IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	**19.03.2025**
Pronounced on	**29.04.2025**

CORAM :
THE HONOURABLE MR.JUSTICE S.S.SUNDAR
and
THE HONOURABLE MR.JUSTICE C.SARAVANAN

Tax Case Appeal No.643 of 2008

M/s.Prime Urban Development India Ltd,
83, 3rd Floor, Plot No.4, Avinashi Road,
Near Petrol Bunk,
Asher Nagar, Tirupur – 641 003.
(Accepted the cause title vide order of Court dated 28.11.2022 made in CMP.No.19917 of 2022 in T.C.No.643 of 2008)

... Appellant

Vs.

The Assistant Commissioner of Income Tax,
Circle – I,
Tirupur.

... Respondent

Prayer:

Appeal filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Chennai Bench “D” dated 18th May 2007 in I.T.A.No.2475/MDS/2006 for the Assessment Year 2002-2003.

For Appellant	:	Mr.G.Baskar
For Respondent	:	Mr.Karthik Ranganathan Senior Standing Counsel

JUDGMENT

(Judgment of the Court was delivered by **C.SARAVANAN, J.**)

This Tax Case Appeal is directed against the Order dated 18.05.2007 passed by the Income Tax Appellate Tribunal (hereinafter referred to as the 'Tribunal') in ITA.No.2475/MDS/2006.

2. At the time of admission of this Tax Case Appeal, the following Substantial Questions of Law were framed by this Court:-

1. ***Whether the Income Tax appellate Tribunal is right in not admiring a fresh ground raised for the first time before the Tribunal, when it involves a pre-question of law and involves no additional investigation into facts?***
2. ***Whether the unabsorbed depreciation can be set off against the long term capital gain for the assessment year in question?***
3. ***Whether the Income Tax Appellate Tribunal is right in holding that the provision for deferred tax liability as per AS 22 issued by the Institute of Chartered Accountants of India is an unascertained liability under Explanation (c) to sub-section (2) of Section 115JB for the purpose of computing minimum alternate tax, despite the standard being mandated by Section 211(3C) of the Companies Act, 1956?***

3. In view of the submissions made by the learned counsel for the Appellant/Assessee and the learned counsel for the Respondent/Income Tax Department, we proceed to frame the following supplementary question of law as Substantial Question of Law No.4:-

> ***4. Whether the Appellant/Assessee was precluded from pursuing the remedy under Section 154 of the Act, merely because an Appeal under Section 246A of the Act was filed subsequently before the Appellate Commissioner against the same assessment order against which the Appellant/Assessee had earlier filed application under Section 154 of the Act?***

4. When the case was taken up for further hearing, the learned counsel for the Appellant/Assessee submitted that the Appellant/Assessee is not pressing the Substantial Question of Law No.3.

5. It is therefore submitted that the Substantial Question of law No.3 framed by this Court on 09.07.2008 can be answered against the Appellant/Assessee in the light of the amendment to Section 115JB of the Income Tax Act, 1961 (hereinafter referred to as the 'Act') by the **Finance Act, 2000** with effect from **01.04.2001**.

6. The above statement of the learned counsel for the Appellant/Assessee stands recorded. Therefore, the 3rd Substantial Question of Law is accordingly answered against the Appellant/Assessee.

7. Since, no arguments were advanced either by the learned counsel for the Appellant/Assessee or by the learned Standing Counsel for the Respondent/Income Tax Department in so far as the 1st Substantial Question of Law is concerned, we therefore refrain from answering the same.

8. Therefore, we proceed to answer the Substantial Question of Law No.2 and Supplementary Question of Law viz Substantial Question of Law No.4 in respect of which arguments were advanced both by the Appellant/Assessee at the time of initiation of arguments and by the learned Standing Counsel for the Respondent/Income Tax Department.

9. Brief facts of the case which are necessary for answering the above Substantial Questions of Law are as under:-

(i) The Appellant/Assessee is a company engaged in the business of spinning of yarn and manufacture of knitted hosiery garments etc. exported both yarn and knitted hosiery garments etc.

(ii) The Appellant/Assessee filed its **Return of Income** on **31.10.2002** for the **Assessment Year 2002-2003** relevant to the **Previous Year 2001-2002.**

(iii) In the aforesaid **Return of Income** filed by the Appellant/Assessee on **31.10.2002,** the Appellant/Assessee declared 'Nil' income under the normal method of computation of income and offered **Rs.47,71,532**/- as taxable income under Minimum Alternate Taxation Scheme under Section 115JB of the Act.

(iv) During the Financial **Year 2001-2002,** the Appellant/Assessee had sold a parcel of land to its subsidiary company and claimed the benefit of Section 47A of the Act.

(v) However, the said subsidiary company converted the same into stock-in-trade. Therefore, the exemption claimed by the Appellant/Assessee under Section 47A of the Act had to be withdrawn and was not available.

(vi) Therefore, the Appellant/Assessee filed a revised **Return of**

Income on **29.10.2004** for the **Assessment Year 2002-2003**.

(vii) However, the revised **Return of Income** that was filed on **29.10.2004** for the **Assessment Year 2002-2003** was filed beyond the statutory period of limitation under Section 139(5) of the Act.

(viii) The revised **Return of Income** was actually filed pursuant to a **Notice** dated **16.04.2003** issued to the Appellant/Assessee under **Section 143(2)** of the Act before the regular **Return of Income** filed by the Appellant/Assessee on **31.10.2002** for the **Assessment Year 2002-2003** was scrutinized.

(ix) The Appellant/Assessee thus offered income from the sale of land as taxable income, since the land sold to its subsidiary company was converted into stock-in-trade and since the exemption claimed under Section 47A of the Act was withdrawn by the Appellant/Assessee.

(x) While offering the aforesaid capital gains from the sale of land to its subsidiary company as taxable income, the Appellant/Assessee claimed to set off the unabsorbed depreciation that had remained unutilized from the **Assessment Year 1999-2000** against the tax liability from the aforesaid capital gains under **Section 32** read with **Section 72** of the Act.

(xi) Meanwhile, an **Assessment Order** dated **28.03.2005** was passed under **Section 143(3)** of the Act by the Appellant/Assessee for the **Assessment Year 2002-2003.**

(xii) Under these circumstances, the Appellant/Assessee filed an application under Section 154 of the Act for rectification of the aforesaid **Assessment Order** dated **28.03.2005** for setting-off the unabsorbed depreciation from the **Assessment Year 1999-2000** against the tax liability arising out of the long term capital gains from the sale of land to its subsidiary company under **Section 32** read with **Section 72** of the Act.

(xiii) Meanwhile, an appeal was also filed by the Appellant/Assessee on **12.05.2005** against the said **Assessment Order** dated **28.03.2005** passed under **Section 143(3)** of the Act before the Commissioner of Income Tax (Appeals) (hereinafter referred to as the 'Appellate Commissioner') under **Section 246A** of the Act.

(xiv) Exercising the power under **Section 154** of the Act, the Assessing Officer accepted the claim of the Appellant/Assessee vide **Order** dated **25.08.2005** in so far as setting off the unabsorbed depreciation that was available from the **Assessment Year 1999-2000** against the capital gains from the sale of land by the Appellant/Assessee to its subsidiary company.

(xv) The Appellate Commissioner vide Order dated **15.11.2006** affirmed the decision of the Assessing Officer in the **Assessment Order** dated **28.03.2005** and the disallowed claim for set off the unabsorbed depreciation from the **Assessment Year 1999-2000** against the capital gains in the **Assessment Year 2002-2003** even though it stood already allowed by the **Assessing Officer** vide **Order** dated **25.08.2005** passed under the **Section 154** of the Act.

(xvi) Aggrieved by aforesaid **Order** dated **15.11.2006** of the Appellate Commissioner, the Appellant/Assessee filed appeal before the Tribunal.

(xvii) The Tribunal vide **Impugned Order** dated **18.05.2007** dismissed the appeal filed by the Appellant/Assessee and thus affirmed the **Order** dated **15.11.2006** of the Appellate Commissioner.

(xviii) While dismissing the appeal filed by the Appellant/Assessee, the Tribunal also upheld the Order dated **15.11.2006** of the Appellate Commissioner including the issue regarding the disallowance of claim to set-off of the unabsorbed depreciation from the **Assessment Year 1999-2000** against the capital gains in the **Assessment Year 2002-2003**.

10. During the course of hearing, the learned counsel for the Appellant/Assessee stated that once an order on a particular issue had been passed by the Assessing Officer under **Section 154** of the Act, it was not open for the Appellate Commissioner to re-look into the same and that the Appellate Commissioner should have treated the appeal in so far as that issue is concerned as not pressed for.

10.1. It is further submitted that the Appellate Commissioner ought not to have passed an order adverse to **Order** dated **25.08.2005** of the **Assessing Officer** passed under **Section 154** of the Act.

10.2. The learned counsel for the Appellant/Assessee would submit that even on merits, the Tribunal has committed an error in disallowing the claim for setting-off the tax liability arising out of long term capital gains against the unabsorbed depreciation which had remained unutilized.

10.3. It is submitted that the only remedy that was available to the Department was under Section 263 of the Act before the jurisdictional

Commissioner of Income Tax in the exercise of the revisional power given to the Judicial Commissioner under the Act.

10.4. It is submitted that in the light of the **Order** dated **25.08.2005** of the Assessing Officer passed under **Section 154** of the Act, the Order of the Appellate Commissioner dated **15.11.2006** disallowing the claim to set off unabsorbed depreciation from the **Assessment Year 1999-2000** for being set-off against the capital gains in the **Assessment Year 2002-2003** from the sale of land to the subsidiary company was unjustified and unwarranted.

10.5. It is therefore submitted that the Impugned Order dated 18.05.2007 of the Tribunal rejecting the appeal of the Appellant/Assessee against the Order of the Appellate Commissioner is liable to be interfered with.

10.6. The learned counsel for the Appellant/Assessee has placed the reliance on the following decisions:

*(i) **NTPC** Vs. **CIT** [1998] 97 Taxman 358 (SC);*

*(ii) **CIT** Vs. **Virmani Industries (P) Ltd** [1995] 83 Taxman 343 (SC);*

*(iii) **CIT** Vs. **Sanmar Speciality Chemicals Ltd** [2020] 122 taxmann.com 212 (Madras);*

*(iv) **CIT** Vs. **Venkateshwara Leather (P) Ltd** [2022] 137 taxmann.com 145 (Madras);*

*(v) **CIT** Vs. **ACC Ltd** [2020] 113 Taxmann.com 168(SC).*

11. The learned Senior Standing Counsel for the Respondent/Income Tax Department on the other hand would submit that the Appellant/Assessee was not entitled to resort to forum shopping i.e., one before the Assessing Officer under Section 154 of the Act and the other before the Appellate Commissioner under Section 246A of the Act.

11.1. That apart, it is submitted by the counsel for the Respondent/Income Tax Department that in terms of Section 154(1A) of the Act, the Appellant/Assessee was precluded from pressing for the relief under the guise of rectification of mistake.

11.2. That apart, it is submitted by the counsel for the Respondent/Income Tax Department that there was no scope for setting off the unabsorbed depreciation against the income arising from the long term capital gains under Section 32(2) of the Act.

11.3. Specifically, it was submitted by the learned counsel for the Respondent/Income Tax Department that the law with regard to the claim of setting off the unabsorbed depreciation had undergone a change with effect from **01.04.2001** vide **Finance Act, 2000**. Therefore, the claim for unabsorbed depreciation by the Appellant/Assessee was rightly denied by the Department.

11.4. It is submitted that till **31.03.2002**, unabsorbed depreciation could be set off against the income from any other head, if the unabsorbed depreciation could not be wholly set-off under sub-clause 1 to Section 32(2) of the Act. However, this was not available with effect from **01.04.2002** i.e., from **Assessment Year 2002-2003**.

11.5. Therefore, it is submitted that during the period in dispute, there was no scope for allowing the unabsorbed depreciation to be set off against the income arising from capital gains and therefore the impugned order of the Tribunal does not merit any interference.

11.6. The learned counsel for the Respondent/Income Tax Department summarized his submissions as follows:-

(i) The Appellant/Assessee cannot file an appeal against Order of an Assessing Officer when the issue is already before the Assessing Officer under Section 154 of the Act, notwithstanding the fact that Appellant/Assessee may or may not secure an Order under Section 154 of the Act.

(ii) There is no scope for pursuing a petition under Section 154 Act once an appeal is filed against the same Assessment Order.

(iii) There is no scope for allowing the unabsorbed depreciation for being set-off against the income arising from capital gains in view of the amendment to Section 32(2) vide **Finance Act, 2001** with effect from **01.04.2002.** Hence, prays for dismissal of this Appeal.

11.7. The learned counsel for the Respondent/Income Tax Department further submitted that the power under Section 251(1)(a) of the Act makes it clear that vast and wide powers are vested with the Appellate Commissioner to enhance the Assessment.

12. By way of rejoinder, the learned counsel for the Appellant/Assessee would submit that the law on the subject is clear. It is submitted that Section 32(2) of the Act as it stood during the period in dispute is similar to the period in which an order was passed by the Hon'ble Supreme Court in ***CIT Vs. Virmani Industries Private Limited*** *[1995] 83 Taxman case 343(SC)***.**

DISPOSITION:-

13. We have considered the arguments advanced by the learned counsel for the Appellant/Assessee and the learned Senior Standing Counsel for the Respondent/Income Tax Department.

14. The Appeal under Section 260A of the Act can be entertained only if the Court is satisfied that the case involves Substantial Questions of Law as held in **Sir Chunilal V.Mehta and Sons, ltd** Vs. **The Century Spinning and Manufacturing co., ltd., 1962 AIR 1314**.

15. Before answering the 2nd Substantial Question of Law, we shall first deal with the 4th Substantial Question of Law which was argued during the course of hearing of this appeal.

DECISION ON THE SUBSTANTIAL QUESTION OF LAW NO.4:-

16. The Appellant/Assessee had filed a composite appeal under Section 246A of the Act and after filing a Petition under Section 154 of the Act, two separate orders have culminated as detailed below:-

(1)	**(2)**	**(3)**
Nature of Proceedings	**Date of initiation of the Proceeding in the Column No.1**	**Date of Order in response to Application / Appeal in (1) & (2)**
Application under Section 154 of the Act	06.05.2005	25.08.2005
Date of Appeal under Section 246A of the Act	12.05.2005	15.11.2006

17. Thus, Order under Section 154 of the Act passed by the Assessing Officer preceded the Order of the Appellate Commissioner in response to the appeal filed by the Appellant/Assessee under Section 246A of the Act.

18. To answer the above Substantial Question of Law, it will be useful to refer to the text of Section 154 of the Act. Section 154 of the Act is extracted hereunder:-

*"**154. Rectification of mistake.**—*

(1) With a view to rectifying any mistake apparent from the record an income-tax authority referred to in section 116 may,—
(a) amend any order passed by it under the provisions of this Act;
(b) amend any intimation or deemed intimation under sub-section (1) of section 143;]]
(c) amend any intimation under sub-section (1) of section 200A;]
(d) amend any intimation under sub-section (1) of section 206CB.]

(1A) Where any matter has been considered and decided in any proceeding by way of appeal or revision relating to an order referred to in sub-section (1), the authority passing such order may, notwithstanding anything contained in any law for the time being in force, amend the order under that sub-section in relation to any matter other than the matter which has been so considered and decided.]

(2) Subject to the other provisions of this section, the authority concerned —
(a) may make an amendment under sub-section (1) of its own motion, and
(b) shall make such amendment for rectifying any such mistake which has been brought to its notice [by the assessee or by the deductor,] [or by the collector], and where the authority concerned is the Commissioner

(Appeals)], by the [Assessing Officer] also.

(3) An amendment, which has the effect of enhancing an assessment or reducing a refund or otherwise increasing the liability of the assessee [or the deductor] [or the collector], shall not be made under this section unless the authority concerned has given notice to [the assessee or the deductor] [or the collector] of its intention so to do and has allowed [the assessee or the deductor] [or the collector] a reasonable opportunity of being heard.

(4) Where an amendment is made under this section, an order shall be passed in writing by the income-tax authority concerned.

[(5) Where any such amendment has the effect of reducing the assessment or otherwise reducing the liability of the assessee or the deductor [or the collector], the Assessing Officer shall make any refund which may be due to such assessee or the deductor [or the collector].]

(6) Where any such amendment has the effect of enhancing the assessment or reducing a refund [already made or otherwise increasing the liability of the assessee or the deductor [or the collector], the Assessing Officer shall serve on the assessee or the deductor [or the collector], as the case may be] a notice of demand in the prescribed form specifying the sum payable, and such notice of demand shall be deemed to be issued under section 156 and the provisions of this Act shall apply accordingly.

(7) Save as otherwise provided in section 155 or sub-section (4) of section 186 no amendment under this section shall be made after the expiry of four years [from the end of the financial year in which the order sought to be amended was passed]

[(8) Without prejudice to the provisions of sub-section (7), where an application for amendment under this section is made [by the assessee or by the deductor] [or by the collector] on or after the 1st day of June, 2001 to an income-tax authority referred to in sub-section (1), the authority shall pass an order, within a period of six months from the end of the month in which the application is received by it,—
(a) making the amendment; or
(b) refusing to allow the claim.]"

19. The power to pass an order under Section 154(1) of the Act can be exercised by the Income Tax Department who had earlier passed Order only under the following four circumstances namely:-

1. amend any order passed by it under the provisions of this Act;
2. amend any intimation or deemed intimation under sub-section (1) of section 143;
3. amend any intimation under sub-section (1) of section 200A;
4. amend any intimation under sub-section (1) of section 206CB

20. An Order can be made under the Section 154 of the Act by the Income Tax Authority referred to in Section 116 of the Act only with a view to rectify the mistake apparent from the face of record in the Order that was earlier passed. It has to be borne in mind that an application under Section 154 of the Act is confined only to rectify an error apparent on the face of record. The machinery under Section 154 of the Act is not intended to be used as a substitute for an appeal.

21. Under no circumstances, an application under Section 154 of the Act can be allowed to be transformed into an appeal in dis-guise. This position stands clarified by several decisions of the Court. Reference can be made to the following decision of the Courts:-

(i) ***CIT*** *Vs.* ***Hero Cycles (P) Ltd*** *[1997] 94 Taxman 271 (SC);*
(ii) ***CIT*** *Vs.* ***Shri Eklingji Trust*** *[2001] 119 Taxman 527 (Rajasthan);*
(iii) Yogendra Prasad Santhosh Kumar *Vs.* ***CIT(A)*** *[2014] 44 Taxmann.com 299 (All) and*
(iv) CIT *Vs.* ***Hero Cycles (P) Ltd*** *[1997] 94 Taxman 271 (SC)*

22. The learned counsel for the Appellant/Assessee heavily relied on sub-section (1A) to Section 154 of the Act to persuade us to come to a conclusion that the Appellant/Assessee was not precluded from pursuing the twin remedy both before the Assessing Officer under Section 154 of the Act and before the Appellate Commissioner under Section 246A of the Act respectively.

23. While the counsel for the Respondent/Income Tax Department stated that once an appeal or revision was filed/ initiated against an

Assessment Order, the Income Tax Authority was precluded from venturing into the same issue in respect of which an Assessee or the Department was either before the Appellate or Revisional Authority.

24. A reading of Section 154(1A) of the Act indicates that an Assessment Officer is not precluded for passing an Order in relation to any matter which was not considered and decided by way of an appeal or revision relating to an Order referred to in sub-section (1) of Section 154 of the Act.

25. Therefore, Order dated **25.08.2005** passed under Section 154 for the **Assessment Year 2002-2003** pursuant to the application filed on **06.05.2005** by the Appellant/Assessee cannot be said to be without jurisdiction, if indeed there was an error apparent on the face of record in the **Assessment Order** dated **25.03.2005**.

26. However, if in respect of an issue, the Appellate Authority or the Revisional Authority as the case maybe has passed an order, the authority who originally passed the order which is subject matter of an order of the

Appellate Authority or the Revisional Authority, as the case may be is precluded from passing an order under Section 154 of the Act.

27. The reason for such restriction is plain and simple. The Original Authority against whose order, the Appellate Authority or the Revisional Authority as the case may be, has passed an order, cannot resort to prevarication and dilute the order of such Original Authority in the first instance or that of the Appellate Authority or the Revisional Authority as the case may be, as the order of the Original Authority would have stood merged with the Order of the Appellate Authority or the Revisional Authority, as the case may be.

28. Therefore, the Original Authority cannot rectify an order after the appellate authority or the revisional authority has passed an order. However, that restriction in sub-section (1A) to Section 154 of the Act cannot be interpreted to mean that if an application is filed under 154 of the Act, the authority who has passed the order sought to be rectified is not empowered to rectify the error apparent on the face of the record merely because an appeal

or revision is pending, before the Appellate or the Revisional Authority as the case may be. The Original Authority can exercise the power vested with them under Section 154 of the Act, before the Appellate or the Revisional Authority as the case may be passes an Order within their domain.

29. The Original Authority before whom such an application is filed has to merely see whether the application is indeed filed for rectification of error apparent on the face of record and is not appeal in disguise.

30. It is not open for the Respondent/Income Tax Department to contend that if an appeal is pending before the Appellate Commissioner under Section 246A of the Act or any other proceedings are pending before any Revisional Authority under the Act, no order can be passed in view of Section 154(1A) of the Act.

31. All that Section 154(1A) of the Act contemplates is that an authority who has passed an Order against which an Appellate/Revisional Authority has passed an Order, the Original Authority who had earlier passed

the Order which is sought to be rectified cannot pass an Order revising such order in respect of which such Appellate/Revisional Authority has passed an Order.

32. Merely because an appeal was filed before the Appellate Authority or revision pending before the Revisional Authority would not preclude the Original Authority to rectify any mistake or error apparent from the record under Section 154 of the Act in respect of which either no order has been passed by the Appellate/Revisional Authority or yet an Order was to be passed.

33. We are therefore unable to accept the arguments of the learned counsel for the Respondent/Income Tax Department in the light of the last sentence in Paragraph No.14 of the decision of the ***Rajasthan High Court in CIT Vs. Shri Eklingji Trust*** *[2001] 119 Taxman 527.*

34. Further, the decision of the Court in the above case cannot be considered as laying down proposition as canvassed by the learned counsel

for the Respondent/Income Tax Department. There the Court has merely observed as under:-

> *"14. .... May be the power of Sec 154 is not confined to correct arithmetical or clerical mistake only but it does not extent either to raise some other contentions but by the very same authority which were not raised in original order."*

35. Further, if an Order is passed under Section 154 of the Act which was both without jurisdiction or erroneous and prejudicial to the interest of the Respondent/Income Tax Department, the Respondent/Income Tax Department was not without remedy. The remedy for the Respondent/Income Tax Department in such cases is under Section 263 of the Act.

36. Therefore, the negative restriction in Section 154(1A) of the Act cannot be construed to mean that once an appeal or revisional proceedings have been initiated against an Assessment Order, the rectification proceeding initiated earlier under Section 54 of the Act will lapse.

37. However, it would not preclude the Appellate Commissioner to exercise powers under Section 251(1)(a) of the Act, as power is wide enough

to confirm, refuse, enhance or annul the assessment.

38. It is clear that the Appellate Commissioner Order while disposing an appeal under Section 251(1)(a) of the Act may confirm, refuse, enhance or annul the assessment.

39. The only caveat under Section 251(1)(a) of the Act is such enhancement has to be in respect of an issue which was the subject matter of the Assessment order notwithstanding the fact that it was not raised before the Appellate Commissioner by the Assessee. All that is required is a reasonable opportunity of being heard by way of a Show Cause Notice. This is evident from a reading of sub-bvsection (2) to Section 251 of the Act. Section 251(2) of the Act reads as under:-

> *"**251. Powers of the Commissioner (Appeals)**.—*
>
> *(1) In disposing of an appeal, the Commissioner (Appeals) shall have the following powers—*
>
> *(a) in an appeal against an order of assessment, he may confirm, reduce, enhance or annul the assessment;*
>
> *(b) in an appeal against an order imposing a penalty, he may confirm or cancel such order or vary it so as either to enchance or to reduce the penalty;*

(c) in any other case, he may pass such orders in the appeal as he thinks fit.

(2) The Commissioner (Appeals) shall not enhance an assessment or a penalty or reduce the amount of refund unless the appellant has had a reasonable opportunity of showing cause against such enhancement or reduction

Explanation.—*In disposing of an appeal, the [Commissioner (Appeals)] may consider and decide any matter arising out of the proceedings in which the order appealed against was passed, notwithstanding that such matter was not raised before the [Commissioner (Appeals)] by the appellant."*

40. Explanation to Section 251 of the Act makes it clear that the Appellate Commissioner may consider and decide any matter arising out of the proceedings in which the Order appealed against was passed. Thus, the Appellate Commissioner can look into the matter afresh. However, the Appellate Commissioner has to give notice to the Assessee if the Appellate Commissioner proposes to enhance the assessment.

41. This position also stands clarified by the Hon'ble Supreme Court in ***Commissioner of Income Tax*** Vs. ***Rai Bahadur Hardutroy Motilal Chamaria*** *[1967] 66 ITR 443*, wherein, the Hon'ble Supreme Court while dealing with Section 31(1) of the Indian Income Tax Act, 1922 which is *pari*

materia with Section 251 of the Act, observed as under:-

"It is necessary also to emphasise that the statute provides that, ***once an assessment comes before the Appellate Assistant Commissioner, his competence is not restricted to examining those aspects of the assessment which are complained of by the assessee; his competence ranges over the whole assessment and it is open to him to correct the Income-tax Officer not only with regard to a matter raised by the assessee but also with regard to a matter which has been considered by the Income-tax Officer and determined in the course of the assessment. It is also well-established that an assessee having once filed an appeal cannot withdraw it****. In other words, the Assessee having filed an appeal and brought the machinery of the Act into working, cannot prevent the Appellate Assistant Commissioner from ascertaining and settling the, real sum to be assessed, by intimation of his withdrawal of the appeal. Even if the assessee refuses to appear at the hearing, the Appellate Assistant Commissioner can proceed with the enquiry and if he finds that there, has be-en an under-assessment, he can enhance the assessment (Commissioner of Income-tax, Punjab v. Nawab Shah Nawaz Khan (1938) 6 ITR 370. In this context reference may be made to the decision of the Court of Appeal in The King Vs. Income Tax Special Commissioners [1936] 1 KB 487* ***in which the taxpayer sought to withdraw a notice, of appeal which had been given on his behalf against an additional assessment under Sch. D. The Commissioners of Inland Revenu****e were not satisfied that the assessment was adequate. The Special Commissioners then proposed to proceed with the hearing of the appeal in the ordinary way. At that stage the taxpayer sought a writ of prohibition to prohibit the Special Commissioners from hearing the appeal.* ***It was held by the Court of Appeal that notice of appeal having once been given, the Commissioners were bound to proceed in accordance with the Income-Tax Acts and determine the true amount of the assessment. At page 493 of the Report Lord Wright observed as follows :***

" -in making the assessment and in dealing with the appeals, the Commissioners are exercising statutory authority and a statutory duty which they are bound to carry out. They are not in the position of judges deciding an issue between two particular parties. Their obligation is wider than that. It is to exercise their judgment on such material as comes before them and to obtain any material which they think- is necessary and which they ought to have, and on that material to make the assessment or the estimate which the law requires them to make. They are not deciding a case interparties; they are assessing or estimating the amount on which,

> *in the interests of the country at large, the tax- payer ought to be taxed." The principle that emerges as a result of the authorities of this Court is that the Appellate Assistant Commissioner has no jurisdiction, under Section 31(3) of the Act, to assess a source of income which has not been processed by the Income- tax Officer and which is not disclosed either in the returns filed by the assessee or in the assessment order, and therefore the Appellate Assistant Commissioner cannot travel beyond the subject matter of the assessment.*

42. Therefore, we are of the view that while powers are vested with the Assessing Officer to pass the Order rectifying the Assessment Order under Section 154 of the Act even if appellate or revisional proceedings are pending, it would also not preclude the Appellate Commissioner to enhance the tax liability in respect of the issue which was the subject matter of the Assessment. Thus, it can be concluded as follows:-

(i) In case, no appeal is pending before the Appellate Commissioner under Section 246A of the Act and if an order of rectification is passed under Section 154 of the Act, the remedy that is available to the Respondent/Income Tax Department is to invoke the power of revision under Section 263 of the Act if such an Order is erroneous and prejudicial to the interests of the Revenue.

(ii) However, if an appeal is pending before the Appellate Commissioner, the Appellate Commissioner has wide powers to enhance the tax liability in respect of those aspects which was the subject matter of the Assessment Order although it was not raised before the Appellate Commissioner in view of the language in Section 251(1)(a) of the Act.

43. Admittedly, in the Assessment Order the claim for adjusting the unabsorbed depreciation against the income arising from capital gains was the subject matter of assessment. Therefore, it has to be held that the Appellate Commissioner was justified in re-looking the same irrespective of the Order passed under Section 154 of the Act.

44. The Income Tax Department is not required to involve the machinery under Section 263 of the Act by the Jurisdictional Commissioner for holding that the consequential Assessment Order passed was erroneous and prejudicial to the interest of the Respondent/Income Tax Department.

45. Therefore, we answer the 4th Substantial Question of Law as above by holding that the powers of the Appellate Commissioner under Section 251 of the Act are wide enough to include and to look into issues which was the subject matter of the Assessment Orders and Orders passed under Section 154 of the Act.

DECISION ON THE SUBSTANTIAL QUESTION OF LAW NO.2:-

46. We now proceed to answer the Substantial Question of Law No. 2 i.e., Whether the Tribunal was justified in upholding the Order of the Appellate Commissioner in so far as the order fails to recognize the claim of the Appellant/Assessee to set off the unabsorbed depreciation from the **Assessment Year 1999-2000** against the profits arising from the long term capital gains in the **Assessment Year 2002-2003**.

47. The **Impugned Order** dated **18.05.2007** of the Tribunal deals with several aspects including the issue relating to unabsorbed depreciation. The present Tax Case Appeal relates to the **Assessment Year 2002-2003** i.e.,

Previous Year 2001-2002. In other words, the dispute relates to the income earned by the Appellant/Assessee between **01.04.2001** and **31.03.2002**.

48. The Appellant/Assessee had filed a Return of Income under Section 139(1) of the Act for the Assessment Year **2002-2003** on **31.10.2002** for the aforesaid period. A copy of the calculation in the book profit filed along with the aforesaid Return of Income for the purpose of Section 115JB of the Act is not available.

49. In the statement enclosed along with the Return of Income filed by the Appellant/Assessee, the Appellant/Assessee had not included a sum of **Rs.5,13,37,500/-** for the sale of immovable properties in view of Section 47(iv) of the Act as per which income from Capital Gains under Section 45 will not apply for transfers of any transfer of a capital asset by a company to its subsidiary company.

50. However, the land which was sold to its subsidiary was converted as stock-in-trade by its subsidiary. Therefore, the Appellant/Assessee filed a

revised return of income subsequently on **20.10.2004**, after the time for filing a revised return had expired under Section 139(5)/(v) of Act.

51. It is in this background, an **Assessment Order** dated **28.03.2005** was passed, wherein, the benefit of unabsorbed depreciation claimed for a sum of **Rs.1,28,39,356/-** was disallowed by the Assessing Officer which accrued for the **Assessment Year 1999-2000.**

52. There is no dispute that the Appellant/Assessee had unabsorbed depreciation which was allowed to be set off by the Assessing Officer in the Rectification Order dated 28.05.2005. The unabsorbed depreciation which has accumulated from the **Assessment Year 1999-2000** is for a sum of **Rs.4,26,88,856/- (actually, Rs.4,24,88,948/-).**

53. In the Impugned Order, it has been held that under Section 72 of the Act, only the loss arising from business can be carried forward and set off only against profit and gains from business and cannot be set off against income from the capital gains. The Appellant/Assessee wanted to set off the

unabsorbed depreciation partly towards the business income and partly towards the income from long term capital gains under Section 72 of the Act.

54. In this connection, the learned Counsel for the Appellant/Assessee relied on the followings decisions of the Courts:-

***(i) CIT Vs. Hickson and Dadajee (P) Ltd**, 2020 122 Taxmann 94 (SC)*

***(ii) CIT Vs. Pioneer Asia Packing (P) Ltd**, (2008) 170 Taxman 127 (Madras)*

***(iii) CIT Vs. S & S Power Switchgear Ltd,** (2009) 318 ITR (Madras)*

***(iv) CIT Vs. S & S Power Switchgear Ltd.,** (2019) 111 Taxmann 95 (Madras)*

***(v) Bond Safety Beits (Dissolved) Vs. DCIT** (2023) 156 Taxmann 222 (Bombay)*

55. As per Section 32(1) of the Act inserted by the Income Tax (Amendment) Act, 1998 as in force with effect from **01.04.1998**, an assessee is entitled for deduction of depreciation in respect of the following:-

(i) in the case of assets of an undertaking engaged in generation or generation and distribution of power, such percentage on the actual cost thereof to the assessee as may be prescribed;

(ii) in the case of any block of assets, such percentage on the written down value thereof as may be prescribed.

56. As per Section 32(2) of the Act as amended by **Finance Act, 2000** with effect from **01.04.2001**, where in the assessment of the assessee, full effect cannot be given to any allowance under clause (ii) of sub section (1) of Section 32 of the Act in any previous year owing to there being no profits or gains chargeable for that previous year or owing to the profits or gains being less than the allowance, then, the allowance or that part of allowance to which effect has not been given (hereinafter referred to as unabsorbed depreciation allowance), as the case may be:-

> *(i) shall be set off against te profits and gains, if any, of any business or profession carried on him and assessable for that assessment year;*
>
> *(i) shall be set off against te profits and gains, if any, of any business or profession carried on him and assessable for that assessment year;*
>
> *(ii) if the unabsorbed depreciation allowance cannot be wholly set off under clause (i), the amount not so set off shall be set off from the income under any other head, if any, assessable for that assessment year;*

(iii) if the unabsorbed depreciation allowance cannot be wholly set off under clause (i) and clause (ii), the amount of allowance not so set off shall be carried forward to the following assessment year and–

(a) It shall be set off against the profits and gains if any of any business or profession carried on by him and assessable for that assessment year;

(b) If the unabsorbed depreciation allowance cannot be wholly so set off, the amount of unabsorbed depreciation allowance not so set off shall be carried forward to the following assessment year not being more than eight assessment year immediately succeeding assessment year for which the aforesaid allowance was first computed:

57. However, Section 32(2) of the Act was amended by the **Finance Act, 2001** with effect from **01.04.2002**. After the amendment to Section 32(2) of the Act with effect from **01.04.2002**, if an Assessee is unable to give full effect cannot be given to any allowance under sub-section (1) of Section 32 of the Act, in any previous year, owing to there being no profits or gains chargeable for that year, or owing to the profits or gains chargeable being less than the allowance, then, subject to the provisions of sub-section (2) of Section 72 and sub-section (3) of Section 73 of the Act, the allowance or the part of the allowance to which effect has not been given, as the case may be,

shall be added to the amount of the allowance for depreciation for the following previous year and deemed to be part of that allowance, or if there is no such allowance for that previous year, be deemed to be the allowance for that previous year, and so on for the succeeding previous years.

58. Both amended and unamended Section 32(2) of the Act are reproduced below:-

Section 32(2) of the Income Tax Act, 1961	
Section 32(2) of the Act amended by Finance Act, 2000 with effect from 01.04.2001	***Section 32(2) of the Act substituted by the Finance Act, 2001 with effect from 01.04.2002***
(2) Where in the assessment of the assessee full effect cannot be given to any allowance under clause (ii) of sub section (1) in any previous year owing to there being no profits or gains chargeable for that previous year or owing to the profits or gains being less than the allowance, then, the allowance or the part of allowance to which effect has not been given (hereinafter referred to as unabsorbed depreciation allowance), as the case may be:- *(i) shall be set off against the profits and gains, if any, of any business or profession carried on him and assessable for that assessment year;* *(i)* ***if the unabsorbed depreciation allowance cannot be wholly set off under clause (i), the amount not so set off shall be set off from the income under any other head, if any, assessable for that assessment***	*(2) Where, in the assessment of the assessee, full effect cannot be given to any allowance under sub-section (1) in any previous year, owing to there being no profits or gains chargeable for that year, or owing to the profits or gains chargeable being less than the allowance, then, subject to the provisions of sub-section (2) of section 72 and sub-section (3) of section 73, the allowance or the part of the allowance to which effect has not been given, as the case may be, shall be added to the amount of the allowance for depreciation for the following previous year and deemed to be part of that allowance, or if there is no such allowance for that previous year, be deemed to be the allowance for that previous year, and so on for the succeeding previous years.*

Section 32(2) of the Income Tax Act, 1961	
year; *(iii) if the unabsorbed depreciation allowance cannot be wholly set off under clause (i) and clause (ii), the amount of allowance not so set off shall be carried forward to the following assessment year and -* *(a) It shall be set off against the profits and gains if any of any business or profession carried on by him and assessable for that assessment year;* *(b) If the unabsorbed depreciation allowance cannot be wholly so set off, the amount of unabsorbed depreciation allowance not so set off shall be carried forward to the following assessment year not being more than eight assessment year immediately succeeding assessment year for which the aforesaid allowance was first computed:* *Provided that the time limit of eight assessment years specified in sub-clause (b) shall not apply in the case of a company for the assessment year beginning with the assessment year relevant to the previous year in which the said company has become a sick industrial company under sub-section (1) of section 17 of Sick Industrial Companies (Special Provisions Act) 1985 (1 of 1986) and ending with the assessment year relevant to the previous year in which the entire net worth of such company becomes equal or exceeds the accumulated losses.* ***Explanation:-*** *for the purposes of the clause, "net worth" shall have the meaning assigned to it in clause (ga) of sub-section (1) of section 3 of the Sick Industrial Companies (Special Provisions Act) 1985 (1 of 1986).*	

59. Amendments to the provision of the Income Tax Act are not retrospective unless expressly provided in the amendment itself. If the provision as it stood between **01.04.2001** to **31.03.2002** is applied to the facts of the case there is no doubt that the Appellant/Assessee was entitled to set of the unabsorbed depreciation against any other income in view of Section 32(2)(ii) as it stood between **01.04.2001** to **31.03.2002.**

60. What is relevant is the provision as it stood between **01.04.2001** and **31.03.2002** for **Assessment Year 2002-2003**. The amendment to Section 32(2) of the Act with effect from 01.04.2002 will be relevant only for **Assessment Year 2003-2004** for the relevant **Previous Year 2002-2003.**

61. In the revised Return of Income filed on **29.10.2004** for the Assessment Year 2002-2003, the Appellant/Assessee had declared the business income as **Rs.4,24,86,856/-.** However, the Assessing Officer had also questioned the computation of the long term capital gains arising from the sale of land and building to its subsidiary.

62. The following table discloses the method adopted by the Appellant/Assessee and by the Department to arrive at the aforesaid long term capital gain of **Rs. 2,96,47,500/-** and **Rs. 3,57,81,900/-** respectively.

	As per Appellant/Assessee	**As per Department**
Fair market value of the land in 1981	(Rs.9,600 x 400 cents) = **Rs.38,40,400/-**	(Rs.6,000x400 cents) = **Rs.24,00,000/-**
Sale consideration of the land	Rs.4,60,05,900/-	Rs.4,60,05,900/-
Index cost of fair value	$\frac{426}{100}$ X 38,40,400 = **Rs.1,63,58,400/-**	$\frac{426}{100}$ X 24,00,000 = **Rs.1,02,24,000/-**
Long term capital gain	Rs.2,96,47,500/-	Rs.3,57,81,900/-

63. As per sub-clause (i) to subsection (2) to Section 32 of the Act, as

it stood between **01.04.2001** to **31.03.2002**, the unabsorbed depreciation could be set of against the profit and gains from business or any profession carried on by an Assessee which is assessable for that Assessment Year.

64. If the unabsorbed depreciation cannot be set off against profit and gains of the business or any profession of an Assessee assessable for that Assessment Year, then such amount can be set off from the income under any other head, if any, assessable for that Assessment Year. This is clear from a reading of Section 32(2)(ii) of the Act.

65. Thus, it is clear that Section 32(2) of the Act as it stood between **01.04.2001** and **31.03.2002** contemplated setting off the unabsorbed depreciation against profits and gains if any, not only from any business or profession carried on by an Assessee for that Assessment Year but also from any other head, if any, assessable for that assessment year.

66. In other words, the unabsorbed depreciation was available for

being set off against income from profit and gains from business or any profession of that Assessment Year and if the same is not feasible against any other income from that Assessment Year.

67. Therefore, while we answer the Substantial Question of Law also in so far as Question No.2 in favour of the Appellant/Assessee, we are of the view, the matter has to be remitted back to the original authority to re-do the assessment by clearly examining the computation by comparing the income tax payable in both circumstances, viz., under the normal method of computation and under Section 115JB of the Act in terms of the book profit.

68. However, we note that the computation of the profit and loss account of the Appellant/Assessee which has been filed along with the Typed Set of Documents indicates that the Appellant/Assessee had a net income of Rs.115,29,30,526.54. However, the net profit before tax arrived at Rs.111,73,63,748.04. The income that was declared in the Return of Income that was filed under Section 139(1) of the Act on 31.10.2002 by the Appellant/Assessee, was confined to a fraction of the same for a tune of

Rs.1,28,39,356/-. It is evident that the computation given by the Appellant/Assessee made under Section 115JB of the Act is erroneous. The Appellant/Assessee has not disclosed the correct book profit for the purpose of Section 115JB of the Act.

69. Since the dispute pertains to the Assessment Year 2002-2003, it is expected that the Assessing Officer will complete the assessment within a period of six months from the date of receipt of a copy of this order. Needless to state, the appellant shall be heard, before final orders are passed.

70. In the result, this Tax Case Appeal stands disposed of and the Substantial Questions of Law are answered as follows:-

Question No.1: Whether the Income Tax appellate Tribunal is right in not admiring a fresh ground raised for the first time before the Tribunal, when it involves a pre-question of law and involves no additional investigation into facts?

Decision: Not Answered.

Question No.2: Whether the unabsorbed depreciation can be set off against the long term capital gain for the assessment year in question?

Decision: Answered in favour of the Appellant/Assessee and against the

Respondent/Income Tax Department.

Question No.3: Whether the Income Tax Appellate Tribunal is right in holding that the provision for deferred tax liability as per AS 22 issued by the Institute of Chartered Accountants of India is an unascertained liability under Explanation (c) to sub-section (2) of Section 115JB for the purpose of computing minimum alternate tax, despite the standard being mandated by Section 211(3C) of the Companies Act, 1956?

Decision: Answered against the Appellant/Assessee.

Question No.4: Whether the Appellant/Assessee precluded from pursuing the remedy under Section 154 of the Act, if an Appeal under Section 246A of the Act is filed before the Appellate Commissioner?

Decision: Answered in favour of the Appellant/Assessee and against the Respondent/Income Tax Department

No costs.

(S.S.S.R., J.) **(C.S.N., J.)**
29.04.2025

mrr/jas
Index : Yes/No
Neutral Citation: Yes/No
Speaking Order (or) Non-Speaking Order

To

1.Income Tax Appellate Tribunal, “D” Bench,
Chennai.

2.The Assistant Commissioner of Income Tax,
Circle – I,
Tirupur.

S.S.SUNDAR, J.
and
C.SARAVANAN, J.

mrr

Tax Case Appeal No.643 of 2008

29.04.2025