

IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH KOLKATA

**BEFORE SHRI RAJPAL YADAV, VICE PRESIDENT
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER**

**ITA No.643/Kol/2023
Assessment Year: 2015-16**

Ambuja Neotia Healthcare Venture Ltd. 86C, Vishwakarma, Topsia, Kolkata-700046. (PAN: AACCN4806C)	Vs.	Deputy Commissioner of Income-tax, Circle-11(1), Kolkata.
(Appellant)		(Respondent)

Present for:

Appellant by : Shri Miraj D. Shah, Advocate
Respondent by : Shri Abhijit Kundu, CIT,DR

Date of Hearing : 10.08.2023
Date of Pronouncement : 21.08.2023

ORDER

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

This appeal filed by the assessee is against the order of Ld. CIT(A), National Faceless Appeal Centre (NFAC), Delhi vide Order No. ITBA/NFAC/S/250/2023-24/1052784809(1) dated 12.05.2023 passed against assessment order u/s. 143(3) of the Income-tax Act, 1961 (hereinafter referred to as the “Act”), for AY 2015-16 dated 31.12.2017.

2. Grounds taken by the assessee are reproduced as under:

“1. For that on the facts and in the circumstances of the case, the Ld. CIT(A) (NFAC) has erred in law as well as on facts in passing an order u/s. 250 by dismissing appeal against disallowance of Rs.10,33,21,064/- under section 35AD being capital expenditure incurred for the purpose of specified business as per law.

2. For that on the facts and in the circumstances of the case, the disallowance of Rs.48,36,016/- on account of loss on sale of assets which were not part of block of assets, thereby invoking provisions of section 32 is bad in law as well as on facts.”

3. Brief facts of the case are that assessee is engaged in the hospital and trading of pharmaceuticals business. It filed its return on 30.09.2015, reporting a total loss of Rs.18,08,89,140/-. Assessee had constructed a hospital with more than 100 beds and commenced its operation from AY 2013-14. In this respect, assessee claimed a deduction u/s. 35AD for the capital expenditure incurred for the purpose of specified business i.e. constructing and running business of hospital. In the year under consideration, assessee has claimed a deduction of Rs.10,33,21,064/- u/s. 35AD while computing its income from profits and gains from business and profession which was disallowed by the Ld. AO by holding that deduction u/s. 35AD of the Act can only be claimed during the year of running of the specified business for which such expenses was crystallised. Ld. AO found that the claim of assessee is not tenable and rejected the same.

3.1. In respect of the second issue of disallowance of Rs.48,36,016/- being loss on sale of assets, assessee had planned to set up a clinic towards expansion of its business. Expenditure incurred by it in this regard were accounted as capital work in progress. Since the clinic was not ready to use, the same was not added to the block of assets and accordingly, no depreciation was claimed on the same. In the year under consideration, assessee analysed to arrive at a conclusion that setting up of clinic would not be economically viable and in order to save future losses, this expansion of business by setting up of clinic was dropped. Accordingly, assets in this respect were put to sell and the difference between realisation of sales and expenditure incurred up to the date were charged to P&L Account, claiming it as a loss, amounting to Rs.48,36,016/-. Ld. AO disallowed the claim by holding

that it is a capital loss. Aggrieved, assessee went in appeal before the Ld. CIT(A), who has sustained the above two disallowances made by the Ld. AO. Aggrieved, assessee is in appeal before the Tribunal.

4. Before us, Ld. Counsel submitted that assessee is engaged in the specified business as contained in section 35AD, sub-section (8)(c)(v) which includes "*building and operating, any where in India, a hospital with at least 100 beds for patients.*" Accordingly, assessee is entitled to claim a deduction of capital expenditure incurred for the purpose of said specified business. According to him, assessee has incurred capital expenditure in the specified business which has not been disputed by the Ld. AO. Ld. Counsel stated that Ld. AO has failed to specify the reason for not allowing the claim of expenditure. He referred to provisions of section 35AD which states that "*an assessee shall be allowed a deduction in respect of the whole of any expenditure of capital nature incurred, wholly and exclusively for the purpose of any specified business carried on by him during the previous year in which such expenditure is incurred by him.*"

4.1. He also submitted that due appreciation must be given to the explanatory circular for Finance Act, 2009, explaining the provision of section 35AD which reads as follows:

"16.3 The salient features of the new regime of investment-linked tax incentives are the following:-

Hundred per cent deduction would be allowed in respect of the whole of any expenditure of capital nature incurred, wholly and exclusively, for the purposes of the specified business carried on during the previous year in which such expenditure is incurred.

