IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL (IT) NO.1029 OF 2017

Principal Commissioner of Income Tax-9 … Appellant
Vs.
Destimoney India Services Pvt. Ltd. … Respondent

Mr. Arvind Pinto for Appellant.
Mr. R. Murlidhar a/w. Mr. Upendra Lokegaonkar i/b. Mint and Confreres for Respondent.

CORAM : UJJAL BHUYAN,
MILIND N. JADHAV, JJ.
DATE : FEBRUARY 03, 2020

P.C. :

Heard Mr. Pinto, learned standing counsel Revenue for the appellant and Mr. Murlidhar, learned counsel for the respondent - assessee.

2. This appeal under Section 260-A of the Income Tax Act, 1961 (briefly 'the Act' hereinafter) has been preferred by the Revenue assailing the order dated 28.10.2015 passed by the Income Tax Appellate Tribunal, 'I' Bench, Mumbai ('Tribunal' for short) in I.T.A. No.3055/ Mumbai/2015 for the assessment year 2011-12.

3. Following order of this Court dated 04.11.2019, appellant has projected the following revised question as substantial question of law:

> 'Whether on the facts and in the circumstances of the case was the Tribunal right in law in setting aside the order of the CIT passed under Section 263 of the Act holding that when the claim of the assessee made for rectification has been justifiably allowed by the assessing officer then the same cannot be treated as a ground to invoke the provisions of Section 263 of the Act; overlooking the fact that the mistake rectified by the assessing officer was not apparent from the record but was that of a debatable issue?"

4. Assessment proceeding for the assessment year 2011-12 was

concluded by the assessing officer under Section 143(3) of the Act on 29.03.2014 determining total taxable income of the respondent at Rs.18,16,28,888.00.

5. Respondent thereafter filed application on 28.04.2014 for rectification of the assessment order under Section 154 of the Act. It was mentioned that respondent had carried forward business loss as well as unabsorbed depreciation to be set-off against income for the assessment year 2011-12 as well as for future years. While computing the total taxable income during assessment proceedings, set-off of the said brought forward business loss and unabsorbed depreciation aggregating to Rs.34,25,68,953.00 was not granted. In such circumstances, respondent sought for rectification of the assessment order by setting-off the brought forward business loss and unabsorbed depreciation against the assessed income. Assessing officer in his order dated 06.06.2014 accepted the above contention of the respondent by taking the view that it was a mistake apparent from the record. Accordingly, the assessment order was rectified by setting-off the unabsorbed depreciation of earlier years aggregating to Rs.18,16,28,888.00 to the extent of the assessed income and thereafter the remaining unabsorbed amount to be carried forward to the next year for the set-off.

6. The jurisdictional commissioner i.e., Commissioner of Income Tax-6, Mumbai took the view that the subsequent claim made by the respondent was a debatable issue which required a hearing. It was not a mistake which could be construed to be apparent from the record. In such circumstances, the Commissioner invoked jurisdiction under Section 263 of the Act by taking the view that the rectification order was erroneous in as much as it was prejudicial to the interest of the Revenue and by the order dated 26.08.2014, set aside the rectification order passed by the assessing officer with the direction that rectification application of the respondent be disposed of by passing a fresh order in accordance with law after giving a reasonable opportunity to the

respondent.

7. This order was assailed by the respondent by filing appeal before the Tribunal. In the appellate proceedings, Tribunal noted that the issue regarding set-off of unabsorbed depreciation against the income of the respondent for the assessment year under consideration was covered by the decision of the Supreme Court in *CIT Vs. Virmani Industries Pvt. Ltd.*, (1995) 216 ITR 607 which view has been followed by several High Courts as well as by the Tribunal. Therefore, by the appellate order dated 28.10.2015, Tribunal held that when the claim of the respondent was justifiably allowed by the assessing officer then the same could not have been interfered with by the Commissioner by invoking the provisions of Section 263 of the Act because the rectification order could not be construed to be erroneous and prejudicial to the interest of Revenue. Accordingly, Tribunal set aside the order passed by the Commissioner.

8. Hence, Revenue is in appeal before us.

9. Mr. Pinto has exclusively referred to the orders passed by the lower authorities particularly to the order passed by the Commissioner. He submits that the Commissioner had rightly held the issue to be debatable. His further contention is that the Commissioner had done the right thing to remand the matter back to the assessing officer to re-hear the rectification application after giving a reasonable opportunity to the respondent. Therefore, no prejudice was caused to the respondent by the order passed by the Commissioner. He also submits that carried forward depreciation cannot be set-off against deemed income.

10. On the other hand, learned counsel for the respondent refers to the order passed by the Supreme Court in Virmani Industries Pvt. Ltd. (*supra*) and submits that the issue in the rectification application is squarely covered by the aforesaid decision. Therefore, when the assessing officer had followed the decision of the Supreme Court and

allowed the prayer for rectification by setting-off the carried forward unabsorbed depreciation with the income of the respondent, the same could not have been construed by the Commissioner to be an order which is erroneous and prejudicial to the interest of the Revenue. In such circumstances, question of remanding the matter back to the assessing officer for re-hearing of the matter does not arise.

11. Submissions made by learned counsel for the parties have been considered. Also perused the materials on record.

12. After hearing learned counsel for the parties and on going through the materials on record, the issue involved in rectification proceedings is quite evident. By the order passed by the assessing officer under Section 154 of the Act, he had allowed unabsorbed depreciation of earlier years to be set-off against the income of the respondent for the assessment year under consideration, further allowing unabsorbed depreciation and unabsorbed business loss to be carried forward to the next year for set-off.

13. In Virmani Industries Pvt. Ltd. (*supra*), Supreme Court was considering the meaning and interpretation of sub-section (2) of Section 32 of the Act which deals with carry forward of depreciation of the following previous year and deemed to be part of that allowance and so on for the succeeding previous years. In the said case it was found that for the relevant assessment year, depreciation under Section 32(1)(ii) was more than the profits or gains of the assessee. Assessee claimed that the unabsorbed depreciation should be brought forward and set-off against profits of the new business. This claim of the assessee was rejected by the income tax officer as well as by the commissioner on the ground that such a set-off was permissible only where the business carried on in the subsequent assessment year was the same business which was carried on in the earlier assessment year. However, Tribunal disagreed with the said view and upheld the claim of the assessee.

Thereafter, at the request of the revenue, Tribunal made reference to the High Court on the question as to whether unabsorbed depreciation should be allowed to be set-off against the profits of new business by the assessee in the succeeding assessment year. In reference, the High Court answered the question in the affirmative i.e., in favour of the assessee and against the revenue; whereafter the matter came up before the Supreme Court.

14. Supreme Court considered the meaning of the expression "profits or gains chargeable" and held as under:

> "We may first consider the meaning of the expression "profits or gains chargeable". On first impression, the said expression appears to refer only to profits or gains of business or profession chargeable under Section 28. But this court has repeatedly held that the said expression is not so confined and that it refers to income under all the heads of income specified in Section 14. In Jaipuria China Clay Mines (P) Limited, the facts were these: the total income of the respondent - assessee for the Assessment Year 1952-53 before charging depreciation was Rs.14,041/-. After deducting depreciation of Rs.5,360/-, the Income Tax Officer computed the profit at Rs.8,681/-. Against this profit, he set off the losses of an earlier year. Having done this, the Income Tax Officer computed the income of the assessee from dividends at Rs.2,01,130/- and levied tax on it. The assessee claimed that the unabsorbed depreciation aggregating to Rs.76,857/- should be deducted from the dividend and if it is so done, the total income would get reduced to Rs.1,32,955/-. The Income Tax Officer rejected the claim. When the matter was ultimately carried to this Court, it took note of the opening words of sub-section, viz., "where, in the assessment of the assessee or if the assessee is a registered firm, in the assessment of its partners, full effect cannot be given to any such allowance....." and held on that basis that the expression "profits or gains chargeable" in the said sub-section is not confined to profits and gains from business or profession but takes within its ambit all heads of income. This Court was of the opinion that while amending Section 10(2) (vi) of the Indian Income Tax Act, 1922 by the Amendment Act 25 of 1953, the Parliament has accepted the interpretation placed upon the said expression by several High Courts to the above effect. It referred to the decisions of Lahore High Court in Karam Ilahi Mohammad Shafi v. CIT, (1929) 3 ITC 456, Madras High Court in A. Suppan Chettiar & Co. v. CIT, (1929) 4 ITC 211, East Punjab High Court in Laxmichand Jaipuria Spg. & Wvg. Mills, In re, (1950) 18 ITR 919 and Bombay High Court in Ambika Silk Mills Co. Ltd. v. CIT, (1952) 22

ITR 58 besides the judgment of the Judicial Commissioner, Nagpur in Ballarpur Collieries v. CIT, (1929) 4 ITC 255 interpreting the said expression as covering all heads of income. The Court further pointed out that even after the said amendment, the Bombay and Gujarat High Courts have taken the same view in CIT v. Ravi Industries Ltd., (1963) 49 ITR 145 and CIT v. Girdharlal Harivallabhadas Mills Company Limited, (1064) 51 ITR 693 respectively. The contrary view taken by the Madras High Court in CIT v. B. Nagi Reddy, (1964) 51 ITR 178 was disapproved. The court then observed (at page 559 of 59 ITR):

> "Bearing these two considerations in mind, if one looks at the language of proviso (b) to section 10(2)(vi), the first question that arises is: What is the meaning of the expression "in the assessment of the assessee or if the assessee is a registered firm, in the assessment of the partners, full effect cannot be given to any such allowance in any year? … Taking the case of the partners of a registered firm, the assessment must be their individual assessment, i.e, assessments in which the profits from the firm and other sources are pooled together. The legislature is clearly assuming that effect can be given to depreciation allowance in the assessment of a partner; the only way effect can be given in the assessment of a partner is by setting it of against income, profits and gains under other heads. The learned counsel for the revenue tried to meet this inference by suggesting that what the legislature contemplated was an assessment of those partners who were carrying on other business. But in our opinion this suggestion is unsound. What would happen if a partnership consists of four partners, two carrying on other business, Mr. Sastri was unable to explain. Now, if this is the inference to be drawn from these words, it is quite clear that the words "no profits or gains chargeable for that year" are not confined to profits and gains derived from the business whose income is being computed under section 10."

To the same effect is the decision in Rajapalayam Mills Ltd. v. CIT, (1978) 115 I.T.R. 777. The court observed that when the profits or gains of a business for a particular assessment year are to be computed under Section 10 (of 1922 Act), the current depreciation allowance for the assessment year in question is deductible under clause (vi) of Section 10(2), but the depreciation allowance of the preceding years would be liable to be taken into account only if, and to the extent to which, it is not absorbed by the total income of the assessee computed under different heads and chargeable to tax for those assessment years. The Court observed (at page 785):

> "Now, it is well settled, as a result of the decision of this court in CIT v. Jaipuria China Clay Mines (P) Ltd., [1966] 59 ITR 555 (SC), that the words 'no profits or gains chargeable for that year' are not confined to profits and gains derived from the business whose income is being computed under section 10, but they refer to the totality of the profits or gains computed under the various heads and chargeable to tax."

and added (at page 785):

> "It is, therefore, clear that effect must be given to depreciation allowance first against the profits or gains of the particular business whose income is being computed under section 10 and if the profits of that business are not sufficient to absorb the depreciation allowance, the allowance to the extent to which it is not absorbed would be set off against the profits of any other business and if a part of the depreciation allowance still remains unabsorbed, it would be liable to be set off against the profits or gains chargeable under any other head and it is only if some part of the depreciation allowance still remains unabsorbed that it can be carried forward to the next assessment year. … But where any part of the depreciation allowance remains unabsorbed after being set off against the total income chargeable to tax, it can be carried forward under proviso (b) to clause (vi) to the following year and set off against the year's income and so on for succeeding years. The method adopted by the statute for achieving this result is that the carried forward depreciation allowance is deemed to be part of and stands on exactly the same footing as the current depreciation for the assessment year and is thus allowable as a deduction under clause (vi)."

Both these decisions are rendered by a Bench of three learned Judges and are binding upon us."

15. From the above, it is evident that Supreme Court held that the expression "profits or gains chargeable" could not be confined to profits and gains from the business whose income was being computed under Section 10 of the Act. Proceeding further, Supreme Court held that effect must be given to depreciation allowance first against the profits or gains of the particular business whose income was being computed under Section 10 and if the profits of that business are not sufficient to absorb

the depreciation allowance, the allowance to the extent to which it was not absorbed would be set-off against the profits of any other business and if a part of the depreciation allowance still remained unabsorbed, it would be liable to be set-off against the profits or gains chargeable under any other head and it is only if some part of the depreciation allowance still remained unabsorbed then only it can be carried forward to the next assessment year. Supreme Court explained that carried forward depreciation allowance is deemed to be part of and stands on exactly the same footing as the current depreciation for the assessment year under consideration and thus allowable as a deduction.

16. Following the decision of the Supreme Court in Virmani Industries Pvt. Ltd. (*supra*), Tribunal took the view that this issue was conclusively decided and therefore, not allowing setting off the carried forward depreciation with the income of the assessment year under consideration was a mistake made by the assessing officer which was apparent from the record. When this mistake was pointed out to the assessing officer, he had rightly rectified the same under Section 154.

17. In so far contention of Mr. Pinto that carried forward depreciation cannot be set-off against deemed income is concerned, we are of the view that such a situation does not arise in the present case.

18. On a thorough consideration of the matter, we are in agreement with the view expressed by the Tribunal and find no error or infirmity therein. Therefore, the proposed question of law does not arise out of the said order of the Tribunal.

19. Consequently, appeal is dismissed. However, there shall be no order as to costs.

(MILIND N. JADHAV, J.) **(UJJAL BHUYAN, J.)**