

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN  
&

THE HONOURABLE MR. JUSTICE ASHOK MENON

THURSDAY, THE 1ST DAY OF MARCH 2018 / 10TH PHALGUNA, 1939

ITA.No. 723 of 2009

AGAINST THE ORDER/JUDGMENT IN ITA 162/COCH/2003 of INCOME TAX APPELLATE  
TRIBUNAL, COCHIN BENCH DATED 21-03-2006

APPELLANT(S)/RESPONDENT/REVENUE

THE COMMISSIONER OF INCOME TAX,  
COCHIN.

BY ADVS.SRI.P.K.R.MENON,SR.COUNSEL, GOI(TAXES)  
SRI.JOSE JOSEPH, SC, FOR INCOME TAX

RESPONDENT(S)/APPELLANT/ASSESSEE:

COCHIN SHIPYARD LTD.,  
COCHIN-682 015.

BY ADV. SRI.E.K.NANDAKUMAR (Sr.)

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 01-03-2018,  
ALONG WITH ITA NOS.768/2009, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

APPELLANT'S EXHIBITS

ANNEXURE-A : COPY OF ORDER UNDER SECTION 143(3) OF THE INCOME TAX ACT DATED 27.3.2001 FOR THE ASSESSMENT YEAR 1998-99.

ANNEXURE-B : COPY OF ORDER OF THE CIT DATED 10.3.2003 PASSED UNDER SECTION 263.

ANNEXURE-C : COPY OF ORDER DATED 21.3.2006 OF THE INCOME TAX APPELLATE TRIBUNAL, COCHIN BENCH, COCHIN IN ITA NO.162/COCH/2003.

//TRUE COPY//

PS TO JUDGE.

jg-12/3

“C.R.”

K.VINOD CHANDRAN & ASHOK MENON, JJ.

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ITA Nos.723 and 768 of 2009  
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Dated this the 1<sup>st</sup> day of March, 2018

J U D G M E N T

Vinod Chandran, J.

The issue revolves around the setting-off of unabsorbed depreciation against income other than the profits and gains arising out of business or profession; here, interest income from deposits in Banks. The assessee is a Company carrying on building and repair of ships. The assessment years are 1997-98 and 1998-99. The assessee claimed setting-off of unabsorbed depreciation first against the profits and gains arising out of the business, and then against income from other sources, ie: interest income from Bank deposits. The question of law raised for both the years is whether the Income Tax Appellate Tribunal was right in setting aside the *suo motu* revision made by the Commissioner of Income Tax under Section 263 of the Income Tax Act, 1961, which declined the benefit of set-off of unabsorbed depreciation allowance as against the income from other sources.

2. In both the years, the unabsorbed depreciation was *inter alia* set-off against the income from other sources being interest in Bank deposits, which was found to be wrong in a *suo motu* revision under Section 263. The learned Senior Counsel for the Revenue relying on the judgment of the Honourable Supreme Court in **(2017) 11 SCC 482 [Peerless General Finance and Investment Company Limited v. Commissioner of Income Tax, Kolkata-I]** argued that the allowance could be claimed even as per the amendment only for the assessment year 1997-98. For the subsequent years in which there is a carry forward of unabsorbed depreciation, it could be allowed only as against the profits and gains arising from the business or profession. The learned counsel for the assessee relying on the very same decision of the Honourable Supreme Court contended that as per the amendment, the unabsorbed depreciation could be set-off to the extent it has not been set-off against the profits and gains arising from business and then against the income derived from other heads; in the assessment year 1998-99, and in the later years only as against the profits and gains arising from the business or profession. The learned Senior Counsel would assert

that sub-Clause (ii) of section 32(2) would only be applicable to the assessment year 1997-98 and not to the assessment year 1998-99.

3. There can be no dispute that before the amendment, an assessee could set-off unabsorbed depreciation, first against the profits and gains arising from business or profession and then against the income from other sources. The amendment, admittedly, is applicable only from 1.4.1997. Hence, for the assessment year 1997-98 (previous year 1996-97), there can be no dispute that the assessee is entitled to set-off against the income from other sources also.

