
(1984) 08 BOM CK 0034

In the Bombay High Court

Case No : I. T. APPEAL No"s. 5877 AND 5878 (BOM.) OF 1982

ROYAL INTEROCEAN LINES

APPELLANT

Vs

Income Tax OFFICER.

RESPONDENT

Date of Decision : 23-08-1984

Acts Referred:

Income Tax Act, 1922 — Section 44B

Citation : (1986) 17 ITD 725

Hon'ble Judges : D. V. Junnarkar, A.M.

Bench : Division Bench

Judgement

Per Shri D. V. Junnarkar, Accountant Member - The assessee is a non-resident company engaged in the business of operation of ships, picking up of cargo and passengers in Indian ports occasionally. For the assessment year 1976-77, it picked up total cargo, the freight for which was Rs. 1,76,02,507. For the assessment year 1978-79, the cargo picked up the freight in respect of which was Rs. 2,30,28,533. The ITO applied the provisions of section 44B of the Income Tax Act, 1961 (the Act), and determined the assessee's profits and gains out of such business chargeable to tax at 7 1/2 per cent of the value of such freight. In the assessment proceedings, the assessee claimed to bring forward the depreciation allowance determined in respect of the proceedings assessments u/s 32(1) (i), read with section 32(2) of the Act and have it allowed against the profits of the two years under consideration. The ITO having rejected the assessee's claim for both the years by reference to the non obstante clause at the beginning of section 44B (1) the assessee appealed before the Commissioner (Appeals). The Commissioner (Appeals) also agreed with the ITO about the non-eligibility of the assessee to bring forward the depreciation in respect of the preceding years to the years under consideration in view of the opening clause of section 44B (1).

2. The assessee is, therefore, in appeal before the Tribunal on the ground that the Commissioner (Appeals) erred in upholding the ITO's contention that there

was no brought forward loss of the earlier years on the ground that this loss represented unabsorbed depreciation. It was the assessee's case that the Commissioner (Appeals) failed to appreciate that the unabsorbed depreciation was a business loss and was available for set off against the income of the years under consideration determined by him. Further, it was submitted that the Commissioner (Appeals) failed to appreciate that in the assessee's case the loss of the prior years was determined on the basis of their voyage account in the proportion of the Indian freight to the total freight. Accordingly, the depreciation was also allowed on their ships proportionately and not in accordance with section 32 for the whole year. It was, therefore, the assessee's case that the entire loss determined by the ITO represented their loss and no part thereof related to depreciation carried forward u/s 32. In support of the aforesaid contentions, the learned counsel for the assessee relied upon the Madras High Court decision in the case of *A. Suppan Chettiar & Co. v. CIT* [1929] 4 ITC 211 wherein the learned Judges of the Madras High Court had held that where the profits and gains of the assessee's business were not sufficient to cover the full depreciation allowance u/s 10(2) (vi) of the Indian Income Tax Act, 1922 and the claim was made that the portion of the depreciation not so set off against the profits should be apportioned against the business profits other business and even from other sources. It was brought to our notice by the learned counsel for the assessee that the Bombay High Court had followed this decision of the Bombay High Court while deciding the case of *Ambika Silk Mills Co. Ltd. Vs. Commissioner of Income Tax, Bombay City*, . Reference in this connection was also made to another Bombay High Court decision in the case of *Dharampur Leather Cloth Co. Ltd. Vs. Commissioner of Income Tax, Bombay City*, . Reference was also made to the Gujarat High Court decision in the case of *Chokshi Metal Refinery Vs. Commissioner of Income Tax, Gujarat-II*, On behalf of the revenue, the learned departmental representative has referred to the Gauhati High Court decision in the case of *Commissioner of Income Tax Vs. Singh Transport Co.*, Reference was also made to the Supreme Court decisions in the cases of *Commissioner of Income Tax, Calcutta Vs. Jaipuria China Clay Mines (P) Ltd.*, and *S. Sankappa and Others Vs. The Income Tax Officer, Central Circle II, Bangalore*, The stress on behalf of the revenue was that depreciation allowance was entirely of a different nature from any ordinary business loss and had to be considered separately from other business losses suffered by the assessee, which could be brought forward u/s 72 of the Act.

3. We have carefully considered the facts and in the circumstances of the case and the arguments on either side. The facts lie within a very narrow compass. The assessee is a non-resident shipping concern. It picks up cargo in Indian ports. For ascertaining its taxable profits, the ITO has applied the provision of section 44B. In the ordinary course, for determining the taxable profits from any business, profession or vocation, provision is made under sections 28 to 43A of the Act. In the case of a non-resident shipping concern, there is neither time nor facilities available for determining the profits and gains of the shipping concern

during the limited time when the ship belonging to such concern was in the Indian port when it had to clear its Income Tax dues before leaving the Indian territory. The Legislature has, therefore, provided a rough and ready method laid down u/s 44B. This rough and ready method is in complete supersession of the normal procedure for determining the profits and gains by reference to the actual books of account of the assessee and actual relief and allowances admissible under the normal provisions. What the assessee is claiming is relief u/s 32(1) (i), read with section 32(2). Once the opening clause of section 44B has completely ruled out the operation of the provisions of sections 28 to 43A in our opinion, the assessee cannot seek to rely on the provisions of section 32(1) (i) or 32(2) by calling it by some other name, say business loss. As to the assessee's reliance on the Madras High Court decision in the case of A. Suppan Chettiar & Co. (supra) or on the Bombay High Court decision in the case of Ambika Silk Mills Co. Ltd. (supra) the learned Judges of these two High Courts held that the assessee was eligible for the brought forward depreciation allowance because the respective provisions under the 1922 Act and the 1961 Act were applicable to the facts of those cases. There, operation was not specifically ruled out as by section 44B in the present case. In our opinion, the reference to the Bombay High Court decision in the case of Dharampur Leather Cloth Co. Ltd. (supra) and the Gujarat High Court decision in the case of Chokshi Metal Refinery (supra) is also wholly irrelevant. During the course of the hearing, the learned counsel for the assessee has brought to our notice the Income Tax authorities decision dated 28-9-1981 in the assessee's own case for the assessment year 1975-76 in IT Appeal No. 2699 (Bom.) of 1980 wherein the learned members have held that the depreciation allowance brought forward u/s 32(2) was of the nature of a business loss. Even this argument, in our opinion, does not support the assessee's case. A perusal of that decision will show the background in which the decision is rendered. It was not a case of depreciation u/s 32(1) (i) which was sought to be brought forward in the assessee's case. It was a depreciation allowance u/s 32(1) (iii). The learned members distinguished the nature of the allowance from ordinary depreciation u/s 32(1) (i) by a specific reference to the omission of allowance admissible u/s 32(1) (iii) or section 32(2). Here we are not concerned with the depreciation allowance u/s 32(1) (iii). This is a case of depreciation allowance u/s 32(1) (i). In our opinion, the Gauhati High Court decision in the case of Singh Transport Co. (supra) and the Supreme Court decisions in the case of Jaipuria China Clay Mines (P.) Ltd. (supra) and in the case of S. Sankappa (supra) support the revenue's case that depreciation allowance stands on a different footing from ordinary business loss.

4. But, in our opinion, this entire discussion is futile on the facts and in the circumstances of the present case. Whether the depreciation allowance admissible to an assessee u/s 32(1) (i) or 32(2) is in the nature of a business loss or is different from a business loss is wholly irrelevant for determining the issue involved in the present appeal. The allowance brought forward u/s 32(2) is totally ruled out by the opening clause of section 44B (1). Once that allowance is

not available at all, where is the question of determination of the nature of such allowance ? In our opinion, the lower authorities have rightly interpreted the provisions of section 44B (1) and this rejected the assessee's claim for bringing forward the depreciation allowance of the earlier years and allowing it as a business loss against the profits of the years under consideration.

5. In the result, the appeals are dismissed.