

आयकर जयालाय जावकरण, ९ न्यायपोठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH, CHENNAI

श्री महावीर सिंह, उपाध्यक्ष एवं श्री जी. मंजुनाथ, लेखा सदस्य के समक्ष
BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENT AND
SHRI G. MANJUNATHA, ACCOUNTANT MEMBER

आयकर अपील सं./ITA No.: 449/CHNY/2017
निर्धारण वर्ष / Assessment Year: 2008-09

**M/s. Hussain Mohideen
Ibrahim Sha,**
C/o. M/s. Ramesh and
Ramachandran,
Chartered Accountants,
New No.39, Old No.29/3,
Viswanathapuram Main Road,
Kodambakkam,
Chennai – 600 024.

The ACIT,
v. Business Circle,
Chennai.

PAN : AAFPI9651L

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by
प्रत्यर्थी की ओर से/Respondent by

: Shri Y. Sridhar, CA
: Shri G. Chandrababu, Addl.CIT

सुनवाई की तारीख/Date of Hearing

: 16.02.2021

घोषणा की तारीख/Date of Pronouncement

: 16.02.2021

आदेश /O R D E R

PER MAHAVIR SINGH, VP:

This appeal by the assessee is arising out of the order of the Commissioner of Income Tax (Appeals)-2, Chennai in ITA No.3/CIT(A)-2/2014-15 dated 5.02.2016. The Assessment was framed by ACIT, Business Circle I, Chennai U/s 143(3) r.w.s.147

of the Income Tax Act, 1961 (hereinafter 'the Act') for the A.Y. 2008-09 vide order dated 28.02.2014. The original order of the Tribunal was passed vide order dated 27.02.2018 and the same was challenged before the Hon'ble High Court of Madras. The Hon'ble High Court of Madras in TCA No.722 of 2018, order dated 24.06.2019 directed the Tribunal vide para Nos.6 to 10 as under:-

6. However, what weighed in the mind of the Tribunal was with regard to the expenditure, which according to the assessee, was recorded in the books of accounts maintained in the course of regular business. The assessment was reopened solely on the ground that under Section 115BBE of the Act having been brought into the statute book, the expenditure under Section 11BBE., etc. should be assessed separately.

7. At this juncture, it will be beneficial to refer to a recent circular issued by the CBDT in Circular No.11 of 2019 dated 19.06.2019, wherein the Board has clarified on the following lines:

"Thus keeping the legislative intent behind amendment in Section 11BBE(2) vide the Finance Act, 2016 to remove any ambiguity of interpretation, the Board is of the view that since the term 'or set off of any loss' was specifically inserted only vide the Finance Act 2016, w.e.f. 01.04.2017, an assessee is entitled to claim set-off of loss against income determined under Section 115BBE of the Act till the assessment year 2016-17."

8. Learned counsel appearing for the respondent/assessee referred to a decision rendered by Division Bench of this Court in Commissioner of Income Tax Vs. Chensing Ventures reported in [2007] 291 ITR 258 (Madras), wherein, the loss sustained by the assessee, in any year under, the heads of income was permitted as set off against income under any other head. Learned counsel for assessee also referred to a decision of Division Bench in High Court of Gujarat in Commissioner of Income Tax-II Vs. Shilpa Dyeing & Printing Mills (P) Limited reported in [2013] 39 taxmann.com 3 (Gujarat).

9. After elaborately hearing learned counsel for the parties, we are of the considered view that the matter requires reconsideration by the Tribunal for the reasons, which we have indicated in this judgment. Furthermore, the CBDT has issued Circular No.11 of 2019 dated 19.06.2019 also needs to be looked into as regards the effect of the introduction of Section 115BBE of the Act.

10. In the light of the above, the appeal filed by the Revenue is allowed, the order of the Tribunal is set aside and the matter is remanded back to the Tribunal for fresh consideration for the issues we have pointed out in this judgment. Consequently, the substantial questions of law are left open. No costs.

In term of the directions of Hon'ble High Court of Madras, the matter was fixed for hearing and this appeal was called for hearing today.

2. The brief facts are that the assessee is an individual carrying on the business of bed roll suppliers to Southern Railway. The assessee filed his return of income for the relevant assessment year 2008-09 on 30.09.2008. A survey u/s.133A of the Act, was conducted on the business premises of the assessee on 24.07.2009 and consequent to survey, assessment was framed u/s.143(3) r.w.s. 147 of the Act. Consequent to survey, a sum of Rs.75,00,000/- was offered as business income. A revised return was filed declaring loss of Rs.1,78,03,450/- after adjusting the loss originally returned in the original return of income at Rs.2,53,03,450/-. The AO during the course of

assessment proceedings invoked the provisions of section 115BBE r.w.s 69C of the Act and made addition of Rs.75,00,000/- due to non-availability of bills or evidences to support the purchases. Accordingly and practically, the expenses relating to purchase were disallowed by invoking the provisions of section 115BBE r.w.s 69C of the Act. Aggrieved, assessee preferred an appeal before CIT(A). CIT(A) also confirmed the action of the AO. It was the claim of the assessee that the expenditure of purchase once shown by the assessee in its regular business accounts, the source is obviously explained. Once source is explained, provisions of section 69C cannot be invoked. It was the claim of the assessee that the provisions of section 115BBE of the Act was brought on the statute book w.e.f. 01.04.2017 and the relevant assessment year involved is 2008-09. Hearing these arguments, the Tribunal deleted the addition and allowed the claim of the assessee. Aggrieved, Revenue preferred an appeal u/s.216A of the Act, before the Hon'ble High Court of Madras and the Hon'ble Madras High Court has remanded the matter back to the file of the Tribunal only on the issue, whether the provisions of section 115BBE of the Act is prospective or retrospective in nature, particularly in view of the CBDT Circular No.11 of 2019 dated 19.06.2019.

3. The Id.senior Departmental Representative only stated that the provisions of section 115BBE of the Act, as brought in statute book w.e.f. 01.04.2017 is clarificatory in nature and hence, retrospective. He stated that section 115BBE of the Act, was brought into statute book to clarify the ambiguity prevailing in respect of unexplained expenditure claimed by the assessee and being disallowed u/s.69C of the Act. In view of these arguments, he stated that the CIT(A) has rightly upheld the addition made by the AO.

4. We noted that the provisions of section 115BBE of the Act have been brought into the statute book w.e.f. 01.04.2017 by the Finance Act, 2016 and a beneficial circular has been issued by CBDT vide Circular No.11 of 2019 dated 19.06.2019, wherein the CBDT has clarified the applicability of circular. Even this position has been explained in the explanatory notes to the provisions of the Finance Act, 2016 by CBDT vide F.No.370142/20/2016-TPL, Circular No. 3/2017 dated 20.01.2017, wherein it is clarified that the amendment in section 115BBE of the Act, will take effect from 01.04.2017 and will, accordingly, applied for assessment year 2017-18 and

subsequent assessment years. The relevant clause 46 reads as under:-

46. Clarification regarding set off of losses against deemed undisclosed income

46.1 Section 115BBE of the Income-tax Act inter alia provides that the income relating to section 68 or section 69 or section 69A or section 69B or section 69C or section 69D is taxable/at the rate of thirty per cent and further provides that no deduction in respect of any expenditure or allowances in relation to income referred to in the said sections shall be allowable

46.2 Currently, there is uncertainty on the issue of set-off of losses against income referred to in section 11 5BBE of the Income-tax Act. The matter has been carried to judicial forums and courts in some cases has taken a view that losses shall not be allowed to be set-off against income referred to in section 11 5BBE. However, the current language of section 11 5BBE of the Income-tax Act does not convey the desired intention and as a result the matter is litigated. In order to avoid unnecessary litigation, the provision of the sub-section (2) of section 115BBE of the Income-tax Act has been amended as to expressly provide that no set off of any loss shall be allowable in respect of income under the sections 68 or section 69 or section 69A or section 69B or section 69C or section 69D.

46.3 Applicability: This amendment takes effect from 1st of April, 2017 and will, accordingly, apply from assessment year 2017-18 and subsequent assessment years.

5. As regards to the decision of the Hon'ble Gujarat High Court in the case of CIT v. Shilpa Dyeing & Printing Mills (P) Ltd., [2013] 39 taxmann.com 3 (Gujarat), wherein it was held that the income declared in survey is to be taxed and it has to fall under one of the head of income i.e., business income and therefore, is available for set-off against the business income. Since in the present case, during survey an income of

Rs.75,00,000/- was surrendered and added in the income of the assessee and consequent business loss was claimed, the same is available for set-off against business loss. The Hon'ble Gujarat High Court has considered this position vide para 8 & 9 as under:-

“We, however, find that Section 71 of the Act permits an assessee to set off loss other than that of capital gains against income from other head. This very issue came-up for consideration before the Madras High Court in case of chensing Ventures (supra). The Division Bench of the Court considered the issue in following manner:

“6. Heard counsel. The Assessing Officer has not given any reason whatsoever to deny the set off of the business loss against the income declared under the head & “other sources”. Section 71 deals with set off of loss against income under any other head. After setting off losses against the income under the same head, if the net result is still a loss, the assessee can set off the said loss under Section 71 of the Act against income of the same year under any other head, except for losses which arise under the head “capital gains”. The income tax is only one tax and levied on the sum total of the income classified and chargeable under the various heads. Section 14 has classified the different heads of income and income under each head is separately computed. Income which is computed in accordance with law is one income and it is not a collection of distinct tax levied separately on each head of income and it is not an aggregate of various taxes computed with reference to each of the different sources separately. There is only one assessment and the same is made after the total income has been ascertained. The assessee is subject to income-tax on his total income though his income under each head may be well below the taxable limit. Hence the loss sustained in any year under any heads of income will have to be set off against income under any other head. In this case, the Assessing Officer made addition of Rs.28,50,000/- as undisclosed income under Section 69 of the Act. Once the loss is determined, the same should be set off against the income determined under any other head of income in the assessment, no

