(2008) 02 BOM CK 0133

In the Bombay High Court

Case No : Writ Petition No. 2370 of 2007

Peninsula Land Ltd. APPELLANT

Vs

Commissioner of Income Tax RESPONDENT

Date of Decision : 20-02-2008

Acts Referred:

Income Tax Act, 1961 — Section 119(2)(b), 143, 143(3), 144, 147(b)

Citation : (2008) 175 TAXMAN 58

Hon'ble Judges : R.S. Mohite, J;F.I. Rebello, J

Bench : Division Bench

Advocate : S.E. Dastoor, Murlidharan and A.K. Jasani, for the Appellant; A.D. Kango and P.S. Sahadevan, for the Respondent

Final Decision : Allowed

Judgement

R.S. Mohite, J.—Heard both sides. Rule. By consent rule made returnable forthwith and parties heard for final disposal. This is a writ petition filed by Peninsula Land Ltd. (hereinafter referred to as the "petitioner") seeking to quash and set aside the orders dated 22-2-2007 and 7-9-2007 passed by the respondents under sections 154 and 264 of the Act respectively for the assessment year 1994-95 insofar as they deny the petitioner''s right to set off unabsorbed depreciation.

2. The facts of the case as set out by the petitioner in his petition are as follows:

(a) In respect of the assessment year 1992-93, the petitioner filed a return of income on 20-1-1993 and a revised return on 31-12-1994 in which it claimed that it was entitled to a set off of the brought forward losses of Devangere Cotton Mills Ltd. which was merged with the petitioner with effect from 1-7-1992. Respondent No. 2 passed an assessment order dated 31-3-1995 u/s 143(3) of the Act in which he determined the petitioner''s total income at Rs. 54,25,840 after setting off the entirety of the losses (Rs. 4,17,02,772) of the erstwhile Devangere Cotton Mills Ltd. and 2/3rd of the unabsorbed depreciation and investment allowance as per the then prevailing law Rs. 3,59,97,750 of the said erstwhile Devangere Cotton Mills Ltd. Respondent No. 2 recorded in the order that the balance of unabsorbed depreciation and investment allowance of Rs. 1,79,98,975 was allowed to be carried forward to the next year. The amount comprised of unabsorbed depreciation of Rs. 1,48,40,552 and unabsorbed investment allowance of Rs. 31,58,423. Being aggrieved by the several disallowances and additions made by respondent No. 2, the petitioner filed an appeal before the CIT(A) which was disposed of vide order dated 29-9-1995. Respondent No. 2 passed an order dated 2-8-1999 to give effect to the said order of the CIT(A) and he determined the petitioner''s total income at Rs. 11,53,200. The figures of the losses, unabsorbed depreciation and investment allowance of the erstwhile Devangere Cotton Mills Ltd. remained unchanged.

(b) In respect of the assessment year 1993-94, the petitioner filed a return of income on 31-12-1993 and a revised return on 2-2-1995 in which it declared a total loss of Rs. 58,50,232 and Rs. 68,05,671 respectively. Respondent No. 2 passed an assessment order dated 27-12-1995 u/s 143(3) of the Act by which he determined the total income of the petitioner at nil, after setting off depreciation and investment allowance of Rs. 76,52,499. Being aggrieved by the several disallowances and additions made by respondent No. 2, the petitioner filed an appeal before the CIT(A) which was disposed of vide order dated 14-8-2002. Respondent No. 2 passed an order dated 16-9-2003 to give effect to the said order of the CIT(A) and he determined the petitioner''s total income at a "loss" of Rs. 1,77,46,293.

(c) In respect of the assessment year 1994-95, the petitioner filed a nil return of income on 30-11-1994. Respondent No. 2 passed an assessment order dated 28-2-1997 u/s 143(3) of the Act by which he determined the total income of the petitioner at Rs. 5,23,32,724. In arriving at this income, respondent No. 2 allowed the petitioner a set off of the depreciation and investment allowance aggregating Rs. 1,03,46,476 which was brought forward from the assessment year 1992-93. This amount represented the difference between the figure of Rs. 1,79,98,975 which was determined in the assessment order dated 31-3-1995 passed for the assessment year 1992-93 and the figure of Rs. 76,52,494 which was recorded as having been adjusted in the assessment order dated 27-12-1995 passed for the assessment year 1993-94. Respondent No. 2 thereafter passed an order dated 2-12-1997 u/s 154 of the Act by which he reduced the total income to Rs. 4,49,39,949. Being aggrieved by the order dated 28-2-1997 passed by respondent No. 2, the petitioner filed an appeal before the CIT(A) which was disposed of vide order dated 17-3-1999. Respondent No. 2 passed an order dated 29-7-1999 to give effect to the said order of the CIT(A) and he determined the petitioner''s total income at Rs. 2,67,71,123.

(d) That on receipt of the order dated 16-9-2003 for the year 1993-94, the petitioner addressed an application dated 20-10-2003, addressed to the Dy. CIT. In this application, the petitioner referred to the order dated 16-9-2003 giving effect to the order of the CIT(A) for the assessment year 1993-94 in which a loss of Rs. 1,77,46,293 had been determined. The petitioner pointed out that the said loss was entitled to be carried forward and set off against the income for the assessment year 1994-95. It was also pointed out that the loss of Rs. 76,52,499, being the unabsorbed depreciation of the assessment year 1992-93 would also be available for carry forward and set off against the income for the assessment year 1994-95. The petitioner annexed a detailed statement in which it was pointed out that if the aforesaid unabsorbed depreciation and investment allowances for the assessment year 1992-93 (Rs. 76,52,499) and the assessment year 1993-94 (Rs. 1,77,46,293) were set off, the income for the assessment year 1994-95 would be Rs. 13,72,331 and the petitioner would be entitled to a refund of taxes and interest. The application prayed for an expeditious passing of an appropriate order for assessment year 1994-95 and for a grant of refund along with interest u/s 244A. As there was no response from respondent No. 2 for the said application, the petitioner addressed reminder letters dated 11-8-2005 and 15-3-2006 in which it reiterated its submissions with regard to the set off of the unabsorbed depreciation and investment allowance for the assessment years 1992-93 and 1993-94.

(e) The petitioner addressed two other letters dated 6-6-2006 and 8-6-2006. In the letter dated 8-6-2006, the petitioner clarified that as per the effect order dated 16-9-2003 passed for the assessment year 1993-94, the total loss was determined at Rs. 1,77,46,293 and this loss has been arrived at after set off of income under the head "Income from house property" and "Income from other sources". It was pointed out that the depreciation allowable as per the Act amounted to Rs. 8,69,12,679 and therefore, the loss determined as per the said effect order was an unabsorbed depreciation and not business loss as stated in the earlier letter. The petitioner submitted that the correct unabsorbed depreciation available for set off was as under:

Asst. yr.

Type of losses

Amount (Rs.)

1992-93

Unabsorbed depreciation

(1,79,98,975-1,03,46,476)

76,52,499

1993-94

Unabsorbed depreciation

1,77,46,293

The petitioner further drew attention to section 32(2) of the Act, as applicable up to the assessment year 1996-97 and submitted that under this provision, the carried forward depreciation was deemed to be part of, and stands exactly on the same footing as current depreciation and was eligible to be set off against income chargeable under any head. The petitioner pointed out that as per the effect order passed for the assessment year 1994-95, the revised total income was determined at Rs. 2,67,71,123 and the unabsorbed depreciation was eligible for set off against the said income.

(f) In response to the aforesaid letters addressed by the petitioner, respondent No. 2 passed an order dated 9-6-2006 u/s 154 of the Act. With respect to the assessment year 1992-93, respondent No. 2 observed that in that year depreciation/investment allowance of Rs. 1,79,98,975 was allowed to be carried forward out of which Rs. 76,52,499 was set off against the income for assessment year 1993-94 and balance of Rs. 1,03,46,476 was set off against the income of the assessment year 1994-95. He recorded that the balance amount of Rs. 76,52,499 was carried forward depreciation available for set off. In respect of the assessment year 1993-94, respondent No. 2 noted that as per the assessment order the total income was determined at nil after setting off the brought forward depreciation/investment allowance aggregating Rs. 76,52,499 of the preceding year. He also noted that pursuant to the order dated 16-9-2003 passed to give effect to the order of the CIT(A), the unabsorbed depreciation was worked out at Rs. 1,77,46,283. He held that the income for the assessment year 1994-95 had to be determined after allowing carried forward unabsorbed depreciation of Rs. 76,52,499 for the assessment year 1992-93 and Rs. 1,77,46,283 for the assessment year 1993-94. After such set off, he determined the revised total income for the assessment year 1994-95 at Rs. 13,72,341.

