

IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, MUMBAI
BEFORE SHRI SHAMIM YAHYA, AM AND SHRI SANDEEP GOSAIN, JM

I.T.A. No. 228/Mum/2017
(Assessment Year: 2009-10)

Dy. CIT, Central Circle-2(4), Room No. 802, 8 th Floor, Old CGO Annex Bldg., M. K. Road, Mumbai-400 020	Vs.	M/s. Ajmera Cements P. Ltd. 2 nd Floor, Citi Mall, Andheri Link Road, Andheri (W), Mumbai-400 053
PAN/GIR No. AADCA 1126 F		
(Appellant)	:	(Respondent)

Appellant by	:	Shri Chaudhary Arun Kumar Singh
Respondent by	:	Shri Prakash Jotwani

Date of Hearing	:	12.09.2018
Date of Pronouncement	:	17.09.2018

ORDER

Per Shamim Yahya, A. M.:

This appeal by the Revenue is directed against the order of the learned Commissioner of Income Tax (Appeals)-52, Mumbai ('ld.CIT(A) for short) dated 28.10.2016 and pertains to the assessment year (A.Y.) 2009-10.

2. The grounds of appeal read as under:

(i) "On the facts and in the circumstances of the case and in law, the Ld' CIT(A) erred in holding that the unabsorbed depreciation available to the assessee as on AY 2002-03 be dealt with in accordance with the provision of Section 32(2) of the Act as amended by Finance (No 1) Act,2001 and not by provision of section 32(2) as is stood before the said amendment."

(ii) " On the facts and in the circumstances of the case and in law, the Ld¹ Commissioner of Income Tax(A) erred in holding that the carried forward of an unabsorbed depreciation of AY 1998-99 and AY 1999-2000 cannot be disallowed again in AY 2009-10 and the disallowance in AY 2009-10 amounted to double disallowance without appreciating that the disallowance of unabsorbed

depreciation was not allowable to be carried forward in AY 2009-10 and the assessing officer has rightly denied its carried forward in AY 2009-10."

(Hi)" On the facts and in the circumstances of the case and in law, the Ld' Commissioner of Income Tax(A) erred in holding that the unabsorbed depreciation of AY 1998-99 , AY 1999-2000 and AY 2001-02 to be carried forward indefinitely during subsequent assessment year without appreciating that the depreciation of aforesaid assessment years shall be governed by the provision of section 32(2) prior to the amendment to section 32(2) by Finance (No 1) Act,2001."

3. Brief facts of the case are that the assessee is a company engaged in the business of cement manufacturing etc. It filed its return of income on 26.09.2009 declaring total income at Rs. Nil. The original assessment u/s. 143(3) was completed on 21.11.2011 wherein the Assessing Officer ('A.O.' for short) made disallowance of Rs.10,43,153/-. Later the case was reopened u/s. 147 vide notice u/s. 148 dated 21/01/2014. In response, the assessee filed a letter requesting the A.O. to consider the original return filed on 26/09/2009 as return filed in response to notice u/s. 148. Thereafter, assessment proceedings were taken up by the AO. In due consideration to the facts of the case, the AO disallowed the claim of the assessee towards unabsorbed depreciation amounting to Rs.80,89,842/- relating to A.Ys. 1998-99 to 2000-01, which basically constitutes unabsorbed depreciation of Rs.33,23,569/- for A.Y. 1998-99, Rs.43,49,544/- for A.Y. 1999-2000 and Rs. 4,16,729/- for A.Y. 2001-02. The assessment was, thus, completed on a loss of Rs.1,23,42,373/- vide order dated 30/09/2014 passed u/s. 143(3) r.w.s. 147 of the Act.

4. Upon the assessee's appeal, the ld. CIT(A) allowed the assessee's claim by holding as under:

5. Ground No. 1 is relating to disallowing the claim of the assessee towards unabsorbed depreciation amounting to Rs. 33,23,569/- for the A.Y. 1998-99 and Rs. 43,49,544 for the A.Y. 1999-2000. From the submissions made by the Ld. AR and the facts of the case it is gathered that the A.O. had disallowed such claim of the assessee towards unabsorbed depreciation b/f in the immediately preceding year (i.e. A.Y. 2008-09) while completing the assessment and therefore, it is not understandable as to why the A.O. chose to disallow such claim again in the A.Y. 2009-10. It is further gathered that this issue has also been examined by my Id. predecessor in the case of the assessee for A.Y. 2008-09 vide order dated 12/12/2014. He has allowed the claim of the assessee in that year following Hon'ble ITAT, Mumbai decision dated 09/10/2013 in case of Arch Fine Chemicals P. Ltd. and Hon'ble Gujarat High Court decision in case of General Motors (I) P. Ltd. Therefore, considering the overall facts of the case, and submissions of the assessee, I hold that firstly, the AO was not justified in considering this issue again in the current assessment year because he had already added back these amounts in A.Y. 1998-99 and secondly, this issue has already been decided by my Hon'ble predecessor in favour of the assessee vide his order dated 12/12/2014. Accordingly, the disallowance/addition in respect of unabsorbed depreciation to the tune of Rs. 76,73,113/- (Rs. 33,23,569/- + Rs. 43,49,544) is directed to be deleted. Consequently, this ground is allowed in favour of the assessee.
6. Ground No. 2 is relating to disallowance of the claim of the assessee towards unabsorbed depreciation of Rs. 4,16,729/- relating to A.Y. 2001-02. While disallowing this claim, the AO has simply relied upon Hon'ble ITAT, Special Bench decision in the case of Time Guaranty Ltd. It is gathered that this issue has also been considered by my Id. predecessor in case of the assessee for A.Y. 2008-09 and following the judgement of Hon'ble Gujarat High Court in case of General Motors (I) P. Ltd. and Hon'ble ITAT, Mumbai Bench decision in the case of Arch Fine Chemicals P. Ltd., he decided the issue in favour of the assessee. Therefore, respectfully following the decision of my Id. predecessor vide his order dated 12/12/2014, as also Hon'ble Gujarat High Court in case of General Motors(Supra) this issue is decided in favour of the assessee.
5. Against the above order, the Revenue is in appeal before us.
6. We have heard both the counsel and perused the records. The Id. Counsel of the assessee submitted that the issue is covered in favour of the assessee by the decision of the ITAT in assessee's own case in ITA No. 761/Mum/2015 for assessment year 2008-09 vide order dated 23.06.2016.

7. Per contra, the Id. Departmental Representative ('ld. DR' for short) did not dispute this proposition.

8. Upon careful consideration, we note that this Tribunal in SMC Bench has decided the issue in assessee's own case in assessee's favour in ITA No. 761/Mum/2015 (supra).

The tribunal has adjudicated as under:

2. I have heard the parties and perused the record. The Assessing Officer held that the unabsorbed depreciation pertaining to Assessment Years 1997-98 to 1999-2000 cannot be set-off against the current year's income, on the reasoning that the provisions of Sec. 32(2) of the Act, prior to its amendment by Finance Act, 2001 w.e.f. 1.4.2002, had provided a time limit of 8 years for carrying forward the unabsorbed amount of depreciation. The Ld. CIT(A), however, allowed the claim of the assessee by following the decision rendered by Hon'ble Gujarat High Court in the case of General Motors India Pvt. Ltd. (Special Civil Application No. 1773 of 2012) dt. 23.8.2012. The Ld. CIT(A) also noticed that the decision rendered by the Hon'ble Gujarat High Court in the above said case has been followed by the coordinate bench of Tribunal in the case of Arch Fine Chemicals P. Ltd. (ITA Nos. 2414 & 2415/Mum/2012 dt. 9.10.2013). Accordingly, the Ld. CIT(A) decided the issue in favour of the assessee and directed the Assessing Officer to allow set-off of unabsorbed depreciation brought forward from Assessment Years 1997-98 to 1999-2000 and allow carry forward of balance remaining after set-off. Aggrieved, the Revenue has filed this appeal before us.

3. The Ld. Counsel for the assessee placed heavy reliance on the order passed by the Ld. CIT(A) and submitted that the Ld. CIT(A) has followed the decision rendered by the Hon'ble Gujarat High Court as well as the coordinate bench of the Tribunal. On the contrary, the Ld. DR placed reliance on the order passed by the Assessing Officer.

4. Having heard the rival contentions, I do not find any reason to interfere with the order passed by the Ld. CIT(A), since he has decided the issue by following the decisions rendered by the Hon'ble Gujarat High Court and the coordinate bench of the Tribunal (referred supra).

9. Since no contrary decision has been shown to us and it is not the case that the above said Tribunal order in assessee's own case has been reversed by the Hon'ble

jurisdictional High Court, we do not find any infirmity in the order of the Id. CIT(A).

Accordingly, following the precedent as above, we uphold the order of the Revenue.

10. In the result, the Revenue's appeal stands dismissed.

Order pronounced in the open court on 17.09.2018

Sd/-

Sd/-

(Sandeep Gosain)
Judicial Member

(Shamim Yahya)
Accountant Member

Mumbai; Dated : 17.09.2018

Roshani, Sr. PS

Copy of the Order forwarded to :

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

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai