

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH "D" KOLKATA**

Before **Shri N.V.Vasusdevan, Judicial Member** and
Shri Waseem Ahmed, Accountant Member

ITA No.1513/Kol/2011
Assessment Year :2007-08

J.K. Lakshmi Cement Ltd., 7, Council House Street, Kolkata – 700 001 [PAN No.AAACJ 6715 G]	V/s .	Commissioner of Income Tax, Central-1, 18, Rabindra Sarani, Poddar Court, Kolkata-700 001
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर से/By Appellant	Shri Siddharth Jhajharia, FCA & Shri Sajay Sen, AR
प्रत्यर्थी की ओर से/By Respondent	Shri Sandeep Chaube, CIT-DR
सुनवाई की तारीख/Date of Hearing	17-12-2015
घोषणा की तारीख/Date of Pronouncement	05-02-2016

आदेश /ORDER

PER Waseem Ahmed, Accountant Member:-

This appeal by the assessee against the order of Commissioner of Income Tax (Central-I) Kolkata in appeal No.cit(C-I)/263/JK Lakshmi Cement Ltd./Tech/11-12/Kol/6446-48 dated 27/28.09.2011. Assessment was framed by ACIT,CC-VI, Kolkata u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide his order dated 19.11.2009 for assessment year 2007-08.

2. Only issue raised by assessee in its appeal is that Ld. CIT erred in confirming the assessment order of Assessing Officer by disallowing the depreciation for an amount of Rs.228,77,86,812/- to be carried forward.

3. Facts of the case are that assessee is a Limited Company is engaged in business of manufacturing and sale of cement. Assessee has shown unabsorbed depreciation amounting to Rs.228,77,86,812/- in the year under consideration. This depreciation pertains to AY beginning from AY 1992-93 to 2001-02. As per the law unabsorbed depreciation can be carried forward upto eight years. Ld. CIT found from the assessment order of AO that the issue of unabsorbed depreciation has not been examined by AO. Therefore, Ld. CIT opined that the order of AO is erroneous and prejudicial to the interest of revenue. Accordingly, Ld. CIT issued show cause notice u/s. 263 of the Act for certain clarification on the issue as discussed above. Assessee submitted that for the relevant AY 2007-08 no set off of the unabsorbed depreciation relating to AYs 1992-93 to 2001-02 have been claimed by assessee. Besides the above, assessee submitted that AO in his order for relevant to AY 2007-08 has already held that unabsorbed depreciation pertaining to assessment year beginning from 1992-93 to 2001-02 for an amount of Rs.228,77,86,812/- not available to be carried forward. However, assessee has gone in appeal before Ld. CIT(A) against the assessment order which is *sub judice*. In view of above, assessee submitted that the issue of unabsorbed depreciation which was carried forward from the earlier years do not make the order of AO is erroneous and prejudicial to the interest of revenue. Assessee also submitted that the restriction for claiming the unabsorbed depreciation has been removed with effect from 01.04.2002. Now as per the provisions of the Act the unabsorbed depreciation carry forward up to any number of years. However, Ld. CIT disregarded the claim of assessee by observing that unabsorbed depreciation of Rs.228,77,86,812/- for AYs 1992-93 to 2001-02 was wrongly allowed to be carried forward by the order of AO because as per the provision u/s 32 sub-section 2 of the Act became effective only from 01.04.2002 and

unabsorbed depreciation of Rs. 228,77,86,812.00 pertains to AY prior to the amendment in the IT Act. Accordingly, Ld. CIT held that the order of AO is erroneous and prejudicial to the interest of revenue. Hence, the order of the AO was set aside with a direction to pass afresh order in the light of above discussion accordingly after giving reasonable opportunity of being heard to assessee.

4. Aggrieved, assessee preferred an appeal before us.

Shri Siddharth Jhajharia & Shri Sujoy Sen Ld. Authorized Representative appearing on behalf of assessee and Shri Sandeep Chaube, Ld. Departmental Representative appearing on behalf of Revenue.

5. We have heard rival submissions of both the side and perused the materials available on record. Ld. AR submitted paper book which is running from pages 1 to 29 and relied on the order passed by AO whereas Ld. DR relied on the order passed by Ld. CIT. From the aforesaid discussion, we find that assessee's claim of unabsorbed depreciation pertaining to AYs beginning from 1992-93 to 2001-02 for an amount of Rs.228,77,86,812/- which was allowed to be carried forward by AO in his order for the relevant AY i.e. 2007-08 but Ld. CIT found that unabsorbed depreciation was not allowable to be carried forward for a period more than 8 years. Therefore, Ld. CIT opined that matter to be restored to file of AO for fresh adjudication. We further find that same issue has been decided by Hon'ble Gujarat High Court in the case of *General Motors India (P) Ltd. vs. DCIT* (2013) 354 ITR 244 (Guj) and head-note of extract portion is reproduced below:-

"Any unabsorbed depreciation available to an assessee on 1st day of April, 2002 (A.Y 2002-03) will be dealt with in accordance with the provisions of section 32(2) as amended by Finance Act, 2001 and not by the provisions of section 32(2) as it stood before the said amendment. Had the intention of the Legislature been to allow the unabsorbed depreciation allowance worked out in A.Y 1997-98 only for eight subsequent assessment years even after the amendment of section 32(2) by Finance Act, 2001 it would have incorporated a provision to that effect. However, it does not contain any such provision.

Therefore, the provisions of section 32(2) as amended by Finance Act, 2001 would allow the unabsorbed depreciation allowance available in the A.Y 1997-98, 1999-2000, 2000-01 and 2001-2002 to be carried forward to the succeeding years, and if any unabsorbed depreciation or part thereof could not be set off till the A.Y 2002-03 then it would be carried forward till the time it is set off against the profits and gains of subsequent years. 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. Thus any unabsorbed depreciation available to an assessee on 1st day of April 2002 (A.Y 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 A.Y 1997-98 upto the A.Y 2001-002 got carried forward to the assessment year 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."

We find that Hon'ble Gujarat High Court has given relief to assessee on the same line of facts in the case of *General Motors India (P) Ltd.* (supra). In this view of the matter, we find that the order passed by Assessing Officer is not erroneous and prejudicial to the interest of revenue. In this view of the matter, we reverse the order of Ld. CIT passed u/s. 263. This ground of assessee's appeal is allowed.

6. In the result, assessee's appeal is allowed.

Order pronounced in the open court 05/02/2016

Sd/-

(N.V.Vasudevan)
(Judicial Member)

Kolkata,

*Dkp

दिनांक:-

/02/2016

कोलकाता ।

Sd/-

(Waseem Ahmed)
(Accountant Member)

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant-JK Lakshmi Cement Ltd. 7, Council House Street, Kolkata-01
2. प्रत्यर्थी/Respondent-CIT (C-I) 18 Rabindra Sarani, Poddar Court, Kolkata-01
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, **कोलकाता** / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता ।