

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX APPEAL NO. 853 OF 2018

Bond Safety Belts (Dissolved)	]	
Through its erstwhile partners	]	
Michael Pereira and Jennifer Fernandes	]	
‘Bakhtavar’, Opp. Colaba Post Office	]	
Colaba, Mumbai – 400 005.	]	.. Appellant
v/s.		
The Deputy Commissioner of Income Tax	]	
Circle 12(2), 1st Floor, Room No.123	]	
Aayakar Bhavan, M.K. Road	]	
Mumbai – 400 020.	]	.. Respondent

...

Mr. Niraj Sheth i/b. Mr. Atul Jasani, for the Appellant.

Mr. Suresh Kumar, for the Respondent.

...

**CORAM : K. R. SHRIRAM &
KAMAL KHATA, JJ.**

DATED : 27TH SEPTEMBER 2023.

ORAL JUDGMENT : (PER K. R. SHRIRAM, J.)

1. Though there are three substantial questions of law proposed, effectively, we need to consider only the first two substantial questions of law which read as under:

“(i) Whether, on the facts and in the circumstances of the case and in law, the Tribunal ought to have allowed a deduction for write-off of debit balances in Sundry Creditors’ account of Rs. 18,264/- and deposits of Rs. 20,190/-?”

“(ii) Whether, on the facts and in the circumstances of the case and in law, the Tribunal was justified in denying set-off of unabsorbed depreciation pertaining to the Assessment Years 1996-97 to 2001-02 aggregating Rs. 13,89,661/- against short term capital gains?”

2. The counsel agreed that instead of admitting and framing substantial question of law, the Court could hear the Appeal finally at this stage itself.
3. Appellant Bond Safety Belts (Dissolved) was a partnership firm and it came to be dissolved with effect from 6th December 2014. The Appeal therefore is filed through the erstwhile partners.
4. The firm had filed its return of income for the Assessment Year (“AY”) 2010-2011 declaring total income of Rs.2,02,07,915/- which was arrived at after claiming deduction for write off of debit balances amounting to Rs.1,29,039.75/-. This included sundry creditors of Rs.18,262.45 and deposits to various utilities amounting of Rs. 20,190/-.

5. The firm also had claimed as set-off against income, of unabsorbed depreciation amounting to Rs.39,19,416/- which included unabsorbed depreciation of Rs.13,89,661/- pertaining to AY 1996-97 to 2001-02. The depreciation of Rs. 39,19,416/- was set-off against net short term capital gains of Rs.2,41,27,331/- and hence, the total income declared was Rs.2,02,07,915/-.
6. The Assessing Officer ("AO") passed an assessment order dated 28th March 2013 under Section 143(3) of the Income Tax Act, 1961 ("the Act") wherein he disallowed Rs.77,264/- out of the amount of Rs.1,29,039/-. It is stated in the Appeal that it is not clear how this amount of Rs.77,264/- was arrived at but it was disallowed under Section 36(2)(i) of the Act.
7. The AO also disallowed set-off of the unabsorbed depreciation of Rs.13,89,661/- that pertained to AY 1996-97 to 2001-02. The AO had relied upon a decision of the Special bench of the Tribunal in the case of *DCIT v/s. Times Guaranty Limited [ITA No.4947 and 4198/Mum/2008]* where the Tribunal had held that depreciation was available for carry forward only for a period of 8 years and set off only against business income. Aggrieved by the said assessment order the firm-Assessee

preferred an Appeal before the Commissioner of Income Tax (Appeals) [**"CIT(A)"**]. The said Appeal was partly allowed. Insofar as deduction in respect of sundry creditors of Rs.18,264/- and deposits of Rs.20,190/-, the CIT(A) held that the Assessee had not furnished any evidence to show that the same was the loss incurred during the current assessment year. He also disallowed CST of Rs.1,935.81/- on the ground that the same was not shown as income earlier.

8. As regards set-off of depreciation of Rs.13,89,661/- is concerned, it was submitted on behalf of the Assessee, relying on a judgment of Gujarat High Court in *General Motors (India) Pvt. Ltd. v/s. DCIT*¹, that the unabsorbed depreciation pertaining to the years in question can be set-off against the profits and gains of subsequent assessment years against income under any head. This submission was not accepted by CIT(A). The Assessee therefore preferred an Appeal before the Income Tax Appellate Tribunal (**"ITAT"**) against the order dated 21st January 2015 passed by CIT(A).

9. The ITAT dismissed the Appeal by holding that the CIT(A) was justified into concluding that the Assessee has failed to file

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evidence in respect of claim of deduction on account of right of sundry creditors and deposits and as regards unabsorbed depreciation the Gujarat High Court in *General Motors* (supra) has held that unabsorbed depreciation of the years in question could be set-off only against the profits and gains of subsequent assessment years.

10. Since the Assessee felt the ITAT had misread the judgment in *General Motors* (supra) a MA was filed which has been subsequently dismissed.

11. Mr. Sheth stated that he would not press the substantial question No.1 proposed as quoted above due to the amounts being small. We make it clear that we have not expressed any opinion on that question.

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 Ltd.*², dismissed the appeal by following the judgment in *General Motors* (supra). The High Court while considering the appeal in *Gunnebo* (supra), has

² ITA No. 1337 of 2016 dated 11th February 2019(unreported)

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 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 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 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 s. 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 s. 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)

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 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."

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 side 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 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."

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) 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.

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 1005-97 to 2001-02 aggregating to
Rs.13,89,661/- against short term capital gains.

19. Appeal accordingly disposed.

(KAMAL KHATA, J.)

(K.R. SHRIRAM, J.)