

(1993) 09 GUJ CK 0032
In the Gujarat High Court
Case No : IT Ref. No. 156 of 1981

Commissioner of Income Tax

APPELLANT

Vs

Deepak Textiles Industries Ltd.

RESPONDENT

Date of Decision : 28-09-1993

Acts Referred:

Income Tax Act, 1961 — Section 32, 32(1), 32(2), 71, 71(2)

Citation : (1994) 210 ITR 1029

Hon'ble Judges : M.B. Shah, J;J.M. Panchal, J

Bench : Division Bench

Advocate : B.J. Shelat instructed by R.P. Bhatt and Co, for the Appellant; J.P. Shah, for the Respondent

Judgement

J.M. Panchal, J.—At the instance of the CIT, Gujarat-I, Ahmedabad, the Tribunal, Ahmedabad, Bench "A", has made the present reference to this Court under s. 256(1) of the IT Act, 1961 ("Act" for short), as it was satisfied that four questions of law arise for the opinion of the High Court out of its order dt. 17th May, 1988 rendered in ITA No. 1181/Ahd/1978-79.

Facts :

2. The assessee, Deepak Textile Industries (P) Ltd., carried on business in purchase and sale of cloth. In the previous year relevant to the asst. yr. 1975-76 it suffered a trading loss of Rs. 32,608. In respect of said loss, a set off under s. 71(2) of the Act was claimed against its long term capital gains of Rs. 31,247. The ITO was of the view that said business loss was net genuine and, therefore, he disallowed the claim of set off.

3. The assessee also claimed set off of unabsorbed depreciation of earlier years against the assessee's income of the year under consideration. The ITO rejected the said claim on the ground that during the year in question the assessee did not carry on any business activity. The ITO completed the assessment on a total income of Rs. 25,679 vide his order dt. 22nd March, 1978.

4. Against the above referred order, the assessee preferred an appeal before the AAC. After considering the material on record and hearing the parties, the AAC came to the conclusion that there was sufficient material for coming to the conclusion that the assessee did carry on business in the year of account. He directed the ITO to give set off against the assessee's other income in question. He further directed the ITO to give set off of unabsorbed depreciation of earlier years.

5. Being arrived by the abovereferred order, the Revenue went in appeal before the Tribunal. The Tribunal observed that so far as the question of setting off of unabsorbed depreciation of earlier years was concerned, facts of the present case were not different from those in the case of Rajratna Naranbhai Mills Co. Ltd. decided by it on 17th March, 1978 in ITA No. 1514 (Ahd) /76-77. In view of this conclusion, the Tribunal agreed with the finding of the AAC. On the question of setting off of business loss, the Tribunal was of the view that in the year of account the assessee did his business and it suffered loss in question.

6. In view of the above conclusion, the Tribunal dismissed the appeal by order dt. 17th May, 1988.

7. The CIT, therefore, moved an application under s. 256(1) of the Act requiring the Tribunal to draw up a statement of case and refer questions of law for the opinion of the High Court. The Tribunal was satisfied that four questions of law arise out of the order passed by it in ITA No. 1181/Ahd/78-79 and, therefore, the Tribunal drew up the statement of case and has made reference of the following four questions of law for the opinion of the High Court :

"1. Whether, on the facts and in the circumstances of the case, the unabsorbed depreciation brought forward from earlier years should be adjusted against assessee's income from other sources ?

2. Whether, on the facts and in the circumstances of the case, the assessee is entitled to the set off of business loss against its long term capital gains ?

3. Whether the assessee carried on business during the year under consideration and as a result thereof the assessee was entitled to set off of the business loss against the assessee's other income ?

4. Whether the assessee was entitled to unabsorbed depreciation brought forward from earlier years to be adjusted against its income from other sources, notwithstanding the fact that the assessee had sold its business of textile mills and had ceased carrying on business of manufacture and sale of cloth in asst. yr. 1964-65 ?"

Reasons :

8. Questions No. 1 and 4 are common and inter-connected with each other and, therefore, they have been taken up together for rendering opinion thereon.

