

THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "D" BENCH

Before: Shri P.M. Jagtap, Vice President
And Shri Siddhartha Nautiyal, Judicial Member

ITA No. 278/Ahd/2021
Assessment Year 2017-18

Nisarg Enterprise Pvt. Ltd., 3601/3602, Phase-IV, GIDC, Trikampura, Mehmdabad Highway Road, Ahmedabad-382445 PAN: AAACN8527E (Appellant)	Vs	The ACIT, Circle-3(1)(1), Ahmedabad (Respondent)
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Assessee by: Shri Hemanshu Shah, A.R.
Revenue by: Shri Atul Pandey, Sr. D.R.

Date of hearing : 01-11-2022
Date of pronouncement : 04-11-2022

आदेश/ORDER

PER : SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER:-

This is an appeal filed by the assessee against the order of National Faceless Appeal Centre (NFAC), Delhi in DIN & Order No.

ITBA/NFAC/S/2021-22/1036019426(1) vide order dated 29/09/2021 passed for the assessment year 2017-18.

2. The assessee has taken the following grounds of appeal:-

“1. In law and in facts and circumstances of the Appellant's case, the learned Commissioner of Income-tax (Appeals) has erred in points of law and facts.

2. In law arid in facts and circumstances of the Appellant's' case, the learned Commissioner of Income-tax (Appeals) has grossly erred in dismissing appellant's ground of not granting set off of brought forward business loss of Rs.22,08,026/- of Asst. Year 2016-17. The claim was put up vide letter dt.14.11.2019 before Ld ACIT, Circle - 3(1)(1), Ahmedabad. This claim was referred in submission to CIT(A) in letter dt 29-9-2021.

3. In law and in facts and circumstances of the Appellant's case, the learned Commissioner of Income-tax (Appeals) has grossly erred in in dismissing appellant's ground of charging interest u/s.234A of I.T. Act for Rs.1,076/-.

4. In law and in facts and circumstances of the Appellant's case, the learned Commissioner of Income-tax (Appeals) has grossly erred in in dismissing appellant's ground of charging interest u/s.234B of I.T. Act for Rs.8,877/-.

5. *In law and in facts and circumstances of the Appellant's case, the learned Commissioner of Income-tax (Appeals) has grossly erred in in dismissing appellant's ground of charging interest u/s.234C of I.T. Act for Rs.1,68,513/-.*

6. *In law and in facts and circumstances of the Appellant's case, the learned Commissioner of Income-tax (Appeals) has grossly erred in in dismissing appellant's ground of raising demand of Rs.2,05,367/-.*

7. *In law and in facts and circumstances of the Appellant's case, the learned Commissioner of Income-tax (Appeals) has grossly erred in in dismissing appellant's ground of issuing penalty notice u/s.274 r.w.s. 270A of I.T. Act.*

8. *Your appellant reserves the right to add, alter, amend all or any of the above grounds of appeal as may be advised from time to time.”*

3. The brief facts the case are that assessee filed return of income on 13-02-2018 declaring total income of ₹ 1,02,39,870/-. The case of the assessee is that it had certain brought forward business losses to the tune of ₹ 22,08,026/- from assessment year 2016-17, which the assessee inadvertently omitted to claim in the return of income. During the course of assessment proceedings, the assessee filed letter dated 14-11-2019 requesting for set-off of such brought forward business losses against the income for the captioned year. However, the AO passed assessment order under section 143(3) of the

Act on 04-12-2019, in which the brought forward business loss of ₹ 22, 08,026/- for assessment year 2016-17 were not set-off against the income of assessment year 2017-18. In fact, the assessment order did not at all make any mention of the aforesaid submission / claim of set-off filed / made by the assessee requesting for set-off of business losses of assessment year 2016-17 against the income of assessment year 2017-18.

4. In appeal, Ld. CIT(Appeals) dismissed assessee's appeal with the following observations:

“Findings and Decision:

4. Perusal of order u/s. 143(3) dated 04.1.2.2019 for AY.2017-18 shows that the assessment was completed by making an addition of Rs.44,230/- towards interest on income tax refund u/s.244A received by the appellant during the year which was not included in the return of income. Though the appellant is not disputing the impugned addition on account of interest u/s.244A on refund, present appeal has been filed on the consequential charging of interest u/s.234A, 234B and 234C and initiation of penalty proceeding u/s.271(1)(c). The appellant also raises the issue of not granting set off of brought forward business losses of AY.2016-17. It is claimed that though a letter dated 14.11.2019 was filed during the course of assessment proceedings seeking set off of brought forward business losses of AY.2016-17, the AO did not allow it. Having considered the facts on record and submissions of the appellant, the appeal is disposed of as under:

Ground No.1:

4.1. *It is general and warrants no specific adjudication.*

Ground No.2:

4.2. *This Ground pertains to the issue of set off of carry forward losses of AY.2016-17. It is seen that as per the return of income filed by the appellant for AY.2017-18, the total income is shown at Rs. 1,02,39,870/- which has been adopted as such by the AO in the assessment order and the only addition made thereto is the sum of Rs.44,230/- towards interest U/S.244A as stated above. This clearly shows that the appellant itself had not made any such claim of set-off of carry forward business loss in the return of income.*

4.2.1. *It is further seen that nowhere in the order, there is any mention of such brought forward business loss of AY.2016-17 or its denial which the appellant claimed to have requested before the AO during the course of assessment proceedings. No evidence thereof also has been filed by the appellant. However, the appellant submits that as per intimation u/s. 143(1) dated 07.12.2016 for AY.2016-17, it is allowed to carry forward current year's loss of Rs.22,08,026/- and that a rectification application u/s. 154 filed before the AO on 13.01.2020 is pending. However, these are matters outside the pari materia of the impugned assessment order u/s. 143(3) dated 04.12.2019 passed by the AO for AY.2017-18. The current status of such loss determined if any for AY.2016-17 is also an issue of fact which requires verification with reference to the records of the AO vis a vis assessment orders passed if any for AY.2016-17.*

