

(1995) 07 OHC CK 0042
In the Orissa High Court
Case No : S.J.C. No. 19 of 1987

Commissioner of Income Tax

APPELLANT

Vs

R.N. Mishra

RESPONDENT

Date of Decision : 07-07-1995

Acts Referred:

Income Tax Act, 1961 — Section 32, 32(2), 70, 73

Citation : (1995) 2 OLR 243

Hon'ble Judges : S. Chatterjee, J; D.M. Patnaik, J

Bench : Division Bench

Advocate : S.C. Lal, A. Agrawal and B. Agrawal, for the Respondent

Judgement

1. This is a reference at the instance of the Commissioner of Income Tax, Orissa, raising the following question :

"Whether, on the facts and in the circumstances of the case, the Tribunal was justified in directing the Income Tax Officer to allow the claim of the assessee to bring forward the unabsorbed depreciation determined in the earlier years and set off against the income of the year under consideration although such unabsorbed depreciation was apportioned in the past among the partners and was allowed to be adjusted against their other incomes in terms of Section 32(2) of the Income Tax Act, 1961 ?"

2. The facts reveal, inter alia, that the assessee is a registered firm. The assessment year is 1979-80. In the immediately preceding assessment year, unabsorbed depreciation was apportioned amongst the partners of the assessee-firm and was allowed to be adjusted against their other incomes in terms of Section 32(2) of the Income Tax Act, 1961. In the assessment year under consideration, the assessee-firm claimed that the unabsorbed depreciation as apportioned in the past, having remained unadjusted, should be carried forward to the year under consideration and adjusted against the profits of the year. The Income Tax Officer did not discuss the assessee's claim. The matter was carried

in appeal before the Commissioner of Income Tax (Appeals) from whose order it was found that the assessee's claim related to the unabsorbed depreciation pertaining to the assessment years 1975-76, 1976-77 and 1977-78 since allocated for set-off against the income of the partners in the subsequent years. The Commissioner of Income Tax (Appeals) found that the unabsorbed depreciation still remaining unabsorbed for a particular year in the hands of the partners, reverted to the firm and was allowable in the next year, first in the income of the firm and so on. The Income Tax Officer was, therefore, directed to ascertain the unabsorbed depreciation of the firm which still remained to be set off in the hands of the partners and add the same to the depreciation of the current year and allow the same as deduction against the income determined for that year. The matter was taken before the Tribunal. The Tribunal recorded that on the point under consideration there were conflicting decisions of some of the High Courts. Since preponderance of judicial decisions was found to be in favour of the assessee, the Tribunal upheld the order of the Commissioner of Income Tax (Appeals) in this regard. Hence, this reference before this court.

3. During the course of hearing, our attention was drawn to the decision in Commissioner of Income Tax Vs. Singh Transport Co., . The Gauhati High Court considered that depreciation allowance has been treated differently by the Legislature from business losses and losses in speculation business. The rigour of limitation is not applicable in the case of an unabsorbed depreciation allowance. Unabsorbed depreciation never loses its nature or character as depreciation allowance. It is required to be set off and carried forward not by force of Section 72 and/or Section 73 of the Income Tax Act, 1961, but by virtue of the provisions of Section 32(2) itself. By discussing the facts of the said case in depth and detail it further found that depreciation allowance in the following year is available only to the firm whose income is to be computed as enjoined under Sections 182 and 183 of the Act. Section 32(2) contemplates that the assessment of the partner is relevant only for the purpose of ascertaining whether full effect has not been given to the depreciation allowance. Accordingly, it was held that the unabsorbed depreciation of the assessee, a registered firm, for the preceding assessment years allocated to the partners, not wholly set off in their respective assessments, should be brought back for computation of the total income of the firm in the subsequent years, as if it were the firm's unabsorbed depreciation. Discussing further, it held that unabsorbed depreciation allowance goes to the partners by virtue of the provisions of Section 32(2) itself and Section 32(2) is a complete code dealing with set-off and carry forward of depreciation allowance. This view finds support from the observations made by the Supreme Court in Commissioner of Income Tax, Calcutta Vs. Jaipuria China Clay Mines (P) Ltd., and S. Sankappa and Others Vs. The Income Tax Officer, Central Circle II, Bangalore, . As per the facts available there, it was made clear that where full effect has not been given to the depreciation allowance in the assessment of the partners the unabsorbed allowance should be allowed to be set off by the registered firm in the succeeding year.

4. By applying the ratio of the aforesaid two decisions to the facts of the present case, we do not find that the Tribunal has committed anything wrong. The present question raised before us is, therefore, answered in the affirmative and in favour of the assessee. The S. J. C. is disposed of. No costs.