

IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'G' BENCH,
NEW DELHI

BEFORE SHRI A.D. JAIN, VICE PRESIDENT, AND
SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER

ITA No. 2301/DEL/2016
[A.Y 2011-12]

M/s Hindon River Mills Ltd
P/o Hindon Nagar, Dasna
Ghaziabad

Vs.

The Dy. C.I.T.
Circle - 1
Ghaziabad

PAN No: AAACH 9966 K

[Appellant]

[Respondent]

Date of Hearing : 14.08.2019
Date of Pronouncement : 28.08.2019

Assessee by : Shri Salil Kapoor, Adv
Shri Sumit Lal Chandani, Adv

Revenue by : Shri N.K. Bansal, Sr. DR

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:

This appeal by the assessee is preferred against the order of the Commissioner of Income Tax [Appeals], Aligarh dated 08.02.2016 pertaining to assessment year 2011-12.

2. The sum and substance of the grievance of the assessee is that the CIT(A) erred in not allowing set off of unabsorbed depreciation by wrongly interpreting the provisions relating to unabsorbed depreciation and its set off.

3. Representatives of both the sides were heard at length and case records perused carefully.

4. Facts on record show that assessment was framed u/s 143(3) of the Income-tax Act, 1961 [hereinafter referred to as 'the Act'] vide order dated 18.0.2014. The returned income was assessed by disallowing the claim of depreciation of Rs. 10.67 lakhs and loss declared by the assessee was reduced to Rs. 1.77 lakhs. Further, rental income of Rs. 3 crores and interest income of Rs. 4.62 lakhs were set off with loss and net income was determined at Rs. 1.06 crores and unabsorbed depreciation of Rs. 112.34 crores was set off and net income of the assessee was taken at NIL.

5. The assessee carried the matter before the CIT(A) and disallowance of depreciation was agitated before the CIT(A).

6. However, invoking the powers vested upon him, the CIT(A) issued a show cause notice to the assessee proposing enhancement of assessment. In his show cause notice, the CIT(A) asked the assessee why the claim of depreciation should not be rejected u/s 32(2) of the Act as allowance for deprecation can be given only to the extent of available profits and as per the computation there are no profits and gains chargeable to tax during the year under consideration and claim of set off of unabsorbed depreciation against non business income should not be disallowed, as the same is in accordance with the provisions of the Act.

7. The assessee filed a detailed reply and in its reply, it was pointed out that a similar action was taken by the Assessing Officer in A.Ys 2007-08 and 2008-09 and the matter was agitated before the CIT(A) who accepted the stand of the assessee and held that legal position is in favour of the assessee's claim.

8. The provisions of section 32(2) as delineated, and adjudication by various courts are squarely in favour of the position that unabsorbed depreciation can be utilised for set off against any source of income as

it gets burnt into current year's depreciation. Copies of orders of the CIT(A) for A.Ys 2007-08 and 2008-09 were furnished.

9. The CIT(A) was not convinced with the claim of the assessee who was of the opinion that it is mandatory to carry forward the unabsorbed depreciation if the same cannot be set off from business income and since in the case of the assessee there is loss under the head 'Profits or gain of business' and no business income is available for set off against unabsorbed depreciation, therefore, no amount of unabsorbed depreciation can be set off.

10. As regards the set off of unabsorbed depreciation against income under the head 'Income from house property' and 'income from other sources', the CIT(A) was of the opinion that there is no provision under the Act which may allow such set off. Accordingly, the Assessing Officer held that the brought forward unabsorbed depreciation cannot be allowed to be set off from income under the head 'Income from house property' and 'income from other sources'. Aggrieved by this, the assessee is before us.

11. At the very outset, the ld. AR stated that the under lying facts are identical to the facts considered by the co-ordinate bench in the case of M/s Suresh Industries Pvt Ltd ITA No. 5374/Mum/2011 wherein the Tribunal has considered the decision of the Hon'ble Supreme Court in the case of Jaipuria China Clay Mines Pvt Ltd 59 ITR 555, Rajapalayam Mills 115 ITR 777 and Virmani Industries Pvt Ltd 216 ITR 607.

12. The ld. AR further pointed out that similar view was taken by the Special Bench of the Tribunal in the case of Times Guaranty Ltd 4 ITR [T] 210. The ld. AR further pointed out that the Lucknow Bench of the Tribunal has followed the order of the Mumbai Bench. The ld. AR further drew our attention to the order passed by the CIT(A) for A.Y 2007-08 and also by the Assessing Officer for A.Y 2013-14, wherein the CIT(A) and the Assessing Officer have accepted the set off of unabsorbed depreciation.

13. Per contra, the ld. DR strongly supported the findings of the Assessing Officer. It is the say of the ld. DR that the facts of the case in hand are not similar to the facts considered by the Tribunal, and, therefore, the same should not be considered.

14. We have given a thoughtful consideration to the orders of the authorities below. We find force in the contention of the Id. AR. Similar issue was considered by the co-ordinate bench in the case of Suresh Industries [supra]. The relevant findings read as under:

"8. We have heard the rival submissions and perused the orders of the lower authorities and have carefully considered the relevant provisions of the Act and the Paper Book submitted by the assessee. A perusal of the statement of income for the year under consideration show that the assessee has shown Long Term capital gains at Rs. 1,30,00,000/- after claiming exemption u/s. 54EC of the Act. The assessee has also shown net loss from business before depreciation at Rs. 17,48,195/-. To this, the assessee added current year's depreciation at Rs. 2,32,059/- and unabsorbed depreciation brought forward from assessment years 1999-2000 and 2002-03 at Rs. 6,42,208/- and claimed set off amounting to Rs. 26,22,462/- from the Long Term capital gains at Rs. 1,30,00,000/-. Profit and gains of business or profession are computed in accordance with the provisions contained in Sec. 30 to 43 of the Act. Depreciation is allowed as per the provisions of Sec.

32(1) of the Act. [Section 32\(2\)](#) of the Act contains provisions relating to unabsorbed depreciation which is 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 for that previous year, and so on for the succeeding previous years.]

9. A perusal of the aforementioned section shows that Sec. 32(2) has been subjected to the provisions of Sec. 72(2) and 73(3) of the Act. Before discussing the provisions of Sec. 72(2) let us first analyze the provisions of Sec. 32(2) of the Act prior to this amendment w.e.f. 1.4.2002 "Substituted by the [Finance Act](#), 2001, w.e.f. 1-4-2002. Prior to its substitution, sub-section (2), as amended by the Taxation Laws (Amendment and [Miscellaneous Provisions](#)) Act, 1986, w.e.f. 1-4-1988, Direct Tax Laws (Amendment) Act, 1987, w.e.f. 1-4-1989 and [Finance Act](#), 1992, w.e.f. 1-4-1993, substituted by the Finance (No. 2) Act, 1996, w.e.f. 1-4-1997 and further amended by the [Finance Act](#), 2000, w.e.f. 1-4-2001, read as under :

'(2) 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 owing 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 set off, 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 the 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 Companies (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."

10. A comparative study of pre-amendment and post amendment provisions of Sec. 32(2) suggests that prior to the amendment, the set off was restricted to the profits and gains, if any, of any business or profession whereas post amendment (i.e. the law applicable for the year under consideration) the set off is available from profits or gains chargeable for the previous year. The claim of the lower authorities that profits or gains so mentioned should be restricted to profits or gains of business or profession cannot be accepted because had that been the intention of the legislature it would not have deleted phrase "of any business or profession in the post amended provisions of Sec. 32(2). The law regarding set off of unabsorbed

depreciation upto 1.4.1996 was very liberal and set off was allowable against any income. This was also upheld by the Hon'ble Supreme Court in the case of CIT Vs CIT Vs Virmani Indus. Pvt. Ltd & Ors 216 ITR 607 (SC) (supra). However, the law regarding such set off was changed by the [Finance Act](#) No. 2 of 1996 and from A.Y. 1997-98 to 2002-03 the unabsorbed depreciation was put at par with business losses u/s. 72. However the status quo have been restored from A.Y. 2003-04 and therefore the ratio laid down by the Hon'ble Supreme Court in the case of CIT Vs Virmani Indus. Pvt. Ltd & Ors 216 ITR 607 (SC) (supra) once again hold good and so now unabsorbed depreciation can be set off against any income. Thus, the claim of current year's depreciation of Rs. 2,32,059/- is directed to be set off against the income under the head "Capital gains". Accordingly, ground No. 1 of the appeal is allowed.

11. Having considered the provisions of Sec. 32(2), it is also clear that if the current year's depreciation cannot be set off owing to the profits or gains chargeable being less than the allowance, the allowance or the part of the allowance to which effect has not been given shall be added to the amount of allowance for depreciation for the following previous year and deemed to be part of the allowance which means that brought forward depreciation merges with the current year's depreciation because of the legal fiction created by provisions of Sec. 32(2) of the Act. However, this fiction has been subjected to the provisions of Sec. 72(2) and 73(3) of the Act.

12. Let us first consider the provisions of Sec. 72(2) of the Act which provides as under:

"Whether any allowance or part thereof is, under sub-section 2 of Sec. 32 or sub section (4) of Sec. 35, to be carried forward, effect shall first be given to the provisions of this section.

13. A simple reading of this section suggests that in case of set off of business loss vis-a-vis depreciation, the first preference shall be given to the business loss as per the provisions of Sec. 72(1) of the Act for the simple reason that the business loss can be carried forward only upto 8 assessment years whereas the depreciation can be carried over upto unlimited period. As has been discussed hereinabove, the brought forward unabsorbed depreciation is treated as current years' depreciation because of the legal fiction, therefore the treatment given to the current year's depreciation is equally applicable to brought forward depreciation after the application of [Finance Act, 2001](#).

14. We have already held that current year's depreciation is to be allowed as set off from the Long Term Capital Gains and brought forward depreciation is to be treated as current year's depreciation as per the legal fiction of [section 32\(2\)](#), the same is also to be allowed to be set off from the Long Term Capital Gains. Accordingly, ground No. 2 of the appeal is also allowed.

15. In A.Y 2007-08, the CIT(A) has allowed the claim of set off in assessee's own case and in A.Y 2013-14, the Assessing Officer himself has allowed the claim of set off. Considering the facts of the case in hand in light of the relevant provisions of the Act and considering the decision of the co-ordinate bench at Mumbai [supra], we direct the Assessing Officer to allow the claim of set off of unabsorbed depreciation by setting aside the findings of the CIT(A).

16. In the result, the appeal filed by the assessee in ITA No. 2301/DEL/2016 is allowed.

The order is pronounced in the open court on 28.08.2019.

**Sd/-
[A.D. JAIN]
VICE PRESIDENT**

**Sd/-
[N.K. BILLAIYA]
ACCOUNTANT MEMBER**

Dated: 28 August, 2019

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
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