Similar such question came up for consideration before this Court in the case of

this very assessee for asst. yrs. 1969-70 and 1970-71. In the case of Commissioner of Income Tax Vs. Deepak Textile Industries Ltd., the question referred for the opinion of the High Court was as under :

"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 asst. yrs. 1969-70 and 1970-71 notwithstanding the fact that the assessee had sold its business of textile mills and had ceased carrying on business of manufacture and sale of cloth in the asst. yr. 1964-65 ?"

9. After considering the scheme of s. 32 and more particularly of sub-s. (2) of s. 32 r/w s. 72, sub-s. (2), and s. 73, sub-s. (3), of the Act, it has been held by the High Court as under :

"Section 32 of the IT Act, 1961, deals with depreciation. Section 32(2) specifically lays down that if in a 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-s. (2) of s. 72 and sub-s. (3) of s. 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. On reading s. 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 legal fiction, all the facts necessary for the purpose of earning depreciation under s. 32(1) of the Act must be secured and, therefore, for the following previous year, the ownership 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. Hence, unabsorbed depreciation should be allowed to be carried forward and set off against assessable income of a subsequent year notwithstanding the fact that the business in respect of which it arose ceased to exist in the year of such set off. Moreover receipt of income during the relevant previous year is not a sine qua non for the deduction of allowances like depreciation."

10. In the facts of the present case, the AAC as well as the Tribunal, after appreciation of the evidence have come to the conclusion that the assessee did carry on business in the year of account. In view of the decision rendered in the case of this very assessee referred to hereinabove, we are of the opinion that on the facts and in the circumstances of the case, unabsorbed depreciation brought forward from earlier years should be adjusted against the assessee's income from other sources and the assessee was entitled to unabsorbed depreciation brought forward from earlier years to be adjusted against its income from other sources notwithstanding the fact that the assessee had sold its business of textile mills and had ceased carrying on business of manufacture and sale of cloth in

asst. yr. 1964-65.

In view of our above conclusion, the question No. 1 and 4 are answered in affirmative i.e. in favour of the assessee and against the Revenue.

11. The question No. 2 and 3 are also common and, therefore, they have been dealt with together for rendering our opinion thereon. The question whether the assessee is entitled to the set off of business loss against its long term capital gains or not has been dealt with in s. 71(2) of the Act, as it stood prior to its substitution by the Finance Act, 1987 w. e. f. 1st April, 1988. Earlier s. 71 was substituted by Finance (No. 2) Act, 1962 w. e. f. 1st April, 1962 and its sub-s. (2) was substituted by Finance (No. 2) Act, 1967 w. e. f. 1st April, 1968. At the relevant time, s. 71(2) read as under :

"71. Set off of loss from one head against income from another :
(1).....

(2) Where in respect of any assessment year, the net result of the computation under any head of income other than "Capital gains" is a loss and the assessee has income assessable under the head "Capital gains", such loss may, subject to the provisions of this chapter, be set off -

(i) against the income, if any, of the assessee assessable for that assessment year under any head including income assessable under the head "Capital gains" (whether relating to short-term capital assets or any other capital assets), or (ii)....." A bare reading of s. 71(2)(i) of the Act makes it clear that in respect of any assessment year, when the net result of the computation under any head of income, other than "Capital gains", is a loss and the assessee's income is assessable under the head "Capital gains", the assessee would be entitled to set off of such loss against his income, assessable for that assessment year under any other head including income assessable under the head "Capital gains".

13. In view of the above referred statutory provisions, we are of the opinion that on the facts and in the circumstances of the case, the assessee is entitled to the set off of business loss against its long term capital gains and as the assessee carried on business during the year under consideration, the assessee was entitled to set off of the business loss against the assessee's other income.

14. In view of our above conclusion, the questions No. 2 and 3 are answered in affirmative i.e. in favour of the assessee and against the Revenue.

15. Therefore, all the questions referred to this Court are answered in affirmative i.e. in favour of the assessee and against the Revenue. The reference accordingly stands disposed of, with no order as to costs.