4. Much has been stated about the Budget Speech in the orders under challenge. But, we are of the opinion that the same need not be looked into at all. The provisions of the Bill and the statute are available and we would confine our consideration to that. Whatever be the intention expressed in the Budget Speech, the law passed by the Parliament alone is relevant and external aid need be resorted to only if there is any ambiguity in the provision incorporated. The provision as available in Finance (No.2) Bill, 1996 is as under:

**“11. Amendment of section 32.-** In section 32 of the Income Tax Act, with effect from the 1<sup>st</sup> day of April, 1997.-

xxx            xxx            xxx  
xxx            xxx            xxx

(c) for sub-section (2), the following sub-section shall be substituted, namely:-

“(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, 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 business or profession for which the allowance was originally computed continued to be carried on by him in the previous year relevant for that assessment year.”

5. The Act reveals the following provision:-

“32 (2) where in the assessment of the assessee full effect cannot be given to any allowance under clause (ii) of sub-section (1) in any previous year owing to there being no profits or gains chargeable for that previous year or owing to the profits or gains being less than the allowance, then, the allowance or the part of allowance to which effect has not been given (hereinafter referred to as unabsorbed depreciation allowance), as the case may be-

(i) shall be set-off against the profits and gains, if any of any business or profession carried on by him and assessable for that assessment year;

*(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

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(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.”

6. We see from the Bill that the proposal was to confine the set-off of unabsorbed depreciation as

against the profits and gains arising from business or profession alone from 1.4.1997 onwards; despite the statements made in the Budget Speech. However, in the statute, the provision as seen above, especially that highlighted, was included making it evident that the claim of set-off as against the income from other sources was available for that year, and for the subsequent 8 years, it could be claimed only as against profits and gains arising from business or profession. As amended on 01.04.1997, the provision enabled any unabsorbed depreciation carried over from the previous years to be first adjusted against the profits and gains from business or profession, then against income from other sources (for that year alone) and any amounts remaining still, to be adjusted against the profits and gains arising from the business or profession for a further period of 8 years. Hence, for the assessment year 1997-98, the claim for set-off of unabsorbed depreciation is allowable against the income from other sources. The amended provision was not in consonance with the Budget Speech or the Bill introduced; and neither of these provide any help in interpreting the amended provision.



7. The learned Senior counsel would take us through the judgment of the High Court which was challenged in ***Peerless General Finance and Investment Company Limited***. It is also pointed out that the SLP was dismissed. The learned Counsel for the assessee would however assert that the Supreme Court made the dismissal subject to the set off against income from other sources being available "*for the assessment year following 01.04.1997*". A reading of the judgment of the High Court definitely indicates that it was held that there could be no set-off of unabsorbed depreciation against income from other sources from the assessment year 1998-1999. The order of the Honourable Supreme Court is seen from the following extract:-

"ORDER OF THE SUPREME COURT

1. Heard the learned counsel for the parties and perused the relevant material.
2. The special leave petition is dismissed subject to the observation that the unabsorbed depreciation as on 1.4.1997 can be set-off against the income from any head for the immediate assessment year following 1-4-1997 and thereafter if there still is any unabsorbed depreciation the same can be set-off only against the business income for a period of eight (8) assessment years.
3. The special leave petition is disposed of in the above terms."

It is to be noticed that the Honourable Supreme Court dismissed the Special Leave Petition filed against the judgment of the High Court of Calcutta. The observation that the unabsorbed depreciation as on 1.4.1997 can be set-off against the income from any head for the immediate assessment year following 1-4-1997 would be 1997-98; relating to the previous year 1996-97. On a reading of the order it is clear that the SLP was dismissed, a reservation was made; which in effect clarifies the position as declared by the High Court. We answer the question for the assessment year 1997-98 in favour of the assessee and against the Revenue and that framed for the assessment year 1998-99 in favour of the Revenue and against the assessee. ITA No.768/2009 is rejected and ITA No.723/2009 is allowed.

Sd/-  
**K.VINOD CHANDRAN**  
JUDGE

Sd/-  
**ASHOK MENON**  
JUDGE