

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

IA NO:GA/2/2017 (OLD NO. GA/1419/2017)
IN
ITAT/162/2017
PRINCIPAL COMMISSIONER OF INCOME TAX, KOLKATA-4,
KOLKATA
VS.
M/S. JCT LIMITED

BEFORE :
THE HON'BLE JUSTICE T.S. SIVAGNANAM
A N D
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
Date: November 25, 2021.

Appearance :
Mr. P.K. Bhowmick, Adv.
... for the appellant

Mr. Asim Choudhury, Adv.
... for the respondent

The Court : This appeal filed by the revenue under Section 260A of the Income Tax Act, 1961 (the Act, in brevity) is directed against the order dated 1st June, 2016 passed by the Income Tax Appellate Tribunal “D” Bench, Kolkata in ITA No.1983/Kol/2013 for the Assessment Year 2008-09. The revenue has framed the following substantial questions of law for our consideration:

“(a) Whether on the facts and in the circumstances of the case the Learned Tribunal was erred in law in

quashing the order of Commissioner of Income Tax passed under Section 263 of Income Tax Act, 1961 by disregarding that the assessment order of the assessee officer in allowing excess carry forwarded of unabsorbed depreciation beyond a period of eight years, was erroneous and prejudicial to the interest of revenue in view of amendment made in Sub-Section 2 of Section 32 by the Finance (No.2) Act, 1996 with effect from 1st April, 1997?

(b) Whether on the facts and in the circumstances of the case the Learned Tribunal was erred in law in quashing the order of Commissioner of Income Tax passed under Section 263 of Income Tax Act, 1961 without considering the finding of the Apex Court in the case of Peerless General Finance & Investment Company Limited, reported in (2016) 73 Taxman.com 258(SC)?”

When the appeal was listed for admission, we found that there is no counsel nominated by the Ministry of Law to appear on behalf of the appellant. Therefore, we request Mr. P.K. Bhowmick to appear for the appellant/revenue. The Ministry of Law is directed to regularise his appearance. We have heard Mr. Choudhury, learned counsel for the respondent/assessee.

The short issue which arises for consideration in this case is whether the exercise of power by the Commissioner of Income Tax under Section 263 was valid and proper. The Tribunal considered the said issue and, in our opinion, rightly held that for invocation of the power under Section 263 of the Act two conditions have to be specified simultaneously, namely, the order sought to be revised should be shown to be erroneous and it should be prejudicial to the interest of the revenue. In this regard the Tribunal followed the decision of the Hon'ble Supreme Court in the case of *Malabar Industrial Co. Ltd. vs. Commissioner of Income-tax* [2000] 109 Taxman 66 (SC). We find that there is no error in the manner the Tribunal has decided this issue and we affirm the view taken by the Tribunal. On the merits of the matter it appears to us that as to whether in allowing excess carry forwarded of unabsorbed depreciation and set off after a period of eight years in view of the amended Section 32 (2) of the Act is justified, the said issue is no longer *res integra*. In fact, before us, the revenue sought to contend that the Tribunal ought to have taken note of the decision of the Hon'ble High Court in *Peerless General Finance & Investment Co. Ltd vs. Commissioner of Income-tax* [2016] 73 taxmann.com 258 (SC). This decision has been held to be inapplicable in the case of *Commissioner of Income Tax, Chennai vs. Sanmar Speciality Chemicals Ltd.* [2020] 122 taxmann.com 212 (Madras). In the said case the revenue took an identical stand by placing reliance on

the decision in *Peerless General Finance & Investment Co. Ltd (supra)*. The said contention was rejected by the Court by ascertaining the following reasons :

“4. The short issue, which falls for consideration, is as to whether, in the facts and circumstances of the case, the Tribunal was right in permitting the assessee to carry forward the depreciation loss pertaining to the assessment year 1997-98 to the present assessment year namely 2006-07, which is beyond the eight year period mandated under the provisions of section 32 of the Act.

5. The revenue is before us by referring to the decision of the High Court of Calcutta in the case of *Peerless General Finance & Investment Co. Ltd. v. CIT* [\[2016\] 73 taxmann.com 257/242 Taxman 209](#) and submitting that an identical issue was considered by the Calcutta High Court wherein the assessee was not granted relief. It is further submitted that the said decision of the Calcutta High Court was tested for its correctness by the Hon'ble Supreme Court and the special leave petition filed against the judgment of the Calcutta High Court was dismissed in the decision in *Peerless General Finance & Investment Co. Ltd. v. CIT* [\[2016\] 73 taxmann.com 258/242 Taxman 173/380 ITR 165 \(SC\)](#).

6. After elaborately hearing the learned Senior Standing Counsel appearing for the appellant - Revenue, we are of the considered opinion that the reliance placed on the decision in the case of *Peerless General Finance & Investment Co. Ltd. (supra)*, would, in no manner, assist the case of the Revenue. We say so after referring to Circular No. 14/2001 dated 22-11-2002 issued by the Central Board of Direct Taxes, which are Explanatory Notes on Provisions relating to Direct Taxes. Paragraph 30 of the said circular deals with modification of provisions relating to depreciation.

7. For better appreciation, we quote paragraphs 30.1 to 30.5 of the said circular as hereunder :

"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 India 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 2002-2003 and subsequent years."

8. From paragraph 30.2 of the above circular, it is clear that the restriction of 8 years for carry forward and set-off of unabsorbed depreciation was dispensed with, with a view to enable the industries to conserve sufficient funds to replace plant and machinery.

9. The learned Senior Standing Counsel appearing for the Revenue would point out that those amendments took place with effect from 1-4-2002 and would accordingly apply in relation to the assessment year 2002-03 and the subsequent years whereas in the assessee's case, the depreciation loss, which they sought to carry forward is for the assessment year 1997-98.

10. The proper manner, in which, the modification has to be understood, is to the effect that from the assessment year 2002-03, if the eight years' period was not lapsed, then the assessee would be entitled to carry forward the loss without any restriction on the time limit. This aspect has been dealt with elaborately in the decision of the Division Bench of the Gujarat High Court in the case of *General Motors India (P.) Ltd. v. Dy. CIT* [\[2012\] 25 taxmann.com 364/210 Taxman 20/\[2013\] 354 ITR 244](#) wherein the relevant portions are as follows :

"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 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.Ys. 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.Ys. 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."

11. A similar issue was considered by a Division Bench of the Bombay High Court in the case of *CIT v. Bajaj Hindustan Ltd.* [IT Appeal Nos. 134 to 136 and 140, 141 and 148 of 2018, dated 13-6-2018] following the decision in the case of *CIT v. Hindustan Unilever Ltd.* [\[2016\] 72 taxmann.com 325/\[2017\] 394 ITR 73 \(Bom.\)](#). The special leave petition filed by the Revenue against the above decision was dismissed by the Hon'ble Supreme Court in the decision in *Pr. CIT v. Bajaj Hindustan Ltd.* [SLP (C) Diary No. 48020 of 2018, dated 25-1-2019].

12. In the decision of the Punjab & Haryana High Court in the case of *CIT v. G.T.M. Synthetics Ltd.* [\[2013\] 30 taxmann.com 83/\[2012\] 347 ITR 458](#)], an identical issue was considered in the following terms :

'8. The effect of omission of the aforesaid proviso was enumerated by the Central Board of Direct Taxes, *vide* Circular No. 794 dated 9-8-2000 [(2000) 245 ITR (Statute)] 21 that the unabsorbed depreciation allowance could be set-off against the income under any other head even where the business was not carried on.

Clause 22 of the said circular which is relevant is as under:

"22. Requirement of continuance of same business for set-off of unabsorbed depreciation dispensed with:

22.1 Under the existing provisions of sub-section (2) of section 32 of the Income-tax Act, carried forward unabsorbed depreciation is allowed to be set-off against profits and gains of business or profession of the subsequent year, subject to the condition that the business or profession for which depreciation allowance was originally computed continued to be carried on in that year. A similar condition in section 72 for the purpose of carry forward and set-off of unabsorbed business loss was removed last year.

22.2 With a view to harmonise the provisions relating carry forward and set-off of unabsorbed depreciation and unabsorbed loss, the Act has dispensed with the condition of continuance of same business for the purpose of carry forward and set-off of unabsorbed depreciation.

22.3 This amendment will take effect from 1st April, 2001, and will, accordingly, apply in relation to the assessment year 2001-2002 and subsequent years."

9. The CIT(A) and the Tribunal, thus, rightly allowed unabsorbed depreciation relevant to the assessment year 1996-97 to be set-off against the income from long term capital gains and income from other sources for the assessment year 2001-2002.'

13. Recently, in the decision of a Division Bench of the Bombay High Court in the case of *Pr. CIT v. Gunnebo India (P.) Ltd.* [2019] 104 CCH 227, the issue was considered in favour of the assessee after referring to the decision of the Division Bench of the Gujarat High Court in the case of *General Motors India (P.) Ltd.*, wherein the relevant portions read thus :

"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 Act, the 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 nos. (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 nos. (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 the 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 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 April, 2002 (asst. yr. 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 asst. yr. 1997-98 up to the asst. yr. 2001- 02 got carried forward to the asst. yr. 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 the light of the above, we find that there is no error in the order passed by the Tribunal. Accordingly, the appeal fails and the same stands dismissed. The substantial questions of law are answered against the revenue.

With the dismissal of the appeal, the connected application stands dismissed.

(T. S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)