ANDHRA PRADESH HIGH COURT

Commissioner of Income-Tax

Vs

Srinivasa Sugar Factory

(B.J Reddy,CJ. Y.Bhaskar Rao, J.)

12.03.1988

JUDGMENT

Y.Bhaskar Rao, J.

1. In these two references made under section 256 (1) of the Income-tax Act, 1961, the question that arises for our decision is common, namely :

> "Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in directing that the unabsorbed depreciation not set-off in the partners' respective accounts in the earlier year should be given set-off against the income of the assessee-firm in the subsequent assessment year ?"

2. The facts being common to both the references, we shall narrate in brief as stated in R.C. No. 202 of 1983. The assessee is a registered firm. The assessee filed a return for the assessment year 1977-78 declaring an income of Rs. 75,010. In the footnote of the statement, the assessee-firm claimed set off of carried for ward depreciation of earlier year amounting to Rs. 97,175. The Income-tax Officer did not admit the above claim. On appeal, therefore, by the assessee, the Appellate Commissioner permitted the setting off of the unabsorbed depreciation of the previous year. Aggrieved by that, the Department filed second appeal before the Appellate Tribunal. The Appellate Tribunal observed that the unabsorbed depreciation of the registered firm for the preceding assessment year allocated to the partners, if not wholly set-off in their respective assessments, should be brought back for computation of the total income of the firm in the subsequent years as if it were the firm's unabsorbed depreciation, and thus upheld the order of the Appellate Assistant Commissioner. As there are conflicting views on the question expressed by different High Courts, the present references are made.

3. Learned counsel for the Revenue submitted that the assessee being the partnership firm, if full effect could not be given to the unabsorbed depreciation of the previous year owing to there being no profits or gains chargeable for the previous year, or owing to the profits or gains chargeable being less than the allowance, then, the said unabsorbed depreciation will be made over to the partners' accounts for being given effect to in their assessments. In the assessments of the partners, if full effect could not be given to the said unabsorbed depreciation, the same will be carried forward to the next succeeding years for being absorbed in the accounts of the partners

only. But the same, learned counsel contended, cannot be brought back for purposes of assessment of the firm's income in the next succeeding year as there is no provision in the Act permitting such a bringing back.

4. Learned counsel for the assessee, Mr. Ratnakar, on the other hand, contended that when full effect could not be given to set-off the unabsorbed depreciation of the previous year, owing to there being no profits or gains chargeable for the previous'year, or owing to the profits or gains chargeable being less than the allowance of the firm, the said unabsorbed depreciation has to be made over to the accounts of the partners for purposes of computation of their income. Even then, if full effect could not be given to the made over unabsorbed depreciation in their assessments, the same has got to be brought back for purposes of computation of the firm's assessment for the next succeeding year and so on. Learned counsel also submitted that there is no bar in section 32 or in any other provision of the Act for such a bringing back of the unabsorbed depreciation for purposes of computation of the firm's assessment in the succeeding year and so on.

5. It is pertinent at this juncture to notice that the assessment of a firm's is done as per the procedure laid down in section 182 of the Act. Firstly, the total income of the firm shall be determined and on that the tax assessed. Thereafter, the share of each partner in the income of the firm shall be made over to his total income and assessed to tax accordingly. If such a share of the partner happens to be "less", it will be given set-off against his other income in that year or carried forward and given set-off in the succeeding years as per the provisions of sections 70 to 75 of the Act.

6. Section 28 of the Act prescribes the income chargeable to income-tax under the head "Profits and gains of business or profession." Section 29 of the Act prescribes the mode of computation of profits and gains. Sections 30 to 38 of the Act prescribe the deductions to be given in the assessment while computing the profits and gains of the business. However, in the instant case, we are only concerned with the deduction in respect of depreciation as contemplated by section 32(2) of the Act.

7. In order to appreciate the rival contentions, it is necessary to set out here the relevant provisions of the Income-tax Act as in force from time to time before the 1953 amendment, after the 1953 amendment and after the 1961 Act came into force. Deductions permissible to an assessee for purposes of computation of profits and gains of business, profession or vocation were contained in section 10 of the Indian Income-tax Act, 1922. Section 10(2)(vi)(b) was the relevant provision which permitted the benefit of carry-forward and set-off of unabsorbed depreciation. Before the amendment was incorporated in the said clause in 1953, it read as under :

> "(b) where, full effect cannot be given to any such allowance in any year not being a year which ended prior to the 1st day of April, 1939, 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."

