

* **THE HIGH COURT OF DELHI AT NEW DELHI**

+ **ITA No. 164/2008**

Judgment Reserved on: 24.02.2011

% **Date of Pronouncement:25.03.2011**

COMMISSIONER OF INCOME TAX ...APPELLANT
Through : Ms. Prem Lata Bansal,
Sr. Advocate with Mr. Deepak
Anand, Advocate.

Versus

GOVIND NAGAR SUGAR LIMITED RESPONDENT
Through : Mr. Rajiv Dutta, Sr.
Advocate with Mr. Sanjay Kumar
Singh and Mr. Dushyant, Advocate

CORAM :
HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE M.L. MEHTA

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| 1. Whether Reporters of local papers may be allowed to see the judgment? | Yes. |
| 2. To be referred to the Reporter or not ? | Yes. |
| 3. Whether the judgment should be reported in the Digest ? | Yes. |

M.L. MEHTA, J.

1. This is an appeal against the order dated 25th May, 2007 of the Income Tax Appellate Tribunal (hereinafter, referred to as 'ITAT') whereby it allowed the appeal of the assessee in respect of the assessment year 2000-01 and 2001-02. The present appeal against the impugned

order, however, relates to the assessment year 2001-02. The assessee filed return of this year declaring loss at ₹6,75,38,576/-. The return was filed on 31st March, 2003, though the due date of filing the return of loss in terms of Section 139(3) of the Income Tax Act (hereinafter, referred to as 'the Act') was 31st October, 2001. The Assessing Officer framed assessment under Section 143(2) on 31st October, 2003 at a loss of ₹6,03,14,560/-. The Assessing Officer, however, did not make any observation in respect of carry forward of unabsorbed loss including unabsorbed depreciation i.e., Assessing Officer did not allow the assessee to carry forward the unabsorbed loss including depreciation. The assessee preferred an appeal before the Commissioner of Income Tax (Appeals) (hereinafter, referred to as 'CIT(A)'), who vide order dated 18th April, 2005 while confirming the order of the Assessing Officer, held that the assessee was not allowed to carry forward the losses by virtue of Section 80 of the Act as it had not filed loss return within the time prescribed under Section 139(3) of the Act. In the appeal preferred by the assessee, the ITAT allowed unabsorbed depreciation for this year and also for the assessment year 2000-01. The ITAT relied upon the judgments of Madras High Court in ***Shri Hari Mills Ltd. v. First I.T.O*** (1967) 65 ITR 348 and ***Sathappa Textiles Pvt. Ltd. v. Second I.T.O.*** (1969) 71 ITR 260, of

Karnataka High Court in ***Brahmaver Chemicals Pvt. Ltd. v. Second ITO*** [1999] 239 ITR 807 and also on the judgment of Punjab and Haryana High Court in ***C.I.T. v. Haryana Hotels Ltd.*** (2005) 276 ITR 521. The ITAT also relied upon the circular issued by CBDT dated 24th June, 1969 in Instruction F.No. 13/8/69-IT(A-III). Based on the decision of the aforesaid judgments and the circular, the ITAT reasoned as under:-

“Section 80 of the Act in terms does not refer to section 32(2) which deals with unabsorbed depreciation. Therefore, it is not necessary for the carry forward of unabsorbed depreciation that the return should have been filed within the time allowed under section 139(3) of the Act. In the light of this legal position supported by the authorities cited above and the circular of the CBDT which is binding on the income-tax authorities and in the absence of any judgment of the Hon’ble Delhi High Court taking a contrary view, we direct the Assessing Officer to determine and carry forward the unabsorbed depreciation for the year under appeal to the subsequent year. The ground is allowed”

2. The revenue has preferred this appeal against the order of the ITAT. The present appeal was admitted on the following substantial questions of law:-

“(a) Whether ITAT was correct in law in holding that for carried forward of unabsorbed depreciation, it was not necessary that the return should have been filed within the time allowed under Section 139(1) read with Section 139(3) of the Income Tax Act?

“(b) Whether ITAT was correct in law in holding that the provisions of Section 80 of the Income Tax Act do not apply to unabsorbed depreciation covered by Section 32(2) of the Act?”

3. For answering the questions on which this appeal has been admitted, we may see that the issue involved in this appeal is as to whether the unabsorbed depreciation should be carried forward under Section 32(2) of the Act despite the fact that the return of the said year was filed belatedly. The instant question involves interpretation of provision of Sections 32, 80 and 139 of the Act.

4. The relevant provision, as contained in Section 32(2) of the Act reads as under:-

32(2) "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"

5. Section 80 of the Act reads as under:-

"80. Submission Of Return For Losses.-"Notwithstanding anything contained in this Chapter, no loss which has not been determined in pursuance of a return filed in accordance with the provisions of sub-section (3) of section 139, shall be carried forward and set off under sub-section (1) of section 72 or sub-section (2) of section 73 or Sub-section (1) or sub-section (3) of section 74 or sub-section (3) of section 74A."

6. The relevant provision of Section 139 (1) and (3) of the Act read as under:-

*"139 Return of income.
(1) Every person,-
(a) being a [company or a firm]; or*

(b) being a person other than a company, if his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax, shall, on or before the due date, furnish a return of his income or the income of such other person during the previous year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed:

(3) If any person who has sustained a loss in any previous year under the head "Profits and gains of business or profession" or under the head "Capital gains" and claims that the loss or any part thereof should be carried forward under sub-section (1) of section 72, or sub-section (2) of section 73, or sub-section (1) or sub-section (3) of section 74, or sub-section (3) of section 74A, he may furnish, within the time allowed under sub-section (1), a return of loss in the prescribed form and verified in the prescribed manner and containing such other particulars as may be prescribed, and all the provisions of this Act shall apply as if it were a return under sub-section (1)."

7. From the provision of Section 139(1), it is evident that the return was to be filed within the due time relevant to the previous year during which the loss was sustained. Sub-section (3) of Section 139 provides for carrying forward of loss or any part thereof sustained by any person in the previous year under any of provisions of Sections 72(1), 73(2), 74(1), 74(3) or 74 A(3).
8. Section 80 contemplates determination of loss in pursuance of return filed under Section 139(3) of the Act which is to be carried forward under Sections 72, 73, 74, 74A. In other words, only such losses which have been determined in pursuance of return filed in accordance with provisions of Section 139(1) & (3), could be carried forward.

9. The question that follows for consideration is as to whether the loss referred under Section 80 of the Act also includes unabsorbed depreciation and investment allowances. For this we may examine the provisions of losses referred to under Section 80 of the Act. Section 72 provides for provisions with regard to carry forward and set off of business losses. According to this Section, where for any assessment year, the net result of computation under the head 'profits and gains of business or profession' is a loss to the assessee, not being a loss sustained in a speculation business, and such loss cannot be or is not wholly set off against income under any head of income in accordance with the provisions of Section 71, then so much of the loss shall be carried forward to the next assessment year. Similarly, Section 73 deals with losses in speculation business. Sub-section (2) of Section 73 provides that for any assessment year any loss computed in respect of speculation business has not been wholly set off under sub-section (1), so much of the loss as is not set off or the whole loss where the assessee had no income from any other speculation business, shall be carried forward on certain conditions. Section 74 deals with losses under the head 'capital gains', which is not relevant for the present case. On examining the aforesaid provisions, as referred in Section 80 of the Act, *prima facie*, these

sections do not cover or deal with procedure of setting off of unabsorbed depreciation and investment allowance.

10. Section 32 of the Act deals with different types of depreciations. From a plain reading of provisions of Section 72 and 32 it is manifestly clear that Section 72 deals with carry forward of unabsorbed business losses other than losses on account of depreciation and that is so because the carry forward depreciation has been provided under Section 32(2) of the Act. The manner of carry forward in the two provisions is entirely different. In this manner of interpretation of the provisions of losses as noted above, we may see that Section 80 and 139(3) of the Act apply to business losses and not to unabsorbed depreciation which is exclusively governed by the provisions of Section 32(2) of the Act. That being so, the period of limitation for filing loss return as provided under Section 139(1) shall not be applicable for carrying forward of unabsorbed depreciation and investment allowances. There is a catena of judgments in support of this proposition of law. In ***Shri Hari Mills*** (supra) and ***Sathappa Textiles*** (supra) it was held that the Section 80 refers to the loss and not for unabsorbed depreciation and, therefore, in respect of carry forward of depreciation, there is no obligation to file return

within the time prescribed for the return under Section 139(1). This view was reiterated by Madras High Court in **Sathappa Textiles** (supra) In **Brahmavar Chemicals** (supra) it was held as under:-

“The above provision contemplates determination of loss in pursuance of the return filed under section 139(3) of the Income-tax Act which are to be carried forward to be set off under section 72, 73, 74 or 74(A). Section 139(3) also refers to the same provision contemplating for filing of the return within the time allowed under section 139(1) and thus the determination of the loss is permissible when the return is filed within the stipulated time under section 139(1). There is no reference to the provision for carry forward of depreciation or investment allowance in section 80.”

11. In the case of **Virmani Industries Pvt. Ltd. [1995] 216 ITR 607 (SC)**, it was held as under:-

“The assessee was engaged in the manufacture of soap and oil during the previous year relevant to the assessment year 1956-57. The assessee had stopped the business in that year and had let out the factory on hire. Ten years later, i.e., in the previous year relevant to the assessment year 1965-66, the assessee started the business of manufacture of steep pipes and that business used part of the old machinery which was being used for soap and oil. It was during the assessment proceedings relating to the assessment year 1965-66, the assessee claimed that the unabsorbed depreciation should be brought forward and set off against the profits of the new business in respect of it pertained to the old machinery utilized in the new business. The apex court ruled that a depreciation allowance which remained unabsorbed could be set off against the income of the accounting period for relevant to the assessment year 1965-66.”

12. In the case of **Haryana Hotels** (supra), the question for consideration was same as is before us in the present case. Referring to various decisions of different Courts it was held as under:-

“Under Section 32(2) of the Act, the unabsorbed depreciation of earlier previous years forms part of the current year's depreciation and thereafter allowance for depreciation is given from the current year's income. There is no such provision in Section 72 of the Act by virtue of which business losses of earlier years shall form part of the current year's business losses and be allowed to be set off from current year's income. However, only the business losses of earlier years which are notified by the Assessing Officer are allowed to be carried forward and set off from the current year's income. Similarly, there is no provision under the Act which makes it mandatory for the assessee to file return for carry forward and set off of unabsorbed depreciation which is to be notified by the Assessing Officer as in the case of unabsorbed business loss. Thus, from a reading of the provisions of the Act, the distinction between unabsorbed depreciation and unabsorbed business loss for the purposes of set off and carry forward is clear.”

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*“A reading of Section 32(2) of the Act makes it clear that a carried forward unabsorbed depreciation allowance is deemed to be part of and stands on the same footing as current depreciation, i.e., in the assessment of the assessee, if full effect cannot be given to any allowance in any previous year owing to there being no profits or gains chargeable for that previous year, the allowance or part of the allowance to which effect has not been given, shall be added to the amount of the allowance for depreciation for the following previous year and deemed to be part of the said allowance. There is no time limit provided under Section 32(2) of the Act for carry forward of unabsorbed depreciation to any subsequent year. The apex court in *CIT v. Jaipuria China Clay Mines (P.) Ltd.* [1966]59ITR555(SC) has held that unabsorbed depreciation of past years had to be added to depreciation of the current year and the aggregate unabsorbed and current year's depreciation had to be deducted from the total income of the assessment year.”*

13. In the case of ***Commissioner of Income-Tax, Delhi-IV v. J.Patel & Co.*** [1984] 149 ITR 682, the Division Bench of our High Court endorsed with approval the case of Madras High Court titled as ***CIT v. Nagapatinam Import and Export Corporation*** [1975] 119 ITR 444 wherein it was held as under :-

"The point to be considered is whether the allowance for depreciation is to be equated with the loss that had been contemplated for apportionment among the partners. For some purposes of the Act, depreciation forms part of the loss. The income of the firm or the loss in the hands of the firm cannot be computed without making allowance for depreciation in case the assessee is eligible for, and has made such a claim by complying with the relevant provisions of the Act. If there is any other loss apart from the depreciation, then that loss will get added to the amount of depreciation allowable to the assessee under s. 32 read with the rules. It is the total of this amount which will be allocated among the partners under the provisions of s. 75. However, the Act thus makes a distinction between the unabsorbed allowance of depreciation and other losses. It has already been seen that s. 72(2) of the Act provides that where any allowance or part thereof is, under sub-s. (2) of s. 32 or sub-s. (4) of s. 35, to be carried forward; effect shall first be given to the provisions of s. 72. In other words, s. 72(2) contemplates the loss other than the unabsorbed depreciation being given a priority in the matter of set-off, as there is a time-limit within which such loss can be adjusted. Under s. 72(3) the loss other than from depreciation is eligible for being carried forward and set-off only for a period of eight assessment years immediately succeeding the assessment year for which the loss was first computed; in the case of unabsorbed depreciation allowance, there is no such time-limit. The Legislature has, therefore, made a specific provision for priority in setting off the loss other than unabsorbed depreciation allowance so that the unabsorbed depreciation allowance can be carried forward if necessary without any time-limit and set off in the appropriate succeeding years. It is thus clear that there is a separate identity maintained under the statute with reference to the unabsorbed depreciation allowance though at the time of computation it forms part of 'loss'. It may be that at the time of allocation among the partners, the unabsorbed depreciation is taken along with any other loss that may have been sustained by the registered firm; but this identity of unabsorbed depreciation is required to be maintained in order to enable it to be set off against the future income separately and independently of the other losses. If we approach the construction of s. 32(2) in the light of the above background, there appears to be no difficulty in construing the reference."

14. In the same case reliance was also placed on the judgment of Gauhati High Court in ***CIT v. Singh Transport Co.*** [1980] 123 ITR 698, which held as under:-

“In the result, we have no hesitation in arriving at the conclusion that Section 32(2) of the Act governs exclusively as to the manner of carry forward and set off in respect of depreciation allowance. In this view of the matter, the rigour of limitation as to the time up to which unabsorbed depreciation allowance can be set off is not applicable in case of such depreciation allowance. Further, Section 32(2) being the provision providing the manner of carry forward and set off of such allowances, the provisions of Section 75 are inapplicable. Section 75 which provides that the partners of a registered firm are exclusively entitled to carry forward and set off losses are only applicable in respect of business losses or losses in speculation business and cannot be applicable to carry forward and set off of depreciation allowance.”

15. Learned counsel appearing for the Revenue relied upon the case of ***Garden Silk Weaving Factory v. CIT*** 189 ITR 512 in support of his submission that unabsorbed depreciation is indeed a part of loss and if the same was not claimed within the due time under Section 139, it could not be allowed to be carried forward. In view of what has been discussed above the learned counsel is not right in interpreting the provisions of law and also the aforementioned judgment of Supreme Court. In this case, the Supreme Court held that though ‘depreciation’ is component element of the genus described as ‘loss’, there is nothing anomalous or absurd in the statute providing for a dissection of the amount of loss for the purpose of carrying forward and providing for a special or different treatment to unabsorbed depreciation.

16. We have already noted above that Section 32 deals with the different types of depreciation whereas Section 80 deals with carry forward of unabsorbed losses other than losses on account of depreciation. If that was not so, there was no need for legislature to provide specific provision for carrying forward of depreciation under Section 32 of the Act. It has already been noted that in case of ***Nagapatnam Import*** (supra), which was relied by our High Court in the case of ***J.Patel*** (supra) whereby, it was held that Section 72 contemplates loss other than unabsorbed depreciation and there was a time limit within which loss can be adjusted, whereas in the case of unabsorbed depreciation there is no time limit and further that under the statute there is a separate identity with respect to unabsorbed depreciation though at the time of computation, it becomes a part of loss.
17. From the above, it comes out that the effect of Section 32(2) is that unabsorbed depreciation of a year becomes part of depreciation of subsequent year by legal fiction and when it becomes part of current year depreciation it is liable to be set off against any other income, irrespective of the fact that the earlier years return was filed in time or not.

18. In view of our aforesaid discussions, both, questions (a) and (b) are answered in affirmative in favour of the assessee and against the Revenue.
19. The appeal is accordingly dismissed with no orders as to costs.

**M.L. MEHTA
(JUDGE)**

**A.K. SIKRI
(JUDGE)**

25th MARCH, 2011
Dev/AK.