

ANDHRA PRADESH HIGH COURT

Additional Commissioner

Vs

Andhra Printers Ltd

(B.J.Divan, C.J. Raghuvir, J.)

23.09.1976

JUDGMENT

B.J. Divan, C.J.

1. In this case, at the instance of the revenue, the following question has been referred to us for our opinion :

"Whether, on the facts and in the circumstances of the case, the business loss carried forward from the previous years should receive priority over the current depreciation allowance for the assessment year 1970-71 ?"

2. The facts leading to this reference are as follows : We are concerned with the assessment year 1970-71. The assessee is a limited company and carries on business as printer and publisher of a daily newspaper called. "Andhra Jyoti" and also a weekly journal. For the assessment year 1970-71, the relevant previous year was the calendar year 1969 and the ITO found that the current year's depreciation was Rs. 1,87,303, whereas the income of the year without providing for depreciation was Rs. 70,555. The ITO set off the income of Rs. 70,555 against the depreciation for that year and directed that the balance of Rs. 1,16,748 should be carried forward to the next year as the unabsorbed depreciation. It is common ground that there were carried forward business losses and the contention before the ITO on behalf of the assessee was that the amount of Rs. 70,555 should be set off not against the current year's depreciation but against the carried forward business losses. That contention was rejected by the ITO and he directed as above.

3. Against the order of the ITO, the assessee took the matter in appeal to the AAC and it was contended that before deducting depreciation of the current year the loss carried forward from the earlier year should be set off and that the ITO had erred in deducting the amount of Rs. 70,555 out of the current year's depreciation of Rs. 1,87,303 and directing the carry forward of balance of the current year depreciation and the business losses brought forward from the earlier year. Following the decision of the Allahabad High Court in Mother India Refrigeration Industries (P.)

Ltd. v. CIT , the AAC accepted the contention of the assessee and directed the ITO to set off the business losses brought forward from the previous years against the amount of Rs. 70,555 before deducting the current year's depreciation, because according to the view taken by the decision of the Allahabad High Court, depreciation brought forward from the earlier years forms part of the current year's depreciation and losses brought forward from the earlier years get priority over the depreciation. The revenue took the matter in further appeal to the Tribunal and, relying upon the decision of the Calcutta High Court in *Aluminium Corporation of India Ltd, v. CIT*¹ and the decision of the Supreme Court in *CIT v. Jaipuria China Clay Mines (P.) Ltd.* , it was contended on behalf of the revenue that the business losses brought forward cannot be set off before deducting the current year's depreciation. The Tribunal came to the conclusion that the decision of the Allahabad High Court in *Mother India Refrigeration Industries'* case squarely applied to this case and, following the decision of the Allahabad High Court, the Tribunal upheld the order of the AAC and, thereafter, at the instance of the revenue, the question hereinabove set out has been referred to us.

4. Before dealing with the different decisions which were cited before us, it would be desirable to refer to the relevant sections of the I.T. Act.

5. Under section 4 of the Act, where any Central Act enacts that income-tax shall be charged for any assessment year at any rate or rates, income-tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions of, the Act in respect Of the total income of the previous year or previous years, as the case may be, of every person. "Person" as defined by Section 2(31) includes, inter alia, a company, and under Section 14, all income shall, for the purposes of charge of income-tax and computation of total income, be classified under the heads of income from salaries, interest on securities, income from house property, profits and gains of business or profession, capital gains and income from other sources. Sections 28 to 44D, consisting of Part D in Chap. IV, deal with computation of profits and gains of business or profession. Chapter IV deals with computation of total income and the different groups of sections in Chapter IV deal with computation of income under different heads of income. Section 29 provides that the income chargeable under the head of profits and gains of business or profession as set out in Section 28, shall be computed in accordance with the provisions contained in Sections 30 to 43A. Section 32(1) provides that in respect of depreciation of buildings, machinery, plant or furniture owned by the assessee and used for the purposes of the business or profession, deductions shall, subject to the provisions of Section 34, be allowed. What is material for the purposes of this judgment is Sub-section (2) of Section 32. It provides that where, in the assessment of the assessee, full effect cannot be given to any allowance under Clause (i) or Clause (ii) or Clause (iv) or Clause (v) or Clause (vi) of Sub-section (1) or under Clause (i) of Sub-section (1A) in any previous year, or 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. Under section 71 set off of loss of income from business or profession has been provided for. Sub-section (1) of Section 71 says, where in respect of any assessment year the net result of the computation under any head of income other than "capital gains" is a loss and the assessee has no income under the head "Capital gains", he shall, subject to the provisions of this Chapter, be entitled to have the amount of such loss set off against his income, if any, assessable for that assessment year under any other head. Hence, by virtue of Section 71(1) of the Act, if as a result of the computation of the income under the head "Profits and gains of business or profession", it is ascertained that the total working out of that computation is a loss, if there are heads of income other than "capital gains" and there is some surplus amount, the business losses thus computed can be set off against the income from heads other than "capital gains". We are not concerned with the provisions of Sub-section (2) of Section 71 for purposes of this judgment. Under section 72(1), provision is made for carry forward and set off of business losses. Sub-section (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 head of income in accordance with the provisions of Section 71, so much of the loss as has not been so set off or, where the assessee has income only under the head "Capital gains" relating to capital assets other than short-term capital assets and has exercised the option under Sub-section (2) of that section or where he has no income under any other head, the whole loss shall, subject to the other provisions of this Chapter, be carried forward to the following assessment year, and under Clause (i) of Section 72(1), the carried forward business loss 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; provided that the business or profession for which the loss was originally computed continued to be carried on by him in the previous year relevant for the assessment year under consideration. Under Sub-section (2) of Section 72, where any allowance or part thereof is, under Sub-section (2) of Section 32 or Sub-section (4) of Section 35, to be carried forward, effect shall first be given to the provisions of this section. Under Sub-section (3) of Section 72, the business loss cannot be carried forward for more than eight years immediately succeeding the assessment year for which the loss was first computed.

6. As has been pointed out in several cases, which we will hereinafter refer to, because business losses can only be carried forward for a period of eight years and unabsorbed depreciation can be carried forward indefinitely, the legislature appears to have given preference by provisions like Sections 72(2) and 72(3) to business losses over depreciation allowance. But, as a result of the decision of the Supreme Court in *CIT v. Jaipuria China Clay Mines (P.) Ltd.*, the law is now well settled that unabsorbed depreciation of previous year can be set off against income from any other head, but under the very provisions of 72(1), carried forward business losses being non-speculative business losses, can only be set off against income from business or profession. The

very wording of Section 72(1) and the proviso to Clause (i) of Section 72(1) indicate that the carried forward business losses can be set off not only against the income from the particular business in which the business loss was originally incurred in the earlier years, but can be set off against the income from any other business or profession, provided that the business or profession for which the loss was originally computed is carried on by the assessee in the previous year relevant to the assessment year under consideration.

7. It must be borne in mind that the business loss which can be carried forward is the loss which has been incurred by the assessee in a particular business or profession and which, in accordance with the provisions of Section 71, is not wholly set off against the income from any other heads of income, and in accordance with Section 71(1) for the relevant assessment year for which loss was incurred. As Section 72(1) points out, it is so much of the loss as has not been set off against the income from any other head of income in accordance with Section 71 which can be carried forward as business loss and set off against the income from the business or profession in subsequent years with the overriding Clause under Section 72(3) that the business loss cannot be carried forward for more than eight years.

8. The question that arises is when Section 72(1) speaks of the net result of the computation of the income under the head "Profits and gains of business or profession" being a loss, is the current year's depreciation first to be provided for before the loss is ascertained, or, whether the revenue income, i.e., the income before making allowance for depreciation is to be set off against the previous year's business loss, i.e., whether the business loss carried forward from the previous year can be set off against the revenue income only.

9. We wish to make it clear that by using the words "revenue income", we mean income before making provision for depreciation allowance. Out of the several authorities which have been cited before us, only in two cases this question has directly arisen for decision. The first of these decisions is the decision of the Allahabad High Court in *Mother India Refrigeration Industries (P.) Ltd. v. CIT*. The Division Bench of the Allahabad High Court in that case was dealing with the provisions of the Act of 1922, which were, in terms, identical with the terms of the different sections of the Act of 1961, to which we have hereinabove referred. Proviso (b) to Section 24(2) of the Act of 1922 was similar to Section 72(2) of the Act of 1961 and proviso (b) to Section 10(2)(vi) of the Act of 1922 was similar to the provisions of Section 32(2) of the Act of 1961. The Allahabad High Court held that by virtue of prov. (b) to Section 24(2) of the Act of 1922, business losses have to be given priority over unabsorbed depreciation allowance. Under prov. (b) to Section 10(2)(vi) depreciation allowance which is carried forward merges into depreciation allowance for the succeeding year and after such merger, the unabsorbed depreciation allowance is to be deemed to be depreciation allowance for the current year. As business losses have to be given priority over unabsorbed depreciation allowance, there is no good reason why business losses which have been brought forward should not receive priority over current depreciation allowance, and it was held that for the relevant assessment years under consideration, the

assessee was entitled to deduct the unabsorbed business loss at the end of the assessment year concerned, before setting off the respective depreciation allowances for the years. In arriving at this conclusion, the Allahabad High Court took notice of the observations of the Calcutta High Court in Aluminium Corporation of India, Ltd. v. CIT [1958] 33 ITR 367(Supra) to the following effect;

" '.....no question of a priority as between the setting off of the depreciation allowance for the current year and the carried over loss of earlier years can ever arise.'" (see p. 514 of 80 ITR)

10. After referring to this observation of the Calcutta High Court, the Division Bench of the Allahabad High Court stated (p. 514):

"That observation no doubt lends support to the stand taken by the department. It may, however, be pointed out that in that case there was no question of unabsorbed depreciation. The Income-tax Officer merely set off current depreciation against the gross profit for a certain year." Relying upon a passage from the decision of the Supreme Court in *CIT v. Jai-puria China Clay Mines (P.) Ltd.*², the Allahabad High Court held that in that passage the Supreme Court recognised the broad principle that, in the matter of carry forward, business losses should receive priority over depreciation allowance, and held that, under prov. (b) to Section 10(2)(vi), depreciation allowance which is carried forward, merges into depreciation allowance for the succeeding year. After such merger, the unabsorbed depreciation allowance is to be deemed to be depreciation allowance for the current year, and since business losses had to be given priority over unabsorbed depreciation allowance, there was no good reason why losses which have been brought forward should not receive priority over current depreciation allowance.

11. Directly opposed to this decision of the Allahabad High Court and taking up the opposite view is the decision of the Gujarat High Court in *CIT v. Gujarat State. Warehousing Corporation*. I was a party to that judgment and the decision of the Division Bench was delivered by T. U. Mehta J. The Gujarat High Court in terms dissented from the view of the Allahabad High Court in *Mother India Refrigeration Industries (P.) Ltd. v. CIT* and relying upon certain observations of the Supreme Court in *CIT v. Jaipuria China Clay Mines (P.) Ltd.*, the observations of the Calcutta High Court in *Aluminium Corporation of India Ltd. v. CIT* [1958] 33 ITR 367(Supra) and the decision of the Bombay High Court in *CIT v. Ravi Industries*³ the Gujarat High Court held that, firstly, the current year's depreciation should be adjusted against the current year's revenue income and then carried forward losses of earlier years have to be deducted and finally the carried forward unabsorbed depreciation allowance of earlier years has to be adjusted.

