

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "B", BANGALORE**

**BEFORE SHRI NARENDER KUMAR CHOUDHRY, JUDICIAL MEMBER
AND
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER**

**ITA No.1162/Bang/2023
Assessment Year: 2009-10**

Late Shri Sheshappa Dasaraddy Raddi by Legal Heir Shri Manjunath Sheshappa Raddi, Shri S.D. Raddi C/o Ramanna Inamati, Renuka Apartment, Second Cross, Sadhanakeri, Dharwad, Karnataka PAN: AECPR6185B	Vs.	Income Tax Officer, Ward 2(1), PB Highway, Navanagar, Hubli, Karnataka
(Appellant)		(Respondent)

Present for:

Assessee by : Ms. Preethi S Patel, Advocate
Sri Prasanna N. Urala, Advocate

Revenue by : Sri Subramanian. S, JCIT

Date of Hearing : 16. 04 . 2024

Date of Pronouncement : 30. 04 . 2024

O R D E R

Per : Narender Kumar Choudhry, Judicial Member:

This appeal has been preferred by the assessee against the order dated 30.10.2023 impugned herein passed by the Ld. National Faceless Appeal Center (NFAC)/ Ld. Commissioner of Income Tax (Appeals) (in short Ld. Commissioner) under section 143(3) of the Income Tax Act, 1961 (in short 'the Act') for the A.Y. 2009-10.

2. Relevant facts for adjudication of the instant appeal are that the Assessing Officer (AO) vide assessment order dated 30.12.2011 under section 143(3) of the Act, made various additions including the addition of Rs.3,00,000/- on account of disallowance of the debit entry as shown in profit & loss account as forfeited amount in respect of the amount of Rs.3,00,000/- adjusted against the bank guarantee; secondly the disallowance of Rs.7,44,788/- under section 43B of the Act on account of the provision for interest payable to ING Vysya Bank.

3. The assessee being aggrieved also challenged the aforesaid additions before the Ld. Commissioner, who vide impugned order affirmed the aforesaid additions, against which the assessee is in appeal before us.

4. Heard the parties and perused the material available on record. For brevity we will deal with the additions one by one. Coming to the addition of Rs.3,00,000/- which was debited by the assessee as forfeited amount in the profit & loss account and disallowed by the AO on the reason that the provisions of section 36 require that the debt is written off in the books of the assessee. The account of N.H. Division has not been written off. Further, the assessee, in spite of the last opportunity given, could not furnish any evidence that N.H. Division has forfeited the amount of Rs.3,00,000/-, hence, the deduction claimed is not allowed.

5. The Ld. Commissioner in the impugned order though observed that prima-facie it appears that the amount has been written off but the written off amount does not appear to be revenue expenditure, it was adjusted against bank guarantee No.11-2006/07, so this forfeiture was not revenue expenditure.

The assessee, though before the Ld. Commissioner produced the copy of letter filed before the Ld. Commissioner, Hubli-25 on dated 18.10.2019 as produced by executive engineer, N.H. Division, Hubli, according to which the amount of Rs.3,00,000/- was adjusted against the bank guarantee, however, the Ld. Commissioner did not find the said expenditure as revenue in nature and therefore in order to verify, issued a query dated 16.10.2023 to the assessee against which the assessee filed no reply and therefore the Ld. Commissioner affirmed the disallowance being not revenue in nature.

6. We have given careful consideration to the peculiar facts and circumstances of the case. It is not in controversy that the amount of Rs.3,00,000/- was adjusted against the bank guarantee for not completing the work by the assessee. It is also a fact that the amount of Rs.3,00,000/- has been shown as written off as observed by the Ld. Commissioner himself. Hon'ble Coordinate Bench of the Tribunal at Delhi in the case of **Green Delhi BQS Limited Vs ACIT** (ITAT Delhi) {Appeal Number: ITA No. 2939/Del/2014 Date of Judgement/Order: 07/05/2018} also dealt with the issue whether encashment of Bank Guarantee would be capital expenditure or Revenue expenditure and ultimately held as under:

