative submitted that during the assessment proceedings vide order sheet entry, dated 02.12.2015, 16.12.2015, 20.01.2016 the Assessee Officer had requested the Assessee to file details/documents pertaining to transaction of sale of equity shares of SSA. However, no details/documents were furnished. Therefore, notice under Section 142(1) dated 15.12.2015 and 14.03.2016 were also issued asking the Assessee to furnish copy of brokers note, ledger account, share transaction details, D-MAT account, bill/vouchers of the share transactions, share transfer details, proof of payment of STT, bank statement of the Assessee, calculation of short term capital loss and Profit & Loss Account, Balance Sheet along with schedules of SSA. In response to the same, the Assessee vide letter, dated 22.02.2016, stated that the Assessee had no contact with SSA and therefore, could not furnish the aforesaid document. The Assessee only provided its own bank statement. It was not clear from the aforesaid bank statements whether the receipt from and payments highlighted by the Assessee were for share transaction or for any other purpose since no supporting documents were furnished by the

Assessee. Ld. Departmental Representative submitted that despite several opportunities the Assessee had failed to provide any of the following documents - brokers note, invoice raised, copy of bills/vouchers, copy of D-MAT account, STT payment challan, ledger account, copy of audit report and copy of return of Sketchers South Asia Pvt. Ltd, & Arlett Infrastructure Pvt. Ltd. Since, the Assessee had failed to discharge the onus by providing the supporting documents and details in support of its claim of loss of Short Term Capital Loss. The Assessing Officer was not satisfied with the genuineness of the claim and the transaction, the Assessing Officer disallowed the claim.

7. In response the Ld. Authorised Representative for the Appellant submitted that the basis on which the Assessing Officer rejected the claim of the Assessee for long term capital loss was flawed. The Assessing Officer failed to appreciate that SSA was a private limited company and its equity share were not listed on stock exchange. Further, the equity shares of SSA held by the Assessee were in physical form. Therefore, the transfer of equity share of SSA by the Assessee to Arlett Infrastructure Pvt. Ltd. could not have been supported by documents which are generally generated in case of transfer of shares of shares of a company listed on stock exchange such as brokers note, D-Mat Account, and STT paid challan. With the reply, dated 22.02.2016, a copy of sale invoice, dated 29.03.2013, raised by the Assessee on Arlett Infrastructure Pvt. Ltd. was filed before the CIT(A) along with the bank statements showing receipts/payments relating to transaction of purchase and sale of share of SSA. It was explained to the Assessing Officer that since more than 3 years had lapsed, the Assessee was not in a position to obtain the documents pertaining to SSA. Thereafter,

ledger account was also filed with the Assessing Officer vide reply dated 01.03.2016. Ld. Authorised Representative for the Appellant vehemently contended that the Assessing Officer failed to make any independent inquiries before rejecting the claim of the appellant. He submitted that the Assessing Officer did not reject the books of accounts of the Assessee in terms of Section 145 of the Act. He further, submitted that the assessment was framed on the Assessee was normal scrutiny assessment under Section 143(3) of the Act and not best judgment assessment under Section 144 of the Act. The Assessing Officer had not called for share certificate or details of valuation as has been contended by the Ld. Departmental Representative. The Ld. Authorised Representative for the Appellant relying upon written submissions, dated 19.09.2017, filed before the CIT(A) submitted that soon after investment was made in the equity shares of SSA, the promoters of the Assessee-Company came to know about certain critical information, through informal channels in the industry, that the decision to make investment in shares of SSA was taken in haste and therefore the same was reviewed. When the assumptions made during the investment process were revisited after making investment, a decision was made to exit from SSA by transferring shares, even at a loss, to mitigate further losses and protect the capital. The future events showed that the decision to offload shares of SSA was the correct decision as SSA recorded losses from the very first year of its operations incurring loss of INR 4,05,54,865/- in the first year itself.

8. In rejoinder, the Ld. Departmental Representative submitted that the even before CIT(A) no computation or valuation has been provided by the Assessee to show why share purchased for

at the face value of INR 10 per share were sold for INR 7.65 per share. He submitted that the Assessee had itself purchased 35,28,000 share of SSA at the rate of INR 10 per share on 28.03.2013 and thereafter, on 29.03.2013 the Assessee sold 1,17,10,000 shares of SSA for a consideration of INR 9 Crore at the rate of INR 7.65 per share. In support of the transaction the Assessee had only filed a copy of invoice dated 29.03.2013 raised by the Assessee on Arlett Infrastructure Pvt. Ltd. Without examining the transaction the CIT(A) has concluded that the transaction is genuine in nature.

9. We have considered the rival submission and perused the material on record including copy of Shareholders' Agreement, dated 27.08.2012, between the Assessee and Skechers South Asia Private Limited placed on record by the Ld. Authorised Representative for the Appellant in response to a query from the bench during the course of the hearing.
10. We note that the CIT(A) has, while granting relief to the Assessee, in paragraph 6.2.6 and 6.2.7 of the order impugned concluded as under:

*"6.2.6 After considering all the facts, it is observed that the reasons recorded by the Ld. Assessing Officer to disallow the short term capital loss are not satisfactory. The Ld.AO was aware that STT paid proof, brokers note and demat statement are not applicable in case of sale of shares of unlisted company.*

*6.2.7 I find that the appellant has discharged it's onus to prove that the transaction is genuine and is purely commercial in nature. Accordingly, the disallowance of Rs. 2,76,00,000/- made by the Assessing Officer is hereby deleted. Hence, this ground of appeal is allowed." (Emphasis Supplied)*

11. The grievance of the Revenue is that the above findings of the CIT(A) that *'the Assessee has discharged it's onus to prove that the transaction is genuine and is purely commercial in nature'* are without any basis. The Assessee had failed to substantiate the purchase as well as sale of share of SSA by providing necessary documents. There is nothing on record to show existence/ownership/transfer of shares, and the basis of valuation of equity shares of SSA. On the other hand, the contention of the Assessee, which has been accepted by the CIT(A), is the sole reason for rejecting the claim of the Assessee for short term capital loss was the failure of the Assessee to furnish documents – brokers note, D-MAT account statement, STT paid challan and documents pertaining to SSA (which were not in possession/control of the Assessee). Further, the Assessing Officer had never asked for the share certificates and details of valuation during the assessment proceedings. Since the Assessee had filed ledger account, invoice and bank statements, the Assessee had discharged the onus to prove that the transaction was genuine.
12. In our view, the Assessing Officer had not rejected the claim of the Assessee solely for the reason that the Assessee had failed to file the above documents. However, it was one the relevant factors considered by the Assessing Officer. In reply letter dated, 22.02.2016, the Assessee had stated as under:

*"2. As regards the Return Acknowledgement, Profit & Loss Account, Balance Sheet & schedules annexed and computation of income etc pertaining to M/s Sketchers Sought Asia Pvt. Ltd., we regret our inability to furnish the same since the said company is more associate with*

*us and we do not have any contacts with them.*  
*(Emphasis Supplied)*

During the assessment proceedings the Assessee stated that it did not have any agreement with SSA and expressed inability to furnish balance sheet and profit & loss account of SSA. The Assessing Officer could not, in absence of any supporting material and only on the basis of bank statements, ascertain whether the payments of INR 11.7 Crore made and the receipt of INR 9 Crore by the Assessee pertained to the share transactions or any other purpose and therefore, returned a finding to this effect. Since the share of SSA were purchased and sold during the relevant previous year, it could be determined from the Balance Sheet and Profit & Loss Account of the Assessee how these transactions were recorded in the books of accounts. The CIT(A) has failed to controvert the aforesaid findings returned by the Assessing Officer. Admittedly only bank statement, invoice dated 29.03.2013 and ledger account were before CIT(A). The Shareholders' Agreement, Share Certificates and Share Transfer Forms were not placed before CIT(A). There was nothing on record to overturn the finding of the Assessing Officer. The CIT(A) had, therefore, erred in holding that the Assessee had discharged its onus to prove that the share transactions were genuine.

13. As regards the valuation and the decision sale equity shares of SSA at a loss, the Ld. Authorised Representative for the Appellant submitted that soon after investment was made in the equity shares of SSA, the promoters of the Assessee-Company came to know about certain critical information, through informal channels in the industry, that the decision to make

investment in shares of SSA was taken in haste and therefore, the same was reviewed. The assumptions made during the investment process were revisited and a decision was made to sale equity shares of SSA to cut future losses. In our view, this was a generic explanation that was accepted by the CIT(A) without appreciating the fact that the Assessee had purchased 35,28,000/- share of SSA at the rate of INR 10 per share on 28.03.2013 and thereafter, sold 1,17,10,000/- shares of SSA on 29.03.2013 at the effective rate of INR 7.65 per share. The Ld. Authorised Representative for the Appellant had, by placing reliance on Clause 3 of the Shareholders' Agreement, dated 27.08.2012, contended that the Assessee was under contractual obligation to make investments and therefore, the fact that the Assessee made investment on 28.03.2013 before making sale on 29.03.2013 cannot lead to an adverse inference against the Assessee. However, we note that the Shareholders' Agreement, dated 27.08.2013, was not before CIT(A) and therefore, this could not have been considered by the CIT(A). Clause 14 of the aforesaid Shareholders' Agreement provided detailed mechanism/procedure to be followed for transfer of shares of SSA. When the Ld. Authorised Representative for the Appellant was confronted with the same, he submitted that the material terms were complied with. However, since these details were not called for by the Assessing Officer the same were not filed. The Assessee would be payable to file the same if granted an opportunity to substantiate the genuineness of the transaction. We find merit contention of the Assessee to the extent that the Assessing Officer had not specifically asked for these documents. However, since the Shareholders' Agreement, dated

27.08.2012, was not before the Assessing Officer there was no occasion for the Assessing Officer to call for the same.

14. In view of the facts and circumstances of the present case, we deem it appropriate and in the interest of justice to remand the issue back to the file of CIT(A) granting an opportunity to the Assessee to substantiate the claim of Short Term Capital Loss. Assessee is directed to file all the relevant documents and details to support the genuineness of the transaction. The CIT(A) is directed to consider the same after calling for a remand report from the Assessing Officer. With the aforesaid directions, we set aside the order passed by the CIT(A) and remand the issue back to the file of CIT(A) for fresh adjudication after giving a reasonable opportunity of being heard to the Assessee.
15. In result, the present appeal filed by the Revenue is allowed for statistical purposes.

Order pronounced on 02.09.2022.

*Sd/-*  
(M. Balaganesh)  
Accountant Member

*Sd/-*  
(Rahul Chaudhary)  
Judicial Member

मुंबई Mumbai; दिनांक Dated : 02.09.2022  
*Alindra, PS*

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,  
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार /(Dy./Asstt. Registrar)  
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai