

IN THE INCOME TAX APPELLATE TRIBUNAL
"SMC" BENCH, AHMEDABAD

BEFORE SMT.ANNAPURNA GUPTA, ACCOUNTANT MEMBER
AND
SMT.SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA No.378/Ahd/2019
Assessment Year :2015-16

Shri Dashrathlal K.Patel 3, Sarvmangal Society Dhobighat Road Mehsana 384 001. PAN : ABHPP5720G	Vs.	ITO, Ward-1 Mehsana.
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(Appellant)		(Respondent)
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Assessee by :	Shri S.N. Divetia, AR
Revenue by :	Shri V.k.Singh,Sr.DR

Date of Hearing : 22/07/2022

Date of Pronouncement: 27/07/2022

O R D E R

PER ANNAPURNA GUPTA, ACCOUNTANT MEMBER

Present appeal has been filed by the assessee against order passed by the ld. Commissioner of Income-Tax(Appeals), Gandhinagar [hereinafter referred to as "Ld.CIT(A) under section 250(6) of the Income Tax Act, 1961 ("the Act" for short) dated 04.01.2019 pertaining to the Asst.Year 2015-16.

2. Ground No.1 raised by the assessee is as under:

1. *Learned Commissioner of Income Tax(A) erred in law and on facts in not allowing set off of Brought Forward Unabsorbed Business Losses (Other than Speculation Loss) against the Speculation Business Income of the Current Year amounting to Rs.12,47,234/-*

3. Issue in dispute is regarding claim of set off of unabsorbed business losses of earlier years from the alleged speculative business profits of the impugned year.

4. The facts relating to the present case is that the assessee had earned profits of Rs.12,47,234/- from intra-day trading of shares, against which it had set off loss of share trading business of earlier years. The same was denied by the AO relying upon the decision of Hon'ble Delhi High Court in the case of CIT Vs. DLF Commercial Developers, 91 DTR 49 (Del) and decision of Hon'ble Allahabad High Court in the case of CIT Vs. Shri Ram Kishan Gupta, ITA No.43 of 2003. The ld.CIT(A) upheld the order of the AO.

5. We have heard both the parties. Ld.Counsel for the assessee has justified setoff of brought forward business losses against speculation business income of the year contending that it is in accordance with law as prescribed by section 72(1) of the Act. Section 72 of the Act which specifically deals with carry forward and set off of unabsorbed business losses is reproduced hereunder for clarity:

72. (1) Where for any assessment year, the net result of the computation under the head "Profits and gains of business or profession" is a loss to the assessee, not being a loss sustained in a speculation business, and such loss cannot be or is not wholly set off against income under any head of income in accordance with the provisions of section 71, so much of the loss as has not been so set off or, where he has no income under any other head, the whole loss shall, subject to the other provisions of this Chapter, be carried forward to the following assessment year, and—

(i) it shall be set off against the profits and gains, if any, of any business or profession carried on by him and assessable for that assessment year ;

(ii) if the loss cannot be wholly so set off, the amount of loss not so set off shall be carried forward to the following assessment year and so on :

Provided that where the whole or any part of such loss is sustained in any such business as is referred to in section 33B which is discontinued in the circumstances specified in that section, and, thereafter, at any time before the expiry of the period of three years referred to in that section, such business is re-established, reconstructed or revived by the assessee, so much of the loss

as is attributable to such business shall be carried forward to the assessment year relevant to the previous year in which the business is so re-established, reconstructed or revived, and—

(a) it shall be set off against the profits and gains, if any, of that business or any other business carried on by him and assessable for that assessment year; and

(b) if the loss cannot be wholly so set off, the amount of loss not so set off shall, in case the business so re-established, reconstructed or revived continues to be carried on by the assessee, be carried forward to the following assessment year and so on for seven assessment years immediately succeeding.

(2) Where any allowance or part thereof is, under sub-section (2) of section 32 or sub-section (4) of section 35, to be carried forward, effect shall first be given to the provisions of this section.

(3) No loss (other than the loss referred to in the proviso to sub-section (1) of this section) shall be carried forward under this section for more than eight assessment years immediately succeeding the assessment year for which the loss was first computed.

A bare reading of the above reveals that the contention of the Ld.Counsel for the assessee that unabsorbed business losses can be set off against any income from business, be it speculative or otherwise, is correct. Section 72(1)(i) clearly states so. There is nothing in the section denying setoff of unabsorbed brought forward business losses from speculative business income.

6. In the facts of the present case, which are not disputed, the assessee has returned speculative business income from intraday trading in shares amounting to Rs.12,47,145/-. The AO we have noted applied section 43(5) of the Act and categorically held the said income to be speculative in nature. Para 3.1 of the AO's order categorically hold so stating as under:

“ it was seen in trading account, of relevant assessment year, that the assessee has gained the speculation profit of Rs.12,47,234/- from intraday trading and this income is also used for set off of the loss of share trading business of earlier years business loss. Whereas as per the provisions of section 43(5) of I T Act,1961,it is clear that derivatives trading does not come under speculation business loss. Intraday share trading business comes under speculation business whereas ,F&O

share trading comes under business as per section 43 of the IT Act,1961."

Even the Ld.CIT(A) noted the said fact at para 4 of his order. Further undisputedly the assessee is claiming set off of brought forward business losses of earlier years from the same. The Ld.DR has not controverted the above facts.

7. As per section 72(1)(i) the assessee is clearly entitled to claim the set off of the unabsorbed business losses from speculation business income of the impugned year. The claim of the assessee therefore, we hold, in accordance with law.

8. We fail to understand how the decision of Hon'ble Delhi High Court in the case of DLF Commercials(supra) relied upon by the AO to deny set off of brought forward losses from speculative income of the year, helps the case of the Revenue. The findings in the said case ,reproduced in the order of the AO at page 5 ,are in relation to section 73 of the Act , which deal with carry forward and set off of speculative losses, which is not the fact in the present case where set off of business losses is in dispute and there is speculative income and not speculative losses at all.

9. As for the decision of the Hon'ble Allahabad High Court in the case of Shri Ram Gupta, neither the AO nor the Ld.DR has given the complete citation of the decision nor filed copy of the same before us. Therefore we have no basis for determining the proposition laid down by the Hon'ble High Court in the said case and the said decision as a consequence is of no assistance to the assessee.

10. In view of the above the claim of set off of brought forward business losses against current years speculative business income is

held to be in accordance with law. And the AO is directed to allow the same to the assessee. Ground of appeal No.1 is allowed.

11. The ground no.2 reads as under:

“2. The Id.CIT(A) erred in law and on facts in making additions of Rs.18,000/- u/s.68 of the I.T.Act.”

12. The issue is relating to the addition of Rs.18,000/- made to the income of the assessee on account of cash credit from one Shri Chirag Bhikhalal Patel. As is evident from the order of the AO, during the assessment proceedings, inquiry in relation to unsecured loans taken by the assessee amounting in all to Rs.35,98,244/- was conducted by the AO by issuance of notice under section 133(6) of the Act to various parties from whom assessee had taken the loans. The Id.AO sought confirmation of the same and out of the above unsecured loans of Rs.35,98,244/-, reply with regard to one party/person, Shri Chirag B. Patel was not obtained, who had given an amount of Rs.18,000/- in cash and addition accordingly made to the income of the assessee under section 68 of the Act.

13. We have perused submissions made by the assessee before the Id.CIT(A) wherein he had pointed out to the Ld.CIT(A) that the registered letter sent to the said depositor was in incorrect name i.e. Chirag Bhikalal Patel while name of the depositor was Chirag Bhikhalal Prajapati, and therefore, the letter returned unserved.

14. We have noted that this fact was communicated to the AO also and he was requested to send letter again and/or hand over the same to the assessee for service, but the request was not granted. We have noted that even the Id.CIT(A) did not take note of the aforesaid pleadings of the assessee and upheld the addition on the

ground that the assessee had not produced any evidence to prove identity of Chirag B. Patel.

Considering the fact that out of total unsecured loan taken by the assessee to the tune of Rs.35,98,244/- all was found genuine except this very small amount of Rs.18,000/-, and noting the fact that the assessee had given all cooperation to the Revenue in this regard pointing out that notice under section 133(6) of the Act had been sent in incorrect name of the depositor, had pointed out the correct name of the depositor and also sought to serve of the notice by the assessee himself, but none of the request of the assessee was acceded to by the Revenue we see no reason to uphold the addition. The assessee having admittedly proved genuineness of 99.5% of the unsecured loans taken and with regard to this small deposit of Rs.18,000/-, had given an explanation for non-service of notice under section 133(6), and had offered all cooperation in getting its confirmation, the said loan can also be safely said to be genuine and cannot be doubted for the mere reason that no confirmation was forthcoming of the same.

15. Taking note of overall facts and circumstances, we see no reason to hold the impugned unsecured loan of Rs.18,000/- as unexplained. The addition so made under section 68 of Rs.18,000/- is therefore directed to be deleted.

Ground of appeal No.2 is allowed.

16. In the result, the appeal of the assessee is allowed.
Order pronounced in the Court on 27th July, 2022 at Ahmedabad.

Sd/-
(SUCHITRA R. KAMBLE)
JUDICIAL MEMBER
Ahmedabad, dated 27/07/2022

Sd/-
(ANNAPURNA GUPTA)
ACCOUNTANT MEMBER