

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**TAX APPEAL NO. 3 of 2014**

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COMMISSIONER OF INCOME TAX....Appellant(s)

Versus

GUJARAT THEMIS BIOSYN LTD....Opponent(s)

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Appearance:

MR SUDHIR M MEHTA, ADVOCATE for the Appellant(s) No. 1

MR BHARGAV KARIA, WITH MR RK PATEL, ADVOCATE for the Opponent(s)

No. 1

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CORAM: **HONOURABLE MR.JUSTICE AKIL KURESHI**
and
HONOURABLE MS JUSTICE SONIA GOKANI**Date : 24/02/2014****ORAL ORDER****(PER : HONOURABLE MS JUSTICE SONIA GOKANI)**

Challenging the order of the Income Tax Appellate Tribunal dated 10th May 2013, the present Tax Appeal has been preferred. On 8th January 2014, while issuing notice to the other side, we had decided to hear only question B which reads as under:

“B. Whether in law and on the facts and circumstances of the case, the ITAT was right in allowing the claim of the assessee for carry forward of unabsorbed depreciation of Rs.58,48,076/- for the period A.Y. 1997-98 to 2000-01 i.e. more than eight years in contravention to the provisions of the unamended provisions of section 32(2)(iii)(b) as stood in the assessment years 1997-98 to 2000-2001 ?”

While issuing the notice, we observed thus:

“With respect to question B, counsel for the Revenue drew our attention to a decision of this Court in the case of **General Motors** reported in 354 ITR 244 in which while examining the validity of the notice for reopening of the assessment, the Court also examined in detail the question of carry forward of unabsorbed depreciation. The Tribunal has relied on this decision to accept the claim of the assessee. The counsel for the Revenue wanted to draw some

factual distinction in the present case as compared to the case of General Motors. We would like to hear the other side as well.

Issue notice returnable on 5th February 2014 to consider only question 'B'."

We have heard learned counsel Mr.Sudhir Mehta for the Revenue and learned counsel Mr.Bhargav Karia for the assessee-respondent.

This very issue has been decided by this Court in the case of **General Motors India P. Ltd. v. Deputy CIT**, 354 ITR 244 (Guj). While deciding the question of reopening of the notice, this Court chose to consider whether unabsorbed depreciation could be carried forward and set off after a period of eight years and would that be governed by section 32 as amended by the Finance Act 2 of 1996. This Court has chosen to answer the same in the following manner:

" The last question which arises for consideration is that whether the unabsorbed depreciation pertaining to A.Y. 1997-98 could be allowed to be carried forward and set off after a period of eight years or it would be governed by Section 32 as amended by Finance Act 2001? The reason given by the Assessing Officer under section 147 is that Section 32(2) of the Act was amended by Finance Act No.2 of 1996 w.e.f. A.Y. 1997-98 and the unabsorbed depreciation for the A.Y. 1997-98 could be carried forward up to the maximum period of 8 years from the year in which it was first computed. According to the Assessing Officer, 8 years expired in the A.Y. 2005-06 and only till then, the assessee was eligible to claim unabsorbed depreciation of A.Y. 1997-98 for being carried forward and set off against the income for the A.Y. 2005-06. But the assessee was not entitled for unabsorbed depreciation of Rs.43,60,22,158/- for A.Y. 1997-98, which was not eligible for being carried forward and set off against the income for the A.Y. 2006-07.

Prior to the Finance Act No.2 of 1996 the unabsorbed

depreciation for any year was allowed to be carry forward indefinitely and by a deeming fiction became allowance of the immediately succeeding year. The Finance Act No.2 of 1996 restricted the carry forward of unabsorbed depreciation and set-off to a limit of 8 years, from the A.Y.1997-98. Circular No.762 dated 18.2.1998 issued by the Central Board of Direct Taxes (CBDT) in the form of Explanatory Notes categorically provided, that the unabsorbed depreciation allowance for any previous year to which full effect cannot be given in that previous year shall be carried forward and added to the depreciation allowance of the next year and be deemed to be part thereof.

So, the unabsorbed depreciation allowance of A.Y. 1996-97 would be added to the allowance of A.Y. 1997-98 and the limitation of 8 years for the carry-forward and set-off of such unabsorbed depreciation would start from A.Y. 1997-98.

We may now examine the provisions of section 32(2) of the Act before its amendment by Finance Act 2001. The section prior to its amendment by Finance Act, 2001, read as under:-

“Where in the assessment of the assessee full effect cannot be given to any allowance under clause (ii) of sub-section (1) in any previous year owing to there being no profits or gains chargeable for that previous year or owing to the profits or gains being less than the allowance, then, the allowance or the part of allowance to which effect has not been given (hereinafter referred to as unabsorbed depreciation allowance), as the case may be,-

(i) shall be set off against the profits and gains, if any, of any business or profession carried on by him and assessable for that assessment year;

(ii) if the unabsorbed depreciation allowance cannot be wholly set off under clause (i), the amount not so set off shall be set off from the income under any other head, if any, assessable for that assessment year;

(iii) if the unabsorbed depreciation allowance cannot be wholly set off under clause (i) and Clause (ii), the amount of allowance not so set off shall be carried forward to the following assessment year and

(a) it shall be set off against the profits and gains, if any, of any business or profession carried on by him and assessable for that assessment year;

(b) if the unabsorbed depreciation allowance cannot be wholly so set off, the amount of unabsorbed depreciation allowance not so set off shall be carried forward to the following assessment year not being more than eight assessment years immediately succeeding the

assessment year for which the aforesaid allowance was first computed:

Provided that the time limit of eight assessment years specified in sub-clause (b) shall not apply in 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-section (1) of section 17 of the Sick Industrial Company (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 clause (ga) of sub-section (1) of section 3 of the Sick Industrial Companies (Special Provisions) Act, 1985."

The aforesaid provision was introduced by Finance (No.2) Act, 1996 and further amended by the Finance Act, 2000. The provision introduced by Finance (No.2) Act was clarified by the Finance Minister to be applicable with prospective effect.

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 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."

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 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 1st 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."

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 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 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.Y. 1997-98 only for eight subsequent assessment years even after the amendment of section 32(2) by Finance Act, 2001 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), in computing the profits and gains of business or profession for any previous year, deduction of depreciation under Section 32 shall be mandatory. 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.

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.”

We notice that in the instant case, the Tribunal while dealing with this case has noted that the carry forward of unabsorbed depreciation concerning A.Y. 2001-02 and assessment years prior thereto can be set off in subsequent years without any set time limit, considering the decision in the case of General Motors India P. Ltd. (supra) wherein this Court has held that carry forward of unabsorbed depreciation prior to assessment can be set off in subsequent years without setting time limit. The Tribunal has rightly applied the law to the facts of the instant case.

No question of law therefore arises in the present Tax Appeal for our consideration. Tax Appeal is resultantly dismissed.

(AKIL KURESHI, J.)

(MS SONIA GOKANI, J.)

(vjn)

