

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "C", MUMBAI

BEFORE SHRI. ANIKESH BANERJEE, JUDICIAL MEMBER AND
SMT. RENU JAUHRI, ACCOUNTANT MEMBER

I.T.A No.3436/Mum/2024
(Assessment Year:2011-12)

Piramal Enterprises Limited Piramal Ananta, Agastya Corporate Park, Kamani Junction, LBS Marg, Kurla, Mumbai-400 070 AAACN4538P	vs	The Assistant Commissioner of Income-tax, Circle-7(3)(1), Mumbai Aayakar Bhavan, M.K. Road, Mumbai-400 020
APPELLANT		RESPONDENT

Assessee by : Shri Ronak Doshi & Priyank Gala
Respondent by : Shri. Krishna Kumar, CIT
Date of hearing : 14/11/2024
Date of pronouncement : 19/11/2024

ORDER

PER ANIKESH BANERJEE, J.M:

Instant appeal of the assessee was filed against the order of the Learned Commissioner of Income-tax (Appeals)-57, Mumbai [for brevity, 'Ld.CIT(A)'] passed under section 250 of the Income-tax Act, 1961 (in short, 'the Act'), for Assessment Year 2011-12, date of order 10.05.2024. The impugned order was emanated from the order of the Ld. Assistant Commissioner of Income-tax-7(3)(1), Mumbai (in brevity, 'the Ld.AO') passed under section 143(3) read with section 147 of the Act, date of order 29/12/2018.

2. The brief facts of the case are that the assessee has filed the return and the assessment was completed under section 143(3) by order dated 29/01/2016. Assessee's case was reopened under section 148 for reason that out of misappropriation of funds amounting to Rs.343 lakhs by Mr. Augustine Fernandes, one of the employees of the assessee. The assessee recovered only Rs.229 lakhs and further estimated recovery of Rs.60 lakhs and, therefore, balance amount of Rs.54 lakhs remained unrecovered. Further, cash of Rs.30,62,000/- was found deposited in assessment year 2011-12 in the bank account of the wife of the said employee. The assessee, vide letter dated 23/05/2017, APB pages 52-54 had accepted that Rs.54 lakhs is pending for recovery and Rs 60 lakh is sub-judice for recovery. Therefore, the Ld.AO reopened the assessment order and accordingly Rs.30,62,000/- was added back with the total income of the assessee by an order under section 143(3) / 147 of the Act. The aggrieved assessee filed an appeal before the Ld.CIT(A) by challenging the validity of reopening under section 148 and also on merit. But Ld.CIT(A) rejected the appeal of the assessee and upheld the impugned assessment order. Being aggrieved on the appeal order, the assessee filed an appeal before us.

3. The Ld.AR argued and filed a written submission which is kept in the record. The Ld.AR argued on merit of the case and stated that the assessee's employee was directly involved in embezzlement of Rs.363 lakhs and out of that Rs.229 lakhs was recovered, and which is offered to tax under section 41(1) of the Act. The list is duly provided in APB page 29 which is reproduced as below: -

29

29

Piramal Enterprises Limited
AY 2011-12

Chart showing year-wise breakup of amounts received and offered to tax

Particulars	Rs. In lakhs	Rs. In lakhs	Rs. In lakhs
Misappropriation of funds			
Total Funds Misappropriated over a period of 2007 to September 2012 (Year-wise breakup not available due to old data)			343
Recovery of Funds			
A. Credited to P&L A/c in FY 2012-13 (AY 2013-14)			
Cash received on various dates and credited to Profit and Loss Account in various expenses ledgers		73	
B. Credited to P&L A/c in FY 2013-14 (AY 2014-15)			
Demand Drafts received in December 2012 (Rs. 23 lakhs plus Rs. 19 lakhs) [Refer Annexure-3]	42		
Full and final Settlement of Mr. Augustine	14		
Shop at Haware Fantasia G-92 sold and proceeds realised	40		
Shop at Haware Fantasia G-93 sold and proceeds realised	36		
Shop at Haware Fantasia G-121 sold and proceeds realised	24	156	
Total Funds recovered (A + B)			229
Estimated amounts of realisation from properties which are now sub-judice			
Shop at Haware Centurion F 01/05 not yet sold and sub-judice (Revised estimate value)		19	
Flat at Airoli (estimated value) not yet sold and sub-judice (Revised estimate value)		23	
Flat at Kalwa (estimated value) not yet sold and sub-judice (Revised estimate value)		18	
Balance Pending Recovery Amount			54

