IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.02.2020

CORAM:

THE HON'BLE DR. JUSTICE VINEET KOTHARI
and
THE HON'BLE MR. JUSTICE R.SURESH KUMAR, J

T.C.(A).No.843 of 2010

M/s.Sanmar Speciality Chemicals Limited
(formerly known as M/s.Sanmar Electronics Corporation Ltd)
47, Developed Plots for Electrical Electronics
Chennai-600 096
Now at
9 Cathedral Road
Chennai - 600 086. ...Appellant

..Vs..

The Deputy Commissioner of Income Tax
Company Circle-III (4)
Chennai. ...Respondent

Prayer: Tax Cases (Appeal) are filed under Section 260-A of the Income Tax Act, 1961, against the order of the Income Tax Appellate Tribunal, Madras 'B' Bench, dated 27.10.2006 passed in I.T.A.No.1938/Mds/2003 for Assessment Year 1999-2000 against the order dated 28.07.2003 made in ITA No 289/2002-2003 on the file of the Commissioner of Income Tax (Appeals) , Chennai 34 for the assessment year 1999-200 against the order dated 28.02.2003 made in PAN/GIR No.Sa-107/AAACS8160G on the file of the Deputy Commissioner of Income Tax Company Circle - VI(1) Chennai for the assessment year 1999-2000.

For Appellant : Mr.R.Venkatanarayanan
for Mr.Subbaraya Aiyer
Senior Standing counsel

For Respondent : Mr.J.Narayana Swamy
Senior Standing Counsel

J U D G M E N T

(Delivered by DR.VINEET KOTHARI, J.)

The present Appeal is directed against the order dated 27.10.2006 passed in I.T.A.No.1938/Mds/2003 by the Income Tax Appellate Tribunal, Madras 'B' Bench for Assessment Year 1990-2000, in which the learned Income Tax Appellate Tribunal following the decision of the Special Bench in I.T.A.No.1225/Mds/2004 vide order dated 25.07.2006 decided the Appeal in favour of the Revenue and against the Assessee. The relevant portion of the order of the Tribunal is quoted below for ready reference:

> "6. We have heard the rival contentions and perused the relevant records. We find that a Special Bench of this Tribunal in I.T.A.No.1225/Mds/2004, vide order dated 25th July 2006 has considered the following question:-
>
> "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?
>
> After elaborately discussing the issue, the Special Bench vide order dated 25.07.06 has held as under:-
>
> "During the course of discussion when the Special Bench of the Tribunal was being insisted upon, the decisions of the Tribunal in Uttam Air Products (P) Ltd. V. Dy. Commissioner of Income Tax in I.T.A.No.767/Del/2001 for the assessment year 1997-98 reported in (2006) 99 TTJ (Del) 718, order dated 28.10.2004 and in Perfect Pharmacists (P) Ltd. Vs. Jt.Commissioner of Income Tax in I.T.A.No.247 (Ind.)/99 dated 16.04.2004 (2004) 140 Taxman 49 were relied upon and stated to be applicable to the facts of the case. At the outset, we may observe that both the said orders of the Tribunal are concerned with the assessment year 1997-98. The decision in Uttam Air Products (P) Ltd. considered the speech of the Finance Minister and the circular of the CBDT No.762 dt. 18.02.1998 that explained the manner in which the amended provisions of section 32 (2) of the Act would have to

be acted upon, the Bench came to conclude that the unabsorbed depreciation for assessment year 1996-97 would have to be treated as depreciation allowance for the assessment year 1997-98 and the period eight years would be calculated from assessment 1997-98. In the other case of Perfect Pharmacists (P) Ltd. identical facts existed as was in the case of Uttam Air Products (P) Ltd. and for identical reasons, as in that case, the Bench had approved the claim of the assessee.

In the present case before us the assessment year 1999-2000, as mentioned earlier, and the depreciation allowance is for the assessment year 1997-98 which the assessee is claiming for set off against the income for the present assessment year. As explained in the earlier paragraph in the table giving comparative position before the amendment and after the amendment it is absolutely clear that it is only section 32 (2)(iii) of the Act, that is operational in the case of the assessee. On that basis all that the assessee could claim is for carry forward of the unabsorbed depreciation for six more successive assessment years to be adjusted against the income from profits and gains from the same business from which the depreciation claim arose and the assessee would be entitled to carry this act for the next six assessment years. Further, the clear condition that is laid down in this section is that in the assessment year in which the assessee is claiming the set off the unabsorbed depreciation, the assessee must be carrying on that business and the income from that business must exist. To put it to other words, if the business from which the depreciation claim arose is not carried out in any of the assessment years, the assessee would not be entitled to set off. For the aforesaid reasons, we decide the question in the negative, i.e. in favour of the Revenue."

8. Since the Special Bench has answered the question in favour of the Revenue for the same assessment year, respectfully following the precedent, we set aside the order of CIT

(A) and restore that of the Assessing Officer.

9. In the result, the Revenue 's appeal is allowed."

2. The learned counsel for the Revenue brought to our notice the decision of the Co-ordinate Bench of this Court in the case of Southern Travels Vs. Assistant Commissioner of Income Tax reported in (2015) 232 TAXMAN 0689 (Madras), in which the Co-ordinate Bench of this Court has set aside the order of the learned Tribunal and remanded the case back to the Tribunal for consideration of the entire issues afresh. Paragraph 9 and paragraph 20 are quoted below for ready reference:

> "9. The Special Bench of the Tribunal referred to the provisions of Sections 32 (2), 32 (2)(i), (ii) and (iii), Section 71 as also Section 72 of the Income tax Act and was of the view that in the facts of the present case, the claim of the assessee that unabsorbed depreciation should be allowed to be adjusted against the capital gains is incorrect, as the said provisions are not attracted to the facts of the present case."
>
> "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."

3. In view of the aforesaid Judgment of the Co-ordinate Bench of this Court, we are not inclined to entertain the present appeal and answer the Questions of Law raised and the matter deserves to be restored back to the learned Tribunal.

4. Accordingly, the Impugned Order dated 27.10.2006 is set aside and the matter is remanded back to the learned Tribunal for consideration of entire issues afresh. Both the parties are at liberty to raise their contentions before the learned Tribunal and the learned Tribunal may decide the matter in accordance with law.

5. With the above directions, this Appeal is disposed of. No costs.

Sd/-
Assistant Registrar(V)

//True Copy//

Sub Assistant Registrar

arr

To

1.The Income Tax Appellate Tribunal
Chennai 'B' Bench, Chennai

2.Deputy Commissioner of Income Tax
Company Circle VI(1)/III(4), Chennai.

3.The Commissioner of Income Tax (Appeals) V,
121, Mahatma Gandhi Road,
Chennai-34.

+1cc to Mr.J.Narayanaswamy, Advocate, S.R.No.9581

T.C.(A).No.843 of 2010

GMR(CO)
KKV/07/08/2020