IN THE INCOME TAX APPELLATE TRIBUNAL DELHI 'C' BENCH
BEFORE SHRI R.P. TOLANI, JM & SHRI A.N. PAHUJA, AM

ITA No.3245/Del/2011 Assessment year:2007-08

Income Tax Officer, Ward 37(1), Room No.409, N Block, Vikas Bhawan, I.P. Estate, New Delhi	V/s.	Shri Hemant Surana, A-401, Defence Colony, New Delhi-24
[PAN No.: AATPS 4960 N]		

C.O. No.237/Del/2011 (In I.T.A. No.3245/Del/2011) Assessment year:2007-08

Shri Hemant Surana, A-401, Defence Colony, New Delhi-24	V/s.	Income Tax Officer, Ward 37(1), Room No.409,N Block, Vikas Bhawan, I.P. Estate, New Delhi
(Appellant)		(Respondent)

Assessee by	Dr. Rakesh Gupta & Shri Ashwani Taneja, ARs
Revenue by	Shri RIS Gill, DR

Date of hearing	14-02-2012
Date of pronouncement	24-02-2012

O R D E R

A.N.Pahuja:- This appeal filed on 16th June, 2011 by the Revenue and the corresponding cross objection[CO] filed on 14th July, 2011 by the assessee against an order dated 25.03.2011 of the ld. CIT(A)-XXVIII, New Delhi, raise the following grounds:-

I.T.A. No.3245/D/2011[Revenue]

1) *"On the facts and circumstances of the case, the learned CIT(A) has erred in deleting the addition of*

₹`3,11,85,809/- on account of disallowance of loss on trading of shares as not an allowable expenditure u/s 37(1) in view of violation of clause 11 mentioned in the 1st schedule of the Chartered Accountant Act, 1949 (amended in 2006) as discussed in detail in the assessment order and that too without giving an opportunity to the Assessing Officer and thereby violating Rule 46A of the I.T. Rules.

2) The appellant craves to add, amend or modify the grounds of appeal at any time.

C.O. No.237/D/2011[Assessee]

1) "That having regard to the facts and circumstances of the case, learned CIT(A) has erred in law and on facts in not deleting the addition of `₹11,00,000/- made by learned AO being the amount of unsecured loans received by the assessee.

2) That the assessee craves the leave to add, modify, amend or delete any of the grounds of cross objections at the time of hearing and all the above grounds are without prejudice to each other."

2. Adverting first to ground no.1 in the appeal of the Revenue, facts in brief, as per relevant orders are that return declaring income of ₹`5,13,624/- filed on 31.10.2007 by the assessee, was selected for scrutiny with the service of a notice u/s 143(2) of the Income-tax Act, 1961 (hereafter referred to as the Act) issued on 15.09.2008. During the course of assessment proceedings, the Assessing Officer (A.O. in short) noticed that the assessee reflected loss of ₹`3,11,85,809/- in the business of shares and sought to set it off against professional income, commission receipts and profit from trading in property as also against share of profit from Surana & Associates, a Chartered Accountant firm. According to the AO, since the assessee was a Chartered Accountant by profession, the loss of ₹`3,11,85,809/- was not admissible in terms of explanation to section 37(1) of the Act. To a query by the AO, the assessee replied that for any default under the Chartered Accountants Act, cognizance could be taken by the Institute of Chartered Accountants of India and there being

no default in terms of provision of the Act, the loss claimed was admissible. Inter alia, the assessee relied upon the decision of Hon'ble Supreme Court in Dr. T.A. Qureshi Vs. CIT (2006) 157 Taxman 514 (SC). However, the AO did not accept the submissions of the assessee and while referring to First Schedule to the Chartered Accountants Act of India concluded that the assessee could not engage in any business or profession other than the profession of CA. Accordingly, since the loss in share trading business was in consequence of a purpose prohibited by law, the AO disallowed the claim of loss of `₹3,11,85,809/-.

3. On appeal, the learned CIT(A) allowed the claim of the assessee in the following terms:-

> *"2.3 The submissions of the appellant and the facts have been carefully considered. The appellant has argued that he is a Chartered Accountant by that he is a Chartered Accountant by qualification but not in practice, suo moto on 31st March, 2007. It was stated that the provisions of clause 11 of the First Schedule referred to by the A.O. are applicable only to Chartered Accountants in practice and are therefore, not applicable to the appellant. The appellant further argued that alternatively, even if there is any violation of the Chartered Accountants Act, this is to be dealt with only by the Institute of Chartered Accountants of India and they can only reprimand, suspend or impose a fine. It was stated that this does not result in any default under the Income Tax Act.*
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> *2.4 The appellant argued that under the explanation to Section 37, the amount proposed to be disallowed has to be an expenditure incurred by an assessee for any purpose, which is an offence or which is prohibited by law. In the present case, the A.O. has disallowed loss and not expenditure. The appellant pointed out that loss is entirely different from expenditure. Loss means damage, disadvantage etc caused by losing something whereas Expenditure means an Expenditure/spending . Expenditure is voluntarily done and with an intent to derive some tangible or intangible benefits from the spending, whereas there is no Loss which is voluntarily done or incurred. All the Losses happen involuntarily and there is never an intent to incur a loss.*

2.5 The appellant argued that under the explanation to Section 37, the amount proposed to be disallowed has to be an expenditure incurred by an assessee for any purpose which is an offence or which is prohibited by law. In the Memorandum of Finance (No.2) Bill, 1998 , it was mentioned that the proposed amendment will result in disallowance of the claim made by certain taxpayers of payments on account of protection money, extortion, hafta, bribes etc. as business expenditure. The appellant argued that it trading in shares is certainly not in the same class as the activities of protection money, extortion, hafta bribes etc.

2.6 The appellant argued that he had incurred loss in shares in F&O segment and such losses are specifically excluded from being speculative transaction u/s 43(5) and allowed as business losses. It was stated that since share trading is not an illegal activity, and it is a loss and not an expenditure, the said addition needs to be deleted. The appellant further argued that although trading in shares is not an illegal business but still without prejudice to the same, for the purposes of taxation, there is no distinction made between legal and illegal business. Profits from an illegal business are subject to tax just as from a legal business.

2.7 The appellant relied on the Supreme Court decision in Dr. T.A. Qureshi v. CIT (2006) 287 ITR 547. He argued that the A.O. has stated that "the case law adduced does not come to the rescue of the assessee since it is distinguishable on facts and issues" without actually distinguishing the case law on facts and issues.

2.8 In the asstt. order, the A.O. has not been able to successfully rebut the arguments of the appellant. The A.O. has disallowed business loss by invoking the Explanation below section 37(1). There is a clear distinction between business expenditure and business loss. In Dr. T.A. Qureshi v. CIT (2006) 287 ITR 547, the Hon'ble Supreme Court held that the Explanation to section 37 is applicable in case of business expenditure and not business loss. The Hon'ble Court held that "The Explanation to section 37 has really nothing to do with the present case as it is not a case of a business expenditure, but of business loss" The appellant has further

argued that he is a Chartered Accountant by qualification but not in practice, having surrendered the certificate of practice and that the provisions of clause 11 of the First Schedule referred to by the A.O., are applicable only to Chartered Accountants in practice, and are therefore, not applicable to the appellant. The A.O. has not been able to show why clause 11 is applicable in this case. The appellant has further argued that in the Memorandum of Finance (N0.2) Bill, 1998, it was mentioned that the proposed amendment will result in disallowance of claim made by certain taxpayers of payments on account of payment of protection money, exortion, hafta, bribes etc. as business expenditure. The A.O. has not been able to show that the Explanation below section 37(1) would cover any such violations by the appellant, as are imputed in the asstt. order. Considering the appellant's submissions and the facts, and the judicial decisions on the subject, the addition made by the A.O. is not legally tenable, and is deleted. The ground is allowed."

4. The Revenue is now in appeal before us against the aforesaid findings of the ld. CIT(A). The ld. DR supported the order of the AO while the ld. AR on behalf of the assessee supported the findings of the ld. CIT(A). Inter alia, the ld. AR relied upon the decision in CIT Vs. M/s The Stock and Bond Trading Company in I.T.A. no.4117 of 2010 (Bombay);State Bank of Saurashtra vs. DCIT,93 ITD662(Ahd.);TN Vohra vs. DCIT,7 SOT 642(Del.),Dr. TA Quereshi vs. CIT,287 ITR 547(SC); CIT vs. Piara Singh,124 ITR 40(SC); CIT vs. Lachatoorah Tea Co. Ltd.,200 ITR 391(Cal.) and extracts from the commentary by Chaturvedi & Pithsaria-page 742

5. We have heard both the parties and gone through the facts of the case as also the aforesaid decisions. Indisputably, the assessee, a chartered accountant, incurred loss of `₹3,11,85,809/- in the business of trading in shares. The AO disallowed the claim of set off of loss, having recourse to the explanation to section 37(1) of the Act while ld. CIT(A) allowed the claim on the ground that the said explanation was attracted only in the case of any expenditure and not in the event of loss. The issue before us is as to whether or not explanation below section 37(1) of the Act, inserted by the Finance Act, 1998 with retrospective effect from 1-4-1962, is applicable in this case.. This *Explanation* lays down that any expenditure incurred by an assessee for any purpose which is an offence or

which is prohibited by law shall not be deemed to have been incurred for the purpose of business and no deduction or allowance shall be made. It is well settled that this explanation is applicable only to an expenditure and not to a loss [Dr. T. A. Quereshi (supra) & TN Vohra(supra).]. There is a distinction between the expenditure and loss. "An expenditure is something or other which the trader pays out"; as observed by Finlay J. in Allen v. Farqusharson Bros. & Co. 17 Tax Cases 59, "I think some sort of volition is indicated". He chooses to pay out some disbursement; it is an expense; it is something "which comes out of his pocket. A loss is something different. That is not a thing which he expends or disburses. That is a thing which, so to speak, comes upon him ab extra." Even otherwise, in the instant case, the ld. CIT(A) concluded that the assessee is a Chartered Accountant by qualification but not in practice, having surrendered the certificate of practice and that the provisions of clause 11 of the First Schedule referred to by the A.O., are applicable only to Chartered Accountants in practice, and are therefore, not applicable to the assessee. The Revenue have not placed before us any material controverting these findings of facts of recorded by the ld. CIT(A). In view of the foregoing ,we are not inclined to interfere with the findings of the ld. CIT(A). Therefore, ground no.1 in the appeal of the Revenue is dismissed.

6. Coming now to ground no.1 in the CO, during the course of assessment proceedings, the AO asked the assessee vide order sheet entry dated 6.11.2009 to furnish details of unsecured loans, account confirmation, bank statement, copies of returns and balance sheet as also profit and loss account of the unsecured creditors. However, the assessee did not furnish any reply. Even the notice dated 23.11.2009 and18th December, 2009 went unresponded. In these circumstances, since the assessee failed to establish identity and creditworthiness of unsecured creditors nor established genuineness of the transactions, the AO added an amount of ₹11lacs u/s 68 of the Act.

7. On appeal, learned CIT(A) upheld the findings of AO in the following terms:-

> *"3.2 The submissions of the appellant and the facts have been carefully considered. In the assessment order, the Assessing Officer has given details of the opportunities given to file evidence in respect of the loan shown and /the appellant's failure to comply. In view of the facts mentioned in the assessment order, it is clear that the appellant has not filed the required evidence during assessment proceedings to establish the identity and creditworthiness of the creditor and the genuineness of the transaction. In view of the above, the addition made by the Assessing Officer does not require any interference. The ground is dismissed."*

8. The assessee is now in appeal before us against the aforesaid findings of learned CIT(A).While inviting our attention to documents placed at page 15 to 20 of the paper book, the ld. AR contended that the AO had completed the hearing in their case on 23rd December, 2009 while the assessee submitted on 24.12.2009, an affidavit of Ms. Anjana Vohra, her confirmation and copy of a letter dated 24th December, 2009 addressed to the manger of the bank, seeking copy of her pass book, along with their letter dated 24th December, 2009. Though these documents were placed before the ld. CIT(A), he did not record any findings on this aspect and upheld the addition made by the AO .Inter alia, the ld. AR relied upon decisions in CIT Vs. Orissa Corporation (P) Ltd., 159 ITR 78 (SC); Nemi Chand Kothari Vs. CIT, 264 ITR 254 (Gau);and Aravali Trading Co. Vs. Income Tax Officer, 187 Taxman 338;and decision dated 21.9.2011 in CIT Vs. Dataware Private Ltd. in ITA no. 263 of 2011. The ld. DR , on the other hand, supported the findings in the impugned order on the ground that the documents now placed before the Bench, were never placed before the ld. CIT(A) or the AO.

9. We have heard both the parties and gone through the facts of the case. Indisputably, the documents placed at sl. no. 3 on page no.15-20 of the paper book viz. affidavit of Ms. Anjana Vohra, her confirmation and PAN details were never considered by the AO, having been submitted before the AO after the conclusion of hearing on 23.12.2009. There is no sl. no.4 in the paper book; admittedly sl. nos. in the paper book having been wrongly numbered. Though

the ld. CIT(A) referred to the relevant submissions of the assessee in the impugned order and these documents are stated to have been placed before him, he did not record his specific findings in the light of these documents and merely affirmed the order of the AO. A mere glance at the impugned order reveals that the order passed by the ld. CIT(A) is cryptic and grossly violative of one of the facets of the rules of natural justice, namely, that every judicial/quasi-judicial body/authority must pass reasoned order, which should reflect application of mind by the concerned authority to the issues/points raised before it. The application of mind to the material facts and the arguments should manifest itself in the order. Section 250(6) of the Act mandates that the order of the CIT(A) while disposing of the appeal shall be in writing and shall state the points for determination, the decision thereon and the reasons for the decision. The requirement of recording of reasons and communication thereof by the quasi-judicial authorities has been read as an integral part of the concept of fair procedure and is an important safeguard to ensure observance of the rule of law. It introduces clarity, checks the introduction of extraneous or irrelevant considerations and minimizes arbitrariness in the decision-making process. Hon'ble jurisdictional High Court in their decision in Vodafone Essar Ltd. Vs. DRP,196 Taxman423(Delhi) held that when a *quasi judicial* authority deals with a lis, it is obligatory on its part to ascribe cogent and germane reasons as the same is the heart and soul of the matter and further, the same also facilitates appreciation when the order is called in question before the superior forum. We may point out that a 'decision' does not merely mean the 'conclusion'. It embraces within its fold the reasons forming basis for the conclusion.[Mukhtiar Singh Vs. State of Punjab,(1995)1SCC 760(SC)].As already observed, the impugned order suffers from lack of reasoning and is not a speaking order on the issue of addition u/s 68 of the Act. In view of the foregoing, we consider it fair and

appropriate to set aside the order of the ld. CIT(A) and restore the matter to his file for deciding the aforesaid issue, afresh in accordance with law in the light of various judicial pronouncements including those referred to above, after allowing sufficient opportunity to both the parties. Needless to say that while redeciding the appeal, the ld. CIT(A) shall pass a speaking order, keeping in mind, inter alia, the mandate of provisions of sec. 250(6) of the Act, bringing out clearly as to whether or not identity and creditworthiness of the aforesaid creditor and genuineness of the transactions, is established in this case. With these observations, ground no. 1 in the CO is disposed of.

10. No additional ground having been raised before us in terms of residuary ground no.2 in the appeal of the Revenue as also in the CO of the assessee, accordingly, both these grounds are dismissed.

11. No other argument or submission was made before us.

12. In result, appeal of the Revenue is dismissed while the CO is allowed but for statistical purposes.

Order pronounced in open Court

Sd/-	Sd/-
(R.P. TOLANI)	(A.N. PAHUJA)
(Judicial Member)	(Accountant Member)

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Copy of the Order forwarded to:-

1. Shri Hemant Surana,A-401, Defence Colony, New Delhi
2. Income Tax Officer, Ward 37(1), New Delhi
3. CIT(A)-XVIII, New Delhi.
4. CIT concerned.
5. DR, ITAT,'C' Bench, New Delhi
6. Guard File.

BY ORDER,

Deputy/Asstt.Registrar