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**PRINCIPAL COMMISSIONER OF INCOME TAX vs. GUNNEBO INDIA PVT. LTD.**

HIGH COURT OF BOMBAY

AKIL KURESHI & B.P. COLABAWALLA, JJ.

INCOME TAX APPEAL NO. 1337 OF 2016

Feb 11, 2019

(2019) 104 CCH 0227 MumHC

Legislation Referred to

Section 32(2), 70, 71 and 72 CBDT Circular No. 14 of 2001

Case pertains to

Asst. Year 2008-09

Decision in favour of:

Assessee

**Loss—Set off of loss from one source against income from another source under the same head of income—Depreciation—Assessee filed return of income—During assessment proceeding, AO noted that assessee claimed to set off of unabsorbed depreciation or prior period against LTCG—AO completed assessment after disallowing assessee's claim—CIT(A) granted relief to assessee—ITAT dismissed Revenue's appeal on ground that as per provisions of s. 32(2) r/w Ss. 70, 71 and 72, total depreciation comprising of depreciation of relevant AY along with unabsorbed depreciation of earlier years becomes total current year's depreciation which was allowed to be set off against income under any head of income including LTCG—Further, as per s. 72, unabsorbed business loss (other than speculative loss) of earlier years should be allowed to be set off only against profits and gains from business carried on by assessee of current year and so on—Held, where there was current depreciation for succeeding year, unabsorbed depreciation was added to current depreciation for such succeeding year and was deemed as part thereof—If, however, there was no current depreciation for such succeeding year, unabsorbed depreciation becomes depreciation allowance for such succeeding year—And once CBDT Circular No. 14 of 2001 clarified that restriction of 8 years for carry forward and set off of unabsorbed depreciation was dispensed with, unabsorbed depreciation from AY 1997-98 up to AY 2001-02 got carried forward to AY 2002-03 and became part thereof, it came to be governed by provisions of s. 32(2) as amended by Finance Act, 2001 and were available for carry forward and set off against profits and gains of subsequent years, without any limit whatsoever—Revenue's appeal dismissed.**

Held

High Court in case of General Motors India (P) Ltd. held that where there was current depreciation for succeeding year, unabsorbed depreciation was added to current depreciation for such succeeding year and was deemed as part thereof. If, however, there was no current depreciation for such succeeding year, unabsorbed depreciation becomes depreciation allowance

for such succeeding year. And once CBDT Circular No. 14 of 2001 clarified that restriction of 8 years for carry forward and set off of unabsorbed depreciation was dispensed with, unabsorbed depreciation from AY 1997-98 up to AY 2001-02 got carried forward to AY 2002-03 and became part thereof, it came to be governed by provisions of s. 32(2) as amended by Finance Act, 2001 and were available for carry forward and set off against profits and gains of subsequent years, without any limit whatsoever. No question of law, therefore, arises.

(Para 4)

**General Motors India (P) Ltd. Vs Deputy Commissioner of Income-tax, 354 ITR 244 (Gujarat), followed.**

Conclusion

As per s. 32(2) r/w Ss. 70, 71 and 72, total depreciation comprising of depreciation of the relevant AY along with unabsorbed depreciation of earlier years becomes total current year's depreciation which is allowed to be set off against income under any head of income including LTCG.

In favour of

Assessee

Cases Referred to

*General Motors India (P) Ltd. Vs Deputy Commissioner of Income-tax reported in 354 ITR 244 (Gujarat)*

Counsel appeared:

*Suresh Kumar for the Petitioner.: Sunil Lala, Shilpa Denavalvi, Sameer Dalal for the Respondent.*

**P.C.:**

The Revenue has filed this appeal challenging the Judgment of the Tribunal. The following questions of law are presented for our consideration.

"1) Whether on the facts and in the circumstances of the case, the ITAT is right in allowing set off of unabsorbed depreciation of prior amounting to Rs.6,01,66,399/- against long term capital gain without properly appreciation the legal provision as laid down by section 71 of the Act as per which brought forward loss cannot be set against income from capital gain?

2) Whether on the facts and in the circumstances of the case, the ITAT is right in deleting the addition of Rs.58,18,028/- on account of short term capital gain on sale of building without appreciating the fact value of building taken by the AO was clearly mentioned in the sale deed?

2. The respondent - assessee is a private limited company. The issues arise for the Assessment Year ("A.Y." for short) 2008-09. Question No.1 pertains to the claim of the assessee for setting off of unabsorbed depreciation or prior period amounting to Rs.6.01 Crores against Long Term Capital Gain. CIT(A) while reversing the decision of the Assessing Officer ("A.O." for short) granted the relief to the assessee referring to the provisions of Section 32(2) of the Income Tax Act, 1961 ("IT Act" for short) read with Sections 70, 71 and 72 thereof. CIT (A) also placed reliance on a decision of the Division Bench of the Gujrat High Court in the case of **General Motors India (P) Ltd. Vs Deputy Commissioner of Income-tax reported in 354 ITR 244 (Gujarat)**.

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 1<sup>st</sup> 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."

5. This decision is followed in series of Judgments of this Court. No question of law, therefore, arises.

6. Question No.2 relates to the A.O.'s objections to the assessee not offering the entire sale consideration of immovable property to Capital Gain Tax. The assessee had sold the land along with the building thereon referred to as SEML property. The assessee had valued the land and the building separately and claimed depreciation on the constructed property. The sale consideration of Rs.51.18 Lacs attributed to the building was offered to tax, but at the same time the assessee also claimed depreciation on the constructed property. The Tribunal accepted such depreciation, however subject to rider of revaluation of the another property referred as Ambaturr which also forms part of the block of depreciable assets.

7. We do not find any error in the order of the Tribunal. No questions of law arises. In the result the appeal is dismissed. No order as to costs.

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