

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "D" BENCH

**Before: Smt. Annapurna Gupta, Accountant Member
And Shri T.R. Senthil Kumar, Judicial Member**

**ITA No. 453/Ahd/2020
Assessment Year 2015-16**

M/s. Vadilal Dairy International Ltd. Plot No. M-13, MIDC Industrial Area, Tarapur, Boisar-401506, Maharashtra PAN: AABCV0520A (Appellant)	Vs	The ACIT, Circle-4(1)(2), Ahmedabad (Respondent)
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**Assessee Represented: Shri Tushar Hemani, Sr. Adv. &
Shri Parimalsinh B. Parmar, A.R.
Revenue Represented: Shri Ashok Kumar Suthar, Sr.D.R.**

Date of hearing : 05-09-2024
Date of pronouncement : 04-12-2024

आदेश/ORDER

PER : T.R. SENTHIL KUMAR, JUDICIAL MEMBER:-

This appeal is filed by the Assessee as against the appellate order dated 21.02.2020 passed by the Commissioner of Income Tax (Appeals)-8, Ahmedabad arising out of the assessment order passed under section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') relating to the Assessment Year 2015-16.

2. The Registry has noted that there is a delay of 147 days in filing the above appeal. This appeal is filed on 15-09-2020 which is during Covid-19 Pandemic period. Thus there is no delay in filing the above appeal.

3. Brief facts of the case is that the assessee is a Company engaged in the manufacture of Milk and Milk Products. For the Asst. Year 2014-15, assessee filed its Return of Income on 29-09-2015 declaring total income of Rs.1,20,18,350/- then a Revised Return of Income on 22-09-2016 declaring total income at Nil after setting off brought forward losses of Rs. 4,44,19,330/-. The return was taken for scrutiny assessment.

3.1. During the course of assessment proceedings, it was noted from the computation of income that the assessee has set off the business loss of Rs. 4,37,55,674/- for A.Y. 2015-16 against the brought forward business loss of A.Y. 2007-08. Further, the assessee has set off the income from 'other sources' of Rs.6,63,656/- for A.Y. 2015-16 against the unabsorbed depreciation of A.Y. 2002-03. However, on perusal of the return of income for A.Y. 2007-08 it was found that no such loss has been incurred during that year which could be carried forward to further years. Also no such proof such has been given by the assessee to claim the set off of unabsorbed depreciation of A.Y. 2002-03 of Rs. 6,63,656/- against the income of A.Y 2015-16. Therefore, vide show cause notice dated 22.12.2017, the assessee was requested to provide all the relevant material evidence such as copy of intimation u/s. 143(1), copy of order u/s. 143(3) for A.Y. 2002-03

and A.Y. 2007-08 to claim the set off of such losses, and also requested to provide copy of relevant circular of CBDT, documents from competent authorities and Income Tax Provisions based on which you have set off losses of earlier years in the light of BIFR order.

3.2. In response, the assessee filed reply dated 26-12-2017 explaining the losses and the Assessing Officer was not satisfied with the reply. The Assessing Officer held that on perusal of the BIFR's order in Para 8.8 had ordered CBDT to only consider the request to allow losses to be carry forward, there was no specific direction from the CBDT to consider the claim of the assessee. In view of the same, the A.O. did not allow set off brought forward business losses against business income of the year under consideration since the same was in violation of Section 72(3) of the Act. Therefore the business income of the assessee of Rs. 4,37,55,674/- and income from other sources of Rs. 6,63,656/- for A.Y. 2015-16 cannot be allowed to be set off against the losses of previous years and demanded tax thereon.

4. Aggrieved against the same, assessee filed an appeal before Ld. CIT(A) who has confirmed the addition.

5. Aggrieved against the same, assessee is in appeal before us raising the following Grounds of Appeal:

1. The learned CIT(A) has erred both in law and on the facts of the case is not allowing set off of carried forward business loss of earlier years against business income of the current year of Rs.4,37,55,674/-,

2. The learned CIT(A) has erred both in law and on the facts of the case in confirming the action of the AO of invoking the provisions of Rule 8D without recording any dissatisfaction to the claim of appellant.
 3. The learned CIT(A) has erred both in law and on the facts of the case in confirming disallowance made by the AO u/s.14A of the Act r.w.r.8D of the Income-tax Rules, 1962 of Rs.20,349/-.
 4. Both the lower authorities have passed the orders without properly appreciating the facts and they further erred in grossly ignoring various submissions, explanations and information submitted by the appellant from time to time which ought to have been considered before passing the impugned order. This action of the lower authorities is in clear breach of law and Principles of Natural Justice and therefore deserves to be quashed.
 5. The learned CIT(A) has erred in law and on facts of the case in confirming action of the ld. AO in levying interest u/s.234A/B/C of the Act.
 6. The appellant craves leave to add, amend, alter, edit, delete, modify or change all or any of the grounds of appeal at the time of or before the hearing of the appeal.
6. Ld. Senior Counsel Shri Tushar Hemani appearing for the assessee submitted that the BIFR in Para 8 namely Reliefs and Concessions from various Financial Institutions/Banks, Secured Creditors, more particularly at Para 8.8 Reliefs and Concessions from CBDT are as follows:
- “8.8 From CBDT
- A. De-merged company (VDIL: Ice Cream)
- 1) To consider to exempt/ grant relief to the company from the provisions of Section 41(1), 43-B, 45, 72 (3), 80 read with 139, 1150R and provisions of Chapter XVII of the Income Tax Act
 - 2) To consider to accept payment of Income Tax dues (Rs.3.37 lakh) without interest and penalty in five equal annual installments beginning from FY 2007-2008 and to consider to waive interest and penalty, if payable.

3) To exempt VDIL and its promoters / directors from the penal provisions of the Income Tax Act

B. Resulting company (Dairy unit)

1) To consider to exempt/grant relief to the company from the provisions of Section 41(1), 43-B, 45, 72 (3) 80 read with 139, 115JB and provisions of Chapter XVII of the Income Tax Act.

2) To consider to accept payment of Income Tax dues (Rs.1.92 lakh) without interest and penalty in five equal annual installments beginning from FY 2007-2008 and to consider to waive interest and penalty, if payable.”

6.1. Thus the sanctioned scheme specifically deals with the reliefs and concessions “From CBDT” namely to consider the exemption/grant relief to the company from the provisions of various sections including Section 72(3) of the Act. Further the CBDT was represented by its Counsel and after considering the same, BIFR passed the above order. Since the views of the Income Tax Department were considered by BIFR, the recommendations of BIFR was allowed to the assessee in view of CBDT Circular dated 16-02-2000 which specifically provides to recommendations contained in BIFR’s order as to consider any particular must be allowed, if views of Income Tax Department have been considered by BIFR during the course of hearing. Thus the CBDT Circulars are binding on the Income Tax Authorities. Thus the Lower Authorities ought to have allowed the benefit of set off of brought forward business loss against business income of current year instead of denying the same on this count.

7. In this connection, decision of Madras High Court in the case of CIT Vs. Lakshmi Machine Works Ltd. reported in [2020] 121 taxmann1.com 284 was relied upon wherein it was held that the provisions of SICA would override the provisions of Income Tax Act.

8. Ground No. 2 disallowance of Rs. 20,349/- u/s. 14A of the Act namely Interest expenses of Rs. 7,849/- and Administrative expenses of Rs. 12,500/-, the assessee has substantial interest free funds in the form of "Share capital" of Rs. 3,19,41,500/- and "Reserves & Surplus" of Rs. 29,16,194/- as against the average investments of Rs.25,00,000/-. Thus the interest free funds were almost 13.94 times of advances in question. Relying upon Jurisdictional High Court Judgment in the case of Torrent Power Ltd., Suzlon Energy Ltd. and Ors., no disallowance is called for u/s. 14A of the Act.

9. Per contra, Ld. Sr. D.R. appearing for the Revenue supported the order passed by the Lower Authorities and requested to confirm the same.

10. We have given our thoughtful consideration and perused the material available on record. As it can be seen from the BIFR's order dated 31-10-2007, under the head, Relief and Concessions to be granted from CBDT namely to consider to exempt/grant relief to the company from the various provisions of Section 41(1), 43B, 45, 72(3) and section 80 r.w.s. 139, 115JB and provisions of Chapter-VII of the Income Tax Act. Thus the assessee cannot be denied the benefit of Section 72(3) of the Act.

10.1. The Madras High Court in the case of Lakshmi Machine Works Ltd. (cited supra) considered the Supreme Court judgment in the case of Indian Shaving Products Ltd. Vs. BIFR and held as follows:

“12. The SICA is a special enactment, the purpose of which is rehabilitation and revival of sick industries. The provisions of section 32(2) thereof read as under:

“32. Effect of the Act on other laws-

(1)

(2) Where there has been under any scheme under this Act an amalgamation of a sick industrial company with another company, the provisions of Section 72- A of the Income-tax Act, 1961 (43 of 1961), shall, subject to the modifications that the power of the Central Government under that section may be exercised by the Board without any recommendation, by the specified authority referred to in that section, apply in relation to such amalgamation as they apply in relation to the amalgamation of a company owning an industrial undertaking with another company.

13. The provisions of section 32(2) of the SICA as well as 72A of the Act and the interplay thereof came to be considered by the Supreme Court in the case of Indian Shaving Products Ltd. (supra). The Bench was considering an appeal against an order of the Appellate Authority for Industrial and Financial Reconstruction upholding an order of the BIFR refusing to grant the benefit of the provisions of Section 71 (a) of the Income-tax Act to the appellant upon amalgamation and sanction of a scheme by the BIFR.

14. After noting that that BIFR had been enacted in public interest, with a view to secure timely detection of sick and potentially sick companies-owning industrial undertakings and to determine preventive, ameliorative, remedial and other measures required to be taken with respect to such companies, the Bench considered the various provisions of the SICA, in specific section 32(2).

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16. The above judgment was rendered prior to coming into force of SICA in terms of which the BIFR was constituted, in an era when sanction was specifically required to be given by the Central Government upon recommendation of the Specific Officer thereunder. Thus, financial viability or otherwise, of the amalgamating company had to be determined first, in order to attract the provisions of Section 72A. However, after the enactment of the SICA and the Constitution of the BIFR, the question of sickness or robust health of the entity is to be determined by the Board. It is only when the Board was satisfied that it would have, in the first place, entertained applications for revival, sanctioning appropriate schemes for rehabilitation. Thus, a sanction by the BIFR implies that the requirements of Section 72(2) of the Act have been met.

17. This provision, and the interplay thereof with the provisions of the Income-tax Act has been considered by the Supreme Court in the case of *Indian Shaving Products (supra)* where at paragraph 7 the Bench holds as follows:

'7. Under Section 72 of the Income-tax Act, to give to the amalgamated Company the benefit of the loss or, as the case may be, allowance for depreciation of the amalgamating company for the previous year in which the amalgamation was effected for the purposes of the Income-tax Act, the Central Government must, upon the recommendation of the specified authority, be satisfied that the amalgamating company was not, immediately before the amalgamation, financially viable by reason of its liabilities, losses and other relevant factors, and that the amalgamation was in the public interest, By reason of section 32(2) of the said Act, where there has been under any scheme thereunder an amalgamation of a sick industrial company with another company, the provisions of section 72A of the Income-tax Act shall apply in relation to such amalgamation, subject to this modification that the power of the Central Government is to be exercised by the BIFR without the necessity of a recommendation by the specified authority mentioned in section 72A of the Income-tax Act. This is because, for the purposes of according sanction to a scheme of amalgamation of a sick industrial undertaking with any other company under section 18 of the said Act, the BIFR has to be satisfied that the amalgamating company is not financially viable, which is the effect of section 3(o) of the said Act, and that the amalgamation is necessary or expedient in the public interest, which is the effect of

sections 17 and 18 of the said Act read together. Sanction of a scheme of amalgamation under section 18 of the said Act necessarily implies that the requirements of section 72A of the Income-tax Act have been met and the BIFR must exercise the power conferred upon it by section 32(2) of the said Act and make the declaration contemplated by section 72A of the Income-tax Act, The conditions for sanctioning a scheme under section 18 of the said Act being the same as those required for a declaration under section 72A of the Income-tax Act, the BIFR could not have sanctioned the scheme of amalgamation of Sharp Edge with the appellant but declined to make the declaration under section 72A of the Income Tax Act with regard to that amalgamation'
(underlining for emphasis, ours)

18. Nothing further remains to be said in the light of the categorical conclusion of the Supreme Court emphasised above. The view taken by the Assessing Authority to the effect that the claim of the assessee is liable to be allowed in the light of the provisions of section 32(2) of the SICA and its interpretation by the Supreme Court is thus, the correct one.

10.2. Since the provisions of SICA would override those of the provisions of the Income Tax Act, When BIFR has sanctioned the scheme which is sufficient and no further compliance need to be called for in regard to the conditions set out about u/s. 72(3) of the Act. Therefore the disallowance made by the Assessing Officer is hereby deleted and Ground No. 1 raised by the assessee is allowed.

11. Regarding Ground No. 2, disallowance made u/s. 14A on interest expenses of Rs. 7,849/-. Since substantial interest free funds were available with the assessee, the disallowance on this count is directed to be deleted. Regarding Administrative expenses of Rs.12,500/- disallowed u/s. 14A wherein no details furnished therefore the same is confirmed. In the result, Ground No. 2 is partly allowed.

12. In the result, **the appeal filed by the Assessee is partly allowed.**

Order pronounced in the open court on 04-12-2024

Sd/-
(ANNAPURNA GUPTA)
ACCOUNTANT MEMBER
Ahmedabad : Dated 04/12/2024

Sd/-
(T.R. SENTHIL KUMAR)
JUDICIAL MEMBER

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)

5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद