IN THE INCOME TAX APPELLATE TRIBUNAL AT AHMEDABAD, "C" BENCH
(BEFORE S/SHRI G.D. AGARWAL, VICE-PRESIDENT AND D.K. TYAGI, JUDICIAL MEMBER)

ITA No.825/Ahd/2009
With
CO. No.89/Ahd/2009
[Asstt. Year : 1999-2000]

ACIT, Mehsana Circle Mehsana.	Vs.	Mehsana District Co-op. Milk Producers Union ltd. Post Box No.1. Mehsana 384 002. **PAN : AAAAM 0329 F**

ITA No.837/Ahd/2009
[Asstt. Year : 1999-2000]

Mehsana District Co-op. Milk Producers Union Ltd. Post Box No.1. Mehsana 384 002. **PAN : AAAAM 0329 F**	Vs.	ACIT, Mehsana Circle Mehsana.
(Appellant)		(Respondent)

Revenue by : Shri R. R. Pathak
Assessee by : Shri Sanjay R. Shah

O R D E R

PER G.D. AGARWAL, VICE-PRESIDENT : These are cross-appeals by the Revenue and the assessee against the orders of the Commissioner of Income Tax(Appeals), Gandhinagar arising out of the order of the Assessing Officer passed under Section 154 of the Income Tax Act, 1961. For the sake of convenience, we dispose of the appeals and CO by this common order.

2. The grounds raised in these appeals read as under:

ITA No.825/Ahd/2009

"1. The ld.CIT(A) has erred in law and on facts of the case in directing the AO to allow th4 claim of carry forward unabsorbed depreciation loss relying upon the provision of explanation 5 to section 32 of the Act. However, the provision of explanation 5 to section 32 is introduced w.e.f. 01.04.2002 whereas the AY involved is 1999-2000."

ITA No.836/Ahd/2009

Your appellant being dissatisfied with the order passed u/s 154 dated 11-12-2008 of the Income 1 ax Act by the commission of Income Tax (Appeals) — Gandhinagar, Ahmedabad presents this appeal against the same on the following amongst other grounds which are without prejudice to each other.

1. The order passed by learned CIT(A) upholding the view of learned AO is bad in law and requires to be quashed

1.1 The learned CIT(A) has erred in upholding the order of learned AO for not allowing claim of carry forward business of loss computed in order u/s 154 dated 10/4/2008 rectifying order giving effect to ITAT's order for the set-off in subsequent years. In the facts and circumstances of the case it is submitted that the business loss of Ks. 30,55,273 which arose after giving effect to ITAT's order ought to have been carried forward for set off in subsequent years. It is submitted that it be so held now.

2. The learned CIT(A) has erred in not allowing carry forward of loss on the ground that return is filed in response to notice u/s. 148 and not u/s. 139(3) or u/s. 139(1) and assessment framed u/s. 147 r.w.s. 143(3) cannot be worse than the original assessment for department where the income offered and accepted was Nil. It is submitted that loss has arisen due to consequential effect of the earlier year's ITAT's orders and not due to the fresh claim of the appellant for the year tinder consideration made in return filed u/s. 148. It is further submitted that consequential effect of the order of CIT(A) and ITAT stands on a different footing, as compared to fresh claim made by assessee in reassessment proceedings and hence have to be given its logical effect as is envisaged in the Act and accordingly business loss arising clue to appeal effect have to

be allowed to be carried forward for future set off.

3.1 The learned CIT(A) failed to appreciate that the return was filed u/s 139(1) of the Act declaring Nil total income. There was a 'nil' income due to claim of deductions under chapter VI-A. If due to adjustments made to the returned income because of appellate order in earlier assessment years or for the year tinder consideration a position of loss arises, it is very much in respect of return filed u/s 139(l) r.w.s 139(3) of the act and, consequently the provisions of section 80 are also not applicable in appellant's case. It is submitted that it be so held now.

3.2 The learned CIT (A) failed to appreciate loss was determined pursuance to order giving effect to appellate order and not due to reassessment u/s. 147 of I. T. Act. It is submitted that in the facts and circumstances such loss ought to have been allowed to be earned forward."

3. The facts of the case are that the assessee is a co-operative society deriving income from processing of milk, milk products and manufacturing of cattle feed. The assessment year under consideration is A.Y.1999-2000 for which the assessee furnished the return of income on 27-12-1999 declaring total income at NIL. The return was processed under Section 143(1) of the Act on 15-12-2000 at the returned income. Thereafter, notice under Section 148 was issued on 29-3-2006. In response to which, the assessee furnished the return of income on 25-4-2006 declaring income at NIL. The assessment was completed under Section 143(3) r.w.s. 147 at the total income of Rs.48,19,80,910/-. The assessee filed appeal before the CIT(A) and the ITAT and finally after appellate proceedings, the income of the assessee was determined at loss Rs.5,41,00,842/-. The assessee vide application under Section 154 dated 27-5-2008 requested that the loss determined by the AO should be directed to be carried forward to the subsequent year. The AO vide his order under Section 154 dated 10-7-2008 held that the loss can be carried

forward only if the same is determined in pursuance to the returned filed under section 139(3). In this case as per return of income, the income declared was NIL and the loss was determined only on giving appeal effect which could not be carried forward. The assessee filed appeal before the CIT(A) who vide his order dated 11-12-2008 agreed with the AO that the loss cannot be carried forward because the conditions section 139(3) are not fulfilled. He further stated that in this case, the assessment was reopened by issue of notice under Section 148. As per the decision of the Hon'ble Apex Court in the case of CIT Vs. Sun Engineering Works Pvt. Ltd., 198 ITR 297 section 147 is for the benefit of the Revenue and assessee cannot be allowed to use this section for the relief not claimed by the him in the original assessment. He therefore stated that because of the assessment under Section 147, the department's position cannot be worse than the original assessment wherein the income offered by the assessee and accepted under Section 143(1) was NIL. He however noticed that out of total loss of Rs.5,41,00,842/-, the sum of Rs.5,10,45,563/- pertained to unabsorbed depreciation. He further stated that the concept of business loss is different than the unabsorbed depreciation. The carry forward of unabsorbed depreciation is not depended upon the section in which the return is filed or the manner in which the loss is determined. He also referred to *Explanation 5* to section 32 and held that the AO is duty bound to calculate the depreciation which the assessee is entitled to. He therefore directed the AO to carry forward unabsorbed depreciation to the extent of Rs.5,10,45,563/-.

4. The Revenue is aggrieved with the direction of the CIT(A) to allow carry forward unabsorbed depreciation while the assessee aggrieved with

the disallowance of unabsorbed business loss is in appeal before us. The assessee is also in cross-objection supporting the order of the CIT(A).

5. Since all the issues arising in the Revenue's appeal as well as assessee's appeal/CO are inter-related they are being considered together for the sake of convenience.

6. At the time of hearing before us, it is stated by the learned DR that as per the return of income furnished by the assessee, the income declared was NIL. As per the section 80 of the IT Act loss can be allowed to be carried forward only when it has been determined in pursuance to a return filed under Section 139(3). As per Section 139(3), the assessee has to furnish the return of loss in a prescribed form and verify in the prescribed manner before the due date for furnishing the return of income. Since the assessee has not furnished any return of loss, the question of allowing the carry forward of the loss cannot arise. He also stated that the return of income, declaring NIL income was accepted under Section 143(1) and thereafter the notice under Section 148 was issued. As per the decision of the Hon'ble Apex Court in the case of Sun Engineering (supra), section 147 is for the benefit of the Revenue the assessee cannot claim any benefit because of initiation of proceedings under Section 148. He further stated that while directing the AO to allow claim of depreciation, the CIT(A) has referred to *Explanation-5* to Section 32. That the *Explanation-5* to Section 32 was introduced by the Finance Act, 2001 w.e.f. 1-4-2002. The assessment year under consideration is A.Y.1999-2000 and therefore the *Explanation-5* to section 32 would not be applicable. He, therefore, submitted that the order of the CIT(A) should be reversed and that of the AO may be restored.

7. The learned counsel for the assessee, on the other hand, stated that the assessee furnished return of income on 27-12-1999 while the due date for filing of the return for A.Y.1999-2000 was 31-12-1999. Thus, the return was duly furnished before the due date prescribed under Section 139(1). The primary condition of section 139(3) is only that the return of income should be furnished under Section 139(1) which is duly complied by the assessee. That the appellate proceedings are the continuation of the assessment proceedings and therefore when after the end of the appellate proceedings, loss is determined by the AO, the same should be carried forward and set off in the subsequent year. He also pointed out that the loss is determined in the year under consideration only because of certain additions to the closing stock made by the Revenue in the earlier yeas for which the set off is given in the year under consideration by way of increase in the value of the opening stock. On the facts of the assessee's case, the decision of the Hon'ble Apex Court in the case of Sun Engineering (supra) would not be applicable. He therefore submitted that the carry forward of unabsorbed business loss should be allowed and the same should be directed to be set off in the subsequent years.

8. With regard to the carry forward unabsorbed depreciation, he has stated that as per section 32(2) unabsorbed depreciation of one year automatically becomes the depreciation of subsequent year. No condition is laid down in the Act for applicability of section 32(2). He therefore submitted that the assessee is entitled to carry forward of unabsorbed depreciation as per section 32(2) of the I.T.Act and reference to *Explanation-5* to Section 32 is not necessary. He fairly submitted that the CO is only in support of the order of the CIT(A).

9. We have carefully considered the arguments of both the sides and perused the material placed before us. In the Revenue's appeal, the only issue is with regard to carry forward of unabsorbed depreciation. The sub-section (2) of Section 32 reads as under:

> *"(2) 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."*

From the above it is evident that for carry forward of unabsorbed depreciation, the only condition is that full effect cannot be given to depreciation allowable under Section 32(1) on account of there being insufficient profit. No other condition is required to be fulfilled by the assessee for carry forward of unabsorbed depreciation. Once the depreciation allowable under Section 32(1) cannot be allowed or partly allowed, the unabsorbed portion of such depreciation automatically becomes the depreciation of the subsequent year. This is subject to the provisions of sections 72(2) and 73(3). Section 72(2) and 73(3) read as under:

> *72(2) Where any allowance or part thereof is, under sub-section (2) of section 32 or sub-section (4) of section 35, to be carried forward, effect shall first be given to the provisions of this section."*

> *73(3) In respect of allowance on account of depreciation or capital expenditure on scientific research, the provisions of sub-section (2) of section 72 shall apply in relation to speculation business as they apply in relation to any other business."*

From the above two sub-sections, it is evident that these sub-sections only provide the priorities which is to be given while setting of the unabsorbed deprecation vis-à-vis business loss. Thus, both these sub-sections have no relevance for the right of the assessee to get carry forward of unabsorbed depreciation. Carry forward of unabsorbed depreciation, as per section 32(2) is automatic and the assessee is not required to fulfill any condition so as to be entitled to get such carry forward. Admittedly in this year, after giving effect to the order of appellate authorities full effect could not be given to the depreciation permissible under Section 32(1), because of no profit or gains. Therefore, unabsorbed depreciation of this year is to be carried forward and added to the depreciation of the following year. In view of the above, we do not find any infirmity in the order of the CIT(A) wherein he directed the AO to carry forward unabsorbed depreciation . Therefore, the ground raised in the Revenue's appeal is rejected.

10. Now, we come to the carry forward of business loss. Section 72 of the Income Tax Act entitles the assessee for carry forward of set off of the business loss, which reads as under:

> *"72. Carry forward and set off of business losses.--(1) Where for any assessment year, the net result of the computation under the head "Profits and gains of business or profession" is a loss to the assessee, not being a loss sustained in a speculation business, and such loss cannot be or is not wholly set off against income under any head of income in accordance with the provisions of section 71, so much of the loss as has not been so set off or, where he has no income under any other head, the whole loss shall, subject to*

the other provisions of this Chapter, be carried forward to the following assessment year, and--

(i) 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: and

(ii) if the loss cannot be wholly so set off, the amount of loss not so set off shall be carried forward to the following assessment year and so on:

Provided that where the whole or any part of such loss is sustained in any such business as is referred to in section 33B which is discontinued in the circumstances specified in that section, and, thereafter, at any time before the expiry of the period of three years referred to in that section, such business is re-established, reconstructed or revived by the assessee, so much of the loss as is attributable to such business shall be carried forward to the assessment year relevant to the previous year in which the business is so re-established, reconstructed or revived, and--

(a) it shall be set off against the profits and gains, if any, of that business or any other business carried on by him and assessable for that assessment year ; and

(b) if the loss cannot be wholly so set off, the amount of loss not so set off shall, in case the business so re-established, reconstructed or revived continues to be carried on by the assessee, be carried forward to the following assessment year and so on for seven assessment years immediately succeeding.

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

(3) No loss (other than the loss referred to in the proviso to sub-section (1) of this section) shall be carried forward under this section for more than eight assessment years immediately succeeding the assessment year for which the loss was first computed."

From the above, it is evident that where for any assessment year, net result of computation under the head "profits and gains of business or profession" is a loss and such loss could not be set off against the income under any other head, the assessee is entitled for the carry forward of such loss to the subsequent years. As per sub-section (3), the loss cannot be carried forward for more than 8 years. Thus, as per section 72, the assessee is not required to fulfill any conditions so as to eligible for carry forward of loss. The only requirement is that the result of computation under the head "Income from Business or Profession" should be loss. However, in this case, the Revenue has relied upon section 139(3) for denying the benefit of carry forward of loss. Section 139 is with regard to the filing of the return by various assessees. Section 139(1) provides the due date for filing of the return by the different assessees. Section 139(2) which empowered the AO to issue notice to the assessee for filing of the return of income is omitted by the Direct Tax Law (Amendment) Act, 1997 w.e.f. 1-4-1987. The sub-section (3), which is relied upon by the Revenue reads as under:

> *"139....*
>
> *(3) If any person who has sustained a loss in any previous year under the head "Profits and gains of business or profession" or under the head "Capital gains" and claims that the loss or any part thereof should be carried forward under sub-section (1) of section 72 or sub-section (2) of section 73 or sub-section (1) or sub-section (3) of section 74 or sub-section (3) of section 74A, he may furnish, within the time allowed under sub-section (1) a return of loss in the prescribed form and verified in the prescribed manner and containing such other particulars as may be prescribed, and all the provisions of this Act shall apply as if it were a return under sub-section (1)."*

From the above, it is evident that the sub-section would be applicable in the case of a person who has sustained a loss in any previous year under

the head "Profits and Gains of business or profession" or "Capital Gain" and has claimed such loss to be carried forward. In such circumstances, he has to furnish the return of income within the time allowed under Section 139(1) of the Act. The case of the Revenue is that since the assessee has furnished the "NIL" return, because of the section 139(3), the assessee will not be entitled to carry forward of the business loss. We are unable to agree with this contention of the Revenue. Section 139(3) would have application only where the assessee files the return disclosing the loss either under the head "profit and gains of business or profession" or under the head "capital gains". For any assessee, who does not claim loss in the return of income, section 139(3) would not be applicable. However, where the assessee files the return disclosing the loss, then he is required to file the return as per section 139(1). In this case, first of all the assessee has not disclosed any loss in the return of income, therefore, the section 139(3) would not be applicable, and even otherwise, the only condition under Section 139(3) is for filing of the return before the due date as prescribed under Section 139(1). Admittedly, in this case, the assessee has filed return of income before the due date for filing of the return, therefore u/s.139(3), the Revenue cannot deny the benefit of carry forward of the business loss to the assessee. We have already dealt with section 72 and held that it does not provide any pre-condition for carry forward of business loss. Section 139(3) would be applicable only when the assessee claims the loss in the return of income. In the case under appeal before us, the assessee furnished the return declaring NIL income. The case was reopened under Section 148 and thereafter, the assessment was completed at the huge income of Rs.48.19 crores. The income resulted into a loss only after giving the effect to the order of the appellate authorities. Now, the question would be when the

loss is finally determined after giving effect to the order of the appellate authorities, can carry forward of the loss be denied because of section 139(3). In our opinion, section 139(3) would have no application, where the loss is determined while giving effect to the orders of the appellate authorities. Section 139(3) would be applicable only where the assessee himself furnished the return disclosing the loss.

The learned CIT(A) while denying the carry forward of unabsorbed loss has relied upon the decision of the Hon'ble Apex Court in the case of CIT Vs. Sun Engineering Works P. Ltd., 198 ITR 297 (SC). He observed that in this case, the assessment was reopened under Section 147 and proceedings under Section 147 were for the benefit of the Revenue. The assessee cannot take advantage because the assessment was reopened under Section 148. In the case of Sun Engineering Works (supra), the Hon'ble Apex Court held at page no.320 and 321 of 198 ITR as under:

> *"As a result of the aforesaid discussion, we find that, in proceedings under section 147 of the Act, the Income-tax Officer may bring to charge items of income which had escaped assessment other than or in addition to that item or items which have led to the issuance of the notice under section 148 and where reassessment is made under section 147 in respect of income which has escaped tax, the Income-tax Officer's jurisdiction is confined to only such income which has escaped tax or has been underassessed and does not extend to revising, reopening or reconsidering the whole assessment or permitting the assessee to reagitate questions which had been decided in the original assessment proceedings. It is only the underassessment which is set aside and not the entire assessment when reassessment proceedings are initiated. The Income-tax Officer cannot make an order of reassessment inconsistent with the original order of assessment in respect of matters which are not the subject matter of proceedings under section 147. An assessee cannot resist validly initiated reassessment proceedings under this section merely by*

showing that other income which had been assessed originally was at too high a figure except in cases under section 152(2). The words "such income" in section 147 clearly refer to the income which is chargeable to tax but has " escaped assessment " and the Income-tax Officer's jurisdiction under the section is confined only to such income which has escaped assessment. It does not extend to reconsidering generally the concluded earlier assessment. Claims which have been disallowed in the original assessment proceeding cannot be permitted to be reagitated on the assessment being reopened for bringing to tax certain income which had escaped assessment because the controversy on reassessment is confined to matters which are relevant only in respect of the income which had not been brought to tax during the course of the original assessment. A matter not agitated in the concluded original assessment proceedings also cannot be permitted to be agitated in the reassessment proceedings unless relatable to the item sought to be taxed as " escaped income ". Indeed, in the reassessment proceedings for bringing to tax items which had escaped assessment, it would be open to an assessee to put forward claims for deduction of any expenditure in respect of that income or the non-taxability of the items at all. Keeping in view the object and purpose of the proceedings under section 147 of the Act which are for the benefit of the Revenue and not an assessee, an assessee cannot be permitted to convert the reassessment proceedings as his appeal or revision, in disguise, and seek relief in respect of items earlier rejected or claim relief in respect of items not claimed in the original assessment proceedings, unless relatable to escaped income ", and reagitate the concluded matters. Even in cases where the claims of the assessee during the course of reassessment proceedings relating to the escaped assessment are accepted, still the allowance of such claims has to be limited to the extent to which they reduce the income to that originally assessed. The income for purposes of " reassessment " cannot be reduced beyond the income originally assessed."

From the above, it is evident that in the above case, the Hon'ble Apex Court was concerned with regard to jurisdiction of the AO during the reassessment and whether in the reassessment, the assessee has right to re-agitate the question which had been decided in the original assessment

proceedings. The Hon'ble Apex Court held that when the assessment is reopened, it is only the underassessment, which is set aside and not the entire assessment. The AO cannot make an order of re-assessment unconcerned with the original order of the assessment in respect of the matters, which are not subject of proceedings under Section 147. However, before us, the issue is different. The assessee has not claimed re-adjudication of any question which had been decided in the original assessment proceedings. In fact, the assessment proceedings as well as appellate proceeding are already completed. The AO himself has given the effect to the appellate orders and determined the loss at Rs.5,41,00,842/-. The above loss is consisted of two components – one is unabsorbed depreciation amounting to Rs.5,10,45,563/- and other is business loss of Rs.30,55,273/-. As against the NIL return income, how the loss is determined after the order of the appellate authorities, we are not aware, though the assessee explained that it was because of the set off of addition in the closing stock made in the earlier years, which was given by way of increase in the opening stock. Be that as it may, it is undisputed that as against the NIL income declared by the assessee in the return, after the order of the appellate authorities, the final outcome of computation under the head "Income from the Business" is loss of Rs.5,41,00,842/-. Therefore, the issue of determination of income or loss is not before us. In our opinion, the decision of the Hon'ble Apex Court in the case of Sun Engineering Works P. Ltd., (supra) could have relevance during the assessment/appellate proceedings. But once the order of the appellate authorities in quantum appeal have become final and the effect have been given thereto and loss is determined thereby, the same has to be carried forward to the subsequent years as per the provisions of the IT Act. The Revenue cannot invoke decision of

Hon'ble Apex Court in Sun Engineering Works Ltd.,(supra) to deny carry forward of loss finally determined, which loss is to be carried forward as per the Section 72 and the only condition for carry forward of loss is the determination of the loss under the head "Profit and Gains of business or profession" or under the head "Capital Gain". Admittedly, the loss is determined under the head "Profit and Gains of Business" and therefore, the same is to be allowed to be carried forward as per section 72. In view of the above, we direct the AO to allow carried forward of business loss as per Section 72 of the Act.

11. The CO is only in support of the CIT(A)'s order, the same is infructous .

12. In result Revenue's appeal and assessee's CO are dismissed. The assessee's appeal is allowed.

Order pronounced in Open Court on 30th June, 2011

Sd/-	Sd/-
(D.K. TYAGI)	(G.D. AGARWAL)
JUDICIAL MEMBER	VICE-PRESIDENT

Place : Ahmedabad
Date : 30-07-2011
Copy of the order forwarded to:

1) : Appellant
2) : Respondent
3) : CIT(A)
4) : CIT concerned
5) : DR, ITAT.

BY ORDER

DR/AR, ITAT, AHMEDABAD