आयकर अपीलीय अधिकरण 'ए' न्यायपीठ चेन्नई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH, CHENNAI

माननीय श्री मनोज कुमार अग्रवाल ,लेखा सदस्य एवं
माननीय श्री मनोमोहन दास, न्यायिक सदस्य के समक्ष।
BEFORE HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM,
AND HON'BLE SHRI MANOMOHAN DAS, JUDICIAL MEMBER

आयकर अपील सं./ **ITA No.176/Chny/2022**

(**निर्धारण वर्ष /** Assessment Year: 2012-13)

ACIT Central Circle-1(2) Chennai.	**बनाम** / Vs.	**M/s. Gimpex Pvt Ltd.** 282, GImpex House, Lingi Chetty Street, George Town, Chennai-600 001.
स्थायी लेखा सं./जीआइ आर सं./**PAN/GIR No. AAACG-2482-P**		
(अपीलार्थी**/Appellant**)	:	(प्रत्यर्थी / **Respondent**)

&

आयकर अपील सं./ **ITA No.77/Chny/2022**

(**निर्धारण वर्ष /** Assessment Year: 2012-13)

M/s. Gimpex Pvt Ltd. 282, GImpex House, Lingi Chetty Street, George Town, Chennai-600 001.	**बनाम** / Vs.	**ACIT** Central Circle-1(2) Chennai.
स्थायी लेखा सं./जीआइ आर सं./**PAN/GIR No. AAACG-2482-P**		
(अपीलार्थी**/Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थी की ओरसे/ **Assessee by**	:	Shri D. Anand (Advocate)-Ld. AR
प्रत्यर्थी की ओरसे/**Revenue by**	:	Dr. R. Mohan Reddy,(CIT) –Ld. DR
सुनवाई की तारीख**/Date of Hearing**	:	12-06-2023
घोषणा की तारीख /**Date of Pronouncement**	:	09-08-2023

आदेश / O R D E R

Per Bench

1. Aforesaid cross-appeals for Assessment Year (AY) 2012-13 arises out of the order of learned Commissioner of Income Tax (Appeals)-18,

Chennai [CIT(A)] dated 07-12-2021 in the matter of an assessment framed by Ld. Assessing Officer [AO] u/s.143 of the Act on 30-03-2015.

2. The Registry has noted delay of 13 days in revenue's appeal, the condonation of which has been sought by the Revenue on the strength of affidavit of Ld. DCIT, Central Circle-1(2), Chennai. Since the delay is minor and Ld. AR did not object to condonation, we admit the appeal for adjudication on merits.

Revenue's Appeal

3. The grounds raised by the revenue read as under: -

> 1. The order of the learned Commissioner of Income Tax (Appeals) is erroneous on facts of the case and in law.
> 2. The learned CIT(A) has erred in holding that the loss on forward contracts of Rs.10.83 Crores cannot be considered as speculation loss and outside the scope of provisions of Sec.43(5), without appreciating the fact that the forward exchange contracts issued by the bankers were cancelled by the assessee prior to the date of settlement.
> 3. The learned CIT(A) failed to note that the assessee has benefitted by prior settlement of contracts, which is speculative in nature.

As is evident, the sole ground is to determine the nature of loss arising on forward contracts cancelled by the assessee prior to the date of settlement.

4. The assessee being resident corporate assessee is stated to be engaged in manufacturing / export of mineral ores. During assessment proceedings, it transpired that the assessee suffered loss on forward exchange contracts. The Ld. AO held that such transactions are covered under the scope of Sec. 43(5)(a) since the transactions have ultimately been settled otherwise than by actual delivery and therefore, loss would be speculative in nature. Though the contracts were entered to guard against loss that may be arising

on future foreign exchange fluctuations, the assessee has to settle the contract by actual delivery of such foreign exchange due from export proceeds which was not the case. In the present case, the forward exchange contracts issued by the bankers were cancelled and the loss was not due to actual settlement. It was the duty of the assessee to prove that the cancellation / swapping were undertaken under a particular situation, the same was acceptable and beyond the control of the assessee. Since the loss was on account of cancellation of contracts, the same would be speculative in nature and therefore, the deduction of the same would not be allowed to the assessee. The assessee incurred loss of Rs.1083.04 Lacs on such contracts which was disallowed by Ld. AO.

