IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI SPECIAL BENCH "E", MUMBAI

Before S/Shri D.Manmohan, VP, R.S.Syal, AM, N.V.Vasudevan, JM

ITA Nos.4917 & 4918/Mum/2008 : Asst.Years 2003-2004 & 2004-2005

The Dy.Commissioner of Income-tax Circle 1(3) Mumbai.	Vs.	M/s.Times Guaranty Limited Times of India Building, Ground Floor M.K.Road, New Marine Lines Mumbai – 400 020. **PA No.AABCT2481Q.**
(Appellant)		(Respondent)

Appellant by : Shri Hemant J Lal
Respondent by : Sh. K. Shivram

Per R.S.Syal (AM) :

The Hon'ble President of the Income Tax Appellate Tribunal has constituted this Special Bench and posted the following question for our consideration and decision:-

> *"On the facts and circumstances of the case, whether the unabsorbed depreciation relating to A.Y. 1997-1998 to 1999-2000 is to be dealt with in accordance with the Provisions of Section 32(2) as applicable for A.Y. 1997-1998 to 1999-2000 as claimed by the revenue or the same has to be dealt with in accordance with the said provisions as applicable to A.Y. 2003-2004 and 2004-2005 as claimed by the Assessee?"*

2. These two appeals by the Revenue emanate from the common order passed by the Commissioner of Income-tax (Appeals) dated 5.5.2008 in relation to the assessment years 2003-2004 and 2004-2005. The following effective common grounds have been raised in both the years:-

"1. On the facts and circumstances of the case and in law the ld.CIT(A) erred in granting set off of unabsorbed depreciation against income from other sources.

2. Further, placed in the above factual and legal scenario, the impugned order of the ld.CIT(A) is, the appellant prays, contrary to law and consequently merits to be set aside and that of the Assessing Officer be restored."

3. Briefly stated the facts of the case are that the assessee continued to derive income from the business of merchant banking activity. It filed return for assessment year 2003-2004 declaring loss of Rs.82,86,513. Assessment order was passed u/s.143(3) on 17.3.2006 in which the Assessing Officer made the following computation of total income as per normal provisions of the Act:-

I) Profits and gains of business (As shown in the computation of total income)		(-) Rs.1,10,27,156
Add : Disallowances		(+) Rs.1,14,16,014
Less : Carried forward business loss of A.Y. 2002-03 of Rs.88,04,621/- limited to Rs.3,88,858/-		(-) Rs.3,88,858
Profits and gains of business		Nil
(II) Income from other sources (As shown)		Rs.27,40,658
Gross income		Rs.27,40,653
Deduction under Chapter VIA		Nil
Total Income		Rs.27,40,653
Tax @ 35% on Rs.27,40,653	Rs.9,59,228	
Surcharge @ 5% on Rs.9,59,228	Rs.47,961	
Total	Rs.10,07,189	

4. Return for the assessment year 2004-2005 was filed declaring total income of Rs. Nil. Assessment order u/s.143(3) was passed on 21.3.2006 in which the Assessing Officer made following computation of total income as per the normal provisions of the Act:-

(i)	Business income	Rs. 2,93,625 (Set off)
(ii)	Income from other sources (Bank Interest)	Rs.28,20,000
Less : Current year depreciation		Rs.16,87,228
Total income		Rs.11,92,772

5. Aggrieved, the assessee preferred appeals before the learned CIT(A) urging that unabsorbed depreciation determined in assessment year 1997-98 to 1999-2000 be allowed set off against income under the head "Income from other sources". The learned CIT(A) observed that the A.O. had neither discussed the plea of the assessee about such set off nor had given any reason as to why such set off was not allowed. The assessee detailed the facts before the CIT(A) explaining that it had declared income of Rs.31,13,625 including bank interest of Rs.28,80,000 which was sought to be set off against brought forward losses including unabsorbed depreciation. It was put forth that on the Assessing Officer's questioning as to why the interest income be not treated as "Income from other sources", the assessee did not raise any objection to the consideration of such income under the residual head, but claimed that unabsorbed depreciation be allowed set off against the income under the head "Income from other sources". In the first appeal, the assessee also relied on the judgments of the Hon'ble Supreme Court in the case of *CIT Vs. Virmani Industries Private Limited [216 ITR 607]* and *Jaipuria China Clay Mines (P) Ltd. [59 ITR 555 (SC)]* in support of its contention.

The learned CIT(A) came to hold that unabsorbed depreciation was available to an assessee perpetually for set off against the gross total income. Relying on the case of *Virmani Industries Private Limited (supra),* the learned CIT(A) concurred with the submissions advanced on behalf of the assessee. The Revenue is in appeal against the relief allowed by the learned first appellate authority.

6. Before us, the learned Departmental Representative contended that the learned CIT(A) erred in allowing set off of unabsorbed depreciation against `Income from other sources' despite the fact that an amendment to law took place by the Finance Act, 2001 with effect from 1.4.2002 substituting the old section 32(2). He pointed out that according to the provisions applicable with effect from assessment year 2002-2003, the assessee could not claim set off of unabsorbed depreciation relating to the assessment years 1997-98 to 2001-2002 against the income under any head except "Profits and gains of business or profession". He also stated that section 32(2), as substituted with effect from assessment year 2002-2003, is a deeming provision and as such its role could not have been extended beyond what was precisely mandated. In his opinion there was no warrant for inferring from the new provision that the unabsorbed depreciation of assessment years 1997-98 to 1999-2000 was eligible for set off against "Income from other sources" in assessment years 2003-2004 and 2004-2005. He relied on the order passed by the Mumbai Bench of the Tribunal on 26.11.2008 in M/s. Dura Foam Industries Pvt. Ltd. Vs. JCIT in ITA No.6260/Mum/2006 holding that the unabsorbed depreciation for assessment years 1997-98 to 2001-2002 could be adjusted only against profits and gains of business or profession from assessment year 2002-2003 onwards and no other income. He also invited our attention towards the copy of order dismissing the Miscellaneous petition application filed by Dura Foam Industries Pvt. Ltd. (supra) . Referring to certain decisions rendered in assessee's favour including *ITO Vs. Keshwa Enterprises (P) Ltd.* in ITA No. 533

(Chd) of 2004 dated 22.12.2005, the learned Departmental Representative contended that unadjusted depreciation in this case related to period prior to assessment year 1997-98 which was sought to be set off against the income from house property and short term capital gains in assessment year 2002-2003 and the Tribunal, relying on the intention of the legislature as reflected from the speech of the Finance Minister, accepted the contention that such unadjusted depreciation could be set off against non-business income. He referred to the Form of income tax return applicable to companies in ITR No.6 in the assessment year 2009-2010. Referring to schedule BFL.A of the said Form, he contended that a separate column has been created for year-wise brought forward depreciation set off under the main head of Details of income after set off of brought forward losses of earlier years. Similar position was stated to be there in the relevant income-tax return Forms for companies as applicable to assessment year 2002-2003 onwards, which contained Schedule containing a separate column for brought forward depreciation set off. It was stated that if the intention of the legislature had been to treat unabsorbed depreciation for assessment years 1997-98 to 2001-2002 as part of current depreciation in accordance with the provisions of section 32(2) as applicable from assessment year 2002-2003, then there was no need for having such separate column in the income-tax return form for set off of year-wise brought forward depreciation. It was stated that the position in law was very clear that the unabsorbed depreciation for assessment years 1997-98 to 2001-2002 was eligible for set off only against the income under head `Profits and gains of business or profession' for a period not more than eight assessment years and there was no question of treating such unabsorbed depreciation as part of current depreciation in the years after substitution.

7. In the oppugnation, the learned Counsel for the assessee reiterated the submissions advanced before the first appellate authority and on the basis of his reasoning urged that the impugned order be approved. It was specifically submitted that the law as existing on the first day of the relevant assessment year is applicable and in that view of the matter, sec. 32(2) as substituted in the assessment years under consideration was applicable as per which the unabsorbed depreciation of the earlier years was liable to be considered as part of current depreciation allowance in the years in question subject to the provisions of sections 72(2) and 73(3). As the substituted law permits the assessee to claim set off of brought forward unabsorbed depreciation against income under any head, the learned A.R. stated that the learned CIT(A) took a correct view in holding so. In support of the proposition that the law as amended on the first day of the assessment year is to be applied, he relied on the judgment of the Hon'ble Supreme Court in the case of *Karimtharuvi Tea Estate Ltd. Vs. State of Kerala [(1966) 60 ITR 262 (SC)]* and *Reliance Jute and Industries Ltd. Vs. CIT [(1979) 120 ITR 921 (SC)]*.

8. The learned A.R. next submitted that the Revenue was not entitled to take a conflicting stand. He referred to the order passed by the Delhi Bench of the tribunal in *Jai Ushin Ltd. Vs. DCIT in ITA No.3412/(Delhi)/2006* in which the departmental contention that the law as amended by the Finance Act, 2001 should be applied, was accepted by the Tribunal. He submitted that it was not open to the Departmental Representative in other stations to argue contrary to what was argued before the Delhi Bench. To strengthen this proposition, he relied on the judgment of the Hon'ble Madras High Court in *Seshasayee Paper and Boards Ltd. Vs. CIT [(2003) 260 ITR 419 (Mad.)]*. The next argument taken by the learned A.R. was that even if it was held that law of the year of loss was to be applied, then also

unabsorbed depreciation should be set off against income from heads other than `Profits and gains of business or profession'. He also argued that the expression "profits and gains chargeable" used in section 32(2) has been interpreted by the Hon'ble Supreme Court in the case of *Virmani Industries Private Limited (supra)* as covering income from all heads. Taking strong assistance from this judgment, the learned A.R. argued that even going by the provisions of law as applicable in assessment years 1997-98 to 1999-2000 the assessee was entitled to set off the unabsorbed depreciation against interest income which was held to be falling under the head `Income from other sources'. He also questioned the very action of the Assessing Officer in assessing interest income from bank under the head `Income from other sources'. He submitted that the assessee was engaged in the business of merchant banking and thus the entire interest income was liable to be considered under the head "Profits and gains of business or profession". Lastly it was stated that in view of the cleavage of opinion between various benches of the Tribunal it was clear that two interpretations was possible. Taking support from the judgment of the Hon'ble Supreme court in the case of *CIT Vs. Vegetable Products Ltd. [(1973) 88 ITR 192 (SC)]* he insisted that view in favour of the assessee should be followed.

9. We have heard the rival submissions at length and perused the relevant material on record in the light of precedents cited before us. The short controversy before us is to decide as to whether depreciation for assessment years 1997-98 to 1999-2000 which could not be absorbed, can be set off against `Income from other sources' in assessment years 2003-2004 and 2004-2005. In order to examine and evaluate the rival contentions on this issue, it would be apt to take stock of the provisions of section 32(2) as substituted by the Finance (No.2) Act, 1996 with effect from 1.4.1997 (hereinafter called the "second period") 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, or any business or profession carried on by him and assessable for that assessment year;*

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

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

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

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

Provided that the 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 :

Provided further that the time limit of eight assessment years specified in Sub-clause (b) shall not apply in the case of a company for the assessment year beginning with the assessment year relevant to the previous year in which the said company has become a sick industrial company under Sub-section (1) of Section 17 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) and ending

with the assessment year relevant to the previous year in which the entire net worth of such company becomes equal to or exceeds the accumulated losses.

Explanation – For the purposes of this clause, "net worth" shall have the meaning assigned to it in Clause (ga) of Sub-section (1) of Section 3 of the sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986)."

10. A bare perusal of this provision indicates that where the amount of depreciation allowance u/s.32(1) for the current year of a business cannot be absorbed fully or partly due to inadequacy of profits or gains from such business, then such allowance or part of it which remained unabsorbed, is to be referred to as "unabsorbed depreciation allowance". Such unabsorbed depreciation allowance is to be set off firstly against the income under the head "Profits and gains of business or profession" from any other business or profession carried on by the assessee for that assessment year. If such business profit is also insufficient to absorb the unabsorbed depreciation allowance, then the remaining amount shall be set off against income under other heads, as mentioned in section 14 of the Act assessable for that assessment year. This exercise of setting off the unabsorbed depreciation allowance against any head of income is restricted to the year in which the claim for depreciation has arisen u/s.32(1). If however income of the assessee under all heads is insufficient to absorb the unabsorbed depreciation allowance, then such amount is to be carried forward to the following assessment year to be set off against the income arising under the head `Profits and gains of business or profession'. Not only that, the business or profession for which the allowance was computed should continue to be carried on by the assessee during the previous year relevant to assessment year in which the set off is claimed. The exercise of carrying forward such unabsorbed depreciation allowance is to be continued up to eight assessment years immediately succeeding assessment year for which the aforesaid depreciation allowance was first computed. From here it follows that the amount of

unabsorbed depreciation allowance which could not be set off against income under any head in the year in which the allowance was first computed, shall be eligible to be carried forward for set off only against income under the head `Profits and gains of business or profession' to the following assessment year(s) not more than eight assessment years immediately succeeding the assessment year for which it was first computed. In *Southern Travels VS. ACIT (2006) 103 ITD 198 (Chennai)(SB)* the assessee sought to set off the unabsorbed depreciation relating to A.Y. 1997-98 against the income under the head capital gains in A.Y. 1999-2000. Repelling this stand, the Special Bench held that the unabsorbed depreciation relating to A.Y. 1997-98 cannot be set off against income under the head Capital gains in A.Y. 1999-2000 and the assessee can only claim carry forward of such unabsorbed depreciation for six more assessment years to be adjusted against the profits and gains from the business as per the provisions of section 32(2)(iii). It is noticed from the facts of the instant case we note that it is during this period, that is assessment years 1997-98 to 1999-2000 that the amount of unabsorbed depreciation allowance resulted, which could not be set off due to inadequacy of profits as per the relevant provisions and led to the present controversy.

11. At this juncture it will be befitting to note the provisions of section 32(2) prior to the amendment made by the Finance (No.2) Act, 1996 with effect from 1st April, 1997 (hereinafter called the "first period") 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 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 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 the allowance for that previous year, and so on for the succeeding previous years."*

12. A glance at this provision indicates that if there are sufficient profits or gains to adjust full depreciation allowance for the current year u/s 32(1) of the Act, then it will be adjusted accordingly. If however there are no profits or gains at all or they are insufficient to accommodate the depreciation allowance for the year in full, then subject to the provisions of section 72(2) and 72(3), the amount of such unadjusted allowance, to which effect has not been given, shall be added to the amount of depreciation allowance for the following previous year and deemed to be part of depreciation allowance for that previous year and so on for eternity.

13. Section 32(2) deeming the unadjusted depreciation allowance of the current year as the current depreciation allowance of the following year, is subject to the provisions of section 72(2) and section 73(3). Section 72(1) provides 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 other head of income in accordance with the provisions of section 71, then such loss shall be carried forward to the following assessment year to be set off against business income. Sub-section (3) provides that no loss shall be carried forward under this section for more than eight assessment years immediately succeeding assessment year for which the loss was first computed. Sub-section (2) of section 72, which is relevant for our purpose, states that where any allowance u/s.32(2) or 35(4) is to be carried forward, the effect shall first be given to the brought forward loss. In other words if there is a brought forward business loss as well as brought forward unadjusted depreciation of earlier years, then brought forward business loss shall have preference over the unadjusted depreciation for the purposes of set off against the business income of

the succeeding year. It is so for the reason that a time limit has been enshrined for carry forward of brought forward business loss up to a period not more than eight

assessment years. As against that the amount of brought forward unadjusted depreciation u/s.32(2) can go on for indefinite period for set off against the business income in the following years. Section 73 deals with losses in speculation business and provides that the unabsorbed speculation loss shall be carried forward to the succeeding years for not more than four assessment years immediately succeeding the assessment year for which the loss was first computed. The prescription of sub-section (3) of section 73 is similar to that of sub-section (2) of section 72 providing for preference to the brought forward speculation business loss over the brought forward unadjusted depreciation allowance or capital expenditure on scientific research.

14. The expression `profits or gains' as used in the language of section 32(2) in the first period became subject matter of controversy. While some High Courts held it as covering only the `Business income', others took diagonally opposite view as encompassing income under all the heads and not restricted to the Business income alone. Such controversy came to be settled by the Hon'ble Supreme Court in *Virmani Industries Private Limited (supra).* In this case the assessee was engaged in the manufacture of soap and oil during the previous year relevant to the assessment year 1956-57. Business was stopped in that year whereafter the factory was let out on hire. Ten years later, that is, in the previous year relevant to the assessment year 1965-66, the assessee started the business of manufacture of steel pipes. For the purpose of this business a part of the old machinery used in the manufacture of soap and oil was utilized. In the assessment proceedings relating to assessment year 1956-57 depreciation u/s.32(1)(ii) was found to be more than the profits and gains of the assessee for that assessment year. In the assessment proceedings relating to assessment year 1965-66, the assessee

claimed that unabsorbed depreciation, to the extent it pertained to the old machinery utilized in the new business, should be brought forward and set off

against the profits of the new business. This claim was rejected by the ITO and by AAC on the ground that such a set off was permissible only where the business carried on in the subsequent assessment year was the same business that was carried on in the earlier assessment year. The Tribunal however upheld the assessee's claim. When the matter went to the Hon'ble High Court, it was held that the assessee was entitled to set off the unabsorbed depreciation allowance relating to assessment year 1956-57 against the income of assessment year 1965-66. It was further held that if such depreciation allowance could not be completely absorbed by the "profits and gains chargeable to tax", which expression included profits and gains arising not only under the head "Business" but also under other heads, then the unabsorbed depreciation was to be treated as the depreciation allowance for the next year and so on until it was completely wiped out. Eventually when the matter came up consideration before the Hon'ble Supreme Court it was noticed that from assessment year 1956-57 to 1965-66 there was a gap of about eight years in which the assessee was in receipt of income from house property only. Upholding the assessee's contention, the Hon'ble Apex Court held as under:-

> *"However, what should have been done is this : the unabsorbed depreciation allowance relating to the asst. yr. 1956-57 should have been set off against the income (income from property) in the following year, i.e., in the following previous year (relevant to asst. yr. 1957-58) and if the income in that year was not sufficient to absorb the entire depreciation allowance so carried forward, it had to be carried forward to the next following year and so on. Only if some depreciation allowance still remained to be absorbed, it could have been set off against the total income for the asst. yr. 1965-66.*
>
> *It is true that the question which was referred to the Tribunal under s. 256(1) of the Income-tax Act merely raises the question whether the unabsorbed depreciation pertaining to the asst. yr. 1956-57 can be carried forward and set off against the income of the accounting year*

relevant to the asst. yr. 1965-66, yet we thought it necessary to clarify the true position of law."

15. In reaching this conclusion the Hon'ble Supreme court relied on an earlier judgment of the Hon'ble Summit Court in *Jaipuria China Clay Mines (P) Ltd. (supra)* in which it was held that the expression `profits or gains chargeable' for that year was not confined to the profits and gains derived from the business alone. On the basis of the above-referred judgments, the legal position about the interpretation of section 32(2) in the first period becomes clear that the current depreciation u/s 32(1) can be adjusted against the income under any head including `Capital gain' or `Income from house property' etc. in the same year. But if there remains some unadjusted depreciation allowance, then that shall be carried forward in the following year(s) for set off against the income under any other heads just like current depreciation allowance u/s 32(1) pertaining to such year.

16. In order to neutralize the effect of the judgment of the Hon'ble Supreme Court in the case of *Virmani Industries Private Limited (supra)* explaining the scope of expression "profits or gains chargeable" employed u/s.32(2) as extending not only to `Business income' but also to other heads of income as given in section 14, the legislature substituted sub-section (2) of section 32 by the Finance (No.2) Act, 1996 with effect from 1.4.1997, as discussed above. By virtue of such substitution, the scope of set off of the brought forward unabsorbed depreciation allowance was constricted to the income under the head `Profits and gains of business or profession' by making a little departure in the language of the later part of the substituted provision. It is apparent from clause (i) of substituted sub-section (2), in the second period, that the unabsorbed depreciation allowance shall be set off against "profits and gains" of any business or profession carried on by the assessee for that assessment year. It indicates that the set off provided under this

clause is against the income chargeable under the head `Profits and gains of business or profession'. Ordinarily the expression `profits and gains' does not refer

to the income under the head `Profits and gains of business or profession' as is apparent from the definition of income u/s 2(24) of the Act. It can be noticed that although clause (i) of sub-section (24) of section 2 talks of `profits and gains', yet clauses (v), (va) etc. also refer to income u/s 28, which is part of Chapter IV-D. From here it follows that though technically the expression `profits and gains' may not refer to the income under the head `Profits and gains of business or profession', but for the purposes of clause (i) of substituted sec. 32(2), it refers to income under the head `Profits and gains of business or profession'. Clause (ii) of sub-section (2) makes the position clear by providing that if the unabsorbed depreciation allowance cannot be wholly set off under clause (i), then the amount not so set off shall be set off from the `income under any other head', if any, assessable for that assessment year. If the interpretation given in *Virmani Industries (supra)* had been intended to be retained, then there was no need to have two looking alike expressions in the language of sub-section (2), viz, firstly, `profits or gains' in the main part of sub-section (2) and then, `profits and gains' in clause (i). The doubt, if any, gets further dispelled when we turn to clause (iii) of sub-section (2) which provides that the unabsorbed depreciation allowance not so set off under clauses (i) and (ii) shall be carried forward to the following assessment year and then set off against the "profits and gains" of any business or profession carried on by the assessee in the following assessment year. Here again we find that the expression "profits and gains" has been used which is similar to that used in clause (i). Had the legislature desired to give wider meaning to the expression "profits and gains" as including income under other heads also, then there was no need at all to have clause (ii) of sub-section (2) providing for the set off of the unabsorbed depreciation allowance against `income under any other head'. From the above discussion it can be easily ascertained that the expression "profits and gains" as

used in clause (i) or (iii)(a) refers only to income under the head `Profits and gains of business or profession'.

17. The further fallout of this substitution of section 32(2), in the second period, is that the provision of carry forward and set off of unabsorbed depreciation for any number of years against income under any head, was further diluted by way of clause (iii)(b) to sub-section (2) restricting the right to set off of unabsorbed depreciation for a period of not more than eight assessment years succeeding the assessment year in which the allowance was first computed. This part of the provision gave birth to one more controversy in the second period that it did not deal with the fate of unadjusted brought forward depreciation allowance for and upto the A.Y. 1996-97. Fears were expressed in the Parliament on this issue. To this, the Finance Minister clarified the position on the floor of the House, as under:-

> *"The proposed amendment is only prospective inasmuch as the cumulative unabsorbed depreciation brought forward as on 1st April, 1997, can still be set off against taxable profits or income under any other head for the assessment year 1997-98 and seven subsequent assessment years. Therefore, the proposed change will have effect only after 8 years and there is no cause for immediate concern about its likely impact on industry. Eight years is a period long enough for industry to adjust itself to the new dispensation and provide for depreciation accordingly."*

18. It is this clarification by the Finance Minister that sealed the fate of the unadjusted brought forward depreciation upto the end of the first period as available for *set off against taxable profits or income under any other head for the assessment year 1997-98 and seven subsequent assessment years.* Here it will be useful consider the order passed by the Chandigarh Bench of the Tribunal in *Keshwa Enterprises (P) Ltd. (supra)* in which question for consideration was the

set off of carried forward unabsorbed depreciation for period prior to assessment year 1996-97 against the income from house property and short term capital gain

relevant to assessment year 2002-2003. The Tribunal decided the controversy in assessee's favour by holding that the unabsorbed depreciation pertaining to the A.Y. 1996-97 and earlier period could be set off against income under other heads in A.Y. 2002-03. In reaching this conclusion the tribunal mainly relied on the speech given by the Finance Minister.

19. From the above discussion it is patent that in the second period, relaxation was allowed by the Finance Minister on two counts, viz., firstly, the cumulative unadjusted brought forward depreciation as on 1.4.1997 could still be set off against taxable income under any head in eight assessment years and secondly, the period of eight years would commence from assessment year 1997-98 irrespective of the year to which such unadjusted depreciation related. In other words, the period of eight years as per clause (iii)(b) of section 32(2) came to be reckoned from assessment year 1997-98 irrespective of the fact that the unadjusted brought forward depreciation arose in assessment year 1984-85 or 1994-95. It is in the light of the speech given by the Finance Minister that the Chandigarh Bench of the Tribunal in *Keshwa Enterprises (P) Ltd. (supra)* held that the unabsorbed depreciation for a period prior to assessment year 1996-97 could be set off against income from house property and short term capital gain for assessment year 2002-2003. On the same pattern, the Hon'ble Madras High Court in *CIT Vs. Pioneer Asia Packing P.Ltd. [(2009) 310 ITR 198 (Mad.)]* has held that the unabsorbed depreciation brought forward as on 1.4.1997 could be set off against the business income or income under any other head for assessment years 1997-98 and seven subsequent assessment years on the basis of the clarification given by the Finance Minister. Again the Hon'ble Madras High Court in *CIT Vs. S & S Power Switchgear Ltd. (2009) 318 ITR 187(Mad)* reiterated the same view by laying down

that the unadjusted depreciation brought forward as on 1.4.1997 could be set off against business income or income under any other head for assessment years

1997-98 and seven subsequent assessment years by relying on the clarification of the Finance Minister as well as the CBDT Circular No.762 dated 18.2.1997. Thus it is axiomatic that the unadjusted depreciation brought forward up to 1.4.1997 became eligible for set off not only against the business income but also against income under other heads in eight assessment years only on the strength of the clarification given by the Finance Minister.

20. Now we turn to the language of section 32(2) as prevailing in assessment years under consideration (hereinafter called the "third period") which runs as under:-

> *"(2) 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 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 the allowance for that previous year, and so on for the succeeding previous years".*

21. The above provision has been substituted by the Finance Act, 2001 with effect from 1.4.2002. In fact, it is reinforcement of the provision as existing in the first period. Thus the law as existing in the second period 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-section (2) of section 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. It is nowhere coming up either from the Notes on clauses or Memorandum explaining the provision of the Finance Bill 2001, that substitution of sub-section (2) of section 32 is retrospective. It is, therefore, patent that the substantive provision contained in section 32(2) as substituted by the Finance Act, 2001 with effect from 1.4.2002, is prospectively applicable to A.Ys. 2002-2003 onwards.

22. A great deal of emphasis has been laid by the learned A.R. on the applicability of law as prevailing on first April of the relevant assessment year. The Hon'ble Supreme Court in *CIT Vs. Scindia Steam Navigation Co. Ltd. [(1961) 42 ITR 589 (SC)]* has held that the law available as on the first day of the relevant assessment year is applicable. In this case the fourth proviso to section 10(2)(vii) of 1922 Act came into force on 5th May, 1946. The Hon'ble Bombay High Court in *Scindia Steam Navigation Co. Ltd. Vs. CIT [(1954) 26 ITR 686 (Bom.)]* held that there was no liability on the assessee to pay tax on the amount as on 1st April, 1946 and hence the amendment brought about on 4th May, 1946 could not fix such liability. Upholding this view, the Hon'ble Supreme court held that the amendment which came into force in May 1946, being not retrospective, could not apply to assessment year 1946-47. Similar view has been expressed by the Hon'ble Madras High Court in the case of *Om Sindhoori Capital Investments Ltd. Vs. JCIT [(2005) 274 ITR 427 (Mad.)]* in which the question for consideration was the applicability of *Explanation (4A)* to section 43(1) inserted with effect from 1st October, 1996. The Hon'ble Court held that such amendment could have no application to assessment year 1996-97 as the law prevailing on the 1st April of the relevant assessment year would govern the assessment. From the above discussion

we find that ordinarily the law prevailing as on the 1st day of the relevant assessment year is applicable unless the amendment is expressly or by necessary

implication retrospective. To this extent we are in full agreement with the learned A.R. that the law prevailing as on the 1st day of the relevant assessment year shall rule the assessment. However we need to examine as to what is, in fact, the mandate of law as on the 1st April of the relevant assessment years. Provision of section 32(2), as substituted by the Finance Act, 2001 with effect from 1.4.2002 has been set out above. Such provision is applicable to assessment years 2003-2004 and 2004-2005 under consideration. On dissection of this provision we find that it has following necessary ingredients:-

-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 being less than the allowances
-then, subject to the provisions of sub-section (2) of section 72 and sub-section (3) of section 73
- the allowance or part of 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 the allowance for that previous year and so on for the succeeding previous years.

23. Firstly it is obvious that section 32(2) is a deeming provision and by the legal fiction, the amount of depreciation allowance u/s.32(1) which is not fully absorbed against income for that year is deemed to be the part of depreciation

allowance for the succeeding year(s). A deeming provision or a legal fiction as it is commonly called is one, the mandate of which does not exist but for such provision. Due to such provision only the given imaginary state of affairs is taken as reality despite it being at variance with the scope of the enactment. It is trite law that a deeming provision cannot be extended beyond the purpose for which it is intended. The Hon'ble Supreme Court in *CIT Vs. Amarchand N.Shroff [(1963) 48 ITR 59 (SC)]* considered the scope of a deeming provision and held that the fiction cannot be extended beyond the object for which it is enacted. In *CIT Vs. Mother India Refrigeration Industries P.Ltd. [(1985) 155 ITR 711 (SC)]* the same view was reiterated by holding that the "legal fictions are created only for some definite purpose and these must be limited to that purpose and should not be extended beyond their legitimate field." We will discuss this case at length *infra*. The Hon'ble jurisdictional High Court in *CIT Vs. Ace Builders P. Ltd. [(2006) 281 ITR 210 (Bom.)]* considered a case in which the assessee was a partner in a firm which was dissolved in the year 1984 and the assessee was allotted a flat towards its credit in the capital account with the firm. The assessee showed the flat as capital asset in its books of account and depreciation was claimed and allowed from year to year. In the previous year relevant to the assessment year 1992-93 the assessee sold the flat and invested the net sale proceeds in a scheme eligible u/s.54E of the Act and accordingly declared Nil income under the head `Capital gains'. The Assessing Officer opined that since the block of building ceased to exist on account of sale of flat during the year, the written down value of the flat was liable to taken as cost of acquisition u/s.54E of the Act. He further held that since the assessee had availed depreciation on such asset which was otherwise long term capital asset, the deeming provision u/s.50 would apply and it would be treated as capital gain on the

sale of short term capital asset and resultantly no benefit u/s.54E could be allowed. When the matter came up before the Hon'ble Bombay High Court, it noted that sub-sections (1) and (2) of section 50 contained a deeming provision and such

fiction was restricted only to the mode of computation of capital gain contained in sections 48 and 49 and hence it did not apply to other provisions. Consequently the assessee was held to be eligible for exemption u/s.54E in respect of capital gain arising out of the capital asset on which depreciation was allowed. On the appraisal of above judgments, the legal position which turns out is that whenever a legal fiction is created by way of a deeming provision, it is of paramount importance to go strictly by the prescription of such provision. Such deeming provision cannot be extended beyond the purpose for which it is intended. With this background in mind we will proceed to consider the command of section 32(2), which is a deeming provision.

24. It has been noticed above that section 32(2) in the third period is a substantive provision and hence prospective in nature. When that is so, naturally its recommendation shall apply from only from assessment years 2002-2003 onwards. Necessary ingredients of the provision, in the third period, have been dotted above. First thing in sub-section (2) is the reference to the assessment of the assessee in which full effect "cannot be" given to any allowance under sub-section (1) in any previous year. Later part of the provision provides that the allowance or part of the allowance to which effect "has not been" given, shall be added to the amount of allowance for depreciation in the succeeding years. At both the places, present tense has been used in negative terms while referring to the allowance to which effect `cannot be' and `has not been' given. So the starting point of sub-section (2) is the assessment of the assessee and the allowance u/s.32(1) to which full effect cannot be given. Section 32(1) deals with depreciation allowance for the current year. It implies that it is only when the assessment of the assessee from

A.Y. 2002-2003 onwards is made in which depreciation allowance for the current year u/s.32(1) cannot be given full effect to owing to the inadequacy of the profit, that the directive of the deeming provision u/s.32(2) shall apply. The mention of

the words "cannot be" and `has not been' indicates that it speaks of the depreciation allowance u/s.32(1) for the current year. The point becomes more lucid when we mull over the language of section 71B, dealing with the carry forward and set off of losses from house property within the same year. It provides that where for any assessment year the net result of computation under the head `Income from house property' is a loss to the assessee and such loss `cannot be' or is not wholly set off against income from any other head of income in accordance with the provisions of section 71, so much of the loss as "has not been so set off" shall be carried forward to the following assessment years. Section 72(1) deals with carry forward and set off of business losses (other than speculation business). It provides 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 loss sustained in speculation business and such loss "cannot be" or is not wholly set off against the income under any head of income in accordance with the provisions of section 71, then so much of the loss as "has not been" so set off shall be carried forward to the following assessment years. From these provisions it is amply clear that present tense in negative has been used here also to represent loss under the head `income from house property' or business loss of the current year. In the like manner, other sections such as 74 and 74A etc., to the extent they talk of loss for the current year, refer to "cannot be" and "has not been" set off. On going through these sections it is palpable that wherever there is mention to loss under a particular head for the current year which is sought to be set off against the income under the same head or other heads of the income for that very year, the set of words `cannot be' and `has not been' have been brought into play. The necessary corollary which, therefore, follows is that the engaging of

same set of words, that is, `cannot be' and `has not been' in section 32(2) fairly suggest that the reference to depreciation allowance u/s.32(1), which could not be adjusted due to inadequacy of profits, is for current year alone starting from A.Y.

2002-03 onwards. This position ceases to admit any doubt when we go to section 75, as substituted by the Finance Act, 1992, with effect from 1.4.1993. This section, dealing with losses of firms, provides that where the assessee is a firm, any loss in relation to the assessment year commencing on or before 1st April, 1992, which `could not be' set off against any other income of the firm and which `had been' apportioned to a partner of the firm but "could not be" set off by such partner prior to the assessment year commencing on 1st April, 1993, then, such loss shall be allowed to be set off against the income of the firm subject to the condition that the partner continues in the said firm and to be carried forward for set off u/ss. 70, 71, 72, 73, 74 and 74A. At this point in time it would be relevant to mention that section 75 has been substituted for sections 75, 76 and 77 by the Finance Act, 1992. Section 75(1), before substitution, provided that where the assessee is a registered firm, and any loss which `cannot be' set off against any other income of the firm shall be apportioned between the partners of the firm, and they alone shall be entitled to have the amount of the loss set off and carried forward for set off under sections 70, 71, 72, 73, 74 and 74A. On a conjoint reading of section 75, before and after substitution, it is discernible that prior to 1.4.1993, when the reference was made to the unabsorbed loss of a firm for the current year getting apportioned between the partners of firm, the words used were "cannot be" set off. However, with effect from 1.4.1993, due to change in the scheme of taxation of firms, unabsorbed losses of the registered firms for earlier years, which were apportioned between the partners but could not be set off against their separate income, have come back to the coffers of the firm. In order to make reference to such losses of earlier years, the words used have been `could not be set off'. Thus it is manifest that the words "cannot be" as used in section 32(2) in the third

period, refer only to the current year's depreciation, which is parallel to section 75 before substitution. The brought forward unabsorbed depreciation of earlier years cannot be included within the scope of section 32(2). If the intention of the

legislature had been to allow such b/fd unabsorbed depreciation respecting the second period also at par with the depreciation for the year u/s 32(1) in third period, then sub-section would have been differently worded somewhat like "where in the assessment of the assessee full effect *could not be* given to any allowance or ……" employing the expression `could not be' akin to that used in the post-substituted sec. 75. Since sub-section (2) of sec. 32 has been worded in present and not in past or past prefect tense and this being a deeming provision, the brought forward unabsorbed depreciation of the second period cannot be brought within its purview.

25. This position can be appreciated from another angle also. From the language of section 32(2), in the second period, we have noted that the depreciation allowance for the current year to which full effect cannot be given due to the paucity of profit, has been referred to as "unabsorbed depreciation allowance". In that view of the matter such unabsorbed depreciation allowance for the assessment years 1997-98 to 2001-2002 strictly comes u/s.32(2) with a special name and character of "unabsorbed depreciation allowance" changing its situation from sec. 32(1). Once it becomes so and finds its place u/s.32(2), then there cannot be any warrant for considering it as allowance u/s.32(1) in the third period, so as to be covered within sub-section (2) of section 32. As the language of this deeming provision does not talk of any brought forward "unabsorbed depreciation allowance" or the depreciation allowance which could not be given effect to in the

earlier years that resultantly became part of section 32(2), there is no question of expanding the scope of legal fiction.

26. In the case of *Mother India Refrigeration Industries P.Ltd. (supra),* which has been decided in the context of provision similar to the first period of section 32(2), the assessment years under consideration were 1951-52 and 1952-53. At the end of assessment year 1950-51 there was an unabsorbed business loss of Rs.67,534 and unabsorbed depreciation of Rs.1,78,154. The assessee's income without taking into account the current depreciation was Rs.50,624 in assessment year 1951-52 and Rs.64,332 in assessment year 1952-53. The assessee contended before the ITO that before deducting current depreciation from the above profits, the unabsorbed loss of the earlier year 1950-51 should be first set off. The ITO did not accept the contention and what he did was that from the profit of Rs.50,624 for assessment year 1951-52, the depreciation allowance for that year amounting to Rs.58,140 were partially set off and the balance of depreciation of Rs.7,516 was ordered to be carried forward with the result that the total unabsorbed depreciation carried forward amounted to Rs.1,85,670. Similarly in assessment year 1952-53, the full depreciation allowance of that year amounting to Rs.44,580 was set off against the income of Rs.64,232 and the net income of Rs.19,652 (Rs.64,232 – Rs.44,580) was utilized for setting off a part of carried forward business loss of Rs.67,534 leaving a balance of unabsorbed loss to the extent of Rs.47,832. Both the unabsorbed amounts of Rs.1,85,670 and Rs.47,832 were directed to be carried forward. Aggrieved by the ITO's refusal to give preference in the matter of set off to the earlier carried forward business loss before deducting the current year's depreciation, the assessee preferred appeals and the AAC accepted the assessee's contention directing that the unabsorbed carried forward business loss should be set off first in each year before deducting current year's depreciation. The Tribunal

accepted the departmental contention but the Hon'ble High Court restored the action of the AAC. It was argued on behalf of the assessee before the Hon'ble Supreme Court that the legal fiction arising from the deeming provision of section 32(2) of the Act was applicable and hence the unabsorbed depreciation was not

merely to be carried forward to the following year but also deemed to be depreciation for that year. It was put forth that the legal fiction contained in section 32(2) must be given full effect without any reservation. Rejecting this contention, the Hon'ble Supreme Court held that in the matter of set off of the unabsorbed business loss of earlier years there was no preference to the unabsorbed depreciation and only the current depreciation was to be first deducted before any question of either carried forward of unabsorbed depreciation or that of unabsorbed depreciation arise. The purpose of legal fiction u/s.32(2) has been clarified by the Hon'ble Supreme Court in the following words : *"Clearly, the avowed purpose of the legal fiction created by the deeming provision contained in proviso (b) to section 10(2)(vi) is to make the unabsorbed carried forward depreciation partake of the same character as the current depreciation in the following year, so that it is available, unlike unabsorbed carried forward business loss, for being set off against other heads of income of that year. Such being the purpose for which the legal fiction is created, it is difficult to extend the same beyond its legitimate field and will have to be confined to that purpose."*

27. Thus it can be seen that the purpose of legal fiction in section 32(2) (which is analogous to proviso (b) to section 10(2)(vi) of the Indian Income-tax Act, 1922) is to make the unabsorbed carried forward depreciation partake the same character as the current depreciation in the following year. In other words the object of the provision, as interpreted by the Hon'ble Supreme Court, is to treat the whole or part of the depreciation allowance u/s 32(1),

which could not be adjusted in the first year, as the current depreciation u/s 32(1) in the second year. In the second year, such depreciation of first year becomes part and parcel of depreciation u/s 32(1) of the second year. If again

in the second year, the total of depreciation u/s 32(1) [including the amount of allowance which came from first year and became depreciation u/s 32(1) in the second year] cannot be absorbed, it shall become current depreciation for the third year to be dealt with in the same manner as the amount of depreciation in the third year and so on. Once the unabsorbed depreciation for the first year is given the character of current depreciation in the second year, the purpose of section 32(2) is fulfilled. It is nowhere laid down that the `unabsorbed depreciation allowance' of the second period is to be given the character of current depreciation in the third period. The function of the deeming provision in section 32(2) is restricted only to giving the current year's unabsorbed depreciation the status of current depreciation in the following year. As soon as that is done, the purpose of the sub-section is achieved. Nothing more and nothing less than that can be deduced from it. When the Hon'ble Supreme Court, being the highest Court of the land, itself held that the object of section 32(2) is to carry forward the unabsorbed depreciation for the current year in the following year, there cannot be any question of arguing to the effect that section 32(2) in the third period, also refers to unabsorbed brought forward depreciation of the second period.

28. This position can be examined from still another angle. The relevant part of the provision, in the second period, is 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, -……"*

29. Highlighted portion is the relevant part of the language of sub-section (2) in the third period. From the above language of the provision for the second period it is noticed that the amount of depreciation allowance for the current year under sub-section (1), to which full effect cannot be given owing to the inadequacy of profits, has been referred to as `unabsorbed depreciation allowance'. When the relevant part of the language of sub-section (2) for the second period (as highlighted above) which is similarly worded, is seen in juxtaposition to that of the third period, , there remains absolutely no doubt whatsoever, that the reference to sub-section (1) is to the depreciation allowance for the current year alone. It, therefore, boils down that the law prevailing as on the 1st April of the assessment years under consideration does not permit the brought forward unabsorbed depreciation allowance of the second period to assume the character of depreciation u/s 32(1) in the third period.

30. The learned Counsel for the assessee contended that the Department in *Jai Ushin Ltd. (supra)* has taken opposite stand to what is their case here. It was thus argued that the Ld. DR should now be stopped from arguing contrary to what was argued before some other bench. We are unable to accept this proposition for the obvious reason that if some Departmental Representative has rightly or wrongly argued an issue before any bench of the Tribunal, other Departmental Representatives across the country cannot be inhibited from arguing what they feel

correct notwithstanding the earlier submission made by the learned Departmental Representative in some different case at some different bench. The judgment relied on by the learned A.R., to buttress this argument, in the case of *Seshasayee Paper and Boards Ltd. (supra),* is not applicable. What has been held in that case is that

the Revenue cannot be permitted to take conflicting stands at different stages of the proceedings with a view to preserving a benefit which it had derived after having invoked the jurisdiction of the Tribunal. The limitation on the Revenue to argue contrary, in that case, was imposed *qua* the same case. If this contention of the ld. AR is taken to a logical conclusion and the Departmental Representatives are prevented from arguing differently in another case, then the same yardstick should also apply to assesses as one unit, which obviously cannot be the case.

31. Be that as it may we note that the position before the Delhi Bench of the tribunal in *Jai Ushin Ltd. (supra)* was rather converse. In that case the assessee adjusted carried forward business loss and unabsorbed depreciation against business income only and it was the A.O. who held that the remaining amount of unabsorbed depreciation was liable to be set off against non-business income. The instant factual matrix is otherwise, inasmuch as here the assessee is claiming that the unabsorbed depreciation allowance be allowed set off against the non-business income, which has been denied by the A.O. No authority needs to be cited for the proposition that it is impermissible to view the rationale and reasoning of any decision divorced from its facts. Another important aspect which cannot be lost sight of here is that it is a special bench, which has been constituted to resolve the conflict of opinion amongst some of the benches of the tribunal on this aspect of the matter. Naturally different and contrary arguments, which prevailed upon the

minds of the members constituting the division benches to decide the issue in one way or the other, need to be thoroughly taken into consideration. It will be too harsh on the assessee or the Revenue, if we stop them from arguing the case in the way they like. We, therefore, jettison this argument.

32. The learned A.R. has also canvassed a view that if two interpretations are possible, then the view in favour of the assessee should be adopted. In support of this argument, he relied on the judgment of the Hon'ble Supreme Court in *Vegetable Products Ltd. (supra).* We are in full agreement with the law propounded by the Hon'ble Supreme Court that : "if two reasonable constructions of a taxing provision are possible then the one favourable to the assessee to be adopted". This rule is applicable where the provision in question is such which is capable of two equally convincing interpretations. It cannot be applied in a loose manner so as to debar a superior authority from examining the legal validity of the conflicting views expressed by the lower authorities. If that be the position, then the Hon'ble Supreme Court, in a case of resolving conflict between the contrary views expressed by the different Hon'ble High Courts, one in favour and other against the assessee, need not examine the niceties of issue and simply uphold the view in favour of the assessee. The principle of favourable interpretation cannot be expanded beyond its reasonable limits. If we go ahead with this rule, then in no case there will be a need to hear arguments by the special bench, as one view in favour of the assessee will always be there in addition to another in favour of the Revenue. This principle of favourable interpretation is applicable only where there exists a logical and bonafide doubt about the interpretation of a provision and not otherwise. The Hon'ble jurisdictional High Court in the case of *CIT Vs. [(1993) 202 ITR 291 (Bom.)]* has held : "principle of interpretation of a statute that in the event of any doubt in regard to the interpretation, the benefit of doubt should be given to the assessee and the interpretation beneficial to the tax payer should be accepted applies only when there is reasonable and genuine doubt in regard to the interpretation of a particular provision. It has no application to a case where the

provision is clear and the law is well settled. This principle cannot be stretched too far. It cannot be used to misinterpret a statutory provision which is otherwise clear and brooks no doubt about its meaning or interpretation just to give the benefit to

the tax payer which the statute did not intend to give". In view of this binding precedent coming from the Hon'ble jurisdictional High Court, it is obvious that the principle of favourable interpretation to the assessee applies only where there is a doubt as regards the interpretation of the provision. If however the provision is unambiguous albeit ticklish, then legislative intention, as reflected from its language, has to be given its true meaning notwithstanding the fact that it goes against the assessee.

33. It was also argued on behalf of the assessee that the Assessing Officer was not justified in treating interest income as falling under the head `Income from other sources'. He submitted that since the business of the assessee is that of merchant banking, the interest income ought to have been considered as business income. We are unable to accept this contention at this stage of proceedings for more than one reasons. It is a settled legal position that to find out head under which interest income would fall, needs to be tested by considering the cumulative effect of several factors, such as the nature of business, nature and source of interest income, circumstances in which the funds were parked. However there is unanimity of the opinion that if the surplus funds are deposited in a bank, the interest income will partake of the character of income from other sources irrespective of the nature of assessee's business. In the instant case interest was earned on FDRs from bank. It was never the case of the assessee before the authorities below that the funds were required to be deposited in bank necessarily for carrying on its business. Further the learned CIT(A) has recorded a finding in para 6.1 of the impugned order that the assessee was not continuously engaged in the activity of money lending during the year and this interest was received through

its deposits with the bank. It can further be noted from para 3.1 of the impugned order that the assessee accepted the treatment given by the A.O. to the interest income as falling under the head `Income from other sources'. In view of the foregoing reasons we are not inclined to accept the view point of the learned A.R. that the interest income be considered as falling under the head "Profits and gains of business or profession".

34. Another leg of the submissions of the ld. AR was that even if it was held that the provision of second period shall apply, still the expression `profits and gains' should be held as covering not only the business income but also income under other heads of income including `Income from other sources'. To bring home this interpretation, he relied on the case of *Virmani Industries Private Limited (supra).* We do not find any merit in this submission for the reason discussed above that it was a case on the interpretation of the expressions `profits or gains' as used in the language of sub-section (2) for the first period. By means of substitution of the provision in the second period, the interpretation given by the Hon'ble Supreme Court to the expression `profits or gains' chargeable as covering all the heads of income and not only restricting it the "Business income" was done away with. However the effect of substitution of section 32(2) by the Finance Act, 2001 is that whatever provision and its interpretation was there in second period stood omitted and the *status quo ante* as existing prior to amendment by Finance Act, 1996 was restored. Resultantly the interpretation given by the Hon'ble Supreme Court to the expression `profits or gains' chargeable has once again resurfaced in the third period as covering not only income under the head `Profits and gains of business or profession' but also income under other heads. The *ratio deciendi* of this case is not relevant in relation to the provisions of the second period. Resultantly the unabsorbed depreciation allowance as generated during the second period cannot have a set off against income under the head `Income from other sources' in the third period.

35. One more argument was taken by the ld. AR that there was substitution of section 32(2) by the Finance Act, 2001 with effect from 1.4.2002 and it was not a case of amendment. He tried to make out a case that the effect of repeal of the earlier section 32(2) would be that the benefit which had accrued to the assessee as per old provision, will automatically come into being under the new provision. In that view of the matter it was argued that the brought forward unabsorbed depreciation allowance for the second period may be treated as depreciation allowance for the current year in the third period.

36. It is seen that section 32(2) as prevailing in the second period was substituted with a new provision in the third period and it was not a case of some amendment. If there is both repeal of the old provision and also simultaneous insertion of a new provision in its place thereof, it is called as "substitution". The submission made on behalf of the assessee that the right of unabsorbed depreciation allowance that accrued in the second period shall remain intact and continue to be governed by the provisions of section 32(2) as inserted in the third period, is devoid of merit. In Crawford's Interpretation of Laws it has been stated as under:-

> *"Effect of Repeal, Generally:- in the first place, an outright repeal will destroy inchoate rights dependent on it, as a general rule. In many cases, however, where statutes are repealed, they continue to be the law of the period during which they were in force with reference to numerous matters (pp. 640-641)*
>
> *The observation of Lord Tenterden Tindal, CJ. referred in the above mentioned passages in Craies on Statute Laws also indicate that the principle that on repeal a statute is obliterated is subject to the exception that it exists in respect of transactions past closed. To the same effect is the law laid down by this Court (See Qudrat Ullah v. Municipal Board [1974] 1 SCC 202: [1974] 2 SCC 530."*

37. From above it can be noticed that as per general rule the repeal of a provision destroys the rights dependent on it. If we examine the general effect of repeal of section 32(2) as prevailing in the second period, then brought forward unabsorbed depreciation allowance should obliterate and die its natural death in the third period. But that is not the case here as the exception shall come into play as against the general effect of repeal as per which the repealed law shall continue to be the law of the period during which it was in force. As a result of that the benefit already earned in second period by way of brought forward unabsorbed depreciation allowance shall come to the third period to be dealt with in accordance with the provision of the second period for set off against the income under the head `Profits and gains of business or profession' for a period not more than eight assessment years immediately succeeding the assessment year for which the aforesaid allowance was first computed. It is still further noted that the Finance (No.2) Act, 1996 also substituted section 32(2) and that also was not a case of amendment. By virtue of this substitution by the Finance Act, 1996 the current year's depreciation in the second period became eligible for set off against income under the head `Profits and gains of business or profession' and then against any other head. In the absence of any provision to deal with the unadjusted brought forward depreciation of the first period in the second period, such amount was not available for set off in and thus it would have ceased to have any effect. To fill the vacuum and save the loss of benefit already accrued to the assesses in the first period in the shape of brought forward unadjusted depreciation due to the repeal of the earlier provision, the Finance Minister came out with the relaxation. But for such relaxation given by the Finance Minister in the Parliament, the brought forward unadjusted depreciation of the first period would have elapsed. We are unable to find any such concession given by the Finance Minister while substituting the provisions of section 32(2) in the third period. *Ex consequenti,* the brought forward unabsorbed depreciation allowance of the second period cannot be treated as the current depreciation in the third period.

38. The legal position of current and brought forward unadjusted/unabsorbed depreciation allowance in the three periods, is summarized as under :-

A. In the first period (i.e. upto A.Y. 1996-97)

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

ii. Amount of such current depreciation which can not be so set off within the same year as per i. above shall be deemed as depreciation u/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.

B. In the second period (i.e. A.Y. 1997-98 to 2001-02)

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

ii. Current depreciation for the year u/s 32(1) (for each year separately starting from A.Y. 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 A.Ys. 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 A.Y. immediately succeeding the A.Y. for which it was first computed, to be set off only against the income under the head `Profits and gains of business or profession'.

C. In the third period (i.e. A.Y. 2002-03 onwards)

i. `First unadjusted depreciation allowance' can be set off upto A.Y. 2004-05, that is, the remaining period out of maximum period of eight A.Y.s (as per Bi. 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 A.Ys. succeeding the A.Y. for which it was first computed.

iii. Current depreciation for the year u/s 32(1), for each year separately, starting from A.Y. 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 u/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.

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 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.

41. Before parting with these appeals we would like to make it clear that all the cases relied on by both the sides have been duly taken into consideration while deciding the matter. We have desisted from making a reference to some of such cases in the order either because of their irrelevance or because of their repetitive nature. Further we appreciate the illuminating arguments put forth by both the sides which have assisted us in disposing of this issue.

42. In the result, both the appeals are allowed.

Order pronounced on this 30th **day of June, 2010.**

Sd/-	Sd/-	Sd/-
(**D. Manmohan**)	(**N.V.Vasudevan**)	(**R.S.Syal**)
Vice President	Judicial Member	Accountant Member

Mumbai : 30th **June, 2010.**

Devdas*

Copy to :
1. The Appellant.
2. The Respondent.
3. The CIT concerned
4. The CIT(A)-XXI, Mumbai.
5. The DR/ITAT, Mumbai.
6. Guard File. TRUE COPY.

By Order

Assistant Registrar, ITAT, Mumbai.