

**2011-TIOL-578-HC-MAD-IT**

**IN THE HIGH COURT OF MADRAS**

**Tax Case (Appeal) No.333 of 2005**

**COMMISSIONER OF INCOME TAX-III, CHENNAI**

**Vs**

**M/s MADRAS FERTILIZERS LTD, CHENNAI**

**Chitra Venkataraman and M Jaichandren, JJ**

**Dated: August 03, 2011**

**Appellant Rep by : Mr. T Ravikumar**

**Respondent Rep by : No Appearance**

**Income Tax - Section 115J - Whether depreciation of the previous years should be deducted for arriving at the book profits u/s 115J, even though such depreciation was not carried forward.**

**T**he assessee filed return of income, declaring NIL income and profit u/s 115J to the tune of 2,79,38,140/-. Subsequently, a revised return was made wherein there was a claim on the investment allowance. The Assessment was completed by the AO claiming that an extent of Rs.2,01,38,614/- was to be deducted towards unabsorbed depreciation for the year 1987-1988. Thus the adjusted profits was arrived at Rs.9,31,27,144/-; 30% of the above was arrived at Rs.2,79,38,143/-. The CIT initiated revisional proceedings on the ground that the order of the officer was prejudicial to the interest of the revenue. The CIT pointed out that according to the balance sheet of the company, as on 31.3.1988 there was no unabsorbed loss or unabsorbed depreciation. Consequently, deduction of a sum of Rs.2,01,38,614/- was erroneous according to the provisions of Section 115J (1A)(iv) Thus, the order of assessment was set aside and the matter was remanded to the officer to re-compute the profit for purpose of 115J taking note of the fact that for the purpose of computation of the profit and loss of the company there was no loss or depreciation available as was evident from the balance sheet. The Tribunal agreed with the assessee and pointed out that since the amount of depreciation of Rs.2,01,39,000/- was well below the total loss of 26,05,25,000/- the officer rightly granted the deduction for the depreciation. The Tribunal further pointed out that the view of the CIT that loss or depreciation referred to in clause (iv) of 115 means only unabsorbed loss or unabsorbed depreciation was not correct.

On Appeal before the HC the Revenue Counsel contended that when the effect of the working of the Profit and Loss Account revealed a positive profit and dividend was also declared thereon, there was nothing to be carried forward on the unabsorbed depreciation for being considered under year under consideration. Thus, if dividend is to be declared, as per Section 205(1), the same is possible only after deduction of the loss or depreciation from the current year profit. Since the unabsorbed depreciation was already adjusted towards the general reserve of the previous year, there being no loss to be carried forward.

**On appeal, the HC held that,**

*++ on the admitted position that the accounts of the assessee showed NIL as regards the carry forward of loss and unabsorbed depreciation, rightly, the CIT revised the order of the officer to take the entire book profit of Rs. 11,22,65,758/-, without any further adjustments for the purpose of working out 30% profit u/s 115J;*

*On the factual position that the assessee had no unabsorbed loss or unabsorbed depreciation to be carried forward for any consideration in the year under consideration, rightly, the CIT gave the direction which is in accordance with the provisions of the Act.*

***Revenue's appeal allowed***

## **JUDGEMENT**

**Per: Chitra Venkataraman:**

The Revenue is on appeal as against the order of the Tribunal raising the following substantial questions of law:

*"Whether in the facts and circumstances of the case, the Tribunal was right in holding that the depreciation of the previous years should be deducted for arriving at the book profits u/s 115J, even though such depreciation was not carried forward?"*

2. In respect of the assessment year 1989-1990, the assessee filed a return of income, on 29.12.1989, returning NIL income and profit under Section 115J to the tune of 2,79,38,140/-. Subsequently, a revised return was made wherein there was a claim on the investment allowance. The Assessment was completed by the Assessing Officer claiming that an extent of Rs.2,01,38,614/- was to be deducted towards unabsorbed depreciation for the year 1987-1988. Thus the adjusted profits was arrived at Rs.9,31,27,144/-; 30% of the above was arrived at Rs.2,79,38,143/-.

3. In exercise of the powers under Section 263 of the Income Tax Act, 1961, the Commissioner of Income Tax initiated revisional proceedings on the ground that the order of the officer was prejudicial to the interest of the revenue. The Commissioner pointed out that according to the balance sheet of the company, as on 31.3.1988 there was no unabsorbed loss or unabsorbed depreciation. Consequently, deduction of a sum of Rs.2,01,38,614/- was erroneous according to the provisions of Section 115J (1A)(iv) of the Income Tax Act, 1961.

4. The assessee filed its reply contending that for the financial year 1988-1989, the assessee made a book profit of Rs.1132.66 lakhs after making provision for depreciation for that year at Rs.211.72 lakhs, in accordance with the provisions of the Companies Act, 1956. The assessee pointed out that after making provision for depreciation of Rs.2,01,39,000/- the loss suffered during the period came to Rs.26,05,25,000/-. This loss was transferred to the General Reserve, thereby reducing the reserve to a very negligible amount. However, such transfer of the loss and the unabsorbed depreciation to the General Reserve Account could not by itself defeat the claim of the assessee for considering the unabsorbed depreciation in the computation of profit and loss in respect of the assessment relating to the year 1989-1990.

5. Thus, the assessee contended that the claim of the assessee for a deduction of the depreciation was in tune with the provisions of 115J of the Income Tax Act, 1961. The Commissioner of Income Tax pointed out to the balance sheet as on 31.3.1988 showing that there was no unabsorbed loss or unabsorbed depreciation for being carried forward to the next year. Although the company incurred a loss during that period it was the unabsorbed loss and depreciation which were adjusted against the committed reserve. It was also pointed out that the assessee declared dividend thereon.

6. Having regard to the above said facts and that the company in order declared the dividend in the previous year relating to the assessment year 1989-1990, the assessee rightly, took the unabsorbed depreciation and loss to the General Reserve and got it adjusted thereon, hence, the entire book profit of Rs.11,22,65,758/- was to be taken as a profit for the year and 30% of the same was to be assessed at the hands of the assessee. Thus, the order of assessment was set aside and the matter was remanded to the officer to re-compute the profit for purpose of 115J of Income Tax Act, 1961, taking note of the fact that for the purpose of computation of the profit and loss of the company there was no loss or depreciation available as was evident from the balance sheet as on 31.3.1988.

7. The assessee preferred an appeal before the Tribunal. The Tribunal agreed with the assessee and pointed out that since the amount of depreciation of Rs.2,01,39,000/- was well below the total loss of 26,05,25,000/- the officer rightly granted the deduction for the depreciation. The Tribunal further pointed out that the view of the Commissioner that loss or depreciation referred to in clause (iv) of 115 of the Income Tax Act, 1961, means only unabsorbed loss or unabsorbed depreciation was not correct. Thus quoting the decision reported in *Surana Steels Pvt. Ltd. Vs. Deputy Commissioner of Income Tax [(1999) 237 ITR 777]* that loss would also include the amount of depreciation the Tribunal accepted the case of the assessee that the loss arrived at after charging depreciation was much more than the loss reported. Rightly, the depreciation charged on the profit and the loss account had to be deducted. Aggrieved by the same the Revenue is on appeal.

8. Learned standing counsel pointing to the balance sheet of the year 1988-1989 contended that when the effect of the working of the Profit and Loss Account revealed a positive profit and dividend was also declared thereon, there was nothing to be carried forward on the unabsorbed depreciation for being considered under year under consideration. Thus, if dividend is to be declared, as per Section 205(1) of the Income Tax Act, the same is possible only after deduction of the loss or depreciation from the current year profit. Since the unabsorbed depreciation was already adjusted towards the general reserve of the previous year, there being no loss to be carried forward, the Tribunal committed a serious error in accepting the plea of the assessee.

9. In spite of service of notice on the assessee, there is no representation on the assessee's side. Consequently, after going through the records the present order is passed.

10. In order to find out the state of affairs in respect of the assessment year 1988-1989, this Court summoned the assessment records from the Revenue. Accordingly, the learned standing counsel has produced the records. A perusal of the Profit and Loss Account for the year 1988-1989 shows that the entire loss including the depreciation for the year was duly set off as against the profits available in the year 1987-1988 by taking the depreciation and loss from the general reserve for an adjustment. After this, the assessee had a profit of Rs.1,64,000/- for the purpose of declaring the dividend. Thus, after adjusting the unabsorbed depreciation as against the general reserve there remained nothing for the

assessee to carry forward to the next year for the purpose of computing the profit, as given under Section 205(1)(b) of the Companies Act.

11. On the admitted position that the accounts of the assessee showed NIL as regards the carry forward of loss and unabsorbed depreciation, rightly, the Commissioner of Income Tax revised the order of the officer to take the entire book profit of Rs.11,22,65,758/-, without any further adjustments for the purpose of working out 30% profit under Section 115J of the Income Tax Act, 1961. Thus, even though the assessee contended that mere adjustment as against the general reserve by itself would not defeat the claim of the assessee for considering the unabsorbed declaration in computation of the profit for the next year in terms of Section 205(1) (b), yet, the fact remains that when the accounts were made up for the assessment year 1989-1990, the loss and unabsorbed depreciation remained NIL. On the factual position that the assessee had no unabsorbed loss or unabsorbed depreciation to be carried forward for any consideration in the year under consideration, rightly, the Commissioner of Income Tax gave the direction which is in accordance with the provisions of the Act, as well as the Income Tax Act, 1961.

12. Going by the above said aspect, we have no hesitation in setting aside the order of the Tribunal, the same being contrary to the facts as projected in the balance sheet of the company for the immediate preceding year. In the light of the above the order of the Tribunal is set aside. The Tax case Revision is allowed.