

(2004) 04 KL CK 0002
In the High Court Of Kerala
Case No : IT Reference No. 253 of 1999

Commissioner of Income Tax

APPELLANT

Vs

A.J. Abraham Anthraper

RESPONDENT

Date of Decision : 06-04-2004

Acts Referred:

Income Tax Act, 1922 — Section 10, 10(2)(vi)

Income Tax Act, 1961 — Section 256(1), 32, 32(1), 32(2), 34

Citation : (2004) 139 TAXMAN 1

Hon'ble Judges : Kurian Joseph, J;G. Sivarajan, J

Bench : Division Bench

Advocate : P.K.R. Menon and George K. George, for the Appellant; John Ramesh, for the Respondent

Judgement

G. Sivarajan, J.—The income tax Appellate Tribunal, Cochin Bench has referred the following question of law u/s 256(1) of the income tax Act, 1961 (for short "the Act") for decision by this Court at the instance of the revenue. Whether, on the facts and circumstances of the case the Tribunal is right in law in holding that the assessee is entitled to set off his share of unabsorbed depreciation from the firm in which he was a partner, against his income of the previous year even though the firm was not carrying on any business during that previous year".

The brief facts are as follows: The respondent-assessee was a partner in the firm M/s. Anthraper Industries. In the assessment under the Act for the year 1983-84 he was assessed to tax on a total income of Rs. 50,000. The Assessing Officer in doing so did not accept the request for adjusting the share of unabsorbed depreciation of the firm brought forward from the earlier years. The unabsorbed depreciation was to the extent of Rs. 48,576 relating to the assessment years 1973-74, 1974-75 and 1975-76. The partnership firm had closed down its business on 2-5-1974 and it was not carrying on business after the assessment year 1975-76. According to the Assessing Officer the unabsorbed depreciation can be adjusted against the income of the partners only if the partnership firm is

carrying on its business activity during the relevant period. The Commissioner of income tax (Appeals) by his order dated 23-5-1990 (Annexure B) dismissed the appeal filed by the assessee and confirmed the assessment. However, in further appeal the Appellate Tribunal allowed the claim of the assessee relying on the decision of the Calcutta High Court in Commissioner of Income Tax Vs. Shiva Prasad Bagaria, . Hence the reference. 2. Sri P.K.R. Menon, learned senior Central Government standing counsel (Taxes) appearing for the applicant submitted that a reading of the provisions of section 32(1) and (2) along with sections 72(2) and 73(1) would show that the share of the unabsorbed depreciation of the firm can be adjusted against the income of the partners of the registered firm only if the firm subsists and carries on business during the relevant previous year. The senior counsel submitted that the expression "previous year" used in section 32(2) only refers to the previous year of the assessee firm and not of the partners and therefore the existence of the partnership business during the previous year relevant to the assessment year 1983-84 is a condition precedent for the adjustment of the share of the unabsorbed depreciation of the firm against the income of the partners.

3. Sri John Ramesh, learned counsel appearing for the respondent-assessee, on the other hand, submits that the Calcutta High Court had elaborately considered this question in Shiva Prosad Bagaria's case (supra) particularly at page 151, where the said court drew a distinction between section 32(2) and section 72(1) proviso. The counsel submits that whereas section 72(1) proviso clearly says that the business must be in existence there is no such restriction in section 32(2) of the Act. The counsel also submits that this Court in Commissioner of Income Tax Vs. A.M.J. Anthraper (Late) (legal heir Mrs. Thankamma J. Anthraper), in the case of the assessee's father had allowed a similar claim. The counsel further submitted that in view of the circular dated 27-3-2000 issued by the Government of India, Ministry of Finance (Department of Revenue) in the Central Board of Direct Taxes stipulating that appeal or reference to the High Court shall be filed by the revenue only in cases where the tax effect exceeds Rs. 2,00,000 the Department was not justified in seeking this reference since the tax effect is comparatively very small. The counsel in support of the said submission has relied on the decision of the Bombay High Court in Commissioner of Income Tax Vs. Camco Colour Co., .

4. In order to appreciate the rival contentions it is necessary to refer to the relevant provisions of the Act under which the claim is made. Section 32(1) of the Act provides for depreciation in respect of buildings, machinery, plant or furniture owned by the assessee and used for the purpose of the business or profession, subject to the provisions of section 34. Sub-section (2) which is relevant for the purpose of this case reads:

(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 (ii) of sub-

section (1) 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".

Since the above sub-section refers to sub-section (2) of section 72 and sub-section (3) of section 73, sub-section (2) of section 72 alone being relevant for the purpose of this case reads as follows :

(2) 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.

5. Here, it must be noted that section 72 deals with carry forward and set off of business losses. Sub-section (1) of 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 or, where he has no income under any other head, the whole loss shall, subject to the other provisions of this Chapter, be carried forward to the following assessment year and the same shall be set off against the profits and gains, if any, of any business or profession carried on by him and assessable for that assessment year provided that the business or profession for which the loss was originally computed continued to be carried on by him in the previous year relevant for that assessment year and if the loss cannot be wholly so set off the amount of loss not so set off shall be carried forward to the following assessment year and so on. Sub-section (2), it must be noted, only says that in the matter of carried forward of the allowance u/s 32(2) of the Act effect must be given first to the provisions of section 72.

6. The main question to be considered in this case is as to whether the unabsorbed depreciation which was allocated to the share of the partners of the registered firm - M/s. Anthraper Industries - in the assessment years 1973-74, 1974-75 and 1975-76 should be allowed to be set off against the other income of the partner u/s 32(2) of the Act even though the firm in which the assessee was a partner and with respect to which the depreciation is carried forward discontinued the business after the assessment year 1975-76.

7. The question whether the very business carried on by the assessee and with respect to which depreciation is carried forward should be in existence during the

previous year in order to claim the benefit of section 32(2) of the Act was considered by several High Courts and majority of the High Courts took the view that the business with respect to which the depreciation is carried forward need not be in existence during the previous year relevant to the assessment year for which the claim u/s 32(2) is made - Commissioner of Income Tax, Bombay City II Vs. Estate And Finance Ltd., , Commissioner of Income Tax Vs. Rampur Timber and Turnery Co. Ltd., , Commissioner of Income Tax Vs. Virmani Industries (P.) Ltd., , Commissioner of Income Tax Vs. Warangal Industries Pvt. Ltd., , Hyderabad Construction Co. Ltd. Vs. Commissioner of Income Tax, Andhra Pradesh, , Addl. Commissioner of Income Tax, Karnataka Vs. Kapila Textiles (P.) Ltd., , Commissioner of Income Tax Vs. Kishanlal and Sons (Udyog) Pvt. Ltd., , Shiva Prosad Bagaria's case (supra), CIT v. Deepak Textiles Industries Ltd. [1987] 16 8 ITR 7 73 4 (Guj.), and Commissioner of Income Tax Vs. Sahu Rubbers Pvt. Ltd., .

8. We also note that the Madras High Court in East Asiatic Company (India) P. Ltd. Vs. Commissioner of Income Tax, has taken a contrary view relying on two earlier decisions; one of the Bombay High Court in Sahu Rubbers Private Ltd. Vs. Commissioner of Income Tax, Bombay City I, and the other of the Madras High Court itself in COMMISSIONER OF Income Tax MADRAS Vs. DUTTYS TRUST CALICUT., followed in Tube Suppliers Ltd. Vs. Commissioner of Income Tax, and Hindustan Chemical Works Ltd. Vs. Commissioner of Income Tax, Bombay City-I, . Here it must be noted that all the decisions which have taken the view that the same business with respect of which depreciation was carried forward need not be in existence in the previous year for claiming the benefit of section 32(2) of the Act had in one way or the other noted the contrary view but did not adopt the said view.

9. In Virmani Industries (P.) Ltd.'s case (supra), the Allahabad High Court considered this question. In that case, the assessee, a Private Limited Company, was carrying on the business of manufacture of soaps and oil. The business was stopped in 1955 and the factory was let out in hire. In the previous year relevant to the assessment year 1965-66 assessee started a business for manufacture of steel pipes and part of the old machinery used in the soap manufacture was utilised in the new business. The question arose as to whether the unabsorbed depreciation of the year 1956-57 could be set off against the profits of the new business. The Allahabad High Court observed thus:

It would at once be clear that there is a difference between the carried forward loss and carried forward depreciation allowance. In the case of a carried forward loss, it can be set off against the profits of a business of the succeeding year provided the business for which the loss was originally computed continued to be carried on in the succeeding year. There is no such requirement so far as the carried forward depreciation allowance is concerned. It is not necessary that the business in respect of which the depreciation allowance was originally worked out should remain in existence in the succeeding year nor is it necessary that the

business assets to which the depreciation pertains must be used in the business carried on in the succeeding year. All that is necessary is that an assessee must carry on some business in the succeeding year in which the set off of the unabsorbed depreciation is claimed. That is so, because a depreciation allowance is essentially a deduction allowable out of the gross profits of a business. If there is no business there can be no depreciation allowance...." (p. 464)

10. The Bombay High Court in Estate & Finance Ltd.'s case (supra) considered the question whether on a proper interpretation of sections 56, 57(ii) and 32(2) of the Act, the unabsorbed depreciation brought forward since 1952-53 could be set off against the business income assessed in the assessment year 1963-64 when the source in respect of which the depreciation was computed had ceased to exist. Earlier decision of that Court in Sahu Rubbers (P.) Ltd.'s case (supra), the decision of the Madras High Court in Dutt's Trust's case (supra) referred to therein and also a still earlier decision of the Bombay High Court itself in DAVID SASSOON and CO., LTD., IN RE., were considered.

The Court observed that the said decisions rendered on the construction of the proviso to section 10(2)(vi) of income tax Act, 1922, in regard to the proper meaning given to the provisions of section 32(2) of the Act, does not constitute a binding authority in as much as the provisions contained in the Act of 1961 has ceased to be a proviso as was the case under the 1922 Act and the decision in Sahu Rubbers (P.) Ltd.'s case (supra) principally turned on the question whether the statutory provision was required to be considered as an independent substantive provision. The Bombay High Court thereafter independently considered the provisions of the 1961 Act afresh. After referring to the decisions of various High Courts, it was observed thus :

...It is true that the approach to be found in the observations at page 470 of the report Sahu Rubbers Private Ltd. Vs. Commissioner of Income Tax, Bombay City I, , viz., that if the intention of the Legislature had 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, may not commend itself to us. Indeed, it is possible to hold and observe that if in a later section when the Legislature intended to impose such a requirement or condition on the right of the assessee to claim a similar benefit the Legislature expressly provided for such restrictive condition, then in the absence of any such restrictive condition the provision giving the benefit of unabsorbed depreciation should be read without importing any such condition, i.e., in favour of the assessee rather than in the manner as was done in Sahu Rubbers Private Ltd. Vs. Commissioner of Income Tax, Bombay City I, . It would appear that the absence of such express provisions in the statutory provision for unabsorbed depreciation is eloquent and can only be fairly construed in favour of the assessee that there was no such requirement." (p. 130)

The Bombay High Court concluded by observing thus:

In any case, we are in agreement with the view expressed by the Tribunal that where two interpretations are possible, it will be proper for the Court to put that interpretation on the statutory provisions as would be favourable to the assessee bearing in mind that the Court is construing a taxing statute. This principle has been enunciated in several decisions and it is not necessary to refer to those decisions in our judgment. In our view the fair interpretation of the statutory provision as it now stands under the income tax Act, 1961, would be as propounded by the Division Bench of the Allahabad High Court in Commissioner of Income Tax Vs. Virmani Industries (P.) Ltd., . Even if we were inclined to be of opinion bearing in mind the observations in Sahu Rubbers Private Ltd. Vs. Commissioner of Income Tax, Bombay City I, , that two views are possible, we must accept the view favourable to the assessee, both because it is a view favourable to the assessee and because there has been a change in the manner of enacting the statutory provisions by which a proviso has now been enacted as an independent substantive provision." (p. 131)

11. A Division Bench of the Andhra Pradesh High Court in Hyderabad Construction Co. Ltd."s case (supra) considered a case where the Tribunal was of the view that the unabsorbed depreciation has to be given, the same treatment as was given to the depreciation for the current year as the question of deducting the depreciation allowance from the present year will arise only if the business, to which the depreciation allowance relates, was carried on. The Division Bench after referring to the provisions of sections 32 and 72 of the Act, observed thus :

... Section 32(2) does not impose any other condition regarding continuance of the business or using of the assets. While u/s 32(1) in respect of depreciation for the assessment year, it is expressly stated that it is in respect of machinery, etc., used for the purposes of the business or the profession, there is no such requirement u/s 32(2).

In this connection, it will be useful to refer to section 72 which deals with the carrying forward and set off of business losses. Under the proviso to section 72(1) (i), set off is allowed only on condition that the business or profession for which the loss was originally computed, continued to be, carried on by him in the previous year relevant to the assessment year. In contrast to an express requirement regarding the continuance of the business or profession as a condition for set off of loss u/s 72(1)(i), proviso, there is no such requirement in regard to unabsorbed depreciation u/s 32(2). We, therefore, do not agree with the decision of the Tribunal that as the business was not continued and as the asset for which depreciation is claimed was not used as it was sold previous to the year of account, the unabsorbed depreciation could not be carried forward and set off." (p. 85)

12. Almost all the decisions referred to in paragraph 8 above which existed at that time were considered and the Division Bench expressly dissented from the view taken by the earlier decision of the Bombay High Court in Sahu Rubbers (P.)

Ltd.'s case (supra) and the decision of the Madras High Court in Dutt's Trust's case (supra) and followed by the Bombay, Allahabad and its own earlier decision.

13. In Kapila Textiles (P.) Ltd.'s case (supra) the Karnataka High Court considered the question whether it is necessary in order to claim the benefit of set off of carried forward depreciation allowance permitted by section 32(2) of the Act, that the assessee must have actually carried on the business during the accounting year. In that case, admittedly, the assessee ceased to carry on its business and during the relevant year the assessee realised amounts by sale of building, plant and machinery and the profits therefore was subjected to assessment u/s 41(2) of the Act. The Court observed thus :

...From the wording of section 32(2) it may seen that it is only subject to the provisions of sub-section (2) of section 72 and sub-section (3) of section 73, which relates to the carry forward and set off of business loss and loss computed in respect of a speculation business, respectively. According to these provisions effect has to be given to section 72 or section 73, as the case may be, first before giving effect to section 32(2). That question does not arise in this case. Similarly, sub-section (5) of section 41 on which the revenue relies also deals with regard to set off of unabsorbed loss and does not deal with the set off of the unabsorbed depreciation allowance. The requirement that the business should have been carried on during the relevant previous year, is a condition applicable for claiming, set off of unabsorbed losses. Further, carrying forward of losses is not permitted beyond eight years in view of section 72(4) of the Act. All these conditions are not incorporated in, or made applicable to, the carry forward and set off of depreciation allowance specially provided for in sub-section (2) of section 32 of the Act." (p. 461)

14. In Kishanlal & Sons (Udyog)(P.) Ltd.'s case (supra) before the Calcutta High Court the assessee had been allowed depreciation in the earlier assessment year for the jetty and trolley lines business which remained unabsorbed. In the assessment years concerned the assessee claimed that such unabsorbed depreciation should be allowed to be carried forward and set off against its business income for the said years. This was disallowed on the ground that the assessee did not carry on its earlier business in the relevant years. This was confirmed in appeal by the Appellate Assistant Commissioner. Before the Tribunal the assessee contended that to claim set off of unabsorbed depreciation it was not necessary that the business in which such depreciation was initially allowed should be carried on in the subsequent years. This was accepted by the Tribunal and allowed the assessee's claim. On reference at the instance of the Revenue, the High Court after considering the decisions of Allahabad, Bombay, Andhra Pradesh, Karnataka High Courts and the earlier decision of the Calcutta High Court itself observed thus:

