
(1980) 03 MAD CK 0006

In the Madras High Court

Case No : Tax Case No"s. 641 and 642 of 1975

Commissioner of Income Tax

APPELLANT

Vs

Coromandel Steels Ltd.

RESPONDENT

Date of Decision : 06-03-1980

Acts Referred:

Income Tax Act, 1961 — Section 256(1), 30, 31, 32, 32

Citation : (1981) 5 TAXMAN 168

Hon'ble Judges : Sethuraman, J;G. Ramanujam, J

Bench : Division Bench

Advocate : J. Jayaraman, for the Appellant; T. Srinivasamurthy, for the Respondent

Judgement

Sethuraman, J.—In this reference u/s 256(1) of the income tax Act, 1961, the following question has been referred:

Whether, on the facts and in the circumstances of the case, it has been rightly held that the unabsorbed development rebate of Rs. 1,98,603

relating to the assessment years 1962-63 to 1967-68 should be set off first against the income for the assessment years 1970-71 and 1971-72,

and then only the business loss relating to the assessment years 1968-69 and 1969-70?"

The assessee, carrying on business in structural engineering, was assessed for the assessment years 1970-71 and 1971-72. For the earlier

assessment years, it had carried forward business losses, unabsorbed depreciation and unabsorbed development rebate as follows:

Assessment Business loss determined Unabsorbed Unabsorbed

years and carried forward depreciation development rebate

Rs. Rs. Rs.

1962-63 ि½ ि½ 7,062

1963-64 ि½ ि½ 11,027

1964-65 ि½ ि½ 21,342

1965-66 ि½ ि½ 73,902

1966-67 ि½ ि½ 45,426

1967-68 ि½ ि½ 21,430

1968-69 2,21,634 1,12,473 8,867

1969-70 1,08,048 1,10,464 9,547

2. For the assessment year 1970-71, it disclosed in the income tax return an income of Rs. 1,51,610. The ITO determined the business income at

Rs. 1,58,140 after allowing the current year's depreciation at Rs. 1,12,473. The ITO then set off Rs. 1,58,140, being the absorbable business loss

out of Rs. 2,21,634 shown in the above table. The result was that the income was determined to be nil for that year. The balance of business loss

of Rs. 63,494 was carried forward.

3. For the assessment year 1971-72, the assessee disclosed Rs. 4,14,333 as income in its return, and the ITO determined the business income to

be Rs. 3,18,148 after allowing Rs. 98,002 being the current year's depreciation. For this year also, he set off the balance of the business loss of

Rs. 63,494 remaining unabsorbed out of Rs. 2,21,634 relating to the assessment year 1968-69 and also the business loss of Rs. 1,08,048 relating

to the assessment year 1969-70. Thereafter, he set off the unabsorbed depreciation of Rs. 1,12,473 relating to the assessment year 1968-69 and

Rs. 34,133 out of the unabsorbed depreciation of Rs. 1,10,464 relating to the assessment year 1969-70. After all these adjustments the income

determined, viz., Rs. 3,18,148, was reduced to "nil". In making the assessment in the above manner, the ITO rejected the contentions of the

assessee that the unabsorbed development rebate relating to the assessment years 1962-63 to 1969-70, amounting to Rs. 1,98,603 shown in the

last column of the table given earlier, should be first deducted and the carried forward business losses of the assessment years 1968-69 and 1969-

70 should be deducted thereafter and that the current year's depreciation and the unabsorbed depreciation of the earlier years should be taken up

for consideration only after the above adjustments.

4. The assessee appealed to the AAC, reiterating the contentions taken before the ITO. The AAC held that the procedure adopted by the ITO

was correct and in accordance with the decision of the Calcutta High Court in Aluminium Corporation of India Ltd. Vs. Commissioner of Income

Tax, West Bengal, Calcutta,

5. The assessee then preferred appeals to the Tribunal and took up more or less the same contentions, as had been unsuccessfully urged before the

ITO and the AAC.

6. For the department the submission was that in view of the specific provision of section 72(2) of the Act, the procedure adopted by the ITO was

correct. The Tribunal, following the decision of the Calcutta High Court in Aluminium Corporation of India Ltd. Vs. Commissioner of Income Tax,

West Bengal, Calcutta, held that the current year's depreciation was rightly deducted in determining the business income for the two assessment

years. The assessee's contention to the contrary thus stood rejected. As regards the unabsorbed business losses of earlier years and unabsorbed

depreciation, it was held that the business loss of the earlier years should first be deducted from the business income computed for the relevant

assessment years, and that only thereafter the unabsorbed depreciation allowance for the earlier years would come in for adjustment. As regards

the unabsorbed development rebate it was held that the ITO should have set off the amounts relating to the assessment years 1962-63 to 1967-68

first and then only taken the business loss relating to the assessment years 1968-69 and 1969-70. Thus, in the view of the Tribunal, the

adjustments would be first with reference to the current year's depreciation, then unabsorbed development rebate and thereafter unabsorbed

business loss. This order of the Tribunal has given rise to the question referred, which has been set out earlier.

7. The question to be considered is the order of priorities in the adjustment of unabsorbed development rebate, unabsorbed depreciation and

unabsorbed business loss. Section 32 relates to the allowance of depreciation. Sub-section (2) of the said provisions, in so far as it is relevant, runs

as follows:

Where, in the assessment of the assessee...full effect cannot be given to any allowance under...clause (ii)...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...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.

8. Section 33 relates to the allowance of development rebate. It runs as follows:

In respect of...new machinery or plant...which is owned by the assessee and is wholly used for the purposes of the business carried on by him,

there shall, in accordance with and subject to the provisions of this section and of section 34, be allowed a deduction, in respect of the previous

year in which...the machinery or plant was installed or, if...the machinery or plant is first put to use in the immediately succeeding previous year,

then, in respect of that previous year, a sum by way of development rebate as specified in clause (b).

9. The development rebate in the case of machinery or plant varied between 15% and 35%, according to the year of installation and the use to

which it was put. Sub-section (2) of section 33 runs as follows:

In the case of a ship acquired or machinery or plant installed after the 31st day of December, 1957, where the total income of the assessee

assessable for the assessment year relevant to the previous year in which the ship was acquired or the machinery or plant installed or the

immediately succeeding previous year, as the case may be (the total income for this purpose being computed without making any allowance under

subsection (1) (or sub-section 1A) of this section or sub-section (1) of section 33A or any deduction under Chapter VI-A or section 280-O is nil

or is less than the full amount of the development rebate calculated at the rate applicable thereto under sub-section (1) or sub-section (1A), as the

case may be,-

(i) the sum to be allowed by way of development rebate for that assessment year under sub-section (1) or sub-section (1A) shall be only such

amount as is sufficient to reduce the said total income to nil; and

(ii) the amount of the development rebate, to the extent to which it has not been allowed as aforesaid, shall be carried forward to the following

assessment year, and the development rebate to be allowed for the following assessment year shall be such amount as is sufficient to reduce the

total income of the assessee assessable for that assessment year, computed in the manner aforesaid, to nil, and the balance of the development

rebate, if any, still outstanding shall be carried forward to the following assessment year and so on, so, however, that no portion of the

development rebate shall be carried forward for more than eight assessment years immediately succeeding the assessment year relevant to the

previous year in which the ship was acquired or the machinery or plant installed or the immediately succeeding previous year, as the case may be.

10. It would be seen from the above provision that the total income is to be computed first without making any allowance u/s 33 or any deduction

under Chap. VI-A or section 280-O. If there was a paucity of income, then the development rebate admissible would be such as to reduce the

said total income to. ""nil"". If there was any balance of development rebate which remained unadjusted, then it would have to be carried forward

and adjusted in the subsequent year in the same manner. Section 34 imposed certain conditions for the grant of development rebate. The deduction

is not to be allowed unless an amount equal to 75% of the development rebate to be actually allowed was debited to the profit and loss account of

the relevant previous year and credited to a reserve account to be utilised by the assessee during the period of eight years next following for the

purpose of the business of the undertaking, other than, (i) for distribution by way of dividends or profits, or (ii) for remittance outside India as

profits or for the creation of any asset outside India. Section 72 provides for carry forward and set off of business losses. Sub-section (2) of

section 72 provides thus:

Where any allowance or part thereof is, under sub-section (2) of section 32.....to be carried forward, effect shall first be given to the provisions of

this section.

11. This provision shows that there is a priority in respect of carried forward loss over unabsorbed depreciation. As to what is to happen to

unabsorbed development rebate is not covered by this provision. That is the

question with which we are now concerned.

12. Taking the above provisions into account, it is manifest that the current year's depreciation is to be allowed first. The depreciation of the

previous years remaining unadjusted is deemed to be part of the depreciation allowance of the relevant year. However, in view of the specific

provision in sub-section (2) of section 72, the unadjusted depreciation yields place to business loss in the matter of set off. The reason is obvious.

There is a time-limit applicable to the adjustment of business losses. Loss cannot be carried forward for more than eight assessment years

immediately succeeding the assessment year for which the loss was first computed : See section 72(3). As far as depreciation is concerned, there is

no time-limit for its being carried forward and set off. It was, therefore, provided that business loss, adjustable over a limited duration, should have

priority over unabsorbed depreciation, which can be set off without any time-limit.

13. Depreciation is loss, though intangible, sustained by the assessee in running any machinery. Provision has been made in the Act for giving

different percentages of the original cost or written down value, as the case may be, as and by way of depreciation to be allowed in each year,

taking into account the nature of the asset and the use to which it is put. Development rebate, however, was treated originally on a par with

depreciation prior to 1st January, 1958. Thereafter, it was liable to be allowed only if the assessee complied with certain conditions. Its allowance

was made contingent on the assessee creating a reserve to the extent contemplated by section 34, and keeping the reserve intact for a period of

eight years, the period during which alone development rebate could, if carried forward, be allowed in the hands of the assessee as a deduction.

14. As pointed by the Karnataka High Court in Mysore Paper Mills Ltd. Vs. Commissioner of Income Tax, Karnataka-I, , in section 33

Parliament has made a provision by way of an incentive to businessmen who invest on new machinery or in modernising plant and equipment. This

provision does not deal with any trading loss as it is ordinarily understood. In order to earn development rebate the assessee has to satisfy the

conditions prescribed by section 34 as seen earlier. Thus, it is not an absolute or unconditional allowance.

15. The allowance of the development rebate as shown by section 33 is so limited as to reduce the total income to ""nil"". In other words, it is not treated as a kind of other deductions contemplated by sections. 30 to 43. It stands on a class by itself. The competition in the matter of allowance between unabsorbed business loss and unabsorbed depreciation was resolved in favour of unabsorbed business loss by Parliament itself. There is, however, no provision made with reference to unabsorbed development rebate, as it stands on a class by itself having regard to the special features which we have noticed above. In these circumstances, the unabsorbed development rebate would come up for consideration only after the allowance of, (a) carried forward business loss, and (b) carried forward depreciation.

16. The Tribunal, in para. 8 of its order, has observed that there was no provision in the income tax Act which militated against the assessee's contention being accepted or which prohibited effect being given to the assessee's contention. So long as there is no provision made by Parliament, it is not possible to make any allowance on the basis of any equitable or other considerations. It is the statute that is required to be worked out. Therefore, if there is no provision in the income tax Act contemplating the allowance as claimed by the assessee, then the assessee cannot be granted the allowance. We may also point out that the Tribunal appears to have been impressed with the lapsing of the unabsorbed development rebate of earlier years, because of the period of its adjustment being limited to eight years. In this particular case, the Tribunal appears to have been impressed by the circumstance that the unabsorbed depreciation and business loss were only of recent years when compared to unabsorbed development rebate, as shown by the table. It was, therefore, to the advantage of the assessee in this case to ask for the unabsorbed depreciation and business loss being postponed for consideration after adjusting unabsorbed development rebate. The contrary may conceivably happen, as an assessee may be saddled with unabsorbed depreciation and unabsorbed losses of earlier years, while unabsorbed development rebate may be of recent origin. The matter has to be considered only in the light of the statutory provision and not in the light of any reasoning based on equitable considerations, on the accident of the relative age of the unabsorbed depreciation, loss or development rebate " in

any particular case.

17. The learned counsel for the assessee submitted that in the present case, the allowance as granted by the Tribunal may be sustained, as in case

of doubt, an adjustment more favourable to the assessee may be preferred to the one less favourable to him. There is absolutely no ambiguity in the

provision of the statute and, therefore, it is not possible to apply any consideration based on the provision being so applied as to be more

advantageous to the assessee or to give the assessee a kind of a choice in the matter of adjustment. The assessee has no choice in a matter like

this. The statute determines the priorities.

18. We have already referred to the decision of the Karnataka High Court in Mysore Paper Mills Ltd. Vs. Commissioner of Income Tax,

Karnataka-I, . In that case, the competition for adjustment was between carried forward depreciation and carried forward development rebate. It

was held that carried forward depreciation had precedence over unabsorbed development rebate. The same consideration which applied to

determine the priority in this manner would equally apply to the present case also. In fact, in the present case, there is unabsorbed depreciation and

also unabsorbed development rebate and in addition there are business losses, which were brought forward. The priority between unabsorbed

depreciation and unabsorbed development rebate would be covered by the decision of the Karnataka High Court, while in respect of business

loss, applying the same reasoning as in the said case and also the considerations which have been adverted to earlier, business loss would have

precedence over both unabsorbed depreciation as well as unabsorbed development rebate.

19. In Commissioner of Income Tax Vs. Madras Wire Products, , the question that arises here was left open for consideration, though the

reasoning in that decision would in a way support the stand taken by the department here. The result is that the question referred to us is answered

in the negative and in favour of the revenue. The revenue will be entitled to its costs. Counsel's fee, Rs. 500. One set.