5. Upon further appeal, Ld. CIT(A) allowed this issue in assessee's favor by observing as under: -

> 7.1.3 I have considered the submissions of the AR, reasons given in the assessment order. In general terms, a forward contract is a customized contract between two parties to buy or sell an asset at a specified price on a future date. A forward contract can be used for hedging or speculation, although its non-standardized nature makes it particularly apt for hedging. The assessee had entered into forward contract with the aim to safeguard against the foreign exchange fluctuation on its revenue receipts from foreign parties. Further, the transaction being hedging transactions, it would fall under exempted category of speculative transactions u/ s 43(5)(a).The assessee further submitted that it had done forward contracts through two banks only out of five banks held by them and the percentage of forward contract was reasonable having regard to the export turnover of the assessee. It is not notional loss booked on restatement of the forward contracts as on 31.03.2012. The loss has arisen on account of cancellation of the forward contracts entered into with the banks on realizing the export proceeds.
>
> 7.1.4 I find that the issue is covered by the jurisdictional Madras High Court in the case of CIT Vs. Celebrity Fashions Ltd. (TCA No.26 of 2018 dated 21/09/2020) and the Hon'ble High Court has allowed the loss on forward contracts as business loss. The observations made in

the said order would be relevant in the assessee's case as well which are reproduced hereunder:

"The assessee herein was not a dealer in foreign exchange, but was an exporter of cotton. Therefore, the Tribunal rightly took note of the transaction done by the assessee though, in order to hedge against the losses, the assessee booked foreign exchange in the forward market with the bank. However, the export contracts entered into by the assessee for the export of cotton in some cases failed and therefore the assessee was held to be entitled to claim deduction in respect of the said amount as business loss".

It will be beneficial to refer to the decision of the Bombay High court in the case of JTVs. Badridas Gauridu Pvt Ltd reported in(2003) 261 ITR 256]. In that case, the assessee was not a dealer in foreign exchange, but was an exporter of cotton as in the case before us. The assessee therein booked foreign exchange contracts, which were held to be only incidental to the assessee's regular course of business."

The Bombay High Court relied on the decision of the Calcutta High Court in the case of CIT Vs.Sooraj Mull Nagarmull (129 ITR 169).

7.1.5 The facts in the assessee's case are similar as decided by the jurisdictional Madras High court, Bombay and Calcutta High courts referred supra. Respectfully following the above decisions, I hold that the loss on forward contracts of Rs.10,83,04.811/ - cannot be considered as speculation loss within the meaning of section 43(5) but a business loss of the assessee. I therefore delete the disallowance of Rs.10,83,04,811/- made by the AO and allow the grounds raised by the assessee**.**

Aggrieved as aforesaid, the revenue is in further appeal before us.

6. Upon perusal of above observations of Ld. CIT(A), it could be seen that the assessee has entered into forward contract to safeguard against the foreign exchange fluctuation on its revenue receipts from foreign parties. These transactions, being in the nature of hedging transactions, would fall under exempted category of speculative transactions u/s 43(5)(a). Another finding is that the quantum of hedging was reasonable having regard to the export turnover of the assessee. It is actual loss which had arisen on account of cancellation of the forward contracts entered into with the banks to safeguard realization of export proceeds.

The Ld. CIT(A) has relied on the binding decision of jurisdictional Madras High Court in the case of **CIT Vs. Celebrity Fashions Ltd. (TCA No.26 of 2018 dated 21/09/2020)** wherein such loss was allowed as a business loss. Similar is the ratio of other decision of Hon'ble Bombay High Court as well as Hon'ble Calcutta High Court. It could thus be seen that the adjudication of Ld. CIT(A) is in line with the correct position of law and backed by binding judicial precedents. No contrary decision has been shown to us. Therefore, the adjudication rendered in the impugned order could not be faulted with. In the result, the revenue's appeal stands dismissed.

7. Assessee's Appeal

The grounds raised by the assessee read as under: -

> The order of the learned CIT(A) to the extent of sustaining the order of assessment, is wrong, illegal and opposed to facts of the instant case.
> The learned CIT(A) erred in upholding and treating the sum of Rs.3,57,41,297/- as income from other sources. The learned CIT(A) ought to have seen that during the impugned assessment year since the balance of security deposit made in the lease agreement was appropriated, as per the terms of the lease agreement, on account of pre-mature termination of lease agreement and forfeiture of right to receive rent, the same is to be treated as income under the head long term capital gains.
> The learned CIT(A) failed to appreciate the alternate claim of the appellant that if the forfeiture of balance of security deposit, for premature termination of lease agreement, is to be treated as revenue receipt, then it is only annual value which can be assessed under the head Income from House property since, such receipt would fall only under the head Income from house property."

As is evident, the sole issue that arises in the assessee's appeal is to determine the nature of amount received by the assessee on termination of certain lease agreement. The income so earned by

the assessee from leasing out of house property has been offered as well as assessed under the head ‘income from house property’.

8. The relevant facts qua the issue are that the assessee leased out certain property to M/s Nilgiri Diary Farm Ltd. (Lessee) and received advance amount of Rs.700 Lacs. Subsequently, the deed was cancelled and the assessee entered into lease cancellation deed on 25.11.2011. As per Clause-8 of the deed, the assessee refunded advance of Rs.150 Lacs. After adjusting lease rent for the period Sept. 09 to Jan. 2010, the balance amount of Rs.514.94 Lacs was forfeited out of security deposit / advance amount. The assessee computed capital gain of Rs.357.41 Lacs on amount so forfeited and offered the same to tax @20%. However, Ld. AO held that the assessee was the owner and not tenant. The termination a contract does not fall under the scope of Sec. 55(2) of the Income Tax Act. Further, the forfeiture of deposit does not contain a date of reckoning and hence the reason for treating it as a long term capital asset having a period of holding of more than 36 months is also not proven. Relying on the decision of Hon’ble Supreme Court in the case of **CIT vs. TV Sundaram Iyengar & sons (222 ITR 344)**, Ld. AO held that the amount changes its character when the amount becomes the assessee's own money because of limitation or by any other statutory or contractual right. Though the assessee had offered the gain to taxation, however, it has treated the same as Long Term Capital Gains (LTCG) without any basis. Therefore, the said amount was treated as ‘Income from other sources’ and taxed at normal rates.

9. Upon further appeal, Ld. CIT(A) upheld the stand of Ld. AO as under: -

> **7.3** Forfeiture of security deposit- Rs.3,57,41,297/-
> **7.3.1** The assessee entered into a lease with the Nilgiri Diary Farms Pvt Ltd. on 12/12/2007 and on 5/6/2008 for lease of the assessee's property at Periyapalayam Road for godown purposes and the Lessee has paid lease deposit and other deposit of Rs.7,00,00,000/-. On 25 November, 2011 the lease deed was cancelled and the balance part of the lease deposit Rs.3,57,41,297 was forfeited by the assessee. The amount so forfeited was offered for tax by the assessee as long term capital gains taxable at 20%. The AO has however taxed the same as income from other sources taxable at normal rate of 30%. Therefore, there is no dispute about charging of the forfeited security deposit as income but the dispute is only about the head of income to be charged viz. whether capital gains or other sources.
> **7.3.2** Before me, the AR submitted that the AO has added the aforesaid amount as income from other sources and also under capital gains as disclosed. The AO is directed to verify and rectify if the income was doubly assessed. I find from the tax calculation sheet there was no levy of tax at special rate applicable to capital gains. Anyhow, the AO has to verify whether tax was levied on the aforesaid amount both under capital gains and as other sources income and grant appropriate relief.
> **7.3.3 As** to the head of income in which the aforesaid amount has to be assessed, the AO held that the assessee is not a tenant but the owner and the termination of contract does not fall under the scope of section 55(2). The forfeiture of deposit does not contain a date of reckoning and hence the reason for treating it as a long term capital asset and having a period of holding more than 36 months is also not proven. There was no basis for the assessee to treat the receipt as long term capital gains. The AO therefore treated the income as income from other sources.
> **7.3.4** On the other hand, the AR submitted that there was extinguishment of right and therefore rightly offered as long term capital gains. The AR in the alternative claimed that the same may be considered as income from house property.
> **7.3.5** I have analysed the facts. As per the lease cancellation agreement, clause 8 reads as under:-
> ***"The First Party and Second Party agrees that out of the security and additional deposit totaling Rs.*** 7,***00,00,000 an amount of Rs. 5,14,***94,***050/-*** is ***waived in view of circumstances mentioned in preamble as per the details below:***
> It is therefore clear from the above recitals in the lease cancellation agreement that there was only waiver of the deposit amount by the tenant and there was no forfeiture or extinguishment of any right in the property. The amount waived by one party would be the income of the other party. The amount waived should only be considered as income

> from other sources. It is not correct on the part of the assessee that there is extinguishment of right to rent. Right to rent is not transferred to anyone. Right to rent has not extinguished also, as the assessee car very well rent the property to any other person as it wishes immediately after the forfeiture of the deposit also. The right to rent the property is very much with the assessee only even after the forfeiture also and hence, it cannot be treated as transfer. Therefore, assessee's claim that there was extinguishment of right cannot be accepted. There was no transfer of any right to assess the receipt as capital gains. The deposit is in the nature of revenue only as rent gets adjusted in it. Hence, it cannot be treated as capital receipt in the hands of the assessee. It cannot be assessed as advance rent as canvassed by the assessee as the property was not continuing on rent with the same person. As it is revenue in nature and as it cannot be taxed under income from house property, I hold that it is liable to be taxed as u/s. 56(2) as the list under section 56(2) is only illustrative. All things considered, I hold that the AO was justified in treating the aforesaid amount of Rs.3,57,41,297/- as income from other sources liable for normal rate of tax. I confirm the addition of Rs.3,57,41,297/- as income from other sources and **dismiss** the grounds raised by the assessee."

Aggrieved as aforesaid, the assessee is in further appeal before us.

Our findings and Adjudication

10. From the facts, it emerges that out of security deposit of Rs.700 Lacs, the assessee has ultimately retained amount of Rs.514.94 Lacs. The same has been treated as capital gains and the assessee has computed LTCG of Rs.357.41 Lacs and offered the same to tax at concessional rate of 20%. The Ld. AO held that the same would be 'Income from other sources' and subjected to tax at normal rates of taxes. The assessee's reasoning is that there was an extinguishment of right and therefore, the gains would be LTCG. In the alternative, the assessee claimed that the same would be considered as 'Income from house property'. The Ld. CIT(A), upon perusal of cancellation deed, observed that the amount of Rs.514.94 Lacs was waived-off by the assessee and

there was no forfeiture or extinguishment of any right in the property. The amount waived by one party would be the income of the other party. The amount waived should only be considered as ‘income from other sources’. It is not correct on the part of the assessee that there is extinguishment of right to rent. Right to rent is not transferred to anyone. Right to rent had not extinguished also as the assessee can very well rent the property to any other person as it wishes immediately after the forfeiture of the deposit also. The right to rent the property was very much with the assessee even after the forfeiture and hence, it could not be treated as transfer. Therefore, assessee's claim that there was extinguishment of right could not be accepted. There was no transfer of any right which would justify assessment of receipt as capital gains. The deposit was in the nature of revenue only as rent gets adjusted in it. Hence, it could not be treated as capital receipt in the hands of the assessee. It could also not be assessed as advance rent as canvassed by the assessee as the property was not continuing on rent with the same person. Since it was revenue in nature and the same could not be taxed under ‘income from house property’, the same was liable to be taxed as u/s. 56(2). Accordingly, the action of ld. AO was upheld which is the grievance of the assessee.

11. We find that this issue has rightly been clinched by learned first appellate authority. It is quite clear that from assessee’s point of view, there is no extinguishment of any right. The impugned amount was received as security deposit and a part of the same has been forfeited by the assessee. The security deposit has

changed its character upon forfeiture and the same is clearly an income of the assessee. As rightly held, right to rent is not transferred by the assessee to anyone. Neither this right has been extinguished in any manner. Therefore, the aforesaid retained amount could not be assessed as capital gains. The same is also not in the nature of advance rent. Therefore, the same would be assessable under the head 'income from house property' only. We order so. The impugned order does not require any interference on our part.

Conclusion

12. Both appeals stands dismissed.

Order pronounced on 09th August, 2023.

Sd/-	**Sd/-**
(MANOMOHAN DAS)	**(MANOJ KUMAR AGGARWAL)**
न्याय□यिक सदस्य / JUDICIAL MEMBER	**लेख□सदस्य / ACCOUNTANT MEMBER**

चेन्नई / Chennai; दिनांक / Dated : 09-08-2023
DS

आदेश की प्रतिलिपि □ ग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/Appellant 2. प्रत्यर्थी/Respondent 3. आयकर आयुक्त/CIT 4. विभागीय प्रतिनिधि/DR 5. गार्ड फाईल/GF