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IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction [Income Tax]

ORIGINAL SIDE

ITA/52/2012

EMEC PVT. LTD.

VS

COMMISSIONER OF INCOME TAX-III,
KOLKATA

BEFORE :

THE HON'BLE JUSTICE SURYA PRAKASH KESARWANI

And

THE HON'BLE JUSTICE RAJARSHI BHARADWAJ

Date : 1st April, 2024*Appearance :**Sri Agnibesh Sengupta, Adv.**Sri Raghunath Ghose, Adv.**Smt. Shusna Santra, Adv.**...for the appellant.**Sri Tilak Mitra, Adv.**...for the respondent.*

1. Heard Sri Agnibesh Sengupta, learned counsel for the appellant and Sri Tilak Mitra, learned senior standing counsel for the respondent.
2. This appeal has been admitted on the following **substantial question of law** :

*“Whether on a true and proper interpretation of the provisions of section 41(1) of the Income Tax Act, 1961, the Tribunal was justified in law in holding that **interest of Rs.23,52,984/- waived by the Bank was chargeable to tax for the assessment year 2003-04**, when the returns for the relevant assessment years 1991-92, 1992-93 and 1993-94 in which interest was debited were filed beyond the time allowed under section 139(1)/139(3) and no carry forward or set off of the business loss representing interest was claimed or allowed”.*

Facts

3. Briefly stated facts of the present case are that the assessee filed returns of loss beyond limitation prescribed under Section 139(1)/139(3) of the Income Tax Act, 1961 (hereinafter referred to as the Act, 1961) for the assessment years 1991-92, 1992-93 and 1993-94. Section 143(3) provides that if any person who sustained a loss in any previous year under the head 'profits and gains of business or profession' or under the head 'capital gains' claims that the loss or any part thereof should be carried forward under Section 72[1] or Section 73[2] or Section 74[1]/[3] or Section 74A[3], he may furnish within the time allowed under sub-Section (1) return of loss in the prescribed form and verified in the prescribed manner and containing such other particulars as may be prescribed. Undisputably, the assessee has not filed return of loss as prescribed. The return showing loss was filed by him much beyond limitation. For the assessment year 1991-92 an intimation under Section 143(1)(a) of the Act, 1961 was sent by the assessing officer to the assessee wherein assessing officer has clearly written that **'as the return was filed late as such loss will not be allowed to carry forward'**. The assessments for the assessment years 1992-93 and 1993-94 were completed by the assessing officer under Section 143(3) in which also the losses were not allowed to be carried forward as the returns were filed beyond the prescribed time. Subsequently, during the assessment year in question, i.e., A.Y. 2003-2004, the assessee entered into a settlement with the lender bank for

settlement of dues. The total loan dues of the assessee was stated to be Rs.89,79,585/- out of which the bank agreed to waive a sum of Rs.44,70,585/-. The assessee paid the aforesaid agreed amount to the bank and thus, the loan liability of Rs.44,70,585/- was waived by the bank which included bank interest of a sum of Rs.23,52,984.

4. For the assessment year 2003-2004, the assessee disclosed total income as "NIL". The case was selected for scrutiny and an assessment order under Section 143(3) of the Act 1961 dated 17.03.2006 was passed by the assessing officer making certain additions including an addition of Rs.29,31,698/- allegedly being the deemed income on account of settlement of the bank loan. The income was assessed at Rs.26,65,361/-. The assessee filed an appeal before the CIT(A) which was dismissed. Aggrieved, the assessee filed second appeal before the Income Tax Appellate Tribunal, "B" Bench, Kolkata, which was allowed and the matter was remanded back to the assessing officer for de novo consideration. Pursuant to the remand order, the assessing officer passed an assessment order dated 06.05.2008 under Section 143(3) of the Act 1961 and assessed the total income of the appellant assessee at Rs.27,37,980/- for the assessment year 2003-04. Aggrieved with the aforesaid assessment order, the appellant assessee filed an appeal before the Commissioner of Income Tax (Appeals) – VIII, Kolkata, which was allowed by order dated 24.07.2008. Aggrieved with the order of CIT(A), the Revenue filed an appeal being ITA No. 1887/Kol/2008 (AY 2003-04) which was allowed by the impugned order dated 29.12.2011 passed by the Income Tax Appellate Tribunal, Bench "A", Kolkata.

