

आयकर अपीलीय अधिकरण "बी" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, PUNE

**BEFORE SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER
AND
SHRI S.S. VISWANETHRA RAVI, JUDICIAL MEMBER**

आयकर अपील सं. / ITA No.647/PUN/2023
निर्धारण वर्ष / Assessment Year : 2017-18

Sun Infrastructure Private Limited,
F-1/2 First Floor, Suyojit Heights,
Opp. Rajiv Gandhi Bhavan,
Sharanpur Road, Nashik – 422002

PAN : AAHCS5734P

.....अपीलार्थी / Appellant

बनाम / V/s.

The Income Tax Officer,
Ward – 2(1), Nashik

.....प्रत्यर्थी / Respondent

Assessee by : N O N E
Revenue by : Shri M.G. Jasnani

सुनवाई की तारीख / Date of Hearing : 14-06-2023

घोषणा की तारीख / Date of Pronouncement : 15-06-2023

आदेश / ORDER

PER S.S. VISWANETHRA RAVI, JM :

This appeal by the assessee against the order dated 27-03-2023 passed by the National Faceless Appeal Centre, Delhi ("NFAC") for assessment year 2017-18.

2. We find no representation on behalf of the assessee nor any application filed seeking adjournment. Thus, the assessee called absent and set ex-parte. Therefore, we proceed to dispose of the appeal by hearing the ld. DR and perusing the material available on record.

3. We find that this appeal was filed with a delay of 01 day. The ld. DR submitted that the issues decided by the NFAC, Delhi are covered against the assessee in the view of the decision of Hon'ble Supreme Court and also for not filing the return of income u/s. 139(1) of the Act regarding delay in depositing employee's contribution to Provident Fund account and claim of carry forward of business loss. Further, the ld. DR argued that the delay may be condoned and dispose off the appeal by confirming the order of NFAC, Delhi. Therefore, the issues covered against the assessee, in order to avoid multiplicity of proceedings, we deem it proper to condone the delay of 01 day.

4. The brief facts of the case on hand are that the assessee is a company engaged in the business of construction of buildings which is evident from para 4 of the assessment order. Further, it is noted from the assessment order that the assessee filed return of income for the year under consideration on 31-03-2018 declaring loss at Rs.81,09,510/-. During the course of scrutiny assessment proceedings, the AO assessed the loss at Rs.73,24,305/- inter alia making addition on account of delay in payment of employee's contribution to Provident Fund and denial of carry forward business loss for subsequent assessment year. The CIT(A), NFAC, Delhi confirmed the order of AO. Against such order of NFAC, Delhi, the assessee is before us.

5. We note that the NFAC, Delhi by following the decision of Hon'ble Supreme Court in batch of the appeals, lead case being Checkmate Services P. Ltd. in Civil Appeal No. 2833 of 2016 confirmed the order of AO in treating the employee's contribution as income of the assessee for delay in depositing the employee's contribution to respective Act within specified time. The NFAC, Delhi discussed the said issue in para 12 and held the

delayed payment of employee's contribution towards PF/ESI in Government Account is not deductible u/s. 43B of the Act and accordingly confirmed the order of AO. The ld. DR placed on record the decision of Hon'ble Supreme Court in the case of Checkmate Services P. Ltd. (supra) and submitted that the assessee is not entitled to claim deduction if the employee's contribution is not paid within due dates of respective statutes. On careful reading of the said decision of Hon'ble Supreme Court held that Section 2(24)(x) deems amount received from the employees as income and the amounts retained by the employer from out of the employee's income by way of deduction etc. were treated as income in the hands of the employer (assessee). Further, it held unless the conditions spelt by Explanation to section 36(1)(va) are satisfied i.e., depositing such amount received or deducted from the employee on or before the due date of respective statutes, the assessee is not entitled to claim benefit of deduction from the total income. Therefore, in our opinion, essential condition for claiming such deduction if such amounts are deposited on or before due date of respective statutes. It is evident from the impugned order that the assessee deposited the employee's contribution to PF/ESI after the prescribed due date of relevant Act which is not disputed by the ld. AR. Therefore, following the decision of Hon'ble Supreme Court in the case of Checkmate Services P. Ltd. (supra), we find no infirmity in the order of CIT(A), NFAC, Delhi in holding the assessee is not entitled to claim deduction for its failure to deposit employee's contribution before due date prescribed under the relevant statutes. Thus, the issue raised by the assessee is fails and it is dismissed.

6. The other issue is regarding denying carry forward of business loss to subsequent years. According to the AO that the carry forward loss is available only when the assessee files return of income u/s. 139(1) of the

Act, but however, as it appears from the record that the assessee did not file return of income within specified period u/s. 139(1) of the Act. The AO discussed the issue in paras 6, 7 and 8 of the assessment order, but however, allowed depreciation loss to an extent of Rs.12,69,074/- as against the claim of Rs.73,24,305/-. The CIT(A) confirmed the order of AO at paras 15 and 16 of the impugned order. For better understanding the paras 15 and 16 are reproduced here-in-below :

"Ground No.2 is as under-

On the basis of facts, in the circumstances of the case and as per law, the A.O. is not justified in denying the carry forward of business losses for the year under appeal incurred by the appellant for the reason that the return of income for the year under appeal is not filed under section 139(1) of the Act.

During the course of assessment proceedings, the AO has noticed that the appellant has claimed to be carry forward loss to subsequent assessment years. The AO has disallowed the same by holding as under-

"It would be pertinent to mention here that the above assessed loss of Rs.73,24,3051- is inclusive of Depreciation loss of Rs. 12,69,0741-. Further, under the circumstances that the return of income was not filed within the stipulated time limit as detailed in section 139(1) of the Act, only depreciation loss of Rs. 12,69,0741- is allowable to be carried forward to the subsequent assessment year. Accordingly, the assessed business loss of Rs. 60,54,2311- is not permissible to be carried forward for any of subsequent assessment years."

In the ground of the appellant has stated that the Assessing Officer has not allowed the carry forward of business losses for the reason that the return of income is not furnished under section 139(1) of the Act.

16. The sections relating to carry forward of business losses to subsequent years when the return is not filed u/s 139(1) are section 80 and section 139(1), The provisions of section are as under –

Submission of return for losses.

Section 80 - Notwithstanding anything contained in this Chapter, no loss which has not been determined in pursuance of a return filed 30 [in accordance with the provisions of sub-section (3) of section 139], shall be carried forward and set off under sub-section (1) of section 72 or sub-section (2) of section 73³¹ [or sub-section (2) of section 73A] or sub-section (1) 32[or sub-section (3)] of section 74³³[or sub- section (3) of section 74A].

*Section 139 (3) - If any person who 13[***] has sustained a loss in any previous year under the head "Profits and gains of business or profession" or under the head "Capital gains" and claims that the loss or any part thereof should be carried forward under sub-section (1) of section ,72, or sub-section (2) of section 73, 14[or sub- section (2) of section 73A] or sub-section (1) 15[or sub-section (3)] of section 74, 16 [or sub-section (3) of section 74A] , he may furnish, within the time allowed under sub-. section (1) 17[***], a return of loss in the prescribed form 18 and verified in the prescribed manner and containing such other particulars as may be prescribed, and all the provisions of this Act shall apply as if it were a return under sub-section (1).*

