IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "K", MUMBAI

BEFORE SHRI G.S.PANNU, ACCOUNTANT MEMBER
AND
SHRI SANDEEP GOSAIN, JUDICIAL MEMBER

ITA No.7715/Mum/2012
(Assessment Year 2008-09)

M/s. Goodyear South Asia Tyres-
Private Limited,
H-18, MIDC Industrial Area,
Waluj , Aurangabad- 431136
PAN: AABCG 5544P ..... Appellant

Vs.

The Asstt. Commissioner of Income Tax,
Circle -1, Jeevan Suman, LIC Bldg.,
2nd Floor, Cannought Place, Town Centre,
N-5, CIDCO, Jalgaon Road,
Aurangabad - 431003 .... Respondent

Appellant by	:	Shri Girish Dave & Ms. Kadambari Dave
Revenue by	:	Shri Manoj Kumar
Date of hearing	:	07/10/2016
Date of pronouncement	:	26/10/2016

ORDER

PER G.S.PANNU,A.M:

The captioned appeal filed by the assessee pertaining to A.Y. 2008-09 is directed against the order of the ACIT, Circle-1, Aurangabad (in short the Assessing Officer) passed under section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 (in short the Act) dated 02/11/2012 , which is in conformity

with the direction of the Dispute Resolution Pannel-1, Mumbai dated 12/06/2012.

2. In this appeal, assessee has raised the following Grounds of appeal:-

1. That on the facts and circumstances of the case, the assessment order passed by the Ld. Assessing Officer ("AO") is bad in law.

2. That on facts and circumstances of the case and in law, the reference made by the Ld. AO suffers from jurisdictional error as the Ld. AO did not record any reasons in the draft assessment order based on which he reached the conclusion that it was "expedient and necessary" to refer the matter to the Ld. Transfer Pricing Officer ("TPO") for computation of the arm's length price, as is required under section 92CA(1) of the Income Tax Act, 1961 ("Act").

3. That on the facts and circumstances of the case and in law, the Ld. AO and Ld. TPO have erred in re-determining the arm's length price ("ALP") of international transactions.

4. That on the facts and circumstances of the case and in law, the Ld. Assessing Officer / Ld. TPO and Ld. DRP erred in enhancing the income of the appellant by Rs. 8,94,969 relating to payment on External Commercial Borrowings ("ECB") undertaken by the appellant by holding that the interest on borrowings paid by the appellant (@LIBOR + 3%) to its Associated Enterprise ("AE") is in excess of the limit prescribed by the RBI (i.e. LIBOR + 2%) and in doing so have grossly erred in:

4.1. ignoring that the interest paid to the AE is as per the rate agreed at the time of taking the loan in 2003 and the rate of interest considered by the TPO (i.e. LIBOR + 2%) is as per the subsequent RBI notification. Further, the AO erred in considering the rate provided by RBI notification to determine the arm's length price;

4.2. ignoring that the appellant had negative net worth hence it was impossible for the appellant to obtain a loan from any other financial institution at or below the rate of interest paid by the appellant;

4.3. ignoring that the cost of borrowing in the hands of AE is LIB OR + 4% but they have charged only LIB OR + 3% from the appellant because of the RBI limit prevalent at the time of granting the loan to the appellant;

5. That the Ld. TPO erred in denying the benefit of 5% margin allowed under the proviso to Section 92C(2) of the Act.

6. That on the facts and circumstances of the case, the Ld. AO erred in disallowing depreciation of Rs. 5,48,900 on certain assets forming part of the block of assets on which depreciation was being claimed by the appellant and while doing so has erred in law in:

6.1. not following the direct judgments on the issue cited by the appellant and by placing reliance on the cases which are not even applicable in the given case.

6.2. in ignoring the settled law on the subject which is to the effect that even if an asset forming part of the block of asset has not been put to use in a year, the depreciation on the same cannot be disallowed, if the asset has been put to use in earlier years.

7. That the Ld. AO has erred in disallowing the unabsorbed depreciation of the appellant pertaining to the Assessment Year ("AY") 1997-98 to 1999-2000 amounting to Rs. 1,11,19,76,984/- and in doing so have grossly erred:

7.1. in law in holding that the unabsorbed depreciation of the appellant for assessment year 1997-98 to 1999-2000 can be carried forward only for a limited period of 8 years in view of section 32(2) of the Act as prevailing during the relevant years;

7.2. in ignoring the decision of the Hon'ble Gujarat High Court in case of General Motors which being the only direct High Court decision on the issue is binding on the Ld. AO;

7.3. in ignoring the direct High Court decision by simply stating that the decision is 'not acceptable' without citing any reasons for bypassing the direct ruling High Court ruling on this point;

7.4. in relying upon the ruling of the Mumbai Special Bench in the case of Times Guaranty which was delivered in a different context pertaining to set-off of unabsorbed depreciation against other heads of income and not ill respect of carry forward of absorbed depreciation.

8. That the Ld. AO erred-in disallowing the unabsorbed depreciation of Rs. 1,11,19,76,984/- in the assessment for the captioned year as the appellant had only carried forward the above amount and had not even claimed the set-off against the taxable income.

9 The Ld. AO has erred on the facts and the circumstances of the case and in law in arbitrarily initiating a penalty proceedings U/S 271(1)(c) against the appellant for furnishing inaccurate particulars of income against each of the additions made by him, without appreciating the fact that even the essential pre-requisites of levy of penalty do not exist in the instant set of facts.

3. The appellant is a company incorporated under the provisions of the Companies Act, 1956 and is, inter-alia, engaged in the business of manufacture and sale of automotive tyres, tubes, flaps, etc. The assessee company is a wholly owned subsidiary of the Goodyear Tire & Rubber Company, Akron, USA. For the assessment year 2008-09, it filed a return of income declaring 'Nil' income after considering the brought forward business loss and unabsorbed depreciation, which was subject to scrutiny assessment whereby, the current year's income has been assessed at Rs.14,43,869/-, which was also set-off against a part of the brought forward business losses. In the course of assessment proceedings certain additions/disallowances were made which are subject matter of the appeal before the Tribunal in terms of the above stated Grounds of appeal.

4. In so far as, Ground of appeal No.1 is concerned, it is general in nature and does not require any adjudication.

5. In so far as Ground of appeal No.2 dealing with the reference made by the Assessing Officer to the Transfer Pricing Officer for computation of arm's length price as per section 92CA(1) of the Act is concerned, the same has not been addressed at the time of hearing and is accordingly dismissed.

6. Grounds of appeal No.3 & 4 relate to a singular issue regarding adjustment made by the Assessing Officer of Rs.8,94,969/- while computing the arm's length price of the international transaction of payment of interest on External Commercial Borrowings (ECBs) raised by the assessee from its associated enterprise. In this context, brief facts are that in the past vide an agreement dated 12/9/2003 assessee had raised a loan by way of ECBs from its associated enterprise, namely, Goodyear Tyre Tire & Rubber Company, Akron,

USA of a sum of USD 90,00,000. The ECB loan was availed by the assessee at the interest rate of LIBOR +3%, in terms of the then prevailing Reserve Bank of India mandate. The Transfer Pricing Officer, while determining the arm's length rate of interest payable on such ECB loan observed that the interest paid by the assessee was in excess of the limits prescribed by the Reserve Bank of India i.e. LIBOR +2% prevailing for the year under consideration. As a consequence, the Transfer Pricing Officer has scaled down the arm's length rate of interest to the above extent, thereby resulting in a disallowance of Rs.8,94,969/- out of interest expenditure. The stand of the assessee was that the rate of interest notified by the RBI at the time of raising ECB loans was LIBOR +3% and it was subsequently revised by the RBI from time to time. Therefore, according to the assessee payment of interest at the ECB loans @ LIBOR +3% was justified. The Revenue, however, takes a position that while bench marking any international transaction in terms of the Indian Transfer Pricing Regulations, the data to be used is for the year in which the tested transaction has taken place and in this view of the matter the prevailing rate of interest in the year under consideration would be relevant. On the above controversy, it was a common point between the parties that similar issue had come up before the Tribunal in the assessee's own case for assessment year 2006-07 in ITA No. 143/PN/2010 dated 28/04/2014, whereby the stand of the assessee has been upheld. In this context, the operative part of the order of the Tribunal dated 28/11/2014 reads as under:-

> *"23. The other issue remaining is with respect to an adjustment made on account of ECB raised by the assessee. In this context, we have already noted the relevant facts. Assessee raised ECB loan of USD 90,00,000 for financing it's working capital requirements vide an agreement dated 12.09.2003. The said loan was raised by the assessee in terms of the then prevailing RBI notification LIBOR plus 3%, as applicable in September, 2003. It has been explained that the relevant Circular of RBI No.36*

dated 14.11.2003 prescribed that EBCs could be raised for working capital requirements at the interest rates specified therein. The Ld. Representative submitted that the assessee having raised the ECB loan at the prevailing RBI notified rates, it could not be said that subsequently the said rate of interest is not an arm's length price/rate. The TPO has observed that in the revised rates notified by the RBI, the ceiling on the interest rates has been lowered. The TPO has observed that subsequent to 2003, when the rates prescribed by RBI have changed to the benefit of borrowers, assessee ought to have undertaken restructuring of the loan and re-negotiated lower rate of interest. That such an aspect has not been undertaken by the assessee and therefore he has applied the subsequent notified rates of the RBI for ECBs in order to determine the arm's length price/rate of interest on ECB loan.

24. On this aspect, the Ld. Representative submitted that the subsequent notifications by RBI for ECBs contained a restriction whereby ECB could not be availed for working capital requirements. In so far as the assessee is concerned, it was pointed out that ECB loan was raised for working capital requirements which was permissible in terms of the then prevailing RBI guidelines at the time of availing of loan in 2003. The Ld. Representative pointed out that before the TPO, assessee vide communication dated 19.02.2009 furnished an agreement for foreign currency cash loan availed by the associated enterprise from M/s J.P. Morgan Chase Bank, wherein the associated enterprise had paid interest @ LIBOR plus 4% i.e. 7.46% (3.46% + 4%) or alternate base rate +3%. In comparison, assessee had paid lower interest on ECB loan which was LIBOR plus 3% i.e. 6.46% (3.46% + 3%) by considering the ceiling prescribed by the RBI at the relevant point of time. In this context, it is sought to be submitted that assessee paid interest rate to the associated enterprise which was even lower than the cost of borrowing of the associated enterprise. In this context, a reference has been made to page 257 to 260 of the Paper Book wherein it was pointed out to the TPO that the rate of interest payable by the associated enterprise on its borrowing to provide ECB to the assessee was LIBOR plus 4% or alternate basis rate +3%. But keeping in mind, the RBI restrictions associated enterprise charged only LIBOR plus 3% from the assessee company. Ld. Representative submitted that this internal benchmark available with the assessee has been disregarded by the TPO.

25. In our considered opinion, the aforesaid comparable uncontrolled transactions i.e. the transaction between the associated enterprise and M/s J.P. Morgan Chase Bank provides a direct benchmark for the purposes of determining the arm's length price of payment of interest in respect of ECB loans. While applying CUP method, in our view, it is appropriate that the amount charged in an controlled transaction is examined with the amount charged in an uncontrolled transaction. In the present case, the aforesaid transaction brought out by the assessee qualifies the said tests. On this aspect, a gainful reference can also be made to the discussion of the Third Member Bench of the Tribunal in the case of Technimount ICB Pvt. Ltd. vs. ACIT (ITA No.4608 & 5085/Mum/2010 dated 17.07.2012) wherein the context of the clause (i) of rule 10B(e) of the Rules, it has been opined that the said rule itself

provides that a preference shall be given to internal comparable uncontrolled transaction vis-à-vis external comparable uncontrolled transaction. The relevant discussion is as under :-

> *"10. Clause (i) of Rule 10B(e) stipulates that net profit margin from an international transaction with an AE is computed in relation to cost incurred or sales effected or assets employed etc. Clause (ii) is material for the present purpose. It provides that the net profit margin realized by the enterprise or by an unrelated enterprise from a comparable uncontrolled transaction or a number of such transactions is computed having regard to the same base. The 'base' of this provision takes one back to clause (i) which refers to cost incurred or sales effected or assets employed or to be employed. On splitting clause (ii) into two parts, it divulges that the reference is made to internal and external comparables. One part of clause (ii) refers to 'the net profit margin realized by the enterprise…… from a comparable uncontrolled transaction' and the other part talks of 'the net profit margin realized……. by an uncontrolled enterprise from a comparable uncontrolled transaction'. It transpires that whereas the first part refers to the profit margin from internal comparable uncontrolled transactions, the second part refers to profit margin from an external comparable uncontrolled transaction.* ***Thus, it is discernible that what is to be compared under this method is profit from a comparable uncontrolled transaction.*** *The word 'comparable' may encompass internal comparable or external comparable. There is cue in the rule itself as to preference to be given to internal comparable uncontrolled transactions vis-a-vis externally comparable uncontrolled transactions.* ***It is because the delegated legislature has firstly referred to the net profit margin realized by the enterprise (internal) from a comparable uncontrolled transaction and, thereafter, it points towards net profit margin realized by an unrelated enterprise (external) from a comparable uncontrolled transaction.*** *Thus where potential comparable is available in the shape of an uncontrolled transaction of the same assesses, it is likely to have higher degree of comparability vis-a-vis comparables identified amongst the uncontrolled transactions of third parties. The underlying object behind computing ALP of an international transaction is to find out the profits which such enterprise would have earned if the transaction had been with some third party instead of related party. When the data is available showing profit margin of that enterprise itself from a third party, it is always safe and advisable to have recourse to such internal comparable case.* ***The reason is patent that the various factors having bearing on the quality of output, assets employed, input cost etc. continue to remain by and large same in case of an internal comparable. The effect of difference due to such inherent factors on comparison made with the third parties, gets neutralized when comparison is made with internal comparable. Ex consequenti, it follows that an internal comparable uncontrolled transaction is more noteworthy vis-a-vis its counterpart, i.e., external comparable."***

26. In view of the aforesaid, in our view, since the rate of interest paid by the assessee to its associated enterprise in respect of ECB loan is lower than the rate of interest paid by the associated enterprise to M/s J.P. Morgan Chase bank, the transaction of payment of interest on ECB loan raised from the associated enterprise is at an arm's length price. Therefore, the addition on account of interest paid on ECB loan is directed to be deleted."

6.1 The aforesaid discussion show that a fact-position which emerged was that transaction of loan raised by the associated enterprise from M/s. J.P.Morgan Chase Bank Ltd. was considered as a valid bench mark. The Tribunal had noted that the rate of interest payable by the associated enterprise on the borrowing raised by it in order to provide the ECB loan to the assessee was LIBOR +4% or alternate base rate +3%, whereas the associated enterprise, keeping in view with the restrictions of RBI, charged interest at LIBOR +3% only from the assessee company. The aforesaid transaction between associated enterprise and M/s. J.P. Morgan Chase Bank provides a direct bench mark for the purposes of determining the arm's length price of payment of interest in respect of the ECB loans under consideration in the instant year before us. In the instant year also, the assessee had brought to the notice of the TPO in its reply dated 12/10/2011, which has been reproduced in the order of the TPO, that the cost of borrowings in the hand of associated enterprise was LIBOR +4%, which is more than the rate at which interest was charged from the assessee company. Considering the similarity of facts, and the rival stands remaining the same, we find that the impugned addition of Rs.8,94,969/- is unsustainable in view of the aforesaid precedent. We hold so. Thus, the assessee succeeds on this issue.

7. In so far as Ground of appeal no. 5 is concerned, the same was not pressed at the time of hearing, therefore, the same is dismissed as being not pressed.

8. In so far as Ground of appeal no.6 is concerned, the same relates to a disallowance of depreciation of Rs.5,48,900/- on impaired and retired assets. In this context, the relevant facts are that in the assessment year of 2002-03 assessee company had suspended the production of two-three wheeler tyres. As a result, some plant and machinery forming part of Plant & Machinery having WDV of Rs.1,24,492/- as on 1/4/2002, were put to use only for part of the previous year relevant to assessment year 2002-03. The aforesaid assets were treated as retired and impaired assets and the WDV as per books of account maintained under the Companies Act, 1956 of Rs.5,82,37,212/- was considered as an impaired loss and debited to the P&L Account. However, in the income tax return for assessment year 2002-03, such loss of Rs.5,82,37,212/- was added back and the depreciation claimed in the return of income included depreciation on the WDV of such assets also. The Assessing Officer disallowed the depreciation on such assets in the assessment for assessment year 2002-03. As a consequence, the depreciation claimed on the WDV of such assets relevant to the instant assessment year was also denied by the Assessing Officer in the impugned assessment, which amounted to Rs.5,48,900/-.

8.1 On this aspect, it was a common point between the parties that in assessment year 2002-03, the Tribunal vide its order in ITA No.1879/PN/2012 & Others dated 15/9/2014 has allowed the claim of the assessee. The relevant discussion in the order of the Tribunal dated 15/09/2014 (supra) is as under:-

16. We have carefully considered the rival submissions. As the discussion in the earlier paragraphs would show, the controversy revolves around assessee's claim for depreciation on block of assets comprising of Plant & Machinery, wherein such block contained certain assets which were retired and considered as impaired assets. In the books of account, assessee claimed the impairment loss as a debit to the Profit & Loss Account. However, in the return of income filed assessee computed depreciation with reference to the block of assets, including the aforesaid impaired assets. The claim has been denied by the Assessing Officer primarily for the reason that such impaired assets were not put to use thereafter.

17. In our considered opinion, the Assessing Officer has not appropriately appreciated the concept of allowance of depreciation in section 32 with the introduction of block of assets w.e.f. 01.04.1988. The depreciation in terms of the block of assets concept is to be allowed on the 'actual cost' or WDV of the particular 'block of assets', even if it is found that a particular asset comprised in the block of asset has not been put to use. The aforesaid proposition is founded on the concept that depreciation is allowable with respect to the block of assets and not the individual assets. In this context, the CIT(A) has referred to the judgement of the Hon'ble Delhi High Court in the case of Bharat Alluminium Co. Ltd. (supra). In the said case, it was found that certain Plant & Machinery was not put to use in the relevant year and therefore depreciation thereupon was not allowed. The Tribunal taking into consideration the concept of 'block of assets' introduced w.e.f. 01.04.1998 held that whether an individual asset is put to use in a particular year or not is of no consequence inasmuch as the requirement of law is to establish the use of concerned block of assets and not use of particular assets individually. The Hon'ble Delhi High Court affirmed the view of the Tribunal and the following discussion is relevant :-

> *"After going through these decisions of the various Benches of the Tribunal and the schematic intention behind the provisions relating to depreciation contained in the aforesaid provisions, we are inclined to affirm the view taken by the Tribunal in the instant case. While doing so, we have in mind the rationale and purpose for which the concept of block asset was introduced by the amendment in the provisions of the Act, as reflected in the Circular dated 23.09.1988 of the CBDT. Intention behind these provisions is apparent.* ***Once the various assets are clubbed together and become block asset within the meaning of Section 2(11) of the Act, for the purpose of deprecation it is one asset. Every time, a new asset is acquired, it is to be thrown into the common hotchpotch, i.e., block asset on meeting the requirement of depreciation allowable at the same rate. The value of the block asset increases and the depreciation is to be given on the aforesaid value, which is to be treated as written down value. Individual assets lose their identity from that very moment it becomes inseparable part of block asset insofar as calculation of depreciation is concerned. Fusion of various assets into the block asset gets disturbed***

only when eventuality contained in clause (iii) of Section 32 takes place, viz., when a particular asset is sold, discarded or destroyed in the previous year (other than the previous year in which first brought in use). Even in that event, the amount by which the moneys payable in respect of that particular building, machinery, etc. together with the amount of scrap value is to be deducted from total written down value of the 'block asset'.

32. Once we understand and appreciate this scheme contained in the aforesaid provisions, it is not possible to accept the contention of the learned counsel for the Revenue that unless a particular asset is used for the purpose of business or provision, depreciation is not allowed. ***No doubt, as per Section 32(1) of the Act, in order to be entitled to claim depreciation, the asset is to be owned by the assessee and it is also to be used for the purpose of business or profession. However, the expression "used for the purpose of business" when applied to block asset would mean use of block asset and not any specific building machinery, plant or furniture in the said block asset as individual assets have lost their identity after becoming inseparable part of the block asset. That is the only manner in which various provisions can be harmonized*** *..... ..... In the instant case, the PSL equipment was purchased and put to use by the assessee in previous year relevant to the Assessment Year 1990-91 and the same had entered into the block asset in that year.* ***It thus lost individual identity for the allowance of depreciation in that year. Since it is not in dispute for the year in question that block of assets was used, the assessee was rightly given the benefit of deprecation in the years in question.*** *The question stands answered against the Revenue."*

18. To the similar effect is the judgement of the Hon'ble Delhi High Court in the case of Oswal Chemicals and Fertilizers Ltd., 341 ITR 467 (Del). The Hon'ble Gujarat High Court in the case of Sonal Gum Industries (supra) has also held that in relation to the block of assets, it is not possible to segregate items falling within the block for the purposes of granting depreciation or restricting the claim thereof. According to the Hon'ble High Court, once it is found that the assets are used for business, it is not necessary that all the items falling within the particular block of assets ought to be simultaneously used for being entitled to the allowance of depreciation.

19. In the case before us, certain items of Plant & Machinery pertaining to the two-three wheeler tyres manufacturing unit were forming part of the block assets and were being put to use till the preceding assessment year 2001-02 and for a part of the year under consideration. However, since then and in the subsequent assessment years, these items of machinery were impaired and not being put to use. It has been explained before us that the production of two-three wheeler tyres was

abandoned by the assessee and hence the non-use of such machinery. Nevertheless, the assets in question are forming part of block of assets and there is no requirement of law, as discussed in the earlier paragraphs to ensure that each of the item of assets comprised in the 'block of asset' is put to use in order to claim depreciation. Therefore, considering the above discussion, in our view, the CIT(A) made no mistake in allowing assessee's claim for depreciation in relation to part of the machinery relating to the manufacture of two-three wheeler tyres.

20. Before parting, we may also refer to the decisions of the Hon'ble Bombay High Court in the case of Dinesh Kumar Gulabchand Agrawal vs. CIT, 267 ITR 788 and the Hon'ble Karnataka High Court in the case of DCIT vs. Yelama Daseppa Hospital, 290 ITR 253 which were relied upon by the Assessing Officer to deny the claim of the assessee. The CIT(A) has distinguished the above decisions and we do not find any infirmity in such stand of the CIT(A). In so far as the aforesaid decisions are concerned, a perusal thereof reveals that in those cases assets were not at all put to use in the year of acquisition itself, meaning thereby that the assets did not become part of the 'block of assets' on which depreciation could be allowed in terms of section 32 of the Act. However, in the case of the present assessee, it is undeniable that the assets in question were already in use and were forming part of the block of assets at the beginning of the year under consideration and on such 'block of assets', depreciation was being claimed and allowed in the past. Therefore, the fact that such assets were not in use hereinafter cannot be a reason to deny depreciation on such assets which form part of the block of assets, i.e. Plant & Machinery.

21. As a result of the aforesaid discussion, we hereby affirm the order of the CIT(A) to the effect that since the impaired assets form part of the block of assets, it shall continue to exist for the purposes of allowance of depreciation under the Act as per section 32 of the Act so long as the relevant block of assets continues to exist.

8.2 Following the aforesaid, precedent, which has been rendered on the same issue, the plea of the assessee is allowed and the Assessing Officer is directed to allow depreciation of Rs.5,48,900/- as claimed by the assessee. Thus, on this aspect assessee succeeds.

9. In so far as Grounds of appeal No.7 & 8 are concerned, it relates to the action of the Assessing Officer in holding the unabsorbed depreciation pertaining to assessment years 1997-98 to 1999-2000 amounting to Rs.111,19,76,984/- cannot be carry forward beyond a period of eight years in

view of section 32(2) of the Act, as prevailing during the relevant assessment years. On this aspect also, it was a common point between the parties that similar issue had come up before the Tribunal in the case of the assessee itself for assessment year 2007-08 ie. in ITA No.1212/PN/2012 dated 25/03/2015 in the context of invoking of section 263 of the Act by the Commissioner of Income Tax. It is pointed out that the stand of the Revenue was negated by the Tribunal following the judgment of the Hon'ble Gujarat High Court in the case of General Motors India Pvt. Ltd. vs. DCIT, 354 ITR 244(Guj). It is also pointed out that the Pune Tribunal in the case of M/s. SAB Miller Breweries Pvt. Ltd., ITA No.1176/PN/2013 dated 27/02/2015 had considered an identical issue and relying on the judgment of the Hon'ble High Court (supra), the stand of the assessee has been upheld. In this context, the relevant discussion by the Hon'ble Gujarat High Court in the case of General Motors India Pvt. Ltd.(surpa) reads as under:-

> *"30. 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.*
>
> *31. 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.

32. 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.

33. 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 :

> *"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 owning 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 setoff, 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 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.

35. 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."

36. 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

30.1Cinder 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.

30.2With 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 depredation under section 32 shall be mandatory.

30.3Under 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.

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

30.5These 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 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 depredation; 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.

38. Therefore, it can be said that, current depreciation is deductible in the 40 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.

For the aforesaid reasons, this writ petition succeeds and is allowed. The 41 notice issued under section 148 of the Income-tax Act, 1961, dated March 29, 2011, annexure A and the assessment order dated December 27, 2011, passed by the Assessing Officer annexure F respectively to the writ petition are quashed. Rule is made absolute. The parties shall bear their own costs."

10. It may also be relevant to observe that subsequently, Hon'ble Gujarat High Court in the case of CIT v. Gujarat Themis Biosyn Ltd. (2014)44 taxman.com 20(Guj) vide order dated 24/2/2014 has also laid down a similar ratio. In terms of the aforesaid legal position, it is to be held that benefit of set –off of unabsorbed depreciation of assessment year 1997-98 to 1999-2000 could be allowed against the income relating to the assessment year 2008-09, and thereafter. Following the aforesaid judicial pronouncements we find no

reason to uphold the plea of the Revenue. As a consequence, on this ground also, assessee succeeds.

11. In so far as Ground of appeal No.9 is concerned, the same relates to initiation of penalty u/s. 271(10(b) of the Act, which is premature and is liable to be dismissed. We hold so.

12. In the result, the appeal of the assessee is partly allowed, as above.

Order pronounced in the open court on 26/10/2016

Sd/-	Sd/-
(SANDEEP GOSAIN)	(G.S. PANNU)
JUDICIAL MEMBER	ACCOCUNTANT MEMBER

Mumbai, Dated 26/10/2016
Vm, Sr. PS
Copy of the Order forwarded to :

1. The Appellant ,
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)
ITAT, Mumbai