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.385 of 2017

The Commissioner of Income tax,
Chennai. .. Appellant/Appellant

-vs-

M/s.DCM Hyundai Limited,
No.2, Ground Floor, Sri Ram Nagar,
Prakash Nagar Main Road,
Thiruniravur-602 024.
PAN: AAACD2712K .. Respondent/Respondent

Prayer :- Appeal under Section 260A of the Income Tax Act, 1961 against the order dated 30.11.2016 made in I.T.A.No.1580/Mds/2016 on the file of the Income Tax Appellate Tribunal 'C' Bench, Chennai for the assessment year 2009-10.

And against the order of Commissioner of Income Tax (Appeals)-1, Chennai in ITA.No.140/14-15 dated 11/12/2016 and against the order of Income Tax Officer, Company ward I (1), Chennai in GIR/PAN/AAACD2712K/2009-10/dated 31/03/2014.

For Appellant : Ms.R.Hemalatha,
Senior Standing Counsel

For Respondent : Mr.Venkata Narayanan
For M/s.Subbaraya Aiyar,
Padmanabhan & Ramamani

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 30.11.2016, made in I.T.A.No.1580/Mds/2016 on the file of the Income Tax Appellate Tribunal 'C' Bench, Chennai for the assessment year 2009-10.

2.The appeal was admitted on 02.01.2018, on the following substantial question of law:-

"Whether unabsorbed depreciation could be set off against capital gains in any Assessment Year prior to 2001-2002?"

3.Heard Ms.R.Hemalatha, learned Senior Standing Counsel for the appellant/Revenue and Mr.Venkata Narayanan, learned counsel for the respondent/assessee.

4.It is not in dispute that the substantial question of law framed for consideration has 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:-
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> > "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].
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> > 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 question of law is answered against the Revenue. No costs.

abr 18/08/2021

BEING MENTIONED

This matter having been listed on 23/08/2021 for Being mentioned in present of this order of this TCA.No.385/2017 dated 18/08/2021 and made herein in the presence of Mr.T.Ravikumar, Advocate for the appellant Mr.Venkata Narayanan, for M/s.Subbaraya Aiyar Padmanabhan, for the respondent, this Court made the following order.

(Order of the Court was made by T.S.Sivagnanam, J.)

This matter has been listed 'for being mentioned' at the instance of the learned Senior Standing Counsel for the appellant-Revenue.

2.Upon consideration of the submissions made, we are of the view that nothing is required to be clarified and the order dated 18.08.2021 stands as it is and the appeal stands dismissed.

Rs 23.08.2021

Sd/-

Assistant Registrar (CS-VI)

//True Copy//

Sub Assistant Registrar

TO

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

2.The Income Tax Officer,
Company Ward - I (1),
Chennai - 34.

3.The Commissioner of Income Tax (Appeals)-I,
121, Mahatma Gandhi Road,
Chennai 600 034.

4.The Commissioner of Income Tax, Chennai.

+2cc to Mr.T.Ravikumar, Advocate, S.R.No.41926, 41547

T.C.A.No.385 of 2017

SJ(CO)
GN(17/09/2021)