



TCA No. 841 of 2010

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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DATED : 25.04.2022

CORAM

THE HONOURABLE MR. JUSTICE R. MAHADEVAN
and
THE HONOURABLE MR. JUSTICE J. SATHYA NARAYANA PRASAD

Tax Case (Appeal) No. 841 of 2010

M/s. Reiter LMW Machinery Limited
Sulur Railway Feeder Road
Muthugoundenpudur
Coimbatore - 641 406

.. Appellant

Versus

The Assistant Commissioner of Income Tax
Company Circle I (1)
Chennai

.. Respondent

Appeal filed under Section 260A of The Income Tax Act, 1961 against the Order dated 06.03.2009 passed in ITA No.2204/Mds/2006 on the file of the Income Tax Appellate Tribunal, "D" Bench, Chennai.

For Appellant : Mr. Subbaraya Aiyar
For Respondent : Mr. M. Swaminathan and
Mrs.K.G.Usha Rani



TCA No. 841 of 2010

JUDGMENT

[Judgment of the Court was delivered by **R.MAHADEVAN,J.**]

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This is an assessee's appeal questioning the order of the Income Tax Appellate Tribunal dated 06.03.2009, relating to the assessment year 2002-03.

2.The appellant is engaged in the business of manufacture of textile machinery and they derived income from its 100% Export Oriented Undertaking (EOU) and hence, they claimed exemption under section 10B of the Income Tax Act (in short, “the Act”). According to the appellant, though they had commenced its business in the year 1995-96, they claimed exemption only during the assessment years from 1997-98 to 2001-02. While so, for the assessment year 2002-03, the appellant filed their return of income on 29.10.2002 admitting a total income of Nil after claiming deduction under section 10B of Rs.14,81,502/- and setting off unabsorbed depreciation of Rs.37,09,820/- against the income from other sources. The return was processed under section 143(1) of the Act on 21.02.2003 accepting the appellant's claim of deduction. Subsequently, as per the proceedings of the Commissioner of Income Tax dated 09.05.2003, notice dated 18.06.2003 under section 143(2) was issued indicating that the case was selected for scrutiny to restrict the higher depreciation and to disallow set off the



TCA No. 841 of 2010

unabsorbed depreciation of earlier years against the income from other sources. Thereafter, upon hearing the appellant's representative, the assessing officer passed the assessment order dated 22.03.2005 *inter alia* restricting the claim of depreciation to Rs.4,22,33,168/- as against the claim of Rs.5,34,00,463/- by adjusting the written down value as on 01.04.2001 and disallowing a sum of Rs.37,09,820/- towards set off of unabsorbed depreciation against the income from other sources. Aggrieved by the order of assessment, the appellant filed an appeal before the CIT(A), who by order dated 30.03.2009 partly allowed the appeal. Challenging the same, the appellant went on further appeal before the Income Tax Appellate Tribunal, which by order dated 06.03.2009, dismissed the said appeal. Therefore, this tax case appeal by the appellant /assessee before this court.

3. On 13.09.2010, this court admitted this Tax Case Appeal on the following substantial questions of law:

“(i) Whether on the facts and in the circumstances of the case the Tribunal was right in holding that depreciation should be allowed only on the notional WDV as on 01.04.2001 and not on WDV as on 01.04.1997?”

“(ii) Whether on the facts and in the circumstances of the case the Tribunal failed to appreciate that for the assessment years 1997-1998 to 2001-2002 no depreciation has been allowed and hence the depreciation for the current assessment year should be allowed on the WDV as on 01.04.1997?”



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(iii) *Whether on the facts and in the circumstances of the case the Tribunal was right in holding that the provisions of Section 10B (6) would apply to the assessment year in question even though it is not the previous year relevant to the assessment year immediately succeeding the last of the relevant assessment years and the assessee has been held to be entitled for relief under Section 10B for the year?*

(iv) *Whether on the facts and in the circumstances of the case the Tribunal was right in holding that the appellant is not entitled to set off unabsorbed depreciation brought forward from the assessment years 1995-1996 and 1996-1997 in view of Section 10B(6) of the Act ignoring the fact that for these two assessment years at the option of the assessee, provisions of Section 10B were not applicable to the Assessee?*

(v) *Whether on the facts and in the circumstances of the case the Tribunal failed to appreciate that in the case of the appellant the assessment years 1995-1996 and 1996-1997 did not fall within the expression 'relevant assessment years' under clause (v) of Explanation 2 (v) to Section 10B and hence provisions of Section 10B (6) were not applicable to the unabsorbed depreciation relating to assessment years 1995-1996 and 1996-1997?*

(vi) *Whether on the facts and in the circumstances of the case the Tribunal was right in holding that the unabsorbed depreciation brought forward from the assessment years 1995-1996 and 1996-1997 cannot be set off against the income computed under the head 'other sources'?*

4. The aforesaid substantial questions of law can be summarised into the following two main issues relating to (i) claim of depreciation and (ii) set off of unabsorbed depreciation against income from other sources.



TCA No. 841 of 2010

5.1. Regarding the first issue viz., claim of depreciation, the assessing officer placing reliance on section 10B (6) (i) and (iv) of the Act, concluded that the appellant is entitled to depreciation only on the residual opening written down value as on 01.04.2001 computed as per the Income Tax Act and accordingly, restricted the claim of depreciation to Rs.4,22,33,168/-.

5.2. According to the learned counsel for the appellant, the appellant commenced its manufacturing activities during the previous year relevant to the assessment year 1995-1996, but did not opt for deduction under Section 10B of the Act until the assessment year 1997-1998; and they exercised the option vested by virtue of sub-section (3) or sub-section (5) of Section 10B of the Act only for the assessment years 1997-98 to 2001-02 and claimed higher depreciation under section 32 on the closing WDV relating to the assessment year 1996-97. The learned counsel further contended that the provisions of section 10B(6) are applicable to the previous year relevant to assessment year immediately succeeding the last of the relevant assessment years or of any previous year relevant to any subsequent assessment year and hence, the same has no application during the assessment year preceding or during the relevant assessment years.



5.3. On the other hand, the learned senior standing counsel for the respondent contended that there is no provision under the Act to defer depreciation for a particular period and hence, the appellant is entitled to depreciation only on the residual opening of written down value as on 01.04.2001 and accordingly, the Assessing Officer rightly restricted the claim of depreciation to Rs.4,22,33,168/-, as also affirmed by the Appellate Authorities.

5.4. To appreciate the rival contentions, it is but relevant to refer to the provisions of section 10B(6) of the Act, which read as under:

“10B(6) – Notwithstanding anything contained in any other provision of this Act, in computing the total income of the assessee of the previous year relevant to the assessment year immediately succeeding the last of the relevant assessment years, or of any previous year, relevant to any subsequent assessment year -

(i) section 32, section 32A, section 33, section 35 and clause (ix) of sub-section (1) of section 36 shall apply as if every allowance or deduction referred to therein and relating to or allowable for any of the relevant assessment years ending before the 1st day of April, 2001, in relation to any building, machinery, plant or furniture used for the purposes of the business of the undertaking in the previous year relevant to such assessment year or any expenditure incurred for the purposes of such business in such previous year had been given full effect to for that assessment year itself and accordingly sub-section (2) of section 32, clause (ii) of sub-section (3) of section 32A, clause (ii) of sub-section (2) of section 33, sub-section (4) of section 35 or the second proviso to clause (ix) of sub-section (1) of section 36, as the case may be, shall not apply in relation to any such allowance or deduction;

(ii)....

(iii)...

(iv) in computing the depreciation allowance under section 32, the written down value of any asset used for the purposes of the business of the undertaking shall be computed as if the assessee had claimed and



TCA No. 841 of 2010

been actually allowed the deduction in respect of depreciation for each of the relevant assessment year.”

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It is evident from the above said provisions that the allowance or deduction for any relevant assessment years ending before the 1st April, 2001, in relation to building, machinery, plant or furniture used for the business purposes in the previous year relevant to such assessment year, had been given full effect to for that assessment year itself.

5.5. It is an admitted fact that the appellant is running a 100% export oriented unit (EOU) from the year 1995-96 and they enjoyed tax exemption under section 10(B) of the Act. The benefit of exemption originally granted was 100% of the income derived from the EOU. Subsequently, amendment was introduced to section 10(B) in the year 2001, thereby restricting the exemption to 90%, which necessitates the assesseees to claim depreciation and carry over excess absorbed depreciation for the subsequent years under section 32(2) of the Act. In the present case, the appellant claimed depreciation for the assessment years 1997-98 to 2001-02. According to the provisions of section 10B(6) as extracted above, the depreciation for the initial assessment years, in which, the appellant commenced its production, was restricted and they were not permitted to carry forward and set off of the unabsorbed depreciation of the earlier years to the subsequent years, because until 2001 there was



complete exclusion of the income from EOU. Thus, applying the said provisions of law, the assessing officer restricted the claim of depreciation only on the residual of written down value as on 01.04.2001, which was rightly affirmed by the appellate authorities. For better appreciation, the findings of the appellate authorities are extracted below:

CIT(A)

“4.1. The section 10B(6)(iv) of the IT Act, 1961 reads as under:

....

From a reading of this section, it is very clear that depreciation, whether claimed or not, is to be taken as allowed and the WDV is to be taken as if it is allowed. In the instant case, the appellant claims that it has exercised its option in the earlier years that depreciation is not claimed, but allowed to be carried forward. A reading of this section does not indicate that the appellant is allowed any such kind of option. Whether the appellant claims it or not, depreciation has to be taken to be allowed and the WDV should be brought down accordingly. In view of this, I am of the opinion that the finding of the Assessing Officer in the assessment order on this point that the appellant is entitled for depreciation only on the residual WDV as on 1-4-2001 is correct and the depreciation allowable u/s 32 of the I.T. Act 1961 has been correctly restricted to Rs.4,22,33,168. In view of this, no interference is called for in the finding of the Assessing Officer on this point in the assessment order. The appellant's plea fails.”

ITAT

“2.3....

The relevant provisions of Section 10B(6) read as under:-

2.4. A reading of the above clearly indicates that depreciation, whether claimed or not, is to be taken as allowed. Hence, when the assessee enjoys exemption under these provisions, it is deemed that depreciation u/s 32 has been allowed and the WDV of the asset used for the purpose of business of the undertaking shall be computed as if the assessee had claimed and had to be actually allowed the deduction in respect of depreciation with respect to relevant assessment years. The assessee's plea that the provisions of section 10B(6) are applicable to the previous year relevant to assessment year immediately succeeding the last of the relevant assessment years or of any previous year relevant to any subsequent assessment year. Therefore, it was claimed that this section



TCA No. 841 of 2010

has no application during the assessment year preceding or during the relevant assessment years. In our opinion, this is an unnecessary interpolation in the plain provisions of the Act. As per the mandate of the Act, in computing depreciation allowance u/s 32, it will be deemed that assessee had claimed and has been actually allowed the deduction in respect of depreciation with each of the relevant assessment years. Hence, the written down value after this period has to be arrived at accordingly and depreciation for succeeding years have to be with reference to this reduced written down value. Hence, the assessee's plea that in current assessment year, it can claim higher depreciation with reference to WDV of assessment year 1996-97 is devoid of cogency. Hence, in our opinion, the plea of the assessee is liable to be rejected. Hence, we affirm order of authorities below on this issue."

Thus, we are of the opinion that the aforesaid findings rendered by the appellate authorities, warrant no interference and the first issue is decided in favour of the Revenue. Accordingly, the substantial questions of law (i), (ii), (iii), (iv) and (v) are answered against the appellant / assessee.

6.1. As regards the second issue viz., set off of unabsorbed depreciation of Rs.37,09,820/- relating to assessment years 1995-96 and 1996-97 against the income from other sources, the assessing officer disallowed the said claim made by the appellant, on the ground that as per section 32(2), the unabsorbed depreciation of earlier years can be set off only against the profits and gains of any business carried on by the assessee and assessable in the immediately succeeding assessment year and the same cannot be permissible against the income from other sources; and that the appellant claimed exemption under section 10B only from the assessment year 1997-98 onwards.



TCA No. 841 of 2010

The said finding of the assessing officer was also affirmed by the appellate authorities.

6.2. The learned counsel for the appellant contended that the interest income was not derived from industrial undertaking and therefore, not eligible for deduction under section 10B. Further, the interest income though assessed under the head 'income from other sources', it can be set off in computing the total income of the appellant. Without considering the same, the assessing officer erroneously disallowed the said claim and the same was also confirmed by the Appellate Authorities, merely reiterating the findings of the assessing officer. The learned counsel also placed reliance on the decision of this court in ***Commissioner of Income Tax v. SPEL Semi Conductors Ltd, [(2013) 212 Taxman 0506]*** and submitted that the unabsorbed depreciation relating to the assessment years 1995-96 and 1996-97 can be brought forward and set off against the income from other sources. The relevant paragraph of the said decision can be profitably extracted below:

“6. Thus, as far as the income from other sources are concerned, given the fact that under section 32(2) of the Act, there is a provision of set off of unabsorbed depreciation allowance as against the income from other sources, it is not necessary that one should wait for the assessee to earn income from business so as to exhaust the carried forward loss to be set off as against the business income and then apply the unabsorbed depreciation. A reading of section 32(2) thus makes it clear that if the unabsorbed depreciation allowance could not be wholly set off under clause (i) and clause (ii), the amount of depreciation not so set off can be



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set off from income from other head, if any, available for that assessment year. The language of section 32(2) is very clear and there is hardly anything contained in section 72(2) to prevent such set off of carried forward depreciation being given to the assessee under the head of income from business or income from other sources. The Revenue does not deny the fact that as far as the income from other sources are concerned, there could be no set off of business loss or carried forward loss. However, what is contended by the Revenue is that section 72(2) controls the operation of section 32(2) to have the set off of unabsorbed depreciation against the income from other sources. We do not agree with this line of reasoning. What is spoken to under section 72(2) is as regards set off of business loss as against the income from profits and gains of business or profession and if there is loss as well as unabsorbed depreciation, the set off shall be first on the business loss as against the business income and then on unabsorbed depreciation. What is spoken to under section 32(2) is as regards set off of unabsorbed depreciation as per clause (ii) of sub section (1) and when the unabsorbed depreciation could not be set off as against the income from business or profession by reason of there being no income available under the said heads and where there is income from other sources, effect must be given to section 32(2) of the Act for that assessment year”.

6.3. The learned senior standing counsel appearing for the revenue fairly conceded the submission made on the side of the appellant that the authorities below failed to examine this issue in a proper perspective and decided the same against the appellant / assessee.

6.4. Taking note of the submissions made by the learned counsel on either side and upon perusal of the orders of the authorities below, we set aside the orders of the authorities below and remand the matter to the assessing officer to the limited extent of deciding the claim of the assessee relating to set off of unabsorbed depreciation for the assessment years 1995-96 and 1996-97 against the income from other sources. The assessing officer shall reconsider



TCA No. 841 of 2010

the issue and pass fresh orders, on merits and in accordance with law, after affording due opportunity of hearing to the appellant / assessee, as expeditiously as possible. The sixth substantial question of law raised herein is accordingly, decided in favour of the appellant / assessee.

7.This tax case appeal stands disposed of in the above terms. No costs.

(R.M.D., J.) (J.S.N.P., J.)

25.04.2022

rsh

Index:Yes/no

Internet:Yes/No

To

1.The Assistant Commissioner of Income Tax
Company Circle I (1)
Chennai

2.The Commissioner of Income Tax (Appeals)-I
Coimbatore.

3.The Income Tax Appellate Tribunal,
Madras D Bench, Chennai.



WEB COPY



TCA No. 841 of 2010

R.MAHADEVAN, J.
and
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rsh

TCA No. 841 of 2010

25.04.2022