

Saln Processing and Weaving Mills Vs. Asstt. Cit

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Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : Nov-23-2007

Judge : R Easwar, Vice, R Sharma

Appellant : Saln Processing and Weaving Mills

Respondent : Asstt. Cit

Judgement :

1. This is an appeal filed by the assessee against the order of Commissioner (Appeals) dated 25-4-2005 for the assessment year 1999-2000, in the matter of order passed under Section 143(3) of the Income Tax Act, 1961 wherein following grounds of appeal have been raised: That the learned Commissioner (Appeals) is not justified in confirming the disallowance of set off-of unabsorbed depreciation of earlier years to assessment year 1999-2000 from income from "house property" during the year under consideration.
2. That the learned Commissioner (Appeals) has not correctly appreciated the provisions of Section 32(2) and the amendment made therein and is not justified in disallowing the claim of set-off of depreciation of earlier years brought forward against the income of the appellant during the relevant previous year.
3. That the learned Commissioner (Appeals) is wrong in holding that unabsorbed depreciation brought forward up to the assessment year 1997-98 is not liable to be set-off from income house property in the subsequent years as claimed by the appellant.

4. That the order passed by the learned Commissioner (Appeals) is without proper opportunity and bad in law.

5. That the order passed by the learned Commissioner (Appeals) is against the merits, circumstances and legal aspects of the case.

6. That the appellant craves leave to add, alter, amend or withdraw any or all the grounds of appeal on or before the date of hearing.

2. Rival contentions have been heard and record perused. The only dispute in this appeal is against not allowing set-off of unabsorbed depreciation of earlier years against income from house property during the assessment year 1999-2000 under consideration. According to the assessing officer the unabsorbed depreciation of earlier years under Section 32(2) of the Income Tax Act cannot be set off against income from house property. It was stated by the assessing officer that there is no provision of set-off of unabsorbed depreciation against house property income as per Section 72 of the Income Tax Act, 1961 where the business has been permanently discontinued. With this observation, the assessing officer refused setting-off of unabsorbed depreciation pertaining to assessment years 1991-92 and 1992-93 against current year's income shown under the head 'Income from house property'.

3. By the impugned order, Commissioner (Appeals) confirmed the action of the assessing officer by observing as under: I have considered the submissions of the learned Counsel for the appellant and the facts of the case. I have also gone through the relevant provisions of Section 32(2) pre-amended as also post-amended. As per the pre-amended section prior to 1-4-1997 unabsorbed depreciation should be allowed to be carried forward and set-off against assessable income of subsequent year notwithstanding the fact that the business in respect of which depreciation was allowable ceased to exist in the year of such set-off. Further receipt of business income during the relevant previous year was not a condition for deduction of allowance like depreciation. There were many judicial decisions to support this view some of which were relied upon by the learned Counsel. However, after insertion of proviso to Section 32(2) with effect from assessment year 1997-98, the Legislature has made it crystal clear that for

and from the assessment year 1997-98, it is necessary that the business or profession for which the allowance was originally computed should continue to be carried on by the assessee in the previous year relevant to the assessment year in which the unabsorbed depreciation is to be set off. In the instant year it is an admitted fact that the business of the appellant in which the depreciation was originally computed in assessment years 1991 -92 and 1992-93 was no longer in existence and it has been clearly admitted by the appellant that the business of spinning and weaving mills was discontinued due to recession in the said business and due to heavy losses. Under the circumstances, the assessing officer has rightly denied setting off of unabsorbed depreciation of assessment years 1991-92 and 1992-93 q during the year against income from house property in view of the explicit proviso attached to Section 32(2) with effect from 1-4-1997. The relevant proviso very clearly express that Section 32(2) will be applicable only when the business or profession for which the allowance was originally computed continued to be carried on by him in the previous year relevant for the assessment year. The order of the assessing officer is therefore sustained and the appellant's grounds are dismissed.

4. Aggrieved by the above order of the Commissioner (Appeals), the assessee is in further appeal before us. It was argued by the learned Authorities Representative Shri Ajay Vohra that amendment in Section 32(2), brought in by the Finance No. (2) Bill, 1996 was only prospective as pronounced by the Hon'ble Finance Minister in his speech wherein it was stated that cumulative unabsorbed depreciation brought forward as on 1-4-1997 can still be set off against the taxable business profit or income under any other head for the assessment year 1997-98 and seven subsequent assessment years. Reliance was placed by the learned AR on the decisions of the ITAT, in case of the ITAT in case of Asstt CIT v. Poddar Projects Ltd. (2005) 92 ITD 468 (Kol.), ITO v. Selchem Engineers (P.) Ltd (Del), ITO v. Keshwa Enterprises (P.) Ltd. (2006) 100 ITD 365 (Chd.) and the decision of ITAT Special Bench, Chennai in case of Southern Travels v. Asstt CIT (2006) 103 ITD 198 (Chen) (SB) in support of the proposition that amendment with respect to set-off of unabsorbed depreciation as per the amended provisions, shall be applicable only for the depreciation allowance pertaining to the assessment year 1997-98 and subsequent assessment years.

5. On the other hand, it was argued by the learned Departmental Representative that after insertion of proviso to Section 32(2) with effect from assessment year 1997-98, the Legislature has made it clear that for and from assessment year 1997-98, it was necessary that business or profession for which the allowance for depreciation was originally computed should continue to be carried over by the assessee in the previous year relevant to the assessment year in which the unabsorbed depreciation has to be set-off. As the business of the assessee to which unabsorbed depreciation pertained was admittedly closed, the lower authorities were justified in disallowing the set-off of such unabsorbed depreciation against the income from house property for the assessment year 1999-2000.

6. We have considered the rival contentions and also deliberated on various case laws cited by the learned Authorised Representative and Departmental Representative as well as discussion by the lower authorities in their respective orders. Section 32(2) deals with allowance of depreciation, carry forward and set-off of unabsorbed depreciation. There was an amendment in Section 32(2) by Finance (No.2) Act, 1996 with effect from assessment year 1997-98. Prior to the amendment, it provided that in the assessment of the assessee where full effect cannot be given to the depreciation allowance owing to there being no profit and gains chargeable for that previous year or owing to the profit or gain chargeable being less than the allowance, then subject to the provisions of Sections 32(2) and 72(2) and 73(3), the allowance or the part of the allowance to which effect could not be given, shall be added to the amount of the allowance for depreciation for the following previous year and deemed to be part of that allowance. The effect of these provisions are that the unabsorbed depreciation for the particular year becomes, by legal fiction, part of the depreciation allowance for the succeeding years and so on without any time-limit. Thus, prior to the amendment, Section 32(2) clearly contemplated that current depreciation is deductible, in the first place from the income of the business to which it pertains, and in case such depreciation amount is larger than the amount of the profit of that business than such excess is deductible from the profits of any other business, if any, carried on by the assessee, and if a balance left even thereafter, that comes for absorption from the income from any source under any of the other heads of the income during that year, and in case there is still a balance left over, the same is to be treated as

unabsorbed depreciation and it shall be carried forward to the next succeeding year, and where there is current depreciation for such succeeding year, the unabsorbed depreciation brought forward from earlier years is added to the Current depreciation for such succeeding year and is deemed, by legal fiction a part thereof. Accordingly, the unabsorbed depreciation can be allowed to be carried forward and set-off against income from any source in a subsequent year notwithstanding the fact that the business in respect of which it had arose ceased to exist in the year of such set-off. After the amendment was brought in by Finance (No. 2) Act, 1996 with effect from 1-4-1997, i.e., assessment year 1997-98, the unabsorbed depreciation of earlier years can be carried forward to the following assessment year and can only be set-off against the profits and gains of any business or profession carried on by the assessee and assessable for that assessment year and following assessment year. However, after the amendment, it was made mandatory that for availing the benefit of carried forward of unabsorbed depreciation, the business or profession for which the allowance was originally computed continued to be carried on by the assessee in the previous year relevant for that assessment year as stipulated in the first proviso to Section 32(2)(iii) of the Act. In the instant case, relevant g assessment year under consideration is 1999-2000, now the question arises as to whether the provisions of Section 32(2)(iii) as substituted with effect from 1-4-1997 can be applied to the unabsorbed depreciation or the old provision is to be applied. As per the amended provisions if the full effect cannot be given to the current depreciation allowance of the assessment year 1997-98 because the business income or any other income of that assessment year 1997-98 is not sufficient to absorb it, the p same can be carried forward in the next 8 assessment years for being set off against any business income of the assessee subject to the condition that carry forward of depreciation is possible only, if the business or profession for which the allowance was originally computed is continued to be carried on by him in the previous year relevant for the assessment year in which set-off of unabsorbed depreciation is given effect to. Here the controversy relates to the question as to whether the depreciation allowance allowed to the assessee up to an inclusive of assessment year u 1996-97 which remained unabsorbed and is brought forward to the assessment year 1999-2000 is to be governed by the substituted Section 32(2) of

the Act. This controversy has been elaborately dealt with in case of Poddar Project Ltd. (supra), wherein it was held that: with regard to the clarification given by the Finance Minister in his speech delivered while coming the Finance (No. 2) Bill 1996, in the Lok Sabha and giving harmonious meaning; and reasoning; to the amended Section 32(2) brought into effect on and from 1-4-1997, we are of the considered view that the depreciation allowance allowed to the assessee up to and inclusive assessment year 1996-97 which remained unabsorbed and is brought forward to the assessment year 1997-98 and subsequent assessment years up to assessment year 2004-05 can be set-off as per pre-amended Section 32(2) and consequently, it can be set-off against taxable business profits or income under any other head for assessment year 1997-98 and seven subsequent assessment years. Therefore, the assessee's claim, in the present case, to set-off unabsorbed depreciation brought forward from assessment years 1995-96 and 1996-97 against income under 'House Property' for the assessment year 1998-99 is to be allowed, and, we order accordingly. Consequently, the issue involved in the Cross Objection filed by the assessee is decided in favour of the assessee. Before parting with the issue, we may put it on record that we have noticed a decision where a similar view has been taken by the Income-tax Appellate Tribunal, Delhi Bench 'A' in the case of ITO v. Selchem Engineers (P) Ltd (2004) 90 ITD 732 vide order dated 16-4-2004. Income Tax Appellate Tribunal 'E' Bench, Calcutta in the case of Joint CIT v. India Steamship Co. Ltd (IT Appeal No. 1308 (Cal.) of 2000 vide order dated 24-7-2002), which was later followed by ITAT, 'A' Bench, Calcutta in the case of Poddar Udyog Ltd. (IT Appeal No. 1678 (Cal.) of 2000 order dated 9-6-2003), has also taken the similar view.

7. We have also gone through the extracts of the Speech of Finance Minister on the Finance (No. 2) Bill, 1996 wherein it was categorically observed that proposed amendment was only prospective, inasmuch as, cumulative unabsorbed depreciation brought forward as on 1-4-1997, can still be set-off against that taxable business profit or income in other head for the assessment year 1997-98 and seven subsequent assessment years.

8. In view of the above discussion and decisions of co-ordinate Benches discussed hereinabove, we do not find any merit in the action of the lower

authorities for declining setting off of unabsorbed depreciation allowance allowed up to and inclusive of the assessment year 1996-97, and the same can be set-off of against the taxable business profit or income under any other head, which in the instant case is income from house property. Accordingly, we reverse the finding and conclusion of both the lower authorities and direct the assessing officer to allow setting off of unabsorbed depreciation brought forward up to the assessment year 1996-97. We direct accordingly.

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