Sub-section (2) of section 32 of the I.T. Act, 1961, provides that once depreciation has been duly allowed in a particular year but could not be given effect to by reason of the chargeable profits or gains being less than the

allowance, the same has to be added to the amount of allowance for depreciation for the following previous year or alternatively if there is no allowance in that year be deemed to be the allowance for that previous year. This continues in the succeeding previous years. The deeming provision comes into operation if there is no allowance in any succeeding previous year. It has been held by this Court in *Eastern Cold Storage (P.) Ltd. Vs. Commissioner of Income Tax*, that the deeming provision has to be given full effect for all purposes of the Act. The Allahabad High Court, the Andhra Pradesh High Court, the Karnataka High Court as also the Bombay High Court in its subsequent decision in *Commissioner of Income Tax, Bombay City II Vs. Estate And Finance Ltd.*, have clearly held that in order to claim unabsorbed depreciation, it is not necessary that the depreciable assets have to be utilised in the new business.

We respectfully agree with the said view and hold that the deeming provision in the said sub-section has to be given its full effect and the allowance has to be treated as a depreciation allowance in the succeeding years irrespective of the business carried on." (p. 743)

The Calcutta High Court took the view that section 32(2) of the Act contains an independent provision for setting off unabsorbed depreciation carried forward from the preceding year, that the deeming provision in the section has to be given full effect for the purpose of the Act and hence it is not necessary that the business in respect of which depreciation was originally allowed and carried forward should remain in existence in the succeeding year when set off is claimed.

15. In *Deepak Textiles Industries Ltd.*'s case (supra) the Gujarat High Court considered the scope of section 32(2) of the Act. In that case depreciation was allowed in the assessment year 1964-65 in respect of the business of manufacture and sale of cloth. The assessee claimed set off of unabsorbed depreciation carried forward from the earlier assessment years against the income computed for the assessment year 1970-71. This was disallowed on the ground that the assessee had sold the business of Textile Mills and had ceased to carry on the said business in the assessment year concerned. The Tribunal accepted the contention of the assessee and allowed the claim. On a reference, the High Court with reference to the relevant provisions observed thus:

On reading section 32(2) of the Act, it is clear that the purpose of the Legislature in introducing the legal fiction, is to give the benefit of the unabsorbed depreciation in the following previous year or in the succeeding previous years and when that is the purpose of the legal fiction, all the facts necessary for the purpose of earning depreciation u/s 32(1) of the Act must be secured and, therefore, for the following previous year the ownership of machinery, user of machinery and user of machinery for the purpose of business and existence of business also will be required to be assumed for giving effect to the legal fiction. These facts are to be assumed only for the purpose of giving effect to the legal fiction and in doing so, there is no question of construing the legal fiction beyond

the purpose for which it is created and/or beyond the language of the section by which it is created. On the contrary, if such facts are not assumed, the very purpose of introducing the legal fiction will be defeated and the Court will not endure that the purpose for which the legal fiction of deemed allowance introduced for the sale of doing justice to the assessee who could not take advantage of the total amount of depreciation in the current year be defeated by calling upon to prove the necessary ingredients for earning depreciation allowance u/s 32(1) of the Act." (p. 779)

The decision of the Supreme Court in *Commissioner of Income Tax, Calcutta Vs. Jaipuria China Clay Mines (P) Ltd.*, rendered, in the context of the 1922 Act was also relied.

16. The matter was again canvassed before the Calcutta High Court in *Shiva Prosad Bagaria's case* (supra). The counsel for the Revenue contended that in view of the decisions rendered by the Bombay and Madras High Courts in *Kishanlal & Sons (Udyog)(P.) Ltd.'s case* (supra) requires reconsideration. The question was again considered in detail with reference to all the decisions noted including the decisions which have taken the contrary view. It was noted that the Bombay High Court in *Estate & Finance Ltd.'s case* (supra) considered its earlier decisions in *Sahu Rubbers (P.) Ltd.'s case* (supra) and the Madras decision in *Dutt's Trust's case* (supra) and the said two decisions were not followed. It was further noted that in a later decision in *Commissioner of Income Tax Vs. Sahu Rubbers Pvt. Ltd.*, the Bombay High Court followed the view taken by the said Court in *Estate & Finance Ltd.'s case* (supra) holding that the assessee is entitled to set off of the unabsorbed depreciation and that it is not necessary that the same business should be in existence enabling the assessee to claim unabsorbed depreciation. The Calcutta High Court observed thus:

