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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.02.2025

CORAM :

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

T.C.A.No.910 of 2010

M/s.Vedanta Limited,
SIPCOT Industrial Complex,
Madurai Byepass Road,
T.V.Puram Post,
Tuticorin – 628 002. ... Appellant
(Cause Title accepted vide order of
Court dated 01.12.2022, made in
CMP.No.20640/2022 in TCA.No.910/2010)

Vs.

Commissioner of Income Tax,
Salem. ... Respondent

Prayer: Appeal under Section 260A of the Income Tax Act, 1961, against the order of the Income Tax Appellate Tribunal, "D" Bench, Chennai dated 28.04.2006 in I.T.A.No.1801/Mds/2004 for the Assessment Year 1996-1997.

For Appellant : Mr.G.Baskar

For Respondent : Mr.T.Ravikumar
Senior Standing Counsel

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JUDGMENT

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

This Tax Case Appeal has been filed by the Assessee. It is directed against the impugned order dated 28.04.2006 passed by the Income Tax Appellate Tribunal (hereinafter referred to as the 'Tribunal') in ITA No. 1801/MDS/2004 for the Assessment Year 1996-97.

2. By the impugned order dated 28.04.2006, the Tribunal allowed the aforesaid appeal filed by the Income Tax Department against the Order dated 07.04.2004 passed by the Commissioner of Income Tax (Appeals) (hereinafter referred to as the 'Appellate Commissioner') reversing the decision of the Assessing Officer vide Assessment Order dated 12.05.1999 passed under Section 154 of the Income Tax Act, 1961 (hereinafter referred to as the 'Act').

3. This Tax Case Appeal was admitted by this Court on 07.12.2010 and the following substantial questions of law were framed: -

> "*(i) Whether, on the facts and in the circumstances of the case and in the light of the provisions of Section 32(2) which do not provide for any limitation with regard to the carried forward entitlement, the Tribunal was right in upholding the stand of the revenue that the error committed by the Assessing Officer in the order for the assessment year 1990-91 would deny the benefit of*

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such carried forward conferred on the appellant under the Income Tax Act?

(ii) Whether the Tribunal was right in law in ignoring the principles of natural justice which warrants that the rightful entitlement of benefit of depreciation be granted to the appellant?"

4. The operative portion of the impugned order dated 28.04.2006 passed by the Tribunal in ITA No. 1801/MDS/2004 reads as under: -

"*3. We have heard both the parties. The issue to be decided is whether Assessing Officer was justified in rejecting the claim of carry forward of depreciation from assessment year 1990-91 to assessment year 1996-97 and adjusted against the profits of the year under consideration. In the instant case in assessment year 1990-91 the Assessing Officer in depreciation chart has mentioned that unabsorbed depreciation for assessment year 1982-83 has expired. This order was passed by Assessing Officer on* ***dated ...****has become final. The assessee has moved rectification petition after expiry of four years to allow the carry forward and set off of unabsorbed depreciation quantified in 1982-83. Obviously, the Assessing Officer cannot rectify the order after expiry of four years. Unless such rectification is done in assessment year 1990-91, the effect of carry forward of unabsorbed depreciation cannot be given in assessment year 1996-97. The law helps the vigilant not the dormant. The assessee should have been careful in getting the defects rectified when order dated 24.02.1993 for assessment year 1990-91 was received. It is also important that assessment year 1990-91 is not before us and therefore we are unable to decide the issue in respect of carry forward of depreciation in assessment year 1990-91 and set off of the same against the income of assessment year 1996-97. In view of above discussion we are of the considered view that unless rectification of mistake is done in respect of assessment year 1990-91, the effect of unabsorbed depreciation for assessment year 1982-83 cannot be allowed in assessment year 1996-97. Accordingly, we set aside*

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the order of ID CIT(A) and restore the order of Assessing Officer."

5. The facts of the case is that the Appellant/Assessee, a loss making company had both unabsorbed depreciation and unabsorbed loss during the Assessment Year 1982-1983. The present dispute pertains to unabsorbed depreciation of **Rs.1,05,49,851/-** accumulated from the **Assessment Year 1982-1983**. The Assessment Order for the **Assessment Year 1982-1983** was passed on **14.03.1986** under Section 143(3) of the Act. The Appellant had no occasion to utilize the same earlier as it was incurring loss.

6. As per Section 32(2) of the Act, there was no time limit prescribed for setting off the "unabsorbed depreciation" unlike the "unabsorbed business loss" of an Assessee under Section 24(2) of the Act. The aforesaid "unabsorbed depreciation" of **Rs.1,05,49,851/-** had thus remained unutilised during the succeeding Assessment Years, as the Appellant/Assessee was making loss. The loss was carried forward under the column meant for 'business loss'. Similarly, "unabsorbed depreciation" was carried forward under the column meant for 'unabsorbed depreciation'.

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7. However, in Assessment Order dated 24.02.1993 passed under Section 143(3) of the Act for the Assessment Year 1990-1991, the "unabsorbed depreciation" was not shown in the column meant for the "unabsorbed depreciation".

8. It is the specific case of the Appellant / Assessee that until the Assessment Year 1996-97 relevant to the Previous Year 1995-96, the Appellant / Assessee was still making loss and therefore there was no occasion to utilize the unabsorbed depreciation. Since, the Appellant / Assessee had generated taxation income during the aforesaid Assessment Year 1996-1997, the Appellant / Assessee wanted to set-off the accumulated unabsorbed depreciation of **Rs.1,05,49,851/-** from the **Assessment Year 1982-1983** against the business income for the **Assessment Year 1996-1997.**

9. The Appellant / Assessee thus filed a NIL Return of Income for the Assessment Year 1996-1997 after adjusting the carried forward losses and accumulated during the Assessment Year 1996-1997 in the return filed on **30.12.1996**.

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10. The assessment was completed under Section 143(3) of the Act vide Order dated **12.02.1999** for the **Assessment Year 1996-1997**. The Assessing Officer while quantifying the carried forward losses against the total income, disallowed the deduction of the unabsorbed depreciation of **Rs. 66,91,068/-** out of unabsorbed depreciation **Rs.1,05,49,851/-** accumulated as carried forward from the **Assessment Year 1982-1983**.

11. Aggrieved by the aforesaid Order dated **12.02.1999**, an appeal was filed by the Appellant / Assessee before the Appellate Commissioner. The Appellate Commissioner vide Order dated **04.06.1999** remanded the matter back to the Assessing Officer for a fresh consideration. The Assessing Officer vide Order dated **07.07.1999**, once again disallowed the unabsorbed depreciation accumulated from the **Assessment Year 1982-1983**.

12. Meanwhile, the Appellant / Assessee also moved an applications dated **06.04.1999** and **08.05.1999** under Section 154 of the Act against the Assessment Order dated **12.02.1999** for the **Assessment Year 1996-97**.

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13. As far as the claim for unabsorbed depreciation was concerned, the Assessing Officer vide Order dated **18.05.1999** passed under Section 154 of the Act stated that setting-off the unabsorbed depreciation of **Rs.66,91,068/-** out of aforesaid unabsorbed depreciation **Rs.1,05,49,851/-** accumulated as carried forward in the **Assessment Year 1996-1997** was not permissible in view of limitation under Section 154 of the Act.

14. The Assessing Officer further held that the period of limitation for carry forward losses expired on **31.03.1997**, i.e., four years from **Assessment Order** dated **24.02.1993** passed under Section 143(3) of the Act for the **Assessment Year 1990-1991** relevant to the previous year **1989-1990**.

15. As the aforesaid amount of unabsorbed depreciation was shown as 'business loss' in the **Assessment Year 1990-1991**, it was held that the aforesaid unabsorbed depreciation lapsed in the **Assessment Year 1990-91**.

16. Aggrieved by the aforesaid Order dated **18.05.1999** passed under Section 154 of the Act for the **Assessment Year 1996-1997**, the Appellant / Assessee filed an appeal before the Appellate Commissioner.

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17. By Order dated **07.04.2004**, the Appellate Commissioner once allowed the appeal filed by the Appellant / Assessee and remanded back the case to the Assessing Officer and directed the Assessing Officer to look into the past records and re-consider the loss in the year after taking into account the correct account of unabsorbed depreciation in the hands of the Appellant / Assessee.

18. It is pertinent to note that in the proceeding before the authorities under Section 154 of the Act and in the subsequent orders of the Assessing Officer and the Appellate Commissioner, the unabsorbed depreciation from the **Assessment Year 1982-1983** had remained unutilized in the hands of the Appellant / Assessee. The set off was confined only to **Rs.66,91,068/-** and not to the entire amount of accumulated unabsorbed depreciation of **Rs.1,05,49,851/-**.

19. Meanwhile, aggrieved by the Order dated **07.04.2004** of the Appellate Commissioner against order dated **18.05.1999** passed under Section 154 of the Act, the Income Tax Department also filed appeal in ITA.No.180/Mds/2004 before the Tribunal which culminated in the impugned order dated 28.04.2006 of the Tribunal.

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20. It is the case of the Appellant / Assessee that despite two orders of the Appellate Commissioner dated **04.06.1999** and **07.04.2004**, the benefit of unabsorbed depreciation was not given to the Appellant / Assessee.

21. Instead, the Tribunal has reversed the Order of the Appellate Commissioner stating that rectification of the Assessment Order dated **24.02.1993** for the Assessment Year 1990-91 cannot be done after a lapse of four years when the Appellant/Assessee filed the rectification petition to allow the unabsorbed depreciation and since the Appellant / Assessee had remained inert and was not vigilant, the Appellant / Assessee was not entitled to the benefit of the unabsorbed depreciation which was lapsed in the Assessment Order dated 24.02.1993 for the past assessment year 1990-91 under Section 143(3) of the Income Tax Act.

22. In this connection, the learned counsel for the Appellant / Assessee has placed reliance on the following decisions:-

(i) ***CIT*** *vs* ***Manmohan Das [1996] 59 ITR 699 (SC);***
(ii) ***CIT*** *vs* ***Dalmia Cements (Bharat) Ltd [1995] 82 Taxman 229 (SC)*** *and*
(iii) ***Kanaka films (P) Ltd*** *vs* ***ITO [1989] 43 Taxmann 113 (Madras)***

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23. On the other hand, the learned counsel for the Respondent would submit that the impugned order dated 28.04.2006 of the Tribunal does not mandate any interference. It is submitted that unabsorbed depreciation was given up by the Appellant / Assessee after the Assessment Order dated 24.02.1993 was passed under Section 143(3) of the Act for the Assessment Year 1990-91 by not filing either an appeal or a rectification application of the Assessment Order within the time stipulated under Section 154 of the Income Tax Act. Therefore, it is stated that the Appellant / Assessee is deemed to have given up the claim for the unabsorbed depreciation from the Assessment Year 1982-1983.

24. Further, learned counsel for the Respondent submitted that under Section 154(7) of the Act time limit prescribed for rectifying any mistake apparent on the face of the record is of four years from the date of passing of the Assessment Order for the relevant Assessment Year. Therefore, it is stated since the same had lapsed in the present case, the Assessee's Petitions dated 06.04.1999 and 08.05.1999 under Section 154 of the Act which is beyond the time prescribed under the Act i.e., four years could not be entertained.

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25. Learned counsel for the Respondent further submitted that in ***Peerless General Finance and Investment Co. Ltd.,*** reported in ***380 ITR page 165 (SC)*** it was held that, in view of the amendment by Sub-section (2) of Section 32 by Finance Act (No 2) Act, 1996, with effect from 01.04.1997, unabsorbed depreciation as on 01.04.1997 could be set off against income from any heads from the immediate assessment year following 01.04.1997. Thereafter, if there still was any unabsorbed depreciation, the same could be set off against business income for a period of 8 assessment years from the relevant Assessment Year.

26. Learned counsel for the Respondent further submitted that the Apex Court in ***Hind Wire Industries Ltd Vs. CIT*** reported in ***212 ITR page 639 SC*** held that the word 'Order' in the expression 'from the date of order sought to be amended' in Section 154(7) of the Act as it stood at the relevant assessment year includes amended or rectified order and it did not necessarily mean the original order. The Hon'ble Supreme Court in the aforesaid case held that where the original order was subsequently rectified, a second application for rectification can be made within four years from the date of rectificatory order. Therefore, it is stated that the Tribunal was correct in holding that the second rectification application was well within limitation.

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27. It is further submitted by the learned counsel for the Respondent that in ***Sri New Durga Bansal Cold Storage and Ice Factory*** *Vs* ***CIT*** – reported in ***397 ITR page 626*** (All) it was held that if no appeal was filed against the original Assessment Order on issue of set off of capital loss while issue of quantum of capital gain was challenged, period of limitation for rectification of order on the first issue would not get extended by virtue of subsequent order.

28. It is further submitted that the judgment of the Karnataka High Court Single Judge in ***Em Chockalingam Chettiar*** *Vs* ***Agrl.ITO*** reported in ***161 ITR page 216*** had clearly held that Assessment Order of the particular Assessment Year could be rectified within four years from the date of the Assessment Order which is the maximum period of limitation as prescribed under Sub-Section (7) to Section 154 of the Act. It is therefore submitted that no relief could be granted beyond the prescribed time.

29. We have considered the arguments advanced by the learned counsel for the Appellant / Assessee and the learned counsel for the Respondent.

30. The dispute in the present case pertains to the **Assessment Year 1996-1997** i.e., for the relevant previous Year **1995-1996**. The Return of

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Income for the aforesaid **Assessment Year 1996-1997** was filed on **30.12.1996** by the Appellant/Assessee as is evident from a reading of the **Assessment Order** dated **12.12.1999** passed under Section 143(3) of the Act wherein, the claim for the aforesaid unabsorbed depreciation was disallowed as same was not reflected in the **Assessment Order** dated **24.02.1993** passed for the **Assessment Year 1990-1991**.

31. There is no dispute that the accumulated unabsorbed depreciation from the Assessment Year 1982-1983 had remained un-utilized, owing to the fact that the Appellant / Assessee was a loss making company. The Appellant / Assessee had no occasion to utilize the same in the earlier Assessment Years. The unabsorbed depreciation was however not reflected in the Assessment Order dated 24.02.1993 passed under Section 143(3) of the Act for Assessment Year 1990-1991 and was shown as having lapsed in the said Assessment Order, even though, there is no provision prescribing for such lapsing of unabsorbed depreciation under the the Act.

32. There is no dispute that the unabsorbed depreciation could be perennially carried forward by an assessee from the relevant Assessment Year only by amendment to Section 32(2)(iii)(b) of the Act with effect from

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01.04.1997 vide Finance Act (2), 1996, the unabsorbed depreciation as on **01.04.1997** would lapse, 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 years immediately succeeding the assessment year for which the aforesaid allowance was first computed. This position of law was also observed by the Hon'ble Supreme Court in ***Peerless General Finance and Investment Co. Ltd.,*** reported in ***380 ITR page 165 (SC)***, dated 08.12.2015, held as follows: -

> "*it was held that in view of amendment to sub Section (2) of Section 32 by Finance Act (No 2) Act, 1996, with effect from 01.04.1997, unabsorbed depreciation as on 01.04.1997 could be set off against income from any head from immediate assessment year following 01.04.1997 and thereafter, if there still was any unabsorbed depreciation, same could be set off against business income for a period of 8 assessment years in Special Leave to Appeal (C) No. 34124 of 2014*".

33. The position which stood prior to **01.04.1997** was restored back with effect from **01.04.2002** whereby, the above 8 year cap to set on the unabsorbed depreciation against the business income was removed.

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34. As per Section 32(1) of the Income Tax Act, 1961 as amended by Finance Act, 1997 with effect from 01.04.1997 in respect of depreciation of buildings, machinery, plant or furniture owned [wholly or partly], by the assessee and used for the purposes of the business or profession, deductions shall be allowed subject to the provisions of Section 34 of the Act.

35. As far as the present case is concerned, we are concerned with the unabsorbed depreciation which was accumulated from the **Assessment Year 1982-1983**. As per Section 32(2) of the Act as it stood amended with effect from 01.04.1997, where in the assessment of the assessee full effect cannot be given to any allowance under Clause (ii) of sub-section (1) to Section 32 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 by him and assessable for that assessment year;

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(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.

36. As per amended Section 32(2)(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 it shall be set off by the following methods namely:-

(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 years immediately succeeding the assessment year for which the aforesaid allowance was first computed:

37. Section 32(2)(iii) of the Act reads as under:-

"32(2)(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.

(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;

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(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 years immediately succeeding the assessment year for which the aforesaid allowance was first computed:"

38. However, the amendment to Section 32 of the Income Tax Act, 1961 with effect from **01.04.1997** vide **Finance Act (No 2) Act, 1996** can have no implications on the Appellant / Assessee or the Income Tax Department for computation of the taxable income of the Appellant / Assessee for the **Financial Year 1995-1996** assessable during **1996-1997**, because the amendment to Section 32 of the Income Tax Act, 1961 vide **Finance Act (No 2) Act, 1996** came into force only with effect from **01.04.1997**.

39. The restrictions/cap that was put in place with effect from **01.04.1997** under Section 32(2)(iii)(b) of the Act vide **Finance Act (No 2) Act, 1996**, cannot apply for the assessment of tax for the period prior to **01.04.1997.** The aforesaid amendment to Section 32 of the Income Tax Act, 1961 vide **Finance Act (No 2) Act, 1996** cannot be retrospective effect.

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40. If the claim for the aforesaid unabsorbed depreciation was made in the return that was filed for the subsequent **Assessment Year 1997-1998**, the sting under the amended provision vide **Finance Act (No 2) Act, 1996** which came into force only on **01.04.1997** will apply on the Appellant/Assessee.

41. As the amendment to Section 32 with effect from **01.04.1997** can have only a prospective effect on the assessments to be made from the **Assessment Year 1997-1998** alone. Since the claim was made for the determination of the taxable income for the Assessment Year **1996-1997** i.e., before **01.04.1997,** the accumulated unabsorbed depreciation which had remained unutilized cannot be said to have lapsed during **1995-1996**.

42. As far as rejection of application filed under Section 154 of the Income Tax Act, 1961 which has been interfered vide impugned order by the Tribunal is concerned, the impugned order is only based on the amendment to Section 32 of the Income Tax Act, 1961 vide Finance Act, 1997 and not on the limitations under Section 154 of the Act. Therefore, we are not required to answer on the issue relating to limitation for rectifying the order under Section 154 of the Income Tax Act, 1961.

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43. Therefore, the substantial question of law raised by the Appellant / Assessee has to be answered in favour of the Appellant / Assessee and against the Income Tax Department.

44. This Tax Case Appeal is allowed. No costs.

[S.S.S.R., J.] **[C.S.N., J.]**

19.02.2025

Neutral Citation : Yes / No

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To:

Commissioner of Income Tax,
Salem.

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

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T.C.A.No.910 of 2010

19.02.2025

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