

आयकर अपीलिय अधिकरण, 'बी' न्यायपीठ, चेन्नई
**IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH, CHENNAI**

श्री वी दुर्गा राव, न्यायिक सदस्य एवं श्री जी. मंजुनाथ, लेखा सदस्य के समक्ष
**BEFORE SHRI V. DURGA RAO, HON'BLE JUDICIAL MEMBER AND
SHRI G. MANJUNATHA, HON'BLE ACCOUNTANT MEMBER**

आयकर अपील सं./ITA No.: **868/Chny/2020**
निर्धारण वर्ष / Assessment Year: 2014-15

The Deputy Commissioner of
Income-tax,
Corporate Circle-2(1),
Chennai.

M/s. Green Star Fertilizers
v. Limited,
No. 88, SPIC House, 7th Floor,
Mount Road, Guindy, Chennai –
600 018.

[PAN: AADCG-9451-D]

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by
प्रत्यर्थी की ओर से/Respondent by

: Shri. D. Hem Bhupal, JCIT
: Shri. B. Ramakrishnan, FCA

सुनवाई की तारीख/Date of Hearing

: 29.11.2022

घोषणा की तारीख/Date of Pronouncement

: 31.01.2023

आदेश / O R D E R

PER G. MANJUNATHA, ACCOUNTANT MEMBER:

This appeal filed by the revenue is directed against the order passed by the learned Commissioner of Income Tax (Appeals)-6, Chennai, dated 20.03.2020 and pertains to assessment year 2014-15.

2. At the outset, we find that there is a delay of 47 days in appeal filed by the revenue. During the course of hearing, when defect was brought to the notice of learned DR present for the revenue submitted that delay in filing of appeal is mainly due to lockdown imposed by the Govt. on account of spread of Covid-19 infections and in view of Hon'ble Supreme Court suomotu Writ Petition No.3 of 2020, if the period of delay is covered within the period specified in the order of the Apex Court, then same needs to be condoned in view of specific problem faced by the public on account of Covid-19 pandemic.

3. The learned AR, on the other hand, fairly agreed that delay may be condoned in the interest of justice.

4. Having heard both sides and considered reasons given by the learned DR, we find that the Hon'ble Supreme Court in suomotu Writ Petition No.3 of 2020, has extended limitation applicable to all proceedings in respect of courts and tribunals across the country on account of spread of Covid-19 infections w.e.f. 15.03.2020, till further orders and said limitation has been extended from time to time. We further noted that delay

noticed by the Registry pertains to the period of general exemption provided by the Hon'ble Supreme Court extending limitation period applicable for all proceedings before Courts and Tribunals and thus, considering facts and circumstances of the case and also in the interest of natural justice, we condone delay in filing appeal filed by the Revenue.

5. The revenue has raised the following grounds of appeal:

"1. The order of the CIT(A) is contrary to law, facts and circumstances of the case.

2. The learned CIT(A) erred in holding the reopening assessment and invocation of section 147 is bad in law.

3. For these and other grounds that may be adduced at the time of hearing, it is prayed that the order of the learned CIT(A) may be set aside and that of the Assessing Officer restored."

6. The brief facts of the case are that, the assessee company is engaged in the business of manufacturing of fertilizers, filed its return of income for the assessment year 2014-15 on 25.11.2014, declaring a total income of Rs. 10,45,230/-. The return has been subsequently revised on 24.08.2015 declaring the same income. The assessment has been completed u/s. 143(3) of the Income-tax Act, 1961 (hereinafter referred to as "the Act") on 30.12.2016 and

determined total income of Rs. 3,26,68,091/- by making various additions including disallowance u/s. 14A of the Act and set off of losses. The case has been subsequently reopened u/s. 147 of the Act, for the reasons recorded as per which income chargeable to tax had been escaped assessment on account of depreciation claimed on capitalization of foreign exchange losses towards ECB loans, obtained from holding company. In response to 148 notice, the assessee has filed its return of income on 19.12.2017, declaring total income of Rs. 10,45,230/-. During the course of assessment proceedings, the Assessing Officer noticed that the assessee had incurred forex losses on ECB for the purpose of acquisition of assets in India and utilized for the purpose of capital projects. The assessee had capitalized forex losses on restatement of ECB loan and claimed depreciation in terms of section 43A of the Act. Therefore, the AO called upon the assessee to file necessary justifications for claim of depreciation. In response, the assessee submitted that since assets has been acquired in India out of ECB loans, provisions of section 43A of the Act has no application. The AO, after considering relevant submissions of the assessee and also taken note of provisions of section 43A opined that, if provision of section 43A of the Act is not

applicable, then the assessee cannot capitalize forex loss on ECB and claim depreciation. Therefore, the AO rejected arguments of the assessee and disallowed depreciation claimed on forex loss capitalized and added back to the total income. The relevant findings of the AO are as under:

"4. Subsequently, notice u/s. 143(2) was issued to the assessee on 10.09.2018. In response, the assessee submitted its reply vide letter dt 10.10.2018 and 20.11.2018 in support of its claim of depreciation on capitalised unrealised loss on restatement of ECB. After examination of the details and information filed by the assessee company and discussing the case with the Authorised Representative (AR) of the assessee company, the assessment is completed as under:

4.1 The assessee incurred the forex loss on ECBs for the purpose of acquisition of assets in India and utilised for the purpose of capital projects executed. The assessee acknowledged that section 43A is not applicable as the assets were not purchased from abroad. It is to be noted that the only section which speaks about capitalisation of loss/gain out of exchange fluctuation on reinstatement of liability on actual payment basis is section 43A. If that section is not applicable then the assessee has to mention under which section the notional forex loss was capitalised. It is to be noted that similar disallowance has been made by the department for the AY 2013-14 and 2012-13 when the assessee claimed the same nature of loss as business expenditure.

4.2 However, during the AY 2014-15, the assessee claimed that it capitalised the unrealised loss Rs. 8,56,57,500/- as per AS 11 and claimed depreciation. Further the assessee stated that the claim of depreciation is correct as per the statutory acceptance u/s 43AA and the relevant ITDS notified by CBDT u/s 145 (2) of the I.T Act. It is to be noted that section 43AA is not applicable to the assessee as it is effected from the 1st day of April, 2017 and the facts of the assessee case is different. Since section 43A is not

applicable as the assets were not purchased from abroad and no other section as per the I. T Act allows the assessee to capitalised the notional forex loss and to claim depreciation.

4.3 In view of the above, the depreciation claimed on account capitalised unrealised loss of Rs.8,56,57,500/- on reinstatement of ECB loan is disallowed to the tune of Rs.1,28,48,625- (i.e. Rs.8,56,57,500x16%) and an amount of Rs.2,85,52,500/- has been withdrawn from the capital work-in-progress (239,175,716- 28,552,500 = 210,623,219/-) and no disallowance of depreciation as the assessee has not claimed any depreciation on capital work in progress (WIP)."

7. Being aggrieved by the assessment order, the assessee preferred an appeal before the CIT(A), Before the CIT(A), the assessee has challenged reopening of assessment in light of certain judicial precedence including the decision of Hon'ble Supreme Court in the case of CIT vs. Kelvinator (2010) 320 ITR 561 SC. The Ld. CIT(A), after considering relevant submissions of the assessee and also taken note of certain judicial precedence, quashed reassessment order passed by the AO on the ground that, there was no failure on the part of the appellant to disclose fully and truly all facts necessary for assessment and thus, invocation of section 147 is bad in law and impugned assessment is therefore annulled. Aggrieved by the CIT(A) order, the assessee is in appeal before us.

8. The Id. DR, referring to dates and events submitted that the assessment year now involved in the present case is 2014-15 and original assessment has been completed u/s. 143(3) of the Act on 30.12.2016. The assessment has been re-opened within four years from the end of relevant assessment year. Therefore, proviso to section 147 has no application. However, the Ld. CIT(A) quashed reassessment order by following proviso to section 147 of the Act, which is incorrect.

9. The Ld. Counsel for the assessee, on the other hand supporting the order of the CIT(A), submitted that the issue of disallowance of forex loss on ECB was subject matter in original assessment order passed by the AO u/s. 143(3) of the Act and hence, re-opening of assessment on a very same issue amounts to 'change of opinion'. He further referring to petition filed in terms of Rule 27 of Income Tax Appellate Tribunal Rules, 1963 dated 23.02.2022, submitted that the issue involved in present appeal on merits is covered by the decision of Hon'ble ITAT, Chennai in assessee's own case for assessment year 2013-14 in ITA Nos. 34 & 35/Chny/2020, therefore, petition filed by the assessee may be admitted and decide the issue in accordance with law.

10. We have heard both the parties, perused materials available on record and gone through orders of the authorities below. There is no dispute with regard to the fact that the assessment has been reopened within four years from the end of relevant assessment year. In fact, the Ld. Counsel for the assessee has accepted the fact that, the assessment has been reopened within four years from the end of the relevant assessment year. In case, the assessment has reopened within four years from the end of relevant assessment year, then the case needs to be examined in the light of provisions of section 147(1) of the Act, without any influence from proviso to section 147 of the Act. In this case, although the assessment has been reopened within four years from the end of relevant assessment year, the Id. CIT(A) has quashed 148 notice and consequent re-assessment order in light of proviso to section 147 of the Act, by holding that there is no failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment in that assessment year. In our considered view, the reasons given by the Id. CIT(A) to quash reassessment order is abundantly wrong and contrary to section 147 and proviso provided thereon. Further, reliance

placed on by the Id. CIT(A) on certain judicial precedence is contrary to facts on record and misplaced. Therefore, we are of the considered view that the CIT(A), is completely erred in quashing re-assessment and consequent assessment proceedings and thus, we set aside the order passed by the Id. CIT(A) and uphold reassessment order passed by the AO u/s. 143(3) r.w.s. 147 of the Act.

