IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.08.2021

CORAM

The Honourable Mr.Justice T.S.SIVAGNANAM
and
The Honourable Mr.Justice SATHI KUMAR SUKUMARA KURUP

T.C.A.No.1132 of 2015

The Commissioner of Income tax,
Chennai. .. Appellant

-vs-

M/s.DCM Hyundai Limited,
No.2, Ground Floor, Sri Ram Nagar,
Prakash Nagar Main Road,
Thiruniravur-602 024.
PAN: AAACK2712K .. Respondent

Prayer :- Appeal under Section 260A of the Income Tax Act, 1961 against the order dated 06.01.2014 made in I.T.A.No.1125/Mds/2012 on the file of the Income Tax Appellate Tribunal 'A' Bench, Chennai for the assessment year 2007-08 against the order of the Commissioner of Income Tax, Chennai-I, Chennai – 34 dated 29.03.2012 in C.No.218(49)/CIT-I/263/2011-12 and against the order of the Assistant Commissioner of Income-Tax, Company Circle-I(4), Chennai-34 dated 23.12.2009 in PAN/GIR No.AAACD2712K for the Assessment year 2007-08.

For Appellant : Mr.T.Ravikumar
Senior Standing Counsel

For Respondent : Mr.B.Ramanakumar &
Mr.S.Harish Kumar

JUDGMENT
(Delivered by T.S.Sivagnanam, J.)

This appeal, by the appellant/Revenue, filed under Section 260A of the Income Tax Act, 1961, is directed against the order dated 06.01.2014 made in I.T.A.No.1125/Mds/2012 on the file of the Income Tax Appellate Tribunal, Madras 'A' Bench, Chennai for the assessment year 2007-08.

2.The appeal was admitted on 15.12.2015, 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 unabsorbed depreciation for the assessment year 1996-97, can be set off against short term capital gain for the assessment year 2007-08?
>
> 2) Is not the finding of the Tribunal bad especially when the intention of the legislature was to allow the set off from other income relating to unabsorbed depreciation for the assessment year 1996-97 upto 8 years only as per Section 32(2)? and
>
> 3) Whether, on the material placed before it, the Tribunal was right in setting aside the order passed under Section 263?"

3.Heard Mr.T.Ravikumar, learned Senior Standing Counsel for the appellant/Revenue and Mr.B.Ramanakumar and Mr.S.Harish Kumar, learned counsels for the respondent/assessee.

4.It is not in dispute that the substantial questions of law framed for consideration have been answered against the Revenue in the case of CIT Vs. Best & Crompton Engineering Ltd., [T.C.A.No.844 of 2014, dated 02.08.2021]. The relevant paragraphs of the judgment read as follows:-

> "4.On going through the facts and circumstances, we find that the substantial questions of law, raised in the present appeal, were considered by this Court in the case of CIT vs. Sanmar Speciality Chemicals Ltd. reported in (2020) 428 ITR 237 (Madras). The relevant portion of the judgment reads as follows:-
>
> > "11. A similar issue was considered by a Division Bench of the Bombay High Court in the case of CIT v. Bajaj Hindustan Ltd. [IT Appeal Nos. 134 to 136 and 140, 141 and 148 of 2018, dated 13-6-2018] following the decision in the case of CIT v. Hindustan Unilever Ltd. [2016] 72 taxmann.com 325/[2017] 394 ITR 73 (Bom.). The special leave petition filed by the Revenue against the above decision was dismissed by the Hon'ble Supreme Court in the decision in Pr. CIT v. Bajaj Hindustan Ltd. [SLP (C) Diary No. 48020 of 2018, dated 25-1-2019].
> >
> > 12. In the decision of the Punjab & Haryana High Court in the case of CIT v. G.T.M. Synthetics Ltd. [2013] 30 taxmann.com 83/[2012] 347 ITR 458], an identical issue was considered in the following terms :

'8. The effect of omission of the aforesaid proviso was enumerated by the Central Board of Direct Taxes, vide Circular No. 794 dated 9-8-2000 [(2000) 245 ITR (Statute)] 21 that the unabsorbed depreciation allowance could be set-off against the income under any other head even where the business was not carried on.

Clause 22 of the said circular which is relevant is as under:

"22. Requirement of continuance of same business for set-off of unabsorbed depreciation dispensed with:

22.1 Under the existing provisions of sub-section (2) of section 32 of the Income-tax Act, carried forward unabsorbed depreciation is allowed to be set-off against profits and gains of business or profession of the subsequent year, subject to the condition that the business or profession for which depreciation allowance was originally computed continued to be carried on in that year. A similar condition in section 72 for the purpose of carry forward and set-off of unabsorbed business loss was removed last year.

