

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ
**IN THE INCOME TAX APPELLATE TRIBUNAL,
"D" BENCH, AHMEDABAD**

**BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
And
SHRI SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER**

आयकर अपील सं./ITA No. 211/AHD/2022
निर्धारण वर्ष/Asstt. Year: 2017-2018

Elecon Engineering Co.Ltd., Anand Sojitra Road, Vallabh Vidyanagar-388120. PAN: AAACE4644D	Vs.	The Principal Commissioner of Income Tax-1, Vadodara.
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(Applicant)		(Respondent)
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Assessee by :	Shri M.K. Patel, A.R
Revenue by :	Shri Alok Kumar, CIT.D.R

सुनवाई की तारीख / **Date of Hearing** : **13/09/2022**
घोषणा की तारीख / **Date of Pronouncement**: **16/11/2022**

आदेश/ORDER

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Assessee against the order of the Learned Principal Commissioner of Income Tax, Ahmedabad, dated 29/03/2002 arising in the matter of assessment order passed under s. 263 of the Income Tax Act, 1961 (here-in-after referred to as "the Act") relevant to the Assessment Year 2017-2018.

2. The only issue raised by the assessee is that the Ld. PCIT erred in holding the assessment framed u/s 143(3) of the Act, as erroneous in so far prejudicial to the interest of Revenue.

3. The facts in brief are that the assessee in the present case is a limited company and engaged in the business of manufacturing of Industrial gears coupling and Wind Turbine Generators (WTG). The assessee filed the return of income u/s 139 of the Act, declaring an income of Rs. 42,35,08,700/- which was subsequently revised dated 12/06/2018 declaring the same amount of income. However, the assessee further revised its return of income dated 19/03/2019 declaring total income at Rs. 41,34,30,940/- only. However, the assessment was finally framed u/s 143(3) of the Act, dated 30/12/2019 at Rs. 71,00,42,527/- only.

4. The Ld. PCIT, having examined the assessment records of the assessee, found that the assessee has claimed foreign fluctuation loss of Rs. 1,14,10,638/- with respect to foreign currency loan which was converted into the shares of the company. The assessee in the original return of income disallowed such loss treating the same as capital in nature. This fact was also arising from the tax audit report in form 3 CD wherein it was certified that the impugned loss of Rs. 1,14,10,638/- is capital loss. However, the assessee in the revised return of income has claimed such loss as revenue in nature by virtue of the provision of section 43AA of the Act, which was brought by Finance Act, 2018 with retrospective effect from the Assessment Year 2017-18 i.e. the year under consideration. Thus the assessee has claimed such loss in the revised return of income. As per the Ld. PCIT, all the above stated facts were not verified by the AO during the assessment proceedings. As such, the AO without looking into all facts as discussed above and without making any inquiry has allowed such loss to the assessee in the assessment framed u/s 143 of the Act. Thus, the Ld. PCIT proposed to revise the assessment order passed u/s 263 of the Act on account of non-verification of the capital loss as discussed above.

5. The assessee in response to such show cause notice vide letter dated 21/03/2022 submitted that the impugned loss was treated as capital loss initially and therefore the same was mentioned by the Auditor in the Audit Report dated 30/11/2017. However, subsequently there was an amendment by Finance Act, 2018 and such loss was allowed as deduction under the provisions of section 43AA of the Act. Such amended provision was applicable in the year under consideration. Accordingly, the assessee filed revised return of income claiming such loss as Revenue in nature. The copy of revised return of income was duly considered by the AO as well while framing the assessment u/s 143 of the Act. It was also submitted that originally in the intimation generated u/s 143(1) of the Act, such loss was disallowed by the CPC dated 24/09/2019. However, the assessee made the representation to the AO during the assessment proceedings that the impugned amount of loss has been disallowed in the intimation generated u/s 143(1) of the Act. The assessee has also filed the clarificatory letter issued by the Tax Auditor stating that such loss is eligible to be allowed by virtue of the amended provision of section 43AA of the Act. The assessee also submitted that capital expenditures are generally not allowed for deduction in terms of provisions of section 37 of the Act but the provision of section 37 of the Act are general in nature whereas provisions of section 43AA of the Act being specific provision allow the deduction to the assessee on account of such loss. Thus, the loss claimed by the assessee cannot be disallowed merely treating the same as capital in nature by invoking the provision of 37 of the Act.

6. However, the Ld. PCIT was not agreed with the contention of the assessee on the reasoning that Tax Audit Report clearly specified that the loss claimed by the assessee is capital in nature and therefore the same cannot be allowed as deduction. However, the AO without considering the same has allowed loss to the assessee which was claimed by it in the revised return of income filed dated 19/03/2019. Thus, the Ld. PCIT held that the order passed by the AO under the provision of section 143(3) of the Act, is erroneous in so far prejudicial to the interest of revenue

on account of non-verification. The Ld. PCIT has also made reference to the explanation of 263 of the Act, holding that the necessary inquiries were not conducted by the AO during the assessment proceedings.

7. Being aggrieved, by the order of the Ld. PCIT, the assessee is in appeal before us.

8. The Ld. A.R before us filed a paper book running from pages 1 to 108 reiterated the contention as made before the Id. PCIT and drew our attention on the claim made in the revised return which is placed on pages 8 to 15 of paper book. The reason for filing the revised return of income was also furnished by the assessee which can be verified from page 12 of paper book. The Ld. AR further drew our attention on the submission made to the AO during the assessment proceedings which are placed on pages 66 to 70 and 77 to 285 of the paper book. In view of the above the Ld. AR contended that all the necessary details were available with the AO and therefore it is incorrect to hold that the assessment has been framed by the AO without application of mind. On the other hand, the Ld. DR vehemently supported the order of the Id. PCIT.

9. We have heard the rival contentions of both the parties and perused the materials available on record. The facts of the case are not in dispute which have been elaborately discussed in the preceding paragraph. From the preceding discussion we note that all the necessary details with respect to the deduction claimed by the assessee under the provisions of section 43AA of the Act were available before the AO during the assessment proceedings. The revised return wherein the deduction was claimed was filed before the AO which was duly accepted by the AO in the assessment proceedings after raising the questions to the assessee. This fact can be verified from the question raised in the notice issued u/s 142(1) of the Act. The relevant question read as under:

Why the revised return filed on 12/06/2018, 19/03/2019 be treated as invalid as the original return was filed belatedly on 01/12/2017.

9.1 The reply of the assessee dated 06/12/2019 read as under:

Return of income is revised on 19.03.2019. We have already submitted computation of total income for revised return, the same is again submitted herewith for ready reference. In the notes forming a part of computation of total income it is disclosed that the return is revised to give effect to two changes viz. (1) claim for weighted deduction u/s.35(2AB) is reduced based upon the certificates issued by DSIR in Form 3CL and (2) to give effect of amendment made in section 43AA and accordingly treated the expenditure on exchange rate fluctuation as allowable expenditure.

It is submitted that loss on exchange rate fluctuation on transaction during the year for date on which loan given by the assessee company to its subsidiary at Mauritius and date on which the loan converted into equity share investment during the year in return exchange fluctuation loss of Rs.1,14,10,638/- was disallowed considering the same as capital expenditure.

Subsequently, section 43AA inserted in the Income Tax Act by Finance Act 2018 with retrospective effect from Assessment Year 2017-18. It is provided that any gain or loss on realized foreign exchange fluctuation which is not covered by section 43A will be taxable if it is gain and will be tax deductible if it is loss. In view of the amendment in Act was applicable from assessment year 2017-18, assessee has filed revised return on 19-03-2019 and disallowance of Rs.1,14,10,638/- made in original return for loss on foreign exchange fluctuation not covered by section 43A has been removed from the computation of total income treating the same as tax deductible. This has resulted in reducing the total taxable income by Rs.1,14,10,638/- on this one ground.

Assessee submits that while finalizing the assessment, above claims made in revised return be considered and exchange rate fluctuation expense of Rs.1,14,10,638/- be allowed as tax deductible revenue expense under section 43AA. It is submitted that in the intimation for processing made by CPC it is appearing that the above deduction of Rs.1,14,10,638/- as per revised return is not allowed to the assessee it is therefore again requested that the amount of Rs.1,14,10,638/- is allowable expense as claimed in revised return be allowed.

9.2 We also find that that the assessee has furnished necessary explanation for claiming deduction under the provisions of section 43AA of the Act on account of impugned loss claimed during the assessment proceedings.

9.3 However, we find that there was no question raised by the AO during the assessment proceedings with respect to deduction claimed by the assessee u/s 43AA of the Act.

