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E-483  
15-10-07

IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH 'E' : NEW DELHI

BEFORE SHRI N.K.KARHAIL, JM AND SHRI P.M.JAGTAP, AM

I.T.A.No.1826/Del/2005  
Assessment Year : 2000-01

M/s Ashirwad Steels & Alloys  
(P) Limited,  
328, Gaushala Nadi Road,  
Muzaffarnagar.  
(Appellant)

Vs. Addl.Commissioner of Income Tax,  
Circle-1,  
Muzaffarnagar.

(Respondent)

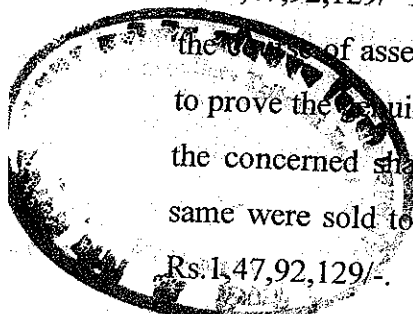
Appellant by : Shri Ved Jain, CA.  
Respondent by : Shri Amit Govil, Sr.DR.

ORDER

PER P.M.JAGTAP, AM :

This appeal by the assessee is directed against the order of learned CIT(A), Muzaffarnagar dated 25.1.2005 and in the grounds raised therein, the assessee has challenged the action of the learned CIT(A) in upholding the action of the Assessing Officer in treating the income of Rs.1,47,92,129/- claimed to be received by the assessee from trading of shares as 'income from other sources' and in not allowing the same to be set-off against brought forward business loss and unabsorbed depreciation.

2. The assessee in the present case is a company which is mainly engaged in the business of manufacturing and trading of MS Bars. A return of income for the year under consideration was filed by it on 30.11.2000 declaring a loss of Rs.1,41,10,760/-. In the said return, the assessee company had claimed to have earned other income of Rs.1,47,92,129/- in trading of shares which was shown as its business income. During the course of assessment proceedings, the assessee company was called upon by the AO to prove the genuineness of the said claim. In reply, it was submitted by the assessee that the concerned shares were purchased by it from M/s DKG Buildcon Pvt.Ltd. and the same were sold to M/s V.B.Impex Pvt.Ltd. at a higher price resulting in the income of Rs.1,47,92,129/-. It was submitted that even though no much services were required to be rendered to earn the said income, the purchase and sale transactions of shares were



part of its business activities and the profit earned from the said transactions was its business income. It was also explained that although there was no transfer of funds immediately on the said transactions of purchase and sale of shares, the assessee company had good contacts with the concerned parties and it was agreed that the payments would be settled during the financial year itself to the extent possible.

3. In order to verify the submissions made on behalf of the assessee company as aforesaid, the following information was called for by the AO from the concerned parties u/s 133(6):-

- (1) Give evidence of Registration of company.
- (2) Whether share sold are quoted or not. In case of quoted share give quotation.
- (3) File copy of bank account showing the receipts of sale consideration.
- (4) Give name & addresses of Directors of company, with Telephone Nos.
- (5) Whether company is assessed to tax, if yes, give PAN & address of assessing officer and proof of filing of return for assessment year 2000-01, onwards.
- (6) Photocopy of the correspondence file.
- (7) Copy of balance sheet for F.Y. 1999-2000."

4. In the replies received by the AO, the concerned parties i.e. M/s DKG Buildcon Pvt.Ltd. and M/s V.B.Impex Pvt.Ltd. confirmed the transactions of purchase and sale of shares made with the assessee company. However, the relevant details such as name and address of the persons who held the shares before and after the sale were not given by them. Copies of de-mat accounts had also not been furnished by the said companies. The name and address of the person who made correspondence with regard to the purchase and sale of shares had also not been provided by the said companies. It was, therefore, held by the AO that genuineness of the relevant share transaction claimed to have been effected by the assessee giving rise to the income of Rs.1,47,92,129/- was not established and treating the said income as 'income from other sources', he did not allow the brought forward business losses to be set-off against the said income as claimed by the assessee. He, accordingly, completed the assessment u/s 143(3) assessing the total

income of the assessee company at Rs.39,86,600/- as against a loss of Rs.1,41,10,760/- returned by the assessee.

5. Aggrieved by the order of the AO passed u/s 143(3), the assessee company preferred an appeal before the learned CIT(A). It was pointed out on behalf of the assessee company before him at the outset that the other income of Rs.1,47,92,129/- shown in the profit & loss account was consisting of Rs.42,129/- on account of interest received on FDRs whereas the balance amount of Rs.1,47,50,000/- only was on account of income from trading of shares. It was further submitted on behalf of the assessee that the shares in question had been purchased by it from M/s DKG Buildcon Pvt.Ltd. and the same were subsequently sold to M/s V.B.Impex Pvt.Ltd. resulting in a substantial gain. It was submitted that the existence of both these companies was established on evidence before the AO and the transactions of purchase and sale of shares with the assessee company were also confirmed by the said companies. It was submitted that the shares so dealt with by the assessee company were of M/s Padmini Polymers Ltd., a renowned company and the same were duly listed on stock exchange. It was also pointed out that the said transactions of purchase and sale of shares were made at the prevailing market price. It was further submitted that Explanation to Section 73 had no application to the facts of the assessee's case since the same was applicable only when transactions are settled without taking delivery of the shares.

6. All the aforesaid submissions made on behalf of the assessee company, however, did not find favour with the learned CIT(A) and he proceeded to uphold the action of the AO in treating the profit earned by the assessee in trading of shares as 'income from other sources' instead of 'income from business' as claimed by the assessee for the following reasons given in paragraph No.3.4 of his impugned order:-

"3.4 I have carefully considered the submission of the authorised representative and perused the documents placed on record. The main issue involved is whether the profits shown by the assessee from alleged purchase and sale of shares were genuine or not. The assessee company was engaged in the business of manufacturing of M.S.Bars. The company had commenced its business during previous year 1998-99 and its first assessment was A.Y. 1999-2000 in which the company had shown loss of Rs.1,80,71,540/-. Assessment year 2000-01, under

consideration, was the second year. From the perusal of the documents placed on records, the following facts have emerged:

(i) The appellant company's business was manufacturing of M.S.Bars. As per objects clause contained in Memorandum of Associated sale and purchase of shares was not one of its main objects. The main objects are as under:

**“(A) MAIN OBJECTS TO BE PURSUED BY THE COMPANY ON ITS CORPORATION:**

1. To carry on the business of running an induction furnace or any type of furnace for the manufacture of mild steel ingots, alloy steels or special steels in any form;
2. To carry on the business of manufacturing and trading of stainless steels and aluminium utensils.
3. To conduct and carry on any business relating to rolling, roughing, casting, plating, fabricating, welding, extruding, stretching, reducing, forging, forming, pressing, hammering, drawing, machining, grinding, engineering or processing or smelting or converting, melting, refining, making, working or furnishing in any other manner all kinds of metals of ferrous and non ferrous, alloys and special steels in any form.
4. To acquire, purchase and run a Rolling Mill on lease or otherwise for the purpose of rolling of iron and steel and other metals, alloys and special steel.
5. To manufacture, produce, buy, sell, trade, import, export or generally to deal in implements; agricultural implements and other rolling stock and hardware;
6. To carry on the business as importers, exporters and dealers of and in clinkers ashes, second hand or used machinery, tools, scrap metals and metallic residues and waste and scrap materials of any kind and to undertake breaking of any huge machinery or ship or plant etc. for selling its contents for the benefit of the company.”

Thus, purchase and sale of shares was not the main object of business of the assessee company.

(ii) From the tax audit report of the year ended on 31.3.2000 also, it is noticed that the business of the assessee company was shown as “manufacturing of M.S.Bars” and it was specially mentioned that there was no change in the business of the company during the year under

consideration. Relevant para 8 of the form 3CD, report U/s 44-AB, is as under:

- “8.(a) Nature of business or profession : Manufacturing of M.S.Bars  
 (b) If there is any change in the nature of business or procession, the-particulars of such change. NO”

Thus, the tax audit report clearly states that the purchase and sale of shares was not the business of the appellant company.

(iii) In the profit and loss account also, the assessee had shown alleged income from purchase and sale of shares as other income. The relevant portion of profit and loss account is reproduced as under:

	Current Year 31.03.2000	Previous Year 31.03.1999
<u>Income:</u>		
Sales	16,26,22,388.00	43370507.45
Other Income	1,47,92,129.00	--
Increase/(Decrease) in stock	<u>2,018,802.50</u>	<u>4597389.50</u>
Total :	<u>17,94,33,319.50</u>	<u>47967896.95</u>

(iv) Though the shares of M/s Padmini Polymers Limited were quoted on the Stock Exchange, alleged purchase and sale of these shares were shown to be done off stock exchange.

(v) Shares were claimed to be purchased on 16.8.1999 @ 10.50 per share and sold on 15.11.1999 @ 40 rupees within three months. The appellant had not adduced any cogent evidence regarding delivery of shares.

(vi) This was the sole transaction shown to be done by the company. The company had never purchased or sold shares before this transaction or thereafter.

(vii) The appellant had not furnished any correspondence done for the transaction and claimed to be done through Directors telephonic conversation and meeting. Director's of the company do not have any experience or expertise that they would earn a profit of Rs.1,47,50,000/- in a single transaction.

(viii) The appellant company had not made any payment to M/s D.K.G. Buildcon (P) Limited during the financial year 1999-2000 and F.Y. 2000-01 from whom shares were claimed to be purchased for Rs.52,50,000/-. The payments to M/s D.K.G. Buildcon (P) Limited was shown to be made on 12.6.2002 by a transfer entry from the party to whom the shares were sold i.e. M/s V.B.Impex (P) Limited. M/s V.B.Impex (P) Ltd. had communicated the appellant that they had debited M/s D.K.G.Buildcon (P) Limited by Rs.52,50,000/- and credited their account. It may not be irrelevant to reproduce the letter written by M/s D.K.G.Buildcon (P) Limited and M/s V.B.Impex (P) Limited in this regard:

D.K.G.Buildcon Pvt.Ltd.  
D-2, Bal Udhyan Marg, Uttam Nagar, New Delhi - 110059

Date : 05.06.2002

Ashirvad Steel & Alloys Pvt.Ltd.  
7<sup>th</sup> KM.Meerut Road,  
Muzaffarnagar (UP)  
Sir,

As discussed with you, you are requested to kindly make the payment of Rs.52,50,000/- (Rupees Fifty two lacs fifty thousand only) to M/s V.B.Impex Pvt.Ltd., L-53, Uttam Nagar, New Delhi on our behalf under intimation to us.

Kindly acknowledge the same.

Thanking you,

Yours faithfully  
For D.K.G.Buildcon Pvt.Ltd.  
(Director)

V.B.IMPEX PVT.LTD.  
L-53, Bal Udhyan Marg, Uttam Nagar, New Delhi - 110059.

Date : 10.06.2002  
Ashirvad Steel & Alloys Pvt.Ltd.  
7<sup>th</sup> KM. Meerut Road,  
Muzaffarnagar (UP).  
Sir,

As per letter dated 05.06.2002 received from M/s D.K.G.Buildcon Pvt.Ltd., we have debited your account by Rs.52,50,000/- (Rupees fifty two lacs fifty thousand only).  
You are requested to credit our account by Rs.52,50,000/- (Rupees fifty two lacs fifty thousand only).

You are requested to credit our account by Rs.52,50,000/- (Rupees fifty two lacs fifty thousand only).

Kindly acknowledge the same.

Thanking you,

Yours faithfully,

For V.B.Impex Pvt.Ltd.

Director

It is highly improbable and unbelievable that a person would not make payment of the amount of Rs.52,50,000/- for the purchase of shares for such a long time.

Secondly, it is also evidence from the above two letters that both the parties i.e. M/s D.K.G.Buildcon Pvt.Ltd. and M/s V.B.Impex Pvt.Ltd. were related parties and the appellant company was introduced as conduit to accommodate the appellant.

(ix) The appellant has not received any payment during the financial year under consideration and even in two subsequent financial years. As on 1.4.2003, the amount of Rs.1,47,50,000/- was shown as outstanding, which was the balance amount after adjustment entry as discussed hereinabove. Even during the financial year 2003-04, payment of Rs.85,00,000/- only was shown to be received.

(x) It was the second year of the company. In the first year, the appellant company had shown huge loss of Rs.1,80,71,450/- which include unabsorbed depreciation of Rs.80,76,555/-.

From the above-mentioned facts, it is very clear that the assessee company was not in the business of purchase and sale of shares. Since the company had huge brought forward losses, the profits were taken only through accommodating entry in order to set off the brought forward and current losses. The assessee company was shown as a conduit between M/s D.K.G.Buildcon Pvt.Ltd. and M/s V.B.Impex (P) Limited in order to book profits and no genuine transaction had taken place. The cases cited by the authorized representative are not applicable to the facts of the case as in all the case, genuineness of the transactions was not doubted whereas in the case of the appellant, transaction of purchase and sale was not considered genuine. It may not be out of place to mention that the word "business" connotes some real, substantial and systematic or organized course of activity or conduct with set purposes. A single and isolated transaction can be held to be capable of falling within the definition of business as being adventure in the nature of trade provided the transactions bears clear indicia of trade. The question, therefore, whether a particular source of income is business or not must be decided according to our ordinary notion as to what a business is. In the instant case, there was no indicia

of trade and the assessee was not indulged in the business of purchase and sale of shares.

Looking into the surrounding circumstances of the case mentioned herein above that the purchase and sale of shares was not the business of the appellant company; that this was the sole transaction of purchase and sale of shares; that the appellant company had not made any payment for the purchase of shares and the same was shown only as adjustment entry; that the transactions were claimed to be off stock exchange; that no correspondence was furnished regarding the deal of purchase or sale of shares; that the company had huge brought forward losses; that there was no expert and experienced staff or directors of the company to deal in shares which could result into huge profits and that the payment of sale of shares had not been received and applying the principle of human probability as was held by the Supreme Court in the case of CIT Vs. Durga Prasad More (1971) 82 ITR 540 (SC) and Sumati Dayal Vs. CIT (1995) 214 ITR 801 (SC), it is the irresistible conclusion that the alleged transactions of purchase and sale (SC), it is the irresistible conclusion that the alleged transactions of purchase and sale shown by the appellant were not genuine. However, since the appellant has shown income of Rs.1,47,50,000/- the same is treated as income from undisclosed sources to be taxed under the head "income from other sources". The AO was, thus, justified in treating the income to the extent of Rs.1,47,50,000/- as income from other sources. However, balance amount of Rs.42,129/- is to be treated as income from business.

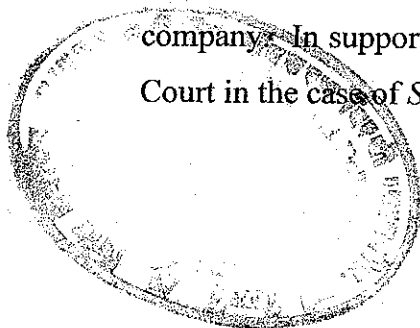
It may also be mentioned that unabsorbed depreciation cannot be set off from the income from other sources, as per the provisions of section 32(2) operative for the previous year relevant to assessment year 2000-01 under consideration. The amended provisions of section 32(2) were made effective w.e.f. 1.1.2002. The amendment was not curative in nature. In assessment year 2000-01 under consideration, the provisions of section 32(2) were at par with provisions of section 72 relevant to carry forward and set off of business loss. Therefore, the AO was justified in not allowing set off of unabsorbed depreciation from 'income from other sources'. Since the transaction of purchase and sale of shares is not considered genuine, it was not part of the business of the assessee and there was no loss, provisions of Explanation U/s 73 are not applicable."

Aggrieved by the order of the learned CIT(A), the assessee has preferred this appeal before the Tribunal.

7. The learned counsel for the assessee submitted before us that the shares of M/s Padmini Polymers Ltd. purchased and sold by the assessee were regularly listed on the



stock exchange and there is no dispute about the values at which the same were purchased and sold by the assessee. He submitted that the transactions of purchase and sale of the said shares have been treated as bogus by the AO without bringing any adverse material on record to justify the same. He submitted that all the relevant details and documents were furnished by the assessee before the AO to support and substantiate its claim of having purchased and sold the said shares and even in the independent enquiry made by the AO with the concerned parties, the purchaser as well as seller of the shares had confirmed the said transactions. He submitted that both the said parties are regularly assessed to income tax and in their assessments, the transactions of purchase and sale of shares shown by them with the assessee company have been accepted by the department. According to him, the Assessing Officer, however, treated the said transactions as bogus merely on the basis of delay in settlement of payment which was not justified. He contended that if the Assessing Officer was not satisfied about the genuineness of the transactions on the basis of details and documents already furnished by the assessee, he could have made further enquiries in the matter so as to ascertain the truth and having failed to do so, the conclusion drawn by him by treating the transactions as bogus was merely based on suspicion and surmises. Relying on the decision of Hon'ble Supreme Court in the case of *Umacharan Shaw & Bros. Vs. CIT* – 37 ITR 271, he contended that suspicion, however strong, cannot take place of legal proof. He also contended that the proof submitted by the assessee company to establish the genuineness of the share transactions was treated by the AO as no proof. He submitted that the delivery of shares was taken and subsequently given by the assessee and therefore, Explanation to Section 73 was not applicable to the said transactions of purchase and sale of shares made by the assessee company. In reply to a query raised by the Bench in this context, he submitted that the said shares, however, were not transferred in the name of the assessee company and the same were apparently acquired on a 'blank transfer'. He contended that the said transactions made by the assessee company with the two parties were accepted by the department in the cases of seller as well as purchaser and there was thus no justification for the AO not to accept the same in the case of the assessee company. In support of this contention, he relied on the decision of Hon'ble Delhi High Court in the case of *Sona Electric Company Vs. CIT* – 152 ITR 507.

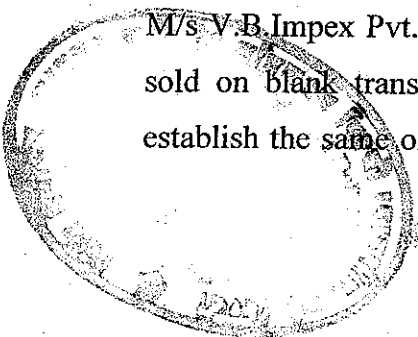


8. Without prejudice to his aforesaid contentions and as an alternative, the learned counsel for the assessee submitted that when the transactions of purchase and sale of shares were held to be bogus by the AO, the same ought to have been totally ignored by him and it was not permissible for him to bring to tax the income arising from such transactions which have been treated by himself as bogus. He also submitted that the credit as a result of the said transactions was not a cash credit as envisaged in Section 68 and therefore, the same could not be added in the hands of the assessee company as its deemed income even by invoking the provisions of Section 68. He further submitted that the said transactions were duly recorded by the assessee company in the books of account of its business and even if the same were to be treated as not genuine, it would not change the nature of the said transactions in the absence of any evidence to show to the contrary. He contended that the action of the AO in treating the said transactions as bogus and in still bringing to tax the profit arising from the said transactions as income of the assessee company from other sources was not sustainable and the learned CIT(A) was not justified in upholding the same.

9. The learned DR, on the other hand, strongly supported the orders of the authorities below in treating the transactions of sale and purchase of shares shown by the assessee as bogus and in treating the profit arising from such transactions shown by the assessee as its income from other sources. In this regard, he invited our attention to paragraph No.3.4 of the impugned order of the learned CIT(A) to show that all the aspects of the matter were duly taken into consideration by him while upholding the decision of the AO on this issue. He submitted that there was a failure on the part of the assessee company to produce the relevant documentary evidence such as broker's receipt, contract note, proof of delivery of shares etc. to establish the genuineness of the share transactions and this being so, the authorities below were right in not accepting the said transactions as genuine. He submitted that the assessee company itself had accepted of having earned the profit from the said share transactions and since the said profit was duly credited in its books of account, the same was rightly held as its income liable to tax despite having treated the said transactions as bogus. He submitted that since the explanation of the assessee about the source of the said income being share transactions was not accepted by the department, the said income was rightly brought to tax under the

residuary head of 'income from other sources'. He submitted that in the cases cited by the learned counsel for the assessee, cogent evidence was produced by the assessee which could not be denied by the department and since no such cogent evidence was produced by the assessee in the present case to establish the genuineness of the relevant transactions, the decisions rendered in the said cases have no application to the facts of the present case.

10. We have considered the rival submissions and also perused the relevant material on record. It is observed that even though the values of shares claimed to have been purchased and sold by the assessee were duly supported by market quotations of the concerned shares at the relevant time and the same was not disputed by the department, the assessee company was specifically called upon by the AO to establish the genuineness of the said transactions by producing the supporting documentary evidence. It is no doubt true that the existence of the two companies with whom the said transactions were made by the assessee company was established on evidence and in the independent enquiry directly made by the AO, the said two companies had also confirmed of having made the said transactions with the assessee company. However, the same was not sufficient to conclusively establish the genuineness of the relevant transactions especially when the same was doubted on the basis of inordinate delay in settlement of payments against the said transactions and the failure of the assessee to produce the relevant details such as copy of de-mat account etc. In our opinion, if the shares dealt in by the assessee company were of reputed company like M/s Padmini Polymers Ltd., supporting evidence could have been or rather should have been brought on record by it to at least establish that the said shares were registered in the name of M/s DKG Buildcon Pvt.Ltd. prior to their sale to the assessee company and the same were duly transferred in the name of M/s V.B.Impex Pvt.Ltd. on their sale by the assessee company to the said company. Before us, the learned counsel for the assessee has submitted that the delivery of the said shares was actually taken by the assessee company and without transferring and registering the said shares in its name, the same were sold to M/s V.B.Impex Pvt.Ltd. If this is the factual position and the shares were acquired and sold on blank transfer as claimed, the assessee company should be in a position to establish the same on evidence. It is relevant to note here that the relevant shares were



listed on a stock exchange at the relevant time and if this is so, it has to be seen as to whether such blank transfers directly between purchaser and seller of shares without any assistance of brokers was permissible as per the stock exchange rules. All these aspects, in our opinion, were relevant to ascertain the genuineness of the transactions of purchase and sale of shares claimed to be made by the assessee company. It appears from the record that neither the assessee company has brought the relevant documentary evidence on record to establish its case nor the AO has made sufficient enquiry in the matter before drawing an adverse inference against the assessee in the matter of genuineness of the relevant share transactions. Even the learned CIT(A) <sup>has</sup> decided the issue against the assessee mainly on the basis of human probability without appreciating that all these relevant and material aspects of the matter had remained to be ascertained. Having regard to all these facts of the case, we are of the view that it would be fair and proper and in the interest of justice to restore this matter to the file of the Assessing Officer for deciding the same afresh after making the necessary enquiry and after giving the assessee company an opportunity to led evidence to establish the genuineness of the relevant transactions. The Assessing Officer shall ~~also~~ be free to look into the other relevant aspects of the matter <sup>also</sup> touched upon by the learned CIT(A) in his impugned order such as nature of assessee's business, applicability of Explanation to Section 73 etc. as he may think fit to do. The assessee company shall also be at liberty to raise the alternative contentions before the AO who is directed to consider and deal with the same on merits in accordance with law as required in the set aside proceedings. The impugned order of the learned CIT(A) on this issue is, therefore, set aside and this appeal of the assessee is treated as allowed for statistical purposes.

11. In the result, the appeal of the assessee is treated as allowed for statistical purposes.

Decision pronounced in the open Court on 21<sup>st</sup> September, 2007.

*sd/-*

(N.K.KARHAIL)  
JUDICIAL MEMBER

*sd/-*

(P.M.JAGTAP)  
ACCOUNTANT MEMBER

Dated : 21.09.2007.  
VK.

Copy forwarded to: -

- 1. Appellant *By Hand*
- 2. Respondent
- 3. CIT
- 4. CIT(A)
- 5. DR, ITAT

*[Handwritten Signature]*  
Deputy Registrar



