आयकर अपीलीय अधिकरण, मुंबई

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES 'A' MUMBAI

सर्वश्री आय.पी. बंसल, न्यायिक सदस्य /**एवं**

सर्वश्री संजय अरोड़ा , लेखा सदस्य के समक्ष ।

BEFORE SHRI I.P. BANSAL, JUDICIAL MEMBER /AND

SHRI SANJAY ARORA, ACCOUNTANT MEMBER

आयकर अपील सं. / ITA No. 5847/Mum/2011

निर्धारण वर्ष /Assessment Year 2008-09

Shri Lachmandas Jiwnani, 84, Arcadia, 195, Nariman Point, Mumbai 400 021.	**बनाम**/ Vs.	The ITO 12(3)(2), Mumbai.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAFPJ 0277K		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Appellant by :	Shri Vimal Punmiya
Respondent by :	Shri M.L.Perumal

सुनवाई की तारीख / **Date of Hearing : 25/02/2014**

घोषणा की तारीख /**Date of Pronouncement : 25/02/2014**

आदेश / O R D E R

PER I.P.BANSAL, JM:

This is an appeal filed by the assessee. It is directed against an order passed by Ld. CIT (A)-23, Mumbai dated 22/06/2011 for the assessment year 2008-09. The grounds of appeal read as under:

1. The Commissioner of Income Tax (A) erred in adding the interest on Bank loan of Rs.11,37,521/- claimed by the assessee in its return of income.
2. The Ld. Commissioner of Income Tax (A) erred in confirming the disallowance of Rs.16,31,853/- under the head "Income from

Business & profession" on account that the expenses claimed by the assessee are not related to business activity stated by the assessee."

3. The Ld. Assessing Officer erred in serving the order dated 4/1/2011 which itself is bad-in-law is also confirmed.
4. The. Ld. Commissioner of Income Tax (A) erred in confirming the charging interest u/s. 234A, 234B & 234C of the Income Tax Act,1961.
5. The Ld. Commissioner of Income Tax (A) erred in confirming the penalty u/s. 271(1)(c) of Income Tax Act, 1961."
6. The appellant craves leave to add further grounds or to amend or alter the existing grounds of appeal on or before the date of hearing."

2. At the outset it was pleaded by Ld. AR that the issues raised in Ground No. 1 & 2 are covered by the earlier order of the Tribunal and reference was made to the order dated 17/1/2014 passed in ITA No.4030/Mum/2013 for assessment year 2007-08. Copy of order was placed on our record and was also given to Ld. DR.

2.1 It was further submitted that Ground No.3 is not pressed and Ground No.4 is regarding interest levied under section 234A, 234B and 234C of the Income Tax Act, 1961 (the Act) which is consequential to the assessed income and, therefore, AO may be directed to recompute the interest accordingly.

2.3 Apropos Ground No.5, it was submitted that the same is premature and may be dismissed and Ground No.6 is general in nature.

3. On the other hand, Ld. DR did not object such submissions of the assessee that Ground No.1 & 2 are covered by the earlier decision of the Tribunal.

4. For the sake of completion of facts and decision of Tribunal on Ground No.1, the relevant portion of aforementioned order of the Tribunal is reproduced bellow:

2. In ground No. 1 the assessee has disputed the order of Ld. CIT(A) in disallowing the interest of Rs. 5,18,912/- claimed by the assessee u/s 24(b) of the Income Tax Act.

3. The relevant facts giving rise to this ground of appeal are that the assessee had two properties which are stated to be let out to Saraswat Co-operative Bank Ltd. The ground floor of the premises Sailor building at Fort in Mumbai was purchased by the assessee in the year 1989 and let out to Saraswat Co-operative Bank Ltd. in the year 1994. There is no dispute in respect of the said ground floor of the premises.

3.1 The assessee purchased first floor of the premises of the said Sailor building at Fort Mumbai in the year 2002. The said property was also let out by the assessee to Saraswat Co-operative Bank Ltd. in January 2004. The assessee took advance of Rs. 51,00,000/- from Saraswat Co-operative Bank Ltd., which was equivalent to advance rent of 60 months bearing interest at the rate of 12% per annum chargeable at monthly outstanding balance. The assessee claimed that the said advance from Saraswat Co-operative Bank Ltd. was obtained as loan for purchase of the said property i.e. first floor of the said building and the interest paid on the said advance amount is deductible u/s 24(b) of the Income Tax Act. The AO did not accept the contention of the assessee and stated that the said advance was a rent and it could not be said to be a loan taken by the assessee for purchase of the property. That the assessee does not fulfill the criteria laid down u/s 24(b) of the Act and disallowed the claim of interest of the assessee. Being aggrieved assessee filed appeal before the first appellate authority.

