

| आयकर अपीलीय अधिकरण न्यायपीठ, कोलकाता |
IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH, KOLKATA

BEFORE SHRI SANJAY GARG, HON'BLE JUDICIAL MEMBER
&
DR. MANISH BORAD, HON'BLE ACCOUNTANT MEMBER

I.T.A. No. 719/Kol/2023
Assessment Year: 2013-14

M/s. Prudential Management Advisors Pvt. Ltd. Suite No. 10, 5 th Floor Shantiniketan Building 8, Camac Street Kolkata - 700017 [PAN : AAACP2505Q]	Vs	Assistant Commissioner of Income Tax, Circle-3(1), Kolkata
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अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)
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Assessee by :	Shri Manoj Kataruka, A/R
Revenue by :	Shri Abhijit Kundu, CIT, D/R

सुनवाई की तारीख/Date of Hearing : 22/01/2024
घोषणा की तारीख /Date of Pronouncement: 21/03/2024

आदेश/ORDER

PER DR. MANISH BORAD, ACCOUNTANT MEMBER :

The present appeal is directed at the instance of the assessee against the order of the National Faceless Appeal Centre, Delhi (hereinafter the "Id. CIT(A)") dt. 24/05/2023, passed u/s 250 of the Income Tax Act, 1961 ("the Act") for the Assessment Year 2013-14.

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

"1) That on the facts and in the circumstances of the case the action of the CIT(A) to confirm the addition made by the AO of Rs.6,34,50,000/- on account of loss on sale of investments is contrary to the material evidences of record and the addition is arbitrary, excessive and illegal.

2) That on the facts and in the circumstances of the case the action of the CIT(A) confirm the addition made by the AO of Rs.25,33,00,386/- on account of sundry creditors u/s 41(1) of the Act is contrary to the material evidences of record and the addition is arbitrary, excessive and illegal.

3) *That the order of the Ld. CIT(A) confirming the action of the A.O. is arbitrary, excessive and illegal.*

4) *That the above grounds of appeal will be argued in details at the time of hearing and the appellant craves leaves to submit additional grounds of appeal if any and or alter, vary, modify or rectify-the statement of facts and grounds of appeal at or before the time of hearing.*

2.1. The assessee has also raised the following Additional Grounds of Appeal:-

1) *That on the facts and in the circumstances of the case, the order passed by the Assessing Officer without any jurisdiction and upheld by the Ld. CIT(A) is erroneous and bad in law.*

2) *That on the facts and in the circumstances of the case, the action of the Ld. CIT(A) to uphold the order passed by the Assessing Officer without the issue of notice u/s 143(2) is erroneous and bad in law.*

3) *That on the fact and in the circumstances of the case the action of the AO excessively assessing the income to the extent of Rs. 1,46,78,367/- is arbitrary, excessive and illegal.*

The aforesaid ground of appeal raised is purely legal issue which goes to the route in fact matter and the same does not require any fresh investigation into the fact, facts already being on record. Further, the omission to raise the additional grounds is neither wilful nor intentional.

In view of the above, the aforesaid additional grounds may kindly be admitted and adjudicated while hearing the cross objection filed by the assessee.

An opportunity of being heard is prayed for."

3. Brief facts of the case are that the assessee is a private limited company engaged in investment business. Return of income for Assessment Year 2013-14 was filed on 29/10/2014 declaring total loss of Rs.7,88,26,077/-. Case selected for scrutiny and after considering the assessee's submissions, assessment completed u/s 143(3) of the Act on 07/03/2016 at an income of Rs.23,79,35,377/- arrived at after making

addition denying claim of loss from sale of shares at Rs.6,34,50,000/- and addition u/s 41(1) of the Act for cessation of liability towards sundry creditors at Rs.25,33,00,386/-. Aggrieved assessee preferred appeal before the Id. CIT(A) but vide order dt. 27/03/2018, the Id. CIT(A) confirmed the view of the Assessing Officer framing *ex-parte* order. Thereafter, the assessee preferred appeal before this Tribunal in ITA No. 872/Kol/2018, wherein the Tribunal vide its order dt. 08/02/2019, set aside the matter to the Assessing Officer for fresh adjudication. In compliance to the order of this Tribunal, the Id. Assessing Officer carried out the assessment proceedings but even after giving sufficient opportunity, none appeared and accordingly the assessment was completed u/s 254 /251/143(3) of the Act dt. 26/12/2019, assessing the income at Rs.23,79,35,377/- which comprised of both the additions as were made in the assessment proceedings u/s 143(3) of the Act dt. 07/03/2016. Aggrieved the assessee preferred appeal before the Id. CIT(A) but failed to succeed.