Apart from above, expenses incurred in connection with sale of properties

Debited in FY 2013-14 (AY 2014-15)

17

Summary	FY 2012-13	FY 2013-14	Total
Recovery	73	156	229
Less: Expenses	-	-17	-17
Net Recovery (Credited to P&L A/c)	73*	139^	212

*Refer Appendix-A attached herewith [Also forming part of FPB at Page No. 98]

^Refer Appendix-B attached herewith

Certified True Copy
For PIRAMAL ENTERPRISES LTD.

The expense was duly covered under section 37(1) in the financial statement of the assessee. But the reopening was made as per the information received by the Id. AO that the impugned amount was deposited in the bank account of the employee's wife. In other case, it is a sustainable claim of expenses under section 28 for embezzlement of the expenses. Only by mere mentioning section 37, the addition was confirmed. The Ld.AR invited our attention in appeal order page 11, para 6.3 which is reproduced as below: -

“6.3 *The facts recorded & finding of the AO in the assessment order and the submission made by the appellant has been considered.*

The facts of the case of the appellant are that one of the employee, Shri Augustine Fernandes misappropriated funds to the extent of Rs.343 lakhs by raising bogus vouchers and claiming bogus expenditure in the name of M/s. Piramal Enterprises Ltd. Out of misappropriation of funds, the appellant recovered an amount of Rs.229 lakhs and expected recovery of Rs.60 lakhs from realization of property, which was sub judice. Cash of Rs.30,62,000/- was deposited by Shri Augustine Fernandes in the bank account jointly held with his wife in Citizen Co-operative Bank. The fact of misappropriation of fund was admitted by Shri Augustine Fernandes and the addition of Rs.30,62,000/- was made in the hands of the wife of the employee. There was a clear linkage of misappropriation of funds by raising bogus vouchers of expenditure and claiming bogus expenditure and cash deposit of Rs.30,62,000/- in the bank account of employee jointly held with his wife. It clearly indicated that expenditure to the extent of Rs.30,62,000/- claimed by the appellant in the books of account was by way of raising bogus vouchers. Expenditure which was bogus could not be the expenditure which was wholly and exclusively for business purpose and it could

not be allowed u/s.37(1) of the Act. Therefore, the action of the AO to disallow Rs.30,62,000/-u/s.37 is upheld.”

4. During the proceedings of the reopening, the assessee placed that the recovery amount was duly offered to tax by the assessee and when the said amount will be recovered the assessee would pay the tax on the recovery.

5. The Ld.AR relied on the order of the Hon'ble Bombay High Court in the case of **Bombay Forgings Pvt Ltd vs CIT (1994) 206 ITR 562 (Bom)** wherein it was held as under: -

“2. The assessee is a private limited company and this reference relates to the assessment year 1975-76. The assessee submitted its return of income for this assessment year on 5-7-1975 declaring a total income of Rs. 4,43,123. A revised return was filed on 30-7-1975 declaring a total income of Rs. 2,30,583. In the year 1976, the assessee suspected the commission of a fraud by two of its principal officers, viz., M.V. Gokarn and H.H. Sanghani, Sales Manager and Chief Accountant & Secretary, respectively. The matter was referred to a detective agency who submitted its report in February 1977. It was found that during the relevant previous year these employees had embezzled or misappropriated goods worth Rs. 6,54,777. It was done by manipulating the accounts. As a result, the aforesaid goods did neither reflect in the closing stock nor as goods in transit, nor was their value credited to the sales. The result was that though the goods worth Rs. 6,54,777 were embezzled by the above two employees, the fact of embezzlement did not come to the notice of the assessee-company during the previous year. All the same, because of their clever manipulation of accounts, the loss resulting on account of such embezzlement was duly taken care of in the accounts of the relevant year itself. Thus, though the assessee-company had no knowledge as such of the loss by embezzlement of the previous year, the loss had been suffered inasmuch as goods had been surreptitiously taken out of the assessee's stock without crediting the sales account and, consequently, the loss was

