

आयकर अपीलीय अधिकरण, विशाखापटणम पीठ, विशाखापटणम

**IN THE INCOME TAX APPELLATE TRIBUNAL,
VISAKHAPATNAM BENCH, VISAKHAPATNAM**

**श्री वी. दुर्गराव, न्यायिक सदस्य एवं
श्री डि.एस. सुन्दर सिंह, लेखा सदस्य के समक्ष**

**BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER &
SHRI D.S. SUNDER SINGH, ACCOUNTANT MEMBER**

**आयकर अपील सं./I.T.A.No.108/Viz/2016
(निर्धारण वर्ष/Assessment Year:2012-13)**

Asst. Commissioner of Income Tax
Circle-2(1), Guntur

Vs. M/s.Sai Bhaskar
Irons Limited
3-1-3/A, 3rd Lane
Rajendra Nagar
Guntur
[PAN :AAMCS1675G]

(अपीलार्थी/ Appellant)

(प्रत्यर्थी/ Respondent)

अपीलार्थी की ओर से/ Appellant by : Shri Deba K.Sonowala, DR

प्रत्यर्थी की ओर से / Respondent by : Shri I Kama Sastry, AR

सुनवाई की तारीख / Date of Hearing : 09.02.2018

घोषणा की तारीख/Date of Pronouncement : 21.02.2018

आदेश / O R D E R

PER D.S. SUNDER SINGH, Accountant Member:

This appeal is filed by the revenue against the order of the
Commissioner of Income-Tax (Appeals) [CIT(A)]-1, Guntur vide ITA

No.65/CIT(A)-1/GNT/2015-16 dated 30.12.2015 for the assessment year 2012-13.

2. All the grounds of appeal are related to the set off of carried forward depreciation against the addition made u/s 68 of IT Act. In this case, the assessee filed return of income declaring total income of Rs.Nil after adjusting brought forward losses. The case was selected for scrutiny and the Assessing Officer (AO) made the addition of Rs.3,99,00,000/- u/s 68 of the I.T. Act as unproved cash credits determining gross total income of Rs.6,42,31,119/-. From the gross total income, the AO allowed the set off of unabsorbed brought forward business loss of Rs.1,99,59,152/- and set off of depreciation amounting to Rs.43,71,967/-and assessed the income at Rs.3.99 crores. The AO did not allow the unabsorbed brought forward depreciation loss from the income assessed. Aggrieved by the order of the AO the assessee went on appeal before the CIT(A) and the Ld.CIT(A) allowed the appeal of the assessee holding that the income required to be assessed under the head 'income from other sources' and once it is treated as part of gross total income, the unabsorbed carried forward depreciation has to be allowed as set off from such total income. For ready reference, we extract the relevant paragraph of Ld.CIT(A)'s order which reads as under :

"I have gone through the facts of the case, contents of the assessment order, written submissions filed by the assessee and the case laws relied by the AO and the assessee. The assessee-company is engaged in the business of manufacturing of iron in the name of Sal Bhaskar Irons Limited, during the financial year relevant to the assessment year 2012-13 has introduced the share capital to the tune of Rs.7,22,89,833/- out of that an amount of Rs.3,23,89,834/- received through cheques and the remaining balance Rs.3,99,00,000/- was received in cash from various applicants and the AO requested to find the details the applicant such as full postal addresses, PAN of the applicant along with identity proof like copy of driving license, copy of ration card and Election ID Card etc, along with a valid confirmation letter to prove the creditworthiness of the applicants to invest such a huge amounts as share application money in the company and the assessee has not produced the details to the satisfaction of the AO. As a result, the AO disallowed the same and added to the total income as per the provision of 68 to the extent of Rs.3,99,00,000/- and with regard to the set off of unabsorbed carry forwarded depreciation loss, the assessee-company is not entitled to set off the losses, since the addition made from undisclosed income sources. However, the assessee-company is eligible to carry forward the same to the subsequent years. The assessee-company on the other hand has taken a stand that the appellant plea for set off of depreciation loss of Rs.93,08,058/- against such addition, which the learned Assessing Officer has not considered and completed assessment. The additions made under section 68 are taxed under any heads of income as provided in section 14. If the addition under section 68 is not fit into any heads of income of A to E then it should be considered as part of "income from other sources". Else such addition is not taxable at all. Once it is treated as part of gross total income then unabsorbed depreciation is to be allowed as set off of such income.

The Hon'ble Supreme Court of India in the case of KalekhanMohd. HanifVs. CIT 50 ITR 1 held that "the expression 'nature and source' has to be understood as a requirement of identification of the source and its genuineness. That the onus on the assessee has to be understood with reference to the facts of each case and proper inference drawn from the facts."

The Hon'ble Madras High Court in the case of CIT Vs. Chensing Ventures 212 CTR 539 (2007) it was held that "After setting off losses against the income under the same head, if the net result is still a loss, the assessee can set off the said loss under Section 71 of the Act against income of the same year under any other head, except for losses which arise under the head "capital gains". The income tax is only one tax and levied on the sum total on the income classified and chargeable

under the various heads. Section 14 has classified different heads of income and income under each head is separately computed. Income which is computed in accordance with law is one income and it is not a collection of distinct tax levied separately on each heads of income and it is not an aggregate of various taxes computed with reference to each of the different sources separately. There is only one assessment and the same is made after the total income has been ascertained. The assessee is subject to income-tax on his total income though his income under each head may be well below the taxable limit. Hence the loss sustained in any year under any heads of income will have to be set off against income under any other head. In this case, the Assessing Officer made addition of Rs.28,50,000/- as undisclosed income under Section 69 of the Act. Once the loss is determined, the same should be set off against the income determined under any other head of income. In the assessment, no reasons were given by the Assessing Officer to deny the benefit of Section 7 the Act. The benefit provided under Section 71 of the Act cannot be denied and the learned Standing Counsel appearing for the Revenue is also unable to explain or give reasons why the assessee is not entitled to the benefit of Section 71 of the Act. The reasons given by the Tribunal are based on valid materials and evidence and the same is in accordance with the provisions of Section 71 of the Act."

The Hon'ble Gujarat High Court in the case of CIT Vs. Shilpa Dyeing & Printing Mills (P) Ltd., 219 Taxman 279 (Gujarat) (2013), it was held that "we, however, find that Section 71 of the Act permits an assessee to set off loss other than that of capital gains against income from other head. This very issue came-up for consideration before the Madras High Court in case of Commissioner of Income Tax Vs. Chensing Ventures (supra). The Division Bench of the Court considered the issue in following manner:

Heard Counsel. The Assessing Officer has not given any reason whatsoever to deny the set off of the business loss against the income declared under the head & other sources. Section 71 deals with set off of loss against income under any other head. After setting off losses against the income under the same head, if the net result is still a loss, the assessee can set off the said loss under Section 71 of the Act against income of the same year under any other head, except for losses which arise under the head capital gains. The income tax is only one tax and levied on the sum total of the income classified and chargeable under the various heads. Section 14 has classified the different heads of income and income under each head is separately computed. Income which is computed in accordance with law is one income and it is not a collection of distinct tax levied separately on each head of income and it is not an aggregate of various taxes

computed with reference to each of the different sources separately. There is only one assessment and the same is made after the total income has been ascertained. The assessee is subject to income-tax on his total income though his income under each head may be well below the taxable limit. Hence the loss sustained in any year under any heads of income will have to be set off against income under any other head. In this case, the Assessing Officer made addition of Rs.28,50,000/- as undisclosed income under Section 69 of the Act. Once the loss is determined, the same should be set off against the income determined under any other head of income.

Section 71 permits assessee to set off loss other than that of capital gains against income from other head. Thus, statutory provisions contained in section 71 was applicable in present case.

In view of the detailed discussion of the facts and circumstances of the case, it is not appropriate to disallow the claim of carry forward depreciation set off against the additions made u/s.68 of the I.T. Act, 1961. Hence, the AO is directed to allow the set off of carry forward depreciation."

3. Aggrieved by the order of the Ld.CIT(A), the revenue is in appeal before us. Appearing for the revenue, the Ld.DR argued that unexplained cash credits assessed u/s 68 required to be assessed separately as undisclosed income and no deduction required to be allowed from the income so assessed u/s 68. The Ld.DR relied on the decision of Hon'ble Gujarat high court in the case of Fakir Mohmed Haji Hasan Vs. Commissioner of Income Tax in IT reference No.267 of 1993 dated 10 August 2000, which reads as under :

"6.2. The opening words of section 14 "Save as otherwise provided by this Act' clearly leave scope for "deemed income" of the nature covered under the scheme of sections 69, 69A, 69B and 69C being treated separately, because such deemed income is not income from salary, house property, profits and

gains of business or profession, or capital gains, nor is it income from 'other sources' because the provisions of sections 69, 69A, 69B and 69C treat unexplained investments, unexplained money, bullion, etc., and unexplained expenditure as deemed income where the nature and source of investment, acquisition or expenditure, as the case may be, have not been explained or satisfactorily explained. Therefore, in these cases, the source not being known, such deemed income will not fall even under the head "income from other sources". Therefore, the corresponding deductions, which are applicable to the incomes under any of these various heads, will not be attracted in case of deemed incomes which are covered under the provisions of sections 69, 69A, 69B and 69C of the Act in view of the scheme of those provisions."

3.1. The Ld.CIT(A) also relied on the decision of Guru Prasad Vs.CIT [158 ITR 278] (Pat) and argued that the additions made u/s 68 is altogether on different footing and no other deduction required to be allowed from the income so assessed u/s 68. Hence requested to set aside the order of the Ld.CIT(A) and restore the order of the AO.

4. On the other hand, Ld.AR argued that the income has to be assessed under various heads of income of A to E as per section 14 of IT Act. If the addition u/s 68 is not fit into any of the heads then it should be considered as income from other sources and to be included in gross total income. Once the income is treated as part of gross total income, then unabsorbed depreciation is to be allowed as set off and there is no other alternative for it. The Ld.AR relied on the decision of ACIT circle -4, Surat Vs Shree

Raghupati Fibres Pvt. Ltd. In ITA No.256/Ahd/2011 of ITAT 'D' Bench, Ahmedabad, for the assessment year 2004-05 dated 12.09.2014.

4.1. Referring to Ruling of Hon'ble ITAT Ahmedabad, Ld.AR argued that the income required to be assed u/s 68 as income from other sources and once the income is treated as part of gross total income, the revenue has to allow the set off of carry forward unabsorbed depreciation. Referring to Hon'ble Madras High Court judgement in the case of CIT Vs. SPEL SEMI Conductor Ltd. (2013) 212 taxman 0506, the Ld.AR argued that there is income available in other head and the unabsorbed depreciation required to be set off as per Section 32(2) r.w.s.72(2) and Section 72(2) does not come on its way for set off.

4.2. The Ld.AR invited our attention to Hon'ble Supreme Court decision in CIT vs. Mother India Refrigeration Industries Private Ltd. (1985) 23 Taxman 0008 and argued that Hon'ble Supreme Court in para No. 10 and 11 held that the unabsorbed carried forward depreciation par takes the character of current depreciation in the following year so that it is available unlike unabsorbed carry forward business loss for being set off against other heads of income of that year.

5. We have heard both the parties and perused the material placed on record. As held by the Coordinate Bench in the case of Shree Raghupati Fibres Pvt. Ltd., Ahmedabad, the income required to be assessed as per Section 14 of the IT Act under any one of the heads of income from A to E. If the addition u/s 68 does not fit into any of the heads of income of A to E then it should be considered as part of “income from other sources” and to be included in the gross total income. If the addition does not fit into any of the heads, the same is not taxable at all. Hon’ble Madras High Court in the case of CIT Vs. Chensing Ventures 212 CTR 539 relied up on by the Ld.CIT(A) held that after set off of losses against income under the same head if the result is still loss the assessee can set off of losses u/s 71 of the Act against income of the same year under any other head except for losses which arise under the head ‘capital loss’. As held by Hon’ble Supreme Court in the case of CIT Vs. Mother India Refrigeration Industries Private Ltd. (supra) the unabsorbed depreciation partake the same character as current year depreciation in the following year so that it is available unlike unabsorbed carry forward business losses for being set off against other heads of income of that year. The relevant part of the order of the Hon’ble Apex court’s decision in para No.10 and 11 is reproduced as under:

“10. It is true that proviso (b) to s. 10(2)(vi) creates a legal fiction and

under that fiction unabsorbed depreciation either with or without current years depreciation is deemed to be the current years depreciation but it is well settled, as has been observed by this Court in Bengal Immunity Co. Ltd. vs. The State of Bihar (1955) 2 SCR 603 at 606 that legal fictions are created only for some definite purpose and these must be limited to that purpose and should not be extended beyond that legitimate field. Clearly, the avowed purpose of the legal fiction created by the deeming provision contained in proviso (b) to s. 10(2)(vi) is to make the unabsorbed carried forward depreciation partake of the same character as the current depreciation in the Viewing year, so that it is available, unlike unabsorbed carried forward business loss, for being set off against other heads of income of that year. That it is so becomes clear from this Court's observations in Jaipuria China Cray Mines (P) Ltd. case (supra) appearing at page 561 of the Report which run thus:

"The unabsorbed depreciation allowance ' is carried forward under proviso (b) to s, 10(2)(vi) and the method, of carrying it forward is to add it to the amount of the allowance or depreciation in the following year and deeming it to be part of that allowance; the effect of deeming it to be part of that allowance is that it falls in the following year within cl. (vi) and has to be deducted as allowance."

In CIT vs. Ravi Industries (1963) 49 ITR 145 (Born) TC27R .635, the same position has been clarified by the Bombay High Court. The Court has observed that the unabsorbed depreciation does not lose its character and attributes when it is carried forward to the following year; such unabsorbed depreciation of the earlier year, which is carried forward to the current year and which is deemed to be of the current year under proviso (b) of s. 10(2) (vi) can be set off unlike other business losses, against income under other heads. Such being the purpose for which the legal fiction is created it is difficult to extend the same beyond its legitimate field and will have to be confined to that purpose, It is, therefore, not possible to accept the contention of counsel for the assessee that because of the legal fiction the unabsorbed carried forward losses should be given preference not merely over the unabsorbed carried forward depreciation but also over the current years depreciation, There is thus no modification of, nor deviation from, the basic and well recognised principle of commercial accountancy by the statute as is contended by counsel for the assessee.

11. Since the provisions of the 1961, Act are in paimateria with the corresponding provisions under the 1922 Act the same conclusion must follow under the 1961 Act namely that current depreciation must be deducted first before deducting the unabsorbed carried forward business losses of the earlier years in giving set off while computing the total income of any particular year".

5.1. Hon'ble Madras High Court in the case CIT vs. SPEL SEMI conductor

Ltd supra held as under:

“6. Thus as far as the income from other sources are concerned, given the fact that under section 32(2) of the Act, there is a provision of set off of unabsorbed depreciation allowance is against the income from other sources, it is not necessary that one should wait for the assessee to earn income from business so as to exhaust the carried forward loss to be set off against the business income and then apply the unabsorbed depreciation. A reading of section 32(2) thus makes it clear that if the unabsorbed depreciation allowance could not be wholly set off under clause (i) and clause (ii), the amount of depreciation not so set off can lie set off from income from other head if any, available for that assessment year. The language of Section 32(2) is very clear and there is hardly anything contained in Section 72 (2) to prevent such set off of carried forward depreciation being given to the assessee under the head of income from business or income from other sources. The Revenue does not deny the fact that as far as the income from other sources are concerned, there could be no set off of business loss or carried forward loss. However, what is contended by the Revenue is that Section 72(2) controls the operation of Section 32(2) to have the set off of unabsorbed depreciation against the income from other sources. We do not agree with this line of reasoning. What is spoken to under Section 72(2) is as regards set off of business loss as against the income from profits and gains Of business or profession and if there is loss as well as unabsorbed depreciation, the set off shall be first on the business loss as against the business income and then on unabsorbed depreciation. What is spoken to under Section 32(2) is as regards set off of unabsorbed depreciation as per clause (ii) of sub section (1) and when the unabsorbed depreciation could not be set off as against the income from business or profession by reason of there being no income available under the said heads and where there is income from other sources, effect must be given to Section 32(2) of the Act for that assessment year.”

5.2. As discussed, Hon'ble Madras High Court in the case of SPEL SEMI Conductor Ltd. (2013) 90 DTR 0436, if the unabsorbed depreciation allowance could not be wholly set off under clause (i) and (ii) of section 32, the amount of depreciation not so set off can be set off from the income of the other head if any available for the assessment year. The language of section 32 (2) is very clear and there is hardly contained in the section

72(2) to prevent such set off of carry forward depreciation being given to the assessee under the head income from business or income from other sources. As per the settled principles of law, the unabsorbed depreciation gets accumulated and partake the character of the current year depreciation and required to be set off against the income available under any other head. This view is supported by the Hon'ble Apex court's decision cited supra. The decision of Hon'ble Gujarat High Court relied upon by the Ld.DR is not with regard to the allowance of unabsorbed depreciation but with regard to the other deductions in respect of claims made by the assessee and the additions discussed in the Hon'ble Gujarat High courts decision was unexplained investments/expenditure under 69, 69A, 69B, and 69C which are not recorded in the books of accounts and the source could not be explained. Where as in the assessee's case the impugned additions were cash credits u/s 68 for which the entries are made in books of accounts and the source was not explained by the assessee. Therefore, the decision relied upon by the Ld.DR is not helpful to the revenue and distinguishable on facts. The Ld.CIT(DR) relied on the order of the Guru Prasad Vs.CIT, the issue in the case was not related to the unabsorbed carried forward depreciation hence the case law relied up on by the Ld.DR is not applicable in the assessee's case. In the instant case the

addition was cash credits u/s 68 and the income required to be taxed as income from other sources and to be included in the gross total income. Once the addition is included in the gross total income, the AO has to allow the set off of unabsorbed depreciation loss as provided u/s 71 of the IT Act. Hon'ble Supreme court held that the unabsorbed carried forward depreciation par takes the character of current year depreciation in the following year and the same is allowed to be set off against other heads of income of that year. The AO has not assigned any reason for denying the claim of the assessee for set off of unabsorbed depreciation. Section 71 deals with the set off of loss from one head against income from another head. After setting up of losses against income under the same head, if the net result is still losses, the assessee can set off the such losses u/s 71 of the Act, against income of the same year under any other head. Section 71 permits the assessee to set off losses other than capital gains against the income from other heads. Since the unabsorbed depreciation par takes the character of current year's depreciation in the following year, we hold that the CIT(A) has rightly allowed the set off of unabsorbed depreciation and we do not find any infirmity in the well reasoned order of the Ld. CIT(A) and the same is upheld.

6. In the result, appeal of the revenue is dismissed.

The above order was pronounced in the open court on 21st Feb 2018.

Sd/-
(वी. दुर्गराव)

(V. DURGA RAO)

न्यायिक सदस्य/JUDICIAL MEMBER

विशाखापटणम /Visakhapatnam

दिनांक /Dated : 21.02.2018

L.Rama, SPS

Sd/-

(डि.एस. सुन्दर सिंह)

(D.S. SUNDER SINGH)

लेखा सदस्य/ACCOUNTANT MEMBER

आदेश की प्रतिलिपि अग्रेषित /Copy of the order forwarded to:-

1. अपीलार्थी / The Appellant- Asst.Commissioner of Income Tax, Circle-2(1), Guntur
2. प्रत्यर्थी / The Respondent- M/s.Sai Bhaskar Irons Limited, 3-1-3/A, 3rd Lane Rajendra Nagar, Guntur
3. The Pr. Commissioner of Income Tax, Guntur
- 4.The Commissioner of Income Tax(Appeals)-1, Guntur
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, विशाखापटणम /DR, ITAT, Visakhapatnam
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Sr. Private Secretary
ITAT, VISAKHAPATNAM