

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

मजनीय श्री महवीर सिंह, उपाध्यक्ष एवम्
मजनीय श्री मनोज कुमार अग्रवाल, लेखक सदस्य के समक्ष।
BEFORE HON’BLE SHRI MAHAVIR SINGH, VP AND
HON’BLE SHRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील संख्या ITA No.2398/Chny/2018
(निर्धारण वर्ष / Assessment Year: 2009-10)

&

आयकर अपील संख्या ITA No.1912/Chny/2019
(निर्धारण वर्ष / Assessment Year: 2012-13)

M/s. Shin-Etsu Polymer India P. Ltd Plot –OZ-12, Hitech SEZ Sipcot Industrial Growth Centre, Oragadam, Chennai-602 105.	बनान / Vs.	DCIT, Corporate Circle-6(2) / Corporate Circle-6(1), Chennai.
स्थायी लेखासं./जीआइआरसं./PAN/GIR No. AALCS-2482-E		
(पीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थीकीओरसे/ Appellant by	:	Shri S. Sridhar (Advocate)-Ld.AR
प्रत्यर्थीकीओरसे/ Respondent by	:	Shri AR V Sreenivasan (Addl.CIT)-Ld. Sr. DR

सुनवाईकीतारीख/ Date of Hearing	:	03-08-2023
घोषणाकीतारीख / Date of Pronouncement	:	11-08-2023

आदेश / ORDER

Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid appeals by assessee for Assessment Years (AY) 2009-10 & 2012-13 arise out of separate orders passed by the learned first appellate authority. However, the facts as well as issues are substantially the same in both these years. First, we take up appeal for AY 2009-10 that arises out of the order dated 26-06-2018 passed by learned Commissioner of Income Tax (Appeals)-15, Chennai [CIT(A)] in the

matter of an assessment framed by learned Assessing Officer (AO) u/s 143(3) r.w.s. 92CA(4) of the Act on 08-03-2013. The assessee has raised following grounds: -

1. The order of The Commissioner of Income Tax (Appeals) - 15, Chennai dated 26.06.2018 in I.T.A.No.430/2013-14/CIT(A)-15 for the above mentioned Assessment Year is contrary to law, facts, and in the circumstances of the case.
2. The CIT (Appeals) erred in sustaining the disallowance of Rs,2,32,21,580/- being the expenses incurred after incorporation of the Appellant company/after setting up before the commencement of the commercial production for the reasons stated in para 4.3.2 of the impugned order without assigning proper reasons and justification.
3. The CIT (Appeals) failed to appreciate that the distinction between setting up of the business and commencement of the business was completely lost sight of and ought to have appreciated that the expenses incurred after setting up of the business would be eligible for deduction as a revenue outgo within the scope of section 37(1) of the Act.
4. The CIT (Appeals) failed to appreciate that the decisions cited were completely overlooked in this regard and ought to have appreciated that the claim for deduction of such expenses in the computation of taxable total income was legally sustainable as well as justifiable.
5. The CIT (Appeals) erred in sustaining the disallowance of net forex loss for the reasons stated in para 5.3.2 of the impugned order and consequently erred in sustaining the action of the Assessing Officer in adding back such sum in the computation of taxable total income without assigning proper reasons and justification.
6. The CIT (Appeals) failed to appreciate that there should not any distinction between setting up of business and commencement of the business and ought to have appreciated that the expenses incurred after setting up of the business should be reckoned for allowance/deduction in the computation of taxable total income, thereby vitiating the related findings.
7. The CIT (Appeals) failed to appreciate that the prescribed accounting standard and the decisions cited would fortify the stand of the Appellant in claiming the forex loss as part of the computation of taxable total income and ought to have appreciated that the facts brought out before him especially the process of quantification of forex loss would fortify the claim for such deduction.
8. The CIT (Appeals) erred in sustaining the restriction of the claim of depreciation for full year while imposing artificial distinction between setting up of business and commencement of the business for granting 50% of the total claim and consequently erred in sustaining the action of the Assessing Officer in adding back the differential sum in the computation of taxable total income without assigning proper reasons and justification.
9. The CIT (Appeals) went wrong in recording the findings in this regard in para 6.3.1 of the impugned order without assigning proper reasons and justification.
10. The CIT (Appeals) failed to appreciate that there was no proper opportunity given before passing of the impugned order and any order passed in violation of the principles natural justice would be nullity in law.”

As is evident, the assessee is aggrieved by disallowance of business expenditure on the ground that the business had not commenced. The assessee is also aggrieved by disallowance of forex loss.

2. The Registry has noted delay of 134 days in appeal for AY 2012-13, the condonation of which has been sought by Ld. AR on the strength of affidavit of authorized representative of Assessee Company. It has been submitted that the impugned order was misplaced by accounts department which led to delay in the appeal. Though Ld. DR opposed condonation of delay, the bench deems it fit to condone the delay and admit the appeal for adjudication on merits.

3. The Ld. AR advanced argument to submit that there is vital difference between set-up of business and commencement of business. Once the business is set-up, the expenditure would be allowable to the assessee as routine business expenditure. The Ld. Sr. DR controverted the arguments of Ld. AR and supported the impugned order. Having heard rival submissions and upon perusal of case records, the appeal is disposed-off as under.

Proceedings before lower authorities

4.1 The assessee being resident corporate assessee is stated to be engaged in manufacturing of cellular phone keypads. During assessment proceedings, it transpired that in the statement of computation of total income, the assessee claimed deduction of Rs.232.21 Lacs towards pre-operative expenses. However, the same were not debited to Profit & Loss Account. The assessee commenced business in the month of January, 2009 and accordingly, Ld. AO held that claim could only be made for expenditure incurred post that date. The Ld. AO supported the

same by observing that the assessee claimed another deduction u/s 35D for Rs.4.11 Lacs in the Profit & Loss Account. The Ld. AO held that in such a case, no other deduction could be allowed to the assessee. The aforesaid expenditure was incurred before commencement of business and therefore, the same would not be allowable to the assessee. The expenditure so claimed has been tabulated in para 2.2 of the order. Upon perusal of the same, Ld. AO held that the entire expenditure was revenue in nature and the same could not be capitalized under block of assets. The same would also not be allowable u/s 30 to 37 of the Act as the entire amount was incurred prior to commencement of business.

4.2 The assessee defended the same on the ground that the assessee started commercial production during December, 2008 but it could not be said that it was not in operation for earlier period. The said expenditure qualifies for deduction u/s 37(1) since the same was revenue in nature., It was also submitted that the expenditure was debited as pre-operative expenditure but no depreciation was claimed u/s 32. However, rejecting the same, Ld. AO disallowed the expenditure so claimed by the assessee.

4.3 Another disallowance was on account of forex loss. The assessee claimed forex loss of Rs.246.04 Lacs on reinstatement of creditors at year end. Out of that, amount of Rs.208.53 Lacs pertained to forex loss incurred prior to commencement of business operations i.e., from 01-04-2008 to 31-12-2008 whereas remaining loss of Rs.45.34 Lacs was incurred for the period from 01-01-2009 to 31-03-2009. The Ld. AO held that loss pertaining to period prior to commencement of business operations could not be allowed. After adjusting amount of Rs.15.63

Lacs as credited by the assessee in the Profit & Loss Account, the net amount of Rs.192.90 Lacs was disallowed.

4.4 During appellate proceedings, the assessee, inter-alia, submitted that since the assessee was a manufacturing company, it had taken time to commence commercial activity by installing machineries, conducting trial run before commencement of commercial operation in the month of January, 2008. During setting-up of the business, the assessee incurred various expenses which were of revenue in nature. The expenditure was required to commence the commercial activity as without incurring such expenses, the production could not have been achieved. The expenditure being revenue in nature would qualify for deduction u/s 37(1).

4.5 The Ld. CIT(A) noted that the assessee was incorporated on 10-01-2007 and it had commenced manufacturing during January, 2009. Since the expenditure was incurred prior to commencement of manufacturing, Ld. AO rightly disallowed the same. The assessee claimed separate deduction u/s. 35D. Therefore, the action of Ld. AO was upheld. The disallowance of loss on account of forex loss was also upheld. Aggrieved, the assessee is in further appeal before us.

Our findings and Adjudication

5. From the facts, it emerges that the assessee was incorporated on 10-01-2007 and it had commenced manufacturing during January, 2009. However, there is vital difference between set-up of business and commencement of business. Once the business is set-up, the expenditure incurred thereafter could not be held to be pre-operative expenses and if the same are revenue in nature, the same would be

allowable to the assessee. The undisputed fact is that though the assessee has capitalized the expenditure in the books of accounts, it has claimed the deduction thereof in the computation of income. The Ld. AO has accepted that the expenditure is revenue in nature. The assessee has claimed that no depreciation has been claimed against the said expenditure. If the disallowance is upheld, the deduction of impugned expenditure would never be allowed to the assessee which is unjustified. The claim u/s 35D is for specific expenditure only. Therefore, we would hold that the impugned expenditure would be fully allowable to the assessee subject to verification by Ld. AO that the assessee has not claimed any depreciation on the same and this expenditure has not been claimed in any of the other years. We order so. This ground stand allowed for statistical purposes.

6. So far as the issue of forex loss is concerned, we find that this issue has been restored back by Tribunal in assessee's own case for AY 2011-12 vide ITA No.3090/Chny/2018 dated 06-10-2020. Therefore, to enable revenue take a consistent stand, this issue is restored back to the file of Ld. AO on similar lines. This ground as well as the appeal stand allowed for statistical purposes.

7. In AY 2012-13, the grievance of the assessee is two-folds i.e., (i) disallowance of forex loss; (ii) Disallowance of bad-debts. The Ld. AO disallowed net unrealized forex loss for Rs.114.37 Lacs which was upheld by Ld. CIT(A). This issue, as in AY 2009-10, stands restored back to the file of Ld. AO on similar lines. This ground stand allowed for statistical purposes.

8. The disallowance of bad-debts stem from the fact that the assessee made payment for expenses against corporate cards given to managerial personnel to incur expenditure on behalf of the company. Since the payment was made to bank but the bills were not received, the same was written-off as bad-debts. The Ld. AO, invoking the provisions of Sec. 36(2), denied the same on the reasoning that debts were not offered as income. The assessee made advance to employees for travel, pooja, etc. which were lying unsettled for a long time and hence, written-off. However, in the absence of requisite details forthcoming from the assessee, the same was disallowed. The Ld. CIT(A) upheld the disallowance.

9. We find that the impugned expenditure is routine business expenditure and arising in the ordinary course of business. Though the assessee may have wrongly claimed the same as bad-debts, the same are allowable u/s 37(1). Therefore, we direct Ld. AO to delete the disallowance of Rs.5.47 Lacs. The appeal stands allowed for statistical purposes.

10. Both appeals stand allowed for statistical purposes.

Order pronounced on 11th August, 2023.

Sd/-
(MAHAVIR SINGH)
उपअध्यक्ष / VICE PRESIDENT

Sd/-
(MANOJ KUMAR AGGARWAL)
लेखासदस्य / ACCOUNTANT MEMBER

चेन्नई Chennai; दिनांक Dated : 11-08-2023.
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आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकरआयुक्त/CIT
4. विभागीयप्रतिनिधि/DR
5. गार्डफाईल/GF