
(1982) 08 MAD CK 0018
In the Madras High Court
Case No : Tax Case No. 983 of 1977

N. Krishnammal

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 03-08-1982

Acts Referred:

Income Tax Act, 1961 — Section 24, 28, 32, 32(1), 32(2)

Citation : (1984) 147 ITR 431

Hon'ble Judges : R. Sengottuvelan, J;G. Ramanujam, J

Bench : Division Bench

Advocate : T.V. Balakrishnan, for the Appellant; J. Jayaraman, for the Respondent

Judgement

Ramanujam, J.—The assessee in this case is an individual deriving income from interest on securities, house property, lorry business and

other sources. She is also a partner in a firm, Messers. Pioneer Transports. For the assessment year 1971-72, the ITO determined the profit in

respect of the income from the lorry business at Rs. 8,347 after negative the claim of the assessee for set off of unabsorbed depreciation of Rs.

47,644 in the firm of Meesrs. Pioneer Transports relating to the assessment years 1967-68 and 1968-69, on the ground that the assessee has not

satisfied the mandatory requirements of the relevant provisions of the I.T. Act, 1961, herein after referred to as ""to be eligible for the set-off

claimed.

2. The said disallowance of the assessee's claim of unabsorbed depreciation was taken in appeal to the AAC : but without success. The assessee,

therefore, took the matter further to the Income Tax Appellate Tribunal. The Tribunal concurred with the view of the AAC and rejected the

assessee's appeal. The assessee thereafter sought and obtained a reference to this court under s. 256(1) of the Act on the following question of

law :

Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the assessee was not entitled to set off

against the business income of the assessee for the assessment year 1971-72, the unabsorbed depreciation determined in the assessment of the

firm, of which the assessee was a partner for assessment years 1967-68 and 1968-69, and carried forward"".

3. It is seen from the order of the Tribunal that in the firm's assessment for the year 1967-68, the assessee's share of loss has been determined at

Rs. 36,333 and for the year 1968-69, her share of loss has been determined at Rs. 44,519. Up to the assessment year 1968-69, the firm has

been treated as a registered firm and the allocation of loss has been made to the partners on that basis. However, from the assessment year 1969-

70, the assessment has been made on the firm as an unregistered firm and in the year 1969-70, the assessment has resulted in a net loss of Rs.

35,360 representing the unabsorbed depreciation which the ITO has noted as loss to be carried forward. Similarly, for the assessment year 1970-

71, the firm was treated as an unregistered firm and the net loss was determined at Rs. 25,614 representing unabsorbed depreciation and the ITO

has noted in the assessment order that this will be carried to the next year.

4. In the assessment of the assessee as an individual for the year 1967-68, her share of the loss in the firm was determined at Rs. 30,596 and for

the assessment year 1968-69, the total loss was determined at Rs. 67,090 which included the brought forward loss of the previous year of Rs.

30,596. For the year 1969-70, her income was determined at Rs. 4,994 under business and other sources and for the assessment year 1970-71,

her total income was determined at Rs. 5,230 and after adjusting the brought forward loss of the earlier year of Rs. 72,305, the net loss was taken

at Rs 67,075. However, in view of the rectification orders passed by the ITO on October 3, 1970, the total loss for 1968-69 carried forward to

the next year was Rs. 67,090. Having regard to the above factual position, let us consider the admissibility of the claim of the assessee for set off of

unabsorbed depreciation in her individual assessment.

5. What the assessee wants is that the share of loss falling to her share in the assessment years 1967-68 and 1968-69 in the assessment of the firm

which represented the unabsorbed depreciation should be set-off in her individual assessment in the assessment year in question. The claim for set-

off has been rejected by the ITO on the ground that there was no continuity in the transport firm's business in that the business of the lorry

transport was stopped during the period from May 1, 1969, to August 16, 1969. As regards the said objection, the contention of the assessee

was that the business of lorry transport carried on by the firm has been continued to be carried that the business was stopped only for 3 1/2

months from May 1, 1969, to August 16, 1969, but there has been no cessation of the lorry business, and that the lorry business was continued by

the firm from August 17, 1969 till June 11, 1970, the date of dissolution, after a full for a short period of 3 1/2 months till June 11, 1980 the date

of dissolution, and that thereafter the assessee took over the lorry transport business which the firm was carrying on before its dissolution and,

therefore, the assessee is entitled to claim set off. Having regard to the assessee's claim that she has been continuing the transport business after the

dissolution of the firm, the AAC directed the ITO to verify the actual share of loss from the firm remaining unabsorbed in 1971-72 and set it off

against the income from the same business, that is, lorry transport, in conformity with the provisions of s. 72 of the Act. However, his direction did

not cover the unabsorbed depreciation.

6. Before us the learned counsel for the assessee contends that a similar direction should have been given by the AAC for unabsorbed depreciation

as well. According to the learned counsel for the assessee, the provisions of s. 32(2) are clear that in the case of a registered firm, if full effect

could not be given to any allowance for depreciation, allowance has to be given in the assessment of the partners. In support of the said contention,

he relied on the decision of the Gujarat High Court in Commissioner of Income Tax, Gujarat Vs. Garden Silk Wvg. Factory, , the decision of the

Allahabad High Court in Commissioner of Income Tax Vs. Virmani Industries (P.) Ltd., and of the Delhi High Court in Raj Narain Agarwala Vs.

The Income Tax Commissioner, Delhi, . The learned counsel for the Revenue on the other hand relied on the decision in Ballarpur Collieries Co.

Vs. Commissioner of Income Tax, Poona, and the decision in Commissioner of Income Tax Vs. Nagapatinam Import and Export Corporation, .

The Tribunal has purported to follow the decision of the Bombay High Court in Ballarpur Collieries Co. Vs. Commissioner of Income Tax, Poona,

. The question is whether the Tribunal is right in holding that the assessee is not entitled to claim a set-off of unabsorbed depreciation to the extent of his share on the facts and in the circumstances of the case.

7. Before considering the scope of the decisions referred to above, we would like to refer to the sections of the I.T. Act which are relevant in this

connection. Section 32 deals with depreciation and sub-s. (1) of that section empowers deduction in respect of depreciation of buildings,

machinery, plant or furniture owned by the assessee and used for the purpose of the business sub-s. (2) of s. 32 is as follows :

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 (iia) or clause (iv) or clause (v) or

clause (vi) of sub-section (1) or under clause (i) or 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 sub-section (3) of section 73, the allowance or part of the allowance to which effect has not been given, as the case may be, shall

be added to the amount of the allowance for depreciation for the following previous year and deemed to be part of that allowance, or if there is no

such allowance for that previous year, be deemed to be allowance for that previous year, and so on for the succeeding previous year"".

9. Section 72 deals with carry forward and set off of business losses. Sub-ss. (2) and (3) which are relevant are extracted below :

72. (2) Where any allowance or part thereof is, under sub-section (2) of section 32 or sub section (4) of section 35, to be carried forward, effect

shall be given to the provisions of this section.

(3) No loss (other than the loss referred to in the proviso to sub-section (1) of this section) shall be carried forward under this section for more

than eight assessment years immediately succeeding the assessment year for

which the loss was first computed"".

10. A reading of s. 32(2) would indicate that its full effect for depreciation provided under s. 32(1) cannot be given owing to there being no profits

chargeable for the previous year or profits being less than the allowance, then 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 allowance for depreciation for the following year and deemed to be part of that

allowance. Thus, the allowance for depreciation is allowed to be carried forward for set off against future years' profits. It is because of this that

the unabsorbed depreciation allowance was carried forward in the assessments of the firm and in the partners' assessment full effect of the

proportionate carried forward unabsorbed depreciation will have to be given. Therefore, as per s. 32(2) read with s. 72(2), the unabsorbed

depreciation which has been carried forward in the firm's assessment has to be given effect to fully in the individual assessment of the partners.

11. The question is whether the assessee's share of unabsorbed depreciation carried forward could be set off as against her income from other

sources. Since tax is chargeable under s. 28 on the aggregate of the profits of all the business carried on by the assessee, if the profits of a particular

business are insufficient to absorb the depreciation allowance permitted by s. 32, the allowance like any other business loss can be set off under ss.

70 and 71. If some part of the depreciation allowance remained unabsorbed, it can be carried forward under s. 32(2) to the following year and set

off against the year's profits and so on for succeeding years. The carried forward depreciation allowance is deemed to be part of that year's

allowance and stand on exactly the same footing as the current depreciation in the assessment year.

