



**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH “G”, MUMBAI
BEFORE MS. PADMAVATHY S., ACCOUNTANT MEMBER
AND
SHRI. RAJ KUMAR CHAUHAN, JUDICIAL MEMBER
ITA NO. 2099/MUM/2023 (A.Y: 2013-14)**

Suvino Televideo

12, Chandragupta Estate, New Link
Road, Oshiwara, Andheri (West),
Mumbai – 400058.

PAN: AANFS6322A

(Appellant)

Vs. ITO Ward 25(1)(3)

Mumbai.

(Respondent)

Assessee Represented by

: Shri. Narayan Patil

Department Represented by

**: Shri. Pushkaraj
Bhangepatil**

Date of conclusion of Hearing

: 17.01.2025

Date of Pronouncement

: 18.02.2025

ORDER

PER RAJ KUMAR CHAUHAN (J.M.):

1. This appeal is filed by the appellant/assessee against the order dated 24.03.2023 of Learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi [hereinafter referred to as the “CIT(A)”], passed under section 250 of the Income Tax Act, 1961 [hereinafter referred to as “the Act”] for the A.Y. 2013-14. The ld. CIT(A)

has dismissed the appeal of the assessee and confirmed the order of the learned Assessing Officer, ITO, Ward – 25(1)(3) (hereinafter referred to as “*ld. AO*”), dated 18.03.2016, who has refused to allow to carry forward the unabsorbed depreciation pertaining to A.Y. 1995-96 to the considered year 2013-14.

2. The brief facts as culled out from the proceedings before the lower authority are that the assessee is a partnership firm engaged in the business of hiring out of equipment and as studio owners and allied business. During the year under consideration, the assessee has shown income from house property of Rs. 2,10,252/- after setting off unabsorbed depreciation of Rs. 4,33,328/- of A.Y. 2006-07, business loss of Rs. 2,10,252/- and income from capital gain of Rs. 11,14,59,699/- which has been set off against the unabsorbed depreciation for A.Y. 2007-08, thus resulting in Nil total income for the year under consideration. The return of income was filed by the assessee on 25.07.2013, declaring total income at Rs. Nil. A revised return of income was filed on 04.03.2014 declaring total income at Rs. Nil. The return was processed u/s. 143(1) accepting returned income. The case was selected for scrutiny under CASS and the first statutory notice u/s. 143(2) of the

Act was issued on 04.09.2014 which was duly served upon the assessee. Subsequently, notice u/s. 142(1) along with detailed questionnaire was sent to the assessee on 21.07.2015 which was responded by filing details and submissions.

3. The ld. AO was of the view that the business losses included depreciation u/s. 72 of the Act, hence, carry forward of depreciation including business losses can be set off from **business income only**. It is further stated that in case of assessee there is no business income during the year under consideration. Hence, the set off of unabsorbed depreciation as claimed by the assessee against the house property income and capital gains is disallowed and the incomes under respective heads are brought to tax. It is further observed that the assessee has claimed to carry forward of loss pertaining to A.Y. 1995-96 onwards and the same is also claimed to be set off against the current year income. (A.Y. 2013-14). The ld. AO asked the assessee vide order sheet noting dated 12.02.2016 to justify the claim of unabsorbed depreciation for A.Y. 1995-96, 1996-97 and 1997-98, as against the house property income and capital gains pertaining to the current year (A.Y. 2013-14).

4. The assessee vide his details dated 18.02.2016 has made submission which find noted and adjudicated upon by the ld. AO. That the combined reading of Section 32(2) and 70(2) shows that if an assessee has unabsorbed depreciation u/s. 32(2) as well as unabsorbed business loss carried forward u/s. 72(1), Section 72(2) provides that the unabsorbed losses shall have precedence and to be set off first, so far as the sufficiency of the income to be set off against permits. Further, it is stated that Section 72(2) contemplates that if there is some unabsorbed loss carried forward to set off and there is also some unabsorbed depreciation allowance carried forward to be set off, the former shall get priority. It is further asserted by the assessee before the ld. AO that u/s. 32(2), unabsorbed depreciation of a year becomes the part of depreciation of subsequent year by legal fiction and when it becomes part of the current year depreciation then it was liable to be set off against any other income. The assessee relied upon the judgment of the Hon'ble Supreme Court in the case of **CIT vs. Jaipuria China Clay Mines (P) Ltd. (59 ITR 555)** where it was held that *“it is wrong to assume that Section 72 also deals with the carrying forward of depreciation. This carry forward having been provide in Section 32(2)*

in a different manner, Section 72 deals with losses other than losses due to depreciation”.