reflected in the books of account. The assessee-company having come to know of the embezzlement some time in the year 1976, referred the matter to a detective agency who submitted their report in February 1977 which confirmed the fact of embezzlement in the previous years and determined the total loss by embezzlement at Rs. 9,07,230 out of which Rs. 6,54,777 related to the previous year under consideration. The ITO was of the opinion though the loss by embezzlement was caused to the assessee during the relevant previous year, the detection having taken place subsequently, the claim for deduction of the amount of loss can be allowed only in the year when the detection took place and the final report was submitted by the detective agency. He, therefore, back to the income of the assessee a sum of Rs. 6,54,777 representing the value of the goods embezzled 1 two employees during the relevant previous year which was not reflected in the books of account that the order of the ITO was confirmed by the Commissioner (Appeals) and the Tribunal. The Tribunal was of the opinion that the loss of Rs. 6,54,777 suffered by the assessee during the relevant previous ye account of embezzlement could not be allowed as a deduction in that year as the detection thereof had place subsequently. Hence, at the instance of the assessee question No. 1 has been referred by the Tribunal to this Court.

3. We are told at the bar that both the questions referred at the instance of the revenue are already covered by the decisions of the Supreme Court, and this Court. We shall deal with them a little later. First, we shall deal with question No. 1 referred to us at the instance of the assessee, the facts regarding which have already been set out above.

4. There is no dispute in the instant case about the fact that the embezzlement of goods worth Rs. 6,54,777 took place during the previous year under consideration and the loss caused as a result thereof was reflected in the books of account of that year. It is also not in dispute that the loss was incidental to the business of the assessee and deductible in computation of its income from business. There is also no controversy about the fact that no deduction was claimed by the assessee in the year when the embezzlement was suspected or was confirmed by the detective agency. The only question for consideration

is whether the Tribunal was justified in holding that this loss was allowable as a deduction not in the year in which it took place but in the year when it was suspected.

5. We have carefully considered the facts of the case and the order of the Tribunal. We find it difficult to uphold the decision of the Tribunal, particularly in view of the admitted position that the embezzlement had taken place during the relevant previous year and the same was duly reflected in the books of account by omission of the value of such goods from the sales as well as the closing stock of the assessee in preparation of the final accounts. In our opinion there is no justification in such a situation to add back the amount of such loss to profits of the assessee for that year on the ground that it could be claimed as a deduction only when it was detected by the assessee. In fact, in a situation like this, so far as loss is concerned, detection was not relevant. It was relevant only for the purpose of finding of culprits and recovery from them, if possible.

6. Under the circumstances, we are of the clear opinion that the loss caused to the assessee by embezzlement during the relevant previous year was allowable as a deduction in computation of the income in that previous year itself. The first question is, therefore, answered in the negative, that is, in favour of the assessee and against the revenue.”

He further relied on the order of the Hon'ble **Bombay High Court** in case of **G.G. Dandekar Machine Works Ltd vs CIT (1993) 202 ITR 161 (Bom)** held that

“Section 28(i) of the Income-tax Act, 1961 - Business loss/deductions - Allowable as - Assessment year 1973-74 - Whether if loss incurred by assessee is found to be incidental to carrying on of his business, it will be deductible as a trading loss in computing profits of assessee from said business - Held, yes - Whether where there was embezzlement of amount from assessee's current bank account which was maintained by it for running of its business, such a loss was incidental to business of assessee and was, therefore, deductible under section 28(i)”

6. The Ld.DR vehemently argued and fully relied on the orders of the revenue authorities.

7. We heard the rival submission and considered the documents available in the record. We note that the assessee claimed the expenses which was not related to the business, but the amount was utilized by the employee in fraudulent way. The assessee suffered the embezzlement of the fund by the employee. The assessee claimed these expenses under section 37(1) of the Act. But on later stage, assessee came to know that these expenses are not a genuine expense, but it is an embezzlement of the fund by one of the employees. The Id. AR referred the **CBDT Circular No 35-D (XLVII-20) [F.No. 10/48/65-IT(A-I)]** dated **24/11/1965** where it is stated that loss arising due to embezzlement is allowable loss U/s 28(i) of the Act. The grievance of the revenue is that the claim of expenses is not under section 37(1), but it will come under section 28 of the Act considering the embezzlement. The assessee had never rectified the head during filing of return of Income in pursuance of notice U/s 148 of the Act. The Ld.AR relied on the judgement of the Hon'ble Supreme Court in the case of **Kedarnath Jute Mfg Co Ltd vs CIT (1971) 82 ITR 363 (SC)**. The Hon'ble Apex Court allowed the appeal of the assessee with following observation.

"The main contention of the learned Solicitor-General is that the assessee failed to debit the liability in its books of accounts and, therefore, it was debarred from claiming the same as deduction either under section 10(1) or under section 10(2)(xv) of the Act. We are wholly unable to appreciate the suggestion that if an assessee under some misapprehension or mistake fails to make an entry in the books of account and although, under the law, a deduction must be allowed by the Income-tax Officer, the assessee will lose the right of claiming or will be debarred from being allowed that deduction. Whether the assessee is entitled to a particular deduction or not will depend on the provision of law relating thereto and not on the view which the assessee might take of his rights nor can the existence or absence of entries in the books of account be decisive or conclusive in the matter. The assessee who was maintaining accounts on the

mercantile system was fully justified in claiming deduction of the sum of Rs. 1,49,776 being the amount of sales tax which it was liable under the law to pay during the relevant accounting year. It may be added that the liability remained intact even after the assessee had taken appeals to higher authorities or courts which failed. The appeal is consequently allowed, and the judgment of the High Court is set aside. The question which was referred is answered in favour of the assessee and against the revenue. The assessee will be entitled to costs in this court and in the High Court.”

We note that the assessee offered the sum of Rs.229 lakhs to tax, after recovery of the funds. We find that it is a justified claim for assessee that after receiving all the recovery, the same will be offered to tax. But the impugned amount was not recovered during impugned assessment year. It is only detected in the bank account of employee's wife. Only on the basis of the assumption the addition is unjustified. The debited amount is not fulfilling the purpose of expenses claimed U/s 37(1) of the Act but after all this expense is related to loss due to embezzlement which is allowable expenditure. The assessee is in process of recovery and after recovering the same the realized amount was offered for tax. We respectfully relied on the order of Hon'ble **High Court of Bombay in Bombay Forgings Pvt Ltd** (supra) and **G.G. Dandekar Machine Works Ltd** (supra). In this issue, the assessee is eligible for the deduction due to loss of fund in embezzlement. The Id. AO unable to bring any evidence the impugned amount was recovered during impugned assessment year, In our considered view, the addition is unjustified, and we set aside the impugned appeal order. Accordingly, the addition is deleted. We are not expressing any view on the legal grounds as it is only for the academic purpose.

8. In the result, the appeal of the assessee bearing **ITA 3436/Mum/2024** is allowed.

Order pronounced in the open court on 19th day of November 2024.

Sd/-

(RENU JAUHRI)
ACCOUNTANT MEMBER
Mumbai, दिनांक/Dated: 19/11/2024
Pavanan

sd/-

(ANIKESH BANERJEE)
JUDICIAL MEMBER

Copy of the Order forwarded to:

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त CIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
5. गार्डफाइल/Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar), ITAT, Mumbai