

**IN THE INCOME TAX APPELLATE TRIBUNAL  
"G" Bench, Mumbai**

**Before Shri C.N. Prasad, Judicial Member  
and Shri A.L. Saini, Accountant Member**

**ITA No. 5387/Mum/2016**  
(Assessment Year: 2011-12)

A C I T - 8(2)(2)  
Room No. 624, Aayakar Bhavan  
M.K. Road, Mumbai 400020

M/s. Starflex Sealing  
India P. Ltd.  
Vs. 124, Nagdevi Street  
Mumbai 400 003

PAN – AAACN1679B

**Appellant**

**Respondent**

Appellant by: Shri V. Vidhyadhar  
Respondent by: Shri Sunil Hirawat

Date of Hearing: 19.02.2018  
Date of Pronouncement: 21.02.2018

**ORDER**

**Per C.N. Prasad, JM**

This appeal has been filed by the Revenue against the order of the CIT(A)-14, Mumbai dated 27.06.2016 for A.Y. 2011-12.

2. The first ground of appeal raised by Revenue is that the CIT(A) erred in deleting the disallowance made under Section 43B of the Income Tax Act, 1961 (hereinafter "the Act") in respect of payment of employees contribution to Provident Fund and ESIC.

3. The AO, while completing the assessment, disallowed the PF contribution and ESIC in respect of employees in view of the provisions of Section 2(24)(x) r.w.s. 36(1)(va) of the Act for the reason that these amounts were remitted by the assessee beyond the due date specified in the respective Acts. It was contended before the AO that since these payments were made within the due date for filing return of income no disallowance is required to be made. However, the AO did not agree with

the contention of the assessee and disallowed the same under Section 43B of the Act.

4. On appeal, the CIT(A), following the decision of the Hon'ble Jurisdictional High Court in the case of CIT vs. Ghatge Patil Transport Ltd. 368 ITR 749, deleted the disallowance.

5. The learned D.R., on the other hand, vehemently supported the order of the Assessing Officer.

6. The learned counsel for the assessee placed reliance on the decision of the Hon'ble Jurisdictional High Court. The learned counsel for the assessee further submitted that this issue has been decided in its favour by the Coordinate Bench in assessee's own case for A.Y. 2009-10 in cross objection No. 223/Mum/2014 dated 08.06.2015 following the decision of the Hon'ble Jurisdictional High Court Ghatge Patil Transport Ltd. (supra).

7. On hearing both the parties we find that the issue in appeal is squarely covered by the decision of the Hon'ble Jurisdictional High Court Ghatge Patil Transport Ltd. (supra) wherein the Hon'ble High Court held as under: -

*“The question arising, therefore, is (a) whether the Tribunal was right in ignoring the distinction between the employees' contribution and employer's contribution and whether the decision of the Hon'ble Supreme Court in the case of CIT v. Alom Extrusions Pvt. Ltd. reported in (2009) 319 ITR 306 (SC) would apply only in the cases of the employees' contribution; and (b) whether the Tribunal was right in holding that the payment of the employees' contribution is subject to the provisions of section 43B would lead to the inclusion of the employers' contribution as well.”*

Respectfully following the said decision we uphold the order of the learned CIT(A) in deleting the disallowance made towards employees' PF contribution and ESIC. Thus, the ground is dismissed.

8. The next ground raised by the Revenue is in respect of allowing set off of brought forward depreciation for A.Y. 2001-02 beyond eight assessment years.

9. The learned counsel for the assessee at the outset submitted that the issue in appeal is squarely covered by the decision of the Hon'ble Gujarat High Court in the case of General Motors Pvt. Ltd. 257 CTR 123 and following the decision the Coordinate Bench in assessee's own case in ITA No. 5354/Mum/2013 dated 08.06.2015 for A.Y. 2009-10 allowed set off unabsorbed depreciation pertaining to A.Y. 2000-01.

10. The learned D.R., on the other hand, vehemently supported the order of the Assessing Officer.

11. We heard the rival submissions and perused the orders of the authorities below and the decision in assessee's on case for A.Y. 2009-10. On perusal of the order of the Coordinate Bench in assessee's own case we find that similar issue had come up before the Tribunal in A.Y. 2009-10 and the Coordinate Bench has decided this issue in favour of the assessee by observing as under: -

*3. In appeal, the CIT(A) allowed the set off of unabsorbed depreciation pertaining to A.Y.2000-01 after having the following observations :-*

*"4.3 I have carefully considered the facts of the case. There was amendment in section 32(2) of the Act w.e.f.1-4-2002. As per unamended provisions the unabsorbed depreciation of earlier years could be carried forward to a maximum of eight assessment years and set off against income of those eight assessment years. After lapse of eight assessment years, no carry forward and set off was allowed. However, after amendment this condition of eight assessment years has been removed and unabsorbed depreciation is required to be considered as part of next / subsequent assessment years, depreciation and allowed as such. If there is no such income for adjustment of such unabsorbed depreciation, such unabsorbed depreciation has been allowed to be carried forward for subsequent assessment years without any restrictions of any years. The dispute was as to whether or not the unabsorbed depreciation of assessment years prior to AY 2000-01 is allowed to be carried forward and set off against the income of subsequent years in view of amendment made in section 32 of the Act. This dispute arose in various cases. The ITAT Special Bench Mumbai in-the case of M/ s. Times Guaranty Ltd. discussed this issue and divided the unabsorbed depreciation in three parts i.e.*

*(i) Unabsorbed Depreciation pertaining to the assessment year up to AY 1996-97;*

(ii) *Pertaining to Assessment Year 1997-98 to AY 2001-02 &*

(iii) *Depreciation pertaining to Assessment Year from AY 2002-03 onwards.*

*The Special Bench held that the unabsorbed depreciation for the second period i.e. for AY 1997-98 to AY 2001-02 can be carried forward and set off for a maximum period of eight assessment years and subsequently it could not be set off against income other than business income.*

*As per decision of ITAT Special Bench., Mumbai in the case of M/s. Times Guaranty Ltd., the appellant's depreciation for AY 2000-01 was not allowable to be set off against the income of year under consideration. However, thereafter the Gujarat High Court in the case of M/ s. General Motors India Pvt. Ltd. 257 ITR 123 has held that.-*

*"i) Amendment to Sec.32(2) by Finance Act 2001 is applicable from A.Y.2002-03 and subsequent years. Therefore, unabsorbed depreciation from A. Y 97-98 upto A. Y 2001 to got carried forward to the A. Y.2002-03 and become part thereof,*

*ii) It came to the governed by the provisions of Sec.32(2) as amended by Finance Act 2001 and was available for carry forward and set off against the profits and gains of subsequent years, without any limits whatsoever."*

*The decision of Hon'ble Gujarat High Court in the case of General Motors P. Ltd. is subsequent to the decision of ITAT Special Bench, Mumbai. However, while adjudicating the issue, the decision of ITAT Special Bench, Mumbai has not been considered by the Gujarat High Court. However, being a higher judicial forum / authority, the decision of Gujarat High Court is required to be followed. There is no any contrary decision of any other High Court on this issue.*

*In view of above and following the above decision of Gujarat High Court, the AO is directed to allow set off of unabsorbed depreciation of assessment year 2000-01.*

*This ground of appeal is therefore, allowed."*

*Against this order of CIT(A), the revenue is in appeals before us against allowing set off of depreciation and the assessee is in cross objections against the confirmation of addition so made by the AO on account of ESIC contribution for the assessment years 2009-10 & 2010- 2011.*

*5. We have considered rival contentions and gone through the orders of authorities below. The issue under consideration is squarely covered by the decision of Hon'ble Gujarat High Court in the case of M/s General Motors Pvt. Ltd., 257 CTR 123, by relying on which*

*CIT(A) has allowed setting off of depreciation. Hence, there is no infirmity in the order of CIT(A). Accordingly, we dismiss the appeal of the revenue for assessment year 2009-2010.”*

Respectfully following the said decision we uphold the order of the CIT(A) and reject the ground raised by Revenue on this issue.

12. In the result, the appeal filed by the Revenue is dismissed.

Order pronounced in the open court on 21<sup>st</sup> February, 2018.

Sd/-  
**(A.L. Saini)**  
**Accountant Member**

Sd/-  
**(C.N. Prasad)**  
**Judicial Member**

Mumbai, Dated: 21<sup>st</sup> February, 2018

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT(A) -14, Mumbai*
4. *The CIT - 8, Mumbai*
5. *The DR, “G” Bench, ITAT, Mumbai*

*By Order*

//True Copy//

*Assistant Registrar*  
*ITAT, Mumbai Benches, Mumbai*

n.p.