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T.C.A.No.48 of 2013

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.01.2026

CORAM :

THE HONOURABLE DR.JUSTICE ANITA SUMANTH
and
THE HONOURABLE MR.JUSTICE MUMMINENI SUDHEER
KUMAR

T.C.A.No. 48 of 2013

M/s.Sivasakthi Threads,
No.38, SIDCO Industrial Estate,
Goundampalayam, Palladam Taluk,
Tirupur- 641 605

.. Appellant

VS

The Deputy Commissioner of Income-Tax
Central Circle III, 67-A Race Course Road,
Coimbatore – 641 018.

.. Respondent

Prayer : Appeal filed under Section 260A of the Income-Tax Act, 1961
against the order of the Income-Tax Appellate Tribunal, Bench 'C' dated
17.10.2012 in ITA No.1374/Mds/2012 for assessment year 2007-08.

For Appellant : Mr.R.Sivaraman

For Respondent : Mr.V.Mahalingam
Senior Standing Counsel

JUDGMENT

(Delivered by Dr. ANITA SUMANTH, J.)

This is an appeal at the instance of the assessee challenging
concurrent orders of the authorities rejecting the claim of set-off of
unabsorbed depreciation as against current year loss.



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2. There was a search in the premises of one Periyasamy under

Section 132 of the Income-Tax Act, 1961 (Act) on 27.09.2006.

Simultaneous survey under Section 133A was conducted in the business premises of various entities connected to the searched person including the appellant/assessee herein. Based on the records seized and impounded as well as other information, an assessment was completed for the assessment year 2007-08 under Section 143(3) read with Section 153C of the Act on 30.12.2008.

3. In the present appeal, we are concerned solely with the additions made on account of excess stock. In the course of assessment, the authority took note of the physical stock of goods and valued the same initially at a sum of Rs.53.83 lakhs and thereafter, correcting certain errors, at a sum of Rs.31,83,700/- (Rs.31.83 lakhs approx.), as seen from a reading of paragraphs 11.1 read with 11.3 (iv) of the assessment order.

4. Ultimately, the assessment came to be concluded making an addition of Rs.31.83 lakhs as unaccounted stock in business for assessment year (AY) 2007-08. This assessment has become final as has the classification of the addition as unaccounted stock.

5. While so, the assessee filed an application seeking rectification of the mistake apparent on the record under Section 154 of the Act contending that it had claimed unabsorbed depreciation loss of



Rs.11,06,525/- that had not been given effect to in the computation of income while framing the assessment. It also pointed out that it had claimed a refund of Rs.6.00 lakhs which was paid as advance tax for which credit had not been given.

6. It hence sought set-off of unabsorbed depreciation loss which assumes the character of current year unabsorbed depreciation loss as per Section 32(2) of the Act and, which would result in reduction of income from Rs.31,83,700/- to Rs.20,77,175/- after set-off of current year depreciation loss of Rs.11,06,525/- with consequential reduction of tax liability.

7. The rectification application came to be rejected by order dated 19.02.2010, the Assessing Authority accepting the credit for advance tax at Rs.6.00 lakhs but rejecting the set-off of unabsorbed depreciation loss, as claimed.

8. The rationale of the Assessing Authority was that the addition made in the order of assessment represented investments of the assessee that had not been recorded in the books of account. Such addition came under the ambit of deemed income under Section 69 of the Act, which did not fall under head 'Profits and Gains of Business or Profession (PGBP). As Section 32(2) provided for carry forward and set-off of unabsorbed depreciation loss only from PGBP, the claim of the assessee was rejected.



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In doing so, the Assessing Authority also relied upon a decision of the Gujarat High Court in *Fakir Mohammed Haji Hasan V. CIT*¹.

9. As against the order, the assessee filed an appeal before the Commissioner of Income Tax (Appeals) (CIT(A)), who confirmed the rejection of the claim concurring with the Assessing Authority on the applicability of the decision in the case of *Fakir Mohammed Haji Hasan*² assailing which, a second appeal was filed before the Income Tax Appellate Tribunal (ITAT/Tribunal).

10. Both before the CIT(A) as well as the Tribunal, the appellant specifically brought to note the provisions of Section 70 of the Act, which provided for set-off of unabsorbed depreciation loss as against other sources of income as well.

11. The Tribunal dismissed the appeal concurring with the orders of the authorities, as against which, the present Tax Case (Appeal) has been filed raising the following substantial questions of law that had been admitted on 18.02.2013.

1. Whether on facts and circumstances of the case, the Appellate Tribunal is correct in law holding that the Assessing Officer was right in denying the relief of set off of unabsorbed depreciation of Rs.11,70,675/- against the addition of Rs.31,83,700/- as excess stock in business on the ground that the decision of the High Court of Gujarat reported in Fakir Mohmed Haji Hasan Vs. Commissioner of

1247 ITR 290 (Guj.)

2Foot Note Supra (1)



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Income Tax (2001) 247 ITR 290 (Guj.) was applicable to the Assessee's case?

2. *Whether on facts and circumstances of the case the Appellate Tribunal is correct in law in holding that the decision of the Gujarat reported in Fakir Mohmed Haji Hasan Vs. Commissioner of Income Tax (2001) 247 ITR 290 (Guj.) is applicable in facts of the Assessee's case, especially when the Assessing Officer has not invoked Section 69 of the Income Tax Act to make addition of Rs.31,83,700/- which was admittedly assessed as unaccounted stocks in business in the hands of Sivasakthi Threads?*

3. *Whether the facts and circumstances of the case, the Assessee is entitled to set off of unabsorbed depreciation under the heads profit and gains of business based upon the judgment in The Commissioner of Income Tax Vs. Chensing Ventures (2007) 291 ITR 258 (Mad)?*

12. The submissions of Mr.Sivaraman, learned counsel for the assessee align with the submissions put forth before the authorities at the time of assessment and appeal. His primary argument revolves around the provisions of Sections 71 and 72 of the Act, which provide for set-off of unabsorbed depreciation loss as against other incomes as well, should the assessee in question not have any income under the head 'business'. To this end, he cites a decision of this Court in the case of *CIT V. Chensing Ventures*³.

13. As far as the decision of the Gujarat High Court in *Fakir Mohammed Haji Hasan*⁴ is concerned, he draws attention to the subsequent decisions of the Gujarat High Court in *Commissioner of*

³291 ITR 258 (Mad)

⁴Foot Note Supra (1)



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Income Tax V. Radhe Developers India Ltd.⁵, CIT. V. Shilpa Dyeing &

Printing Mills P. Ltd.⁶ and Krishnamegh Yarn Industries V. ACIT⁷

distinguishing the decision in *Fakir Mohammed Haji Hasan⁸* and finding it per incurium.

14. Mr.Mahalingam, learned Senior Standing Counsel for the revenue would support the orders of the authorities, though he is unable to defend the position that the provisions of Sections 71 and 72 have been wholly lost sight of by the authorities.

15. We have heard both learned Counsel and perused the materials placed before us.

16. The assessing officer has, in order of assessment dated 30.12.2008, made an addition of a sum of Rs.31,83,700/- as unaccounted stock in business. The assessee thereafter sought rectification of that order on the ground that its claim for carry forward and set-off of unabsorbed loss and depreciation had been omitted to be considered. The plea was rejected, and we are of the considered view that the assessee's claim has not been appreciated in proper perspective by the authorities.

17. As per Section 32(2), unabsorbed depreciation loss which is carried forward, assumes the character of current year loss. The

5329 ITR 1 (Guj.)

6(2013) 39 taxmann.com 3 (Guj.)

7376 ITR 561 (Guj.)

8Foot Note Supra (1)



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entitlement of the assessee to set-off the same as against business income or other incomes barring capital gains, is clear from a reading of Section 72 of the Act, which provides for carry forward and set-off of unabsorbed depreciation loss as against other income as well, in the absence of the assessee returning income from business.

18. This position has been omitted to be taken note by the authorities. In *Fakir Mohammed Haji Hasan*⁹ as well, the provisions of Sections 71 and 72 have not been taken note of, and this has been noted in the subsequent decisions of the Gujarat High Court in *Radhe Developers India Ltd.*¹⁰, *Shilpa Dyeing & Printing Mills P. Ltd.*¹¹ and *Krishnamegh Yarn Industries*¹². The consequence is that current years' loss is liable to be set-off as against current years' income, barring under the head 'capital gains'.

19. Mr.Mahalingam refers to Section 79A of the Act, that states that, where, consequent upon a search under Section 132, requisition under Section 132A, or survey under Section 133A, other than under subsection (2A) of that section, the total income of any previous year of an assessee includes any undisclosed income, no set-off against such undisclosed income of any loss brought forward or otherwise, or

⁹Foot Note Supra (1)

¹⁰Foot Note Supra (5)

¹¹Foot Note Supra (6)

¹²Foot Note Supra (7)



unabsorbed depreciation under Section 32(2) may be granted in computation of total income. However, as Section 79A has been inserted vide Finance Act 2022, with effect from 01.04.2022 only, this argument does not benefit the revenue in this case.

20. In light of the aforesaid position, which the revenue accedes to, the substantial questions of law are answered in favour of the assessee and against the revenue.

21. Some arguments have been raised in the context of Section 115 BBE of the Act, inserted vide Finance Act, 2012, with effect from 01.04.2013, that provide for a special treatment in respect of incomes under the categories referred to in Sections 68, 69, 69A, 69B, 69C or 69D. The Section was substituted vide Taxation Laws (Second Amendment), Act 2016, with effect from 01.04.2017. The provision, both prior to, and post substitution, reads as follows:

Prior to substitution:

Tax on income referred to in section 68 or section 69 or section 69A or section 69B or section 69C or section 69D.

(1) Where the total income of an assessee includes any income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D, the income-tax payable shall be the aggregate of-

(a) the amount of income-tax calculated on income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D, at the rate



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*of thirty per cent; and
(b) the amount of income-tax with which the assessee would have been chargeable had his total income been reduced by the amount of income referred to in clause (a).*

Post substitution:

*115BEE [(1) Where the total income of an assessee,-
(a) includes any income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D and reflected in the return of income furnished under section 139; or
(b) determined by the Assessing Officer includes any income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D, if such income is not covered under clause (a), the income-tax payable shall be the aggregate of-
(i) the amount of income-tax calculated on the income referred to in clause (a) and clause (b), at the rate of sixty per cent; and
(ii) the amount of income-tax with which the assessee would have been chargeable had his total income been reduced by the amount of income referred to in clause (i)
(2) Notwithstanding anything contained in this Act, no deduction in respect of any expenditure or allowance [or set off of any loss] shall be allowed to the assessee under any provision of this Act in computing his income referred to in clause (a) and clause (b) of sub-section(1).*

22. Sub-section (2), inserted with effect from 01.04.2017, expressly states that no deduction in respect of expenditure or allowance or set-off of any loss shall be allowed to the assessee in computing the income in terms of Section 115 BBE.

23. There was some ambiguity as to whether the denial of set-off of



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loss provided for under Section 115BBE(2), though inserted with effect from 01.04.2017, would operate prospectively, or was clarificatory and hence would operate retrospectively. Courts have accepted the position that the operation is prospective, based on Central Board of Direct Taxes Circular No.11/2019 dated 19.06.2019.

24. Though Mr.Sivaraman raises this argument in support of the position that the present claim for AY 2007-08, being prior to 01.04.2017 must be allowed, we do not think this argument is relevant as the assessment in this case has not been made under Section 115BBE, which is a charging provision by itself, but under Section 143(3) read with Section 153C of the Act.

25. This Tax Case (Appeal) is allowed. No costs.

[A.S.M, J.] [M.S.K, J.]
23.01.2026

Index:Yes
Speaking order
Neutral Citation:Yes
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To

1.The Deputy Commissioner of Income-Tax
Central Circle III, 67-A Race Course Road,
Coimbatore – 641 018.



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2. The Income-Tax Appellate Tribunal, Bench 'C', Chennai.

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