

आयकर अपीलीय अधिकरण, 'ए' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH, CHENNAI

श्री महावीर सिंह, उपाध्यक्ष एवं डॉ एम एल मीना, लेखा सदस्य के समक्ष
BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENT AND
Dr. M.L. MEENA, ACCOUNTANT MEMBER

आयकर अपील सं./ITA No.:2100/CHNY/2017

निर्धारण वर्ष /Assessment Years: 2012 - 13

The ACIT,
Corporate Circle - 5(2),
Chennai - 34.

M/s. Rudradev Aviation Pvt.
v. **Ltd.,**
RR Tower III,
Thiru Vi Ka Indl. Estate,
Guindy, Chennai - 600 032.

(अपीलार्थी/Appellant)

PAN: AADCR 3575R

(प्रत्यर्थी/Respondent)

&

C.O. No.: 152/CHNY/2017
(in I.T.A. No. 2100/CHNY/2017

निर्धारण वर्ष /Assessment Year: 2012 - 13

M/s. Rudradev Aviation Pvt.
Ltd.,
RR Tower III,
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The ACIT,
v. Corporate Circle - 5(2),
Chennai - 34.

PAN: AADCR 3575R

राजस्व की ओर से /Revenue by

: Shri Guru Bashyam, CIT

निर्धारिती की ओर से/Assessee by

: Shri R. Venkatesh, CA

सुनवाई की तारीख/Date of Hearing

: 14.03.2022

घोषणा की तारीख/Date of Pronouncement

: 31.03.2022

आदेश / O R D E R**PER BENCH:**

This appeal by the Revenue and cross objection by the assessee are arising out of the order of Commissioner of Income Tax (Appeals)-3, Chennai in ITA No.111/15-16/CIT(A)-3, vide order dated 28.04.2017. The assessment was framed by the DCIT (OSD), Corporate Range 5, Chennai u/s.143(3) of the Income Tax Act, 1961 (hereinafter the 'Act') vide order dated 30.03.2015 for the assessment year 2012-13.

2. The only issue in this appeal of Revenue is against the order of CIT(A) deleting the disallowance of write off amounting to Rs.12,37,27,087/- made by the assessee in the profit & loss account towards the joint venture loss holding the same as capital loss. For this, Revenue has raised various grounds which need not to reproduce.

3. The brief facts are that the assessee is a private limited company incorporated with the main object to start an Aviation Training School. The assessee filed its return of income claiming

total loss of Rs.6,01,88,401/-, comprising of the following income and losses

i) Gain from sale of land & building	:	Rs.4,77,38,633
ii) Irrecoverable advance taken to profit and loss account (however claimable as capital loss)	:	Rs.12,37,27,087
iii) Pre-Operative expenses	:	Rs.75,17,501
iv) Gain from Venture	:	Rs.2,35,00,000

The main issue now before us is, the loss claimed by assessee of Rs.12,37,27,087/- held by CIT(A) as 'capital loss'. The AO during the course of assessment proceedings noted that the assessee is in formative stage and business did not take off and hence, the land was sold to one M/s. AmarPrakaash Developers Pvt. Ltd., for a consideration of Rs.16.73 crores. This land is stated at No.92, Thirumudivakkam Village, Sriperumbudur and the extent of land sold is 7 acres and 76 cents. The assessee company and its Associate Enterprise M/s. Raghav Techpark Pvt. Ltd., are the joint vendors. The assessee's portion of sale consideration is Rs.14,57,40,400/-. The assessee in its accounts claimed joint venture loss of Rs.12,37,27,087/-. The AO noted that the assessee vide the purchase agreement dated 18.01.2007 had intended to purchase A320 flight simulation equipment from M/s. Thales Training & Simulation Ltd., and for that purpose paid a sum of

Rs.14,10,97,242/-. According to AO, due to breach of terms and conditions, the procurement was not completed and the assessee had written off the entire sum of Rs.14,10,97,242/- as joint venture loss and assessee's share of Rs.12,37,27,087/-. According to AO, an irrecoverable advance made towards acquisition of capital asset cannot be allowed as expenditure u/s.28(i) r.w.s. 36(1)(vii) of the Act in view of the decision of Hon'ble Madras High Court in the case of Kwality Fun Foods and Restaurants (P) Ltd., vs. DCIT, [2013] 356 ITR 170 and also considered the decision of Hon'ble Apex Court in the case of Swadeshi Cotton Mills Co. Ltd., vs. CIT, [1967] 63 ITR 65 and the Hon'ble Jurisdictional High Court in the case of EID Parry (India) Ltd., 257 ITR 253. In view of the above, the AO disallowed the claim of loss by observing in para 6.6 as under:-

“6.6 Under an hypothetical situation, that if the assessee were to receive the amounts paid or if the asset is delivered, such items would not certainly enter the P&L A/c., but will come into the Balance Sheet. Therefore, following the rationale clearly expressed by the Madras High Court in the case of M/s. Kwality Fun Foods and Restaurants (P.) Ltd (supra) and M/s. E.I.D Parry India and the Supreme Court in the case of Abdullabhai Abdulkadar (supra) and swdeshi cotton mills, the claim of loss of Rs.12,37,27,087/- is treated as capital loss and is not allowed to be adjusted against the profits credited to the P & L A/c. Since the provisions of section 37(1) of the I.T. Act, 1961 does not provide for deduction of capital expenses or losses, the claim of expenditure of Rs.12,37,27,087/- is added to the taxable income of the assessee for the year.”

4. The CIT(A) following the decision of Hon'ble Calcutta High Court in the case of M/s. Binani Cements Ltd., 380 ITR 116 (Cal) allowed the assessee's claim of loss as capital loss to be set off against capital gains arising from transactions relating to the abandoned project. The CIT(A) also noted that even the AO relying on the Hon'ble Jurisdictional High Court decision in the case of Kwality Fun Foods and Restaurants (P) Ltd., *supra* and EID Parry India Ltd., *supra*, has considered this loss as capital loss and not revenue loss as claimed by the assessee in the return of income. The CIT(A) after considering the submissions of the assessee noted that on the exit from the project by the assessee, the same become eligible to be written off as capital loss which can be set off against capital loss arising out of the same transaction in term of section 70 of the Act. Accordingly, he directed the AO to allow capital loss at Rs.12,37,27,087/- which shall be set off against the current income from all sources, inter alia capital gains. Aggrieved, now Revenue is in appeal before the Tribunal.

5. Before us, the Id.CIT-DR, stated that in the present case, capital asset within the definition of provisions of section 2(14) of the Act and consequently there is no transfer of any asset as

envisaged u/s.45 of the Act and accordingly, the impugned loss does not qualify as capital loss to be set off against other incomes in term of section 70 of the Act. He argued that the claimed expenditure was capital in nature and loss arising out of the same is not allowable loss under any other head of income. He stated that the CIT(A) has not appreciated that the irrecoverable advance of Rs.12,37,27,087/- represents a balance sheet item and cannot be allowed for set off against the taxable income under any other head i.e., be it capital gains or under any other head of income. The Id.CIT-DR relied on the decisions of Hon'ble High Court of Madras in the case of Commissioner of Income-Tax vs R. Chidambaranatha Mudaliar, (1990) 240 ITR 552 (Mad), Hon'ble Apex Court in the case of Vania Silk Mills (P) Ltd., (1991) 191 ITR 647(SC) and Hon'ble Bombay High Court in the case of CIT vs Sterling Investment Corporation, 123 ITR 441 (Bom). He also relied on the judgments cited by the AO in the assessment order of Hon'ble Madras High Court in the case of Kwality Fun Foods and Restaurants (P) Ltd., *supra*. He argued that even Hon'ble Supreme Court in Swadeshi Cotton Mills Co. Ltd., *supra*, has categorically held that irrecoverable advance given in the course of business is not allowable as business or trading loss, since the loss is a loss of capital as distinguished

from allowable capital loss. Accordingly, the Id.CIT-DR asked the Bench to reverse the order of CIT(A) on this issue and confirm the assessment order.

6. On the other hand, the Id.AR for the assessee stated that the assessee has filed cross objections in which issue raised is as regards to whether the loss claimed is capital or revenue but finally he said that as decided by CIT(A) on the alternative plea of the assessee that the capital loss allowed to be set off against the incomes of current year including capital gains, the assessee will not pursue the cross objection. As far as capital work-in-progress i.e., construction cost is concerned, the same is allowable as cost to be adjusted against sale consideration being the building appurtenant to the land sold. He argued that the claim of assessee in setting off the cost of the building against the sale consideration was revenue in nature but he stick on the alternative contention that the capital cost incurred towards the abandoned project during the year is set off against the incomes of the assessee including capital gains by CIT(A) is as per the provisions of the Act. For this, he placed reliance on the decision of Hon'ble Madras High Court in the case of Kwality Fun Foods and Restaurants (P) Ltd., *supra* wherein the

Hon'ble Madras High Court has considered the loss as capital loss and not business loss following the decision of Hon'ble Supreme Court in the case of Hasimara Industries Ltd., vs. CIT, (1998) 231 ITR 842 (SC). The Id.AR also stated that even in the case of Swadeshi Cotton Mills Co. Ltd., *supra*, the purchase of taxable machinery and subsequent breach of contract, the loss was considered as capital loss by observing as under:-

On the facts put forward by the appellant itself and accepted by the Tribunal and the High Court, it is clear that the sum of Rs. 35,000 claimed as deduction under section 10(2)(xv) was really paid for breach of contracts in respect of purchase of textile machinery which would have been a capital asset. The payment was, therefore made to avoid a larger capital expenditure that would not have served the interests of the appellant-company. Such a payment made is clearly in the nature of a capital expenditure and not an expenditure incurred wholly or exclusively for the purpose of the business. The payment was neither made for the purpose of earning profits, nor for the purpose of furthering, protecting or continuing its business which was to be carried on from day to day. The payment was made with the object of avoiding an unnecessary investment in capital assets, and was an amount which was altogether outside the account of profits and gains, in the computation of which deductions are allowable for expenditure incurred wholly and exclusive for earning those profits and gains. It is, therefore, clear that this amount could not have been claimed as a legitimate deduction under section 10(2)(xv) of the Income-tax Act. Our view is supported by the observations of Rowlatt J. in "Countess Warwick" Steamship Co. Ltd. v. Ogg. The appeal consequently has no force and is dismissed with costs.

6.1 Finally Id.AR filed the decision of Hon'ble Madras High Court in the case of Tamilnadu Magnesite Ltd., vs. ACIT in T.C.A Nos.907 & 908 of 2007, wherein entire case laws were considered and finally held that the expenditure claimed whether capital or revenue has to be considered in the factual position in the case on own and held that the expenditure incurred in regard to scrap of machinery and scraps sold and loss incurred is on account of business loss. The Id.AR stated that even though the Hon'ble Madras High Court fulfills the first proposition of assessee but still as alternatively argued, he is happy with the decision of Id.CIT(A), who has held that the loss incurred on abandoned project is capital loss allowable against the incomes of current year including capital gains. In term of the above, the Id.counsel requested that the order of CIT(A) may kindly be upheld.

7. We have heard rival submissions and gone through facts and circumstances of the case. Admitted facts are that the assessee is a private limited company incorporated on 21.08.2006 with the main object to start Aviation Training School. The main object of the assessee was to impart civil aviation training to pilots, cabin crew, aeronautical engineers, aircraft maintenance staff and MRO.

Accordingly, the assessee, to set up of an aviation academy, purchased land admeasuring around 6.76 acres at Thirumudivakkam in March, 2007. The assessee entered into a joint business agreement with Raghav Tech Park, who also offered their one acre adjacent land required for the academy. To start the business, the assessee entered into an agreement on 18.01.2007 with M/s. Thales Training & Simulation Ltd., a UK based company, for impart of technology and equipments intending to acquire A320 & B737 simulation equipment. Accordingly, assessee company made an initial advance payment of Rs.14,10,97,242/-, which includes assessee's share, being joint venture business agreement with Raghav Tech Park to the extent of Rs.12,37,27,087/-. The assessee before us filed complete details of advance amount paid including bank charges. The assessee constructed building therein to create the infrastructure for housing the equipment and technology to be imported from UK based company. Due to economic reason and general downturn subsequent to signing of agreement with UK company, the assessee could not mobilize and arrange capital and to raise loans for the project. This resulted into the inability to make further payments to M/s. Thales Training & Simulation Ltd., and continued with the project. Consequently, the

assessee took a decision to abandon the project and exit from the joint venture partnership. In this regard, the assessee and the joint venture partner M/s. Raghav Tech Park Ltd., sold the lands and also the amounts spend in the project were written off in the profit & loss account as revenue expenditure. Now, the only limited dispute remains is whether the amounts spent in the project, which was abandoned, claimed a written off in the profit & loss account as revenue expenditure u/s.37(1) of the Act is allowable as revenue expenditure or capital expenditure. The CIT(A) allowed the amount spent in the project and written off as revenue expenditure as capital in nature i.e., capital loss to be set off against the incomes of current year including capital gain arising out of sale of lands. The CIT(A) relied on the decision of Hon'ble Calcutta High Court in the case of . Binani Cements Ltd., *supra*. The CIT(A) noted that the assessee initially claimed this expenditure as revenue being written off in the profit & loss account but also made alternative claim for allowing the write off as capital loss to be set off against the incomes of current year. The CIT(A) adjudicated the issue of alternative claim. The CIT(A) particularly referred to Hon'ble Jurisdictional High Court decision in the case of Kwalitiy Fun Foods and Restaurants (P) Ltd., *supra* and EID Parry India Ltd., *supra*, and

noted that "However, I have to respectfully follow the decision of the Jurisdictional High Court supra and referred to in the assessment order, by which the write off of the advance as capital loss. The capital loss is allowable to be set off as against income under various heads during the year to derive at the income which should be subject to tax. This, in my view, the AO should have allowed, having held the same to be capital loss. On the facts and circumstances and following the Jurisdictional High Court, I am inclined to allow the ground and direct the AO to allow Rs.12,37,27,087/- as capital loss which shall be set off against the current income from all sources, which inter alia also includes capital gains."

7.1 Now before us, the Id.CIT-DR argued that there is no capital asset on which capital loss can be allowed u/s.45 of the Act, thereby the provisions of section 70 of the Act, cannot be brought into operation. The Id.CIT-DR made only argument that expenditure was capital in nature and any loss arising out of the same is not allowable loss under any other head of income and he relied on the case law of Hon'ble Bombay High Court in the case of Sterling Investment Corporation Ltd., supra and Hon'ble Madras High Court

in the cases of R. Chidambaranatha Mudaliar, *supra* and Mascon Technical Services Ltd., [2013] 358 ITR 545. We noted from the decision of Hon'ble Madras High Court in the case of R. Chidambaranatha Mudaliar, *supra*, wherein the Hon'ble High Court was concerned with the allowances of capital loss against the set off of subsequent year income i.e., capital gains. The Hon'ble Madras High Court held that any loss arising on account of transfer of own capital asset, which is a pre-condition of loss to be treated as capital loss, such loss cannot be carried forward and set off against capital gains of subsequent year. In the present case before us, the facts are very clear that the assessee is claiming loss of current year against the incomes of current year and particularly capital gains. The issue before the Hon'ble Bombay High Court in Sterling Investment Corporation Ltd., *supra*, is as regards to loss occurred due to forfeiture and not by relinquishment of assessee by its capital asset. But in the present case, the issue is abandon of the project due to certain reasons. We have gone through the decision of Hon'ble Madras High Court in the case of Mascon Technical Services Ltd., *supra*, and noted that the issue before Hon'ble Madras High Court is as regards to share issue expenses whether is to be allowed as revenue expenditure even when shares could not be issue due to

non-approval of SEBI. But the facts before us in present case are altogether distinguishable and different. As before us, the issue is capital loss can be allowed arising out of abandoned project against the capital gains earned during the year or not. This has been answered by Hon'ble Madras High Court in the case of Kwality Fun Foods and Restaurants (P) Ltd., and EID Parry India Ltd., *supra*, holding the assets as capital asset and loss arising out of the same as capital loss.

7.2 We have noted that exactly on identical facts Hon'ble Madras High Court in recent decision in the case of Tamilnadu Magnesite Ltd., *supra*, has considered the issue and found that the expenditure claimed on abandoned project is of capital in nature by observing in para 33 & 34 as under:-

33. In our considered view, reliance placed on the decision of this Court in the case of E.I.D.Parry (India) Ltd., (supra) and the Kerala High Court in the case of Malabar & Pioneer Hosiery (P) Ltd. (supra) is of little avail, as in both cases, it was for a new project, in contra distinction with the factual position in the case on hand. Therefore, those decisions are factually distinguishable. Heavy reliance was placed on the decision of this Court in the case of Mascon Technical Services Ltd. (supra).

34. At the first blush it appears that the decision would help the case of the revenue, but on a closer reading it proves otherwise. The question was whether the assessee was justified in seeking for

bifurcation of the expenses incurred into capital and revenue. The Division Bench referred to the decision in the case of Brooke Bond India Ltd. vs. CIT reported in [1997] 225 ITR 798/91 Taxman 26 (SC). In the case of Brooke Bond India Ltd. (supra), it was held that expenditure, in connection with the additional issue of shares, paid to the Registrar of Companies by way of filing fee and hence, has no application. The Division Bench held that the decision in the case of Brooke Bond India Ltd. (supra) would have no application to the facts of the case, as the expenditure incurred by the assessee were shown in the books of accounts as towards issue expenses incurred during the year and they found there was no justifiable ground to dissect one part of the expenditure as revenue expenditure and another part as capital expenditure. As pointed out by the Hon'ble Supreme Court in Empire Jute Co. Ltd. (supra), we cannot take a decision sans facts and the factual position as set out in the preceding paragraph would clearly show that the abandoned project was not a new one and it was a decision taken by the Government after about 12 years after the petitioner was invited to take over the project, which was already in existence, as they were an expert in the same line of business. Therefore, on facts, we find that the CIT(A) was perfectly right in deleting the addition and holding that the expenditure was revenue not capital expenditure. We may point out that the decision in the case of Ideal Cellulura Ltd. (supra) was also a case where the expenditure was incurred to bring into existence a new asset, which is not so in the case on hand. Therefore, the said decision is also distinguishable on facts.

Even the Hon'ble Madras High Court in Kwality Fun Foods and Restaurants (P) Ltd. *supra*, has held that even the advance to contractor for execution of work for the purpose of business, if become irrecoverable, the amount was not allowable as business loss but it is capital in nature. In view of the above, we noted that

the undisputed fact is that the letter for termination of contract and forfeiture of advance paid received from M/s. Thales UK Ltd. Based on the terms of joint business arrangement executed with M/s. Raghav Tech Park Ltd., the assessee eventually recognized that the investment made in its own project as terminal loss and loss incurred on forfeiture of advance i.e., payment to suppliers. But, now assessee just supported alternative claim that even it is considered as capital loss as supported by various High Court's decisions, the same will meet the ends of justice. We are of the view that the alternative claim decided by the CIT(A) regarding allowability of capital loss and this being a short term capital loss as per section 70 of the Act, this loss can be set off against income from other sources under the same head in the current year and even there was long term capital gain from sale of land this should be set off accordingly. We find no infirmity in the findings of CIT(A) and hence, the same is affirmed. The appeal of Revenue is dismissed.

8. Coming to the cross objection of the assessee in C.O. No.152/CHNY/2017, the Id.AR for the assessee has not seriously

pressed the same because he was satisfied with the decision of CIT(A) and hence, the same is dismissed as academic.

9. In the result, the appeal filed by the Revenue as well as the cross objection filed by the assessee are dismissed.

Order pronounced in the court on 31st March, 2022 at Chennai.

Sd/-

(डॉ एम एल मीना)

(Dr. M.L. MEENA)

लेखा सदस्य /ACCOUNTANT MEMBER

Sd/-

(महावीर सिंह)

(MAHAVIR SINGH)

उपाध्यक्ष /VICE PRESIDENT

चेन्नई/Chennai,

दिनांक/Dated, the 31st March, 2022

RSR

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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|------------------------|-------------------------|------------------------------|
| 1. निर्धारिती/Assessee | 2. राजस्व/Revenue | 3. आयकर आयुक्त (अपील)/CIT(A) |
| 4. आयकर आयुक्त /CIT | 5. विभागीय प्रतिनिधि/DR | 6. गार्ड फाईल/GF. |