4.2.2. *It is a settled position of law that CIT(A) is empowered to decide only such matters which arise out of the proceedings in which the order was appealed and, in a case, where the Assessing Officer has not dealt with an issue during the course of the assessment proceedings or in the assessment order, the Id. CIT(A) has no power to deal with the same. Reliance is placed on the Hon'ble Supreme Court in the case of CIT Rai Bahadur Hardtroy Motilal Chamaria (1967) 66 ITR 443 (SC), has held as under: -*

"The principle that emerges as a result of the authorities of this Court is that the Appellate Assistant Commissioner has no jurisdiction, under s. 31(3) of the Act, to assess a source of income which has not been processed by the Income-tax Officer and which is not disclosed either in the returns filed by the assessee or in the assessment order, and therefore, the Appellate Assistant Commissioner cannot travel beyond the subject-matter of the assessment. In other words, the power of enhancement under s. 31 (3) of the Act is restricted to the subject-matter of assessment or the sources of income which have been considered expressly or by clear implication by the Income-tax Officer from the point of view of the taxability of the assessee.

As we have already stated, it is not open to the Appellate Assistant Commissioner to travel outside the record, i.e., the return made by the assessee or the assessment order of the

Income- tax Officer with a view to find out new sources of income and the power of enhancement under s. 31(3) of the Act is restricted to the sources of income which have been the subject-matter of consideration by the Income-tax Officer from the point of view of taxability. In this context "consideration" does not mean "incidental" or "collateral" examination of any matter by the Income-tax Officer in the process of assessment. There must be something in the assessment order to show that the Income-tax Officer applied his mind to the particular subject-matter or the particular source of income with a view to its taxability or to its non-taxability and not to any incidental connection. In the present case it is manifest that the Income-tax Officer has not considered the entry of Rs. 5,85,000 from the point of view of its taxability and therefore the Appellate Assistant Commissioner had no jurisdiction, in an appeal under s. 31 of the Act, to enhance the assessment."

4.2.3. As noted above, the issue of set off of brought forward business loss does not arise from the assessment order nor has the appellant adduced any evidence to substantiate that the issue had in fact been raised before the AO during the course of assessment proceedings. Therefore, no appeal can arise on this issue. Accordingly, Ground No.2 is dismissed as inadmissible in law following the ratio of the judicial pronouncements on the issue."

5. The assessee is in appeal before against the aforesaid order passed by Ld. CIT(Appeals). The counsel for the assessee drew our attention to page 23 of the paper book and submitted that in the intimation under section 143(1) of the Act issued for assessment year 2016-17, the Department had itself processed the return and determined the brought forward business loss of the assessee at ₹ 22,08,026/- for assessment year 2016-17. Therefore, there is no doubt that the assessee is eligible for set-off of brought forward losses of assessment year 2016-17 to the tune of ₹ 22,08,026/- against the income for the impugned assessment year 2017-18. Further, the counsel for the assessee also drew our attention to page 16 of the paper book and submitted that this issue was brought to the knowledge of the Ld. CIT(Appeals), and the assessee had specifically requested the Ld. CIT(Appeals) to allow set-off of brought forward losses of assessment year 2016-17 against the income for the impugned assessment year. However, Ld. CIT(Appeals) completely ignored the assessee's request and did not allow such set-off, which is a legally tenable claim of the assessee. In response, the Ld. DR has relied upon the observations made by Ld. CIT(Appeals) in the appellate order.

6. We have heard the rival contentions and perused the material on record. In our considered view, even though the assessing officer may not be permitted to allow the assessee's legitimate claim for set-off of brought forward business losses, in the event the assessee does not claim the same in the return of income, however, the appellate authorities are vested with the authority to allow such claim of the assessee, in case the same is tenable in law. In the case of **Pruthvi Brokers & Shareholders[2012] 23**

taxmann.com 23 (Bom.), the High Court held that an assessee is entitled to raise before appellate authorities additional grounds in terms of additional claims not made in return filed by it. Again the Bombay High Court in the case of **Sesa Goa Ltd.[2020] 117 taxmann.com 548 (Bombay)** held that where assessee inadvertently omitted to make claim for deduction under section 10B in respect of two 100 per cent Export Oriented Undertakings, however, all necessary facts for claiming deduction under section 10B were already on record, Commissioner (Appeals) in exercise of his plenary/co-terminus powers, as well as Tribunal, ought to have entertained claim. The Karnataka High Court in the case of **Karnataka State Co-operative Federation Ltd.[2021] 128 taxmann.com 1 (Karnataka)** held that assessee's fresh claim before appellate authority is entertainable even when same is not claimed in original return of income nor assessee has filed revised return of income to make such claim. The Bombay High Court in the case of **B. G. Shirke Construction Technology (P.) Ltd.[2017] 79 taxmann.com 306 (Bombay)** has held that an assessee is entitled to make a claim before Tribunal which was not raised before Assessing Officer at time of filing return of income or by filing a revised return of income.

6.1 In view of the consistent position taken by the various Courts on this issue, in the interest of justice, we are restoring the file to the AO with the direction to verify the assessee's claim of set-off of brought forward business losses of assessment year 2016-17 against income of assessment year 2017-18, and if the claim is legally tenable, to allow for such set-off.

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

Order pronounced in the open court on 04-11-2022

Sd/-
(P.M. JAGTAP)
VICE PRESIDENT
Ahmedabad : Dated 04/11/2022

Sd/-
(SIDDHARTHA NAUTIYAL)
JUDICIAL MEMBER

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद