

\$~3

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 09.01.2018

+ **ITA 1031/2017**

PR. COMMISSIONER OF INCOME TAX - 2 Appellant

Through: Mr. Zoheb Hossain, Sr. Standing
Counsel.

versus

BRITISH MOTOR CAR CO. (1934) LTD Respondent

Through: Mr. Salil Kapoor, Mr. Sumit
Lalchandani and Ms. Soumya Singh,
Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A. K. CHAWLA

HON'BLE MR. JUSTICE S. RAVINDRA BHAT (ORAL)

%

CM APPL. 42239/2017 *(for condonation of delay)*

1. For the reasons mentioned in the application, the delay in re-filing the present appeal is hereby condoned.

CM stands disposed of.

ITA 1031/2017

2. The question of law urged by the Revenue in the appeal is whether the interpretation of Section 32(2) of the Income Tax Act,

1961 ('the Act') as amended by Finance Act, 2001, could be given effect to beyond the period of eight years, prior to its commencement?

3. The assessee in this case had carried forward depreciation for a number of years – the earliest of which, was 1998-99.

4. For Assessment Year (A.Y.) 2010-11, the Assessing Officer (AO) disallowed the amounts claimed as depreciation on the ground that the amendment to Section 32(2) of the Act, which removed the cap, was prospective and effective only from 01.04.2002. The CIT(A) however reversed that decision relying upon *CIT v. Govind Nagar Sugar Ltd.*, (2011) 334 ITR 13 (Del); *CIT V s. Haryana Hotels Ltd.*, (2005) 276 ITR 521 (P&H); *CIT v. Fabriquip Private Ltd.*, (2003) 260 ITR 207 (Guj), and several other decisions.

5. The ITAT, by its impugned order, upheld the decision of the CIT(A) and relied upon a subsequent judgment of the Gujarat High Court in *General Motors India Pvt. Ltd. v. DCIT*, 354 ITR 244 (Guj). That judgment had been followed by this Court in *Motor & General Finance Ltd. v. ITO*, 2017 80 Taxxman.com 14 (Delhi). Mr. Zoheb Hossain, learned counsel for the Revenue contends that the decision in *Motor & General Finance Ltd* (supra) cannot be considered conclusive because it was rendered in the context of validity of a re-opening of an assessment under Section 147 of the Act and the Court was not really called upon to decide on the scope of Section 32(2) of the Act.

6. Learned counsel for the assessee on the other hand, appearing on advance notice, contended that the decision in *Motor & General Finance* (supra) has been approved on the Special Leave Petition rejected by the Supreme Court, and, more particularly, this Court has approved the reasoning in *General Motors India Pvt. Ltd.*(supra) by the Gujarat High Court.

7. Section 32(2) of the Act to the extent is relevant, reads, as follows:-

“32. Depreciation

(1)

(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 for that previous year, or owing to the profits or gains chargeable being less than the allowance, then, subject to the provisions or 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.”*

8. Prior to its amendment, the provision had limited the carry forward of depreciation to 8 years. This restriction was brought in, by Finance Act, 1996. Prior to that amendment, there was no restriction or cap in the carrying forward of depreciation. In *General Motors*

India Pvt. Ltd. (supra), the entire history of the legislation was considered by the Gujarat High Court including the reasons for the Finance Act No.2 of 1996, the amendment of 2001-brought into force with effect from 01.04.20002 as well as the circular of the Central Board of Direct Taxes (Circular No.14 of 2001). The Gujarat High Court, after considering and noticing these relevant facts, observed as follows:-

“34. We may now examine the provisions of section 32(2) of the Act before its amendment by the Finance Act, 2001. The section, prior to its amendment by the 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.”

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

36. *Section 32(2) of the Act was amended by the 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 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 of that previous year, and so on for the succeeding previous years.”

37. The purpose of this amendment has been clarified by the Central Board of Direct Taxes in Circular No. 14 of 2001 (see [2001] 252 ITR (St.) 65, 90). 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 eight 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 eight 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.”

38. The Central Board of Direct Taxes 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 eight years for carry forward and set off of unabsorbed depreciation. The amendment is applicable from the assessment year 2002–03 and subsequent years. This means that any unabsorbed depreciation available to an assessee on the 1st day of April, 2002 (the assessment year 2002–03), will be dealt with in accordance with the provisions of section 32(2) as amended by the 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 the assessment year 1997–98 only for eight subsequent assessment years even after the amendment of section 32(2) by the 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 the amendment of section 32(2) of the Act, a purposive and harmonious interpretation has to be taken. While construing the 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 the 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 the Finance Act, 2001, would allow the unabsorbed depreciation allowance available in the assessment years 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. 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 the 1st day of April, 2002

(the assessment year 2002–03), will be dealt with in accordance with the provisions of section 32(2) as amended by the Finance Act, 2001. And once Circular No. 14 of 2001 clarified that the restriction of eight years for carry forward and set off of unabsorbed depreciation had been dispensed with, the unabsorbed depreciation from the assessment year 1997–98 up to the assessment year 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 the Finance Act, 2001, and were available for carry forward and set off against the profits and gains of subsequent years, without any limit whatsoever.”

9. This Court is in agreement with the reasoning of the Gujarat High Court. The rationale for the amendment appears to be that the restriction against set off and carry forward limited to 8 years, beyond which the benefit could not be claimed under provisions of the Income Tax Act, was for the reasons deemed appropriate by the Parliament. The limit was imposed in 1996 through Finance Act No.2. As the Gujarat High Court observed, Had the intention of Parliament being really to restrict the benefit (of unlimited carry forward prospectively), there were more decisive ways of doing so—such as, an expressed provision or an exception or proviso etc. The absence of any such legislative devise meant that provisions had to be construed in its own term and not so as to restrict the benefit or advantage, it sought to confirm.

10. For these reasons, the Court is of the opinion that the reasoning in *Motor & General Finance Ltd.* (supra) does not call for re-examination.

11. The Court also approves and follows the judgment in *General Motors India Ltd.* (supra) of the Gujarat High Court. No substantive question of law arises.

The appeal is therefore dismissed.

S. RAVINDRA BHAT, J

A. K. CHAWLA, J

JANUARY 09, 2018

nn

न्यायमेव जयते