



* IN THE HIGH COURT OF DELHI AT NEW D

ITA No. 948 of 2007

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Decided On: 04th November, 2009.

SHIVANI TEXTILES LTD.

... Appellant

through :

Mr. Rishi Aggarwal, Advocate.

VERSUS

DEPUTY COMMISSIONER OF INCOME TAX

... Respondent

through :

Ms. Rashmi Chopra, Advocate.

CORAM :-

THE HON'BLE MR. JUSTICE A.K. SIKRI

THE HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J. (ORAL)

1. In the return filed by the appellant for the Assessment Year 1997-98, the assessee claimed bad debt in sum of Rs.53,57,964.76/-, which according to the assessee it had written off. This was a payment made to M/s. Body Wrap Apparels. In fact, an agreement dated 25.08.1994 was entered into between the assessee and the said partnership firm, viz., Body Wrap Apparels. Under this agreement, M/s. Body Wrap Apparels had agreed to procure export orders of the readymade garments on behalf of the assessee herein and manufacture the readymade garments as required. For this purpose, the agreement provided



to M/s. Body Wrap Apparels, at the time of signing agreement for manufacture of exportable garments. Clause 10 of this agreement mentions about the advances, which had to be returned in case of breach in terms & conditions of the agreement and reads as under:

“10. It is clearly understood that if there is any breach in the terms and conditions as narrated above, by the Second Party, then the Second Party alongwith its Partners will be liable to refund the advance given alongwith the interest @ 24% p.a. and all other cost, expenses incurred which are incidental thereto, to the First Party.”

2. According to the assessee, it had made a total payment of Rs.2,23,64,404/- to M/s. Body Wrap Apparels under the said agreement. M/s. Body Wrap Apparels had refunded certain amounts out of the aforesaid payment received by it. It had also utilised some amount on buying fabric and had incurred expenditure on freight job charges, etc. Even after accounting for these moneys spent by M/s. Body Wrap Apparels, a sum of Rs.53,57,968/- was still payable to the assessee by M/s. Body Wrap Apparels, but the said firm failed to made this payment to the assessee. For recovery of this amount, the assessee filed Suit No.665 of 1998 on 26.03.1998 in this Court. At the same time, as mentioned above, in the return filed for the Assessment Year 1997-98, this amount was also shown as bad debt.



the claim for bad debt could be made only if it had become debt and irrecoverable. In the instant case, since Suit had been filed by the assessee for recovery of the amount from the said debtor, there was still a ray of hope for recovery of amount and therefore, it could not be written off as bad debt.

4. The assessee preferred appeal before the CIT (A) against this assessment order dated 28.03.2000 passed by the AO. CIT (A), after hearing the parties, came to the conclusion that this amount paid could not have been treated as bad debt and therefore, could not be claimed as bad debt under Section 36(2)(i). At the same time, he was of the opinion that it was a trading loss and therefore, allowed the deduction of the said amount to the assessee on this ground. Thus, he allowed the appeal, but on different ground.

5. Challenging this order of the CIT (A), the Revenue preferred appeal before the Income Tax Appellate Tribunal (hereinafter referred to as 'the Tribunal'). According to the Revenue, if it was to be claimed as a trading loss under Section 37 of the Income Tax Act, it was necessary to prove, at the same time, that such an amount was irrecoverable. Two Members of the Bench which heard the appeal, differed with each other and the matter was referred to the Third Member, who allowed the



6. The present appeal is preferred against the said judgment of the Tribunal. Insofar as finding of the CIT (A) that the amount in question was not a 'bad debt' but advance made to the party during the course of business, which could not be treated as a bad debt but as trading loss, was not questioned by the appellant by either filing any appeal or preferring cross-objection before the Tribunal. Even otherwise, after going through the order of the CIT (A), discussing this aspect we are in agreement with the view taken by the CIT (A). Discussion in this behalf is contained in para 5 and 6 of the order of the CIT (A).
7. If the amount is to be treated as trading loss, then it was necessary for the assessee to prove that the amount was not recoverable. Third Member on this aspect has made the following pertinent observations:

"14. In my considered view, there may be a divergence of opinion in regard to interpretation of section 36(1)(vii) as to whether after 1-4-1989 it is necessary for the assessee to establish that the debt had become bad for the purpose of claiming deduction, yet there is no scope for two opinions in respect of deduction under section 37(1) insofar as a deduction would be permissible to the assessee of business loss and the burden to prove the loss is undoubtedly upon the assessee. What is permissible to the assessee as a deduction is of a business loss - whether the assessee has suffered a loss or not, is a question of fact which is to be decided on the basis of evidence on record. The burden to establish that the assessee has suffered a loss, in my view, is undoubtedly upon the assessee. Their Lordships of the Supreme Court in the case of *Associated*



In the case of *Calcutta Agency Ltd.* (supra). It was held t burden of proving necessary facts in order to entitle assessee to claim exemption was on the assessee. It was further held that the assessee had not established the necessary facts and, therefore, the High Court was in error to apply the principles of law on the assumption of facts which were not proved. 17

In my considered view, the principle laid down by the Hon'ble Supreme Court in the aforementioned cases is aptly applicable to the present case. The learned Commissioner (Appeals) has applied the principle of law laid down in various decisions of the Hon'ble Supreme Court and other High Courts overlooking the necessity of establishment of factum of loss. The learned Judicial Member has also concurred with the view of the Commissioner (Appeals). The learned Accountant Member has also concurred with the legal opinion expressed by the learned Judicial Member and I also concur with my learned brothers and the Commissioner (Appeals) that deduction is permissible to an assessee of a business loss under section 37(1). So, however, the necessity of establishing the loss cannot be overlooked. As pointed out earlier, the assessing officer has recorded a finding of fact that assessee has failed to establish that the debt was irrecoverable. In other words, the assessing officer has not accepted the factum of loss. The learned Accountant Member has also recorded a finding of fact that the assessee has no evidence to establish that it had suffered a loss in the previous year relevant to assessment year under appeal. Mere cancellation of agreement, in my view, was not sufficient to establish that assessee had suffered a loss. It is also relevant to point out that assessee had filed suit for recovery of the amount in December, 1998 though the amount has been written off in financial year 1996-97. Though, not filing of a suit for some time may not be conclusive for determining as to whether a debt had become bad or not, yet the conduct of the assessee would be a relevant factor for determining the issue. It is observed from the copy of order of the Hon'ble High Court passed on 18-1-2005 that assessee had not seriously pursued the matter in the court of law for the recovery of the amount in question. It has been observed by Their Lordships. 'There being no appearance on behalf of the plaintiff, the suit is dismissed for default. 'The assessee has not only failed to furnish evidence to establish




was the understanding between the assessee and debtor has not been disclosed to the revenue or to appellate authorities what are the reasons for not pursuing the suit for recovery is also shrouded with mystery. The claim of the assessee that it has suffered a loss is not supported by any evidence except that there was a debt outstanding against the party. The debt is not of a small amount but more than Rs. 50 lakhs. Mere statement that the amount has become bad, in my considered view, would not be enough for allowance of deduction under section 37. The request of the assessee that an opportunity may be given to establish that assessee has actually suffered a loss at this stage is too late in the day, more so in the light of finding of fact recorded by the learned Accountant Member that the Authorised Representative had submitted before the Division Bench that he has no evidence to prove that the amount had become irrecoverable at the time of write off. The assessee never sought this opportunity either before the Commissioner (Appeals) or before the Division Bench. I therefore, do not entertain such a request at this stage."

8. Thus, from whatever angle the matter is to be looked into, the assessee could not have obtained the deduction of the aforesaid amount in the Assessment Year 1997-98. We are, therefore, of the opinion that no substantial question of law arises in the present case.
9. However, before we part with the order, it is necessary to take note of one development in the present case. Suit filed by the assessee was ultimately dismissed for non-prosecution on 13.01.2005 because of the reason that there was no progress in this Suit at all as the defendants could not even be served. Learned counsel for the assessee made a statement that various



least on the dismissal of the Suit the amount irrecoverable. Mr. Aggarwal, learned counsel for the assessee stated as the Bar that this amount has not been recovered till date. Thus it can be claimed as trading loss at least after the dismissal of the said Suit in that relevant year.

10. In these circumstances, we are of the opinion that in the interest of justice, liberty is granted to the assessee to move an application under Section 154 of the Act before the Assessing Officer insofar as return filed by the assessee for the assessment year 2005-06 is concerned claiming this amount as trading loss in that year. If such an application is filed within one month from today, that shall be considered by the AO on its merit and shall not be dismissed on the ground of limitation.


(A.K. SIKRI)
JUDGE


(SIDDHARTH MRIDUL)
JUDGE

November 04, 2009.

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