

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT
“SMC BENCH”

BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER

ITA No. 10/SRT/2022 (AY: 2016-17)

(Physical Court hearing)

Marvelore Mining & Allied Industreis Pvt. Ltd., 251, Shree Ambica, Besides Yash Plaza, Varachha Road, Surat- 395006. PAN : AAFCM4849R	Vs	The ITO, Circle-1(1)(2), Surat.
APPELLANT		RESPONDEDNT

Appellant by	Shri Ashwin K. Parekh, CA
Respondent by	Shri J. K. Chandnanai, Sr. DR
Date of hearing	17/10/2022
Date of pronouncement	26/10/2022

ORDER

PER PAWAN SINGH, JUDICIAL MEMBER:

1. This appeal filed by the assessee is directed against the order of the Learned National Faceless Appeal Centre, Delhi (in short ‘NFAC’)/CIT(A)”, dated 27/12/2021 for the Assessment Year (AY) 2016-17, which in turn arises out of an assessment order passed by the Assessing Officer under section 143(1) of the Income Tax Act, 1961 [hereinafter referred to as ‘the Act’], dated 19/12/2018. The assessee has raised the following grounds:

“1. The Commissioner of Income-tax(Appeals) has grievously erred in law and on facts in confirming the addition of Rs.15,95,250/- u/s. 41(1) of the Act without appreciating the facts that Liability is for Capital Expenditure incurred in A.Y.2011/12, the Liability was not waived and Liability written off in A.Y.2019/20 by returning the

disputed machinery. The addition of Rs.15,95,250/- should therefore be deleted.

The appellant reserves the right to add, alter, modify, amend or withdraw any of the grounds of appeal before hearing.”

2. Brief facts of the case are that the assessee is a private limited company, is engaged in the business of Calcium Carbonate powder and trading of Calcium Bauxite. The assessee has filed its return of income for the AY.2016-17, on 05.10.2016 declaring total income of Rs. Nil. The case was selected for scrutiny. During the assessment, the Assessing Officer noted that assessee has shown liabilities of sundry creditors at Rs.15,95,250/-. The assessee was show caused as to why the said amount should not be added to the total amount. The assessee filed its reply. The contents of reply of assessee is recorded in para 7 of assessment order. In the reply, the assessee stated that the outstanding liability is against the purchase of machinery from Sabko Emerystone & Engineering Industries Pvt. Ltd. in AY.2011-12. The machinery is defective and it was never put to use and the supplier was instructed to take back its machinery. Thus, the assessee has not credited of amount of such machinery. The assessee has not claimed depreciation on this machinery in any of the assessment order. In absence of any claim of expenditure/loss, depreciation in any assessment year, the provision of Section 41(1) cannot be applied.
3. The reply of assessee was not accepted by Assessing Officer by taking view that the contention of assessee is that sundry creditors is for plant and machinery and not a trade liability as revenue expenditure.

The assessee has not demonstrated that the credit is actually on account of capital expenditure. The assessee has not demonstrated that asset allegedly brought by assessee is excluded in the fixed asset. The assessee has given two reasons without any movement in the ledger, these two ledgers alone are inadequate to support the claim of assessee. The Assessing Officer held that assessee has not established his claim of sundry creditor is capital in nature and thereby as it Rs.15,95,250/-, in the income of assessee.

4. Aggrieved by the addition in the assessment order, the assessee filed appeal before the ld. CIT(A). The appeal of assessee was adjudicated by NFAC, Delhi/ [ld CIT(A)]. Before NFAC, the assessee filed its submissions. The submissions of assessee is recorded in para 4 at page no. 2 to 6. The assessee in its submission reiterated that they have purchased machinery from supplier M/s. Sabko Emerystone & Engineering Industries Pvt. Ltd. in AY.2011-12. The machinery was defective, it was never put to use, the supplier was asked to take its machinery, the assessee has not paid any amount till AY.2016-17. The Provisions of Section 41(1) is not applicable. The assessee further explained that Provisions of Section 41(1) is applicable when the assessee claimed an allowance of deduction in respect of any loss from expenditure or credit liability incurred by him. Any amount is obtained in respect of loss of expenditure for any benefit is obtained in respect of such trading liability by way of remission and thereof of such amount of benefit is obtained by it in similar subsequent year.

The assessee also relied where the case laws of various High Courts. The assessee specifically relied on the decision of Hon'ble Supreme Court in case of CIT vs Mahendra & Mahendra, 404 ITR 1 (SC) wherein it was held that it is a *sine qua non* that there should be an allowance for deduction claimed by assessee in any assessment for any year in respect of loss on expenditure or trading liability incurred by assessee. Then subsequently during any previous year, the creditor remits or revenue any such liability, then assessee's liability tax under section 41 of the Act. The objection behind the section is simple, it is made to ensure that assessee does not get away of a double benefit, one by deduction and another by way of not be taxed benefit received by him in the later years with respect to deduction allowed earlier in case of remission of such liability. The assessee further reiterated that machinery was defective, it was never put to use supplier was instructed to take back this machinery. The assessee never claimed the depreciation on such machinery in any of assessment years.

5. The Id. CIT(A) after considering the submission of assessee held that the assessee claimed that amount in respect of purchase machinery that is capital gains. However, one hand, the amount was shown outstanding, on the other hand, the assessee claimed that the machinery was defective and it would not use. The machinery was never added to the fixed assets schedule nor any depreciation was claimed. The Id. CIT(A) held that basic accounting principle, of double entry, this claim is contradictory. When revenue become outstanding

then it was debited in trading has not profit and loss account and at the same time, on liability side the amount is shown outstanding. It was further held that earlier expenditure remaining outstanding, the cost is added in the fixed asset and the value shown under payable of sundry creditor (if any depreciation is charged, the same is reduced from value of Written Depreciation Value (WDV), cost of asset and depreciation and depreciation of debited in the profit and loss account). Thus, the explanation that amount was shown as payable, without any corresponding entry in the fixed asset schedule is simply not possible. Further, the copy of ledger account of party shows it is a running account. Thus, the explanation that it was not any revenue expenditure was for purchase of machinery, which was defective that appears to be an afterthought. The ld. CIT(A) on his above observation upheld the order of Assessing Officer. Further aggrieved, the assessee has filed present appeal before Tribunal.

6. I have heard the submission of ld. Authorized representative (AR) of the assessee and ld. Senior departmental representative (Sr. DR) for the Revenue and have gone through the order of lower authorities carefully. The ld. AR of the assessee submits that in absence of any claim of expenditure, loss or depreciation in any assessment year, provision of section 41(1) of the Act cannot be applied. The sundry creditor shown in the books of assessee are not on account of trading liability. The assessee has purchased machinery from Sabko Emerystone & Engineering Industries Pvt. Ltd., the tax invoices of

such machineries are at page nos.50 to 51 of the paper book. Such machineries were defective. The machinery was never put to use. The assessee never claimed depreciation on such machineries. The supplier was asked to remove/take back the delivery of such machineries. Since, the liability was not on account of trading liability and the assessee has not claimed such expenditure many of the years, therefore, no addition can be made under section 41 of the Act. The ld. AR submits that grounds of appeal raised by assessee is squarely covered by the decision of Hon'ble Apex Court in the case of CIT vs Mahindara & Manindra Ltd. (supra).

7. On the other hand, Ld. Sr. DR for the Revenue supported the order of ld. CIT(A). The ld. Sr. DR submits that the assessee has shown the amount of creditor is a part of trading liability. So defective of decision relied by ld. DR in the case of CIT vs Mahindra & Mahindra Ltd. (supra) is not applicable of the present case.
8. I have considered the submission of both the parties and gone through the order of lower authorities carefully. As recorded above the Assessing Officer made the addition of Rs.15,95,250/- by taking view that assessee has not demonstrated that liability is on account of capital expenditure, nor the assessee has shown that an asset allegedly brought by assessee, was included by the fixed asset schedule. Before the ld. CIT(A), the assessee claimed that outstanding liability pertains to purchase of machinery from M/s.

Sabko Emerystone & Engineering Industries Pvt. Ltd. (supra). The machinery was defective and it was never put to use. The assessee has not made payment nor claimed depreciation thereof. I find that similar contention was raised by the Assessing Officer. The Assessing Officer without controverting the fact held that assessee has not demonstrated that liability/creditor is on account of capital expenditure.

9. The ld. CIT(A) also upheld the action of Assessing Officer by taking view that copy of ledger account of creditor party i.e. Sabko Emerystone & Engineering Industries Pvt. Ltd. (supra) shown that it is running account. I find that lower authority has not disputed about the purchase of machinery. No adverse evidence is brought on record that the liability is other than purchase of machinery. Thus, the credit in the books is not on account of trading liability. The expenditure incurred and purchases of machinery are certainly a capital expenditure. Further, the assessee has never claimed depreciation on such machinery. The Hon'ble Apex Court in the case of CIT vs Mahindra & Mahindra (supra) held on a perusal of section 41(1), it is evident that it is a *sine qua non* that there should be an allowance or deduction claimed by the assessee in any assessment for any year in respect of loss, expenditure or trading liability incurred by the assessee. Then, subsequently, during any previous year, if the creditor remits or waives any such liability, then the assessee is liable to pay tax under section 41.

The objective behind this section is simple. It is made to ensure that the assessee does not get away with a double benefit once by way of deduction and another by not being taxed on the benefit received by him in the later year with reference to deduction allowed earlier in case of remission of such liability.

10. In view of the aforesaid factual and the legal position, I am of the view that in absence of any evidence that liability shown by assessee was other than purchase of machinery (capital asset), which was never put to use and the assessee never claimed depreciation thereof. That the consideration under section 41(1) of the Act is not sustainable.
11. In the result, the appeal filed by the assessee is allowed.

Order pronounced in open court on 26/10/2022.

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Surat, Dated: 26/10/2022
SAMANTA

Copy to:

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

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By order

Asstt. Registrar, ITAT, Surat