IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.11.2018

CORAM:

THE HONOURABLE MR.JUSTICE **T.S.SIVAGNANAM**

and

THE HONOURABLE MR.JUSTICE **N.SATHISH KUMAR**

Tax Case Appeal No.1598 of 2008

MSV Samikalai Nadar (HUF)
118/1 Jai Nagar, Thanathavanam Main Road,
Ponmeni, Madurai - 625 010. ...Appellant

-vs-

Commissioner of Income Tax I
Madurai 625 002. .... Respondent

Tax Case Appeal filed under Section 260-A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras "D" Bench dated 12.10.2007 in I.T.A.No.691/MDS/2006 for the assessment year 1998-99.

For Appellant : Mr.B.Sivaraman
for Ms.Lakshmi Sriram

For Respondent : Ms.V.Pushpa
for Mr.M.Swaminathan

J U D G M E N T

(Judgment of the Court was delivered by
T.S.SIVAGNANAM,J.)

This appeal by the assessee has been filed under Section 260-A of the Income Tax Act, 1961 is directed against the order passed by the the Income Tax Appellate Tribunal, Madras "D" Bench, in I.T.A.No. 691/MDS/2006 for the assessment year 1998-99.

2. The appeal has been admitted on 04.11.2008 on the following substantial questions of law:-

> " *i) Whether on the facts and circumstances of the case, the Tribunal was right in law in holding that as per the provisions of Section 32(2) with effect from 1.4.1997, the unabsorbed depreciation upto the assessment year 1996-97 gets merged with the depreciation of the assessment year 1997-98 as the current year's (1997-98) depreciation and the entire unabsorbed depreciation including that of the assessment years 1994-95 and 1995-96 can be set off against business income only of assessment year 1998-99 and cannot be set off against capital gains for the assessment year 1998-99 as per the amended Section 32(2) with effect from 1.4.1997?*
>
> *ii) Whether on the facts and in the circumstances of*

the case, the Tribunal was right in law in not considering the CBDT circular and the speech of the Finance Minister (1996 222 ITR St 36) and the CBDT Circular No.762 dated 18.2.1998 (1998 230 ITR St page 1,2)?"

3. We have heard Mr.B.Sivaraman, learned counsel for the assessee and Mr.M.Swaminathan, learned Senior Standing Counsel on behalf of the respondent.

4. On a perusal of the order passed by the Tribunal, we find that the Tribunal followed the decision of the Special Bench in the case of ***Southern Travels vs. ACIT*** (103 ITD 198) and accordingly, allowed the appeal filed by the Revenue. The said decision in the case of Southern Travels was challenged before the Division Bench of this Court in the case of ***Southern Travels vs. The Assistant Commissioner of Income Tax*** [MANU/TN/1396/2015]. The question which was considered was whether 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.

5. The Division Bench in the said judgment set aside the order passed by the Tribunal and remanded the matter back to the Tribunal

for consideration of the entire issue afresh. The operative portion of the judgment reads as follows:-

"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 to 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 ears 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 MANU/SC/0163/1965 : 57 ITR 306 and Sasoon Vs. CIT reproted in 86 ITR 575 raised in the ground 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, the Tax Case (Appeal) *stands disposed of. No costs."*

6. Thus, by following the above decision, the appeal filed by the assessee is allowed and the order passed by the Tribunal is set aside and the matter is remanded back to the Tribunal for consideration of the entire issue afresh. The substantial questions of law framed for consideration are left open. No costs.

(T.S.S.,J.) (N.S.K.,J.)

13.11.2018

Speaking / Non-Speaking Order

Index : Yes/No

svki

To

1.The Commissioner of Income Tax I
Madurai 625 002.

2. The Income Tax Appellate Tribunal,
Madras "D" Bench.

T.S.SIVAGNANAM,J.

and

N.SATHISH KUMAR,J.

(svki)

<u>TCA.No.1598 of 2008</u>

13.11.2018