8. We have carefully considered the rival contention and perused the orders of the lower authorities. The simple issue involved in this appeal is whether the bank guarantee encashed by the Delhi transport Corporation on the facts submitted above is an allowable expenditure or not or is allowable to the assessee under section 28 of the income tax act or not. The identical issue has been considered by the Hon'ble Gujarat High Court in case of neo Constructo construction Ltd 218 taxman 24/37 Taxmann.com 57 wherein the fact that the assessee company was engaged in the business of construction and development of plants. It entered into a contract with the

contractee . At the time of entering into the contract entered, bank guarantee was furnished as performance guarantee. Subsequently the assessee having noticed that it would not be possible for it to perform the contract took a decision to not to proceed further with the contract and informed the contractee. Accordingly, Due to the nonperformance of the contract the principal encashed the bank guarantee and recovered the amount. Assessee claimed the above sum as deduction as business expenditure. The Hon'ble high court held that such encashment of the bank guarantee which was furnished by the assessee as a performance guarantee due to non-fulfillment of the contract by the assessee can be said to be compensatory in nature and therefore allowable as business expenditure under section 37 (1) of the act. The identical view has also been followed by the coordinate bench in case of SIS Live versus ACIT 65 Taxmann.com 10 (Delhi) wherein it has been held that the assessee contract providing coverage of Commonwealth Games pay certain amount to Prashar Bharathi as the performance guarantee provided on account of inadequate performance of the said contract, be allowed as a deduction under section 37 (1) of the act. Therefore, it cannot be said that above expenditure is not allowable to the assessee. Furthermore it is not the case of the revenue that assessee is not engaged in the business of constructing bus shelters. That is the only business of the assessee. The above loss because of an event of the bank guarantee is also incurred by the assessee during the course of the business of the assessee. Therefore, it cannot be said to be capital expenditure even if the assessee failed to create requisite bus shelters. In fact, for that reason only the assessee was to provide the bank guarantee and same was encashed. **Therefore, it cannot be said that the above expenditure is capital expenditure in nature.** Furthermore, the order of the Hon'ble high court is rendered during the assessment year. Merely because it was to be enforced after 7 days, it cannot be said that the liability has not been crystallized during the year or even for the reason that the assessee also approached the arbitration proceedings, same is unascertained liability. According to us, the liability has been crystallized during the year only in view of the decision of the Hon'ble Delhi High Court, which was rendered during the year. Even otherwise if during the arbitration proceedings an award comes and assessee is also entitled to the benefit on account of allowability of this claim, same would be chargeable to tax under section 41 (1) of the income tax act. Merely because of these reasons, it cannot be stated that the claim of the

assessee has not crystallized during the year. In view of the above facts, we reverse the findings of the lower authorities and direct the Ld. assessing officer to allow the claim of the assessee of Rs. 208 Lacs on account of encashment of the bank guarantee by the Delhi transport Corporation for non-fulfilment of the work awarded to the assessee which is allowable to it as a business expenditure/loss. In the result ground No. 1 of the appeal of the assessee is allowed.

On the aforesaid analyzations we are of the considered view that the amount of adjustment against bank guarantee as involved in this case is liable to be treated as revenue in nature, hence, we are inclined to delete the addition of Rs.3,00,000/- which was adjusted against the bank guarantee.

7. Coming to the next addition of Rs.7,44,788/- on account of disallowance under section 43B of the Act qua provision for interest payable to ING Vysya Bank, which has been disallowed by the AO and affirmed by the Ld. Commissioner. At the outset the Ld. Counsel of the assessee with regard to this addition, submitted that the assessee in the subsequent year has paid the interest and therefore the same may be allowed to be adjusted in the subsequent assessment year.

8. The Ld. D.R. did not raise any objection. Hence, considering the peculiar facts and circumstances as in the instant case the provision of interest payable has been disallowed. However, as the assessee has claimed that he has paid the interest in the next financial year and therefore in our considered view justice would be met by remanding the instant issue to the file of the AO to verify the claim of the assessee and allow the interest paid in the subsequent financial year/assessment year, as per the provisions of the Act. Hence, AO is directed accordingly.

9. In the result, the appeal filed by the assessee stands partly allowed for statistical purposes.

Order pronounced in the open court on 30.04.2024.

**Sd/-
(LAXMI PRASAD SAHU)
ACCOUNTANT MEMBER**

**Sd/-
(NARENDER KUMAR CHOUDHRY)
JUDICIAL MEMBER**

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Bangalore
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Bangalore