

# **BOMBAY HIGH COURT**

Commissioner of Income-Tax

Vs

Nagpur Gas

(M Mohta, C.J. M Chandurkar , J.)

11.01.1983

## **JUDGMENT**

### **Chandurkar, J.**

1. The assessee is partnership firm which originally consisted of three partners, namely, (1) T. A. Patel, (2) R. T. Patel and (3) M. T. Patel. Each partner had 1/3rd share in the profits and losses. T. A. Patel died on April 4, 1970. The accounting year of the partnership firm was the calendar year. The assessment years in question are 1971-72 to 1975-76. Under the deed of partnership, which has now been taken on record as annexure-D, the relevant clauses dealing with the effect of the death of one of the partners are clauses 4 and 5.

2. Clause 4 of the partnership deed provides that the partnership is at will and that on the death or retirement of any partner, the partnership shall continue and the share of the partner so dying or retiring shall belong to his nominees, as specified in clause 5 of the deed, who shall be admitted to the partnership. T. A. Patel was the father of the two other partners. Clause 5 of the partnership deed expressly provides that the nominee of Shri T. A. Patel will be his sons, Shri R. T. Patel and Shri M. T. Patel, and they will have equal shares in the share of Shri T. A. Patel, i.e., each one will have 1/6th share on the death of Shri T. A. Patel if at the time of death, Shri R. T. Patel and Shri M. T. Patel survived. As a result of the operation of these clauses of the partnership deed, the share of Shri R. T. Patel in the profits and losses after the death of Shri T. A. Patel was 43% and that of Shri M. T. Patel, 57%.

3. For each of the assessment years in question the profits and losses and depreciation allowance in respect of the firm was determined, the quantum not being relevant for the purposes of answering this reference. The ITO also apportioned the unabsorbed depreciation and development rebate of depreciation and development rebate allotted to the partners in their individual assessments was not absorbed against their individual incomes. It was the case of the assessee before the ITO that the unabsorbed depreciation and forward in the assessment for the

future assessment years in the case of the firm. This was negated by the ITO.

4. The firm appealed against this order. The AAC, who heard the appeals, took the view that the principle laid down in s. 78(1) of the I.T. Act, 1961, would also apply in the case of depreciation remaining unabsorbed in the hands of the deceased partner. Accordingly, he directed that the benefit of unabsorbed depreciation of the deceased partner amounting to Rs. 4,88,731 shall be lost to the firm and carry forwards shall be restricted to the aggregate of unabsorbed depreciation remaining in the hands of the two continuing partners. In so far as the assessment year 1970-71 was concerned, in place of a sum of Rs. 14,81,575 which, according to the assessee, was the correct amount which should be permitted to be carried forward, the carry forward amount was restricted to Rs. 9,92,844.

5. The Revenue was aggrieved by the decision of the AAC permitting the unabsorbed depreciation to be carried forward in accordance with the decision of this court in *Ballarpur Collieries Co. v. CIT*<sup>1</sup>. The assessee-firm was also aggrieved by the order of the AAC in so far as the entire unabsorbed depreciation amount was not allowed to be carried forward. Therefore, there were two sets of appeals, one by the Revenue and the other by the assessee. The Revenue missed the appeals filed by the assessee having regard to the decision of this court in *Ballarpur Collieries Co.'s case* [1973] 92 ITR 219, and also further allowed the appeals filed by the assessee, holding that on a perusal of the provision of s. 78 and s. 32 of the I.T. Act, it was clear that notwithstanding the fact that one set off against his individual profits and gains were available to the firm for carry forward and for set off against future profits under s. 32(2) of the I.T. Act. Reliance was also placed by the Tribunal on the decision in *Ballarpur Collieries Co.'s case* [1973] 92 ITR 219 (Bom). (Supra)

6. Arising out of this order of the Tribunal, the following two questions have been referred at the instance of the Revenue under s. 256(1) of the I.T. Act, 1961 :

"1. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was correct in confirming the orders of the Appellate in the hands of the partner, from the assessment of the assessee ?

2. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was correct in allowing the appeals of the assessee and in holding that the unabsorbed depreciation of the dissolved firm already apportioned in the hands of the partner who died should be allowed in the hands of the present assessee-firm ?"

7. With regard to the controversy incorporated in question No. 1, the position appears to us to be settled by the earlier decision of this court in *Ballarpur Collieries Co. v. CIT* [1973] 92 ITR 219, (Supra) to which one of us was a party. The questions as to what is to happen when full

effect to the appreciation allowance cannot be give in the assessment of the partners has been extensively considered in that decision and it was held that loss occasioned on account of unabsorbed depreciation does not lose its character or nature as unabsorbed depreciation and is carried forward not by virtue of s. 24(2) of the I.T. Act, 1922, but by virtue of the express provision of s. 10(2)(vi), proviso (b), of that Act. It is no doubt true that as Shri Joshi, on behalf of the Revenue, has contended that the decision dealt with the position under the 1922 Act, but it was fairly conceded before us that the relevant provision under s. 32(2) of the 1961 Act are identical to the provision in s. 10(2)(vi), proviso (b), of the 1922 Act.

8. Shri Joshi has tried to persuade us that the decision in the Ballarpur Collieries Co.'s case [1973] 92 ITR 219 (Bom)(supra), may be reconsidered in view of the fact that that decision has not been followed by the Gujarat High Court in *CIT v. Garden Silk Wvg. Factory*<sup>2</sup> In the Garden Silk Weaving Factory's case the Gujarat High Court has taken a view that once an allocation of unabsorbed depreciation is made amongst the partners of the firm, then there remains nothing with the firm which is income of the Gujarat High Court does show that the decision of this court in Ballarpur Collieries Company's case [1973] 92 ITR 219 (Bom) (supra) was not followed by that court. It is not necessary for us to go into the question as to whether the view taken by the Gujarat High Court in the Garden Silk Weaving Factory's case [1975] 101 ITR 658 (Guj) is correct or not, but we might, in passing, mention that a circumstance which seems to have weighed with the Gujarat High Court, is that there is another court which has taken a view contrary to the decision i Ballarpur Collieries Co. [1973] 92 ITR 219 (Bom), and that decision was *K. T. Wire Products v. Union of India* , which was a decision of the Allahabad High Court. The Gujarat High Court also made a reference to the decision in *Raj Narain Agarwala v. CIT*<sup>3</sup> The learned counsel for the Revenue, therefore, wanted us to follow the Gujarat view in preference to the view of this court.

9. Unfortunately for the Revenue, the decision of this court does not now stand as a lone view taken with regard to the question as to whether once unabsorbed depreciation is allocated to the partner and it cannot be fully set off in the assessment of the partner, it should be permitted to the firm to carry forward the said unabsorbed depreciation. The Bombay view has been followed by the Madras High Court, firstly, in *CIT v. Nagapattinam Import and Export Corporation*<sup>4</sup>. In that case, the Madras High Court has taken the view that language of s. 32(2) of the 1961 Act makes it clear that in the case of registered firm, either the whole of the depreciation allowance or any part thereof for which effect had not been given by adjustment in the hands of the partner will have to be added to the amount of the depreciation in the following year and deemed to the amount of the depreciation in the following year and deemed to be part of the allowance for the later year and can be considered for set of or adjustment in the hands of the firm. This view of the Madras High Court was further followed by the same court in *CIT v. Madras Wire Products*

[1980] 123 ITR 722, where for the relevant years in question the Madras High Court held that the unabsorbed depreciation of the assessee, which was registered firm for the assessment year 1965-66, should be set off against its income for the assessment year 1966-67, to the extent that it was not adjusted in the assessment of its partners for the assessment year 1965-66. A similar view has also been taken by the Gauhati High Court in *CIT v. Singh Transport Co*<sup>5</sup>. where it has been held that where full effect has not been given to the depreciation allowance in the assessment of the partners, the unabsorbed allowance should be allowed to be set off by the registered firm in the succeeding year. Apart from the fact that the decision in Ballarpur Collieries Company's case [1973] 92 ITR 219 (Bom) is a decision of this court and as such is binding on us, we find that it has also been followed by two other High Courts, and, in our view, it does not require any reconsideration. Question No. 1 must, therefore, be answered in the affirmative and in favor of the assessee.

10. So far as question No. 2 is concerned, the learned counsel for the Revenue has contended that guidance should be taken from the provisions of s. 78 of the I.T. Act, 1961, in order to decide the question as to whether notwithstanding the death of one of the partners the entire unabsorbed depreciation allowance should be permitted to be carried forward by the firm for the next year. Section 78(1) deals with a case where a change has occurred in the constitution of a firm and whether, in such a case, a loss proportionate to the share of a retired or deceased partner is to be carried forward and set off. Section 78(1) provides as follows :

"Where a change has occurred in the constitution of a firm, nothing in this Chapter shall entitle the firm to have carried forward and set off so much of the loss proportionate to the share of a retired or deceased partner computed in accordance with section 67 as exceeds his share of profits, if any portion of the said loss which is not apportionable to him under section 67".

11. Now it is true that the AAC has extended the principle in s. 78(1) to the case of depreciation allowance under s. 32, and that reasoning is sought to be supported by the learned counsel for the Revenue. A bare reading of s. 78(1) will show that by incorporating that provision it was expressly provided that a loss proportionate to the share of a retired or deceased partner computed in accordance with s. 67 as exceeds his share of profits of the previous year in the firm shall not again be allowed to be carried forward by the firm. Therefore, its operation must be restricted to the subject-matter dealt with by that provision, namely business loss. The principle cannot be extended to a depreciation allowance in respect of which no such provision has been though fit to be made by Parliament, and it would be improper to deal with the unabsorbed depreciation loss on the basis of an analogy with reference to s. 78(1). It is obvious that, notwithstanding the death of one of the partners, the partnership business continued to belong to

the remaining partners by virtue of a that for a limited purpose the new partnership deed. It may also be true that for a limited purpose the new partnership may be a reconstituted firm, but it is difficult to see how unabsorbed depreciation will lose its character as unabsorbed depreciation merely because one of the partners had lived, that part of the unabsorbed depreciation would have reverted that amount. In the absence of any specific provision similar to the one under s. 78(1) dealing with unabsorbed depreciation, it is difficult to find that there was any error in the view taken by the Tribunal. Consequently, question No. 2 has to be answered in the affirmative and in favour of the assessee.

12. Accordingly, the questions are answered as follows :

Question No. 1 : In the affirmative and in favour of the assessee.

Question No. 2 : In the affirmative and in favour of the assessee.

13. The assessee to get the costs of this reference.

Cases Referred.

1[1973] 92 ITR 219

2[1975] 101 ITR 658

3[1970] 75 ITR 1 (Del)

4[1979] 119 ITR 444

5[1980] 123 ITR 698