Commissioner Of Income Tax vs Mahendra Mills on 15 March, 2000

Equivalent citations: AIR 2000 SUPREME COURT 1960, 2000 AIR SCW 1016, 2000 (6) COM LJ 21 SC, 2000 (2) SCALE 384, 2000 (3) LRI 279, 2000 (3) SCC 615, 2000 KERLJ(TAX) 185, 2000 (4) SRJ 360, (2000) 6 COMLJ 21, (2000) 3 JT 405 (SC), (2000) 109 TAXMAN 225, (2000) 243 ITR 56, (2000) 2 SCALE 384, (2000) 159 CURTAXREP 381, (2000) 156 TAXATION 666, (2000) 3 SUPREME 102

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Bench: D.P.Wadhwa, S.S.M.Quadri

PETITIONER:
COMMISSIONER OF INCOME TAX

Vs.

RESPONDENT:
MAHENDRA MILLS

DATE OF JUDGMENT: 15/03/2000

BENCH:
D.P.Wadhwa, S.S.M.Quadri

JUDGMENT:

D.P. WADHWA, J.

A common question of law arises in these appeals. It is:

> "Whether, on the facts and in the circumstances of the case, the Tribunal was right in coming to the conclusion that the Income-tax Officer could not grant depreciation allowance to the assessee under the Income-tax Act, 1961 when the same was not claimed by the assesse?"

The question was referred at the instance of Revenue to the High Court by the Income Tax Appellate Tribunal ('Tribunal' for short) for its opinion and answered in affirmative in favour of the assessee and against the Revenue. This question has been answered differently by various High Courts one in favour of the assessee and the other in favour of the Revenue.

Section 32 has since been amended by the Taxation Laws (Amendment and Miscellaneous Provisions) Act, 1986, with effect from 1.4.1988. However, the answer to the question remains of substantial importance as various matters are stated to be pending in the High Courts relating to Assessment Years prior to 1.4.1988. Section 32 as it stood prior to 1.4.1988, in relevant part, is as under :

> "32. (1) In respect of depreciation of buildings, machinery, plant or furniture owned by the assessee and used for the purposes of the business or profession, the following deductions shall, subject to the provisions of section 34, be allowed
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> (i) .....
>
> (ii) in the case of buildings, machinery, plant or furniture, other than ships covered by clause (i), such percentage on the written down value thereof as may in any case or class of cases be prescribed:
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> Provided that where the actual cost of any machinery or plant does not exceed seven hundred and fifty rupees, the actual cost thereof shall be allowed as a deduction in respect of the previous year in which such machinery or plant is first put to use by the assessee for the purposes of his business or profession:
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> Provided further that no deduction shall be allowed under this clause or clause (iii) in respect of any motor-car manufactured outside India, where such motor-car is acquired by the assessee after the 28th day of February, 1975, and is used otherwise than in a business of running it on hire for tourists;"
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> "32(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 (iia) or clause
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> (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 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 the allowance for that previous year, and so on for the succeeding previous years."

We may also quote Sections 28 and 29 :

"28. The following income shall be chargeable to income-tax under the head "Profits and gains of business or profession", -

(i) the profits and gains of any business or profession which was carried on by the assessee at any time during the previous year;

(ii) any compensation or other payment due to or received by, -

(a) any person, by whatever name, called, managing the whole or substantially the whole of the affairs of an Indian company, at or in connection with the termination of his management or the modification of the terms and conditions relating thereto;

(b) any person, by whatever name called, managing the whole or substantially the whole of the affairs in India of any other company, at or in connection with the termination of his office or the modification of the terms and conditions relating thereto;

(c) any person, by whatever name called, holding an agency in India for any part of the activities relating to the business of any other person, at or in connection with the termination of the agency or the modification of the terms and conditions relating thereto;

(d) any person, for or in connection with the vesting in the Government, or in any corporation owned or controlled by the Government, under any law for the time being in force, of the management of any property or business;

(iii) income derived by a trade, professional or similar association from specific services performed for its members;

(iv) the value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession.

"Income from profits and gains of business or profession, how computed

29. The income referred to in section 28 shall be computed in accordance with the provisions contained in sections 30 to 43A."

Assessee is a company and maintains accounts on mercantile basis. For the assessment year 1974-75, assessee did not claim any depreciation. Income-tax Officer, however, allowed depreciation. Assessee appealed to CIT (Appeals) who allowed the appeal. Revenue then took the matter to the Tribunal which dismissed the appeal of the Revenue. At the instance of the Revenue, the question of law as set out in the beginning of the judgment was referred to the Gujarat High Court for its opinion. High Court by the impugned judgment following its earlier decision in Chokshi Metal Refinery vs. Commissioner of Income-Tax, Gujarat-II [(1977) 107 ITR 63 (Guj)] answered the

question in affirmative, in favour of the assessee and against the Revenue. Aggrieved, revenue has come to this Court. Income-tax Officer in Assessment Order noted that assessee did not claim current depreciation. It was contended before him that the allowance of depreciation is a right given to the assessee and like all other rights and privileges assessee has full freedom to claim or not to claim it and that right cannot be a burden. A privilege cannot be to a disadvantage and an option cannot become an obligation. Income-tax Officer did not accept the contention of the assessee and computed the current depreciation for a sum of Rs.37,61,652/- which he allowed. Mr. Verma, learned senior counsel for the Revenue submitted that Sections 28, 29 and 32(1) and 32(2) are to be read together and so read, depreciation had to be allowed under law and it is not relevant if it is claimed by the assessee or not. He said there is conflict of judgments of the High Courts. While some judgments support the view canvassed by him, others support the view of the assessee. Section 28 lays down as to what Income shall be chargeable to income tax under the head "Profits and gains of business or profession" and Section 29 mandates that income referred to in Section 28 shall be computed in accordance with the provisions contained in Sections 30 to 43A. That being the law, Income- tax Officer was bound to allow depreciation whether the assessee chooses to claim the same or not. To arrive at the profit, depreciation has to be deducted commercially, accountably as well as statutorily. Written down value of the plant and machinery for the next year will have to be claimed which cannot be the written down value of the current year. Sub- section (2) of Section 32 prescribes mechanism as to how the deduction is to be allowed. Mr. Verma said if the claim for depreciation was a case of choice for the assessee, it would negate the decision of this Court in Commissioner of Income-Tax, Calcutta vs. Jaipuria China Clay Mines (P) Ltd. [(1966) 59 ITR 555 (SC)] and Garden Silk Weaving Factory vs. Commissioner of Income-tax [(1991) 189 ITR 512 (SC)]. Income-tax Officer during the course of assessment can call for the records.

Mr. Verma said that during the course of assessment proceedings, Income-tax Officer can call for the account books of the assessee, look into the same and calculate the depreciation allowable under Section 32. To carry forward loss one has to arrive at the net income which can be done only after adjusting depreciation though now after change in law depreciation cannot be carried forward beyond certain years. Mr. Verma submitted that looking at the language used in Section 29 the Income-tax Officer is duty bound to allow depreciation in order to compute the income referred to in Section 28 of the Act which he is to do keeping in view of the provisions contained in Sections 30 to 43 (now Section 43D). The assessee need not make any claim for depreciation of the current year. It is admissible under the law. Section 32 only requires as to how the allowance of depreciation is to be quantified. As any claim of depreciation made by the assessee is not binding on the Income-tax Officer similarly not to claim the same is also not binding on the Income- tax Officer and he can from the available material allow admissible deduction for the current year in arriving at the true income of the assessee.

Mr. Dastur, who on our request appeared as amicus curiae, submitted that view canvassed by the Revenue is not correct. He said if the assessee does not claim depreciation or does not furnish particulars for claiming depreciation as prescribed under Section 34 of the Act in his return of income, depreciation cannot be thrust upon him. To get depreciation allowance, there must be a claim for that under Section 32 which would subject to furnishing of particulars under Section 34 of the Act. The word "furnishing" in Section 34 would mean 'what is given voluntarily'. Section 34 of

the Act prescribes conditions for depreciation allowance. Sub-section (1) of Section 34 is relevant and it is as under : "34.(1) The deductions referred to in sub-section (1) of sub-section (1A) of section 32 shall be allowed only if the prescribed particulars have been furnished; and the deduction referred to in section 33 shall be allowed only if the particulars prescribed for the purpose of clause (i) and clause (ii) of sub-section (1) of section 32 have been furnished by the assessee in respect of the ship or machinery or plant."

Mr. Dastur referred to a circular of the Central Board of Direct Taxes (CBDT) which provides that depreciation could not have been allowed. Circular of the Central Board of Revenue (No. 29D (XIX-14) of 1965, F. No. 45/239/65.ITJ dated August 31, 1965) was to the effect that "where the required particulars have not been furnished by the assessee and no claim for depreciation has been made in the return, the Income-tax Officer should estimate the income without allowing depreciation allowance". Thus, unless the particulars of depreciation are furnished, no depreciation allowance could be allowed. He referred to yet another circular of the CBDT which provides that it is the duty of the Income Tax Officer to advise the assessee of his right to claim depreciation etc. but that would arise only if the assessee is ignorant of his right. Moreover, the duty of the Income Tax Officer is to give advice to the assessee of his right and no more. The circular of the Central Board of Revenue (No. 14 (SL- 35) of 1955 dated April 11, 1955) required the officers of the department "to assist a taxpayer in every reasonable way, particularly in the matter of claiming and securing reliefs. .... Although, therefore, the responsibility for claiming refunds and reliefs rests with the assessees on whom it is imposed by law, officers should (a) draw their attention to any refunds or reliefs to which they appear to be clearly entitled but which they have omitted to claim for some reason or other....." When there are two provisions under which an assessee could claim some benefit, it is for the assessee to choose one. Reference was made to claim for medical reimbursement for the current year which is different than claim for depreciation. This is so because depreciation is a claim on written down value and if depreciation is not claimed in the current year, written down value would remain the same for the following year. Prior to the amendment of Section 32 business loss could be carried forward for eight years. There was no time limit for the claiming of depreciation. This is not so now. Earlier, therefore, it was always for the assessee to claim business loss first and current depreciation thereafter if he so desired. There was, thus, basic difference in carry forward loss and carry forward unabsorbed depreciation. Mr. Dastur said it is not correct to say that if the contention of the assessee is correct, that would negate the decision of the Supreme Court in the cases of CIT vs. Jaipuria China Clay Mines [59 ITR 555] and Garden Silk Weaving Factory vs. CIT [189 ITR 512]. He then referred to Rule 5AA in the Income Tax Rules, 1962 (Rules) which was inserted by the Income Tax (Amendment) Rules, 1981 with effect from April 1, 1981. It was omitted by Income Tax (Third Amendment) Rules, 1987 with effect from April 2, 1987. Rule 5AA is as under:

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> "5AA. (1) For the purposes of the deduction referred to in sub-section (1) or sub-section (1A) of section 32 and sub-section (1) of section 32A, the following particulars shall be furnished in a columnar form, namely: -

(i) description of assets in respect of building, indicate whether the building is taken on lease or is owned by the assessee;

(ii) written down value of existing assets;

(iii) actual cost of assets acquired during the previous year;

(iv) capital expenditure on additions or alterations;

(v) period of user only where return relates to assessment year 1969-70 or any earlier year;

(vi) amount of moneys payable and scrap value in respect of assets sold, discarded, demolished or destroyed;

(vii) amount on which depreciation is allowable total of items (ii) to (iv) exclusive of amounts relating to assets referred to in item (vi);

(viii) rate of depreciation;

(ix) total number of days worked to be furnished only if extra shift allowance is claimed;

(x) total number of days worked double shift and triple shift (to be furnished only if extra shift allowance is claimed);

(xi) depreciation claimed

(a) initial depreciation;

(b) normal depreciation (including extra depreciation for approved hotels);

(c) additional depreciation;

(d) extra-shift allowance double shift and triple shift;

(xii) total depreciation;

(xiii) investment allowance claimed (also indicate rate);

(xiv) remarks (indicate the amount of initial depreciation, investment allowance or development rebate allowed in respect of the assets in an earlier year).

(2) Where the depreciation in respect of any asset is not admissible as a deduction under clause (ii) of sub-

section (4) of section 37 or sub-clause (ii) of clause (c) of section 40 or sub-clause (ii) of clause (a) of sub- section (5) of section 40A, such depreciation shall be excluded for the purposes of sub-rule (1)."

This Rule 5AA prescribed the particulars for depreciation necessary to be furnished for allowance of depreciation. Prior to insertion of Rule 5AA return of income tax in the form prescribed itself required particulars to be furnished if the assessee claimed depreciation. Mr. Dastur said that the case set up by the assessee before the Income Tax Officer was correct. It was wrong on the part of the Income Tax Officer to refuse depreciation in the face of the provision of law to the contrary. He said that calling the books of the assessee for the purpose of computing depreciation is of no relevance inasmuch as depreciation in the books cannot necessarily be the amount of depreciation which is allowable under the Act.

Section 37 also uses the words "shall be allowed in computing the income chargeable". Under this Section any expenditure which is not expenditure as described in Sections 30 to 36 and is also not in the nature of capital expenditure or personal expenses and laid out or expended wholly or exclusively for the purpose of business or profession of the assessee shall be allowed in computing the income chargeable under the head "Profits and gains of business or profession". It was submitted that expenditure can be allowed only if it is claimed. Similar is the language used in Section 34 of the Act. Here also depreciation can be allowed only if it is claimed after giving necessary particulars as required in a return of income, which is to be submitted in the form prescribed. If reference is made to the form of return relevant at the time, complete details are required to be given for the purpose of claiming depreciation. This is under the heading "Statement of particulars under Section 32A(4)/34(1) regarding investment allowance, depreciation and development rebate".

The provisions contained in Sections 34 and 37 were contrasted with Section 16 which deals with deduction from salary. The language here is "the income chargeable under the head "salary" shall be computed after making the following deductions namely: -".

Mr. Dastur like Mr. Verma also referred to judgments of the High Courts giving diverse views. High Courts of Allahabad and Madras supported the view canvassed by the Revenue while the High Courts of Bombay, Gujarat, Punjab and Haryana, Karnataka, Andhra Pradesh, Calcutta and Kerala supported the case of the assessee. We may now refer to some of the judgments cited at the Bar beginning with Jaipuria China Clay Mines and Garden Silk Weaving Factory cases. Commissioner of Income Tax, Calcutta vs. Jaipuria China Clay Mines (P) Ltd. [(1966) 59 ITR 555 (SC)] was a case under the Income Tax Act, 1922. The question which came up for consideration before this Court was: "whether, in the facts and circumstances of the case, the unabsorbed depreciation of the past years should be added to the depreciation of the current year and the aggregate of the unabsorbed depreciation of the current year and the aggregate of the unabsorbed depreciation and the current year's depreciation be deducted from the total income of the previous year relevant for the assessment year 1952-53?"

The Court noted the following facts in the case :

> "The Income-tax Officer assessing the respondent, M/s. Jaipuria China Clay Mines (P) Ltd., Calcutta, hereinafter referred to as "the assessee" for the year 1952-53 computed its total income at Rs.14,041 before charging depreciation for that year. From that figure he deducted depreciation for the year amounting to Rs.5,350, thus computing a profit of Rs.8,681. From this figure he deducted an equivalent amount, i.e., Rs.8,681, in respect of losses during 1947-48, and he thus worked out the business income as nil. He then computed the dividend income at Rs.2,01,130 and determined the total income at this figure and levied tax on it. The assessee had in its favour an unabsorbed depreciation aggregating to Rs.76,857 and it contended before the Income-tax Officer that this sum should be deducted from the income received from dividends, which, if done, would reduce the total income to Rs.1,32,955, but the Income-tax Officer refused to accede to this contention. The Appellate Assistant Commissioner upheld the order of the Income-tax Officer and the assessee's appeal to the Appellate Tribunal met with the same fate. The High Court, however, accepted the contention of the assessee and answered the question referred to it in favour of the assessee."

The Court said that the answer to the question depended upon the interpretation of Sections 6, 10 and 24 of the 1922 Act. The Court also observed that it was concerned with the law as it stood on April 1, 1952. It analysed the sections stating that the scheme of the Act is that the tax is levied in respect of the total income of the previous year of every individual, Hindu undivided family, etc., and the total income consists of income under various heads such as Salaries, Interest on securities, Income from property, Profits and gains of business, profession or vocation, and Income from other sources and Capital gains. Various sections deal with how income, profits and gains under each head have to be computed. Section 10 deals with the computation of profits and gains of any business carried on by an assessee. Section 10(2) prescribes the allowances which have to be deducted before computing the profits and gains; one of the allowances is "depreciation", and this is provided under sub-clause (vi). Section 24 provides for set-off of losses in computing aggregate income. After referring to proviso (b) to Section 10(2)(vi) this Court observed: "Apart from authority, looking at the Act as it stood on April 1, 1952, it is clear that the underlying idea of the Act is to assess the total income of an assessee. Prima facie, it would be unfair to compute the total income of an assessee carrying on business without pooling the income from business with the income or loss under other heads. The second consideration which is relevant is that the Act draws no express distinction between the various allowances mentioned in section 10(2). They all have to be deducted from the gross profits and gains of a business. According to commercial principles, 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 are not large enough to wipe off depreciation, the profit and loss account would show a loss. Therefore, apart from proviso (b) to section 10(2)(vi), neither the Act nor commercial principles draw any distinction between the various allowances mentioned in section 10(2); the only distinction is that while the other allowances may be outgoings, depreciation is not an actual outgoing."

Proviso (b) to Section 10(2)(vi) is as under: -

> "(b) where, in the assessment of the assessee or if the assessee is a registered firm, in the assessment of its partners, full effect cannot be given to any such allowance in any year not being a year which ended prior to the 1st day of April, 1939, owing to there being no profits or gains chargeable for that year, or owing to the profits or gains chargeable being less than the allowance, then, subject to the provisions of clause (b) of the proviso to sub-section (2) of section 24, 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 year and deemed to be part of that allowance for depreciation for the following year and deemed to be part of that allowance, or if there is no such allowance for that year, be deemed to be the allowance for that year, and so on for succeeding years."

In conclusion this Court agreed with the High Court and answered the question in favour of the assessee. In Garden Silk Weaving Factory vs. Commissioner of Income-Tax [(1991) 189 ITR 512 (SC)] questions before this Court were:

> "(1) Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the assessee, a registered firm, is entitled to carry forward unabsorbed depreciation from earlier years and that it will be deemed to be an allowance in the nature of depreciation in the previous year relevant to the assessement year 1968-69? (2) Whether the claim of the assessee to carry forward and set off loss of Rs.3,49,242 against its total income for the assessment year 1968-69 has been rightly rejected?" It will be seen that the issues which were before the Court are not the same which we are now considering. In the case of Garden Silk Weaving Factory reliance was again placed on the earlier decision of this Court in Jaipuria China Clay Mines (P) Ltd.'s case. The whole stress of argument of Mr. Verma was that net income has to be ascertained and for that purpose Income Tax Officer is duty bound to look into the amount of depreciation available for that assessment year and to allow credit for the same to arrive at the net income. This, he said, would be so irrespective whether the assessee has claimed depreciation or not and whether particulars of depreciation have been furnished or not. We do not think these two judgments of this Court on which strong reliance was placed by Mr. Verma advance his case. Issues in those cases were entirely different having no bearing on the question before us. CIT vs. Dharampur Leather Co. Ltd. [(1966) 60 ITR 165 (SC)] was a case under the Income-tax Act, 1922. Sub-section (1) of section 10 deals with the tax payable by an assessee in respect of the profits or gains of any business, profession or vocation carried on by him. Sub-section (2) requires such profits or gains to be computed after making the allowances therein set out. Clause (vi) thereof speaks of allowances in respect of depreciation of buildings, machinery, plant, etc., and the proviso (a) to clause (vi) reads thus: "Provided that the prescribed particulars have been duly furnished". In proceedings for the Assessment Year 1955-56, the Income-tax Officer held that depreciation must be computed as if income of the

assessee had been worked out properly in the earlier years when it was exempted and depreciation had been allowed at the usual rates. It was contended by the assessee that no depreciation had in fact been actually allowed to the assessee in any earlier years and, therefore, the depreciation should be computed on the original cost of various items of plant and machinery and other assets of the assessee. The Income-tax Officer, however, rejected this contention and held that depreciation must be computed on the written down values of machinery computed as if the income of the assessee had been worked out properly in the years when the company was exempted and the depreciation being allowed at the usual rates. The assessee failed before the Appellate Assistant Commissioner and the Appellate Tribunal. The Appellate Tribunal held that the words "actually allowed" in section 10(5)(b) of the Act were wide enough to cover the case of the assessee. The High Court, however, held that if in the prior years no depreciation had been actually allowed then the actual cost incurred by the assessee for acquiring the machinery would be the written down value of the machinery. This Court rejected the contention of the Revenue that on a proper interpretation of Section 10(5)(b) of the Act the depreciation must be deemed to have been allowed to the assessee for the years in which the income of the assessee was exempted. The Court interpreted the words "actually allowed" occurring in Section 10(5)(b) to hold that the words "actually allowed" did not include any notional allowance. In Beco Engineering Co. Ltd. vs. CIT [(1984) 148 ITR 478 (P&H)] assessee claimed depreciation in its original return. Later he filed a revised return in which he withdrew the claim for depreciation. Income-tax Officer was of the view that it was statutorily binding upon him to compute the total income which must take into consideration the deduction of depreciation allowance. High Court held that in case the assessee had not claimed depreciation allowance he could not be granted the same by the Income-tax Officer. In regard to the revised return High Court took the view that the original return could not be adverted to.

In CIT vs. Shri Someshwar Sahakari Sakhar Karkhana Ltd. [(1989) 177 ITR 443 (Bom.)] two issues were raised. One issue was whether the assessee had a choice in the matter of claiming a deduction on account of depreciation and the second issue was whether, having claimed in the original return, the Income-tax Officer was entitled to rely on the particulars furnished therein and allow a deduction on account of depreciation regardless of the fact that the assessee had stated in the revised return that he did not want it. After examining judgments of the various High Courts and of this Court in CIT vs. Dharampur Leather Co. Ltd. [(1966) 60 ITR 165 (SC)] the Court said: -

"In our view, to sum up on the first issue, the assessee has a choice to claim or not to claim a deduction on account of depreciation. If he chooses not to claim it, the Income-tax Officer is not entitled to allow a deduction on account of depreciation."

In CIT vs, Friends Corporation [(1989) 180 ITR 334 (P&H)] the question before the High Court was whether on the facts and in the circumstances of the case the Appellate Tribunal was right in law in holding that the Income-tax Officer could not suo motu allow depreciation on the three tankers held by the assessee. Second question was whether on the facts and in the circumstances of the case the

Tribunal was right in law in accepting the contention of the assessee that he had not made an effective claim in the return for claiming depreciation. For the Assessment Year 1976-77 assessee filed its return of income showing loss of Rs,22,521/-. No particulars of the depreciation for the tankers were filed. Income-tax Officer, however, worked out depreciation on the tankers from what he gleaned from the assessee's account. High Court said that depreciation allowance is, at any rate, a benefit available to the assessee to avail of, but if the assessee chooses not to claim it, it would be contrary to reason and law to hold that it must be forced upon him. High Court said:

"There is no gainsaying that allowance for depreciation is a benefit available to the assessee to claim, but not one that can be thrust upon him against his wishes. At any rate, in order to claim depreciation, the assessee must furnish the requisite particulars as prescribed by the Income-tax Act and the Rules made thereunder. In the absence of such particulars, the assessee cannot avail of, nor indeed can he be held entitled, to depreciation. It would be pertinent in this behalf to advert to the judgment of this Court in Beco Engineering Co. Ltd. v. CIT [1984] 148 ITR 478, where a reference was made to Circular No. 29D(XIX- 14) of 1965, dated August 31, 1965, issued by the Central Board of Direct Taxes which provides that where the required particulars have not been furnished by the assessee and no claim for depreciation has been made in the return, the Income-tax Officer should estimate the income without allowing depreciation allowance. Further, it was held that from the language of section 32(1)(ii) and 34(1) read with the circular, it was clear that in case an assessee had not claimed depreciation, the Income-tax Officer could not give him depreciation allowance."

In CIT vs. Arun Textiles "C" [(1991) 192 ITR 700 (Guj.)] the assessee withdrew the claim of depreciation in the revised return. Income-tax Officer nevertheless allowed depreciation, which was claimed in the original return. The Court noticed from the provisions of section 32(1) of the said Act that the deduction in respect of depreciation on the items mentioned therein shall be allowed subject to the provisions of section 34 of the Act. Under section 34(1) of the said Act as was applicable during the relevant year, it was, inter alia, provided that the deductions referred to in sub-section (1) of section 32 shall be allowed only if the prescribed particulars have been furnished. The form prescribed by rule 12 required particulars to be given for the purpose of the claim for deductions under the said provision. It is not that when depreciation is allowable, the Income-tax Officer has no option but to grant it even if the assessee makes clear its intention not to claim the depreciation. The Court said: -

> "Under clause (ii) of sub-section (1) of section 32, such percentage on the written down value of the specified assets is to be allowed as a deduction in respect of the depreciation of the assets. It appears that allowance in such cases is, therefore, to be calculated on the written down value of the assets. The written down value of assets is defined in section 43(6) of the Act and, in respect of the assets acquired prior to the accounting year, the written down value would be the actual cost of acquisition less the aggregate of all the deductions "actually allowed"

to the assessee in the past years. It would follow that, where depreciation may be merely allowable but which is not computed, it cannot be said to have been "actually allowed". Therefore, depreciation which is not claimed cannot be made to reflect in the written down value of the assets.

If the idea behind the provisions was to provide for compulsory deductions for the depreciation, then the written down value of assets acquired before the previous year would have been defined so as to mean actual cost less all depreciation allowable and not "actually allowed" as provided in section 43(6)(b) of the Act. The provisions of section 32(1) of the Act are intended to confer benefit on the assessee of claiming deductions on account of depreciation in respect of the specified classes of assets and, whenever it is claimed, it ought to be allowed."

High Court also noticed that in that case admittedly the assessee had filed his revised return in which he has not claimed deductions in respect of depreciation under Section 32(1)(ii) of the Act and said: -

> "The provisions of section 32 are intended to give benefit to the assessee for claiming deductions in respect of depreciation on the type of assets mentioned therein. Furthermore, a mere claim to deduction would not be enough since the deductions are to be allowed subject to the provisions of section 34 which required necessary particulars to be furnished in the prescribed form. Therefore, until a claim is made for allowing deductions of the nature covered under section 32 along with necessary particulars, there would hardly be any occasion for the Income-tax Officer to "allow" any claim. In the context in which the word "allowed" is used in section 32(1), it is clear to us that the meaning intended is "to admit something claimed". The word "allowed" means "to accept as true or valid, to acknowledge admit, grant", "to admit something claimed, to acknowledge grant, concede" (See the Oxford English Dictionary, Volume I, 1970 Reprint, page 2392). There is nothing in the provisions of section 32(1) read with section 29 of the Act to indicate that even when no claim is made for allowing deduction in respect of the depreciation under section 32(1), the Income-tax Officer is bound to allow a deduction. In our view, it is implicit in the said provisions that the assessee should have made a claim for deduction under the said provisions to enable the Income-tax Officer to consider the same."

High Court rejected the argument of the Revenue that unless depreciation was taken into account the Income-tax Officer could not arrive at the correct taxable income of the assessee. This is how the High Court said: -

> "It is difficult to accept this argument for, under the scheme of the Act, income is to be charged regardless of depreciation on the value of the assets and it is only by way of an exception that section 32(1) grants an allowance in respect of depreciation on the value of the capital assets enumerated therein. It may appear intriguing on the part of the assessee as to why it does not claim the benefit of deduction from its taxable income, but the choice is clearly its. Where the assessee does not want the benefit, it cannot be thrust upon it. There is no provision which makes it compulsory on the part of the Income-tax Officer to make deductions in all cases. If it were incumbent on the Income-tax Officer to make compulsory deductions irrespective of whether the assessee claimed or not, the statutory requirement of making the claim along with necessary particulars and the provision for "allowing" it would be

unnecessary."

In Chief CIT (Administration) vs. Machine Tool Corporation of India Ltd. [(1993) 201 ITR 101 (Kar.)] the assessee filed revised return whereby it withdrew its claim regarding depreciation in the original return. Income- tax Officer, however, allowed depreciation as per details furnished in the original return. High Court noticed the divergence of opinion among the High Courts on the question and also referred to a circular of the Central Board of Direct Taxes dated September 4, 1972 to the effect that the Board will have no objection to the line of action suggested by the assessee, as there is nothing in law to hold that it is mandatory for the assessing authority to allow depreciation even if the assessee withdraws his claim. Court said there could not be any doubt that allowing of deductions as provided under Section 32 of the Act itself was subject to the provisions of Section 34. Sub-section (1) of Section 34 requires furnishing of particulars by the assessee in return as a condition precedent to claim the deductions, and if he does not choose to do so it is not mandatory for the Income-tax Officer to find something on the record to impose that benefit upon the assessee. Court also held that once a revised return is filed under Section 139(5) of the Act, the original return is substituted by the revised return and consequently the entries in the relevant claim of the original return seeking depreciation could not be used for any purpose. It is, therefore, not open to the Income-tax Officer to advert to the original return or statement filed along with it for the purpose of allowing deductions after such claim was expressly withdrawn under the revised return.

In CIT vs. Andhra Cotton Mills Ltd. [(1996) 219 ITR 404 (AP)] for the Assessment Year 1979-80 the assessee, a company, filed its return of income showing a loss of over rupees one crore. Later, a revised return was filed showing a loss of over rupees one crore though for a lesser amount than in the original return. Income-tax Officer, however, computed the current profit at Rs.4,32,364/- and the current depreciation at Rs.9,64,029/- leading to a net loss of Rs.5,31,665/-. Contention of the assessee was that since there was carried forward loss, if depreciation is not allowed as the deduction, then the carried forward loss could be set off against the current profit and the current depreciation could be carried forward without limitation, unlike business loss, for which there is a period of limitation for set off. That was the reason why the assessee had filed the revised return withdrawing the claim for deduction of depreciation. The question that ultimately came to be referred to the High Court was "Whether, on the facts and in the circumstances of the case, the Income- tax Appellate Tribunal is justified in upholding the orders of the Commissioner of Income-tax (Appeals) directing withdrawal of the deduction by way of depreciation allowed by the Income-tax Officer." It was the submission of the Revenue that the provisions of the statute required that true income should be ascertained and such income in respect of a business cannot be properly ascertained without deducting the depreciation which is the first charge on the profit. For this support was drawn from the decision of the Supreme Court in CIT v. Mother India Refrigeration Industries P. Ltd. [1985] 155 ITR 711. High Court said that under Section 139(5) a revised return could be filed if there was an omission or wrong statement. Assessee had prepared a Profit and Loss Account providing for depreciation but it did not opt for that option in the normal course of its business. High Court found that in the original return Profit and Loss Account containing the provision for depreciation had been filed. High Court was of the view that revised return was not a valid return and rejected the contention of the assessee that since particulars of depreciation were not given in the revised return the Income-tax Officer could not take into account the particulars of

depreciation contained in the original return. High Court then went on to observe:

> "Moreover, under section 143(1)(b)(iv), even while making an assessment accepting the return of the assessee, the Income-tax Officer has to allow the proper deduction under section 32. Under section 143(3), an assessment made under section 143(1) is deemed to be incomplete or inadequate if proper depreciation is not allowed. These provisions also indicate, along with section 28 which requires that the income from a business has to be computed in accordance with the provisions of sections 29 to 44, and read with section 145, that depreciation is a proper deduction in arriving at the correct income from business. No doubt section 34 provides that the deduction shall be allowed only if the prescribed particulars are furnished. This only ensures that correct information is available to the Income-tax Officer for allowing the proper deduction. But this cannot be construed to mean that where the assessee deliberately withholds the information, no deduction for depreciation could be given in computing the income. In the present case, the motivation for the assessee to withdraw the claim for deduction of depreciation is only to get a set-off of the business loss of the earlier year. But the current depreciation is a first charge on the profit as held by the Supreme Court in Mother India Refrigeration Industries P. Ltd.'s case [1985] 155 ITR 711 and that charge cannot be ignored by withholding the particulars so as to avail of the setting off the earlier year's loss which lapses by the prescribed period of limitation. In our considered opinion, therefore, the assessee cannot withdraw the claim for depreciation allowance when particulars are available in accordance with section 34 only for the purpose of setting off of the loss of the earlier years. Since the particulars were available as furnished along with the original return, the Income-tax Officer is bound to allow the deduction of depreciation in computing the income from business. The assessment made by the Income-tax Officer, in this case, is, therefore, correct and in accordance with law."