4. Ld. CIT(A) also did not accept the contention of the assessee inspite of the fact that the assessee furnished the copy of the letter dated 12th June 2002 from the bank which agreed to pay to the assessee the amounts as rent advance equivalent to 60 months rent on the interest at the rate of 12% per annum chargeable on monthly outstanding balance. That the assessee utilized admittedly out of the said advance of Rs. 51,00,000/- a sum of Rs. 29,00,000/- for purchasing the said first floor of the premises in August 2002 and rent out to the bank in January 2004. The Ld. CIT(A) also observed that the rent advance in respect of first floor of the property in 2004 could not have been utilised for purchase of the property in 2002. It was also observed by Ld. CIT(A) that the assessee utilised only a sum of Rs. 29,00,000/- for acquiring the tenancy right in the said property and the contention of the assessee that the balance amount out of Rs. 51,00,000/- was utilised for undertaking repairs and renovation of the property, is not supported by any evidence. Thus the Ld. CIT(A) confirmed the action of the AO. Hence the assessee is in further appeal before the Tribunal.

5. The Ld. AR on behalf of the assessee filed a written submission giving the details of the fact, wherein it is stated that the assessee made a proposal to Saraswat Co-operative Bank Ltd. to arrange funds for acquiring the first floor premises and the bank showed interest in obtaining on rent the said premises for its banking operation. To enable the assessee to acquire the property, the Bank made an advance of Rs. 51,00,000 and termed the said amount as advance rent. The Ld. AR submitted that out of the said fund the assessee utilized a sum of Rs.

29,00,000/- for acquisition of the property. The assessee has also stated that the balance amount was utilized for renovating and to carry out the other internal structural work as per requirements of the bank so that bank could operate its business activity from the said premises. Therefore this entire amount was utilized for the purpose of purchase of said first floor of the property as well as to carry out internal structural work to cater to the needs of the bank. The assessee submitted that he had paid the interest on the said advance received by it and, therefore it was a loan taken by the assessee for purchase of the property. The Ld. AR referred to section 24(b) of the Act and stated that it talks of borrowed capital and not talks of borrowed loan. Since the assessee paid the interest on the said advance taken by the assessee from Saraswat Co-operative Bank Ltd. at the rate of 12% per annum, which was utilized to purchase first floor of the premises, the assessee is entitled to claim interest payment u/s 24(b) of the Act..

5.1 On the other hand Ld. DR relied upon the order of Ld. CIT(A). The Ld. CIT(A) submitted that the said amount was released in April 2004, whereas the assessee acquired the property in August 2002, therefore, it could not be said that the property was acquired by the assessee out of advanced funds given by the Saraswat Co-operative Bank Ltd. The Ld. DR further submitted that the Ld. CIT(A) has discussed this issue in her order that the rent advance on the first floor of the property was granted to the assessee only in the month of January 2004 when the possession of the property was gien to the bank and the deed was executed. Therefore, the Ld. CIT(A) has rightly concluded that the assessee could not have received any advance rent prior to that date.

5.2 We have carefully considered the orders of the authorities below and the submissions of Ld. Representatives of the parties. We have also perused relevant pages of the paper book placed on record. There is no dispute to the fact that the assessee has acquired first floor of the premises, Sailor building situated at Fort, Mumbai, in August 2002 and paid a sum of Rs. 29,00,000/- for acquisition of the said property. We have also observed from pages 26 to 28 of the paper book, which is a copy of the letter from Saraswat Bank dated 12th June 2002 that the bank agreed to give an advance equivalent to 60 months rent to the assessee bearing interest at the rate of 12% per annum with monthly rent to enable the assessee to purchase the said property and to let it out to the bank on the terms and conditions mentioned in the said letter. We also observe that the assessee on receipt of Rs. 51,00,000/- from Saraswat Bank transferred a sum of Rs. 37,00,000/- to its another bank account, ABN Amro Bank account on 11th July 2002 and on 21st August 2002 issued a cheque from ABN Amro Bank account of Rs. 29,00,000/- for acquisition of property. Therefore, we are of the considered view that the assessee utilized the sum of Rs. 29,00,000/- out of the amount received by the assessee from Saraswat Bank as advance rent for purchasing the first floor of the said premises Sailor building. The fact that the said amount was advanced by the Saraswat Bank to the assessee is not in dispute and the only dispute is as to whether the said amount advanced by Saraswat Bank to the assessee in the form of rent advance could be considered as amount borrowed by the assessee from the said Bank for purchase of the property. On consideration of terms and conditions of the letter dated 12th June 2002 (placed at pages 26 to 28 of the paperbook), we are of the considered view that it was a loan advanced by Saraswat Bank Cooperative Ltd to the assessee which was *utilized by the assessee for purchase of first floor of the premises and the said rent/advance carried interest at the rate of 12% per annum with monthly rest. We are of the considered view that though the said amount advanced to the assessee is termed as rent advance but in all form it is an advance of loan to the assessee and a part of the said loan has been utilized by the assessee for purchase of first floor of the premises which was later on let out by the assessee to Saraswat Bank Cooperative Ltd. and the rental income has been derived by the assessee. Therefore, we are of the considered view that the assessee utilized the sum of Rs. 29,00,000/- for purchase of the immovable property i.e. first floor of Sailor building at Fort, Mumbai, and the assessee is entitled to get the deduction of the interest paid thereon u/s 24(b) of the Income Tax Act. In regard to further contention of the assessee that the balance amount was utilized by the assessee for carrying out repairs and changes in the internal structure of the said property to make it suitable for the bank to carry out its banking operations, the assessee has admittedly not furnished any evidence for undertaking the repair and renovation of the said property. At the time of hearing the Ld. AR also expressed his inability to produce the requisite evidence to support the claim for undertaking repair and renovation of the said property. Hence we are of the considered view that the assessee has utilized only a sum of Rs. 29,00,000/- out of the advance of Rs. 51,00,000/- received by the assessee from Saraswat Bank Coopeartive Ltd. for purchase of first floor of the property and the assessee is entitled to get the deduction of interest on Rs. 29,00,000/- u/s 24(b) of the Income Tax Act. Hence ground no. 1 of the appeal taken by the assessee is allowed in part i.e. to allow the deduction of interest u/s 24(b) of the Act in respect of interest paid on Rs. 29,00,000/- to Saraswat Bank Cooperative Ltd., the amount which was utilized by the assessee for purchase of first floor of the property at Sailor building, Fort, Mumbai.*

4.1 For Ground No.2, the observation of the Tribunal are as under:

6. In ground no. 2 of the appeal the assessee has disputed the order of Ld. CIT(A) in not allowing the set off of business loss of Rs. 27,89,564/- against income from house property.

7. The relevant facts are that the assessee is an individual engaged in the business of share trading and also derives income from house property. The assessee filed return of income declaring total income of Rs. 61,95,047/-. It is stated that during the course of assessment proceedings the assessee submitted a letter along with revised computation of income that the assessee had carried forward its business loss wrongly instead of setting off siad business loss against income from house property. It is stated that the AO did not take into account the revised computation filed by the assessee along with the letter. Being aggrieved, assessee filed appeal before first appellate authority.

8. The Ld. CIT(A) has held that the assessee furnished a copy of his return of income for assessment year 2010-11 and the balance-sheet for the said period. From the details of stock disclosed in the balance-sheet of assessment year 2010-

11, it was observed that closing stock of shares as in assessment year 2007-08 and the opening stock of the assessment year 2010-11 are one and the same. The Ld. CIT(A) concluded that in the intervening period i.e A.Y. 2008-09 and 2009-10, no business was carried on by the assessee as was the situation in 2007-08. It is further stated that as per composition of closing stock as on 31st March 2007, it is observed that the same consists exclusively of investments in group companies. The total closing stock as on 31st March 2007 and opening stock as on 01.04.2006 is determined at Rs. 1,21,12,053/- and the entire amount consists of investment in various group companies of the assessee. The Ld. CIT(A) has further stated that the assessee carried on share trading activity up to assessment year 2004-05 and no details for assessment years 2005-06 & 2006-07 was furnished. That the assessee carried on his share trading activity during earlier years prior to assessment year 2004-05 and whatever business was carried on in the assessment year 2010-11, is entirely on account of fresh purchase made during that period. The Ld. CIT(A) concluded that the business carried on in the past came to an end and there was no business activity in the assessment year under consideration. Therefore, the Ld. CIT(A) rejected the loss claimed by the assessee.