5. The ld. AO has considered these submissions of the assessee and concluded that the same was not acceptable. The observation of the ld. AO are relevant and reproduced as under:

*“The submission of the assessee is perused, but the same is not acceptable. Section 72 of the Income tax Act, 1961 stipulates that, *Where for any assessment year, the net result of the 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, so much of the loss as has not been so set off or, where he has no income under any other head, the whole loss shall, subject to the other provisions of this Chapter, be carried forward to the following assessment year and*

- (i) 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;*
- (ii) If the loss cannot be wholly so set off, the amount of loss not so set off shall be carried forward to the following assessment year and so on.....”*

Further, section 32 (2) (iii) prior to its substitution w.e.f. 1.4.2002 read as under: “if the unabsorbed depreciation allowance cannot be wholly set off under clause (1) 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....."*

Thus, as per section 72, where for any assessment year, the net result of the computation under the head, "Profits and gains of business or profession" is a loss to the assessee, means any loss from business which is not set off during the relevant assessment year, is allowed to be carried forward to the following assessment years and can be set off against profits and gains from business and profession income only carried on by the assessee and assessable for those assessment years. The Act clearly states that the business loss has to be adjusted against the head business, or profession income and as such this carried forward loss cannot be adjusted against any other head of income. Reliance is also placed on the decision of the Hon'ble Apex court in the case of Garden Silk Weaving Factory reported at 94CTR 136 (1991), wherein it was held that depreciation is indeed a part of the "loss". This is because, in the first place, 'depreciation' is a normal outgoing, though in a sense notional, which has to be debited in the computation of the profits of a business on commercial principles (quite apart from statute) and it is difficult to see why, when such deduction yields a negative figure of profits, it cannot be a loss' as generally understood. Thus, it means that business losses included depreciation under section 72 of the Act. Hence carry forward depreciation including business losses can be set off from business income only. In the case of assessee there is no business income during the year under consideration.

Hence, the set off of unabsorbed depreciation as claimed by the assessee against the house property income and capital gains, is disallowed and the incomes under respective heads are brought to tax.

(2) Whether the loss from unabsorbed depreciation before 2002 can be carry forward upto unlimited time?

Assessee has claimed the carry forward of loss pertaining to Assessment Year 1995-96 onwards, as mentioned above and which is also claimed to be set off against the current year income. As per section 32(2) prior to its amendment w.e.f. 01.04.2002, the loss not so set off can be carried forward to only eight assessment years immediately succeeding

the assessment year for which the loss was first computed. In the case of the assessee, it is seen that brought forward depreciation loss has been adjusted against income from house property and income from capital gain thereby resulting in a Nil income for this relevant assessment year. Moreover, the unabsorbed depreciation pertains to Assessment Years 1995- 96, 1996-97 and 1997-98. Reliance is also placed on the decision of the Hon'ble Tribunal in the case of DCIT vs. Times Guaranty Ltd. the Hon'ble Tribunal vide its order No. 4917 & 4918/Mum/2008 dated 30th June, 2010, wherein the Hon'ble Tribunal has given the following decision in para 39 and para 40, which is as under:

“39. Adverting to the facts of the instant case we find that the unabsorbed depreciation allowance arose in the second period i.e. assessment years 1997-98 to 1999-2000 which 1999-2000 which could not be adjusted against the income under the head 'Profits and gains of business or profession' up to assessment year 2002-2003. Now the assessee cannot claim set off of such unabsorbed depreciation allowance against income under any head other than 'Profits and gains of business or profession' in the years under consideration. As the assessee is seeking to claim the set off of such brought forward unabsorbed depreciation allowance against income under the head 'Income from other sources', that cannot be accepted. In view of the foregoing reasons we are of the considered opinion that the learned CIT(A) erred in not correctly interpreting the law in this regard. The impugned order is hereby vacated and the action of the Assessing Officer is restored in both the years under consideration.

40. The question posed before this Special Bench is, therefore, answered in favour of the Revenue by holding that the unabsorbed depreciation relating to assessment year 1997-98 to 1999-2000 is to be dealt with in accordance with the provisions of section 32(2) as applicable for assessment year 1997-98 to 1999-2000.”

As seen above, business loss pertaining to Assessment Years 1995-96, 1996-97 and 1997-98 will not be allowed to be carried forward. The carry forward of business loss and depreciation loss will be allowed as under:

<i>Asst. Year</i>	<i>Business loss</i>	<i>Unabsorbed Depreciation</i>	<i>Time limit for carry forward of business</i>	<i>Time limit for carry forward of depreciation</i>

			loss	loss
1995-96	-	3904646	-	2003-04
1996-97	-	3250422	-	2004-05
1997-98	-	4773206	-	2005-06
1999-2000	-	4000052	-	2006-07
2001-02	-	-		
2002-03	-	321120	-	Unlimited period
2003-04	44237	1686352	2011-12	Unlimited period
2004-05	-	135360		Unlimited period
2005-06	-	-		Unlimited period
2006-07	67542	414569	2014-15	Unlimited period
2007-08	95492	343041	2015-16	Unlimited period
2008-09	425192	272433	2016-17	Unlimited period
2009-10	314459	207444	2017-18	Unlimited period
2010-11	18139	180533	2018-19	Unlimited period
2011-12	13480	157239	2019-20	Unlimited period
2012-13	483365	137062	2020-21	Unlimited period

As seen above, unabsorbed depreciation pertaining to Assessment Years 1995-96 to 1999-2000 and business loss pertaining to Assessment Year 2003-04, will not be allowed to be carried forward. Thus, the claim of the assessee for setting off of depreciation loss of these above mentioned years against house property income and capital gain income of current year is disallowed and the incomes as shown in the computation of income are brought to tax under their respective heads as claimed by the assessee. However, the said loss which is disallowed may be carried forward for subsequent years as stated in the following table: -

Asst. Year	Business loss	Unabsorbed Depreciation	Time limit for carry forward	Time limit for carry forward
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			<i>of business loss</i>	<i>of depreciation loss</i>
2002-03	-	-	321120	Unlimited period
2003-04	-	-	1686352	Unlimited period
2004-05	-		135360	Unlimited period
2005-06	-			Unlimited period
2006-07	67542	2014-15	414569	Unlimited period
2007-08	95492	2015-16	343041	Unlimited period
2008-09	425192	2016-17	272433	Unlimited period
2009-10	314459	2017-18	207444	Unlimited period
2010-11	18139	2018-19	180533	Unlimited period
2011-12	13480	2019-20	157239	Unlimited period
2012-13	483365	2020-21	137062	Unlimited period

As seen above, unabsorbed depreciation pertaining to Assessment Years 1995-96 to 1999-2000 and business loss pertaining to Assessment Year 2003-04, will not be allowed to be carried forward. Thus, the claim of the assessee for setting off of depreciation loss of these above mentioned years against house property income and capital gain income of current year is disallowed and the incomes as shown in the computation of income are brought to tax under their respective heads as claimed by the assessee. However, the said loss which is disallowed may be carried forward for subsequent years as stated in the following table:

<i>Asst. Year</i>	<i>Business loss</i>	<i>Unabsorbed Depreciation</i>	<i>Time limit for carry forward of business loss</i>	<i>Time limit for carry forward of depreciation loss</i>
2002-03	-	-	321120	Unlimited period

2003-04	-	-	1686352	Unlimited period
2004-05	-		135360	Unlimited period
2005-06	-		-	Unlimited period
2006-07	67542	2014-15	414569	Unlimited period
2007-08	95492	2015-16	343041	Unlimited period
2008-09	425192	2016-17	272433	Unlimited period
2009-10	314459	2017-18	207444	Unlimited period
2010-11	18139	2018-19	180533	Unlimited period
2011-12	13480	2019-20	157239	Unlimited period
2012-13	483365	2020-21	137062	Unlimited period

Penalty u/s. 271(1)(c) of the Act for furnishing inaccurate particulars of income and concealment of income is separately being initiated.

5. Subject to the above, the total income of the assessee is computed as under:

		Rs.	Rs.
	Income from house property (as per computation)		6,34,580
	Income from Business & Profession (As per computation of income)		(2,10,252)

	<i>Income from capital gain (short term capital gain as per computation of income)</i>		<i>1,14,59,699</i>
	<i>Gross total income</i>		<i>1,14,59,699</i>
	<i>Deduction under Chapter VIA</i>		<i>NIL</i>
	<i>Total Income</i>		<i>1,18,93,027</i>
	<i>Total Income (Rounded off to)</i>		<i>1,18,93,030</i>

Assessed u/s. 143(3) of the Act. Give credit for pre paid taxes after due verification. Charge interest as per law, issue demand notice /R.O. accordingly. Penalty proceedings u/s. 271(1)(c) of the Income Tax Act, 1961 for furnishing inaccurate particulars of income and concealment of income is separately being initiated.”

6. The Id. CIT(A) has noted down that the appellant has filed online written submissions, where they have discussed various amendments over a period in depreciation provision is as under:

“3.3. We disagree to the contention of the assessee. There had been various amendments over a period in Depreciation provision. We would like to summarize the same as below,

Provision upto 31.03.1996 i.e., A.Y 1996-97.

(i) Current depreciation, that is the amount of allowance for the year under sec. 32(1), can be set off against income under any head within the same year.

(ii) Amount of such current depreciation which cannot be so set off within the same year as per (i) above shall be deemed as depreciation under s. 32(1), that is depreciation for the current year in the following year(s) to be set off against income under any head, like current depreciation.

Provision from 01.04.1996 to 31.03.2001 i.e. from A.Y 1997-98 to A.Y 2001-02.

(i) Brought forward unadjusted depreciation allowance for and upto asst. yr. 1996- 97(hereinafter called the "First unadjusted depreciation allowance"), which could not be set off upto asst. yr. 1996-97, shall be carried forward for set off against income under any head for a maximum period of eight assessment years starting from asst. yr. 1997-98.

(ii) Current depreciation for the year under s. 32(1) (for each year separately starting from asst. yr. 1997-98 upto 2001-02) can be set off firstly against business income and then against income under any other head.

(iii) Amount of current depreciation for asst. yrs. 1997-98 to 2001-02 which cannot be so set off as per (ii) above, (hereinafter called the "Second unabsorbed depreciation allowance) shall be carried forward for a maximum period of eight assessment years from the assessment year immediately succeeding the assessment year for which it was first computed, to be set off only against the income under the head "Profits and gains of business or profession".

Provision from 01.04.2001 onwards ie. from A.Y 2002-03 onwards

(i) All the old provision as applicable before 01.04.1996 was restored.

(ii) Any Unabsorbed Depreciation which could not be set off till AY 2001-02 will be carried forward and considered as the depreciation of current year i.e. AY 2002-03.

From the above summary it is quite evident that the unabsorbed depreciation of A. Y 199697 are considered as depreciation of current year ie. A.Y 1997-98 Further the said unabsorbed depreciation not adjusted till A.Y 2001-02 will again form part of current year depreciation i.e. for A. Y 2002-03.

Appellant also relies on the following judgements,

a. *General Motors India (P). Ltd. Vs DCIT (2013) 354ITR 244 (Guj)*

"37. 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 1st day of April, 2002 (A.Y. 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 A.Y. 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"

b. *DCIT Vs Andhra Petrochemicals Ltd 123ITD 89*

The Tribunal held that:

"15. The only other issue remains for the asst. yr. 2002-03 is with regard to the entitlement to carry forward depreciation pertaining to the asst. yr. 1994-95. The provisions as applicable for the asst. yr. 1994-95 do not restrict carry forward of depreciation for any specified period and as per the provisions as they existed then, the depreciation carried forward from the earlier years has to be treated as current year's depreciation in which event, the depreciation of the asst. yr. 1994-95 has to be treated as the current year's depreciation for the asst. yr. 1995-96 and so on. However, by virtue of the amendment to the provisions w.e.f. 1st April, 1997 carried forward depreciation is available for set off only for a period of eight years and the CBDT has clarified the amended provisions by stating that the limitation of eight years shall start from the asst. yr. 1997-98 by which the assessee would be entitled to carry forward the unabsorbed depreciation upto the asst yr. 2004-05 However, by the Finance Act, 2001 w.g 1st April, 2002, the old provisions were revived by dispensing with the restriction of eight years for carry forward and set off of unabsorbed depreciation. As on 1st April, 2002 the assessee's right to carry forward

the depreciation of the asst. yr. 1994-95 being alive and available for set off, the amended provisions come into play, in which event the same has to be determined Since it tras to be carried forward to the next year. In our considered opinion, the AO as well as the CIT(A) have not considered the plain meaning of the provisions in correct perspective. We. therefore, set aside the orders passed by the tax authorities on this issue and direct the AO to permit the assessee to carry forward the depreciation referable to the asst. yr. 1994-95"

c. KMC Speciality Hospitals India Ltd. Vs ACIT dt 5th May, 2014 the issue was with respect to the carry forward of unabsorbed depreciation relating to AYs 1989-90 to 1998-99. The Chennai Tribunal held as under.

"8. Therefore, it is to be seen that wherever unabsorbed depreciation was not allowed to be set off against the profits arising after the period of eight years, should be again considered to be set off, after the amendment. When the quantum of unabsorbed depreciation is computed after the amendment, whatever balance of unabsorbed depreciation is available to the credit of the assessee, must be determined as unabsorbed depreciation eligible for carry forward and set off. The interregnum restriction of limiting of the claim for eight-year period does not take away the right of an assessee to claim the balance of unabsorbed depreciation, forever. The balance of unabsorbed depreciation revives back into life and becomes eligible for carry forward and set off along with the other part unabsorbed depreciation available to the credit of the assessee."

d. 81 Karnataka Co-operative Milk Producers' Federation Ltd. Vs. DCIT (2011) 53 DTR (Kar)

e. ITO VS Suraj Solvent & Vanaspati Industries Ltd 16 DTR (Asr)(Trib) 492

f. DCIT VS Tamil Nadu State Transport Corporation (Villupuram) Limited dt 18.01.2012

3.4. Therefore, we see that the above decisions have held that the amendment by Finance Act 2002 was a return back to the original provision, to make the claim simple. The old position has been restored, which allows set off unabsorbed depreciation against any head of income and the restrictive period of 8 years for claiming the set off has been deleted vide CBDT circular, thereby extending the claim period.

Based upon the above stated facts and circumstances of the case, your honor is requested to allow the appeal of the Appellant.

In case of any contrary view and in case of any further details / clarifications are required by honor, the Appellant requests to provide an opportunity to furnish the same and an opportunity of being heard before disposing of the matter.”

7. After duly considering the submissions of the assessee/appellant, the Id. CIT(A) while relying upon the special bench judgment of the ITAT Mumbai in the case of **DCIT vs. Times Guaranty Ltd. (2010) 40 SOT (Mum) & ITA Nos. 4917 & 4918/Mum/2008, A.Y. 2003-04 & 2004-05**, has dismissed the appeal but has not considered the judgment of the Gujrat High Court in the case of **General Motors India (P.) Ltd. Vs. DCIT (2013) 354 ITR 244 (Guj)**. The Id. CIT(A) has not accepted the submission of the appellant, wherein they have asserted that as per provision of depreciation from 01.04.2001 onwards i.e., from A. Y. 2002-03 onwards, the old provision as applicable before 01.04.1996 was restored and any unabsorbed depreciation which would be set off for A. Y. 2001-02 will be carried forward and considered as depreciation of current year. While rejecting the claim of the assessee, the Id. CIT(A) observed that there are many differing decisions of various courts on this issue but none of the decision relied by the appellant pertains to the jurisdictional courts. While relying the

judgment of the ITAT Mumbai Special Bench decision in the case of DCIT vs. Times Guaranty Ltd. (supra), the contentions of the assessee/appellant was rejected as is evident from para 5.3.2 and 5.3.3 of the ld. CIT(A)'s order reproduced as under:

“5.3.2. The Hon'ble of ITAT Mumbai [Special Bench Decision) in the case of DCIT VS. Times Guartee Ltd. (2010) 40 SOT 14 (SB) (Mum) & ITA Nos.4917 & 4918/Mum/2008 Asst. Years 2003-2004 & 2004-2005; wherein it was held the provisions of Sec. 32(2) as substituted by the Finance Act, 2001 w.e.f. 1st April, 2002, which is reinforcement of the provision as existing in the first period i.e.. prior to 1st April, 1997. Thus, the law as existing in the second period w.e.f. 1st April, 1997 was completely taken back and as a result of that the provision as prevailing in the first period was restored. From the language of the sub-s. (2) of s. 32 it is manifest that it is a substantive provision and not a procedural one. It is settled legal position that the amendment to substantive provision is normally prospective unless expressly stated otherwise or it appears so by necessary implication. The special Bench summarised its conclusions thus: "The legal position of current and brought forward unadjusted/unabsorbed depreciation allowance in the three periods, is summarized as under.

1. In the first period (i.e. upto asst, yr. 1996-97) (1) current depreciation, that is the amount of allowance for the year under s. 32(1), can be set off against income under any head within the same year. (ii) amount of such current depreciation which cannot be so set off within the same year as per (i) above shall be deemed as depreciation under s. 32(1), that is depreciation for the current year in the following year(s) to be set off against income under any head, like current depreciation,

2. In the second period (ie, asst, yrs. 1997-98 to 2001 01-02), (1) brought forward unadjusted depreciation allowance for and upto asst. yr. 1996-97 (hereinafter called the 'First unadjusted depreciation allowance'), which could not be set off upto asst. yr. 1996-9 7, shall be carried forward for set off against income under any head for a maximum period of eight assessment years starting

from asst. yr. 1997-98. (ii) current depreciation for the year under s. 32(1) (for each year separately starting from asst. yr. 1997-98 upto 2001-02) can be set off firstly against business income and then against income under any other head. (ii) amount of current depreciation for asst. yrs. 1997-98 to 2001-02 which cannot be so set off as per (ii) above, hereinafter called the 'Second unabsorbed depreciation allowance' shall be carried forward for a maximum period of eight assessment years from the assessment year immediately succeeding the assessment year for which it was first computed, to be set off only against the income under the head 'Profits and gains of business or profession'.

