
(1976) 11 MAD CK 0014

In the Madras High Court

Case No : Tax Case No"s. 312 and 315 of 1972 (Reference No"s. 99 and 102 of 1972)

Commissioner of Income Tax

APPELLANT

Vs

Lucas-T.V.S. Ltd. (No. 2)

RESPONDENT

Date of Decision : 24-11-1976

Acts Referred:

Income Tax Act, 1961 — Section 32(2), 80E

Citation : (1977) 110 ITR 346

Hon'ble Judges : Sethuraman, J;Ismail, J

Bench : Division Bench

Advocate : J. Jayaraman and Nalini Chidambaram, for the Appellant; S. Swaminathan, for the Respondent

Judgement

Ismail, J.—The former reference relates to the assessment year 1967-68. The latter reference relates to the assessment years 1964-65 to

1966-67. In the former reference, the Income Tax Appellate Tribunal, Madras Bench, at the instance of the Commissioner of Income Tax u/s

256(1) of the Income Tax Act, 1961, has referred the following three questions for the opinion of this court :

1. Whether it has been rightly held that the assessee is entitled to the deduction of 8% from its profits and gains of Rs. 71,43,105 u/s 80E of the

Income Tax Act, 1961, for the assessment year 1967-68 ?

2. Whether, on the facts and in the circumstances of the case, it has been rightly held that the sum of Rs. 1,30,768 representing indirect expenditure

such as salaries, rent, lighting, etc., and allocated to various assets formed part of the capital asset for the eligibility of depreciation allowance and in

relation to the cost of machinery was eligible for development rebate"" also ?

3. Whether it has been rightly held that the expenditure incurred on the construction of roads was entitled to depreciation as part of the building u/s

32 of the Income Tax Act, 1961 ?

2. In the latter reference the second and the third questions in the former reference have been referred to this court.

3. The assessee-company acquired land at Padi near Madras and erected buildings, plant and machinery, etc., on the said land. It also entered into

lease with the Integral Coach Factory with respect to the adjoining piece of land for its use. After completing the work of erecting the factory to

certain stage; the production commenced on December 1, 1962. The accounts of the company were closed for the first time on November 30,

1962, during the course of which the assessee had incurred a total expenditure of Rs. 5,86,509 in all relating to salaries, rent, lighting, etc. This

expenditure was capitalised by the company during the year ended November 30, 1962, and the company allocated the same to capital assets in

proportion to the direct cost of the assets themselves and, thereafter, claimed depreciation and development rebate. The Income Tax Officer while

considering this claim required the assessee to furnish details of expenses. After scrutinising the statements filed by the assessee, the Income Tax

Officer came to the conclusion that out of Rs. 5,86,509, Rs. 1,30,768 would have to be treated as other expenses which were in no way

connected with the installation of machinery and acquisition of other assets. Therefore, excluding the sum of Rs. 1,30,768, he recomputed the value

of the fixed assets for the purpose of arriving at depreciation and development rebate. The Appellate Assistant Commissioner agreed with the view

taken by the Income Tax Officer that non-factory expenditure were routine administrative expenditure which had nothing to do with the bringing

into existence of any asset and, therefore, the Income Tax Officer was right in excluding the sum of Rs. 1,30,768. The assessee did not draw up a

profit and loss account for the period ended November 30, 1962. What it did was that it closed the accounts relating to the pre-production

expenses on November 30, 1962, by transferring various amounts to the capital accounts maintained in the books for the cost of the capital assets

like building, plant and machinery, etc. The total cost of the capital assets incurred up to November 30, 1962, was Rs. 44,39,720 and the pre-

production expenditure of Rs. 5,86,509 was allocated towards the cost of the various assets in proportion to the direct cost of the assets

themselves shown inclusive of the allocation from the pre-production expenditure.

4. There was also a claim by the assessee-company towards the cost of roads laid out on its own land during the assessment years 1964-65 to

1966-67. The Income Tax Officer negated the claim for depreciation on roads for the reason that these are not, buildings but only lands. The

Appellate Assistant Commissioner also agreed with the view expressed by the Income Tax Officer that the roads are only lands and the Income

Tax Rules did not provide for any depreciation on roads. Aggrieved by the order of the Appellate Assistant Commissioner, the assessee went on

appeal to the Appellate Tribunal. The Tribunal held that the pre-production expenditure incurred by the assessee formed part of the capital assets.

It also held that the assessee was entitled to depreciation on the roads as claimed by it. It is the correctness of this conclusion of the Tribunal with

reference to the three assessment years 1964-65 to 1966-67 that is challenged in the form of the two questions extracted already in T.C. No. 315

of 1972.

5. The first questions in T.C. No. 312 of 1972 arises out of the following facts. The assessee admittedly was a priority industry coming within the

scope of Section 80E read with the Fifth Schedule to the Income Tax Act, 1961, and the entire income for the assessment year 1968-69 of Rs.

