

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES "D" : DELHI

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND
SHRI L.P. SAHU, ACCOUNTANT MEMBER

ITA.No.2777 & 2778/Del./2017

&

S.A.Nos.323 & 324/Del./2018

Assessment Years 2012-2013 & 2013-2014

M/s. Kirtiman Cements and Packaging Industries Ltd., Yamunagar. C/o. Rajiv Goel & Associates, C.As 179, Bank Road, Ambala Cantt. PAN AADCK0078N	VS	The ACIT, Central Circle, Income Tax Office, Sector-12 Karnal.
(Appellant)		(Respondent)

For Assessee :	Shri Rohit Goel, C.A.
For Revenue :	Shri Amit Jain, Sr. D.R.

Date of Hearing :	11.05.2018
Date of Pronouncement :	15.05.2018

ORDER

PER BHAVNESH SAINI, J.M.

This order shall dispose of both the appeals filed by the assessee along with stay applications.

2. We have heard the learned Representatives of both the parties and perused the material on record.

3. Learned Counsel for the Assessee submitted that the issue involved in the appeals as well as stay applications is *whether unabsorbed depreciation of current year and earlier year is allowable against income under the Head "Income from other sources" being disclosed/assessed under section 68 of the I.T. Act, 1961* ? He has submitted that the issue is covered in favour of the assessee by the Order of ITAT, Chandigadh Bench in the case of ACIT, Circle-1, Ludhiana vs. M/s. Raghav Woollen Mills 2016-(8) TMI 421 and Order of ITAT, Agra Bench in the case of Shri Satish Kumar Goyal, Agra vs. JCIT, Range-1, Agra ITA.No.143/Ag/2014 dated 04.05.2016, copies of the same are placed on record. He has submitted that identical issue have been decided by ITAT, Delhi Bench in the case of ACIT, Circle-1, Muzaffarnagar vs. M/s. Pushkar Steels Pvt. Ltd., Muzaffarnagar in ITA.No.5473/Del./2011 dated 29.02.2012 following the decision of Special Bench of ITAT, Mumbai in the case of DCIT vs. Times of Guaranty Ltd., (2010) 131 TTJ 257 (Mum.) (SB). Learned Counsel for the Assessee also submitted

that against the outstanding demand assessee has paid substantial amount.

4. The Ld. D.R. did not dispute the above fact.

5. With the consent of both the parties, the appeals are decided along with stay applications.

6. Both the appeals by the same assessee are directed against different orders of the Ld. CIT(A)-3, Gurgaon, dated 17.02.2017 for A.Ys. 2012-2013 and 2013-2014. The issue is common in both the appeals. Therefore, appeal of assessee for A.Y. 2012-2013 is decided for the purpose of both the appeals.

ITA.No.2777/Del./2017 – A.Y. 2012-2013 :

7. The assessee raised on the following grounds :

1. *The Commissioner of Income Tax (Appeals) has erred in law and facts in confirming the disallowance for set off unabsorbed depreciation of earlier year and Current year against the income declared and assessed u/s 68 amounting Rs.1,51,00,000/-.*

2. *That learned Commissioner of Income Tax (Appeals) has erred in law and facts in confirming the action of AO that income u/s 68 is assessable as deemed Income ignoring the provisions of section 115BBE introduced from AY 2013-14 and not retrospectively.”*

8. Briefly, the facts of the case are that survey under section 133A was conducted in the case of the assessee-company on 04.09.2012. It is noted in the assessment order that search was conducted in the group case in which some incriminating material was found relating to the assessee-company. The A.O. recorded satisfaction for initiating the proceedings under section 153C of the I.T. Act. The assessee-company submitted before A.O. that original return filed under section 139(1) may be treated as return having filed in response to the notice issued under section 153C of the I.T. Act. The A.O. noted that assessee-company is running business of manufacturing of HDPE/PP Bags and Fabric. It's head office is

situated in Chandigadh and factory is situated in Industrial Area Manakpur District, Yamuna Nagar. During the year under consideration, assessee has shown gross receipts of Rs.37,43,40,387/- which includes other income of Rs.40,65,312/-. The assessee-company has claimed net profit of Rs.13,51,427/- that after adjustment of eligible depreciation of current year under Income Tax Act, the unabsorbed depreciation of current year comes to Rs.48,03,674/-. The assessee company has carried forwarded unabsorbed depreciation of Rs.1,78,93,656/- from earlier year, resulting unabsorbed depreciation upto this year at Rs.2,26,97,330/- and net business income at NIL. In the return of income, the assessee has declared income from other sources of Rs.1.51 crores which has been set off against this unabsorbed depreciation resulting carried forward of remaining unabsorbed depreciation of Rs.75,97,330/- for next year. A.O. also noted that the group has surrendered undisclosed income to the tune of Rs.5.97 crores in the hands of various persons of the group which is noted in para 4.1 of the assessment order. In the

computation of income, other income amounting to Rs.1.51 crore has also been declared by assessee-company. Such other income is the income disclosed during the course of survey by the assessee-company by surrendering share application money received during the year. The surrender letter filed by the assessee-company is reproduced at page-11 of the assessment order. In the computation of income, the assessee-company has set-off the current year unabsorbed depreciation as well as earlier years unabsorbed depreciation, total amounting to Rs.1.51 crores against this other income surrendered during the course of survey and this has resulted the total income of assessee-company for the year under consideration at -NIL-. The assessee-company has paid tax under section 115JB of the I.T. Act at book profit of Rs.29,41,582/-. The assessee-company was asked to explain as to how the undisclosed income declared during the course of survey amounting to Rs.1.51 crores is eligible to be set-off against the unabsorbed depreciation of current year and earlier year. The contention of assessee-company was invited towards

Judgment of Punjab & Haryana High Court in the case of Kim Pharma (P) Ltd. vs. CIT (2013) 258 CTR 454 (P&H). The submission of the assessee-company is reproduced in the assessment order. The contention of assessee-company has been summarized by A.O. in the assessment order and is reproduced as under :

- i) *“The income declared by the assessee on account of amount credited in books of accounts under Share Application Money u/s 68 is disclosed under income from other sources by the assessee as per the provisions of Income Tax Act and unabsorbed depreciation can be set off against such income.*
- ii) *The judgment of Hon’ble Punjab & Haryana High Court in the case of M/s Kim Pharma is not applicable to the facts of the case of assessee as Kim Pharma was dealing with the issue of addition u/s 69 and its set off from Business Loss whereas the case of assessee is u/s 32(2). The High Court in the case of*

Kim Pharma has simply held that surrendered Income is not taxable under Income from Business and relied upon the decision of Fakir Mahamed Haji Hasan.

- iii) *The judgment of Hon'ble Gujarat High Court in Fakir Mahamed Haji Hasan is contrary to the decision of Punjab & Haryana High Court in the case of CIT vs. Ram Chander 159 ITR 689 and decision of Jurisdiction High Court should prevail.*
- iv) *In the case of M/s Liberty plywood P Ltd vs. ACIT, ITA No. 727/Chd/2012 dated 17.12.2012 the issue has been dealt after considering the judgment of Punjab and Haryana High Court in the case of Kim Pharma P Ltd and held that unabsorbed depreciation should be allowed against surrender Income.”*

8.1. The A.O. however, did not accept the contention of assessee-company and noted that the income surrendered was on account of deemed income which would not fall under any source of income provided under section 14 of the I.T. Act and

it will not even fall under the Head “Income from other sources”. A.O. also noted that assessee-company relied upon the order of ITAT, Chandigadh Bench in the case of M/s. Liberty Plywood Private Ltd., Ambala Cantt. vs. ACIT, Ambala ITA.No.727/Chd/2012 dated 17.12.2012. However, Department has not accepted the same decision and it was decided to file appeal before the Hon’ble Punjab & Haryana High Court, the details of which are not available. He has noted that since the order in the case of M/s. Liberty Plywood Private Ltd., Ambala Cantt. vs. ACIT, Ambala (supra) is not accepted, therefore, contention of assessee-company was rejected and the depreciation set-off by the assessee-company against the income surrendered during the course of survey was disallowed.

9. The assessee-company challenged the assessment order before Ld. CIT(A). The written submissions of the assessee-company is reproduced in the appellate order. The Ld. CIT(A), however, dismissed the appeal of assessee-company.

10. We have considered the rival submissions. The assessee-company relied upon the order of ITAT, Chandigadh Bench in the case of M/s. Liberty Plywood Private Ltd., Ambala Cantt. vs. ACIT, Ambala (supra) and submitted that the issue is covered by the said decision, copy of which is also filed on record, in which, the Tribunal followed the decision of the Special Bench of the Tribunal in the case of DCIT vs. Times of Guaranty Ltd., (2010) 131 TTJ 257 (Mum.) (SB) and decided the identical issue in favour of the assessee. The decision in the case of M/s. Liberty Plywood Private Ltd., Ambala Cantt. vs. ACIT, Ambala (supra) has been followed by ITAT, Chandigadh Bench in the case of ACIT, Circle-1, Ludhiana vs. M/s. Raghav Woollen Mills 2016-(8) TMI 421 in which it was held as under :

“3. On ground Nos. 1 and 2, revenue challenged the order of Ld. CIT (Appeals) in allowing the assessee to set off unabsorbed depreciation upto the extent of Rs.50 lacs against the deemed income under [section 69, 69A, 69B and 69C](#) of the Income Tax Act.

4. Briefly the facts of the case are that during the course of survey proceedings, certain discrepancies were found. To cover up these discrepancies, assessee voluntarily disclosed additional income of Rs. 50 lacs under the head "Cash Rs. 8,23,000/-, Receivable - Rs.19,98,500/- and Stock - Rs. 21,78,500/- (total Rs. 50 lacs). The Assessing Officer found that the Income Tax Return filed by the assessee firm for the year under appeal, it was revealed that firm had declared loss of Rs. 38,56,371/- including the surrendered income of Rs.50 lacs. The assessee had shown less income therefore, explanation of the assessee was called for with reference to the decision of Hon'ble Punjab & Haryana High Court rendered in the case of Kim Pharma Pvt. Ltd. and assessee was required to show cause as to why the income voluntarily disclosed during survey should not be separately assessed as deemed income under [section 69](#), [69A](#), [69B](#) and [69C](#). The assessee filed detailed reply before Assessing Officer to explain the above surrendered amount. The Assessing Officer after considering reply of the assessee and following decision in the case of Kim Pharma Pvt. Ltd.(supra) held that income disclosed during the course of survey was to be taxed as deemed income. It was also held that against the deemed income, set off of business loss/ depreciation loss cannot be allowed.

5. The assessee challenged the addition before Ld.CIT (Appeals) and detailed written submission of the assessee is noted in which assessee also made a claim that request was made at assessment stage to adjust the unabsorbed depreciation claim under [section 32\(2\)](#) of the Income Tax Act against the surrendered amount as per provisions of the Act. It was pleaded that the adjustment of current year or unabsorbed depreciation can be made against such deemed income as per decision of jurisdictional ITAT Chandigarh Bench in the case of Liberty Plywood Pvt. Ltd. in ITA 727/2012 vide order dated 17.12.2012. The ld. CIT(Appeals) confirmed the addition of Rs. 50 lacs on account of deemed income under [section 69, 60A, 69B and 69C](#) of the Income Tax Act.

6. On the same issue, the assessee also contended that adjustment of depreciation of current year against deemed income is permissible. The Assessing Officer held that income of the assessee surrendered during survey under [section 133A](#) to be treated as deemed income under [section 69, 69A, 69B and 69C](#) and the same cannot be set off against business loss/depreciation loss. The assessee reiterated the same submissions before ld. CIT(Appeals) and submitted that there was no issue of set off of depreciation including unabsorbed depreciation

under [section 32](#) against the amount surrendered in survey and treated as deemed income. On the same facts, ITAT Chandigarh Bench in the case of Liberty Plywood Pvt. Ltd. (supra), after considering decision of the Hon'ble Punjab & Haryana High Court in the case of Kim Pharma Pvt. Ltd. (supra) has held that depreciation under [section 32](#) can be adjusted against the so called deemed income, the amount surrendered in survey without having any nexus of nature and source. It was submitted that facts of the case of the assessee are similar to that of in the case of M/s Liberty Plywood Pvt. Ltd. (supra). The assessee, therefore, claimed that unabsorbed depreciation may be allowed set off against deemed income. The ld. CIT(Appeals), following the decision of Chandigarh Bench in the case of M/s Liberty Plywood Pvt. Ltd. (supra) and Special Bench in the case of DCIT Vs Times Guaranty Ltd. (supra), allowed the appeal of the assessee. His findings in para 4.2 of the appellate order are reproduced as under :

"4.2 I have considered the facts of the case, the basis of addition and the submissions during the course of the assessment as well as appellate proceedings. The Assessing Officer considered the surrendered income as deemed income u/s 69A,69B and 69C and the same was not allowed to be set off against business loss/depreciation loss by relying on the

judgment of the Hon'ble ITAT Chandigarh Bench in the case of M/s Liberty Plywood Pvt. Ltd., ITA No.727/Chd/2012 vide order dated 17/12/2012. However, on a perusal of the said decision it is seen that it has been directed in the said order to allow set-off of unabsorbed depreciation of current year from deemed income surrendered during the survey. In the said case it has been observed that the decision of Hon'ble Punjab and Haryana High court in the case of M/s Kim Pharma (P) Ltd. vs. CIT. it was held that surrendered income during the survey has to be assessed separately as deemed income and set-off of losses under section 70 and 70(1) was not possible against such income. However, the said decision does not deal with the issue of setting off of depreciation under section 32(2) and that unabsorbed depreciation which is carried forward as current depreciation u/s 32(2) is clearly available for setting-off. The Hon'ble ITAT referred to the case of the special Bench of the Hon'ble Tribunal in the case of DCIT vs. Guaranty Ltd. (2010) 4 ITR (Trib) 210 (Mum) SB for the same and held as under:-

"From the above it is clear that unabsorbed depreciation for the block of Assessment Year 1997-98 to 2001-02 which could not have been set off earlier, cannot be allowed to be set off now. Therefore, we set aside the order of the id. CIT(A) and remit the matter back to the file of Assessing Officer with a direction to

only allow set off of unabsorbed depreciation which is outside the block of Assessment Year 1997-98 to 2001-02."

Accordingly, the Assessing Officer was not justified in not adjusting depreciation of current year against the deemed income. Thus, these grounds of appeal are allowed."

7. *The ld. DR relied upon order of the Assessing Officer and submitted that in the case of M/s Kim Pharma Pvt. Ltd. (supra), the decision of Gujrat High Court in the case of Fakir Mohmed Haji Hasan V CIT 247 ITR 290 have been followed and Hon'ble High Court held that the said decision fully apply to the facts of the case. Therefore, unabsorbed depreciation cannot be set off.*

7(i). *On the other hand, ld. counsel for the assessee reiterated the submissions made before authorities below and submitted that the identical issue was considered by ITAT Chandigarh Bench in the case of M/s Liberty Plywood Pvt. Ltd. (supra) in which the Tribunal considered the decision in the case of M/s Kim Pharma Pvt. Ltd. and held as under :*

"10. We have heard the rival submissions carefully. The main controversy involved is whether the surrender income amounting to Rs. 70.00 lakhs should be treated as business income so as to

set off brought forward losses u/s 70 of the Act as well as the depreciation u/s 32(2). As far as the decision of Hon'ble Supreme Court in case of CIT V. D.P. Sandhu Bros. Chembur, P. Ltd. (supra) is concerned, we find that facts in that case are totally different. In that case the assessee had sold tenancy rights for Rs. 35.00 lakhs which were claimed to be non-taxable. However, the Assessing Officer assessed the same as income from other sources u/s 10(3) of the Act. On assessee's appeal the Commissioner held that the sum was taxable under the head "capital gain". He determined the cost of acquisition on the basis of fair market value and subjected the receipt for tenancy rights after reducing the cost of such rights as assessable under the head 'capital gain'. On further appeal, the Tribunal held that though the income was assessable under the head 'capital gain' but since there was no cost of acquisition and therefore, following the decision of Hon'ble Supreme Court in case of CIT V. B.C. Srinivasa Setty, 128 ITR 294 it was held that since the capital gain can not be computed, the same was not taxable. On revenue's appeal to the High the issue was decided against the Department. When this matter traveled to the Hon'ble Supreme Court after detailed discussion, it was held that tenancy rights constituted capital assets. While dealing with the alternative argument of the Revenue that sale tenancy rights should be taxable under the head of income from other sources the Hon'ble Apex Court observed at placitum 14 to 16 as under:-

"Section 14 of the Income-tax Act, 1961 as it stood at the relevant time similarly provided that "all income shall for the purpose of charge of income-tax and computation of total income be classified under six heads of income", namely:-

(A) Salaries;

(B) Interest on Securities;

(C) Income from house property;

(D) Profits and gains of business or profession;

(E) Capital gains;

(F) Income from other sources unless otherwise, provided in the Act has not to be excluded from the total income under the Act, only if it is not chargeable to income tax under any of the heads specified in section 14, items A to E. Therefore, if the income is included under any one of the heads, it cannot be brought to tax under the residuary provisions of section 56.

There is no dispute that a tenancy right is a capital asset the surrender of which would attract section 45 so that the value received would be capital receipt and assessable if at all only under item E of section 14. That being so, it cannot be treated as a casual or nonrecurring receipt u/s 10(3) and be subjected to tax u/s 56. The argument of the appellant that even if the income cannot be chargeable u/s. 45 because of the inapplicability of the computation provided u/s 48, it could still imposed tax under

the residuary head as thus unacceptable. If the income cannot be taxed u/s 45, it cannot be taxed at all. (See S.G. Mercantile Corporation P. Ltd. V CIT (1972) 83 ITR 700 (S.C)."

11. *Thus it is clear from the above that once the item of receipt is held to be falling under a particular head then the same cannot be charged alternatively under another head particularly under the head "income from other sources". This observation can not lead to the conclusion if income does not belong to a particular head same cannot be charged at all. As far as the decision of Ahmedabad Bench of the Tribunal in case of Fashion Word V ACIT, ITA No. 1634/Ahd/2006 (supra) is concerned interpreting the decision of Hon'ble High Court in case of Fashion Word V ACIT, ITA No. 1 634/Ahd/2006 (supra) has to give a way to interpretation put on the same decision by the Hon'ble Punjab & Haryana High Court in case of [M/s Kim Pharma \(P\) Ltd. V. CIT, ITA No. 106 of 2011 \(O&M\)](#), Hon'ble High Court clearly held that surrendered income can be taxed as deemed income without setting off of the losses u/s 70 & 71. We are bound to follow the decision of Hon'ble Punjab & Haryana High Court and following the same, we hold that surrendered income has to be assessed separately as deemed income.*

12. *Coming to the issue of setting off of depreciation u/s 32(2), first of all it has to be noticed that the decision of Hon'ble Punjab & Haryana High Court in case of [M/s Kim Pharma \(P\) Ltd. V. CIT](#), (supra) held that surrendered income during the survey has to be assessed separately as deemed income and set off of losses u/s 70 & 71*

was not possible against such income. However, it is clear that this decision does not deal with the issue of setting off of depreciation u/s 32(2). Section 32(2) reads as under :

32(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 to 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.]

The plain reading of the above clearly shows that if the depreciation cannot be fully adjusted against profits and gains chargeable in the relevant year because of inefficiency of the profits then the same would be added to the depreciation of the following year. This means that

unabsorbed depreciation which can not be set off in a particular year, would become current depreciation in the following year and there is no restriction against such set off. Therefore, un-absorbed depreciation which is carry forward as current depreciation u/s 32(2) is clearly available for setting off and similar view was taken by the Ahmedabad Bench of the Tribunal in case of ITO V. Hytaisun Magnetics Ltd. ITAs No. 2897 & 2898/Ahd/2008 held as under:

*"We find that it is not in dispute that during the year under consideration the assessee had income of Rs.2,34,10,540/- assessed under the head income from other sources in view of provisions of section 69 of the Act. Further it is also not in dispute that the assessee had brought forward unabsorbed depreciation of Rs. 10 . 13 crores in Assessment year 1993-94 , Rs. 1.59 crores in Assessment year 1994-95 and Rs. 68.14 lakhs in Assessment year 1995-96 which is available for set off against income of the current year. As per provisions of section 32(2) unabsorbed depreciation are deemed as part of current year's depreciation to the extent of available income. Further there is no provisions under the **Income Tax Act** to prohibit set off of current year's business loss against income of the assessee which is assessable under the head*

income from other sources. Section 70 does not prohibit such set off.

13. *However, this provision has been amended twice w.e.f. 1.4.1997 by Finance Act (No. 2 of 1996) and against on 1.4.2002 by Finance Act, 2001. Certain restrictions were introduced again set off of by such unabsorbed depreciation. Controversy also arose in this respect. Ultimately the matter traveled to the Special Bench of the Tribunal in case of DCIT V. Times Guaranty Ltd. (2010) 4 ITR (Trib) 210 (Mum)(SB). In this case it was held as under :*

"Under section 32(2) of the Income-tax Act, 1961, prior to its substitution, by the Finance (No. 2) Act, 1996 with effect from April 1,1997 the current depreciation under section 32(1) could be adjusted against income under any head including "Capital gains" and "Income from house property" in the same year. If there remained some unadjusted depreciation allowance, that was carried forward in the following year(s) for set off against income under any other heads just like current depreciation allowance under section 32(1) pertaining to such year.

Under sub-section (2) of section 32 as substituted by the Finance (No. 2) Act, 1996, with effect from April 1,1997, the scope of set-off of the brought forward unabsorbed

depreciation allowance was restricted to the income under the head "Profits and gains of business or profession". Under clause (i) of substituted sub-section (2), the unabsorbed depreciation allowance could be set off against "profits and gains" of any business or profession carried on by the assessee for that assessment year. Under clause (ii) of sub-section (2) if the unabsorbed depreciation allowance could not be wholly set off under clause (i), the amount not so set off could be set off from the "income under any other head", if any, assessable for that assessment year.

The provision for carry forward and set-off of unabsorbed depreciation for any number of years against income under any head, was further diluted by way of clause (iii)(b) to [section 32\(2\)](#) restricting the right to set-off of unabsorbed depreciation for a period of not more than eight assessment years succeeding the assessment year in which the allowance was first computed. This part of the provision did not deal with the treatment of unadjusted brought forward depreciation allowance for and up to the assessment year 1996-97. The Finance Minister clarified the amendment as prospective inasmuch as the cumulative unabsorbed depreciation brought forward as on April 1,

1997, could be set off against taxable profits or income under any other head for the assessment year 1997-98 and seven subsequent assessment years. In other words, the period of eight years under clause (iii)(b) of [section 32\(2\)](#) came to be reckoned from assessment year 1997-98 irrespective of the fact that the unadjusted brought forward depreciation arose in an earlier assessment year. Thus, on the strength of the clarification given by the Finance Minister, the unadjusted depreciation brought forward up to April 1,1997 became eligible for set off not only against the business income but also against income under other heads in eight assessment years.

Two like expressions are used in sub-section (2), viz, firstly, "profits or gains " in the main part of sub-section (2) and then "profits and gain' in clause (i). The expression "profits and gains" as used in clause (i) or (iii)(a) refers only to income under the head "Profits and gains of business or profession".

[Section 32\(2\)](#) was again substituted by the [Finance Act, 2001](#) with effect from April 1, 2002 restoring the provision as prevailing prior to the amendment made by the Finance (No. 2) Act, 1996 with effect from April 1,1997.

Sub-section (2) of [section 32](#) is a substantive provision and not a procedural one. It is settled legal position that the amendment to a substantive provision is normally prospective unless expressly stated otherwise or it appears so by necessary implication. It is nowhere seen either from the Notes on Clauses or Memorandum explaining the provision of the Finance Bill 2001, that substitution of sub-section (2) of [section 32](#) is retrospective. Therefore, the substantive provision contained in [section 32\(2\)](#) as substituted by the [Finance Act, 2001](#) with effect from April 1, 2002, is prospectively applicable to 'the assessment year 2002-03 onwards.

[Section 32\(2\)](#) is a deeming provision and by a legal fiction, the amount of depreciation allowance under [section 32\(1\)](#) which is not fully absorbed against income for that year is deemed to be part of the depreciation allowance for the succeeding year(s). A deeming provision cannot be extended beyond the purpose for which it is intended. [Section 32\(1\)](#) deals with depreciation allowance for the current year. It is only when the assessment of the assessee from assessment year 2002-03 onwards is made in which depreciation allowance for the current year under [section 32\(1\)](#) cannot be given full effect, owing to the

inadequacy of profits, that the directive of the deeming provision under [section 32\(2\)](#) shall apply.

Wherever there is mention of loss under a particular head for the current year which is sought to be set off against the income under the same head or other heads of the income for that very year, the words "cannot be" and "has not been" have been brought into play. The words, "cannot be" and "has not been" used in the present tense in [section 32\(2\)](#) suggest that the reference to depreciation allowance under [section 32\(1\)](#), which could not be adjusted due to inadequacy of profits, is for the current year alone starting from assessment year 2002-03 onwards. The brought forward unabsorbed depreciation of earlier years cannot be included within the scope of [section 32\(2\)](#).

In [section 32\(2\)](#) the depreciation allowance for the current year to which full effect cannot be given due to the paucity of profits, has been referred to as "unabsorbed depreciation allowance". Such unabsorbed depreciation allowance for the assessment years 1997-98 to 2001-02 strictly comes under [section 32\(2\)](#) as "unabsorbed depreciation allowance". As the language of this deeming provision does not talk of any brought forward "unabsorbed

depreciation allowance" or depreciation allowance which could not be given effect to in the earlier years that resultantly became part of [section 32\(2\)](#), there is no question of expanding the scope of the legal fiction.

The purpose of a legal fiction in [section 32\(2\)](#) is to make the unabsorbed carried forward depreciation partake of the same character as the current depreciation in the following year. In other words the object of the provision is to treat the whole or part of the depreciation allowance under [section 32\(1\)](#), which could not be adjusted in the first year, as the current depreciation under [section 32\(1\)](#) in the second year. In the second year, such depreciation of first year becomes part and parcel of depreciation under [section 32\(1\)](#) of the second year. If again in the second year, the total of depreciation under [section 32\(1\)](#) (including the amount of allowance which came from first year and became depreciation under [section 32\(1\)](#) in the second year) cannot be absorbed, it shall become current depreciation for the third year to be dealt with in the same manner as the amount of depreciation in the third year and so on. Once the unabsorbed depreciation for the first year is given the character of current depreciation in the second year, the purpose of [section 32\(2\)](#) is fulfilled. The

"unabsorbed depreciation allowance" of the period after substitution by the Finance (No. 2) Act, 1996 cannot be given the character of current depreciation in the assessment years after substitution with effect from April 1, 2002.

711 (SC) relied on.

Therefore, the law prevailing as on the 1st April of the assessment year 2002-03 and subsequent years does not permit the brought forward unabsorbed depreciation allowance of the period after substitution by the Finance (No. 2) Act, 1996 to assume the character of depreciation under [section 32\(1\)](#) in these assessment years.

If there is both repeal of the old provision and simultaneous insertion of a new provision in its place, it is called "substitution". But for the relaxation given by the Finance Minister in Parliament, the brought forward unadjusted depreciation of the period prior to the amendment made by the Finance (No. 2) Act, 1996 with effect from April 1, 1997 would have elapsed. There is no such concession given by the Finance Minister while substituting the provisions of [section 32\(2\)](#) with effect from April 1, 2002. Therefore, the brought forward unabsorbed

depreciation allowance of the period after substitution by the Finance (No. 2) Act, 1996 cannot be treated as the current depreciation in the assessment years under consideration. The position can be summed up as follows :

For the assessment years 1997-98 to 2001-02 brought forward unadjusted depreciation allowance for and up to assessment year 1996- 97 (the "first unadjusted depreciation allowance"), which could not be set off up to assessment year 1996-97, shall be carried forward for set off against income under any head for a maximum period of eight assessment years starting from assessment year 1997-98. Current depreciation for the year under [section 32\(1\)](#) (for each year separately starting from assessment years 1997-98 up to 2001-02) can be set off firstly against business income and then against income under any other head. The amount of current depreciation for assessment years 1997-98 to 2001-02 which cannot be so set off, the "second unabsorbed depreciation allowance", shall be 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". For the assessment year

2002-03 onwards the "first unadjusted depreciation allowance" can be set off up to assessment year 2004-05, that is, the remaining period out of maximum period of eight assessment years against income under any head. The "second unabsorbed depreciation allowance" can be set off only against the income under the head "Profits and gains of business or profession" within a period of eight assessment years succeeding the assessment year for which it was first computed. Current depreciation for the year under [section 32\(1\)](#), for each year separately, starting from assessment year 2002-03 can be set off against income under any head. The amount of depreciation allowance not so set off (the "third unadjusted depreciation allowance") shall be carried forward to the following year. The "third unadjusted depreciation allowance shall be deemed depreciation under [section 32\(1\)](#), that is depreciation for the current year in the following year(s) to be set off against income under any head, like current depreciation, in perpetuity,"

14. From the above it is clear that unabsorbed depreciation for the block of Assessment year 1997-98 to 2001-02 which could not have been set off earlier, cannot be allowed to be set off now . Therefore , we set aside the order of the Id .

CIT (A) and remit t he matter back to the file of Assessing Officer with a direction to only allow set off of unabsorbed depreciation which is outside the block of Assessment year 1997-98 to 2001-02."

7(ii). In this decision, the Tribunal considered the decision in the case of M/s Kim Pharma Pvt. Ltd. in which set off of the losses under section 70 and 71 was not found possible against such income. The Tribunal also noted that in this decision, the set off of depreciation under section 32(2) was not considered. The Tribunal also followed decision of the Mumbai Special Bench in the case of Times Guaranty Ltd. (supra) and decided the issue in favour of the assessee. The issue is, therefore, covered in favour of the assessee by the order of the ITAT Chandigarh Bench in the case of M/s Liberty Plywood (supra). Following reasons for decision in this case, we dismiss the departmental appeal."

10.1. The ITAT, Agra Bench in the case of Shri Satish Kumar Goyal, Agra vs. JCIT, Range-1, Agra ITA.No.143/Ag/2014 dated 04.05.2016 has taken similar view in favour of assessee. The findings of the Tribunal are reproduced as under:

“7. In the present case, it is more than evident that though assessee offered an aggregate cash receipt of Rs. 4,51,29,000/- as his income in the computation of income but the nature and source of the said receipts was not explained with reference to any cogent material or evidence. No name of the person(s) from whom such amount was allegedly received, was given. It was merely branded and sought to be passed as casual income. Even casual income has also some origin and at least there must be some explanation regarding such alleged casual income. Any receipt can not be treated as casual income just like that merely for the reason that assessee seeks to term it as casual income. Explanation offered in this regard was too general, scanty and without reference to any basis, material or evidence. Explanation given by the assessee does not inspire any confidence. No evidence has been led, not even before us, to explain about the nature and source of such alleged receipts. Explanation given by the assessee is thus unsatisfactory & assessee failed to discharge the initial onus contained in [section 68](#) in this regard. We thus do not find any infirmity in the order passed by AO and CIT(A) which hold that the nature and source of the alleged cash receipts or explanation in this regard was not satisfactory. Therefore, we are of the considered view that the misc. income of Rs.4,51,29,000/- offered by the

assessee represented the sum found credited in the books of the appellant, the nature and source of which was not satisfactorily explained was rightly treated as income u/s 68 of the [Income Tax Act](#), 1961. We do not find any infirmity in this regard and we uphold such finding of the A.O. which was confirmed by the first appellate authority.

8. *Having so held, the next question which arises for our consideration is as to under which head of income, such income is assessable. In other words, whether income covered u/s 68 is beyond the five heads of income as given in [section 14](#) including the head 'income from other sources'.*

[Section 14](#) of the Income Tax Act, provides that unless otherwise provided by the Act, all incomes shall be classified under five heads of income i.e. 'salary', 'house property', 'profits and gain business or profession', 'capital gains' and 'other sources'. Admittedly, the purported miscellaneous income can neither fall under the head salary, nor under the head house property, nor under the head profit and gains business or profession, nor under the head capital gain. All that remains is the residual head income i.e. income from other sources. [Section 56\(1\)](#) of the Income Tax Act, provides income of every kind, which is not to be excluded from the total income shall be

chargeable to income tax under the head income from other sources, if it is not chargeable to income under any of the head specified in [section 14](#) items A to E. Conjoint reading of [section 14](#) and [section 56\(1\)](#) read with [section 68](#) suggests that income referred u/s 68 would be assessable under the head income from other sources. This is so for the reason that all incomes are to be classified under the five given heads and 'nothing otherwise' as contemplated under [section 14](#) has been provided in the Act in respect of the income covered u/s 68 so as to trigger the exception given in [section 14](#). Similarly, the income referred in [section 68](#) does not fall into the exclusions as given in [section 56\(1\)](#) i.e. such deemed income u/s 68 is not to be excluded from the total income under this head nor it is chargeable under the first four heads. Therefore, the natural and obvious result would be that such deemed income u/s 68 would be assessable under the head 'income from other sources' and we thus so hold.

In fact, Hon'ble Punjab & Haryana High Court in the case of [Kim Pharma P. Ltd. vs. CIT 258 CTR 454](#) held that deemed income u/s 69, 69A, 69B & 69C are not assessable under the head income from other sources. Hon'ble Punjab & Haryana High Court relied upon Gujarat High Court decision in the case of [Fakir Mohmed Hazi Hasan vs.](#)

CIT 247 ITR 290. It is important to submit Hon'ble Gujarat High Court in a subsequent decision of DCIT vs. Radhey Developers India Ltd. 329 ITR 1 held that in the decision of Fakir Mohmed Hazi Hasan vs. CIT 247 ITR 290, the legislative scheme emanating from conjoint reading of provisions of section 14 and 56 were not considered. Hon'ble Gujarat High Court in this case further held that the decision of Apex Court in the case of Commissioner of Income Tax vs. D.P. Sandu Bros. Chembur (P) Ltd. 273 ITR 1 has dealt with this every issue while deciding the treatment to be given to the transaction of surrendered tenancy right, following the earlier decision of the Apex Court in the case of United Commercial Bank Ltd. vs. Commissioner Of Income Tax 32 ITR 688. Hon'ble Gujarat High Court held that it would be sufficient to state that the Income Tax Act, envisages taxing every income under any of the heads specified in section 14.

Thus, it is evident that on this issue at least there are divergent views. It has not been brought to our notice that there is any decision on this issue from the jurisdictional High Court i.e. Hon'ble Allahabad High Court. Therefore in such a situation the view favourable to the taxpayer has to be accepted which is a settled proposition of law, as held by Hon'ble Supreme Court in the case of Commissioner of Income Tax vs. Vegetable Products Ltd. 88 ITR 192.

This leads to the third issue involved in the present appeal which is as to whether the loss under the head 'business'

can be denied to be set off against the income assessable under the head 'income from other sources'. Section 71 of the Income Tax Act, which provides the set off of loss from one head against income from another does not deny such set off.

Even the denial of such set off brought by section 115BBE was brought on the statute by Finance Act, 2012 w.e.f. 01.04.2013 i.e. for and from the A.Y. 2013-14. Therefore, when the specific denial of the set off was brought prospectively by the legislature in section 115BBE, the set off of loss under the head 'business' against the 'income from other sources' cannot be denied to the assessee.

We may add here that both sides argued at great length and have given multiple decisions which have been considered by us and for the sake of brevity, we have not dealt them separately but we have considered the entire gamut of case laws referred by Ld. Counsel for the assessee and taken into account before the above mentioned decision was reached.

