

## Unabsorbed depreciation is allowed to be carried forward even if return isn't filed within due date

**Summary – The Mumbai ITAT in a recent case of Anil Printers Ltd., (the Assessee) held that Section 80 requires that return be filed as per section 139(3) to carry forward losses within due date, as envisaged under section 139(1), but within ambit of section 80 for carry forward losses, section 32(2) is not included**

### Facts

- The assessee was engaged in the business of manufacturing of computers stationary, ATM cards, ITC cards, etc. For relevant year, assessee filed its return after due date claiming carry forward and set-off of unabsorbed depreciation.
- The Assessing Officer rejected assessee's claim on the plea that section 80 restricted the same.
- The Commissioner (Appeals), however, allowed assessee's claim.
- On revenue's appeal:

### Held

- If sub-section (2) of section 32 is analyzed, it speaks about not giving full effect 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 profit or gains chargeable being less than the allowance. Whereas, section 80 requires that return be filed as per section 139(3) to carry forward losses within due date, as envisaged under section 139(1), yet, within the ambit of section 80 for carry forward losses, section 32(2) is not included.
- In the present case, the assessee has claimed set of and carry forward of unabsorbed depreciation against the profit and gains of business of the succeeding year. The business loss determined in the hands of the assessee under the head 'profit and gains of business' stands on different footing than unabsorbed depreciation determined in the hands of the assessee, thus, the assessee having claimed the set of and carry forward of allowance of depreciation, unadjusted against the profit of current previous year cannot be denied such set of or carry forward of unabsorbed depreciation allowance as the provisions of section 139(3) is not applicable, more specifically, when the assessee filed its return of income, though belatedly, but within the extended period allowed under the statute, thus, the assessee is entitled to the benefit of carry forward and set-off of unabsorbed depreciation allowance as part of depreciation.
- So far as, the contention of the revenue that section 80 restrict the same, is concerned, it is noted that section 32 deals with different types of depreciation, whereas, section 80 deals with carry forward of unabsorbed losses other than losses on account of depreciation.

- The newly substituted section 32(2) (with effect from 1-4-2002) by the Finance Act, 2001 (14 of 2001), which is operative for and from assessment year 2002-03, certain conditions, *inter alia*, the restriction of eight years for carry forward and set-off of unabsorbed depreciation were dispensed with, reverting to pre-1997 position. It may be noted that the legal fixation of treating unabsorbed depreciation as the depreciation of the subsequent years has been specifically made subject to the provisions of sections 72(2) and 73(3). Thus, if an assessee has unabsorbed depreciation under section 32(2) as well as unabsorbed business loss carried forward under section 72(1), section 72(2) provided the unabsorbed losses shall have precedence, and be set-off first, so far as the sufficiency of income to be set-off against permits.
- It is only after the carried forward business loss is set-off, and there yet remains positive income, that the unabsorbed depreciation would come in for a set-off. This is beneficial to the assessee inasmuch as the unabsorbed business losses have a time bar of eight years while the unabsorbed depreciation has no time bar, it integrates with, and is treated as depreciation allowable for the subsequent year itself. What section 72(2) contemplates is that if there is some unabsorbed losses carried forwarded to be set-off, and there is also some unabsorbed depreciation allowance carried forward to be set-off, the former shall get priority.
- This is so because unabsorbed depreciation retains its own character even in succeeding year(s) as distinguished from current depreciation. Under section 32(2) a legal fiction has been created that unabsorbed depreciation of the earlier year shall form part of current year's disallowance and therefore it shall have to deal with accordingly subject to the provision of section 72(2) and 72(3). Thus, the carried forward unabsorbed depreciation of the earlier year has to be taken as a part of the current year's depreciation allowance and to be set-off, to the extent possible, against income of the current year. The unabsorbed depreciation should be allowed before the unabsorbed investment allowance and that would be the order of priority in claiming the unabsorbed depreciation and unabsorbed investment allowance.
- In view of the foregoing discussion, there is no infirmity in the conclusion drawn by the Commissioner (Appeals).
- Finally, the appeal of the revenue is dismissed.