

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.04.2018

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

AND

THE HONOURABLE MR.JUSTICE N.SESHASAYEE

T.C. (Appeal).No.885 of 2008

M/s.Sanmar Speciality Chemicals Limited
9, Cathedral Road
Chennai- 600 086

...Appellant

VS

The Income Tax Officer
Company Ward VI(I)
Chennai – 600 034

...Respondent

Prayer:- Appeal filed under Section 260A of the Income Tax Act against the order of the Income Tax Appellate Tribunal "C" Bench, Chennai dated 14th December 2007 in ITA No.1583/Mds/2005.

For Appellant : Mr.Vijayaraghavan

For Respondent : Mr.T.R.Senthil Kumar

JUDGMENT

Heard Mr. Vijayaraghavan, learned counsel appearing for the appellant and Mr.T.R.Senthil Kumar, learned counsel appearing for the respondent.

2. This appeal by the assessee is directed against the order passed by the Income Tax Appellate Tribunal in ITA No.1583/Mds/2005 dated 14.12.2007 for the relevant Assessment Year 1999-2000.

3.This Tax Case Appeal has been admitted on the following substantial questions of law:

1.Whether on the facts and in the circumstances of the case the Tribunal was right in holding that the assessing officer's computation of setting off of unabsorbed depreciation first against the profits is principally correct without appreciating that the provisions of Section 205 of the Companies Act is not required to be applied to Section 115JA?

2.Whether on the facts and in the circumstances of the case the tribunal was right in directing the assessing officer to determine the depreciation or business loss of each year and to carry forward the lower of two for adjustment which will result in enhancement of assessment for which the Tribunal has no power?

3. Whether on the facts and in the circumstances of the case the Tribunal was right in upholding the adjustments of unabsorbed depreciation alone against book profits while such adjustments are not contemplated under the provisions of Section 115JA of the Act?

4. After elaborately hearing the learned counsel for the parties and after perusing the materials placed on record, we find that the Tribunal has remanded the matter to the Assessing Officer to consider the calculation aspect afresh. Learned counsel pointed out that decision referred to by the Tribunal in the case of **Hindustan Powerplus Ltd., Vs. DCIT** in I.T.A.Nos.920 to 922/Mds/2005 dated 31.01.2007 has no relevance to the facts of the present case. Learned counsel further submits that the Assessee may not have any serious objection for the Assessing Officer to redo the calculation, but the Assessee cannot be worse than what they were in the hands of the Assessing Officer pursuant to an order of remand passed by the Tribunal. In this regard, it is relevant to take note of the legal position as to whether the Tribunal has power to enhance the assessment and take back the benefit granted to the Assessee by the Assessing Officer. This question is no longer res integra and has been answered by the Supreme Court in **MCORP Global (P) Ltd., Vs. Commissioner of Income Tax** reported in **(2009) 309 ITR 0434**. It was held that the

Tribunal was not authorized to take back the benefit granted to the Assessee by the Assessing Officer and the Tribunal has no power to enhance the assessment. The Hon'ble Supreme Court referred to an earlier decision in the case of **Hukumchand Mills Ltd., Vs. CIT** reported in (1967) 63 ITR 232 (SC). The operative portion of the judgment reads as follows:

"6.In the case of Hukumchand Mills Ltd., Vs.CIT (1967) 63 ITR 232 (SC) this Court has held that under s.33(4) of the IT Act, 1922 [equivalent to s.254(1) of the 1961 Act]. The Tribunal was not authorized to take back the benefit granted to the assessee by the AO. The Tribunal has no power to enhance the assessment. Applying the ratio of the said judgment to the present case, we are of the view that in this case, the AO had granted depreciation in respect of 42,000 bottles out of the total number of bottles (5,46,000), by reason of the impugned judgment. That benefit is sought to be taken away by the Department, which is not permissible in law. This is the infirmity in the impugned judgment of the High Court and the Tribunal."

5. The decision in the case of MCORP Global (P) Ltd., was followed by the Division Bench of the High Court of Gujarat in **Fidelity Shares and Security Ltd., Vs. Deputy Commissioner of Income Tax** reported in **(2017) 390 ITR 0267 (Guj)**, wherein it was held

that the Tribunal has no power under the Income Tax Act to enhance the assessment in appeal in view of the statutory provisions. Further it was held that the benefit, which was sought to be taken away by the Department, was not permissible in law and this is the infirmity in the judgment of the Tribunal as the Tribunal has no power to enhance the assessment in appeal.

6. Considering the facts and circumstances of the case, we find that there is no error in the order passed by the Tribunal in remanding the matter for fresh consideration to the Assessing Officer. But, however, the learned counsel for the appellant pointed out that the observations and directions issued by the Tribunal are incorrect. In any event, we have indicated in the preceding paragraphs that the Tribunal has no power under the Income Tax Act to enhance the assessment in an appeal. Equally, it cannot be done on an order of remand being passed by the Tribunal to the Assessing Officer. Therefore, we opine that it is sufficient to clarify the legal position as held by the Honble Supreme Court in **Hukumchand Mills Ltd., case** and in **MCORP Global (P) Ltd. case** followed by the High Court of Gujarat in **Fidelity Shares and Security Ltd., Vs. Deputy Commissioner of Income Tax case**. The Assessing Officer, while

reconsidering the matter on remand, should bear the above legal principle in mind and the assessee cannot be denied whatever benefit he has granted in the Assessment Order dated 28.02.2003.

