

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ, अहमदाबाद ।

**IN THE INCOME TAX APPELLATE TRIBUNAL
"SMC" BENCH, AHMEDABAD**

BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER

आयकर अपील सं./ ITA.No.1416/Ahd/2013

निर्धारण वर्ष/ Asstt. Year: 2006-2007

M/s.Petrofils Cooperative Ltd. 201, Pearl Tower Prakruti Residency Gotri Road, Baroda 390 015. PAN : AAAAAP 043 P	Vs	ACIT, Cir.2(2) Baroda.
अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)

Assessee by :	Shri J.P. Shah, AR
Revenue by :	Shri Mukdit Nagpal, Sr.DR

सुनवाई की तारीख/Date of Hearing : 09/11/20167

घोषणा की तारीख /Date of Pronouncement: 12/01/2017

आदेश/ORDER

Assessee is in appeal before the Tribunal against order of Id.CIT(A)-II, Baroda dated 12.2.2013 passed for the Asstt.Year 2006-07.

2. Though the assessee has taken four grounds of appeal, wherein it has raised number of arguments, but in brief, grievance of the assessee is whether it is entitled to claim carry forward of unabsorbed depreciation of earlier years (i.e. prior to amendment carried out in section 32 by Finance Act, 2001) to subsequent years.

3. The Id.AO has noticed the details of unabsorbed business loss as well as unabsorbed depreciation. Such details are as under:

A.Y.	Unabsorbed business loss	Unabsorbed depreciation
1992-93	-	1367.82

1993-94	-	1321.41
1994-95	-	193.37
1995-96	1021.82	917.48
1996-97	616.65	4133.97
1997-98	4951.56	5637.53
1998-99	1543.36	2345.97
1999-00	4699.03	4377.36
2000-01	5233.51	202.86
2001-02	14885.04	181.59
2002-03	633.48	-
2003-04	162.29	-.
2004-05	145.42	-
2005-06	345.51	-
Total	34355.47	20679.36

4. According to the AO, prior to an amendment effected in section 32(2) by way of Finance Act, 2001, the assessee was entitled for carry forward of depreciation for eight subsequent assessment years. He was of the opinion that after amendment, depreciation after A.Y.1997-98 could not be claimed for carry forward. In other words, the AO was of opinion that depreciation upto A.Y.1997-98 amounting to Rs.13571.58 lakhs is not allowable to the assessee for carry forward.

5. On appeal, the Id.CIT(A) has not recorded any independent finding in this year. The Id.CIT(A) has simply relied upon his order in the Asstt.Year 2007-08 and 2008-09. The assessee has brought to notice of the Id.CIT(A), decision of the Hon'ble jurisdictional High Court in the case of General Motors India P. Ltd. Vs. DCIT reported in 354 ITR 244 (Guj). In spite of this decision being brought to notice of the Id.CIT(A), he did not take cognizance of the decision and did not adjudicate the issue on merit. To my mind it is not a correct step at the end of the Id.CIT(A). The Id.CIT(A) ought to have dealt with the decision of the Hon'ble jurisdictional High Court and if it is not applicable to the case of the assessee only then rejected the claim of the assessee. I find that this decision is squarely applicable on the facts of the present case. The discussion made by the Hon'ble jurisdictional High Court reads as under:

“30. The last question which arises for consideration is that whether the unabsorbed depreciation pertaining to A.Y. 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? The reason given by the Assessing Officer under section 147 is that Section 32(2) of the Act was amended by Finance Act No.2 of 1996 w.e.f. A.Y. 1997-98 and the unabsorbed depreciation for the A.Y. 1997-98 could be carried forward up to the maximum period of 8 years from the year in which it was first computed. According to the Assessing Officer, 8 years expired in the A.Y. 2005-06 and only till then, the assessee was eligible to claim unabsorbed depreciation of A.Y. 1997-98 for being carried forward and set off against the income for the A.Y. 2005-06. But the assessee was not entitled for unabsorbed depreciation of Rs.43,60,22,158/- for A.Y. 1997-98, which was not eligible for being carried forward and set off against the income for the A.Y. 2006-07.

31. Prior to the Finance Act No.2 of 1996 the unabsorbed depreciation for any year was allowed to be carry forward indefinitely and by a deeming fiction became allowance of the immediately succeeding year.

The Finance Act No.2 of 1996 restricted the carry forward of unabsorbed depreciation and set-off to a limit of 8 years, from the A.Y.1997-98. Circular No.762 dated 18.2.1998 issued by the Central Board of Direct Taxes (CBDT) in the form of Explanatory Notes categorically provided, that the unabsorbed depreciation allowance for any previous year to which full effect cannot be given in that previous year shall be carried forward and added to the depreciation allowance of the next year and be deemed to be part thereof.

32. So, the unabsorbed depreciation allowance of A.Y. 1996-97 would be added to the allowance of A.Y. 1997-98 and the limitation of 8 years for the carry-forward and set-off of such unabsorbed depreciation would start from A.Y. 1997-98.

33. We may now examine the provisions of section 32(2) of the Act before its amendment by Finance Act 2001. The section prior to its amendment by Finance Act, 2001, read as under:-

“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 subclause (b) shall not apply in 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 Company (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 clause (ga) of sub-section (1) of section 3 of the Sick Industrial Companies (Special Provisions) Act, 1985.”

34. The aforesaid provision was introduced by Finance (No.2) Act, 1996 and further amended by the Finance Act, 2000. The provision introduced by Finance (No.2) Act was clarified by the Finance Minister to be applicable with prospective effect. 35.

Section 32 (2) of the Act was amended by Finance Act, 2001 and the provision so amended reads 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 for that previous year, 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 allowance of that previous year, and so on for the succeeding previous years.”

36. The purpose of this amendment has been clarified by Central Board of Direct Taxes in the Circular No.14 of 2001. The relevant portion of the said Circular reads as under :-

“Modification of provisions relating to depreciation

30.1 Under the existing provisions of section 32 of the Income-tax Act, carry forward and set off of unabsorbed depreciation is allowed for 8 assessment years.

30.2 With a view to enable the industry to conserve sufficient funds to replace plant and machinery, specially in an era where obsolescence takes place so often, the Act has dispensed with the restriction of 8 years for carry forward and set off of unabsorbed depreciation. The Act has also clarified that in computing the profits and gains of business or profession for any previous year, deduction of depreciation under section 32 shall be mandatory.

30.3 Under the existing provisions, no deduction for depreciation is allowed on any motor car manufactured outside India unless it is used (i) in the business of running it on hire for tourists, or (ii) outside in the assessee’s business or profession in another country.

30.4 The Act has allowed depreciation allowance on all imported motor cars acquired on or after 1st April, 2001.

30.5 These amendments will take effect from the 1st April, 2002, and will, accordingly, apply in relation to the assessment year 2002-03 and subsequent years.”

37. The CBDT Circular clarifies the intent of the amendment that it is for enabling the industry to conserve sufficient funds to replace plant and machinery and accordingly the amendment dispenses with the restriction of 8 years for carry forward and set off of unabsorbed depreciation. The amendment is applicable from assessment year 2002-03 and subsequent years. This means 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 not by the provisions of section 32(2) as it stood before the said amendment. Had the intention of the Legislature been to allow the unabsorbed depreciation allowance worked out in A.Y. 1997-98 only for eight subsequent assessment years even after the amendment of section 32(2) by Finance Act, 2001 it would have incorporated a provision to that effect. However, it does not contain any such provision. Hence keeping in view the purpose of amendment of section 32(2) of the Act, a purposive and harmonious interpretation has to be taken. While construing taxing statutes, rule of strict interpretation has to be applied, giving fair and reasonable construction to the language of the section without leaning to the side of assessee or the revenue. But if the legislature fails to express clearly and the assessee becomes entitled for a benefit within the ambit of the section by the clear words used in the section, the benefit accruing to the assessee cannot be denied. 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 under Section 32 shall be mandatory. Therefore, the provisions of section 32(2) as amended by Finance Act, 2001 would allow the unabsorbed depreciation allowance available in the A.Y. 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 A.Y. 2002-03 then it would be carried forward till the time it is set off against the profits and gains of subsequent years.

38. Therefore, it can be said that, current depreciation is deductible in the 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 (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.

39. For the aforesaid reasons, this writ petition succeeds and is allowed. The notice issued under Section 148 of the Income-tax Act, 1961, dated 29.3.2011 Annexure A and the assessment order dated 27.12.2011 passed by the Assessing Officer Annexure F respectively to the writ petition are quashed. Rule is made absolute. The parties shall bear their own costs.”

6. Respectfully following the decision of the Hon’ble High Court, I direct the AO to allow carry forward of depreciation which has not been allowed to the assessee because unabsorbed depreciation upto 1997-98 would become depreciation of the current year and it is to be treated in accordance with law.

7. In the result, appeal of the assessee is allowed.

Order pronounced in the Court on 12th January, 2017 at Ahmedabad.

Sd/-
(RAJPAL YADAV)
JUDICIAL MEMBER