

आयकर अपीलीय अधिकरण," जे" खंडपीठ मुंबई
INCOME TAX APPELLATE TRIBUNAL,MUMBAI-"J",BENCH

सर्वश्री जोगिन्दरसिंह, न्यायिक सदस्य एवं राजेन्द्र, लेखा सदस्य

Before S/ShJoginder Singh,Judicial Member & Rajendra,Accountant Member

आयकर अपील सं./ITA/4086/Mum/2014,निर्धारण वर्ष /Assessment Years: 2008-09

DCIT-Central Circle-41 Room No.655, 6 th Floor, Aayakar Bhavan, M.K. Road Mumbai-400 020.	Vs.	M/s. JSL Structures Ltd. 6 th Floor, Valecha Chambers, New Link Road, Oshiwara, Andheri (W) Mumbai-400 053. PAN:AAACP 2307 E.
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(अपीलार्थी /Appellant)

(प्रत्यर्थी / Respondent)

Revenue by: Shri Ashish Heliwal –Sr.AR

Assessee by: shri Aditya Asgaonkar-AR

सुनवाई की तारीख / **Date of Hearing: 30.03.2016**

घोषणा की तारीख / **Date of Pronouncement: 30.03.2016**

आयकर अधिनियम,1961 की धारा 254(1)के अन्तर्गत आदेश

Order u/s.254(1)of the Income-tax Act,1961(Act)

लेखा सदस्य राजेन्द्र के अनुसार PER Rajendra A.M.-

Challenging the order,dtd.10/02/2014 of the CIT (A)-38,Mumbai the Assessing Officer(AO) has filed the present appeal.Assessee-company filed its return of income on 07/12/2009, declaring total income at rupees NIL.The AO completed the assessment,u/s.143(3) r.w.s.147 of the Act,on 27/12/2012, determining the income of the assessee at Rs.12,28,509/-.

2.Effective ground of appeal is about carry forward of unabsorbed depreciation.Brief facts of the case are that the original assessment u/s.143(3)of the Act was completed on 07.12.2009 determining the income of the assessee at Rs.NIL,after setting off of brought forward losses of earlier years.Subsequently,the assessment was reopened by issue of notice under section 148 of the act and the assessment u/s.143(3)r.w.s.147 was completed on 27/12/2012, determining the income of the assessee same as the original assessment i.e.at Rs NIL. However,in the reopened assessment unabsorbed depreciation pertaining to AY.1997-98 to AY.1999-2000, amounting to Rs. 1.17 crores was not allowed to be carried forward.While completing the assessment, the AO held that depreciation pertaining to AY.1997-98 could not be carried forward for more than 8 AY.s i.e.,it could not be carried forward beyond AY. 2007-08.The AO relied upon the decision of the Special Bench delivered in the case of Times Guarantee Ltd.(40SOT14).The claim of the assessee for carry-forward of unabsorbed depreciation Rs.1,17,14,644/- was rejected by the AO.

3.Aggrieved by the order of the AO,the assessee preferred an appeal before the First Appellate Authority(FAA).Before him, the assessee contended that it had incurred losses in the earlier years,that those losses consisted of business loss as well as unabsorbed depreciation,that against the profit earned by the assessee for the AY.2008-09 amounting to Rs.2.53 crores,that part of the carry forward loss was set off ,that as per the provisions of the Act the business loss was set off first before setting off of the unabsorbed depreciation, that the total carry forward of business loss was Rs.5.82 crores, that the unabsorbed depreciation amounted to Rs.2.64 crores,that the profit of the AY.2008-09 was only sufficient to set off a

part of the business losses and not the depreciation, that after setting off of business loss of Rs.2.53 crores the balance unabsorbed loss (Rs.3.28 crores) and the unabsorbed depreciation (Rs.2.64 crores) was claimed for carry-forward, that in the original assessment order carry forward of such loss was not denied, following the decision of Times Guarantee Ltd. (supra), that assessee brought into the notice that the Hon'ble Gujarat High Court in the case of General Motors India(P) Ltd. had decided the issue of carry forward of depreciation in favour of the assessee-company, that the Hon'ble Court had held that unabsorbed depreciation pertaining to AY.997-98 could be allowed to be carried forward and set off after a period of 8 years and without any time limit. In accordance with section 32(2) of the Act, the judgment had also dealt with the CBDT Circular No.14 of 2001, that the unabsorbed depreciation for the period AY.1997-98 till AY.2006-07 became depreciation of AY.2008-09 for the purpose of allowability of depreciation, that it lost its character of being unabsorbed depreciation of a particular year. The assessee relied upon the cases of Arch Fine Chemicals (P) Ltd.(ITA / 2014-2415/Mum/2012,dt.9.10.13) and Associated Cables Pvt.Ltd.(ITA/556/Mum/2012,dt.31.10.13).

After considering the submission of the assessee and the assessment order the FAA held that the restriction of 8 yrs for carry forward and set off of unabsorbed depreciation had been dispensed with from AY.2002-03, that the unabsorbed depreciation from AY.1997-98 upto AY.2001-02 got carry forward to AY.2002-03 and became part thereof, that the Hon'ble Gujarat High Court in the case of General Motors (I) Pvt. Ltd. (25taxmann.com 364) had held that unabsorbed depreciation had to be allowed to be carry forward. He further mentioned that in the case of Arch Fine Chemicals Ltd.(supra), the Tribunal had followed the judgment of General Motors (I)Pvt.ltd.(supra). Following the decisions of the Arch Fine Chemicals Ltd. and Associated Cables Pvt. Ltd. allowed the appeal filed by the assessee.

4. Before us, the Departmental Representative(DR) supported the order of the AO. The Authorised Representative(AR) referred to the cases of General Motors(I)Ltd., Bajaj Hindustan Ltd.(47taxmann.com333) dt.17.4.14, and Smith and Nephew Healthcare(P) Ltd. (50 taxmann.com420 dt.15.1.14).

5. We have heard the rival submissions and perused the material before us. We find that the Hon'ble Gujarat High Court has dealt with the issue at length as under.

“32. The last question which arises for consideration is that whether the unabsorbed depreciation pertaining to the assessment year 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 the Finance Act, 2001 ?

The reason given by the Assessing Officer under section 147 is that section 32(2) of the Act was amended by the Finance (No. 2) Act of 1996, with effect from the assessment year 1997-98 and the unabsorbed depreciation for the assessment year 1997-98 could be carried forward up to the maximum period of eight years from the year in which it was first computed. According to the Assessing Officer, eight years expired in the assessment year 2005-06 and only till then, the assessee was eligible to claim unabsorbed depreciation of the assessment year 1997-98 for being carried forward and set off against the income for the assessment year 2005-06. But the assessee was not entitled for unabsorbed depreciation of Rs. 43,60,22,158 for the assessment year 1997-98, which was not eligible for being carried forward and set off against the income for the assessment year 2006-07.

33. Prior to the Finance (No. 2) Act 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 (No. 2) Act of 1996 restricted the carry forward of unabsorbed depreciation and set-off to a limit of eight years, from the assessment year 1997-98. Circular No. 762, dated February 18, 1998 (see [1998] 230 ITR (St.) 12), 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.

34. So, the unabsorbed depreciation allowance of the assessment year 1996-97 would be added to the allowance of the assessment year 1997-98 and the limitation of eight years for the carry forward and set off of such unabsorbed depreciation would start from the assessment year 1997-98.

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

XXXXXXXXXXXXXXXXXX

36. The aforesaid provision was introduced by the Finance (No.2) Act, 1996, and further amended by the Finance Act, 2000. The provision introduced by the Finance (No. 2) Act was clarified by the Finance Minister to be applicable with prospective effect.

37. Section 32(2) of the Act was amended by the 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 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 the allowance of that previous year, and so on for the succeeding previous years."

38. The purpose of this amendment has been clarified by the Central Board of Direct Taxes in Circular No. 14 of 2001 (see [2001] 252 ITR (St.) 65, 90). 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 eight 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 eight 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."

39. The Central Board of Direct Taxes 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 eight years for carry forward and set off of unabsorbed depreciation. The amendment is applicable from the assessment year 2002-03 and subsequent years. This means that any unabsorbed depreciation available to an assessee on the 1st day of April, 2002 (the assessment year 2002-03), will be dealt with in accordance with the provisions of section 32(2) as amended by the 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 the assessment year 1997-98 only for eight subsequent assessment years even after the amendment of section 32(2) by the 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 the amendment of section 32(2) of the Act, a purposive and harmonious interpretation has to be taken. While construing the 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 the 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 the Finance Act, 2001, would allow the unabsorbed depreciation allowance available in the assessment years 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 assessment year 2002-03 then it would be carried forward till the time it is set off against the profits and gains of subsequent years.

40. 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 the 1st day of April, 2002 (the assessment year 2002-03), will be dealt with in accordance with the provisions of section 32(2) as amended by the Finance Act, 2001. And once Circular No. 14 of 2001 clarified that the restriction of eight years for carry forward and set off of unabsorbed depreciation had been dispensed with, the unabsorbed depreciation from the assessment year 1997-98 up to the assessment year 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 the Finance Act, 2001, and were available for carry forward and set off against the profits and gains of subsequent years, without any limit whatsoever.”

Various Benches of the Tribunal have followed the above judgment and have held that unabsorbed depreciation of AY.1997-98 could be allowed to be carry forward and set off after a period of 8 years in view of the amended section 32(2) of the Act. Respectfully following the judgment of the Hon'ble Gujarat High Court in the case of General Motors (I) Pvt.Ltd., we uphold the order of the FAA. Ground No.1-2 are decided against the AO.

5. Last ground of appeal is about re-opening of the assessment u/s. 147 of the Act. The FAA held that reopening was bad in law. We have decided the issue on merits, so we are not adjudicating the jurisdictional issue treating the same infructuous.

As a result appeal filed by the AO stands dismissed.

फलतः निर्धारित अधिकारी द्वारा दाखिल की गई अपील नामंजूर की जाती है.

Order pronounced in the open court on 30th, March, 2016.

आदेश की घोषणा खुले न्यायालय में दिनांक 30 मार्च, 2016 को की गई।

Sd/-

Sd/-

(जोगिन्दर सिंह /Joginder Singh)

(राजेन्द्र / RAJENDRA)

न्यायिक सदस्य / JUDICIAL MEMBER

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 30.03.2016.

Jv.Sr.PS.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1.Appellant /अपीलार्थी

2. Respondent /प्रत्यर्थी

3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, 4.The concerned CIT/संबद्ध आयकर आयुक्त

5.DR “A ” Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, J खंडपीठ, आ.अ.न्याया.मुंबई

6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार Dy./Asst. Registrar

आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai.