

THE INCOME TAX APPELLATE TRIBUNAL  
"B" Bench, Mumbai  
Shri B.R. Baskaran (AM) & Shri Pavan Kumar Gadale(JM)

I.T.A. No. 1490/Mum/2021 (A.Y. 2014-15)  
I.T.A. No. 1491/Mum/2021 (A.Y. 2015-16)  
I.T.A. No. 456/Mum/2022 (A.Y. 2017-18)

Man Industries (India) Limited 101 Man House, S.V. Road Vile Parle West Mumbai-400 056.  PAN : AAACM 2675G  (Appellant)	Vs.	ACIT, Central Range-7(2) Room No. 655 6 <sup>th</sup> Floor, Aayakar Bhavan, M.K. Road, Mumbai 400 020.  (Respondent)
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Assessee by	Shri Biren Shah
Department by	Shri Chetan M. Kacha
Date of Hearing	19.09.2022
Date of Pronouncement	28.10.2022

O R D E R

Per B.R.Baskaran (AM) :-

All the three appeals filed by the assessee are directed against the orders passed by the learned CIT(A)-49, Mumbai and they relate to A.Y. 2014-15, 2015-16 & 2017-18. Since common issue is urged in these appeals, they were heard together and are being disposed of by this common order, for the sake of convenience.

2. The solitary issue urged in these appeals relates to disallowance of claim of depreciation on the withholding tax (TDS liability) borne by the assessee, which has been capitalised.

3. The facts relating to the issue are stated in brief. The assessee company is engaged in the business of manufacture and sale of large diameter carbon steel line pipes required for high pressure transmission application for gas, crude oil, petrochemical products and portable water.

The assessee had borrowed funds by issuing Foreign Currency Convertible Bonds (FCCB) during the financial year 2012-13. The same was issued at a premium and the total amount of premium paid Rs. 112.05 crores. The assessee was required to deduct TDS @ 10% from the above said payment. The assessee borne the TDS liability (also called as “withholding tax”). Accordingly the total premium paid by the assessee worked out to Rs. 124.45 crores, out of which the assessee claimed a sum of Rs.100.78 crores as revenue expenditure and capitalised the balance amount of Rs. 23.66 crores. The computation in this regard has been tabulated in the assessment order as under :-

Particulars	Amount (Rs.)
Premium paid	1,12,05,07,097
10% WHT	12,40,33,655
Total Premium claimed	1,24,45,40,752
Less : Revenue expenditure claimed	1,00,78,62,838
Premium capitalized	23,66,77,914

The Assessing Officer noticed that, as per the agreement entered for receiving FCCB, the assessee would be liable to bear withholding tax only in excess of 10%. Since the withholding tax was only 10%, the Assessing Officer took the view that there was no necessity for the assessee to bear withholding tax.

4. Before the Assessing Officer, the assessee relied on the decision rendered by Hon'ble Madras High Court in the case of CIT Vs. Standard Polygraph Machines (P) Ltd. (2002) (124 taxman 669), wherein it was held that the withholding tax payable on the consideration given to foreign collaborator and borne by the assessee will form part of actual cost of the plant and machinery, on which depreciation should be allowed. The assessee also relied on the decision of Mumbai bench of the Tribunal in the case of BOB Card Ltd. (ITA No. 7660/Mum/2011), wherein it was held that the assessee would be entitled to claim deduction of tax liability paid since the payment made in terms of contractual agreement in discharge of its trade liability.

5. The assessee also submitted that an identical disallowance of depreciation made by the Assessing Officer in A.Y. 2013-14 on identical reasoning has since been deleted by the learned CIT(A). However, the Assessing Officer expressed the view that the Revenue has filed the appeal before the ITAT challenging the decision so rendered by the learned CIT(A) and accordingly did not follow the decision rendered by the learned CIT(A) in A.Y. 2013-14. Accordingly the Assessing Officer disallowed the depreciation claimed in three years under consideration as detailed below :-

Assessment year	Depreciation disallowance
2014-15	1,58,14,291
2015-16	1,34,42,147
2017-18	97,11,951

In the appellate proceedings, the assessee relied upon the decisions relied upon by the assessee before the Assessing Officer. However, the Ld CIT(A) took the view that both the decisions are distinguishable. He further held that in the present case, the withholding tax borne by the assessee is not as per the terms of contractual agreement. He further held that, it has been paid by the assessee only as statutory liability on behalf of the bond holder as per the provisions of section 195A of the Act. He also expressed the view that the bond holder may also claim credit for the withholding tax as per the provisions of DTAA. Accordingly he confirmed the disallowance of depreciation made by the Assessing Officer in all the three years under consideration.

6. The learned AR submitted that the Assessing Officer has made an identical disallowance of depreciation on withholding tax borne by the assessee in A.Y. 2013-14. He submitted that the Tribunal, vide its order dated 25.11.2021 passed in ITA No. 7530/Mum/2019, has deleted the disallowance by following the decision of Hon'ble Madras High Court in case

of Standard Polygraph Machines (P) Ltd. (supra). He further submitted that the depreciation claimed during the years under consideration relate to the second year, third year and fifth year of claim after acquisition of asset. He submitted that, under block concept of depreciation, the eligibility of the assessee to claim depreciation has to be examined in the year in which concerned assets entered into the block. Once the asset enters into the block, it will lose its identity and hence no disallowance of depreciation could be made in the subsequent years. In support of this proposition the learned AR placed reliance on the decision rendered by Mumbai Bench of the Tribunal in the case of Bhavani Gems Vs. PCIT (ITA No. 766/Mum/2021 dated 29.4.2022), wherein the Tribunal, following the decision rendered by Ahmedabad Bench of the Tribunal in the case of Bodal Chemical Pvt. Ltd (ITA No. 139/Ahd/2011 dated 16.10.2019), held that the revenue, having once allowed deduction for depreciation claimed by the assessee in a year, is debarred to reject the claim of the assessee made in the subsequent year on the written down value brought forward from the earlier assessment year. Accordingly, the learned AR submitted that the Assessing Officer could not have made disallowance of depreciation claimed in the years under consideration.

7. On merits, the learned AR placed reliance on the decision rendered by the Tribunal in assessee's own case in the first year i.e. A.Y. 2013-14 (referred supra) and also decision rendered by Hon'ble Madras High Court in the case of Standard Polygraph Machines (P) Ltd. (supra).

8. On the contrary, the learned DR submitted that that the assessee also stood as representative-assessee of the payee of the premium on FCCB. The assessee, after having borne TDS liability on the premium amount, could claim it as refund from the income tax department. Accordingly, the learned DR submitted that if the assessee claims back TDS amount back as refund, the same would be offset payment already made. Under this scenario, the

assessee's claim of treating TDS liability as capitalized value of the asset is liable to be rejected and consequently depreciation claimed thereon should also be liable to be allowed. Accordingly he submitted that the orders passed by the learned CIT(A) in this year does not call for any interference.

9. We heard the rival contentions and perused the record. The facts relevant to the issue are that the assessee has borne the TDS payable on the FCCB premium paid by the assessee. The withholding tax liability so borne by the assessee was Rs.12.40 crores. In the normal course, the TDS amount would be reduced from the amount payable to the payee and the net amount alone will be paid to him. The TDS amount will be remitted to the credit of the payee, who can adjust the same against his tax liability. In the instant case, since the assessee has borne the TDS deductible on the amount of premium payable on FCCD, the same would become additional cost to the assessee. Hence it will go to increase the premium payable on FCCB. The assessee has capitalized a portion of premium amount, which included the above said amount of Rs.12.40 crores. The amount was capitalized by the assessee in the year relevant to AY 2013-14 and it also claimed depreciation thereon, which was disallowed by the assessing officer in AY 2013-14. The Ld CIT(A), however, deleted the disallowance and hence the revenue filed appeal before the Tribunal in that year. As stated by Ld A.R, the ITAT has confirmed the order passed by Ld CIT(A), vide its order dated 25.11.2021 passed in ITA No.7530/Mum/2019, with the following observations:-

“98. The issue raised in the 6th ground of appeal is against the deletion of addition of Rs.1,68,96,638/- by CIT(A) as made by the AO on account of Depreciation of claimed on account of premium.

