

(1976) 11 CAL CK 0010
In the Calcutta High Court
Case No : Income-tax Reference No. 3 of 1969

Commissioner of Income Tax

APPELLANT

Vs

Wilh. Wilhelmsen

RESPONDENT

Date of Decision : 17-11-1976

Acts Referred:

Income Tax Act, 1922 — Section 10(2)
Income Tax Rules, 1922 — Rule 33, 8

Citation : (1978) 115 ITR 10

Hon'ble Judges : S.C. Deb, J;Dipak Kumar Sen, J

Bench : Division Bench

Advocate : B.L. Pal and A. Sengupta, for the Appellant;D. Pal and M. Seal, for the Respondent

Judgement

Deb, J.—The following questions are involved in this reference u/s 66(2) of the Indian Income Tax Act, 1922 :

"1. Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the assessee was entitled to get depreciation allowance under Rule 8 of the Income Tax Rules even in respect of ships which had formed part of the assessee's fleet for more than twenty years ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was right in deleting the addition of Rs. 55,280 made by the Appellate Assistant Commissioner on account of excess depreciation in respect of the vessel "Tortugus" ?

3. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in deleting the enhancement of Rs. 97,547 to the total income made by the Appellate Assistant Commissioner on account of wrong deduction of unabsorbed depreciation allowed by the Income Tax Officer ?"

2. The assessee is a Norwegian shipping company. The assessment year involved is 1958-59. The previous year ended on December 31, 1957. The facts stated by

the Tribunal may be briefly stated as follows:

(i) Instead of furnishing the annual accounts for its world business for the assessment year 1958-59, the assessee furnished separate complete annual accounts for its Indian trade, that is to say, for all round voyages of each ship to and from the Indian ports. The assessment was made under the third method of rule 33 of the Indian Income Tax Rules, 1922, and the instructions issued under this rule. What was ultimately brought to tax was the net Indian profits of each ship employed in the Indian trade in the accounting year 1957.

(ii) In view of the said instructions the Income Tax Officer disallowed depreciation on eight ships mentioned in his order as those ships were in the assessee's fleet for more than 20 years.

(iii) The Income Tax Officer allowed Rs. 55,280 as depreciation in respect of the vessel "Tortugus" for its three round voyages of 195, 150 and 128 days, respectively, aggregating to 473 days in the accounting year.

(iv) There was an unabsorbed depreciation of Rs. 3,31,493 in the assessment year 1953-54. Out of that amount, Rs. 2,49,093 was set off against the assessee's income for the assessment year 1957-58. The unabsorbed depreciation of Rs. 97,547 for the assessment year 1953-54 pertained to seven ships mentioned at page 33 of the paper book and those ships did not come to India in the assessment year 1958-59 and only one of them came to India in the assessment year 1957-58. In the books of the assessee, the said sum of Rs. 97,547 was shown as a business loss brought forward from the earlier years and the Income Tax Officer allowed it to be set off against the profits for the assessment year 1958-59.

(v) On appeal by the assessee, the Appellate Assistant Commissioner sustained the order of the Income Tax Officer regarding the disallowance of depreciation on those eight ships which were in the assessee's fleet for more than 20 years.

(vi) The Income Tax Officer submitted that by mistake he had allowed depreciation for 473 days on the ship "Tortugus" instead of 365 days and, therefore, depreciation for 108 days should be disallowed. He also submitted that due to mistake he had allowed the set-off of Rs. 97,547. The assessee accepted those contentions and, accordingly, the Appellate Assistant Commissioner enhanced the assessment by disallowing the excess depreciation of 108 days on the "Tortugus" and also by the said sum of Rs. 97,547.

(vii) On further appeal, the assessee contended before the Tribunal that the instructions so far as they relate to disallowance of depreciation on those eight ships were ultra vires the provisions of Section 10(2)(vi), proviso (c) to that Section and rule 8 of the Income Tax Rules, 1922. The assessee argued that depreciation on all those ships should be allowed u/s 10(2)(vi) and proviso (c) to that section read with Rule 8. It further contended that the words "company's fleet" used in the instructions were referable only to those ships of the assessee

which were employed in its Indian trade and, therefore, the Appellate Assistant Commissioner was wrong in holding that the depreciation allowance on those ships had ceased after the 20th assessment year.

(viii) The Tribunal expressed no opinion on the vires of the instructions and held that the instructions were misinterpreted by the Appellate Assistant Commissioner, for, according to the Tribunal, the instructions could not go against the provision of Section 10(2)(vi), proviso (c), to that section and Rule 8 of the Rules. The Tribunal accordingly allowed the said claim in the following terms :

".....Section 10(2)(vi) is quite clear in providing that depreciation on ships are to be allowed on the original cost and proviso (c) to the same section delimits the total allowance of depreciation from year to year to the extent of such capital cost. Under rule 8, the rates have been prescribed for the different kinds of ocean-going steamers and vessels. When the depreciation is allowed under the Indian Income Tax Act it follows that in the matter of calculating the overall or total depreciation for the purpose of proviso (e) to Section 10(2)(vi) one has also to take into account only such depreciation as has been actually allowed under the Indian Income Tax Act. As such we are not concerned with any notional depreciation or depreciation which might have been provided, in the accounts other than those relevant for the purpose of assessment under the Indian Income Tax Act. This, to our mind, seems to be the most patent and obvious interpretation of Section 10(2)(vi). In the case of the present assessee which is assessed on the round voyage method, a particular ship might have called at the Indian port some 25 years back and may be employed for the company's Indian trade for the second time only in the 26th year. That does not mean that the company will not be entitled to depreciation in the 26th year because in the intervening 25 years the ship was evidently not used for purpose, of the round voyage via India and as such no depreciation had been allowed under the Indian Income Tax Act except for the first year.....

In the case of a foreign shipping company like that of the appellant-company there may be ships which are borne more than 20 years on the total world fleet and many of the ships might not have been used at all in the Indian waters but there is no prohibition under the Indian Income Tax Act against allowing depreciation on such ships simply on the ground that the ship had formed a part of the company's fleet for more than 20 years. We, therefore, hold in favour of the appellant company, viz., that depreciation allowance as provided in rule 8 should be allowed on all ships employed in connection with the company's Indian trade subject only to the limitation imposed under proviso (c) to Section 10(2)(vi)."

(ix) Regarding the "Toriugus", the assessee argued before the Tribunal that the depreciation on that ship for 473 days should be allowed on the basis of "the round voyages" system of accounting adopted by the assessee. Reliance was also placed on the 2nd proviso to Rule 8 and though the said proviso is solely

confined to the seasonal factories, it was argued on its analogy that depreciation allowance for 473 days should be allowed. On the other hand, the department contended that under Rule 8 depreciation could only be allowed with reference to the previous year, i.e., 365 of 1957, and hence depreciation for more than 365 days should not be allowed. The Tribunal, however, accepted the contentions of the assessee and by following the instructions deleted the addition of Rs. 55,280.

(x) The Tribunal also deleted the addition of Rs. 99,547 by holding that the instructions, though were previously valid, had become obsolete in view of the introduction of Section 24(2) in the Act by the Finance Act, 1955 and allowed the assessee's claim in the following terms :

".....now under the present law the earlier losses could be set off against the profits and gains of any business, if only the assessee is found to carry on the particular business in respect of which the loss had arisen in earlier years in the year in which the claim for set-off is made. In the present case, therefore, since the appellant-company admittedly carried on business in shipping year after year and the unabsorbed depreciation relates to that business only, the appellant is legally entitled to claim set-off of earlier years' losses of Rs. 97,547 representing unabsorbed depreciation only, against the profits of the same shipping business as earned and found assessable for the assessment year 1958-59."

3. It is an admitted fact that the assessment was made under the third method of rule 33 and the instructions issued under this rule by the Central Board of Revenue as printed in the Income Tax Manual (10th edition) and all the authorities concerned have considered the instructions. Mr. Ajit Sen-gupta, learned junior counsel for the revenue, drew our attention to Circular No. 35/413-I/T/25, dated August 8, 1925, printed at pages 36 and 37 of the Income Tax Circular, Vol. II, in support of his senior's contention that the assessee was not entitled to depreciation allowance on those eight ships.

4. The instructions printed in the aforesaid Income Tax Manual do not contain certain relevant provisions contained in this circular. Mr. Sen-gupta has failed to show that this circular still holds the field. Therefore, we must leave it out of our consideration as contended by Dr. Debi Pal, learned advocate for the assessee.

5. Dr. Pal argued that these instructions primed in the Manual should not be taken into consideration in determining question No. 1 which according to him is solely confined to the interpretation of rule 8 read with Section 10(2)(vi) and proviso (c) to that Section. But the scope and ambit of a question in a reference must be understood in the light of the facts and circumstances of the case stated and found by the Tribunal : vide Commissioner of Income Tax, Andhra Pradesh Vs. Dhanrajgiri Raja Narasingirji, of the report.

6. The statement of the case states that the Income Tax Officer had disallowed the claim for depreciation on those eight ships by relying on the instructions printed in the Manual and the Appellate Assistant Commissioner had sustained the said order of the Income Tax Officer on the basis of the instructions. The

Tribunal has also stated that the instructions were "misinterpreted" by the authorities below and it has allowed the assessee's claim relating to depreciation allowance on "Torlugus" on the basis of the instructions on which Dr. Pal has also placed strong reliance on question No. 2 and, therefore, his above contention must fail.

7. Dr. Pal contended that the instructions fetter the quasi-judicial power of the Income Tax Officer in the matter of allowing depreciation on ships and, therefore, the Board had no power to issue the instructions u/s 5(8) of the Act and as such the instructions are not binding on the Income Tax authorities. As an aid to this contention he cited Sirpur Paper Mills Ltd. Vs. The Commissioner of Wealth Tax, Hyderabad, , J. K. SYNTHETICS LTD. AND OTHERS Vs. CENTRAL BOARD OF DIRECT TAXES AND OTHERS., and A.L.A. Firm Vs. Commissioner of Income Tax, .

8. The above plea was not mooted before the Tribunal and it does not arise out of its order. It is a new plea and Dr. Pal cannot be heard on it. That apart, it must fail because the instructions "merely lay down the manner of applying rule 33" and do not in any manner fetter the quasi-judicial power of the Income Tax Officer.

9. He also argued that the instructions are ultra vires the provisions of Section 10(2)(vi), proviso (c), and rule 8 of the Rules, because they are inconsistent with these provisions of law. It is also his submission that the case of Ellerman Lines Ltd. Vs. Commissioner of Income Tax, West Bengal, Calcutta, does not apply to the present case.

10. Before we further proceed we should record here that it is not the contention of Dr. Pal that rule 33 is ultra vires the Act or the instructions are ultra vires rule 33 as expressly stated by him before us.

11. It has been stated in Ellerman Lines Ltd. Vs. Commissioner of Income Tax, West Bengal, Calcutta, of the report, that "it may not be possible to strictly comply with the provisions contained in Section 4 and Section 10(2) of the Act by the foreign shipping companies" whose ships ply all over the world and "possibly to get over such difficulty rule 33 was enacted."

12. It was found in Ellerman Lines Ltd. Vs. Commissioner of Income Tax, West Bengal, Calcutta, that the assessment was made under the third method of rule 33 and development rebate was claimed under the instructions issued by the Board in exercise of its powers u/s 5(8) of the Act which at that time did not provide for any development rebate. Proviso to Section 10(2)(vib) was incorporated in the Act after the said instructions were issued by the Board. The Income Tax Officer and the Appellate Assistant Commissioner rejected the assessee's claim for investment allowance under the United Kingdom Act, corresponding to the development rebate under the Indian Act, but it was allowed by the Tribunal.

13. The Supreme Court, at page 920 of the report, rejected the contention that

those instructions could not abrogate or modify the provisions of the Act. It held at page 921 of the report that the "instructions in question merely lay down the manner of applying Rule 33", and, by following its earlier decision in the case of Navnitlal C. Javeri Vs. K.K. Sen, Appellate Assistant Commissioner of Income Tax, "D" Range, Bombay, , also held that those instructions, though clearly deviated from the provisions of the Act, were binding on the Income Tax authorities.

14. The instructions in Ellerman Lines Ltd. Vs. Commissioner of Income Tax, West Bengal, Calcutta, , in Navnitlal C. Javeri Vs. K.K. Sen, Appellate Assistant Commissioner of Income Tax, "D" Range, Bombay, and also the instructions before us are inconsistent with the provisions of the Act and, therefore, we are not impressed by the contention of Dr. Pal which must also fail for the reason that the instructions before us "merely lay down the manner of applying rule 33" and are binding on the Income Tax authorities and also on this court acting under its reference jurisdiction.

15. Dr. Pal urged that a benefit not provided for in the Act but directed to be given to the assessee by the Board stands on a different footing from a benefit conferred on the assessee by the Act but directed to be disallowed by the Board. According to him, the first one is binding on the taxing authorities but not the latter one.

16. But his contention must fail, for the law does not know any such distinction. Further, the instructions merely lay down the manner of applying rule 33. Therefore, it must be held that they are valid and binding on all concerned in view of Ellerman Lines Ltd. Vs. Commissioner of Income Tax, West Bengal, Calcutta, , although they are not strictly in conformity with Section 10(2)(vi), proviso (c) to that section, and rule 8 of the Rules. It must also be held that the Tribunal fell into error in holding that the instructions cannot override Section 10(2)(vi), proviso (c) to that section, and rule 8 of the Rules.

17. The Tribunal allowed the assessee's claim for depreciation on "Torlu-gus" by following the instructions and rejected the instructions on question No. 1 on the ground that they are inconsistent with Section 10(2)(vi), proviso (c) to that section, and rule 8 of the Rules. It also held on question No. 3 that the instructions, though they were previously valid, have become obsolete after the introduction of Section 24(2) in the Act. To us these inconsistencies appear to be mutually conflicting and cannot be supported. Dr. Pal has supported the aforesaid inconsistencies, but we must reject it, for they are mutually destructive.

18. I will now briefly re-state a few facts before dealing with the contentions of Dr. Pal on the instructions. Instead of furnishing annual accounts for its world business, the assessee furnished a separate and complete annual accounts for its Indian trade. The Income Tax Officer disallowed depreciation on eight ships by following the instructions as those ships were included or borne on the assessee's fleet for more than 20 years.

19. Rule 33 runs thus :

"In any case in which the Income Tax Officer is of opinion that the actual amount of the income, profits or gains accruing or arising to any person residing out of the taxable territories whether directly or indirectly through or from any business connection in the taxable territories or through or from any property in the taxable territories, or through or from any asset or source of income in the taxable territories, or through or from any money lent at interest and brought into the taxable territories in cash or in kind cannot be ascertained, the amount of such income, profits or gains for the purposes of assessment to Income Tax may be calculated on such percentage of the turnover so accruing or arising as the Income Tax Officer may consider to be reasonable, or on an amount which bears the same proportion to the total profits of the business of such person (such profits being computed in accordance with the provisions of the Indian Income Tax Act), as the receipts so accruing or arising bear to the total receipts of the business, or in such other manner as the Income Tax Officer may deem suitable."

20. The instructions, issued under Rule 33, read as follows :

"This rule provides the manner of ascertaining the income, profits or gains of a non-resident person, when the actual amount of his income, profits or gains chargeable to tax in British India cannot be arrived at.

In respect of foreign shipping companies carrying on business in British India the following methods will be followed for the purpose of calculating their income from shipping business in respect of assessment for the year 1939-40 and for earlier years :

(i) If a company furnishes annual accounts for the whole of the business, Indian and foreign, the second method provided by Rule 33 will reasonably be applied. Depreciation has only to be considered in calculating the world profits. These are to be calculated according to the Indian Income Tax Act. Profits calculated according to the United Kingdom Act will, therefore, require certain adjustments. Deductions permitted in the United Kingdom but not permitted in India will have to be added back and deductions permissible in India but not permissible in the United Kingdom will have to be allowed. If any company, however, prefers to claim the depreciation allowed by the United Kingdom Income Tax authorities, the Commissioners of Income Tax may adopt that figure. Otherwise, depreciation will have to be calculated according to the Indian rules. What follows applies to the calculation of depreciation according to the Indian rules. For this purpose, a complete depreciation record has to be maintained for the entire fleet. Depreciation begins to run from the first year in which the company is "assessed" in India, that is, the first year in which its profits or loss were determined for the purpose of deciding whether it was liable to Indian Income Tax, Unabsorbed depreciation, i.e., any balance of depreciation which cannot be allowed in any year owing to the profits not being sufficient to cover the full

amount permissible under the Indian rules will be carried forward and allowed as far as possible in calculating the world profits according to the Indian method in the following year and if necessary in subsequent years provided that unabsorbed depreciation for 1938-39 and earlier years cannot be set off against an assessment for 1939-40 or any subsequent year.

The proportion of Indian receipts to total receipts is applied to the world profits calculated according to the Indian method (if there are any such profits) and the result is the Indian income liable to tax. No further deduction is permissible from the amount thus arrived at on account of depreciation (unabsorbed or otherwise) or anything else. The due proportion of all allowances permissible is automatically set off against the Indian profits by the above method.

This method is equally applicable whether a company works out the profits for each voyage or follows any other method of account provided that it prepares complete annual accounts for the whole business, Indian and foreign, and furnishes the accounts of gross receipts, Indian and foreign.

Some lines do not furnish complete annual accounts for their world business. They keep separate complete annual accounts for their Indian trade, that is, for all "round voyages" to and from Indian ports. The proper course is then to apply the method just described treating the profits of the Indian trade and the gross receipts of the Indian trade as though they were the "world profits" and the "world receipts" respectively. In fact, the business other than the Indian trade is ignored.

(ii) A difficulty sometimes arises in such cases owing to the fact that the ships employed in the Indian trade are constantly being changed. Unless United Kingdom depreciation is accepted as indicated above, a depreciation record will have to be kept for every ship employed at any time in the Indian trade. Depreciation must be allowed on each ship employed in the Indian trade in a given year and the allowance must be a proportion of the annual rate calculated with reference to the number of days spent in the Indian trade, whether at sea or in harbour. Any unabsorbed depreciation in any year must be distributed among the ships in the Indian trade in that year in proportion to the capital cost of each and the unabsorbed depreciation thus allotted to any ship can only be allowed in any subsequent year against the same ship.

The allowance should cease :

(a) on ships which were included in the fleet in the first year in which the company becomes liable to assessment in India (irrespective of whether it was actually found to have a taxable income in that year or not), after the twentieth year beginning with that year ;

(b) on ships subsequently added to the company's fleet, after they have been borne on the fleet for 20 years.

In both cases the period may be extended proportionately where the United

Kingdom depreciation is allowed in calculating the profits of the Indian trade" which take the place as already explained of the world profits".

Obsolescence cannot be allowed in these cases.

British shipping companies--Assessment of : When assessing British Shipping Companies, the Income Tax Officer should accept a certificate granted by the Chief Inspector of Taxes in the United Kingdom stating, (1) the ratio of the profits of any accounting period as computed for the purposes of the United Kingdom Income Tax computed without making any allowance for wear and tear to the gross earnings of the company's whole fleet, and their ratio of the United Kingdom allowance for wear and tear to the gross earnings of the whole fleet, or (2) the fact that there were no such profits. The expression "gross earnings of the company's whole fleet", means the total receipts of the shipping company, excepting only receipts from non-trading sources, such as income from investments. "Assessment for 1940-41 onwards--The above instructions should also be followed in respect of the assessments of foreign shipping companies for 1940-41 onwards. These instructions, inter alia, allow a foreign shipping company furnishing annual accounts for the whole of its business, Indian and foreign, to adopt the U.K. wear and tear allowance in lieu of the depreciation allowance under the Indian Income Tax Act, for the purpose of the computation of its income in accordance with the second method provided by rule 33, and also allow a British shipping company to elect to be assessed on the basis of a ratio certificate granted by the U.K. authorities regarding the income or loss and the wear and tear allowance."

21. Dr. Pal argued:

(i) The instructions should be construed in a manner consistent with the provision of Section 10(2)(vi), proviso (c) to that section, and Rule 8 of the Rules. Under these provisions depreciation on a ship is to be allowed on its original cost subject to the limitation imposed by the said proviso. Accordingly, depreciation on those ships must be allowed so long as their aggregate does not exceed their original cost to the assessee.

(ii) These instructions should be read fairly and reasonably and by applying equitable principles depreciation on those ships should be allowed.

(iii) The word "fleet" and the words "company's fleet" used in Clauses (a) and (b) of the instructions mean the assessee's Indian fleet, i.e., the ships employed in its Indian trade. If they are not so read, the ships which were in the assessee's world fleet in the first year in which the assessee became liable to be assessed in India would not get any depreciation under Clause (a) if they were not employed in the Indian trade for 20 years beginning with that first year of assessment although the income arising from those ships would be taxed in India if they were employed in the Indian trade after the 20th year. Similarly, the ships which are subsequently added to the assessee's fleet will not get any depreciation under Clause (b) after 20 years even if they were not engaged in

the Indian trade at all. This is highly inequitable and unjust and, therefore, these two expressions must mean the assessee's Indian fleet and not its world fleet.

(iv) The words "ships" and "have been borne on the fleet for 20 years" used in Clause (b) are referable only to those ships which are actually engaged in the Indian trade for 20 years. If it is held that they are not so referable then it would be highly inequitable and unjust that a ship which was employed in the Indian trade in a particular year would not get any depreciation allowance afterwards if it was kept out of the business altogether for the purposes of repair or renovation, say for 20 years,

(v) Depreciation must be allowed under the instructions on each ship employed in the Indian trade "in a given year". Hence, if a ship was employed in the Indian trade for the first time, say in 1940, and thereafter it was employed in the Indian trade for the second time, say in 1961, the depreciation on that ship must be allowed in that second year notwithstanding the fact that no Indian trade was carried on by that ship in between these two years.

(vi) Before depreciation allowance can cease, a right to receive it must arise or accrue under the law. Therefore, if a ship was included in the assessee's Indian fleet in the year in which the assessee became first liable to be assessed in India and such ship was not employed in the Indian trade for 20 years from the said first year of assessment a right to depreciation on that ship cannot accrue for these 20 years and accordingly question of cesser of this non-existent depreciation can never arise.

(vii) It is possible to take two views on the instructions, one as taken by the Income Tax Officer and the Appellate Assistant Commissioner, and the other by the Appellate Tribunal and as contended by him. Therefore, the view which is more favourable to the assessee should be adopted.

(viii) The instructions are also ambiguous and the ambiguity should be resolved in favour of the assessee.

22. Save that these instructions should be reasonably and fairly construed, we are not impressed by the contentions of Dr. Pal. It is an admitted fact that, since it was not possible to compute the assessee's profits or gains in terms of Section 10(2) of the Act, assessment was made under the third method of Rule 33.

23. It is beyond dispute that Rule 33 is attracted where it is not at all possible to arrive at the actual amount of the Indian income, profits and gains arising or accruing to the foreign shipping companies and this rule lays down the manner of ascertaining their actual amount of income, profits or gains chargeable to tax in India.

24. Rule 33 is a special provision. It prescribes three alternative methods of assessment. It authorises the Income Tax Officer to assess the income of a non-resident by applying the particular method which is properly applicable to a particular case.

25. Section 10(2) of the Act is wholly silent on these three methods of assessments which are also wholly inconsistent with the provision of Section 10(2) of the Act. These methods cannot be applied when it is possible to assess the Indian income of a non-resident in terms of Section 10(2) of the Act. But where such assessment is not possible, Section 10(2), Section 10(2)(vi), proviso (c) to it and Rule 8 must give way to Rule 33 and the instructions as well.

26. We are not permitted to invoke equitable principles for construing the instructions. The instructions cannot also be read in harmony or in conformity with the provisions of Sections 10(2), 10(2)(vi), proviso (c) to it and Rule 8 of the Rules.

27. The words used in the instructions are "Indian trade" and not the words "Indian fleet" or "world fleet". The words "Indian trade" have not been used in Clauses (a) and (b) of the instructions. Therefore, the words "fleet" used in Clause (a) cannot mean only those ships which were actually engaged in the Indian trade of the assessee in the first year in which the assessee became first liable to be assessed in India.

28. Moreover, the words "company's fleet" used in Clause (b) clearly indicate that the word "fleet" used in Clause (a) means the assessee's fleet and not its Indian fleet. The expression "Indian trade" and the expression "world trade" used in their context also do not support the contentions of Dr. Pal.

29. Further, the plain meaning of the word "fleet" used in Clause (a) and the words "company's fleet" used in Clause (b) cannot be restricted to those ships of the assessee which had actually carried on the Indian trade in a particular year. The word "fleet" and the words "company's fleet" mean the same thing, namely, all the ships belonging to the assessee and employed by the assessee in its shipping business or trade.

30. Therefore, if a ship belonging to the assessee was engaged in the trade in the first year in which the assessee became first liable to be assessed in India, depreciation on that ship is not deductible after 20 years from that year in view of Clause (a) of the instructions even if that ship was afterwards engaged in its Indian trade. Similarly, after the first year in which the assessee became first liable to be assessed in India, if a ship is added to its fleet and is engaged in its trade, no depreciation on that ship can be allowed after the expiry of 20 years under Clause (b) of the instructions.

31. The expression "after they have been borne on the fleet for 20 years" used in Clause (b) in its context does not mean only those ships which have actually carried on the Indian trade for 20 years.

