

(1987) 08 GUJ CK 0012

In the Gujarat High Court

Case No : Income-tax Reference No. 185 of 1976

Commissioner of Income Tax

APPELLANT

Vs

Deepak Textile Industries Ltd.

RESPONDENT

Date of Decision : 18-08-1987

Acts Referred:

Income Tax Act, 1961 — Section 10(2), 2(34), 24, 24(2), 3

Citation : (1987) 66 CTR 34 : (1987) 168 ITR 773

Hon'ble Judges : B.S. Kapadia, J;A.M. Ahmadi, J

Bench : Division Bench

Advocate : B.R. Shah, for the Appellant; J.P. Shah, for the Respondent

Judgement

B.S. Kapadia, J.—The following has been referred by the Income Tax Appellate Tribunal, Ahmedabad, u/s 256(1) of the Income Tax Act

to this court for opinion :

Whether, on the facts and in the circumstances of the case, the unabsorbed depreciation should be allowed to be carried forward and set off

against the assessable income for the assessment years 1969-70 and 1970-71 notwithstanding the fact that the assessee has sold its business of

textile mills and had ceased carrying on business of manufacture and sale of cloth in the assessment year 1964-65 ?

2. The facts leading to the present reference briefly stated are as under :

The assessee is a private limited company which carries on business of manufacture and sale of cloth. During the assessment year 1969-70, it

disclosed income from business. The assessee claimed set off of unabsorbed depreciation carried forward from the earlier assessment year against

the income computed for the assessment year in question. The Income Tax

Officer took the view that since the business of the assessee-company relating to manufacture of textiles had come to an end, the set off the unabsorbed depreciation for the earlier years against the income brought to tax for the assessment year in question cannot be granted.

3. During the assessment year 1970-71, there was no income from business. The assessee claimed set off of unabsorbed depreciation carried

forward from the earlier assessment years against the income computed for the assessment year in question. The Income Tax Officer took the view

that since the business of assessee-company relating to manufacture of textiles had come to and end, the assessee was not entitled to carry forward

and set off the unabsorbed depreciation for the earlier years against the income brought to tax for the assessment year in question.

4. Against the aforesaid orders, the assessee filed appeals before the Appellate Assistant Commissioner and this claim was made by way of an

additional ground. It was, inter alia, contented that the carried forward depreciation formed part and parcel of current year's depreciation and was

eligible for set off against the income from other sources, namely, income from other sources and capital gains. However, the Appellate Assistant

Commissioner did not accept the contention of the assessee on the ground that carrying on of the business was a necessary condition for allowing

the impugned claim. Since the business of textile manufacture was discontinued as nearly as in the assessment year 1964-65, the assessee was not

entitled to get the benefit of allowance as claimed and, accordingly, he rejected the appeals of the assessee for both the years under reference.

5. The assessee carried the matter further by way of an appeal before the Income Tax Appellate Tribunal, Ahmedabad, for both the years. It was

conceded on behalf of the assessee that the manufacturing activity had come to an end, but it was urged that there was some business activity

during the assessment year in question and, therefore, it could not be said that the assessee's business was completely discontinued as held by the

lower authorities. It was also urged that though the business of manufacturing of textiles had come to an end, the entire business activity of the

assessee had not come to an end. Reliance was placed on the provisions of section 41(1) of the Income Tax Act. However, the Tribunal for

reasons recorded and following the decision in the case of Commissioner of

Income Tax Vs. Virmani Industries (P.) Ltd., , held that the assessee would be entitled to set off the unabsorbed depreciation against the total income as may be computed for the assessment year 1969-70. So far as the assessment year 1970-71 is concerned, in that appeal also, the friction created u/s 41(1) of the Act was relied upon. The Tribunal, for reasons recorded and following the decisions in the case of Commissioner of Income Tax Vs. Rampur Timber and Turnery Co. Ltd., , held that the assessee would be entitled to set off the unabsorbed depreciation against the total income as may be computed for the assessment year 1970-71. Against the said decisions, at the instance of the Commissioner of Income Tax, Gujarat(I), the aforesaid question has been referred to this court for opinion.

6. On behalf of the Revenue, Shri B. R. Shah, learned Advocate, has submitted that under the scheme of the Act, the profits and gains of each distinct business carried on by assessee during the previous year are to be computed separately in accordance with the provisions contained in Section 30 to 43A of the Act and for the purpose of determining income chargeable to tax under the head ""Profits and gains of business or profession"", amongst others, a deduction for the depreciation allowance as envisaged by section 32(1) of the Act has to be made. It is submitted that this deduction is to be made out of the revenue of the business in the previous year, but when it is not possible to give effect or full effect to allowance for depreciation against the revenue of the business of the previous year, law permits adjustments against income from any other business or income under any other head. Still, if the allowance remains unabsorbed, it is allowed to be carried forward to the next following previous year and so on for the succeeding previous years. He further submits that by a deeming fiction created in sub-section (2) of section 32, the unabsorbed depreciation which is carried forward is put on par with the depreciation allowance for the next following year and so on subject to the provisions contained in sections 72(2) and 73(3) of the Act. He further submits that it becomes an allowance for the current previous year u/s 32(1) of the Act and it cannot have a better treatment than the actual depreciation allowance for the current year. He further submits that the question of making an allowance for depreciation in the current previous year

can only arise if the income chargeable to tax under the head "Profits or gains of business or profession" is required to be computed in accordance with the provisions of the Act. He, therefore, submits that if the business is not carried on during the current previous year and there is no profit or gain of the business in question to be computed in accordance with the provisions of the Act, the occasion for making allowance for depreciation u/s 32(1) will not arise. He, therefore, submits that it would be equally true of the carried forward unabsorbed depreciation of the preceding previous year. He also submits that the dimmed fiction created by sub-section (2) of section 32 is not like the one created by the Explanation to sub-section (2) or (3) of section 41 so as to provide for the fictional existence of the business or profession in the previous year. He also submitted that conceptually also, carry forward is provided for being adjusted on future against the very source which could not take care of the subject-matter. He further submits that if the source itself has dried up, there is no purpose in carrying forward and it has to be written off as lost. He, therefore, submits that on stoppage of a business altogether, it cannot have any accounting period or previous year to which the unabsorbed depreciation can become an allowance.

7. Mr. J. P. Shah learned advocate for the petitioner-assessee, submits that section 32 of the Act is a complete code in respect of depreciation.

According to him, section 32(1) requires existence of the following three facts of deduction of current year's depreciation and all the facts must co-exist in the concerned current year :

- (1) ownership of machinery,
- (2) user of machinery, and
- (3) user of machinery for the purpose of business.

8. He submits that section 32(2) specifically provides that in the 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 to which effect has not been given shall be added to the amount of the allowance for depreciation for the following previous year and be deemed to be part of the 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. He,

therefore, submits that section 32(2) specifically provides in such a case that the entire current depreciation will be deemed to be next year's

current depreciation. He submits that when there is a legal fiction with regard to allowance for the previous year, it means that for that previous

year all the three ingredients required u/s 32(1) of the Act are to be assumed though factually not in existence. He, therefore, submits that to insist

on the actual fulfilment of any of the above three conditions in respect of deemed current depreciation is to go utterly contrary to what is decided in

the case of Commissioner of Income Tax, Delhi Vs. S. Teja Singh, . He, therefore, submits that it is not necessary to insist on the existence of the

business in the current year when unabsorbed depreciation is to be set off in the current year. He also submitted that income is not the sine qua non

for deduction of expenses and allowances like depreciation.

9. It may be stated that a number of authorities were cited by the learned advocates appearing for both the sides.

10. With a view to properly appreciate the submissions of the learned advocates, it is necessary to quote the relevant extract of section 32 of the

Income Tax Act :

32. (1) In respect of depreciation of buildings, machinery, plant or furniture owned by the assessee and used for the purposes of the business or

profession, the following deductions shall, subject to the provisions of section 34, be allowed -

(i) in the case of ships other than ships.....

(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 (i) or clause (ii) or clause (iia) or clause (iv) or clause (v) or

clause (vi) of sub-section (1) or under clause (i) of sub-section (1A) 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.

11. It is true that as submitted by Mr. J. P. Shah, the learned advocate appearing for the applicant, section 32(1) of the Income Tax Act requires

the existence of the following three facts for deduction of current year's depreciation, namely; (i) ownership of machinery, (ii) user of machinery,

and (iii) user of machinery for the purpose of business. All the aforesaid three facts must co-exist in the current year. It is also clear from a perusal

of section 32(2) of the Act that the said sub-section (2) is only subject to the provisions of sub-section (2) of section 72 and sub-section (3) of

section 73. Section 72 of the Act provides for carry forward and set off business losses and sub-section (2) thereof provides that 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, namely, section 72. Similarly, section 73 of the Act provides for losses in speculation business and sub-section (3)

thereof provides that in respect of allowance on account of depreciation or capital expenditure on scientific research, the provisions of sub-section

(2) of section 72 shall apply in relation to speculation business as they apply in relation to any other business. It means that in speculation business

also, when there is a loss, effect shall first be given to the losses of the current year and thereafter any allowance or part thereof carried forward u/s

32(2) of the Act will be set off. Section 32 is not subject to any other section except the two aforesaid sub-sections.

12. It is settled law that in interpreting or creating a legal fiction, the court has to ascertain for what purpose the legal fiction is created and after

ascertaining this, the court has to assume all those facts and the consequences which are incidental or inevitable corollaries in giving effect to the

fiction. In the case of Commissioner of Income Tax, Delhi Vs. S. Teja Singh, , it has been held that it is a rule of interpretation well settled in

constructing the scope of a legal fiction, that it would be proper and even necessary to assume all those facts on which alone the fiction can

operate.

13. 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 under the section 32(1) of the Act must be secured and, therefore, for the following previous year the ownership of the machinery, user of machinery and the 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 sake of doing justice to the assessee which could not take advantage of the total amount of depreciation in the current year be defeated by calling upon them to prove the necessary ingredients for earning depreciation allowance u/s 32(1) of the Act.

14. It is, therefore, clear that wherein the assessment of any assessee, full effect cannot be given to any allowance under any of the clauses mentioned in sub-section (1) in any previous year owing to there being no profits or gains chargeable for the previous year or owing to the profits or gains chargeable being less than the allowance, a legal fiction is created that this unabsorbed depreciation allowance will be deemed to be part of that allowance in the following previous year. It is further provided that if there is no such allowance in the previous year, then the allowance or the part thereof to which effect has not been given would be deemed to be the allowance for that year and so on for the succeeding previous years. It is, therefore, very clear that whenever there is no such allowance for depreciation for the following previous year, the unabsorbed carried forward depreciation will be deemed to be the allowance for that previous year. It is to be noted that the assessee could not have got all the advantages of that amount of depreciation as he had already compiled with the provisions of the section 32(1) of the Act, but he could not do so

owing to either there being no profits or gains chargeable for that previous year or owing to the profits or gains being less than the allowance.

When that is so it is not necessary to prove all the three ingredients of section 32(1) of the Act in the next following previous year or for succeeding

previous years, as the case may be, for carrying forward the unabsorbed depreciation. Prima Facie, it appears that to call upon the assessee to

comply with all the three ingredients of section 32(1) of the Act for the following previous year or the succeeding years would amount to putting at

naught the legal fiction and the purpose for which it is made.

15. A question has arisen before Supreme Court in the matter Commissioner of Income Tax, Calcutta Vs. Jaipuria China Clay Mines (P) Ltd., , as

to whether the unabsorbed depreciation of the past year is deductible from the total income of the accounting year under the Indian Income Tax

Act 1922. In the said case, it was held that the unabsorbed depreciation of past years had to be added to the depreciation of the current year and

the aggregate unabsorbed and current year's depreciation had to be deducted from the total income of the previous year relevant of the

assessment year 1952-53. It was further held in the said case that "the Income Tax Act draws no distinction between the various allowances

mentioned in section 10(2). They have to be deducted from the gross profits and gains of a business. According to commercial principles,

depreciation would be shown in the accounts and the profits and loss account would reflect the depreciation accounted for in its accounts. If the

profits are not large enough to wipe off the depreciation, the profits and loss account would show a loss. If the Legislature had enacted proviso (b)

to section 24(2), depreciation allowance would have been deducted first out of the profits and gains in preference to any losses which might have

been carried forward u/s 24. But as the losses can be carried forward only for six years u/s 24(2), the assessee would in certain circumstances

have in his books losses which he would not be able to set off." It is significant to note that it is also held in said case that "in proviso (b) to section

10(2)(vi), the Legislature clearly assumes that effect can be given to depreciation allowance in the assessment of partner. The only way effect can

be given in the assessment of partner is by setting it off against the income, profits and gains under other heads." In the said case, while answering in

the negative the arguments advanced on behalf of the Revenue, that what the Legislature contemplated was an assessment of those partners who were carrying on other business, it was observed that (at P. 559) ""In our opinion, this suggestion is unsound. What would happen if a partnership consists of four partners, two carrying on other business and two carrying on no other business, Mr. Shastri was unable to explain. Now, if this is the interference to be drawn from these words, it is quite clear that the words "no profits or gains chargeable for the year" are not confined to profits and gains derived from the business whose income is being computed u/s 10.

16. It may be stated that the Supreme Court also considered the expression ""in the assessment of the assessee or if the assessee is a registered firm in the assessment of partners full effect can be given to any such allowance in any year"" for the purpose of giving effect to the unabsorbed depreciation of the past years of registered firm and the Supreme Court came to the conclusion that the only effect which can be given in the assessment of a partner is by setting it off against the income, profits and gains under other heads and for that purpose they considered the case of a partnership firm in which two partners were carrying on other business while other two partners were carrying on no other business. If the unabsorbed depreciation was to be given set off only against the business income, the other two partners who were not carrying on such business could not get the advantage of the unabsorbed depreciation of the past years and they also came to the conclusion that the words used ""no profits or gains chargeable for that year"" in section 10 (which pari materia in sub-section (2) of section 32) are not confined to the profits and gains derived from the business by a person whose income is being computed u/s 10. It can be noted that the Supreme Court has considered and approved the decision of Bombay High Court in the case *Ambika Silk Mills Co. Ltd. Vs. Commissioner of Income Tax, Bombay City*, , where in it was held that when the profits and gains of business are insufficient to cover depreciation allowance u/s 10(2)(vi) of the Indian Income Tax Act, 1922, the excess depreciation can be set off against the capital gains for that year. Similarly, the Supreme Court in that case also considered and approved the case of *Commissioner of Income Tax, Bombay City I Vs. Ravi Industries Ltd.*, , where in it was observed that the unabsorbed

depreciation does not lose its character when it is carried forward to the following year. Such unabsorbed depreciation of the following year

which is carried forward to the current under proviso (b) to section 10(2)(vi) can be set off unlike other business losses against income under

other heads.

17. This illustration of the partners given by the Supreme Court in the aforesaid case is good not only for the purpose of giving effect to the

unabsorbed depreciation by giving set off against income, profits and gains under other heads, but also it would be useful to consider the legal

fiction introduced in sub-section (2) of section 32 of the Act. When the other partners who were not carrying on any other business can get set off

of the unabsorbed depreciation from the income profits and gains under other heads, it would naturally mean that it is not necessary to carry on the

business in the following previous year or succeeding previous years for the purpose of getting the advantage of set off unabsorbed depreciation of

past years. That also indicates that for the purpose of giving full effect to the legal fiction u/s 32(2) of the Act, all the facts on which the depreciation

allowance can be earned will have to be assumed.

18. It may be stated that recently the Supreme Court has considered the provisions of section 32(2) and section 72(2) of the Income Tax Act in

the case of Commissioner of Income Tax, Kanpur Vs. Mother India Refrigeration Industries P Ltd., . In the said case, it has been held that in

giving set off while computing the total income of the assessee of any particular year, the current depreciation must be deducted first before

deducting the unabsorbed carried forward business losses of the earlier years and the latter cannot be given preference over the former. While

considering this point, the Supreme Court has also considered the case of Commissioner of Income Tax, Calcutta Vs. Jaipuria China Clay Mines

(P) Ltd., , but observed that the point that arose for decision in that case was entirely different and the observations cannot be divorced from the

point decided therein. While relying on the case of The Bengal Immunity Company Limited Vs. The State of Bihar and Others, it is observed that it

is well settled as observed therein that the legal fictions are created only for some definite purpose and these must be limited to that purpose and

should not be extended beyond that legitimate field. However, it may be stated

that so far as the principles laid down in Commissioner of Income Tax, Calcutta Vs. Jaipuria China Clay Mines (P) Ltd., are distinguished in the said case by observing that the said case dealt with a different point altogether and as such the observations made in the context of the points that arose for decision there would be of no avail. It is, therefore, clear that the point involved in the case of Commissioner of Income Tax, Kanpur Vs. Mother India Refrigeration Industries P Ltd., was with regard to giving priority to unabsorbed carried forward business losses and it is decided that it cannot have priority over the current year's depreciation in giving set off while computing the total income of an assessee of a particular year. Thus it is clear that in a subsequent case also the Supreme Court has not doubted the decision of Commissioner of Income Tax, Calcutta Vs. Jaipuria China Clay Mines (P) Ltd., .

19. The aforesaid Bombay case was also referred to in the case of Commissioner of Income Tax Vs. Warangal Industries Pvt. Ltd., . In the said case during the previous year corresponding to the assessment year 1967-68, the assessee, a private limited company, running an oil mill, sold its building, machinery, etc., on October 22, 1965, and the title to the immovable property was transferred on February 19, 1966, though the document of transfer was registered in October 1970. The assessee closed its account on every Diwali date, i.e., in this case on November 12, 1966. The Income Tax Officer held that the assessee did not carry on any business during the assessment year 1967-68 on the ground that the plant and machinery and building were sold on October 22, 1965, and accordingly included the business income returned by the assessee under the head ""Other sources"". He further computed the income u/s 41(2) of the Income Tax Act, 1961, at Rs. 43,496 rejecting the claim of the assessee in regard to the unabsorbed depreciation on the same ground that it has not carried on business during the previous year. The assessee was successful before the Appellate Assistant Commissioner and the Tribunal and on a reference made at the instant at the Revenue, Chief Justice Divan (as he then was) observed that it is clear that the unabsorbed depreciation of the past years to be added to the depreciation of the current year and the aggregate has to be deducted from the total income of the previous year and the Tribunal was right in holding that the assessee was

entitled to have the unabsorbed depreciation set off against the income computed, even though it might be income u/s 41(2) of the Act, so far as the assessment year 1967-68 is concerned. In the said case, it is further observed that the deeming fiction created by sub-section (2) of section 32 is only subject to provisions of section 72(2) and section 73(3) and is not subject to any other provision of the Act. It is, therefore, clear that the fiction created u/s 32(2) of the Act is not subject, at any rate, to section 41(5) or any other section of the Act. The reference was answered the favour of the assessee and against the Revenue.

20. In order to meet the argument on behalf of the Revenue that there should be income from business for earning deductions and allowances u/s

32(2) also, the Supreme Court in the case of Commissioner of Income Tax, West Bengal-III Vs. Rajendra Prasad Moody, was cited. The

Supreme Court held in the said case as under (headnote) :

The plain natural construction of the language of section 57(iii) of the Income Tax Act, 1961, irresistibly leads to the conclusion that to bring a

case within that section it is not necessary that any income should in fact have been earned as a result of the expenditure. What section 57(iii)

requires that the expenditure must be laid out or expended wholly and exclusively for the purpose of making or earning income. The section does

not require that this purpose must be fulfilled in order to qualify the expenditure of deduction : it does not say that the expenditure shall be

deductible only if any income is made or earned.

21. It is submitted on the basis of this decision that where income under the head is not the sine qua non of deduction of expenditure, it would be

more so for an allowance like depreciation. In view of this Supreme Court decision, the argument seems to be right and we agree with Mr. J. P.

Shah on the point.

22. In view of the legal fiction u/s 32(2) of the Act and in view of the judgment of the Supreme Court in the case of Commissioner of Income Tax,

Calcutta Vs. Jaipuria China Clay Mines (P) Ltd., , it is not necessary to refer to the other authorities cited at the Bar.

23. The submission made by Mr. B. R. Shah, learned advocate appearing for the Revenue, the deduction (depreciation allowance) is to be made

out of the Revenue of the business in the previous year cannot be accepted in

view of the decision in Commissioner of Income Tax, Calcutta Vs.