99. During the course of Assessment Proceeding the A.O. observed that the assessee has made excess payment to the bond holder to the extent of Rs.12,40,33,655/- and accordingly deprecation on capitalized premium amounting to Rs.1,68,96,338/- was claimed by the assessee. The AO during the assessment proceedings noted that depreciation on the excess payment made to FCCB holders can not be allowed and added the same to the income of the assessee.

100. The Id CIT(A) allowed the appeal of the assessee by observing that the AO has not disputed the fact that the withholding tax is paid actually paid by the Assessee. Further it is also not a case wherein the assessee has recovered withholding tax from the bond holder. The payment made by the assessee is its business decision and accordingly the payment in question should be allowed.

101. After hearing the parties and material placed before us, we note that the assessee has redeemed FCCB and paid total premium of 1,12,05,07,097/- by grossing up the amount by withholding tax. In other words the TDS deducted and deposited by the assessee on behalf bondholders was treated as part of that. Besides we note that claim was in accordance with [section 195A](#) of the Income Tax Act, 1961 as the Company paid withholding tax of Rs.12,40,33,655/- by the grossing up the amount of premium and paid Rs.112,05,07,097/- as premium on redemption of FCCB to bondholder. We also note that it has been provided in the [section 195A](#) itself which is extracted below:

"In a case other than that referred to in sub-section (1A) of [section 192](#), where under an agreement or other arrangement, the tax chargeable on any income referred to in the foregoing provisions of this Chapter is to be borne by the person by whom the income is payable, then, for the purposes of deduction of tax under those provisions such income shall be increased to such amount as would, after deduction of tax thereon at the rates in force for the financial year in which such income is payable, be equal to the net amount payable under such agreement or arrangement."

101.1 We note that the case of the assessee is squarely covered by the decisions in the case of [Commissioner of Income Tax V. Standard Polygraph Machines \(P\) Ltd.](#) (2002) 124 taxman 669 (Madras High Court) and ACIT 2(1) V. M/s. BOB Card Ltd. ITA No. 7660/Mum/2011 - Tribunal, Mumbai wherein the issue has been decided in favour of the assessee. We therefore respectfully following the ratio laid down in the above decision uphold the order of Id. CIT(A) by dismissing the ground no.6 of the Revenue's appeal."

Thus, we notice that the claim of depreciation has been allowed in the first year of claim.

10. Under these facts, it is contention of the assessee that the AO could not have disallowed in the subsequent years, since the depreciation has been allowed in the first year. We notice that the above said proposition of the assessee finds support from the decision rendered by Ahmedabad bench of ITAT in the case of Bodal Chemicals Ltd (supra), wherein it was held that the

revenue, once allowed the deduction for the depreciation claimed by the assessee, then it is debarred to reject the claim of the assessee in the subsequent year on the WDV carried forward from the earlier assessment year. Though the AO had disallowed the claim of depreciation made in AY 2013-14, being the first year of claim, the same was deleted by Ld CIT(A) and the ITAT. As such the claim of depreciation made in the first year has been allowed. Hence, there is merit in the above said contention of the assessee.

11. In our view, the issue before us can be looked at from another angle also. There should not be any dispute that the identity and character of the asset, which has entered into the block of asset, would be lost. It was so held by Hon'ble Delhi High Court in the case of Bharat Aluminium Co Ltd (ITA No.532 and others of 2006 dated 15-10-2009) as under:-

“(i) The rationale and purpose for which the concept of block asset was introduced, as reflected in the CBDT's Circular dated 23.09.1988 is that once the various assets are clubbed together and become 'block asset' within the meaning of s. 2(11), it becomes one asset. Every time, a new asset is acquired, it is to be thrown into the common hotchpotch, i.e., block asset on meeting the requirement of depreciation being allowable at the same rate. Individual assets lose their identity and become an inseparable part of block asset insofar as calculation of depreciation is concerned;

(ii) The fusion of various assets into the block asset gets disturbed only when the eventuality contained in clause (iii) of s. 32 takes place, viz., when a particular asset is sold, discarded or destroyed in the previous year (other than the previous year in which first brought in use). Even in that event, the amount by which the moneys payable in respect of that particular building, machinery, etc. together with the amount of scrap value is to be deducted from total written down value of the 'block asset';

(iii) Though as per s. 32(1) the asset is to be owned and "used" for the purpose of business or profession, the expression "used for the purpose of business" when applied to block asset would mean use of block asset and not any specific items in the said block as individual assets have lost their identity after becoming inseparable part of the block asset; (iv) The fact that under the second proviso to s. 32 assets acquired after 30th Sept shall be entitled to 50% depreciation of amount admissible does not mean requirement of user of individual asset remains intact. In the first year when the particular asset is acquired, user of the asset is required. In subsequent years, the user of individual assets is not required.”

In the instant case also, the TDS liability borne by the assessee on the premium amount, after it is thrown into the common hotchpotch of block asset in AY 2013-14 has lost its identity and become an inseparable part of block asset insofar as calculation of depreciation is concerned. Hence the AO could not have disallowed the depreciation claim as made in the first year.

12. On merits, we notice that the co-ordinate bench has already taken the view that the TDS liability (withholding tax) on the premium payable on FCCB and borne by the assessee, would go to increase the cost of asset and accordingly depreciation is allowable thereon. In this regard, the co-ordinate bench has followed the decision rendered by Hon'ble Madras High Court in the case of Standard Polygraph Machines (P) Ltd (supra). In the above said decision, the Hon'ble Madras High Court held that the TDS liability borne by the assessee shall form part of the consideration. The decision rendered by Hon'ble Madras High Court is extracted below:-

**“2. The assessment year is 1981-82. The assessee claimed that the amount of income-tax paid by the assessee in respect of the consideration paid by the assessee to the foreign collaborator should also form part of the actual cost of the plant and machinery on which depreciation and investment allowance should be allowed. That claim was accepted by the ITO, but negatived by the Commissioner in *suo motu* revision under section 263 of the Income-tax Act, 1961. **The Tribunal has held that the amount of tax paid by the assessee should be regarded as liability of the foreign collaborator which the assessee had undertaken to pay as per the agreement entered into with the collaborator. The Tribunal, therefore, held that it should be treated as part of the value of plant and machinery of the assessee.****

**3.** This Court in the case of *CIT v. Festo Elgi (P.) Ltd.* [\[1981\] 129 ITR 499<sup>1</sup>](#), has held that the technical know-how supplied to the assessee constitutes tools for carrying on the business of the assessee and forms part of the capital assets and, therefore, depreciation and development rebate was allowable on the amount paid to the foreign collaborator. The revenue has not produced before us the terms of the agreement entered into between the collaborator and the assessee and we must, therefore, accept what has been stated by the Tribunal. The Tribunal has held that the amount paid by the assessee as income-tax on the amount paid to the foreign collaborator was only in discharge of the liability of the collaborator which the assessee had undertaken to pay as part of the agreement entered into with the foreign collaborator for receiving the technical know-how under the agreement. The amount so paid as tax has been held to be an amount

payable by virtue of the terms of the agreement between the collaborator and the assessee. Had the collaborator not been assured of the assessee's undertaking the liability, the collaborator would have charged higher fee to cover the liability for taxes. It is only on the assurance of the assessee that the liability will be met by the assessee, that the collaborator had agreed to receive the sum specified in the agreement. **The Tribunal was right in its view that the amount so paid by the assessee was only in discharge of a liability which it had undertaken in terms of the agreement entered into between the assessee and the collaborator and it, therefore, forms part of the consideration for the agreement relating to know-how."**

Hence, we find no reason to disallow the depreciation claimed by the assessee in all these three years.

