

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 42 of 1984

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.THAKKER and sd/-

MR.JUSTICE M.C.PATEL sd/-

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1. Whether Reporters of Local Papers may be allowed
to see the judgements? yes

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy
of the judgement?

4. Whether this case involves a substantial question
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?
2 to 5 No

RAJRATNA NARANBHAI MILLS LTD.

Versus

COMMISSIONER OF INCOME TAX

Appearance:

Mr.A.L.Shah for OFFICIAL LIQUIDATOR for Petitioner
MR.PRNAV G.DESAI with MR MANISH R BHATT for
Respondent.

CORAM : MR.JUSTICE C.K.THAKKER and
MR.JUSTICE M.C.PATEL

Date of decision: 30/06/98

ORAL JUDGEMENT (Per C.K.Thakkar,J.)

The following question is referred by the Income
Tax Appellate Tribunal for the opinion of this Court:-

"Whether on the facts and in the circumstances of

the case, the Tribunal was right in law in holding that set off of unabsorbed depreciation allowance carried forward from earlier years could not be allowed against income from other sources unless the assessee carried on some business and there is income actual or notional from the business?"

The assessee is a company in liquidation. By an order passed by this Court on June 26, 1967, the Company was ordered to be wound up. Assessee's business was manufacture and sale of cloth till July, 1966. For the assessment years under appeal (1977-78 and 1978-79) the assessee had derived income from interest and rent chargeable under the head of income from other sources under sec. 56 read with sec. 57 of the Income Tax Act, 1961 (hereinafter referred to as "the Act"). For the assessment year 1977-78, the assessee submitted its return showing total income of Rs. 82,226/- comprising interest income of Rs. 77,413/- and rental income of Rs. 5,276/-. Against the income shown, the assessee claimed deduction of expenses of Rs. 463/-. For the assessment year 1978-79, the assessee disclosed income from other sources, namely, interest of Rs. 51,697/- and claimed expenses to the extent of Rs. 14,757/-. Thus, the total income worked out as Rs. 36,940/-.

For both the years, the assessee claimed a set off of unabsorbed depreciation brought forward from earlier years. For said claim, the assessee relied upon a decision of High Court of Allahabad in COMMISSIONER OF INCOME-TAX v. RAMPUR TIMBER & TURNERY CO. LTD., 89 ITR 150. The Income Tax Officer negatived the assessee's claim. He, however, observed that for assessment years 1971-72 and 1973-74, the Tribunal accepted the claim of the assessee. But since the decision of the Tribunal was challenged by the department and was subject-matter of reference before this Court, the claim of the assessee was not tenable. The appellate authority allowed the appeals. The Tribunal, however, held that since the company had totally closed its business, it was not entitled to claim benefit of deduction.

At the time of hearing of reference, our attention was invited to a decision of the Hon'ble Supreme Court in COMMISSIONER OF INCOME-TAX v. VIRAMANI INDUSTRIES PVT. LTD. AND OTHERS, 216 ITR 607, wherein also a similar contention was raised before the court

that if the business is totally closed the assessee cannot claim set off. After considering leading decisions on the point, Their Lordships observed:

"Yet another question which has to be answered before we can answer the question concerned in this appeal is whether it is necessary that in the following year the assessee must carry on business, i.e. some or other business, to avail of the benefit of the said sub-section. Two views are possible in this behalf, viz., (1) since the sub-section speaks of unabsorbed depreciation being carried forward to the next year and "added to the amount of the allowance for depreciation for the following previous year and deemed to be part of that allowance" the sub-section necessarily contemplates existence of a business in the following year, and (2) inasmuch as the sub-section not only speaks of adding the unabsorbed depreciation to the depreciation allowance allowed in the following year but also says that in the absence of such allowance, the carried forward depreciation allowance shall be the allowance for that year, it means that in the following year the assessee need not carry on any business or profession for availing of the benefit of sub-section (2) of section 32. We are inclined to adopt the second of the above two views having regard to the decisions of this court in Jaipuria China Clay Mines (P) Ltd.'s case (1966) 59 ITR 555 and Rajapalayam Mills Ltd.'s case (1978) 115 ITR 777."

The Apex Court stated:

"In the light of the interpretation of sub-section (2) of section 32 affirmed by us in this judgment, however, what should have been done is this: the unabsorbed depreciation allowance relating to the assessment year 1956-57 should have been set off against the income (income from property) in the following year, i.e. in the following previous year (relevant to the assessment year 1957-58) and if the income in that year was not sufficient to absorb the entire depreciation allowance so carried forward, it had to be carried forward to the next following year and so on. Only if some depreciation allowance still remained to be absorbed, it could have been set off against the total income for the assessment year 1965-66."

Following the view taken by the Court in CIT v. JAIPURIA CHINA CLAY MINES (P) LTD. 59 ITR 555 and RAJAPALAYAM MILLS LTD. v. CIT, 115 ITR 777, the Hon'ble Supreme Court held that the unabsorbed depreciation allowance has not only to be set off against other heads of income in the relevant previous year but where it is carried forward, it "stands on exactly the same footing as the current depreciation".

Thus, according to the Hon'ble Supreme Court, even if the assessee has changed the business or the business is totally stopped and is not doing any business, the deduction can be claimed and the said benefit cannot be denied.

A similar view is taken by this Court also in various cases, see CIT v. DEEPAK TEXTILE INDUSTRIES LTD., 168 ITR 773; ANANT MILLS CO. LTD. v. COMMISSIONER OF INCOME TAX, 206 ITR 582 and ANANT MILLS CO. LTD. vs. COMMISSIONER OF INCOME-TAX, 206 ITR, 72.

In view of the above well-settled legal position, in our opinion, the Tribunal has committed an error of law in not allowing set off of unabsorbed depreciation allowance to the assessee carried forward from earlier years against income from other sources on the ground that the assessee was not carrying on any business and there was no income, actual or notional, from such business.

The question referred to us must, therefore, be answered in the negative, i.e. in favour of assessee and against the revenue. The reference is answered accordingly. In the facts and circumstances, there is no order as to costs.
