आयकर अपीलीय अधिकरण, 'बी' न्यायपीठ, चेन्नई।
IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH: CHENNAI

श्री एबी टी. वर्की, न्यायिक सदस्य एवं
श्री **मंजूनाथा .जी,** लेखा सदस्य **के समक्ष**
BEFORE SHRI ABY T. VARKEY, JUDICIAL MEMBER AND
SHRI MANJUNATHA. G, ACCOUNTANT MEMBER

आयकर अपील सं./**ITA Nos.841 & 842/Chny/2022**
निर्धारण वर्ष **/Assessment Years: 2007-08 & 2008-09**

The Asst. Commissioner-of Income Tax, Central Circle-1(2), Chennai.	**v.**	M/s.Empee Sugars & Chemicals Ltd., 59, Empee Tower, Pudupet, Chennai. [**PAN:** AABCE 5658 G]
(अपीलार्थी**/Appellant)**		**(**प्रत्यर्थी**/Respondent)**

Department by	:	Mr.D.Hema Bhupal, JCIT
Assessee by	:	None
सुनवाई की तारीख/Date of Hearing	:	21.03.2023
घोषणा की तारीख /Date of Pronouncement	:	24.03.2023

आदेश / O R D E R

PER ABY T. VARKEY, JM:

This is an appeal preferred by the Revenue against the order of the Commissioner of Income Tax (Appeals)-18, Chennai, dated 27.07.2022, for the Assessment Year (AY) 2007-08.

ITA No.841/Chny/2022 for the AY 2007-08:

2. The Revenue has raised the following grounds of appeal:

2 The learned CIT(A) erred in allowing the carry forward of unabsorbed depreciation pertaining to the assessment years prior to 1999-2000 also, with the income for the A.Y. 2007-08, without appreciating the fact that the unabsorbed depreciation cannot be carried forward for a period of more than 8 years, prior to the amendment to sec. 32(2) of the IT Act, by Finance Act 2001 and especially when the amendment is not with retrospective effect.

2.1 The learned CIT(A) erred in allowing the carry forward of unabsorbed depreciation pertaining to the assessment years prior to 1999-2000 also, with the income for the A.Y. 2007-08, when the intention of the legislature was not to carry forward the unabsorbed depreciation beyond eight years from the year of computation?"

3. The brief facts of the case noted by the AO are that the assessee had brought forward depreciation loss of Rs.67,14,004/- for the AY 1999-2000 and business loss for AY 1997-98. According to the AO, as per the law *prior* to amendment w.e.f. 01.04.2002, Section 32 of the Income Tax Act, 1961 (hereinafter "the Act"), carryover of depreciation was permitted only for a period of 8 assessment years, as in the case of business loss. As such, according to AO, the assessee's claim of depreciation of Rs.67,14,004/- for A.Y 1999-2000 only qualifies for brought forward depreciation, whereas the entire income of Rs.1,86,76,253/- was set off against brought forward loss and therefore, the set off claim made by the assessee was limited by him to Rs.67,14,004/-.

4. Aggrieved, the assessee preferred an appeal before the Ld.CIT(A), who noted that the AO during the original assessment allowed un-absorbed depreciation to the tune of Rs.1,86,73,253/- to be set off with the income of the assessee. The assessee had brought forward the un-absorbed depreciation of Rs.67,14,004/- for the AY 1999-2000 and the balance unabsorbed depreciation pertains to the earlier assessment years. And the AO in the re-opened/re-assessment proceedings limited the set off claim at Rs.67,14,004/- since prior to amendment carried out w.e.f. 01.04.2012, in Sec.32(2) of the Act, depreciation can be carry forward only for a period of eight (08) assessment years and can be set off only during that period.

The Ld.CIT(A) allowed the claim of the assessee by relying on the decision of the Hon'ble Gujarat High Court in the case of M/s.General Motors India Pvt. Ltd., reported in 25 taxmann.com 364 and held that, the assessee is entitled to set off the entire unabsorbed depreciation claimed of Rs.1,86,73,253/-. This impugned action of Ld CIT(A) is disputed before us and after going through the facts on record and the law involved in the *Lis,* we concur with the action of the Ld.CIT(A), since we find that the issue involved in this appeal is no longer *res-integra* as held by the Hon'ble jurisdictional High Court of Madras in the case of M/s.Harvey Heart Hospitals Ltd. v. ACIT reported in [2021] 127 taxmann.com 805 and also in the case of CIT v. Sanmar Specialty Chemicals Ltd. reported in [2020] 122 taxmann.com 212. Further, we also note that recently the Hon'ble Madras High Court in TCA No.236 of 2017 dated 20.07.2021 in the case of CIT v. M/s.Tamil Nadu Small Industries Corporation Ltd., has concurred with the *ratio* laid down by the Hon'ble Gujarat High Court in the case of M/s.General Motors India Pvt. Ltd., wherein, the Hon'ble Gujarat High Court 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 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. In the light of the above discussion, we do not find any infirmity in the action of the Ld.CIT(A), who has relied on the ratio laid down by the Hon'ble Gujarat High Court in the case of M/s.General Motors India Pvt. Ltd (supra) and therefore, the appeal filed by the Revenue stands dismissed.

6. In the result, appeal filed by the Revenue in ITA No.841/Chny/2022 for the AY 2007-08 stands dismissed.

ITA No.842/Chny/2022 for the AY 2008-09:

7. This is an appeal preferred by the Revenue against the order of the Commissioner of Income Tax (Appeals)-18, Chennai, dated 27.07.2022, for the Assessment Year (AY) 2008-09.

8. The Revenue has raised the following grounds of appeal:

2. The learned CIT(A) erred in deleting the addition made towards payment of purchase tax amounting to Rs.1.52 crores, on the ground that the same was paid to the cane growers directly, and within the due date of filing of the return of income, without appreciating the fact that the assessee was offering its income net of all indirect taxes, and purchase tax also being an indirect tax, the assessee company is not eligible for any further deduction on account of Purchase tax,

2.1 The learned CIT(A) erred in deleting the addition made towards payment of purchase tax amounting to Rs.1.52 crores, on the ground that the same was paid to the cane growers directly, and within the due date of filing of the return of income, without appreciating the fact that the sales tax assessment order of the assessee dated 26.8.2010, reflects only an amount of Rs.7,78,821/- as purchase tax, pertaining to the assessee for the A.Y. 2008-09 and thereby the assessee had claimed excess purchase tax.

9. The assessee company has filed its return of income on 30.09.2008 declaring total income of Rs.5,47,26,083/-, and later filed revised return on 25.03.2010 admitting '*nil*' income and paid tax on book profit u/s.115JB of the Act. Thereafter, the AO noted that assessment was completed on 27.12.2010 u/s.143(3) of the Act, by making various additions at an income of Rs.5,61,76,484/-. Later, the case of the assessee was re-opened u/s.147 of the Act, wherein, the AO noted that the assessee has debited a sum of Rs.1,60,14,968/- as purchase tax. Whereas, in the Sales Tax order dated 26.08.2010, the taxes on purchases was shown as Rs.7,78,821/-. According to the AO, the purchase tax, being indirect tax, required to be disallowed for the reason that the assessee is excluding Excise Duty and Sales Tax from the income. Thus, the AO disallowed Rs.1,60,14,968.

10. Aggrieved by the aforesaid action of the AO, the assessee preferred an appeal before the Ld.CIT(A), who allowed the claim of the assessee by holding as under:

6. The only dispute in this appeal is against the disallowance of purchase tax of Rs.1,52,36,147/-.

6.1 In the course of assessment proceedings, the AO found that the appellant had debited a sum of Rs.1,60,14,968/- as purchase tax whereas as per the sales tax order, purchase tax was only Rs.7,78,821/-. The AO is of the view that purchase tax being indirect tax required to be disallowed as the appellant was excluding excise duty and sales-tax while computing the income. The AO rejected the submission of the appellant that the outstanding purchase tax was paid before the due date of filing of the return by 30/09/2008 and therefore the same may be

allowed in terms of section 43B of the Act by observing that the appellant is excluding excise duty and sales-tax from the income.

6.2 The appellant disputed the re-opening of the assessment as well as on merits of the addition. According to the AR, the assessment was re-opened on mere change of opinion and without any fresh materials and on merits the submission was that the AO has completely overlooked the provisions of section 43B of the Act as per which the tax paid before the due date of filing of the return of income is admissible as deduction.

6.3 I have considered the submissions of the AR and the findings given by the AO. The AO has not disputed the fact that the amount of purchase tax shown as outstanding as on 31.03.2008 was paid before the due date of filing of the return of income. The only objection of the AO was that the appellant is not considering sales-tax and excise duty while computing the income. I find that the appellant through its letter dated 4/12/2013 submitted to the AO has stated that prior to 2002 purchase tax has to be paid/to the Government of Andhra Pradesh and from April, 2002 purchase tax has to be paid to the Cane growers at Rs.60/- per ton of sugarcane supplied to factory. According to the appellant, a sum of Rs.1,60,14,968/- was to be paid to the Cane Growers towards purchase tax. The appellant used to debit purchase tax account and credit the cane payable account. When the appellant makes payment to the cane growers towards sugarcane payable, the purchase tax was automatically paid. The purchase tax was paid to the cane growers. In the light of the above clarification that the purchase tax was paid to cane growers and not directly to the Government, the details available in the sales tax order cannot be taken as the basis of purchase tax paid. The appellant had debited purchase tax and paid the balance as on 31/3/2008 before the due date of filing of the return and therefore the same cannot be disallowed under section 43B and the claim of the appellant was in order, I therefore delete the disallowance of Rs.1,52,36,147/- and allow the grounds raised.

11. Aggrieved by the aforesaid action of the Ld.CIT(A), the Revenue is before us.

12. None appeared for the assessee. Having heard the Ld.DR and after perusal of the records, we note that the Ld.CIT(A) had deleted the additions made by the AO to the tune of Rs.1.52 Crs. (*in respect of payment of purchase tax*) on the ground that the same was paid to the Cane Growers directly by assessee and within due date of filing the return of income. Assailing the action of the Ld.CIT(A), the Ld.DR submitted that there is no authority shown by assessee to come to a conclusion that the purchase tax for the year under consideration need to be paid to the Cane Growers; and

there is no evidence/material to show that the assessee had made such a payment towards purchase tax before 31.03.2008 (i.e. before the due date of the filing of the return) to the tune of Rs.1,60,14,968/- to the Cane Growers/Govt of Andhra Pradesh. Therefore, he prayed that this issue may be restored back to the file of the AO, since such a plea [*about assessee remitting purchase tax was to the Cane Growers*] was not brought to the notice of AO; and it needs verification about the authority of law which prescribes that purchase tax after year 2002 need to remitted to Cane Growers rather than the Government of Andhra Pradesh; and whether assesse remitted actually the purchase tax in accordance to law, which issues/facts need to be examined/verified. In this regard, we note that the Ld.CIT(A) has not referred to any authority/instruction on the subject (*i.e. up to year 2002, purchase tax has to be paid to Government of Andhra Pradesh and from April, 2002, to the Cane Growers*) and the Ld.CIT(A) has not referred to any evidences/materials to hold that the assessee had, in fact, made payment of purchase tax on or before due date of filing of return of income as per law. This aspect needs to be examined by the AO and therefore, we set aside the impugned order of the Ld.CIT(A) and restore the matter back to the file of the AO for examining -

> (i) whether from April, 2002, purchase tax need not be paid to the Government of Andhra Pradesh and instead has to be paid to the Cane Growers as asserted in the impugned order and
>
> (ii) thereafter AO to find out whether the assessee had accordingly made payment of Rs.1,60,14,968/- on or before the due date of filing of return of income. And after examining the same, the AO to pass fresh order on this issue in accordance with law and needless to say, opportunity to be given to assessee.

13. In the result, appeal filed by the Revenue in ITA No.842/Chny/2022 for the AY 2008-09 is allowed for statistical purposes.

14. In the result, appeal filed by the Revenue in ITA No.841/Chny/2022 for the AY 2007-08 is dismissed and appeal filed by the Revenue in ITA No.842/Chny/2022 for the AY 2008-09 is allowed for statistical purposes.

Order pronounced on the 24th day of March, 2023, in Chennai.

Sd/-	***Sd/-***
(मंजूनाथा.जी**)**	**(एबी टी. वर्की)**
(MANJUNATHA.G)	**(ABY T. VARKEY)**
लेखा सदस्य**/ACCOUNTANT MEMBER**	न्यायिक सदस्य**/JUDICIAL MEMBER**

चेन्नई/Chennai,
दिनांक/Dated: 24th March, 2023.
TLN

आदेश की प्रतिलिपि अग्रेषित**/Copy to:**

1. अपीलार्थी/Appellant	4. आयकर आयुक्त/CIT
2. प्रत्यर्थी/Respondent	5. विभागीय प्रतिनिधि/DR
3. आयकर आयुक्त (अपील)/CIT(A)	6. गार्ड फाईल/GF