

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'C' अहमदाबाद ।

IN THE INCOME TAX APPELLATE TRIBUNAL  
"C" BENCH, AHMEDABAD

BEFORE SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER  
& SHRI MAHAVIR PRASAD, JUDICIAL MEMEBR

आयकर अपील सं./I.T.A. No. 2818/Ahd/2017  
(निर्धारण वर्ष / Assessment Year : 2014-15)

<b>Omni Lens Pvt. Ltd.</b> C/o. Mukesh M. Patel & Co., Tax Planning House, Above Usmanpura Underbridge, Ahmedabad - 380013	<b>बनाम/</b> Vs.	<b>DCIT</b> Circle 3(1)(2), Ahmedabad
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACO1725F		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी ओर से /Appellant by :	Shri Mukesh M. Patel, A.R.
प्रत्यर्थी की ओर से / Respondent by :	Shri Lalit P. Jain, Sr. D.R.

सुनवाई की तारीख / Date of Hearing	24/07/2018 & 29/08/2018
घोषणा की तारीख /Date of Pronouncement	16/10/2018

आदेश/ORDER

**PER PRADIP KUMAR KEDIA - AM:**

The captioned appeal has been filed at the instance of the assessee against the order of the Commissioner of Income Tax (Appeals)-7, Ahmedabad ('CIT(A)' in short), dated 16.10.2017 arising in the assessment order dated 22.12.2016 passed by the Assessing

Officer (AO) u/s. 143(3) of the Income Tax Act, 1961; (the Act) concerning assessment year 2014-15.

2. The grounds of appeal raised by the assessee reads as under:-

- “1. *That the learned CIT(A) erred in law and on facts in disallowing the appellant’s claim for Rs.3,90,02,779/- in respect of Bad Debts written off in its accounts for F.Y. 2013-14 and upholding the disallowance made by the Assessing Officer on the ground that the aforesaid claim was not a bad debt at all and that it had been wrongly categorized by the appellant as a bad debt.*
2. *That the learned CIT(A) failed in appreciating that the appellant having fulfilled all relevant conditions for claim of Bad Debts u/s. 36(1)(vii) rws 36(2), its case was squarely covered by the ratio of the decision of the Hon’ble SC in the case of TRF Ltd. and the clear guidelines as laid down by the CBDT Circular No. 12/2016 dtd. 30-05-2016.”*

3. Briefly stated, the assessee is engaged in the business of manufacturing of optical lenses. The assessee filed its return of income for AY 2014-15 declaring total income of Rs.12,21,74,920/- which was subjected to scrutiny assessment. In the course of scrutiny assessment, the AO *inter alia* observed that the assessee is also engaged in commodity trading business on NSEL (National Spot Exchange Ltd.) platform. The assessee has entered into several contracts for buying of various commodities on NSEL platform. Simultaneous reverse sale contract of the exact specification of purchase also entered on NSEL platform for delivery at future date at a gap of 25/36 days after the purchase contract. Thus, each purchase transaction was matched by a cross contract of simultaneous sale transaction. Both purchase and sale were claimed to be delivery based business transactions. As claimed on behalf of the assessee, NSEL issued some delivery allocation report for each purchase transaction by virtue of which the commodity purchased on behalf of the purchaser (assessee) was kept in various warehouses on behalf of the

participant assessee. The obligation of delivery at the time of sale at a pre-determined subsequent date was being met out of the purchase delivery of exact specification lying in the warehouses on behalf of the various participants including assessee. Such transactions of purchase of commodity and simultaneous sale for performance of delivery at a later date were supported by contract notes in the name of the assessee issued by brokers affiliated to NSEL.

3.1 As stated on behalf of the assessee before the AO, the assessee decided to employ its idle funds in purchase of commodity on NSEL platform and received money back at the time of delivery against sale of commodity of exact identification and quantity performed at a later date in a pre-determined gap of nearly 25/36 days. This activity of purchase delivery obtained on spot and sale delivery given at later date yielded certain business gains. In short, the assessee deployed its funds for purchase of commodity to be held for certain specified period before settlement of sale contract. The physical delivery of commodity as per the contract was kept in the warehouses of the NSEL on behalf of the assessee and, as noted, the same were returned and delivered back by NSEL against its sale at future date. The sale proceeds were thus credited to the account of the assessee at the time of delivery of goods and paid to participant assessee.

3.2 In the delivery based future contracts in commodity as per the dynamics of business as noted above, the assessee claimed bad debts to the tune of Rs.3,90,02,779/- owing to its alleged irrecoverability from the buyers of the goods on the platform of spot exchange.

3.3 On inquiry towards claim of bad debts in the course of assessment proceedings, the assessee pointed out that it was engaged in commodity trading business narrated above in FY 2012-13 and FY

2013-14 through two broker intermediaries viz; M/s. Dipal Finance (DF) & M/s. Chimanlal Popatlal Commodities Broker Pvt. Ltd. (CPCBPL). It was pointed out on behalf of the assessee that NSEL vide its Circular dated 31<sup>st</sup> July, 2013 suspended its trading activities in commodities. A substantial fraud purportedly committed by NSEL and its management was claimed to be discovered. Consequently, the Ministry of Consumer Affairs vide its notification dated 06.08.2013 barred NSEL from issuing any new contracts. The trading activity on NSEL Platform was thus in effect permanently suspended. In this backdrop, the assessee claimed to have written off an amount of Rs.3,90,02,779/- in aggregate receivable from its two brokers against the unrealised contracts in commodities. It was the case of the assessee before the AO that in view of large scale fraud perpetrated by NSEL management and in view of negligible chance of recovery of the amount due to the assessee from its brokers (acting as agents of NSEL), the assessee company considered it commercially prudent to write off the outstanding amount of Rs.3.90 Crores as bad debts while closing the financial accounts pertaining to AY 2014-15 in question. The AO however declined the claim of bad debts of such unrealized contracts on the ground that bad debts in question cannot be considered as bad debts and the claim of bad debts by the assessee in respect of contracts executed in this year (FY 2013-14) itself is clearly premature. It was also observed that final deficiency could not be arrived at this stage as contemplated under s.36(2)(ii) of the Act. To support the disallowance, the AO also relied upon various judicial pronouncements and held that the assessee was at least required to show a bonafide statement of irrecoverability to debts having regard to the facts and circumstances of the case. The AO accordingly held that the bad debts claimed by the assessee does not qualify for deduction under s.36(1)(vii) r.w.s. 36(2) of the Act in the year under consideration. The AO accordingly disallowed bad debts amounting to

Rs.3,90,02,774/- and added the same to the total income of the assessee.

4. Aggrieved, the assessee preferred the appeal before the CIT(A).

5. Before the CIT(A), the assessee reiterated that the conditions envisaged for allowability of bad debt under s.36(1)(vii) r.w.s. 36(2) of the Act were duly fulfilled on facts and the case of the assessee is squarely governed by the ratio of the decision rendered by Hon'ble Supreme Court in the case of TRF Ltd. vs. CIT 323 ITR 397 (SC). It was contended that bad debt claim has been written off as irrecoverable in the books of the assessee pertaining to FY 2013-14 relevant to AY 2014-15. Secondly, the aforesaid debt formed part of the commodity business which has been duly taken into account while computing the income of the assessee. Discarding the plea of the assessee for allowability of bad debts however, the CIT(A) observed that the assessee in the subsequent FY 2014-15 (AY 2015-16) has also recovered certain amount from its brokers against the outstanding debt. The CIT(A) also observed that in this background, where the debt money was in the process of being returned, the assessee did not wait for even the next FY to judge the potential of recovery and consider write off the amount as irrecoverable if necessary. The CIT(A) accordingly held that the ratio of the decision in TRF Ltd.(supra) cannot be applied in the facts of the case where the moot question itself is whether the debt is bad or not. The assessee has written off the entire debt as bad debt in the same very financial year immediately after suspension of activity by NSEL where the official recovery process had set in motion by the Exchange and therefore, the debt amount could not be outrightly regarded as bad debt. The CIT(A) accordingly held that the debt was wrongly categorized as bad debt in

the given facts and consequently, confirmed the disallowance of bad debt made by the AO.

6. Further aggrieved, the assessee preferred appeal before the Tribunal.

7. When the matter was first called for hearing, the learned AR for the assessee reiterated various submissions made before the lower authorities and essentially submitted that the debt had arisen in the course of commodity business conducted on the platform of NSEL and therefore, the debt arose in the course of carrying ordinary business. The profits arising on various contracts entered into for purchase and sale of commodity were taken into account while computing the income of the assessee during financial year in which the amount of such debt became irrecoverable. It is contended on behalf of the assessee that the trading activities were permanently suspended on the spot exchange platform by the Government notification and serious fraud was alleged to be committed by the spot exchange. The NSEL failed to honour its commitment and, in turn, the two brokers could not pay amount due to assessee. In such scenario, it was not unreasonable on the part of the assessee to assume that the chances of recovery of debt outstanding with two brokers are negligible. A paltry amount of Rs.19,066/- and Rs.3,755/- was received in the subsequent assessment year which naturally would not inspire any confidence towards recovery. The learned AR thus contended that the action of the assessee is within four corners of law and cannot be faulted in the light of the categorical decision of the Hon'ble Supreme Court in the case of TRF Ltd. (supra).

7.1 The learned AR thereafter referred to a CBDT Circular No.12/2016 dated 30<sup>th</sup> May, 2016 to submit that it is not necessary for

the assessee at all to establish that the debt in fact has become irrecoverable. The writing off the bad debt as an irrecoverable in the books of accounts is sufficient discharge of onus to claim bad debt. The learned AR also submitted that in keeping with the decision of Hon'ble Supreme Court in TRF Ltd. (supra), the circular seeks to eliminate the protractive litigation on the issue.

7.2 When the hearing was in progress, the learned AR for the assessee was required by the Bench to also furnish the copy of contract notes from both brokers together with the ledger accounts of the brokers, bank statement showing NSEL transaction as well as copy of delivery note to appreciate the nature of transactions in perspective to take an informed decision. The hearing was accordingly adjourned and the Bench re-assembled to look into the documents called for and continue with the hearing.

7.3 The learned AR, in the light of some sample contract notes, submitted that the assessee entered into a purchase contract of various quantities of different commodities from time-to-time and also simultaneously sold exact commodities of identical specification on the same day of respective purchase and therefore, at a given point of time while the purchase and sale thereof were made on spot, the delivery towards purchase of commodities effected was retained in the warehouses to the credit of participant assessee at the command of the spot exchange and the delivery were handed over to opposite buyer at a future date as contracted against the realization of sale proceeds. Referring to the ledger account, the learned AR pointed out next that the debts due from the respective brokers have been duly written off in the books of account. Adverting to the delivery notes, the learned AR pointed out that the receipt of delivery on purchase is backed by warehouse receipts allocated in favour of the assessee representing the

custody of various quantities of different commodities as per the contract on behalf of the assessee. In the light of all these facts, the learned AR strongly professed that the Revenue authorities have misdirected themselves in law and on facts in denying the legitimate claim of bad debts befall upon the assessee. The learned AR accordingly sought suitable relief in the matter as urged in its grounds of appeal.

8. The learned DR, on the other hand, relied upon the orders of the AO and CIT(A). The learned DR submitted that the debt was in the process of being realized and certain allocations were also made by the spot exchange to the respective participants (through their affiliated brokers) even after the financial accounts for AY 2013-14 were drawn and audited. In such a situation, where the recovery process had commenced from the spot exchange and was in motion, the action of the assessee to write off the entire debt in a hurried manner is clearly premature and not befitting with the facts of the case. The learned DR submitted that the debt is required to be actually bad for it to be written off and a good or doubtful debt cannot be compared with bad debt contemplated under s.36(1)(vii) of the Act. The Learned DR accordingly submitted that the ratio of the decision of Hon'ble Supreme Court in TRF Ltd. (supra) is based on its own set of facts and clearly does not apply to the circumstances narrated hereinabove. Similarly, it was contended that CBDT Circular does not give license to an assessee to claim any debt as bad debt. The learned DR accordingly contended steadfastly that no interference with the conclusion drawn by the CIT(A) is called for.

9. We have carefully considered the rival submissions and perused the orders of the authorities below. We have also perused the material placed before us and referred to in the course of hearing. The sole



controversy in the captioned appeal relates to maintainability of claim of bad debts arising from transactions executed on the platform of NSEL. It is the case of the assessee that the bad debt has arisen in the course of commodity trading activity due to non-receipt of money against the sale part of the integrated contracts of both purchase and sale of commodity issued by the commodity brokers affiliated to National Spot Exchange. It is further case of the assessee that it is a matter of record that a nefarious scam broke out in July 2013 whereby the commodity trading activity on the platform of the National Spot Exchange was perennially suspended under the directions of Government of India. The National Spot Exchange could not recover money of the participants from the corresponding borrowers (buyers of commodity) and only a miniscule fraction of money could be recovered till the date of finalization of accounts. Under the circumstances, the debt outstanding from the respective brokers was rightly written off in the accounts as bad debt.

10. It is the case of the assessee that in view of the decision of the Hon'ble Supreme Court in the case of TRF Ltd.(supra) as well as in the light of CBDT Circular, the requirement to establish to the satisfaction of the AO that the debt had, in fact, become bad is no longer the requisite of law. It is further case of the assessee that in view of the express mandate available under s.36(1)(vii) of the Act there is no legal impediment in writing off the debt in the year of transaction itself on the assessee forming an opinion that such debt has turned irrecoverable. It is thus the case of the assessee that the claim of bad debt cannot be denied on the ground that recovery process is in place and the claim is purportedly premature.

11. We find ourselves in agreement with this pivotal contention on behalf of the assessee that it is not necessary for the tax payer to

establish that the debt has become irrecoverable for allowance of deduction. It is an admitted position that the debt has arisen in course of commodity trade and such debt or a part thereof has been taken into account while computing the chargeable income of the assessee. The amount outstanding from the respective brokers has been shown to be duly written off in the books of accounts. Therefore, there is a good deal of force in the point of view expressed on behalf of assessee that the claim of bad debt becomes allowable as per the scheme of the Act having regard to the decision of the Hon'ble Supreme Court in TRF Ltd. allowed by and CBDT Circular (supra).

12. However, the matter does not end here. There is another crucial aspect that requires to be necessarily looked into. Factual matrix placed before us compels us to do so. A bare perusal of the contract notes placed before us brings out that the purchase of commodity and sale thereof giving rise to the outstanding debt in question has been recorded in the one and same contract. While the purchase has been made at say X-date, a simultaneous corresponding sale of same quantity and product has been instantly made at the same time and date of purchase itself. Thus every purchase of commodity with delivery is simultaneously squared off by cross contract of corresponding sale marked with delivery. The delivery against purchase is statedly obtained by the exchange on behalf of the respective participants on spot against payments by the participants and is re-delivered on behalf of the participants against sale at a future date (gap of prefixed 25/36 days) and sale consideration is received on delivery of such commodity. Simply put, a participant invests money in the spot exchange against the purchase of commodity, the delivery of which is kept in the command of the spot exchange. The delivery so obtained against the purchase is returned at the time of sale at a future date for which the contract of future sale is already executed at

the time of purchase itself. The moot question therefore arises in these facts is to know as to what has happened to the delivery of the goods purportedly obtained on purchase as per the contract note which has given rise to the present unrealized debt in question. Once a debt is backed and secured by the delivery of goods of equivalent amount or near thereto, one cannot outrightly say that debt is not recoverable or realizable at all. Therefore, to decide the question on allowability of bad debt on such transactions, the integral aspect about the fate of delivery of commodity acquired and retained in the warehouses by the intermediaries purportedly on behalf of the assessee is required to be necessarily examined. A perusal of the order of the lower authorities gives an infallible impression that such crucial aspect has not been addressed. Without understanding the fate of the goods purchased purportedly in the custody of or on behalf of the assessee, it will not be possible to determine the issue. Where the purchase with delivery is settled by cross contract of sale with delivery at future date against sale proceeds, the entire debt turning bad is rather innocuous.

13. We therefore consider it expedient to remit the matter back to the file of the AO to ascertain as to whether the transaction of purchase and sale were backed by actual delivery as claimed or not and a fair value of stock lying undelivered against unrealized sale is thus required to be deducted from the quantum of debt. In case, it is found that the assessee or other intermediaries have not obtained the possession of goods purchased as contracted and demonstrated by way of warehousing receipts and the purchase and sale contracts are settled otherwise than by actual delivery of goods, it will naturally be a case of business transactions of speculative nature in terms of Section 43(5) of the Act. Notably, the loss/bad debt arising from transactions of speculative nature without actual delivery of goods under contract carry differential treatment under the scheme of the Act. It may be

pertinent to take note of relevant statutory provisions in this regard as follows:

Section 43(5) of the Act defines 'speculation transaction' which means a transaction in which a contract for the purchase or sale of any commodity, including stocks and shares, is periodically or ultimately settled otherwise than by the actual delivery or transfer of the commodity or scripts. Explanation 2 to Section 28 of the Act provides that where speculative transactions carried on by an assessee are of such a nature as to constitute a business, the business, i.e., the speculation business shall be deemed to be distinct and separate from any other business.

Section 73(1) provides that any loss, computed in respect of a speculative business carried on by the assessee, shall not be set off except against profits and gains, if any of another speculation business.

14. The bad debt arising from speculative transaction in such an event would be deemed to be 'speculative loss' as per the ratio of the decision of the Hon'ble Supreme Court in case of Rajputana Trading Co. Ltd. vs. CIT (1969) 72 ITR 286 (SC). All these aspects require factual verification at the end of the AO to determine the nature as well as quantification of bad debt having regard to security of commodity. Accordingly, as discussed above, the matter is restored to the file of the AO for re-determination of the issue in accordance with law in the light of observations noted above. Needless to say, a reasonable opportunity shall be given to the assessee while determining the issue.

15. At this juncture, we may hasten to add that Section 254 of the Act defines the powers of the Tribunal in widest possible terms.

Where it is found that a non-taxable item is taxed or a permissible deduction is denied, there is no reason to prevent assessee from raising grievance before the Tribunal in this regard. In the similar vein, the ITAT is under solemn duty to set the facts right and in perspective to determine the correct position of taxability on a given issue. The aspect of delivery of goods against the debt is integral to determine the quantification of debt rendered unrecoverable as well as the real nature of bad debt. The ITAT can venture into examination of such an integrally connected critical aspect of the matter to determine the character of transactions as well as quantification of loss. This view is fortified by the decision of the Hon'ble Karnataka High Court in the case of Fidelity Business services India Pvt. Ltd. vs. ACIT (2018) 95 taxmann.com 253 (Kar.). Similar view has been expressed by the Hon'ble Delhi High Court in the case of CIT vs. Jansampark Advertising and Marketing Pvt. Ltd. (2015) 56 taxmann.com 286 (Del.). The Hon'ble Delhi High Court in this case observed that where the AO failed to discharge its obligation to conduct a proper inquiry to take the matter to logical conclusion, it is also the obligation of the first appellate authority and indeed that of ITAT to have ensured that effective inquiry is carried out on the subject matter of appeal. Likewise, the Hon'ble Bombay High Court in ITO (TDS) vs. Thyrocare Technology Ltd. (Bom) Income Tax Appeal No.53 of 2016 & Ors. judgment dated 11.09.2017 also similarly observed that once the Tribunal was obliged in law to examine the matter and re-appreciate all the factual materials, then it should have performed that duty satisfactorily and in terms of powers conferred by law. The Aurangabad Bench of the Hon'ble Bombay High Court in the case of CIT vs. Chalisgaon People's Co-op. Bank Ltd. (Tax Appeal No. 31 of 2005 & Ors. judgment dated 23.03.2015) has also underlined the need for appropriate enquiry on the factual aspects to determine the issue. It observed that it was obligatory on the part of fact finding

authorities to make inquiry and arrive at a finding. Thus, the solemn duty requires us to direct the AO to examine the issue after taking note of crucial aspect of actual delivery of commodity, if any, as claimed and to ascertain as to how the entire debt has turned bad when the assessee was purportedly in possession of the goods purchased. The matter is remanded back to the file of AO accordingly.

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

**This Order pronounced in Open Court on 16/10/2018**

Sd/-  
(MAHAVIR PRASAD)  
JUDICIAL MEMBER  
Ahmedabad: Dated 16/10/2018

Sd/-  
(PRADIP KUMAR KEDIA)  
ACCOUNTANT MEMBER

True Copy

*S. K. SINHA*

आदेश की प्रतिलिपि अद्येषित / Copy of Order Forwarded to:-

1. राजस्व / Revenue
2. आवेदक / Assessee
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद /  
DR, ITAT, Ahmedabad
6. गार्ड फाइल / Guard file.

By order/आदेश से,

उप/सहायक पंजीकार  
आयकर अपीलीय अधिकरण, अहमदाबाद ।