The judicial precedence on non-allowability of carry forward of business losses to subsequent years when the return is not filed u/s 139(1) are as under –

i. *PCIT Vs Wipro Ltd [2022] 140 taxmann.com 223 (SC)*

9. In such a situation, filing a revised return under section 139(5) of the IT Act claiming carrying forward of losses subsequently would not help the assessee. In the present case, the assessee filed its original return under section 139(1) and not under section 139(3). Therefore, the Revenue is right in submitting that the revised return filed by the assessee under section 139(5) can only substitute its original return under section 139(1) and cannot transform it into a return under section 139(3), in order to avail the benefit of carrying forward or set-off of any loss under section 80 of the IT Act. The assessee can file a revised return in a case where there is an omission or a wrong statement. But a revised return of income, under section 139(5) cannot be filed, to withdraw the claim and subsequently claiming the carried forward or set-off of any loss. Filing a revised return under section 139(5) of the IT Act and taking a contrary stand and/or claiming the exemption, which was specifically not claimed earlier while filing the original return of income is not permissible. By filing the revised return of income, the assessee cannot be permitted to substitute the original return of income filed under section 139(1) of the IT Act. Therefore, claiming benefit under section 10B (8) and furnishing the declaration as required under section 10B(8) in the revised return of income which was much after the due date of filing the original return of income under section 139(1) of the IT Act, cannot mean that the assessee has complied with the condition of furnishing the declaration before the due date of filing the original return of income under section 139(1) of the Act. As observed hereinabove, for claiming the benefit under section 10B (8), both the conditions of furnishing the declaration and to file the same before the due date of filing the original return of income are mandatory in nature.

ii. *Prima Agro Ltd. Vs. err [2012] 21 taxmann.com 527 (Ker.)*

5. The question to be considered is whether assessee's claim that the completion of regular assessment based on belated return, entitles the assessee to carry forward unabsorbed business loss computed by the assessing officer. The bar contained in Sections 139(3) and 80 is only in the nature of disentitlement for the assessee to carry forward unabsorbed business loss unless return is filed within the statutory period. In fact Assessing Officer is entitled to complete the assessment based on any return filed in time. Return can be filed at any time within one year from the end of the relevant assessment year and such return is also a valid return based on which assessment can be completed. Therefore, the Assessing Officer was perfectly justified in making assessment based on the return filed under Section 139(4). In this case the Assessing Officer completed the assessment by refixing business loss in deviation from the return filed and also computed unabsorbed depreciation. In our view, the Tribunal rightly declined assessee's claim for carry forward of unabsorbed business loss because provisions of Sections 139(3) and 80 disentitle the assessee to carry forward unabsorbed business loss. However, there is no provision similar to Section 139(3) or Section 80 prohibiting carry forward of depreciation computed based on return filed under Section 139(4). So much so, in our view, the Tribunal rightly granted partial relief to the appellant assessee to carry forward unabsorbed depreciation and not business loss. The assessee's contention that the

assessment completed should be taken as one based on regular return filed under Section 139(1) has no basis. On the other hand, the Tribunal rightly treated the return as one filed under Section 139(4) and so much so, the assessee was rightly declined the benefit of carry forward of business loss based on the belated return filed.

In view of the provisions 'of section 139(3), section 80 and the aforesaid judicial precedence, the action of the AO is held to be appropriate. Therefore, ground no. 2 raised by the appellant is dismissed."

7. In the light of the above, as admittedly no return of income was filed by the assessee within specified period u/s. 139(1) of the Act entitling carry forward of business loss to subsequent years and therefore, we find no infirmity in the order of CIT(A), NFAC, Delhi and it is justified. Thus, the issue raised by the assessee is dismissed.

8. In the result, the appeal of the assessee is dismissed.

Order pronounced in the open court on 15th June, 2023.

Sd/-
(Inturi Rama Rao)
ACCOUNTANT MEMBER

Sd/-
(S.S. Viswanethra Ravi)
JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 15th June, 2023.

रवि

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The concerned CIT, Pune.
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "बी" बेंच, पुणे / DR, ITAT, "B" Bench, Pune.
5. गार्ड फ़ाइल / Guard File.

//सत्यापित प्रति// True Copy//

आदेशानुसार / BY ORDER,

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune