

(1981) 03 CAL CK 0007

In the Calcutta High Court

Case No : Income-tax Reference No. 381 of 1977

Eastern Cold Storage (P.) Ltd.

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 30-03-1981

Acts Referred:

Income Tax Act, 1961 — Section 32(2), 34(1), 41(2)

Citation : (1983) 139 ITR 664

Hon'ble Judges : Sudhindra Mohan Guha, J; Sabyasachi Mukharji, J

Bench : Division Bench

Advocate : K. Roy and M. Sinha, for the Appellant; B.K. Bagchi and S. Chakrabarty, for the Respondent

Judgement

Sabyasachi Mukharji, J.—This reference u/s 256(1) of the I.T. Act, 1961, involves the assessment year 1973-74. In view of the peculiar nature of the facts it would be relevant to refer to the appropriate orders of the ITO, the AAC and the Tribunal. The assessee filed the return for the relevant assessment year on June 22, 1973, showing a loss of Rs. 58,483. The assessee claimed deduction of a sum of Rs. 1,863 on account of building repairing. It was stated by the ITO that no evidence in this regard could be produced by the assessee and such expenses, as claimed by the assessee, were disallowed keeping in view, the ITO observed, that "the business of the company has stopped functioning for the last few years". So far as prompts u/s 41(2) of the I.T. Act, 1961, was concerned, the ITO further observed that the assessee had sold away plants and machineries as per list filed for a consideration of Rs. 1,21,001 to M/s. Central Refrigeration Service, 61, Sova Bazar Street, Calcutta. The assessee was granted depreciation on the said machinery, etc., up to December 31, 1970, of which the ITO noted the figures as follows :

" Description Org. cost Depn. allowed WDV as on 31-12-70

Rs. Rs. Rs.

Machinery 1,90,402.56 1,45,203.56 45,199

Insulation 83,052.32 65,341.32 17,711

Elec. instal- lations

13,927.57 8,550.57 5,377

Furniture 56,944.54 35,044.54 21,900

90,187"

2. The ITO, thereafter, went on to observe that no depreciation was allowed for the assessment year 1972-73 as "there was no claim for the same". Accordingly, he computed the profit u/s 41(2) as indicated in the order, that is to say, sale proceeds at Rs. 1,21,001 less written down value at Rs. 90,187 and arrived at the figure of Rs. 30,814 and after taking that into account had arrived at Rs. 31,422. It is apparent from the aforesaid order of the ITO that no set-off for the unabsorbed depreciation was allowed to the assessee in the year in question. There was an appeal before the AAC. The AAC in his order observed as follows ;

"The appellant sold its plant and machinery during the year for a sum of Rs. 1,21,000 on which profit u/s 41(2) was computed at Rs. 30,814. This entire amount has been subjected to tax by the ITO in complete disregard of the fact that Rs. 52,405 was brought forward from the year 1965-66 as unabsorbed depreciation. Since profit u/s 41(2) is a profit derived from business any amount of unabsorbed depreciation that has been brought forward has to be set-off against such profit.

The ITO is directed to do so and the appeal for 1973-74 is allowed.

This appeal for 1974-75 not having been pressed the appeal is dismissed."

3. The ITO was, therefore, directed to compute the income in accordance with the direction contained in the order of the AAC. There was a further appeal by the Revenue against the said order of the AAC. The Appellate Tribunal noted that the assessee had sold plant and machinery during the year under consideration and profit u/s 41(2) was computed at Rs. 30,814 which was subjected to tax. The Tribunal noted the views of the AAC and referred to the decision of the Supreme Court in the case of Commissioner of Income Tax, Calcutta Vs. Jaipuria China Clay Mines (P) Ltd., and the Tribunal was of the view that the facts were similar. A reference was also made to Section 34(2)(ii) of the Act. The Tribunal after hearing the respective submissions upheld the Revenue's contention and was of the view that in view of the provisions of Section 34(2)(ii) of the I.T. Act, 1961, the AAC was not justified in allowing the assessee's contention. The appeal of the Revenue was, therefore, allowed. Upon this, the following question has been referred to this court u/s 256(1) of the I.T. Act, 1961 :

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the unabsorbed depreciation should not be deducted in

computing the profits u/s 41(2) of the Income Tax Act, 1961 ?"

4. In view of the controversy before the Tribunal and in view of the facts and the question involved, we are of the opinion that it would be proper to reframe the question to bring out the real controversy in the manner following :

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in not allowing the set-off of the unabsorbed depreciation against the profit u/s 41(2) of the Income Tax Act, 1961 ?"

5. In order to answer this contention, it would be necessary to refer to the relevant provisions of certain sections. Section 32 of the I.T. Act, 1961, deals with depreciation and profits and the circumstances in which such depreciation should be allowed. It enjoins, however, that if the circumstances enumerated in the different sub-clauses of the section are fulfilled, then the following deductions shall, subject to the provision of Section 34, be allowed, and then the deductions are mentioned which are not necessary for us to refer. Before we refer to Section 34 it would be necessary to mention that Section 28 to Section 41B are contained under the sub-heading "D" in Chap. IV of the I.T. Act, 1961. Section 28 of that Act contains the income that shall be chargeable to Income Tax under the head "profits and gains of business or profession". Section 28 thereafter stipulates the types of profits and gains which are exigible to tax as profits and gains of the business. Section 29 stipulates that the income referred to in Section 28 shall be computed in accordance with the provisions of Section 30 to 43A. Therefore, in computing the profits and gains of business or profession, Sections 30 to 43A are attracted. Therefore, Section 32 is attracted, which we have referred to. Section 34, which is relevant for our present purpose deals with the conditions for depreciation allowance and development rebate. We are, however, not concerned in the instant reference with the question of development rebate. Sub-section (1) of Section 34 stipulates that the deductions referred to in Sub-section (1) of Section 32 shall be allowed only if the prescribed particulars are furnished and the deductions referred to in Section 33 shall be allowed only if the prescribed particulars for the purposes of Clause (i) and Clause (ii) of Sub-section (1) of Section 32 are furnished by the assessee in respect of the ship or machinery or plant. We are not really concerned with Sub-section (2) of Section 34. Section 32, as we have indicated before, deals with depreciation and in view of the controversy in this case it would be material, in our opinion, to refer to Sub-section (2) of Section 32. The said sub-section reads as follows :

"(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 (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 Subsection (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."

6. Reference in this connection should also be made to Section 32, Sub-section (1) which provides for depreciation in the case of building, machinery, plant or furniture owned by the assessee and used for the purpose of business or profession and allows certain deductions, viz., the deduction for depreciation in certain manner indicated in different sub-clauses. As we have indicated before, Sub-section (2) of Section 32 was the section upon which reliance was placed. Section 33 provides for development rebate with which we are not concerned. Section 34 deals with the condition for depreciation allowance and development rebate. The deductions referred to in Sub-section (1) of Section 32 shall be allowed, Sub-section (1) of Section 34 enjoins, only if the prescribed particulars were furnished, and, the deduction referred to in Section 33 should be allowed only if the particulars prescribed for the purpose of Clause (i) and Clause (ii) of Sub-section (1) of Section 32 had been furnished by the assessee in respect of certain business. The other material portion relevant for our present purpose is Section 41, Sub-section (2) of which deals with what is known in Income Tax law as balancing charge. Sub-section (2) of Section 41 is material and is as follows ;

"(2) Where any building, machinery, plant or furniture which is owned by the assessee and which was or has been used for the purposes of business or profession is sold, discarded, demolished or destroyed and the moneys payable in respect of such building, machinery, plant or furniture, as the case may be, together with the amount of scrap value, if any, exceed the written down value, so much of the excess as does not exceed the difference between the actual cost and the written down value shall be chargeable to Income Tax as income of the business or profession of the previous year in which the moneys payable for the building, machinery, plant or furniture became due :

Provided that, where the building sold, discarded, demolished or destroyed is a building to which Explanation 5 to Section 43 applies, and the moneys payable in respect of such building, together with the amount of scrap value, if any, exceed the actual cost as determined under that Explanation, so much of the excess as does not exceed the difference between the actual cost so determined and the written down value shall be chargeable to Income Tax as income of the business or profession of such previous year.

Explanation.--Where the moneys payable in respect of the building, machinery, plant or furniture referred to in this sub-section become due in a previous year in which the business or profession for the purpose of which the building, machinery, plant or furniture was being used is no longer in existence, the provisions of this sub-section shall apply as if the business or profession is in existence in that previous year."

7. We need not refer to Sub-section (2) of Section 72 or Section 73 of the I.T. Act, 1961, in detail but we refer only to the fact that Sub-section (1) of Section 72 provides for carry forward and set-off of business losses. Sub-section (2) of Section 72 provides that where any allowance or part thereof, as referred to under Sub-section (2) of Section 32, meaning thereby the depreciation allowance, shall be carried forward, effect shall first be given to the provisions of this section. Section 73 is not material for our purpose as it deals with speculation business.

8. In this connection, reference was made to several judicial decisions and it would be material to refer to the same. But, before we do so, it must be emphasised here that we are concerned with the question, whether depreciation in respect of the previous year's assets which had been used in the business of the assessee, and which had not been set-off in the manner indicated under Sub-section (2) of Section 32, could be set-off against any profit which was deemed to arise by operation of Section 41(2) of the Act. The material point that one has to bear in mind, in this connection, is that depreciation can be only in respect of the business carried on. It is not material that the business need be continued to be carried on. This aspect is important because, as we shall indicate the fiction of Section 41(2) is that a business is deemed to be carried on in the year in which the profit, which is known as balancing charge, arises out of the sale of depreciable assets. If the fact is that profits arise in this year and the further fact is that such profits arise in respect of the business deemed to be carried on by the assessee then the fact that the assessee had not continued, all throughout the previous year, the business prior to the year in question, would not, in our opinion, make any difference. Bearing in mind the aforesaid position it would now be relevant for us to decide this controversy.

9. But, before we do so, we must deal with one contention urged on behalf of the Revenue that in this case, as the amount was not claimed by the assessee before the ITO, the assessee was not entitled to get this depreciation set off. In this connection, reliance was placed on the decision of the Supreme Court in the case of *The Additional Commissioner of Income Tax, Gujarat Vs. Gurjargravures Private Ltd.*, . There, the Supreme Court observed that one of the grounds of appeal raised by the respondent in appeal before the AAC was that the ITO had erred in not giving the assessee the benefit of Section 84 of the I.T. Act, 1961. No such claim had been made before the ITO, when he completed the assessment nor was there any material on record supporting such a claim. In a subsequent year, the relief u/s 84 had been allowed to the assessee. The appeal was dismissed by the AAC on the ground that the question of making an error on the part of the ITO did not arise as no claim for exemption u/s 84 had been made before the officer. On a further appeal, the Appellate Tribunal held that since the entire assessment was open before the AAC, there was no reason for his not entertaining the claim, and, directed the ITO to allow the appropriate relief. On a reference, the High Court held that it was competent for the Tribunal to so hold and direct. The Supreme Court reversing the decision of the High

Court had observed that as neither there was any claim made before the ITO regarding the relief u/s 84 nor was there any material on record in support thereof, from the mere fact that such a claim had been allowed in a subsequent year, it could not be assumed that the prescribed conditions justifying a claim for exemption u/s 84 were also fulfilled. The Tribunal, therefore, was not competent to hold that the AAC should have entertained the question of relief u/s 84 or to direct the ITO to allow the relief. Now, in this case, we must bear in mind that Section 84, at the relevant time, exempted certain income from newly established industrial undertaking or hotels in certain per cent. of profits earned on capital employed. In order to be eligible for such exemption certain conditions had to be fulfilled. Now, whether these conditions were fulfilled or not must appear from the materials submitted by the assessee or gathered by the Revenue and put on the record. It is in that context that the Supreme Court made the aforesaid observations. In this case, the material facts are whether the assessee was entitled to depreciation, secondly, whether the assessee carried on the business and, thirdly, whether any profits or gains had arisen from the carrying on of the business. Now, on these facts, subject to the interpretation of the effect of Section 41(2) and the materials which are on record, as would be apparent from the order of the AAC, and these facts are not disputed, that is to say, the assessee sold its plant and machinery during the year for a sum of Rs. 1,21,001 on which the profit was computed u/s 41(2) at Rs. 30,414. The other fact is that Rs. 52,405 was brought forward from the year 1965-66 as unabsorbed depreciation. Now, if on these facts, which were on record, the assessee is entitled to set off the depreciation brought forward, it will be a question of law flowing from the interpretation of Section 32(2) read with Section 72(2) of the Act. Section 34 which deals with the furnishing of particulars for allowance of depreciation allowance would not strictly be applicable in this case because, in this case, all the particulars are on record and, secondly, the conditions that the prescribed particulars would be furnished, is only enjoined for the purpose of claiming initial depreciation in Sub-section (1) of Section 34, which has no reference to the right of the assessee to carry forward unabsorbed depreciation against the future profits of the business, which would be a question of law. In that background, in our opinion, the ratio or principle of the Supreme Court upon which reliance was placed on behalf of the Revenue, in the aforesaid decision will be of no assistance.

10. Our attention was also drawn to the decision in the case of Commissioner of Income Tax, Calcutta Vs. Jaipuria China Clay Mines (P) Ltd., . There, total income of the respondent for the assessment year 1952-53, before charging depreciation, was Rs. 14,404. After deducting depreciation of Rs. 5,360, the ITO computed the profit at Rs. 8,681 against the whole of which he set off the losses of an earlier year. The ITO then computed the dividend income of the respondent at Rs. 2,01,130, determined the total income on that figure and levied tax on it. The respondent claimed that the unabsorbed depreciation aggregating to Rs. 76,857 in its favour should be deducted from the dividend income reducing the

total income thereby to Rs. 1,32,955. The ITO rejected the claim. It was held by the High Court that the unabsorbed depreciation of past years had to be added to depreciation of the current year and the aggregate unabsorbed depreciation and current year's depreciation had to be deducted from the total income of the previous year relevant to the assessment year 1952-53. The ITO drew no distinction between the various allowances mentioned in Section 10(2), that had to be deducted from the gross profits and gains of business. According to the commercial principle, depreciation would be shown in the accounts and the profit and loss account would reflect the depreciation accounted for in the accounts. If the profits were not large enough to wipe off the depreciation the profit and loss account would show the loss. Carry forward of depreciation was provided for u/s 10(2)(v) of the Indian I.T. Act, 1922. Section 24(2) only dealt with losses other than due to speculation. If the Legislature had not enacted proviso (b) to Section 24(2) of the Indian IT. Act, 1922, the depreciation allowance would have been deducted out of the profits and gains in preference to any losses which might have been carried forward u/s 24. But such lossess could be carried forward only for those years, u/s 24(2) ; the assesses would, in certain cases, have in its books the losses which he would not be able to set off. In prov. (b) to Section 10(2)(vi) of the Indian I.T. Act, 1922, the Legislature clearly assumed that the effect could be given only to depreciation allowance in the assessment of a partner. The only way the effect could be given in the assessment of the partner was by setting off that against income and profits and gains under other heads.

11. This decision, in our opinion, would not be of much assistance in resolving the present controversy. In our opinion, it establishes the proposition that unabsorbed depreciation could be carried forward unless it is set off in the manner indicated in the Act. Our attention was drawn to a decition of the Allahabad High Court in the case of Commissioner of Income Tax Vs. Rampur Timber and Turnery Co. Ltd., . There, the assessee which was carrying on business in the manufacture of bobbins, etc., stopped with effect from the previous year relating to the assessment year 1955-56, though it continued to own the plant, machinery, etc. Thereafter, the assessee continued to be assessed only in respect of income from the property which it 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 the business aforesaid, which had been allowed to the assessee as an expenditure in those assessments. During the assessment for the assessment year, the ITO included the aforesaid amount of Rs. 6,892 as the business income of the assessee in view of the provisions of Section 41(1) of the I.T. Act, 1961. On a second appeal, the Appellate Tribunal by a majority, held that the profit of Rs. 6,982 should be set off against the unabsorbed depreciation allowance of Rs. 46,003 determined for the assessment years 1951-52 to 1954-55. On a reference, it was held by the Allahabad High Court, that the sum of Rs. 6,982 assessed as business income of the assessee for the relevant previous year was liable to be set off against the unabsorbed

depreciation of Rs. 46,003 carried forward from 1954-55. The benefit of unabsorbed depreciation could be availed of, according to the Allahabad High Court, by an assessee in any subsequent year without satisfaction of the pre-conditions attaching to Sub-section (1) of Section 32 of the Act and, it was not necessary that in such subsequent year, the assessee actually carried on the business and the asset in question was used for the purpose of the assessee's business. If, 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, would 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, therefore, available to be set off against its income from property. Alternatively, it was held that Section 41(1) created a legal fiction that the sum of Rs. 6,982 shall be deemed to be the business income of the assessee for the relevant previous year although the business ceased to exist. If so, the inevitable corollary of that fiction would be that the business would be deemed to have been carried on in that year. Hence, the unabsorbed depreciation of the past would be available as depreciation allowance for the relevant previous year and should be set off against the sum of Rs. 6,982 deemed to be the business income of the assessee of the previous year. For the purpose of our present controversy, it is not necessary to go as far as that whether the unabsorbed depreciation from the previous year could be set off against other income, income apart from the business. For our present purpose, it will be material to note that the fiction created u/s 41(2) obliges the assessee to have the business deemed to be carried on and for such deeming provision profit arises or accrues u/s 32(2). Learned advocate for the Revenue sought to criticise this view of the Allahabad High Court by citing other decisions to which we shall presently refer. In this respect, we may note that there is one question which is relevant, whether Section 28 deals with the profits and gains of the business. One of the material controversies that was agitated in this case was whether the same business need be in existence or some business would be sufficient. As we shall presently note the correct approach would be to hold that some business must be in existence. The depreciation allowance could be set off against the business income. Therefore, the assessee must be carrying on or deemed to be carrying on some business.

12. Next, our attention was drawn to a decision of the Andhra Pradesh High Court in the case of Commissioner of Income Tax Vs. Warangal Industries Pvt. Ltd., . where 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 accounts on every Depavali, that is, in this case, November 22, 1966. The ITO 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 source". He further computed the income u/s 41(2) of the I.T. Act, 1961, at Rs. 43,496 rejecting the claim of the assessee in regard to the unabsorbed depreciation on the same ground that it had not carried on the business during the previous year. The assessee was successful before the AAC and the Tribunal. The High Court held that by virtue of the Explanation to Section 41(2) of the I.T. Act, 1961, a fiction was created and the business which was no longer in existence had to be treated as in existence during the previous year in the course of which machinery, building and furniture, in respect of which depreciation had been allowed during the earlier years, was sold, discarded, demolished or destroyed. Since the Legislature itself had not made the other fiction u/s 32(2) subject to the provisions of Section 41(5), which was for the benefit of the assessee, it was obvious that in working out the due profit u/s 41(2), full effect must be given to the deeming fiction arising u/s 32(2) as well. It was clear that the unabsorbed depreciation of the past year was to be added to the depreciation of the current year and the Tribunal was right in holding that the assessee was entitled to have the unabsorbed depreciation set off against the income computed. At p. 761 of the report. Chief Justice Divan, speaking for the Andhra Pradesh High Court observed as follows (p. 761) :

"It is clear that so far as the unabsorbed depreciation from the previous years is concerned, it is allowable from any income from any source whatsoever in the subsequent years of account and that principle being clear, it is obvious that, notwithstanding the provisions of Section 41(5). full effect must be given to the deeming fiction u/s 32(2). Mr. Rama Rao for the Revenue relied on certain observations of the Bombay High Court in *Sahu Rubbers Private Ltd. Vs. Commissioner of Income Tax, Bombay City I*, In that case, it was held that in order to claim adjustment in the assessment year of unabsorbed depreciation of an earlier year, the assessee must establish that the business in respect of which it was allowed continued in the previous year relevant to the assessment year, and if that business is no more in existence, unabsorbed depreciation cannot, thereafter, be adjusted in the assessment of future years in respect of a different business. But the effect of the deeming fiction now embodied in Section 32(2) which was formerly embodied in Section 10(2)(vi) of the Indian Income Tax Act, 1922, has been, in our opinion, correctly explained by the Bombay High Court itself in *Commissioner of Income Tax, Bombay City I Vs. Ravi Industries Ltd.*, , particularly after the decision of the Supreme Court in *Commissioner of Income Tax, Calcutta Vs. Jaipuria China Clay Mines (P) Ltd.*, . It is clear that the unabsorbed depreciation of past years has to be added to the depreciation of the current year and the aggregate unabsorbed and current year's depreciation has to be deducted from the total income of the previous years."

13. We are in respectful agreement with the said observations of the learned Chief Justice.

14. Next our attention was drawn to the decision of the Kerala High Court in the

case of Commissioner of Income Tax Vs. Official Liquidator, New Era Mfg. Co. Ltd., . There, the Division Bench of the Kerala High Court observed that the Legislature has introduced a fiction in the Explanation to Section 41(2) of the I.T. Act, 1961, to bring to charge the receipt by sale of plant and machinery in excess of their written down value in the relevant previous year as the income of the business of that previous year, although the business had ceased to exist earlier. Consequently, as an inevitable corollary the income computed under Sub-section (2) of Section 41, which, with the aid of the Explanation, is made chargeable to tax even when the business is no longer in existence in the relevant previous year, has to be, before it is charged, subjected to a set-off against the carried forward depreciation allowance by giving full play to the provisions of Sub-section (2) of Section 32 and Sub-section (5) of s, 41, In that case, for the accounting year 1963-64, during which the assessee-company went into liquidation, it had an unabsorbed depreciation of Rs. 1,81,019. During the accounting year 1969-70, some plant and machinery and furniture belonging to the assessee-company were sold for Rs. 1,08,743. In the return filed by the assessee-company, no profit u/s 41(2) of the I.T. Act, 1961, was disclosed but a note was added in the return showing " value received by sale of plant and machinery is less than book value" and no income was shown. The ITO estimated the written down value of the plant and machinery for the purpose of Section 41(2) at Rs. 35,692 and adjusted the same against Rs. 1,00,000, being the sale price of the plant and machinery and thus arrived at a profit of Rs. 64,308 which he assessed to tax u/s 41(2). On appeal, the AAC held that the assessee-company was entitled u/s 32(2) to treat the unabsorbed depreciation of the earlier years as depreciation allowance in the relevant previous year and could be set-off against the profits computed u/s 41(2) for the assessment year 1970-71. On appeal by the Revenue, the Appellate Tribunal agreed with the conclusions of the AAC. On a reference, at the instance of the Revenue, it was held by the Kerala High Court that since the business of the assessee should be deemed to be in existence in the accounting year relevant to the assessment year 1970-71, by the fiction introduced by the Explanation to Section 41(2), the unabsorbed depreciation of the past years would be carried forward and set-off against the profits computed in terms of Section 41(2) for the assessment year 1970-71.

15. Reliance was also placed on the observations of the Supreme Court on the construction of a fiction in the case of Cambay Electric Supply Industrial Co. Ltd. Vs. The Commissioner of Income Tax, Gujarat-II, Ahmedabad, , and our attention was drawn to the observations of the court on the role of fiction in that case.

16. On the other hand, on behalf of the Revenue, it was contended that where, as in this case, in the year prior to the previous year, the un-absorbed depreciation had not been set-off, in view of Sub-section (2) of Section 32 of the Act, the assessee was not entitled to the set-off as claimed. It was contended that Sub-section (2) of Section 32 enjoined that unabsorbed depreciation should be carried forward to only the next previous year and if that was not done then it

could not be carried forward any further in any future year. In aid of this submission reliance was placed on a Division Bench judgment of the Calcutta High Court in the case of Shree Ramesh Cotton Mills Ltd. Vs. Commissioner of Income Tax, . There, the Division Bench observed that Section 32 of the I.T. Act, 1961, provided that where there was excess unadjusted depreciation in any previous year such excess depreciation should, subject to Sections 72(2) and 73(3), be added to the amount of the allowance for depreciation for the next following previous year and be deemed to be part of that allowance, or if there was 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. It was, further, held that the provisions of Section 32(2) read with Sections 72 and 73 of the Act and Clause (v) of Annex. I of App. II to the I.T. Rules, 1962, clearly showed that unless the unabsorbed depreciation was adjusted in the next previous accounting year it could not be taken into account later on for the purpose of computation of the total income of the assessee in any subsequent year, and the Appellate Tribunal, therefore, was justified in rejecting the claim of the assessee for an adjustment of the unabsorbed depreciation relating to a business closed long ago against the income of the assessment years 1969-70 or 1970-71.

17. It is true that in this case during the relevant accounting year, the assessee had earned income from rent collected in respect of the works and the sale of plant and machinery and was assessed u/s 41(1) for the assessment year 1969-70. It appears that no argument was advanced as to the effect of the Explanation to Section 41(2). It was sought to be argued that the effect of Section 32(2) read with Section 72 of the Act was that the assessee was entitled to set off the unabsorbed depreciation of the assessee against the income notwithstanding the fact that the aforesaid business of the assessee had closed long before the starting of the accounting year. It was not urged before the Division Bench that in order to be entitled to set off, though the assessee was obliged to carry on the business in the relevant year, in which such set-off was sought for, it was not necessary or envisaged that the assessee should be deemed to continue to be carrying on business for all the prior previous years when the unabsorbed depreciation had not been set off because there was no business in the years prior to the previous year. Furthermore, it appears that the Division Bench noted that there was a finding of the Tribunal that the unabsorbed depreciation was not adjusted in any of the earlier years. All these facts had not been challenged by the assessee. It is not a question of adjusting unabsorbed depreciation. The question is the setting-off the unabsorbed depreciation against the profits which arise in respect of the business carried on by an assessee and in the case of profit arising u/s 41(2) by operation of the Explanation which is deemed to be carried on by the assessee during the year in question. Though the Division Bench referred to certain provisions of the I.T. Rules, which it was contended to be a wrong reference, it is not necessary for our purpose to go into that aspect of the matter. As we have mentioned before, the essential thing is that the assessee should be deemed to be carrying on business in the year in

question.

18. Learned advocate for the Revenue also drew our attention to several decisions in aid of his submission that the same business must be continued to be carried on by the assessee. But he drew our attention to the decision of the Allahabad High Court in the case of Commissioner of Income Tax Vs. Virmani Industries (P.) Ltd., , where the Division Bench observed at p. 464, as follows :

"It would at once be clear that there is a difference between the carried-forward loss and carried-forward depreciation allowance. In the case of a carried forward loss, it can be set off against the profits of a business of the succeeding year provided the business for which the loss was originally computed continued to be carried on in the succeeding year. There is no such requirement so far as the carried forward depreciation allowance is concerned. It is not necessary that the business in respect of which the depreciation allowance was originally worked out should remain in existence in the succeeding year nor is it necessary that the business assets to which the depreciation pertains must be used in the business carried on in the succeeding year. All that is necessary is that an assessee must carry on some business in the succeeding year in which the set-off of the unabsorbed depreciation is claimed. That is so, because a depreciation allowance is essentially a deduction allowable out of the gross profits of a business. If there is no business there can be no depreciation allowance."

19. We are in respectful agreement with this. The Division Bench also disagreeing with the observations of the Bombay High Court has observed that for the purpose of Section 32(2) it was not necessary either that the same business should be carried on in the succeeding year or that the depreciable assets or the original business should be utilised in the new business and so long as the assessee carries on some business in the year in which the set-off was claimed, the unabsorbed depreciation by fiction became the depreciation allowance of that year even if that business had no depreciable assets.

20. Reliance was also placed on certain observations of the learned single judge of this court in the case of Brooke Bond and Co. Ltd. Vs. Commissioner of Income Tax, . There the facts were entirely different and the context in which the learned judge had to decide the controversy was in the context of Section 10(2) (vi)(b) of the Indian I.T. Act, 1922. In that view of the matter, it is not necessary, in our opinion, to deal with this decision in great detail.

21. Our attention was drawn to a decision of the Bombay High Court in the case of Commissioner of Income Tax, Bombay City II Vs. Estate And Finance Ltd., , There, the Division Bench of the Bombay High Court observed that when enacting the provision regarding carry forward and set off of unabsorbed depreciation u/s 32(2) of the I.T. Act, the Legislature could have imposed a condition that unabsorbed depreciation could be set off against the profit of a subsequent year only if the business, in relation to which depreciation was allowed, must continue to exist in such a year. Such a provision had to be

construed in favour of the assessee. Where two interpretations were possible, the court should take the interpretation which was favourable to the assessee bearing in mind that the taxing statute was being construed. Therefore, under the provision of Section 32(2) for the purpose of setting off of unabsorbed depreciation carried forward from the preceding year, it was not necessary that the business in respect of which the depreciation allowance was originally worked out should remain in existence in such succeeding year. The Bombay High Court further noted that the decision in *Sahu Rubbers Private Ltd. Vs. Commissioner of Income Tax, Bombay City I*, did not constitute a binding authority on the interpretation to be placed by the court and the true meaning to be given to the statutory provision enacted in Section 32(2) of the 1961 Act. The difference between the proviso to Section 10(2)(vi) of the Act of 1922 and Section 32(2) of the Act of 1961, was not a difference in phraseology. But the provision contained in Section 32(2) was not a proviso to any provision computing depreciation. It was an independent provision. The Bombay High Court further observed that the decision in *Sahu Rubbers Private Ltd. Vs. Commissioner of Income Tax, Bombay City I*, principally turned on the question whether the statutory provision had to be interpreted and given effect to as a proviso or as an independent provision. In that case, a limited effect was given to the legal fiction contained in the proviso principally because the fiction was provided for in the enactment by way of proviso. There, at p. 128 of the report, Mr. Justice Desai, speaking for the Bombay High Court spoke as follows :

