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IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI E BENCH, NEW DELHI

[Coram: Pramod Kumar AM and A. T. Varkey JM]

I.T.A. No.: 2974/Del/13
Assessment year: 2009-10

Minda Sai Limited ***……………….Appellant***
C/o R N Saraf & Co
2659/2, Gurudwara Road, Karol Bagh
New Delhi 110005 [PAN:AAAFT4536E]

Vs.

Income Tax Officer
Ward 10(2)(2), Mumbai ***……………..Respondent***

Appearances by:

Ashwani Taneja, *for the appellant*
J P Chandrakar, *for the respondent*

O R D E R

Per Pramod Kumar, AM:

1. By way of this appeal, the assessee appellant has challenged correctness of learned CIT(A)'s order dated 5th January 2012 in the matter of assessment under section 143(3) of the Income Tax Act, 1961, for the assessment year 2009-10.

2. In the first ground of appeal, the assessee has raised the following grievance:

> **That having regards to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. A.O. in not setting off the brought forward depreciation pertaining to assessment year 1999-2000 and 2000-2001 amounting to Rs. 1,76,41,753 and Rs. 2,63,05,110 respectively totalling to Rs. 4,39,46,863 against the income from Business or Profession of the current year.**

3. The short question that we are thus required to adjudicate is whether or not the unabsorbed depreciation of Rs 4,39,46,863, which pertains to the

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assessment years 1999-2000 and 2000-01, can indeed be set off against the income under the head 'profits and gains from business and profession' during the current assessment year.

4. The relevant material facts are like this. During the course of the assessment proceedings, the Assessing Officer noticed that in its computation of income, the assessee has claimed set off, against income under the head 'profits and gains from business and profession', of, *inter alia*, unabsorbed depreciation brought from the assessment year 1999-2000, amounting to Rs 1,76,41,753, and brought from the assessment year 2000-01, amounting to Rs 2,63,05,110. The Assessing Officer was of the view that this set off was inadmissible in view of the legal position that the unabsorbed depreciation pertaining to the assessment years prior to the assessment year 2002-03 could only be carried forward for eight subsequent assessment years. The Assessing Officer was of the view that, in view of the above legal position, the unabsorbed depreciation could not have been carried forward beyond the assessment year 2008-09, i.e. beyond the immediately preceding assessment year. In support of this legal position, the Assessing Officer relied upon a Special Bench decision of this Tribunal in the case of **DCIT Vs Times Guaranty Limited [(2010) 4 ITR (Trib) 210 Mumbai SB].** The assessee was not satisfied with the stand so taken by the Assessing Officer, and he carried the matter in appeal before the learned CIT(A), inter alia, on the ground that the Assessing Officer was "wrong in law in not setting off the unabsorbed depreciation for the assessment years 1999-2000 and 2000-01". Pointing out the subsequent judicial precedent by Hon'ble Guajarat High Court in the case **General Motors India Pvt Ltd Vs DCIT [(2013) 354 ITR 244 (Guj)]**, the assessee contended that the issue is now covered in favour of the assessee by a decision of higher judicial authority. Learned CIT(A), even as he took note of this contention- though somewhat dismissively, upheld the stand of the Assessing Officer and observed as follows:

> **4.4 I have gone through the submission of the appellant and also the observation made by the A.O. in the assessment order. Before proceeding further, it is appropriate to refer to the case of DCIT vs. Times Guaranty Ltd., ITAT, Mumbai 'E' Special Bench which has discussed thoroughly the present issue which is before me. The ITAT Bench has specifically observed that the provision of Sec. 32(2) after amendment of Finance Act, 2001 w.e.f. 01.04.2002 i.e. for A.Y. 2002-03 has to be understood in totality. It is seen that this sub-section of sec. 32(2) is in fact reinforcement of the provision as existing in the first period i.e. law prevailing upto A.Y. 1996-97. The law as existing in the second period i.e. from A.Y. 1997-98 was completely taken back and as a result of that provision as prevailing in the first period**

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i.e. till A.Y. 1996-97 was restored. From the language of sub-sec.(2) of sec. 32 it is manifest that it is a substantive provision and not a procedural one and it is a settled legal position that the amendment to substantive provision is normally prospective unless expressly stated otherwise or it appears so by necessary implication. It is nowhere coming up either from the notes on Clauses or Memorandum explaining the provision of the Finance Bill, 2001, that substitution of sub-sec.(2) of sec. 32 is retrospective. It is, therefore, patent that the substantive provision contained in sec. 32(2) as substituted by the Finance Act, 2001 w.e.f. 1st April, 2002, is prospectively applicable to A.Y. 2002-03 onwards.

4.5 By explaining clearly that the amendment made by Finance Act, 2001 is not from retrospective effect, the controversy raised by the appellant is settled. I am relying on the Special Bench judgement in the case of DCIT vs. Times Guaranty Ltd., which is the jurisdictional ITAT Special Bench order and disallowance made by the A.O. is hereby confirmed. Thus, this ground of appeal is dismissed."

5. The assessee is aggrieved and is in appeal before us.

6. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

7. We find that Section 32(2) of the Act, which deals with the set off of unabsorbed depreciation, was subjected to several amendments in the recent past. As it stood in the relevant previous year and as it was in force with effect from 2002-03, the said provision was as follows:

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

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year, be deemed to be allowance of that previous year, and so on for the succeeding previous years.

8. The above provision was, however, not the same as at the point of time to which unabsorbed depreciation, set off of which is the point of dispute in the present appeal, pertains. The relevant provision at that point of time, which was in effect from assessment year 1997-98 to 2001-02, was as follows:

(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:

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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).

9. The question then arises as to how should the provisions regarding set off of unabsorbed depreciation be applied so far as set off of the unabsorbed depreciation which pertains to the point of time when the pre-amendment law was in force but which was claimed to be set off at the point of time when post amendment law was force. When coordinate division benches of this Tribunal were called upon to adjudicate this question, there were differences of opinion. In order to resolve these differences in approach, a Special Bench was constituted in the case of **DCIT Vs Times Guaranty Ltd *(supra)***. In the said special bench decision, it was held that that the amendment made to s. 32(2) w.e.f. assessment year 2002-03 is substantive and a substantive amendment is normally prospective in operation. The Special Bench was of the view that Section 32(2) is a deeming provision which by legal fiction provides that the unabsorbed depreciation allowance u/s 32(1) is deemed to be depreciation allowance for the succeeding year(s). A deeming provision, according to the Special Bench, is to be strictly interpreted and cannot extend beyond the purpose for which it is intended. The Special Bench held that S. 32(1) deals with depreciation allowance for the current year and s. 32(2) uses the present tense to refer to allowance to which effect `cannot be' and `has not been' given which indicates that s. 32(2) speaks of depreciation allowance u/s 32(1) for the current year starting from assessment year 2002-03**.** It was also held that the brought forward unabsorbed depreciation of earlier years cannot be included within the scope of s. 32(2). The special Bench observed that if the intention of the legislature had been to allow such forward unabsorbed depreciation of earlier years at par with current depreciation for the year u/s 32(1), s. 32(2) would have used past or past prefect tense and not the present tense. In substance thus, the Special Bench did conclude that so far as unabsorbed depreciation relating to assessment years prior to the assessment year 2002-02 is concerned, it cannot be set off after the end of eight years from the assessment year to which unabsorbed depreciation pertains. The Special Bench thus finally concluded that **"amount of current depreciation for asst. yrs. 1997-98 to 2001-02 which cannot be so set off as per (ii) above shall be**

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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'".

10. The development of law, however, did not end there.

11. Hon'ble Gujarat High Court, in the case of **General Motors India Pvt Ltd *(supra)*,** had an occasion to consider the question **"whether the unabsorbed depreciation pertaining to the assessment year 1997-98 could be allowed to be carried forward and set off after a period of eight years or would it be governed by the section 32, as amended by the Finance Act, 2001".**

12. Dealing with this specific question, which was precisely the question answered in favour of the revenue by the special bench, Their Lordships decided the issue in favour of the assessee, and, *inter alia*, observed as follows:

> **………. 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**

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> **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.**

13. Once Their Lordships express a “considered opinion” to the effect that “any unabsorbed depreciation available to an assessee on 1st day of April 2002 will be dealt with in accordance with the provisions of section 32(2) as amended by Finance Act, 2001”, the legal position is that the restriction of eight years, which was in force till the law was amended by the Finance Act 2001 w.e.f. 2002-03, does not come into play.

14. Learned Departmental Representative fairly accepts that there is no decision from any other Hon’ble High Court, including Hon’ble jurisdictional High Court, contrary to the law so laid down by Hon’ble Gujarat High Court. He, however, hastens to add that this division bench should follow the special bench decision, which is binding on the division bench, while the Hon’ble Gujarat High Court is a non-jurisdictional High Court decision. We have also noted that the learned CIT(A) has also followed a somewhat similar line of reasoning by emphasizing upon the Special Bench decision even as simply brushing aside the esteemed views of Hon’ble Gujarat High Court.

15. In the hierarchical judicial system that we have in our country, any bench of this Tribunal, whatever be its numerical strength – a single member bench, a division bench, an even larger or even largest bench, is placed a tier well below Hon’ble High Courts. It is only elementary that, in the hierarchical judicial system, each judicial forums in a lower tier has to loyally accept the decisions of the authorities in the tiers above. Learned CIT(A)’s observations that “by explaining clearly that the amendment made by Finance Act, 2001” the special bench has settled the controversy are thus irrelevant because the binding nature of a judicial decision cannot be attributed to, what is perceived, as detailed analysis, inimitable articulation or even expertise reflected in the order, as the binding effect of a judicial order is wholly dependent on the forum at which it is delivered, and such a judicial view only binds lower tiers of the judicial hierarchy and that too only till the time a superior forum does not take a contrary view. In that sense every judicial view is a writing on the sand inasmuch as each time there is a wave of superior judicial view which does not approve that stand, the earlier writing on the sand just gets washed away. That

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is the way the hierarchical judicial system works and that is the way in which hierarchical judicial system can work. As observed by Hon'ble Supreme Court in the case of **Assistant Collector of Central Excise vs. Dunlop India Ltd. [(1985) 154 ITR 172 (SC)],** where the Hon'ble Court has itself quoted from the decision of House of Lords as under:

> **"We desire to add and as was said in Cassell & Co. Ltd. vs. Broome (1972) AC 1027 (HL), we hope it will never be necessary for us to say so again that "in the hierarchical system of Courts" which exists in our country, "it is necessary for each lower tier"………., "to accept loyally the decision of the higher tiers". "It is inevitable in hierarchical system of Courts that there are decisions of the Supreme appellate Tribunal which do not attract the unanimous approval of all members of the judiciary… But the judicial system only works if someone is allowed to have the last word, and that last word, once spoken, is loyally accepted.** "…**<u>The better wisdom of the Court below must yield to the higher wisdom of the Court above. That is the strength of the hierarchical judicial system</u>**."
>
> (Emphasis by underlining supplied by us)

16. The question whether the non- jurisdictional High Court binds the Tribunal benches or not came up for consideration before Hon'ble Bombay High Court in the case of **CIT Vs Godavaridevi Saraf [(1978) 113 ITR 589]**. That was a case in which Their Lordships were *in seisin* of the question as to "whether, on the facts and circumstances of the case, and in view of decision in the case of A.M. Sali Maricar & Anr. vs. ITO & Anr. (1973) 90 ITR 116 (Mad) the penalty imposed on the assessee under s. 140A(3) was legal ? The specific question before Their Lordships thus was whether the Tribunal, while sitting in Bombay, was justified in following the Madras High Court decision. It was in this context that Hon'ble Bombay High Court concluded as follows:

> **"It should not be overlooked that IT Act is an all India statute, and if a Tribunal in Madras has to proceed on the footing that s. 140A(3) was non-existent, the order of penalty under that section cannot be imposed by any authority under the Act. Until a contrary decision is given by any other competent High Court, which is binding on the Tribunal in the State of Bombay** *(as it then was),* **it has to proceed on the footing that the law declared by the High Court, though of another State, is the final law of the land…………..an authority like Tribunal has to respect the law laid down by the High Court, though of a different State, so long as there is no contrary decision on that issue by any other High Court………"**

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17. What is set out above is also the legal position reiterated by various coordinate benches, including in the cases of **Tej International Pvt Ltd Vs DCIT [(2000) 69 TTJ 650]** and **ACIT Vs Aurangabad Holiday Resorts Pvt Ltd [(2007) 118 ITD 1].** In this view of the matter, and having noted that Hon'ble Gujarat High Court has decided this issue in favour of the assessee in the case of General Motors Pvt Ltd (supra), we uphold the plea of the assessee.

18. In view of the reasons set out above, we disapprove the conclusions arrived at by the authorities below and direct the Assessing Officer to grant the set off of the unabsorbed depreciation in the light of the legal position set out above. The assessee will get the relief accordingly.

19. Ground no. 1 is thus allowed in the terms indicated above.

20. In ground no. 2, the assessee has raised the following grievance:

That having regards to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of the Ld. A.O. in increasing the book profit under Section 115JB of the Act

-	**Provision for doubtful debts**	**561837**
-	**Prior period expenses**	**412896**
-	**Disallowance of expenses under Section 14A of the Act**	**200225**
		1174958

21. So far as provision for bad and doubtful debts, amounting to Rs 5,61,837 is concerned, learned counsel for the assessee did not have any specific submissions to make and, to this extent, the ground must be treated as not pressed.

22. As regards the adjustment of Rs 4,12,896 in respect of the prior period expenses, learned representatives fairly agree that this issue is covered, in favour of the assessee, by a coordinate bench decision in the case of **Shivashahi Punarvasan Prakalp Ltd Vs ITO [(2012) 135 ITD 51]**, even as learned Departmental Representative dutifully relied upon the orders of the authorities below. As we see no reasons to take any other view of the matter than the view so taken by the coordinate bench, we uphold this grievance of the assessee and direct the AO to delete the impugned addition of Rs 4,12,896 in computation of book profit for the purpose of section 115JB.

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23. Coming to disallowance of Rs 2,00,225 under section 115JB on the ground that this amount pertains to disallowance under section 14A, learned counsel for the assessee has invited our attention to Hon'ble Delhi High Court's decision in the case of **CIT Vs Holcim India Pvt Ltd [2014 TIOL 1586 HC DEL IT]** wherein it is held that unless there is an exempt income, disallowance under section 14 A cannot be invoked. When, however, it was pointed out to him that this decision is in respect of disallowance under section 14A on merits but when the challenged is not made to such a disallowance under section 14A, this decision cannot support assessee's case against adjustment made in computation of book profits under section 115JB, learned counsel submitted that the same principle must apply in computation of book profits under section 115 JB as well since the provisions of Section 115 JB cannot be applied contrary to the law laid down by Hon'ble jurisdictional High Court. Learned Departmental Representative, on the other hand, relies upon the orders of the authorities below which rely on clause (f) of Explanation to Section 115JB(2) which refers to the adjustment in respect of "the amount or amounts of expenditure relatable to any income to which section 10 (other than provisions contained in clause 38 thereof) or section 11 or section 12 apply". His contention is that once the assessee has on his own accepted this disallowance, the adjustment under section 115JB in respect thereof is only a natural corollary thereto.

24. In our considered view, the plea of the learned counsel is indeed well taken. The assessee may have accepted the disallowance under section 14 A but once it is a settled legal position, in the light of the law laid down by Hon'ble jurisdictional High Court, that there cannot be any disallowance under section 14A unless there is corresponding exempt income and the assessee has no such exempt income, adjustment under clause (f) of Explanation to Section 115JB (2) cannot indeed be made. The adjustment has to meet the tests of law and what cannot be considered to be 'expenditure relatable to exempt income' under the law, cannot be subjected to the adjustment either. There is no estoppel against the law. The mere fact that the assessee has accepted this disallowance affects that disallowance only and nothing more than that; it does not clothe such an adjustment, in computation of book profit under section 115JB, with legality. There is no dispute that there is no corresponding tax exempt income. Therefore, the adjustment in question is indeed unsustainable in law.

25. In view of these discussions, as also bearing in mind entirety of the case, we direct the AO to delete the impugned adjustment of 2,00,225.

26. Ground no. 2 is thus partly allowed in the terms indicated above.

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27. In ground no. 3, the assessee has raised the following grievance:

> **Ld. CIT(A) has erred in law and facts in not considering the plea of the appellant company for allowing credit of tax deducted at source at Rs.2869587/- as against Rs.4455301/- claimed in return of income and not receiving refund voucher by the appellant company and charging interest under Section 234D of the Act amounting to Rs.20026/- and withdrawing interest under Section 244A amounting to Rs.47676/- of the Act.**

28. No specific grievances have been raised in support of the above ground of appeal. Learned counsel has only prayed that the necessary verifications may be carried out, in respect of the above, by the Assessing Officer. Learned Departmental Representative does not oppose the prayer. In this view of the matter, this issue is remitted to the file of the Assessing Officer for necessary verification.

29. Ground no. 3 is thus allowed for statistical purposes in the above terms.

30. Ground no. 4 is general in nature and does not call for any adjudication.

31. In the result, the appeal is partly allowed in the terms indicated above. Pronounced in the open court today on 9th day of January, 2015.

Sd/xx
A. T. Varkey
(Judicial Member)

Sd/xx
Pramod Kumar
(Accountant Member)

New Delhi, the 9th day of January, 2015.

Copies to:
(1) The appellant
(2) The respondent
(3) Commissioner
(4) CIT(A)
(5) Departmental Representative
(6) Guard File

By order etc

Assistant Registrar
Income Tax Appellate Tribunal
Delhi benches, New Delhi