8. By section 8 of the Indian Income-tax (Amendment) Act, 1953, which came into force from April 1, 1952, an amendment was made in the aforesaid clause. After the amendment, the said clause read as under :

"(b) where, in the assessment of the assessee or if the assessee is a registered firm, in the assessment of its partners, full effect cannot be given to any such allowance in any year not being a year which ended prior to the 1st day of April, 1939, 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."

9. The relevant provision now to be found in the 1961 Act is contained in section 32 (2) which reads as under :

" (2) Where, in the assessment of the assessee (or, if the assessee is a registered firm or an unregistered firm assessed as a registered firm, in the assessment of its partners), 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 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."

10. It is, thus, seen that right from 1922 to 1961, the provision contemplated addition of the unabsorbed depreciation of the previous year to the allowance for depreciation for the succeeding years. As regards the importance or implication of this contemplated addition, we shall make a reference a little later. It needs to be pointed out here that before the amendment made in 1953, the benefit of carrying forward and setting off of depreciation allowance was permissible in case of firms as well as partners. However, by the amendment made in 1953, a firm was prevented from claiming benefit again of depreciation allowance which is fully effected in the assessment of its partners. As noted supra, section 32 (2) of the 1961 Act provides for carrying forward of the unabsorbed depreciation of the previous year to the succeeding previous years for purposes of computation of the income of the firm. This provision, however, is subject to section 72(2) and 73(3) of the Act. It is to be borne in mind that there is a material omission of reference to section 75 of the Act in section 32 (2), more so, in the face of specific reference therein to sections 72(2) and 73(3) of the Act. This omission, Mr. Ratnakar submits, is deliberate and very much intended by the Legislature, particularly when section 182(2) governing the set-off or carried forward of

the share of a partner in the losses of the firm is specific in making a reference to the provisions of sections 70 to 75 of the Act. We find sufficient force in this submission of learned counsel. The specific reference to sections 70 to 75 of the Act in section 182(2) and the material absence of reference to section 75 in section 32(2) of the Act, constitute a departure and, therefore, the bounds of operation of the respective provisions would necessarily differ. The crucial provision, section 75 of the Act, authorises apportionment of the losses of the firm which cannot be set-off against any other income of the firm among the partners of the firm and specifies them alone to be entitled to have the remainder amount of the loss carried forward and set-off under sections 70, 71, 72, 73, 74 and 74A of the Act. Sub-section (2) of section 75 further disables the firm to have its loss carried forward and set-off. Conspicuously enough, section 75 does not control the operation of section 32(2) even if we accede to the contention that depreciation is a component of "business loss". It is apposite at this stage to have a look at the decision in IN RE Stock and Share Auction and Banking Company [1894] 1 Ch D 736, wherein it was held that where section after section of an Act relating to the winding up of the companies was limited to winding up by the court, the absence of any such limitation in another section which contained the provisions as to procedure "if the winding up of a company is not concluded within one year after its commencement" indicated an intention on the part of the Legislature that the latter action should apply also to cases of voluntary winding-up. Further, the omission to make a reference to section 75 in section 32 (2) cannot be supplied by the courts under the guise of interpretation. The Supreme Court in CST v. Parson Tools and Plants , held in page 1043 thus :

> "If the Legislature wilfully omits to incorporate something of an analogous law in a subsequent statute, or even if there is a casus omissus in a statute, the language of which is otherwise plain and unambiguous, the court is not competent to supply the omission by engrafting on it or introducing in it, under the guise of interpretation, by analogy or implication, something which it thinks to be a general principle of justice and equity. To do so, would be entrenching upon the preserves of the Legislature, the primary function of a court of law being jus dicere and not jus dare."

11. In this view of the matter, as submitted by learned counsel for the assessee, since reference to section 75 is conspicuous by its absence in section 32 (2), though sections 72 (2) and 73 (3) have been mentioned, the normal provisions relating to carry forward and set-off the unabsorbed depreciation have to operate in the instant matters.

12. According to sub-section (2) of section 32, that part of the depreciation allowance of the firm which is not fully effected in its partners' assessments is to be added to the amount of allowance for depreciation claimed by a firm 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. We do not find any reason to deprive the firm of the legal benefit to which it is entitled under sub-section (2) of section 32.

13. One more factor, as noted supra, worthy of being taken note of is the implication or importance of the addition contemplated by section 32 (2) of the unabsorbed depreciation of the previous year to the amount of allowance for depreciation for the following previous year. The depreciation contemplated by section 32 is in respect of buildings, machinery, plant, furniture and ships. It is not beyond the realm of common sense that only inanimate objects like those noted above suffer depreciation calling for a written down value, and there does never arise the

question of an animate object like a partner suffering the allowance of depreciation. As a mere logical sequence, it necessarily follows that "the amount of the allowance for depreciation for the following previous year" to which the unabsorbed depreciation is directed to be added is as against the inanimate objects like buildings, machinery, plant or furniture owned by the firm. Testing it from a different angle, had the Legislature intended that the remainder of the unabsorbed depreciation of the previous year after assessment of the partners' income cannot be brought back to the succeeding previous year for assessment of the income of the firm, there is absolutely no need to recall the allowance or part of the allowance to which effect has not been given even after operation of sections 72(2) and 73(3) for being added to the amount of the allowance for depreciation for the following previous year and so on. Thus, viewed from either angle, the only possible construction that could legally be given to section 32(2) is that the provisions after having undergone the subservience of sections 72(2) and 73(3), the allowance or part of the allowance to which effect has not been given, i.e., unabsorbed depreciation of the previous year, shall have to be added to the amount of the depreciation for the following previous year and deemed to be part of that allowance, etc. Mention is very much necessary here that in case the unabsorbed depreciation could not be given full effect in the following previous year also, the section contemplates a cycling rotation of its operation, namely, by undergoing again and again the subservience of sections 72 (2) and 73 (3). Thus section 32 (2) is a self-equipped mechanism of its own.

14. As noted in the opening paragraph of this judgment, the reason that gave rise to the instant references is the difference of opinion expressed on the present question by the Madras, Bombay and Gauhati High Courts in one way and the Gujarat, Madhya Pradesh and Allahabad High Courts in a contrary way.

15. In CIT v. Madras Wire Products , as in the present one, the question was whether the unabsorbed depreciation of the registered firm for the previous year should be set-off against its income for the following previous year to the extent that it was not adjusted in the assessment of its partners for the previous year. The Madras High Court answered the question in the affirmative and in favour of the registered firm. In this, the Madras High Court followed its earlier decisions in CIT v. Nagapatinam Import and Export Corporation and in CIT v. Madras Wire Products . It is to be noted that to the same effect is the decision of the Nagpur Bench of the Bombay High Court in Ballarpur Collieries Co. v. CIT . The Gauhati High Court also in CIT v. Singh Transport Co. held that the unabsorbed depreciation of a registered firm for the preceding assessment years allocated to the partners, not wholly set-off in their respective assessments, should be brought back for computation of the total income of the firm in the subsequent years, as if it were the firm's unabsorbed depreciation.

16. The Gujarat High Court, however, in CIT v. Garden Silk Weaving Factory , took a contra view holding that in respect of the unabsorbed depreciation allowance, if it could not be given full effect in the assessments of the individual partners, the remainder cannot be brought back and set off against the firm's business income. It opined that depreciation allowance is to be given the same treatment as business loss on its allocation to the partners. The Allahabad High Court also in K. T. Wire Products v. Union of India , held that in the case of a registered firm, when once the net loss including depreciation allowance, if any, is allocated to the partners, they alone are entitled to set off the loss in their individual assessments and to carry forward the remainder. The Gujarat High Court again in Garden Silk Weaving Factory v. CIT , by following its earlier

decision in CIT v. Garden Silk Weaving Factory , took the same view. To similar effect is the decision of the Karnataka High Court in Sankaranarayana Construction Co. v. CIT . The decision of the Madhya Pradesh High Court in Kalani Udhyog v. ITO , is one in relation to the losses allocated to the partners and governed by section 75(1) of the Act. No doubt, the decision is against the registered firm.

17. The Delhi High Court in CIT v. J. Patel and Co. , had an occasion to consider the instant question at great length and in depth by referring to several decisions cited supra taking divergent views. It has mainly relied upon the decision of the Supreme Court in CIT v. Jaipuria China Clay Mines (Pvt.) Ltd. . Their Lordships of the Supreme Court observed (at page 561) as under :

> "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."

