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Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : Jul-19-1991

Reported in : (1991)39ITD30(Delhi)

Judge : R Rattan, M Agarwal

Appellant : inspecting Assistant

Respondent : Escorts Electronics Ltd.

Judgement :

1. and 2. [These paras are not reproduced here, as they involve minor issues.] 3. The asscsscc is a public limited company. It was incorporated for the purpose of the business of manufacture and sale of X-Ray equipment and spare parts to be manufactured in India in collaboration with a French company known as M/s C.G.R., France. The said business came to an end sometimes during the accounting period ending 31-12-1980 relevant to assessment year 1981 -82. Thereafter, the asscsscc is selling its properties from which some income taxable under Section 41(2) of the Income-tax Act, 1961 is earned. Apart from that, the assessee also has some income from "other sources". The assessee also has some unabsorbed depreciation and loss, for which it claimed adjustment against the income taxable under Section 41(2) as well as against the income from other sources. This claim of the assessee was negatived by the Assessing Officer in assessment year 1982-83 and the matter ultimately came to this Tribunal in I.T.A. Nos. 3493/87 and 4684/87, which were decided by a Bench of this Tribunal to which one of us, the Judicial Member, was a party. The Tribunal held that the

presumption about the existence of business was limited for the purposes of Section 41 (2) and the income so assessed did not become income from business for purposes, like set off of unabsorbed depreciation loss. The assessee was, therefore, held not to be entitled to the set off of unabsorbed depreciation against the amount taxable under Section 41(2). The Tribunal also held that unabsorbed depreciation could not be set off against income from other sources.

4. During the years under consideration also the assessee sold some of its assets and similar controversies arise again which have been decided by the CIT(A) in favour of the assessce. During the period relevant to assessment year 1983-84 the assessee sold some of its plant & machinery and its claim was that the machinery so sold was imported from outside and since the assessee's plant was situate in the Santa Cruz Export Zone no customs duty was payable at the time of the import.

But when the said machinery was sold a sum of-Rs. 2,05,063 became payable by the assessee to the customs authorities and this should be allowed as a deduction in computing the profit arising from the sale of the said machinery. This claim was negatived by the Assessing Officer as, according to him, Section 41(2) did not speak of any such reduction. On appeal the CIT(A) has accepted the assessee's claim holding that the amount payable to the customs authorities has to be treated to be of the nature of expenditure and, therefore, adjustable for computing the profits under Section 41 (2). The learned Departmental Representative merely relied upon the Assessing Officer's view without pointing out how the amount payable by the assessee as customs duty on the sale of the machinery could not be treated as expenditure. It is true that Sub-section (2) of Section 41 does not speak of expenditure connected with the sale of property but it does speak of moneys payable in respect of the building, machinery or plant and when determining the money so payable we have to arrive at the net amount payable by excluding all relevant and reasonable expenses. It is not disputed that on the sale of the machinery the assessee became liable to pay customs duty to the Government of India and, therefore, in determining the profit arising from the sale such amount has to be adjusted. We, therefore, uphold the CIT (Appeals)'s order on this point and reject the first ground in ITA No. 5829/87.

5. The next ground in the aforesaid appeal relates to the assessee's claim for set off of business loss of earlier years against the profit determined under Section 41 (2). As already stated this issue had come before this Tribunal for assessment year 1982-83 and following the judgment of the Madras High Court in East Asiatic Co. (India) (P.) Ltd. v. CIT 11986] 161 ITR 135, this Tribunal held that unabsorbed depreciation of earlier year could not be set off against the profit taxable under Section 41(2) as no business was actually conducted by the assessee in the relevant accounting period and the presumption created by Section 41 (2) about the existence of business could not be extended further for purposes of set off of unabsorbed depreciation.

The Tribunal observed that the aforesaid judgment of the Hon'ble Madras High Court was the only direct authority on the point. That order of the Tribunal is now reported in Escorts Electronics Ltd. v. MC [1991] 37 ITD 402 (Delhi).

6. At the hearing of the present appeals, the learned counsel for the assessee, however, cited several authorities in which views contrary to the Madras view (supra) have teen expressed and he therefore, pleaded that since two views on the issue are possible, a view favourable to the assessee be adopted and for this year it be held that unabsorbed depreciation/loss is adjustable against profit taxable under Section 41 (2). The earliest judgment on the point seems to be in CIT v. Rampur Timber & Turnery Co. Ltd. [1973] 89 ITR 150 (All.) in which in similar circumstances it was held that unabsorbed depreciation can be set off against the income taxable under Section 41(1) and 41(2). The Hon'ble High Court held that Section 41 creates a legal fiction that certain amounts shall be deemed to be business income of the assessee for the relevant previous year although in fact the business has ceased to exist. According to the Hon'ble Allahabad High Court the inevitable corollary of that fiction would be that the business would be deemed to have been carried on in that year. Then in CIT v. Official Liquidator, New Era Mfg. Co. Ltd. [1977] 109 ITR 262 the Hon'ble Kerala High Court took the same view agreeing with the aforesaid view taken by the Allahabad High Court, In CIT v. Warangal Industries (P.) Ltd. [1977] 110 ITR 756, the Hon'ble Andhra Pradesh High Court also took the same view observing that by virtue of the Explanation to Section 41 (2) a fiction is created and the business, which is no longer in

existence, has to be treated as in existence during the previous year, in the course of which the machinery, building or furniture in respect of which depreciation has been allowed during the earlier years, is sold, discarded, demolished or destroyed. The Hon'ble High Court held that full effect must be given to the deeming fiction and, therefore, unabsorbed depreciation has to be set off against the income taxable by virtue of Section 41(2) of the Act.

7. In Addl. CIT v. Kapila Textiles (P.) Ltd. [1981] 129 ITR 458 the Hon'ble Karnataka High Court also came to the same conclusion. Thus, as many as four High Courts have taken a view in favour of the assessee, while the only view in favour of the revenue is that of the Madras High Court (supra). The learned counsel for the assessee felt sorry that when the earlier year's appeal was heard he failed to bring to the notice of the Tribunal the contrary view taken by so many High Courts.

It is now settled law that when two views are possible, a view which is favourable to the assessee, should be adopted. This is all the more so when several High Courts take the view in favour of the assessee.

Therefore, although for assessment year 1982-83 this Tribunal took a contrary view, for the years under consideration we hold that the assessee is entitled to set off of business loss/depreciation against the profit taxable under Section 41(2) of the Act. We, therefore, upheld the CIT(A)'s order on the point.

8. to 11. [These paras are not reproduced here, as they involve minor issues.]