3. In the third period (i.e. asst. yr. 2002-03 onwards). (i) 'first unadjusted depreciation allowance' can be set off upto asst. yr. 2004-05, that is, the remaining period out of maximum period of eight assessment years (as per B(i) above) against income under any head. (ii) 'second unabsorbed depreciation allowance' can be set off only against the income under the head "Profits and gains of business or profession' within a period of eight assessment years succeeding the assessment year for which it was first computed. (ii) current depreciation for the year under s. 32(1), for each year separately, starting from asst. yr. 2002-03 can be set off against income under any head. Amount of depreciation allowance not so set off (hereinafter called the 'Third unadjusted depreciation allowance') shall be carried forward to the following year. (iv) the Third unadjusted depreciation allowance' shall be deemed as depreciation under s. 32(1), that is depreciation for the current year in the following year(s) to be set off against income under any head, like current depreciation, in perpetuity.

5.3.3. The decision of the Special bench of ITAT, Mumbai in the case of DCIT Vs. Times Guartee Ltd. (Supra) is the jurisdictional ITAT for the appellant and therefore, maintaining judicial discipline on the issue, the issue is decided against the appellant. The addition made by the AO is upheld. Appeal on ground No. 1 is dismissed.”

8. Aggrieved assessee is in appeal before us and has raised the following grounds of appeal:

“1. Disallowing Set-off of Unabsorbed Depreciation - INR 1,18,93,030/- That on the facts and circumstances of the case learned Assessing Officer (hereinafter referred to as 'Ld. AO') has erred in disallowing the set-off of Unabsorbed Depreciation against Income from House Property and Income from Short-term capital gain.

HENCE APPEALED

2. The appellant craves leave to add, alter, delete, rectify and modify any of the grounds of appeals before or at the time of hearing the appeal.”

9. We have heard the ld. AR on behalf of the assessee who would argue that both the lower authorities have misdirected themselves and has not followed the correct law laid down by the General Motors India (P). Ltd. Vs. DCIT (supra) and has failed to acknowledge that as per provisions with effect from 01.04.2001 onwards i.e., from A. Y. 2002-03, the old provisions as applicable before 01.04.1996 was restored and any unabsorbed depreciation which could not be set off till A. Y. 2001-02 will be carried forward and considered as the depreciation of the current year. The ld. AR has also relied upon following decisions in support of his contentions.

- *“General Motors India (P). Ltd. Vs DCIT (2013) 354ITR 244 (Guj)*
- *DCIT Vs Andhra Petrochemicals Ltd 123ITD 89 (ITAT Vizag)*
- *KMC Speciality Hospitals India Ltd. Vs ACIT dt 5th May, 2014 Chennai*

- *Karnataka Co-operative Milk Producers' Federation Ltd. Vs. DCIT (2011) 53 DTR (Kar) 81.*
- *ITO Vs Suraj Solvent & Vanaspati Industries Ltd 16 DTR (Asr)(Trib) 492.*
- *DCIT Vs Tamil Nadu State Transport Corporation (Villupuram) Limited dt 18.01.2012.”*

10. The ld. AR further argued that it is now settled by Hon'ble High Court, Mumbai in the case of ***Bond Safety Belts (Dissolved) vs. DCIT [2023] 156 taxmann.com 222 (Mumbai), order dated 27.09.2023*** that as per the provisions of Section 32(2) 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 years along with the unabsorbed depreciation of the earlier years becomes the total current years depreciation which is allowed to be set off against income under any head of income including long term capital gain. It is therefore submitted that the grounds in appeal be allowed and order of the lower authorities be set aside. In support of his arguments, the following cases has been relied: -

- Bond Safety Belts (Dissolved) vs. Deputy Commissioner of Income-tax [2023] 156 taxmann.com 222 (Bombay)[27-09-2023]*
- Commissioner of Income-tax vs. Hickson and Dadajee (P.) Ltd. [2020] 122 taxmann.com 94 (SC)[06-01-2020].*

- iii. *Commissioner of Income-tax vs. Bajaj Hindustan Ltd. [2019] 103 taxmann.com 32 (SC)/[2019] 261 Taxman 558 (SC)[03-01-2019]*
- iv. *Harvey Heart Hospitals Ltd. vs. Assistant Commissioner of Income Tax [2021] 127 taxmann.com 805 (Madras)/[2021] 431 ITR 83 (Madras)[06-01-2021].*
- v. *Dr. Willmar Schwabe India (P.) Ltd. vs. Additional Commissioner of Income-tax [2023] 152 taxmann.com 428 (Delhi)[17-05-2023].*
- vi. *Circular No. 14 of 2001 Modification of provisions relating to depreciation.”*

11. The ld. DR on the other hand supported the judgment of the ld. AO as well as ld. CIT(A) and has submitted that the appeal is liable to be dismissed.

12. We have considered the rival submissions and examined the record and the judgment relied by the appellant.

13. Thus, the question for determination before us is whether the assessee/appellant is entitled to carry forward the unabsorbed depreciation pertaining to the A. Y. 1995-96 onwards, if so, whether the assessee is entitled to set off the said unabsorbed depreciation against income from house property and income from stock and capital gains as claimed by the appellant?

14. The ld. AO while denying the claim of the assessee was of the opinion that the unabsorbed depreciation pertaining to A.Y. 1995-96 to 1999-2000 was not allowable to be carried forward after the amendment of Section 32(2) w.e.f. 01.04.2002 which is prospective in nature and prior to the said amendment, the loss and unabsorbed depreciation which could not be set off was allowable to be carried forward to only 8 assessment years immediately succeeding the assessment year for which the loss/depreciation was first computed. The ld. AO was also of the opinion that the unabsorbed depreciation if permissible could be set off against business income and not permissible to be set off against capital gains income. The said decision of the ld. AO has been confirmed by the ld. CIT(A) who has based his decision on the Mumbai Tribunal Special Bench decision in case of DCIT vs. Times Gurantee Ltd. (supra).

15. As noted earlier the ld. CIT(A) had not considered the judgment of the Hon'ble Gujrat High Court General Motors India (P.) Ltd. Vs. DCIT (supra) and the said judgment has been considered to be the right law on this issue by the Hon'ble Jurisdictional High Court in Bond Safety Belts (Dissolved) vs. DCIT (supra).

16. Now we proceed to refer the decision relied by Id. AR which are as under:

a. ***Bond Safety Belts (Dissolved) vs. DCIT [2023] 156 taxmann.com 222 (Mumbai), order dated 27.09.2023***

15. Therefore, the intent of the amendment was for enabling the industry to conserve sufficient funds to replace plant and machinery and accordingly dispense with the restriction of 8 years for carry forward and set-off of unabsorbed depreciation. The purpose of amendment in section 32(2) of the Act by Finance Act 2001 should be interpreted purposively and harmoniously with the intent as it appears from CBDT circular. 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 the Assessee or Revenue. But if the legislature fails to express clearly and the Assessee becomes entitled for a benefit within ambit of the section, the benefit accruing to the Assessee cannot be denied. Therefore, as stated in General Motors India (P.) Ltd. (supra) with which we are in respectful agreement, if current depreciation is deductible in the first place from the income of the business to which it relates and such depreciation amount is larger than the amount of the profit of that business, then such excess comes for absorption from profit 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 still a balance leftover, it is to be treated as unabsorbed depreciation and taken to the next succeeding year.

16. Paragraph No. 35 to 38 of General Motors India (P.) Ltd. (supra) reads as under:

35. 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 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."

36. The purpose of this amendment has been clarified by Central Board of Direct Taxes in the Circular No. 14 of 2001. 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 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 1st April, 2001.

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

37. 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 1st day of April, 2002 (A. Y. 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 A. Y. 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) as amended by Finance Act, 2001 would allow the unabsorbed depreciation allowance available in the A. Y. 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 A. Y. 2002-03 then it would be carried forward till the time it is set off against the profits and gains of subsequent years.

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 1st day of April 2002 (A. Y. 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 A.Y. 1997-98 upto the A. Y. 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.

In effect what it means is the depreciation amount has to be adjusted in the following order:

- (a) *first against profits and gains from business;*
- (b) *excess of depreciation from any other business of the Assessee;*
- (c) *even if that leaves a surplus then from out of income from any source under any of the other heads of income during that year.*
- (d) *If still there is a balance leftover, it is to be treated as unabsorbed depreciation and it is taken to the next succeeding year.*

17. Otherwise it would leave a peculiar situation inasmuch as like the case at hand, there is no profit from business because the operation of the business had been stopped and to pay off the liabilities other investments or other assets have been disposed leading to capital gains on which capital gains tax has to be paid on the one hand and on the other there will be unabsorbed depreciation perennially pending.

18. Accordingly we hereby quash and set aside the order of ITAT on this issue. We hold that ITAT was not justified. Assessee should be permitted to set off of the unabsorbed depreciation pertaining to A.Y 1005-97 to 2001-02 aggregating to Rs. 13,89,661/- against short term capital gains.

19. Appeal accordingly disposed.

b. CIT vs. Hicsonand Dadaji (P.) Ltd., (2020) 120 taxmann.com 93 (Bombay):-

This case involved carry forwarding of unabsorbed depreciation available to the assessee on the first day of April, 2002 for the A.Y. 2002-03 without the restriction of 8 years, which was applicable

during the A.Y. 1997-98 to 2001-02 and it was held that the circular no. 14/2001 dated 22.11.2001 clarifies that the restriction of 8 years as existing between A. Y. 1997-98 upto 2001-02 to carry forward and set off unabsorbed depreciation has been dispensed w.e.f. A.Y. 2002-03. Consequently, the unabsorbed depreciation available from 1st April, 2001 will be allowable from the A.Y. 2002-03.

c. *Harvey Heart Hospitals Ltd. vs. Assistant Commissioner of Income Tax [2021] 127 taxmann.com 805 (Madras)/[2021] 431 ITR 83 (Madras)[06-01-2021]:-*

In this case the Hon'ble High Court while referring the judgement of the Hon'ble Gujarat High Court reported in **General Motors India (P.) Ltd. Vs. DCIT (2013) 354 ITR 244 (Guj)**. (supra), was pleased to hold that unabsorbed depreciation pertaining to A. Y. 1997-98 to 2001-02 can be carry forward and adjusted after the lapse of 8 years in view of Section 32(2) of the Act as mandate by the Finance Act, 2001.

d. Dr. Willmar Schwable India (P.) Ltd. vs. Additional Commissioner of Income-tax (High Court of Delhi) [2023] 152 taxmann.com 428 (Delhi) [17-05-2023]

In this case, the unabsorbed depreciation which the petitioner concededly set off in the AY in issue is an amount equivalent to Rs. 7,63,79,560/-. The period over which this depreciation had accumulated spanned between AY 1998-99 and 2001-02.

It was noted as submitted by the Counsel that prior to the Finance Act, 1996, unabsorbed depreciation could be carried forward for an unlimited period, and post the Finance Act, 1996, this period was restricted to eight (8) years. This restriction qua the period for which unabsorbed depreciation could be carried forward was removed, pursuant to Finance Act, 2001. Thus for the A.Y. 2011-12, there was no bar on the petitioner setting off unabsorbed depreciation which had accrued over the period spanning AY 1998-99 to AY 2001-02. The Hon'ble High Court was pleased to hold that *"we are also inclined to accept the other submissions made by Mr. Thakkar on merits, that both the carry forward of*



unabsorbed depreciation and its set off, are permissible in A.Y. 2011-12”.

17. We have considered the rival submissions, the case relied upon by the assessee and order of Ld. CIT(A) dated 24.03.2023 wherein para 5.3, he has observed that *“there are many differing decisions by various Courts on this issue of unabsorbed depreciation of AY 1996-97 for unlimited period even pertaining to AY 1996-97 as in the present case after the amendment by Finance Act 2002 wherein the old position has been restored which allows set off unabsorbed depreciation against any head of income and the restrictive period of 8 years for claiming the set off has been deleted vide CBDT Circular, thereby extending the claim period, it was observed by Ld. CIT(A) that none of the decision relied upon by the assessee pertain to the Jurisdictional Courts.”*

18. It is noticed that the AO as well as ld. CIT(A) has not followed the correct law laid down by the Hon’ble Gujarat High Court reported as ***General Motors India (P.) Ltd. Vs. DCIT (2013) 354 ITR 244 (Guj)*** (supra). The said decision of the Hon’ble Gujarat High Court has been followed and accepted by the Hon’ble Jurisdictional High Court in the case of ***Bond Safety Belts vs. DCIT (2023) 156 taxmann.com***

222(Mumbai) dated 27.09.2023. It is thus apparent that when the Ld. CIT(A) has passed the impugned order dated 24.03.2023, the Bond Safety Belts (supra) judgment was not delivered. The Hon'ble Jurisdictional High Court while following the judgment of **General Motors India (P.) Ltd. (supra)** held that assessee should be permitted to set off unabsorbed depreciation pertaining to AY 1997-98 to 2001-02 against the short term capital gains. Thus, following the mandate of law laid down by Hon'ble Jurisdictional High Court in the case of **Bond Safety Belts (supra)**, the assessee in the presence case is right in carrying forward of unabsorbed depreciation amounting Rs. 1,18,93,030/- against income from house property and income from short term capital gain. Accordingly, the AO is directed to delete the addition. Hence the ground raised by the assessee is allowed.

19. In the result, appeal filed by the assessee is allowed in the above terms.

Order pronounced in the open court on 18.02.2025.

**Sd/-
(PADMAVATHY S.)
(ACCOUNTANT MEMBER)**

**Sd/-
(RAJ KUMAR CHAUHAN)
(JUDICIAL MEMBER)**

Mumbai / Dated 18.02.2025
Dhananjay, Sr.PS

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mumbai