

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.01.2021

CORAM

**THE HON'BLE MR.JUSTICE M. DURAISWAMY
AND
THE HON'BLE MRS.JUSTICE T.V. THAMILSELVI**

**Tax Case Appeal No.355 of 2009 and
M.P. No.1 of 2009**

M/s. Harvey Heart Hospitals Ltd.,
542, T.T.K. Road,
Chennai - 600 018.

... Appellant

v.

The Assistant Commissioner of Income Tax,
Central Circle I (2),
Chennai - 600 034.

... Respondent

Tax Case Appeal filed under Section 260A of the Income Tax Act,
1961 against the order of the Income Tax Appellate Tribunal, Madras 'A'
Bench, Chennai, dated 30.01.2009 passed in I.T.A.No.1842/Mds/2008.

For Appellant : Mr. R. Sivaraman

For Respondent : Ms. K.G. Usha Rani
for Mr. T.R. Senthil Kumar,
Standing Counsel

J U D G M E N T

(Delivered by M. DURAISWAMY,J)

The appellant has filed the above Tax Case Appeal challenging the order dated 30.01.2009 passed by the Income Tax Appellate Tribunal, Chennai, in respect of the assessment year 2005-06.

2.1 According to the appellant, it is in the health care industry and was incorporated in the year 1996. For the assessment year 2005-06, it has filed the original return of income on 31.10.2005 declaring 'nil' income. A search was conducted under section 132 of the Income Tax Act on 14.12.2005. Later, a notice under section 153 C of the Act was issued on the appellant, however, there was no seizure of the appellant and no unaccounted assets were found. The appellant was required to file return of income within 15 days of the receipt of notice and the same was filed on

18.10.2007 admitting 'nil' income. Thereafter, a notice under section 143(2), dated 26.10.2007 and a notice under section 142(1), dated 14.11.2007 were issued. Since the reopening pursuant to a search need to involve unearthing of unreported income, the appellant sought the reasons recorded by the respondent while passing the impugned order, however, the same was not furnished to the appellant. The books of accounts of the appellant, which had been seized by the department during the search, continued to remain with them. The appellant was called upon to produce all vouchers and documents and all available vouchers were produced on 20.12.2007, however, the department had not returned back the same to the appellant. The assessment was finalised by order dated 31.12.2007.

2.2 As against the order passed by the Assessing Officer, the appellant filed an appeal before the Commissioner of Income Tax (Appeals). The appellant also raised the plea of jurisdiction to complete the assessment under section 153A read with section 147 of the Income Tax Act. With regard to dis-allowance on gains on slump sale and omission to set off business loss, the appellant raised a plea that the sale of

business assets though computed under the head income from capital gains, the sale would partake the character of the business income and accordingly, would be eligible for set off against business losses brought forward. Further, it is the case of the appellant that the Assessing Officer ought not to have ignored the expenditure incurred and depreciation and business losses brought forward while arriving at the business income at 'nil'.

3. The Commissioner of Income Tax (Appeals) dismissed the appeal filed by the appellant and the appellate authority was of the opinion that when once a capital gain is computed in relation to sale of a capital asset notwithstanding its being in the nature of a business asset, the same cannot be allowed to be set off against unabsorbed brought forward business loss within the meaning of the provisions of Section 72. Regarding the eligibility of getting the unabsorbed depreciation pertaining to the assessment year 1997-98 to 2000-01 set off against short-term capital gain computed by the Assessing Officer under section 50 of the Income Tax Act, the appellate authority chose to follow the order of the Tribunal referred to

by him in his order and confirmed the dis-allowance of the set off of brought forward unabsorbed depreciation relating to the assessment year 1997-98 to 2000-01 in the assessment order as well as the rectification order dated 26.03.2008. With regard to the sale of goodwill, the appellate authority confirmed the view of the Assessing Officer in the same manner and with regard to the claim of bad debts, the appellate authority found no infirmity in the order of the Assessing Officer.

4. As against the order passed by the appellate authority, the appellant filed an appeal before the Income Tax Appellate Tribunal.

5. Aggrieved over the same, the appellant has filed the above Tax Case Appeal raising the following substantial questions of law:-

" (i) Whether the Tribunal was right in law in holding that the assessment made u/s. 153C r/w Sec. 143(3) is valid especially when there are no incriminating materials seized warranting such an assessment on the appellant?

(jj) Whether the Tribunal is right in not confirming

the view of the Assessing Officer that the business income arising out of sale of fixed assets is to be treated only as short term capital gains under Section 50 of the Income Tax Act even though the depreciable assets were sold?

(iii) Whether the Tribunal was right in law in holding that the unabsorbed depreciation relating to Assessment Year 1997-98 to 2000-2001 is not eligible for set off against any income of the appellant for the Assessment Year 2005-06?"

6.1 Mr. R. Sivaraman, learned counsel appearing for the appellant submitted that he is not making any submission with regard to questions of law Nos. 1 and 2 and therefore, this court need not give any finding with regard to the same in this Tax Case. The learned counsel made his submission only with regard to 3rd question of law i.e. with regard to unabsorbed depreciation relating to assessment year 1997-98 to 2000-2001 is not eligible for set off against any income of the appellant for the Assessment Year 2005-06.

6.2 The learned counsel further submitted that the Hon'ble Division

Bench of this court, in identical circumstances, in the Judgment reported in **2009 (318) 187 (Madras) [Commissioner of Income Tax v. S & S Power4 Switchgear Limited]** held that in view of the amended provisions of section 32(2), with effect from 1.4.1997, the deeming fiction of treating the earlier years' unabsorbed depreciation as current year depreciation was removed and the period available for absorbing the unabsorbed depreciation against the profit of the succeeding years was limited to eight years. Further, the Division Bench held that the clarification of the Finance Minister in the Parliament was also to the effect that the cumulated unabsorbed depreciation brought forward as on 01.04.1997 could still be set off against the taxable business profit or income under any other head for the assessment year 1997-98 and seven subsequent years. In view of the said position, the Division Bench held that the assessee was entitled to the unabsorbed depreciation brought forward as on 01.04.1997 and could set it off against short-term capital gains.

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6.3 On the same lines, the Hon'ble Division Bench in an unreported Judgment dated 14.09.2020 made in **T.C.A.No.358 of 2018 [The**

Commissioner of Income Tax Chennai v. M/s. Sanmar Speciality Chemicals Ltd., Chennai], held that the assessee is entitled to carry forward the loss without any restriction on the time limit.

6.4 The Hon'ble Supreme Court, in the Judgment reported in **2019 (103) Taxmann.com 32(SC) [Commissioner of Income tax v. Bajaj Hindustan Ltd]** held that unabsorbed depreciation pertaining to the assessment year 1997-98 to 2001-02 can be carry forward and adjusted after the lapse of eight assessment years in view of the section 32(2) as amended by the Finance Act, 2001.

6.5 The learned counsel for the appellant also submitted that the 3rd questions of law raised in the present Tax Case Appeal is covered by the above decisions of the Hon'ble Apex Court and the Division Benches of this court, hence, the Tax Case Appeal should be allowed.

7. Ms. K.G. Usha Rani, learned counsel for Mr. T.R. Senthil Kumar, learned Standing Counsel appearing for the respondent submitted that the

issue involved in the above Tax Case Appeal is covered by the decisions of the Hon'ble Apex Court and the Division Benches of this court.

8. Since the learned counsel appearing for the appellant has not made any submission with regard to the questions of law Nos. 1 and 2, we are not advertng to any finding with regard to the same. In view of the submissions made by the learned counsel on either side, following the Judgments passed by the Hon'ble Apex Court and the Division Benches of this court, cited supra, the order passed by the Income Tax Appellate Tribunal is liable to be set aside. Accordingly, the same is set aside. The 3rd question of law is decided in favour of the appellant. The Tax Case Appeal stands allowed. No costs. Consequently, the connected Miscellaneous Petition is closed.

(M.D.,J.) (T.V.T.S.,J.)

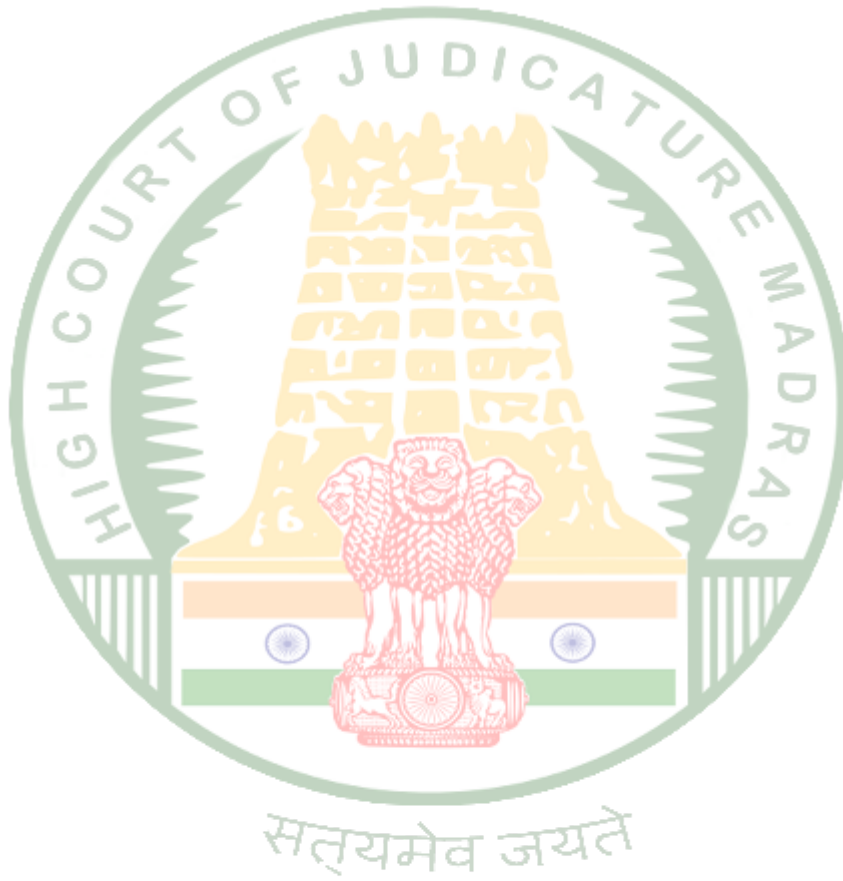
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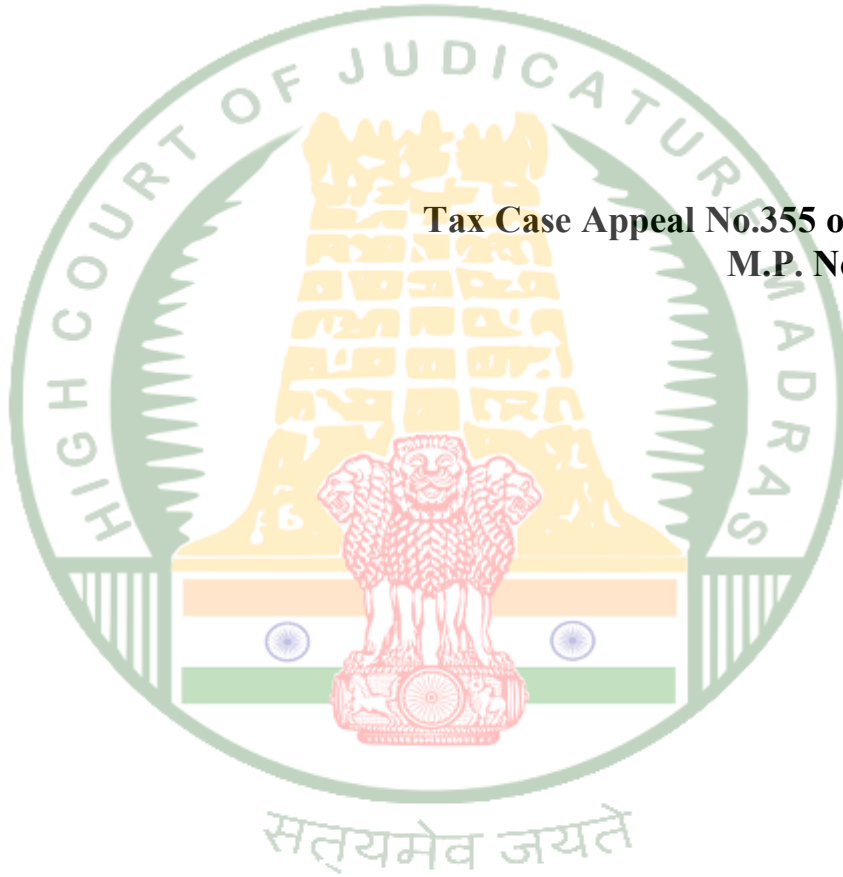
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