

| आयकर अपीलीय अधिकरण न्यायपीठ, कोलकाता |  
IN THE INCOME TAX APPELLATE TRIBUNAL  
"C" BENCH, KOLKATA

BEFORE DR. MANISH BORAD, HON'BLE ACCOUNTANT MEMBER  
&  
SHRI SONJOY SARMA, HON'BLE JUDICIAL MEMBER

I.T.A. No. 368/Kol/2023  
Assessment Year: 2015-16  
I.T.A. No. 369/Kol/2023  
Assessment Year: 2017-18  
I.T.A. No. 370/Kol/2023  
Assessment Year: 2018-19

Deputy Commissioner of Income Tax, Circle - 5(1), Kolkata	Vs	M/s. Balmer Lawrie and Co. Limited 21, N.S. Road Kolkata - 700001 [PAN : AABCB0984E]
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अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)
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Assessee by :	Shri Akkal Dudhewala, FCA
Revenue by :	Shri G. Hukuga Sema, CIT, D/R

सुनवाई की तारीख/Date of Hearing : 07/06/2023  
घोषणा की तारीख /Date of Pronouncement: 05/09/2023

आदेश/O R D E R

PER DR. MANISH BORAD, ACCOUNTANT MEMBER :

These appeals have been filed by the Revenue against the orders, all dated 18.11.2022, passed by the Ld. Commissioner of Income-tax (Appeals), NFAC for the Assessment Years 2015-16, 2017-18 & 2018-19. Since the grounds involved in these appeals are common, they are being taken up together.

2. At the outset, we find that there is delay of 81 days in filing of these appeals by the department before this Tribunal. The department has filed a petition for condonation of delay. After perusing the same, we are convinced that the department was prevented by sufficient

cause from filing this appeal in time before this Tribunal. Hence, we condone the delay and admit these appeals for hearing.

3. Brief facts of the case are that, the assessee is engaged in the business of manufacturing of Industrial containers, Grease & Lubricants, Leather Chemicals, Trading in Tea, Logistic Infrastructure (CFS) Engg. & Technology Service Division and Travel & Tour Services. Assessments were framed for Assessment Year 2015-16, 2016-17 and 2018-19, wherein certain additions were made and the same were challenged by the assessee before the Id. CIT(A) who granted relief. Aggrieved revenue is now in appeal before this Tribunal for all these three Assessment Years, wherein some issues are common.

4. The first common issue relevant to all the three Assessment Years is relating to disallowance of deduction claimed on account of proportionate leasehold premium, which has been claimed by the assessee in relation to lease of four plots of land at Mumbai and Kolkata, which are used for setting up Container Freight Stations (CFS). At the outset, the Id. Counsel for the assessee submitted that the issue has been dealt by the Hon'ble Jurisdictional High Court in the assessee's own case for Assessment Year 2008-09 which was reported in (2019) 111 *taxmann.com* 316 (Cal), has decided the issue in favour of the assessee. He further submitted that the Hon'ble Tribunal in assessee's own case of Assessment Year 2013-14 in ITA No. 259/Kol/2023 dated 24.05.2023, has also dealt with the same issue and respectfully following the

judgment of the Hon'ble Jurisdictional High Court, dismissed the grounds raised by the revenue.

5. The Id. D/R on the other hand, vehemently argued supporting the order of the lower authorities but could not controvert the contentions made by the assessee.

6. We have heard rival contentions and perused the material placed before us.

7. We notice that the assessee has claimed amortization of lease premium related to lease to four plots of land which was disallowed by the Assessing Officer. But thereafter, the assessee succeeded before the Id. CIT(A). We notice that in the assessee's own case, for Assessment Year 2008-09, the Hon'ble Jurisdictional High Court in assessee's own case for Assessment Year 2008-09 which was reported in (2019) 111 *taxmann.com* 316 (Cal) has dealt with the following substantial question of law –

*"Whether the learned Tribunal has committed error in not following its earlier order dated 11th April, 2008 passed in assessee company's own case in ITA 348/Kol/2007 while interpreting the five-years lease deeds to hold that proportionate premium on lease hold lands was nothing but advance payment of rent and the same was not a capital expenditure and as such, the business deduction should be allowed under Section 37(1) of the Income Tax Act, 1961."*

8. The Hon'ble Court answered the question in favour of the assessee by held as under:

*10. Special Bench of the Tribunal gave its view regarding advance payment of rent to be capital expenditure on findings, inter alia, that there was termination clause, by which premature termination did not provide for refund of premium, claimed to be advanced rent, there was no clause in the agreement to show that*

*the amount of Rs.2.04 crore was paid by the assessee as advance rent for all future years and the lump sum payment of future years rent had been paid to avail some concession for advance payment of rent or for some other business consideration. It is clear from our perusal of terms of leases between assessee and its lessors, such terms are not there between them. We are unable to appreciate that fact of rent being depressed rent can only be appreciated as such if there is recital about it in the lease rent. That substantial amount of money was paid as premium, claimed and shown by assessee to be advance rents and where rents reserved are as above, it follows there was no contention raised before the Tribunal regarding the rents reserved corresponding to market rate of rent. We have no hesitation to infer that rents reserved are depressed rents.*

*11. Finding by the Tribunal that assessee's agreements are exactly similar with the agreements before Special Bench, considered and dealt with in Mukund Ltd. (supra) is perverse as based on no material or contrary to material before it.*

*12. For reasons aforesaid we answer the question in the affirmative and in favour of assessee.*

9. The above decision of the Hon'ble Jurisdictional High Court has subsequently been followed by this Tribunal in the assessee's own case for Assessment Year 2013-14. We, therefore, respectfully following the same, dismiss this common grounds raised by the revenue relating to disallowance of amortization of lease premium over the effective life of lease. Thus, the finding of the Id. CIT(A) allowing the claim of the assessee of deduction on account of lease premium as business expenditure is upheld. Accordingly, the ground raised by the revenue is dismissed for all the impugned Assessment Years.

10. Now, we take up Ground No. 2 for Assessment Year 2015-16 relating to disallowance of prior period expenses.

11. The Id. Counsel for the assessee at the outset stated that the issue stands covered by the decision of the Hon'ble jurisdictional High Court of Calcutta in the assessee's own case for AY 2012-13 in ITA No. 259/Kol/2022 dated 13.03.2023.

Per contra the Id. D/R failed to controvert this contention of the Id. Counsel for the assessee.

12. We observe that this issue raised before us relating to disallowance of prior period expenses has been dealt by the Hon'ble Jurisdictional High Court in the assessee's own case for Assessment Year 2012-13 and the relevant finding given by the Hon'ble Court in para 4 is extracted below:

*“..Further on perusing the details furnished by the assessee with regard to those expenses, the tribunal noted that the assessee had claimed deduction in respect of items which were revenue in nature and therefore fully allowable in arriving at its business income. Further the learned tribunal has pointed out that the revenue did not controvert the contention raised by the assessee that no deduction in respect of these expenses was allowed in the prior years and the tax rate in the earlier years and in the year under consideration were same and therefore irrespective of the year of deduction allowed, the revenue's effect was taxed neutral. The learned tribunal also referred to the decision of the High Court of Gujarat in PCIT Versus Adani Enterprises Limited Tax Appeal No. 566 of 2016 and found the said decision to be relevant to the facts and circumstances of the case. Thus, we find that the learned CIT(A) and the learned tribunal has examined the facts and granted relief to the assessee and more importantly that for the earlier assessment years i.e. 2005-2006, 2009-2010, the revenue has accepted the orders passed by the CIT(A). Though the appeal was filed before the tribunal for the assessment years 2010-2011 and 2011-2012, the same were dismissed. Thus, a consistent view is required to be adopted in the absence of any material placed by the revenue before the required tribunal to show that there was any distinguishing feature in the assessment year under consideration to make a departure from the earlier view.*”

13. Respectfully following the decision of the Hon'ble High Court, the findings given by the Ld. CIT(A) in allowing the claim of the assessee in respect of prior period expenditure is upheld and Ground No. 2 raised by the assessee for Assessment Year 2015-16.

14. Now, the last issue for our consideration, is Ground No. 2 raised for Assessment Year 2018-19, which relates to claims for investment allowance of Rs.18,78,36,932/- made by the assessee u/s 35AD of the Act.

