

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 24.8.2015 and Pronounced on: 28.03.2016

Coram:

The Honourable Mr. Justice V. RAMASUBRAMAN
and
The Honourable Mr. Justice K.K. SASIDHARAN

Tax Case (Appeal) No.213 of 2015

M/s. Sundaram Finance Limited
21, Pattulos Road,
Chennai 600 002.

... Appellant/Appellant

Vs.

The Deputy Commissioner of Income Tax
Special Range II, Chennai.

... Respondent/Respondent

Prayer : Appeal filed under Section 260 A of the Income Tax Act, against the order of the Income Tax Appellate Tribunal 'B' Bench, Chennai, dated 13th July 2005 in ITA Nos.2781/(Mds)/95 against the order, dt. 22.11.1995 in I.T/appeal No.141/93-94 of the Commissioner of Income Tax (Appeals), Chennai against the Assessment order, dated 29.10.93 of the Deputy Commissioner of Income Tax, Special Range-II, Madras in PAN/GIR No-47-066-Co-3051/9-5 for the assessment year 1988-89.

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

For Respondent : Mrs.Hema Muralikrishnan,
Jr.Standing Counsel for Income Tax.

JUDGMENT

V.RAMASUBRAMANIAN, J

This appeal is by the Assessee, under Section 260-A of Income Tax Act 1961, raising the following substantial questions of law:-

(1) Whether on the facts and circumstances of the case, the Tribunal was right in holding that the unabsorbed investment allowance had to be deducted from profits for the purpose of computing and allowing deduction under Section 32-AB ?

(2) Whether on the facts and in the circumstances of the case the Tribunal was right in not appreciating that deduction under Section 32-AB had to be allowed before set off under Section 72 and hence before deducting unabsorbed investment allowance from the earlier years ?

2. Heard Mr.R.Vijayaraghavan, learned counsel for the Assessee and Mrs.Hema Muralikrishnan, learned Junior Standing Counsel for the Department.

3. The appellant is a non-banking finance company. Their assessment for the Assessment Year 1988-89 was reopened under Section 147 of the Act by issuing a notice under Section 148 of the Act, on 27.9.1991. The appellant filed a Return of Income admitting the same total income as declared in the Original Return.

4. In the Original Assessment, the Assessing Officer allowed deduction under Section 32-AB to the extent of Rs.57,16,131/-. But in the re-assessment proceedings, the Assessing Officer reduced the claim of deduction to Rs.17,21,922/- on the ground that depreciation for the relevant assessment year had to be recomputed.

5. The contention of the assessee that the deduction under Section 32-AB was on the profits and gains of business before setting off the carried forward loss under Section 72 of the Act, was rejected and the Assessing Officer held that the carry forward of investment allowance for the earlier year was set off as per Section 32-A(3)(ii) of the Act and not under Section 72 of the Act.

6. The Assessing Officer also took the view that the depreciation written back to the extent of Rs.3,59,74,762/- would form part of the book profits of the relevant previous year.

7. The assessee filed an appeal raising several issues. But the appeal was confined only to four issues namely (i) Whether the depreciation written back would form part of the book profits of the relevant previous year (ii) Whether the withdrawal of deduction amounting to Rs.17,21,992/- under Section 32-AB on the ground that the appellant did not have a positive income under the head "profits and gains of business" was correct (iii) Whether the withdrawal of depreciation at 100% in respect of bricks for cupola was correct and (iv) Whether the levy of interest under Section 216 was correct.

8. The first Appellate Authority upheld the contention of the assessee on the first question relating to the depreciation written back, on the ground that the issue is covered by Circular No.550 dated 1.1.1990 and that therefore, the Assessing Officer should verify the claim with reference to the Board Circular and allow relief. But the first Appellate Authority held against the assessee, the second question relating to deduction under Section 32-AB on the ground that if there is no positive income under the head income from business, there cannot be any scope for allowing this deduction.

9. The assessee as well as the Revenue filed further appeals before the Tribunal. While the appeal filed by the Revenue was for the Assessment Year 1994-95, the appeal filed by the assessee was for the Assessment Years 1988-89, 1992-93, 1993-94 and 1994-95. The appeal of the assessee for the Assessment Year 1988-89 was with regard to deduction under Section 32-AB. The assessee contended that deduction under Section 32-AB should be computed before setting off of carried forward unabsorbed investment allowance.

10. But the Tribunal, by an order dated 13.7.2005 held that the total income for the purpose of deduction under Section 32-AB has to be computed as per the provisions of Sections 28 to 32-A and that therefore, the investment allowance carried forward has to be set off for the purpose of computing total income. Holding further that once the carry forward investment allowance was set off admittedly, the assessee has no positive income for the purpose of grant of deduction under Section 32-AB, the Tribunal rejected the assessee's appeal. Therefore, the assessee has come up with the above appeal.

11. It is the contention of Mr.R.Vijayaraghavan, learned counsel for the assessee that deduction under Section 32-AB has to be computed on the profits as computed under the head "profits and gains of business" and not on the total income. According to the learned counsel the profits under Section 28 have to be computed first and thereafter, the eligible allowances and deductions as enumerated in Sections 29 to 43-C have to be allowed. Section 32-AB itself, according to the learned counsel envisages set off of the relief under the Section against "profits and gains of business" prior to setting off of carried forward business losses or unabsorbed depreciation under Section 72.

12. In support of the said contentions, the learned counsel relied upon a decision of this Court in Seshasayee Paper and Boards Limited v. Deputy Commissioner of Income Tax [272 ITR 165]. In the said case, this court was concerned with the question whether the unabsorbed depreciation should be allowed before the unabsorbed investment allowance and what could be the

order of priority in claiming the unabsorbed depreciation and unabsorbed investment of allowance. After referring to the decision of the Supreme Court in CIT v. Mother India Refrigeration Industries [155 ITR 711], to the effect that in computing the profits and gains of a business for the current year, depreciation for the current year must be deducted first before deducting the unabsorbed carried forward business losses of earlier years, this Court answered the question against the assessee. But while doing so, this Court quoted with approval the order of priority enumerated by the High Court of Gujarat in Monogram Mills Company Limited v. CIT [135 ITR 122].

13. In Monogram Mills case, the Gujarat High Court held that the scheme of priority would be as follows:-

- (1) current year's depreciation-because that is the first charge on the receipts in the P&L a/c;
- (2) carried forward business losses under s. 72(2) r/w s.72(1);
- (3) unabsorbed depreciation by virtue of the provisions of s. 32 (2);
- (4) unabsorbed development rebate - because of the provisions of cls. (i) and (ii) of s. 33(2); and
- (5) current year's development rebate.

14. Therefore, on the basis of the above decisions, the learned counsel for the assessee contends that the priority of setting off the carried forward business or unabsorbed allowances against the total income should be in the following order of preference:

Firstly, current year's depreciation and amortised scientific expenditure have to be deducted (ss 32 & 35)

Then, carried forward business loss (only from business income, under certain conditions) s.72(1);

Then, unabsorbed depreciation and amortised scientific expenditure of earlier years (ss 32 (2) and 35(4);

Then, unabsorbed development rebate of earlier years (ss.33 (2) (ii)

Then, current year's development rebate (ss.33(2) (i)

Then, unabsorbed development rebate (ss.33A(2) (ii)

Then, current year's development allowance of earlier years (s.32A(3) (ii)); and

Lastly, current year's investment allowance (s.32A(3) (i).

15. We have carefully considered the above submissions.

16. At the outset, it should be pointed out that Sections 28 to 44DB are grouped together under the heading "D-Profits and gains of business or profession" under Chapter IV which deals with "Computation of Total Income". Section 28 of the Act lists out the different types of income that are chargeable to income tax under the head "Profits and gains of business or profession". Section 29 lays down that the income referred to in

Section 28 should be computed in accordance with the provisions contained in Sections 30 to 43-D.

17. A close look at Sections 28 and 29 would show that all types of income need not necessarily be chargeable to tax under the head "Profits and gains of business or profession". While Section 28 merely lists out the income chargeable to tax under the above head, Section 29 indicates the method of computation of such income.

18. Sections 30 to 43-D, to which a reference is made in Section 29, deal with certain items of expenditure, depreciation, investment allowance etc., which could be deducted from the total income, for the purpose of arriving at the income that could be charged to tax under the head "Profits and gains of business or profession". But these provisions do not deal with the question of set off or carry forward. Issues relating to set off or carry forward and set off are dealt with in Chapter VI.

