Income Tax Appellate Tribunal - Madras
P.L. Haulwel Trailers Ltd. (Since ... vs The Dy. Commissioner Of Income ... on 20 January, 2006
Equivalent citations: 2006 100 ITD 485 Chennai, 2006 284 ITR 254 Chennai, (2006) 103 TTJ Chennai 249
Bench: N Ganesan, C Poojari
ORDER N.R.S. Ganesan, Judicial Member

1. Both the appeals of the assessee relate to Assessment Years 1995-96 & 1996-97. Since common issues arise for consideration in both the appeals, we heard the same together and disposing of the same by this common order.

2. The first issue arises for consideration is regarding set off of unabsorbed depreciation, unabsorbed loss and unabsorbed investment allowance relating to Assessment Year 1987-88. The learned representative for the assessee submitted that the assessee filed the return for the Assessment Year 1987-88 on 13.7.87. However, the Assessing Officer treated the return as non est. The Assessing Officer has also rejected the claim of the assessee for set off of carry forward business loss, depreciation and investment allowance. According to the learned representative, even though the return was treated as non est, the assessee is entitled to carry forward the unabsorbed depreciation. The learned representative for the assessee placed her reliance on the decision of the Mumbai Bench of this Tribunal in the case of Bombay Gas Co. Ltd. v. Dy. Commissioner of Income Tax (2004) 141 Taxman 22 and submitted that the Mumbai Bench of this Tribunal held that even non filing of the return for earlier Assessment Years was of no consequence as regards the claim of carry forward of unabsorbed depreciation. The learned representative again placed her reliance on the judgment of the Punjab & Haryana High Court in the case of CIT v. Haryana Hotels Ltd. and submitted that the carry forward unabsorbed depreciation shall be set off even though no return was filed. The learned representative has also placed her reliance on the judgment of the Supreme Court in the case of Calcutta Electric Corporation Ltd. v. CIT (1992) 194 ITR 296.

3. On the contrary, Mr. K. Srinivasan, the learned Departmental Representative (D.R.) submitted that for the purpose of carrying forward unabsorbed depreciation and unabsorbed loss, it has to be quantified in the year in which the depreciation and losses arose. Unless and until it was quantified or determined in the year in which it arose, it cannot be carried forward and set off in the subsequent years. Therefore, according to the learned D.R., the assessee is not entitled to carry forward and set off of the depreciation and business loss relating to Assessment Year 1987-88. The learned D.R. further submitted that it is not known what has happened after 1987-88 till the Assessment Year 1995-96.

4. We have considered the rival submissions on either side, and also perused the material available on record. Admittedly, for the Assessment Year 1987-88, the assessee filed the return belatedly, therefore, the Assessing Officer treated the return as non est. The assessee admitted the decision of the Assessing Officer to treat the return as non est. In other words, the order of the Assessing Officer treating the return as non est for the Assessment Year 1987-88 attained finality. The only case of the assessee is that irrespective of the quantification or filing of return, the assessee is entitled to carry forward and set off of depreciation and business loss.

5. We have carefully gone through the judgment of the Punjab & Haryana High Court in the case of Haryana Hotels Ltd. (supra). In the case before the Punjab & Haryana High Court, the assessee filed the return of income for the Assessment Year 1987-88 which was treated as invalid. The Assessing Officer disallowed the brought forward losses and unabsorbed depreciation of the earlier year on the ground that no valid assessment has been made for the Assessment Year 1987-88. However, the Tribunal directed the Assessing Officer to allow the claim of the assessee for carry forward of unabsorbed depreciation as well as business loss. On a reference, the Punjab & Haryana High Court held that the assessee was entitled to get unabsorbed depreciation of the earlier years 1984-85 and 1985-86. However, the Punjab & Haryana High Court held that in respect of business loss, it cannot be carried forward and set off since no assessment was made for the Assessment Year 1987-88. The Punjab & Haryana High Court referred to various judgments including the judgment of the Madras High Court in the case of Sri Rajarathinam Transports Pvt. Ltd. v. CIT . After referring to judgment of the Madras High Court in the case of Sri Rajarathinam Transports Pvt. Ltd. (supra), the Punjab & Haryana High Court observed that they are unable to accept the view laid down by the Madras High Court.

6. We have also carefully gone through the judgment of the Madras High Court in the case of Sri Rajarathinam Transports Pvt. Ltd. (supra). The issue before the Madras High Court was whether the assessee was entitled to set off the unabsorbed depreciation of the Assessment Year 1960-61 in the Assessment Year 1963-64. The assessee before the Madras High Court filed the return of income for the Assessment Year 1960-61 belatedly beyond the time prescribed in Sections 139(1)(a), 139(4) and 139(1)(b)(i) of the Income Tax Act. Therefore, no assessment could be made and the depreciation could not be quantified or determined. In those factual circumstances, the Madras High Court held that in the absence of the specific order of the assessing authority determining the depreciation not only for the purpose of assessment but also for its carry forward from Assessment Year to Assessment Year, the assessee could not be permitted to claim set off the unabsorbed depreciation. This judgment of the Madras High Court was not approved by the Punjab & Haryana High Court. This Bench of the Tribunal is situated within the territorial jurisdiction of the Madras High Court, therefore, this Bench of the Tribunal is bound by the judgment of the Madras High Court. In other words, this Tribunal is bound by the judgment of the jurisdictional High Court in the case of Sri Rajarathinam Transports Pvt. Ltd. (supra). In view of the above, in our opinion, the judgment of the Punjab & Haryana High Court in the case of Haryana Hotels Ltd. (supra) may not be helpful to the assessee.

7. We have also carefully gone through the decision of the Mumbai Bench of this Tribunal in the case of Bombay Gas Co. Ltd. (supra). The Mumbai Bench held that the fact that the assessee had not filed the return for the Assessment Years was of no consequence. The Mumbai Bench observed that the unabsorbed depreciation is to be carried forward to the following year even though no return was filed by the assessee. This decision of the Mumbai Bench of this Tribunal is also not helpful to the assessee in view of the judgment of the Madras High Court in the case of Sri Rajarathinam Transports Pvt. Ltd. (supra).

8. We have also carefully gone through the judgment of the Supreme Court in the case of CIT v. Virmani Industries Pvt. Ltd. And Ors. . The assessee before the Supreme Court was engaged in the

business of manufacture of soap and oil. The assessee stopped the business and let out the factory on hire. After ten years, the assessee started the business of manufacture of steel pipes. The assessee claimed that the unabsorbed depreciation of the business from manufacture of soap and oil should be carried forward and set off against the new business of manufacture of steel pipes. In those factual circumstances, the Supreme Court held that the depreciation which remains unabsorbed could be set off against the income of the new business. The Supreme Court had no occasion to consider the effect of non filing of the return or non determination of the depreciation. We find that the Madras High Court in the case of Sri Rajarathinam Transports Pvt. Ltd. (supra) specifically considered this issue. Therefore, in our opinion, this judgment of the Supreme Court in the case of Virmanai Industries Pvt. Ltd. (supra) may not be of any assistance to the assessee. Moreover, the Apex Court in the case of Calcutta Electric Corporation Ltd. (supra) also had no occasion to consider the effect of non determination of depreciation. The issue before the Apex Court in this case is regarding the actual cost of asset. Therefore, the judgment of the Apex Court is also not applicable to the facts of this case.

9. Since, admittedly, the return was treated as non est and unabsorbed depreciation and business loss were not determined during the Assessment Year 1987-88, in our opinion, it cannot be carried forward and set off against the income for the Assessment Year 1995-96 in view of the judgment of the Madras High Court in the case of Sri Rajarathinam Transports Pvt. Ltd. (supra). Moreover, it is not known whether the depreciation remains to be unabsorbed during the period 1987-88 to 1994-95. The assessee or the Department could not clarify whether the depreciation remains to be unabsorbed. In view of the above, we do not find any merit in the appeals of the assessee. Accordingly, we confirm the order of the lower authorities on this issue.

10. The next issue arises for consideration for the Assessment Year 1996-97 is regarding levy of interest under Section 234C of the Income Tax Act. Ms B. Mala, the learned representative for the assessee submitted that the assessee paid the advance tax by depositing the cheque in the specified and authorised bank within the due date. However, the cheques were actually realized on 17.9.95, 17.12.95 and 20.3.96. The Assessing Officer by taking the actual date of realization of cheques, levied interest under Section 234C of the Income Tax Act. The CIT(A) confirmed the order of the Assessing Officer on the ground that though the assessee deposited the cheques within the due date, the funds had not come to the coffers of the Government or its banker by the due date since it was collected on the subsequent date. According to the learned representative, since the assessee has deposited the cheques with authorized banker, the date of payment always relates back to the date of presentation of the cheques with authorised bank. The learned representative for the assessee placed her reliance on the decision of this Tribunal in the case of Pentamedia Graphics Ltd. v. Deputy Commissioner of Income Tax in I.T.A. No. 85 (Mds)/2002 order dated 8.5.2002 and another decision of the Bangalore Bench of this Tribunal in the case of ACIT v. Molex (India) Ltd. in I.T.A. No. 303/Bang/2003 order dated 2.8.2005. The learned representative again placed her reliance in circular No. 261 dated 8.8.79 issued by the CBDT and also the decision taken by the Directorate of Service Tax in F. No. V/DGST/30-Misc-46/2000/11727 dated 23.8.2000. The learned representative has produced a copy of the above said two circulars.

11. On the contrary, Mr. K. Srinivasan, the learned D.R. submitted that originally the payments to Government accounts were regulated by Central Treasury Rules. According to the Central Treasury Rules, when a cheque was realized or honoured, it will relate back to the date of presentation of cheque with authorised banker. According to the learned D.R., the Central Treasury Rules were replaced by Central Govt. Account (Receipts and Payments) Rules, 1983 which specifically says that the date of payment of Government dues tendered in the form of cheque or draft shall be the date on which it was cleared and entered in the receipt scroll. In view of the latest Central Govt. Account (Receipts and Payments) Rules, 1983, according to the learned D.R., the assessee is liable to pay interest under Section 234C since the amount was actually realised subsequent to the due date for payment of advance tax. The learned D.R. placed his reliance on the decision of this Tribunal in the case of JCIT v. Duramettalic Sanmar Ltd. in I.T.A. No. 1437(Mds)/2000 dated 24.6.2005.

12. We have considered the rival submissions on either side, and also perused the material available on record. As rightly submitted by the learned D.R., the Central Govt. Account (Receipts and Payments) Rules, 1983 clearly says that the date of payment of Government dues tendered in the form of cheque or draft shall be the date on which it was cleared and entered in the receipt scroll. This rule was framed by Government of India in exercise of the executive power conferred under Article 283(1) of the Constitution of India. For the purpose of convenience, we are reproducing the Article 283(1) of Constitution of India.

283. Custody, etc., of Consolidated Funds, Contingency Funds and moneys credited to the public accounts. - (1) The custody of the Consolidated Fund of India and the Contingency Fund of India, the payment of moneys into such Funds, the withdrawal of moneys there from, the custody of public moneys other than those credited to such Funds received by or on behalf of the Government of India, their payment into the public account of India and the withdrawal of moneys from such account and all other matters connected with or ancillary to matters aforesaid shall be regulated by law made by Parliament, and until provision in that behalf is so made, shall be regulated by rules made by the President.

13. In view of the above provision in the Constitution, the Consolidated Fund of India and Contingency fund of India shall be regulated by law made by Parliament. Until a law was enacted by Parliament, the President of India was empowered to frame rules for regulation of funds. Both parties have not brought to our notice any law made by the Parliament for regulating the above Funds of the Government of India. However, it is brought to our notice that the Rule framed, namely, Central Govt. Account (Receipts and Payments) Rules, 1983. This rule would be in operation till the Parliament enacts a law for regulating the above Funds as provided in Article 283(1) of the Constitution of India. Rule 20 Clause (1) of Central Govt. Account (Receipts and Payments) Rules, 1983 clearly says that where a cheque or draft is tendered to the bank, on the date on which it was cleared and entered in the receipt scroll shall be deemed to be the date of receipt of payment. Rule 1(3) clearly says that they will apply to all transactions pertaining to Government of India other than payment of pensionery benefits.

14. We have also carefully gone through the decision of this Tribunal in the case of Pentamedia Graphics Ltd. (supra). This Tribunal after considering the decision of Authority for Advance Rulings

reported in 221 ITR 172 and circular issued by CBDT dated 8.8.1979, found that when the cheque or draft was tendered and it was honoured on presentation, the payment must be deemed to have been made on the date on which it was handed over to the Government banker. The Tribunal found that the circular issued by CBDT dated 8.8.79 would bind the revenue authorities. Therefore, it was held that when the cheque was realised, the date of payment would relate back to the presentation of the cheque. A similar view was taken by the Bangalore Bench of this Tribunal in the case of Molex (India) Ltd. (supra). The Bangalore Bench of this Tribunal has also placed its reliance on the judgment of the Karnataka High Court in the case of Sahara Airlines Ltd. v. Commissioner of Customs (Appeals) (110 Taxman 3). We find that this Tribunal in the case of Smt. Valli Alagappan v. JCIT in I.T.A. No. 359(Mds)/2001 dated 30.8.2005 held that the payment by cheque should be taken to be due payment if the cheque is subsequently encashed. This Tribunal placed its reliance on the judgment of the Madras High Court in the case of CIT v. Kumudam Publications (P.) Ltd. and the judgment of the Apex Court in the case of K. Saraswathy v. P.S.S. Somasundaram Chettiar (1989) 4 SCC 587. Since the issue before the Tribunal was regarding prima facie adjustment under Section 143(1)(a), this Tribunal held that it is a debatable issue. We further find that this Tribunal in the case of T. Stanes & Co. Ltd. v. Deputy Commissioner of Income Tax in I.T.A. No. 358(Mds)/96 dated 8.10.2003 held that when the payments were made by cheque, the date of presentation of the cheque should be taken as date of payment if the cheque was subsequently honoured. However, in the case of JCIT v. Duramettalic Sanmar Ltd. in I.T.A. No. 1437(Mds)/2000, this Tribunal by an order dated 24.6.2005 by referring to the CBDT circular dated 8.8.79 and the Central Govt. Account (Receipts and Payments) Rules, 1983 held that the date of payment would be the date of actual realization of the amount by the respective bankers. In view of the above, it is necessary to examine the legal consequence of payment by cheque or draft.

15. We find that cheque is a bill of exchange. The Parliament in order to define law relating to promissory note, bill of exchange and cheques enacted the Negotiable Instruments Act, 1881. Section 6 of the Negotiable Instruments Act 1981 defines "cheque" as follows:

A "Cheque" is a bill of exchange drawn on a specified banker (sci) and not expressed to be payable otherwise on demand This is the definition given by Parliament in the Negotiable Instruments Act 1981. Sections 10 and 82 of the Negotiable Instruments Act 1881 clearly say that once the cheque is encashed in the ordinary course, it will discharge the drawer from payment. The Supreme Court in the case of K. Saraswathy (supra), while considering the provisions of Sections 10 and 82 of the Negotiable Instruments Act, held that the payment by cheque should be taken to be due payment if the cheque is subsequently encashed in the ordinary course. Therefore, the Parliament in their wisdom enacted Negotiable Instruments Act, 1881 to regulate and manage the transactions through cheques. We further find that Section 138 of the Negotiable Instruments Act, 1881 was amended by the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 by inserting Chapter XVII comprising of Sections 138 to 142 with effect from 1.4.1989. This chapter was introduced in the Negotiable Instruments Act, 1881 with a view to enhance the acceptability of cheques in settlement of liabilities by making the drawer liable for penalties in case of bouncing of cheques due to insufficiency of the funds in the account or for the reason that it exceeds the arrangement made by the drawer with adequate safeguards to prevent harassment of honest drawers. Therefore, the intention of the legislature is to encourage the citizens to settle their

liabilities through cheque or draft.

16. Furthermore, Section 40A(3) of the Income Tax Act clearly says that any payment made otherwise than a crossed cheque drawn on a bank or by a crossed banker exceeding Rs. 20,000/-, 20% of the same shall be disallowed while computing the total income. Furthermore, Section 269SS of the Income Tax Act clearly says that after 30.6.84, no person shall pay or accept any loan or deposit otherwise than by an account payee cheque or account payee bank draft when the same exceeds Rs. 20,000/- or more. Similarly, Section 269T of the Income Tax Act says that no banking company or a co-operative bank or co-operative society and no firm or other person shall repay any loan or deposit exceeding Rs. 20,000/- in cash. Therefore, the Parliament in order to facilitate the usage of cheque and bank draft in the normal transaction introduced Chapter XVII in the Negotiable Instruments Act 1881 and also introduced similar provisions in the Income Tax Act. Sections 271D & 271E of the Income Tax Act enable the income tax authorities to impose penalty for failure to comply provisions of Sections 269SS and 269T. Therefore, the intention, of the legislature is to make the citizens of this country to pay their liability through a crossed cheque or crossed bankers draft. Furthermore, the CBDT, the highest administrative body of the direct taxes, issued circular in Circular No. 261 dated 8.8.79 clarifying that the date of payment would relate back to the date of presentation of the cheque if the cheque is honoured on presentation. Admittedly, this circular of the CBDT was not withdrawn even after Central Govt. Account (Receipts and Payments) Rules, 1983 was framed. In other words, even today the circular issued by the CBDT in Circular No. 261 dated 8.8.79 holds the field.

17. Income Tax-Act was a special enactment by the Parliament for the purpose of assessment, levy of tax and collection of tax. Therefore, the collection of income tax shall be regulated by the provisions of Income Tax Act. The CBDT, who is authorised to issue circulars and clarification under Section 119 of the Income Tax Act, issued a circular clarifying that if a cheque or draft is tendered, the date of payment would be the date of handing over the cheque to the Government banker provided the same was honoured on presentation. This circular issued by the CBDT in exercise of their statutory power under Section 119 of the Income Tax Act would be binding on the income tax authorities in preference to any other executive instruction issued by any other authorities. The Karnataka High Court in the case of Sahara Airlines Ltd. (supra) considered the scope of Central Govt. Account (Receipts and Payments) Rules, 1983 and made it clear that if the Government dues are paid by cheque, the date of payment shall be deemed to be the date on which date the cheque was handed over the Government's banker provided the cheque was not dishonoured. The Directorate of Service Tax which is also an apex body in assessing, levying and collecting service tax had an occasion to consider this issue in F. No. V/DGST/30-Misc-46/2000/11727 dated 23.8.2000. At para 6 of the above said circular, the Directorate has observed as follows:

It is observed that the identical issue had arisen in case of payment of Inland Air Travel Tax (IATT) by Sahara Airlines Ltd. The concerned authorities had imposed penalty and ordered recovery of the interest from the party since the cheques deposited, by them towards payment of IATT were credited to the Government after the due date. The matter has now been decided in second appeal by the Government of India Sahara Airlines Ltd. v. Commissioner of Customs (Appeals) (2000) 110 Taxman 378(G05). The Government has held that a harmonious reading of the provisions of Rule 7

of the Central Govt. Account (Receipts and Payments) Rules and Rules 79 & 80 of the Treasury Rules, makes it clear that the Government dues can be presented in the form of cheque into the authorised Bank. And if the cheque is not dishonored later, the payment shall be deemed to have been made on the date when the cheque was handed over to the Government's bankers. Accordingly, the Government set aside the imposition of penalty/interest etc. in the said case.

The ratio of above cited decision of the Government would apply mutatis - mutandis to the payment of service tax also. Therefore, it is clarified that in the cases where the service tax amount has been deposited by an assessee in the authorised Bank, by cheque, before the due date and such cheque is not dishonored later, the Department need not initiate proceedings for recovey of interest/penalty etc. However, if the cheque is not honored in due course or the clearance is abnormally delayed for any lapse on the part of the assessees, the Department would be free to take penal action etc., as deemed fit.

Therefore, it is very clear that even the Government has taken a decision with respect to the payment of Government dues by cheque. This circular of Directorate of Service Tax clearly expresses the intention of the Government in treating the payments made by the individual assessees by cheque or bank draft.

18. Now let us come to Central Govt. Account (Receipts and Payments) Rules, 1983. As we have already observed, this Rule was framed by the executive authorities in exercise of their power under Article 283(1) of the Constitution of India. Rule 20(1) of Central Govt. Account (Receipts and Payments) Rules, 1983 says that when the payment was made by cheque or draft, the payment shall be deemed to have been made on the date on which it was cleared and entered in the receipt scroll. Whereas, under the Negotiable Instruments Act 1881, as interpreted by the Supreme Court in the case of K. Saraswathy (supra), it obvious that the date of payment relates back to the date of presentation of the cheque provided the cheque was honoured on its presentation. Therefore, there is an apparent conflict between the law enacted by Parliament, namely, the Negotiable Instruments Act, 1881 on one hand and the Rule framed by executive authorities in exercise of their power under Article 283(1) of the Constitution of India, on the other end.

19. The question now arises for consideration is when there is a conflict between the rules framed by the executive authorities and the law enacted by the Parliament, which one will prevail? This question has been settled by the Apex Court in number of judgments. Whenever there is a conflict between the rules framed by the executive authorities and the law enacted by the Parliament, it is obvious that the law enacted by the Parliament will prevail over the rules framed by the executive authorities. It is not necessary to quote any authorities for this proposition. However, to make the things clear, the following judgments of the Apex Court can be relied upon:

(1) Virender Singh Hooda v. State of Haryana .

(2) Tamil Nadu Housing Board v. N. Balasubramaniun .

Both the above judgments were followed by the judgment of the Madras High Court in the case of President, Income Tax Appellate Tribunal v. A. Kalyanasundharam And Ors. . Therefore, the provisions of Negotiable Instruments Act, 1881 as interpreted by the Apex Court in the case of K. Saraswathy (supra) would prevail over the Central Govt. Account (Receipts and Payments) Rules, 1983.

20. Furthermore, the Authority For Advance Rulings in a case reported in 221 ITR 172 considered an identical situation. In the case before the Authority for Advance Rulings, the assessee originally deposited the cheque on 15.3.1994. However, the same was returned unpaid. The cheque was again presented on 15.4.94 which was honoured on 16.4.94. The assessee claimed before the Authority for Advance Rulings that the payment should relate back to the date of original presentation. The Authority for Advance Rulings held that the contention of the assessee cannot be accepted. After referring to the Central Govt. Account (Receipts and Payments) Rules, 1983 and the CBDT circular, ultimately concluded that the payment can be said to have been made at the earliest on 15.4.94 when the cheque was redeposited for second time. This decision of the Authority for Advance Rulings also supports the case of the assessee. The decision of the Authority For Advance Rulings clearly shows that the date of presentation of the cheque would be the date of payment provided the cheque was honoured on presentation.

21. In the case before us, admittedly, the cheques were presented and deposited before the authorised banker within the due date for payment of advance tax. The cheques were admittedly encashed and the amounts were realised subsequently. It is not the case of the Revenue that the cheques were returned unpaid at any point of time. In those circumstances, as held by the Authority for Advance Rulings, the date of payment should be taken as date of presentation of the cheques. The Apex Court as well as Madras High Court have also taken similar view after interpreting Sections 10 and 82 of the Negotiable Instruments Act, 1881. Therefore, in our opinion, the date of presentation should be taken as date of payment since admittedly, the cheques were honoured.

22. In view of the above discussion, the decision of this Tribunal in the case of Durametallic Sanmar Ltd. (supra) is distinguishable and therefore, it is not applicable to the facts of the case. Further, the decision of this Tribunal in the case of Pentamedia Graphics Ltd. (supra) was not considered in the case of Durametallic Sanmar Ltd. (supra). Moreover, this Tribunal in the case of Durametallic Sanmar Ltd. has not considered the provisions of Negotiable Instruments Act and the judgment of the Apex Court. Therefore, the decision of this Tribunal would not be of any assistance to the revenue. By respectfully following the judgment of the Apex Court in the case of K. Sarawsathy (supra) and the judgment of the Madras High Court in the case of Kumudam Publications (P.) Ltd. (supra) and the decision rendered by the Authority for Advance Rulings (supra), we set aside the order of the lower authorities and direct the Assessing Officer to take the date of presentation of the cheques befor the authorised banker for payment of advance tax as date of payment.

23. In the result, I.T.A. No. 1035(Mds)/99 is partly allowed and I.T.A. No. 1034(Mds)/99 is dismissed. However, there will be no order as to costs.