8.1 CIT(A) has further stated that without prejudice to above, that no business was carried on by the assessee during the relevant previous year, the claim for deduction on account of various expenses is also examined. The total losses claimed by assessee is Rs. 27,89,564/-. The Ld. CIT(A) has stated that the assessee has not produced any supporting vouchers and only copies of ledger accounts for various items of expenses have been furnished. The Ld. CIT(A) has further stated that the assessee has claimed the deduction on account of interest on bank loan of Rs. 10,77,827/- and out of it an amount of Rs. 5,18,912/- has been added back as the same is claimed as deduction from house property income. The Ld. CIT(A) has further stated that the balance sum of Rs. 6,12,923/- claimed as deduction in the profit and loss account is on account of rent advance pertaining to the property in ground floor. Since no evidence was brought on record to show that the said rent advance was utilized for the purpose of assessee's business of share trading, the interest claimed of Rs. 6,12,923/- is not allowable. The Ld. CIT(A) has also stated that the other claim of the assessee on account of deduction of rent of Rs. 1,28,574 and society charges of Rs. 9,31,469/-, is also not allowable as no supporting documents/evidences have been produced. In view of above, the Ld. CIT(A) did not allow the claim to set off the business loss claimed by the assessee against income from house property. Hence the assessee is in further appeal before Tribunal.

9. During the course of hearing the Ld. AR submitted that the assessee due to oversight, did not claim business loss of Rs. 27,89,564/- against income from other sources. He submitted that the assessee vide letter dated 14th December 2009 pointed out mistake to the AO in the course of assessment proceedings, but the AO did not determine any loss for the year nor he set off the same against assessee's income from house property. The Ld AR submitted that during the assessment year 2005-06, the assessee had a turnover of Rs. 46,00,000/-. That the assessee was carrying on business of purchase and sale of shares regularly but due to volatile market conditions, the assessee did not undertake any business activity during the assessment year 2007-08. The Ld. AR submitted that *the assessee again started purchase and sale of share activity during assessment year 2010-11 and in the intervening period, the assessee did not carry on the business due to lull in the market and uncertain fluctuation. He submitted that assessee did not stop business and, therefore, not allowing to set off business loss for the assessment year under consideration against the income from other sources i.e. income from house property is not justified. He submitted that Ld. CIT(A) has stated that closing stock of shares as on 31st March 2007 is the opening stock as on 01st April 2009, it clearly shows that there was a suspension and not complete stoppage of business activities. That assessee had been computing his income under the head income from business and profession in all the assessment years, which shows that business activities were still on. The Ld. AR relied on the decision of Hon'ble High Court of Madras in case of Vairavan Chettiar vs Commissioner Of Income-Tax and (72 ITR 114) submitted that if the assessee had stopped its business due to lull in the market and inactivity for some period but kept its apparatus alive, it would be regarded as continuing the business activity and the losses/loss suffered by it has to be allowed as business loss. There may be long intervals of inactivity and a concern may still be a going concern, though it may, for some time, be inactive and dormant. The Ld. AR also referred the decision of the Hon'ble High Court of Bombay in the case of Hindustan Chemicals Works Ltd. Vs. CIT (124 ITR 561) and submitted that if there is no activity because of lull in the business, it is a temporary suspension of the business and could not be held that the business has been stopped. The Ld. AR also submitted that Income Tax Appellate Tribunal's Mumbai bench in the case of Bechtel International Inc., USA Vs. ADIT in ITA No. 2188/Mum/2010 vide its order dated 18th June 2011 also held that mere inactivity for a limited period does not mean that the taxpayer's business ceased to exist or that it did not carry on any business at all. Expenditure incurred during the said period of inactivity/lull is allowable even though the taxpayer has not earned any business income. The Ld. AR submitted that the business was only inactive or dormant due to the prevailing circumstances in the year, it does not mean to stoppage of the business. He submitted that the business loss should be allowed to be set off against the income from house property.*