32. The instructions also provide that where a foreign shipping company furnishes annual accounts for the whole of its business, Indian and foreign, the proportion

Indian receipts ----- Total receipts is to be applied to the world profits

which is to be calculated according to the Indian method and thus the Indian income liable to tax is ascertained and no further deduction on account of depreciation whether unabsorbed or otherwise is allowed from the amounts thus arrived at, because its due proportion is automatically set off against the Indian profits by the above method. Therefore, merely because the assessee has furnished the annual accounts of its Indian trade it cannot be said that it should get depreciation allowance more than a foreign shipping company which has furnished its annual accounts for the whole of its business, namely, Indian and foreign.

33. Depreciation on a ship is allowed only for 20 consecutive years under Clauses (a) and (b) of these instructions. It also appears to us that the full cost of each ship is not allowed to be ultimately set off against the taxable income in India under rule 33 and the instructions as well, because the foreign shipping companies are allowed depreciation allowances in foreign countries under the Income Tax Acts for carrying on trade or business in those countries with the ships concerned.

34. Depreciation on a ship is allowed only when it is actually employed in the trade or business. Therefore, if a ship is kept in any dry dock for 20 years for repair or renovation it must be held that it is not actually engaged in any Indian trade and accordingly depreciation on that ship cannot be claimed or allowed in the computation of the total Indian income of the assessee.

35. We also do not find any ambiguity in the instructions. Their language is plain and clear to us. We are also of the opinion that it is not at all possible to take two views on the instructions.

36. Subject to Clauses (a) and (b) of the instructions, depreciation is allowable on each ship under the instructions employed in the Indian trade in a given year. Clauses (a) and (b) provide both the starting point of deductible depreciation on ships and its cesser for the purpose of computation of the Indian income of the foreign shipping companies.

37. The right to get the depreciation allowance on the ships in Clause (a) accrues in the year in which the assessee first becomes liable to assessment in India and it ceases after the 20th year which is to be calculated from the aforesaid first year irrespective of the question as to whether they have carried on any Indian trade or not in this span of 20 years.

38. Similarly, the right to get the depreciation allowance on ships in Clause (b) accrues when they are added to the assessee's existing fleet for the purposes of its trade and it ceases after they have remained for 20 years in the assessee's fleet irrespective of the question mentioned in the preceding paragraph.

39. It also appears to us from Appendix "A" to Rule 8 that for the purposes of depreciation allowance the legislature has contemplated 20 years to be the normal expectation of a life of a ship. In the present case, depreciation has also

been allowed on that basis by the Income Tax Officer : See Schedule I to the assessment order which has been kept on the record at the instance of the parties.

40. In the premises, the contention of Dr. Pal that the full cost of these eight ships should be set off against the assessee's taxable income in India must fail and we return our answer to question No. 1 in the negative and in favour of the revenue.

41. On question No. 2, it is the submission of Mr. B. L. Pal, the learned senior counsel for the revenue, that, since the total income of the previous year is taxed under the Act, the words "given year" used in the instructions should be confined to 365 days of the accounting year 1957 and accordingly depreciation in respect of the vessel "Tortugus" should be restricted to 365 days of this accounting year.

42. Mr. Pal also drew our attention to Schedule II to the assessment order which has been kept on the record at the instance of the parties. This Schedule shows that the net Indian profit has been arrived at by applying a particular rate on the basis of the following formula :

43. Net profit of round voyages X Total Indian earnings : Total earnings of round voyages.

44. In arriving at the net profit of the round voyages the depreciation allowed to this ship has been deducted from the total earnings of its round voyages. Therefore, if the depreciation allowance is reduced to 365 days, then the net profit of the round voyage will proportionately be reduced and accordingly the net Indian profit will also be reduced proportionately.

45. In these circumstances, Mr. Pal has rightly conceded that the Appellate Assistant Commissioner was wrong in enhancing the assessment by Rs. 55,280. He has, however, submitted that the Tribunal was not justified in deleting the whole amount and it should have restricted the addition to the proportionate amount calculated on the basis of 365 days of the previous year by applying the above formula in terms of the instructions.

46. Since the enhancement of assessment by Rs. 55,280 cannot be supported, the question now is whether the depreciation allowance in respect of this ship should be restricted to 365 days as contended by Mr. Pal.

47. The period taken for round voyages must necessarily vary from ship to ship. One ship may take less than 365 days, whereas the other ships may take more than 365 days to complete their round voyages.

48. These instructions, however, do not restrict the receipt, expenditure and the depreciation allowance to 365 days of the previous year in the case of the round voyages. Subject to Clauses (a) and (b), the depreciation must be allowed in a given year and such "allowance must be a proportion of the annual rate calculated with reference to the number of days spent in the Indian trade

whether at sea or in harbour".

49. The annual rate is fixed by rule 8 of the Rules. In determining the quantum of depreciation the proportion of the annual rate is, therefore, to be applied with reference to the number of days spent by a particular ship in the Indian trade whether at sea or at harbour as provided in the instructions.

50. Accordingly, if the period spent by a ship in the Indian trade is either more or less than 365 days, the annual rate as fixed by rule 8 is to be applied with reference to the total number of days employed in the Indian trade in terms of the instructions. Therefore, where the period exceeds 365 days, the depreciation must also be allowed on that basis on an increased amount and on the same proportion.

51. It is also to be noted here that it is not the contention of Mr. Pal that the Income Tax Officer and the Appellate Assistant Commissioner were not justified in taking into account the receipts and expenditure for 473 days of this ship and, therefore, if the depreciation allowance in respect of this ship is restricted to 365 days, its true and correct profit from the Indian trade cannot be ascertained.

52. Since the net Indian profit of this ship has been assessed on the basis of its entire receipt and expenditure for 473 days, depreciation in respect of this ship for 473 days, in our opinion, in the facts and circumstances of the case, should also be allowed in order to arrive at the total Indian income for the purposes of taxation.

53. Though the Tribunal has erred in applying the analogy of seasonal factories in allowing the assessee's claim, the contentions of Mr. Pal for the reasons already stated must fail and we return our answer to question No. 2 in the affirmative and in favour of the assessee.

54. On question No. 3 it is to be noted here that in view of the decision of the Supreme Court in the case of Commissioner of Income Tax, Calcutta Vs. Jaipuria China Clay Mines (P) Ltd., , Dr. Pal has rightly conceded that the Tribunal was wrong in holding that the instructions have become obsolete.

55. Dr. Pal urged that under proviso (b) to Section 10(2)(vi) of the Act the unabsorbed depreciation of the past years must be added to the depreciation of the current year and the aggregate unabsorbed and current year's depreciation must also be deducted from the assessee's total income of the assessment year 1958-59, notwithstanding the fact that the unabsorbed depreciation of the assessment year 1953-54 pertained to those seven ships mentioned at page 33 of the paper book and out of those seven ships only one ship came to India in the year relevant to the assessment year 1957-58 and none of those six ships came to India in the accounting year relevant to the assessment year 1958-59.

56. But the present case before us is not governed by proviso (b) to Section 10(2)(vi) of the Act but by the instructions. Depreciation is not a business loss under the Act and, therefore, the unabsorbed depreciation brought forward from

the assessment year 1953-54 was not a business loss.

57. Out of the total unabsorbed depreciation brought forward from the assessment year 1953-54, Rs. 2,49,093 was set off against the assessor's income for the assessment year 1957-58, in which year only one ship, out of those seven ships, came to India and the entire unabsorbed depreciation pertaining to that ship was set off against the profits of that year.

58. These seven ships did not come to India in the accounting year 1957, relevant to the assessment year 1958-59. Under the instructions the unabsorbed depreciation in respect of a particular ship can only be allowed against that particular ship in the subsequent years provided that it was employed in the Indian trade in the subsequent years.

59. Therefore, the carried forward unabsorbed depreciation for the assessment year 1953-54 pertaining to those six ships cannot be set off against the assessee's profits for the assessment year 1958-59 and, accordingly, the contentions of Dr. Pal must fail.

60. It may be noted here that in enhancing the assessment by Rs. 99,547, the Appellate Assistant Commissioner overlooked a vital fact, namely, that the net Indian income of the assessee was computed by the Income Tax Officer by applying the formula stated earlier. The result of this obvious oversight, as rightly conceded by Mr. Pal, is that the assessee's income which is liable to be taxed in India has been disproportionately increased which is not warranted by the above formula.

61. In the presence and subject to the concession made on behalf of the revenue as recorded in the preceding paragraph, we answer question No. 3 in the negative and in favour of the revenue.

62. In view of the divided success, the parties shall pay and bear their own costs of this reference.

63. Before concluding we should record here that the delay in delivering this judgment was due to the fact that we had to spend many days to consider the well-argued important questions of law involved in this reference.

Dipak Kumar Sen, J.

64. I agree.