No sec. 41(1) deemed income when assessee writes off liability of vendor cos after outright purchase of business

Summary – The Mumbai ITAT in a recent case of Precept Ltd., (the Assessee) held that where in course of purchase of several businesses on 'going concern basis', assessee wrote off outstanding sundry creditors belonging to vendor companies, since no loss or expenditure qua sundry creditors was claimed, writing off in question was not covered by provisions of section 41(1)

Where assessee after converting into public limited company, issued share capital, in view of fact that it had duly deducted tax at source on brokerage charges, claim raised for deduction of share issue expenses under section 35D was to be allowed

Facts

- The assessee bought running business of several companies on 'going concern basis'. It acquired all assets and liabilities of those companies as they stood on the date of purchase. Thereafter, certain outstanding 'Sundry Creditors' belonging to vendor companies were written back by the assessee by way of credit to profit and loss account.
- The Assessing Officer opined that the assessee capitalized the consideration paid to take over the business in its books of account and claimed depreciation thereupon and hence the write-back of creditors constituted income in the hands of the assessee in terms of section 41(1).
- The Commissioner (Appeals) upheld the order of Assessing Officer.
- On second appeal:

Held

- In the present case, there was no loss, expenditure or trading liability incurred by the assessee in respect of which allowance or deduction has been made in the assessment for any year and thereafter assessee received some benefit *qua* this loss or expenditure. These creditors were taken over by the assessee from vendor companies and subsequently written off in the books of account. Nevertheless, undisputedly, the assessee never claimed any loss or expenditure *qua* those sundry creditors.
- Hence, the same is clearly not covered by clause (*a*) of section 41(1). Clause (*b*) covers a situation where the assessee has been allowed allowance or deduction of certain expenditure and subsequently his 'successor in business' receives certain benefits out of the same. The expression 'Successor in business', as per *Explanation-2*, covers four types of situation. Clause (*iii*) is related with firms which is not the case here and hence, not applicable. Clauses (*i*) & (*iv*) applies in case of amalgamation/demerger of company, but here the Tribunal is dealing with a case of 'outright

purchase' as event from 'business transfer agreement' and financial statements and therefore, the same is also not applicable. Clause (*ii*) covers case of 'succession' by other person in that business' which is also not the case here.

- The issue can be looked from another angle. Hypothetically assuming that the assessee took over certain fictitious liabilities meaning thereby that actual liabilities stood at lower value. In that case, the value of 'net asset' *i.e.* 'Value of Assets taken over less value of liabilities taken over' would have been at higher value and consequently, the value of goodwill, which was nothing but 'total consideration less net assets' would have been at lesser value thereby resulting into less depreciation claim for the assessee.
- Even in that situation, depreciation is neither a loss, nor an expenditure, nor a trading liability, referred to in section 41(1). Hence, the same further supports the stand of the assessee. Even otherwise, neither clause (*a*) nor clause (*b*) of section 41(1) applies to the assessee on the facts and circumstances of the case. Hence, from any angle, the impugned addition is not sustainable.