

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI "SMC" BENCH: NEW DELHI**

**BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER**

**ITA No.4/Del/2020  
[Assessment Year : 2011-12]**

Ajay Jain, W2A026, Wellington Estate, DLF City, Phase-5, Gurgaon-122009. <b>PAN-AAGPJ8481L</b>	vs	ACIT, Circle-63(1), New Delhi.
<b>APPELLANT</b>		<b>RESPONDENT</b>
<b>Appellant by</b>	S/Shri Ved Jain, Adv. & Ms. Supriya Mehta, CA	
<b>Respondent by</b>	Shri Sanjay Nargas, Sr.DR	
<b>Date of Hearing</b>	16.02.2023	
<b>Date of Pronouncement</b>	07.03.2023	

**ORDER**

**PER KUL BHARAT, JM :**

The present appeal filed by the assessee for the assessment year 2011-12 is directed against the order of Ld. CIT(A)-33, Delhi dated 30.10.2019. The assessee has raised following grounds of appeal:-

1. *"On the facts and circumstances of the case, the order passed by the learned CIT(A) is bad both in the eye of law and on facts.*
2. *On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the action of the AO despite the fact that the assessment order passed by the AO in the absence of any valid notice issued under section 148 is bad in law.*
3. *On the facts and circumstances of the case, the learned CIT(A) has erred, both on facts and in law, in rejecting the contention of the assessee that the notice issued under section 148 of the Act is bad and liable to be quashed as the same is barred by limitation.*
4. *On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in rejecting the contention of the assessee that the reopening of the assessment proceedings as well*

*as the re-assessment order passed by the AO is illegal & without jurisdiction as the same has been passed without there being valid service of notice issued under section 148 of the Income Tax Act.*

5. *On the facts and circumstances of the case, learned CIT(A) has erred both on facts and in law in confirming the order of the AO rejecting the contention of the assessee that reopening the assessment under Section 147 of the Act and consequent reassessment without complying with the statutory conditions and the procedure prescribed under the law are bad and liable to be quashed.*
6. *On the facts and circumstances of the case, learned CIT(A) has erred both on facts and in law in confirming the order of the AO rejecting the contention of the assessee that the reasons recorded for reopening the assessment does not meet the requirements under section 147 of the Act, bad in law and are contrary to the facts.*
7. *On the facts and circumstances of the case, learned CIT(A) has erred both on facts and in law in confirming the reopening ignoring the fact that there is no live nexus between the reasons recorded and the belief formed by the assessing officer.*
8. *On the facts and circumstances of the case, the learned CIT(A) has erred, both on facts and in law in confirming the order passed by the AO despite the fact that reopening the assessment proceedings as well as re-assessment order passed under section 148 of the Act are illegal, as the same have been made without assumption of valid jurisdiction.*
9. *On the facts and circumstances of the case, the learned CIT(A) has erred, both on facts and in law, in rejecting the contention of the assessee that the reassessment proceedings initiated by the learned AO without obtaining approval of the prescribed authority under the Act is bad in law and liable to be quashed.*
10. *(i) On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law, in confirming the addition of Rs. 38,79,684/- on account of credit entries in the bank account treating the same as unexplained under section 68 of the Income Tax Act.*

*(ii) That the abovesaid addition has been confirmed rejecting the detailed submissions and explanations made by the assessee in this regard.*

*(iii), That the abovesaid addition has been made ignoring the business loss of Rs. 50,33,473/- declared by the assessee.*

11. *On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the above addition by indulging in surmises only on the basis of presumption and assumption.*

12. *The appellant craves leave to add, amend or alter any of the grounds of appeal.”*

2. Facts giving rise to the present appeal are that the case of the assessee was re-opened u/s 147 of the Income Tax Act, 1961 (“the Act”) after obtaining the requisite approval from Ld. PR. CIT-21, New Delhi. Accordingly, a notice dated 21.08.2018 was issued u/s 142(1) of the Act to the assessee and asked to file return of income but non-compliance of the statutory notice, penalty was imposed to the assessee on 31.08.2018. However, on 20.09.2018, the assessee filed its return of income at NIL. Thereafter, the Assessing Officer (“AO”) framed the assessment u/s 143(3) r.w.s 147 of the Act vide order 27.12.2018. The AO made addition in respect of credit entries amounting to Rs.38,79,684/- and assessed the income at Rs.38,79,680/-.

3. Aggrieved against this, the assessee preferred appeal before Ld.CIT(A) who sustained the addition and dismissed the appeal of the assessee.

4. Aggrieved against the order of Ld.CIT(A), the assessee is in appeal before this Tribunal.

5. Ld. Sr. DR, opposed these submissions and supported the orders of the authorities below.

6. Apropos to **Ground Nos. 1 to 9**, Ld. Counsel for the assessee submitted that he has a very strong case on merits. He therefore, submitted that he would rest his arguments on merit alone and does not wish to press grounds related to legality of assessment. Ld. Counsel for the assessee submitted that the authorities below failed to give set off of business loss of Rs.50,33,473/- if the loss was allowed, there would not be any addition. He submitted that even before Ld. CIT(A), it was stated that the return was filed at business loss of Rs.50,33,473/-. He submitted that the AO erred in not allowing set off of loss of Rs.50,33,473/- chargeable under head "Profit and Gains" suffered by the assessee on account of share trading business. He contended that even the categorization of the credit entries has been wrongly done. He further reiterated the submissions as made in the synopsis. The relevant contents of the synopsis are reproduced as under:-

*Brief Facts of the case:*

- 1. The facts of the present case are that the Assessee, Shri Ajay Jain, is a trader engaged in the business of share trading. The assessee has made various investments in the shares, future & Option of equities, commodities via various Brokers.*
- 2. That, during the year under consideration the assessee case was reopened under section 147 of the Act on the basis of AIR Information. The assessee was asked to file the return of Income and furnish the details of gain or loss on the share transactions.*
- 3. The assessee filed its ITR on 20.09.2018 declaring the loss of Rs 50,33,474/- under the Head PBGP. Copy of the acknowledgement of*

*ITR and computation of income are placed at PB Pg. No.22-23. Also, a copy of profit and loss A/c of the assessee is placed at PB pg. 44.*

4. *Thereafter the Id. AO asked the assessee to submit the explanation regarding the source of the fund to the above losses along with documentary evidences.*
5. *The assessee, vide its reply, explained the source transactions. The same is reproduced herein under:*
  - *The assessee had taken a loan from Kotak Mahindra Bank to fund its investments in securities with Kotak Securities Ltd.*
  - *The assessee invested the amount from the income earned in the previous Assessment Year from a long term capital gain of Rs.12,75,266/-*
  - *Further the assessee also taken a short term loan of Rs.33,94,009/-*
6. *Further the assessee also submitted complete bank ledgers along with supporting documents and ledgers explaining the credit entries appearing in the bank ledgers in the books of the assessee which are placed at PB Pg. 51-54 &Pg 83.*
7. *However, the AO did not consider the same and added Rs.38,79,684/- to the income of the assessee as unexplained credit entries in the bank account of the assessee.*
8. *It is relevant to note that the AO did not consider the loss under head PGBP of Rs 50,33,474/- declared by the assessee in the return of income for the purpose of it set off against the income added as undisclosed income under section 68.*
9. *The assessee preferred an appeal before the CIT(A). The Ld. CIT(A) confirmed the addition of Rs.38,79,684/- made by the AO on the ground that assessee has not explained the entries credited in the bank account.*
10. *Now the assessee is in appeal before the Hon'ble Tribunal.*

11. *In this regard, it is submitted that the AO and CIT(A) has failed to appreciate the submissions of the assessee wherein the assessee has explained all the credit entries appearing the bank account.*
12. *It is submitted that without prejudice to the fact that addition is unwarranted even if the above addition is taken into consideration, the same shall be eligible to be setoff under the provisions of section 71 of the Act. As per section 71, the assessee shall be entitled to set-off the losses arises from the business income against the income of Other Sources. The relevant extract of section is reproduced herein under:*
- 13.71. (1) *Where in respect of any assessment year the net result of the computation under any head of income, other than "Capital gains", is a loss and the assessee has no income under the head "Capital gains", he shall, subject to the provisions of this Chapter, be entitled to have the amount of such loss set off against his income, if any, assessable for that assessment year under any other head, if the net result is still a loss, the assessee can set off the said loss under section 71 of the Act against income of the same year under any other head, except for losses, which arises under head "Capital Gains".*
14. *We may also mention that restriction on the 'set off' of losses against the income brought to tax u/s 68 of the Act has been provided under section 115BBE of the Act via the amendment in the Finance Act 2016. Further, this amendment is prospective in nature. Hence, in the absence of such restrictions during the year under consideration i.e. AY 2011-12, the AO may 'set off' of losses against income assessed under section 68 of the Act.*
15. *In the present case, the income of Rs. 38,79,6801- under the Head "Other Income" is also eligible for "set off" against the losses of Rs. 50,33,474/- (PB Pg. 23) chargeable under head "Profit and Gains" in accordance with the provision of section 71.*

16. Hence the assessee is entitled to set off the business loss of Rs.50,33,474/- of this year as appearing in computation of income submitted filed by the assessee. Thus, the claim for such loss shall be given to the assessee and addition made by Ld. AO be set off from such business losses as per section 71 of the Act.

17. It may be relevant to note that if a return is filed late, the only restriction is that loss is not allowed to be carried forward. However loss of the year is eligible for set off against any addition made by AO. Accordingly in the present case assessee has filed return of loss of Rs.50,33,474/- (PB Pg. 23). The AO ought to have set off the addition made by him of Rs.38,79,680/-. This is without prejudice to the fact that the addition otherwise is unsustainable.”

7. On the other hand, Ld. Sr. DR opposed these submissions and supported the orders of the authorities below. He submitted that the assessee had not filed return of income on time therefore, he was not eligible for set off of business loss.

8. I have heard Ld. Authorized Representatives of the parties and perused the material available on record and gone through the orders of the authorities below. A short question which needs to be decided whether the assessee is eligible for set off of business loss u/s 71 of the Act. Ld. Counsel for the assessee relied upon the decision of Division Bench of the Tribunal in the case of *ACIT, Central Circle-2, Jaipur vs M/s. SanjaiBairathi Gems Ltd. in ITA No.157/JP/2017* order dated 08.08.2017. I find merit into the contention of the assessee that it was eligible for set off of business loss as per section 71 of the Act. As per this provision, income under any head of income, other than “capital gains” is loss and the assessee has no income under the head “capital gain”. He shall be entitled to have the amount of such loss set off against the

income, if any, assessable for that assessment year under any other head. If the net result is still a loss, the assessee can set off the said loss u/s 71 of the Act. Therefore, I deem it proper to set aside the orders of the authorities below and restore this issue to the file of AO to verify the claim of the assessee and allow set off of loss as per the provisions of law. Thus, Grounds raised by the assessee are allowed for statistical purposes.

9. Ground Nos. 11 & 12 raised by the assessee are general in nature, need no separate adjudication hence, dismissed.

10. In the result, the appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in the open Court on 07<sup>th</sup> March, 2023.

**Sd/-**

**(KUL BHARAT)  
JUDICIAL MEMBER**

*\* Amit Kumar \**

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR  
ITAT, NEW DELHI