12. In *Ballarpur Collieries Co. Vs. Commissioner of Income Tax, Poona*, the assessee-firm was carrying on the business of coal mining. For the

year 1958-59, the total of the firm was determined by the ITO at Rs. 5,24,035 after making allowance for the depreciation and development

rebate allowable for that year and the profits were allocated among the partners in accordance with their shares. The firm appealed to the AAC

contending that the aggregate losses of the earlier years should be set off against the income of Rs. 5,24,035 before tax was levied on the

registered firm. This contention having been rejected by the appellate authority, the matter was taken to the Income Tax Appellate Tribunal

contending that the unabsorbed depreciation of Rs. 1,12,283 in respect of the assessment year 1956-57 and of Rs. 2,15,911 in respect of the

assessment year 1957-58 should be deducted from the income of Rs. 5,24,035 to arrive at the income of the firm for 1958-59 The Tribunal held

that the unabsorbed depreciation in the partner's hands was available for set off by the firm itself in the following year in view of the provisions of

proviso (b) to s. 10(2) (vi) of the 1922 Act and that the depreciation for 1956-57 could be set off by the firm against the income for the year

1958-59. At the instance of the Revenue, the matter was referred to the High Court. Before the High Court it was urged by the Revenue that once

the loss resulting on account of unabsorbed depreciation is allocated to the shares of the partners, the firm itself cannot claim a right to carry

forward the unabsorbed depreciation so as to have it deducted from its income before the taxable income of the firm is determined. On the other

hand, the assessee contended that the right to carry forward unabsorbed depreciation by s. 32(2) which says that depreciation which remained

unabsorbed has to be taken into account before the income of the firm in question is computed. The court rejected the contention of the Revenue

and held that even though for certain purposes of set off, losses occasioned on account of unabsorbed depreciation is dealt with under s. 24 of the

Act, it does not lose its character or nature as unabsorbed depreciation and is carried forward not by virtue of the provisions of s. 32(2) but by

virtue of the express provisions of s. 10(2) (vi), proviso (b), of the Act of 1922. The Allahabad High Court in K.T. Wire Products Vs. Union of

India (UOI) and Others, , has, however, taken a different view. It has held that in the case of a registered firm, the net loss including the

depreciation allowance, if any, is allocated to the partners who alone are entitled to set off the loss allocated to them in their individual assessments

and to carry forward any loss which remains unabsorbed, as provided in ss. 32(2) and 72(2) of the Act and that the firm as such is not entitled to

carry forward the losses determined in its assessment. However, the question that arose in those two decisions is entirely different. The question

that arose for consideration in those cases was as to whether after allocation of the unabsorbed depreciation allowance as between the partners to

be adjusted against their individual income, it is possible for the firm to go back on the earlier allocation and take the unadjusted unabsorbed

depreciation allowance and to carry forward the same for setting it off against its future income. While the Bombay High Court held it is possible,

the Allahabad High Court held that it is not possible. The question that arises here is as to whether a partner could carry forward his share of the

unabsorbed depreciation allowance in the partnership for the purpose of set off against his future income As a matter of fact, on the question arising

here, both the decisions proceed on the basis that the partner is entitled to carry forward his share of the unabsorbed depreciation allowance and

set it off against his future income.

13. In a recent decision of this court in Commissioner of Income Tax Vs. Nagapatinam Import and Export Corporation, , a somewhat similar

question that assessment for 1970-71 of a registered firm, the ITO found that there is unabsorbed depreciation to the extent of Rs. 3,60,000 which

could not be set off and therefore, he allocated this as a loss among the partners in accordance with their shares to which they were entitled under

the partnership deed. The firm's claim for set off of the said sum in its assessment for the year 1971-72 was negated by the ITO and the AAC

on the ground that the unabsorbed depreciation having been allocated as between the partners, the firm thereafter cannot claim set off in relation to

any portion thereof. When the matter went before the Tribunal, the Tribunal held that notwithstanding the allocation of the unabsorbed

depreciations as between the partners, the firm can still claim the benefit of set off. When the matter came to this court, this court held that the

language of s. 32(2) makes it clear that, in the case of a registered firm, either the whole of the depreciation allowance or any part thereof for which

effect had not been given by adjustment in the hands of the partners, will have to be added to the amount of the depreciation in the following year

and deemed to be part of the allowance for the later year and can be considered for set off or adjustment in the hands of the firm. The reasoning of

the Bench in that case is that in the first instance, the unabsorbed depreciation of the firm will be allocated among the partners to be adjusted in the

hands of the partners and whatever remained unabsorbed in the hands of the partners will have to be transported into the assessment of the firm for

purposes of assessment in its hands and the partner will not be able to get it adjusted in his own assessment thereafter, and that the object of the

relevant provision of the Act is to see that there is adjustment forwards unabsorbed losses only once either in the hands of the partner or in the

hands of the firm In the said decision, the learned Judges have referred to the scheme of the Act and stated (p. 447) :

