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

BEFORE SHRI R.C.SHARMA, AM
&
SHRI AMARJIT SINGH, JM

ITA No.657/Mum/2009
(Assessment Year :2000-01)
ITA No.595/Mum/2008
(Assessment Year :2001-02)
ITA No.1116/Mum/2013
(Assessment Year :2001-02)

M/s. SHRM Food & Allied Services Pvt. Ltd., Kolsite House, 1st Floor, 31/A, Shah Industrial Estate, Off. Veera Desai Road, Andheri – West Mumbai – 400 053	Vs.	ITO WD 8 (3)(1), Aayakar Bhavan, M.K. Marg, Mumbai – 400 020
PAN/GIR No.AAACT2529E		
Appellant)	..	**Respondent**)

Assessee by	Shri J.D. Mistry
Revenue by	Shri Ram Tiwari
Date of Hearing	**05/07/2017**
Date of Pronouncement	**03/10/2017**

आदेश / O R D E R

***PER R.C.SHARMA (A.M)*:**

These are the appeals filed by the assessee against the order of CIT(A)-XXIX dated 21/11/2008 for the A.Y. 2000-01 and 2001-02 in the matter of order passed u/s.143(3) of the IT Act.

2. The following grounds have been taken by the assessee in the A.Y.2000-01:-

I. VALIDITY OF RE-OPENING OF ASSESSMENT UNDER SECTION 148 OF THE ACT:

1.1 On the fact and in the circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals) [hereinafter referred to as CIT (A)] erred in upholding reopening of the assessment for the above year by the learned Assessing Officer.

1.2 The learned CIT(A) failed to appreciate that the learned Assessing Officer has reopened the assessment without satisfying the conditions laid down under Section 147 of the Act required to be fulfilled before reopening such assessment.

1.3 It is submitted that the proceedings initiated for reopening the assessment under Section 148 of the Act for reopening the assessment are bad in law and invalid.

The appellant prays that the assessment framed by the learned Assessing Officer be quashed or set aside as null and void and bad in law.

11. ADDITION IN RESPECT OF ALLEGED RECEIPT OF RS. 65,00,000/-:

2.1 On the facts and in the circumstances of the case and in law, the learned CIT (A) erred in upholding the computation of income made by the Assessing Officer as Income from Other Sources in respect of a sum of Rs.65,00,000/ - paid directly by SHRM Group, one of the shareholder of the Appellant company to the bank, in respect of guarantee invoked by the bank, as alleged receipt in the hands of the Appellant.

2.2 On the facts and in the circumstances of the case and in law, the learned CIT (A) and the learned Assessing Officer failed to appreciate the detailed submissions made by the Appellant and the rule of law laid down in various decisions relied upon by the Appellant in this behalf.

3. Grounds taken by assessee in the A.Y.2001-02 in ITA No.595/Mum/2008 is as under:-

I. VALIDITY OF RE-OPENING OF ASSESSMENT UNDER SECTION 148 OF THE ACT:

1.1 *On the fact and in the circumstances of the case and in law, the learned CIT (A) erred in upholding the validity of reopening by the Assessing Officer the assessment under section 148 of the Act for the*

above year without satisfying the conditions laid down under Section 147 of the Act required to be fulfilled before reopening such assessment.

1.2 The learned CIT (A) and Assessing Officer failed to appreciate the explanations given and submissions made by the appellant with reference to the validity of reopening of assessment under section 148 of the Act. It is submitted that the proceedings initiated for reopening the assessment under Section 148 of the Act for reopening the assessment are bad in law and invalid.

In view of the above the appellant prays that the assessment framed by the learned CIT(A) and Assessing Officer be quashed or set aside as null and void and bad in law.

II. ADDITION IN RESPECT OF SETTLEMENT OF LOAN UNDER SECTION 41 (1) READ WITH SECTION 28(iv) OF THE ACT RS.1,50,00,000/-:

2.1 On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in upholding the addition made by the Assessing Officer for a sum of Rs.1,50,00,000/- respect of waiver of loan on settlement with the bank by invoking the provisions of Section 41(1) read with Section 28(iv) of the Act.

2.2 The learned CIT(A) and Assessing Officer failed to appreciate the detailed submissions made by the appellant and the rule of law laid down in various decisions relied upon by the appellant in this behalf.

The appellant prays that the addition made by the learned Assessing Officer be deleted as the same is unwarranted, unjustified and bad in law.

III. ASSESSMENT OF INTEREST INCOME UNDER THE HEAD INCOME FROM OTHER SOURCES RS.1,90,029/-:

3.1 On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in upholding the assessment made by the Assessing Officer in respect to interest income for the year under the head Income from Other Sources as against the same offered by the appellant under the head business income.

3.2 The learned CIT(A) and Assessing Officer failed to appreciate the detailed submissions made by the appellant and the rule of law laid down in various judicial pronouncements relied upon by the appellant in this behalf. It is submitted that the interest income for the

year be taxed under the head Profits and Gains of Business or Profession and not under the head Income from Other Sources.

The appellant prays that the learned Assessing Officer be directed to compute the income of the appellant under the head Profits and Gains of Business and Profession and allow set off of carried forward losses there against.

4. The Grounds taken in ITA No.1116/Mum/2013 for 2001-02 are as under:-

***I. PENALTY LEVIED UNDER SECTION** 271(1)(C) **OF THE ACT RS.** 59,32,500/-:*

1.1 On the facts and in the circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals) [CIT(A)] erred in confirming penalty imposed under Section 271(l)(c) of the Act at Rs, 59,32,500 for alleged furnishing of inaccurate particulars of income of the appellant.
1.2 On the facts and in the circumstances of the case and in law, the learned CIT(A) failed to appreciate the explanation offered by the Appellant in its proper context. The learned CIT(A) failed to appreciate that the Appellant is not guilty of furnishing any inaccurate particulars of income or concealment of income and hence, the levy of penalty under Section 271(l)(c) of the Act is unjustified and unreasonable.
1.3 The appellant has disclosed all the relevant facts accurately and in a transparent manner in support of its claims and contentions and hence, the provisions of Section 271(1)(c) of the Act are not at all applicable.

5. Common grounds have been raised by assessee in both the years under consideration, accordingly both the appeals were heard together and are now decided by this consolidated order.

6. Rival contentions have been heard and record perused. Facts in brief in the A.Y.2000-01 the assesses filed return of income at los of Rs. 57,60,252/- on 29/11/2000. It was found that during the relevant year previous year, Group SHRM-France one of the share holders, had paid to

Banque National De Paris, France, an amount of Rs.73,33,834.70 pursuant to invocation of a guarantee provided in connection with overdraft facilities extended to the assessee company Banque Nationale De Paris India. The amount so paid had been waived by Group SHRM. The assessee company written back an amount of Rs. 8,33,834.70 representing the interest component to the profit and loss account under the head other income. AO observed that the balance amount of Rs. 65,00,000/- paid by Group SHRM and waived off becomes income of the assessee itself as there exists no liability for this amount. This net amount of Rs. 65,00,c000/- becomes income of the assessee company."

7. In view of the above, A.O held that the amount of Ra. 65,00,000/- chargeable to tax had escaped assessment and accordingly the A.O. reopened the case u/s, 147 of the Act and finally added Rs.65,00,000/- u/s.41(1) of IT Act.

8. By the impugned order, CIT(A) confirmed the action of the AO against which assessee is in further appeal before us.

9. We have considered rival contentions and carefully gone through the orders of the authorities below and also deliberated on the judicial pronouncements referred by lower authorities in their respective orders and also as cited by learned AR and DR during the course of hearing before us in the context of factual matrix of the case.

10. From the record we found that Banque Nationale De Paris (herein after referred to as Bank) had extended cash credit facilities to the

assessee company in the earlier years. These facilities were secured by way of hypothecations of all movable assets including book debts and stocks. Further, these facilities were guaranteed by Group SHRM - France, one of the shareholders of the assessee company. Since the assessee company was not able to repay the overdrafts availed and interest due thereon, the corporate guarantee given by Groupe SHRM - France was invoked by the Bank for recovery of the amount payable by the assessee company to the Bank. Copies of letter dated 27/10/1998, 22/05/1998 and 11/03/1999 issued by the Bank, in this behalf, are placed on the record. Accordingly, during the year ended 31st March, 2000 Groupe SHRM paid a sum of Rs. 73,33,834.70 (Rs. 65,00,000 for principal amount and Rs. 8,33,834 for interest thereon). This amount was directly paid by Groupe SHRM to the bank as it has given the guarantee and the same was invoked by the bank. Consequently, the assessee company had credited a sum of Rs.65,00,000/- representing the principal component to its Capital Reserve Account and a sum of Rs. 8,33,834/- representing the interest component was credited to the Profit and Loss Account under the head "Other Income - Provision no longer required written back" and duly offered the same to tax. The Principal Component of the amount paid by Groupe SHRM being a loan in respect of which no deduction, benefit or loss was either claimed or allowed, was transferred to Capital Reserve Account and interest component was duly credited to the Profit and Loss

Account and also offered to tax as income within the meaning of Section 41(1) of the Act. The loan received is a capital receipt and it does not lose its capital nature even when it is renounced or waived by the lender.

11. We found that the interest component has duly been credited by assessee to the Profit and Loss Account and has also been considered as income within the meaning of Section 41 (1) of the Act. However, neither any loss, deduction or benefit was claimed by the assessee company nor was allowed to it in respect of the Principal component in earlier years, it was carried to Capital Reserve Account. The transaction of obtaining a loan is not a trading transaction and therefore, the same cannot be considered as income exigible to income tax. The rule of law laid down by the Hon'ble Supreme Court in the case of CUT Vs. Ty Sundaram lyengar & Sons Limited (1996) 222 ITR 344 relied upon by assessee also refers to cessation of trading liability. It is useful to refer to the observations of the Supreme Court in this regard;

> *"If an amount is received in the course of trading transaction, even though it is not taxable in the year of receipt as being of revenue character, the amount charges its character when the amount becomes the assessee's own money because of limitation owned by any other statutory or contractual right. When such a thing happens, common sense demand that the amount should be treated as income of the assessee.*
>
> *If a common sense view of the matter were taken, the assessee, because of the trading operation, had become richer by the amount which it transferred to its profit and loss account. The money had arisen out of ordinary trading transaction. Although the amounts received originally were not of income nature, the amounts remained with the assesses for a long period unclaimed by the trade parties. By lapse of time, the claim of the deposit became time-barred and the amount attained a totally different quality. It became a definite trade surplus".*

12. In the instant case, the assessee company had obtained a secured loan and one of the shareholders of the assessee company had paid part of the principal amount directly to the Hank and the Bank had waived the remaining part of the principal amount. Further, the amount paid directly by the concerned shareholder of the assessee company was also waived by such shareholder. Hence, the entire principal component, not being a trading transaction, was duly credited to Capital Reserve Account. Accordingly, even the ratio of the decision of the Supreme Court in the case of CIT Vs. TV Sundaram lyengar & Sons Limited (Supra) is not applicable to the facts and the circumstance of the case. The fact that there is a difference between the amount received in the course of a trading transaction and other deposit or loan is evident from the decision of the Hon'ble Supreme Court in the case of K.MS. Lakshmanier & Sons (1953) 23 ITR 202 where trade advances were not treated as loans and security deposits were treated as loans. The Apex Court, in this case, has discussed the issue as under:

> *"On the other hand, a more recent decision of the English Court of Appeal in Davies Vs. The Shell Company of China - (22 ITR Suppl.1), which Mr. Pathak brought to our notice, is more in point. A British Company, which sold petroleum products in China through Chinese agents, required the latter to deposit with the company a sum of money in Chinese dollars to be held as security against possible default by the agents in payment for the products consigned to them and to be repaid when the agency came to an end. These deposits were, during the war, transferred to the United Kingdom for reasons of safety and were there held in sterling. Subsequently, when the Chinese dollar depreciated in relation to sterling, the amount required to repay the deposits in Chinese dollars were much less than the sums held by the company as the sterling equivalents of the deposits, and the, question arose whether such deposit were trading receipts or receipts of a capital nature. In holding that they were capital*

receipts and the profit was therefore a capital gain, Ujenkins, L]., who delivered the leading judgement observed:

