

**In the High Court of Judicature at Madras**

**Dated: 15.10.2012**

**Coram**

The Honourable Mrs.JUSTICE CHITRA VENKATARAMAN

The Honourable Mr.JUSTICE K.RAVICHANDRABAABU

**Tax Case (Appeal) No.2490 of 2006**

Commissioner of Income Tax

Chennai

... Appellant

Vs.

M/s. SPEL Semi Conductor Limited

Chennai

... Respondent

Tax Case (Appeal) against the order of the Income Tax Appellate Tribunal, Madras 'B' Bench, dated 21.4.2006 in ITA. No. 1378/ Mds/ 05 for assessment year 1998-99.

For Appellant : Mr. N.V.Balaji

For Respondent : Mr.R.Venkatanarayanan

### JUDGMENT

(Judgment of the Court was delivered by  
CHITRA VENKATARAMAN,J. )

The Revenue is on appeal as against the order of the Income Tax Appellate Tribunal relating to assessment year 1998-99. The above Tax Case (Appeal) was admitted on the following questions of law:-

"1. Whether on the facts and circumstances of the case, the Tribunal was right in directing the Assessing Officer to recompute the income after allowing set off of unabsorbed depreciation from income from other sources, especially, when carry forward losses remained?

2. Whether the provisions of Section 32(2) can be given effect to, ignoring the provisions of Section 72(2) of the Income Tax Act?"

2. The assessee is engaged in the business of manufacture of semi conductors. Admittedly the assessee has claimed set off of unabsorbed depreciation from the assessment years 1990-91 to 1997-98 for more than Rs.13 crores and unabsorbed loss for Rs.18 crores relating to assessment year 1995-96 to 1997-98. While recomputing the income for the assessment year 1998-99, the Assessing Officer adjusted the loss brought forward from 1995-96 and 1996-97 to Rs. 1,36,60,836/- and Rs.11,24,919/- respectively on the business income of Rs.1,47,85,755/- and arrived at the business income as 'Nil'. It is a matter of record that after adjusting carried forward loss, there was still more amount available by way of carried forward loss. It is also seen from the assessment order that the assessee had income from other sources to the tune of Rs.10,03,533/-. The assessee sought for adjustment of carried forward of unabsorbed depreciation in the income from other

sources. The claim of the assessee was negated by the Officer. Aggrieved by the same, the assessee went on appeal before the Commissioner of Income Tax (Appeals), who rejected the assessee's case by holding that the assessee could not have set off any depreciation before exhausting the set off of losses upto eight assessment years. In other words, the assessee should have exhausted first the unabsorbed carried forward loss for earlier years before claiming any set off on unabsorbed depreciation. Thus, holding, the Commissioner of Income Tax (Appeals) dismissed the appeal. Aggrieved by the same, the assessee went on further appeal before the Tribunal. On consideration of Section 32(2) of the Income Tax Act and Section 72(2) of the Income Tax Act, the Tribunal held that the assessee was entitled to set off unabsorbed depreciation as against the income from other sources. Aggrieved by the same, the Revenue is on appeal before this Court.

3. Section 32(2) of the Income Tax Act, which is relevant for the case on hand, reads as follows:-

32(2) 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:

4. Section 72(2) of the Act, which is relevant for the case on hand reads as under:-

72(1) .....

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.

5. A combined reading of the above said sections shows that while carried forward of loss could be adjusted as against the profits and gains of business or profession of the year, the set off of unabsorbed depreciation allowance as per Section 32(2) could be given effect to only after giving relief on the carried forward loss. Given the fact that the carried forward of business loss could be adjusted only as against the business income, if there is no other income available, then as per

Section 72(2) of the Act, unabsorbed depreciation has to wait for further years subject to the limitation of eight years for absorbing the same in the business income of the assessee. However, in a case of assessee as one before us, when the assessee has income both from business as well as from other sources, that after having set off of the business loss as against the current year income from business, there existed no further business income, the carried forward business loss remaining still unabsorbed could only be carried forward for the next year. However, given the fact that the assessee has income under the other heads, Section 32(2) provides the relief.

6. Thus, as far as the income from other sources are concerned, given the fact that under Section 32(2) of the Act, there is a provision of set off of unabsorbed depreciation allowance as against the income from other sources, it is not necessary that one should wait for the assessee to earn income from business so as to exhaust the carried forward loss to be set off as against the business income and then apply the unabsorbed depreciation. A reading of Section 32(2) thus makes it clear that if the unabsorbed depreciation allowance could not be wholly set off under clause (i) and clause (ii), the amount of depreciation not so set off can be set off from income from other head, if any, available for that assessment year. The language of Section 32(2) is very clear and there is hardly anything contained in Section 72(2) to prevent such set off of carried forward depreciation being given to the assessee under the head of income from business or income from other sources. The Revenue does not deny the fact that as far as the income from other sources are concerned, there could be no set off of business loss or carried forward loss. However, what is contended by the Revenue is that Section 72(2) controls the operation of Section 32(2) to have the set off of unabsorbed depreciation against the income from other sources. We do not agree with this line of reasoning. What is spoken to under Section 72(2) is as regards set off of business loss as against the income from profits and gains of business or profession and if there is loss as well as unabsorbed depreciation, the set off shall be first on the business loss as against the business income and then on unabsorbed depreciation. What is spoken to under Section 32(2) is as regards set off of unabsorbed depreciation as per clause (ii) of sub section (1) and when the unabsorbed

depreciation could not be set off as against the income from business or profession by reason of there being no income available under the said heads and where there is income from other sources, effect must be given to Section 32(2) of the Act for that assessment year.

7. In the light of the clear provisions, we have no hesitation in rejecting the Revenue's plea, there by confirming the order of Tribunal. The above Tax Case (Appeal) is dismissed. No costs.

To

1. Commissioner of Income Tax, Chennai

2. The Income Tax Appellate Tribunal,  
Madras 'B' Bench.

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