7. In the light of the above, the Substantial Questions of Law No.2 is answered in favour of the Assessee in the light of the law laid down by the Hon'ble Supreme Court in Hukumchand Mills Ltd., case and in MCORP Global (P) Ltd. case followed by the High Court of Gujarat in Fidelity Shares and Security Ltd., case. Substantial Questions of Law Nos.1 and 3 are left open and the assessee is entitled to canvass all issue before the Assessing Officer. As pointed out earlier, the Assessing Officer should bear in mind the decisions of the Supreme Court while considering the matter on remand.

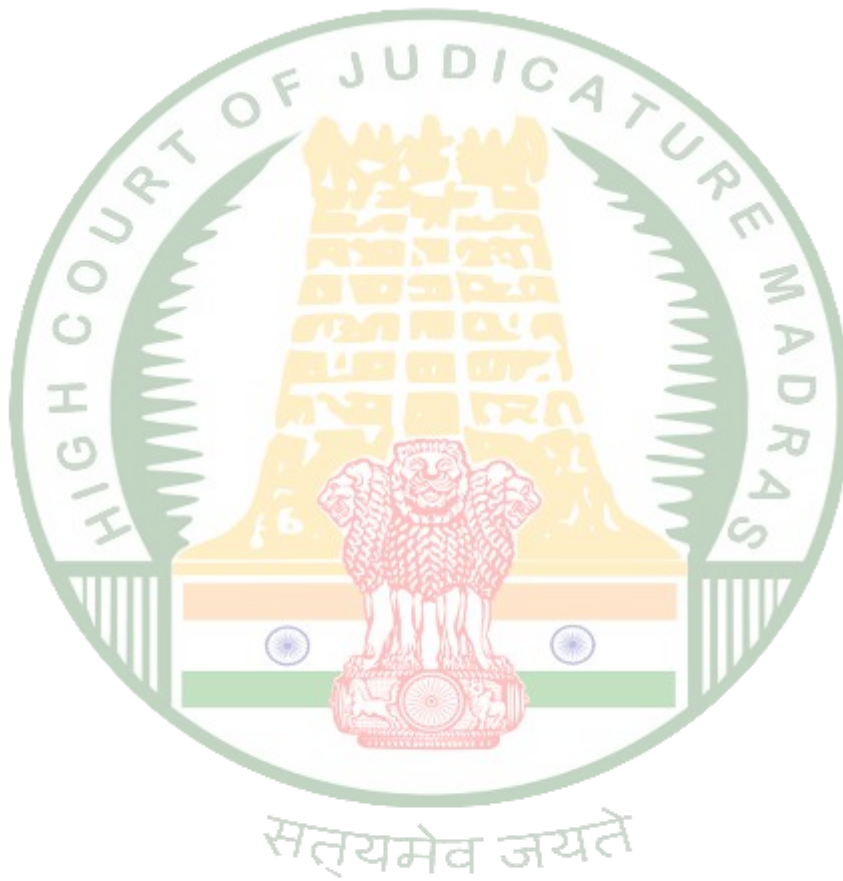
With the above observations and directions, this Tax Case Appeal is partly allowed. No costs.

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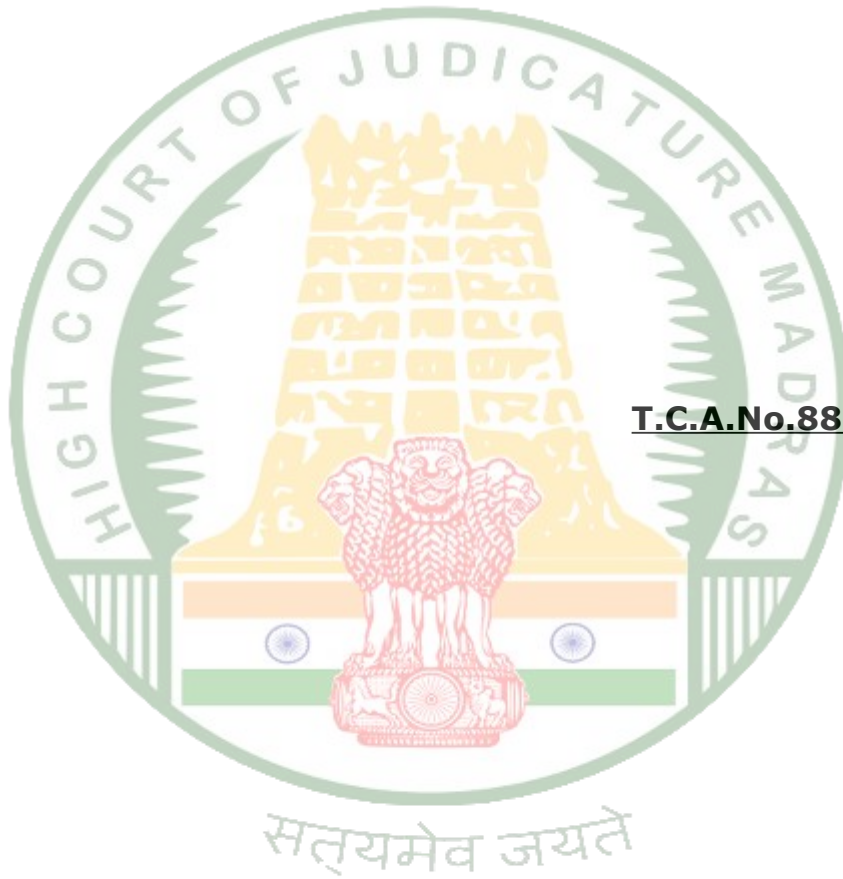
The Income Tax Appellate Tribunal "C" Bench
Chennai



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&
N.SESHASAYEE.J.,

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