

IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH : KOLKATA

[Before Hon’ble Shri Aby. T. Varkey, JM & Shri M.Balaganesh, AM ]

I.T.A No. 774/Kol/2013

Assessment Year : 2007-08

Chanchal Kumar Ash  
[PAN: ACXPA 6531 H]  
(Appellant)

-vs- DCIT, Circle-50, Kolkata  
(Respondent)

For the Appellant : Shri Anikesh Banerjee AR  
Mrs. Saswati Mitra Dutta, Advocate.

For the Respondent : Shri R.P. Neogi, Addl. CIT

Date of Hearing : 05.04.2018

Date of Pronouncement : 13.04.2018

**ORDER**

**Per M.Balaganesh, AM**

1. This appeal by the assessee arises out of the order passed by the Learned Commissioner of Income Tax (Appeals) – XXXII, Kolkata (in short the Id CITA) in Appeal No. 59/XXXII/10-11/Cir-50/Kol dated 02.01.2013 against the order passed by the DCIT, Circle-50, Kolkata [ in short the Id AO] under section 143(3) of the Income Tax Act, 1961 (in short “the Act) for the Assessment Year 2007-08.

2. The first issue to be decided in this appeal is as to whether the Id AO was justified in treating loss from derivative transactions amounting to Rs 19,63,492/- as loss from speculation business and not allowing the setting off of this loss against regular business income and income from other sources, in the facts and circumstances of the case.

2.1. The brief facts of this issue are that the assessee is an individual running a petrol pump and had filed his return of income for the Asst Year 2007-08 on 31.10.2007 declaring Nil income. The assessee was directed to produce the books of accounts, copies of bank statements and other relevant papers and documents by the Id AO in the assessment proceedings. The Id AO observed that the authorized representative of the assessee appeared from time to time and the case was heard with reference to the papers, documents and submissions furnished by him. The Id AO observed that assessee had derived his income during the year under appeal from retail outlet of Indian Oil Petrol Bunk. He was also having income from other sources. The Id AO observed that the assessee had claimed loss of Rs 19,63,492/- as regular business loss and had set off the same against his petrol bunk business income of Rs 4,18,968/- . The Id AO treated the loss of Rs 19,63,492/- was treated as speculation loss. The assessee did not file any appeal against this action of the Id AO before the Id CITA , though an appeal was preferred in respect of other additions made in the assessment. Hence there was no occasion for the Id CITA to address this issue. The assessee had raised a ground for the first time before us as under:-

*1. Under the facts and circumstances of the case the ld. Deputy Commissioner of Income Tax, Circle 50, Kolkata has erred in law as well as in fact in treating loss from derivative transactions amounting to Rs. 19,63,492/- as loss from speculation business and not allowing the setting off of this loss against Business Income and Income From Other Sources.*

2.2. We have heard the rival submissions. We find that the ground raised before us involves a mixed question of fact and question of law and it goes into the root of the matter. It is not clear from the records that whether the assessee had made any factual submissions before the Id AO that the loss of Rs 19,63,492/- was incurred out of derivative transactions are not. We are not able to ascertain the same from the paper book filed by the assessee except placing reliance on Form 10DB filed by the Id AR. No doubt, if the said loss is incurred from derivative transactions, the same would not be speculation loss in terms of section 43(5)(d) of the Act. This requires factual

verification by the Id AO. Hence we deem it fit and appropriate, in the interest of justice and fairplay, to remand this issue to the file of Id AO for denovo adjudication. The assessee is at liberty to furnish necessary documents and evidences in this regard in support of his contentions. The issue regarding the eligibility to set off this loss with other business income and other sources and balance , if any, to be carried forward to subsequent years, shall be decided by the Id AO, pursuant to the decision taken in respect of Ground No. 1 supra. Accordingly the Ground No. 1 raised by the assessee is disposed off accordingly.

3. The next issue to be decided in this appeal is as to whether the Id CITA was justified in upholding the addition of Rs 11,37,227/- u/s 68 of the Act in the facts and circumstances of the case.

3.1. The brief facts of this issue are that the Id AO observed that the assessee had shown an amount of Rs 11,37,227/- as 'Unsecured Loans' in his Balance Sheet being the amounts received during the year. The assessee filed the list of the loan creditors numbering to 61 persons from whom amounts were received in the total of Rs 11,37,227/- during the year. The Id AO observed that on perusal of the said list, the minimum amount of loan was Rs 16,227/- and maximum amount was Rs 19,500/-. The assessee had received Rs 18,500/- each from 17 loan creditors, Rs 18,000/- each from 11 loan creditors, Rs 19,000/- each from 16 loan creditors and Rs 19,500/- each from 13 loan creditors and Rs 17,000/- each from 3 loan creditors and a sum of Rs 16,227/- was recorded in the name of Shri Nirmal Sarkar. The assessee furnished the loan confirmation from all the 61 loan creditors in the same type of statement of accounts printed from the same place. In order to verify the genuineness of loan, summons u/s 131 of the Act were issued by the Id AO to 40 of them at random basis. In response to the said notices, the following persons appeared before the Id AO :-

Sl.No.	Date	Name	Loan Amount
1.	10.11.09	Sahil Biswas	Rs.19,500/-
2.	10.11.09	Budha Sena	Rs.19,500/-
3.	10.12.09	Binoy Mondol	Rs.18,000/-
4.	10.12.09	Bablu Roy	Rs.19,500/-
5.	07.12.09	Ananda Sarkar	Rs.19,500/-
6.	07.12.09	Rabin Mondol	Rs.19,000/-
7.	07.12.09	Bishnu Pada Mondol	Rs.18,500/-
8.	10.12.09	Ashim Roy	Rs.19,000/-

3.2. The Id AO recorded statements from aforesaid persons and found that none of the so-called loan creditors were having sound financial ability to afford the loan to a Petrol Pump Owner (i.e the assessee herein) since they were found to be a daily wage earner having income during the financial year for Rs 50/- to Rs 60/- per day as a daily wage earner. The Id AO also observed that even some of those persons used to work under the assessee as a daily paid worker during the period. The Id AO reproduced the relevant portion of the statements recorded from those persons to justify his conclusion drawn above. The Id AO concluded that the persons who appeared before him had an annual income ranging from Rs 21,900/- to Rs 43,800/- even if they have worked for 365 days in the year, except Sri Salil Biswas who claimed to have earned Rs 90,000/- in financial year 2006-07 from fishing and agriculture though he could not produce any evidence as to his source of income.

3.3. The Id AO further observed that one Shri Nirmal Sarkar is stated to have paid the assessee a sum of Rs 16,227/- as loan. He observed that the figure of loan itself is doubtful. The Id AO issued summons u/s 131 of the Act to him on 4.11.2009 but the party did not turn up. The authorized representative of the assessee was directed to

produce the said party on 30.11.2009 vide order sheet noting dated 23.11.2009, which remained uncomplied. With regard to the absence of 32 persons ( difference between 40 persons to whom summons were issued and 8 persons who appeared before the Id AO) , the assessee submitted vide his letter dated 16.12.2009 that as those are casual manual workers like cultivation of land, fishing, farming and other workers in the village area, they should be given adequate time to make their deposition. The Id AO observed that this submission of the assessee makes it clear that the persons are casual daily manual workers who do not have their financial stability and also it is obvious that the assessee does not want to present them before the department by taking a plea which cannot be accepted in view of the fact that the assessee knows it very well that his case is getting time barred by limitation by the end of the calendar year. Accordingly, the assessee was show caused as to why the sum of Rs 11,37,227/- representing loans should not be treated as amounts received from bogus parties and taxed u/s 68 of the Act. In response the assessee submitted that as per list provided of 61 loan creditors, 21 persons were checked personally by the Id AO on 9.11.2009 who were personally present before the Id AO. It was further submitted by the assessee that:

*“In this connection it is humble submission that all the said persons depends for their earnings as casual manual workers like cultivation of land, fishing, farming and other works in the village area moreover it is now high time of harvesting of crops and most of them are engaged in such works. They all are being very innocent having no such profoud education background but honest and sentimental native people.*

*Under the circumstances your humble petitioner earnestly requests to consider the fact in the matter of aforesaid nature / character of the summoned persons in my case during hearing and in no way consider their absence if any absconding to face the inquiry. I would request earnestly to give them all adequate time to decide my case of proceedings and oblige.”*

3.4. The Id AO observed that the submissions of the assessee are not acceptable in view of the fact that the Id AR was initially asked whether he could produce the persons who

are claimed to have given loan to the assessee, the Id AR brought around 20 persons from whom statements could not be recorded on the same date viz 10.11.2009 (not on 9.11.2009). However, statements of the two persons were recorded on that date and the Id AR was requested subsequently to send 3 persons in a day vide order sheet noting dated 23.11.2009. The Id AO observed that the Id AR was allowed sufficient opportunity to produce the so-called loan creditors but he could produce only 8 of them including the two persons whose statement was already recorded on 10.11.2009. The Id AO observed that the creditworthiness of the parties could not be proved beyond doubt as well as the genuineness of the transactions. With regard to the persons who were not summoned or were absent, the Id AO observed that the same ratio would be applied keeping in view the judgment in the case of Durga Prasad More vs CIT reported in 82 ITR 540 (SC) and Sumati Dayal vs CIT reported in 214 ITR 801 (SC) where in it was stated that an evidence has to be judged by applying the test of human probabilities and an inference is to be drawn on the basis of circumstance available on record. Accordingly, the Id AO added the entire loan amount of Rs 11,37,227/- as bogus as unexplained cash credit u/s 68 of the Act.

4. The assessee filed additional evidences before the Id CITA which were sent to the Id AO for remand report on 27.8.2012. The Id AO sent the remand report on 5.10.2012 as under:-

*" As per your kind direction the assessee was asked to appear before the undersigned on 28/09/2012 vide this office letter dated 07/09/2012. In response to above letter Shri Chanchal Kr. Ash, assessee himself appeared along with following two loan creditors:*

- (1) Shyamal Halder: Shri Shyamal Halder, loan creditor has stated that I have given cash loan amounting to Rs. 19,000/- on 01/6/2006 to Sri chanchal Kr. Ash out of my personal savings. I am a small seasonal business man and also filed a Xerox copy of the Voter ID Card and his signature is verified from the loan confirmation and it is found in order.*
- (2) Samar Dey: Sri Samar Dey, Loan creditor has stated that I have given cash loan amounting to Rs. 18,500/- on 01/06/2006 to Shri chanchal Kr. Ash out of my personal savings. I am a small cultivator and also filed a Xerox Copy of the Voter ID Card and his signature is verified from the loan confirmation and it is found in order.*

*The assessee has produced only two loan creditors out of sixty one loan creditors. The assessee has failed to produce fifty-nine loan creditors till today. Hence, your hour is requested to do the needful as per law.*

5. The Id CITA observed that no rejoinder to the remand report was filed by the assessee before him. The Id CITA observed that the three main ingredients viz (i) identity of the creditors ; (ii) creditworthiness of the creditors and (iii) genuineness of the transactions were not proved by the assessee in the instant case either during the assessment proceedings or during the remand proceedings despite giving several opportunities. Accordingly, he confirmed the addition made in the sum of Rs 11,37,227/- u/s 68 of the Act.

6. Aggrieved, the assessee is in appeal before us on the following grounds:-

*2.a) Under the facts and circumstances of the case the Ld. Commissioner of Income Tax (Appeals)-XXXII, Kolkata has erred in law as well as in fact in confirming the addition of Rs. 11,37,227/- under section 68 of the Income Tax Act, 1961, by treating Unsecured Loans of the assessee as bogus.*

*b) Under the facts and circumstances of the case the ld. Commissioner of Income Tax (Appeals)-XXXII, Kolkata has erred in law as well as in fact in not considering the particulars of information & documents submitted by the assessee with respect to his Unsecured Loan Creditors.*

*c) Under the facts and circumstances of the case the ld. Commissioner of Income Tax(Appeals)-XXXII, Kolkata has erred in law as well as in fact in not considering the recorded statements of the summoned and examined Unsecured Loan Creditors of the assessee.*

7. We have heard the rival submissions. We find that the Id AR argued that the assessee is running his business in a village where no banking facilities are available. He argued that the parties in order to keep safe custody of their hard earned savings had come forward to offer loans to the assessee in cash totaling to Rs 11,37,227/- comprising of 61 persons. He submitted that some of these persons had even appeared before the Id AO in response to the summons issued u/s 131 of the Act and had confirmed the fact of giving loan to the assessee herein. While this is so, there is no case of making any addition treating the loan creditors as bogus u/s 68 of the Act. He

stated that the assessee was suffering from serious illness related to cardiac problem and accordingly could not produce the loan creditors before the Id AO in the remand proceedings. In response to this, the Id DR vehemently relied on the findings of the lower authorities in as much as the creditworthiness of the loan creditors were not proved beyond doubt by the assessee and hence prayed for non-interference of the orders of the lower authorities. We find that all the 61 persons had given loan confirmations before the Id AO confirming the fact of giving loans to the assessee. We find that some of the loan creditors had in fact appeared before the Id AO in response to the summons issued u/s 131 of the Act. The Id AO had not given any credit even for the parties who had appeared before him in response to summons u/s 131 of the Act. The assessee had also stated that more parties could have been produced before the Id AO during remand proceedings but for the sickness of the assessee. In these circumstances, we deem it fit and appropriate in the interest of justice and fair play, to remand this issue to the file of the Id AO for de novo adjudication to give one more opportunity to the assessee to produce the parties who were not produced earlier before the Id AO. Accordingly, the Ground Nos. 2(a) to 2(c) raised by the assessee are allowed for statistical purposes.

8. In the result the appeal of the assessee is allowed for statistical purposes.

**Order pronounced in the Court on 13.04.2018**

Sd/-  
[A.T. Varkey]  
Judicial Member

Sd/-  
[ M.Balaganesh ]  
Accountant Member

Dated : 13.04.2018

SB, Sr. PS

Copy of the order forwarded to:

1. Chanchal Kumar Ash, Khantura, Gobardanga, P.O.-Khantura, District-North 24 Parganas, Pin-743273
2. DCIT, Circle-50, Kolkata, Manicktola Civic Centre,Uttarapan Shopping Complex, DS-II, Second Floor, Ultadanga, Kolkata-700054.
3. C.I.T(A)- , Kolkata      4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Senior Private Secretary  
Head of Office/D.D O. ITAT, Kolkata Benches

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