Aggrieved with this order, the appellant assessee has filed the present appeal.

Submissions

5. Learned Counsel for the appellants refers the findings recorded by the CIT(A) and submits that the impugned order of the ITAT is totally erroneous and findings recorded therein are perverse. He submits that waiver of liability of the bank shall not fall under Section 41(1) of the Act, 1961 and hence the addition made by the ITAT is arbitrary and illegal.
6. Learned Counsel for the respondents supports the impugned order of the ITAT.

Discussion and Findings

7. We have carefully considered the submissions of learned counsel for the parties and perused the paper books.
8. Learned counsel for the parties have not disputed the facts as afore-noted.
9. The CIT(A) while allowing the appeal of the appellant assessee has recorded the following findings on the issue in question :-

“6. Decision on Grounds No. 2 & 3

I have gone through the submission of A/R of the appellant and also gone through the assessment order. The Ld. A/R of the appellant filed a copy of the order u/s 154 dated 15.01.1999 and copy of the assessment order u/s 143(3) dated 29.03.1995 in respect of Asstt. Year 1992-93 and intimation u/s 143(1) (a) for

Asstt. Year 1991-92 wherein A.O. has written that, as return was filed late as such loss will not be allowed to be carried forward.

*The Ld. A/R of the appellant drew my attention to the chart which was at Paper Book page 15 and stated that **no benefit by way of carry forward of losses of the earlier year were claimed and the loss which was adjusted with the income of Asstt. Year 1995-96 & 1996-97 was the loss of the Asstt. Year 1994-95 only.***

The Ld. A/R of the appellant also pointed out that no loss was allowed to be carried forward in the Asstt. Year 1992-93 for which he drew my attention to the order u/s. 143(3) dated 23.03.1995.

Section 41(1) provides that, “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.”

6.1. From the aforesaid facts it is very much clear that no allowance or deduction has been made for any year in respect of loss, expenditure or trading liability in the present case.

The case cited by the ACIT reported in 271 ITR 17 are not on the facts of the case and are distinguishable. This was a case of a partnership firm for Asstt. Year 1976-77 where loss was determined and set off in the hands of the partners. Hence benefit was derived by the partners who constitute the partnership.

I have considered the explanations and documents on record which were filed by the ld. A/R of the appellant as Paper Book pages 1 to 70. I find force in the arguments of the Ld. A/R of the appellant. I find from the records filed before me that the appellant-company did not derive any benefit of the Bank interest waived for

*in any of the earlier years viz. Asstt. **Years 1991-92, 1992-93 & 1993-94. I also find from record that the returns for the Asstt. Years 1991-92, 1992-93 & 1993-94 were all filed beyond time and were non-est returns as 139(4) does not allow filing of loss return.** I find from the facts on record that the provision of sec. 41(1)(a) of the I.T. Act 1961 is not applicable in the instance case as the appellant did not derive benefit in the earlier years.*

*I have also considered the case cited by the Ld. A/R of the appellant reported in 65 ITR 370 (SC) at 377 and Hon'ble Gauhati High Court at 22 ITR 328 at pages 332/333 where the Hon'ble court have held that the provision of section 139(4) does not apply to loss returns and I agree with the Ld. A/R's view that in such case those returns filed beyond time of loss are non-est. **I find that the AO has not been able to point out the factum that the assessee has been allowed an allowance or deduction in any assessment year in respect of loss, expenditure or trading liability.***

*After considering the Paper Book filed specially page 24 for the quantum of Bank interest where the A/R of the appellant referred to the chart of loss not to be carry forward of the 3 years i.e., A.Y. 1991-92, 1992-93 & 1993-94 as the returns were filed beyond due dates. From the records I find that the amount of loss which was on account of bank interest was a sum of Rs.23,52,987/- only. I have also considered the written submissions and the case laws relied upon by the Ld. A/R of the appellant. I direct the AO not to add u/s 41(1) a sum of Rs.23,52,984/- instead of the claim of the appellant in the Grounds of Appeal of Rs.29,31,698/-. **Accordingly, round nos. 2 & 3 is allowed.***

10. While setting aside the detailed order of the CIT(A), the only discussion which the Tribunal has made is in paragraphs 7, 8 and 9, are reproduced below :-

“7. On the other hand, ld. Counsel on behalf of assessee has submitted that though it is a fact assessee has debited the interest in all the preceding three assessment years and the fact is that assessee is running in losses and assessee has not been getting the carry forwarding of the losses since in all the three years assessee has filed the returns belatedly. Therefore he supported the orders of the ld. CIT(A) and requested to uphold the same.

*8. After hearing the rival submissions and on careful perusal of materials available on record, we are of the view that when **once assessee has debited the interest in the profit and loss account assessee has already taken the benefit of the interest in its accounts whether he has taken the benefit of the Income Tax Act it is not the relevant issue for consideration.** If we accept the contention of assessee and the ld. CIT(A) we are of the view that we are acting to the contrary to the provision of the IT Act. **Since in this case assessee himself has admitted that he has filed the returns of losses belatedly and not entitled for carry forwarding of the losses then when we allow the interest component which was part of the losses which is not allowable to the assessee to set off because the said loss return has been filed belatedly** by assessee then this will be contrary to the provisions of the IT Act. Therefore we are unable to accept the contention of the assessee as well as the ld. CIT(A). In the result we concur with the view of AO and upheld the same by setting aside the orders of the ld. CIT(A).*

9. In the result ground Nos.2 to 4 of the revenue are allowed.”

11. Section 41(1) of the Act 1961 provides as under:-

“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**,-

- (a) the **first-mentioned person has obtained**, whether in cash or in any other manner whatsoever, **any amount in respect of such loss or expenditure** or some benefit in respect of such trading liability by way of remission or cessation thereof, **the amount obtained by such person or the value of benefit accruing to him shall be deemed to be profits and gains of business or profession** and accordingly chargeable to income-tax as the income of that previous year, whether the business or profession in respect of which the allowance or deduction has been made is in existence in that year or not; or
- (b) the successor in business has obtained, whether in cash or in any other manner whatsoever, any amount in respect of which loss or expenditure was incurred by the first-mentioned person or some benefit in respect of the trading liability referred to in clause (a) by way of remission or cessation thereof, the amount obtained by the successor in business or the value of benefit accruing to the successor in business shall be deemed to be profits and gains of the business or profession, and accordingly chargeable to income-tax as the income of that previous year.

[Explanation 1.- For the purposes of this sub-section, **the expression “loss or expenditure or some benefit** in respect of any such trading liability by way of remission or cessation thereof” **shall include the remission or cessation of any liability** by a unilateral act by the first mentioned person under clause (a) or the successor in business under clause (b) of that sub-section by way of writing off such liability in his accounts.]

[Explanation 2].- For the purposes of this sub-section, “successor in business” means, -

- (i) where there has been an amalgamation of a company with another company, the amalgamated company;
- (ii) where the first-mentioned person is succeeded by any other person in that business or profession, the other person;
- (iii) where a firm carrying on a business or profession is succeeded by another firm, the other firm;]
- (iv) where there has been a demerger, the resulting company.]”

12. From bare reading of the afore-quoted provisions of Section 41(1)(a) read with the Explanation 1, it is evident that only those allowance or deduction would fall within the purview of Section 41 which have been made in the assessment. Section 41(1)(a) comes into play 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 and subsequently during any previous year if such person has obtained any amount, whether in cash or in any other manner, in respect of such loss or expenditure or some benefit in respect of such trading liability by way of remission or cessation thereof, then the amount obtained by such person or the value of the benefit accruing to him shall be deemed to be the profit and gains of business or profession and accordingly chargeable to income tax as income of the previous year, whether the business or profession in respect of which the allowance or deduction has been made is in existence in that year or

not. Thus, Section 41(1)(a) of the Act 1961 has been enacted to neutralise the benefit by way of deduction already obtained by an assessee, in the circumstances mentioned in Clause (a) of Sub-Section (1). The purpose is that an assessee should not be benefited twice, ***firstly, by reduction of income tax liability by way of deduction of an allowance or a deduction of an expenditure etc. in the assessment and secondly, obtaining whether in cash or any other manner whatsoever, any amount in respect of such loss or expenditure (allowance or deduction), or some benefit in respect of such trading liability by way of remission or cessation thereof.***

13. Therefore, the real test to be applied for invoking Section 41(1)(a) of the Act 1961 is to see **whether** deduction of a loss or expenditure was made in the assessment and **whether** the assessee has obtained any amount in respect of such loss or expenditure or some benefit in respect of such trading liability. If allowance or deduction in respect of loss, expenditure or trading liability incurred by the assessee has not been made in the assessment, then Section 41(1)(a) shall have no application inasmuch as there will be no question of neutralising the benefit obtained by the assessee by way of deduction made from income in the assessment. But, if the allowance or deduction has been made in the assessment year in respect of loss, expenditure or trading liability incurred by the assessee and assessee has obtained any amount or some benefit in respect thereof in subsequent year, then the amount so obtained shall be deemed to be the profit and gains of business or profession and accordingly chargeable to income tax as the income of

that previous year in which the benefit has been obtained. Thus, the object and purpose of Section 41(1) of the Act, 1961 is to ensure that an assessee does not get away with a double benefit once by way of deduction and another by not being taxed on the benefit received by him in the later year; vide *Commissioner vs. Mahindra And Mahindra* (2018)16 SCC 79 (Para 18).

14. Having explained the provisions of Section 41(1)(a) of the Act 1961, as above, we turn to the facts of the present case. It is undisputed that in the assessment years 1991-92, 1992-93 and 1993-94, the assessee filed return disclosing loss on account of accrued bank interest. The returns were filed by it beyond the time prescribed under Section 139(1)/139(3). Section 139(4) of the Act 1961 is an enabling provision which permits the filing of a return within a definite time. The assessee has not filed return pursuant to the provisions of Section 139(4) of the Act 1961. An intimation under Section 143(1)(a) of the Act 1961 and assessment orders under Section 143(3) for the assessment years 1992-93 and 1993-94 were issued to the assessee by the assessing officer specifically mentioning that as the return was filed late, as such, loss will not allowed to be carried forward. The **CIT(A)** has perused the records and come to the conclusion in afore-quoted paragraph 6.1 that **“no allowance or deduction has been made for any year in respect of loss, expenditure or trading liability in the present case”**. He further recorded a finding that the assessing officer has not been able to point out the factum that the assessee has been allowed an allowance or deduction in any assessment year in respect of loss,

expenditure or trading liability. He also recorded a finding that the amount of loss which was on account of bank interest was a sum of Rs.23,52,984/- only which was part of loss.

15. On perusal of the impugned order of the ITAT, it is evident that the ITAT has not set aside or reversed the aforesaid findings of the CIT(A). The ITAT has allowed the appeal of the Revenue merely on an observation in paragraph 8 of the impugned order that once the assessee has debited interest in the profit and loss account, then the assessee has already taken benefit of interest in its account, whether he has taken the benefit of the Income Tax Act is not the relevant issue for consideration.
16. This finding of the Tribunal is totally misconceived and is in complete ignorance of the express provisions of Section 41(1)(a). The first requirement of Section 41(1) is that the allowance or deduction is made in respect of the **loss, expenditure** or a **trading liability** incurred by the assessee. The **other requirement** is that the assessee has **subsequently obtained any amount** in respect of such loss or expenditure **or obtained a benefit in respect of such trading liability** by way of a **remission or cessation thereof**. Even if for argument sake it is assumed that the aforesaid **first requirement** is satisfied, yet the other requirement in assessee's case is not satisfied as the appellant assessee has neither subsequently obtained any amount in respect of the bank interest debited in his books of account in the A.Y. 1991-92, 1992-93 and 1993-94 nor waiver of interest on bank loan in the A.Y. 2003-04 is remission or cessation of a trading liability. The view being

taken by us is also supported by the law laid down by Hon'ble Supreme Court in Commissioner of Income Tax-6, Mumbai vs. Balkrishna Industries Ltd. (2018)15 SCC 608 (Para 9&10), Polyflex (India) Pvt. Ltd., Bangalore vs. Commissioner of Income Tax, Karnataka (2002)7 SCC 188 (Para 5&9) and Nector Beverages Pvt. Ltd. vs. Deputy Commissioner of Income Tax (2009)15 SCC 374 (Para 17).

17. In Commissioner vs. Mahindra And Mahindra Ltd. (2018)16 SCC 79 (Para 18&19) Hon'ble Supreme Court explained Section 41(1) of the Act, 1961 and held as under :-

*“18. On a perusal of the said provision, it is evident that it is a **sine qua non that there should be an allowance or deduction claimed by the assessee in any assessment for any year in respect of loss, expenditure or trading liability incurred by the assessee. Then, subsequently, during any previous year, if the creditor remits or waives any such liability, then the assessee is liable to pay tax under Section 41 of the IT Act. The objective behind this section is simple. It is made to ensure that the assessee does not get away with a double benefit once by way of deduction and another by not being taxed on the benefit received by him in the later year** with reference to deduction allowed earlier in case of remission of such liability. It is an undisputed fact that the respondent had been paying interest at 6% p.a. to KJC as per the contract but the assessee never claimed deduction for payment of interest under Section 36(1)(iii) of the IT Act. **In the case at hand, the learned CIT(A) relied upon Section 41(1) of the IT Act and held that the respondent had received amortisation benefit. Amortisation is an accounting term that refers to the process of allocating the cost of an asset over a period of time, hence, it is nothing else than depreciation. Depreciation is a reduction in the value of an asset over time, in particular, to wear and tear. Therefore, the***

deduction claimed by the respondent in previous assessment years was due to the deprecation of the machine and not on the interest paid by it.

*19. Moreover, the purchase effected from Kaiser Jeep Corporation is in respect of plant, machinery and tooling equipments which are capital assets of the respondent. It is important to note that the said purchase amount had not been debited to the trading account or to the profit or loss account in any of the assessment years. **Here, we deem it proper to mention that there is difference between “trading liability” and “other liability”. Section 41(1) of the IT Act particularly deals with the remission of trading liability. Whereas in the instant case, waiver of loan amounts to cessation of liability other than trading liability. Hence, we find no force in argument of the Revenue that the case of the respondent would fall under Section 41(1) of the IT Act.”***

18. Law laid down in Mahindra And Mahindra (Supra) is applicable on facts of the present case that waiver of loan amounts to cessation of liability other than trading liability. Hence Section 41(1)(a) of the Act, 1961 is not attracted on facts of the present case.
19. For all the reasons afore-stated, we are of the view that the Tribunal has committed manifest error of law to hold that the interest of Rs.23,52,984/- waived by the bank was chargeable to tax in the hands of the appellant assessee for the assessment year 2003-04 under Section 41(1) of the Act, 1961. Consequently, the impugned order of the ITAT deserves to be set aside and the order of the CIT(A) dated 23/24.07.2008 in Appeal No.47/CIT(A)-VIII/08-09/C-9 deserves to be affirmed and the question of law as framed above deserves to be answered accordingly.

20. For all the reasons afore-stated, the appeal is allowed. The substantial question of law as framed above, is answered in favour of the assessee and against the revenue. The impugned order dated 29.12.2011 in ITA No.1887/Kol/2008 (assessment year 2003-04) passed by the Income Tax Appellate Tribunal, Bench 'A', Kolkata is set aside and the aforesaid order of the CIT(A) dated 24.07.2008 is affirmed.

(SURYA PRAKASH KESARWANI, J.)

(RAJARSHI BHARADWAJ, J.)