

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.07.2020

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI
AND
THE HON'BLE MR.JUSTICE KRISHNAN RAMASAMY

T.C.A.No.415 of 2017

Principal Commissioner of Income Tax 4
No.121, Mahatma Gandhi Road,
Chennai - 600 034 ... Appellant

vs.

M/s. Lotte India Corporation Ltd,
4/169, Rajiv Gandhi Salai (OMR),
Kandanchavadi Bus Stop,
Perungudi Taluk, Chennai - 600 096. ... Respondent

Prayer :- Appeal filed against the order of the Income Tax Appellate Tribunal, Madras A Bench, dated 28.09.2016 in ITA Nos.524/Mds/2016, against the order of The Commissioner of Income Tax Appeals 8, Chennai in ITA No.84/2011-12 dated 21.12.2015 in the assessment year 2006-07.

Against the order of The Assistant Commissioner of Income Tax, Chennai, dated 19.12.2011 PAN/GIR No. AAACP1916F in the assessment year 2006-07.

For appellant : Mr.Karthik Ranaganathan
For respondent : Mr.Sandeep Bagmar

ORDER
(Made by DR.VINEET KOTHARI, J.)

The Court was held by Video Conference, as per the Resolution of the Full Court dated 3 July 2020, by Judges at their respective residence and the counsel, staff of the Court appearing from their respective residences.

2. The Revenue has filed this appeal under Section 260A of the Act for the assessment year 2006-07 against the order of the learned Income Tax Appellate Tribunal "A" Bench, dated 28.09.2016 in ITA Nos.524/Mds/2016 whereby the learned Tribunal allowed the benefit of carry forward of losses under Section 72

(A) of the Act to the respondent Assessee which is the amalgamated company in respect of the brought forward losses of the amalgamating company viz., M/s.Confectionary Specialties Limited (for short, "M/s.CSL")

3. The following purported substantial questions of law are raised by the Revenue for our consideration :-

1. Whether on the facts and circumstances of the case the Appellate Tribunal is correct in law in holding that Unabsorbed depreciation relating to the assessment year 2001-02 and assessment years prior thereto can be set off in subsequent years, without any limit, as per the amended provision of section 32[2] of the Income Tax Act?

2. Whether the Tribunal was correct in deleting the dis-allowance on the claim of setting off of brought forward unabsorbed depreciation amounting to Rs.1,19,02,780/- pertaining to Asst Years 1999-2000 and 2000-2001 ?

4. The learned Tribunal, in paragraphs 13 and 14 of its order, has given the following finding in this regard :-

13. We have heard both sides, perused the materials on record and gone through the orders of authorities below. The assessee has claimed unabsorbed depreciation of the assessment years 1999-2000 and 2000-01 in the assessment year under consideration. In view of the modification to the provisions of section 32(2) of the Act with effect from 01.04.2002, whereby, the unabsorbed depreciation loss gets merged with subsequent years' depreciation and becomes current depreciation of subsequent year, the assessee can claim the unabsorbed depreciation loss only from the assessment year 2002-03. In other words, the unabsorbed depreciation losses, starting from assessment year 2002-03 will be carried forward to subsequent assessment and becomes part of subsequent year's depreciation. Therefore, the Assessing Officer denied claiming the unabsorbed depreciation loss pertaining to the assessment years 1999-2000 and 2000-01 against the total income of the current assessment year. The ld. CIT(A) directed the Assessing Officer to allow the unabsorbed depreciation of the assessment years 1999-2000 and 2000-01 claimed in the assessment

year 2010-11 by following the decision of the Tribunal in the case of Best & Crompton Engineering Ltd. (supra), wherein the Tribunal has followed the decision of the Hon'ble Gujarat High Court in the case of General Motors India (P.) Ltd. v. DCIT 354 ITR 244, By filing a copy of the order of the Tribunal in the case of Binny Ltd. v. ACIT (supra), the ld. Counsel for the assessee has submitted that the issue involved in the appeal is squarely covered in favour of the assessee. We have also perused the above decision of the Tribunal, wherein, it was held as under:

"7. The next ground raised by the assessee in this appeal is that the Commissioner of Income-tax (Appeals) erred in confirming the disallowance of Rs.8,25,66,340/- relating to unabsorbed depreciation without considering the facts and circumstances of the case.

8. The facts of the case are that the Assessing Officer disallowed set off brought forward depreciation by observing that the claim of loss u/s.32(2) included the unabsorbed depreciation relating to assessment years prior to 1986-87 and that in the current assessment year viz. 2008-09 unabsorbed depreciation prior to the assessment year 2000-01 cannot be set off. For this purpose, he relied on the judgment of the Tribunal Special Bench, Mumbai in the case of Times Guaranty Ltd. (40 SOT 14). The Commissioner of Income-tax (Appeals) confirmed the same. Against this, the assessee is in appeal before us.

9. We have heard both the parties. It is brought to our notice that the same issue was considered by the Gujarat High Court in the case of CIT vs. (44 taxmann.com 204), wherein they considered their earlier judgment in the case of General Motors India (P.) Ltd. v. DCIT (354 ITR 244), wherein it was held as under:

"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 setoff 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 Incometax 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."

In view of this, we are of the opinion that carry forward of unabsorbed depreciation concerning assessment year 2001-02 and assessment years prior thereto can be set off in subsequent years without any set time limit. Accordingly, this ground of appeal is allowed."

13. At the time of hearing, the ld. DR could not controvert the above findings of the Tribunal or filed any order of higher Court decision having modified or reversed the above order of the Tribunal. Hence, respectfully following the above decision, we are of the opinion that the ld. CIT(A) has rightly directed the Assessing Officer to allow the unabsorbed depreciation of the assessment years 1999-2000 and 2000-01 in the assessment year under consideration. Thus, the ground raised by the Revenue is dismissed.

5. The learned counsel for the Revenue also brought to our notice the findings of the learned Commissioner of Income Tax (Appeals) in its order dated 21.12.2015 for the next assessment year 2007-08 in which the learned Commissioner of Income Tax (Appeals) has given a categorical finding that the Assessee in the fourth year of its operation after its merger with effect from 1.4.2003, has achieved more than 100% of its installed capacity, as production of toffees in the 4th year. Paragraph 3 of the said order of the Commissioner of Income Tax (Appeals), including the figures of production, are quoted below for ready reference :-

3) Achievement of prescribed production level by Amalgamated Company

Notwithstanding our contents in paragraph 'I' above, we wish to submit that the learned AO summarily disregarded the evidence and material submitted before him substantiating compliance with Section 72A read with Rule 9C viz. achievement of production of 50% of installed capacity in the 4th year i.e. AY 2007-08 and maintenance of the same in the 5th year i.e. AY 2008-09.

In pursuance of the amalgamation which was effective from 1 April 2003; all the assets, along with plant and machinery, was taken over from the facility of CSL at Chennai by Lotte India and integrated into its own production line. Specifically, the machinery owned by CSL which produced Stick Pack and Flow Packs, was cohesively used by Lotte India in its manufacturing facility at NeIlikuppam, South Arcot District Tamil Nadu for the purpose of wrapping the confectionaries manufactured. Thus by utilizing the Stick Pack and Flow Pack packaging machinery of CSL, Lotte India could achieve the desired level of production as prescribed. To substantiate the above, the relevant factual information is tabulated below for your kind reference -

Sl.No	Particulars		Quintals
1	Installed Capacity ascertained by CSL only for evaluating synergies on amalgamation		12,000
2	As per Rule 9C level of production to be achieved by fourth year of amalgamation, being AY 2007-08 is atleast 50% of installed capacity of CSL		6,000
3	Production of toffees by Lotte India in FY 2002-03, prior to amalgamation	A	61,885

Sl.No	Particulars		Quintals
4	Production of toffees by Lotte India in AY 2007-08, being the fourth year since amalgamation	B	89,428
5	Actual increase in production achieved by Lotte India consequent to amalgamation in AY 2007-08	(B-A)	27,543
On comparing (5) and (2) it can be ascertained that Lotte India's production is more than 100% of installed capacity of CSL			
6	Maintenance of 50% production required up to 5 th Year, AY 2008-09		6,000
7	Production of toffees by Lotte India in AY2008-09 being the fifth year since amalgamation	C	76,749
8	Actual increase in production achieved by Lotte India consequent to amalgamation by AY 2008-09	(C-A)	14,864
On comparing (8) and (6) it can be ascertained that Lotte India's production is more than 100% of installed capacity of CSL. Thus Lotte India has maintained the minimum production level in the fifth year, despite the recession and market slump, increase in raw material price which lowered the production			

The production of toffees by Lotte India in the years mentioned above can be verified from the audited financial statements of the relevant years. In this regard, we have enclosed the following for your kind reference -

Particulars	Annexure
Copy of extract of relevant page of the financial statement for the year ended 31 March 2003, showing production of toffees by Lotte India in FY 2002-03, prior to amalgamation	5
Copy of extract of relevant page of the financial statement for the year ended 31 March 2007, showing production of toffees by Lotte India in AY 2007-08, be in the fourth ear since amalgamation	6
Copy of extract of relevant page of the financial statement for the year ended 31 March 2008, showing production of toffees by Lotte India in AY 2008-09, be in the fifth ear since amalgamation	7

Based on the above, the Company submits that the condition with respect to achievement of 50% of the installed capacity of CSL has been complied with by Lotte India in the 4th year i.e. AY 2007-08 and it has also continued to maintain the minimum level of production upto 5th year i.e. AY 2008-09.

6. The relevant provisions of Section 72A read with Rule 9C are very clear in this regard. These provisions clearly stipulate that after the merger, within four years, the amalgamated company should achieve at least 50% of the installed capacity of production. Though the learned Tribunal, in its order, has not discussed the facts and figures as discussed by the Commissioner of Income Tax (Appeals) in its order quoted above, it has observed that the non filing of prescribed Form No.62 for the third Assessment Year, after amalgamation, namely AY 2006-07, is not relevant, because the mark of 50% of installed capacity of production can be achieved at any point of time within four years after the date of merger, which is 01.04.2003 in the present case. Even though the exact date of crossing over the mark of 50% cannot be ascertainable in the present case, but the fact is undisputed that in the fourth year, the amalgamated company achieved more than 100% of its installed capacity of production. We do not think that the requirement of filing of the requisite information in Form No.62 for the third assessment year can be said to be a condition precedent or a mandatory condition to allow the Assessee to carry forward such losses under Section 72A of the Act. The said condition of filing the Form No.62, at best, is only directory and non compliance thereof would not disentitle the Assessee to claim such carry forward losses to be set off against the profits of the Assessee company. There is no dispute before us that the fact of crossing of the 50% of installed capacity of its production stood achieved by the Assessee in the present case in the fourth year, as would be clear from the order of the Commissioner of Income Tax (Appeals) for AY 2007-08, which is produced on record and quoted above.

7. In view of this clear finding of fact, which remains uncontroverted with any contra material brought on record by the Assessing Authority, we are of the clear opinion that no substantial question of law, as claimed by the Revenue Department in the present appeal filed by it, arises for our consideration.

8. The appeal filed by the Revenue is thus found to be without merit and is liable to be dismissed and the same is accordingly dismissed. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

kpl/tar
To

1.The Income Tax Appellate Tribunal, Madras A Bench,
Rajaji Bhavan Bezant Nagar Chennai 90.

2. The Commissioner of Income Tax Appeals 8,
No.121, MahatmaGandhi Road, Nungambakkam, Chennai-34

3.The Assistant Commissioner of income Tax
No.121, MahatmaGandhi Road, Nungambakkam, Chennai-34

4.The Principal Commissioner of Income Tax
No.121, MahatmaGandhi Road, Nungambakkam, Chennai-34

+1 cc to M/s.Sandeep Bagmar, Advocate Sr.No. 25529

MG(CO)
RMP(15/09/2020)

T.C.A.No.415 of 2017

सत्यमेव जयते

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