9.4 Admittedly, the provisions of section 43AA of the Act were brought by the Finance Act 2018 with retrospective effect i.e. assessment year 2017-18. Moreover, there was a dispute between assessee and the income tax department as the deduction claimed by the assessee in the revised return of income was denied by the AO under the intimation generated u/s 143(1) of the Act. Now the situation before us is like this that the assessee has furnished the necessary details in support of his claim as discussed above but there was no whisper/question from the side of the AO with respect to deduction claimed by the assessee in the return of income. In other words there was no question raised by the AO to the assessee for the deduction claimed by the assessee in the revised return of income. Thus, in the absence of any inquiry by the AO, we are of the view that it is a case of non-application of mind. At the time of hearing, a query was also raised to the Ld. AR to justify whether any inquiry has been made by the AO with respect to the claim made by the assessee. However, the Ld. AR failed to make any satisfactory reply. Thus it can be safely concluded that there was no enquiry made by the AO during the assessment proceedings despite the fact that all the necessary details were available before the AO.

9.5 Before parting, we also note that the Ld. PCIT has made reference to the explanation 2 of section 263 of the Act in holding the assessment order as erroneous in so far prejudicial to the interest of revenue. In this regard we find that the PCIT has not made any reference to the explanation 2 of section 263 of the Act in the notice issued u/s 263 of the Act, thus we are of the view that no reference to the explanation 2 of section 263 of the Act cannot be made while holding the order of the assessment as erroneous in so far prejudicial to the interest of the Revenue. In holding so, we draw support and guidance from the judgment of PCIT vs. Shreeji Prints (P.) Ltd. reported in 130 taxmann.com 293 wherein it was held as under:

5 The Tribunal has found that in the order passed by the PCIT, Explanation 2 of section 263 of the Act, 1961 is made applicable. The Tribunal observed that the PCIT has not mentioned in the show cause notice to invoke the Explanation 2 of section 263 of the Act 1961. Therefore, by invocation of Explanation in the order without confronting the assessee and giving an opportunity of being heard to the assessee is not appropriate and sustainable in law.

9.6 Be that as it may be, the Hon'ble Court in the series of cases held that the order is erroneous in so far prejudicial to the interest of revenue if the inquiry has not been conducted during the assessment proceeding. In this regard we find support and guidance from the judgment of High court of Himachal Pradesh in case of Vidharba Singh (HUF) vs. PCIT reported in 86 taxmann.com 113 where it was held as under:

116. It is in this backdrop, Tribunal found the inquiry conducted by the Assessing Officer not to be in accordance with law (Pages 137 to 148) and the view taken by the Officer not to be a plausible one (Pages 148- 153), holding that since it was a case of "no inquiry", Commissioner rightly remitted the case back to the Assessing Officer, for carrying out assessment in accordance with law (Pages 153-158).

117. At this juncture, it be also observed that by the very same order, the Tribunal also decided the appeals filed by the Agent (Pages 159 to 200), inter alia, observing as under, to which no challenge is laid:

"An overview of the above features indicates that the agricultural produce was not proved; transportation of the same to UAA was also not proved; bills issued by UAA were not genuine; cash received from UAA shown at Rs.1.00 crore did not appear in their books of account; the expenses claimed were not backed by any vouchers/bills; and all the expenses were claimed to have been incurred on one single day and that too in cash. We fail to comprehend as to how the assessment order accepting the genuineness of carrying out the agricultural operations and earning a huge income in such circumstances can be considered as an order made after proper inquiry as has been canvassed by the assessee... .."

118. Thus, in the given facts and circumstances, we hold the Tribunal to have correctly affirmed the order passed by the Commissioner. Also, it cannot be said that the Tribunal erred in accepting the additional evidence placed on record by the Revenue. It also cannot be said that the Tribunal committed any material irregularity and violated any procedure and such action is illegal or bad in law. In fact, we find principles of natural justice and fair play to have been adhered to and fully complied with.

9.7 In view of the above and after considering the fact in totality we are of the view that the AO has not conducted inquiry with respect to loss claimed by the assessee in the revised return of income by virtue of amended provision of section 43AA of the Act which was made applicable retrospectively. Thus, the ground of

appeal of the assessee is not allowed.

10. In the result, the appeal filed by the assessee is dismissed.

Order pronounced in the Court on 16/11/2022 at Ahmedabad.

**Sd/-
(SIDDHARTHA NAUTIYAL)
JUDICIAL MEMBER**

**Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER**

(True Copy)

Ahmedabad; Dated 16/11/2022
Manish