

BOMBAY HIGH COURT

Sahu Rubbers Private Ltd

Vs

Commissioner of Income-Tax

(V Desai, C.J.Y Tambe, J.)

03.08.1962

JUDGMENT

Tambe, J.

1. This is a reference under sub-section (1) of section 66 of the Indian Income-tax Act (hereafter referred to as the Act). We are here concerned with assessment years 1956-57 and 1957-58, the corresponding account years being those ending with 31st August, 1955, and 31st August 1956, respectively. The assessee is private limited company, which at one time was carrying on the business of manufacture time before August 1, 1949, the labour working in the factory made terms of the demands made by the labour. It appears that some certain demands and the Industrial Tribunal had made an award in terms of the demands made by the labour. The assessee anticipating that it would not be profitable to work the factory if those demands were to be satisfied, closed its business on August 1, 1949, and commenced doing the business of importing trimobiles, clocks and cement and deal in those goods. This new business was commenced before the year ended August 31, 1949. In April, 1950, the assessee again re-started its rubber shoes factory, but again closed that business manufacturing business during the assessment years 1950-51 and 1951-52 a total amount of depreciation amounting to Rs. 51,547 (Rs. 13,909 for 1950-51 and Rs. 37,638 for 1951-52) remained unabsorbed during those years and was therefore carried forward. This aforesaid amount of unabsorbed depreciation in respect of the assets used in the shoe manufacturing business was claimed as a deduction by the assessee from the profits of the assessment years 1956-57 and 1957-58. As already stated, the assessee's business of manufacture and sale of rubber shoes was completely stopped within a couple of years after it recommenced in the year 1950. In the accounting years the assessee was dealing only in trimobiles, clocks and cement. The claim of the assessee for deduction of the aforesaid amount of unabsorbed depreciation has been rejected by the income-tax authorities as well as by the Tribunal. On an application made by the assessee, the Tribunal has drawn up the statement of the case and referred to us the following question of law :

"On the facts and in the circumstances of the case, whether the depreciation to which full effect could not be given owing to there being no profits or gains chargeable for years 1950-51 and 1951-52 could either wholly or in part be added to the amount of the allowance for depreciation in the assessment years 1956-57 and 1957-58 and be deemed to be a part of that allowance for those years ?"

2. The question referred to us turns on the construction of the proviso (b) to clause (vi) of sub-section (2) of section 10 of the Act. Mr. Ramaswami, learned counsel for the assessee, contends that even though the assessee was not carrying on the business of manufacture and sale of rubber shoes he was entitled to set off the aforesaid unabsorbed depreciation against the profits and gains of his business for the two assessment years in question. According to Mr. Ramaswami, the continuance of the business is not a condition precedent to entitle the assessee to claim a set-off in respect of the unabsorbed depreciation of previous years. That can be set off, even if the business does not continue, against the profits made by the assessee in the subsequent years. It is his argument that the aforesaid proviso, since its amendment in 1941, is a substantive provision of law and has to be read with a part of the Chapter IV of the Act which deals with deductions and assessment. In support of his contention, he has referred us to the decisions reported in *Ambica Silk Mills Co. Ltd. v. Commissioner of Income-tax*, *Keshavlal Premchand v. Commissioner of Income-tax* and *Aluminium Corporation of India Ltd. v. Commissioner of Income-tax*. We find it difficult to accept the contentions raised by Mr. Ramaswami.

3. Section 10 appears in the Third Chapter, which deals with taxable income. Section 6 enumerates various heads of income and provides that the profits and gains of these heads shall be chargeable to income-tax in the manner laid down in Chapter III. Section 7 deals with computation of income from salaries. Section 8 relates to computation of income from securities. Section 9 relates to computation of income from property; and section 10 relates to computation of profits and gains of business profession and vocation. Material part of section 10 is as follows : "10. (1) The tax shall be payable by an assessee under the head 'profits and gains of business, profession or vocation' in respect of the profits and gains of any business, profession or vocation carried on by him.

(2) Such profits or gains shall be computed after making the following allowances, namely :.....

(iv) in respect of insurance against risk of damage or destruction of buildings, machinery, plant, furniture, stocks or stores, used for the purpose of the business, profession or vocation, the amount of any premium paid;.....

(vi) in respect of depreciation of such buildings, machinery, plant or furniture being the property of the assessee, a sum equivalent.... to such percentage on the original cost thereof to the assessee

as may in any case or class of cases of cases be prescribed and in any other case, to such percentage on the written down value thereof as may in any case or class of cases be prescribed...

Provided that - ...

(b) whether, 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 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 allowance for that year, be deemed to be the allowance for that year, and so on for succeeding years."

4. Section 10 relates to computation of profits and gains of business, profession or vocation carried on by the assessee during the year. Sub-section (2) of this section enumerates certain heads under which certain allowances are deducted from the gross profits and gains of the business. Clause (vi) of sub-section (2) entitles the assessee to get depreciation allowance in respect of such buildings, machinery, plant and furniture used for the purpose of business, profession or vocation by him during that year; proviso (b) to clause (vi) deals with the manner in which the depreciation allowance determined is to be set off against the profits and gains of the assessee. Now, in the first instance, it provides that the amount of depreciation allowance determined in the manner provided in clause (vi) of sub-section (2) is to be set off against the profits of the assessee chargeable in that year. If there are no profits or if the available profits are not sufficient to absorb the amount of depreciation, proviso (b) further provides that such unabsorbed depreciation, allowance is to be included in the depreciation allowance allowable to the assessee in the next year, or if there is no such allowance for that year, then the unabsorbed depreciation of the previous year is to be deemed the depreciation allowance of the year. This provision as to the manner in which the unabsorbed depreciation allowance is to be adjusted leads to the only inference that, for its adjustment in the subsequent year, the business of the assessee must continue. It postulates continuance of that business. If the business does not continue, then no question arise of ascertaining the depreciation allowance allowable for that year in respect of those depreciable assets. Now, when no question arises about the computation of depreciation allowance, the unabsorbed depreciation cannot be added to any depreciation, nor can it be substituted in its place. In our opinion, in order to claim adjustment of unabsorbed depreciation of the previous year in the assessment year, the assessee must establish that his business is continuing. If the business is no more in existence, unabsorbed depreciation cannot thereafter be adjusted in the assessments of future years. Had the intention of the legislature been

to adjust the unabsorbed depreciation allowance against the profits and gains chargeable to tax of the following year or years irrespective of whether that business continues or not, it would have said so. But it has not said so and the reason appears to be obvious. If unabsorbed depreciation in respect of assets of a defunct business is added to the depreciation allowance in respect of a running business of an assessee it would adversely effect the written down value of those assets without there being any depreciation thereof. In *Commissioner of Income-tax v. Dutt's Trust, Calicut* the Madras High Court has held that the assessee was not entitled to set off unabsorbed depreciation of his cinema business discontinued prior to the year of account against the profits of saw mill business of the assessee in the year of account. No decision contrary to the one of the Madras High Court has been pointed out to us by Mr. Ramaswami. It is, however, his contention that the decision no more correctly states the law, inasmuch as proviso (b) has undergone a change by reason of its amendment in 1941 and that makes all the difference. Now, by the amendment in 1941, all that is introduced in proviso (b) is the clause "subject to the provisions of clause (b) of the proviso to sub-section (2) of section 24". We fail to see how any difference has been made by the introduction of this clause in the second proviso. All that has been done by that proviso is to postpone adjustment of the unabsorbed depreciation till adjustment of the previous loss. In other words, as between losses of previous year and the unabsorbed depreciation, priority is given to prior loss; the reason being that if the prior losses are not absorbed within 8 years, the assessee loses the right to get them set off against the profits of the future years. Such, however, is not the case in the case of unabsorbed depreciation allowance which can be adjusted in subsequent years without there being any limitation of time. This is a provision in the interest of the assessee. In the absence of this of this provision the result would have been that by the fiction created in proviso (b) unabsorbed depreciation allowance would become depreciation of the current year and for that reason it would have precedence over the adjustment of the prior losses. It is only to safeguard the interest of the assessee that this clause has been introduced by the amendment. On the language of the proviso (b), in our opinion, it relates to the computation of the profits and gains of business of an assessee and deals with the same subject-matter as is dealt with in clause (vi) of sub-section (2) of section 10 and, therefore, is within the ambit and scope of clause (vi), and is not an independent substantive provision of law. The three decisions on which reliance is placed by Mr. Ramaswami are, in our view, not of any assistance to the assessee. None of them deals with the question of adjustment of unabsorbed depreciation as against the profits of the subsequent years. In *Ambica Silk Mills Co. Ltd. v. Commissioner of Income-tax* the question that arose for decision was whether the depreciation allowance of the current year could be set off against the income from other heads if the income of that particular business was not sufficient to absorb it and it was held that in such a case the amount of depreciation allowance could be adjusted against income from other heads. At page 64, the learned Chief Justice observed :

"In our opinion the only proper interpretation that should be placed upon the expression 'profits or gains' is 'profits or gains, not merely from the particular business in respect of which depreciation is claimed, nor profits or gains from any business conducted by the assessee, but the profits or gains which may accrue or arise to the assessee under any of the heads referred to in section 6'."

5. These observations have no application as to the conditions under which the assessee could claim adjustment of unabsorbed depreciation allowance as against the profits of the subsequent years. In *Keshavlal Premchand v. Commissioner of Income-tax* the question arose as to the construction of the proviso to sub-section (1) of section 24 and it was held that : "It is clear, on the language of the proviso itself and on the scheme of the Act, that the Legislature, in enacting the so-called provision, was enacting a substantive provision dealing with the mode of computing the profits and gains chargeable under the head ' profits (1) and gains of business, profession or vocation', and what the Legislature has provided is that when you compute these profits and gains, the loss sustained in a speculative transaction must not be taken into account except to the extent of the amount of profits and gains, if any, in any other business consisting of a speculative transaction." It is difficult to hold that the proviso (b) to clause (vi) of sub-section (2) of section 10 is a substantive provision of law by reason of the fact that the proviso to sub-section (2) of section 24 is a substantive provision of law. In *Aluminium Corporation of India Ltd. v. Commissioner of Income-tax* the question that arose was whether the prior losses should have precedence before the depreciation allowance of the current year and it was held that the depreciation allowance should be adjusted first before setting off prior losses. No other decision has been referred to us by Mr. Ramaswami.

6. For the reasons stated above, our answer to the question referred to us is in the negative.

7. The assessee shall pay the costs of the department.

Question answered in the negative.