(g) Respondent No. 2 thereafter issued a notice dated nil u/s 154 of the Act for the assessment year 1994-95 in which he alleged that the petitioner has been wrongly allowed set off of unabsorbed depreciation of the assessment years 1992-93 and 1993-94. He referred to certain observations from an unreported decision of the Tribunal in the case of E. Merck (India) Ltd. which he claimed were in his support.

(h) In response to the said notice, the petitioner addressed two letters dated 22-6-2006 and 27-6-2006 in which it pointed out that the said unreported judgment of the Tribunal was in favour of the stand of the petitioner. The petitioner emphasized that the said judgment made it clear that prior to the amendment made to section 32(2) of the Act with effect from 1-4-1997, unabsorbed depreciation could be set off against income under any other head. In the second letter dated 27-6-2006, the petitioner relied on several decisions including the decision of this Court in Commissioner of Income Tax Vs. Principal Officer, Laxmi Surgical Pvt. Ltd, wherein it had been held that unabsorbed depreciation was deemed to be current depreciation of the year to which it had been brought forward and was eligible to be set off against the income of that year under any head. The petitioner pointed out that the same view has been taken by the Hon''ble Supreme Court in Garden Silk Wvg. Factory v. CIT [1991] 189 ITR 5121.

(i) Respondent No. 2 accepted the submissions of the petitioner and passed an order dated 28-6-2006 u/s 154 of the Act in which he held "the proceedings initiated vide notice u/s 154 dated 22-6-2006 are hereby dropped".

(j) Respondent No. 2 thereafter issued yet another notice dated 17-8-2006 u/s 154 of the Act in which he directed the petitioner to show cause why a rectification order should not be passed on the following three grounds:

(i) Order u/s 154 dated 9-6-2006 seeks to rectify assessment order u/s 143(3) dated 28-2-1992 which is beyond the statutory period of limitation.

(ii) The amounts sought to be rectified u/s 154 includes both depreciation/ investment allowance, the break-up of which has not been given and investment allowance cannot be carried forward.

(iii) In view of the debate in respect of allowability of unabsorbed depreciation against income from other sources, the said issue is debatable in nature and cannot be rectified u/s 154.

(k) In response to the said notice, the petitioner addressed a letter dated 24-8-2006 in which it made the following points:

(i) It was pointed out that vide effect order dated 16-9-2003 passed for the assessment year 1993-94, a loss (actually unabsorbed depreciation) of Rs. 1,77,46,293 had been determined and respondent No. 2 was duty bound to set off the same against the income for the assessment year 1994-95 which had been determined at Rs. 2,67,71,123 vide effect order dated 29-7-1999.

(ii) The petitioner relied on the section 240 of the Act which states that a refund becoming due to an assessee as a result of the order passed in appeal is required to be given even without any claim having been made. It was emphasized that the petitioner had vide letter dated 20-10-2003 made the said claim for refund.

(iii) It was further submitted without prejudice that when the effect order dated 29-7-1999 was passed for the assessment year 1994-95 determining the income at Rs. 2,67,71,123, the petitioner did not have the benefit of the order determining the loss of Rs. 1,77,46,293 for the assessment year 1993-94 because it was passed subsequently on 16-9-2003. The petitioner submitted that in such a situation it was impractical to apply the statutory period of limitation of four years for rectification. The petitioner set out all the relevant dates in the matter and emphasized that in no case would it have been possible to give consequential effect to the order passed for the assessment year 1993-94 for the subsequent assessment year 1994-95 within the statutory limitation period of four years. The petitioner argued that it could not be made to suffer for a delay which was attributable to the judicial proceedings.

(iv) With regard to the merits, the petitioner emphasized that the judgment of this Hon''ble Court in Principal Officer, Laxmi Surgical (P.) Ltd.''s case (supra) covered the issue and was binding on respondent No. 2.

(v) It was pointed out that respondent No. 2 had, after considering the petitioner''s submissions had dropped the earlier notice dated 22-6-2006.

(vi) The petitioner accepted that investment allowance of Rs. 31,58,423 may be disallowed.

(l) Respondent No. 2 passed an order dated 22-2-2007 u/s 154 of the Act in which he made the following points:

(i) That the order dated 9-6-2006 passed u/s 154 of the Act was beyond the statutory period of limitation and could not confer benefit on the petitioner.

