

IN THE INCOME TAX APPELLATE TRIBUNAL  
“E” Bench, Mumbai  
Before Shri B.R. Baskaran (AM)& Shri Pawan Singh (JM)

I.T.A. No. 30/Mum/2016 (Assessment Year 2010-11)

Toucan Food & Snacks Pvt. Ltd. 136, Great Western Building, Nagindas Master Road Extension Fort, Mumbai-400 001. PAN : AAAC1623R	Vs.	ACIT Rage 8(3)(3) Aayakar Bhavan M.K. Road Mumbai-400020.
(Appellant)		(Respondent)

Assessee by	Shri F.B. Andhyarujina
Department by	Shri V. Justin
Date of Hearing	7.06.2018
Date of Pronouncement	7.06.2018

ORDER

Per B.R. Baskaran (AM) :-

The appeal filed by the assessee is directed against the order dated 30.10.2015 passed by the learned CIT(A)-18, Mumbai and it relates to A.Y. 2010-11. The assessee is aggrieved by the decision rendered by the learned CIT(A) on the following issues :-

- (a) Addition of ₹ 698.40 lakhs made u/s. 28(iv) of the Act.
- (b) Disallowance of business loss of ₹ 4.36 lakhs.

2. The assessee-company was engaged in the business of trading in food items and edible oil. It filed its return of income for the year under consideration declaring loss of ₹ 4,36,483/-. The Assessing Officer noticed that the assessee did not carry on any business activities during the year under consideration. Opening and closing stock was shown at the same figure of ₹ 208.76 lakhs. After considering the explanations of the assessee in this regard, the Assessing Officer took the view that the assessee has not carried on any business activity during the year and accordingly disallowed claim of loss of ₹ 4,36,483/-.

3. The Assessing Officer noticed from the Balance sheet of the assessee that it had received a sum of ₹ 698.40 lakhs by issuing “unsecured redeemable/convertible debentures during the year 1999-2000. As per the terms of issue of debenture, the same is convertible/redeemable on or after 30.11.2008. The entire debentures have been issued to a company named M/s. S.M. Finance Ltd., Hyderabad. The AO noticed that the debentures have not been redeemed or converted into share capital. Hence the Assessing Officer took the view that the debenture amount was no longer payable and hence assessee has derived benefit from its business activities in terms of sec. 28(iv) of the Act by non-paying debenture amount. In this regard, the Assessing Officer took support from the decision rendered by Hon'ble Bombay High Court in the case of Solid Containers Ltd. Vs. DCIT (308 ITR 417) and also decision rendered by Hon'ble Supreme Court in the case of T.V. Sundaram Iyengar & Sons Ltd. (222 ITR 344). Accordingly, the Assessing Officer assessed ₹ 698.40 lakhs as income of the assessee u/s. 28(iv) of the Act. The learned CIT(A) also confirmed the same and hence the assessee has filed this appeal.

4. The Learned AR submitted that the assessee could not redeem/convert debentures into share capital as the subscriber of debentures, M/s S.M Finance did not comply with the formalities in this regard. When questioned, as to whether these debentures have been redeemed or converted into Share capital subsequently or not, the learned AR, after consulting the company officials, submitted that these debentures have been converted into share capital in succeeding years. The Ld A.R submitted that the tax authorities have committed an error in invoking provisions of section 28(iv) of the Act to the transaction under consideration. The Ld A.R placed reliance in support his submissions on the decision rendered by Hon'ble Supreme Court in the case of Commissioner Vs. Mahindra & Mahindra Ltd. (Civil Appeal Nos. 6949-6950 & Others dated 24.4.2018), wherein Hon'ble Supreme Court has held that provisions of section 28(iv) of the Act, shall have application only in respect of any benefit or perquisite arising from the business in any form other

than in the shape of money. In the case before Hon'ble Supreme Court, loan obtained from Mahindra & Mahindra Ltd, was waived and accordingly the assessee disclosed ₹ 57.74 lakhs as cessation of liability. The Assessing Officer sought to tax the same as benefit arising to the assessee out of business and hence perquisite u/s. 28(iv) of the Act. Since the loan has been received by the assessee by way of cash, Hon'ble Supreme Court has held that the amount of ₹ 57.74 lakhs cannot be taxed u/s. 28(iv) of the Act.

5. The Learned AR submitted that the ratio laid down by Hon'ble Supreme Court in the above said case would squarely apply to the facts of the above cited case. Accordingly, learned AR submitted that the learned CIT(A) was not justified in confirming the assessment made u/s. 28(iv) of the Act.

6. On the contrary, learned DR placed strong reliance on the order passed by the learned CIT(A).

7. Having heard the rival contentions, we are of the view that there is merit in the contention of the assessee on two counts. First of all, the assessee has received amount by issuing debentures by way of cheque and hence as per the decision rendered by Hon'ble Supreme Court in the case of Mahindra & Mahindra Ltd. (supra), provisions of section 28(iv) of the Act shall not be applicable to it. Secondly, it is the contention of the assessee that the debentures have been converted into share capital in the subsequent years, in which case, impugned debenture amount cannot be considered to be a ceased liability. Accordingly, we set aside the order passed by the learned CIT(A) on this issue and direct the Assessing Officer to delete addition made u/s. 28(iv) of the Act.

8. Next issue relates to disallowance of business loss claimed by the assessee. We noticed from the assessment order that the assessee was carrying on its business activities in the immediately preceding assessment year i.e. A.Y. 2009-10. During the year under consideration the assessee did not carry on any trading activities. Hence the opening stock of ₹ 208 lakhs has

remained with the assessee as it is and hence was shown as closing stock. We noticed that neither the assessee nor the Assessing Officer has given break up details of various expenses claimed by the assessee. It is the settled proposition of law that the expenditure claimed by the assessee is fully allowable, if business activity was stopped on account of temporary lull in the business. On the other hand, if the assessee has completely stopped the business, then the expenditure relating to maintaining the status of the company shall be allowable as deduction.

9. In the instant case, there is no finding as to whether the business was stopped on account of temporary lull in the business or on account of complete stoppage of business. Hence, this issue requires fresh examination at the end of the Assessing Officer. Accordingly, we set aside the order passed by the learned CIT(A) on this issue and restore the same to the file of the Assessing Officer with the direction to examine the issue afresh in the light of principles discussed supra.

10. In the result, appeal filed by the assessee is treated as allowed for statistical purposes.

Order has been pronounced in the Court on 7.6.2018.

Sd/-  
(PAWAN SINGH)  
JUDICIAL MEMBER

Sd/-  
(B.R.BASKARAN)  
ACCOUNTANT MEMBER

Mumbai; Dated : 7/6/2018

Copy of the Order forwarded to :

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

6. Guard File.

//True Copy//

*PS*

BY ORDER,

Senior Private Secretary  
ITAT, Mumbai