

IN THE INCOME TAX APPELLATE TRIBUNAL
“SMC” BENCH, MUMBAI
BEFORE SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No. 2544/Mum/2023

(A.Y: 2014-15)

J.B Advani & Company Pvt Ltd., Ador House, 4 th Floor, 6 K, Dubash Marg, Kalgoda, Lion Gate, Fort, Mumbai-400001.	Vs.	ACIT, Circle 2(2)(1), Aayakar Bhavan, Mumbai-400021.
PAN/GIR No. : AAACJ1966D		
Appellant	..	Respondent

Assessee by :	Shri. Paras Savla & Shri Pratik Poddar. AR
Revenue by :	Shri.G.J.Ninawe.Sr. DR

Date of Hearing	31.10.2023
Date of Pronouncement	06.11.2023

आदेश / O R D E R

PER PAVAN KUMAR GADALE JM:

The assessee has filed the appeal against the order of the National Faceless Appeal Centre (NFAC), Delhi / CIT(A) passed u/sec143(3) and U/sec 250 of the Ac. The assessee has raised the following grounds of appeal:

Ground No. 1:

The CIT(A) erred in upholding the order of learned AO and not allowing the set off of unabsorbed depreciation brought forward from earlier years against the short-term capital gains of Rs.15,11,940 for the relevant assessment year, ignoring the fact

that as per the provisions of section 32(2) read with section 71(2) of the Act, the unabsorbed depreciation of the earlier years stands on the same footing as the depreciation for the current year, and therefore it can be set-off against business profits as well as against the income under any other head.

The CIT(A) erred in upholding the order of learned AO and not appreciating that the issue is covered by favorable judicial precedents.

Ground No. 2:

The CIT(A) erred in not giving appropriate directions for computing the interest correctly under section 234D of the Act.

Ground No. 3:

The CIT(A) erred in not giving appropriate directions for computing the interest correctly under section 244A of the Act.

Each one of the above grounds of appeal is without prejudice to the other.

The appellant reserves the right to add, alter, amend, vary, omit or substitute the above grounds of appeal or add a new ground or grounds of appeal at any time before or at the time of hearing of the appeal as they may be advised

2. The brief facts of the case are that, the assessee company is engaged in the business of manufacturing and supply of electrical steel lamination, gas cutting products, gas regulators, and assembling of welding equipment, & AC/DC ARC Welders. The assessee has filed the return of income for the A.Y 2014-15 disclosing a total income of Rs.

Nil. Subsequently the case was selected for limited scrutiny under the CASS and notice u/s 143(2) and U/sec 142(1) of the Act along with questionnaire are issued. In compliance to the notice, the Ld. AR of the assessee appeared from time to time and submitted the details and the case was discussed. The Assessing Officer (AO) on perusal of the facts, information and computation of income found that the assessee has adjusted brought forward unabsorbed depreciation of Rs.15,11,939/-against the income of the current year, whereas the assessee has disclosed the income under the head, income from house property, short term capital gains and income from other sources and the business loss of Rs. 2,27,37524/-.Further the A.O found that after adjusting the business losses against the income from other heads in accordance u/sec 71 of the Act, the assessee has set off remaining capital gains of Rs.18,04,325/- against brought forward short term capital loss of amount to Rs.2,92,386/-and balance of Rs. 15,11,939/-is income from short term capital gains, which was set off against the brought forward unabsorbed depreciation of preceding year. The AO has called for the explanations on claim of set off of brought forward unabsorbed depreciation. In compliance, the assessee has

filed the explanation vide letter dated 07.11.2017. Whereas the AO was not satisfied with the explanations and has dealt on the provisions of Section 32 & section 70 to 72 of the Act is of the opinion that the setoff claim cannot be allowed. Finally the A.O has disallowed the setoff of unabsorbed depreciation of earlier year and assessed the total income of Rs.15,11,940/- and passed the order u/section 143(3) of the Act dated 10.11.2017.

3. Aggrieved by the order the assessee has filed an appeal before the CIT(A), whereas the CIT(A) considered the grounds of appeal, submissions of the assessee and findings of the AO. But has confirmed the action of the Assessing Officer and dismissed the assessee appeal. Aggrieved by the CIT(A) order, the assessee has filed an appeal before the Hon'ble Tribunal.

4. At the time of hearing, the Ld. AR submitted that the CIT(A) has erred in confirming the action of the AO in denial of claim of setoff of unabsorbed depreciation carried forward from earlier year against the income from capital gains and which is permitted in accordance with the provisions of the Act. Further the Ld. AR substantiated the submissions with the factual paper book and judicial

decisions and prayed for allowing the appeal. Per Contra, the Ld. DR supported the order of the CIT(A).

5. Heard the rival submissions and perused the material on record. The sole matrix of the disputed issue envisaged by the Ld. AR that the CIT(A) has erred in sustaining the action of the AO in denial of claim of setoff of unabsorbed depreciation carried forward from earlier year against the income from short term capital gains. The contentions of the Ld. AR are that the unabsorbed depreciation carried forward from earlier year has to be treated on par with the Current Year depreciation. The Ld.AR emphasized on the provisions of Section 71 & 72 of the Act and the methodology adopted in setoff of current year losses and carried forward/brought forward business loss and unabsorbed depreciation. The Ld. AR has relied on the following judicial decisions as under:

- 1. PCIT v. Gunnebo India Pvt. Ltd ITA No1337 of 2016, order dated 11.02.20192.*
- 2. Bond Safety Belts v. DCIT ITA No. 853 of 2018, order dated 27.09.2023.*
- 3. CIT v. Virmani Industries (P.) Ltd. [1995] 83 Taxman 343 (SC).*
- 4. General Motors India (P.) Ltd. v. DCIT, [2012] 25 taxmann.com 364 (Gujarat)*

5. *CIT v Kisan Engineering Works Ltd. [2013] 33 taxmann.com 328 (Allahabad).*
6. *CIT v. G.T.M. Synthetics Ltd.[2012] 347 ITR 458 (Punjab & Haryana)*
7. *Suresh Industries (P.) Ltd. v. ACIT [2012] 27 taxmann.com 203 (Mum).*
8. *DCIT v. J.BEnggWorks [2017] 82 taxmann.com 326 (Mumbai - Trib).*
9. *Sunshield Chemicals (P.) Vs. ITO [2015] 64 taxmann.com 161 (Mumbai - Trib).*
- 10 *Pfizer Ltd v. CIT [1991]191 ITR 626 (Bombay)*
11. *Tata Communications Payment Solutions Ltd v. DCIT ITA No. 107/Mum/2022, order dated 23.05.2022*
12. *Small Industries Development Bank of India v. DCIT, ITA NO. 3707/MUM/2012, order dated 15.09.2017*
13. *Koninklijke Philips N.V. Vs. DCIT, [2023] 146 taxmann.com 213 (Kolkata Trib.)*

6. Recently, The Hon'ble High Court of Bombay in the case of Bond Safety Belts Vs. DCIT in Income Tax Appeal.No. 853 of 2018 order dated 27-09-2023 has observed on the similar issue read as under:

“12.As regards the 2nd substantial question of law proposed on the unabsorbed depreciation, a Division Bench of this Court in PCIT vs. Gunnebo India Pvt Ltd², dismissed the appeal by following the judgment in General Motors (supra)The High Court while considering the appeal in Gunnebo (supra), has

quoted the relevant portion of the order of ITAT which had dismissed the revenue's appeal where ITAT has held that as per the provisions of Section 32(2) of the Act read with Sections 70, 71 and 72 of the Act it becomes very clear that the total depreciation comprising of the depreciation of the relevant assessment year along with the unabsorbed depreciation of the earlier years becomes the total current year's depreciation which is allowed to be set-off against income under any head of income including long term capital gain and hence did not find any reason to interfere with the order of CIT(A). The High Court has also quoted relevant paragraph from General Motors (supra) where there is reference to a Circular No. 14 of 2001 issued by the CBDT where the Court has held that the unabsorbed depreciation was available for carry forward and set-off in the subsequent assessment year. Paragraph 3 and 4 of Gunnebo (supra) read as under.

3. The Revenue carried the matter in appeal. The Appellate Tribunal dismissed the appeal of the Revenue making the following observations-

16. We have observed that the current year's depreciation is allowed to be set off against the income from business as well as against the other heads of income and unabsorbed depreciation in carry forward and become part of the depreciation of the subsequent year and the total depreciation becomes current year's depreciation as per section 32(1) of the Act, which is allowed to be set off against the income under any head of income. As per the provisions of section 32(2) of the Act r.w.s.70, 71 and 72 of the Act it becomes very clear that the total depreciation comprising of the depreciation of the relevant assessment year along with the unabsorbed depreciation of the earlier years becomes the total current year's depreciation which is allowed to be set off against income under any head of income including Long Term Capital Gain. Accordingly, we find no reason to interfere with the order of CIT(A) qua this

issue and the same is hereby upheld. We also hold that as per provisions of section 72 of the Actt he unabsorbed business loss (other than speculative loss) of earlier years shall be allowed to be set off only against the profits and gains from business carried on by the assessee of the current year and so on. We order accordingly. However, our above decision with respect to ground no. (i) and (ii) raised in memo of appeal filed by Revenue should be read in conjunction with and subject to our findings with respect to ground no(iii) and (iv) which are decided by us in the preceding para's of this order and the computation shall be made accordingly."

4. Having heard the learned counsel for parties and having perused the documents on record, we do not find any error in the order of the Appellate Tribunal Gujarat High Court in the case of General Motors India (P) Ltd. (supra) had considered somewhat similar issue, of course in the backdrop of th assessee's challenge to a notice of reopening of the assessment The Gujarat High Court had held and observed as under-

"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 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 April, 2002 (asst yr. 2002-03) will be dealt with in accordance with the provisions of s32(2) as amended by Finance Act, 2001. And once the Circular No. 14 of 2001 clarified that the restriction of 8 years for carry forward and set off of unabsorbed depreciation had been dispensed with, the unabsorbed depreciation from asst, yr. 1997-98 up to the asst. yr. 2001-02 got carried forward to the asst. yr2002-03 and became part thereof, it came to be governed by the provisions of s. 32(2) as amended by Finance Act2001 and were available for carry forward and set off against the profits and gains of subsequent years, without any limit whatsoever."

13. In the appeal at hand, the ITAT, in the impugned order, after relying on General Motors (supra), has incorrectly come to a conclusion that the Assessee has claimed set-off of the impugned unabsorbed depreciation against the income under the head capital gain which is not permissible. This is totally contrary to the conclusion of the co-ordinate bench of the ITAT in Gunnebo (supra) where, as quoted above, the ITAT has held that the unabsorbed depreciation of earlier years become the total current year depreciation which is allowed to be set-off against income under any head of income including long term capital gain.

14. The CBDT issued a Circular No. 14 of 2001 and the relevant portion of the said circular reads as under.

"Modification of provisions relating to depreciation

30.1 Under the existing provisions of section 32 of the Income-tax Act carry forward and set off of unabsorbed depreciation is allowed for 8 assessment years.

30.2 With a view to enable the industry to conserve sufficient funds to replace plant and machinery. specially in an era

where obsolescence takes place so often, the Act has dispensed with the restriction of 8 years for carry forward and set off of unabsorbed depreciation. The Act has also clarified that in computing the profits and gains of business or profession for any previous year, deduction of depreciation under section 32 shall be mandatory

30.3 Under the existing provisions, no deduction for depreciation is allowed on any motor car manufactured outside India unless it is used (i) in the business of running it on hire for tourists, or (ii) outside in the assessee's business or profession in another country.

30.4 The Act has allowed depreciation allowance on all imported motor cars acquired on or after 1 April, 2001.

30.5 These amendments will take effect from the 1st April, 2002, and will, accordingly, apply in relation to the assessment year 2002-03 and subsequent years."

15. Therefore, the intent of the amendment was for enabling the industry to conserve sufficient funds to replace plant and machinery and accordingly dispense with the restriction of 8 years for carry forward and set-off of unabsorbed depreciation. The purpose of amendment in Section 32(2) of the Act by Finance Act 2001 should be interpreted purposively and harmoniously with the intent as it appears from CBDT circular. While construing taxing statutes, rule of strict interpretation has to be applied giving fair and reasonable construction to the language of the Section without leaning to the of the Assessee or Revenue But if the legislature fails to express clearly and the Assessee becomes entitled for a benefit within ambit of the Section, the benefit accruing to the Assessee cannot be denied Therefore, as stated in General Motors (supra) with which we are in respectful agreement, if current depreciation is deductible in the first place from the income of the business to

which it relates and such depreciation amount is larger than the amount of the profit of that business, then such excess comes for absorption from profit 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 still a balance leftover, it is to be treated as unabsorbed depreciation and taken to the next succeeding year.

16. Paragraph No. 35 to 38 of General Motors (supra) reads as under.

35. Section 32(2) of the Act was amended by Finance Act. 2001 and the provision so amended reads as under-

"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 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 allowance of that previous year, and so on for the succeeding previous years."

36. The purpose of this amendment has been clarified by Central Board of Direct Taxes in the Circular No. 14 of 2001. The relevant portion of the said Circular reads as under-

"Modification of provisions relating to depreciation

30.1 Under the existing provisions of section 32 of the Income-tax Act, carry forward and set off of unabsorbed depreciation is allowed for 8 assessment years.

30.2 With a view to enable the industry to conserve sufficient funds to replace plant and machinery. specially in an era where obsolescence takes place so often, the Act has dispensed with the restriction of 8 years for carry forward and set off of unabsorbed depreciation. The Act has also clarified that in computing the profits and gains of business or profession for any previous year, deduction of depreciation under section 32 shall be mandatory.

30.3 Under the existing provisions, no deduction for depreciation is allowed on motor car any motor manufactured outside India unless it is used (i) in the business of running it on hire for tourists, or (ii) outside in the assessee's business or profession in another country.

30.4 The Act has allowed depreciation allowance on all imported motor cars acquired on or after 1" April 2001.

30.5 These amendments will take effect from the 1" April, 2002, and will, accordingly, apply in relation to the assessment year 2002-03 and subsequent years."

37 The CBDT Circular clarifies the intent of the amendment that it is for enabling the industry to conserve sufficient funds to replace plant and machinery and accordingly the amendment dispenses with the restriction of 8 years for carry forward and set off of unabsorbed depreciation. The amendment is

applicable from assessment year 2002-03 and subsequent years. This means that any unabsorbed depreciation available to an assessee on 1 day of April, 2002 (A. Y2002-03) will be dealt with in accordance with the provisions of section 32(2) as amended by Finance Act2001 and not by the provisions of section 32(2) as it stood before the said amendment. Had the intention of the Legislature been to allow the unabsorbed depreciation allowance worked out in A. Y1997-98 only for eight subsequent assessment years even after the amendment of section 32(2) by Finance Act2001 it would have incorporated a provision to that effect However it does not contain any such provision Hence keeping in view the purpose of amendment of section 32(2) of the Act a purposive and harmonious interpretation has to be taken. While construing taxing statutes rule of strict interpretation has to be applied, giving fair and reasonable construction to the language of the section without leaning to the side of assessee or the revenue But if the legislature fails to express clearly and the assessee becomes entitled for a benefit within the ambit of the section by the clear words used in the section, the benefit accruing to the assessee cannot be denied. However, Circular No. 14 of 2001 had clarified that under Section 32(2) as amended by Finance Act, 2001 would allow the unabsorbed depreciation allowance available in the AY. 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 Assessment Year 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 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.

(emphasis supplied)

In effect what it means is the depreciation amount has to be adjusted in the following order.

(a) first against profits and gains from business;

(b) excess of depreciation from any other business of the Assessee;

(c) even if that leaves a surplus then from out of income from any source under any of the other heads of income during that year.

(d) If still there is a balance leftover, it is to be treated as unabsorbed depreciation and it is taken to the next succeeding year.

17. Otherwise it would leave a peculiar situation inasmuch as like the case at hand, there is no profit from business because the operation of the business had been stopped and to pay off the liabilities other investments or other assets have been disposed leading to capital gains on which capital gains tax has to be paid on the one hand and on the other there will be unabsorbed depreciation perennially pending.

18 Accordingly we hereby quash and set aside the order of ITAT on this issue. We hold that ITAT was not justified. Assessee should be permitted to set off of the unabsorbed depreciation pertaining to A.Y 96-97 to 2001-02 aggregating to Rs.13,89,661/- against short term capital gains.

19 Appeal accordingly disposed “

7. Considering the facts, circumstances and the ratio of the jurisdictional Honble High Court decision, the unabsorbed depreciation carried forward from earlier years to set off against the short term capital gains. Accordingly, follow the judicial precedence, and set aside the order of the CIT(A) and direct the Assessing officer to allow the claim of setoff of unabsorbed depreciation carried forward from earlier year against the income from short term capital

gains. Further the assessing officer is directed to compute interest U/sec234D &U/sec244A of the Act in accordance with the provisions of the Act. And the grounds of appeal are allowed in favour of the assessee.

8. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 06.11.2023.

Sd/-
(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Mumbai, Dated 06.11.2023

KRK, PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT (Judicial)
4. The PCIT
5. DR, ITAT, Mumbai
6. Guard File

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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(Asst. Registrar)
ITAT, Mumbai