19. Under Section 72 (1), the assessee is allowed to carry forward to the following assessment year and get set off against the profits and gains of business assessable for that assessment year, (i) any loss that could not be set off against income under any head of income in accordance with the provisions of Section 71 or (ii) the whole loss where he has no income under any other head. But this benefit will be available under Section 72(1), only where the net result of the computation under the head "Profits and gains of business or profession" for any assessment year is a loss to the assessee.

20. Sub-section (2) of Section 72 states that where any allowance is to be carried forward in terms of Section 32(2) or 35 (4), effect should first be given to the provisions of Section 72. Under sub-section (2) of Section 32, as it stood at the relevant point of time, the following rules were provided:

(i) If full effect cannot be given to any allowance covered by the section, in any previous year owing to there being no profits or gains chargeable for that previous year or owing to the profits and gains being less than the allowance, then the allowance to which effect has not been given may be set off against the profits and gains assessable for that assessment year.

(ii) If the unabsorbed depreciation allowance cannot be wholly set off under the first rule, the amount not so set off shall be set off from the income under any other head.

(iii) If the unabsorbed depreciation allowance cannot be wholly set off under rules 1 and 2 above, the amount of

allowance that could not be set off, shall be carried forward to the following assessment year and set off against profits and gains assessable for that assessment year. This process can be repeated successively for a period not more than 8 assessment years.

21. Keeping the above in mind, if we come back to Section 32-AB it could be seen that under the Finance Act, 1987, this Section was amended. We are taking particular note of this amendment, in view of the fact that in the case on hand we are concerned with the assessment year 1988-89. The Explanatory note on the provisions of the Finance Act, 1987 contained in Circular No.495 dated 22.9.1987 states that under the Finance Act, 1986, deduction under Section 32-AB was allowed after setting off business loss if any, brought forward from earlier years and that in order to remove the hardship in cases where the assessee may not be able to avail of this benefit because of brought forward losses from earlier years, Finance Act, 1987 sought to provide that the deduction will be allowed before setting off of brought forward losses.

22. The words inserted in Section 32-AB (1), by the Finance Act, 1987 were "such deduction being allowed before the loss, if any, brought forward from earlier years is set off under Section 72. Therefore, it is clear that any deduction under Section 32AB has to be allowed before a set off is made under Section 72 in respect of the loss brought forward from the earlier years. Hence, the second question of law, is even as per the plain language of Section 32AB(1), as amended by Finance Act, 1987, has to be answered in favour of the assessee.

23. On the first question it is seen from para 4 of the order of the Tribunal that the Tribunal was persuaded to take a view in favour of the Revenue, only on account of the fact that the assessee was left with no positive income for the purpose of grant of deduction under Section 32AB, once carried forward investment allowance was set off. But the grant of the benefit did not depend upon the question whether the assessee was left with a positive income or not. If the deductions to be made under various provisions from Section 30 onwards, lead only to a negative income that could be chargeable to tax under the head "Profits and gains of business" in terms of Section 28, the same cannot lead to a different interpretation to the plain language of the provisions.

24. The Assessing Officer went purely by logic, on the basis of the decision of the Supreme Court in *Cambay Electric Supply v. CIT* [113 ITR 84], to hold that unabsorbed depreciation etc., provided in earlier Sections have to be set off before making a deduction under the latter Sections. Since the carry forward of investment allowance is under Section 32A(3)(ii) and not under

Section 72, he held that income from business has to be computed by allowing a deduction as per the benefit available under a prior Section namely Section 32A(3)(ii) before proceeding to give a deduction under the latter Section namely Section 32AB.

25. But we do not find that such a logic has any application. While Section 32A deals with investment allowance, Section 32AB deals with investment deposits. We have already pointed out the object of the amendment made under Finance Act, 1987 to Section 32AB.

26. Therefore, we are of the considered view that even the first question of law has to be answered in favour of the assessee. Accordingly, both questions of law are answered in favour of the assessee and the appeal allowed. No costs.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

gr.

To

1. The Income Tax Appellate Tribunal,
Bench B Chennai.

2. The Deputy Commissioner of Income Tax
Special Range II, Chennai-600 034.

3. The Commissioner of Income tax (Appeals),
Chennai 600 034.

+ 1 cc to Mr.J. Narayanasamy, Advocate Sr.19136

T.C.A.No.213 of 2015

GJ(CO)
Eu 13.04.16

WEB COPY