For some purposes of the Act, depreciation forms part of the loss. The income of the firm or the loss in the hands of the firm cannot be computed

without making allowance for depreciation in case the assessee is eligible for, and has made such a claim by complying with the relevant provisions

of the Act. If there is any other loss, apart from the depreciation, then that loss will get added to the amount of depreciation allowable to the

assessee s. 32 read with the rules. It is the total of this amount which be allocated among the partners under the provisions of s. 75. However, the

Act thus makes a distinction between the unabsorbed allowance of depreciation and other losses. It has already been seen that s. 72(2) of the Act

provides that where any allowance or part thereof is, under sub-s. (2) of s. 32 or sub-s. (4) of s. 35, to be carried forward effect shall first given to

the provisions of s. 72. In other words, s. 72(2) contemplates the loss other than the unabsorbed depreciation being given a priority in the matter of

set-off, as there is a time-limit within which such loss can be adjusted. Under s. 72(3) the loss other than from depreciation is eligible for being

carried forward and set off only for a period of eight assessment years immediately succeeding the assessment year for which the loss was first

computed; in the case of unabsorbed depreciation allowance, there is no such time-limit. The legislature has, therefore, made a specific provision

for priority in setting off the loss other than the unabsorbed depreciation allowance so that the unabsorbed depreciation allowance can be carried

forward if necessary without any time-limit and set off in the appropriate succeeding years. It is thus clear that there is a separate identity

maintained under the statute with reference to the unabsorbed depreciation allowance though at the time of computation it forms part of "loss". It

may be that at the time of allocation among the partners the unabsorbed depreciation is taken along with any other loss that may have been

sustained by the registered firm; but this identity of unabsorbed depreciation is required to be maintained in order to enable it to be set off against

the future income separately and independently of the other losses. If we approach the construction of s. 32(2) in the light of the above

background, there appears to be no difficulty in construing the reference.

14. This decision, though rendered on a different point, supports the case of the assessee that once the unabsorbed depreciation is allocated to the

partners for adjustment, the partner can carry it forward and set it off been taken by the same Bench in Commissioner of Income Tax Vs. Madras

Wire Products, .

15. We are of the view that the decision relied on by the Revenue does not throw any light on the question to be decided here. On the other hand,

those decisions proceed on the basis that the unabsorbed depreciation of the firm has to be allocated to the partners for adjustment in the first

instance and if it could not be adjusted in full the unabsorbed portion shall be added in the account of the allowance for depreciation and carried

forward and set off in the partner's hands. It is no doubt true, as pointed out by this court in Commissioner of Income Tax Vs. Nagapatinam

Import and Export Corporation, , the unabsorbed depreciation allowance can be adjusted only once either in the hands of the partners or in the

hands of the firm but not in both. In this case the firm has been dissolved and has ceased to exist after 1970. There is, therefore, no possibility of

the unabsorbed depreciation being adjusted in the hands of the firm any longer. Therefore, the assessee is entitled to treat the unabsorbed

depreciation as depreciation in the current year as contemplated by s. 32(2) of the Act and set off the same against her aggregate income. The

view we have taken finds support from the decision of the Supreme Court in Commissioner of Income Tax, Calcutta Vs. Jaipuria China Clay

Mines (P) Ltd., . In that case the Supreme Court has observed that in proviso (b) to s. 10(2)(vi) of the 1922 Act corresponding to s. 32(2) of the

1961 Act, the Legislature clearly assumed that credit can be given to depreciation allowance in the assessment of partner and the only way in which

it could be given in the assessment of a partner was by setting it off against income, profits and gains under other heads. The following passage

at page 559 is pertinent :

Bearing these two considerations in mind, if now looks at the language of proviso (b) to section 10(2)(vi), the first question that arises is : What is

the meaning of the expression "in the assessment of the assessee or if the assessee is a registered firm, in the assessment of the partners, full effect

cannot be given to any such allowance in any year ?" It would be noted that the words used are "in the assessment of the assessee or the

assessment of the partners". Taking the case of the partners of registered firm, the assessment must be their individual assessments, i.e.,

assessments The Legislature is clearly assuming that effect can be given to depreciation allowance in the assessment of a partner; the only way

effect can be given in the assessment of a partner is by setting it off against income, profit and gains under other heads.

16. We, therefore, hold that the assessee's claim for off of her share of the unabsorbed depreciation of the firm for the earlier two years has to be

allowed in the assessment year in question.

17. The question referred is, therefore, answered in the negative and in favour of the assessee. The assessee will have her costs from the Revenue.

Counsel's fee Rs. 500.