4. Now the assessee is in appeal before this Tribunal and along with raising grounds on the merits of the case on the ground of additions made by the Assessing Officer and subsequently confirmed by the Id. CIT(A) has also raised additional ground challenging the validity of jurisdiction of the Assessing Officer on account of not issuing notice u/s 143(2) of the Act.

5. So far as the legal ground is concerned, the Id. Counsel for the assessee submitted that at the time of carrying out the original assessment proceedings are completed on 07/03/2016, a valid notice

u/s 143(2) of the Act was not issued for initiating such proceedings. He stated that notice was issued by the ITO Ward-3(1) but the assessment has been framed by DCIT, Circle-3(1), Kolkata. Therefore, for assuming jurisdiction, the Id. DCIT, Circle-3(1), Kolkata, should have issued notice u/s 143(2) of the Act failing which assessment proceedings are *void ab initio*.

5.1. As far as the merits of the case is concerned, it was submitted that disallowance on loss of sale of shares is uncalled for because the same has been arrived on sale of shares, which were part of investments made by the assessee in the preceding years and the revenue authorities have already assessed the income for the preceding years and, therefore, it is a genuine claim of loss. So far as the addition u/s 41(1) of the Act is concerned, he submitted that there is a liability standing in the name of M/s. Mercury Fund Management Company Ltd. at Rs.23,86,43,087/-. This is a trading liability and the alleged creditor confirmed the outstanding balance. It is not a liability which has ceased to exist and towards which no sum is payable by the assessee. Since there is no cessation of liability, addition u/s 41(1) of the Act is uncalled for.

6. The Id. D/R, so far as the legal issue raised by the assessee is concerned, made submission on 13/09/2023, stating that, in view of the judgment of the Hon'ble Apex Court in the case of *DCIT (Exemption) vs. Kalinga Institute of Industrial Technology* reported in [2023] 151 taxmann.com 434 (SC), wherein the Hon'ble Court has held that Section 124(3)(a) of the Act precludes the assessee from

questioning the Assessing Officer, if he does not do so within 30 days of receipt of notice u/s 142(1) of the Act. Copies of the judgment has been placed on record by the ld. D/R. He also added that when the notices u/s 143(2) of the Act was generated through CASS, the PAN jurisdiction was lying with ITO, Ward-3(1) and he has validly issued the notice since no objection has been raised by the assessee throughout the assessment proceedings. As far as the merits of the case is concerned, he supported the findings of the Assessing Officer stating that the impugned additions may be confirmed.

7. We have heard rival contentions and perused the material placed before us. First, we will take up the legal issue raised in the additional ground challenging the validity of assessment proceedings on account of non-issuance of valid notice u/s 143(2) of the Act. We observe that the impugned order has been framed against the order of the Assessing Officer dt. 26/12/2019 passed u/s 254/251/143(3) of the Act. This assessment proceedings which attained finality on 26/12/2019, were carried out in pursuance to the directions given by the Tribunal in ITA No. 872/Kol/2018; Assessment Year 2013-14, order dt. 08/02/2019, observing as follows:-

