

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :: 03-04-2019

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI

AND

THE HON'BLE MR.JUSTICE C.V.KARTHIKEYAN

T.C.A.No.90 OF 2009

M/s.Alankar Business Corporation Ltd.
(Formerly Chennai Bottling Co.Ltd)
15, Shastri Road, Ram Nagar,
Coimbatore.

Appellant

-vs-

The Income Tax Officer,
Company Ward - I (1),
Chennai- 600 034.

Respondent

Appeal under Section 260A of the Income Tax Act, 1961, against the order of the Income Tax Appellate Tribunal, Chennai 'A' Bench, dated 18.07.2008, passed in ITA No.286/Mds/2006, against the order of the Commissioner of Income Tax (Appeals)-VIII, Chennai dated 21.11.2005 made in ITA Tr.No.21/2004-05 against the order dated 30.03.2004 passed by the Income Tax Officer, Company ward I(1), Chennai 34.

For Appellant : Mr.V.S.Jayakumar

For Respondent : Mr.T.Ravi Kumar,
Senior Standing Counsel.

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JUDGMENT
(By Dr.Vineet Kothari, J.)

This Appeal has been filed by the Assessee, namely, M/s.Alankar Business Corporation Ltd., Coimbatore, under Section 260A of the Income Tax Act, in short, 'Act', raising the following Substantial Questions of Law, which were admitted by a Co-ordinate Bench of this Court on 26.03.2009, arising from the

order of the learned Income Tax Appellate Tribunal, Chennai 'A' Bench, dated 18.07.2008, for Assessment Year 2001-2002.

'1. Whether the Tribunal was right in holding that the Unabsorbed Depreciation is not eligible to be carried forward under Section 32 (2) of the Income Tax Act, 1961 ?

2. Whether the Tribunal was right in rejecting the alternative plea and holding that the Unabsorbed Depreciation cannot be set off against the Short Term Capital Gain under Section 50 read with Section 72 of the Income Tax Act, 1961 ?

2. The question about carry forward of 'Unabsorbed Depreciation' was dealt with by the learned Tribunal and claim was disallowed with the following observations :

'20. We heard both sides in detail on this issue. As already stated, the treatment of unabsorbed depreciation allowance was similar and analogous upto assessment year 1996-97 by virtue of the amendment brought in by the Taxation Laws (Amendment & Miscellaneous) Act, 1986 which was with effect from 1.4.88 and also by virtue of Direct Taxation (Amendment) Laws, 1987 which was with effect from 1.4.1989 and the same position was re-introduced from the assessment year 2002-2003 onwards by Finance Act, 2001. The unabsorbed depreciation can be carried forward to subsequent assessment year which will take the colour of current depreciation of that subsequent year and can be set off against any income arising in that particular assessment year and further possible to be carried forward to subsequent years without any time limit. But, this was not the position available in the interim period from the assessment year 1996-97 to 2001-02. The period of carry forward was restricted to eight years; so also the brought forward unabsorbed depreciation can be set off only against business income of the subsequent assessment year. Literally speaking, this law applies to the impugned assessment year 2001-02 for which the assessee is in appeal before us. Even though the earlier position was re-introduced by a subsequent amendment, as far as the impugned assessment year 2001-02 is concerned, the relevant law was declared by the Finance (No.2) Act, 1996. The restriction imposed on carry forward and set off of unabsorbed depreciation allowance is clearly applicable to a case falling in the assessment year 2001-02. The consequent amendment brought in by the

Finance Act, 2001 does not change the position. This is because the Act has made it very clear that the amendment could be effective with effect from 1.4.2002; that is for the assessment year 2002-03 onwards. When the amending statute declares that the amended law is applicable with effect from a particular assessment year onwards, no rule for retrospectively can be applied thereto. As the words of statute were clear, there is no need of any exertion of interpretation. Therefore, in the light of the decisions cited by the ld. Senior D.R., we find that the assessee is governed by the position of law declared by Finance Act, 1996 and therefore, fettered by the restrictions and accordingly the unabsorbed depreciation cannot be set off against short term capital gains. This issue is decided against the assessee.

21. The third and alternative ground raised by the ld. C.A. at the time of argument and reiterated in the written submission filed by him is that the short term capital gains sought to be set off by the assessee should be treated as business income as the short term capital gains was computed under Section 50 of the Income-tax Act, 1961.

22. It is the case of the ld. C.A. that even though the computation was made under the head 'capital gains', virtually the point arises out of the sale of assets used in the business and depreciable in the course and therefore, always in the nature of business profit.

23. The above alternative contention also cannot be accepted for the reason that the profit arises out of the sale of block of assets has been specifically treated as short term capital gain under Section 50 of the Income-tax Act, 1961 and head of income under which it has to be computed is 'income from other sources' and not 'profits and gains of business or profession'. When the statute states for the interim period that the brought forward unabsorbed depreciation cannot be set off against any income other than the business income it is not possible to set off the unabsorbed depreciation to the short term capital gains computed under a specific head 'capital gains'.

24. In this context, it is fruitful to refer to the decision of Supreme Court in the case of Apollo Tyres Ltd. v. CIT (2002) 255 ITR 273 (SC) where the Court has held that Assessing Officer cannot disturb the book profit as certified under the Companies Act and where the issue was whether the UTI dividends

could be treated as part of business income. But the crucial difference in that case considered by the Supreme Court is that the dividend income was considered as income of the eligible business and not the income computed as such under the head 'profits and gains of business or profession'. Therefore, no analogy can be drawn from that decision either. Therefore, this contention also fails.

25. In result, this appeal filed by the assessee is dismissed.''

3. Mr.V.S.Jayakumar, learned counsel for the Assessee has urged before us that the learned Tribunal has erred in rejecting the said claim of the Assessee because prior to Amendment to Section 32 by the Finance Act, 2001, with effect from 01.04.2002, the carry forward of the said 'Unabsorbed Depreciation' was allowed without limitation of eight years and the Assessment Year 2001-2002 in question being the last year, the Assessee was entitled to carry forward and set off the 'Unabsorbed Depreciation' for the present year also.

4. On the contrary, Mr.T.Ravikumar, learned Senior Standing Counsel for the Revenue, has relied upon a decision of the Hon'ble Supreme Court in the case of Peerless General Finance and Investment Co. Ltd. v. Commissioner of Income Tax, (2016) 380 ITR 165 (SC), by which, the Hon'ble Supreme Court, by a short order, affirmed the judgment of the Calcutta High Court. The said order passed by the Hon'ble Supreme Court is quoted below for ready reference :

'1. Heard the learned counsels for the parties and perused the relevant material.

2. The special leave petition is dismissed subject to the observation that the unabsorbed depreciation as on April 1, 1997, can be set off against the income from any head for the immediate assessment year following April 1, 1997 (assessment year 1998-99)*, and thereafter if there still is any unabsorbed depreciation the same can be set off only against the business income for a period of eight (08) assessment years.

3. The special leave petition is disposed of in the above terms.

* As corrected by the order of the Supreme Court dated 16-12-2015.''

5. Having heard the learned counsels for the parties, we are of the opinion that since the matter of calculation of 'Unabsorbed Depreciation' in which it was first computed and the limitation of eight years prior to amendment has not been

properly computed in the present case, the matter deserves to be remanded back to the learned Assessing Authority for undertaking such computational exercise once again.

6. Therefore, without answering the aforesaid questions of law framed for our consideration, we remand the matter back to the learned Assessing Authority in the present case for Assessment Year 2001-2002 for fresh consideration. The Assessee will be free to raise his factual as well as legal contentions before the learned Assessing Authority and the Assessing Authority will be free to take a fresh view in the matter. The Assessing Authority may pass fresh orders within six months from today.

7. Appeal of the Assessee disposed of accordingly. No costs.

Sd/-
Assistant Registrar(CS IV)

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Sub Assistant Registrar

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To

1.The Income Tax Officer,
Company Ward - I (1),
Chennai- 600 034.

2.Income Tax Appellate Tribunal,
Chennai 'A' Bench,
Chennai.

3.The Commissioner of Income Tax (Appeals-VIII)
Chennai.

+1cc to Mr.V.S.Jayakumar, Advocate, S.R.No.32370

+1cc to Mr.T.Ravikumar, Advocate, S.R.No.32340

T.C.A.No.90 OF 2009

PM(CO)
vrn/20.05.2019