15. The facts relating to this ground are that, the assessee had set-up and commenced operations of a Temperature Controlled Warehouse ('TCW') at Haryana in the relevant FY 2017-18. Since said activity of TCW qualified as a 'specified business' as defined u/s 35AD of the Act, the whole of the capital expenditure of Rs.18,78,36,932/- incurred in relation thereto was claimed as deduction u/s 35AD of the Act. During the course of assessment, the AO observed that the trade license provide relevant details/evidence that the said business activity of TCW had commenced during FY 2017-18 and therefore it was eligible to claim deduction for the investment allowance u/s 35AD of the Act. The Assessing Officer observed that the trade license to operate the business was obtained by the assessee only on 11.07.2018, which, according to ld. AO, suggested that the business had commenced only in the subsequent FY 2018-19 (AY 2019-20) and hence the claim of the

assessee u/s 35AD of the Act cannot be allowed for Assessment Year 2018-19.

16. Assessee carried the matter in appeal before the Id. CIT(A) and stated that except for obtaining the trade license all the other formalities connected to the commencement of business of TCW has been completed during FY 2017-18. The same includes, the clearances from the Haryana Pollution Control Board and the Fire Department, power connection and regular bills for electricity, sales/revenue received during the year from the said business. Based on these facts, the Id. CIT(A) granted the relief to the assessee.

17. Aggrieved, the revenue is now in appeal before this Tribunal. Id. D/R vehemently argued supporting the order of the Id. Assessing Officer and stated that the trade license has been obtained in FY 2018-19 and without obtaining such license assessee could not operate the business activity of TCW.

18. The Id. Counsel for the assessee, vehemently argued supporting the order of the Id. CIT(A) and again took us through the documents stating that all the other formalities connected with the business activity has been complied with and, therefore, the finding of the Id. CIT(A) may be confirmed.

19. We have heard rival contentions and perused the material placed before us. We notice that the assessee incurred capital expenditure towards setting up of a specific business of TCW at Haryana. The

assessee claimed deduction u/s 35AD of the Act as the TCW qualified as a specific business. There is no dispute at the end of the revenue authorities that the said business is not a specified business. The only dispute is that whether the said claim is allowable for Assessment Year 2018-19 (FY 2017-18) or for Assessment Year 2019-20 (FY 2018-19). The assessee has claimed deduction u/s 35AD of the Act in AY 2018-19 claiming that the business had been commenced and statutory clearances from Haryana Pollution Control Board and the Fire Department has been obtained, copies of power bills issued by Uttar Haryana Bijli Vitran Nigam Ltd ('SEB') from the month of May 2017 onwards to show that substantial power was being consumed to run and operate the TCW. Reference was also made to the relevant excerpts from the Management Report audited by the CAG, India which also clearly stated that the business of TCW had commenced during FY 2017-18. Further, we notice that the Id. CIT(A) allowed the said claim u/s 35AD of the Act by observing as follows:-

*"7.13 The appellant had installed temperature controlled warehouse for storage of agricultural products. To apply for trade license, one has to obtain NOC from Fire Department, Pollution Control Board, details of Property tax payment details, Building approval Plan, Occupation Certificate etc. These all NOCs are being issued by the municipal authorities itself. In the instant case, the appellant submitted the NOC from fire department as well as Pollution Control Board. Suffice to say that before getting NOCs from Fire department and pollution control board, the heavy machinery would have installed and building approval plan, occupation certificate, etc. had also been obtained from municipal authorities. Thus, the appellant would have got all the NOC/consent from the concerned municipal authority except trade licence. No doubt, trade licence is a necessary document/certificate that allows you the right to operate*

*your business in a particular municipal limit. The very purpose of obtaining trade licence is to ensure that no individual is carrying out unethical business practices and is following relevant rules, safety measures and guidelines. The question is not that when the trade licence was issued to appellant, the question is that during the period of 18.10.2017 (date of commencement of operation as claimed by the appellant) to 11.07.2018 (date of issuance of trade licence), whether the appellant had followed relevant rules, safety measure and guidelines or not or the business activity carried out during this period was unethical. The appellant had obtained NOCs from Fire department and Pollution Control Board which is controlled by the municipal corporation, therefore, the appellant followed the relevant rules, safety measure and guidelines and not doing any unethical business.*

*7.14 The very fact of this case is appellant had incurred capital expenditure of Rs. 18,78,36,932/- and claimed deduction us 35AD of the Act on the business of temperature controlled warehouse. The AO mere stated that since the licence was issued on 11.07.2018, therefore, the commencement of operation of specified business can be on or after 11.07.2018 and brought to tax the income arises from the business of temperature controlled warehouse. The AO had not distinguished the fact that that how this income was earned as it was not earned from eligible specified business us 35AD of the Act. The AO merely treated it as business income. Subsection (2) of section 35AD of the Act states the conditions that investment allowance us 35AD of the Act can be allowed to only those business which was not setup by splitting up, or the reconstruction of a business already in existence and it was not set up by the transfer to the specified business of machinery or plant previously used for any purpose. Since, the A brought to tax the income earned from temperature controlled warehouse under normal business income, therefore, the same business can't be said an specified business as the business was already in existence prior to that previous year and investment allowance us 35AD of the Act can't be allowed in subsequent years. However, the investment allowance was not disputed by the AO in subsequent years.*

*7.15 Section 35AD is a benevolent provision was inserted with effect from the 1<sup>st</sup> day of April, 2010 namely 'Deduction in respect of expenditure on specified business.' It provides an investment linked tax incentives on Capital expenditure or expenditure incurred prior to commencement of business by assessee to encourage the investment in certain businesses specified in this*

*provision. A deduction that is given without any reference to any restriction or limitation cannot be restricted, as was done by the AO in present case. Mere on the basis of technicality that the trade licence was issued on later date, the advantage of these provisions can't be withheld though the appellant had fulfilled all the criteria to obtain trade licence.*

*7.16 Considering the facts and circumstances of the case and respectfully following the judicial pronouncement ordered by various courts, the AO is not justified in disallowing the investment allowance us 35AD of the Act amounting to the tune of Rs. 18,78,36,932/- mere on the basis that the trade licence was issued during F.Y. 2018-19 and was valid for that year only. I am of the view that the appellant had commenced operation of its business during F.Y. 2017-18 and the appellant had rightly claimed investment allowance us 35AD of the Act. The appellant gets relief in this ground."*

20. On going through the above finding of the Id. CIT(A) and also considering the facts placed before us, by the Id. Counsel for the assessee regarding obtaining of NOC from Haryana Pollution Control Board and the Fire Department, power bills issued by the Uttar Haryana Bijli Vitran Nigam Ltd ('SEB') from the month of May 2017 onwards to show that substantial power was being consumed, revenues generated from the sale of services at the TCW along with sample copies of agreements, which are placed at Pages 16 to 48 of the paper book, evidencing that the TCW facility was in operation and generating revenues to the assessee during FY 2017-18. Considering all these facts, we are inclined to hold that the business has commenced during AY 2017-18 and the audit report of the CAG, India, also supports this fact. The only ground on which the AO denied the said claim is the date of trade license which was issued on 11/07/2018. The said trade license

cannot itself be the only ground to reject the claim u/s 35AD of the Act. Substantial compliances have been made to prove that the business has commenced during FY 2017-18. We thus fail to find any infirmity in the finding of the Id. CIT(A) and dismiss this ground raised by the revenue.

21. In the result, all the appeals filed by the revenue are dismissed.

**Order pronounced in the Court on 5<sup>th</sup> September, 2023 at Kolkata.**

*Sd/-*  
**(SONJOY SARMA)**  
**JUDICIAL MEMBER**

*Sd/-*  
**(DR. MANISH BORAD)**  
**ACCOUNTANT MEMBER**

Kolkata, Dated 05/09/2023

*SC Sarma*

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Assessee
2. प्रत्यर्थी / The Respondent
3. संबंधित आयकर आयुक्त / Concerned Pr. CIT
4. आयकर आयुक्त)अपील (/ The CIT(A)-
5. विभागीय प्रतिनिधि , आयकर अपीलीय अधिकरण, कोलकाता/DR,ITAT, Kolkata,
6. गार्ड फाई/ Guard file.

आदेशानुसार/ BY ORDER,  
 TRUE COPY

Assistant Registrar  
 आयकर अपीलीय अधिकरण  
 ITAT, Kolkata