

Commissioner of Income Tax, Kanpur

Vs

Mother India Refrigeration Industries (P) Ltd.

with

Hindustan Vacuum Glass Limited

Vs

Commissioner of Income Tax, Delhi

Civil Appeals Nos. 1570-71 (NT) of 1973 and Tax Reference Case No. 15 of 1983

(V.D. Tulzapurkar, Sabyasachi Mukharji, Ranganath JJ)

14.08.1985

JUDGMENT

TULZAPURKAR, J. -

1. In these appeals and the tax reference, the common question arising for determination relates to the priority between current depreciation and unabsorbed carried forward business loss that is to say which should be deducted first while computing the total income of an assessee for the concerned assessment year.

2. The facts giving rise to the above question in the civil appeals are these. The concerned assessment years are 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 1951-52 and Rs. 64,332 in 1952-53. The assessee contended before the Income Tax Officer that before deducting the 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 Rs. 50,624 for 1951-52, the depreciation allowance for that year amounting to Rs. 58,140 was partially set off and the balance of the depreciation of Rs. 7516 was ordered to be carried forward with the result that the total unabsorbed depreciation carried forward amounted to Rs. 1,85,670. It was further directed that the entire unabsorbed loss amounting to Rs. 67,534 should also be carried forward. Similarly, in 1952-53, the full depreciation allowance of that year amounting to Rs. 44,580 was set off against the income of Rs. 64,232; the net income of Rs. 19,652 (Rs. 64,232 minus Rs. 44,580) was utilised for setting off a part of the 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 (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 for both the years and the AAC accepted the assessee's contention and directed that unabsorbed carried forward business loss should be set off first in each year before deducting the current year's depreciation. The Department

preferred further appeals to the Appellate Tribunal and relying upon the decision of the Calcutta High Court in Aluminium Corporation of India v. CIT (33 ITR 367 : AIR 1958 Cal 404) the Tribunal accepted the Department's contention and restored the ITO's decision. At the instance of the assessee, the following question was referred to the High Court for its opinion :

Whether for the assessment years 1951-52 and 1952-53, the assessee was entitled to deduct the unabsorbed business loss at the end of the assessment year 1950-51, before setting off the depreciation allowance of Rs. 58,140 and Rs. 44,580, respectively, for these years ?

After referring to the relevant provisions of the Indian Income Tax Act, 1922, namely, Sections 10 and 24, particularly proviso (b) to Section 10(2)(vi) and Section 24(2), proviso (b), the High Court answered the question in favour of the assessee. The Revenue has challenged the High Court's view in these appeals.

3. The facts in the tax reference are briefly these. For the assessment year 1969-70, the assessee company filed a return on July 18, 1969, disclosing a loss of Rs. 50,736 : subsequently a revised return was filed on August 20, 1971, claiming a set off of the carried forward loss of earlier years against the income of that year even before making any allowance for the current year's depreciation. The Income Tax Officer held that the carried forward loss could not be given priority over the current year's depreciation in the matter of set off and completed the assessment determining the unabsorbed depreciation for the year at Rs. 40,255, brought forward development rebate at Rs. 8020 and the carried forward past losses were allowed to be carried forward in full. In appeal the AAC, following the decision of the Allahabad High Court in the case of Mother India Refrigeration Industries (P) Ltd. (which decision is the subject matter of civil appeals before us), accepted the assessee's contention that the carried forward losses have priority not only over the unabsorbed depreciation of the past years but also over the current year's depreciation in the matter of set off. The Department preferred an appeal to the Appellate Tribunal and the Tribunal took the view that unabsorbed carried forward losses of the earlier years will have priority over unabsorbed depreciation of the earlier years but not over the current year's depreciation. In coming to this conclusion, the Tribunal placed certain construction on the relevant provisions of the 1961 Act, namely, Sections 32(2) and 72(2). In other words it preferred the views of the Calcutta High Court in Aluminium Corporation case (33 ITR 367 : AIR 1958 Cal 404) and of the Andhra Pradesh High Court in Addl. CIT v. Andhra Printers Ltd. (117 ITR 555) insofar as the competition for priority was between unabsorbed carried forward loss and current depreciation. At the instance of the assessee in view of the conflict of decisions between the various High Courts, the Tribunal has referred the following question of law for this Court's opinion under Section 257 of the Income Tax Act, 1961 :

Whether on the facts and in the circumstances of the case, the depreciation for the current year should first be deducted before deducting the unabsorbed carried forward business losses having regard to the provisions of Section 72(2) read with Section 32(2) of the Income Tax Act, 1961 ?

