

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "J", MUMBAI
BEFORE SHRI PRAMOD KUMAR, ACCOUNTANT MEMBER AND
SHRI PAWAN SINGH, JUDICIAL MEMBER**

ITA No.4587/Mum/2014

Assessment Year: 2010-11

ITO Ward 8(2)(1), Room No. 216, 2 nd Floor, Aayakar Bhavan, M.K. Road, Mumbai-400020	Vs.	M/s Jay Container Service Co. Pvt. Ltd., Plot No.2, Vatika, 14 Baptista Road, Opp. Ishwarlal Park, Vile Parle (West), Mumbai-400056. PAN: AAACJ0257F
(Appellant)		(Respondent)

Revenue by : Mrs. Lata Sunder (DR)

Assessee by : Shri Govind Javeri

Date of hearing : 12.01.2016

Date of Pronouncement : 08.02.2016

ORDER

PER PAWAN SINGH, JM:

1. The present appeal has been filed by the Revenue against the order dated 10.04.2014 passed by CIT(A)-17, Mumbai for Assessment Year (AY) 2010-11 on the following grounds of appeal:

1. Whether on the facts and in the circumstances of the case and in law the Ld. CIT(A) erred in upholding the claim of the assessee of setting off of unabsorbed depreciation pertaining to assessment years prior to AY 2002-03 i.e. period from 1993-94 to 2001-02 against the income for the AY 2010-11 without appreciating that the unabsorbed depreciation pertaining to the period prior to AY 2001-02 would be allowed to be carried forward and set off only for the subsequent eight assessment years as envisaged by the Finance Act (No. 2) 1996?"

2. Whether on the facts and in the circumstances of the case and in law the Ld. CIT(A) erred in upholding the claim of the assessee of setting off of unabsorbed depreciation pertaining to assessment years prior to AY 2002-03 i.e. period from 1993-94 to 2001-02 against the income for the AY 2010-11 ignoring the ratio laid down by the Special Bench of the Mumbai Tribunal in the case of Times Guaranty Ltd. [131 TTJ 257 (ITAT, Mumbai, SB)] wherein it was held that the carry forward and set off of Unabsorbed depreciation pertaining to

assessment years upto 2001-02 has to be restricted to a period of eight years in accordance with the provisions of Finance Act (No 2) of 1996? ."

3. The appellant prays that the order of the CIT(A) on the above ground be set aside and that of the A.O. be restored.

2. The brief fact of the case are that the assessee-company is engaged in the business of trading, leasing of ship containers and providing services in repair, maintenance and storage of ship containers, filed its return of income on 27.09.2010 declaring total income of Rs. 21,37,419/-. The return was processed u/s. 143(1) of the I.T. Act, 1961 and selected for scrutiny.
3. While making the assessment besides the certain disallowance/addition, the AO disallowed a sum of Rs. 83,47,538/- on account of carry forward and set off unabsorbed depreciation for prior period upto AY-1996-97 and secondly from AYs 1997-1998 to 2001-02 and for third period for AY 2002-03 onward and further hold that unabsorbed depreciation relating to AY 1997-98 to 1999-2000 is to be dealt with in accordance with the provision of section 32(2) as applicable to AY 1997-98 to 1999-2000 only. Against the order of AO, the assessee filed the appeal before the CIT(A) and the CIT(A) while dealing with the issue allowed the set off carry forward depreciation loss and accepted the appeal of the assessee vide in its order dated 17.04.2014, against which the Revenue has filed the present appeal before us.
4. We have heard the Departmental Representative (DR) for Revenue and Authorised Representative (AR) of the assessee and perused the material available on record. The DR relied upon the order of AO. The AR argued that the ground raised in the present appeal are squarely covered by the coordinate bench of Delhi Tribunal vide ITA No. 2974/Del/2013 (which is authored by my Senior Id. Colleague).
5. We have gone through the contents of the order in ITA No. 2974/Del/2013 titled as Minda Sai Ltd. Vs. ITO wherein the similar issues were in respect of setting of brought forward depreciation pertaining to AY-1999-2000 & 2001-02 were elaborately discussed in para 9 to 13 of the said judgment, which may be read as under:

9. The question then arises as to how should the provisions regarding set off of unabsorbed depreciation be applied so far as set off of the unabsorbed depreciation which pertains to the point of time when the pre-amendment law was in force but which was claimed to be set off at the point of time when post amendment law was force. When coordinate division benches of this Tribunal were called upon to adjudicate this question, there were differences of opinion. In order to resolve these differences in approach, a Special Bench was constituted in the case of DCIT Vs Times Guaranty Ltd (supra). In the said special bench decision, it was held that that the amendment made to S. 32(2) w.e.f. assessment year 2002-03

*is substantive and a substantive amendment is normally prospective in operation. The Special Bench was of the view that Section 32(2) is a deeming provision which by legal fiction provides that the unabsorbed depreciation allowance u/s 32(1) is deemed to be depreciation allowance for the succeeding year(s). A deeming provision, according to the Special Bench, is to be strictly interpreted and cannot extend beyond the purpose for which it is intended. The Special Bench held that S. 32(1) deals with depreciation allowance for the current year and s. 32(2) uses the present tense to refer to allowance to which effect 'cannot be' and 'has not been' given which indicates that s. 32(2) speaks of depreciation allowance u/s 32(1) for the current year starting from assessment year 2002-03. It was also held that the brought forward unabsorbed depreciation of earlier years cannot be included within the scope of s. 32(2). The special Bench observed that if the intention of the legislature had been to allow such forward unabsorbed depreciation of earlier years at par with current depreciation for the year u/s 32(1), s. 32(2) would have used past or past perfect tense and not the present tense. In substance thus, the Special Bench did conclude that so far as unabsorbed depreciation relating to assessment years prior to the assessment year 2002 -02 is concerned, it cannot be set off after the end of eight years from the assessment year to which unabsorbed depreciation pertains. The Special Bench thus finally concluded that **"amount of current depreciation for asst. yrs. 1997-98 to 2001-02 which cannot be so set off as per (H) above shall be carried forward for a maximum period of eight assessment years from the assessment year immediately succeeding the assessment year for which it was first computed, to be set off only against the income under the head 'Profits and gains of business or profession'".***

10. The development of law, however, did not end there.

11. Hon'ble Gujarat High Court, in the case of **General Motors India Pvt Ltd (supra)**, had an occasion to consider the question **"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 would it be governed by the section 32, as amended by the Finance Act, 2001"**.

12. Dealing with this specific question, which was precisely the question answered in favour of the revenue by the special bench, Their Lordships decided the issue in favour of the assessee, and, inter alia, observed as follows:

..... 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.

13. Once Their Lordships express a "considered opinion" to the effect that "any unabsorbed depreciation available to an assessee on 1st day of April 2002 will be dealt with in accordance with the provisions of section 32(2) as amended by Finance Act, 2001", the legal position is that the restriction of eight years, which was in force till the law was amended by the Finance Act 2001 w.e.f, 2002-03, does not come into play.

6. We have found that the issue raised in the present appeal are squarely covered by the decision of ITA No. 2974/Del/2013 and keeping in view the principle of consistency and respectfully following the judgment of coordinate bench, the grounds raised in the present appeal do not found any force and are dismissed.
7. In these circumstances, we are inclined to dismiss the appeal of the Revenue on the abovesaid ground and upheld the order of CIT(A).
8. In the result, the appeal filed by the Revenue is dismissed.

Order pronounced in the open court on this 8th day of February 2016.

Sd/-

(PRAMOD KUMAR)

ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 08/02/2016

S.K.PS

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent.
3. आयकरआयुक्त(अपील) / The CIT(A), Mumbai.
4. आयकरआयुक्त/ CIT
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard file.

Sd/-

(PAWAN SINGH)

JUDICIAL MEMBER

आदेशानुसार/BY ORDER,

उप/सहायकपंजीकार

(Asstt.Registrar)

आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai