

IN THE INCOME TAX APPELLATE TRIBUNAL
"G" BENCH, MUMBAI
BEFORE SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER &
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER
ITA No. 2267/Mum/2023
(A.Y: 2009-10)

Shri Santosh Bhalchandra Powle, 8 th National House, 3 rd Floor, 27 Raghunath Dadaji Street, Fort, Mumbai-400001.	Vs.	ACIT-22(3), Aayakar Bhavan, M.K.Road, Mumbai-400020.
PAN/GIR No. : AAJPP1107A		
Appellant	..	Respondent

Appellant by :	Ms.Aishwarya Vanikar.AR
Respondent by :	Shri.Virbhandra Mahjan.Sr.DR

Date of Hearing	17.10.2023
Date of Pronouncement	18.10.2023

आदेश / O R D E R

PER PAVAN KUMAR GADALE JM:

The assessee has filed the appeal against the order of the National Faceless Appeal Centre (NFAC), Delhi /CIT (A) passed u/sec 250 of the Act. The revenue has raised the following grounds of appeal:

1 Considering the facts and circumstances of the case and in law, the Commissioner of Income-tax (Appeals) ["CIT (Appeals)"] / National Faceless Appeal Centre ["NFAC"] has erred in denying set off of brought forward short-term capital loss of Rs.6,08,259/-

2 Considering the facts and circumstances of the case and in law, the Commissioner of Income-tax (Appeals) ["CIT(Appeals)"] / National Faceless Appeal Centre ["NFAC"] has erred in not allowing carry forward of short term capital loss (Speculative) of Rs.75,773/-

3 Considering the facts and circumstances of the case and in law, the Commissioner of Income-tax (Appeals) / National Faceless Appeal Centre (NFAC) erred in not adjudicating Ground No.3 raised by the Appellant in Appeal filed before them.

4 Considering the facts and circumstances of the case and in law, the CIT(A) / NFAC has erred in confirming the action of the Assessing Officer in disallowing interest of Rs.3,74,188/- and bank charges of Rs.28,747/- without appreciating that the same was paid in respect of loan used as working capital in the business of Appellant

5 On the facts and circumstances of the case and in law, the Appellant was prevented by sufficient cause and therefore was unable to file submissions before the CIT(A) / NFAC and therefore prays that the Appellant be granted one more opportunity to submit the same.

6 The Appellant craves leave to add to, alter or amend, the above Grounds of Appeal as and when advised.

2. The brief facts of the case are that, the assessee is engaged in the business. The assessee has filed the return of income for the A.Y 2009-10 on 17.09.2009 disclosing a total income of Rs.80,66,760/-. Subsequently, the case was selected for scrutiny under the CASS and the assessment was completed

u/s 143(3) of the Act with additions/disallowances by the A.O and the total income was assessed at Rs. 93,24,140/- vide order dated 29-12-2011. Aggrieved by the A.O order, the assessee has filed an appeal before the CIT(A), whereas the appellate authority has confirmed/ sustained the disallowances of (i) Telephone and Mobile expenses of Rs.70,979/-(ii) Interest on mortgage loan of Rs.3,74,188/-(iii) Bank charges/commission towards mortgage loan of Rs. 28,474/-and (iv) vehicle expenses including depreciation of Rs.73,249/- and partly allowed the assessee appeal. On second appeal filed by the assessee with the Hon'ble Tribunal, the ITAT vide order dated 6.09.2017 has sustained the three disallowances and in respect of vehicle expenses , the disallowance was restricted @ 10% as against @20% made by the Assessing Officer. Further the assessee has filed the Miscellaneous application in the ITAT order dealt at Para 4 of the A.O order as under:

“4. Further, the filed Miscellaneous Application and sought rectification/recall of ITAT order No. ITA No. 7498/Mum/2016 dated 06.09.2017. Pursuant to it, the Hon'ble ITAT passed the order u/s 254(2) of the Act vide order No Miscellaneous Application No. 234/Mum/2018 arising out of ITA No. 7498/Mum/2016 dated 11.12.2018.

The Tribunal has allowed/disallowed/set aside the following issues:

<i>01</i>	<i>Telephone & Mobile Expenses</i>	<i>70,979</i>	<i>Restricted at 10%</i>
<i>02</i>	<i>Interest on mortgage loan</i>	<i>3,74,188</i>	<i>Remitted back to AO</i>
<i>3</i>	<i>Bank charges / commission towards mortgage loan</i>	<i>28,474</i>	<i>Remitted back to AO</i>

3. Subsequently, the AO has issued notice U/sec 142(1) of the Act dated 7.12.2019 along with the detailed questionnaire. Whereas the assessee has filed the submissions on 13.12.2019 and the assessing officer has dealt on the facts, submissions and disputed issues at Para 6 of the order as under:

“Disallowance of Interest on Mortgage Loan & Bank Charges

6. From the perusal of the P & L account, the assessee has shown interest of 3,74,188/- paid to Bank of India on mortgage loan. In this regard, the notice u/s 142(1) of the Act was issued to the assessee on 07.12.2019. In response to the same, M/s Santosh B Powle & Co, Chartered Accountant the AR of the assessee has submitted on 13.12.2019 which are reproduced herein as under:

It is submitted that the mortgage loan availed by the appellant was exclusively utilized for the purpose of business. The loan amount was channelized towards working capital requirements of the business of the

assessee since the assessee is in such business where the receipt of income may vary from month to month as well as regularity of such income and receipt cannot be guaranteed as they are totally dependent on nature of assignments undertaken by the assessee. While disallowing the expenditure in the original order on the ground of personal usage AO has not pointed any specific instances where such money was diverted or utilized.

The assessee had submitted before the Tribunal that the Hon'ble Tribunal has itself held in its order that the assessee had negative working capital at the end of the year i.e. current liabilities are far more than current assets)As such, the Tribunal accepted the fact that the assessee was always in need of working capital and as such on this reasoning, the utilization of overdraft facility could be justified.

Further, it is humbly submitted that even otherwise the Hon'ble Jurisdictional High Court in the case of CIT Vs Bombay Samachar Ltd-(1969) 74 ITR (Bom) has held that:

...it is not the requirement of the provision that the assessee must further show that the borrowing of the capital was necessary for the business so that if at the time of borrowing the assessee had sufficient amount of its own, the deduction could not be allowed'.

The assessee further submits that even otherwise it is a settled law that neither the AO nor the department can sit in the armchair of a businessman in order to substitute their judgement for his judgement in business decisions(Ref. S.A. Builders Vs CIT-(2007) 288 ITR 1(SC). It is also worth noting that even the Tribunal has nowhere expressly dismissed the claim of the assessee that the

overdraft facility was utilized for professional purposes nor has affirmed the finding of the CIT(A) in this regard and in fact his order is set aside to that extent. As such, in the humble submission of the assessee, the claim of the interest expenses deserved to be allowed.

6.1 The submission of the assessee has been perused categorically. However, the same is not tenable and acceptable as the assessee has not brought on record anything new, nor substantiated with any material fact in defence of his claims for the expenses so incurred. The assessee produces nothing to substantiate the working capital expenditure during the ongoing proceedings.

6.2 In view of the above, the assessee's claim of interest on mortgage loan paid amounting to Rs. 3,74,188/- as well as bank charges/commission pertaining to mortgage loan amounting to Rs. 28,474/- overall at Rs. 4,02,662/- is hereby disallowed u/s 36(1)(iii) of the IT Act and added to the total income of the assessee being the same are nature of expenses. The penalty proceedings u/s 271(1)(c) is initiated separately for furnishing inaccurate particulars of income.

6.3 As per direction of Hon'ble ITAT, the disallowance of Rs. 36,625/- being 10% of Rs. 3,66,247/- on account of other expenses as discussed above in para No. 3 is also disallowed u/s 37(1) of the Act and added to the total income of the assessee.

6.4 As per another direction of Hon'ble ITAT, the disallowance of Rs. 7,098/ being 10% of Rs. 70,979/- on account of telephone/mobile expenses as discussed above in para No. 4 is also disallowed u/s 37(1) of the Act and added to the total income of the assessee.

4. Finally, the Assessing Officer has assessed the total income of Rs.85,13,150/-and passed the order U/sec143(3) r.w.s 254 of the Act dated 30.12.2019.

5. Aggrieved by the order, the assessee has filed an appeal before the CIT(A),whereas the CIT(A) has considered the grounds of appeal, statement of facts and findings of the AO and has issued notices of hearing and since there was no compliance by the assessee to notices. Therefore the CIT(A) considering the information on record has confirmed the action of the A.O and dismissed the appeal. Aggrieved by the order of the CIT(A), the assessee has filed an appeal before the Hon'ble Tribunal.

6. At the time of hearing, the Ld.AR submitted that the CIT(A) has erred in confirming the action of the Assessing officer overlooking the facts and submissions of assessment proceedings. Further the assessee has a good case on merits and shall substantiate with the material evidences and prayed for an opportunity to explain before the lower

authorities. Per Contra, the Ld. DR supported the order of the CIT(A).

7. We heard the rival submissions and perused the material on record. Prima-facie the CIT(A) has passed the order considering the fact that there is no appearance/submissions in spite of providing adequate opportunity of hearing and the notices were issued. Therefore, the CIT(A) was of the opinion that the assessee is not interested in prosecuting the appeal and dismissed the appeal ex-parte confirming the action of the assessing officer. The CIT(A) has issued the notices of hearing on 11-1-2021,30-06-2021, 06-12-2022,16-12-2022 & 03-04-2022 referred at Page 4 Para 4 of the order, but there was no response and thus the Ld.CIT(A) came to a conclusion that the assessee is not interested and decided the appeal based on the information available on record. Whereas the assessee has raised grounds of appeal challenging the additions made by the assessing officer and there could be various reasons for non appearance which cannot be overruled. Therefore, considering the principles of natural justice shall provide with one more opportunity of hearing to the

assessee to substantiate the case with evidences and information. Accordingly, set aside the order of the CIT(A) and remit the entire disputed issues to the file of the CIT(A) to adjudicate afresh and the assessee should be provided adequate opportunity of hearing and shall cooperate in submitting the information for early disposal of the appeal. Accordingly, we allow the grounds of appeal of the assessee for statistical purposes.

8. In the result, the appeal filed by the assessee is allowed for statistical purposes.

Order pronounced in the open court on 18.10.2023.

Sd/-
(GAGAN GOYAL)
ACCOUNTANT MEMBER

Sd/-
(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Mumbai, Dated 18.10.2023

KRK, PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT (Judicial)
4. The PCIT
5. DR, ITAT, Mumbai
6. Guard File

ITA No. 2267/Mum/2023
Shri Santosh Bhalchandra Powle., Mumbai.
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सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

(Asst. Registrar)
ITAT, Mumbai