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Date: 2026.11.05

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL (L.) NO. 39 OF 2026

/erest Kanto Cylinder Ltd. ...Appellant

Vs.

1. Deputy Commissioner of Income Tax-Circle 3(4)
2. Principla Commissioner of Income Tax-3. ...Respondents

Mr. Pankaj Toprani i/b. Krupa Jimit Shah, for Appellant.
Mr. Arjun Gupta, for Respondents.

CORAM: G. S. KULKARNI &
DR. NEELA GOKHALE, JJ.
RESERVED ON: 14 August 2026
PRONOUNCED ON: 05 November 2026

JUDGMENT (Per G. S. Kulkarni, J.)

1. This appeal under Section 260A of the Income Tax Act, 1961 (for short, "**the Act**") is filed by the appellant/assessee assailing the order dated 20 January 2025 passed by the Income Tax Appellate Tribunal (ITAT), Mumbai Bench ('**the Tribunal'**). By the impugned order, the appeal filed by the appellant/ assessee under Section 250 of the Act, assailing the order passed by the Commissioner of Income Tax (Appeal), stands rejected. The Assessment Year in question is A.Y. 2021-22.

2. Although the assessee has raised different questions, having regard to the contentions as canvassed at the Bar, the following substantive question of law arises for our consideration in the present appeal:-

> " Whether in the facts and in the circumstances of the case and in law, was the Tribunal justified in upholding the disallowance of loss of Rs. 56,79,598/- on sale of block of certain depreciable fixed assets, under section 41 (2) of the Act on the ground that the provisions of section 41

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(2) are applicable only to those entities engaged in the business of generation or generation and distribution of power?"

3. The appellant is a listed public limited Company engaged in the business of manufacturing and exporting CNG Cylinders and is stated to be regularly assessed to tax. For the assessment year (AY) 2021-22, the assessee filed its return of income on 11 March 2022, declaring total income of Rs. 1,34,59,23,877/- under the provisions of Section 115JB of the Act. Under the normal provisions of the Act, the assessee declared NIL income on account of carry forward of past losses. While computing its income, the appellant/assessee, *inter alia,* claimed a deduction of Rs. 56,79,598/- towards loss arising on the sale of certain block of depreciable fixed assets under Section 41(2) of the Act. An intimation was issued by the Assistant Director of Income Tax, Central Processing Centre, Bengaluru, dated 14 December 2022, under Section 143 (1) of the Act. In the said intimation, the loss of Rs. 56,79,598/- claimed on the sale of a certain block of depreciable fixed assets was disallowed, among other disallowances. Being aggrieved by the aforesaid disallowance, including the disallowance of the said loss of Rs.56,79,598/- arising on the sale of a certain block of depreciable fixed assets, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals) NFAC, Delhi. In the said appeal, the Additional/Joint Commissioner of Income Tax (Appeals) - 3, Chennai, passed an order dated 5 February, 2024, whereby the disallowance of the said loss of Rs. 56,79,598/- claimed by the assessee on the sale of the said block of depreciable fixed assets was upheld. Aggrieved by such disallowances so upheld by the Additional/Joint CIT (A) - 3 Chennai, including the disallowance of the loss of Rs. 56,79,598/-, the appellant

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preferred an appeal before the Tribunal. It is on such appeal, the impugned order has been passed.

4. There was some issue in regard to the order dated 20 January 2025 passed by the Tribunal, as it was the assessee's contention that two separate orders had been passed. In such context, a Miscellaneous Application (bearing No. 55/Mum/2025) was filed against the first order. However, we do not intend to delve into this controversy, as it appears that subsequently it was quite clear that only one order of the tribunal was uploaded and made available to the parties. Certified copy of such order dated 20 January 2025 passed by the Tribunal was also issued. It is this order which is impugned in the present appeal. The other order appears to have been inadvertently uploaded. We have, accordingly, proceeded to hear the learned counsel for the parties on the present appeal.

5. Mr. Toprani, learned counsel for the appellant/assessee has made the following submissions:-

The Tribunal was not justified in upholding the disallowance of Rs. 56,79,598/- arising on the sale of certain block of depreciable fixed assets under Section 41(2) of the Act, on the ground that the provisions of Section 41 (2) are applicable only to entities engaged in the generation or generation and distribution of power, while disregarding the several decisions relied upon and placed before the Tribunal for its consideration. It is also his contention that such issue was neither raised by the Department nor was it the subject matter of consideration before the CIT (A), and that the same was never argued by the

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departmental representative before the Tribunal. It is his contention that insofar as the assessee's entitlement to claim the loss of Rs. 56,79,598/ arising on the sale of certain blocks of depreciable fixed assets is concerned, the assessee's case is squarely supported by the view taken by the Madras High Court in the case of **M/s. Share Aids Pvt. Ltd. vs. ITO**[1]. It is his submission that the Tribunal ought not to have ignored the assessee's case in upholding the disallowance of loss of Rs.56,79,598/- on sale of certain block of fixed assets and that the assessee's case was also covered by the decision of the Tribunal in the case of **Digital Electronics Ltd. vs. Addl. CIT**[2] wherein the Tribunal held that the deemed short-term capital gain under Section 50 of the Act assumes the character of business income, as the same arose on account of sale of long term business assets and such decision of the Tribunal was also approved by this Court in the case of **PCIT vs. Alcon Developers**[3] as a result of which neither the provisions of Section 70 nor Section 71 of the Act was attracted.

6. On the other hand, Mr. Gupta, learned counsel for the revenue in opposing the appeal would submit that the claim for set off of business loss of Rs.56,79,598/- under Section 41(2) of the Act disallowed by the CIT(A) and ITAT, was justified. It is submitted that the assessee's case that substantial questions of law arise on the basis that the loss is allowable under Section 41(2) of the Act as a business loss, since the sales consideration of depreciable assets is lower than the Written Down Value, completely ignores Section 43(6) of the Act,

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1 (2021) 124 taxmann.com 256 (Madras)

2 2011) 135 TTJ 419 Mumbai

3 (2021) 432 ITR 267 Bombay

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which defines "Written Down Value". It is submitted that although the assessee's contention is that the said provision does not provide for losses to be claimed, since the word 'income' includes loss, the said loss is allowable to be set off as business loss under Section 41(2) against business income. It is submitted that Section 43(6)(c)(i)(B) read with Section 43(6)(c)(ii)(A) defines 'Written Down Value' to mean 'the Written Down Value after reduction of the moneys payable in respect of the asset which is sold ….' which essentially would mean reduction of the sale price from the Written Down Value to create a unique Written Down Value. It is submitted that Section 41(2) provides that when the depreciable assets used for the purposes of the business are sold, the excess of the sale price over the Written Down Value which does not exceed the difference between the actual cost and Written Down Value is chargeable to the income-tax. It is submitted that once the money payable/sale consideration exceeds the Written Down Value computed under Section 43(6) of the Act and this excess does not exceed the difference between the actual cost and Written Down Value, income accrues to the assessee. It is submitted that for such reasoning, the income has not accrued to the assessee under Section 41(2) and is not a business loss. It is not disputed by the assessee.

7. Mr. Gupta would next submit that although Section 43 opens with the lines "In Sections 28 to 41 and in this section, unless the context otherwise requires" therefore Section 43(6) is an interpretative provision used to interpret Section 41. It is hence submitted that it is clear that no loss can be claimed under Section 41(2) when the said section does not even provide for any loss to be

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claimed and when there is no loss accruing to the assessee under Section 41(2) of the Act. Mr. Gupta would next submit that the decision of this Court in **PCIT vs. Alcon Developers** (supra) is distinguishable on the facts since in such case, there was no dispute that the carry forward loss sought to be set off was indeed a carry forward loss. It is submitted that the assesseee was seeking to categorize the loss as a business loss under Section 41(2) for the purpose of set off when the same does not even constitute a business loss by virtue of Section 43(6) once applied to Section 41(2) of the Act. It is submitted that the very issue in the present case is the categorization of the loss as a business loss, unlike the case of **Alcon Developers** where the same was already accepted. It is submitted that although the authorities below have not examined the said issue as being contended, if there is no dispute regarding the aforesaid propositions and the assessee does not dispute the same, then simply because the ITAT has made findings on different grounds or reasoning would not warrant admission of the appeal, since the entire issue rests on the interpretation of Section 41(2) of the Act. It is, therefore, submitted that the appeal be dismissed.

Analysis

8. We have heard learned counsel for the parties. We have also perused the record and the impugned order. We may observe that on examining the return as filed by the assessee, an intimation under Section 143(1)(a) of the Act was issued by the Assessing Officer adding Rs.57,52,498/- due to inconsistency in the amount of profit chargeable to tax under Section 41 as specified in the Income

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Tax Return and Tax Audit Report. The assessee, however, contested that the said amount had already been included by the assessee in the Income Tax Return, being accounted for in the income for the assessment year under the heads such as (a) recovery of bad debts Rs.13.37 lakhs and (b) liabilities no longer required written back Rs.44.15 lakhs. It was, therefore, contended by the assessee that the addition made by the Assessing officer (CPC) amounted to double taxation and hence, the sum of Rs.57,52,498/- is to be deleted.

9. The CIT(A) observed that it was noted from records that the assessee had sold the assets at a price lower than what they were shown in the books of account. The CIT(A) observed that under the Income Tax Act, the concept of a block of assets is provided for fixed assets, which means that all the assets belonging to a particular category are clubbed together and known as a block of assets. It was observed that whenever an asset is sold from the block, the sale price is reduced from the Written Down Value of the block (WDV). The profit or loss is computed only when the block ceases to exist, otherwise, no profit or loss is allowed as a deduction under Section 43(6)(c)(i) of the Income Tax Act, which provides that the Written Down Value (WDV) of the block of assets will be computed by reducing the money payable in respect of any asset falling within that block, which is sold or discarded or demolished or destroyed during that previous year. It was observed that once the sale price is already reduced from the WDV, the assessee could not claim it as a loss. For the sake of clarity, it was observed that Section 37 provides that an expense of capital nature shall not be allowed as a deduction, therefore, the loss on the sale of fixed assets is a capital loss

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and accordingly, not allowed as a deduction. It was observed that a combined reading of Section 43(6)(c)(i) and Section 37 clearly indicate that the sale price of fixed assets has to be reduced from WDV and cannot be claimed as an expenditure. It was hence observed that the assessee's contention cannot be accepted and hence, the loss of Rs.56,79,598/-, disallowed by the AO(CPC) would not require any interference and accordingly confirmed the finding of the Assessing Officer.

10. We find that the assessee contended that the loss of Rs.56,79,598/- was incurred by it on sale of some of the assets which was computed by reducing the Net Block of such assets as on 31 March, 2021 from their sale price and such loss was claimed by the assessee as an allowable loss under Section 41(2) of the Act. It appears from the record that the assessee referred to Section 41(2) read with Section 50 of the I.T. Act contending that the provisions of Section 41(2) and Section 50 simultaneously exist in the Act. Section 41 provides for "Profits chargeable to tax" and Section 50, is a 'Special provision for computation of capital gains in case of depreciable assets'. The assessee contended that plainly the provisions of Section 41(2) would prevail over the provisions of Section 50, which was in the nature of deeming provisions for the reason that deeming provision assumes the existence of the fact which does not really exist relying on the decision in Indira Sawhney vs. Union of India[4]. Also, referring to the decision in CIT vs. Bombay Corporation[5], it was contended that when a person is "deemed to be" something, the only meaning possible is that whereas he is not in reality that

4 JT 1999(9) SC 557

5 AIR 1930 PC 54

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something and that the Act of Parliament requires him to be treated as if he were. Hence, plainly the provisions of Section 41(2) would prevail over the deeming provisions. On such analogy, the assessee contended that Section 28 of the Act provides that the profit and gain of any business or profession carried on by the assessee during the previous year shall be chargeable to income tax under the "Profits and Gains" of business or profession. Further, Section 29 of the Act provides that income from profits and gains of the business or profession referred to in Section 28 shall be computed in accordance with the provisions contained in Sections 30 to 43D.

11. It is assessee's case that for such reason, in computing the income from business, the provisions of Section 41 of the Act would be applicable. The assessee supporting its contention relying on the decision of the Supreme Court in **CIT vs. J.H. Gotla**[6] wherein it was held that the word "income" includes 'loss' and, therefore, if the sale consideration of assets falls short of WDV of assets, the balance being loss is to be considered for the purpose of allowance under Section 41(2) of the Act. Hence, according to the assessee, this analogy squarely applies to the provisions of Section 50 as well which only provides for short term capital gain where the full value of consideration is in excess of WDV. It was thus the assessee's case that it does not provide for the converse situation. As the word "income includes loss, the short term capital loss falls within the purview of Section 50 as well. The assessee, therefore, categorically contended that as the provisions of Section 41(2) and Section 50 co-exist, the assessee can take the

6 156 ITR 323 SC

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benefit of Section 41(2) which is more beneficial to the assessee relying on the decision of the Supreme Court in the case of **CIT vs. Vegetable Products Ltd.**[7], however, at the same time, contended that in **CIT vs. Urmila Ramesh**[8], the Supreme Court held that both Section 41(2) and Section 50 of the I.T. Act cannot apply at the same amount.

12. Considering the rival contentions, we find that the Tribunal has considered that the assessee sold its fixed assets falling within the definition of "Plant" as defined under Section 43(3), which includes 'vehicles'. The sale value as received by the assessee was lower than the Written Down Value of the asset and accordingly, the assessee contended that it has generated loss amount to Rs.56,79,598/-. Such loss was adjusted with the same year's business income. The assessee in supporting its case also placed reliance on the decision of **Share Aids (P) Ltd.** (supra), wherein the Madras High Court has held that when certain assets forming part of block assets, other than immovable property, are sold in the ordinary course of business, before being held during the relevant previous year and the resulting loss, on the sale price being less than the Written Down Value, should be treated as a business loss under Section 41(2) of the Act. The assessee, however, argued that Section 50 of the Act, being a deeming provision should yield to the plain language of Section 41(2), as the latter directly addresses the treatment of such losses. Such contention of the assessee was rejected by the Assessing Officer adding the said amount to the taxable income. The department has taken a contrary position that the process of calculation is clearly outlined by

7 88 ITR 192

8 230 ITR 422

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the provisions of Section 43(6)(c)(i) of the Act, which applies to "any block of assets", including both movable and immovable assets and hence, the decision of the Madras High Court in **Share Aids (P) Ltd.** (supra) would be distinguishable, as the decision specifically noted that the loss was allowed in the context of a business closure, rendering the carry forward of loss irrelevant. Further while Section 41(2) recognizes the loss, characterization of the loss is determined under Section 50 of the Act, which treats it as a short-term capital loss.

13. The Tribunal, however, considering the issue whether Section 41(2) was applicable to the assessee, who was engaged in the business of manufacturing and exporting of CNG Cylinders, and in the context of the assessee's assertion considering the language of Section 41(2) which includes the applicability of Section 32(1)(i) held that 'on a combined reading of the provisions of Section 41(2) and Section 32(1)(i) made it clear that that the provisions of Section 41(2) are applicable only to those entities engaged in the business of generation or generation and distribution of power, who claim depreciation on straight line method. It was observed that in assessee's case, the depreciation was claimed on WDV method where assets are grouped as "block of assets", there is no question of applicability of Section 41(2) of the Act and consequential consideration of the gain or loss on sale under the head "profits and gains of business or profession". The view taken by the Tribunal is that the impugned transaction in assessee's case where the loss had arisen from the sale of asset in the block of assets was required to be considered as Short Term Capital Loss under Section 50 of the Act. The relevant observations in that regard as made by the Tribunal are required to be

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noted, which read thus:

> "42. Before proceeding to examine whether the loss on sale of asset can be considered as business loss under section 41(2), we will first examine whether the said section is applicable to assessee who is engaged in the business o manufacturing and exporting of CNG Cylinders. Section 41(2) provides three conditions for the purpose of applicability of the said section. The conditions are:
>
> (a) Building, machinery, plant or furniture is owned by the assessee;
> (b) Depreciation is claimed under clause (i) of sub-section (1) of section 32; and
> (c) Building, machinery, plant or furniture was or has been used for the purposes of business
>
> Therefore, one of the conditions for applicability of section 41(2) is that the assessee should have claimed depreciation under section under clause (i) of sub-section (1) of section 32 which reads as under -
>
> "32. (1) In respect of depreciation of-
>
> (i) buildings, machinery, plant or furniture, being tangible assets.
>
> (ii) know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after the 1st day of April, 1998, not being goodwill of a business or profession,
>
> owned, wholly or partly, by the assessee and used for the purposes of the business or profession, the following deductions shall be allowed-
>
> In the case of assets of an undertaking engaged in generation or generation and distribution of power, such percentage on the actual cost thereof to the assessee as may be prescribed."
>
> A Combined reading of the provisions of section 41(2) and section 32(1)(i) makes it clear that provisions of section 41(2) are applicable only to those entities engaged with the business of generation or generation and distribution of power who claim depreciation on straight line method (SLM). In assessee's case where the depreciation is claimed on WDV method where assets are grouped as "block of assets" there is no question of applicability of section 41(2) of the Act and consequential consideration of the gain or loss on sale under the head "profits and gains of business or profession". The impugned transaction in assessee's case where the loss has arisen from the sale of asset in the block of asset have to be considered as STCL under section 50 of the Act."

14. Considering the aforesaid observations of the Tribunal, the question which falls for determination is whether the provisions of Section 41(2) were applicable in the assessee's case. To answer this question, it would appropriate to note the provisions of Section 41(2), which reads thus:

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"Profits chargeable to tax.

41(1) ……..

(2) Where any building, machinery, plant or furniture,—

(a) which is owned by the assessee;

(b) in respect of which depreciation is claimed under clause (*i*) of sub-section (1) of section 32; and

(c) which was or has been used for the purposes of business,

is sold, discarded, demolished or destroyed and the moneys payable in respect of such building, machinery, plant or furniture, as the case may be, together with the amount of scrap value, if any, exceeds the Written Down Value, so much of the excess as does not exceed the difference between the actual cost and the Written Down Value shall be chargeable to income-tax as income of the business of the previous year in which the moneys payable for the building, machinery, plant or furniture became due.

Explanation.—Where the moneys payable in respect of the building, machinery, plant or furniture referred to in this sub-section become due in a previous year in which the business for the purpose of which the building, machinery, plant or furniture was being used is no longer in existence, the provision of this sub-section shall apply as if the business is in existence in that previous year."

(emphasis supplied)

15. It needs to be noted that sub-section (2) of Section 41 of the Income-tax Act has undergone legislative changes. In 1986, sub-section (2) was omitted by the Taxation Laws (Amendment and Miscellaneous Provisions) Act, 1986, with effect from 1 April 1988. Consequent upon the change in the scheme of depreciation allowance, there were further legislative amendments made with effect from the year 1988. The legislative history in regard to the aforesaid statutory amendments has been succinctly captured in the celebrated commentary *Sampath Iyengar's Law of Income Tax*[9], which reads thus:

"**Sub-section (2)**

Balancing charge upto 31-3-1988 deduction for power companies [section 41(2)]

25. Legislative history. - 1961 - Sub-section (2) till its omission continued

9 Sampath Iyengar's Law of Income Tax, 13th Edition, page no.6225

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unamended except for the addition of the second proviso later. It was originally couched in the following words:

"(2) Where any building, machinery, plant or furniture which is owned by the assessee and which was or has been used for the purposes of business or profession is sold, discarded, demolished or destroyed and the moneys payable in respect of such building, machinery, plant or furniture, as the case may be, together with the amount of scrap value, if any, exceed the Written Down Value, so much of the excess as does not exceed the difference between the actual cost and the Written Down Value shall be chargeable to income-tax as income of the business or profession of the previous year in which the moneys payable for the building, machinery, plant or furniture became due:

Provided that where the building sold, discarded, demolished or destroyed is a building to which Explanation 3 to section 43 applies, and the moneys payable in respect of such building. together with the amount of scrap value, if any, exceed the actual cost as determined under that Explanation, so much of the excess as does not exceed the difference between the actual cost so determined and the Written Down Value shall be chargeable to income-tax as income of the business or profession of such previous year.

Explanation. - Where the moneys payable in respect of the building, machinery, plant or furniture referred to in this sub-section become due in a previous year in which the business or profession for the purpose of which the building, machinery, plant or furniture was being used is no longer in existence, the provisions of this sub-section shall apply as if the business or profession is in existence in that previous year."

1980. - The second proviso to sub-section (2) was inserted by the Finance (No. 2) Act, 1980, with effect from 1 April, 1981 in the following terms:

"Provided further that where an asset representing expenditure of a capital nature on scientific research within the meaning of clause (c) of sub-section (2B) of section 35, read with clause (4) of section 43 owned by the assessee which was or has been used for the purposes of business after it ceased to be used for the purpose of scientific research related to the business is sold, discarded, demolished or destroyed, the provisions of this sub-section shall apply as if for the words "actual cost", at the first place where they occur, the words "actual cost as increased by twenty-five per cent thereof" had been substituted."

The effect of this insertion was explained by the Board in a circular[4] as under:

"14.1 As explained in item (if) of paragraph 10.3 of this circular[5], a new sub-section (2B) has been inserted in section 35 under which a weighted deduction will be allowed in an amount equal to one and one-fourth times the expenditure incurred by an assessee on scientific research undertaken by him under a programme approved in this behalf by the prescribed authority having regard to the social, economic and industrial needs of India. Under this provision, capital expenditure incurred on the purchase of machinery and equipment would, in some cases, qualify for the weighted deduction. The Finance Act has made two consequential amendments in section 41. In a case where such machinery or equipment used for the purpose of scientific research related to the business is sold, discarded, demolished or destroyed, moneys payable in respect of such machinery or equipment, together with the amount of scrap value, if any, shall become chargeable to income-tax to the extent such moneys do not exceed 125 per cent of the actual cost of such machinery or equipment. In a case where such machinery or equipment is sold, without having been used for other purposes, the

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sale price to the extent it does not exceed 125 per cent of the actual cost will be included in the income of the assessee for the previous year in which the sale takes place."

1986. Sub-section (2) was omitted by the Taxation Laws (Amendment and Miscellaneous Provisions) Act, 1986 with effect from 1 April, 1988, consequent upon the change in the scheme of depreciation allowance.[1] Though the sub-section has no application from assessment year 1988-89, the earlier commentary is retained as the sub-section will still operate in respect of the earlier assessment years.