13. We notice that the tax authorities have taken the view that, as per the agreement entered by the assessee with the FCCB holders, it is liable to bear the TDS liability in excess of 10%. In the instant case, the TDS liability was only 10% and hence there was no contractual obligation for the assessee to bear the withholding tax (TDS liability). Accordingly, the tax authorities have taken the view that the capitalized value of withholding tax borne by the assessee is not eligible for depreciation.

14. We are unable to agree with the rationale given by the tax authorities. It may be true that the assessee, as per the written agreement, was liable to bear the withholding tax liability, if it exceeds 10% of the premium amount. However, as submitted by Ld A.R, the fact would remain that the assessee has ultimately borne the liability of withholding tax of 10% also. Here, the question before us is not on the correctness or otherwise of the action of the assessee in bearing the TDS liability on its own account. We notice that the AO has not enquired on the developments subsequent to the entering of agreement, which compelled the assessee to bear the TDS liability, which in the normal course would be deducted from the amount payable to the payee. Be that as it may, once the assessee has borne the liability of withholding tax, as per the ratio laid down by the Hon'ble Madras High Court, the same

would acquire the character of cost in the hands of the assessee and the same would go to increase the cost of asset. Once the cost of asset is increased, then the depreciation is allowable thereon. Accordingly, we are of the view that the ratio laid down by Hon'ble Madras High Court in the above said case would apply to the facts of the present case and the same was also applied in the assessee's own case in AY 2013-14 by the co-ordinate bench of Tribunal. Hence the above said view expressed by the tax authorities is liable to be rejected.

15. Before us, the Ld D.R contended that the assessee would have got back the withholding tax amount (TDS amount) as refund, since the assessee herein is the representative assessee for the payees, i.e., it is the say of Ld D.R that the assessee would get refund of withholding tax and effectively, there will not be any TDS liability upon the assessee. In that case, the assessee would not be eligible to get depreciation on the TDS liability so capitalized. Accordingly, he submitted that the AO has rightly disallowed the depreciation claim made on the amount of withholding tax.

16. We are of the view that the Ld D.R is advancing his arguments on probabilities and not on facts. First of all, it is not shown to us that the assessee has got refund of withholding tax. According to Ld D.R, the assessee is acting as representative of the payees. In case of an representative assessee, there is no personal benefit/consequences, i.e., the consequences/benefits arising from the transactions would belong to the principal and not to the representative. It is not shown to us that the refund, if any, that will be obtained out of the impugned withholding tax would be given back to the assessee by the payees to offset the TDS liability already borne by the assessee. If the above said scenario happens, it would happen in future and in that year of receipt, the AO is always be free to examine the tax liability, if any/ tax treatment to be given thereon. Hence, a future contingency, which may or may not happen, cannot be a ground to deny the

depreciation claimed on the amount of withholding tax borne by the assessee and which has been capitalized.

17. In view of the foregoing discussions, we are of the view that the depreciation claim by the assessee cannot be disallowed in all the three years under consideration. Accordingly, we set aside the orders passed by Ld CIT(A) on all the three years and direct the AO to allow the depreciation claimed by the assessee.

18. In the result, all the three appeals filed by the assessee are allowed.  
Order pronounced in the open court on 28.10.2022.

Sd/-  
(PAVAN KUMAR GADALE)  
JUDICIAL MEMBER

Sd/-  
(B.R. BASKARAN)  
ACCOUNTANT MEMBER

Mumbai; Dated : 28/10/2022

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

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BY ORDER,

(Assistant Registrar)  
ITAT, Mumbai

PS