

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 1.12.2020

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI
AND
THE HON'BLE MR.JUSTICE M.S.RAMESH

Tax Case (Appeal) No.381 of 2009

M/s.Share Aids Private Ltd.,
New No.14, Old No.120,
P.S.Sivasamy Salai,
Mylapore, Chennai 600 004. Appellant
Vs.

The Income Tax Officer (OSD),
Company Circle VI (2),
Aayakar Bhavan, New Block,
121, Nungambakkam High Road,
Chennai 600 034. Respondent

Tax Case (Appeal) filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, 'D' Bench, Chennai, dated 26.12.2008 made in ITA No.649/Mds/2008 for the Assessment Year 2001-02 against the order of the Commissioner of Income-Tax(Appeal-IX Chennai dated 24.01.2008 and made in ITA.No.468/05-06 for the assessment year 2001-02.

against the order of the Income tax officer(OSD), Company Circle VI(2) Chennai dt.02.01.2006 and made in PAN/GIR.AAACS9352A, GIR No.SH69 of the Assessment Year 2001-02.

For Appellant : Ms.Madhupreetha Elango

For Respondent : Mr.J.Narayanasamy,
Senior Standing Counsel

JUDGMENT
(Delivered by DR.VINEET KOTHARI,J)

This Tax Case Appeal has been filed by M/s.Share Aids Private Limited, who was acting as Share Transfer Agents and Registrars, raising the following substantial questions of law from the order of the learned Tribunal dated 26.12.2008 for the Assessment Year 2001-2002 by which the Revenue's Appeal was allowed by the learned Tribunal.

2. The Tax Case Appeal was admitted on the following questions of law:-

- "i) Whether under the facts and circumstances of the case the assessee is entitled to invoke Section 41(2) of the Income Tax Act, 1961 to calculate the loss on sale of asset and claim the same as the business loss incurred and reflect the same in the assessee's Income Tax returns?
- ii) Whether depreciation can be claimed on capital assets and whether provisions of Section 50 of the Act will apply to the current situation when there are no other assets in the block except those sold?
- iii) Whether the ITO is entitled to partly accept expenditure and disallow the balance without assigning any reasons for either of the same?"

3. The relevant findings of the learned Tribunal with regard to the aforesaid two questions as given in para 2.6 to 3.3 till are extracted hereunder for ready reference:-

"2.6 From a plain reading of the Section, it is clear that Section 41(2) is applicable only where the sale value along with scrap value exceeds the written down value. In such case, Section 41(2) mandates that realized value to the extent represented by cost and WDV of the asset should be charged to income as 'business income'. In the present case, the sale value realized is less than the written down value. So there is no question of any treatment as per Section 41(2). In this case, the assets involved are capital assets on which depreciation has been claimed. The sale price realized is less than the written down value of the respective block of assets after all depreciable assets were sold. Under the circumstances, resulting loss has to be treated as loss arising from transfer of short term capital asset as per provisions of Section 50 of the Income Tax Act. It is settled law that when the language of the Act is plain and unambiguous, there is no scope of bringing any interpolation therein. Hence, the order of the learned Commissioner of Income Tax (Appeals) is set aside on this issue.

3. The next issue raised is that the Commissioner of Income Tax (Appeals) erred in deleting the addition of Rs.3,56,949/- by observing that Assessing Officer has not given any information as to whether the expenditure

was genuine or not.

3.1 On this issue the Assessing Officer noted that assessee has claimed an expenditure of Rs.3,56,949/- under the head "Recovery". The Assessing Officer disallowed the same by observing as under:

"The assessee stated that it incurred expenditure on account of postage, stationery, courier charges, etc., the cost of which are recovered from the various clients. The assessee stated that as per the SEBI directions, change of address was to be communicated to the individual investors both by advertisement in prominent newspapers and also by individual communications. The assessee also stated that due to closure of the business in 2000, efforts were made to recover all the expenses and fee payable before the handing over the records. However, it could not recover the expenses incurred and that the assessee's claim represented the amount spent by it but could not be recovered. The assessee did not produce any details regarding the expenditure incurred and amount recovered. No evidence was also produced to prove that it has incurred the above loss."

3.2 Upon assessee's appeal the learned Commissioner of Income Tax (Appeals) held that since 'Recovery' is an expenditure and Assessing Officer has not given his opinion as to whether it was genuine or not and if he has treated a part of the expenditure as genuine, the other part cannot be disallowed. Hence he directed for deletion of this addition.

3.3 We have heard both the counsels and perused the relevant records. We find that the learned Commissioner of Income Tax (Appeals) has given a very strange reason for deleting this addition. It is quite apparent from the assessment order that no evidence whatsoever was produced before the Assessing Officer regarding the details of this expenditure. De hors production of any evidence, Assessing Officer could not have gone into the veracity of this expenditure. Under the circumstances, we set aside the order of the learned Commissioner of Income Tax (Appeals) and restore that of Assessing Officer on this

issue."

4. The learned counsel for the Appellant/Assessee Ms.Madhupreetha Elango submitted that the if a loss is caused on the sale of the Capital Assets by the Assessee, the same should be allowed as Business Expenditure under Section 41(2) of the Act as it cannot be brought to tax under Section 50 of the Income Tax Act as held by the learned Tribunal. She submitted that the Assessee Company was in loss and was later on wound up and in the process of winding up, it not only sold some of its Assets on which depreciation was claimed by it under Section 32 of the Act and suffered losses thereon as the same was sold below the written off value of those assets in the Books of Accounts and therefore, such loss was clearly allowable as a Business Loss in the hands of the Assessee. She also drew the attention of the court to Section 70 of the Act to support her contention.

5. The relevant facts with regard to the said loss suffered by the Assessee as narrated by the learned Tribunal are quoted below for ready reference:-

"2.1 Assessee in this case is acting as share transfer agents and registrars. In this case, assessee claimed losses on sale of depreciable assets of Rs.6,83,244/-when computing income under the head 'business'. The Assessing Officer noted that as regards block of assets in the category 'motor vehicles', the WDV as on 31.3.2000 was Rs.9,92,734/-. Hence, Assessing Officer held that assessee cannot claim loss on sale of one of the motor vehicles of Rs.1,23,736/-. The sale price realised will go to reduce the WDV of the block of assets. When this was pointed out, assessee claimed that it may be allowed additional depreciation at Rs.25,747/- under motor vehicles. However, Assessing Officer held that in the re-assessment proceedings, this claim of the assessee cannot be allowed on the anvil of Hon'ble Apex Court decision in the case of CIT Vs. Sun Engineering Works P. Ltd. 198 ITR 297. The Assessing Officer further enquired from the assessee why loss on sale of assets claimed at Rs.6,83,244/- should not be disallowed as a capital loss. The assessee contended that it was claiming losses u/s 41(2) of the Income Tax Act and that Section 50 is not applicable. However, the Assessing Officer held that, after introduction of block of asset concept for depreciation purpose, Section 41(2) will be applicable only to assets of an industrial

undertaking engaged in generation, or generation and distribution of power. Regarding the other assets only Section 50 is applicable, which is a specific section for computation of capital gains in case of depreciable assets. The assessee's claim that what is sold is not a capital asset is also not acceptable. Hence, the Assessing Officer did not accept the assessee's plea that the loss should be allowed u/5 41(2)."

6. On the other issue involved in the present case with regard to recovery of the expenditure like Postage, Courier Charges etc., from the clients of the Assessee Company, the total expenditure incurred by the Assessee during the year in question was more and recovery from the clients was less and thus, the net 'Unrecovered' amount to the extent of Rs.3,56,949/- was claimed as expenditure under the head "Recovery". The Assessee claimed that this was the expenses incurred for Postage, Courier, Stationery etc., to comply with the guidelines of SEBI to inform the change of address to the individual investors both by advertisement in prominent newspapers and also by individual communications. But, since there was closure of business in the year 2000, the relevant to Assessment Year 2001-2002, only a part of expenses could be recovered from the clients and the balance amount was claimed as 'Business Expenditure' which was disallowed by the learned Tribunal.

7. The learned counsel for the Appellant/Assessee submitted that it was a Business Expenditure in the regular course of business of the Assess at the relevant point of time during the previous year and therefore, the same could not be disallowed by the Assessing Authority as well as the learned Tribunal. As the Assessee had duly furnished its audited Balance Sheet before the Assessing Authority and thus the entire expenditure was duly verified by the Auditors as well as Books of Accounts maintained in the regular course of business.

8. Per contra, the learned counsel for the Revenue Mr.J.Narayanasamy, learned Senior Standing Counsel supported the impugned order of the learned Tribunal.

9. We have heard the learned counsel for the parties at length and perused the relevant records. The relevant provisions of Section 41(2), Section 50 and Section 70 to their relevant extent are quoted below for ready reference:-

"Profits chargeable to tax.

41(1) Where an allowance or deduction has been made in the assessment for any year in respect

of loss, expenditure or trading liability incurred by the assessee (hereinafter referred to as the first-mentioned person) and subsequently during any previous year,

.....
(2) Where any building, machinery, plant or furniture,--

(a) which is owned by the assessee;
(b) in respect of which depreciation is claimed under clause (i) of subsection (1) of section 32; and
(c) which was or has been used for the purposes of business, is sold, discarded, demolished or destroyed" and the moneys payable" in respect of such building, machinery, plant or furniture, as the case may be, together with the amount of scrap value, if any, exceeds the written down value, so much of the excess as does not exceed the difference between the actual cost and the written down value shall be chargeable to income-tax as income of the business of the previous year in which the moneys payable for the building, machinery, plant or furniture became due".

Explanation.--Where the moneys payable in respect of the building, machinery, plant or furniture referred to in this sub-section become due in a previous year in which the business for the purpose of which the building, machinery, plant or furniture was being used is no longer in existence, the provision of this sub-section shall apply as if the business is in existence in that previous year."

"Special provision for computation of capital gains in case of depreciable assets.

50. Notwithstanding anything contained in clause (42A) of section 2, where the capital asset is an asset forming part of a block of assets in respect of which depreciation has been allowed under this Act or under the Indian Income tax Act, 1922 (11 of 1922), the provisions of sections 48 and 49 shall be subject to the following modifications :-

(1) 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 the 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 of 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;

(2) where any block of assets ceases to exist as such, for the reason 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.

"Set off of loss from one source against Income from another source under the same head of income.

70(1) Save as otherwise provided in this Act, where the net result for any assessment year in respect of any source falling under any head of income, other than "Capital gains", is a loss, the assessee shall be entitled to have the amount of such loss set off against his income from any other source under the same head."

10. From the aforesaid Scheme of Provisions of the Act and the argument of the learned counsel for the Assessee, we are satisfied that the learned Tribunal has erred in disallowing the loss suffered by the Assessee on the sale of the Assets on which it claimed depreciation under Section 32 of the Act.

11. Section 41(2) falls under Part D of Chapter IV which provides for 'Computation of Total Income'. The provisions under Section 28 to 44DB of the Act are relating to 'Computation of Profits and Gains of Business or Profession'. Part D of the said Chapter deals with Capital Gains and Sections 45 to 55A deals with 'Capital Gains'. Though both these provisions talk of only deemed income and deemed Capital Gains where depreciable assets are sold by the Assessee, they do not clearly spell out the treatment of loss occurring at the stage of sale of such depreciated assets. We are of the opinion that even if these provisions talk only of taxability on the excess received by the Assessee over the written down value of the assets, it cannot exclude or ignore the minus figure or loss occurring on such sale transactions.

12. In our opinion, since the sale of those Assets of the Block of Assets, not being immovable property of the Assessee, were sold during the regular course of business, before it was wound up during the relevant previous year, the loss occurring on such sale at a figure less than the written down value of the assets should be treated as "Business Loss" under Section 41(2) of the Act, quoted above. The treatment of such losses as Capital Gains either as Short Term Capital Gains or Long Term Capital Gains would depend upon the period for which assets are held by the Assessee. In either case, Section 70 of the Act provides for Carry Forward and set off of such Business Loss or Short Term Capital Loss in the hands of the Assessee, as Section 70 clearly spells about set off of loss from one source against income from another source under the same head of income. Since in the present case, the business of the Assessee was closed during the relevant previous year itself therefore, the other situation of Carrying Forward such Business Loss is not really relevant but, such loss suffered actually by the Assessee could not have been disallowed by misconstruing both these provisions.

13. The Assessment of income in the hands of the Assessee implies Assessment of loss also and it is a question of fact depending upon the sale value realised by the Assessee on the sale of assets. Therefore, the first question deserves to be answered in favour of the Assessee and against the Revenue. We hereby do so.

14. The second question of law is concerned also, we are of the opinion that the Business Expenditure incurred by the Assessee in the form of Postage, Courier and Stationery Charges could not be disallowed by the Assessing Authority and the Tribunal. The incurring of those Expenditures was not doubted or disproved by the Revenue Authorities in the hands of the Assessee. No such finding of such Expenditure not having been incurred by the Assessee is available on record.

Therefore, merely because the Assessee could not recover the whole or part of the said expenditure incurred in the course of business, particularly to comply with the guidelines laid down by SEBI and claim such unrecovered expenditure as deduction from its income, the same could not have been disallowed by the Authorities below.

15. Apparently, the Audit of the Books of Accounts of the Limited Companies is mandatorily provided for in the Companies Act also and therefore, if the Audit Report and Audited Balance Sheet is available on the record, the expenditure in question can safely be presumed to have been verified by the Auditors as well. The Books of Accounts regularly maintained by the Assessee in the ordinary course of business have neither been rejected by the Assessing Authority in the present case nor have been otherwise disbelieved. Therefore, such Expenditure in the hands of the Assessee was required to be allowed by the Assessing Authority. The learned Tribunal also fell in error in disallowing the same. Therefore, the second question also deserves to be answered in favour of the Assessee and against the Revenue.

16. The Appeal of the Assessee deserves to be allowed. The same is, accordingly, allowed. The questions of law are answered in favour of the Assessee and against the Revenue. No order as to costs.

Sd/-

Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

ssk.

To

1. Income Tax Appellate Tribunal,
'D' Bench, Chennai

2. The Income Tax Officer (OSD),
Company Circle VI (2),
Aayakar Bhavan, New Block,
121, Nungambakkam High Road,
Chennai 600 034.

3 The Commissioner of Income Tax(Appeals)-IV, Chennai.

+1cc to Mr.M.R.Parthasarathy Advocate SR.NO.388571

T.C.(A) No.381/2009

SDR 19/12/2020