



आयकर अपीलिय अधिकरण "आई" न्यायपीठ मुंबई में।

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "I", MUMBAI**

श्री अमित शुक्ला, न्यायिक सदस्य एवं
श्री रमित कोचर, लेखा सदस्य के समक्ष।

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

ITA No. : 6661/Mum/2014

(Assessment year: 2010-11)

इंदौर स्टील अँड आइरन मिल्स लिमिटेड Indore Steel and Iron Mills Ltd, Office No. 71, 2 nd Floor, Empire Bldg., 134, Dr. D N Road, Fort, Opp. V T Stn. Mumbai -400 001 स्थयी लेखा सं. PAN: AAACI 6050 K	Vs	ITO -3(2)(1), Mumbai
अपीलार्थी (Appellant)		प्रत्यर्थी (Respondent)
Appellant by	:	श्री शिव प्रकाश Shri Shiv Prakash
Respondent by	:	श्री प्रकाश पथाड़े Shri Prakash Pathade

सुनवाई की तारीख /Date of Hearing : 16-08-2016

घोषणा की तारीख /Date of Pronouncement : 16-08-2016

आदेश

ORDER

श्री अमित शुक्ला, न्या सः

PER AMIT SHUKLA, JM:

The aforesaid appeal has been filed by the assessee against impugned order dated 22.09.2014, passed by Id. CIT(Appeals) -4, Mumbai in relation to the order passed under section 154 for the assessment year 2010-11. The grounds raised by the assessee reads as under:-

- (1) *That the learned CIT(A) has erred in law and facts of the case:*
- (2) *That the learned CIT(A) has erred in considering only a part of the submission, made before him, and has happened to totally ignore to take into consideration the submission of the Appellant vide its letter dated 08.09.2014 and also the ratio of the decisions of the cases referred to therein and relied upon the appellant.*

The order thus passed by the CIT(A) is improper and the decision taken unjust.

- (3) *That the learned CIT(A) has grossly erred in ignoring to deal with the ground of appellant against the action as well as order passed u/s 154 of the Act by the Assessing Officer The action u/s 154 had been wrongly resorted by the assessing officer the issue involved being highly debatable rendering the order passed there under unsustainable the confirmation of the said order by the learned CIT(A) is improper and unjust.*
- (4) *That the learned CIT(A) has also erred in dismissing the appellant's appeal by wrongly applying the decision of the Honourable Special Bench of ITAT, Mumbai Bench in the case of DCTI vs Time Guarantee Ltd the facts of the said case being different besides the said case had not arisen out of an order u/s 154 but out of an order /s 143(3) the application of the ratio of the said case to that the appellant's is untenable and improper".*

2. Brief facts *qua* the issue involved are that, assessee company is engaged in the business of manufacture of rolled products of Iron and steel. It had filed its return of income at "nil" on 01.10.2010 and as against the said returned income, assessment was completed under section 143(3) vide order dated 01.03.2013, determining the total income at Rs.29,40,465/-. Later on, the Ld. Assessing Officer noted that the depreciation pertaining to assessment years 1998-99, 2000-01 and 2001-02 aggregating to Rs.1,31,03,362/- has been claimed and allowed to be set off against the current year's income of AY 2010-11. He observed that, such a brought forward unabsorbed depreciation allowance pertaining to the period 1998-99 to 2001-02 can be carried forward for maximum period of 8 assessment years from the assessment year immediately succeeding the assessment year for which it was first computed to be set off against the income under the head "profits and gains of business and profession". Thus, he held that such an unabsorbed depreciation amounting to Rs.1,31,03,362/- cannot be allowed to set off against the current year's income. In support, he referred and strongly relied upon the decision of ITAT

Mumbai Special Bench in the case of DCIT vs Times Guarantee Ltd, reported in [2010] 40 SOT 14. Accordingly, he issued a notice under section 154 on 26.11.2013, rectifying the assessment order passed under section 143(3). In response, the assessee vide reply dated 03.12.2013 had objected to such a rectification and also gave submissions on merits. However, the Ld. Assessing Officer after referring to section 32(2) as it stood prior to amendment brought by Finance Act, 2001 w.e.f. 01.04.2002, held that, unabsorbed depreciation totaling to Rs.1,31,03,362/-, pertaining to the assessment years 1998-99, 2000-01 and 2001-02, which has been claimed in AY 2010-11, will not be allowable as it is beyond the period of 8 years.

3. Before the Ld. CIT(A), detailed submissions were made by the assessee objecting to such rectification under section 154, not only on merits but also on the ground that the same is beyond the scope and ambit of section 154. However, the Ld. CIT(A) too relying upon the decision of ITAT Special Bench in the case of Times Guarantee Ltd, decided the issue against the assessee.

4. Before us, the Ld. Counsel had filed his written submission, wherein, *firstly*, it has been contended that the impugned issue cannot be raised within the scope of section 154 and *secondly*, the unabsorbed depreciation pertaining to the assessment years prior to the assessment year 2002-03 shall be allowed to be carried forward for more than the period of 8 years as per the amended provision. In support, strong reliance has been placed on the decision of Hon'ble Gujarat High Court in the case of General Motors India Ltd vs DCIT, reported in 354 ITR 244.

5. On the other hand, Ld. DR strongly relied upon the order of the CIT(A).

6. After considering the relevant finding given in the impugned orders as well as the submissions made by the parties, we find that the Ld. Authorities below, while decided the impugned issue have merely relied upon the decision of Hon'ble Special Bench in the case of DCTI vs Times Guarantee Ltd. (*supra*). It is an undisputed fact that the claim of carried forward of depreciation aggregating to Rs.1,31,03,362/- pertains to assessment years 1998-99, 2000-01 and 2001-02. Before the amendment, the time limit for carried forward of unabsorbed depreciation was for period not more than 8 assessment years immediately succeeding the assessment years for which the aforesaid allowance was first computed. However, by the Finance Act, 2001 an amendment was brought under section 32(2), whereby, restriction of 8 years for the carried forward and set off of unabsorbed depreciation was removed. This precise issue has been answered by Hon'ble Gujarat High Court in the case of General Motors India Pvt Ltd vs DCIT (*supra*) after detailed discussion of pre-amended and amended provisions and also the CBDT Circular. The relevant observation and finding of the Hon'ble Gujarat High Court reads as under:-

"30. The last question which arises for consideration is that whether the depreciation pertaining to A.Y. 1997-98 could be allowed to be carried forward and set off after a period of eight years or it would be governed by Section 32 as amended by Finance Act 2001? The reason given by the Assessing Officer under section 147 is that Section 32(2) of the Act was amended by Finance Act No.2 of 1996 w.e.f. A.Y. 1997-98 and the unabsorbed depreciation for the A.Y. 1997-98 could be carried forward up to the maximum period of 8 years from the year in which it was first computed. According to the Assessing Officer, 8 years expired in the A.Y. 2005-06 and only till then, the assessee was eligible to claim unabsorbed depreciation of A.Y. 1997-98 for being carried forward and set off against the income for the A.Y.

2005-06. But the assessee was not entitled for unabsorbed depreciation of Rs.43,60,22,158/- for A.Y. 1997-98, which was not eligible for being carried forward and set off against the income for the A.Y. 2006-07.

31. Prior to the Finance Act No.2 of 1996 the unabsorbed depreciation for any year was allowed to be carry forward indefinitely and by a deeming fiction became allowance of the immediately succeeding year, The Finance Act No.2 of 1996 restricted the carry forward of unabsorbed depreciation and set-off to a limit of 8 years, from the A.Y.1997-98. Circular No.762 dated 18.2.1998 issued by the Central Board of Direct Taxes (CBDT) in the form of Explanatory Notes categorically provided, that the unabsorbed depreciation allowance for any previous year to which full effect cannot be given in that previous year shall be carried forward and added to the depreciation allowance of the next year and be deemed to be part thereof.

32. So, the unabsorbed depreciation allowance of A.Y. 1996-97 would be added to the allowance of A.Y. 1997-98 and the limitation of 8 years for the carry-forward and set-off of such unabsorbed depreciation would start from A.Y. 1997-98.

33. We may now examine the provisions of section 32(2) of the Act before its amendment by Finance Act 2001. The section prior to its amendment by Finance Act, 2001, read as under:-

'Where in the assessment of the assessee full effect cannot be given to any allowance under clause (ii) of sub-section (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 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;

- (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 and—
 - (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:

Provided that the time limit of eight assessment years specified in sub-clause (b) shall not apply in case of a company for the assessment year beginning with the assessment year relevant to the previous year in which the said company has become a sick industrial company under sub-section (1) of section 17 of the Sick Industrial Company (Special Provisions) Act, 1985 (1 of 1986) and ending with the assessment year relevant to the previous year in which the entire net worth of such company becomes equal to or exceeds the accumulated losses.

Explanation.- For the purposes of this clause, "net worth" shall have the meaning assigned to it in clause (ga) of sub-section (1) of section 3 of the Sick Industrial Companies (Special Provisions) Act, 1985."

34. The aforesaid provision was introduced by Finance (No.2) Act, 1996 and further amended by the Finance Act, 2000.

The provision introduced by Finance (No.2) Act was clarified

by the Finance Minister to be applicable with prospective effect.

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 sub-section (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 sub-section (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 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, in wake of the Hon'ble Gujarat High Court, the decision of Special Bench of ITAT will not have any persuasive precedence and accordingly respectfully following the ratio laid down by the Hon'ble Gujarat High Court, we hold that assessee is entitled for claim of unabsorbed depreciation for the assessment year 1998-99, 2000-01 and 2001-02 aggregating to Rs.1,31,03,362/- from the current year's income and the restriction of 8 years as per the earlier provision will not be applicable. Thus, grounds raised by the assessee are treated as allowed.

8. In the result, appeal of the assessee stands allowed.

Order pronounced in the open court on 16th August, 2016

Sd/-

(रमित कोचर)

लेखा सदस्य

(RAMIT KOCHAR)

ACCOUNTANT MEMBER

Sd/-

(अमित शुक्ला)

न्याईक सदस्य

(AMIT SHUKLA)

JUDICIAL MEMBER

Mumbai, Date: 16th August, 2016

प्रति/Copy to:-

- 1) अपीलार्थी /The Appellant.
 - 2) प्रत्यर्थी /The Respondent.
 - 3) The CIT(A) –4, Mumbai.
 - 4) The CIT–3, Mumbai.
 - 5) विभागीय प्रतिनिधि “आई”, आयकर अपीलीय अधिकरण, मुंबई/
The D.R. “I” Bench, Mumbai.
 - 6) गार्ड फाईल \
- Copy to Guard File.

आदेशानुसार/By Order

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Dy./Asstt. Registrar
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*चव्हान व.नि.स

*Chavan, Sr.PS