" If the agent's deposit had in truth been a payment in advance to be applied by the Company in discharging the sums from time to time due from the agent in respect of petroleum products transferred to the agent and sold by him, the case might well be different and might well fall within the ratio decidendi of Landes Bros. Vs. Shnpson (1934) 19 Tax Cos. 62 and Imperial Tobacco Co., Vs. Kelly (1943) 25 Tax *Cas.292.But, that is not the character of the deposit here in question. The intention manifested by the terms of the agreement is that the deposit should be retained by the company, carrying interest or the benefit of the deposit or throughout the terms of the agency. It is to be available during the period of the agency for making good the agent's defaults in the event of any default buy him, but otherwise it remains, us 1 see it, simply as a loan owing by the company to the agent and repayable on the termination of the agency; and I do not see how the fact that the purpose for which it is given is to provide it security against any possible default by the agent can invest it with the character of a trading receipt".*

13. In view of the above, it is clear that secured loan obtained from the bank is not obtained during the course of trading transaction and hence neither the provisions of Section 41(l) of the Act nor the rule of law laid down in the decisions relied upon by AO can be invoked to treat that as income within the meaning of Section 41(1) of the Act. Accordingly, AO is directed to delete the addition so made u/s.41(1).

14. As we have already decided the merit in favour of the assessee, we are not going to deal with the issue of reopening which is now academic in nature.

15. In the result, appeal for the A.Y.2000-01 is allowed.

16. In the A.Y.2001-02, assessee is aggrieved for addition of Rs.1.50 crores in respect of waiver of loan on settlement with the bank by

invoking the provisions of Section 41(1) read with Section 28(iv) of the Act.

17. We have considered rival contentions and found that Banque Nationale De Paris (herein after referred to as Bank) had extended overdraft facilities to the assessee company in the earlier years. These facilities were secured by way of hypothecations of all movable assets including book debts and stocks. Further, these facilities were guaranteed by Group SHRM - France, one of the shareholders of the assessee company. Since the assessee company was not able to repay the overdrafts availed and interest due thereon, the corporate guarantee given by Group SHRM - France was invoked by the Bank for recovery of the amount payable by the assessee company to the Bank. The amount payable by the assessee company to the Bank as at 31st March, 2000 stood at Rs. 1,94,44,420.14 which included principal amount of Rs. 1,50,00,000/- and interest component of Rs. 44,44,420.14. During the year ended 31st March, 2001 relevant to Assessment Year 2001-02, Group SHRM - France, the shareholder of the assessee company paid a sum of Rs. 60,00,000 directly to the Bank towards the overdraft facilities extended by the Bank to the assessee company. In terms of the compromise settlement offer accepted by the Bank the balance amount was waived by the Bank. Consequently, the assessee company had credited a sum of Rs. 1,50,00,000 representing the principal component to its capital reserve account and a sum of Rs.44,44,420 representing the interest component was credited to the

Profit and Loss Account under the head "Other Income - Provision no longer required written back" and duly offered the same to tax.

18. It is clear from the records placed before us that the total dues payable by the Bank consisted of principal component and interest component. The principal Component being a loan in respect of which no deduction, benefit or loss was either claimed or allowed, was transferred to Capital Reserve Account and interest component was duly credited to the Profit and Loss Account and also offered to tax as income within the meaning of Section 41(1) of the Act. The loan received is a capital receipt and it does not lose its capital nature even when it is renounced or waived by the lender.

19. As we have already discussed this issue in the A.Y.2000-01, therefore, following the reasoning given hereinabove, we do not find any merit for treating the waiver of loan as taxable u/s.41(1) of the IT Act.

18. In the result, appeal of the assessee for A.Y.2001-02 is also allowed.

19. In ITA No.1116/Mum/2013, assessee is aggrieved for levy of penalty u/s. 271(1)(c) in the A.Y.2001-02 for treating the waiver as revenue receipt. As we have already deleted the addition while deciding the quantum appeal for the A.Y.2000-01, penalty levied has no legs to stand. Accordingly, we direct the AO to delete the penalty so imposed.

20. In the result all the appeals of the assessee are allowed.

Order pronounced in the open court on this 03/10/2017

Sd/-	**Sd/-**
(AMARJIT SINGH)	**(R.C.SHARMA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai; Dated 03/10/2017
Karuna Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

सत्यापित प्रति //True Copy//

(Asstt. Registrar)
ITAT, Mumbai