

BOMBAY HIGH COURT

Commissioner of Income-Tax

Vs

Ravi Industries Ltd

(V. Desai, and Y Tambe, JJ.)

11.09.1962

JUDGMENT

V.S. Desai, J

1. The question raised on this reference concerns the availability of the carried forward unabsorbed depreciation allowance for being set off against the losses of profits and gains under heads other than the head "Business, profession or vocation".

2. The assessee is a limited company. In the assessment year 1957-58, for which the previous year was the calendar year ending on 31st December, 1956, the assessee had an unabsorbed depreciation brought forward from the earlier year in the sum of Rs. 2,01,271. The depreciation for the current year was Rs. 75,594. After deducting the current year's depreciation from the income from business there was a balance of Rs. 24,054 as the business income for the year. The assessee had also property income in the year of account to the extent of Rs. 23,162. The Income-tax Officer set off the business income of Rs. 24,054 against the unabsorbed depreciation and showed the business income as nil for the year. He did not, however, allow the property income to be set off against the unabsorbed depreciation and showed the business income as nil for the year. He did not, however, allow the property income to be set off against the unabsorbed depreciation with the result that he showed the taxable income in the assessment year at Rs. 23,162 and the unabsorbed depreciation to be carried forward at Rs. 1,77,217. The Appellant Assistant Commissioner in the appeal which the assessee preferred, from the decision of the Income-tax Officer, determined the assessee's total income at nil, and worked out the unabsorbed depreciation to be carried forward at Rs. 1,54,055, i.e., he allowed a set-off not only of the business income against the unabsorbed depreciation, but also a set-off of the property income against it. The department went in appeal in Tribunal against the decision of the Appellate Assistant Commissioner. The appeal was dismissed by the Tribunal and the decision of the Appellate Assistant Commissioner was confirmed. Thereafter, on an application under section

66(1) at the instance of the department, the Tribunal has drawn up the statement of the case and referred to this court the following question :

"Whether on the facts and circumstances of this case the unabsorbed depreciation allowance of the earlier year deemed to be a part of depreciation allowance of the current year under proviso (b) to section 10(2) (vi) of the Act can be set off, unlike other business losses, against income under other head ?"

3. The argument urged by the department before the Tribunal and also before us is mainly this that the unabsorbed depreciation which is carried forward, so far as its availability for being set off against income, profits and gains of the following years is concerned, stands on the same footing as the carried forward losses. Under section 24(2) which deals with the set-off of the carried forward losses, the carried forward losses are only capable of being set off against gains from business carried on by the assessee for the following year subject to the proviso that the business in which the losses were originally sustained continued to be carried on by the him during that year. The carried forward losses are not capable of being set off against income from any other heads, except under the head "Business, profession or vocation". Since, the unabsorbed carried forward depreciation is on the same footing as the carried forward losses, the unabsorbed depreciation also cannot be set off against income from any other head. In the present case, therefore, the Appellate Assistant Commissioner and the Tribunal were wrong in allowing the income from property to be set off against the unabsorbed carried forward depreciation. According to Mr. Joshi learned counsel for the revenue the unabsorbed depreciation is a business loss and carried forward unabsorbed depreciation is a carried forward business loss. It must, therefore, be dealt with in the same manner as the carried forward losses under section 24(2), so far as its availability as set-off is concerned.

4. In order to appreciate the contention which has been urged by Mr. Joshi, it is necessary to refer to the provisions of section 10(2) (vi), proviso (b), and the provisions of section 24(2) of the Indian Income-tax Act. Under section 10, the mode of computation of income under the head "Profits and gains of business, profession or vocation" is prescribed. Section 10(1) provides that under that head, tax shall be payable by an assessee in respect of profits and gains of any profession or vocation carried on by him. Sub-section (2) of section 10 enumerates several allowances which will be allowed in the computation of the income under that head. Section 10(2) (vi) deals with the allowance which is permissible for depreciation of the buildings, machinery, plant or furniture used by the assessee for the purposes of his business, profession or vocation. Proviso (b) to section 10(2) (vi), so far as it is material for our purpose, states :

"(b) Where, in the assessment of the assessee... full effect cannot be given to any such allowance in any year... owing to there being no profit 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, 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...."

5. 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 more than the profits or gains of any other business, profession or vocation, carried on by the assessee because under section 10 computation of the totality of the business, 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 business, etc. carried on by the assessee, there is still a surplus left over. Such surplus, it has been held, is available of 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. Section 24(2) so far as is material is as follows :

"24(2) Where any assessee sustains a loss of profits or gains in any year, being a previous year not earlier than the previous year for the assessment for the year ending on the 31st day of March, 1940, in any business, profession or vocation and the loss cannot be wholly set off under sub-section (1) so much of the loss as is not so set off or the whole loss where the assessee had no other head of income shall be carried forward to the following year, and....

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

(iii) if the loss in either case cannot be wholly so set off the amount of loss not so set off shall be carried forward to the following year and so on, but no loss shall be so carried forward for more than eight years.

Provided that -

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

6. It would thus appear that the addition to the following year's depreciation of the previous year's unabsorbed depreciation of the treating of that added depreciation as part of the depreciation for the following year is subject to the qualification contained in the proviso (b) to sub-section (2) of section 24, namely, that the availability of the carried forward depreciation for setting off against the gains of the business of the following year will be postponed to the first absorption of the carried forward losses of the business from earlier years, if there are any. Except for this qualification the unabsorbed depreciation added to the current year's depreciation has the same character and colour as the current depreciation for the following year. It is not disputed that the current depreciation is available for being adjusted against the income from other heads if any surplus thereof is left, after adjusting against the income from the business in which the depreciation is allowed, and also against the income from any other business, profession or vocation falling under any head in section 10. If the unabsorbed depreciation becomes a part of the depreciation for the current year, there does not appear to be any reason why it should not be available for being set off against the income from other heads. The postponement of the application of the unabsorbed depreciation against the income or gains from business until after the absorption of the carried forward losses where such losses exist, has been pressed into service by Mr. Joshi for urging that the said provision indicates that the unabsorbed depreciation is on the same footing and has the same character and colour as the carried forward losses which are dealt with in section 24(2). We do not think that would be the correct view of the matter. It appears to us from the language used in the proviso (b) to section 24(2) that depreciation allowance is treated differently from the carried forward losses. The main provision of section 24(2) deals with the carried forward losses. Then the proviso says that where there are not only carried forward, priority will be given to the carried forward losses and not to the depreciation allowance. The language used in the proviso appears to us to indicate that section 24(2) is a provision which deals with carried forward losses while carried forward depreciation does not come within section 24(2), but flows through an entirely different channel which is provided under section 10(2) (vi), proviso (b). Mr. Joshi has argued that there could have been no question of adjusting priority between the carried forward depreciation allowance is nothing else but a carried forward loss. We do not think that the submission is correct. The subject of depreciation allowance has been dealt with in section 10(2) (vi). The provision permitting it to be carried forward and the consequence of its being carried forward is also contained in section 10(2) (vi), proviso (b). It is only because both the carried forward losses under section 24(2) as well as the carried forward depreciation allowance under section 10(2) (vi), proviso (b), are capable of being

adjusted against the profits and gains of the business of the years to which they are carried forward that provision had been made fixing the order in which they will be absorbed. The fixing of the priority also does not appear to be without a purpose. The carried forward losses are, under section 24(2), capable of being adjusted up to a maximum period of eight years. The depreciation allowance which is permitted to be carried forward is, however, allowed to be carried forward without any time limit until it is totally absorbed. It may therefore be that the carried forward losses which can be carried forward without any limit of time is utilised. Fixing of the priority between these two items would not necessarily indicate, as urged by Mr. Joshi, that they belong to the same category or are of the same colour or nature.

7. Mr. Joshi has then argued that the current year's depreciation, if it is not totally absorbed in the profits of the business in which it is allowed or in any other business, profession or vocation under section 10, such surplus thereof as remains is a loss under the head "business". Such loss may be set off under section 24(1) against the income from any other head if there be such income during that year. If, even after the set-off under section 24(1), there is any excess remaining it goes thereafter as a carried forward loss to be treated under section 24(2) for the subsequent years. Its availability under section 24(1) according to Mr. Joshi, is on the basis that it is a loss. If that is its nature when it comes for deduction under section 24(1) against the income from other heads, it must continue to take that nature thereafter, and for subsequent years it can only be treated as a loss carried forward. Mr. Joshi argues that its treatment as a part of the depreciation allowance for the following year under the proviso (b) to section 10(2) (vi) is only for the purpose of the computation of the income from the business and not for any other purpose. For all other purposes it is a carried forward loss and can be only available as the carried forward loss under section 24(2). The argument, according to us, is not sustainable. As we have already pointed out, the language of the proviso (b) to section 10(2) (vi) gives it the same nature and colour as the depreciation for the current year except so far as its availability for setting off against the profits and gains from business are concerned. We do not see any reason why the attribute of being available to be set off against the income from other heads which is available to the depreciation for the current year should not be available to this added part of it. The unabsorbed part of the current year's depreciation goes no doubt, under section 24 as a loss under the head of business for being set off against the profits under any other head, that would not have the effect of making the carried forward loss when the provision of the statute clearly and unequivocally states that allowance for the next year.

8. On consideration of the provisions of section 10(1), section 10(2) (vi), proviso (b) and section 24(1) and (2), it appears to us that the depreciation allowance permitted under section 10(2) (vi) is available in the first place in the computation of the income from the business in which the depreciation is given and is adjusted against the profits and gains of that business. If the

depreciation allowance is larger than the profits or gains in that business so that an excess remains after the said profits or gains are absorbed, such excess comes under section 10(1) for absorption of the profits and gains of other business, if any, carried on by the assessee. If a balance from the depreciation allowance is left even thereafter, that becomes available for set off against the income, profits and gains from any other head during that year. In the case there is still a balance left over, it is taken to the following year, and if there is current depreciation for the following year, it is added on to the that current depreciation and deemed a part of it, and if there is no current depreciation for the following year, the balance carried forward becomes the depreciation allowance for the following year available for adjustment in the same manner as the current depreciation for the following year except that where are also carried forward losses of the earlier years the said carried forward losses will be first absorbed against the profit and gains of the business before the carried part of the depreciation allowance is allowed to be adjusted. Except for this distinction between the carried forward part of the allowance and the current depreciation there is not other distinction between them. No difficulty in taking this view is created by the language of section 24(2) or by the proviso (b) to that section. We have already dealt with Mr. Joshi's contentions in that connection, and it is not therefore necessary to reproduce them again.

9. The view that we are taking also receives support from the observations in some of the decided cases. In *Ambika Silk Mills Co. Ltd. v. Commissioner of Income-tax*, in dealing with the provision of proviso (b) of section 10(2) (vi), this court observed :

"In our opinion the only proper interpretation that should be placed upon the expression 'profit or gains' is 'profits or gains, not merely from the particular business in respect of which depreciation is claimed, nor profits 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'."

10. On a consideration of the provisions of section 10(2)(vi), proviso (b) and section, 24(2) proviso (b) it was observed :

"Therefore, by enacting section 10(2)(vi) and the proviso and section 24(2) (b) what the Legislature had in mind was this : 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."

11. In Aluminium Corporation of India Ltd. v. Commissioner of Income-tax, it was observed :

"Proviso (b) to section 10(2)(vi) begins with setting out by way of a premise that there is an amount of depreciation allowance to which effect or full effect cannot be given owing to there being no profits or owing to the profits or gains chargeable being less than the allowance. There is thus a surplus of allowance. As to what is to be done with the surplus, the further provision of the proviso is that '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'. What is contemplated is that the surplus allowance is to be 'added to the amount of the allowance for the following year' and it is this adding to which is made subject to the provisions of clause (b) of section 24(2). On being added to the allowance for the following year, the amount added becomes a part of the following year's allowance and the obvious effect is that it is to be treated or applied in the same manner as the allowance of the future year to which it is added."

12. It was also observed :

"It appears to me, however, that what clause (b) of the proviso to section 10(2) (vi) really intends to lay down is that the surplus amount of depreciation shall be added to the amount of depreciation allowance for the following year, subject only to the operative portion of clause (b) of section 24(2), that is to say, subject to the losses being first set off."

13. In Hukamchand Mills Ltd. v. Commissioner of Income-tax (I. T. Reference No. 56 of 1958) decided on 28th August, 1961, we observed as follows :

"In our opinion on the language of proviso (b) it is clear that the amount of unabsorbed depreciation allowance of the previous year assumes the same character and colour of the depreciation amount determined for the assessment year and the question whether the unabsorbed depreciation amount of the previous year is to be adjusted against the total income or total world income would depend on the determination of the question as to whether the depreciation amount determined for the assessment year is deductible against the total world income of the assessee or the total income of the assessee."

14. Mr. Joshi has pointed out that in none of these cases the point which arises for determination

in this case was involved. That undoubtedly is so. But the observations referred to by us from the said cases are made on a consideration of the provisions of section 10(2) (vi), proviso (b), and section 24(1) and (2), and are consistent with the view that we are taking in the present case.

15. Mr. Joshi has invited our attention to the case in *Laxmichand Jaiporia Spinning and Weaving Mills, In re*. It was held in that case that "where the profits and gains from business are insufficient to cover the full depreciation allowance under section 10(2) (vi) of the Indian Income-tax Act, 1922, the excess depreciation can be treated as loss of profits and gains within of section 24. ... The object of proviso (b) to sub-section (2) of section 24 is only to give preference to ordinary losses incurred by an assessee in regard to set-off over the loss which comes under clause (b) of the proviso to sub-section (2) (vi) of section 10. Where set-off is to be given for different kinds of losses other than those due to depreciation such losses must be set off first and then the loss due to depreciation." Mr. Joshi has argued that this case is an authority for the proposition that the unabsorbed depreciation is of the category of a carried forward loss, and therefore, it is on the basis of a carried forward loss that it comes for treatment under section 24(1) and (2). It must, therefore have the same disqualification as is possessed by the carried forward losses, namely, that they are not available for being set off against the income from any other head except that under the head "Business". In our opinion, the said decision does not lay down any such proposition as is contended for by Mr. Joshi. 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), proviso (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.

16. In the view that we are taking, our answer to the question referred to us on the present reference is in the affirmative. The Commissioner will pay the costs of the assessee.

17. Question answered in the affirmative.