"The first of these two decisions of the Allahabad High Court in point of time is the one in *Commissioner of Income Tax Vs. Rampur Timber and Turnery Co. Ltd.*, . The assessee, in that case, was carrying on business in the manufacture of bobbins, etc., and had stopped the business with effect from the previous year relevant to the assessment year 1955-56, though it continued to own the plant, machinery, etc. Thereafter, the assessee continued to be assessed only in respect of income from the property which it 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 electricity charges already paid by it in the years when it was carrying on the business aforesaid, which had been then allowed to the assessee as expenditure of the business in those assessments. During the assessment for the assessment year 1962-63, the Income Tax Officer included the aforesaid amount of Rs. 6,982 as the business income of the assessee in view of the deeming provisions contained in Section 41(1) of the Income Tax Act, 1961. It was urged by the assessee that such profit should be set-off against the unabsorbed depreciation allowance of Rs. 46,003 determined for the assessment years 1951-52 to 1954-55. In the reference to the High Court this contention of the assessee was accepted. It was held that the benefit of unabsorbed depreciation could be availed of by an assessee in any subsequent year without satisfaction of the preconditions attaching to Sub-section (2) of Section 32 and it is not necessary that in such subsequent years the assessee actually carried on the business and the asset in question was used for the

purpose of the assessee's business. It may be pointed out that in this decision the Division Bench also accepted the alternative head of argument which proceeded upon the basis that a legal fiction was created u/s 41(1) and as a corollary to that legal fiction it was necessary also to assume that the business had actually continued in the relevant year although, as a matter of fact, it had been closed down. It could have been argued that, as the decision has been based on both the arguments its authority to that extent is weakened somewhat and we should give effect to the scheme of Section 10(2)(vi)(b) as propounded by Sahu Rubbers Private Ltd. Vs. Commissioner of Income Tax, Bombay City I, , even though the statutory provision has been somewhat differently enacted in Section 32(2).

Such comment as is available in respect of the decision of the Allahabad High Court in Commissioner of Income Tax Vs. Rampur Timber and Turnery Co. Ltd., is not available for the later decision of that very High Court in Commissioner of Income Tax Vs. Virmani Industries (P.) Ltd., in which the Allahabad High Court was once again called upon to construe Section 32(2) and where the Bombay decision in Sahu Rubbers Private Ltd. Vs. Commissioner of Income Tax, Bombay City I, was cited on behalf of the Revenue but was expressly dissented from by the Allahabad High Court. According to that High Court, the view of the Bombay High Court contained in Sahu Rubbers Private Ltd. Vs. Commissioner of Income Tax, Bombay City I, was contrary to the plain language of Section 32(2) of the Act."

22. Our attention was also drawn to the observations of the Bombay High Court in the case of Hindustan Chemical Works Ltd. Vs. Commissioner of Income Tax, Bombay City-I, . There, the Division Bench had no occasion to construe the effect of Explanation to Section 41(2) of the Act. We have noticed the Explanation to Section 41(2) which makes the provision of Section 41(2) applicable "as if the business or profession is in existence in that previous year". Therefore, it should be deemed that the assessee had carried on the business or profession in the year in question in which the charging of the profit u/s 41(2), arises or accrues and this fiction is not limited only for the purpose of Section 41(2) but is for all the purposes of the Act. Therefore, we should allow the fiction to have its full operation and allowing its operation, it appears to us, that the business was carried on in the year in question and in that year there was an unabsorbed depreciation of the previous year. On the question of the fiction, our attention was drawn to the observations we had made in the decision in the case of Reliance Jute and Industries Ltd. Vs. Commissioner of Income Tax, , In that case, we had to deal with Sub-section (1A) of Section 214 of the I.T. Act and there we had reiterated that it was a rule of interpretation well settled that in construing the scope of a legal fiction it would be proper and even would be necessary to assume all those facts upon which alone the fiction would operate and not to restrict it unless the section which created that fiction gave an indication that the fiction was for a limited purpose.

23. On the question whether depreciation not claimed in the return would be allowed or not it was held by the Allahabad High Court in the case of Ascharajlal Ram Parkash Vs. Commissioner of Income Tax, that though the assessee in his return did not claim depreciation for a truck purchased in the previous year nor gave the necessary particulars in the form of return, the ITO, if in the course of the assessment proceedings, came to know of the relevant particulars necessary for the grant of a deduction for depreciation, was bound to come to it and allow depreciation, as the ITO was bound to arrive at the true figure of profits and gains of the business of the assessee. It could not be contended that merely because the assessee did not file the necessary particulars in his return, the ITO did not have jurisdiction to grant the depreciation allowance. If that is the position, in the case of Section 34(2) in case of initial depreciation, and where there is no dispute as to the amount or quantum of unabsorbed depreciation, and, where there is income in a subsequent year from the business, which is deemed to be carried on by the operation of the Explanation to Section 41(2), then such depreciation could be set off against the income of the business.

24. For the reasons aforesaid, we would answer the question, as refrained, in the negative and in favour of the assessee.

25. The parties will pay and bear their own costs.

Sudhindra Mohan Guha, J.

26. I agree.