9.1 On the other hand Ld. DR relied upon the order of CIT(A).

9.2 We have considered the submissions of the Ld. Representatives and carefully perused the order of Ld. CIT(A). There is no dispute to the fact that in the assessment year under consideration i.e. assessment year 2007-08, the assessee did not carry on its business of purchase and sale of shares. As per trading and P&L account for the year ending March 31st 2007, copy placed at page 7 of the paper book, the opening stock as well as the closing stock of shares remained same. The assessee stated that due to volatile market condition it did not undertake any business activity but the said business was revived or started from assessment year 2010-11. For the intervening period also, the assessee has stated that it did not carried on any activity due to uncertainty in the market condition. We also observe that prior to the assessment year under consideration, the assessee also did not carry on any activity of purchase and sale of shares. Further during the assessment year 2005-06, the assessee had a turnover of Rs. 46,00,000/- and earlier to that assessment year i.e. assessment year 2004-05 it *was Rs. 24.51 lakhs. Considering the facts and circumstances of the case that prior to the assessment year under consideration and also subsequent to the assessment year under consideration, the assessee had carried on the share transaction and the same has been considered as business of the assessee, we are of the considered view that it could not be said that the assessee had stopped its share business activity merely because assessee did not carry on any purchase and sale of shares in the assessment year under consideration and/or two years prior to the assessment year under consideration or three years subsequent to the assessment year under consideration. The closing stock as on 31st March 2007 has not been disposed by the assessee but the same was carried on from year to year till the assessee again started its business of purchase and sale of shares from assessment year 2009-10. Since the assessee has not filed details of shares held in stock, it is not known whether the assessee was holding shares which could be traded in open market. When the assessee resumed his business of purchase and sale of shares, it is not known whether the assessee sold any of shares held as stock-in-trade. It might be possible that the assessee when resumed trading in shares, he started with fresh purchase and sale of shares. All these facts need verification. The assessee will furnish requisite details of the shares held as stock-in-trade to the AO and the AO will verify the said details and decide the issue as to whether the assessee had temporarily suspended his business or there was complete stoppage of business by assessee. In case, the AO decides that there was a temporary suspension of business by assessee as contended by assessee, the assessing officer will set off of business loss against the income under the other head i.e. "Income from house property" in the assessment year under consideration. In view of above and also the fact that the assessee has not filed requisite details of total loss claimed by assessee at Rs.27,89,564/-, as stated by ld. CIT(A) in para 16, we direct that the assessee will furnish requisite details to the AO and the AO will decide the same as per law by a reasoned order. Hence, Ground No.2 of the appeal taken by assessee is allowed for statistical purposes by restoring the issue to the AO to decide the same afresh on the basis of evidence that may be furnished by assessee before him in accordance with law.*

4.2 As no difference was pointed in the facts and circumstances of the case as compared to the facts of A.Y 2007-08, respectfully following the aforementioned decision of the Tribunal, Ground No.1 is allowed in part in the same terms as it has been partly allowed in respect of assessment year 2007-08. Ground No.2 is restored back to the file of AO with similar directions as have been given in respect of A.Y 2007-08. Ground No.2 is considered to be allowed for statistical purposes.

5. Ground No.3 is dismissed being not pressed.

6. Apropos Ground No.4, the AO is directed to recomputed the interest under section 234A, 234B and 234C in accordance with the assessed income after giving effect to this order.

7. Apropos Ground No.5, the same is dismissed being premature.

8. In view of the above discussions, the appeal filed by the assessee is partly allowed for statistical purposes.

Order pronounced in the open court on 25/02/2014

आदेश की घोषणा खुले न्यायालय में दिनांकः 25/02/2014 को की गई ।

Sd/- Sd/-

(संजय अरोड़ा / **SANJAY ARORA**) (आय.पी. बंसल **/ I.P. BANSAL**)

लेखा सदस्य **/ ACCOUNTANT MEMBER** न्यायिक सदस्य **/ JUDICIAL MEMBER**

मुंबई Mumbai; दिनांक Dated 25/02/2014

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**

व.नि.स./*Vm*, Sr. PS