

IN THE INCOME TAX APPELLATE TRIBUNAL “D” BENCH, MUMBAI

**BEFORE SHRI PRASHANT MAHARISHI, AM
AND
SHRI SUNIL KUMAR SINGH, AR**

ITA No. 3688/Mum/2023
(Assessment Year: 2014-15)

ACIT, Circle- 27(1)
408, 4th Floor, Tower No.6,
Vashi Railway Station
Complex, Vashi, Navi Mumbai,
Mumbai-400 703

(Appellant)

Vs. Deepak Chanderbhan Sudhija
225/226 Commodity exchange,
plot no.2/3/4 Sector-17, Vashi,
Navi Mumbai -400 705

(Respondent)

PAN No. BANPS6548H

Assessee by : None
Revenue by : Smt. Mahita Nair, DR

Date of hearing: 14.05.2024
Date of pronouncement : 21.05.2024

ORDER

PER PRASHANT MAHARISHI, AM:

01. ITA No.3688/Mum/2023 is filed by the Asst. Commissioner of Income Tax, 27(1), Mumbai, [the Ld AO] for A.Y. 2014-15, against the appellate order passed by the NFAC [The Ld CIT (A)] dated 18th August, 2023, wherein the appeal filed by the assessee against the assessment order passed under Section 143(3) read with section 147 of the Income tax Act, 1961 [the ACT] dated 30th December,

2016 by the Income Tax Officer, Ward 28(1)(3), Mumbai, was allowed.

02. Therefore, the learned Assessing Officer is aggrieved and have raised following grounds of appeal:-

“1. On the facts and in the circumstances of the case and in law, the CIT(A) has erred in allowing the appeal of the assessee without deciding the issue emanating from the order u/s 143(3) r.w.s 147 of the Act dated 29.12.2017.

2. On the facts and circumstances of the case and in law, the CIT(A) has erred in disposing grounds of appeal which were not the same as were raised in Form No. 35 dated 23.01.2023 in its order No. ITBA/NFAC/S/250/2023-24/1055244137(1) dated 18.08.2023.

3. On the facts and circumstances of the case and in law, the appellant prays that the Hon'ble Tribunal may kindly set aside the said order No. ITBA/NFAC/S/250/2023-24/1055244137(1) dated 18.08.2023 to the Ld. CIT(A) for afresh adjudication on the ground raised by the assessee in Form No. 35 dated 23.01.2018.

4. On the facts and circumstances of the case and in law, it is prayed that the appellant may be allowed to withdraw appeal in case the CIT(NFAC) recalls the

order dated 18.08.2023 as per request letter of the appellant.”

03. Brief facts of the case shows that the assessee is an individual who filed his return of income on 27th April, 2015, at a total income of ₹2,77,340/-. Assessment under Section 143(3) of the Income-tax Act, 1961 (the Act) was completed on 28th December, 2015, at the total income of ₹88,26,923/-. Subsequently, based on information received from the investigation wing on 8th March 2017, that assessee has carried out high value credit transaction of ₹6 crores. Accordingly, notice under Section 148 of the Act was issued on 31st March 2017. Assessee requested for the reason of reopening which were provided to the assessee-raised objection, which were disposed off by the speaking order dated 20th December 2017. The learned Assessing Officer asked about the details. It was found that assessee has taken unsecured loan from various parties, which are reflected as credit entries in its bank statements. The assessee was requested to furnish the evidence in support of genuineness of loan and therefore, the assessee was asked to furnish the details such as confirmation of bank statement of the lender and income tax return, etc. On 14th December 2017, he was also asked to produce the parties from whom the assessee has obtained this unsecured loans. The assessee failed to prove the genuineness of the loan, however, sent email on 22nd December, 2017, showing the narration of the entries in the bank statement, on the basis of such narration entries provided, name of the parties mentioned, the learned Assessing Officer issued notice under Section 133(6) of the Act to some of the parties as assessee failed to submit necessary details. The assessee was further asked to show cause why the addition under Section 68 of the Act should not

be made. The assessee submitted his reply on 28th December 2017, wherein it is contested that some of the loan amounts credited in the books of account of the assessee has been repaid subsequently and further, the entire arrangement of obtaining loan to make advances to one Mr. Jagdish Behlani for various business transactions. It is further stated that Mr. Jagdish Behlani did not return the money due to dispute and therefore, the entire sum is bad debt. It was stated that the complete amount received has been given to Mr. Jagdish Behlani. The learned Assessing Officer rejected the explanation stating that assessee's explanation does not satisfy the requirement of Section 68 of the Act and therefore, the addition under Section 68 of the Act was made to the extent of ₹2,46,92,401/- and total income of the assessee was determined at ₹3,35,19,324/- by an assessment order dated 29th December, 2017.

04. The learned CIT (A) allowed the appeal of the assessee by order dated 29th December 2017. Therefore, the learned Assessing Officer is aggrieved and is in appeal.
05. The learned Departmental Representative submitted that the statement of facts in form no.35 stated by the assessee is different and the details in the appellate order are different. It was submitted that CIT (A) has captioned one order but has stated something in order which is absolutely irrelevant to the matter
06. Assessee was issued notice, however, none appeared and therefore issue is decided on the merits of the case as per information available on record.



07. We have carefully perused the order of the Id CIT (A). We find that order devoid of any facts related to the appeal that will show from the following facts :-

08. The Id AO has passed assessment order for the impugned assessment year u/s 143(3) r.w.s.147 of the I.T. Act, 1961 on :29.12.2017. The Id CIT (A) in caption has mentioned this order, but in First Para of the order he mentioned as under :-

"The appeal was instituted on 25.01.2017 against the 143(3) order u/s dated 30.12.2016 for the AY 2014-15 passed by the Ward 28(1)(3), Mumbai (hereinafter referred to as the "AO")."

09. The Id CIT (A) records following Grounds of appeal :-

- i. Because, order passed under Section 143(3) is wholly without jurisdiction and is bad in law
- ii. Because, Ld. AO erred in law and on facts in exceeding the authority given under the Act, read with CBDT instructions for Limited Scrutiny
- iii. Because, Ld. AO erred in law and on facts in not obtaining the approval of the Principal CIT while completing assessment and the order passed is void-ab-initio Cases.
- iv. Because, Ld. AO erred in law and on facts in not following Principle of Consistency when in



past interest income stands assessed under the head Income from Business on net basis

- v. Because Ld. AO erred in law and on facts in applying the provisions of Section 44AB of the Income Tax Act
- vi. Because, Ld. AO erred in law and on facts in applying in provisions of section 40(a)(ia) for making disallowance of interest expense to the tune of Rs. 85,49,579/- for nondeduction of TDS
- vii. Because, Ld. AO erred in law and on facts in not appreciating the fact that the provisions of section 194A are not applicable to the Assessee
- viii. Because, Ld. AO erred in law and on facts in disallowing interest expense amounting to Rs. 74,07,353/- on the ground that assessee has failed to establish claim of interest expenditure
- ix. Because Ld. AO erred in law and on facts in disallowing interest expense amounting to Rs. 85,49,579/- even though the fact that the recipients has already shown in their return of income and therefore there is no loss of revenue to the Department
- x. Because, Ld. AO erred in law and on facts in applying different method of accounting for

assessing income and different method of accounting for allowing expenditure

- xi. Because, Ld. AO erred in law and on facts in initiating penalty under section 271(1) (c) of the Income Tax Act, 1961
- xii. Because, Ld. AO erred in law and on facts in initiating penalty under section 271B of the Income Tax Act, 1961
- xiii. The appellant individual craves to leave to add, alter, modify or delete any of the ground

010. We do not know wherefrom these grounds of appeal are noted by the ld CIT (A).

011. However the grounds of appeal raised by assessee as mentioned in form no 35 are as under :-

- i. Because, the order passed u/s 147 is wholly without jurisdiction, illegal, void-ab-initio and is null and void.
- ii. Because, the order passed is in complete defiance to the principle of natural justice and with out affording adequate opportunity to the Appellant to put his case
- iii.)Because, the Ld. AO has erred in recording reasons for the reopening as mere recording of satisfaction in the absence of independent inquiry, which cannot be a substitute for recording reasons required for issue of notice u/s 148



- iv. Because, on the facts and circumstances of the case, the impugned order is illegal, invalid, void-ab-initio as the same is passed without application of mind merely on the basis of receipt of information and without affording reasonable opportunity to the Appellant.
- v. Because, the assessment has been done on the basis of alleged information collected at the back of the Appellant and without providing copies thereof so as to allow opportunity to Appellant to rebut the said information
- vi. Because, the order passed on the basis of assumption of jurisdiction u/s 148 on reason recorded without having any evidence of failure on the part of appellant to disclose fully and truly the information to the Department as required under law.
- vii. Because, Ld. AO erred in law and on facts in treating the credits in the bank account of the appellant to the tune of Rs.2,46,92,401/- as unexplained cash credit u/s 68
- viii.)Because, Ld. AO erred in law and on facts in adding Rs. 2,46,92,401/- without appreciating the documentary evidence submitted by the appellant in the course of the assessment proceedings.
- ix. Because, Ld. AO erred in law and on facts the Ld. AO was not justified in stating that the appellant has failed to offer credible explanation in respect of Rs. 2,46,92,401/- credited in the bank accounts.

- x. Because, Ld. AO erred in estimating total income at Rs.3,35,19,320/-/- when the same is not the real income of the Appellant
 - xi. Because, the Ld. AO erred in law and on fact s in not giving benefit for advance given in con sequence to unsecured loan which have become bad and unrecoverable
 - xii. Because the Learned AO erred in initiating pe nalty proceedings u/s 271(1)(c) of The Income Tax Act, 1961.
 - xiii. Because Ld. AO erred in levying interest u/s 2 34B and 234C and the same ought to be deleted
012. The ld CIT (A) has decided altogether different grounds of appeal which were not there in the appeal memo in Form no 35 before him, but has taken grounds of appeal which are not at all issues in appeal and allowed the appeal of the assessee as under :-

"3. BRIEF FACTS: The assessee E filed his return of income on 26/04/2015 for the Assessment Year 2014-2015 declaring total income of Rs. 2,77,340/- The case was selected for scrutiny under CASS for limited scrutiny. The assessee is doing Business of Weighing Bridge Activities under the name and style of Star computerised weigh bridge and Chirag enterprise from Vashi, Navi Mumbai. In the present case assessee is liable for tax audit under section 44AB under Income Tax Act, 1961 which the assessee failed to do so. The Assessing Officer assessed the interest Income on net basis. A Show Cause Notice was issued asking for disallowance on account of interest expense amounting to Rs. 85,49,579/-. During the assessment proceedings, the assessee in his reply to the Assessing

Officer has stated that the assessee is doing business of money lending and therefore neither the provisions of section 44AB nor provisions of section 40(a)(ia) are applicable in the case. However, the Assessing Officer assessed total income to Rs. 88,26,923/- as against 2,77,340/- returned by the assessee by disallowing interest expense of Rs. 85,49,579/-. Aggrieved by the above order, the assessee preferred this appeal.

4. During the appellate proceedings, the statement of facts submitted by the assessee which are reproduced as below:

The Appellant is an individual Operating Business of Weighing Bridge Activities under the name and style of Star computerised weigh bridge and Chirag enterprise from Vashi, Navi Mumbai.

Appellant E filed his return of income on 26/04/2015 for the Assessment Year 2014-2015 declaring total income of Rs. 2,77,340/- The case was selected for scrutiny under CASS for limited scrutiny as per para 4.1 of assessment order. Accordingly notice dated 29/07/2016 under section 143(2) of the I.T. Act, 1961 was issued and duly served on the Appellant. Thereafter, the Appellant received notice under section 142(1) dated 22/08/2016 conveying the reasons for selection under CASS (Limited Scrutiny via E- Mail). During the course of Assessment Proceeding the Appellant duly placed on record order passed under section 143(3) by Ld DCIT 22(3) for A.Y. 2011-2012 wherein the interest Income stands assessed on net basis. However Ld AO for the captioned assessment year contended that the appellant is liable for tax audit under section 44AB under Income Tax Act, 1961 which the Appellant failed



to do so. Accordingly a Show Cause Notice was issued asking for disallowance on account of interest expense amounting to Rs. 85,49,579/-. While issuing the said show cause notice Ld AO relied up on the provisions of section 40(a)(ia) for want of non- deduction of TDS . The same was duly replied by the Appellant. During the course of Assessment Proceedings the Appellant filed various submissions on e dated 14/09/2016, three undated letter in response to AO letter date d 22/08/2016 and also letter dated 21/12/2016 Mailed in 26/12/2016 , which the Appellant wish to place reliance during appellate proceedings. The Appellant craved before Ld. AO that he is not engaged in the business of money lending and therefore neither the provisions of section 44AB nor provisions of section 40(a)(ia) are applicable in the Appellant case. However, Ld. AO assessed total income of the Appellant to Rs. 88,26,923/- as against 2,77,340/- returned by the Appellant by disallowing interest expense of Rs. 85,49,579/-. Appellant wish to place reliance on documents as mentioned in para 8 above and also any other document(s) during the course of appellate proceedings. The Ld AO also made disallowance of interest expenditure to the tune of 74,07,353/- on the premise that the appellant failed to submit the document in relation to the interest expense even in situation where provisions of section 40(a)(ia) are not held applicable in the facts of the case. In this regard the appellant duly informed the Ld AO that the Appellants father was in ICU during the fag and completion of assessment proceedings. And therefore requested for the reasonable opportunity to furnish the evidence in relation to genuineness of the interest expenditure to the tune of Rs.



74,07,353/-. However the assessment was completed as the case was getting time barred in the month of order. The Ld AO failed to appreciate the fact that the recipients of the interest income have also offered the interest income in their return of income and thus there is no loss of revenue to the department. Hence this Appeal.

5. Decision :-

I have considered the assessment order , the grounds of Appeal and also the written submissions of the assessee .Since all the grounds of appeal are inter-related, they are taken up together. I notice from the assessment order, The Assessing officer went ahead with the presumption that the assessee is in the business of money lending since the amount of interest income earned and the amount of interest expenditure expended are high and accordingly proceeded to compare the turnovers, and decided that the turnover from business income and the interest income combined are exceeding the limit for which a 44AB report is mandatory. However, I am of the opinion that for determining whether someone is in the business of money lending depends on various factors beyond just high interest income and corresponding expenditure. Considerations include the frequency and regularity of lending activities, the intention to make a profit, organizational structure, advertising, and more. High interest income alone may not be sufficient to establish a money lending business.



Some of the notable case laws related to determining whether an individual is in the business of money lending based on their interest income are as follows:

1. CIT vs. Daulatram Rawatmull (1963) AIR 1963 SC 1351: In this Indian case, the Supreme Court held that the character of a transaction depends on its true nature and not solely on the intention of the parties involved. High interest income alone may not determine the business of money lending; other factors must be considered.

2. Sardar Baldev Singh vs. CIT (1996) AIR 220 ITR 573 P&H: The Punjab and Haryana High Court in this case stated that mere lending of money does not constitute a business unless there is a systematic activity with a view to making profits. The intention and regularity of such lending are crucial factors.

3. CIT vs. V.S.Dempo & Co. Pvt. Ltd. (1995)214 ITR 451 BOM : The Bombay High Court held that lending money with the primary intention of earning interest can be considered a business activity, but the nature and manner of lending, as well as the frequency, should be taken into account. The assessing officer had failed to bring any factors as the mentioned by the hon'ble judicial forums as mentioned above. Neither any tangible evidence nor any cogent reasons had been brought out. Hence in view of the above I am constrained to allow the appeal. 6. As a result, appeal is allowed."

013. In this case :-



- a) Reference of assessment order in caption of the order of Id CIT (A) is correct but the reference of the assessment order in the body of the appellate order is different.
 - b) Facts stated in assessment order are not at all facts mentioned by the Id CIT (A). Both are strangely different.
 - c) Statement of facts reproduced by the Id CIT (A) in appellate order is not the statement of facts submitted before us by the Id. AO.
 - d) Grounds of appeal of the assessee before Id CIT (A) are different then grounds of appeal reproduced by the Id CIT (A) in body of appellate order is different
014. Reading of each of the grounds of appeal raised by the Id AO, we are of the view that those are emphatic, clear and forthright. All the grounds of appeal are appropriate and are submitting in guarded words to set aside the appellate order passed by National Faceless Appellate Authority in most casual manner.
015. Thus, we are constrained to state that this is the perfect case of '**cut & paste**' that too without application of mind. Without mincing many words, we find that order of the Id CIT (A) is passed without application of mind, devoid of any merit, unsustainable and perverse.
016. Thus, for the reasons stated above we allow all the grounds of appeal, direct the Id CIT (A) to look in to the facts and pass the order on the merits of the case, after giving proper opportunity of hearing to the assessee/ appellant.



017. In the result, appeal of the ld AO is allowed.

Order pronounced in the open court on 21.05.2024.

Sd/-
(SUNIL KUMAR SINGH)
(JUDICIAL MEMBER)

Sd/-
(PRASHANT MAHARISHI)
(ACCOUNTANT MEMBER)

Mumbai, Dated: 21.05.2024

Sudip Sarkar, Sr.PS

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai