

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'D' अहमदाबाद ।
IN THE INCOME TAX APPELLATE TRIBUNAL
“D” BENCH, AHMEDABAD

BEFORE SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER
& SHRI MAHAVIR PRASAD, JUDICIAL MEMBER

आयकर अपील सं./I.T..A. Nos. 1465, 1466, 1475 &
1245/Ahd/2017

(निर्धारण वर्ष / Assessment Years : 2009-10, 2011-12, 2004-05 &
2012-13)

Erstwhile Assessing Officer Dy. Commissioner of Income-tax, Cir. – 1(2), Baroda	बनाम/ Vs.	The Liquidator M/s Petrofiles Co- operative Ltd. D-5, Petrofils Nagar, P.O. Petrochemical Township, Dist. Baroda,
Present Assessing Officer The Deputy Commissioner of Incoem Tax, Circle-1(2), 2 nd Floor, Aayakar Bhavan, Race Course Circle, Vadodara		
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAAAP0443P		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी ओर से /Appellant by :	Shri Alok Singh, CIT.DR
प्रत्यर्थी की ओर से/Respondent by:	Shri Mehul K. Patel, A.R.

सुनवाई की तारीख / Date of Hearing	25/11/2019
घोषणा की तारीख/Date of Pronouncement	27/11/2019

आदेश/ORDER

PER PRADIP KUMAR KEDIA - AM:

The captioned appeals directed at the instance of Revenue arise from the respective orders of the Commissioner of Income Tax (Appeals) ('CIT(A)') against different assessment years as tabulated below:

ITA Nos.	Name of assessee	AY	CIT(A)'s order dated	AO's order dated	AO's order under Section
1465/Ahd/2017	The Liquidator	2009-10	28.03.17	23.11.11	143(3) of the Income Tax Act (in short 'the Act')
1466/Ahd/2017	-Do-	2011-12	-Do-	25.03.14	-Do-
1475/Ahd/2017	-Do-	2004-05	28.03.17	20.11.06	-Do-
1245/Ahd/2017	-Do-	2012-13	14.02.17	11.03.15	-Do-

2. The grievances raised being common, all the cases were heard together and disposed of by the common order.

3. ITA No.1245/Ahd/2017 relevant to AY 2012-13 is taken as a lead case for the purposes of adjudication.

ITA No.1245/Ahd/2017 – AY 2012-13

4. In the captioned appeal, the Revenue has raised the following grounds of appeal for adjudication:

“1. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in directing to set-off of unabsorbed depreciation allowance carried forward from earlier years against the income from other sources as well as capital gains without appreciating the fact that the assessee during the year under consideration has not carried any business activity.

2. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in directing to set-off of unabsorbed depreciation allowance, without appreciating the fact that carrying on of a business was an essential prerequisite for allowing set off of such unabsorbed depreciation, as mentioned in the case of Rajaratna Naranbhai Mills Ltd. held by ITAT Ahmd. Bench “C” (Special Bench) [1982] 1 ITD 1044 (Ahd.) (SB), and in the case of Dharti Dredging & Infrastructure Ltd.

vs. Additional Commissioner of Income-tax, [2013] 35 taxmann.com 563 (Hyderabad-Trib.).”

5. When the matter was called for hearing, the learned DR for the Revenue pointed out that the solitary issue in the Revenue's appeal is whether the assessee is entitled to claim adjustment of brought forward of unabsorbed depreciation of earlier years without any fetters and also set off of such brought forward unabsorbed depreciation under s.32(2) of the Act against the income assessed under various heads of income other than 'business income'. The learned DR made two fold submissions; (i) the restriction of 8 years of carry forward and set off of unabsorbed depreciation should be applied for the unabsorbed depreciation in relation to period prior to amendment brought forward by Finance Act, 2001 and (ii) the assessee should not be allowed to claim set off of unabsorbed depreciation against income arising under different heads other than 'business income'. The learned DR accordingly submitted that action of the AO should be upheld.

6. The learned AR, on the other hand, pointed out that CIT(A) has rightly appreciated the law concerning the issues raised on behalf of the Revenue and no interference thereof is called for. The learned AR further pointed out that identical issue came up for adjudication before the Tribunal in AYs. 2006-07 to 2009-10 where the co-ordinate bench of ITAT has relied upon the decision of the Hon'ble Supreme Court in the case of *CIT vs. Virmani Industries Pvt. Ltd. (1995) 215 ITR 60 (SC)* and the decision of the Hon'ble Gujarat High Court in case of *General Motors India P. Ltd. vs. DCIT 354 ITR 244 (Guj)* whereby firstly the restriction of 8 years for carry forward and set off and unabsorbed depreciation has been dispensed with by the subsequent amendment and accordingly the unabsorbed depreciation arising in the assessment order prior to the amendments are also governed by the provisions of Section 32(2) of the Act as amended by the Finance Act,

2001. Similarly, in view of the decision of the co-ordinate bench in relation to AY 2006-07 in assessee's own case the assessee is entitled for claim of set off of unabsorbed depreciation under s.32(2) of the Act against 'income from other sources' for the reasonings provided by the co-ordinate bench in this regard.

7. We have considered the rival submissions. The core issue involves maintainability of set off of unabsorbed depreciation. The CIT(A) has dealt with the issue as under:

“2.2 Rejection of claim of set-Off of brought forward unabsorbed depreciation against income from capital gains.”

The assessee has earned long term and short term capital gains during the year under consideration and accordingly, it has claimed set off of brought forward unabsorbed depreciation against the capital gains income. The AO proposed to reject the claim of assessee on the ground that business activities were not being carried out during the year under consideration and hence set off of depreciation was not permissible. The assessee objected to the AO's proposition and filed a detailed reply which has been reproduced by the AO in para 6.2 of the assessment order, The assessee mainly submitted that as per the provisions of section 32(2), the brought forward depreciation is deemed to be the depreciation of year under consideration even if no profit under the head business / profession was chargeable to tax. To support the contention, the assessee has relied upon the decision of Hon'ble ITAT, Ahmedabad In the assessee's own case for A.Y. 2006-07 to 2009-10 (order dated 27.06.2014), where it has been held that existence of business is not required for set off of brought forward unabsorbed depreciation u/s 32(2) against the Income under various heads of income.

2.2.1 After considering the submission of the assessee, AO rejected the claim of set off of brought forward depreciation against the income from capital gains after recording his findings in para 6.3 to 6.8 of the assessment order, which are reproduced as under;

“6.3 The reply of the assessee has been considered, but the same is not acceptable. In the case under consideration, the assessee is a Co-operative Credit society, a joint venture of Government of India and Co-operative societies engaged in manufacturing of polyester filament yarn. The Cooperative society was making heavy losses and the Central Registrar of Cooperative societies had appointed the liquidator to wind up the assessee society vide order dated 11.4.2001. Thus, during the year under consideration, the assessee has not carried any business activity in the return of Income filed the

assesses has set off the Income from long term capital gain and short term capital gain against unabsorbed depreciation however the brought forward unabsorbed depreciation was already disallowed In early year assessment order and the same view was upheld by the CIT(A) furthermore the adjustment for unabsorbed depreciation cannot be allowed. In the return of Income filed, the assesses Ass set off the Income from long term capital gains and short term capital gains against brought forward unabsorbed depreciation. However, this cannot be allowed for the reasons stated as below:-

6.4 The Income Tax Act, 1961 has laid down the manner in which total Income of an assesses is to be computed. Chapter IV deals with the computation of Total income. Section 14 states that

"Save as otherwise provided by this Act, all income shall, for the purposes of charge of Income-tax and computation of total income, be classified under the following heads of income : —

- A.— Salaries.*
- B. — 35[***]*
- C.—Income from house property.*
- D, — Profits and gains of business or profession.*
- E.— Capital gains.*
- F. —Income from other sources."*

U/s 14, income for the purposes of charge of income tax has to be classified in 5 heads of income. Once the income is classified under any of the head of Income, the deductions shall be available to the assessee as per the Section dealing with the respective heads of income. Eg. Income from salary has to be calculated as per the provisions of Section 15 to Section 17, Income from House Property has to be calculated as per the provisions of Section 22 to Section 27, Profits and Gains of Business or Profession has to be calculated as per the provisions of Section 28 to Section 44, Capital Gains as per Section 45 to Section 55 and Income from Other Sources as per Section 56 to Section 59. Then, Chapter V deals with Income of Other person included in assessee's total Income. Chapter VI deals with set off and carry forward of losses. Section 71(2) states

"Where in respect of any assessment year, the net result of the computation under any head of Income, other than "Capital gains", is a loss and the assesses has income assessable under the head "Capital gains", such loss may, subject to the provisions of this Chapter, be set off against his Income, if any, that assessment year under any head of Income Including the head "Capital gains" (whether relating to short- term capital assets or any other capital assets)."

Thus, the basic condition for set off of business loss is that there should be computation under any head of Income. In the present case, the head of income is "Profits and gains of business or profession". Section 28 lists out the Income which

are to be considered in computing the income under the head "Profits and gains of business or profession". Section 28 lists out certain receipts relatable to the business activity. Thus, section 28 states that the receipts should be relatable to some sort of business activity. The existence of a business activity or earning of receipts from a business activity is a precondition to compute Income under the head "Profits and gains of business or profession". Section 28 necessitates the existence of a business activity/profession.

6.3 The assessee went into liquidation in the year 2001 and therefore, it can be concluded that no business activity was carried out by the assessee since 2001. Whatever receipts were received by the assessee shall be taxed under the head "Income from other Sources". The assessee too has accepted that all Its Income shall be taxed under the head "Income from Other Sources", vide letter dated Nil, submitted to this office. Since the assessee has not carried out any business activity during the year under consideration, there shall be no computation under the head "Profits and gains of business or profession",

The assessee has claimed benefit of unabsorbed depreciation u/s 32(2) of the Income Tax Act, 1961, Section 32(2) states that when there is no depreciation allowance for a particular year, the brought forward unabsorbed depreciation shall be treated as deprecation allowance for that year. Thus, Section 32(2) deems the brought forward depreciation of previous assessment year as the deprecation allowance of the current assessment year. The depreciation allowance u/s 32 shall tie given effect as per the provisions of Section 29 which prescribe the manner in which Income from business or profession shall be computed. Section 29 states that

"The Income referred to in section 28 shall be computed in accordance with the provisions contained In sections 30 to 34[43D]."

Section 29 is with reference to income referred in Section 28. Since, during the year under consideration, the assessee has not earned any income referred to in Section 28 and no business activity existed for the year under consideration, the provisions of section 29 cannot be applied In this case. Thus, there shall be no computation of Income under the head "Profits and gains of Business or Profession ". Accordingly, the deductions available as per provisions u/s 38 to 43D are not applicable In the case of the assessee and when, there Is no computation of Income under the head Business as Profession, then question of merger of brought forward deprecation with current year deprecation or treating the brought forward unabsorbed deprecation as current year depreciation doesn't arise. The depreciation, whether unabsorbed or current could only come into picture when the Income under the head "Profits and gains of business or profession" is computed. Therefore, even if the unabsorbed deprecation by virtue of fiction enacted In Section 32(2)

is treated as deprecation for the current year, there must be Income under the head "Profits and gains of business or profession" or existence of some business activity, so that the allowance for depreciation could operate. The fiction enacted in Section 32(2) only treats unabsorbed deprecation on par with current deprecation and subject to the carry forward of losses, which has precedence by operation of Section 72, the said unabsorbed depreciation assumes the character and colour of current depreciation. Section 32(2) through which the assessee claimed set off of the unabsorbed depreciation is part of Chapter IV-D of the Act which is connected with the Computation of Business Income.

In the absence of any computation under the head "Profits and gains of Business or Profession", the provisions of Section 32 (2) and consequently, the provisions of section 71(2) shall not be applicable and thus, the claim of the assessee to set -off Income from capital gains against unabsorbed deprecation of the period prior to 2001 is rejected.

6.6 Further, reliance is placed on the case laws stated below:-

- 1) [1998] 229 JTK \$48 (K&K.) HIGH COURT OF KERALA Malabar Agricultural Co. Ltd. v. Commissioner of Income tax

Whether where assessee who was engaged in business of growing tea for manufacture and sale, had actually sold part of tea garden along with whole of factory and was not engaged in any manufacturing or processing during relevant previous year, assessee was not entitled to set off unabsorbed depreciation of earlier years against Income of current year - Held, yes

- 2) Income-Tax Officer vs Rajaratna Naranbhai Mills Ltd. [1982] 1 ITD 1044 (Ahd) (SB):-

Whether benefit of set off of carry forward deprecation allowance is admissible if assessee had not carried on any business or had no notional Income assessable under section 41 during relevant accounting year— Held, No

The concluding paragraph of the judgment i.e. Para No. 15 is as follows:-

"To sum up, we recapitulate the question which is referred to us as follows:

"Whether the assessee is entitled to set off of unabsorbed depreciation of the earlier year and brought forward against the income from other sources?" Our decision is that the assessee is not entitled to such a set off because the business in respect of which the depreciation is claimed had ceased to exist and the assessee is not

having any Income from business at all either actual or notional. The assessee will be entitled to carry forward unabsorbed depreciation if, firstly, there is Income from same business, secondly, if there is income from some business and, lastly, if there is income from business which is said to have been notionally carried on by virtue of fiction enacted In section 41. If, however, there is no such Income and the source of income from business or profession is extinct, then the unabsorbed depreciation cannot be allowed to be carried forward and, consequently, could not be set off against income from any other sources. 16. In the result, the appeals are allowed."

6.7 Another Important fact in this case is that the carry forward of unabsorbed depreciation has been disallowed in Para 25 of assessment order for AY 2004-05 dated 20/11/2006, against which the assessee has not preferred any appeal tilt date. This means that the assessee has accepted the decision on this issue and the issue has attained finality. The Assessment order for A.Y. 2004-05 is final and in that assessment order, carry forward of unabsorbed depreciation was expressly denied. Since the assessment of earlier year i.e. A.Y. 2004-05 is finalized without allowing carry forward of unabsorbed depreciation and the assessee is not in appeal, there exists no unabsorbed depreciation to be brought forward and the question of setting off such bought forward depreciation against current year's income doesn't arise.

Similarly, for A.Y. 2007-08, A.Y. 2008-09, A.Y. 2009-10, A.Y. 2010-11 & A.Y. 2011-12 the carry forward of unabsorbed depreciation has been disallowed in the assessment order. For all these years, the assessee went Into appeal against the assessment order and the Hon'ble CTT (Appeals) dismissed this ground of appeals for A.Y. 2007-08, A.Y. 2008-09, A.Y, 2008- 10, A.Y.2010-11 & A.Y. 2011-12, This proves that the assesses was not allowed to carry forward unabsorbed depreciation of earlier years and therefore, the question of adjusting the same with current year's income doesn't arise.

6.8 Based on the above discussion, the claim of the assessee to set off brought forward unabsorbed depredation against capital gains Income is rejected."

We find that the order of the CIT(A) is inconsonance with the decision of the Hon'ble Supreme Court in the case of *CIT vs. Virmani Industries Pvt. Ltd. (1995) 215 ITR 60 (SC)* and the decision of the Hon'ble Gujarat High Court in case of *General Motors India P. Ltd. vs. DCIT 354 ITR 244 (Guj)*. The Hon'ble Gujarat High Court in *CIT vs. Gujarat Themis Biosyn Ltd. Tax Appeal No. 3 of 2014* has also expressed the view that claim of the assessee for carry forward of

unabsorbed depreciation was to be allowed to be carried forward to the succeeding assessment years without any fetters of limitation of 8 years placed as per erstwhile provisions of Section 32(2) of the Act. The CIT(A) in our view has rightly reversed the action of the AO and directed him to allow the set off of unabsorbed depreciation allowance carried forward from earlier years against 'income from other sources' after necessary verifications of quantum of brought forward unabsorbed depreciation. We see no error in the order of the CIT(A). We thus decline to interfere.

8. In the result, all the four captioned appeals filed by the Revenue are dismissed.

This Order pronounced in Open Court on 27/11/2019

Sd/-
(MAHAVIR PRASAD)
JUDICIAL MEMBER
Ahmedabad: Dated 27/11/2019

Sd/-
(PRADIP KUMAR KEDIA)
ACCOUNTANT MEMBER

True Copy

S. K. SINHA

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

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2. आवेदक / Assessee
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद /
DR, ITAT, Ahmedabad
6. गार्ड फाइल / Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण, अहमदाबाद ।