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

BEFORE SHRI G.S. PANNU, ACCOUNTANT MEMBER AND
SHRI AMARJIT SINGH, JUDICIAL MEMBER

ITA NO. 4221/MUM/2015 : (A.Y : 2003-04)

F.E. Dinshaw Charities 412, Churchgate Chambers, 5, Sir Vithaldas Thackersey Marg, Mumbai 400 020 (Appellant) **PAN : AAATF0029L**	Vs.	Dy. Director of Income Tax-1(2) Mumbai (Respondent)

ITA NO. 4332/MUM/2015 : (A.Y : 2003-04)

ITO (Exemptions) – 1(3), Mumbai (Appellant)	Vs.	F.E. Dinshaw Charities 412, Churchgate Chambers, 5, Sir Vithaldas Thackersey Marg, Mumbai 400 020 **PAN : AAATF0029L** (Respondent)

Assessee by : Shri Ronak G. Doshi
Revenue by : Shri A.K. Kardam

Date of Hearing : 20/07/2016
Date of Pronouncement : 20/01/2017

ORDER

PER G.S. PANNU, AM :

These are cross-appeals filed by the assessee and the Revenue against the order of CIT(A)-7, Mumbai dated 10.04.2015, pertaining to the Assessment Year 2003-04, which in turn has arisen from the order passed by the Assessing Officer dated 10.12.2010 under section 143(3) r.w.s 147 of the Income Tax Act, 1961 (in short 'the Act').

2. The Grounds of appeal raised by the assessee and Revenue in their respective appeals are as under :-

ITA No. 4221/Mum/2015 (Assessee's appeal)

"GROUND I: RE-OPENING OF ASSESSMENT IS INVALID

1. On the facts and in the circumstances of the case and in law, the CIT(A) erred in confirming the action of the Deputy Director of Income Tax - I (2), ("the A.O") in re- opening the assessment and passing an order under section 143(3) r.w.s. 147 of the Act despite of the fact that notice u/s. 148 of the Act was issued beyond four years from the end of the relevant assessment year.

2. The Appellant therefore prays that the re-assessment order be quashed as null and void.

GROUND II : EXCESS APPLICATION OF INCOME ON THE OBJECTS OF THE TRUST TRAETED AS INCOME HAVING ESCAPED ASSESSMENT

1. On the facts and in the circumstances of the case and in law, the CIT (A) erred in confirming the action of the A.O in not accepting that the difference of Rs. 3,76,104/-, between income deemed to have been applied as per Form 10B and as per Return of Income represents the arithmetical error.

2. The Appellant therefore prays that the income deemed to have applied should be considered Rs.79,54,625/- as mentioned in the Return of Income and also in the Certificate dated August 26th, 2015 of an Independent Chartered Accountant."

ITA No. 4332/Mum/2015 (Revenue's appeal)

"1. Whether on the facts of the case and in law the Id.CIT(A) erred in allowing the carry forward of long term capital loss of Rs.1,61,76,065/- and

allowing set off against the income of the year, allowing the deficit will tantamount to double deduction on account of expenditure out of exempt income.

2. Whether on the facts and in the circumstances of the case and in law, the Ld CIT(A) erred in allowing the claim of the assessee for carry forward of the said loss, ignoring the fact that there was no express provision in the I T Act, 1961 permitting allowance of such claim. "

3. The appellant prays that the order of the Commissioner of Income Tax (Appeals)-I, Mumbai be set aside and that of the Assessing Officer be restored."

3. In brief, the relevant facts are that the assessee is a charitable trust, which is registered u/s 12AA of the Act, and for Assessment Year 2003-04 it filed a return of income originally on 17.10.2003 declaring NIL income. In an assessment finalized u/s 143(3) of the Act dated 27.3.2006, the total income was determined at NIL. Subsequently, the Assessing Officer reopened the assessment by issuing notice u/s 148 of the Act dated 24.3.2010 on the ground that income to the extent of Rs.3,76,104/- had escaped assessment. In the ensuing assessment finalized u/s 147 r.w.s. 143(3) of the Act dated 10.12.2010, the total income was assessed at Rs.8,05,246/-. Firstly, the Assessing Officer made an addition of Rs.3,76,104/- on the ground that the deduction for accumulation of income available to the assessee was only to the extent of Rs.75,78,521/- as reported in Form 10B and not to the extent of Rs.79,54,625/- allowed at the time of assessment. Secondly, the Assessing Officer disallowed assessee's claim for set-off of Long Term Capital Gain of Rs.4,29,142/- against brought forward Long Term Capital Loss of Assessment Year 1995-96 and carry forward of the balance

unabsorbed Long Term Capital Loss of Rs.1,61,76,065/- in view of judgment of the Hon'ble Supreme Court in the case of *Harprasad & Co. (P) Ltd., 99 ITR 118 (SC)*. Against such an assessment, assessee carried the matter in appeal before the CIT(A) challenging the initiation of proceedings u/s 147/148 of the Act as well as the merits of the two additions. The CIT(A) has upheld the action of Assessing Officer u/s 147/148 of the Act and also the addition of Rs.3,76,104/- to the extent of excess application of income allowed earlier. Against the aforesaid, assessee is in appeal before us on the above stated Grounds of appeal. So however, with regard to the issue of set-off of carry forward of Long Term Capital Loss, the action of Assessing Officer has since been set-aside by the CIT(A), against which the Revenue is in appeal before us. In this manner, the rival counsels have been heard and the relevant material perused.

4. We may first take up the appeal of assessee with respect to the addition of Rs.3,76,104/-. In this context, the relevant facts are that in the return of income, assessee had made a claim in terms of option available under Explanation-2(b) to Sec. 11(1)(a) of the Act of Rs.79,54,625/-. In terms of the said claim, assessee exercised the option of accumulating and applying the said sum towards the objects of the Trust within the next 12 months, i.e., in the subsequent Assessment Year of 2004-05. So however, in the prescribed Audit report Form no. 10B such accumulation of amount deemed to have been spent on the objects of the Trust was stated at Rs.75,78,521/-. This difference has prevailed with the Assessing Officer to hold that the amount of Rs.3,76,104/- has escaped assessment within the meaning of

Sec. 147/148 of the Act and he has, in fact, disallowed the said sum in the impugned assessment. On the contrary, the claim of assessee has been that such difference is only an arithmetical error and that the amount of Rs.79,54,625/- stated in the computation of total income was the correct figure and that the amount of Rs.75,78,521/- stated in Form no. 10B was an inadvertent mistake. It is also noted that in the proceedings before the lower authorities, assessee also obtained and furnished a revised certificate from the Auditors in this regard, a copy of which has been placed in the Paper Book at page 67. The Assessing Officer as well as the CIT(A), however, disagreed with the assessee and held the assessee entitled to the relief under Explanation 2(b) to Sec. 11(1)(a) of the Act to the extent of Rs.75,78,521/- only.

5. Before us, the learned representative for the assessee has reiterated the submissions taken before the lower authorities.

6. On the other hand, the ld. DR has emphasised on the contradicting claim in the computation of income vis-a-vis the amount stated in the Auditors report in Form no. 10B and, therefore, justified the disallowance.

7. We have carefully considered the rival submissions. In our considered opinion, the action of income-tax authorities is quite misconceived having regard to the facts and circumstances of the case, as our aforesaid discussion would show. In the present case, in the computation of income assessee claimed deduction of an amount of Rs.79,54,625/- as application of money in terms of clause (ii)(b) of

Explanation to Sec. 11(1) of the Act. It is also emerging that in the Audit report in prescribed Form no. 10B annexed with the return, said amount was shown as Rs.75,78,521/-. The explanation of assessee is that the amount stated in Form no. 10B is an inadvertent mistake. It is quite clear that in the subsequent Assessment Year of 2004-05 when assessee actually spent the said sum, the claim made was to the extent of Rs.79,54,625/-, as is borne out from the copy of statement of total income for Assessment Year 2004-05 placed in the Paper Book at pages 55 to 66. At the time of hearing, the learned representative pointed out that the claim of application of income to the extent of Rs.79,54,625/- with respect to Assessment Year 2003-04 stands accepted in the assessment for Assessment Year 2004-05, which has been finalized u/s 143(3) of the Act dated 29.12.2006. Therefore, the furnishing of Form no. 10B at an understated figure of Rs.75,78,521/- is ostensibly a mistake. Having regard to the entirety of facts and circumstances of the case, we find no reason to uphold the stand of Assessing Officer and as a consequence, order of CIT(A) is set-aside and Assessing Officer is directed to delete the addition of Rs.3,76,104/-. Thus, on this aspect, assessee succeeds.

8. Now, we may take up the appeal of Revenue, wherein the CIT(A) has decided the issue of set-off of Long Term Capital Gain of Rs.4,29,142/- against the brought forward Long Term Capital Loss for Assessment Year 1995-96 and carry forward of the balance unabsorbed Long Term Capital Loss of Rs.1,61,76,065/- in favour of the assessee. It is noted that the CIT(A) has allowed the stand of assessee considering the order of the predecessor CIT(A) in assessee's own case for the

instant assessment year dated 18.1.2007, wherein a similar issue was dealt with arising from the regular assessment framed by the Assessing Officer u/s 143(3) of the Act dated 27.3.2006. Before us, the learned representative for the respondent-assessee pointed out that in the original assessment proceedings, appeal of the assessee was allowed by the CIT(A) after receiving a Remand report from the Assessing Officer wherein such a claim was agreed to by the Assessing Officer. It has also been pointed out that against the order of CIT(A) dated 18.1.2007, which has since been followed by the CIT(A) now, the Department had not come in appeal before the Tribunal.

9. We find that the aforesaid factual matrix brought out by the learned representative for the assessee is not disputed by the Revenue. Therefore, in our view, the CIT(A) made no mistake in allowing the claim of assessee and, therefore, the Revenue has to fail in its appeal.

10. In the result, the appeal of Revenue is dismissed.

11. Now, the only Ground remaining in the appeal of assessee is with regard to the validity of proceedings initiated u/s 147/148 of the Act. The same, in our view, is rendered academic since the additions made by the Assessing Officer in the impugned reassessment proceedings have since been deleted and there does not remain any grievance of the assessee. Therefore, the said Ground is not adjudicated for the present, as it is rendered academic.

12. Resultantly, whereas the appeal of Revenue is dismissed, that of the assessee is allowed, as above.

Order pronounced in the open court on 20th January, 2017.

Sd/-	Sd/-
(AMARJIT SINGH)	**(G.S. PANNU)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai, Date : 20th January, 2017

SSL

Copy to :

1) The Appellant
2) The Respondent
3) The CIT(A) concerned
4) The CIT concerned
5) The D.R, "I" Bench, Mumbai
6) Guard file

By Order

Dy./Asstt. Registrar
I.T.A.T, Mumbai