4. Since the answer to the question raised depends upon proper construction to be placed on the relevant provisions of the 1922 Act as also of the 1961 Act it will be necessary to set out the relevant provisions. Under the 1922 Act Section 10(2)(vi) permits, while computing profits or gains of business, a deduction by way of depreciation allowance in respect of buildings, machinery, plant or furniture of a sum equivalent to such percentage on the written down value thereof as may be

prescribed. Then comes proviso (b) to the aforesaid provision which is material. The relevant portion of proviso (b) (omitting unnecessary words) runs thus :

(b) Where, in the assessment of the assessee full effect cannot be given to any such allowance in any year owing to there being no profits or gains chargeable for that year, or owing to the profits or gains chargeable being less than the allowance, then, subject to the provisions of clause (b) of the proviso to sub-section (2) of Section 24, 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 year and deemed to be part of that allowance, or if there is no such allowance for that year, be deemed to be the allowance for that year, and so on for succeeding years;

Section 24 provides for setting off of loss in computing aggregate income. Sub-section (1) thereof provides for setting off of loss of profits or gains under one head against profits or gains under any other head in the same year. Sub-section (2) thereof runs thus :

(2) Where any assessee sustains a loss of profits or gains in any year, in any business, profession or vocation, and the loss cannot be wholly set off under sub-section (1) so much of the loss as is not so set off or the whole loss where the assessee had no other head of income shall be carried forward to the following year, and

#(i) * * *##

(ii) Where the loss was sustained by him in any other business, profession or vocation (meaning other than speculative business), it shall be set off against the profits and gains, if any, of any business, profession or vocation carried on by him in that year : provided that the business, profession or vocation in which the loss was originally sustained continued to be carried on by him in that year;

Then comes proviso (b) to sub-section (2) which is material and it runs thus :

(b) Where depreciation allowance is, under clause (b) of the proviso to clause (vi) of sub-section (2) of Section 10, also to be carried forward, effect shall first be given to the provisions of this sub-section;

5. Under the 1961 Act the material provisions are to be found in Section 32(1) and (2) and Section 72(1) and (2) and it was not disputed that the material provisions in both the Acts are couched in substantially the same language. Two more things which are common under both the Acts need be noticed. Unabsorbed carried forward business loss can be set off only against business income of the following year or years while depreciation can be deducted from income under any other head; further while the former can be carried forward for a limited number of years as specified in the enactment there is no time limit prescribed for carrying forward unabsorbed depreciation.

6. Counsel for the Revenue urged that on a proper construction of the proviso (b) to Section 10(2)(vi) read with the proviso (b) to Section 24(2) of the 1922 Act (equivalent to Section 32(2) read with Section 72(2) of the 1961 Act), it is apparent that unabsorbed carried forward losses of the earlier years have been given priority over unabsorbed depreciation of the earlier years but not over the current year's depreciation for, under proviso (b) to Section 10(2)(vi), it is the carry forward

(actual words used are "added to") of unabsorbed depreciation to the following previous year that is made subject to the proviso (b) to Section 24(2), that is to say, the preference given to the unabsorbed carried forward losses of the earlier years under proviso (b) to Section 24(2) is over the unabsorbed depreciation and not over the current depreciation. Counsel further urged that such a construction is in accord with the basic and well recognised principle of commercial accountancy that in computing the profits and gains of business for a particular year, that year's depreciation (meaning current depreciation) is always to be treated as the first charge on such profits and gains and that is also the scheme of the Act. According to him tax is payable on the total income of the concerned year, that such income includes profits and gains of a business, that the profits and gains must mean net profits and gains and net profits and gains cannot be ascertained without debiting the current year's depreciation to the profit and loss account of that year and it is in accordance with this principle of commercial accountancy that preference to unabsorbed carried forward losses has not been given over current depreciation but has been given over the unabsorbed depreciation of the earlier years in the matter of set off. In fact, counsel contended that having regard to well settled principles of accountancy and the aforesaid provisions of the Act there can be no competition between current year's depreciation and unabsorbed carried forward losses and the current depreciation must be deducted first before unabsorbed carried forward losses are set off. In support of his submissions counsel relied upon four decisions : Aluminium Corporation of India Ltd. v. CIT (33 ITR 367 : AIR 1958 Cal 404), CIT v. Gujarat State Warehousing Corporation (104 ITR 1) Addl. CIT v. Andhra Printers Ltd. (117 ITR 555) and CIT v. Malwa Sugar Mills Co. Ltd. (134 ITR 56) In all these decisions, the view taken is that current depreciation has to be deducted first before unabsorbed carried forward business losses are set off. He pointed out that the High Court in deciding the question in favour of the assessee referred to a decision of this court in Jaipuria China Clay Mines (P.) Ltd. (59 ITR 555 : AIR 1966 SC 1187 : (1966) 2 SCR 449) and relied on certain observations made therein but the point that arose for decision in that case was entirely different and the observations cannot be divorced from the context of the point decided therein.

7. On the other hand, counsel for the assessee in the appeals and the tax reference strongly relied upon the legal fiction arising from the deeming provisions contained in proviso (b) to Section 10(2)(vi) of the 1922 Act and Section 32(2) of the 1961 Act as a result whereof the unabsorbed depreciation is not merely carried forward to the following previous year but is deemed to be the depreciation for that year and according to counsel this entire aggregate depreciation is made subject to the proviso (b) to Section 24(2) (of the 1922 Act) or to Section 72(2) (of the 1961 Act). Counsel urged that this legal fiction must be given full effect without any reservation and, therefore, between the aggregate amount of depreciation and the unabsorbed carried forward losses priority has to be given to the latter in the matter of set off. It was further urged that the Revenue cannot rely upon the principles of commercial accountancy, however well settled or well recognised these might be, in order to achieve a result contrary to what is warranted by the express provision of the statute including the legal fiction if any, created therein; in other words, principles of commercial accountancy, if they are modified or deviated from by statute, cannot be allowed to prevail over statutory provisions. It was also urged that the construction of the relevant provisions suggested by the assessee and which has been accepted by the High Court has some advantages and therefore should be preferred to the construction suggested by the Revenue.

8. Having regard to the aforesaid rival contentions, it will be clear that the real issue that arises for our consideration in this case is whether, on a proper construction of the relevant provisions of the concerned enactment, unabsorbed carried forward losses should have preference over current depreciation in the matter of set off or is the position vice versa while computing the total income of an assessee in the concerned assessment year ? And the answer to this question depends on what is

the true scope and purpose of the legal fiction created under proviso (b) to Section 10(2)(vi) of the 1922 Act or under Section 32(2) of the 1961 Act.

9. At the outset it may be stated that a close scrutiny of the relevant provisions of the 1922 Act as also the 1961 Act clearly shows that the computation of income under the head "profits and gains of business" of any particular assessment year is required to be done after making certain allowances specified in sub-section (2) of Section 10 of the 1922 Act and after allowing certain deductions in accordance with the provisions contained in Sections 30 to 43A of the 1961 Act; in other words it is the net profits and gains after the specified deductions are made that are subjected to tax; one of such deductions pertains to depreciation allowance at the prescribed rate of percentage of the written down value of the business asset; and this is provided in Section 10(2)(vi) of the 1922 Act and in Section 32(1) of the 1961 Act. Up to this stage of computation no question of either carry forward of unabsorbed depreciation of the earlier years or carry forward of unabsorbed business losses of earlier years arises. In other words, the normal accountancy principle has to be applied in arriving at the net income from business for that year by debiting the current year's depreciation. The question is whether any deviation from this normal rule of accountancy is contemplated by proviso (b) to Section 10(2)(vi) read with proviso (b) to Section 24(2) of the 1922 Act or by Section 32(2) read with Section 72(2) of the 1961 Act and it is here that the aspect of proper construction of these provisions arises. Dealing with the provisions of the 1922 Act first, it will be clear that proviso (b) to Section 10(2)(vi) is in two parts and provides for two things; its first part provides for a carry forward of unabsorbed depreciation and its second part provides for clubbing the said carried forward depreciation with the current year's depreciation and deeming the aggregate to be the current year's depreciation. However, carrying forward of the unabsorbed depreciation and the deeming provision in proviso (b) is not absolute but are subject to the proviso (b) to Section 24(2). Had proviso (b) to Section 24(2) not been enacted by the Legislature the result would have been that the aggregate depreciation would have been deducted first out of the profits and gains in preference to unabsorbed business losses which might have been carried forward under Section 24(2) but as such losses can be carried forward only for limited number of years the assessee would in certain circumstances have in his books losses which he might not be able to set off even within the time limit during which the set off is permitted. In order to prevent such a situation the Legislature enacted proviso (b) to Section 24(2). And proviso (b) to Section 24(2) expressly states "where depreciation allowance is, under clause (b) of the proviso to clause (vi) of sub-section (2) of Section 10, also to be carried forward effect shall first be given to the provisions of this sub-section". In other words, it clearly provides that in the matter of set off the unabsorbed business losses of the earlier years will have preference over unabsorbed depreciation that is required to be carried forward under proviso (b) to Section 10(2)(vi) and no preference over the current depreciation is intended.

10. It is true that proviso (b) to Section 10(2)(vi) creates a legal fiction and under that fiction unabsorbed depreciation either with or without current year's depreciation is deemed to be the current year's depreciation but it is well settled, as has been observed by this court in *Bengal Immunity Company Limited v. State of Bihar* ((1955) 2 SCR 603, 606 : AIR 1955 SC 661 : 1955 SCJ 672) 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 that legitimate field. 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. That this is so becomes clear from this Court's observations in *Jaipuria China Clay Mines (P.) Ltd. case* (59 ITR

555 : AIR 1966 SC 1187 : (1966) 2 SCR 449) appearing at p. 561 of the Report which run thus :

The unabsorbed depreciation allowance is carried forward under proviso (b) to Section 10(2)(vi) and the method of carrying it forward is to add it to the amount of the allowance or depreciation in the following year and deeming it to be part of that allowance; the effect of deeming it to be part of that allowance is that it falls in the following year within clause (vi) and has to be deducted as allowance.

11. In CIT v. Ravi Industries (49 ITR 145) the same position has been clarified by the Bombay High Court. The court has observed that the unabsorbed depreciation does not lose its character and attributes when it is carried forward to the following year; such unabsorbed depreciation of the earlier year, which is carried forward to the current year and which is deemed to be of the current year under proviso (b) of Section 10(2)(vi) can be set off, unlike other business losses, against income under other heads. 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. It is therefore not possible to accept the contention of counsel for the assesseees that because of the legal fiction the unabsorbed carried forward losses should be given preference not merely over the unabsorbed carried forward depreciation but also over the current year's depreciation. There is thus no modification of nor deviation from the basic and well recognised principle of commercial accountancy by the statute as is contented by counsel for the assesseees.

12. Since the provisions of the 1961 Act are in pari materia with the corresponding provisions under the 1922 Act the same conclusion must follow under the 1961 Act, namely, that the current depreciation must be deducted first before deducting the unabsorbed carried forward business losses of the earlier years in giving set off while computing the total income of any particular year.

13. Having regard to the above discussion it seems to us clear that unabsorbed carried forward losses cannot be given preference over current depreciation in the matter of set off in computing an assessee's income for any particular assessment year and as such the question has been correctly decided in Aluminium Corporation case (33 ITR 367 : AIR 1958 Cal 404) and Malwa Sugar Mills case (134 ITR 56) by the Calcutta High Court, in Gujarat State Warehousing Corporation case (104 ITR 1) by the Gujarat High Court and in Andhra Printers case (117 ITR 555) by the Andhra Pradesh High Court. In the impugned judgment in the Civil appeals the High Court has relied on some observations of this court in Jaipuria China Clay Mines case (59 ITR 555 : AIR 1966 SC 1187 : (1966) 2 SCR 449) but that case dealt with a different point altogether and as such the observations made in the context of the points that arose for decision there would be of no avail. The High Court's decision in the Civil Appeals is therefore set aside and that of the Tribunal is restored while in tax reference the question referred to this Court is answered against the assessee to the effect that the depreciation for the current year must first be deducted before deducting the unabsorbed carry forward business loss. The assesseees will pay the costs of the appeals and tax reference to the Department.

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