71,43,105 was referable to that priority industry. The assessee claimed that it was entitled to a deduction of 8 per cent. of the said profits as

provided for in section 80E of the Act. However, the Income Tax Officer held that out of this profit of Rs. 71,43,105 a deduction of Rs.

31,81,202 should be made and only on the balance of Rs. 39,61,903 the assessee was entitled to a deduction of 8 per cent. The contention of the

Income Tax Officer was that there was an unabsorbed depreciation of the earlier years to the extent of Rs. 10,83,225. Similarly, there was

unabsorbed development rebate of Rs. 12,32,940. There was also other unadjusted business loss to the extent of Rs. 8,65,037 and these must be

deducted from the profit of Rs. 71,43,105 before the 8 per cent. for the purpose of deduction from the profits could be arrived at. The Appellate

Tribunal rejecting the contention of the Income Tax Officer and the Appellate

Assistant Commissioner held that the assessee was entitled to the deduction of 8 per cent. on the entirety of Rs. 71,43,105 u/s 80E of the Act and it is the correctness of this conclusion that is challenged in the form of the first question in T.C. No. 312 of 1972.

6. It is easier to dispose of the second question in T.C. No. 312 of 1972, which is the same as the first question in T.C. No. 315 of 1972, because

the same is covered by a decision of the Supreme Court. The Supreme Court in *Challapalli Sugars Ltd. v. Commissioner of Income Tax and*

Challapalli Sugar Ltd. Vs. The Commissioner of Income Tax, A.P., Hyderabad, has held that the accepted accountancy rule for determining cost

of fixed assets is to include all expenditure necessary to bring such assets into existence and to put them in working condition. It is not in dispute

that the said decision covers the said question. Consequently, following that judgment of the Supreme Court, the second question in T.C. No. 312

of 1972, which is the first question in T.C. No. 315/1972, is answered in the affirmative and against the revenue.

7. Then there is the other common question in both the references, namely, the third question in T.C. No. 312 of 1972 and the second question in

T.C. No. 315 of 1972. The assessee has spent various amounts during the assessment years in question for laying roads. As found by the Tribunal

the roads in question surround the main factory and provide the approach to the main factory as well as ancillary buildings. A small portion of the

roads is in cement concrete and most of it is in asphalt. The Tribunal has also referred to the specification for the construction of the roads.

According; to the Tribunal it was a lateral construction to a certain thickness over: the land on which the roads were laid and the roads provided an

approach; to the buildings and they were in close proximity to the buildings. It is with reference to these facts, the assessee claimed depreciation on

the cost of laying of those roads. The contention of the department was that such roads are only like lands and, therefore, depreciation was not

admissible in the cost thereof. The Tribunal overruled the said contention. Mr. J. Jayaraman, the learned counsel for the department, contends that

the word "" building "" in the Income Tax Act has got a very restricted meaning and does not include land and, therefore, the roads laid on such lands

will not be eligible for allowance of depreciation. In support of the contention, the

learned counsel drew our attention to the decision of the Supreme Court in Commissioner of Income Tax, Punjab, Jammu and Kashmir and Himachal Pradesh Vs. Alps Theatre, . In that case, what was the subject-matter of the controversy was whether in calculating the depreciation allowable for a building, the cost of the land on which the building is constructed can be taken into account or not. The Supreme Court, after examining the provisions contained in Section 10(2) of the Indian Income Tax Act, 1922, held that the language employed in that section clearly showed that the word "building" did not include the site or the land on which the building was constructed. That conclusion was reached by the Supreme Court primarily on the basic principle that, unlike superstructure, the site or land as such does not depreciate and, therefore, there is no scope for providing for any depreciation in respect thereof.

We are unable to agree with the learned counsel for the department that this decision has laid down any general principle that the word "building" occurring in the Income Tax Act, 1961, has a restricted meaning. As a matter of fact, the word "building" has to be understood from the common sense point of view and its use in the Income Tax Act has to be appreciated in the context in which provision for depreciation on such building has been made treating the same as a capital asset of an assessee. In this particular case, we have already referred to the fact that the roads have been laid in the proximity of the factory and for the purpose of providing access to the factory and the other buildings within the compound.

Consequently, there is nothing either on principle or in the context of the use of the word "building" in the Income Tax Act to exclude such roads.

Mr. Jayaraman invited our attention to the fact that the Supreme Court, in the decision referred to already, noticed rule 8 of the Indian Income Tax , Rules, 1922, under which, with reference to purely temporary erections, there could not be any allowance for depreciation and the entire cost of renewal will be allowed as revenue expenditure. We are of the opinion that that provision will not apply to the case of a road, because a road cannot be said to be on the same footing as a purely temporary erection referred to in the rule mentioned above and, as we pointed out already, in this case, the Tribunal found that a small portion of the road is in cement concrete and most of it is in asphalt and, therefore, they are capable of

lasting for a reasonable time during the course of which they may depreciate gradually by use, wear and tear. Under these circumstances, we are of

the opinion that the Tribunal is right in holding that the assessee was entitled to depreciation in respect of the cost of laying the roads referred to

above. The result is that the third question in T.C. No. 312 of 1972 which is identical with the second question in T.C. No. 315 of 1972 is also

answered in the affirmative and against the revenue.

8. We are now left with the first question in T.C. No. 312 of 1972. We have already referred to the fact that with regard to that question, the

contention of the Income Tax Officer was that from the sum of Rs. 71,43,105, a total sum of Rs. 31,81,202 comprising of Rs. 10,83,225

representing unabsorbed depreciation, Rs. 12,32,940 representing unabsorbed development rebate and a sum of Rs. 8,65,037 representing earlier

business loss, should be deducted before the deduction of 8 per cent. of the profit as provided for in Section 80E is granted. Section 80E of the

Income Tax Act, 1961, as it stood at the relevant time, was as follows :

80E. Deduction in respect of profits and gains from specified industries in the case of certain companies.--(1) In the case of a company to which

this section applies, where the total income (as computed in accordance with the other provisions of this Act) includes any profits and gains

attributable to the business of generation or distribution of electricity or any other form of power or of construction, manufacture or production of

any one or more of the articles or things specified in the list in the Fifth Schedule, there shall be allowed a deduction from such profits and gains of

an amount equal to eight per cent. thereof, in computing the total income of the company.

(2) This section applies to-

(a) an Indian company ; or

(b) any other company which has made the prescribed arrangements for the declaration and payment of dividends (including dividends on

preference shares) within India, but does not apply to any Indian company referred to in Clause (a), or to any other company referred to in Clause

(b), if such Indian or other company is a company referred to in Section 108 and its total income as computed before applying the provisions of

Sub-section (1) does not exceed twenty-five thousand rupees.

9. The scope of this section came up for consideration before us in Commissioner of Income Tax Vs. L.M. Van Moppes Diamond Tools (India)

Ltd., . In that case, after considering. the scope of Section 80E, we took the view that earlier years" losses were not liable to be deducted before

finding out the 8 per cent. profit to be deducted u/s 80E. In that case there was also the fact that unabsorbed depreciation of the earlier years also

were deducted by the Income Tax Officer but the Appellate Assistant Commissioner on appeal had held that that amount also should not be

deducted. Since there was no appeal with reference thereto to the Tribunal, we did not express any final opinion on this question in that judgment.

In view of this, out of the three sums referred to already the conclusion of the Tribunal with reference to the earlier years" business losses will be

covered by our judgment referred to above and in the light of the judgment, the conclusion of the Tribunal was right.

10. That leaves out the two other amounts, namely, unabsorbed depreciation and unabsorbed development rebate. In view of our earlier judgment,

referred to above, it has to be proceeded on the basis that the unabsorbed development rebate also will stand on the same footing as the

unabsorbed losses because Section 33(2)(ii) actually provides for the unabsorbed development rebate being set off against the profits in each of

the succeeding years to the extent profits are available for a period of eight years. Consequently, the unabsorbed development rebate stands on the

same footing as unabsorbed losses for the purpose of Section 80E and, therefore, the reasoning which we have given for not deducting

unabsorbed losses in the case already referred to will apply to the case of unabsorbed development rebate also. However, Mr. Jayaraman, the

learned counsel for the department, very strongly distinguished the case of unabsorbed depreciation from the case of; the other two amounts.

According to the learned counsel, Section 32, Sub-section (2), made it clear that the unabsorbed depreciation of the earlier years will be treated as

the depreciation to be allowed in the succeeding year and consequently it will stand on the same footing as the depreciation to be allowed for the

current year and so long as the depreciation from the current year is allowed for calculating the profits and gains, the unabsorbed depreciation of

the earlier years also should be similarly adjusted. We are unable to accept this argument. Section 32(1) deals with the allowance for depreciation.

Section 32(2) says :

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 (iv) or Clause (v) 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.

11. Thus, it will be seen that this very sub-section postpones the adjustment of unabsorbed depreciation to a stage subsequent to the set-off, u/s

72(2) of business losses and the set-off, u/s 73(3) of the losses in speculation business. If for the purpose of Section 80E the previous years"

losses cannot be set off, it will be a fortiori that the unabsorbed depreciation cannot be adjusted because, from the very sequence, the adjustment

of unabsorbed depreciation can come only after the adjustment of the unabsorbed losses of the previous years. Therefore, we are of the opinion

that the unabsorbed depreciation of the earlier years also cannot be deducted from the total profit of Rs. 71,43,105 for the purpose of working out

the 8 per cent. of profit as contemplated u/s 80E.

12. The result is that we answer the first question referred in T.C. No. 312 of 1972 also in the affirmative and against the revenue. There will be no

order as to costs.