

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'डी', मुंबई ।
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "D", MUMBAI

सर्वश्री आर.एस. स्याल, लेखा सदस्य एवं विवेक वर्मा, न्यायिक सदस्य, के समक्ष ।

Before Shri R.S.Syal, AM and Shri Vivek Varma, JM

ITA No.112/Mum/2012 : Asst.Year 2008-2009

The Asstt.Commissioner of Income-tax Circle 4(2) Mumbai.	बनाम/ Vs.	M/s.Rishti Stock and Shares Pvt.Ltd. Maskati Mahal, Ground Floor 119, K.M.Sharma Marg (Lohar Chawl) Mumbai – 400 002. PAN : AABCR5439G.
(अपीलार्थी /Appellant)		(प्रत्यर्थी/Respondent)

CO No.263/Mum/2012 : Asst.Year 2008-2009

M/s.Rishti Stock and Shares Pvt.Ltd. Maskati Mahal, Ground Floor 119, K.M.Sharma Marg (Lohar Chawl) Mumbai – 400 002.	बनाम/ Vs.	The Asstt.Commissioner of Income-tax Circle 4(2) Mumbai.
(प्रत्याक्षेपक/Cross Objector)		(प्रत्यर्थी/Respondent)

राजस्व की ओर से /Revenue by : **Shri Kishan Vyas**
निर्धारिती की ओर से /Assessee by : **Shri Sanjay R.Parikh**

सुनवाई की तारीख / Date of Hearing : 31.07.2013	घोषणा की तारीख / Date of Pronouncement : 02.08.2013
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आदेश / O R D E R

Per R.S.Syal (AM) :

This appeal by the Revenue and cross objection by the assessee arise out of the order passed by the Commissioner of Income-tax (Appeals) on 28.10.2011 in relation to the assessment year 2008-2009.

2. First ground of the Revenue's appeal is against the deletion of addition of ₹20,05,328 on account of bad debts. Briefly stated the facts of this ground are that the assessee, a stock broker, claimed

certain deduction on account of bad debts. The Assessing Officer restricted the allowance to the extent of brokerage which passed through profit and loss account amounting to ₹19,00,789. The remaining amount of ₹20,05,328 was disallowed. The learned CIT(A) deleted the disallowance.

3. After considering the rival submissions and perused the relevant material on record we find that in principle the question of bad debt in the hands of stock broker stands settled in assessee's favour by the judgment of the Hon'ble Delhi High Court in *CIT Vs. D.B. (India) Securities [(2009) 318 ITR 26 (Delhi)]* holding that the unrecovered amount by the share broker on behalf of its sub-broker has to be treated as debt and deduction is allowable. It has further been laid down in this case that the shares remaining in the possession of the assessee can be sold in the market for whatever consideration and adjusted against the balance outstanding payable by the debtors and the net figure which results thereafter, has to be allowed as bad debt. The Special Bench of the Tribunal in *DCIT Vs. Shreyas S.Morakhia [(2010) 5 ITR (Tri.) 1 (Mum.) (SB)]* has also decided this issue in assessee's favour by holding that the sum receivable by share broker from clients for transactions undertaken on their behalf is a trading debt. Unrecovered part has to be allowed as deduction. In view of the above judgment and Special Bench order, we hold that the assessee is entitled to deduction in respect of the amount becoming unrecoverable from its clients. However the deduction has to be restricted to the amount determined after reducing the sum

recoverable from sale proceeds of shares with assessee, if any, in terms of the judgment in *D.B. (India) Securities (supra)*. We, therefore, set aside the impugned order on this issue and restore the matter to the file of A.O. for taking a fresh decision accordingly, after allowing a reasonable opportunity of being heard to the assessee.

4. Second ground of the Revenue's appeal is against the deletion of disallowance of ₹98,198 u/s 40(a)(ia) on account of 'Transaction charges'. The learned AR was fair enough to concede that this issue needs to be decided against the assessee in view of the judgment of the Hon'ble jurisdictional High Court in the case of *CIT v. Kotak Securities Limited [(2012) 340 ITR 333 (Bom.)]*. In view of the candid admission by the learned AR, we set aside the impugned order on this issue and restore the addition made by the Assessing Officer.

5. The only issue in the assessee's cross objection is against sustenance of the above addition of ₹98,198 u/s 40(a)(ia) on the ground that no amount was outstanding at the end of the year and hence the disallowance could not have been made u/s 40(a)(ia). This ground is based on the majority view of this Special Bench decision in *Merilyn Shipping and Transports*. The ld. AR was fair enough to accept during the course of his arguments that the Hon'ble Calcutta High Court, by a recent judgment in *CIT v. Crescent Export Syndicate*, has reversed the majority view of this Special Bench decision in *Merilyn Shipping and Transports*. He accepted that the

addition be confirmed on this score. However, after the conclusion of hearing but before the rising of the Court, the Id. AR came back to contend that the Hon'ble Allahabad High Court has very recently decided similar issue in favour of the assessee and in view of the conflicting decisions, the view in favour of the assessee should be followed. The Id. DR opposed the submissions made on behalf of the assessee.

6. Having heard the rival submissions and perused the relevant material on record, there is no dispute in principle that the amount is otherwise disallowable on merits as has been accepted by the Id. AR in response to the second ground of the Revenue's appeal. Now, the sustenance of such disallowance has been challenged on the ground that the amount was paid during the year and hence no disallowance be made as per the very recent judgment of the Hon'ble Allahabad High Court in *CIT VS. Vector Shipping Services (P) Ltd.* It is noticed that the special bench of the tribunal in *Merilyn Shipping and Transports* held that unless the amount is payable at the end of the year, no disallowance can be made u/s 40(a)(i) of the Act. This view came up for consideration before the Hon'ble Calcutta High Court in *CIT v. Crescent Export Syndicate* and the Hon'ble High Court was pleased to disapprove the view taken by the special bench after considering the very same order. It is further noted that the Hon'ble Calcutta High Court has reiterated the same view vide its judgment dated 4.4.2013 in *CIT VS. Md. Jakir Hossain Mandal.* It is still further relevant to note that the Hon'ble Gujarat High Court, vide its

judgment dated 9.5.2013, in a series of cases led by *CIT VS. Sikandarkhan N. Tunvar* has disproved the special bench order in the case of *Merilyn Shipping (supra)*.

7. The Id. AR has relied on the judgment dated 9.7.2013 rendered by the Hon'ble Allahabad High Court in *CIT VS. Vector Shipping Services (P) Ltd.* to contend that in this case a view favourable to the assessee has been taken. We have gone through the said judgment. It is of paramount importance to note that the only question pressed by the Revenue in that case has been reproduced as under : -

“The department has pressed the only question of law as follows:-

“(a) Whether on the facts and in the circumstances of the case, the Hon'ble ITAT has rightly confirmed the order of the CIT (A) and thereby deleting the disallowance of Rs.1,17,68,621/- made by the Assessing Officer under section 40 (a) (ia) of the I.T. Act, 1961 by ignoring the fact that the company M/s Mercator Lines Ltd. had performed ship management work on behalf of the assessee M/s Vector Shipping Services (P) Ltd. and there was a Memorandum of Understanding signed between both the companies and as per the definition of memorandum of understanding, it included contract also.”

8. From the factual matrix of this case it can be noticed as an admitted position that M/s Mercator Lines Limited had deducted tax at source on salaries paid by it on behalf of assessee, in respect of which the disallowance was made by the AO u/s 40(a)(ia). By answering the question as reproduced above, the Hon'ble High Court held that : *'In the present case tax was deducted as TDS from the salaries of the employees paid by M/s Mercator Lines Ltd., and the circumstances in which such salaries were paid by M/s Mercator Lines Ltd., for M/s Vector Shipping Services, the assessee were sufficiently explained.'* Having answered the question raised before it in above terms, the Hon'ble High Court incidentally noticed that for disallowing expenses from business and profession on the ground that tax has not been deducted, the amount should be payable and not which has been paid by the end of the year. These passing remarks, which are only *obiter dicta*, seem to have been made because the tribunal in the impugned order before the Hon'ble High Court, apart from deleting the disallowance on the ground that *'M/s Mercator Lines Limited had deducted TDS on salaries paid by it on behalf of assessee. Under such circumstances assessee was not required to deduct TDS on reimbursement being made by it to M/s Mercator Lines Limited.'*, also referred to the special bench decision in the case of *Merilyn Shipping (supra)*. As it is manifest from the solitary question of law reproduced above that there is no reference to the deletion of disallowance u/s 40(a)(ia) when the expenditure has been paid, such remarks of the Hon'ble High Court can be considered as *obiter dicta*. On the contrary, the Hon'ble Calcutta High Court in the

aforenoted two judgments and the Hon'ble Gujarat High Court in the above referred case have dealt with this issue on merits arising out of the special bench order in *Merilyn Shipping (supra)* and specifically disproved it. Such decision constitutes the *ratio decidendi* of these cases. There is hardly any prize for guessing that it is the *ratio decidendi* of a judgment which prevails upon the contrary *obiter dicta* of another judgment. In view of the foregoing discussion, we are of the considered opinion that there is no merit in the ground raised by the assessee in its cross objection.

9. परिणामतः राजस्व अपीलें आंशिक स्वीकृत की जाती हैं एवं निर्धारिती की प्रत्याक्षेप खारिज जाती हैं / In the result, appeal of the Revenue is partly allowed and the C.O. of the assessee is dismissed.

Order pronounced on this 02nd day of August, 2013.

आदेश की घोषणा दिनांक: को की गई ।

Sd/-

(Vivek Varma)

न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-

(R.S.Syal)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 02nd August, 2013.

Devdas*

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)-8, Mumbai
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