18. It is worth noting that section 75 of the Act of 1961 embodies the provisions of the second proviso, latter half, to section 24(1) and earlier part of proviso (c) to section 24 (2) of the Act of 1922. There has been no change of law in the Act of 1961, as against the Act of 1922, so far as the carry forward and set-off of depreciation allowance in the case of a registered firm is concerned and the only change that has been brought about is with regard to carry forward and set off of speculation loss of registered firms. The Delhi High Court explained the decision of the Allahabad High Court in K. T. Wire Products v. Union of India by saying that the material observations made therein make it patent that in the case before the Allahabad High Court, the question of the distinct character of the allowance of unabsorbed depreciation as compared to the other business losses was not argued and the case went on the assumption that the unabsorbed depreciation and business loss stood on the same footing so far as the question of carry forward and set-off was concerned.

19. Referring to the decision of the Gujarat High Court in CIT v. Garden Silk Weaving Factory , the Delhi High Court commented that full regard was not given to the language of section 32 (2) as there was no discussion as to how the latter part of section 32 (2) fits in with the interpretation given by the Allahabad High Court to section 32 (2). Having thus dealt with the different decisions rendered by the Supreme Court and High Courts, the Delhi High Court laid down the law as under (headnote of 149 ITR 682) :"A registered firm is entitled to the benefit of carry forward of unabsorbed depreciation for adjustment against the income of the succeeding year.
A registered firm is a separate and distinct entity under the Income-tax Act, 1961. Further,

depreciation is allowed in the case of a firm on account of the firm owning the building, plant or machinery on which the same is allowed. Thus, the benefit of unabsorbed depreciation for purposes of set-off in the following years has to go to the firm itself and not the partners. In fact, section 32 (2) of the Act is a complete code by itself. According to that provision, the unabsorbed depreciation has to be added to the amount of the allowance for depreciation for the following previous years and is to be deemed to be a part of that allowance for those years. Section 32 (2) speaks of addition of unabsorbed depreciation in the next previous year. The only proper interpretation to be placed on the provision is that it is to be added in the hands of the same assessee, i.e., the firm, which only can get depreciation allowance on that asset, the partners being persons different from the assessee-firm. The words that the carried forward depreciation has to be 'deemed to be part of' depreciation allowance of the following year also suggest that the same is to be set-off in the following year in the hands of the same assessee, i.e., the firm itself and not the partners thereof. Thus, the literal interpretation of section 32 (2) also leads to the conclusion that unabsorbed depreciation in the case of a firm is allowed to be carried forward by the firm and set-off against its profits in the following year or years.Section 75 is applicable only in respect of business losses or losses in speculation business and cannot be applicable to the carry forward and set-off of depreciation allowance. A perusal of the relevant provisions of the Act and in particular the provisions of sections 32(2), 72, 73 and 75 clearly show that the manner of carry forward and set-off of depreciation allowance is distinct and b2 separate and is governed exclusively by section 32(2) of the Act."

19. At this stage, learned standing counsel for the Revenue sought to urge that a later decision of the Supreme Court in CIT v. J. K. Hosiery Factory makes it clinching that it is only an unregistered firm that is entitled to the carry forward and set-off the benefit, and not a registered firm. The firm before the Supreme Court was an unregistered one in the assessment year 1949-50, the unabsorbed depreciation then being about Rs. 44,000. The firm got itself registered in the next year and made a claim to set-off the unabsorbed depreciation of the previous assessment year 1949-50. The Supreme Court held that the entity was the same firm and by registration, the firm got certain additional qualifications and put upon itself certain additional burden. It also observed that the Indian Income-tax Act, 1922, did not indicate any intention to deprive the firm subsequently registered of its right to carry forward the unabsorbed depreciation. So observing, the Supreme Court allowed the claim of the firm to carry forward and set-off. However, learned standing counsel drew our attention to the distinction made by the Supreme Court in the context of its reference to the observations of the Allahabad High Court in the case of K. T. Wire Products to the effect that in the case of all assessees other than registered firms, the losses could be carried forward and set off against the business profits of the succeeding year, where-as in the case of registered firms, the net loss, including depreciation allowance once allocated to the partners shall be absorbed in their individual assessments only as per sections 32 (2) and 75 (2) of the Act. Patently, the context involved before the Supreme Court was in the matter of distinguishing the absorption of losses between the assessees other than registered firms and registered firms. The Supreme Court was not considering the question of carrying forward of the remainder unabsorbed depreciation in the hands of partners back to the registered firm. On the other hand, the question before the Supreme Court was that when there is unabsorbed depreciation in an assessment year of an unregistered firm which gets registered immediately in the succeeding year, whether such unabsorbed depreciation can be carried forward to the assessment of the same firm after its registration. Thus, this decision has its own context and we are afraid of divorcing it from that for purposes of following it as an authority as one containing a

full exposition of the law on the instant question. We are not convinced that the scope and authority of this decision shall have to be expanded so as to accede to the submission of learned counsel that the benefit of carry forward and set-off is not available to a registered firm. In this behalf, we are fortified in our view by the decisions of the Supreme Court in *Prakash Amichand Shah v. State of Gujarat, and Madhav Rao Jivaji Rao Scindia v. Union of India*, , laying down the principles as regards the binding nature of precedents. It is interesting to notice that in this very decision, the Supreme Court, while referring to certain observations of the Bombay High Court in CIT v. Estate and Finance Ltd. , went to the extent of holding that the provisions of section 32(2) for the purpose of setting off unabsorbed depreciation carried forward from a preceding year, it was not necessary that the business in respect of which the depreciation allowance was originally worked out should remain in existence in such succeeding year inasmuch as the Legislature had not imposed any such condition.

20. It is lastly urged by learned counsel for the Revenue that the business loss of the firm and the depreciation allowance both merit equal and identical treatment in regard to their absorption and they cannot be discriminated against in the matter of their carrying forward and setting off. Therefore, once the unabsorbed depreciation vests in the hands of partners by operation of section 71, the same cannot be brought back and carried forward to the firm's assessment inasmuch as the amount has got to be absorbed only by the mechanism of section 72 in the assessments of the partners exclusively. Mr. Ratnakar, on the other hand, contended that section 32(2) is a self-contained code by itself, exclusively dealing with the allowance of depreciation not being commanded by the subservience of section 75 and, therefore, the business loss and the depreciation allowance command different fields governed by the respective provisions; In this regard, learned counsel drew our attention to a decision of the Calcutta High Court in Universal Cargo Carriers Inc. v. CIT wherein it is held (headnote) :

> "Business loss as contemplated in section 72 of the Income-tax Act, 1961, is the net result of a particular commutation under the head 'Profits and gains of business'. On such computation, business loss in a particular year is determined which thereafter can be carried forward.So far as depreciation is concerned, the Act provides for compensation of the same by an allowance. Such allowance by itself is not a loss but if it cannot be absorbed in a particular year against business income, then it is carried forward as unabsorbed depreciation allowance under section 32(2). This unabsorbed depreciation allowance does not enter into the computation of the business loss of the assessee in that particular year.On a strict reading of section 72, it cannot be said that unabsorbed depreciation allowance of an assessee is a business loss, particularly as it does not enter into the computation contemplated under the said section."

21. Thus, a clear distinction is drawn between unabsorbed depreciation and business loss. There are two distinct sections dealing with these two items. Unabsorbed business loss is carried forward and set-off against the assessments of the partners exclusively by virtue of section 72, and that too, only for a period of eight assessment years immediately succeeding the assessment year for which the loss was first computed. So far as the unabsorbed depreciation is concerned, it is on a different footing. Under section 32(2), unabsorbed depreciation is to be added to the amount of depreciation allowance of the firm for the subsequent year and deemed to be part of the depreciation of the subsequent year. It can be carried forward indefinitely. Further, section 75(2) bars only the carrying forward of the losses of the registered firm once they are

apportioned among the partners again to the firm back, whereas, there is no such bar as regards the depreciation allowance since section 32(2) is not subjected to the operation of section 75, though it is specifically subjected to the operation of sections 72 (2) and 73 (3). One more distinction to be noticed is that while the business loss inherently takes within it the feature of outgoings, the depreciation allowance is not an actual outgoing. In this view of the matter, we cannot accede to the contention of learned counsel for the Revenue that the business losses as also the depreciation allowance merit the same and identical treatment as regards their absorption.

22. In view of the foregoing reasons, we hold that in cases where, in the assessment of the registered firm, full effect could not be given to the depreciation allowance in any previous year owing to the reasons stated in section 32 (2), then, subject to the operation of sections 72 (2) and 73 (3), the remainder of the unabsorbed depreciation in the hands of the partners shall be brought back and carried forward in the assessment of the firm for the following previous year and this operation shall go on rotating in its cycling as per the mechanism of section 32(2) of the Act. The question framed is accordingly answered in the affirmative and in favour of the assessee-registered firm. No costs.

Jeevan Reddy, J.

23. I agree with my learned brother, Y. Bhaskar Rao J. that the question referred must be answered in the affirmative. But having regard to the importance of the question on which there is a sharp division of opinion among the High Courts in the country, I wish to add a few words. The question referred is set out in the order of my learned brother.

