IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.06.2019

CORAM :

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

TCA.No.757 of 2008

Commissioner of Income Tax,
Chennai .. Appellant

Vs.

S&S Power Switchgear Limited,
168, Mount Poonamallee,
High Road, Chennai - 600 096. .. Respondent

Prayer : Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961, against the order of the Income Tax Appellate Tribunal Madras 'C' Bench, dated 04.04.2007 in I.T.A.No.1964/Mds/2000-01 for the assessment year 2000-01.

For Appellant : Mr. T.R.Senthilkumar
Senior Standing Counsel
and Ms.K.G.Usha Rani

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

* * *

J U D G M E N T

[Judgment of the Court was delivered by T.S.Sivagnanam, J.]

This appeal filed by the Revenue under Section 260 A of the Income Tax Act, 1961 (hereinafter referred to as "the Act") is directed against the order dated 04.04.2007 in MP.No.0027/Mds/07 in ITA.No.1964/Mds/2003 passed by the Income Tax Appellate Tribunal Madras, 'C' Bench in the assessment year 2000 – 2001.

2.The appeal has been admitted on 08.07.2008 on the following substantial question of law:

> *"Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that brought forward losses could be set off against capital gains arising from sale of a business undertaking, contrary to the provisions of Section 72 of the Income Tax Act?"*

3.We have heard Mr.T.R.Senthilkumar, learned Senior Standing counsel for the appellant/revenue and Mr.Vijayaraghavan, learned counsel for the respondent/assessee.

4.Though the appeal has been entertained on the above substantial question of law, in our considered view, the question of law need not be answered for the following technical reasons:

5.The assessment for the relevant year was completed by order dated 24.03.2003. The Assessing Officer held that unabsorbed depreciation cannot be said set off as against the current Long Term Capital Gains by interpreting Section 32(2) of the Act. He further held that identical interpretation is also applicable to Section 72 of the Act and the respondent assessee can set off brought forward business loss against current year business income only and in other words, it held that the assessee cannot claim set off against the capital gains. The assessee filed an appeal before the 'Commissioner of Income Tax (Appeals)-V (CIT(A)) deciding both the issues on which the Assessing Officer denied set off.

6.The CIT(A) by an order dated 04.08.2003 considered both the issues and held in favour of the assessee. It would be relevant to take note of the finding rendered by the CIT(A) on both the issues as could be seen from paragraph 6 of the order dated 04.08.2003, which is extracted hereunder:

> *"6..........The appellant's contention is that its receipt arises only on account of sale of business assets and it is only recapturing of depreciation allowed in the earlier years. Deeming provision cannot change the nature of income – it was contended. The appellant's counsel also pointed out that SLP was refused on this decision. Decision of Supreme Court in the case of Cocanada Radhaswamy Bank Ltd ST ITR [supra] was also cited where the set off of interest from securities was allowed to be set off against business loss. The decision of Supreme Court in the case of United Commercial Bank Limited [supra] is also in the same vein. The Assessing Officer has rejected the appellant's claim on the basis of his interpretation of Section 32(2) of the Income Tax Act, 1961. In my discussion in the earlier part of the order I have discussed as to why his interpretation is not on correct time. For these reasons and also after taking into account the tenor of the decisions cited by the appellant, its ground on this point is accepted and the Assessing Officer is directed to allow the set off as claimed by the appellant."*

7.The revenue preferred an appeal before the Tribunal, which was entertained as ITA.No.1964/Mds/2003. With regard to the other issues, the assessee filed an appeal before the Tribunal in ITA.No.1929/Mds/2003 and there was an another appeal filed by the assessee for the assessment year 1996-1997 in ITA.No.1849/Mds/2003. All the three appeals i.e., one filed by the Revenue and two filed by the assessee were disposed of by the Tribunal by common order dated 02.02.2007. The appeal filed by the revenue in ITA.No.1964/Mds/2003 was dismissed. In other words, the finding rendered by the CIT(A) in ITA.No.58/2003-2004 stood confirmed in which both the issues were decided in favour of the assessee. For the reasons which are not clear, the assessee moved a Miscellaneous Petition before the Tribunal in MP.No.0027/Mds/07 contending that the Tribunal had not considered set off of carried forward business losses against the profit arising from transfer of the business undertaking assessed as capital gains. The Tribunal allowed the miscellaneous petition by order dated 04.04.2007 holding that unabsorbed business losses or carried forward business losses should also be set off against the profit assessed as capital gains.

8.As against the order passed by the Tribunal in ITA.No.1964/Mds/2003 dated 02.02.2007, the revenue filed an appeal before this Court in TCA.No.135 of 2008. Much prior to the appeal filed by the Revenue before this Court against the substantive order of the Tribunal, the Tribunal had passed an order in MP.No.0027/Mds/2007 on 04.04.2007. Thus covering both the issues, the following substantial question of law was framed for consideration in TCA.No.135 of 2008:

"Whether, in the facts and circumstances of the case, the Tribunal was right in allowing set off of prior years business loss and unabsorbed depreciation against short term gains?"

9.The Hon'ble Division Bench in the judgment reported in ***[2009] 318 ITR 0187*** in the case of ***Commissioner of Income Tax Vs. S & S Power Switchgear Limited***, dismissed the appeal filed by the Revenue on the ground that no question of law much less a substantial question of law is involved. In the facts of the present case, the question would be as to whether the present appeal filed by the revenue against the order passed in MP.No.0027/Mds/2007 dated 04.04.2007 would pursued by the revenue. The answer to the said question would be a definite "No". The appeal filed against the substantive order before the Tribunal is dated 02.04.2007 covering both issues and the Tribunal held against the Revenue which order was confirmed by the Division Bench in ***[2009] 318 ITR 0187*** (supra) holding that there is no substantial question of law arising for consideration.

10. In the light of the above, the Revenue cannot prosecute the present case as the order passed in the miscellaneous petition stood merged with the earlier order and the composite order being questioned before the

Court and the challenge at the instance of the revenue having been rejected in ***[2009] 318 ITR 0187*** (supra), the present appeal should also fail. Accordingly the appeal is dismissed on the ground that there is no substantial question of law involved in the case as also for the reasons set out.

(T.S.S., J.) **(V.B.S., J.)**
19.06.2019

Speaking order: Yes/No
Index: Yes/No
mp/cse

T.S.SIVAGNANAM, J.

and

V.BHAVANI SUBBAROYAN, J.

mp/cse

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