

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“G” Bench, Mumbai**

**Before Shri G. Manjunatha, Accountant Member  
and Shri Ravish Sood, Judicial Member**

**ITA No. 6465/Mum/2016  
(Assessment Year: 2009-10)**

Dy. CIT, Circle-4(3)(2)  
R. No. 649, 6<sup>th</sup> Floor,  
Aayakar Bhavan,  
Mumbai – 400 020

M/s Sunvin Industries Pvt. Ltd.  
80-84, 2<sup>nd</sup> Floor,  
Vs. Dadi Seth Agiary Lane,  
Mumbai – 400002

PAN – AA ECS3087L

**(Appellant)**

**(Respondent)**

Appellant by: Shri V. Vinod Kumar, D,R  
Respondent by: None

Date of Hearing: 26.02.2020  
Date of Pronouncement: 28.02.2020

**ORDER**

**PER RAVISH SOOD, JM**

The present appeal filed by the revenue is directed against the order passed by the CIT(A)-9, Mumbai, dated 18.08.2016, which in turn arises from the order passed by the A.O under Sec. 143(3) r.w.s 263 of the Income Tax Act, 1961 (for short 'Act'), dated 16.03.2015.

The revenue has assailed the impugned order on the following grounds of appeal before us:

- “1. On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in directing the A.O to re-calculate the allowability of brought forward unabsorbed depreciation pertaining to the period A.Y. 1998-99 to A.Y. 2000-01 aggregating to Rs.1,47,23,199/- by relying on the decision of Gujarat High Court in the case of General Motors India Pvt. Ltd. Vs. DCIT And Judgment of ITAT, Mumbai in the case of Rinku Polychem Ltd.”
2. Briefly stated, the assessee company which is engaged in the business of textile processing had e-filed its return of income for A.Y. 2009-10 on 28.09.2009, declaring a total income of Rs.nil (after adjusting b/forward business losses and unabsorbed depreciation of

Rs.95,05,272/-), and a 'book profit' under Sec. 115JB at Rs.95,05,272/-. Original assessment was earlier completed under Sec.144 of the Act on 01.12.2011, whereby the income of the assessee was determined at Rs. nil (after making addition of Rs.82,53,000/-) and 'book profit' under Sec. 115JB at Rs.95,05,272/-. Subsequently, the CIT-4, Mumbai, vide his order passed under Sec. 263 of the Act 'set aside' the assessment framed by the A.O under Sec.144, dated 01.12.2011. The A.O giving effect to the order passed by the CIT under Sec. 263 of the Act, framed the assessment under Sec. 143(3) r.w.s. 263 on 16.03.2015, determining its total income at Rs.1,47,23,200/-.

3. The A.O while framing the assessment in pursuance to the order passed under Sec.263, dated 31.01.2014 by the CIT-4, Mumbai, therein observed that the assessee had claimed 'set off' of brought forward unabsorbed depreciation pertaining to A.Y. 1998-99 to A.Y. 2000-01 of an amount of Rs.1,47,23,199/-. Observing, that the Finance Act (No. 2) of 1996 had restricted the period for carry forward & set off of unabsorbed depreciation to 8 years from A.Y.1997-98, the A.O disallowed the aforesaid claim of unabsorbed depreciation of Rs.1,47,23,199/- that was brought forward by the assessee from A.Y. 1998-99, A.Y. 1999-2000 and A.Y: 2000-01. After inter alia disallowing the aforesaid claim of unabsorbed depreciation, the A.O framed the assessment, vide his order passed under Sec.143(3) r.w.s 263, dated 16.03.2015.

4. Aggrieved, the assessee assailed the assessment order before the CIT(A). Before the CIT(A), it was submitted by the assessee that pursuant to the amendment to Sec. 32(2) by the Finance Act, 2001 w.e.f A.Y. 2002-03, the position as regards claim of unabsorbed depreciation was restored to the same position as it was prevailing prior to Finance Act (No.2) of 1996, and the period of 8 years was done away with. In order to buttress his aforesaid claim the assessee had also relied on the CBDT Circular No. 14 of 2001. Further, reliance was also placed by the assessee on the judgement of the Hon'ble High Court of Gujarat in the case of General Motors India (P) Ltd. Vs. DCIT (2013) 354 ITR 244 (Guj) and the order of the ITAT, Mumbai, "D" Bench in the case of M/s Rinku Polychem Ltd. in ITA No. 748, 749 and 750/Mum/2013. Also, it was submitted by the assessee that the CIT(A) had in its own case for A.Y. 2010-11 allowed its claim for brought forward unabsorbed depreciation for A.Y. 1996-97 to A.Y. 2001-02. The CIT(A) after deliberating on the contentions advanced by the assessee found favour with the

same. Observing, that the issue involved in the present appeal was squarely covered by the order of his predecessor in the assessee's own case for A.Y. 2010-11, and also by the order passed by the ITAT, Mumbai in the case of Rinku Polychem Ltd, ITA No. 748, 749 and 750/Mum/2013, the CIT(A) concluded that the assessee's claim for allowability of unabsorbed depreciation for A.Y. 1998-99, A.Y. 1999-00 and A.Y. 2000-01 was well in order. The CIT(A) while concluding as hereinabove had observed as under:

"5.3 I have carefully considered the submission of the appellant and the order passed by the A.O. The issue involved in the cases with regard to allowing the claim of unabsorbed depreciation of Rs 1,47,23,199/- for the AYs 1997-98 to 2001-02. Originally, the assessment was completed u/s 144 on 1.12.2011. Subsequently, CIT- 4, Mumbai passed order u/s 263 and set aside the assessment to the file of the AO with reference to the above issue following the judgment of Times Guarantee(special bench order) in ITA No. 4917 & 4918 for AY 2003-04 & 2004-05 respectively vide order dated 30.3.2010. The AO following the decisions of Times Guarantee (supra) disallowed the unadjusted/ unabsorbed depreciation.

During the course of appellate proceeding the AR drew my attention to the CIT(A)'s order dated 13.2.2015 AY 2010-11 of this very assessee wherein my predecessor vide para 4.4 & 4.5 of the appellate order decided the issue in favour of the appellant following the decision of subsequent judgment of ITAT, Mumbai in the case of Rinku Polychem Ltd. ITA No. 748, 749 and 750/Mum/2013. Therefore, the issue involved in the present A.Y. being the same, it is to be treated as covered in favour of the appellant. Therefore, following my predecessors order for A.Y. 2010-11 I hereby direct the A.O to recalculate the allowability of unabsorbed depreciation subject to availability keeping in view the observation and direction given by my predecessor in above referred appellate order for A.Y. 2010-11 of Rs.1,47,23,199/- after verification of records."

5. The revenue being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. We find that the assessee respondent despite having been put to notice as regards the date of hearing of the appeal had failed to put up an appearance before us. Accordingly, being left with no other alternative, we proceed with as per Rule 25 of the Appellate Tribunal Rules, 1963, and dispose off the appeal after hearing the revenue and perusing the orders of the lower authorities. The Id. Departmental Representative (for short 'D.R') relied on the assessment order.

6. We have heard the Id D.R, perused the orders of the lower authorities and also the judicial pronouncements relied upon by them. Admittedly, the sole issue involved in the present appeal pertains to the allowability of the assessee's claim for 'set off' of unabsorbed depreciation of Rs.1,47,23,199/- pertaining to A.Y. 1998-99, A.Y. 1999-00 and A.Y. 2000-01, as under:

Assessment Year	Unabsorbed Depreciation
AY. 1998-99	Rs.2,826,714
AY 1999-00	Rs.6,494,221
AY 2000-01	Rs.5,402,264

As observed by us hereinabove, vide the Finance Act (No. 2) 1996, the carry forward & set off of unabsorbed depreciation was restricted to a period of 8 years from A.Y. 1997-98. As per the Circular No. 762, dated 18.12.1998, it was clarified that the brought forward depreciation for the earlier years would be added to the depreciation for A.Y. 1997-98 and the period of 8 years would begin from A.Y. 1997-98. However, the legislature in all its wisdom, had thereafter vide the Finance Act, 2001 amended Sec. 32(2) w.e.f A.Y. 2002-03 and restored the position as was prevailing prior to the Finance Act (No. 2) of 1996, and the period of 8 years was done away with. In order to remove any ambiguity the CBDT vide its Circular No. 14 of 2001 had clarified that the removal of the 8 year period was with a view to enable the industry to conserve sufficient funds to replace plant and machinery. The effect of the aforesaid amendment was that the unabsorbed depreciation available to an assessee on 01.04.2002 i.e w.e.f A.Y: 2002-03 was to be dealt with in accordance with Sec. 32(2), as was amended by the Finance Act, 2001 and not by Sec. 32(2) of the Act as it stood before the said amendment. In our considered view, if the legislature would had intended to allow unabsorbed depreciation allowance worked out in A.Y. 1997-98 only for 8 subsequent years even after the amendment of Sec.32(2) by the Finance Act, 2001, it would have then incorporated a provision to the said effect. However, in the absence of any such provision the recourse have to be taken to a purposive and harmonious interpretation, as per which, the unabsorbed depreciation pertaining to A.Y. 1997-98 can be carried forward for 'set off' indefinitely. Be that as it may, our aforesaid view is fortified by the judgment of the **Hon'ble High Court of Gujarat** in the case of **General Motors India (P) Ltd. Vs. DCIT (2013) 354 ITR 244 (Guj)**. In the aforesaid case, it was held by the Hon'ble High Court that unabsorbed depreciation brought forward in respect of period pertaining to A.Y. 1996-97 to A.Y. 2001-02 was allowable to be carried forward indefinitely. Also, we find that a similar view had been taken by the coordinate bench of the Tribunal i.e ITAT, Mumbai "D" bench in the case of M/s Rinku Polychem Ltd. in ITA No.748, 749 and 750/Mum/2013. Accordingly, on the basis of our aforesaid observations, we are of the

considered view that no infirmity arises from the order of the CIT(A), who in our considered view had rightly concluded that the assessee was entitled for allowability of unabsorbed depreciation pertaining to A.Y. 1998-99 to A.Y. 2000-01. On the basis of our aforesaid deliberations we uphold the order of the CIT(A).

7. Resultantly, the appeal filed by the revenue is dismissed.

Order pronounced in the open court on 28.02.2020

Sd/-  
(G. Manjunatha)  
ACCOUNTANT MEMBER

Sd/-  
(Ravish Sood)  
JUDICIAL MEMBER

Mumbai;

Dated: 28/02/2020

Rohit, 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**