

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "G" MUMBAI**

**BEFORE SHRI PAWAN SINGH (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 5624/MUM/2017
Assessment Year: 2012-13**

Dy. Commissioner of
Income Tax 8(2)(2), Room
No. 348, M.K. Road,
Mumbai-400020.

Vs. M/s Sunshield Chemicals
Ltd. Phoenix House, "A
Wing", 4th floor, 462
SenapatiBapat Marg, Lower
Parel (West), Mumbai-
400013.

PAN No. AAFCS8219K

Appellant

Respondent

Revenue by : Mr. Satishchandra Rajore, DR
Assessee by : Mr. Falee H. Bilimoria, AR

Date of Hearing : 13/03/2019
Date of pronouncement: 30/04/2019

ORDER

PER N.K. PRADHAN, AM

This is an appeal filed by the Revenue. The relevant assessment year is 2012-13. The appeal is directed against the order of the Commissioner of Income Tax-14, Mumbai [in short 'CIT(A)'] and arises out of the assessment completed u/s 143(3) of the Income Tax Act 1961, (the 'Act').

2. The 1st ground of appeal

Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) is right in deleting the addition of Rs.8,46,738/- on account of

incremental provision of deferred sales tax without appreciating the fact that section 115JB clearly states that provision on account of deferred tax is to be added back for arriving at Book Profit.

2.1 Briefly stated, the facts are that the assessee had debited Rs.8,46,738/- as provision for deferred sales tax to the profit and loss account. The Assessing Officer (AO) considered that the provision on account of deferred sales tax is hit by the retrospective amendment in clause (h) of Explanation 1 to section 115JB of the Act, since it is in the nature of deferred tax and therefore, added back the above amount to the book profit.

2.2 In appeal, the Ld. CIT(A), following the order of the CIT(A) for AY 2009-10 and 2011-12, deleted the addition made by the AO.

2.3 Before us, the Ld. DR relies on the order of the AO. On the other hand, the Ld. counsel of the assessee submits that the issue has been decided in favour of the assessee by the Ld. CIT(A) in AY 2011-12 and no further appeal was filed by the Revenue before the Tribunal on similar facts.

2.4 We have heard the rival submissions and perused the relevant materials on record. As per the Memorandum to Finance Bill 2008, it is apparent that the intention behind introducing clause (h) to Explanation 1 to section 115JB was to cover deferred tax which was connected with Income Tax and has nothing to do with the amount debited towards deferred sales tax. As per clause (43) of section 2 of the Act, the definition of 'Tax', reads as under:

“tax” in relation to the assessment year commencing on the 1st day of April, 1965 and any subsequent assessment year means income-tax chargeable under the provisions of this Act, and in relation to any other assessment year income-tax and super-tax chargeable under the provisions of this Act prior to the aforesaid date [and in relation to the assessment year commencing on the 1st day of April, 2006, and any subsequent assessment year includes the fringe benefit tax payable under section 115WA]”

Thus, the aforesaid definition of ‘Tax’ deals only with Income Tax chargeable under the Act and is not applicable to Sales Tax. The deferred tax, which was covered *vide* the retrospective amendment pertained to the provision for deferred income tax only.

Therefore, we uphold the order of the Ld. CIT(A) and dismiss the 1st ground of appeal.

3. The 2nd & 3rd ground of appeal address a common issue as produced below:

2. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) is right in allowing set off of carried forward unabsorbed depreciation of Rs.7,29,07,204/- pertaining to the period from AY 1997-98 to 2001-02, under the normal provision of the Act, against the current year income, without appreciating the fact the set off of carried forward unabsorbed depreciation for the period from AY 1997-98 to 2001-02 cannot be allowed beyond 8 years.

3. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) is right in allowing the grant of carry forward of unabsorbed depreciation of AY 2001-02 and AY 2007-08, without appreciating the fact that the carried forward unabsorbed depreciation for AY 2001-02 is not allowable being beyond eight years and as far as

carry forward unabsorbed depreciation for AY 2007-08 is concerned, the AO has already allowed the same.

3.1 During the course of assessment proceedings, the assessee filed before the AO a statement giving details of the set off in respect of brought forward unabsorbed depreciation. However, the AO followed the order of the ITAT, Mumbai in the case of *DCIT v. Times Guaranty Ltd.* (131 TTJ 257) and held that the set off of brought forward unabsorbed depreciation under normal provisions of the Act for the assessment years 1996-1997 to 1999-2000 is not allowed to the assessee, since the same have expired the term of 8 years to be carried forward. Thus the AO held that the assessee will be eligible to have benefit of brought forward depreciation losses for AY 2001-2002 onwards. Observing that the unabsorbed depreciation for the AY 2001-02 has been utilized by the assessee, the AO worked out the claim of depreciation for the year under consideration.

3.2 In appeal the Ld. CIT(A) followed the order of the Tribunal in the case of the assessee for the AYs 2009-10 and 2010-11 and directed the AO to consider the unabsorbed depreciation loss of earlier years at current year's depreciation and allow the carry forward of loss accordingly as per law.

3.3 Before us, the Ld. counsel of the assessee submits that the issue has been decided by the ITAT in favour of the assessee in AYs 2009-10, 2010-11 and 2011-12.

On the other hand, the Ld. DR relies on the order of the AO.

3.4 We have heard the rival submissions and perused the relevant materials on record. In this context, we may refer to para 7 of the order dated 18.04.2018 of the ITAT 'J' Bench, Mumbai in assessee's own case for AY 2011-12 (ITA No. 6466/Mum/2016):

"We find that the issue raised in this appeal is covered in favour of the assessee by the judgment of Hon'ble Gujarat High Court in the case of *General Motors India (P.) Ltd.* (supra). The question before the Hon'ble High Court was whether the unabsorbed depreciation pertaining to AY 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 Finance Act 2001? We find that the Hon'ble Gujarat High Court has held as under:

"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 u/s 32 shall be mandatory. Therefore, the provisions of section 32(2) amended by Finance Act, 2001 would allow the unabsorbed depreciation allowance available in the AY 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 AY 2002-03 then it would be carried forward till the time it is set off against the profits and gains of subsequent years.

Therefore, it can be said that, current depreciation is deductible in such 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 (AY 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 AY 1997-98 upto the AY 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.”

7.1 Now we refer to the judgment of the Hon’ble Bombay High Court in the case of *CIT vs. M/s Hindustan Unilever Ltd.* (ITA No. 1873 of 2013) by the Bombay High Court. The relevant question of law before the High Court is mentioned below:

“7. Whether on facts and in circumstances of the case and in law the Tribunal was right in directing to allow the set off of brought forward depreciation losses of amalgamating company for the Assessment Years 1996-97 and 1997-98 i.e. for the period prior to amendment in sub-section (2) of Section 32 of the Act w.e.f. 01/04/2002?”

The Hon’ble High Court held as under:

“6. Regarding question No.7:

(a) The impugned order of the Tribunal has allowed the respondent-assessee's appeal on the issue of allowing unabsorbed depreciation pertaining to Assessment Year 1996-97 and 1997-98 which was carried forward to be set off in the subject Assessment Year.

(b) The grievance of the Appellant is that in view of the fetter (of eight years) in carrying forward depreciation for Assessment Year 1997-98 upto Assessment Year 2002-03, the set off of the same cannot be allowed in this Assessment Year.

(c) We find that the impugned order of the Tribunal while allowing the Assessee-respondents' claim follows the decision of the Gujarat High Court in *General Motors India Pvt. Ltd. vs. DCIT* reported in 354 ITR 244 wherein on identical facts it was held that the unabsorbed depreciation for the Assessment Year 1997-98 upto Assessment Year 2001-02 could be allowed to be set off, if it was still unabsorbed on 1st April, 2001. The above decision also placed upon the CBDT circular No. 14 of 2001 dated 22nd November, 2001 to hold that any unabsorbed depreciation which is available on 1st day of April, 2001 would be dealt with in accordance with the provisions of section 32(2) of the Act as amended by the Finance Act 2001. Moreover, the Circular No. 14 of 2001 issued by the CBDT clarifies that restriction of the eight years to carry forward and set off the unabsorbed depreciation has been dispensed with. Consequently, unabsorbed depreciation for the intervening periods between assessment year 1997-98 upto 2001-02, if available in the assessment year 2002-03 would be allowable as part of carried forward depreciation from Assessment Year 2002-03 onwards. No decision contrary to the decision of the Gujarat High court has been shown to us. It is clarified that although the decision of the Gujarat High Court was rendered in context of re-opening notice it has also examined the issue on merits and drew support from the

CBDT circular which is beneficial to the assessee to conclude as aforesaid. Nothing has been shown to us to indicate why the decision of the Gujarat High Court in General Motors (India) Ltd. should not be followed in the present facts.”

7.2 In view of the ratio laid down by the Hon’ble Gujarat High Court in *General Motors India (P.) Ltd. (supra)* and Hon’ble Bombay High Court in *M/s Hindustan Unilever Ltd. (supra)*, we uphold the order of the Ld. CIT(A).”

3.5 Facts being identical, we follow the above order of the Co-ordinate Bench and dismiss the 2nd & 3rd ground of appeal.

4. The 4th & 5th ground of appeal do not arise out of the order of the Ld. CIT(A). In fact, these were not the grounds of appeal before him. Thus the 4th & 5th grounds of appeal are dismissed.

5. In the result, the appeal filed by the revenue is dismissed.

Order pronounced in the open Court on 30/04/2019.

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Sd/-
(N.K. PRADHAN)
ACCOUNTANT MEMBER

Mumbai;

Dated: 30/04/2019

Rahul Sharma, Sr. P.S.

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.

//True Copy//

BY ORDER,

(Sr. Private Secretary)
ITAT, Mumbai