22.2 With a view to harmonise the provisions relating carry forward and set-off of unabsorbed depreciation and unabsorbed loss, the Act has dispensed with the condition of continuance of same business for the purpose of carry forward and set-off of unabsorbed depreciation.

22.3 This amendment will take effect from 1st April, 2001, and will, accordingly, apply in relation to the assessment year 2001-2002 and subsequent years."

9. The CIT(A) and the Tribunal, thus, rightly allowed unabsorbed depreciation relevant to the assessment year 1996-97 to be set-off against the income from long term capital gains and income from other sources for the assessment year 2001-2002.'

13. Recently, in the decision of a Division Bench of the Bombay High Court in the case of Pr. CIT v. Gunnebo India (P.) Ltd. [2019] 104 CCH 227, the issue was considered in

favour of the assessee after referring to the decision of the Division Bench of the Gujarat High Court in the case of General Motors India (P.) Ltd., wherein the relevant portions read thus :

"3. The Revenue carried the matter in appeal. The Appellate Tribunal dismissed the appeal of the Revenue making the following observations:- "16. We have observed that the current year's depreciation is allowed to be set-off against the income from business as well as against the other heads of income and unabsorbed depreciation in carry forward and become part of the depreciation of the subsequent year and the total depreciation becomes current year's depreciation as per section 32(1) of the Act, which is allowed to be setoff against the income under any head of income. As per the provisions of section 32(2) of the Act r.w.s. 70, 71 and 72 of the Act, it becomes very clear that the total depreciation comprising of the depreciation of the relevant assessment year along with the unabsorbed depreciation of the earlier years becomes the total current year's depreciation which is allowed to be set off against income under any head of income including long term capital gain. Accordingly, we find no reason to interfere with the order of CIT(A) qua this issue and the same is hereby upheld. We also hold that as per provisions of section 72 of the Act, the unabsorbed business loss (other than speculative loss) of earlier years shall be allowed to be set-off only against the profits and gains from business carried on by the assessee of the current year and so on. We order accordingly. However, our above decision with respect to ground nos. (i) and (ii) raised in memo of appeal filed by Revenue should be read in conjunction with and subject to our findings with respect to ground nos. (iii) and (iv) which are decided by us in the preceding para's of this order and the computation shall be made accordingly."

4. Having heard the learned counsel for parties and having perused the documents on record, we do not find any error in the order of the Appellate Tribunal. Gujarat High Court in the case of General Motors India (P.) Ltd.

(supra) had considered somewhat similar issue, of course in the backdrop of the assessee's challenge to a notice of reopening of the assessment. The Gujarat High Court had held and observed as under:-

"38 Therefore, it can be said that, current depreciation is deductible in the first place from the income of the business to which it relates. If such depreciation amount is larger than the amount of the profits of that business, then such excess comes for absorption from the profits and gains from any other business or business, if any, carried on by the assessee. If a balance is left even thereafter, that becomes deductible from out of income from any source under any of the other heads of income during that year. In case there is a still balance left over, it is to be treated as unabsorbed depreciation and it is taken to the next succeeding year. Where there is current depreciation for such succeeding year the unabsorbed depreciation is added to the current depreciation for such succeeding year and is deemed as part thereof. If, however, there is no current depreciation for such succeeding year, the unabsorbed depreciation becomes the depreciation allowance for such succeeding year. We are of the considered opinion that any unabsorbed depreciation available to an assessee on 1st April, 2002 (asst. yr. 2002-03) will be dealt with in accordance with the provisions of section 32(2) as amended by Finance Act, 2001. And once the Circular No. 14 of 2001 clarified that the restriction of 8 years for carry forward and set-off of unabsorbed depreciation had been dispensed with, the unabsorbed depreciation from asst. yr. 1997-98 up to the asst. yr. 2001- 02 got carried forward to the asst. yr. 2002-03 and became part thereof, it came to be governed by the provisions of section 32(2) as amended by Finance Act, 2001 and were available for carry forward and set-off against the profits and gains of subsequent years, without any limit whatsoever."

14. In our considered view, the above decisions will clearly enure to the benefit of the respondent - assessee.

15. Accordingly, the above tax case appeal is dismissed and the substantial question of law is answered against the Revenue. No costs.”

5.Following the above decision, the substantial questions of law, raised in this appeal, are answered against the Revenue. Consequently, the tax case appeal is dismissed.”

5.Thus, by following the above decision, this appeal stands dismissed and the substantial questions of law are answered against the Revenue. No costs.

abr
18.08.2021

“FOR BEING MENTIONED”

This Appeal having been posted on this day for being mentioned pursuant to the order of this Court dated 18.08.2021 and in the present of Mr.T.Ravikumar, Advocate for the Appellant and of Mr.B.Ramana Kumar, Advocate for the Respondent, the Court made the following order:

When the matter was listed on 18.08.2021, the appeals were dismissed by answering the substantial questions of law against the Revenue, in view of the submissions made by the learned counsel on either side. Subsequently, the learned Senior Standing Counsel mentioned before this Court that substantial question of law No.3 needs to be argued separately. Hence, the matter is listed under the caption 'for being mentioned'.

2.Mr.T.Ravikumar, learned Senior Standing Counsel for the appellant-Revenue submits that apart from the substantial question of law with regard to unabsorbed depreciation, the jurisdiction of the CIT(A) to invoke the provisions under Section 263 of the Act has also been framed as a substantial question of law.

3.The other substantial question of law, which has been framed for consideration is as to whether, on the materials placed before the Tribunal, the Tribunal was right in setting aside the order passed under Section 263 of the Act.

4.The learned Senior Standing Counsel appearing for the Revenue referred to paragraphs 8 and 9 of the order passed by the CIT(A) and submitted that the Hon'ble Supreme Court in the case of Malabar Industrial Company Ltd. Vs. CIT [reported in (2000) 243 ITR 83], which was relied upon by the assessee, held that the revision under Section 263 of the Act has to be filed only on the ground that both the essential conditions namely being erroneous and prejudicial to the interest of the Revenue were not fulfilled.

5.The CIT(A) observed that in the case of the assessee, there is only one view available as noted in paragraphs 4, 6 and 7 and that both the conditions namely the order is erroneous and prejudicial to the interest of the Revenue co-exist and therefore, the CIT(A) was justified in invoking the provisions under Section 263 of the Act. It is submitted that this finding of the CIT(A) was erroneously set aside by the Tribunal.

6.We have carefully gone through the order. We find that the Tribunal rightly noted the legal position as pointed out by the Hon'ble Supreme Court in the case of Malabar Industrial Company Ltd., (supra) and observed that where two views are possible, the one taken by the Assessing Officer in framing the assessment has to be upheld in the proceedings under Section 263 of the Act. After noting the legal position, the Tribunal held that it is not in dispute that there were only two reasons in the show cause notice i.e. the depreciation for the assessment year 1997-98 could not have been set off in the assessment year 2007-08 and the other issue is that the depreciation has been erroneously allowed to be set off by the Assessing Officer against the short term capital gains.

7.The Tribunal, after noting the decision of the Gujarat High Court in the case of General Motors India Private Limited Vs. DCIT [reported in (2013) 257 CTR 123] held that both the reasons are no longer sustainable. Thus, noting that there were no other reasons cited in the show cause notice and the fact that the order passed by the Court favoured the assessee, the Tribunal held that there was no justification in reviving yet another innings before the Assessing Officer as directed by the CIT(A) in the order dated 29.3.2012.

8.The factual position as pointed out by the Tribunal with regard to the reasons, which were referred to in the show cause notice has not been controverted before us and therefore, we are of the view that the Tribunal was right in reversing the order passed by the CIT(A) invoking his jurisdiction under Section 263 of the Act.

9.For all the above reasons, the stand taken by the Revenue is rejected and substantial question of law No.3 is decided against the Revenue.

10.In the result, all the substantial questions of law are answered against the Revenue as indicated above and in the light of the order dated 18.08.2021 and the appeals are dismissed.

Sd/-
Assistant Registrar(CS-VI)

//True Copy//

Sub Assistant Registrar

RS

To

1. The Income Tax Appellate Tribunal,
   Madras 'A' Bench,
   Chennai.

2. The Commissioner of Income Tax,
   Chennai-I, Chennai-34.

3. The Assistant Commissioner of Income Tax,
   Company Circle-I(4), Chennai-34.

+2ccs to Mr.T.Ravikumar, Advocate, S.R.No.41546,41927

T.C.A.Nos.1132 of 2015

AJS(CO)
SU(20/09/2021)