11. Having said so, let us come back to the petition filed by the assessee in terms of Rule 27 of ITAT Rules, 1963. Admittedly, Id. CIT(A) did not adjudicate the issue on merits. Therefore, the assessee has filed a petition in terms of Rule 27 of ITAT Rules, 1963, to support order of the CIT(A) in light of decision of ITAT, Chennai in assessee's own case for assessment year 2013-14 & 2014-15 in ITA Nos. 34 & 35/Chny/2020. The Ld. Counsel for the assessee, referring to petition and also decision of Tribunal submitted that the tribunal had considered an identical issue on forex loss on ECB and held that said loss is revenue in nature, which is allowable u/s. 37(1) of the Act. We find that for earlier assessment years the Tribunal has considered the issue of forex loss on ECB and on the basis of arguments of the counsel for the

assessee, held that forex loss on restatement of ECB loan is revenue in nature which needs to be allowed as deduction, by following the decision of Hon'ble Supreme Court in the case of CIT vs Goetz (India) Ltd reported in 157 Taxman.com 1 (SC). But, fact remains that for the year under consideration, the issue before the Assessing Officer for consideration was whether capitalization of forex loss on restatement of ECB loan is in accordance with terms of provisions of section 43A of the Act or not. The AO, after considering the statement of the assessee that provisions of section 43A of the Act has no application, because the assessee has acquired asset in India held that when provisions of section 43A of the Act has no application, then question of capitalization of forex loss on restatement of ECB loan is contrary to law. Therefore, the issue before us for consideration in terms of petition filed by the assessee under Rule 27 of ITAT Rules, 1963 is, whether capitalization of forex loss on restatement of ECB loan is in accordance with provisions of section 43A of the Act or not. However, it does not relate to whether said loss is revenue in nature or capital in nature and whether it is deductible u/s. 37(1) of the Act. Therefore, the issue has to be decided without influenced by the decision of ITAT rendered in

assessee's own case for assessment years 2013-14 & 2014-15. If you consider the issue without going into the decision of ITAT in ITA Nos. 34 & 35/Chny/2020 for earlier assessment years, one has to understand the concept of capitalization of forex loss on account of difference in rate of exchange of currency. As per the provisions of section 43A of the Act, where the assessee has acquired any asset in any previous year from a country outside India for the purpose of business or profession and, in consequence of a change in the rate of exchange during any previous year after the acquisition of such asset, there is an increase or reduction in liability of the assessee as expressed in Indian currency at the time of making payment, (a) towards the whole or a part of the cost of the asset; or (b) towards repayment of the whole or part of the money borrowed by him from any person, directly or indirectly, in any foreign currency specifically for the purpose of acquiring the asset along with interest, if any, then such difference should be capitalized to cost of asset. The plain reading of provisions of section 43A, makes it very clear that in case assessee acquires any asset from outside India, then, at the time of making payment towards cost of asset or money borrowed for acquisition of asset, any difference in repayment

of liability on account of change in rate of currency, then said difference should be added or reduced from the cost of asset when actual payment is made. In this case, the assessee has capitalized forex loss on restatement of ECB loan without there being any actual payment. Therefore, the issue needs to be examined in light of provisions of section 43A of the Act and its applicability without going into the findings of the Tribunal order given in earlier years, because in earlier years, the question of law before the Tribunal is whether it is capital in nature or revenue expenditure deductible u/s. 37(1) of the Act. In this year, there is no dispute with regard to the nature of expenditure, because the assessee itself has capitalized forex loss on restatement of ECB. Therefore, in our considered view, the issue needs to be examined in light of provisions of section 43A of the Act alone. Since, the Id. CIT(A) has allowed appeal filed by the assessee on legal issue and has not discussed the issue on merits, we are of the considered view that the issue needs to be set aside to the file of the CIT(A) to decide on merits. Thus, we admit petition filed by the assessee in terms of Rule 27 of ITAT Rules, 1963 and direct the CIT(A) to decide the issue of capitalization of forex loss on

restatement of ECB loan in light of provisions of section 43A of the Act.

12. In the result, appeal filed by the revenue is allowed for statistical purposes.

Order pronounced in the court on 31st January, 2023 at Chennai.

Sd/-
(वी दुर्गा राव)
(V. DURGA RAO)
न्यायिकसदस्य/**Judicial Member**

Sd/-
(जी. मंजुनाथ)
(G. MANJUNATHA)
लेखासदस्य/**Accountant Member**

चेन्नई/Chennai,

दिनांक/Dated: 31st January, 2023

JPV

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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|------------------------|--------------------------|------------------------------|
| 1. अपीलार्थी/Appellant | 2. प्रत्यर्थी/Respondent | 3. आयकर आयुक्त (अपील)/CIT(A) |
| 4. आयकर आयुक्त/CIT | 5. विभागीय प्रतिनिधि/DR | 6. गार्ड फाईल/GF |