

**IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN**

Before Shri Chandra Poojari, AM & Shri George George K, JM

ITA No.498/Coch/2017 : Asst.Year 2001-2002

M/s.Amalgam Foods Ltd. Briston Road, Wellington Island Cochin 682 003. PAN : AABCA8283D.	Vs.	The Dy.Commissioner of Income-tax, Circle - 1 Alleppey.
(Appellant)		(Respondent)

Appellant by : Sri.R.Srinivasan
Respondent by : Smt.A.S.Bindhu, Sr.DR

Date of Hearing : 26.11.2018	Date of Pronouncement : 27.11.2018
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ORDER

Per George George K., JM

This appeal at the instance of the assessee is directed against CIT(A)'s order dated 09.08.2017. The relevant assessment year is 2001-2002.

2. The grounds raised read as follows:-

"1. The Officers below were not justified in holding that the loss claimed to have been sustained in earlier years has nothing to do with the current year's transaction and hence, cannot be allowed for the year under consideration.

2. The Officers below failed to appreciate that export advance received for supply of goods had been returned back at the rate prevailing at the time of remittance during the year and the appellant could not anticipate the fluctuation in foreign exchange.

3. *The Officers below did not appreciate the fact as to the mode of receipt of the export advance.*

4. *The Officers below did not appreciate the fact that the loss occurred due to fluctuation foreign exchange rate and should not have held that such export did not earn income during the current year under consideration.*

5. *The Officers below were not justified in referring the case relating to Appollo Tyre v. Deputy Commissioner of Income-tax in ITA No.31/Coch/10 since the appellant company has received the amount on export commitment and not on Capital Goods."*

3. Brief facts of the case are as follows:-

The assessee is a company engaged in export of seafood. For the assessment year 2001-2002 the return of income was filed on 31.10.2001 disclosing a total loss of Rs.3,90,48,193. The assessment was completed u/s 143(3) of the I.T.Act vide order dated 11.02.2004, wherein the total loss was reduced to Rs.2,38,47,637. In the said assessment order, the Assessing Officer had disallowed a sum of Rs.1,51,99,504 claimed as loss incurred on account of foreign exchange fluctuation. The relevant observation of the Assessing Officer while disallowing the loss of Rs.1,51,99,504 reads as follow:-

"As shown in the Annex.V to the Form No.3CD, the expenditure claimed by the assessee include an amount of Rs.1,51,99,504/- being exchange loss relating to the earlier years.

To a proposal for its disallowance as not relating to the relevant previous year, in para 8 of the assessee's reply dated 25-6-2003 the assessee

objected stating that the liability was ascertained and quantified only during this year and after finalization of the accounts for the year ending 31-3-2000, and that therefore such expenditure, which according to the Assessee could not be ascertained earlier, could be allowed in the present asst.year even though the assessee has been following the mercantile system of accounting.

Foreign exchange rates of every day are available the same day itself. Therefore, it could not be that the foreign exchange rate as at 31-3-2000 could not be ascertained even as at the time of finalizing the assessee's accounts for the year ended 31-3-2000. Therefore, the assessee's plea that the liability could be ascertained and quantified only after its accounts for the earlier year were finalized is unacceptable. In the circumstances, the foreign exchange loss of the earlier year is not admissible in this assessment, as it does not relate to the relevant previous year. The claim is accordingly disallowed."

4. Aggrieved by the assessment order, the assessee preferred an appeal to the first appellate authority. The CIT(A) confirmed the view taken by the Assessing Officer. The relevant finding of the CIT(A) reads as follow:-

"3. I carefully examined the facts of the issue and also considered the rival contentions. It is not in dispute that the loss claimed to have been sustained is in respect of the transaction of the earlier years and nothing to do with the current year transaction. It is also not in dispute that the export advance received for the supply of goods had been returned back to the rate prevailing at the time of remittance during the year under consideration. The only dispute is whether the foreign exchange fluctuation loss pertains to previous years transactions but the liability was ascertained and quantified during the year under consideration, can be allowed as

deduction or not. While raising this question, it could easily be made out that it is not as argued by the appellant that the export advance received during the year 1996-97 had been returned back due to the reason that the appellant company could not execute the commitment but it relates to foreign exchange fluctuation corresponding to the goods exported during earlier years. Had it been the case of export advance returned back then the appellant could have furnished additional details such as how the advance had been received, what are the terms and conditions on which the advance had been received, in which year the advance so received had been considered for the taxable income worked out, correspondence they have had with the American company et, in this regard. None of the above details have ever been filed by the appellant. In the absence of filing the above details, the appellant cannot have case for further consideration. This apart, having agreed to the fact during the course of assessment proceedings that the loss stated is in respect of the transactions of the earlier years, the appellant cannot change the argument now, during the course of appeal hearing, stating that the loss incurred is on account of returning back the export advance received in the earlier year. To my understanding, it is not on account of returning back the export advance the captioned loss was incurred but on account of foreign exchange fluctuation corresponding to the goods exported in earlier years the loss was incurred. This is also not an expenditure incurred in the course of earning profit during the year under consideration but pertains to the transaction carried out in the earlier years. Further, as ruled by the Hon'ble ITAT, Cochin Bench in the case of Apollo Tyres Ltd. v. DCIT in ITA No.31/Coch/2010/ dt. 29.05.2013, foreign exchange fluctuation loss shall necessarily be treated as capital loss if it is not incurred in the course of earning profit. In the background of foregoing, I am of the considered opinion that the appellant has no case to argue."

5. Aggrieved by the order of the CIT(A), the assessee has filed the present appeal before the Tribunal. The learned Counsel for the assessee has filed a paper book enclosing the financial statements from 31.03.1997 to 31.03.2001, agreement entered between the assessee and Ocean Diamond Inc., copy of the bank guarantee issued by the Central Bank of India, application to the Reserve Bank of India, letters from Ocean Diamond Inc., etc. The assessee has also filed a petition accompanied by the affidavit of the Managing Director of the assessee-company for admission of additional evidences. It is submitted by the learned AR that the enclosures in the paper book filed were not filed before the Income-tax Authorities since it was not sought by them. It was further contended that the above additional evidences that is filed goes to the root of the issue and substantial cause and justice, the same need to be taken on record. It was submitted that the additional evidences now filed before the Tribunal clearly proves that the assessee had received interest free export advances in the earlier years from Ocean Diamond Inc. and when export obligation could not be fulfilled, the assessee had to remit the amount during the current assessment year. It was stated that the foreign exchange fluctuation loss was on account of return of the export trade advance to Ocean Diamond Inc. which was an allowable business loss.

6. The learned Departmental Representative, on the other hand, strongly supported the orders passed by the Assessing Officer and the CIT(A).

7. We have heard the rival submissions and perused the material on record. The case of the assessee is that during the assessment year 1996-97 it had received from Ocean Diamond Inc., based in USA, interest free export advances for the supply of goods amounting to two Million US Dollars. It was stated by the assessee that it could not execute the supply of goods and the amount had to be returned back during the relevant assessment year. Therefore, it was submitted that the exchange fluctuation loss incurred during the relevant assessment year pertains to the carrying on of the business and is an allowable business expenditure. It further submitted that the same could be quantified / ascertained only at the time of repayment of the advance to Ocean Diamond Inc., USA.

8. We noticed that the assessee has filed additional evidences in the form of financial statements for the year ending 31.03.1997 to 31.03.2001, wherein the advances received from Ocean Diamond Inc. is shown as unsecured loans. The assessee has also produced copies of agreement entered by it with Ocean Diamond Inc., based on which assessee had received export advance of two million USD. On perusal of the agreement, it is clear that the amounts have been received by the assessee for supply of seafood to Ocean Diamond Inc., USA. The assessee has also produced copy of the bank guarantee issued by the Central Bank of India, the applications and communication with the Reserve Bank of India for receipt and remittance of foreign exchange and also

copies of communication assessee had with Ocean Diamond Inc. The additional evidences now filed goes to the root of the issue and for a proper adjudication of case, we admit the same on record. Since the additional evidences are taken on record, in the interest of justice and equity, the same need to be examined by the Assessing Officer. Accordingly, we remit the issue to the Assessing Officer for *de novo* consideration. The Assessing Officer shall examine whether the amount of two Million USD was received by the assessee in the past years as trade advance in the course of its business of export of seafood and whether the foreign exchange fluctuation loss incurred by the assessee was on account of repaying the above trade advance. If the foreign exchange loss is on account of repayment of trade advance and is on revenue front, necessarily same is to be allowed as business loss. It is ordered accordingly.

9. In the result, the appeal filed by the assessee is allowed for statistical purposes.

Order pronounced on this 27th day of November, 2018.

Sd/-
(Chandra Poojari)
ACCOUNTANT MEMBER

Sd/-
(George George K.)
JUDICIAL MEMBER

Cochin ; Dated : 27th November, 2018.
Devdas*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Kottayam.
4. The CIT, Kottayam.
5. DR, ITAT, Cochin
6. Guard file.

BY ORDER,

(Asstt. Registrar)
ITAT, Cochin