

IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH : KOLKATA

[Before Hon’ble Sri N.V.Vasudevan, JM & Dr.Arjun Lal Saini, AM]

I.T.A No. 143/Kol/2014

Assessment Year : 2008-09

A.C.I.T., Central Circle-VI,
Kolkata

-vs.-

M/s. J.K.Tyre & Industries Ltd.
Kolkata

[PAN : AAACJ 6716 F]

(Appellant)

(Respondent)

For the Appellant : None
For the Respondent : Shri Akkal Dudhwewala, FCA

Date of Hearing : 09.08.2016.

Date of Pronouncement : 12.08.2016.

ORDER

Per N.V.Vasudevan, JM

This is an appeal by the Revenue against the order dated 29.11.2013 of CIT(A)-Central-I, Kolkata relating to AY 2008-09.

2. Grounds of appeal raised by the revenue read as follows :-

“1.That the Ld. CIT(A) has erred in deleting the addition of rs.5,55,76,222/- on account of carried forwarded unabsorbed depreciation without appreciating the decision of special bench of ITAT Mumbai in the case of Time Guarantee Ltd. Reported in 40 SOT 14.

2. That the department craves leave to add or modify the grounds of appeal before the hearing of the case.”

3. The Assessee is a company engaged in the business of manufacturing and sale of automobile tyres, tubes & flaps and generation and distribution of power. During the course of assessment proceedings for A.Y.2008-09 the AO on perusal of the records of the A.Y. 2007-08, observed that Unabsorbed Depreciation of Rs. 1,39,1,4,439/-, Rs. 2,18,64,403/-, Rs. 1,67,38,266/- & Rs.30,59,114/- for the A.Y. 94-95, 95-96, 96-97 & 97-98 respectively aggregating Rs.5,55,76,222/- was set off against the business income of the relevant assessment year. As per provisions of Sec.32 of I.T. Act, 1961 (as it

stood before amendment made in Finance Act 2001) Unabsorbed Depreciation prior to the A.Y. 1997-98 and 97-98 to 2000-01 cannot be carried forward beyond eight years. In other words, unabsorbed depreciation upto A.Y. 1997-98 can be carried forward upto A.Y. 2004-05 and not beyond that. According to the AO therefore the unabsorbed depreciation for the period mentioned above was wrongly set off with the business income for the A.Y. 2007-08. The AO observed that remedial measures were being taken for the A.Y. 2007-08 to withdraw the Unabsorbed Depreciation set off which was allowed u/s 143(3) in violation of provisions of sec. 32 of I.T. Act, 1961. The AO in coming to the above conclusion that depreciation for the period 1997-98 to 2000-01 cannot be carried forward for set off beyond 8 years, placed reliance on the decision of the Special Bench of ITAT Mumbai in the case of DCIT Cir-1(3) Vs. M/s. Times Guarantee Ltd. in ITA No. 4917 & 4918/Mum/2008 wherein it was held that unabsorbed depreciation prior to the period 1997-98 can be carried forward for set off against the income for a maximum of eight years starting from the A.Y. 1997-98.

4. Following the decision of the Hon'ble ITAT, Special Bench in the case of Times Guarantee, the AO held that depreciation remaining unabsorbed prior to its amendment w.e.f. 1-4-1997 of Sec. 32(2) can be carried forward 8 years and can be set off against any other head of income. In other words, unabsorbed depreciation upto the A.Y. 1996-97 can be set off with the business income or any other head of income upto the A.Y. 2004-05. Unabsorbed Depreciation for the" period from A.Y.1997-98 to 2001-02 can be carried forward for a maximum period of 8 years against the business income only. Therefore, the unabsorbed depreciation claimed by the assessee for the period A.Y. 1997-98 and earlier years cannot be allowed to be carried forward and set off against the business income as the time limit for carry forward has already expired.

5. The Assessee had contended before the AO no action was taken for the A.Y. 2007-08 on which the Unabsorbed Depreciation was allowed. On such contention, the AO held that it is to be noted that remedial action u/s 147 has already been taken for withdrawing the unabsorbed depreciation which was wrongly allowed to be set off

against the business income. In view of the decisions of the Special Bench of Mumbai Tribunal in the case of Time Warranty Ltd., the AO held that the Unabsorbed Depreciation needs to be recalculated and only the eligible Unabsorbed Depreciation is to be allowed.

6. In view of the above discussions, the Unabsorbed Depreciation of Rs. 1,39,14,439/-, Rs. 2,18,64,403/-, Rs. 1,67,38,266/- & Rs. 30,59,114/- for the A.Ys 94-95, 95-96, 96-97 & 97-98 respectively which was wrongly set off with the business income of A.Y. 2007-08 was withdrawn and consequently, excess claim of Unabsorbed Depreciation to the tune of Rs. 5,55,76,222/- was reduced from the total unabsorbed depreciation claimed against the business income in the assessment year.

7. On appeal by the assessee the assessee pointed out before CIT(A) that the Hon'ble Gujarat High Court in the case of General Motors India (P)Ltd. 210 Taxman 20 (Guj) held in favour of the assessee. It was also pointed out that the proceedings taken by the AO for A.Y.2007-08 in the case of the assessee were dropped. The CIT(A) on a consideration of the aforesaid submissions held as follows :-

“I have called for the relevant assessment record for the assessment year 2007-08 and verified the facts. I find that the contention of the assessee is factually correct. The proceedings u/s 147 pertaining to the assessment year 2007-08 thereby proposing withdrawal of set off in respect of unabsorbed depreciation aggregating to Rs.5,22,76,222/- pertaining to the assessment years 1994-95 to 1997-98 was dropped by the AO vide his order sheet entry dated 28-03-2013. I am afraid the issue as to whether the AO was justified in holding that unabsorbed depreciation related to the assessment years 1994-95 to 1997-98 aggregating to Rs.5,55,76,222/- could not allowed to be set off in the assessment year 2007-08 in view of the provisions of section 32(2) s it stood prior to the amendment by the Finance Act, 2001 and the decision of the Hon'ble Special Bench of the ITAT in the case of M/s. Times Guarantee Ltd is not before me. The issue relates to the assessment year 2007-08 and does not actually emerge from the order under appeal wherein the AO has only given the consequential effect to his findings pertaining to the assessment year 2007-08. As the AO has dropped the proceedings u/s 147 for the assessment year 2007-08 thereby proposing withdrawal of set off in respect of unabsorbed depreciation aggregating to Rs.5,22,76,222/- pertaining to the assessment years 1994-95 to 1997-98, the assessment order u/s 143(3) for the assessment year 2007-08 shall hold the field whereby the AO has allowed carry forward of unabsorbed depreciation of Rs.89,45,30,256/-; and consequently, the same is available for set off in the year under appeal.”

8. Aggrieved by the order of CIT(A) the revenue has preferred the present appeal before the Tribunal.

9. At the time of hearing there is no representation on the side of the revenue. The Id. Counsel for the assessee submitted before us that identical issue was considered and decided by this Tribunal in the case of Epcos India Pvt. Ltd. Vs. DCIT vide ITA No.2110/Kol/2013 order dated 01.06.2016 in favour of the Assessee and by following the decision of the Hon'ble Gujarat High Court in the case of General Motors (I) Pvt.Ltd.(supra). He therefore submitted that order of the CIT(A) should be upheld. None appeared on behalf of the Revenue nor was any request for adjournment made. We therefore proceed to decide the appeal after hearing the submissions of the learned AR.

10. We have considered the submissions of the Id. AR of the assessee and the material available on record. To appreciate the issue that arises for consideration in this appeal, the provisions of Sec.32(2) of the Income Tax Act, 1961 (Act) as it existed at three different point of time need to be set out. The provisions of s. 32(2) prior to the amendment made by the Finance (No. 2) Act, 1996 w.e.f. 1st April, 1997 (hereinafter called the "first period") read as under :

"(2) Where, in the assessment of the assessee, full effect cannot be given to any allowance under cl. (ii) of sub-s. (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-s. (2) of s. 72 and sub-s. (3) of s. 73, the allowance or 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."

11. A glance at this provision indicates that if there are sufficient profits or gains to adjust full depreciation allowance for the current year under s. 32(1) of the Act, then it will be adjusted accordingly. If however there are no profits or gains at all or they are insufficient to accommodate the depreciation allowance for the year in full, then subject

to the provisions of ss. 72(2) and 73(3), the amount of such unadjusted allowance, to which effect has not been given, shall be added to the amount of depreciation allowance for the following previous year and deemed to be part of depreciation allowance for that previous year and so on for eternity.

12. The provisions of s. 32(2) as substituted by the Finance (No. 2) Act, 1996 w.e.f. 1st April, 1997 (hereinafter called the "second period") read as under :

"(2) Where in the assessment of the assessee full effect cannot be given to any allowance under cl. (ii) of sub-s. (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 cl. (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 cl. (i) and cl. (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 business or profession for which the allowance was originally computed continued to be carried on by him in the previous year relevant for that assessment year :

Provided further that the time-limit of eight assessment years specified in sub-cl. (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-s. (1) of s. 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.

Explanation.—For the purposes of this clause, 'net worth' shall have the meaning assigned to it in cl. (ga) of sub-s. (1) of s. 3 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986)."

13. A bare perusal of this provision indicates that where the amount of depreciation allowance under s. 32(1) for the current year of a business cannot be absorbed fully or partly due to inadequacy of profits or gains from such business, then such allowance or part of it which remained unabsorbed, is to be referred to as "unabsorbed depreciation allowance". Such unabsorbed depreciation allowance is to be set off firstly against the income under the head "Profits and gains of business or profession" from any other business or profession carried on by the assessee for that assessment year. If such business profit is also insufficient to absorb the unabsorbed depreciation allowance, then the remaining amount shall be set off against income under other heads, as mentioned in s. 14 of the Act assessable for that assessment year. This exercise of setting off the unabsorbed depreciation allowance against any head of income is restricted to the year in which the claim for depreciation has arisen under s. 32(1). If however income of the assessee under all heads is insufficient to absorb the unabsorbed depreciation allowance, then such amount is to be carried forward to the following assessment year to be set off against the income arising under the head 'Profits and gains of business or profession'. Not only that, the business or profession for which the allowance was computed should continue to be carried on by the assessee during the previous year relevant to assessment year in which the set off is claimed. The exercise of carrying forward such unabsorbed depreciation allowance is to be continued upto eight assessment years immediately succeeding assessment year for which the aforesaid depreciation allowance was first computed. From here it follows that the amount of unabsorbed depreciation allowance which could not be set off against income under any head in the year in which the allowance was first computed, shall be eligible to be carried forward for set off only against income under the head 'Profits and gains of business or profession' to the following assessment year(s) not more than eight assessment years immediately succeeding the assessment year for which it was first computed.

14. The provisions of Sec.32(2) as substituted by the Finance Act, 2001 w.e.f. 1st April, 2002, applicable for AY 2004-05 & 2005-06) Assessment years under consideration (hereinafter called the "third period") reads as under :

"(2) Where, in the assessment of the assessee, full effect cannot be given to any allowance under sub-s. (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-s. (2) of s. 72 and sub-s. (3) of s. 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".

15. The above provision in fact, is reinforcement of the provision as existing in the first period. Thus the law as existing in the second period was completely taken back and as a result of that the provision as prevailing in the first period was restored.

16. The AO was of the view that the claim of the Assessee for carry forward of unabsorbed depreciation for 94-95 to 96-97 for set off after the period of 8 years cannot be allowed because unabsorbed depreciation for AY 94-95 and 95-96 totalling Rs.8,77,48,743 becomes current year depreciation of AY 96-97 and as per the law applicable from AY 1996-97 (Second period) unabsorbed depreciation can be carry forward and set off only upto a period of 8 years. The period of 8 years would i.e., upto 2003-04 and from AY 2004-05 these unabsorbed depreciation cannot be carry forward for set off. Similar reasoning was adopted by the AO for withdrawing carry forward of unabsorbed depreciation of Rs.3,24,68,197/- of AY 1997-98 claimed in AY 2005-06.

17. The position of unabsorbed depreciation for AY 1994-95 till 2003-04 is given as an annexure to this order for better appreciation of facts. The AO was of the view that the carry forward of unabsorbed depreciation for AY. 1994-95, AY. 1995-96 and A.Y. 1996-97 to subsequent years aggregating to Rs. 8,77,48,743/- on the ground that the same is not allowable to be carried forward to subsequent years under the provisions of the Act. Under the amended provisions the above unabsorbed depreciation were

eligible for set off up to AY. 2004-05 and cannot be carried forward to subsequent years.

18. The AO in coming to the above conclusion by placing reliance on the special bench decision of ITAT Mumbai in the case of DCIT Vs. Times Guarantee Ltd. (2010) 40 SOT 14 (SB)(Mum) wherein it was held the provisions of Sec.32(2) as substituted by the Finance Act, 2001 w.e.f. 1st April, 2002, which is reinforcement of the provision as existing in the first period i.e., prior to 1st April, 1997. Thus the law as existing in the second period w.e.f. 1st April, 1997 was completely taken back and as a result of that the provision as prevailing in the first period was restored. From the language of the sub-s. (2) of s. 32 it is manifest that it is a substantive provision and not a procedural one. It is settled legal position that the amendment to substantive provision is normally prospective unless expressly stated otherwise or it appears so by necessary implication. The special Bench summarised its conclusions thus:

“The legal position of current and brought forward unadjusted/unabsorbed depreciation allowance in the three periods, is summarized as under :

A. In the first period (i.e. upto asst. yr. 1996-97) (i) current depreciation, that is the amount of allowance for the year under s. 32(1), can be set off against income under any head within the same year. (ii) amount of such current depreciation which cannot be so set off within the same year as per (i) above shall be deemed as depreciation under s. 32(1), that is depreciation for the current year in the following year(s) to be set off against income under any head, like current depreciation.

B. In the second period (i.e. asst. yrs. 1997-98 to 2001-02). (i) brought forward unadjusted depreciation allowance for and upto asst. yr. 1996-97 (hereinafter called the ‘First unadjusted depreciation allowance’), which could not be set off upto asst. yr. 1996-97, shall be carried forward for set off against income under any head for a maximum period of eight assessment years starting from asst. yr. 1997-98. (ii) current depreciation for the year under s. 32(1) (for each year separately starting from asst. yr. 1997-98 upto 2001-02) can be set off firstly against business income and then against income under any other head. (iii) amount of current depreciation for asst. yrs. 1997-98 to 2001-02 which cannot be so set off as per (ii) above, hereinafter called the ‘Second unabsorbed depreciation allowance’ shall be carried forward for a maximum period of eight assessment years from the assessment year immediately succeeding the assessment year for which it was first computed, to be set off only against the income under the head ‘Profits and gains of business or profession’.

C. In the third period (i.e. asst. yr. 2002-03 onwards). (i) 'first unadjusted depreciation allowance' can be set off upto asst. yr. 2004- 05, that is, the remaining period out of maximum period of eight assessment years (as per B(i) above) against income under any head. (ii) 'second unabsorbed depreciation allowance' can be set off only against the income under the head 'Profits and gains of business or profession' within a period of eight assessment years succeeding the assessment year for which it was first computed. (iii) current depreciation for the year under s. 32(1), for each year separately, starting from asst. yr. 2002-03 can be set off against income under any head. Amount of depreciation allowance not so set off (hereinafter called the 'Third unadjusted depreciation allowance') shall be carried forward to the following year. (iv) the 'Third unadjusted depreciation allowance' shall be deemed as depreciation under s. 32(1), that is depreciation for the current year in the following year(s) to be set off against income under any head, like current depreciation, in perpetuity.

19. Before CIT(A) the Assessee relied on the decision of the Gujarat High Court in the case of. General Motors India Pvt. Ltd. -vs.- DCIT (Guj.) (2013) 354 ITR 244 (Guj.) wherein, the Hon'ble Gujarat High Court has held that unabsorbed depreciation from AY. 1997-98 up to AY. 2001-02 got carried forward to AY. 2002-03 and became part thereof and it came to be governed by the provisions of sec. 32(2) as amended by the Finance Act, 2001 and were available for carry forward and set off against income of subsequent years without any limit. The relevant extracts of the judgment is as under:

"We are of the considered opinion that any unabsorbed depreciation available to an assessee on 1st day of April 2002 (A. Y. 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 A. Y.1997-98 upto the A. Y. 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. "

20. It was pointed out that the above decision in the case of General Motors India Pvt. Ltd. (supra) has been followed by the Hon'ble Gujarat High Court in the case of CIT - vs.- Gujarat Themis Biosyn Ltd. (2014) 44 taxmann.com 204 (Guj.). In this case the Hon'ble High Court upheld the view taken by the ITAT wherein, following the decision of the Hon'ble Gujarat High Court in the case of General Motors Ltd. (supra), it was held that carry forward of unabsorbed depreciation concerning AY. 2001-02 and

assessment years prior thereto can be set off in subsequent years without any set time limit.

21. Reference was further made to the decision of the Hon'ble Jurisdictional Tribunal in the case of Bengal Tea & Fabrics Limited (ITA No 467/koll2012) dated 26th July, 2012 for the AY 2008-09, wherein the question arose as to whether in view of the amended provisions of section 32(2) of the Act the assessee would be entitled to set off the unabsorbed depreciation for the AYs 1997-98 and 1998-99 against the income of the AY 2008-09 (i.e. beyond assessment years 2004-05/2005-06). The Hon'ble Kolkata Tribunal after analyzing and accepting the principles of the decisions of the Hon'ble Karnataka High Court in the case of Karnataka Cooperative Milk producers Federation Ltd. -vs.- DC IT (2011) 53 DTR 81 (Kar) and Hon'ble Amritsar Tribunal in the case of ITO -vs- Suraj Solvent Vanaspati Industries Ltd. (2008) 16 DTR 492 (Amritsar) and further accepting the fact that since there is no contrary decision of the Hon'ble Calcutta High Court on the aforesaid issue has held that the Assessing officer had taken a correct view of the amended provisions of the section 32(2) of the Act to allow the assessee to carry forward the depreciation allowance for the previous year 2004-05 and 2005-06. Reliance was also placed on the decision of the Hon'ble Karnataka High Court in the case of Cooperative Milk producers Federation Ltd. (supra) held as under:

" the provision u/s 32(2) of the Act which came to be introduced limiting/extending the period from eight years for an unlimited period. Further, carrying forward of unabsorbed depreciation for every year has to be calculated individually based on audit report and to arrive at the exact amount to be carried forward.

22. The CIT(A) rightly accepted the stand taken on behalf of the Assessee and reversed the action of the AO. We are of the view that in the light of the decision of the Hon'ble Gujarat High Court in the case of General Motors India Pvt. Ltd. (supra) which has the effect of overruling the decision of the Special Bench in the case of Times Gurantee (supra) and also on the basis of other decisions referred to above, the order of the

CIT(A) does not call for any interference. Accordingly, the appeals by the revenue are dismissed.

23. For the reasons given above we uphold the order of CIT(A) and dismiss the appeal by the revenue.

24. In the result the appeal by the revenue is dismissed.

Order pronounced in the Court on 12.08.2016.

Sd/-
[Dr.Arjun Lal Saini]
Accountant Member

Sd/-
[N.V.Vasudevan]
Judicial Member

Dated : 12.08.2016.
[RG PS]

Copy of the order forwarded to:

1. M/s. J.K.Tyre & Industries Ltd., 7, Council House Street, Kolkata-700001.
- 2.A.C.I.T., Central Circle-VI, Kolkata.
3. CIT(A)-Central-I, Kolkata. 4. CIT-Central-I, Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Asstt.Registrar, ITAT, Kolkata Benches