



WEB COPY

T.C.A.Nos.317 & 318 of 2018 & 371 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.12.2024

CORAM :

THE HONOURABLE DR.JUSTICE ANITA SUMANTH
and
THE HONOURABLE MR.JUSTICE G. ARUL MURUGAN

T.C.A.Nos.317, 318 of 2018 and 371 of 2017
& C.M.P.No.9432 of 2017

Tamil Nadu Small Industries Corporation Ltd.,
Thiru-Vi-Ka Industrial Estate,
Guindy, Chennai – 600 032.
PAN NO: AAAC1239K

.. Appellant
in all appeals

VS

The Assistant Commissioner of Income Tax,
Corporate Circle 3(1),
Chennai – 34.

.. Respondent
in all appeals

Prayer in TCA No. 317 of 2018: Appeal filed under Section 260A of the Income Tax Act, 1961 against order of the Income Tax Appellate Tribunal, 'C' Bench, Chennai, dated 09.06.2017 in ITA No.606/Mds/2017.

Prayer in TCA No. 318 of 2018: Appeal filed under Section 260A of the Income Tax Act, 1961 against order of the Income Tax Appellate Tribunal, 'C' Bench, Chennai, dated 09.06.2017 in ITA No.606/Mds/2017.

Prayer in TCA No. 371 of 2017: Appeal filed under Section 260A of the Income Tax Act, 1961 against order of the Income Tax Appellate Tribunal, 'A' Bench, Chennai, dated 25.11.2016 in ITA No.515/Mds/2016.



WEB COPY



T.C.A.Nos.317 & 318 of 2018 & 371 of 2017

For Appellant : Dr.A.Thiyagarajan, SC
for Mr.S.Ramesh Kumar
(in all appeals)

For Respondent : Mr.J.Narayanaswamy
Senior Standing Counsel
(in all appeals)

COMMON JUDGMENT
(Delivered by Dr. ANITA SUMANTH.,J)

These Tax Case (Appeals) relate to assessment years (AYs) 2008-09, 2010-11 and 2011-12. The substantial question of law that arises for consideration is as follows:

Whether on the facts and in the circumstances of the case, the Hon'ble Tribunal was right in rejecting the claim of the appellant claiming deduction for the provision made for leave salary under section 43B(f) of the Income Tax Act, 1961 is correct in law?

2. The Kerala High Court in *Dhanalakshmi Bank Ltd. V. Commissioner of Income-tax, Cochin* (410 ITR 280) had considered an identical issue in regard to the applicability of Section 43B of the Income Tax Act, 1961 (in short 'Act') in relation to deductions under sub-clause (f) that reads as follows:

43B.Certain deductions to be only on actual payment. Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act in respect of-



WEB COPY



T.C.A.Nos.317 & 318 of 2018 & 371 of 2017

(f) any sum payable by the assessee as an employer in lieu of any leave at the credit of his employee, shall be allowed (irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him) only in computing the income referred to in section 28 of that previous year in which such sum is actually paid by him :

Provided that nothing contained in this section shall apply in relation to any sum which is actually paid by the assessee on or before the due date applicable in his case for furnishing the return of income under sub-section (1) of section 139 in respect of the previous year in which the liability to pay such sum was incurred as aforesaid and the evidence of such payment is furnished by the assessee along with such return.

3.The discussion relating to disallowance of provision under Section

43B(f) at paragraph 5 of the decision in *Dhanalakshmi Bank Ltd.* (supra)

reads as follows:

*'5. In I.T.A.No.126 of 2012, a further issue arising for the year 2006-07 is the dis-allowance of provision for leave encashment under Section 43B spoke of certain deductions only on actual payment. Sub-clause (f) is with respect to any sum payable by the assessee as an employer in lieu of any leave at the credit of his employee. The deduction, hence, is allowable only on actual payment. It is submitted that the Calcutta High Court has struck down the said provision. Admittedly a Special Leave Petition was filed before the Hon'ble Supreme Court and there is also a stay order granted. In such circumstances, the provision applies and this Court has also in a similar case answered the question in favour of the Revenue and against the assessee in *South Indian Bank Ltd. v. CIT* [2014] 49 taxmann.com 100/226 Taxman 130 (Mag.)/363 ITR 111 (Ker). The said question is also answered against the assessee and in favour of the*



Revenue, affirming the order of the Tribunal to that extent.'

WEB COPY

4. In the present case, it is an admitted position, as seen from the order of the Tribunal dated 09.06.2017, that the appellant had made a provision, which, in light of the clear language of Section 43B(f) calls for disallowance. The question of law is hence answered in favour of the revenue and against the assessee.

5. There are two additional questions raised in T.C.(A)No.371 of 2017, reading as follows:

(i) Whether on the facts and in the circumstances of the case, the Hon'ble tribunal was right in fixing eight years limitation for setting off the unabsorbed depreciation when section 32(2) of the Income Tax Act does not prescribe any limitation?

(ii) Whether on the facts and in the circumstances of the case, the reopening of the assessment under section 147 of the Income Tax Act, 1961 is not hit by the principle of merger theory wherein the original assessment order dated 22.09.2010 was merged with the order passed by the Commissioner of Income Tax (Appeals) in ITA No. 408/2011-12/A-IV dated 04.11.2011?

6. As far as the first question of law is concerned, the same is covered by a decision of this Court in *The Commissioner of Income Tax V. Tamil Nadu Small Industries Corporation Limited* (T.C.(A) No.236 of 2017, judgment dated 20.07.2021). The relevant portion of the order reads as follows:



WEB COPY



T.C.A.Nos.317 & 318 of 2018 & 371 of 2017

“4. When the appeal is taken up for hearing, Mr.M.Swaminathan, learned Senior Standing Counsel assisted by Ms.V.Pushpa, learned Junior Standing Counsel, fairly submitted that the question of law that arise for consideration in the above appeal has already been decided against the Revenue and in favour of the assessee in the judgment dated 06.07.2021 made in T.C.A.No.62 of 2015 [The Commissioner of Income Tax, Trichy Vs. M/s.KMC Speciality Hospitals India Ltd., (Formerly Sea Horse Hospitals P. Ltd.,) No.6, Royal Road, Trichy] wherein this Bench held as follows:

.....

3. The appeal was admitted on 2~12~2019 on the following substantial question of law :

“Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the assessee is entitled for carry forward of the depreciation loss pertaining to the assessment year 1997~98 to the present assessment year 2006~07, which is beyond the eight year period mandated under the provisions of section 32 of the Act?”

4. The short issue, which falls for consideration, is as to whether, in the facts and circumstances of the case, the Tribunal was right in permitting the assessee to carry forward the depreciation loss pertaining to the assessment year 1997~98 to the present assessment year namely 2006~07, which is beyond the eight year period mandated under the provisions of section 32 of the Act.

.....

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



WEB COPY



T.C.A.Nos.317 & 318 of 2018 & 371 of 2017

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



WEB COPY



T.C.A.Nos.317 & 318 of 2018 & 371 of 2017

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.Mr.K.Ravi, learned counsel appearing for the respondent submitted that in view of the ratio laid down by the Hon'ble Division Bench of this Court in the judgments in [2021] 127 taxmann.com 805 (Madras) and [2020] 122 taxmann.com 212 (Madras), cited supra, the above appeal may be dismissed.

6.Having regard to the submissions made by the learned counsel on either side, following the ratio laid down in [2021] 127 taxmann.com 805 (Madras) [Harvey Heart Hospitals Ltd. Vs. Assistant Commissioner of Income Tax] and [2020] 122 taxmann.com 212 (Madras) [Commissioner of Income Tax, Chennai Vs. Sanmar Speciality Chemicals Ltd.], the question of law is decided against the Revenue and in favour of the assessee. Accordingly, the Tax Case Appeal is dismissed. No costs.”?

5.Mr.A.Thiagarajan, learned senior counsel appearing for the respondent submitted that in view of the ratio laid down by the Hon'ble Division Bench of this Court in the judgment made in T.C.A.No.62 of 2015, cited supra, the appeal may be dismissed.

6.Having regard to the submissions made by the learned counsel on either side, following the ratio laid down in the judgment dated 06.07.2021 made in T.C.A.No.62 of 2015, cited supra, the question of law is decided against the Revenue and in favour of the assessee. Accordingly, the Tax Case Appeal is dismissed. No costs.



T.C.A.Nos.317 & 318 of 2018 & 371 of 2017

7. The first question of law is hence answered in favour of the assessee and against the revenue.

8. Learned Senior Counsel appearing for the learned counsel on record for the assessee does not hence, press the second question of law and an endorsement is made to this effect, which is recorded.

9. These Tax Case (Appeals) are disposed as above. No costs. Connected Miscellaneous Petition is closed.

[A.S.M., J] [G.A.M., J]
02.12.2024

Index: Yes/No
Speaking Order
Neutral Citation: Yes
sl

To

The Income Tax Officer,
Ward – II (1),
Gandhiji Road,
Salem.



WEB COPY



T.C.A.Nos.317 & 318 of 2018 & 371 of 2017

DR. ANITA SUMANTH.,J.
and
G. ARUL MURUGAN.,J.

Sl

T.C.A.Nos.371 of 2017, 317 & 318 of 2018

02.12.2024