Jaipuria China Clay Mines (P) Ltd., . The further submission that Mr. B. R. Shah that the question of making an allowance for depreciation in the

current previous year can arise only if the income chargeable to tax under the head ""Profits or gains of business or profession"" is required to be

computed in accordance with the provisions of the Act, is true. However, when the business is assumed for the purpose of subsequent previous

year in which unabsorbed depreciation to be given set off as deemed current year's depreciation, it will be assumed that they will be computing the

total income for the particular previous year. It is, however, not necessary that there must be income from the business. There might be losses in

the business and there might be only loss and it would be a loss return or there might be only return on depreciation to be filed though there is no

profits or gains from the business. The submission of Mr. B. R. Shah that the source itself has dried up, there is no purpose in carrying forward the

unabsorbed depreciation and it has to be written off as loss, is contrary to the decision of the Supreme Court in the case of Commissioner of

Income Tax, Calcutta Vs. Jaipuria China Clay Mines (P) Ltd., as the depreciation can be set off against income from other sources.

24. Mr. B. R. Shah has also submitted that the deeming fiction created by sub-section (2) of section 32 of the Act is not like the one created by

explanation (2) of sub-section (3) of section 41 of the Act so as to physically provide for the existence of business or profession in the previous

year. At the outset, it may be stated that the purpose of creating fiction under sub-section (2) of section 32 of the Act is different from the purpose

of providing for the physical existence of business or profession in the previous year under sub-section (2) or sub-section (3) of section 41 of the

Act. The underlying principle in the granting of depreciation allowance under the Act is that true profits of a business cannot be determined without

deducting from the gross profits certain sums representing the value of physical depreciation of the assets, the user of which contributes to the profit

earning capacity of the business. It is clear from the language of sub-section (2) of section 32 of the Act that depreciation allowance or part of the

allowance to which effect has been given for any of the reasons stated therein is to be added to the amount of allowance for depreciation for the

following year or deemed to be part of the allowance or if there is no such allowance for that previous year, be deemed to be allowance for the previous year and so for succeeding previous years. The object of the legal fiction to benefit the assessee who is entitled to depreciation allowance but could not get for the reasons stated in the sub-section (2) of section 32 of the Act in the succeeding years. While the object of section 41 and the sub-sections thereof is to provide for adjustment provisions whereby the Revenue takes back what it has already allowed if certain condition come to pass and assessee recoups something for which for the allowance has already been made and deducted from the business income. Each of the sub-sections of section 41 of the act enumerates a particular circumstance which provides that if such circumstance comes to pass, certain income would be made taxable as deemed income. The section further says the year in which recoupement, etc., is to be taxed. It is clear from the provisions of section 41 of the Act that where no depreciation had ever been allowed on machinery, etc., the excess realised on its subsequent sale shall not attract the provisions of the section 41(2) of the Act. The explanation to section 41(3) of the Act clarifies that the charge is attracted even if the business in which the scientific research asset was used ceased to be in existence in the previous year when the scientific research has become due. Thus the deeming fiction is created for the purpose of giving full effect to the provisions of section 41 of the Act which are enacted for the purpose as mentioned above.

25. As discussed above, as the purposes of creating the legal fiction u/s 32(2) of the Act and of creating fiction of business in section 41 of the Act are different, that can be used for the purpose of arguing and holding that there is no question of assumption of business when unabsorbed depreciation is to be deemed to be the depreciation for the current year.

26. On the contrary, when such deemed income for purpose of section 41 of the Act is to be assessed for that deemed business for a particular year, benefit thereof certainly be available for the purpose of giving benefit of unabsorbed depreciation in that year. Similar of the fact in the case of Commissioner of Income Tax Vs. Rampur Timber and Turnery Co. Ltd., . In the said case, the assessee who was carrying on business in manufacturing bobbins, etc., stopped the business with effect from the previous

year relevant to the assessment year 1955-56, though it continued to own the plant and machinery, etc. There after, the assessee continued to be assessed only in respect of income from the property which owned.

During the previous year relevant to the assessment year 1962-63, the assessee received a refund of Rs. 6,982 from the Electricity Department out of the electricity charges already paid by it in the years when it was carrying on business as aforesaid and which had been allowed to the assessee as expenditure in the business in those assessments. During the assessment for the assessment year 1962-63, the Income Tax Office included the aforesaid amount of Rs. 6,982 as business income of the assessee in view of the provisions of the section 41(1) of the Act. The assessee claimed that this refund was liable to be adjusted against unabsorbed depreciation for the years 1951-52 to 1954-55 amounting to Rs. 46,003. In the said case, the question arose before the High Court whether, on the facts and in the circumstances of the case, depreciation allowance determined for the assessment years 1951-52 to 1954-55 should be set off against the income of Rs. 6,982 assessed u/s 41(2) of the Act. In the said case, it was observed by the High Court that the benefit of unabsorbed depreciation could be availed of by an assessee in any subsequent year without satisfaction of the pre-conditions attached to sub-section (1) of section 32 of the Act and it is not necessary that in such subsequent year the assessee actually carried on business and the asset in question was used for the purpose of the assessee's business. The High Court also followed the judgment of the Supreme Court in the case Commissioner of Income Tax, Calcutta Vs. Jaipuria China Clay Mines (P) Ltd., , and held that in any particular year there is no income from business, but there is income from other heads, the unabsorbed depreciation carried forward from the past years, will be available for set off against such income from other heads. The unabsorbed depreciation of Rs. 46,003 carried forward by the assessee from the assessment year 1954-55 was, obviously, available to it for set off against such income from property.

27. In the said case, it was alternatively held that section 41(1) of the Act creates a legal fiction whereby the refund of Rs. 6,982 received by the assessee in the relevant previous year shall be deemed to be profits and gains of business of that year although the business in respect of which the

amount in question had been allowed as a deduction in the past was not in existence in that year. If so, the inevitable corollary of that fiction would

be that business would be deemed to have been carried on in that year. Hence, the unabsorbed depreciation of the past would be available as the

depreciation allowance for the relevant previous year and set off against the sum of Rs. 6,982 deemed to be business income of the assessee for

that year. Accordingly, the question referred in the said case was answered in the affirmative, in favour of the assessee and against the Department.

28. The above mentioned judgment also clearly supports the interpretation that we have placed on section 32(2) of the Act that when there is a

legal fiction in respect of unabsorbed depreciation, there will be assumption of business also along with the user of the machinery, etc., of the

ownership of the assessee and that they were used for the purpose of business. Thus, in our view, this argument of Mr. B. R. Shah also would not

help the Department for taking a different interpretation of section 32(2) of the Act.

29. Mr. B. R. Shah has also submitted that when there is a stoppage of the business altogether, it cannot have any accounting period or previous

year to which the unabsorbed depreciation can become allowance. Section 2(34) of the Act provides the definition that "previous year" means the

previous year as defined in section 3 of the Act. Section 3(3) of the Act provides that subject to the other provisions of this section, an assessee

may have different previous year in respect of separate sources of his income. It presupposes that previous year cannot be confined to only one

aspect and there would be income in respect of other sources also. It may be the same or there might be separate previous years. In that view of

the matter, it cannot be said that when an assessee no business, he cannot have a previous year. Hence, we do not agree with the submission made

by Shri B. R. Shah, learned advocate appearing for the Revenue.

30. From the above discussion, it becomes clear that the point at issue is mainly covered by the decision of the Supreme Court in the case of

Commissioner of Income Tax, Calcutta Vs. Jaipuria China Clay Mines (P) Ltd., . But that apart, even if two views are possible, we would be

inclined to accept the view which would enhance the purpose of providing for carrying forward the unabsorbed depreciation of the previous

year(s). As we have pointed out earlier, the real object of permitting a carrying forward of the unabsorbed depreciation by creating a legal fiction is

to benefit the tax-payer who has earned the allowance which has remained unabsorbed and if this objective is to be achieved, we think the view

which has commended to us must prevail.

31. For the aforesaid reasons, we answer the questions referred to us in the affirmative, i.e., in favour of the assessee and against the Revenue.

Accordingly, the reference stands disposed off with no order as to cost.