

**IN THE INCOME TAX APPELLATE TRIBUNAL COCHIN BENCH,
COCHIN**

**BEFORE SHRI SANJAY ARORA, AM AND Ms. KAVITHA RAJAGOPAL,
JM**

ITA No. 561/Coch/2022
(Assessment Year: 2001-02)

Amalgam Foods Limited Amalgam House, Bristow Road, Willingdon Island, Kochi-682 002	vs.	Dy. CIT, Circle-1, Alappuzha
[PAN:AABCA 8283D]		
(Assessee)	:	(Respondent)
Assessee by	:	None
Respondent by	:	Smt. J. M. Jamuna Devi
Date of Hearing	:	14.02.2024
Date of Pronouncement	:	14.05.2024

ORDER

Per Bench:

This is an Appeal by the Assessee, directed against the order dated 28.03.2022 by the Commissioner of Income-tax (Appeals), Income Tax Department [CIT(A)], dismissing the assessee's appeal contesting its assessment under section 143(3) read with section 254 of the Income-tax Act, 1961 (the Act) dated 26.12.2019, for assessment year (AY) 2001-2002.

2. None appeared for and on behalf of the assessee-appellant when the appeal was called out for hearing. Taking note of the request dated 05.02.2024 by Sri R. Srinivasan, CA, the learned Counsel for the assessee, that his personal appearance may be dispensed with, and the matter decided after considering written submissions, enclosed along with, the hearing in the matter was proceeded with.

3. The appeal raises the issue of the maintainability of the assessee's claim for foreign exchange loss in the sum of Rs.152 lakh for the current year. This is the second round before the Tribunal; it having decided the assessee's appeal earlier vide order dated 27/11/2018 (in ITA No. 498/Coch/2017 / copy on record). The claim was disallowed in assessment (dated 11.02.2024 / copy on record) in the first round for the reason that the same *did not pertain to the year under reference*, but, even as reported in the audit report, as a prior period expense, i.e., relating to an earlier year/s. The assessee, admittedly following mercantile system of accounting, it's claim that the loss could not be ascertained at the time of finalizing it's accounts for the year ending 31.3.2000, was found not acceptable, and confirmed by the first appellate authority – whose order in the relevant part stands reproduced by the Tribunal in it's order dated 27/11/2018. Before the Tribunal, the assessee pleaded for admission of additional evidence, claiming the same to be going to the root of the matter inasmuch as the loss incurred was on account of repayment of trade advance, received in foreign exchange (FE) in the course of it's business of export of frozen sea food from it's buyer, M/s. Ocean Diamond Inc., USA (ODI), which could be quantified/ascertained only at the time of repayment. The Tribunal after hearing the parties, admitted the additional evidence, and restored the matter back to the file of the Assessing Officer (AO) for examination thereof and consideration of the issue afresh; relevant part of its order reading as:

'8. We noticed that the assessee has filed additional evidences in the form of financial statements for the year ending 31.03.1997 to 31.03.2001, wherein the advances received from Ocean Diamond Inc. is shown as unsecured loans. The assessee has also produced copies of agreement entered by it with Ocean Diamond Inc., based on which assessee had received export advance of two million USD. On perusal of the agreement, it is clear that the amounts have been received by the assessee for supply of seafood to Ocean Diamond Inc., USA. The assessee has also produced copy of the bank guarantee issued by the Central Bank of India, the applications and communication with the Reserve Bank of India for receipt and remittance of foreign exchange and also copies of communication assessee had with Ocean Diamond Inc. The additional evidences now filed goes to the root of the issue and for a proper adjudication of case, we admit the same on record. since the additional evidences are taken on record, in the interest of justice and equity, the same need to be examined by the Assessing Officer. Accordingly, we remit the issue to the

Assessing Officer for de novo consideration. The Assessing Officer shall examine whether the amount of two Million USD was received by the assessee in the past years as trade advance in the course of its business of export of seafood and whether the foreign exchange fluctuation loss incurred by the assessee was on account of repaying the above trade advance. *If the foreign exchange loss is on account of repayment of trade advance and is on revenue front, necessarily same is to be allowed as business loss. It is ordered accordingly.*’
(emphasis, ours)

That is, it opined that the foreign exchange loss, if on account of repayment of trade advance and on revenue account, is an allowable business loss. In the second round, the assessee furnished material to exhibit that it had entered into an export advance and payment agreement with ODI on 27.03.1997, whereby it received an interest free loan of US\$ 2 million (on 28.03.1997) toward supply of goods worth US\$ 20 M within three years of the advance. The loan was secured by a bank guarantee (BG) by the assessee’s banker, Central Bank of India, Ernakulam (CBI) in favour of ODI. As the assessee could not supply the goods even up to the extended date, i.e., 31.12.2001, ODI invoked the BG for US\$ 1.5 M, which was paid by CBI with the approval of RBI during fy 2002-03, the balance US\$ 0.5M having been adjusted against the exports made. The loss, according to the AO, therefore, arose during fy 2002-03, and not fy 2000-01, the relevant previous year. No improvement in it’s case being made by the assessee before the Id. CIT(A), he confirmed the disallowance, holding as under:

‘5.7 The appellant has claimed that the Bank Guarantee issued in favour of the overseas customer was encashed by them and the amount was remitted by the bank and later collected by the appellant. In the written submission filed during the appellate proceedings, the appellant has reiterated the claim as had been made earlier. However, the appellant has not been able to refute the Assessing Officer’s observation that the relevant remittance and the resultant foreign exchange loss *crystallized in the FY 2002-03* and hence the same could not be allowed for AY 2001-02.

5.8 The appellant has reproduced the operative portions of the Hon’ble ITAT order to show that in the set-aside proceedings the Assessing Officer was required to only examine whether the loss was on account of a trade advance or not. However, allowability of the claim in a particular financial year further requires that the transactions should pertain to the relevant A.Y. *As the appellant has not been able to prove that the foreign exchange loss pertained to FY 2000-01 (AY*

2001-02) the claim is not allowable this year. The grounds raised by the appellant are accordingly rejected.’

(emphasis, supplied)

4. Before us, the assessee has per its written submissions (WS), claimed that the loan was repaid during f.y. 2000-01 on being unable to fulfil the export obligation even up to 31.03.2001. The impugned loss, based on the actual foreign exchange rates prevailing at the time of remittance to the foreign buyer, which was by the bank in the first instance, collected later from the assessee, could thus be ascertained and quantified only during fy 2000-01, the relevant previous year. As, however, a part of it relates to the years 1999 & 2000, the proportionate amount of the foreign exchange loss was booked as prior period expense. This, however, could not be anticipated for those years and, besides, the assessee may have undertaken exports up to March 2001, the extended period. Reporting of loss in accounts, however, ought not to be confused with the admissibility of expenditure/loss. Smt. Devi, the learned Sr. DR, would rely on the orders by the Revenue Authorities, stating that their clear findings – which were read out, based on materials furnished, had not been rebutted by the assessee at any stage.

5. We have heard the party before us, and perused the material on record.

5.1 We find the assessee to have misled the authorities with regard to the issue arising inasmuch as there was no dispute as to the admissibility of loss, as the Tribunal was given to understand, but only as to the year in which the liability to pay the same arose. Implicit in the Tribunal’s order is the notion of the repayment of advance being during fy 2000-01, the current year, which the Revenue finds as not. Why, the Balance-Sheet as on 31/3/2001, before the Tribunal, itself reflects the same as an unsecured loan, falsifying the assessee’s account. All that the assessee had to, to substantiate its case, do was to furnish material exhibiting the invocation of the BG; the repayment of the export advance, during fy 2000-01, even as emphasized by the first appellate authority in the first round, expressing

doubt, on that basis, if it was indeed a case of repayment of export advance, as being made out before him for the first time, or a foreign exchange loss on exports for the earlier years. In this regard, we note that while before the Tribunal it states of the loss having been sustained on repayment of the advance during fy 2000-01, the relevant previous year (para 7), before the AO (in the second round), material is adduced, on the basis of which he issues a finding, undisputed, that the export obligation stood extended by the buyer up to 31.12.2001; the BG being invoked subsequent thereto, and the loss, accordingly, arising on repayment during fy 2002-03 (relevant to AY 2003-04). This in fact is admitted in the 'Statement of Facts' (SoF) before the Id. CIT(A) who, accordingly, in the absence of any rebuttal, has endorsed the finding by the AO, even as before him (refer para 13 of the assessee's reply, at page 4 of the impugned order), and at para 6 (page 3) of the WS, the assessee states of the contract being extended up to 31.03.2001, and it being under a *bona fide* impression that it shall be able to fulfil the export obligation by then. That is, it continues to obfuscate the issue. We, though, consider the same, i.e., the date/s of payment, as of no relevance inasmuch as, as opined by the Tribunal, the foreign exchange fluctuation loss, where on revenue account, is an allowable business expense. *The only issue is the loss arising during the relevant year.*

5.2 Before we proceed further, we may record that apart from the variation in dates, i.e., 31.03.2001 or 31.12.2001, which may have different implications, up to which the assessee's export obligation was finally extended, and which ought to be a clear matter of fact, we observe two anomalies in the assessee's stand, which has been inconsistent throughout:

(a) How could be assessee, in view of the admitted extension of the export contract upto at least 31/3/2001, claim before the Tribunal in the first round that it could not book the loss at the time of finalizing the accounts for the y.e. 31/3/2000, the end of the contract period, but only on the repayment of the export advance during fy 2000-01, resulting in crystallizing of the fluctuation loss during that period, and for which it was accordingly booked?

(b) What is the basis of the apportionment of loss, claimed to be arising during fy 2000-01 on repayment, i.e., to the years ending 31.03.1999 and 31.03.2000, which is stated as a reason for booking (the proportionate part of) the loss as a prior period expense?

There is, it is to be noted, no obligation for repayment till the contract period has not expired inasmuch as the assessee could always export till then. Also, it is in that case only the proportionate expenditure, i.e., relatable to the other years, that could be disallowed, and not the total. *The foregoing, if anything, establishes complete incoherence and un-substantiation that marks the assessee's case.*

5.3 We, next, consider the admissibility of the claim. The same is said to arise in the current year inasmuch as the payments stood made during relevant previous year, crystallizing the liability. The same stands accepted by the Revenue, i.e., in principle, which, though, on the basis of the material adduced by the assessee, issues a finding, un-rebutted, of the payment having been made only during fy 2002-03 after obtaining approval from RBI. *We find no dispute thereon.* The assessee, to be fair, when it states of the contract being extended up to 31.3.2001, only states of being under the *bona fide* impression that the export could be made up to March, 2001. It is also not unlikely, Smt. Devi would suggest during hearing, that the contract, initially extended up to 31.03.2001, was finally up to 31.12.2001. Making a bald claim, however, is to no consequence. Even as the relevant facts are in fact extensively documented, the assessee has not furnished the date/s of repayment of advance! We observe no challenge to the finding by the Revenue Authorities of the contract being extended up to 31.12.2001, and the payment finally made during fy 2002-03, the previous year relevant to AY 2003-04.

5.4 So, however, we find the date/s of payment as of little consequence. The reason is simple. The assessee is following mercantile method of accounting. The liability is a trade liability, i.e., on revenue account, to be discharged, either by payment in cash or in kind, i.e., supply of goods ordered. The liability being

constant in terms of foreign exchange, while the assessee's accounts are expressed in Indian rupees (INR), the liability, as long as it outstands, is to be necessarily expressed at the end of each account period in INR, i.e., corresponding to the export obligation yet to be met. For example, if the liability stated at Rs.100 at the beginning of the export contract, is at Rs.110 and Rs.115 at the beginning and the end of the relevant year respectively, the increased liability of Rs.5 is incurred during the year and, thus, allowable as expenditure for that year. Conservatism and prudence are fundamental accounting assumptions, which would dictate booking of such expenditure. This in fact forms the basis for allowance of provision on various expenses, viz. gratuity, leave encashment, sale warranty, etc., and toward which we may advert to decisions in *Rotrak Controls India P. Ltd. v. CIT* [2009] 314 ITR 62 (SC), *Bharat Earth Movers Ltd. v. CIT* [2000] 245 ITR 428 (SC); *Madras Industrial Inv. Corp. Ltd. v. CIT* [1997] 225 ITR 802 (SC), to cite few, as also to *CIT v. British Paints (I) Ltd.* [1991] 188 ITR 44 (SC). Financial obligation in FE may also be added to this list. The actual discharge of the liability during the relevant year is not a condition precedent. This shall also meet the Revenue's objection that the loss arising on repayment is w.r.t. the rates obtaining thereat, and cannot therefore relate to the earlier year/s. This though is subject to two exceptions. One, where the depreciation in Indian currency (vis-a-vis the foreign currency) is likely to be reversed later, i.e., is a temporary phenomena, and, two, where there is a statutory provision regulating the allowance of this expense. The first falls on facts in view of the consistent decline in value of INR vis-a-vis US\$, which perhaps also explains the assessee's booking liability with reference to years 1999 & 2000. The statutory provision, i.e., section 43AA, read out during hearing, is by Finance Act, 2018, w.r.e.f. 01.04.2017. The same is though in sync with what stands stated here. As such, irrespective of the date of extension of the contract, the assessee following accrual method of accounting, is entitled to the actual depreciation in INR vis-à-vis USD during the year. That the same does not

represent the stand of either party, with the Revenue's objection being also on different lines, is of no consequence inasmuch as the same is not binding. It is the correct legal position that is relevant, and not the view that the parties may take of their rights in the matter (*CIT v. C. Parakh & Co. (I) Ltd.* [1956] 29 ITR 661 (SC); *Kedarnath Jute Mfg. Co. Ltd. v. CIT* [1971] 82 ITR 363 (SC)).

6. We may finally capsule our findings. The assessee contested the denial of allowance of its claim for loss on account of foreign exchange fluctuation, which was for the reason that the same pertained to an earlier year/s, on the ground of crystallization of liability, on payment, during the current year. Before the Tribunal, however, it projected the dispute as on account of the nature of the liability, toward which no material had been furnished till then, and which, on that basis, restored the matter back, making it clear that where on revenue account, the liability is an admissible business loss. The assessee adduced additional evidence *qua* it being a trade liability, by way of a trade advance, the date of discharge of which, being secured by way of BG, had been extended upto 31.12.2001. The Revenue found that the BG had been invoked thereafter, and the payment in USD made with the approval of RBI only in fy 2002-03, so that, the 'crystallization' of liability was only in previous year relevant to AY 2003-04. The assessee, without rebutting this finding, which was in view of the parties the issue, with any material, claims the extension of the export obligation upto 31.03.2001. *Coupled with the fact of it being unsubstantiated, how, one may ask, would it matter where the liability is, in any case, discharged during fy 2002-03?* That is, even going by the assessee's version, it is not the date of extension, but the actual discharge of the liability – claimed before the Tribunal as during fy 2000-01, and toward which no material is adduced at any stage, that is relevant. Be that as it may, the said date/s is found irrelevant as the assessee, following mercantile system of accounting, is entitled to the loss incurred by way of increase in the trade liability during the

relevant year. This perhaps also explains the booking of the losses corresponding to the years 1999 & 2000, on adjusting the liability in accounts for the current year. The AO shall allow deduction to the extent of the increase therein during the current year, based on the foreign exchange rates as at the beginning and the end of the year. Needless to add, the loss corresponding to the liability actually discharged during the year, if any, would also stand to be accounted and, thus, allowed. If, for example, Rs.10 out of Rs.100 (i.e., 10% of the original liability), is discharged during the current year, the booking of loss by way of provision would be Rs.4.50 (Rs.5 x 0.9), and not Rs.5. The depreciation corresponding to Rs.10 would stand to be claimed & allowed on actuals. The assessee shall furnish the necessary details/data, which the AO shall examine for its veracity. We decide accordingly.

7. In the result, the assessee's appeal is partly allowed.

*Order pronounced on May 14, 2024 under rule 24 of the Income Tax
(Appellate Tribunal) Rules, 1963.*

Sd/-
(Kavitha Rajagopal)
Judicial Member

Cochin; Dated: May 14, 2024
DDG; Roshani, Sr. PS

Sd/-
(Sanjay Arora)
Accountant Member

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent
3. CIT– concerned
4. DR, ITAT, Cochin
5. Guard File

BY ORDER,

(Dy./Asstt.Registrar)
ITAT, Cochin