12. In *CIT v. Jaipuria China Clay Mines (P.) Ltd.* [1966] 59 ITR 555,Supra) the question before the Supreme Court was altogether different from the question before us. The question there was whether unabsorbed depreciation allowance of previous years could be allowed to be set off against the income from other heads of income, i.e., from heads of income other than non-

speculative business. The assessment year under consideration before the Supreme Court was the assessment year 1952-53, and the total income of the assessee in the previous year relevant to that assessment year was computed at Rs. 14,041, before charging depreciation for that year. From that figure, the ITO deducted depreciation for the year amounting to Rs. 5,360, thus computing the profit at Rs. 8,861. There were carried forward business losses and the amount of Rs. 8,861 was set off against the carried forward business losses, the losses having been incurred in 1947-48, and thus the income from business was worked out at nil. He then computed that the income from dividends earned by the assessee-company was Rs. 2,01,130. The assessee had an unabsorbed depreciation allowance aggregating to Rs. 76,857, and the contention urged on behalf of the assessee was that this amount of Rs. 76,857 should be allowed to be deducted and set off against the dividend income reducing the total income thereby to Rs. 1,32,955 and thus the only question before the Supreme Court was whether the unabsorbed depreciation allowance carried forward from the previous years could be set off against the income from dividend. There was no question before the Supreme Court whether carried forward business loss should get precedence over the current year's depreciation in respect of income from business. The relevant passage occurs at page 561, in the judgment of Sikri J. (as he then Was), speaking for the court. The passage is as follows:

"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. If the legislature had not enacted proviso (b) to Section 24(2), the result would have been that depreciation allowance would have been deducted first out of the profits and gains in preference to any losses which might have been carried forward under Section 24, but as the losses can be carried forward only for six years under Section 24(2), the assessee would in certain circumstances have in his books losses which he would not be able to set off. It seems to us that the legislature, in view of this, gave a preference to the deduction of losses first. But it is wrong to assume that Section 24(2) also deals with the carrying forward of depreciation. This carry forward having been provided in Section 10(2)(vi) .and in a different manner, Section 24(2) only deals with losses other than the losses due to depreciation."

13. It is true that the Supreme Court has pointed out that Section 24(2) of the Act of 1922, equivalent to Section 72 of the Act of 1961, deals with losses other than losses due to depreciation. But the main question that we have to consider is not about carried forward unabsorbed depreciation or carried forward business losses, but the current year's depreciation in computing current year's business income. At page 560 of [1966] 59 ITR, the Supreme Court pointed out that before the amendment of the relevant provisions of the Indian I.T. Act, 1922, in *Ambika Silk Mills Co. Ltd. v. CIT*^d at page 65, the Bombay High Court had held :

"If a business was worked at a loss in any. particular year, the loss can be set off against any other head under Section 24(1); if the loss cannot be fully set off then it can be carried

forward to the next year, but then it can be only set off against the profits of that particular business and that set-off would be permissible to the assessee for a period of six years only. After six years the right to set-off would come to an end. But in the case of depreciation and to the extent that the loss was caused by depreciation being not fully absorbed there would be no limit to the carrying forward of that depreciation, and that depreciation can be set off at any time so long as the business showed a profit in the future."

14. The Supreme Court preferred the view taken by the Bombay High Court after the amendment of the Act of 1922 in *CIT v. Ravi Industries Ltd*⁵. and by the Gujarat High Court in *CIT v. Girdharlal Harivallabhadas Mills Co. Ltd*⁶. The view contrary to the view of the Bombay High Court in Ravi Industries' case [1963] 49 ITR 145 (Bom)(Supra) and of the Gujarat High Court in Girdharlal Hari-vallabhadas Mills' case [1964] 51 ITR 693(Supra) had been taken by the Madras High Court in *CIT v. Nagi Reddy*⁷ The Supreme Court expressed its inability to agree with the view of the Madras High Court. Thus, it is clear from the report in *CIT v. Jaipuria China Clay Mines (P.) Ltd.* that the Supreme Court approved of the view taken by the Gujarat High Court in, Girdharlal Harivallabhadas Mills' case [1964] 21 ITR 693(Supra) and by the Bombay High Court in Ravi Industries' case [1963] 49 ITR 145(Supra).

15. It must be pointed out that the points for decision which arose respectively before the Bombay High Court in Ravi Industries' case [1963] 49 ITR 145(Supra) and before the Gujarat High Court in Girdharlal Harivallabhadas Mills' case [1964] 51 ITR 693(Supra), were the same as arose before the Supreme Court in Jaipuria China Clay Mines (P.) Ltd.'s case, viz., whether unabsorbed depreciation of previous years could be allowed to be set off against the income from heads of income other than business, and, as pointed out above, the view of the Bombay High Court in Ravi Industries' case [1963] 49 ITR 145(Supra), and the view of the Gujarat High Court in Girdharlal Harivallabhadas Mills' case [1964] 51 ITR 693(Supra), were approved by the Supreme Court.

16. We find in Ravi Industries' case [1963] 49 ITR 145 (Bom)(Supra), at page 155 of the report, V. S. Desai J., delivering the judgment of the Division Bench of the Bombay High Court, observed, after rejecting the contention urged on behalf of the revenue:

"It is no doubt true that the excess of the current year's depreciation over the profits and gains of the income coming under the head 'Business' is available for being set off as loss of profits and gains against the income from other heads of business. But that does not mean that the allowance by way of depreciation, therefore, loses all its character and attributes as an allowance when it is carried forward to the following year not being wholly absorbed during the current year. In view of the provision of Section 10(2)(vi), prov. (b), when taken over to the following year, it still retains its character as depreciation allowance and gets added to the current depreciation of the following year when such

current depreciation exists for the following year, or becomes current depreciation for the following year where no such current depreciation exists. The only difference which it has from the current depreciation for the following year is as provided under proviso (b) to Section 24(2), namely, that its application will be postponed to the prior absorption of the carried forward losses of the previous year."

17. At page 149 of the report, after referring to the provisions of Section 10(2)(vi), prov. (b), of the Act of 1922, the Division Bench of the Bombay High Court observed:

"It will be seen from the provisions which we have referred to above that the allowance which is permitted as by way of depreciation for the current year will be adjusted against the profits and gains of the business in which the depreciation is allowed, and if the depreciation is more than the profits or gains of that business, it will be available for adjustment against the profits or gains of any other business, profession or vocation, carried on by the assessee because under Section 10 computation on the totality of the businesses, etc., carried on by the assessee is contemplated and the allowances under Section 10(2) are available in the said computation. It may, however, happen that even after the adjustment of the depreciation allowance against the profits and gains of the totality of the businesses, etc., carried on by the assessee, there is still a surplus left over. Such surplus, it has been held, is available for being set off against the profits and gains from any other head of income under Section 24(1). If after setting off against the income from other heads also there is still a further surplus left, such surplus under the proviso is to be taken to the following year and added to the allowance for depreciation for the following year, and deemed to be a part thereof and so on for succeeding years. Under the terms of the proviso, the unabsorbed depreciation taken to the following year, becomes a part of the depreciation allowance for the following year, but this is subject to the provisions of Clause (b) of the proviso to Sub-section (2) of Section 24."

18. It is thus clear that, according to the view of the Bombay High Court in Ravi Industries' case [1963] 49 ITR 145, the computation of the current year's income from each business has first to be carried out and in computing the income in accordance with the provisions of Sections 30 to 43A of the Act of 1961, depreciation allowance for the current year's income must be taken into consideration. It is only after the net result is ascertained: that the question of carrying forward, etc., would arise. Same is the position which emerges when the observations of the Gujarat High Court in Girdharlal Harivallabhadas Mills case [1964] 51 ITR 693 are examined, care-fully. At page 697 of the report, it is observed :

"If the matter had stood without the provisos to Sub-section (2) of Section 24, the result would have been that by reason of the deeming provision referred to above the unabsorbed depreciation allowance of the preceding years was liable to be regarded as

part of the 'depre-dation allow-ance for the assessment year in question and the loss arising as a result thereof was liable to be dealt with under the provisions of Section 24(1) to the extent that effect could be given thereto.....The legislature has thus provided that the type of loss which could be carried forward for a limited number of years under Section 24(2) should first be set off before the amount of unabsorbed depreciation allowance of previous years is not set off under Section 24(1). It is to carry out this intention that the legislature has stated in proviso (b) to Section 10(2)(vi) that the deeming provisions will apply 'subject to the provisions of Clause (b) of the proviso to Sub-section (2) of Section 24'."

19. The Gujarat High Court also pointed out that the decision of the Calcutta High Court in *Jaipuria China Clay Mines Private Ltd. v. CIT* ⁸ which was subsequently affirmed by the Supreme Court in *CIT v. Jaipuria China Clay Mines (P.) Ltd.*) supported the view taken by it.

20. In *CIT v. Gujarat State Warehousing Corporation* , the Gujarat High Court pointed out that in *Aluminium Corporation of India Ltd. v. CIT* [1958] 33 ITR 367(Supra), the Calcutta High Court had in terms observed that there could be no competition as between the losses carried forward from the previous years and the depreciation of the accounting year for which depreciation allowance was due because in any year ascertained profits of the current year and depreciation allowance would in any case have to be set off against profits first. The Gujarat High Court also pointed out that in *Ravi Industries'* case [1963] 49 ITR 145, the Bombay High Court held that before the carried forward part of the depreciation allowance is allowed to be adjusted, the carried forward business losses will be first absorbed against the profits and gains of the business. Except for this distinction between the carried forward part of the allowance and the current depreciation, there is no other distinction between them.

21. It is true as Mr. Parvatha Rao appearing for the assessee before us has emphasized that, according to the decision of the Supreme Court in *CIT v. Teja Singh* , it is a rule of interpretation well settled that in construing the scope of a legal fiction it would be proper and even necessary to assume all those facts on which alone the fiction can operate. The Supreme Court pointed out citing the observations of Lord Asquith in *East End Dwellings Co. Ltd. v. Finsbury Borough Council*⁹ that when the statute says that you must imagine a certain state of affairs, it does not say, that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs.

22. These observations were re-affirmed by the Supreme Court in *Addl. ITO v. E. Alfred* . But, because the deeming fiction under Section 32(2) says that unabsorbed depreciation of previous years shall be deemed to be the current year's depreciation and is subject to the operation of Section 72(2), the whole question requires careful consideration and the very deeming fiction having been made subject to the operation of Section 72, we have to examine under what circumstances the deeming fiction can be allowed to operate. Normally, the stage of considering

unabsorbed depreciation would only arise for consideration after the computation of current year's business income is over. It is only then the question of unabsorbed depreciation allowance would arise and unabsorbed depreciation of previous year has to yield place to carried forward business losses for set off against the net profit from the current year's business activities ascertained after allowing depreciation for the current year.

23. For the reasons stated by the Gujarat High Court in CIT v. Gujarat State Warehousing Corporation and for the reasons which we have hereinabove set out, we hold that there is no question of setting off carried forward business losses against the current year's revenue income (revenue income being defined in the manner as defined above). First, computation of current year's income must be made in accordance with the provisions of Sections 30 to 43A. Section 32(1) is one of those Sections and it is only Section 32(2) which yields place to Section 72(2) and not Section 32(1), and that being the case, in computing current year's income, current year's depreciation must first be allowed and thereafter the business losses carried forward from the previous year. We respectfully disagree with the conclusion of the Allahabad High Court in Mother India Refrigeration Industries' case .

24. Under these circumstances, we answer the question referred to us as follows :
The business losses carried forward from the previous years cannot receive priority over the current depreciation allowance.

25. We, therefore, answer the question, viz. :

"Whether, on the facts and in the circumstances of the case, the business loss carried forward from the previous years should receive priority over the current depreciation allowance for the assessment year 1970-71 ?" in the negative, i.e., in favour of the revenue and against the assessee.

26. The assessee will pay the costs of this reference to the Commissioner. Advocate's fee Rs. 250.

Cases Referred.

- 1[1958] 33 ITR 367
- 2[1966] 59 ITR 555
- 3[1963] 49 ITR 145
- 4[1952] 22 ITR 58
- 5[1963] 49 ITR 145 (Bom)
- 6 [1964] 51 ITR 693
- 7[1964] 51 ITR 178
- 8[1962] 46 ITR 707
- 9[1952] AC 109 (HL)