"4. We have heard the arguments of both the sides and also perused the relevant material available on record. As pointed out by the ld. Counsel for the assessee from the relevant portion of the impugned order of the ld. CIT(Appeals), applications were duly filed by the assessee seeking adjournment of the hearings fixed by the ld. CIT(Appeals) on 12.03.2018 and 19.03.2018. He has contended that the ld. CIT(Appeals), however, gave a very short adjournment and fixed the hearing of appeal on 26.03.2018, which could not be attended as the Authorized Representative of the assessee was busy in March ending work. He has also submitted that even the Assessing Officer during the course of assessment proceedings had not given

proper and sufficient opportunity to the assessee to explain its claim for loss on sale of investment amounting to Rs.6,34,50,000/- and the entire amount of sundry creditors/sundry advances amounting to Rs.25,33,00,386/- was also added by him to the total income of the assessee overlooking the fact that most of the said sundry creditors/sundry advances were pertaining to the earlier years and the said liability had not ceased to exist. He has urged that the matter may, therefore, be sent back to the Assessing Officer for giving such opportunity to the assessee. Since the ld. D.R. has also not raised any objection in sending the matter back to the Assessing Officer, we set aside the impugned order passed by the ld. CIT(Appeals) and restore the matter to the file of the Assessing Officer for deciding the same afresh after giving the assessee proper and sufficient opportunity of being heard."

8. The above directions of this Tribunal has been adhered by the Assessing Officer and carried out assessment proceedings and, therefore, there was no requirement of initiating further proceedings u/s 143(3) of the Act. Now, coming to the original assessment proceedings which was concluded on 07/03/2016 the assessee has neither challenged the validity of notice u/s 143(2) of the Act during the course of assessment proceedings, even not before the ld. CIT(A) and even did not raise this legal ground before this Tribunal. Now, the plea of the assessee is that at the time of original assessment proceedings, notice u/s 143(2) of the Act was issued by ITO, Ward - 3(1). So, there is no dispute to the fact that the assessee has been issued and duly served upon notice u/s 143(2) of the Act by the ITO, Ward-3(1). It has been further pleaded by the ld. Counsel for the assessee that the jurisdiction to frame the assessment vested with DCIT, Circle-3(1) but has finally framed the assessment and, therefore, it was incumbent upon the DCIT, Circle-3(1) to issue a fresh notice u/s 143(2) of the Act. We observe that when the case of the assessee was selected for scrutiny

through CASS, PAN jurisdiction of assessee was lying with ITO, Ward-3(1). Since the territorial jurisdiction at that point of time was lying with ITO, Ward-3(1), he had issued the notice u/s 143(2) of the Act. The assessee had an option to question the territorial jurisdiction of the Assessing Officer by mentioning it within 30 days from the date on which he was served with the notice. In other words, the assessee ought to have challenged the territorial jurisdiction within 30 days of being served the notice. However, the assessee had not challenged the said action and has participated in the assessment proceedings and filed all necessary details. Now, whether at this juncture, can the assessee raise this legal ground of challenging the territorial jurisdiction. We find that the Hon'ble Apex Court has recently dealt with the similar issue in the case of *Kalinga Institute of Industrial Technology (supra)* and on observing that the assessee had participated pursuant to the notice issued u/s 142(1) of the Act and did not question the jurisdiction of the Assessing Officer u/s 124(3)(a) of the Act, precluding the assessee from questioning the jurisdiction of the Assessing Officer if he does not do so within 30 days of receipt of the notice u/s 142(1) of the Act. The above ratio laid down by the Hon'ble Apex Court is applicable on the assessee also because Section 124(3)(a) of the Act refers to various notices including those issued u/s 143(2) of the Act also and, therefore, respectfully following the ratio laid down by the Hon'ble Apex Court, we fail to find any merit in the legal grounds raised by the assessee in the additional grounds of appeal. Accordingly, additional ground nos. 1 & 2 raised by the assessee are

dismissed. So far as additional ground no. 3 is concerned, the same is consequential in nature which is dependent upon the computation of correct income and the same can be carried out after giving effect to the order of this Tribunal.

9. Now, we take up the merits of the case. The first issue raised in the main grounds of appeal is against the addition made on account of disallowance of loss of Rs.6,34,50,000/- on sale of investment. The facts relating to this issue are that the assessee was allotted 6,50,000 shares of Pyramid Sale Pvt. Ltd. in Assessment Year 2009-10 for a total consideration of Rs.6,50,00,000/- and thereafter during Assessment Year 2010-11, was further allotted 55,000 equity shares for a total consideration of Rs.55,00,000/-. In total there was an investment of Rs.7,05,00,000/- in the equity shares of Pyramid Sale Pvt. Ltd.. The entire payment has been made through banking channel and was duly reflected in the audited financial statements. The assessment year in question is 2013-14 relevant to Financial year 2012-13. The investment of Rs.7,05,00,000/- is appearing as opening balance under the investment head. During the year, the assessee has sold the 7,05,000 equity shares to Alok Nirmal Pvt. Ltd., BFM Industries Ltd. and Rekha Benefit Trust, for a total consideration of Rs.70,50,000/-. It has given rise to loss of Rs.6,34,50,000/-. The basis adopted by the Assessing Officer for denying the claim of loss is that Pyramid Sale Pvt. Ltd., is a shell company operated by an entry operator. He has also referred to statement of Ajay Anand Puglia.

9.1. We, however, notice that firstly no opportunity for cross-examination has been provided to the assessee so as to confront the entry operator about the said issues which, in itself is failure of principles of natural justice and as held by the Hon'ble Apex Court in the case of *Andaman timber Industries v. Commissioner of Central Excise*, [127 DTR 241 (SC)] not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority even when the statements of those witnesses were made basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected.

9.2. Even on merits of the case, we notice that the investments have been made in the preceding years and have been carried out through banking channels. The assessment u/s 143(3)/147 of the Act for Assessment Year 2010-11 and 2012-13 has been framed by the revenue authorities on 29/12/2017 and 27/12/2019. It means that the audited financial statement and other books of account have passed through scrutiny of the revenue authorities and genuineness of the investment in equity shares of Pyramid Sale Pvt. Ltd., have not been doubted. In the year under appeal, opening balance in the investment of Pyramid Sale Pvt. Ltd. has been brought forward and which has been sold to other concerns. The source of sale consideration has also been doubted since the Assessing Officer has not made any observation for the same. It is also not the case of a penny stock listed company since the equity shares in question are private limited companies. Further it is also not

the case that the assessee has claimed a loss against positive income for evasion of tax liability, as the assessee had declared loss of Rs.7,88,26,077/- and therefore, even after the alleged loss is disallowed then also assessee will have a negative income. Further in order to prove the genuineness of the transactions, assessee had filed copy of the ledger account of Pyramid Sale Pvt. Ltd. from 01/04/2008 to 31/03/2013, ledger account in the books of the assessee for the very same period issuing the share premium, copy of bank account of the assessee highlighting the payments made to Pyramid Sale Pvt. Ltd. and copies of bills. On going through these details, we find it to be a genuine transaction which has resulted in loss to the assessee and the same deserves to be allowed. We, therefore, delete the disallowance of loss of Rs.6,34,50,000/- incurred on account sale of investment. Accordingly, Ground No. 1 raised by the assessee allowed.

10. Ground No. 2 is against the addition u/s. 41(1) of the Act of liability for sundry creditors appearing in the balance sheet. We find that the Id. Assessing Officer during the course of assessment proceedings, noticed that there is outstanding liability at Rs.23,86,43,087/- payable to sundry creditor, namely, M/s. Mercury Fund Management Company Ltd.. The Id. Assessing Officer sent notices u/s 133(6) of the Act to M/s. Mercury Fund Management Company Ltd., but did not receive any reply. Id. Assessing Officer thus, resorted to invoke provisions of Section 41(1) of the Act and added the alleged sum to the income of the assessee. Section 41(1) of the Act having a direct bearing on the issue reads as follows:-

“(1) Where an allowance or deduction has been made in the assessment for any year in respect of loss, expenditure or trading liability incurred by the assessee (hereinafter referred to as the first-mentioned person) and subsequently during any previous year,-

(a) the first-mentioned person has obtained, whether in cash or in any other manner whatsoever, any amount in respect of such loss or expenditure or some benefit in respect of such trading liability by way of remission or cessation thereof, the amount obtained by such person or the value of benefit accruing to him shall be deemed to be profits and gains of business or profession and accordingly chargeable to income-tax as the income of that previous year, whether the business or profession in respect of which the allowance or deduction has been made is in existence in that year or not; or

(b) the successor in business has obtained, whether in cash or in any other manner whatsoever, any amount in respect of which loss or expenditure was incurred by the first-mentioned person or some benefit in respect of the trading liability referred to in clause (a) by way of remission or cessation thereof, the amount obtained by the successor in business or the value of benefit accruing to the successor in business shall be deemed to be profits and gains of the business or profession, and accordingly chargeable to income-tax as the income of that previous year.”

11. From perusal of the above provision and more particularly connecting it with the transactions in question before us, it refers to benefit in respect of the trading liability by way of remission or cessation thereto. As per the Id. Assessing Officer there is a liability standing in the books in the name of M/s. Mercury Fund Management Company Ltd., and the assessee is not required to make any payment to the alleged cash creditor and, therefore, the outstanding sum is required to be added in the hands of the assessee. Now, for arriving at this conclusion, the first condition is that liability should be a trading liability. This conditions is fulfilled because the outstanding sum is a trading liability. Second condition is that such liability is not required to be paid and for coming to this conclusion, the alleged cash creditor should either refuse to have any outstanding claim against the assessee or it has been extinguished for any other reason. During the course of assessment proceedings, the Id. Assessing Officer has issued

notice u/s 133(6) of the Act but the reply was not received. However, it has been brought to our notice through supporting evidence that the alleged cash creditor, M/s. Mercury Fund Management Company Ltd., is regularly assessed to tax and has been scrutinised for Assessment Year 2011-12 and 2012-13 and assessments have been framed u/s 254/251/143(3) of the Act dt. 26/12/2019 and u/s 147/143(3) of the Act dt. 29/12/2018, which is just prior to an year before the assessment proceedings in question having been completed. It shows that M/s. Mercury Fund Management Company Ltd., is an active company. The copy of the master data has also been placed at page 54 of the paper book which indicates that M/s. Mercury Fund Management Company Ltd., is an active company and financial statements up to 31/03/2022 are uploaded. Certificate of confirmation of credit balances has also been issued by M/s. Mercury Fund Management Company Ltd., placed at page 31 to 35 of the paper book confirming that there is outstanding balances to be received from the assessee at Rs.23,86,43,087/-. This confirmation letter has been filed by the assessee during the course of assessment proceedings on 24/12/2019. All these documentary evidences establishes that M/s. Mercury Fund Management Company Ltd., is an active company and the liability as on 31/03/2013 is a live trading liability which the assessee was required to pay. Under these given facts and circumstances, where the alleged credit balance has been confirmed by the sundry creditor and the assessee has required to pay off the liability, there remains no scope for bringing the alleged credit balance

under the ambit of cessation of liability as provided u/s 41(1) of the Act. We draw support from the judgment of the Hon'ble Gujarat High Court in the case of *DCIT vs. Rohini Builders 127 Taxman 523*, where it has been held that merely if the summons issue to some of the creditors could not be served or they failed to attend, cannot be a ground to treat the loans as non-genuine. Similar, is the view taken by the Hon'ble Bombay High Court in the case of *CIT vs. Orchid Industries Pvt. Ltd. [2017] 397 ITR 136*. We, therefore, set aside the finding of the ld. CIT(A) and delete the impugned addition made u/s 41(1) of the Act. Thus, Ground No. 2 is allowed.

12. Ground Nos. 3 & 4 are general in nature.

14. In the result, appeal of the assessee is partly allowed.

Order pronounced in the Court on 21st March, 2024 at Kolkata.

Sd/-

**(SANJAY GARG)
JUDICIAL MEMBER**

Sd/-

**(DR. MANISH BORAD)
ACCOUNTANT MEMBER**

Kolkata, Dated 21/03/2024

SC S.P.

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

1. अपीलार्थी / The Assessee
2. प्रत्यर्थी / The Respondent
3. संबंधित आयकर आयुक्त / Concerned Pr. CIT
4. आयकर आयुक्त (अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि , आयकर अपीलीय अधिकरण, कोलकाता/DR,ITAT, Kolkata,
6. गार्ड फाई/ Guard file.

आदेशानुसार/ BY ORDER,
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Assistant Registrar
आयकर अपीलीय अधिकरण
ITAT, Kolkata