

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "E", MUMBAI

BEFORE SHRI ANIKESH BANERJEE, JUDICIAL MEMBER AND
MISS PADMAVATHY S., ACCOUNTANT MEMBER

ITA No.782/Mum/2024
(Assessment Year: 2021-22)

Everest Kanto Cylinder Ltd 204, Raheja Centre, Free Press Journal Marg, Nariman Point Mumbai-400 021 PAN : AAACE30836F	vs	Deputy Commissioner of Income- tax, Circle 3(4), Mumbai World Trade Centre 1, Cuffe Parade, Mumbai-400 005
APPELLANT		RESPONDENT

Assessee by : Shri Shekhar Gupta
Respondent by : Shri Biswanath Das CIT DR

Date of hearing : 02/01/2025
Date of pronouncement : 20/01/2025

ORDER

PER ANIKESH BANERJEE, JM:

Instant appeal of the assessee was filed against the order of the Learned Commissioner of Income-tax Addl. /JCIT(A)-3, Chennai, [for brevity, 'Ld.CIT(A)'] passed under section 250 of the Income-tax Act, 1961 (for brevity, 'the Act'), date of order 05/02/2024 for A.Y. 2021-22. The impugned order was emanated from

the order of theCPC, Bengaluru, passed under section 143(1) of the Act, date of order 14/12/2022.

2. The assessee has raised the following grounds of appeal:-

“1.The learned CIT (Appeals) has erred in law and on the facts of the case in sustaining the disallowance of Rs. 52,34,554/-

2.The learned CIT (Appeals) has erred in law and on the facts of the case in sustaining the disallowance of Rs. 56,79,558/- being loss on sale of assets.

3. The assessee craves leave to add, alter or amend the above grounds of appeal.”

3. The brief facts of the case are that the assessee during the impugned assessment year claimed expenditure, paid by way of penalty or fine related to interest and penalty on delayed payment of Central Sales-tax, interest& penalty on non-fulfillment of advance license obligationand interest on delayed payment of GST which was total amount of Rs.52,34,554/-. The details of the expenses incurred with item-wise list is as follows: -

Sr.No.	Expenditure by way of penalty or fine for violation of any law for the time being force	Amount (Rs.)
1	Interest on delayed payment of value added tax and central sales tax	12,53,782
2	Penalty on delayed payment of value added tax and central sales tax	29,589
3	Interest on non-fulfillment of advance license obligations	38,77,770
4	Penalty on non-fulfillment of advance license obligations	73,175
5	Interest on delayed payment of Goods and Services Tax	238

3.1 Out of the above payment, item at serial No.2 related to Penalty on delayed payment of value added tax and central sales tax had not been pressed; hence, it is taken as withdrawn.

4. The assessee first argued the issue related to the rest of the additions as per the above mentioned list made by the Ld.AO for disallowance of expenditure claimed by the assessee in the P&L Account. The assessee generated the loss for sale of assets under section 50 of the Act amount to Rs.56,79,598/-. The said loss was set off with the current year business income as per provisions of section 41(2) of the Act. The Ld.AO, while processing the return under section 143(1), rejected the expenditure claimed by the assessee and disallowed the loss set off with the current year's income. The aggrieved assessee filed an appeal before the Ld.CIT(A). The Ld.CIT(A) upheld the observation of the Ld.AO. Being aggrieved on the appeal order, the assessee filed an appeal before us.

Argument related to expenditure by way of penalty or fine.

5. The Ld.AR in argument placed that the interest on delayed payment of GST and VAT is duly covered by the order of the Hon'ble Apex Court in the case of **Mahalakshmi Sugar Mills Co Ltd vs CIT (1980) 123 ITR 429(SC)**. We respectfully relied on the order of the Hon'ble Apex Court in the case of Prakash Cotton Mills (P.) Ltd vs CIT 201 ITR 684 (SC) where the Hon'ble Apex Court ruled that the claim of business expenditure under section 37(1) is an allowable expenditure related to interest and damages paid by the assessee was compensatory in nature so as to entitled for deduction under section 37(1) of the Act. Accordingly, we follow the judicial consistency and the order of the Hon'ble Apex Court squarely covers the assessee's matter and accordingly, serial No.1 of the above mentioned list for

interest on delayed payment of VAT and CST amount to Rs.12,53,782/- is allowable expenditure and the addition is uncalled for.

6. Related to interest on non-fulfillment of advance license related to serial no. 3 & 4 of the above-mentioned list, the Ld.AR placed that the assessee is engaged in business of manufacture of CNG cylinders. The assessee imports seamless steel tubes from China. The assessee manufactures CNG cylinders from the steel tubes and exports the same. As per the import / export policy of the Government of India, if the assessee does not pay any customs duty on the import of seamless tubes and there is an obligation to export the manufactured CNG cylinders as per scheduled formula and if the assessee does not fulfill the obligation to export, the assessee was liable to pay interest and penalty for such non-fulfillment of advance license obligations. The assessee relied on the order of the Hon'ble Delhi High Court in case of **CIT vs Enchante Jewellery Ltd 40 taxmann.com 216** and the order of the Hon'ble Gujarat High Court in case of **CIT vs Tarun Commercial Mills Co. Lt 107 ITR 172 (Gujarat)** where the Hon'ble Gujarat High Court ruled that where there was no breach of a public policy which might render payment, agreed to be made for default arising as a result of breach as one akin to penalty or infraction of law and hence amount paid by the assessee for non-fulfillment of export obligation was allowable as business expenditure. Accordingly, we follow the order of the Hon'ble Delhi High Court and Hon'ble Gujarat High Court and the interest and penalty on non-fulfillment of advance licence obligation amount to Rs.38,77,770/- and Rs.73,175/- respectively are allowable expenditure under section 37(1) of the Act.

The Ld.DR was unable to bring any contrary judgement to refute the argument of the Ld.AR. Accordingly, the expenditure claimed by the assessee amount to

R.52,04,965/- (Rs.52,34,554/- (-) Rs. 29,589/-) is allowed expenditure under section 37(1) of the Act.

In the result, the **ground No.1** of the appeal of the assessee is partly allowed.

Ground No.2: Disallowance of loss on sale of asset

7. The issue is related that the assessee sold the motor car cascade trailer during the impugned assessment year and the sale value was lower than the written down value of the asset. Accordingly, assessee generated loss amount to Rs.56,79,598/-. The relevant table is duly annexed as below: -

Asst sold during FY 20-21	Motor Car	Cascade	Trailor	Cascade	Total
Date of Sale / transfer	01/08/2020	20/08/2020	30/12/2020	24/02/2021	
Book value of Asset	60,00,000	87,52,932	21,11,970	95,33,898	2,63,98,800
Accumulated Depreciation up to Date of Sale	38,43,108	6,53,834	12,84,185	5,73,208	63,54,335
Total Net Block of Deduction on date of Deduction	21,56,892	80,99,-098	8,27,785	89,60,690	2,00,44,465
Sale Value	11,71,429	46,60,000	5,33,438	80,00,000	1,43,64,867
(Profit)/Loss	9,85,463	34,39,098	2,94,347	9,60,690	56,79,598

The assessee adjusted the loss with the same year's business income. The Ld.AO rejected the loss. Finally, the order was carried before the Ld. CIT(A) and the appeal was rejected. The Ld.CIT(A) has taken the view which is reproduced as below: -

"5.3.3 Concerning the remaining sum of Rs. 56,79,598/- (8,66,99,535-8,10,19,937) relating to the loss on the sale of assets, it is noted from records that the company sold

the assets at a price lower than what they were shown in the books of accounts. It is important to note that under the Income Tax Act, the concept of a block of assets is provided for fixed assets. This means that all the assets belonging to a particular category are clubbed together and known as a block of assets. Whenever an asset is sold from this block, the sale price is reduced from the written down value of the block (WDV). The profit or loss is computed only when the block ceases to exist. Otherwise, no profit or loss is allowed as a deduction. Section 43(6)(c)(i) of the Income Tax Act provides that the WDV of the block of assets will be computed by reducing the moneys payable in respect of any asset falling within that block, which is sold or discarded or demolished or destroyed during that previous year. So, once the sale price is already reduced from the WDV, the appellant cannot claim it as a loss. Also, for the sake of clarity, Section 37 provides that an expense of capital nature shall not be allowed as a deduction. Therefore, the loss on the sale of fixed assets is a capital loss and accordingly not allowed as a deduction. The combined reading of Section 43(6)(c)(i) and Section 37 clearly indicates that the sale price of fixed assets has to be reduced from WDV and cannot be claimed as an expenditure. Therefore, the appellant arguments cannot be accepted. Hence, the loss of Rs. 56,79,598/- disallowed by the AO (CPC) does not require any interference. Thus, the sum of Rs. 56,79,598/- is confirmed.”

8. The Ld.AR in argument and placed that where the full value of the consideration received or accruing as a result of the transfer of the asset together with the full value of such consideration received or accruing as a result of the transfer of any other capital asset falling within the block of assets during the previous year, exceeds the aggregate of the following amounts, namely:

- (i) Expenditure incurred wholly and exclusively in connection with such transfer or transfers;
- (ii) The written down value of the block assets at the beginning of the previous year, and

(iii) The actual cost of any asset falling within the block of assets acquired during the previous year. Such excess shall be deemed to be the capital gains arising from the transfer of short-term capital assets.

Any block of assets ceases to exist as such, for the reasons that all the assets in that block are transferred during the previous year, the cost of acquisition of the block of assets shall be the written down value of the block of assets at the beginning of the previous year, as increased by the actual cost of any asset falling within that block of assets, acquired by the assessee during the previous year and the income received or accruing as a result of such transfer or transfers shall be deemed to be the capital gains arising from the transfer of short term capital assets. Thus, the provisions of section 41(2) of the Act and of section 50 of the Act simultaneously exist in the Act. It may be noted that the plain provisions of 41(2) of the Act should prevail over the provisions of section 50 which are of the nature of deeming provisions because deeming provision assume existence of a fact which does not really exist. The Ld. AR respectfully relied on the case **Indira Sawhney Vs. Union of India, JT 1999 (9) SC 557**. In the case of **CIT V/s. Bombay Corporation AIR 1930 PC 54**, Lord Viscount Dunedin explained legal fiction by observing: Now a when a person is "deemed to be something, the only meaning possible is that whereas he is not in reality that something, the Act of parliament requires him to be treated as if he were". Therefore, the plain provisions of the Act will prevail over deeming provisions.

9. Section 28 of the Act provides that the profit and gain of any business or profession carried on by the assessee, at any time during the previous year shall be chargeable to income tax under the "Profits and Gains of business or profession". Section 29 of the Act provides that income from profits and gains of

the business or profession referred to in section 28 shall be computed in accordance with the provisions contained in sections 30 to 43D. Therefore, in computing the income from business, the provisions section 41 of the Act would be applicable.

The Hon'ble Supreme Court in the case of CIT V/s. J. H. Gotla, 156 ITR 323 (SC) has held that the word "income" includes "loss". Therefore, if the sales consideration of assets falls short of WDV of assets, the balance being loss is to be considered for the purpose of allowance under section 41(2) of the Act. This analogy squarely applies to the provisions of section 50 as well which only provides for short term capital gain where the full value of consideration is in excess of WDV etc. It does not provide for the converse situation. But as the word "income" includes loss the short term capital loss falls within the purview of section 50 as well.

As the provisions of section 41 (2) and section 50 coexist, an assessee can take the benefit of section 41 (2) which is more beneficial to him. The Supreme Court in the case of **CIT vs. Urmila Ramesh (1998) 230 ITR 422 (SC)**, has held that both section 41 (2) and section 50 of the Act cannot apply to the same amount.

10. The Ld.DR vehemently argued and relied on the order of the revenue authorities. The Ld. DR was unable to bring any contrary judgement to refute the argument of the Ld.AR

11. We have carefully considered the rival submissions and examined the documents available on record. The assessee has relied on the judgment of the Hon'ble Madras High Court in the case of **Share Aids (P) Ltd. vs. ITO[124 taxmann.com 256 (Mad)]**, wherein it was held that when certain assets forming part of block assets, other than immovable property, are sold in the ordinary

course of business before being held during the relevant previous year, the resulting loss—if the sale price is less than the written-down value—should be treated as a business loss under Section 41(2) of the Act.

The assessee has argued that Section 50 of the Act, being a deeming provision, should yield to the plain language of Section 41(2), as the latter directly addresses the treatment of such losses. Reference was made to the principle that deeming provisions create a legal fiction to assume the existence of facts that do not exist in reality, as laid down in **Indira Sawhney** (supra). Further, as per Section 41(2) of the Act, any income arising from the sale of assets exceeding the written-down value is taxable. Similarly, if the sale consideration falls short of the written-down value, the resulting loss is also addressed under Section 41(2) of the Act. The Ld. AR also referred to the decision of the Hon'ble Supreme Court in **J.H. Gotla** (supra), which held that the term "income" includes "loss." Therefore, if the sale consideration is less than the written-down value, the resultant balance (loss) should be considered under Section 41(2) of the Act.

In response, the Ld.DR contended that the process of calculation is clearly outlined in Section 43(6)(c)(i) of the Act, which applies to "any block of assets," including both movable and immovable assets. It was argued that the judgment of the Hon'ble Madras High Court in **Share Aids (P) Ltd(supra)** is distinguishable. Paragraph 12 of the said judgment specifically noted that the loss was allowed in the context of a business closure, rendering the carry forward of loss irrelevant. Furthermore, it is emphasized that while Section 41(2) recognizes the loss, the characterization of the loss is determined under Section 50 of the Act, which treats it as a short-term capital loss (STCL).

12. Before proceeding to examine whether the loss on sale of asset can be considered as business loss under section 41(2), we will first examine whether the said section is applicable to assessee who is engaged in the business of manufacturing and exporting of CNG Cylinders. Section 41(2) provides 3 (three) conditions for the purpose of applicability of the said section. The conditions are.

- (a) Building, machinery, plant or furniture is owned by the assessee;
- (b) **Depreciation is claimed under clause (i) of sub-section (1) of section 32;** and
- (c) Building, machinery, plant or furniture was or has been used for the purposes of business

Therefore, one of the conditions for applicability of section 41(2) is that the assessee should have claimed depreciation under section under clause (i) of sub-section (1) of section 32 which reads as under –

“32. (1) In respect of depreciation of—

(i) buildings, machinery, plant or furniture, being tangible assets.

(ii) know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after the 1st day of April, 1998, not being goodwill of a business or profession,

owned, wholly or partly, by the assessee and used for the purposes of the business or profession, the following deductions shall be allowed—

(i) in the case of assets of an undertaking engaged in generation or generation and distribution of power, such percentage on the actual cost thereof to the assessee as may be prescribed.”

A combined reading of the provisions of section 41(2) and section 32(1)(i) makes it clear that provisions of section 41(2) are applicable only to those entities engaged in the business of generation or generation and distribution of power who claim depreciation on straight line method (SLM). In assessee's case where

the depreciation is claimed on WDV method where assets are grouped as "block of assets" there is no question of applicability of section 41(2) of the Act and consequential consideration of the gain or loss on sale under the head "profits and gains of business or profession". The impugned transaction in assessee's case where the loss has arisen from the sale of asset in the block of asset have to be considered as STCL under section 50 of the Act.

The next issue raised pertains to whether the said STCL can be set off against the current year's business income. As per the amendment to Section 70 of the Act by the Finance Act, 2002, with effect from 01.04.2003, the provisions of Section 70(2) clearly stipulate that a short-term capital loss can only be adjusted against income from other capital assets. Sub section (3) of section 71 clearly stipulates that *"Where in respect of any assessment year, the net result of the computation under the head "Capital gains" is a loss and the assessee has income assessable under any other head of income, the assessee shall not be entitled to have such loss set off against income under the other head "*.

Accordingly, the adjustment of STCL against business income is not permissible. We upheld the decision of the Ld. CIT(A) in this issue. The addition amount to Rs.56,79,598/- is confirmed.

In light of the above, **Ground No. 2** of the assessee's appeal fails and is dismissed.

13. In the result, appeal of the assessee bearing **ITA No.782/Mum/2024** is partly allowed.

Order pronounced in the open court on 20th day of January 2025.

sd/-

(PADMAVATHY S.)
ACCOUNTANT MEMBER
Mumbai,दिनांक/Dated: 20/01/2025
Pavanan

sd/-

(ANIKESH BANERJEE)
JUDICIAL MEMBER

Copy of the Order forwarded to:

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकरआयुक्त CIT
4. विभागीयप्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT,
Mumbai
5. गार्डफाइल/Guard file.

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BY ORDER,

(Asstt. Registrar), ITAT, Mumbai