Section 72(1) provides for carry forward and set off of business losses. The proviso to section 72(1) lays down that carry forward and set off of business losses shall be allowed against profits and gains, if any, of that business or any other business carried on by the assessee and assessable for the assessment year and the business for which the loss was originally computed was carried on by him in the previous year relevant to the assessment year. But such provision is absent in section 32. Section 32(2) does not require in terms that, for allowing the setting off of unabsorbed depreciation, the business must be in existence. The reason is clear. Depreciation in one case is allowed for the machinery or plant which the assessee purchased and which was used for the business. Even if the business is not carried on, there will be wear and tear of the machinery and plant and it will, in the normal course, also depreciate in value and until the assessee sells all the assets, the assessee cannot recover the cost of such asset in the form of depreciation allowance. The condition is that the asset originally purchased on which depreciation was allowed must be in existence to be eligible for depreciation. But, in case of loss which may arise in the course of carrying on the business, unless the business is in existence, this loss cannot be allowed. It

has nothing to do with any asset of the business." (p. 151)

The High Court concluded the matter thus :

Having regard to the views expressed by this Court in Commissioner of Income Tax Vs. Kishanlal and Sons (Udyog) Pvt. Ltd., , the Gujarat High Court in Commissioner of Income Tax Vs. Deepak Textile Industries Ltd., and the Bombay High Court in Commissioner of Income Tax, Bombay City II Vs. Estate And Finance Ltd., , we are of the opinion that the decision of the Madras High Court in East Asiatic Company (India) P. Ltd. Vs. Commissioner of Income Tax, and the decision of the Bombay High Court in Hindustan Chemical Works Ltd. Vs. Commissioner of Income Tax, Bombay City-I, do not correctly lay down the correct principles. We, therefore, following the principles laid down by this Court in Kishanlal & Sons (Udyog) Pvt. Ltd.'s case (supra) must hold that so long as the partner of a firm has assessable income, the unabsorbed depreciation which was being allocated to the share of the partner being a partner of a registered firm should be allowed to be set off against other income even though the firm in which the assessee was a partner discontinued the business where the assets were used and depreciation was allowed. We, therefore, did not find any merit in the contention raised by Mr. S.K. Mitra on behalf of the income tax Department." (p. 152)

17. Now, we will come to the decision of the Madras High Court in East Asiatic Co. (India)(P.) Ltd.'s case (supra) which took the contrary view. In that case the assessee showed a total loss of Rs. 63,53,460 out of which loss to the extent of Rs. 61,84,273 was carried forward from the earlier assessment year. The Tribunal was not able to ascertain as to what amount constituted carried forward business loss and what amount was carried forward as unabsorbed depreciation. The assessee company did not have any business activities in the relevant previous year inasmuch as the assessee was engaged only in the collection of debts. The assessee claimed that it was entitled to set off the carried forward unabsorbed depreciation. This was not allowed by the Assessing Officer. This was confirmed in the assessee's appeals by the Appellate Assistant Commissioner and by the Tribunal. The Tribunal relied on the decision in Dutt's Trust's case (supra) and held that the decision contemplated the physical carrying on of the business in which unabsorbed depreciation has resulted in the succeeding years if set off is to be claimed of unabsorbed depreciation against any other income. The High Court noted that the said view is contrary to the decisions of the Andhra Pradesh, Karnataka and Gauhati High Courts, but observed that the said decisions are against the decisions of the jurisdictional High Court, viz., Madras High Court in Dutt's Trust's case (supra) and in Tube Suppliers Ltd.'s case (supra). The High Court observed as follows :

...The observations quoted above clearly indicate that when carried forward unabsorbed depreciation is treated as an allowance u/s 32(2), it will become a deductible allowance only u/s 32(1). The only effect of the provisions of section 32(2) is to treat the carried forward unabsorbed depreciation allowance on the

same footing as a similar allowance for the relevant previous year. That is the limited purpose of the words which are used in the concluding portion of section 32(2). The deeming fiction can be carried undoubtedly to its logical conclusion but the effect of the deeming fiction will come to an end the moment it is treated as an allowance for the relevant previous year. The fiction cannot be carried further and it is an established proposition that a statutory fiction cannot be given effect to beyond the purpose for which it is intended. The purpose for which the fiction in section 32(2) is intended is merely for the purpose of treating such unabsorbed depreciation as an allowance for the purpose of deductibility u/s 32(1). This fiction does not have the effect of dispensing with the substantive condition in sub-section (1) prescribed as a condition for deductibility, namely, that the buildings, machinery, plant and furniture in respect of the allowance are used for the purposes of the business or profession...." (p. 144)

18. The Madras High Court followed the decision of the Bombay High Court in *Sahu Rubbers (P.) Ltd.*'s case (supra) in preference to the decision of the Bombay High Court itself in *Estate & Finance Ltd.*'s case (supra) since the earlier decision of the Bombay High Court was followed by the Madras High Court in *Tube Suppliers Ltd.*'s case (supra) which is binding on them. The Madras High Court accordingly held that though the unabsorbed depreciation can be carried forward u/s 32(2) of the Act and becomes allowable u/s 32(1) of the Act, the condition required to be satisfied u/s 32(1) of the Act must be satisfied.

19. The Supreme Court in *M/s. Garden Silk Weaving Factory, Surat Vs. The Commissioner of Income Tax, Gujarat, Ahmedabad*, which was an appeal from the decision of the Gujarat High Court, considered the question whether, a registered firm is entitled to carry forward unabsorbed depreciation from earlier years and that it will be deemed to be an allowance in the nature of depreciation in the previous year relevant to the assessment year 1968-69. The Gujarat High Court held that the firm is not entitled to carry forward business loss and claim deduction u/s 32(1) of the Act. The Supreme Court noted that there has been a strong cleavage of opinion among various High Courts on this issue. The view that unabsorbed depreciation once allocated to the partners cannot be taken back to the firm's assessment for being carried forward by the firm and that the partners alone are entitled to carry forward the unabsorbed depreciation for being set off against their income has been taken by the Allahabad, Gujarat, Delhi and Karnataka High Courts. The view that the unabsorbed depreciation, after being carried forward by the partners and set off against their income, reverts to the registered firm for being carried forward and set off against its income that any depreciation still remaining unabsorbed will again go to the partners and so on has been accepted in the decisions of the Bombay, Madras, Gujarat, Delhi, Andhra Pradesh, Punjab & Haryana and Madhya Pradesh High Courts.

20. The Supreme Court then considered the question as to what is to be done when the amount of unabsorbed depreciation does not get absorbed by the other income of the firm and further, the aliquot shares of the partners therein do not

also get absorbed their other income. The Supreme Court observed that there are two answers: (1) that the partners - in whose hands the unabsorbed depreciation has been allocated - should carry forward the depreciation to succeeding years or (2) that the amount of depreciation so remaining unabsorbed should be carried forward by the firm for set off in future assessments. The Supreme Court then observed that the second of these alternatives is what is truly envisaged by the statute. Regarding the possible criticism that the partners derive a double advantage of setting off of the unabsorbed depreciation it is stated that though a firm and its partners are distinct assesseees for the purpose of income tax, the Act still recognises the principle that a firm is only a compendious name for its partners and that the business carried on by the firm is as well a business carried on by each of the partners too - vide section 67(2) and (4) of the Act and the loss of a registered firm is treated as the loss of its partners too - and that the procedure envisaged by it will only enable a firm and the partners to set off the aggregate of the unabsorbed depreciation of the firm against the income of the firm and partners. To the extent effect is given to such unabsorbed depreciation to one or more of the partners the firm cannot get the benefit and vice versa. The Supreme Court held that the firm is entitled to carry forward of the unabsorbed depreciation computed for the assessment year 1966-67 and have it set off in its assessment for 1968-69.

21. It must be noted that the Supreme Court in this judgment has clearly stated thus :

... What the sub-section clearly provides for is that the aggregate of the depreciation available to an assessee over the years will be taken into consideration for set off against its income over a period of years. No doubt, the latter portion of section 32(2) does not envisage that the business carried on by the assessee in the subsequent years should be the same or that the assets to the depreciation in respect of which the unabsorbed depreciation is to be added should be the same, or indeed, that any depreciation at all should be allowable to the assessee in the subsequent year...." [Emphasis supplied] (p. 531)

22. This observation of the Supreme Court justifies the view taken by the majority of the High Courts that the same business need not be in existence during the relevant year for allowing the claim for deduction of the unabsorbed depreciation carried forward from the earlier year.

23. The decision of the Supreme Court in Garden Silk Wvg. Factory's case (supra), however, did not deal with a situation as in the present case, viz., what is the position in case the registered firm with respect to which the depreciation was allowed and the unabsorbed depreciation carried forward is not in existence during the relevant year in which the set off is claimed by the partners of the erstwhile firm. Is it the position that no set off is possible from the income of the partners of the erstwhile registered firm in the subsequent years. The indication from the decision in Garden Silk Wvg. Factory's case (supra) is that it is possible

to set off from the income of the erstwhile partners, since a partnership firm is nothing but a compendious name for its partners and the business carried on by the firm is as well carried on by the partners. The decision of the Supreme Court in Jaipuria China Clay Mines (P.) Ltd.'s case (supra) also supports the same where the Supreme Court adverting to the words "no profits or gains chargeable for that year" occurring in section 10 of the 1922 Act [same as in section 32(2) of the Act] observed that, that said words are not confined to the profits and gains derived from the business by a person whose income is being computed u/s 10.

24. A Division Bench of this Court in A.M.J. Anthraper's case (supra), to which one of us (Sivarajan, J.) was a party, considered the case of another partner of the very same firm, M/s. Anthraper Industries, for the assessment years 1978-79, 1979-80 and 1980-81. The assessee-partner's claim for carried forward and consequential set off of the unabsorbed depreciation was rejected by the Officer on the ground that business loss cannot be carried forward and set off against the income under other head. In appeal, the first Appellate Authority decided that the carrying forward and set off of unabsorbed depreciation can be allowed at the assessee's hands against the income arising under the other heads to the extent of his share. The Tribunal, in appeal filed by the Revenue, confirmed the order of the first Appellate Authority. The Tribunal also noted that the consistent stand of the Department throughout is that the unabsorbed depreciation on allocation to the partners can be carried forward only by the partner.

25. This Court referring to the provisions of section 32(2) of the Act and the decision of the Supreme Court in Garden Silk Wvg. Factory's case (supra) held that the observations of the Supreme Court would rule that the answer to the question, even apart from the situation that on a plain reading of the provisions of the Act, the Tribunal would have to be justified in its view. In view of this decision of this Court, it is no longer open to the Revenue to contend that the partners are not entitled to set off of the carried forward unabsorbed depreciation of the firm allocated to the respective partners from their income from other business or under other heads. The existence or otherwise of the registered firm or the plant and machinery with respect to which the depreciation was originally allowed at the relevant year is immaterial for such grant.

26. We have already found that the majority of the High Courts have taken the view that the existence of the business with reference to which depreciation was originally allowed is not necessary for the purpose of carry forward and set off of the unabsorbed depreciation of the earlier years u/s 32(2) of the Act and that the only decision which has taken a contrary view is of the Madras High Court. We have also noted that the Supreme Court itself has observed in Garden Silk Wvg. Factory's case (supra) that existence of the business or plant and machinery with respect to which depreciation was originally allowed is not relevant for the purpose of section 32(2) of the Act. Even assuming that two views are possible

on this question it is well settled that where two interpretations are possible the Court will have to adopt that interpretation on the statutory provision that would be favourable to the assessee bearing in mind that the Court is construing a taxing statute - Union of India v. Onkar S. Kanwar [2002] 25 8 ITR 7 61 1 (SC) and Petron Engineering Construction Pvt. Ltd. and Another Vs. Central Board of Direct Taxes and Others, .

27. Looked at from any angle, we are of the view that a partner of a registered firm is entitled to set off of his share of unabsorbed depreciation of the firm in which he was a partner against his income of the previous year even though the firm was not carrying on any business during the previous year. We accordingly answer the question referred in the affirmative, i.e., in favour of the assessee and against the Revenue.