

## IN THE HIGH COURT OF SINDH AT KARACHI

Present:

**Muhammad Junaid Ghaffar, CJ.**  
**Agha Faisal, J.**

Income Tax Appeal : Cupola Pakistan Limited vs.  
166 of 1999 Deputy Commissioner of Income Tax

For the Appellant : Mr. Hamza Waheed, Advocate  
Mr. Sami-ur-Rehman, Advocate.

For the Respondent : Mr. M. Aqeel Qureshi, Advocate

Date/s of hearing : 28.08.2025

Date of announcement : 28.08.2025

### ORDER

**Agha Faisal, J.** This appeal has been preferred under Section 136 of the Income Tax Ordinance 1979 (“Ordinance”) assailing the order of the Income Tax Appellate Tribunal dated 10.12.1998 (“Impugned Order”), whereby the appellant’s plea to carry forward losses was denied.

2. Briefly stated, the appellant filed returns for the assessment year 1997-98 demonstrating a loss of Rs.3,249,290/-. A copy of the return is available at page 73 and the expense etc. claimed, culminating in the loss, is available at page 83. At the material time, the appellant had recently incorporated for the objective of marketing and sale of consumer products and services. The appellant had entered into franchise agreements with numerous global brands, including Thomas Cook, TGI Fridays, Estee Lauder, Pizza Express etc. and demonstrated to have incurred expenses in order to conduct its business. The veracity of the instruments, content thereof and / or the nature of the appellant’s activity / expenditure has not been denied by the department’s learned counsel.

3. The appellant incurred loss, as stated supra, however, the carry forward was denied on the premise that the assessee has not done any business activity. An appeal remained unsuccessful on the same premise. The matter went before the learned Tribunal and the Impugned Order merely reproduced the earlier observations of the forum below and concluded as follows:

*“Before us the learned counsel for the appellant has not been able to submit any evidence in support of this contention that the business was commenced during the period under consideration and as such*

*all the expenses claimed were pre-operational in nature and are held have properly been disallowed by the officers below”*

4. In essence, the fact that revenue had not been generated, yet, was held to disentitle the appellant to the benefit claimed. The following questions of law were framed and the matter has remained pending in the docket for almost twenty six (26) years:

*“(1) Whether expenses incurred by a company post incorporation but prior to making any gains or profits are deductible and the loss as a whole can be carried forward to the next assessment year to be set off against the profits of that year?”*

*“(2) Whether on the facts and in view of the grounds stated above the Income Tax Appellate Tribunal was not justified in not allowing expenses which were not of a capital nature and were incurred prior to any profits and gains being derived from the business?”*

*“(3) Whether the Income Tax Appellate Tribunal was not justified in holding that there was no evidence that business was commenced simply because there was no evidence of income being derived during that period and that the expenses were, therefore, pre-operational in nature?”*

*“(4) If the answer to the above questions is in the affirmative, whether the assessee/appellant is entitled to the expenditure of Rs.3,249,290.00 being allowed and carried forward as loss to the next assessment year?”*

5. At the very onset it is considered appropriate to reproduce the pertinent statutory provisions herein below:

*35. Carry-forward of business losses. Where an assessee sustains a loss in any assessment year under the head "Income from business or profession" (not being a loss to which Section 36 applies) and the loss cannot be wholly set off under Section 34, so much of the loss as has not been set off, or the whole of the loss where the assessee has no income under any other head, subject to clause (v) of sub-section (1) of section 23 shall be carried forward to the following assessment year and set off against the profits and gains, if any, of such business or profession assessable for that year if such business or profession continues to be carried on by the assessee for that assessment year; and if the loss cannot be wholly set off in this manner, the amount of the loss not so set off shall be carried forward to the following assessment year, and so on, but no loss shall be carried forward to more than six assessment years immediately succeeding the assessment year for which the loss was first computed ...*

*2(11) "business" includes any trade, commerce or manufacture, or any adventure or concern in the nature of trade, commerce or manufacture ;*

*2(24) "income" includes (a) any income, profits or gains, from whatever source derived, chargeable to tax under any provision of this Ordinance under any head specified in Section 15;*

*(b) any loss of such income, profits or gains; and*

*(c) any sum deemed to be income, or income accruing or arising or received in Pakistan under any provision of this Ordinance ...*

6. Mr. Hamza Waheed meticulously articulated that the Impugned Order is *demonstrably* dissonant with the law, being section 35 of the Ordinance read with sections 2(11) and 2(24) thereof, hence, cannot be sustained. The

respondent's learned counsel, while supporting the Impugned Order, articulated no cavil to the activity undertaken falling within the purview of business, expense incurred being in pursuance thereof and / or the loss capable of being carried forward per section 35 of the Ordinance. Therefore, we find ourselves unassisted with any reason to sustain the Impugned Order.

7. The term *business* has been defined in Section 2(11) of the Ordinance and a plain reading thereof demonstrates the expanse of the ambit thereof. There is abundant authority<sup>1</sup> of the commonwealth jurisdictions amplifying its scope. The admissibility of business losses have withstood judicial scrutiny by this Court in the case of *Commissioner Inland Revenue, LTU, Karachi vs. Karachi Shipping (Pvt.) Ltd.* reported as 2013 PTD 1592 and by the Supreme Court in the case of *Shahid Gul and Partners v. Deputy Commissioner Income Tax* reported as 2021 SCMR 27. The Supreme Court has also dilated upon the conditions for carrying forward business losses as seen in the case of *Commissioner of Income Tax vs. Balochistan Concrete and Block Works* reported as 2017 PTD 717.

8. The nature of expense incurred is not in dispute before us; it is also not denied that the expense is relevant to the business of the appellant; and finally, there is no cavil to the proposition that such a loss is ordinarily permissible to be carried forward per plain reading of section 35 of the Ordinance. The only issue was that such expense was incurred prior to generation of revenue by the appellant, however, department's learned counsel made no effort to articulate how the same could be employed to deny the appellant of the benefit claimed.

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<sup>1</sup> Gujrat High Court in the case of *Commissioner of Income Tax, Gujrat vs. Saurashtra Cement and Chemical Industries Ltd.* reported as [1973] 91 ITR 70 (Pages 175-176); Supreme Court of India in the case of *Commissioner of Income Tax vs. Sarabhai Management Corporation Ltd.* reported as [1991] 192 ITR 151 (Page 153); Gujrat High Court in the case of *Sarabhai Management Corporation Ltd.* reported as [1976] 102 ITR 25 (Page 34); Gujrat High Court in the case of *Prem Conductors vs. Commissioner of Income Tax, Gujrat* reported as [1977] 108 ITR 654 (Pages 663+666); Bombay High Court in the case of *Commissioner of Income Tax, Bombay vs. Ralliwolf Ltd.* reported as [1980] 121 ITR 262 (Pages 268-270); Gujrat High Court in the case of *Commissioner of Income Tax vs. Western India Seafood* reported as [1993] 199 ITR 777 (Page 784); Madras High Court in the case of *Commissioner of Income Tax vs. Franco Tosi Ingegneria* reported as [2000] 241 ITR 268 (Page 269); Delhi High Court in the case of *Commissioner of Income Tax vs. ESPN Software India* reported as [2008] 301 ITR 368 (Page 373); Delhi High Court in the case of *Commissioner of Income Tax vs. Hughes Escorts Communications Ltd.* reported as [2009] 311 ITR 253 (Page 258); Delhi High Court in the case of *Commissioner of Income Tax vs. Whirlpool of India* reported as [2009] 318 ITR 347 (Pages 350-351); Delhi High Court in the case of *Commissioner of Income Tax vs. Samsung India Electronics Ltd.* reported as [2013] 356 ITR 354 (Page 358); Delhi High Court in the case of *Carefour WC & C India P. Ltd. vs. Deputy Commissioner of Income Tax* reported as [2014] 368 ITR 692 (Pages 704+706); Gujrat High Court in the case of *Omniglobe Information Tech India vs. CIT* reported as 369 ITR 1 (Page 3); Judgment of ITAT reported as 1998 PTD (Trib) (Page 3+A); Delhi High Court in the case of *Commissioner of Income Tax vs. E. Funds International India* reported as [2007] 162 Taxman 1 (Paras 6+8) and; Delhi High Court in the case of *Commissioner of Income Tax vs. Aspentech India* reported as [2010] 187 Taxman 25 (Para 6).

9. Therefore, we are of the considered view that questions framed for determination be answered in affirmative, in favour of the appellant and against the respondent department. This appeal is hereby allowed. A copy of this decision may be sent under the seal of this Court and the signature of the Registrar to the learned Appellate Tribunal Inland Revenue, as required per section 133(5) of the Income Tax Ordinance 2001.

Judge

Chief Justice