

(2014) 04 GUJ CK 0135
In the Gujarat High Court
Case No : Special Civil Appln. No. 15825 of 2012

Ausom Enterprises Ltd.

APPELLANT

Vs

Dy. CIT and Others

RESPONDENT

Date of Decision : 09-04-2014

Acts Referred:

Income Tax Act, 1961 — Section 142(1), 143(3), 147, 148, 32 — Sick Industrial Companies (Special Provisions) Act, 1985 - Section 17, 3

Citation : (2014) 04 GUJ CK 0135

Hon'ble Judges : Akil Abdul Hamid Kureshi, J; Sonia Gokani, J.

Bench : Division Bench

Advocate : R.K. Patel, for the Appellant; Nitin K. Mehta, for the Respondent

Judgement

Sonia Gokani, J.?Challenge in this petition is to proceedings of reassessment by way of notice under section 148 of the Income Tax Act, 1961 (the Act hereinafter) in the following factual background.

2. The petitioner-assessee is engaged in the business of manufacturing corrugated boxes. It filed return of income for the assessment year 2007-08 declaring total loss of Rs. 2.02 crores (rounded off). The same was set off against the business loss of the assessment year 1999-2000 and remaining business loss and unabsorbed depreciation, loss was carried forward for set off in subsequent assessment years. This was though scrutinized by the assessing officer and the assessment was framed under section 143(3) of the Act, the assessing officer, initiated the process of reassessment by issuing notice dt. 21-3-2012 and the reason for reopening of such assessment essentially revolves around the question of depreciation loss of 1997-98 and 1998-99 to be set off upto eight succeeding assessment years and not beyond such period, by giving following reasons:

"2. Vide above-referred to letter, you have sought a copy of the reasons recorded for the initiation of assessment proceedings. In this regard, the reason of the initiation of assessment proceedings is as under:

On examination of the assessment record, it has been found that the assessee company engaged in the business of manufacturing corrugated boxes filed its return of income for assessment year 2007-08 on 31st Oct., 2007 declaring total loss of Rs. 2,02,14,896 and the same was set off against business loss of assessment year 1999-2000 and the remaining business loss/unabsorbed depreciation, loss carried forward for set off in subsequent assessment years.

On verification of the case records, it is found that the assessee is having unabsorbed depreciation loss of Rs. 17,54,57,695 of assessment year 1997-98 and of Rs. 17,92,65,382 of assessment year 1998-99 (total Rs. 35,47,23,077). Further, it is noticed that the assessee has shown the said unabsorbed depreciation loss of Rs. 35,47,23,077 as loss pertaining to assessment year 2000-01 and has carried forward the same for set off in subsequent assessment years. Since the depreciation loss was of assessment years 1997-98 and 1998-99, it is to be set off in eight succeeding assessment years only i.e. loss of assessment year 1997-98 to be set off upto assessment year 2005-06 and depreciation loss pertaining to 1998-99 requires to be set off upto assessment year 2006-07.

As per the sub-section (2)(iii)(b) of section 32 as amended by the Finance (No. 2) Act, 1996 the effect from 1-4-1997, if the unabsorbed depreciation allowance cannot be wholly set off, the amount of unabsorbed depreciation allowance not so set off shall be carried forward to the following assessment year not being more than eight assessment years immediately succeeding the assessment year for which the aforesaid allowance was first computed.

Since the depreciation loss of Rs. 35,47,23,077 of assessment years 1997-98 and 1998-99 is not set off within eight succeeding assessment years, carrying forward of the same beyond the period of eight years was irregular. In view of the above, I am satisfied that this is a fit case for income escaping assessment under section 147 of the Income Tax Act.

Therefore, the undersigned has reason to believe that the income chargeable to tax for the year under consideration has escaped assessment as per the provisions of section 147 of the Income Tax Act.

3. You are having unabsorbed depreciation loss of Rs. 17,54,57,695 of assessment year 1997-98 and Rs. 17,92,65,382 of assessment year 1998-99 (total Rs. 35,47,23,077). Further, it is noticed that you have shown the said unabsorbed depreciation loss of Rs. 35,47,23,077 as loss pertaining to assessment year 2000-01 and has carried forward the same for set off in subsequent assessment years. Since the depreciation loss was of assessment years 1997-98 and 1998-99, it can be set off in eight succeeding assessment years only i.e. loss of assessment year 1997-98 can be set off upto assessment year 2005-06 and depreciation loss pertaining to 1998-99 requires can be set off upto assessment year 2006-07.

Since the depreciation loss of Rs. 35,47,23,077 of assessment years 1997-98

and 1998-99 is not set off within eight succeeding assessment years, carried forward of the same beyond the period of eight years was irregular.

In view of the above, you are shown caused as to why the set off of unabsorbed depreciation of Rs. 35,47,23,077 of assessment years 1997-98 and 1998-99 should not disallowed as per the provisions of section 32(2)(iii)(b) of the Act as amended by the Finance (No. 2) Act, 1996, with effect from 1-4-1997.

In view of the above, you are requested to furnish your submissions/comments and attend the office of the undersigned on 26-7-2012 at 4 PM. Failure to comply with the requirement of this notice may result in invoking the penal and other legal provisions of Income Tax Act, 1961. Authorized Representative without proper authorization of the assessee will not be allowed to represent the case. Adjournment will not be given in normal circumstances."

3. This was objected to by the petitioner-assessee by raising objections vide communication dt. 14-8-2012 citing various judicial pronouncements and urging the assessing officer not to continue with the proceedings of reassessment by dropping the notice issued.

4. By an order dt. 31-10-2012, the assessing officer disposed of the objections by holding that the objections raised were found incorrect both in facts and law and the notice issued by the assessing officer on the basis of material on record was in accordance with law.

5. Notice was also issued under section 142(1) of the Act on dt. 31-10-2012.

6. The aggrieved assessee preferred the present petition. While issuing notice, it was noticed that the claim of the petitioner was for depreciation which was examined in the original assessment raising specific query which had been attended to by the petitioner and relying on the decision of this Court in the case of General Motors India (P) Ltd. Vs. Deputy Commissioner of Income Tax, , challenge is made to such proceedings of reopening.

7. The respondent's affidavit in reply in response to the rule issued does not dispute the fact that the original assessment had been concluded on scrutiny. It is further contended that the impugned notice was issued on 21-3-2012 whereas the judgment in the case of General Motors India (P.) Ltd. (supra) has been rendered on 23-8-2012. When the satisfaction was recorded by the assessing officer of the escapement of taxable income from the clutches of law such judgment was not delivered. Moreover, it is the contention of the Revenue that the applicability of such judgment could be examined at the time of reassessment. Furthermore, this is not a case of unabsorbed depreciation allowance, but a case of business loss which has been carried forward from the assessment year 1996-97 onwards and in view of the embargo under section 72(3) of the Act, such loss cannot be allowed to be carried forward beyond a period of eight years.

8. We have heard learned counsel Shri R.K. Patel for the petitioner and learned

counsel Shri Nitin Mehta for the Revenue.

9. The decision in the case of General Motors India (P.) Ltd. (supra) has been pressed into service by the petitioner, relevant part of which requires reproduction at this stage:

"The last question which arises for consideration is that whether the unabsorbed depreciation pertaining to assessment year 1997-98 could be allowed to be carried forward and set off after a period of eight years or it would be governed by section 32 as amended by Finance Act, 2001. The reason given by the assessing officer under section 147 is that section 32(2) of the Act was amended by Finance Act (No. 2) of 1996 with effect from assessment year 1997-98 and the unabsorbed depreciation for the assessment year 1997-98 could be carried forward upto the maximum period of 8 years from the year in which it was first computed. According to the assessing officer, 8 years expired in the assessment year 2005-06 and only till then, the assessee was eligible to claim unabsorbed depreciation of assessment year 1997-98 for being carried forward and set off against the income for the assessment year 2005-06. But the assessee was not entitled for unabsorbed depreciation of Rs. 43,60,22,158 for assessment year 1997-98, which was not eligible for being carried forward and set off against the income for the assessment year 2006-07.

Prior to the Finance Act (No. 2) of 1996, the unabsorbed depreciation for any year was allowed to be carried forward indefinitely and by a deeming fiction became allowance of the immediately succeeding year. The Finance Act (No. 2) of 1996 restricted the carry forward of unabsorbed depreciation and set off to a limit of 8 years, from the assessment year 1997-98. Circular No. 762, dt. 18-2-1998 [(1998) 145 CTR (St) 5] issued by the Central Board of Direct Taxes (CBDT) in the form of Explanatory Notes categorically provided that the unabsorbed depreciation allowance for any previous year to which full effect cannot be given in that previous year shall be carried forward and added to the depreciation allowance of the next year and be deemed to be part thereof.

So, the unabsorbed depreciation allowance of assessment year 1996-97 would be added to the allowance of assessment year 1997-98 and the limitation of 8 years for the carry forward and set off of such unabsorbed depreciation would start from assessment year 1997-98.

We may now examine the provisions of section 32(2) of the Act before its amendment by Finance Act, 2001. The section prior to its amendment by Finance Act, 2001, read as under:

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;

(ii) if the unabsorbed depreciation allowance cannot be wholly set off under clause (i), the amount not so set off shall be set off from the income under any other head, if any, assessable for that assessment year;

(iii) if the unabsorbed depreciation allowance cannot be wholly set off under clause (i) and clause (ii), the amount of allowance not so set off shall be carried forward to the following assessment year and--

(a) it 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;

(b) if the unabsorbed depreciation allowance cannot be wholly so set off, the amount of unabsorbed depreciation allowance not so set off shall be carried forward to the following assessment year not being more than eight assessment years immediately succeeding the assessment year for which the aforesaid allowance was first computed;

Provided that the time-limit of eight assessment years specified in sub-clause (b) shall not apply in case of a company for the assessment year beginning with the assessment year relevant to the previous year in which the said company has become a sick industrial company under sub-section (1) of section 17 of the Sick Industrial Company (Special Provisions) Act, 1985 (1 of 1986) and ending with the assessment year relevant to the previous year in which the entire net worth of such company becomes equal to or exceeds the accumulated losses.

Explanation : For the purposes of this clause, net worth shall have the meaning assigned to it in clause (ga) of sub-section (1) of section 3 of the Sick Industrial Companies (Special Provisions) Act, 1985.

The aforesaid provision was introduced by Finance (No. 2) Act, 1996 and further amended by the Finance Act, 2000. The provision introduced by Finance (No. 2) Act was clarified by the Finance Minister to be applicable with prospective effect.

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 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.

The purpose of this amendment has been clarified by CBDT in the Circular No. 14 of 2001 [(2002) 172 CTR (St) 13]. 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(2) 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 1-4-2001.

30.5 These amendments will take effect from the 1-4-2002, and will, accordingly, apply in relation to the assessment year 2002-03 and subsequent years.

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 1-4-2002 (assessment year 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 assessment year 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 assessment years 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 assessment year 2002-03 then it would be carried forward till the time it is set off against the profits and gains of subsequent years.

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 1-4-2002 (assessment year 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 assessment year 1997-98 up to the assessment year 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."

10. This Court in Tax Appeal No. 3 of 2014 had examined the very issue whether unabsorbed depreciation could be carried forward and set off after a period of eight years. Relying on the decision of General Motors India (P.) Ltd. (supra), it has been held thus:

"We notice that in the instant case, the Tribunal while dealing with this case has noted that the carry forward of unabsorbed depreciation concerning assessment year 2001-02 and assessment years prior thereto can be set off in subsequent years without any set time-limit, considering the decision in the case of General Motors India (P.) Ltd. (supra) wherein this Court has held that carry forward of unabsorbed depreciation prior to assessment can be set off in subsequent years without setting time-limit. The Tribunal has rightly applied the law to the facts of

the instant case.

No question of law therefore arises in the present tax appeal for our consideration. Tax appeal is resultantly dismissed."

11. In the wake of discussion made hereinabove, it can be concluded that judicial pronouncement on the subject is very clear that carry forward of unabsorbed depreciation can be set off beyond the period of eight subsequent years without any set time-limit. Reopening of assessment, as could be noticed from the reasons recorded particularly emphasized that the unabsorbed depreciation had been carried forward by the petitioner beyond a period of eight years resulting into the income escaping the assessment and therefore, the assessing officer at the time of issuance of the notice of reopening in absence of any judicial pronouncement on the subject may have assumed jurisdiction, when the issue is now well-settled by way of judicial decisions, as discussed herein above, allowing continuation of such proceedings would not sub-service any purpose and therefore, by way of this writ jurisdiction, interference as requested for needs to be made quashing and notice of reassessment and all subsequent proceedings.

12. Resultantly, the petition is allowed quashing the impugned notice and the proceedings, if any, undertaken by the respondents.

Rule is made absolute accordingly with no order as to costs.