

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.01.2015

CORAM:

THE HONOURABLE MR.JUSTICE **R.SUDHAKAR**
and
THE HONOURABLE MR.JUSTICE **R.KARUPPIAH**

Tax Case (Appeal) No.758 of 2007

M/s.Southern Travels
Opp. Camp I
Thermal Nagar, Tuticorin

..

Appellant

versus

The Assistant Commissioner of Income Tax
Circle - I(1), Tuticorin

..

Respondent

PRAYER: Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961 as against the order dated 25.07.2006 made in I..T.A..No.1225/mds/04 on the file of the Income Tax Appellate Tribunal, Madras 'C' Bench for the assessment year 1999-2000.

For appellant : Mr.R.Vijayaraghavan
for M/s.Subbaraya Aiyar Padmanabhan

For respondent : Mr.M.Swaminathan
Standing Counsel for Income Tax.

J U D G M E N T

(Judgment of the Court was delivered by **R.SUDHAKAR,J.**)

This Tax Case (Appeal) is filed by the assessee as against the decision of Special Bench of the Income Tax Appellate Tribunal

constituted to consider the following questions of law:

"In view of the provisions of section 32(2)(iii) whether it is possible to set off the brought forward depreciation loss against capital gains?"

2. The brief facts of the case are as follows:

The appellant is a partnership firm, engaged in the business of plying taxis and letting out heavy equipments like dumper and cranes on hire basis. For the assessment year 1999-2000, the appellant filed return of income declaring 'nil' income after setting off of carry forward depreciation loss under Section 32(2) of the Income Tax Act relating to the assessment years 1995-96 and 1997-98 and business loss under Section 72 relating to the assessment year 1997-98. While completing the assessment for the assessment year 1997-1998 in March 2000 under Section 143(3) of the Income Tax Act, the Assessing Officer reduced the carry forward loss for setting off under Sections 72 and 32(2) of the Income Tax Act.

3. For the assessment year 1999-2000, of which we are now concerned, the Assessing Officer initiated re-assessment proceedings under Section 147 of the Income Tax Act by issuing notice dated 23.03.2001 under Section 148, on the ground that the income had

escaped assessment due to setting off carry forward business and depreciation loss for the assessment year 1997-1998 against income from short term capital gains arising on the sale of business asset.

4. Before the Assessing Officer, the assessee contended that short term capital gains in terms of Section 50 of the Income Tax Act had arisen out of sale of depreciable assets, viz., Shoval Loader and Crane, held by the assessee and used for the purpose of earning income, which was assessable to tax under the head 'income from business '. It was also contended that the gain arising on the sale of such depreciable assets is taxable under the head 'short term capital gains', by virtue of Section 50 of the Income Tax Act, if the written down value of the particular block to which it belongs is less than the sale consideration. The assessee, therefore, relied upon the provisions of Section 32(2) of the Income Tax Act and contended that the carry forward depreciation loss was admissible to be set off against profit and gains arising from business in the subsequent year and such profits and gains from business included gains arising from sale of business asset, though it was assessable under separate head of income for the purpose of computation. In support of this contention, the assessee relied upon the decisions of the Supreme Court in the

case of **CIT – Vs – Cocanada** reported in **57 ITR 306** and **Sasoon Vs. CIT** reported in **86 ITR 575**.

5. The Assessing Officer, however, rejected the claim of the assessee and brought to tax the short term capital gains to tax.

6. Not satisfied with the order of the Assessing Officer, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals), who held against the assessee, thereby dismissed the appeal. Hence, the assessee pursued the matter before the Income Tax Appellate Tribunal. The Tribunal constituted a Special Bench to decide the question, which we have already referred supra.

7. Before the Tribunal, the assessee/appellant had raised the following grounds:

"2. The assessing Officer and Commissioner of Incometax (Appeals) - I Madurai, erred in law in holding that unabsorbed depreciation loss of earlier years cannot be adjusted against short term capital gains arising on sale of business assets.

3. The Commissioner of Income tax (Appeal) failed to note that Sec.32(2) and Sec.72 deal with the same aspect of carry forward of past years loss though arising

from different sources.

4. The decision of Supreme Court in CIT Vs. Cocanada Radhaswami Bank Limited (57 ITR 306) and CIT Vs. Ramanath Goenka (259 ITR 26) (Mds) applies to the facts of case and carry forward depreciation loss needs to be adjusted against short term capital gains arising on sale of business assets."

8. In the above factual matrix, the Tribunal has framed the question of law to decide as to whether in view of provisions of Section 32(2)(iii), whether it is possible to set off brought forward depreciation loss against capital gains for the assessment year 1999-2000.

9. The Special Bench of the Tribunal referred to the provisions of Sections 32(2), 32(2)(i), (ii) and (iii), Section 71 as also Section 72 of the Income Tax Act and was of the view that in the facts of the present case, the claim of the assessee that unabsorbed depreciation should be allowed to be adjusted against capital gains is incorrect, as the said provisions are not attracted to the facts of the present case.

10. Aggrieved by the order of the Tribunal, the assessee is before this Court and this Tax Case (Appeal) was admitted by this Court on the following substantial question of law:

"Whether on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the appellant is not entitled to set off of brought forward depreciation loss relating to assessment year 1997-98 against profit and gains arising from sale of business assets for assessment year 1999-2000?"

11. Learned counsel appearing for the assessee submitted that the depreciation loss carried from the assessment year 1997-98 could be set off against short term capital gains arising from the sale of depreciable assets for the assessment year 1999-2000. Under Section 32(2) of the Income Tax Act, the carried forward depreciation had to be set off against income from profits and gains of business. In the present case, the profit on the sale of depreciable assets had arisen in carrying on the business activity, though the profit arising on sale of depreciable assets was taxed under short term capital gains by deeming provision of Section 50 of the Income Tax Act. He further submitted that Section 50 of the Income Tax Act does not state about the capital gain on sale of assets. It only provides for withdrawal of depreciation already allowed on depreciable asset at the time of sale. Hence, the carry forward depreciation allowance for the assessment year 1997-98 as originally allowed is in order and there is no income

escaping assessment. He also submitted that Tribunal had not adverted to the decisions of the Supreme Court in the case of **CIT – Vs – Cocanada** reported in **57 ITR 306** and **Sasoon Vs. CIT** reported in **86 ITR 575**, wherein, it was held that the income arising from business activities, though taxed as income under different heads, constitute business income. Further more, the Tribunal had not addressed the issue that in terms of Section 32(2)(iii), whether the assessee will be entitled to set off the brought forward depreciation loss against capital gains.

12. Per contra, learned Standing Counsel appearing for the Revenue supported the decision of the Special Bench of the Tribunal and contended that if the business from which the depreciation claim arose is not carried out in any of the assessment years, the assessee would not be entitled to set off.

13. Heard learned counsel appearing for the assessee and the learned Standing Counsel appearing for the Revenue and perused the materials placed before this Court.

14. Before going into the merits of the case, for better appreciation of the issue, we would like to consider the provisions of Section 32(2) of the Income Tax Act as it stood prior to the amendment and after amendment vide Finance Act (No.2) Act, 1996, with effect from 1997 and the same is quoted hereunder :-

<i>Before Amendment</i>	<i>After Amendment</i>
The provision of Section 32(2) as it stood prior to the amendment by the Finance (2) Act, 1996, is as under "(2) Where, in the assessment of the assessee, full effect cannot be given to any allowance under clause (ii) of sub-section (1) in any previous year, owing to there being chargeable being less than the allowance, then, subject to the provisions of sub-section (2) of section 72 and sub-section (3) of section 73, the allowance or part of the allowance to which effect has not been given, as the case may be, shall be added to the amount of the allowance for depreciation for the following previous year and deemed to be part of that allowance, or if there is no such allowance for that previous year, be deemed to be the allowance for that previous year, and so on for the succeeding previous years.	(2) Wherein the assessment of the assessee full effect cannot be given to any allowance under clause (ii) of sub-section (1) in any previous year owing to there being no profits or gains chargeable for that previous year or owing to the profits or gains being less than the allowance, then, the allowance or the part of allowance to which effect has not been given (hereinafter referred to as unabsorbed depreciation allowance), as the case may be, – (i) shall be set off against the profits and gains, if any, or any business or profession carried on by him and assessable for that assessment year; (ii) if the unabsorbed depreciation allowance cannot be wholly set off under clause (i), the amount not so set off shall be set off from the income under any other head, if any, assessable for that assessment year; (iii) if the unabsorbed depreciation allowance cannot be wholly set off under clause (i) and clause (ii), the amount of allowance not so set off shall be carried forward to the following assessment year and (a) it shall be set off against the profits and gains, if any, of any business or profession carried on by him and assessable for that assessment year;

Before Amendment	After Amendment
	(b) if the unabsorbed depreciation allowance cannot be wholly so set off, the amount of unabsorbed depreciation allowance not so set off shall be carried forward to the following assessment year not being more than eight assessment years immediately succeeding the assessment year for which the aforesaid allowance was first computed: Provided that the business or profession for which the allowance was originally computed continued to be carried on by him in the previous year relevant for that assessment year.

(emphasis supplied)

15. Section 72 of the Income Tax Act provides for carry forward and set off of business loss and Clause (2) of Section 72 of the Income Tax Act provides the manner in which the carry forward and set off of business loss should be computed. Section 72 of the Income Tax Act reads as follows:

Carry forward and set off of business losses.

72. (1) 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.

or where he has no income under any other head, the whole loss shall, subject to the other provisions of this Chapter, be carried forward to the following assessment year, and

(i) it shall be set off against the profits and gains, if any of any business or profession carried on by him and assessable for that assessment year;

(ii) if the loss cannot be wholly so set off, the amount of loss not so set off shall be carried forward to the following assessment year and so on:

Provided

(a).....

(b)....

(2) Where any allowance or part thereof is, under sub-section (2) of section 32 or sub-section (4) of section 35, to be carried forward, effect shall first be given to the provisions of this section.

(3)....."

(emphasis supplied)

16. In the present case, the Tribunal came to hold that the depreciation for set off relates to the assessment year 1997-1998 and the business is still continuing. In such a situation, the Tribunal went on to hold that Section 32(2) (i) and 32(2) (ii) do not get attracted. This is not the case of the appellant/assessee. The only plea is that if Section 32(2) (iii) provides that unabsorbed depreciation allowance

cannot be wholly set off under clause (i) and clause (ii), the amount of allowance not so set off shall be carried forward to the following assessment year and it shall be set off against profit and gains, if any, of any business or profession carried on by him and assessable for that assessment year in terms of Section 32(2)(iii)(a) of the Income Tax Act. The following assessment year in this case is 1999-2000.

17. Unfortunately, the Tribunal has not addressed the issue in the light of the said provision Section 32(2)(iii)(a) of the Income Tax Act. In paragraph 7 of the order, the Tribunal went on to hold that unabsorbed depreciation being two years older to the present assessment year, viz., 1999-2000, the assessee would be entitled to carry forward the said unabsorbed depreciation to be set off against the profit and gains of business to which this depreciation is related to is still carried on and the same shall be allowed to be carried forward for the following six assessment years. There is no dispute on this finding of the Tribunal.

18. But the core issue is whether in terms of Section 32(2)(iii) of the Income Tax Act, the assessee will be entitled to set off the brought forward depreciation loss against capital gains. That issue, apparently,

has not been addressed by the Tribunal in the order in question. All that the Tribunal says in paragraph 9 of the order is that, though it is abundantly clear that Section 32(2)(iii) is operational in the case of the assessee, it only says that unabsorbed depreciation can be carried forward to the successive years. That is not the issue raised in the appeal.

19. At the risk of repetition, we once again reiterate that the issue to be decided in the case is whether the capital gains arising out of sale of depreciable assets could be set off against the profits and gains of business for the assessment year 1999-2000. That issue, unfortunately, has not been considered by the Tribunal. Furthermore, the decisions of the Supreme Court in the case of ***CIT - Vs - Cocanada*** reported in ***57 ITR 306*** and ***Sasoon Vs. CIT*** reported in ***86 ITR 575*** raised in the grounds of appeal by the assessee have also not been adverted to. The decision of the Supreme Court clearly gives a pointer to the issue as to whether the appellant/assessee is entitled to set off of brought forward depreciation loss as against profits and gains of business arising from sale of depreciable assets for the assessment year 1999-2000.

20. In this view of the matter, we are inclined to remand the matter back to the Tribunal to consider and pass orders on the entire issues raised by the assessee. Accordingly, the order of the Tribunal stands set aside and the matter is remanded back to the Tribunal for consideration of the entire issues afresh.

In the result, this Tax Case (Appeal) stands disposed of. No costs.

Index: Yes / No
Internet: Yes / No

(R.S.,J.) (R.K.,J.)
20.01.2015

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To

1. The Income Tax Appellate Tribunal, Madras 'C' Bench (Special Bench).
2. The Commissioner of Income Tax (Appeals)-I, Madurai.
3. The Assistant Commissioner of Income Tax Circle I (1), Tuticorin.

R.SUDHAKAR,J.
AND
R.KARUPPIAH,J.

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