1998. **Sub-section (2), as at present, was inserted by the Finance (No. 2) Act, 1998, with retrospective effect from 1 April, 1998. It reintroduces the provision for depreciation before block system substituted the pre-existing system, but limits it to power sector only at its choice.** The scope of this provision is explained in Circular[2] as under:

"16.1 Section 32 of the Income-tax Act was amended by the Income-tax (Amendment) Act, 1998, to provide for allowance of depreciation, in the case of assets of an undertaking engaged in generation or generation and distribution of power on straight line method. Depreciation on these assets is to be allowed on individual assets and not on the block of assets. The Act brings about consequential amendments in sections 32 and 41 of the Income-tax Act to provide for the manner of computation of depreciation and also the amount chargeable to income-tax when such an asset is sold, discarded, demolished or destroyed in the previous year.

16.2 Clause (iii) in section 32(1) of the Income-tax Act has been inserted to provide that in the case of any asset in respect of which depreciation is claimed and allowed under section 32(1) and which is sold, discarded, demolished or destroyed in the previous year (other than the previous year in which it is first brought to use), the depreciation allowance will be the amount by which the moneys payable in respect of such asset together with the amount of scrap value, if any, falls short of the Written Down Value thereof. It has also been provided that in such a case depreciation will be allowed only if the deficiency is actually written off in the books of assessee. Sub-section (2) of section 41 of the Income-tax Act has been inserted to provide that where the moneys payable in respect of such assets together with the amount of scrap value, if any, exceeds the Written Down Value, so much of the excess as does not exceed the difference between the actual cost and the Written Down Value shall be chargeable to income-tax as income of the business of the previous year in which the moneys payable became due.

16.3 The Act has also inserted section 50A in the Income-tax Act to provide for the working of the cost of acquisition for the purposes of computation of capital gains in respect of such assets. It has been provided that where the capital asset is an asset in respect of which a deduction on account of depreciation under clause (i) of sub-section (1) of section 32 has been obtained by the assessee in any previous year, the provisions of sections 48 and 49 shall apply subject to the modification that the Written Down Value, as defined in clause (6) of section 43, of the asset, as adjusted, shall be taken as the cost of acquisition of the asset.

16.4 These amendments will take effect retrospectively from 1st day of April, 1998, and will, accordingly, apply in relation to the assessment year 1998-99 and subsequent years."

(emphasis supplied)

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16. Further, with regard to the provisions of Section 41(2) as they stand today, the learned authors, in paragraph 41 at page 6245 of the aforesaid commentary, observed as under:-

> "41. Present position of law. After introduction of block depreciation, section 41(2) has no application, so that the provision was omitted with effect from 1st April, 1988 by the Taxation Laws (Amendment and Miscellaneous Provisions) Act, 1986, so that it can have no application in respect of recovery of depreciation allowed under this section. Where the block itself ceases to exist, the balance of Written Down Value would constitute loss under the head capital gains. Where the sale value of any asset in the block exceeds the Written Down Value of the block itself, the surplus will be short term capital gains. However, section 41(2) was brought back by the Finance (No. 2) Act, 1998, with effect from 1.4.1998 because, the block depreciation was found unsuitable for electricity companies, which are required to keep accounts under the Electricity Act providing for depreciation on straight-line basis. It is for this reason, that this provision was brought back along with the amendment to the rule providing for straight-line depreciation for such companies in Appendix 1A of the Schedule as well as new section 50A to provide for cost of acquisition of capital assets for such companies. See also comment under section 32 para 52. **Thus, section 41(2) will now have a limited application in case of assessee's engaged in generation of electricity and choosing straight line depreciation under section 32(1)(i)**
>
> For assessees not falling under section 32(1)(i), where there is an addition to the block or sale of any asset in the block, the cost of the addition will be added and the sale value will be deducted in ascertaining the Written Down Value of the block as at the end of the year.[1]
>
> On substitution of block scheme of depreciation, where it was applied for a year, when it was not in vogue, cancellation of the assessment for this and other reasons under section 263 for a fresh assessment was held justified.
>
> 42. Question of fact or law. The question whether section 41(2) is applicable to the facts of a particular case is a question of law.[2]"
>
> ---
>
> 1. CIT v. Rhodoen Silk Mills P. Ltd (2011)332 ITR 330(P&H):[TS-5231-HC-2008(Punjab)-O)
> 2. Vishti Management Services P. Ltd. V/ OTP)2011)0 OTR (Trib)372(Del): [TS-5666-ITAT-2010(Delhi)-O)

(emphasis supplied)

17. It is thus clear that Section 41(2) having undergone an amendment by the Finance Act No.2 of 1998 with effect from 1 April 1998, the provision for depreciation would have limited application in the case of the assessee engaged in generation of electricity under Section 32(1)(i), which is not the category in

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which the appellant would fall. It is also clear that for the assessee not falling under the provisions of Section 32(1)(i) where there is an addition to the block or sale of any asset in the block, the cost of the addition would be required to be added and the sale value would be deducted in ascertaining the Written Down Value of the block at the end of the year.

18. In the context in hand, we may refer to the decision in **Commissioner of Income Tax Vs. Rhodoen Silk Mills (P) Ltd.**[10], the Division Bench of Punjab & Haryana High Court, was concerned with the applicability of the provisions of Section 41(2) of the Income Tax Act. The question which had arisen for consideration was whether on the facts and law, the Income Tax Appellate Tribunal was legally justified to ignore clause (b) of Section 41(2) of the Income Tax Act, when the entire machinery of an independent unit as owned and used by the respondent for business and depreciation allowed to it under Section 32 of the Income Tax Act, was sold in the previous year. The Assessing Officer made an addition of Rs.25,76,119/- by treating the difference between the sale price of the entire machinery installed at unit No.1 of the factory premises of the assessee and the Written Down Value of the said machinery by invoking the provisions of Section 41(2) of the Income Tax Act read with the amended provision of Section 50 and 50A of the Act. The assessee being aggrieved by the orders passed by the Assessing Officer, approached the Commissioner of Income Tax (Appeals). The Commissioner of Income Tax (Appeals) passed an order deleting the addition of Rs.25,76,119/- by holding that Section 41(2) was not applicable to the facts of the case and it was applicable only to plant and machinery engaged in generation and

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distribution of power. It was observed that effect of the insertion of Section 50A of the IT Act was to make special provisions for computation of the cost of acquisition in the case of depreciable assets referred in Section 32(1)(i) of the IT Act. It was held that Section 50 of the IT Act was not applicable to the facts of the case as the block of the assets existed at the opening as well as at the closing of the financial year. Against the said order passed by the CIT (Appeals), the Revenue had filed an appeal before the Income Tax Appellate Tribunal. The said appeal was dismissed by the tribunal as it did not find any infirmity in the order of the CIT (Appeals). The Division Bench of the Punjab & Haryana High Court dismissed the appeal filed by the Revenue while holding that the depreciation was claim under the provisions of Section 32(1) of the IT Act as prescribed and hence, the tribunal found no infirmity in the order of the CIT (Appeals). The relevant observations as made by the High Court are required to be noted which reads thus:

> "**3.** The respondent-assessee is a company which filed its return of income- tax for the assessment year 1998-99 on November 30, 1998, declaring a total income of Rs. 16,83,090. The assessment was completed on March 29, 2001, under section 143(3) of the Act on a total income of Rs. 39,37,200. While completing the assessment, the Assessing Officer made an addition of Rs. 25,76,119 by treating the difference between the sale price of Rs.29,80,000 of the entire machinery installed at unit No. 1 of the factory premises of the respondent-company and the Written Down Value of the said machinery as on April 1, 1997 at Rs. 4,11,811 by invoking the provisions of section 41(2) of the Income-tax Act, 1961, read with the amended provisions of sections 50 and 50A of the Act.
>
> **4.** The assessee filed an appeal before the Commissioner of Income-tax (Appeals) against the order of the Assessing Officer dated March 29, 2001. The Commissioner of Income-tax (Appeals), Ludhiana vide his order dated January 25, 2002 allowed the appeal of the assessee and deleted the addition of Rs. 25,76,119 by holding that:
>
> > "1. Section 41(2) was not applicable to the facts of this case as it was applicable only to plant and machinery engaged in generation and distribution of power.
> > 2. Effect of the insertion of section 50A of the Income-tax Act was to make special provisions for computation of the cost of acquisition in the

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case of depreciable assets referred to in section 32(1)(i) of the Act.
3. Section 50 of the Act was not applicable to the facts of the case as the block of the assets existed at the opening as well as at the closing of the financial year."

5. Feeling aggrieved by the aforesaid order, the Revenue filed an appeal before the Income-tax Appellate Tribunal, Chandigarh. The said appeal has been dismissed by the Tribunal as it did not find any infirmity in the order of the learned Commissioner of Income-tax (Appeals) vide its order dated August 5, 2005.

6. Sh. Sanjeev Bansal, learned counsel appearing for the appellant Revenue has argued that the entire machinery, owned by the respondent and used for independent business of unit No. 1 in respect of which depreciation was claimed was sold in the previous year. Accordingly, the excess amount of sale consideration of the machinery over the Written Down Value was considered as profit chargeable to tax under the head "Business income" within the meaning of clause (b) of section 41(2) of the Income- tax Act, on sale of machinery on which depreciation was claimed at the rate of 12.50 per cent. under clause (i) of sub-section (1) of section 32 of the Income-tax Act. It was also argued by him that the entire machinery of unit No. 1 as owned by the respondent was sold during the year and therefore, as per the provisions of section 50(2) of the Act, the block of assets ceased to exist.

7. We have heard learned counsel for the Revenue and perused the impugned order.

8. In the present case, after noticing the provisions of section 2(11) of the Act for the period, the Tribunal has given a finding of fact that block of assets was intact and the same did not cease to exist. From the facts of the case, the Tribunal has found that in the present case, plant and machinery was block of assets and all the assets of similar nature had been shown under this head and as per the depreciation chart filed by the assessee the opening balance in plant and machinery as on April 1, 1997, was Rs.4,11,881.11. In this block of assets there was an addition of Rs.75,33,668 and the sale was at Rs. 29,80,000. Thus, the total cost as on March 31, 1998 was Rs. 49,57,549.11. And after providing depreciation at the rate of 12 per cent. amounting to Rs. 6,19,693.11, Written Down Value as on March 31, 1998, remained at Rs. 43,37,856. Thus, it was found by the Tribunal that the plant and machinery had not been sold totally. There was addition as well as sale but the plant and machinery as a whole remained in existence and therefore, it cannot be said that the block of assets under the head "Plant and machinery" was sold and the difference was chargeable to tax.

9. On the basis of this finding, the Tribunal found that depreciation was claimed under the provisions of section 32(1) of the Act as prescribed. Thus, the Tribunal found no infirmity in the order of the Commissioner of Income-tax (Appeals) and dismissed the appeal filed by the Revenue.

10. There is no material on the record of the case to arrive at a different finding of fact than the one given by the Tribunal regarding the existence of block of assets in the present case. There is also no evidence on the record that the entire plant and machinery of unit no.1 has been sold and the purchase of Rs. 75,33,668 of new machinery has been made for unit No. 2. From the facts it is clear that there was addition as well as sale but the plant and machinery as a whole remained in existence. Thus, the provisions of section 32(1) of the Act were rightly made applicable in the present case and the depreciation had been correctly claimed on the Written Down Value merged after making the

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adjustment of addition and sale of the block of assets.

11. Thus, we find no infirmity in the orders of the Tribunal and no substantial question of law arises in this appeal for determination of this court. Hence, this appeal is dismissed."

19. In the light of the above discussion, we do not find ourselves in agreement with Mr. Toprani when he places reliance on the decision of the Tribunal in **Digital Electronics Ltd. Vs. Additional Commissioner of Income Tax**[11]. In the said case the assessee claimed set off, of the brought forward business losses against short-term capital gains on sale of factory building and plant and machinery. The Assessing Officer was of the view that as per Section 72[12] of the Income Tax Act the brought forward business losses can be set off only against profits and gains of business or profession and the assessee was issued a show cause notice. In reply, the assessee contended that profit realized on sale of business assets, being business income could be set off against the unabsorbed business loss. The Assessing Officer was not impressed with the assessee's submission and disallowed its claim of set off. On appeal, the Commissioner (Appeals) confirmed the order passed by the Assessing Officer. In these circumstances, the tribunal held that Section 72 provides that where for any assessment year, the net result of the computation under the head 'Profits and gains of business or profession' is a loss to the assessee, not being a loss sustained in a speculation business, and such loss cannot be or is not wholly set off against income under any head of income in accordance with the provisions of Section 71, so much of the loss as has not been so set off, is to be carried forward to the following assessment year and is

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12 Carry forward and set off of business losses.

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allowable for being set off 'against the profits, if any, of any business or profession carried on by him and assessable for that assessment year'. It was held that there was no requirement of the gains being taxable under the head 'Profits and gains of business or profession' and, thus, as long as gains are of any, business or profession carried on by the assessee and assessable to tax for that assessment year, the same can be set off against loss under the head profits and gains of business or profession carried forward from earlier years. It was held that the income earned in the relevant year, although not taxable as 'profits and gains from business or profession' was an income in the nature of income of business nevertheless, and hence, the assessee was justified in claiming set off of business losses against the income of capital gains. This decision hence would, in no manner, assist the assessee.

20. In the light of the above discussion, the question of law is answered against the assessee and in favour of the Revenue.

21. The appeal is accordingly dismissed.

22. No costs.

(DR. NEELA GOKHALE, J.) (G. S. KULKARNI, J.)

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