9. *In effect, we hold that the impugned amount of Rs.4,51,29,000/- received by the assessee is to be treated as income under section 68 of the Income Tax Act,*

assessable under the head "Income from other sources" and accordingly as per the provision of section 71, Business losses of the assessee are to be set off against the same. The separate addition of Rs. 4,51,29,000/- is therefore deleted."

10.2. The ITAT, Delhi Bench in the case of ACIT, Circle-1, Muzaffarnagar vs. M/s. Pushkar Steels P. Ltd., Muzaffarnagar in ITA.No.5473/Del./2011 dated 29.02.2012 have directed the A.O. to examine the issue in the light of decision of the Special Bench in the case of DCIT vs. Times of Guaranty Limited (2010) 131 TTJ 257 (Mum.) (SB). The issue is, therefore, covered in favour of the assessee by the above orders of different Benches of the Tribunal. It may also be noted here that A.O. denied the claim of assessee-company because decision of the Chandigadh Bench in the case of M/s. Liberty Plywood Private Ltd., Ambala Cantt. vs. ACIT, Ambala (supra) have not been accepted by the Department and Department intends to file appeal before the Hon'ble Punjab & Haryana High Court. The assessee-company has filed copy of the Judgment of the Hon'ble Punjab & Haryana

High Court in the case of CIT vs. M/s. Liberty Plywood Private Ltd., in ITA.No.118 of 2015 dated 25.01.2016 in which the Departmental Appeal have been dismissed on account of low tax effect. Therefore, the only reason given by the A.O. for denying the claim of assessee-company no more survives. It may also be noted here that every income is to be assessed under section 14 of the I.T. Act and loss to be adjusted under section 70 to 72 of the I.T. Act. In order to assess an income under the Head "Income" and there must be some express provision of law as is held by the Hon'ble Supreme Court in the case of D.P. Sindhu 273 ITR 1. Each income is to be assessed under five Heads of income, Otherwise, the same is not taxable at all. Similar provisions for set-off of loss are defined under Sections 70 to 72 of the I.T. Act. As per Section 72, carried forward of business loss is not to be allowed to be set-off against any other head of income other than income from business. Inter Head set-off of business loss is allowed under section 71 against all other income except income from salary. Same head adjustment of business loss against other business income is

allowed under section 70 of the Act. As such, provisions of law on unabsorbed depreciation which is allowed as depreciation of current year under section 32(2) fall in Section 71 and not under section 72, as such, allowable as 'business expenditure'. Therefore, findings of the A.O. is not correct that surrendered income cannot be assessed even under the Head "Income from other sources". It may also be noted here that after insertion of Section 115BBE, any income assessed under sections 68 to 69D will be taxed under section 115BBE and not under regular provisions w.e.f. A.Y. 2013-2014. Further, Section 115BBE has got amended w.e.f. A.Y. 2017-2018 that loss will not be allowed against such income. Therefore, it is clear that w.e.f. A.Y. 2017-2018 any type of loss will not be allowed deduction and this Amendment is not retrospective in nature. Therefore, claim of assessee-company shall have to be allowed by authorities below. The issue is covered in favour of the assessee-company by the above orders of various Benches of the Tribunal. We, therefore, set aside the orders of the authorities below and direct the A.O. to allow set-off of the depreciation of assessee-

company against the income surrendered during the course of survey. The appeal of assessee-company is accordingly allowed.

11. In the result, ITA.No.2777/Del./2017 of the assessee-company is allowed.

ITA.No.2778/Del./2017 – A.Y. 2013-2014 :

12. In appeal for A.Y. 2013-2014 similar issues have been raised on the following grounds :

1. *The Commissioner of Income Tax (Appeals) has erred in law and facts in confirming the disallowance for set off unabsorbed depreciation of earlier year and Current year against the income declared and assessed u/s 68 amounting Rs.80,00,000/-.*
2. *That learned Commissioner of Income Tax (Appeals) has erred in law and facts in confirming the action of AO that income u/s 68 is assessable as deemed Income ignoring the provisions of*

section 115BBE introduced from AY 2013-14 and restriction on loss set off u/s 115BBE (2) introduced w.e.f. 1.4.2007 and not retrospectively from A.Y. 2013-2014”

13. Following the Order for A.Y. 2012-2013 (supra), we set aside the orders of the authorities below and direct the A.O. to allow the claim of assessee-company.

14. In the result, ITA.No.2778/Del./2017 of the assessee-company is allowed.

15. Since, we have allowed the appeals of the assessee-company, therefore, Stay Applications filed by the assessee-company have become infructuous and are accordingly dismissed.

16. In the result, both the appeals of the assessee-company are allowed and both the stay applications of the assessee-company are dismissed.

Order pronounced in the open Court.

Sd/-
(LP SAHU)
ACCOUNTANT MEMBER

Sd/-
(BHAVNESH SAINI)
JUDICIAL MEMBER

Delhi, Dated 15th May, 2018

VBP/-

Copy to

1.	The applicant
2.	The respondent
3.	CIT(A) concerned
4.	CIT concerned
5.	D.R. ITAT 'D' Bench, Delhi
6.	Guard File.

// BY Order //

Assistant Registrar : ITAT Delhi Benches :
Delhi.