(ii) That there was a "debate" in respect of allowability of unabsorbed depreciation against the income from other sources and that the earlier order passed u/s 154 suffered from a defect.

(iii) That the investment allowance of Rs. 31,58,423 (Rs. 94,75,269 - Rs. 63,16,846) had to be disallowed.

(m) Being aggrieved by the said order dated 22-2-2007 of respondent No. 2, the petitioner filed an application dated 9-4-2007 u/s 264 of the Act by which it requested respondent No. 1 to revise the said impugned order of respondent No. 2. The petitioner made the following points in its application:

(i) The petitioner pointed out that the unabsorbed depreciation of Rs. 1,77,46,293 for the assessment year 1993-94 was determined vide order dated 16-9-2003 and carry forward and set off of the same for the subsequent assessment year 1994-95 was possible only after this date. The petitioner relied on the analogy of the section 155(4) of the Act and submitted that the period of limitation for the assessment year 1994-95 had to be calculated from the end of the financial year in which the order giving effect to the order of the CIT(A) for the assessment year 1993-94 was passed.

(ii) On the merits, the petitioner set out the provisions of section 32(2) of the Act as applicable for the assessment year 1994-95 and pointed out that carried forward unabsorbed depreciation was equivalent to current depreciation and could be set off against income chargeable under any head. It was emphasized that the unreported decision of the Tribunal in the case of E. Merck (India) Ltd. relied upon by the respondent No. 2 was in favour of the petitioner.

(n) The petitioner further filed written submissions dated 31-8-2007 in which it made the following points:

(i) That an order passed to give effect to an appellate order was not an order of rectification u/s 154, but was a mere recomputation of income which can be treated as having been passed u/s 143 of the Act. The petitioner relied on the sub-section (3) of section 153 of the Act which provides that the time-limit for completion of assessment and reassessment are not applicable to the cases of assessments, reassessments or recomputations made in consequence of or to give effect to any finding or directions contained in an order under sections 250, 254 etc.

(ii) On merits, the petitioner reiterated that section 32(2) of the Act as it stood in the assessment year 1994-95 treated carried forward unabsorbed depreciation as being akin to current depreciation and as being eligible to be set off against income under any head. It was emphasized that section 32(2) was amended with effect from 1-4-1997 and by this amendment unabsorbed depreciation was permitted to be set off only against business income.

(o) Respondent No. 1 passed an order dated 7-9-2007 by which he dismissed the petition filed by the petitioner. Respondent No. 1 took the view that the order dated 9-6-2006 was an order passed u/s 154 of the Act and not u/s 143(3)/153(3) as claimed by the petitioner and that the same was barred by limitation as it was passed beyond the period of four years from the date of the effect order dated 29-7-1999 passed for the assessment year 1994-95. On the merits of the issue, respondent No. 1 totally misread the provisions of section 32(2) of the Act and held that "whereas from assessment year 1997-98 onwards the unabsorbed depreciation could be set off from the income under any other head, this benefit was not available up to 1996-97 including assessment year 1994-95 which is under consideration". He held that the order dated 9-6-2006 suffered from a legal mistake and that the impugned order dated 22-2-2007 was valid in law. He accordingly, rejected the petitioner''s application for revision.

3. An affidavit in reply dated 17-12-2007 was filed on behalf of respondent Nos. 1 and 2. It was contended that the petition was not maintainable in view of the provisions of section 119(2)(b) of the income tax Act, 1961. u/s 119(2)(b) the petitioner had an option to make a petition to the CBDT to authorise a subordinate income tax Authority (Assessing Officer) to admit its application for allowing its claim of unabsorbed depreciation and investment allowance, refund or any other relief under the Act after the period of limitation had lapsed. It was contended that the order dated 9-6-2006 passed by respondent No. 1 rectifying the order dated 29-7-1999 and allowing unabsorbed depreciation of assessment years 1992-93 and 1993-94 to the tune of Rs. 2,53,98,782 was not valid and proper and therefore, this mistake has been rectified by respondent No. 1 vide his order dated 7-9-2007. It was contended that the impugned order passed by respondent No. 1 on 7-9-2007 was justified and in accordance with law.

4. On behalf of the petitioner, affidavit-in-rejoinder dated 4-1-2008 was filed by Mr. Vinod Joshi and it was contended that the reference to section 119(2)(b) was misconceived. That in the facts of the present case the question of the petitioner''s application being "admitted" after the "expiry of the time-limit" did not arise. The petitioner''s application was well within the time-limit and his claim has been wrongly rejected on merits on the basis of an erroneous interpretation of the provisions of the Act. It was contended that in the impugned order, section

32(2) of the Act as it stood in the assessment year 1994-95, unabsorbed depreciation was akin to current depreciation and could be set off (against) all categories of income.

5. On behalf of the revenue an additional reply came to be filed on 16-2-2008 and this contained a tabular form indicating the position year-wise. It was contended that in the instant case the order sought to be amended by Assessing Officer was the order passed u/s 143(3) on 28-2-1997. The last date for amending the above order u/s 154 would be 31-3-2001. That the Assessing Officer had passed the first rectification order on 9-6-2006, i.e., more than 3 years after passing of the original orders. That since the limitation period had expired on 31-3-2001, this order was time-barred u/s 154(7). In this background, the Assessing Officer had rightly passed the second order u/s 154 reversing his earlier order as the same was invalid under the income tax Act. That consequently, the CIT-VI has also rightly rejected the assessee''s petition u/s 264. It was thus contended that the Assessing Officer had rightly reversed his earlier rectification order inadvertently passed u/s 154 by passing another order on 22-2-2007 and the CIT-VI was also right in rejecting the petition of the assessee u/s 264 in view of the aforesaid limitations of law provided u/s 154(7) of the income tax Act.

6. An additional affidavit-in-rejoinder sworn by Mr. Vinod Joshi was filed on behalf of the petitioner seeking to explain as to how the business loss of Rs. 1,77,46,293 mentioned in the order dated 16-9-2003 was an error and that the same figure should have been described as "unabsorbed depreciation". Reference was made to certain judgments of the Madras High Court. It was contended that the Assessing Officer ought to have followed these to grant the assessee the benefit of unabsorbed depreciation. That even assuming for the sake of argument, section 154 was applicable, respondent No. 2 could not take the shelter of limitation in view of Circular No. 73, dated 7-1-1972.

7. We have heard both the parties and perused the entire record. In our view, rule in the petition needs to be made absolute for the following reasons.

8. The first question that has been raised and needs to be answered is whether the order dated 9-6-2006 which was purportedly passed u/s 154 of the income tax Act, 1961 was indeed passed by virtue of power which could be traced to section 154 of the income tax Act, 1961. It was contended by the petitioner that in respect of the assessment year 1993-94 the order of the Assessing Officer had been challenged by them before the CIT(A) and this appeal pertaining to the assessment year 1993-94 was disposed of vide an order dated 14-8-2002, granting certain benefits to the petitioner. Consequent to this appellate order, respondent No. 2 had passed an order dated 16-9-2003 to give effect to the said appellate order. The net result was that it was determined that there was an unabsorbed depreciation of Rs. 1,77,46,293 for the assessment year 1993-94 and than an amount of Rs. 76,52,499 representing absorbed depreciation/investment allowance was "freed" thus being available for set off against future

income.

9. For the assessment year 1994-95, the return was assessed and the matter was carried in appeal. In appeal, the CIT(A) determined the petitioner''s total income as Rs. 2,67,71,123. This amount was fixed without accounting for unabsorbed depreciation of the assessment years 1992-93 and 1993-94. On the petitioners'' application dated 20-10-2003 and their subsequent representations dated 6-6-2006 and 8-6-2006 requesting that the unabsorbed depreciation for the years 1992-93 and 1993-94 should be set off against the income for the assessment year 1994-95 as a necessary consequence of the order of the CIT(A) dated 14-8-2002 and the consequent order of respondent No. 2 dated 16-9-2003, respondent No. 2 passed an order dated 9-6-2006 purporting to be an order u/s 154 of the Act and granting the set off as claimed by the petitioners. It is clear from the order dated 9-6-2006 that the set off was granted in order to pass on to the petitioners the benefit that they had obtained under the order passed by an appellate authority in an statutory appeal. In our view, the said order was not an order passed u/s 154 of the income tax Act, 1961. The power to pass such an order was in fact inherent in section 143 or section 144. In the circumstances, the limitation as contained in section 154(7) of the Act would not apply to the passing of such an order. In support of our aforesaid conclusion, reference can be made to the judgment of the Division Bench of this Court in the case of Caltex Oil Refining (India) Ltd. v. CIT [1993] 202 ITR 3751. In that case it was held as under:

The power of the ITO is to make an assessment u/s 143 or section 144 of the income tax Act, 1961. It is that assessment which is the subject-matter of appeal. Evidently, the effect of an appellate order is that the order either stands confirmed, reduced or enhanced or it stands annulled or set aside. It is thus clear that what remains as a final order after giving effect to the orders of the appellate authorities is an order of assessment u/s 143 or section 144. It cannot be anything else." (p. 375)

In our view, the ratio of Caltex Oil Refining (India) Ltd.''s case (supra) which is applicable to orders giving effect to the appellate/ revisional/ reference/ judicial orders in respect of any assessment year under consideration, can also be logically extended to consequent amendments in respect of any succeeding years.

10. Advocate for the petitioners relied upon a judgment of the Division Bench of the Madras High Court in the case of Kanaka Films Private Ltd. Vs. Income Tax Officer, . In the case before the Madras High Court, after passing of the order of the Tribunal, the ITO passed orders to give effect to such order relating to the assessment years 1962-63 to 1966-67. In the meanwhile, the ITO had completed the assessment for the years 1967-68 to 1971-72. The ITO determined the loss for the assessment year 1963-64 to be carried forward at Rs. 18,041 but he did not adjust it against the income of the subsequent years. On these facts, Madras High Court observed as under:

Held, that once the ITO had determined the loss for 1963-64 and held that the assessee was entitled to carry forward the same, he was not justified in his view that this loss could not be set off against business income in the assessment years 1970-71 and 1971-72. The ITO was duty bound to rectify the assessments already completed by him and allow the set off." (p. 88)

11. The Division Bench of the Madras High Court in the case of L. Alagusundaram Chettiar Vs. Commissioner of Income Tax, while deciding the question as to whether limitation prescribed u/s 154 or u/s 147(b) were meant to be applied to amendments made consequential to the decisions of the High Court or the Supreme Court after referring to Kanaka Films (P.) Ltd.''s case (supra) held that the limitation prescribed u/s 154 or section 147(b) are not meant to be applied to amendments made consequential to the decisions of the High Court or the Supreme Court even though the power of the ITO to amend the assessments in consequence of these decisions may be traceable to either section 147(b) or section 154. Following and extending the view of the judgment of this Court in Caltex Oil Refining (India) Ltd.''s case (supra) we agree with the conclusion though in our view, the power of the ITO to amend the assessment in consequence of decision in an appeal/revision/ reference or by a High Court or Supreme Court is not traceable to section 154 but is inherent and traceable to sections 143 and 154 (sic-144) of the income tax Act.

12. In the aforesaid view of the matter, it must be held that the finding given in the impugned orders dated 26-2-2007 and 7-9-2007 holding that the order passed by the Assessing Officer on 9-6-2006 was beyond the period of limitation as prescribed u/s 154(7) of the income tax Act is erroneous.

13. Similarly, in our view, the findings that the allowability of unabsorbed depreciation against income from other sources is debatable in nature, cannot be sustained.

14. In the order passed by the CIT-VI the finding given is that u/s 32(2) of the income tax Act as amended and made applicable for assessment year 1997-98 onwards, it is clear that the unabsorbed depreciation could be set off from the income under any other head, this benefit was not available up to 1996-97 including assessment year 1994-95 which is under consideration. In fact, the position is exactly the reverse for the year 1994-95. Section 32(2) of the income tax Act as applicable to the assessment year 1994-95 reads as under:

(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;

(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;

It appears that CIT-VI while passing order dated 7-9-2007 correctly quoted the aforesaid provision but wrongly mentioned that the provision was applicable for assessment year 1997-98 onwards.

15. In the impugned order dated 26-2-2007 it was mentioned that the assessee had submitted that they were not pressing for a set off of the investment allowance Rs. 31,58,423. This position was again fairly stated before us by the counsel appearing for the petitioner. In the net result, in view of the aforesaid discussion and our findings, the petition deserves to be allowed in terms of prayer clause (a) with a clarification that the petitioners will not have a right to set off in respect of the unabsorbed investment allowance of Rs. 31,58,423. Rule made absolute accordingly in the aforesaid terms.