reasons were given by the Assessing Officer to deny the benefit of Section 71 of the Act. The benefit provided under Section 71 of the Act cannot be denied and the learned Standing Counsel appearing for the Revenue is also unable to explain or give reasons why the assessee is not entitled to the benefit of Section 71 of the Act. The reasons given by the Tribunal are based on valid materials and evidence and the same is in accordance with the provisions of Section 71 of the Act. We find no error or legal infirmity in the impugned order.”

9. We may further notice that the decision in case of Fakir Mohmed Haji Hasan (supra) came-up for consideration in case of Radhe Developers India Ltd. (supra), it was observed as under:

“The decisions of this Court in the case of Fakir Mohmed Haji Hasan (supra) and Krishna Textiles (supra) are neither relevant nor germane to the issue considering the fact that in none of the decisions the Legislative Scheme emanating from conjoint reading of provisions of sections 14 & 56 of the Act have been considered. The Apex Court in the case of D.P. Sandu Bros.Chemhur P. Ltd.,(supra) has dealt with this very issue while deciding the treatment to be given to a transaction of surrender of tenancy right. The earlier decisions of the Apex Court commencing from case of United commercial Bank Ltd v. CIT[1957] 32 ITR 688 (SC) have been considered by the Apex Court and, hence, it is not necessary to repeat the same. Suffice it to state that the Act does not envisage taxing any income under any head not specified in section 14 of the Act. In the circumstances, there is no question of trying to read any conflict in the two judgments of this Court as submitted by the learned Counsel for the Revenue.”

6. Even the Hon’ble High Court of Madras in the case of CIT vs. Chensing Ventures, [2007] 163 TAXMAN 175 (Mad), has considered an identical issue and held that the AO cannot deny benefit of section 71 of the Act, and the AO has to consider the undisclosed income u/s.69 of the Act, but once the loss is

determined, the same should be set-off against the income determined under any other head of income. The Hon'ble Madras High Court held in para No.6 as under:-

6. Heard counsel. The Assessing Officer has not given any reason whatsoever to deny the set off of the business loss against the income declared under the head "Other sources". Section 71 deals with set off of loss against income under any other head. After setting off losses against the income under the same head, if the net result is still a loss, the assessee can set off the said loss under section 171 of the Act against income of the same year under any other head, except for losses which arise under the head "Capital gains". The income-tax is only one tax and levied on the sum total of the income classified and chargeable under the various heads. Section 14 has classified the different heads of income and income under each head is separately computed. Income which is computed in accordance with law is one income and it is not a collection of distinct tax levied separately on each head of income and it is not an aggregate of various taxes computed with reference to each of the different sources separately. There is only one assessment and the same is made after the total income has been ascertained. The assessee is subject to income-tax on his total income though his income under each head may be well below the taxable limit. Hence the loss sustained in any year under any heads of income will have to be set off against income under any other head. In this case, the Assessing Officer made addition of Rs. 28,50,000 as undisclosed income under section 69 of the Act. Once the loss is determined, the same should be set off against the income determined under any other head of income. In the assessment, no reasons were given by the Assessing Officer to deny the benefit of section 71 of the Act. The benefit provided under section 71 of the Act cannot be denied and the learned standing counsel appearing for the revenue is also unable to explain or give reasons why the assessee is not entitled to the benefit of section 71 of the Act. The reasons given by the Tribunal are based on valid materials and evidence and the same is in accordance with the provisions of section 71 of the Act. We find no error or legal infirmity in the impugned order.

7. In view of the above, we are of the considered view that the provisions of section 69C of the Act, will apply but

consequent loss is to be set-off against this income. As regards to applicability of section 115BBE of the Act, as clarified by the CBDT as provisions brought out by the Finance Act, 2016 in the statute book w.e.f. 01.04.2017, the same is prospective and not retrospective.

8. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 16th February, 2021 at Chennai.

Sd/-

(जी. मंजुनाथ)

(G. MANJUNATHA)

लेखा सदस्य /ACCOUNTANT MEMBER

Sd/-

(महावीर सिंह)

(MAHAVIR SINGH)

उपाध्यक्ष /VICE PRESIDENT

चेन्नई/Chennai,

दिनांक/Dated, the 16th February, 2021

RSR

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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|------------------------|--------------------------|------------------------------|
| 1. अपीलार्थी/Appellant | 2. प्रत्यर्थी/Respondent | 3. आयकर आयुक्त (अपील)/CIT(A) |
| 4. आयकर आयुक्त /CIT | 5. विभागीय प्रतिनिधि/DR | 6. गार्ड फाईल/GF. |