24. For the assessment year 1977-78, the assessee, a partnership firm, filed a return declaring an income of Rs. 75,010. In the footnote to the statement, the assessee claimed to set off the unabsorbed depreciation carried forward from the previous assessment year, amounting to Rs. 97,175. The assessee relied upon the decision of the Bombay High Court in Ballarpur Collieries Co. v. CIT . The Income-tax Officer refused to allow the said plea of set-off, observing that the decision of the Bombay High Court was not followed by other High Courts, and has also not been accepted by the Department. On appeal, the assessee relied upon two more decisions of the Madras and Gauhati High Courts reported in CIT v. Nagapatinam Import and Export Corporation and CIT v. Singh Transport Co. , respectively, in addition to the judgment of the Bombay High Court in support of its contention. Following these decisions, the Appellate Assistant Commissioner allowed the appeal and directed the Income-tax Officer to give set-off to the carried forward unabsorbed depreciation before arriving at the income of the assessee. The Department preferred an appeal to the Tribunal. The Tribunal affirmed the view taken by the first appellate authority and dismissed the appeal, whereupon the Revenue applied for, and obtained the present reference. The circumstances in which the question arises are the following :

25. For the previous assessment year, full effect could not be given in the assessment of the assessee to the depreciation allowance which it was entitled to under section 32 (1). Accordingly, it was allocated to the partners in their individual assessments in proportion to their shares. Still, the depreciation could not be fully absorbed and, therefore, for the assessment year concerned herein, the firm sought to carry forward and add the same to the depreciation allowance permissible during this assessment year. This the Income-tax Officer did not allow on the plea

that since the unabsorbed depreciation has been allocated to the partners and given effect to, in their individual assessments, during the previous assessment year, it is not open to the firm to bring it back to its assessment during this assessment year and claim it as unabsorbed depreciation. His view was that once allocated to the individual assessments of the partners, it should be given effect to in their assessments only, and cannot be brought back to the firm's assessment. The question is whether the assessee-firm is entitled to do so, as claimed by it.

26. It would be appropriate to notice the relevant provisions of law in the first instance, as they stood during the relevant assessment year. Sub-section (1) of section 32 provides for depreciation on buildings, machinery, plant and furniture owned by the assessee and used for the purpose of business or profession carried on by him. Sub-section (2), which is the most relevant provision in this behalf, reads as follows :

> "(2) Where, in the assessment of the assessee (or, if the assessee is a registered firm or an unregistered firm assessed as a registered firm, in the assessment of its partners) 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 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."

27 Analysed properly, the sub-section provides for two situations : (i) where, in the assessment of an assessee, full effect cannot be given to any allowance under certain specified clauses in sub-sections (1) and (1A) of section 32, in any previous year, owing to there being no profits or gains chargeable for that previous year, or for the reason that the profits or gains chargeable are less than the allowance permissible, then, subject to the provisions of section 72 (2) and section 73 (3), the allowance or part of the allowance to which effect has not been given, shall be added to the amount of the allowance for depreciation for the following previous year and deemed to be part of that allowance. It further provides that in case there is no such allowance for the following previous year, the carried forward allowance shall be deemed to be the allowance for that year, and so on for the succeeding previous years; (ii) where the assessee is a registered firm, or an unregistered firm assessed as a registered firm, full effect cannot be given to any allowance under the specified sub-clauses in sub-sections (1) and (1A) of section 32 in the assessment of the assessee and in the assessment of its partners, for the reason that there are no profits or gains chargeable for that previous year, or for the reason that profits or gains chargeable are less than the allowance, then, subject to the provisions of section 72 (2) and section 73 (3), the allowance or part of the allowance to which effect has not been given, shall be added to the amount of allowance for depreciation for the following previous year, and deemed to be part of that allowance. It is further provided that if there is no such allowance for that following previous year, the carried forward allowance shall be deemed to be the allowance for that previous year, and so on for the succeeding previous years. I have split up sub-section (2) into two clauses for the sake of felicity and to, avoid confusion; otherwise, the rule contained in sub-section (2) is the

same. Only its application differs where the assessee is a registered firm or an unregistered firm assessed as a registered firm. In other words, in the case of a registered firm, or an unregistered firm assessed as a registered firm, the allowance has to be given effect to not only in the assessment of the assessee (firm) but also in the assessment of its partners, and if full effect cannot still be given to the allowance, it has to be carried forward and added to the allowance admissible for the following previous year, and so on. Though it is not necessary to so, for the purpose of this case, it appears to me logical to say that even in the following previous year, the same process has to be applied, viz., the allowance has to be given effect to-both in the assessment of the firm and also in the individual assessments of its partners, and so on. This is a special provision made by Parliament for carrying forward the unabsorbed depreciation. The rule in sub-section (2) of section 32 applies only in the case of certain specified types of depreciation and not to all types of depreciation. Indeed, if one were to look to sub-section (2) of section 32 alone, there would be no room for any confusion or doubt. Confusion or doubt has arisen, because the provisions of sections 70 to 80 relating to set off or carrying forward and set off of losses are sought to be mixed up with the provision in section 32 (2).

28. Now, I shall refer to the relevant provisions in sections 70 to 80. Section 70 provides that where the net result for any assessment year in respect of any source falling under any head of income (other than "Capital gains") is a loss, the assessee shall be entitled to have the amount of such loss set off against its income from any other source under the same head. Section 71 provides that 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 Chapter VI, 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.

29. Section 72 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, subject to the other provisions of Chapter VI, shall be carried forward to the following assessment year and set off against the profits and gains of that following assessment year, provided that the business or profession for which the loss was incurred continues to be carried on in the previous year relevant to the following assessment year. It provides for carrying forward the loss year after year, up to a period of eight assessment years. Sub-section (2) of section 72 ought to be noticed, since it is one of the provisions referred to in sub-section (2) of section 32. The application of the rule contained in section 32(2) is made subject to section 72(2) and section 73(3). Sub-section (2) of section 72 says :

> "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".

29. Section 73 deals with losses in speculation business and provides that any loss suffered in a speculation business shall not be set off except against profits and gains, if any, of another speculation business and its carrying forward to the following assessment year. Sub-section (3) of this section provides that in respect of allowance on account of depreciation the provisions of

sub-section (2) of section 72 shall apply in relation to speculation business as they apply to any other business.

31. Section 74 deals with losses incurred under the head "Capital gains" and how that loss shall be dealt with and carried forward.

32. Section 74A deals with losses incurred from certain specified sources falling under the head "Income from other sources", like lotteries, cross-word puzzles, races including horse races, etc.; it need not be noticed for the present purpose.

33. Section 75 deals with losses incurred by registered firms. It provides that where the assessee is a registered firm, any loss which cannot be set off against any other income of the firm shall be apportioned between the partners of the firm, and that 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. It would be appropriate to set out section 75 in full. It reads :

"75. (1) Where the assessee is a registered firm, 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.

(2) Nothing contained in sub-section (1) of section 72, sub-section (2) of section 73, sub-section (1) of section 74 or sub-section (3) of section 74A shall entitle any assessee, being a registered firm, to have its loss carried forward and set off under the provisions of the aforesaid sections."

34. Section 76 deals with losses of unregistered firms assessed as registered firms; it says that the rule applicable to registered firms shall apply equally in this case. Section 77 deals with losses of unregistered firms or their partners. It provides that the loss incurred by an unregistered firm shall be set off or carried forward and set off only against the income of the firm. It is not necessary to notice the remaining provisions in sections 78 to 80.

35. Now, the contention of Sri M. Suryanarayana Murthy, learned standing counsel for Revenue, is this : The loss referred to in sections 70 to 80 is the loss arrived at after giving effect to all the allowances permissible in law, in the case of business income, including the depreciation allowance provided by section 32 (1); in the case of a registered firm or an unregistered firm which is assessed as a registered firm, if the loss suffered by it cannot be set off against the other income of the firm, it shall have to be apportioned between the partners of the firm, and the partners of the firm alone are entitled to have the amount of loss set off and carried forward for set off, in accordance with sections 70 to 74A; indeed, sub-section (2) expressly declares that nothing contained in sections 72 (1), 73 (2), 74 (1) or 74A (3) shall entitle any assessee, being a registered firm, to have Its loss carried forward and set off under the provisions of the aforesaid sections, which means that a registered firm cannot carry forward its loss for set off to the following previous year; the carrying forward has to be done only by the partners in their individual assessments; a registered firm is entitled to set off the losses suffered by it against its other income during that particular assessment year alone; but there is no question of its carrying forward the losses to the following assessment year; in such a situation, and particularly because the depreciation allowance is also taken into account while arriving at the loss or profit of a

business, there cannot be two rules, one for the overall loss and another for unabsorbed depreciation, which is really a component of the loss.

36. On the other hand, the contention of learned counsel for the assessee, Sri Y. Ratnakar, is that Parliament has thought it fit to provide a separate rule for set off, and carrying forward for set off, of depreciation/ unabsorbed depreciation, and that it alone is relevant and should be given effect to in the case of depreciation/unabsorbed depreciation. So far as depreciation or unabsorbed depreciation is concerned, learned counsel contends, one should not look to the provisions in sections 70 to 80, except in so far as sub-section (2) of section 32 itself imports them into it.

37. In my opinion, having regard to the provisions referred to above, the contention urged by learned counsel for the assessee should prevail. The rule contained in section 75 is a rule of general application, applicable to carrying forward of losses in the case of registered firms. But, so far as depreciation of the kind referred to in sub-section (2) of section 32 is concerned, the special rule contained in that sub-section alone should be applied, both for the purpose of set off during the relevant assessment year, and also in the matter of carrying forward the unabsorbed depreciation for set off to the following previous years. We are unable to see any impossibility or impracticability in giving effect to both the rules. It may be that it would be an involved process; but that is what Parliament has said. In other words, in the case of a registered firm or an unregistered firm assessed as a registered firm, the depreciation allowance of the kind mentioned in sub-section (2) of section 32 shall first be given effect to in the assessment of the firm, as well as in the assessments of its partners, and if full effect cannot be given to the allowance, the unabsorbed depreciation shall be carried forward to the following previous year and added to the allowance permissible for that following year. The total allowance so calculated shall be given effect to both in the assessment of the firm as well as in the assessments of its partners again and so on, if necessary. So far as the carrying forward of unabsorbed depreciation of the kind mentioned in sub-section (2) of section 32 is concerned, the rule contained in section 75 has no application. This, in my view, represents the correct understanding of the relevant provisions, and I have arrived at this conclusion by reading the relevant provisions harmoniously, giving effect to each of them.

38. For the above reasons, I agree with the decisions in Ballarpur Collieries Co. v. CIT ; CIT v. Nagapatinam Import Export Corporation ; CIT v. Madras Wire Products ; CIT v. Madras Wire Products ; CIT v. Singh Transport Company and CIT v. J. Patel Company . For the same reasons, I am in respectful disagreement with the decisions of the Gujarat High Court in CIT v. Garden Silk Weaving Factory and Garden Silk Weaving Factory v. CIT of the Madhya Pradesh High Court in Kalani Udyog v. ITO , of the Allahabad High Court in K. T. Wire Products v. Union of India and of the Karnataka High Court in Sankaranarayana Construction Company v. CIT . It is not, however, necessary to deal with the facts and principles of each of the above decisions, since broadly the High Courts with which I have agreed, have affirmed the approach and the conclusion arrived at by me, while the others have taken a contrary view.

39. Before parting with this case, I must refer to the contention of learned standing counsel for the Revenue that the decision of the Supreme Court in CIT v. J. K. Hosiery Factory has the effect of approving the decision of the Allahabad High Court in K. T. Wire Products v. Union of India and that, therefore, this court cannot take a view contrary to the one taken by the Allahabad High Court. I have carefully read the paragraph at page 89 of the report which, according to learned

standing counsel, approves the decision of the Allahabad High Court. I do not think that learned counsel is right in his submission, for more than one reason. Firstly, the Supreme Court was not seized with the question which we are considering here, which is evident from the fact that when the decision of the Bombay High Court in Ballarpur Collieries Co. v. CIT was cited, the court said that the observations therein are not relevant for the purpose of that case. Having said that, they set out the substance of the decision of the Allahabad High Court in K. T. Wire Products . A reading of the relevant paragraph shows that the stress was upon the loss, which undoubtedly includes depreciation allowance, and the Supreme Court was referring to the carry forward rule relating to business loss. There are no observations in the said paragraph that the rule applicable to loss as such is equally applicable to unabsorbed depreciation allowance. To repeat, the question with which we are seized was not there before the court. The assessment years concerned in the decision of the Supreme Court were 1949-50 and 1950-51. The assessee was assessed as an unregistered firm for the assessment year 1949-50, but it was granted registration for the succeeding year, i.e., assessment year 1950-51, and the question was whether unabsorbed depreciation of the assessment year 1949-50 could be carried forward and set off in the succeeding assessment year. The Supreme Court held, affirming the decision of the Allahabad High Court, that the firm should be allowed to do so. No other question arose or was considered therein.

40. For the above reasons, I agree with my learned brother that the question referred must be answered in the affirmative, i.e., in favour of the assessee and against the Revenue.