



Shri Mihir Bipin Parekh
Assessment Years: 2006-07 & 2008-09

आयकर अपीलीय अधिकरण “बी” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
“B” BENCH, MUMBAI

माननीय श्री महावीर सिंह, न्यायिक सदस्य एवं
माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।
BEFORE HON’BLE SHRI MAHAVIR SINGH, JM AND
HON’BLE SHRI MANOJ KUMAR AGGARWAL, AM

आयकरअपील सं./ I.T.A. No.3377/Mum/2012
(निर्धारण वर्ष / Assessment Year: 2006-07)

&

आयकरअपील सं./ I.T.A. No.7332/Mum/2012
(निर्धारण वर्ष / Assessment Year: 2008-09)

Shri Mihir Bipin Parekh Ruby Mansion, 2 nd Floor 9 Forjet Cross lane, Gowalia Tank Mumbai- 400 036.	बनाम/ Vs.	DCIT-Circle-16(2) 2 nd Floor, Matru Mandir Opp. Bhatia Hospital Mumbai-400 007.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. AADPP-4223-D		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

Assessee by	:	Shri Vimal Punamiya- Ld. AR
Revenue by	:	Ms. Kavita P. Kaushik-Ld. DR

सुनवाई की तारीख/ Date of Hearing	:	21/01/2020
घोषणा की तारीख / Date of Pronouncement	:	12/03/2020

आदेश / O R D E R

Manoj Kumar Aggarwal (Accountant Member)

1.1 Aforesaid appeals by assessee for Assessment Years [in short referred to as ‘AY’] 2006-07 & 2008-09 contest separate orders of learned first appellate authority. Since common issues were involved, the appeals were consolidated, heard together and now being disposed-off by way of this common order for the sake of convenience and brevity.



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1.2 The appeals are recalled matter since the appeals were initially disposed-off by the bench on 14/06/2017. However, upon assessee's miscellaneous application, the said order was recalled vide MA Nos.691-92/Mum/2017 order dated 02/04/2018 and the appeals were directed to be put up for fresh hearing before the regular bench. Accordingly, the appeals have come up for fresh hearing for adjudication before this bench. First, we take appeal for AY 2006-07.

ITA No. 3377/Mum/2012, AY 2006-07

2.1 The Grounds raised by the assessee read as under: -

On the facts and in the circumstances of the case and in law, the Commissioner of Income Tax, Appeals-1, Mumbai, hereinafter referred to as the Ld. CIT(A) has erred in not allowing the claim of the appellant towards payment of Custom Duty amounting to Rs.93,12,159/-.

The assessee has filed an application dated 31/05/2018 u/r 11 of the Appellate Tribunal Rules, 1963 for admission of additional ground of appeal, which is stated to be an alternative ground only which do not require appreciation of new facts or evidences. The same read as under:-

Without prejudice to ground of Appeal No.1, on the facts and in the circumstances of the case of the appellant and in law, learned CIT(Appeals) has erred in not allowing to the appellant the deduction of custom duty to the extent of Rs.93,12,159/- being the business loss arising to the appellant.

Since the same is merely an alternative ground, the same is admitted as ground no.2.

2.2 The assessment for year under consideration was framed by Ld. Assessing Officer (AO) u/s 143(3) on 23/12/2008 wherein the assessee was saddled with impugned disallowance of Rs.93.12 Lacs. The assessee had filed its return of income on 31/10/2006 declaring loss of



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Rs.122.47 which was ultimately reduced to Rs.29.23 Lacs in the quantum assessment order. The stated addition, upon confirmation by Ld. Commissioner of Income-Tax (Appeals)-1, Mumbai, [CIT(A)] vide impugned order dated 05/03/2012, is under challenge before us.

2.3 The assessee is a resident individual and stated to be dealing in chemicals and pig-hair under proprietorship concern namely *M/s M.B. Sales Corporation*.

2.4 During assessment proceedings, it transpired that assessee's Delhi Branch Office reflected loss of Rs.165.82 Lacs primarily on account of the fact that it paid additional import duty amounting to Rs.197.60 Lacs. The said duty was paid under instructions of Department of revenue intelligence (DRI), Govt. of India based on their beliefs that the import of earlier years was under-valued. The matter of duty was under consideration of Hon'ble Settlement Commission. Upon perusal of final order passed by Settlement Commission, it transpired that an additional octroi duty of Rs.104.47 Lacs was related to the assessee whereas the balance amount of Rs.93.12 Lacs was related with other parties. The disallowance of this duty of Rs.93.12 Lacs is the sole subject matter of appeal before us.

2.5 In defense, the assessee submitted that though the duty was paid in the names of other parties but the same related to the assessee only. However, the said submissions could not find favor with Ld. AO who made disallowance of Rs.93.12 Lacs.

3. The Ld. CIT(A), despite noticing the fact that the payment challans were in the name of the assessee and the amounts were withdrawn from



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its Bank account to make the aforesaid payments, confirmed the disallowance. Aggrieved, the assessee is in further appeal before us.

4. We have carefully heard the arguments advanced by respective representatives and perused relevant material on record including documents placed in the *paper-book*. We have also gone through the written submissions made by Ld. Authorized representative for assessee. The judicial pronouncements as cited before us, have been deliberated upon. Our adjudication to the subject matter of appeal would be as given in succeeding paragraphs.

5.1 The Ld. AR, explaining the circumstances that led to payment of additional import duty, submitted that the assessee was made to pay additional custom duty on the allegation that it imported higher grade of material, which would attract more custom duty. The assessee had done indenting for 3 firms viz. Shri Yamuna Impex, M/s M.H.International & Shri Impex, whose imports were also accounted for as assessee's import by DRI on the reasoning that the goods had first come to assessee's godown. The other 3 entities disowned the liability and did not pay any duty. Therefore, with a view to settle the dispute, the assessee approached settlement commission and paid duty for himself as well as for 3 other entities also. The said duty was paid by the assessee himself and accordingly, the deduction of the same was claimed during the year. The Ld. AR submitted that as per the provisions of Sec.37(1), any expenditure laid out or expended wholly and exclusively for the purpose of the business shall be allowable and therefore, since the expenditure was incurred during the course of business out of commercial



expediency, the deduction of the same would be allowable to the assessee.

5.2 The Ld. AR, explaining the circumstances which led to payment of duty by the assessee, submitted that the business premises as well as Godowns were sealed by DRI and it was obligatory on the part of the assessee to make the payment as demanded by the authorities. The failure to do so would have adversely impacted assessee's business as well as its goodwill / reputation in the market. The Ld. AR also submitted that genuine efforts were made to recover the additional duty from stated parties and demand notices were issued by legal counsels against the 3 entities. However, nothing could be recovered from them and it became irrecoverable loss for the assessee. The supporting documents, in this regard, has been placed on record. The Ld. AR fortified the submissions that out of payment of Rs.93 Lacs, the payment challans to the extent of Rs.67 lacs were in assessee's name. Reliance has been placed on the decision of Hon'ble Calcutta High Court rendered in **CIT V/s Shree Krishna Gaynoday Sugar Ltd. (186 ITR 541)** wherein it was observed that in determining whether an expenditure was deductible, the essential test which has to be applied was whether the expenses were incurred for the preservation and protection of the assessee's business from any such process or proceedings which might have resulted in the reduction of its income and profits. The said decision has been rendered after considering the decision of Hon'ble Supreme Court rendered in **CIT V/s Birla Cotton Spinning and weaving Mills Ltd. (82 ITR 166)** wherein it was observed that the essential test which has to be applied is whether the expenses were incurred for the preservation and protection of the



assessee's business from any such process or proceedings which might have resulted in the reduction of its income and profits and whether the same were actually and honestly incurred. It was not possible to understand how the expenditure on the proceedings in respect of the Investigation Commission by the assessee would not fall within the above rule. Even otherwise, the expenditure was incidental to the business and was necessitated or justified by commercial expediency. The earning of profits and the payment of taxes are not isolated and independent activities of a business. These activities are continuous and take place from year to year during the whole period for which the business continues. If the assessee takes any steps for reducing its liability to tax which results in more funds being left for the purpose of carrying on the business there is always a possibility of higher profits.

5.3 *Au Contraire*, Ld. DR opposing the submissions drew attention to the fact that the expenditure incurred by the assessee on his own account has already been allowed and therefore, the stand of lower authorities was fair and reasonable.

6. Upon careful consideration, the undisputed position that emerges is the fact that the assessee has paid certain duty pursuant to action carried out by DRI. The matter of duty was finalized by Hon'ble Settlement Commission and the assessee made the payment as determined. The payment so made amounted to Rs.197.60 Lacs out of which deduction to the extent of Rs.104.47 Lacs has already been allowed to the assessee. The basis of disallowance of Rs.93.12 Lacs is the fact that the payment is not in assessee's account. However, as rightly pointed out by Ld. AR, the said payment was made by the



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assessee himself out of his own funds and substantial payment challans were in the name of assessee's proprietorship concern namely *M/s M.B.Sales Corporation*. The other entities denied their liability and despite legal action, the stated amount could not be recovered from them and the amount eventually became irrecoverable for the assessee. Therefore, the said loss, in our considered opinion, was incurred in the course of business being carried out by the assessee and non-payment of the duty would have resulted into substantial losses for the assessee and damaged assessee's reputation in the market. This being the case, the said loss would be allowable to the assessee as a business loss out of commercial expediency. The ratio laid down in the cited judicial pronouncements clearly support the case of the assessee. Therefore, we hold that the said expenditure would be an allowable expenditure. The appeal stands allowed.

ITA No.7332/Mum/2012, AY 2008-09

7. Facts are pari-materia the same in this year. The assessee is before us with similar grounds of appeal as well as additional ground of appeal. The assessment was framed u/s 143(3) on 23/12/2010 wherein the assessee was saddled with interest disallowance on account of duty payment of Rs.93.12 Lacs which was disallowed in AY 2006-07. The Ld. AO worked out proportionate interest disallowance for Rs.16.44 Lacs. The same, upon confirmation by Ld. CIT(A), is under further appeal before us.

8. We find that interest disallowance is consequential disallowance. Since we have already deleted the quantum disallowance in AY 2006-07, the consequential disallowance in AY 2008-09 would not survive.



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Therefore, by deleting the same, we allow the grounds raised, in this regard.

9. In ground No.2, the assessee is aggrieved by the fact that Ld. CIT(A) has erred in not allowing the set-off of carried forward of losses of Rs.5.07 Lacs pertaining to AY 2005-06. The said issue would stand remitted back to the file of Ld. AO for re-adjudication in view of our decision for AY 2006-07. The Ld. AO is directed to verify assessee's claim and allow the set-off of losses as per law. The ground stand allowed for statistical purposes. The appeal stands partly allowed.

Conclusion

10. The appeal for AY 2006-07 stands allowed. The appeal for AY 2008-09 stands partly allowed.

Order pronounced in the open court on 12th March, 2020.

Sd/-

(Mahavir Singh)

न्यायिक सदस्य / **Judicial Member**

Sd/-

(Manoj Kumar Aggarwal)

लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated : 12/03/2020
Sr.PS, Jaisy Varghese

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai.