

**INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "SMC-I": NEW DELHI  
BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER**

ITA No. 1031/Del/2014  
(Assessment Year: 2010-11)

Himgiri Metals (P) Ltd, C/o.RRA Taxindia, D-28, South Extension, New Delhi PAN:AAACH7613P <b>(Appellant)</b>	Vs.	JCIT, Range-1, Muzzafarnagar, Uttar Pradesh  <b>(Respondent)</b>
---	-----	---

Appellant by : Dr. Rakesh Gupra, Adv  
Respondent by : Dr. Anjula Jain, Sr. DR

Date of Hearing	14.12.2015
Date of pronouncement	18.12.2015

**ORDER**

This appeal of the assessee is directed against the order dated 28.10.2013 of Id. CIT(A), Muzzaffarnagar for the Assessment Year 2010-11.

2. The assessee has raised the following grounds:-

- “1. That having regard to the facts and circumstances of the case, Id CIT(A) has erred in law and on facts in confirming the action of Id AO is disallowing the unabsorbed depreciation and that too by ignoring the decision of the Hon'ble Gujarat High Court.
2. That in any case and in any vies of the matter, action of the Id CIT(A) in dismissing the appeal and not allowing the set off of carried forward unabsorbed depreciation is bad in law and against the facts and circumstances of the case.”

3. In the present appeal the issue arose from the grounds raised by the assessee is whether unabsorbed depreciation for the Assessment Years 2000-01 and 2001-02 can be allow to set off against the income for the year under consideration. The assessee is a private limited company deriving income from manufacture and sale of zinc metal and zinc sulphate. During the course of assessment proceeding the AO noted that the assessee has claimed unabsorbed depreciation as per the following details:-

<u>Assessment Year</u>	<u>Amount</u>
2000-01	Rs.15,75,293/-
2001-02	Rs.22,509/-
2005-06	Rs.5,11,161/-

2008-09  
Total

Page No. 2  
Rs.2,39,821/-  
Rs.23,48,784/-“

4. Thus the AO found that out of above mentioned depreciation of Rs.23,48,784/-, the assessee has claimed unabsorbed depreciation of Rs.9,55,641/-, which pertains to Assessment Year 2000-01 and 2001-02. The Assessing Officer was of the opinion that the claim of unabsorbed depreciation for Assessment Year 2000-01 and 2001-02 cannot be allow in view of the position of the provisions of the income Tax Act, 1961 applicable for the period to which unabsorbed depreciation relates. Accordingly, the AO disallowed a sum of Rs.9,55,641/- being unabsorbed depreciation pertaining to Assessment Year 2000-01 and 2001-02. The assessee has challenged the action of the AO before the learned Commissioner of Income-tax (Appeals), but could not succeed.

5. Before the tribunal the Id AR of the assessee has submitted that the issue is covered by the judgment of the Hon'ble Gujarat High Court in the case of General Motors India (P) Ltd. Vs. DCIT, (2013) 354 ITR 244 (Guj). He has further pointed out that that by following this judgment the co-ordinate bench of this Tribunal in the case of Minda Sai Limited Vs. Income Tax Officer, ITA No.2974/Del/2013 vide order dated 09.01.2015 has decided this issue in favour of the assessee. On the other hand the Id DR submitted that the authorities below have decided this issue by following the decision of special bench of this tribunal in the case of DCIT Vs. Times Guaranty. Thus, the Id DR submitted that this bench is found to follow the decision of the special bench and therefore claim of the unabsorbed depreciation pertaining to the Assessment Years 2000-01 and 2001-02 cannot be allow against the income for assessment under consideration. She has relied upon the order of the authorities below.

6. Having considered the rival submission as well as relevant material available on record it is noted that an identical issue came before the Hon'ble Gujarat High Court in the case of General Motors India (P) Ltd (supra). The Hon'ble Gujarat High Court after analyzing the provision of section 32(2) as amended by Finance Act 2001 w.e.f 1<sup>st</sup> April 2002 has held in para 35 to 38 as under:-

"35. Section 32 (2) of the Act was amended by Finance Act, 2001 and the provision so amended reads as under :-

"Where, in the assessment of the assessee, full effect cannot be given to any allowance under subsection (1) in any previous year, owing to there being no profits or gains chargeable for that previous year, or owing to the profits or gains chargeable for that previous year, owing to the profits or gains chargeable being less than the allowance, then, subject to the provisions of subsection (2) of section 72 and sub-section (3) of section 73, the allowance or the part of the allowance to which effect has not been given, as the case may be, shall be added to the amount of the allowance for depreciation for the following previous year and deemed to be part of that allowance, or if there is no such allowance for that previous year, be deemed to be allowance of that previous year, and so on for the succeeding previous years."

36. The purpose of this amendment has been clarified by Central Board of Direct Taxes in the Circular No.14 of 2001. The relevant portion of the said Circular reads as under :-

"Modification of provisions relating to depreciation

30.1 Under the existing provisions of section 32 of the Income-tax Act, carry forward and set off of unabsorbed depreciation is allowed for 8 assessment years.

30.2 With a view to enable the industry to conserve sufficient funds to replace plant and machinery, specially in an era where obsolescence takes place so often, the Act has dispensed with the restriction of 8 years for carry forward and set off of unabsorbed depreciation. The Act has also clarified that in computing the profits and gains of business or profession for any previous year, deduction of depreciation under section 32 shall be mandatory.

30.3 Under the existing provisions, no deduction for depreciation is allowed on any motor car manufactured outside India unless it is used (i) in the business of running it on hire for tourists, or (ii) outside in the assessee's business or profession in another country.

30.4 The Act has allowed depreciation allowance on all imported motor cars acquired on or after 1st April, 2001.

30.5 These amendments will take effect from the 1st April, 2002, and will, accordingly, apply in relation to the assessment year 2002-03 and subsequent years."

37. The CBDT Circular clarifies the intent of the amendment that it is for enabling the industry to file conserve sufficient funds to replace plant and machinery and accordingly the amendment dispenses with the restriction of 8 years for carry forward and set off of unabsorbed depreciation. The amendment is applicable from assessment year 2002-03 and subsequent years. This means that 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. Hence keeping in view the purpose of amendment of section 32(2) of the Act, a purposive and harmonious interpretation has to be taken. While construing taxing statutes, rule of strict interpretation has to be applied, giving fair and reasonable construction to the language of the section without leaning to the side of assessee or the revenue. But if the legislature fails to express clearly and the assessee becomes entitled for a benefit within the ambit of the section by the clear words used in the section, the benefit accruing to the assessee cannot be denied. However, Circular No. 14 of 2001 had clarified that under Section 32(2), in computing the profits and gains of business or profession for any previous year, deduction of depreciation under Section 32 shall be mandatory. 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 2001-02 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.

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 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. 2001-02 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."

7. Thus, it is clear the Hon'ble Gujarat High Court has held that unabsorbed depreciation available to the assessee on 1<sup>st</sup> April 2002 will be dealt with in accordance with provision of section 32(2) as amended by Finance Act 2001. The Hon'ble High Court observed that the restriction on carry forward unabsorbed depreciation has been dispensed with by the CBDT Circular No.14/2001 and therefore the unabsorbed depreciation from Assessment Year 1997-98 up to assessment year 2001-02 can be carry forward to the assessment year 2002-03 and becomes part thereof. The Co-ordinate bench of this tribunal in the case of Minda Sai Limited Vs. Income Tax Officer while dealing the identical issue has followed the judgment of the Hon'ble Gujarat High Court and held in para 13-18 as under:-

*"13. Mr. Soparkar, lastly urged that there was no tangible material available with the Assessing Officer on the basis of which he could have formed an opinion that any income chargeable to tax had escaped assessment.*

*14. On the other hand, Mr.K.M. Parikh, learned Central Government Standing Counsel appearing for the revenue has urged that fresh assessment order had been passed by the Assessing Officer on 27.12.2011. Therefore, the writ petition under Article 226 of the Constitution of India would not be maintainable. The remedy of the assessee lies in filing a statutory appeal which is available to the assessee and is required to be exhausted by the assessee. In the alternative, he has urged that if this writ petition is entertained, provisions of appeal would be rendered redundant as every assessee would prefer to approach this Court by-passing the statutory remedy of appeal. In support of his argument, he placed reliance on the decisions in Arvind Mills Ltd. (infra) and GKN Driveshafts (INDIA) Ltd. (infra).*

*15. Mr. Parikh has further urged that the unabsorbed depreciation for the A.Y. 1997-98 can be carried forward upto maximum period of 8 years from the year in which it was first computed. Thus, brought forward depreciation for the A.Y. 1997-98 was eligible for being carried forward and set off against the income for A.Y. 2005-06 only and unabsorbed depreciation of Rs.43,60,22,158/-for the A.Y. 1997-98 was not eligible for being carried forward and set off against income of A.Y. 2006-07. Therefore, the unabsorbed depreciation for the A.Y. 1997-98 was wrongly carried forward and set off against the income for the A.Y. 2006-07. Therefore, income to the extent has escaped assessment and the Assessing Officer rightly issued notice to the assessee under Section 148 after complying with Section 147 of the Act.*

*16. The learned counsel for the revenue has urged that while passing the assessment order dated 27.12.2011, the Assessing Officer has considered the objections of the assessee dated 7.12.2011 and, therefore, it cannot be urged by the assessee that the assessment order*

has been passed without disposing of the objections filed to the notice under Section 148 of the Act. He further urged that even if the objections dated 7.12.2011 of the assessee was decided by the Assessing Officer in the assessment order, that will not make the assessment order illegal and without jurisdiction.

17. Mr. Parikh further urged that reopening of assessment was on tangible material. He urged that if there was an error in applying the provisions of law, it can be treated to be tangible material and the Assessing Officer was justified in reopening of assessment by issuing notice under Section 148 of the Act. From a bare perusal of Section 32(2) as amended by Finance Act No.2 of 1996, it is established that income chargeable to tax has escaped assessment and set off for unabsorbed depreciation could not have been allowed for the A.Y. 2006-07 as the period of 8 years expired in A.Y. 2005-06. There was a clear link between the material facts and the opinion formed by the Assessing Officer for reassessment. Therefore, the writ petition is liable to be dismissed.

18. Before we advert to the rival contentions raised by learned counsel for the parties, it is necessary to extract the reasons given by the Assessing Officer dated 29.3.2011 for reopening of assessment under Section 147 of the Act, which is reproduced below :-

#### REASONS FOR REOPENING OF ASSESSMENT

In this case, the assessee has filed return of income on 29.12.2006 declaring total income at Rs.NIL under E- filing of return. In this case, an order was passed by the Transfer Pricing Officer, Addl. CIT (TOP-I), Ahmedabad u/s. 92CA(3) of the IT. Act on 29.10.2009 and the case was referred to Dispute Resolution Panel. Assessment order was passed under Section 143(3) r.w.s. 144C of the I.T. Act on 20.09.2010 on total income at Rs.NIL. In the assessment order dated 20.09.2010, the unabsorbed depreciation pertaining to A.Y.97-98 of Rs.43,60,22,158/- was allowed to be set off against the income of the A.Y. 2006-07. As per provision of Section 32(2) of the I.T. Act as amended by the Finance Act No.2, 1996 w.e.f. A.Y. 97-98, the unabsorbed depreciation for A.Y. 97-98 can be carried forward upto maximum period of 8 years from the year in which it was first computed. Thus brought forward depreciation for A.Y. 97-98 was eligible for carried forward and set off against the income for A.Y. 2005-06 only. Therefore, the unabsorbed depreciation of Rs.43,60,22,158/- for A.Y. 97-98 was not eligible for carried forward and set off against the income for A.Y. 2006-07 and therefore, the unabsorbed depreciation for A.Y. 97-98 was wrongly carried forward and set off against the income for A.Y. 2006-07. Therefore, the income to the extent has escaped assessment.

I have therefore reason to believe that income of Rs.43,60,22,158/- being wrong set off of unabsorbed depreciation for A.Y. 97-98 has escaped assessment within the meaning of Section 147 of the Act.

Issue notice u/s. 148 of the I.T. Act,

Date :- 29.03.2011 Sd/-

Place :- Godhra Deputy Commissioner of Income-tax Panchmahals Circle, Godhra."

8. Following the judgment of Hon'ble Gujarat High Court as well as the decision of the co-ordinate bench (supra) this issue of setting off unabsorbed depreciation pertains to Assessment Year 2000-01 and 2001-02 is decided in favour of the assessee and the claim of the assessee is allowed.
9. In the result the appeal is allowed.

**Order pronounced in the open court on 18.12.2015.**

**-Sd/-  
(VIJAY PAL RAO)  
JUDICIAL MEMBER**

Dated: 18/12/2015

*A K Keot*

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR: ITAT

ASSISTANT REGISTRAR  
ITAT, New Delhi