Capital expenditure incurred prior to the commencement of operations of the specified business and capitalised in the books of account of the assessee on the date of commencement of operations is also eligible for the deduction."

4.2. Thus, according to the Ld. Counsel, as per both, the section and the explanation, there exists no doubt on allowability of the

Investment Linked deduction under section 35AD, amounting to Rs 10,33,21,064/-

4.3. Ld. Counsel stated that this issue of disallowance made u/s. 35AD is covered by the decision in assessee's own case for AYs 2014-15 and 2017-18 of the Coordinate Bench of ITAT, Kolkata in ITA No. 237 and 238/Kol/2023 dated 05.07.2023 wherein claim of the assessee has been allowed by placing reliance on the decision in the case of Haryana Warehousing Corporation Vs. ACIT in ITA No. 1374/Chd/2016 by Coordinate Bench of ITAT, Chandigarh. The observations and findings given by the Coordinate Bench of ITAT, Kolkata in assessee's own case (supra) are extracted as under:

"2. ITA No.237/Kol/2023 – The sole issue raised by the assessee in this appeal is relating to disallowance of Rs.7,73,14,356/- u/s 35AD being capital expenditure incurred for the purpose of specified business.

3. The brief facts of the case are that the assessee company filed its return of income for the assessment year 2014-15 on 29.11.2014 declaring total loss of Rs.24,43,04,021/-. The case was subsequently selected for scrutiny and assessment order under section 143(3) of the Income Tax Act was passed on 28.12.2016 determining the total loss at Rs. 24,42,58,745/- . Subsequently, the said assessment order was subjected to revision u/s 263 of the Act. On the basis of the verification of material available on records, it was found that the assessment order u/s 143(3) dated 28.12.2016 was erroneous so far as it is prejudicial to the interest of the revenue on the following ground:

"it has claimed a deduction of Rs. 7,73,14,356/- u/s 35AD of the Income Tax Act. The above expenditure was actually incurred by the assessee after commencement of the business and claimed in the next previous year in which the business operation was commenced. As per the provisions of section 35AD of the act certain criteria are required to be fulfilled but the assessee fails to produce any such fulfilment and hence, claim of deduction of Rs.7,73,14,356/- under section 35Ad remains unverified."

The Id. PCIT vide his order u/s 263 dated 26.02.2019 has set aside the issue back to the file of Assessing officer and directed to pass a fresh assessment order after providing reasonable opportunity to the assessee. Thereafter, the Assessing Officer passed the assessment order. During the assessment proceedings, the Assessing Officer observed that the assessee had claimed deduction of Rs.7,73,14,356/- u/s 35AD. However, the assessee had incurred the said expenditure relating to deduction u/s 35AD after commencement of the business and claimed in the next previous year in which the operation was commenced. The Assessing Officer observed

that in this case, the expenditure was not incurred prior to the commencement of the business and not claimed in the previous year in which the operation was commenced, therefore, the same cannot be allowed u/s 35AD of the Act.

4. At the outset, the Id. Counsel for the assessee has submitted that the issue is squarely covered by the decision of the Coordinate Bench of the Tribunal in the Haryana State Warehousing Corporation vs. ACIT in ITA No.351/Chd/2019 vide order dated 03.10.2019 (one of us i.e. Judicial Member being part of the Bench in the said case). The relevant part of the order of the Tribunal is reproduced as under:

5. We have considered the submissions of both the parties and perused the material available on the record. In the present case it is noticed that a similar issue having identical fact was a subject matter of the assessee's appeal for the A.Y. 2011-12 to 2014-15 in ITA No. 239/Chd/2016 & others, wherein the issue has been decided in favour of the assessee and the relevant findings have been given in para 10 to 14 which read as under:

10. Now coming to the issue on merits taken by the assessee vide ground Nos. 4 and 5 of the appeal. The brief facts relating to the issue are that the assessee has claimed deduction u/s 35AD of the Act from its profits on account of construction of warehouses in different Districts of Haryana, however, the AO has disallowed the deduction observing that as per the proviso to [Section 35AD](#) of the Act, the expenditure incurred wholly and exclusively for the purpose of any specified business shall be allowed as deduction during the previous year in which the assessee commences operations of his specified business. The AO observed that though the assessee had taken up the construction of warehousing facility during the year which is covered under the specified business, however, in view of the proviso to [Section 35AD](#), the deduction was available to the assessee whose date of commencement of business is on or after 01.04.2009 and since in this case the assessee has existing business of warehousing and hence, it cannot be said that the assessee had commenced the business of warehousing during the year under consideration. He, therefore, disallowed the deduction claimed by the assessee u/s 35AD of the Act. The Id. CIT(A) upheld the above finding of the AO.

11. We have heard the rival contentions. To better understand the case, we deem it fit to first reproduce the provisions of [Section 35AD](#) of the Act :

"Deduction in respect of expenditure on specified business.

[35AD. (1) An assessee shall be allowed a deduction in respect of the whole of any expenditure of capital nature incurred, wholly and exclusively, for the purposes of any specified business carried on by him during the previous year in which such expenditure is incurred by him:

Provided that the expenditure incurred, wholly and exclusively, for the purposes of any specified business, shall be allowed as deduction during the previous year in which he commences operations of his specified business, if-

(a) the expenditure is incurred prior to the commencement of its operations; and

(b) the amount is capitalized in the books of account of the assessee on the date of commencement of its operations.

12. A perusal of the above provisions of [Section 35AD](#) of the Act reveals that assessee is eligible to claim deduction in respect of capital expenditure if the same is incurred wholly and exclusively for the purpose of any specified business carried out by him during the previous year in which such expenditure is incurred. However, in cases where such expenditure is incurred prior to the commencement of its operations by the assessee and amount is capitalized in the books of account of the assessee on the date of commencement of operations, then such expenditure is allowable as deduction in the previous year in which the assessee commences operations of his specified business.

13. In our view, the lower authorities have wrongly interpreted the relevant provisions of the Act. There are two parts of the abovesaid provisions. In the first part, it has been mentioned that an assessee is eligible to claim deduction of the capital expenditure if such an expenditure has been incurred wholly and exclusively in a specified business. There is no condition of any date or year of commencement of specified business. However, in the second part, it has been provided that if such an expenditure has been incurred prior to the commencement of business and has been duly capitalized in the books of account, the claim will be allowed in the year in which the assessee commences operations of his specified business. There is neither any overlapping nor any contradiction in the aforesaid provision. The assessee is covered in the first part i.e. the assessee has incurred the expenditure on the specified business during the year in which operations of his business of warehousing were already going on. In view of this, we do not find any justification on the part of the lower authorities in denying the deduction to the assessee u/s 35AD of the Act. This ground is, accordingly, allowed in favour of the assessee.

14. In view of this, the legal grounds relating to the reassessment are decided against the assessee whereas the grounds taken on merits regarding the allowability of the claim of deduction u/s 35AD are allowed in favour of the assessee.

So respectfully following the aforesaid referred to order dt. 19/03/2019 in assessee's own case for the A.Y. 2012-13 in ITA No. 239/Chd/2016, the present case is remanded back to the file of the A.O. to be decided as per the directions given in the aforesaid referred to order dt. 19/03/2019."

5. We are in agreement with the above decisions of the Chandigarh Bench of the Tribunal. In view of this, the disallowance made by the lower authorities is ordered to be deleted.”

5. On confrontation of these submissions to the Ld. Sr. DR, nothing contrary was brought on record. Considering the facts and circumstances of the present case, there being no material change in the facts and the applicable law as compared to the preceding years, we follow the decision of the Coordinate Bench in assessee’s own case and thereby allow the claim of the assessee u/s. 35AD of the Act. Accordingly, ground no.1 taken by the assessee is allowed.

6. In respect of ground no. 2 towards disallowance of Rs.48,31,016/- on account of loss of sale of assets which were not part of block of assets as the expansion of business by setting up of clinic was abandoned, assessee furnished the details of the loss claimed by the assessee placed in the paper book. The said detail towards the claim of loss on sale of assets relating to the setting up of clinic which was abandoned is as under:

SL No.	LOCATION	DESCRIPTION OF ASSETS	DATE OF PURCHASE	Loss on Sale
1	Bansdroni	Interior Work-Taltala Pharma	01/04/2014	(3,30,774)
2	Taltala	Interior Work At Taltala	01/04/2015	(95,557)
3	CCNT	Interior Work	01/04/2014	(5,26,682)
4	Genome Kalyani	Supply And Installation Of Cabinet Will Pallah And Rack	31/12/2014	(1,00,000)
5	Genome Kalyani	Interior Finishing Work	31/12/2014	(36,20,893)
6	Genome Kalyani	Fire Fighting Work	31/12/2014	(1,19,610)
7	Genome Kalyani	Lan Networking	31/12/2014	(42,500)
For Ambuja Neotia Healthcare Pvt Ltd			TOTAL LOSS	(48,36,016)

6.1. In this respect, it is contended that expenditure incurred by the assessee has been accounted as capital work-in-progress and not added to the block of assets for the purpose of charging depreciation. Since assessee found that its setting up of clinic as an expansion is not economically viable and in order to save future losses, it was dropped. Accordingly, the assets relating to this set up were put to sell which resulted into certain losses as tabulated above. Assessee has thus, claimed this as expenditure incurred wholly and exclusively for the purpose of business which remained to be capitalised for the purpose of claiming depreciation u/s.32 of the Act. These assets were never put to use and no depreciation was claimed on the said assets.

6.2. To buttress the contention, Ld. Counsel placed reliance on the decision of Hon'ble jurisdictional High Court of Calcutta in the case of Binani Cement Ltd. Vs. CIT (2016) 380 ITR 116 (Cal) wherein it was held that *"Expenditure made for construction/acquisition of new facility subsequently abandoned at the work-in-progress such was allowable as incurred wholly or exclusively for the purpose of assessee's business."* While answering the substantial question of law in favour of the assessee, Hon'ble Court observed as under:

"The issue whether such expenditure could be allowed in the relevant assessment year is however yet to be resolved. The CIT(A) in his order had found as follows:- ~

"The company claimed as allowable the expenditure on this abandoned project. While it was found to be unviable, the expenditure on it was for the purpose of business. It was not claimed or allowed earlier as business expenditure because it was of capital nature entitled to depreciation after completion and on commencement of its use for business. But since that stage is not reached - no asset having come into existence - the capital-work-in-progress had to be written off as such."

There was no challenge to such finding on facts before the learned Tribunal or even before us."

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Following the judgment in the case of Gajapathi Naidu (supra) the question to be asked is when did the expenditure claimed by way of deduction arise? There would have been no occasion to claim the deduction if the work-in-progress had completed its course. Because the project was abandoned the work-in-progress did not proceed any further. The decision to abandon the project was the cause for claiming the deduction. The decision was taken in the relevant year. It can therefore be safely concluded that the expenditure arose in the relevant year.”

7. Per contra, Ld. Sr. Dr. relied on the orders of the authorities below and submitted that it is a capital loss and, therefore, cannot be allowed, as contained in section 37(1) of the Act.

8. We have heard the submissions made by both the parties and perused the material available on record. The fact of abandoning the expansion of business by setting up of a clinic is not in dispute. Also, the incurrance of loss has not been controverted by bringing any material to this effect. Ld. AO has disallowed the claim of loss by holding it as capital in nature. It is also noted that the assessee has accounted the expenditure incurred by it as capital work in progress on which no depreciation had been claimed as these assets were never put to use.

8.1. We note that it is the prerogative of assessee to conduct and plan its business considering economic viability and making of profits. It is the sole discretion of the assessee to make its business decisions for the conduct and the manner in which it wants to plan its business. The dynamics of business are variable and depend upon several factors and consideration, based on which assessee takes its business decision. In the present case before us, assessee found its expansion by setting up a clinic as economically not viable and in order to save its future loss has dropped and abandoned the said project. In order to mitigate the future loss, and to recoup maximum for the expenditure already incurred, the assets deployed on the expansion

were put to sell, resulting in the loss which has been claimed by the assessee in computing its profit and loss from business.

8.2. In view of the decision of the Hon'ble jurisdictional High Court of Calcutta in the case of Binani Cement Ltd. (Supra) and the undisputed facts as stated above, we are of the view that claim of assessee is justifiable and is accordingly allowed. Thus, ground no. 2 taken by the assessee in this respect is allowed.

9. In the result, appeal of the assessee is allowed.

Order is pronounced in the open court on 21st August, 2023.

Sd/-

(Rajpal Yadav)
Vice President

Sd/-

(Girish Agrawal)
Accountant Member

Date:21st August, 2023

JD, Sr. P.S.

Copy to:

1. The Appellant:
 2. The Respondent:
 3. CIT(A), NFAC, Delhi
 4. CIT,
 5. DR, ITAT, Kolkata Bench, Kolkata
- //True Copy//

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata