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**(1996) 02 MP CK 0055**

**In the Madhya Pradesh High Court**

**Case No : Miscellaneous Civil Case No. 147 of 1990**

Azad Bus Service

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

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**Date of Decision : 16-02-1996**

**Acts Referred:**

Income Tax Act, 1961 — Section 32, 32(2), 73(3), 75

**Citation : (1996) 222 ITR 197**

**Hon'ble Judges : N.K. Jain, J;A.R. Tiwari, J**

**Bench : Division Bench**

**Advocate : K.N. Puntambekar, for the Appellant; D.D. Vyas, for the Respondent**

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## **Judgement**

A.R. Tiwari, J.—At the instance of the assessee, the Tribunal has stated the case and referred the undernoted question of law on Application No. 65/(Ind) of 1989 for the assessment year 1982-83 in connection with the order passed by the Tribunal in I. T. A. No. 773/(Ind) of 1985 :

"Whether, on the facts and in the circumstances of the case, the unabsorbed depreciation of the firm for the assessment years 1977-78, 1978-79, 1979-80 and 1980-81 is allowable for set-off against the income of the assessment year 1982-83 ?"

The facts lie in a narrow compass.

2. The year of assessment is 1982-83. The assessee has been assessed in the status of a registered firm. Unabsorbed depreciation of the firm relating to the preceding assessment years 1977-78, 1978-79, 1979-80 and 1980-81 was allocated to the partners of the assessee-firm. It was not allowed by the Income Tax Officer as set-off against the income of the preceding year 1981-82. The order of the Income Tax Officer was confirmed by the first appellate authority. In second appeal before the Tribunal, the order was again maintained. The assessee again claimed set-off for the assessment year 1982-83. The assessee did not succeed in getting the set-off right up to the Tribunal. Aggrieved, the assessee

filed the aforesaid application u/s 256(1) of the Income Tax Act, 1961. On that application, the Tribunal stated the case and referred the question as noted above.

3. We have heard Shri Puntambekar, learned counsel for the applicant-assessee, and Shri D.D. Vyas, learned counsel for the non-applicant-Department.

4. Shri Puntambekar submitted that the Tribunal committed an error of law in not allowing the set-off as claimed and in confirming the order passed by the Income Tax Officer and the first appellate authority. He placed reliance on Commissioner of Income Tax Vs. R.J. Trivedi and Sons, and M/s. Garden Silk Weaving Factory, Surat Vs. The Commissioner of Income Tax, Gujarat, Ahmedabad, .

5. In the decision of Commissioner of Income Tax Vs. R.J. Trivedi and Sons, , it is held as under (at page 427) :

"Depreciation represents the diminution in the value of an asset, when applied to the purpose of making profit or gain (see : Workmen of National and Grindlays Bank Ltd. Vs. The National and Grindlays Bank Ltd., . Depreciation is thus related to an asset and is a notional loss as against the actual loss in the sense of outgoings of a business. So far as carrying forward of loss is concerned, Section 75 places the restriction that it can be carried forward only in the hands of a partner of a firm. But there is no such restriction so far as carrying forward of depreciation u/s 32 of the Act is concerned. The absence of such restriction or limitation in Section 32 of the Act in permitting carrying forward of depreciation is a clear indication of the legislative intent that depreciation, if not fully absorbed in an earlier assessment year in the case of a registered firm or an unregistered firm assessed as a registered firm in the assessment of its partners, can be carried forward to subsequent years subject only to the priority to be given to carrying forward of loss as provided in Section 32(2) read with Section 73(3) of the Act."

In the case of M/s. Garden Silk Weaving Factory, Surat Vs. The Commissioner of Income Tax, Gujarat, Ahmedabad, , it is held that (at page 522) :

"From the above discussion, it will be seen that unabsorbed losses and unabsorbed depreciation are to be carried forward to future years to be set off against future income. There is, however, one important difference. Unabsorbed losses can be carried forward only for a period of eight years whereas unabsorbed depreciation can be carried forward indefinitely."

It is, thus, clear that unabsorbed depreciation can be carried forward indefinitely. That being so, the Tribunal fell into error in not allowing the set off.

6. The point, therefore, stands concluded by the aforesaid decisions.

7. In the result, we answer the question in the affirmative, i.e., in favour of the assessee and against the Department, but without any orders as to costs.

8. Counsel fee, for each side, is however, fixed at Rs. 750, if certified.

9. Transmit a copy of this order to the Tribunal immediately for further action as may be necessary in accordance with rules.