High Court, therefore, answered the question in favour of the Revenue and against the assessee.

In CIT vs. Andhra Cotton Mills Ltd. [(1997) 228 ITR 30 (AP)], where one of us (Quadri,J.) was a member, the assessee questioned the deductions in respect of depreciation allowed by the Income-tax Officer under Section 32 of the Act on the ground that it did not raise any claim for such deductions in its return of income. The assessee also did not furnish the prescribed particulars under Section 34(1) of the Act. High Court considered both the views one in favour and the other against the assessee and preferred the view favouring the assessee. The Court also referred to the circular of the Central Board of Revenue dated August 31, 1965 directing that "where the required particulars have not been furnished by the assessee and no claim for depreciation has been made in the return, the Income-tax Officer should estimate the income without allowing depreciation allowance". The Court observed that the record did not disclose that any particulars regarding depreciation were furnished by the assessee or that the Income-tax Officer had asked for the particulars whereupon the assessee furnished them. In its view, therefore, under Section 34(1) of the Act and the circular of the Central Board of Revenue the Income-tax Officer could not have allowed the deduction of depreciation. High Court said: -

> "We may also observe that, on reading sub- section (1) of Section 34 we do not find any reference to the assessee claiming or not claiming deduction of depreciation. It states that deduction in respect of depreciation "shall be allowed only if the prescribed particulars have been furnished; .." (emphasis* supplied). A fair reading of this provision conveys that when prescribed particulars have been furnished, there is no option but that the said deductions shall be allowed. The reverse may not follow:
>
> that means, the assessing authority even then may allow the deduction in respect of depreciation, but before he does that he has to require the assessee to furnish the requisite particulars for computing the depreciation allowance. Sub-section (9) of section 139, introduced by the Finance (No. 2) Act, 1980, with effect from September 1, 1980, allows the Income-tax Officer to give an opportunity to the assessee to rectify the return, if he found it defective, and, if within the period allowed the assessee failed to rectify the return, "the return shall be treated as an invalid return"."

In the case of Commissioner of Income-Tax vs. J.K. Industries Ltd. [(2000) 241 ITR 537 (Cal.)] the Court held that neither the assessee has claimed the depreciation allowance nor he had furnished the required particulars for deduction on account of depreciation allowance nor there was material on record before the Income-tax Officer, which was necessary to consider the depreciation allowance, Income-tax Officer was not justified in allowing the depreciation to the assessee.

In the case of Ascharajlal Ram Prakash vs. CIT [(1973) 90 ITR 477 (All.)] the issue before the Court was that though the assessee had not claimed depreciation whether the Income-tax Officer could allow the depreciation. High Court took the view that if during the course of assessment proceedings the Income-tax Officer came to know the relevant particulars necessary for grant of depreciation he was bound to give effect to that and allow depreciation. This is how the High Court considered the matter: -

> "Section 32 of the Act provides that depreciation in respect of buildings, machinery, plant and furniture owned by the assessee and used for the purpose of his business or profession shall be allowed subject to the provisions of section 34. Section 34 provides that deductions under section 32 on account of depreciation shall be allowed only if the prescribed particulars have been furnished. In what form the prescribed particulars must be furnished, or in what document, is not mentioned in section 34. There is no requirement in that section that the prescribed particulars must be furnished in any particular document. Rule 12 of the Income-tax Rules provides for the form in which the return of income must be furnished. In the form of return there is a section which refers to the various particulars required under section 34(1) when a claim is made for depreciation. Now, merely because the form of the return provides for a place where the statement of such particulars should be set out does not mean that in the absence of such statement the Income-tax Officer has no power to allow the depreciation. A deduction by way of depreciation is necessary in order to arrive at the true profits or gains of the business or profession. The Income-tax Officer is bound to arrive at the true figure of such profits and gains and

> if in the course of assessment proceedings he comes to know of the relevant particulars necessary for the grant of deduction, he is bound to give effect to it. There is no dispute that during the course of the assessment proceedings in this case the Income-tax Officer did come to know the date on which the truck was purchased, and the original cost of the truck, and from that along with the rate prescribed by the rules for allowing depreciation, he could have computed and allowed depreciation. We are not satisfied that merely because the assessee did not file the necessary particulars in the return filed by him, the Income-tax Officer did not have the jurisdiction to grant the allowance by way of depreciation."

In Dasa-prakash Bottling Co. vs. CIT [(1980) 122 ITR 9 (Mad.)] the Madras High Court considered the fact that though the figures had not been furnished in return as such, but the figures were furnished by the assessee during the course of assessment under protest. High Court took the view that once the details and particulars required were furnished by the assessee whether furnished under protest or not did not make any difference and depreciation could be allowed.

In CIT vs. Southern Petro Chemical Industries Corporation Ltd. [(1998) 233 ITR 400 (Mad.)] following its earlier decision in Dasaprakash Bottling case the Court held that the grant of depreciation was a statutory allowance and even if the assessee had not furnished the particulars, it was open to the Income-tax Officer to grant the depreciation and that it would not be perfectly open to the Income-tax Officer to disallow the claim if the assessee had not furnished the particulars. On the other question where the assessee in the revised return had withdrawn his claim of depreciation the Court said that where the assessee had furnished the particulars regarding the claim of depreciation in the original return the assessee would not be able to withdraw his claim for depreciation as in that case revised return would not be valid within the meaning of Section 139(5) of the Act. High Court said that in that it could not be said that the assessee had discovered any omission or wrong statement in the original return. Even otherwise it was not open to the assessee to withdraw the particulars regarding grant of depreciation by filing a revised return. This is how the Court said: -

> "Even that apart, the assessee had furnished the particulars regarding the claim of depreciation in the original return and a revised return was filed. In our opinion, the revised return is not a revised return within the meaning of section 139(5) of the Act as it cannot be stated that the assessee had discovered any omission or wrong statement in the original return filed. We hold that it is not open to the assessee to deliberately withdraw the claim for depreciation and such a deliberate withdrawal of the claim can neither be regarded as an omission nor furnishing a wrong statement in the original return. It cannot, therefore, be stated that the revised return has taken the place of the original return. That apart, even assuming that the assessee withdrew the original return by filing a revised return, it is not open to the assessee to withdraw the particulars regarding the grant of depreciation by filing a revised return. The particulars had found their way and reached the records of the Income-tax Officer and once they become a part of the records of the Income-tax Officer, it is not open to the assessee to direct the Income-tax Officer to close his eyes to the particulars

> available in his files. When the particulars regarding the grant of depreciation were available, the decision of this Court in Dasaprakash Bottling Co.'s case [1980] 122 ITR 9 would apply. As seen earlier, section 34 of the Act does not require that the particulars should be furnished along with the return. Therefore, once the particulars regarding the grant of depreciation are available, it is open to the Income-tax Officer to grant depreciation, even if the assessee had withdrawn the claim in the revised return."

In Hopeville Estate vs. State of Tamil Nadu [(1978) 112 ITR 861 (Mad.)] High Court struck somewhat a different note. It was a case under the Tamil Nadu Agricultural Income-tax Act, 1955. The assessee had claimed depreciation on the value of the tank said to have been constructed for the use of the workers, in the computation of the agricultural income. This claim was rejected by all the authorities on the ground that the depreciation could not be allowed as per the Income-tax Act, 1961 as no particulars necessary to claim depreciation had been furnished. High Court rejected the contention of the assessee by making the following observations :

> "Even if the authorities have loosely referred to the applicability of the provisions of the Income-tax Act, still we are of the opinion that the petitioner is not entitled to succeed with regard to the facts of this case. We are assuming for the purpose of this argument that the contention of the learned counsel that building includes all structures constructed with a view to provide amenities to workers as defined in the Plantation Labour Act, 1951, as contained in the Explanation to section 5(f) of the Tamil Nadu Agricultural Income-tax Act, is correct. Still the petitioner will have to establish with reference to the provisions contained in the Income-tax Act, the rate of depreciation to which it is entitled, because rule 4(1) of the Tamil Nadu Agricultural Income-tax Rules, 1955, refers to the rates prescribed in the Income-tax Act for calculating the rate of depreciation to be arrived at under section 5(f) of the Tamil Nadu Agricultural Income-tax Act, 1955. Under rule 5 of the Income-tax Rules, 1962, read with Appendix I thereto, buildings are classified into four categories and in respect of the first three categories only the rate of depreciation has been prescribed. Consequently, before claiming depreciation under section 5(f) of the Tamil Nadu Agricultural Income-tax Act, the petitioner must furnish the necessary particulars in order to claim the particular rate of depreciation as provided for in the Income-tax Rules. No such claim whatever has been made in the present case, and the only contention that has been put forward was a general one that the tank is a building, and, therefore, a depreciable asset. As a matter of fact, section 5(f) itself expressly states that the depreciation will be deducted only when the assessee furnishes the prescribed particulars. In this case, no such particulars have been furnished by the petitioner. In view of these circumstances, it is not necessary to consider and deal with any general question, and with reference to the facts of this case for the year in question the Tribunal and the authorities below were right in holding that no depreciation could be deducted in computing the agricultural income."

In CIT vs. Gujarat State Warehousing Corporation [(1976) 104 ITR 1 (Guj.)] the question before the Court was regarding priorities adjustment as between the current depreciation, carried forward depreciation and carried forward losses against the profits and gains of business for the current year in view of the provisions contained in Sections 32(2) and 72(2) of the Act. For the Assessment Year 1967-68 Gujarat State Warehousing Corporation, the assessee, made a business profit of Rs.2,18,488/-. Before this Assessment Year assessee had suffered business losses of Rs.2,43,339/- which were carried forward from the years 1964-65, 1965-66 and 1966-67. Assessee also carried forward unabsorbed depreciation for all these three previous years amounting to Rs.46,696/-. For the current year 1967-68 there was current depreciation of Rs.27,047/-. As the assessee earned business profit of Rs.2,18,488/- without deducting the current depreciation the question which arose during the course of assessment proceedings was whether carried forward business loss of Rs.2,43,339/- should first be deducted from the business profit or whether from the said profit the current depreciation should first be deducted and thereafter the carried forward loss should be deducted. For the Assessment Year 1967-68 assessee had also income of Rs.48,105/- from other sources. The Income-tax Officer first deducted the current depreciation of Rs.27,047/- from the profit of Rs.2,18,488. This gave the balance of Rs.1,81,041/-. From this the Income-tax Officer deducted the carried forward loss of Rs.2,43,339/- thus resulting in the carried forward balance of Rs.61,898/- as business loss. So far as carried forward depreciation of Rs.46,696/- was concerned the Income-tax Officer deducted it from the income from other sources which gave the net profit from other sources at Rs.1,409/-. The net result of this assessment was that while the carried forward depreciation as well as current depreciation were absorbed the business loss of Rs.61,898/- was carried forward to the next Assessment Year 1968-69. According to the assessee the method adopted by the Income-tax Officer in giving priority to the adjustment of the current depreciation over the carry forward loss of Rs.2,43,339/- was not correct and that carried forward loss should have first been deducted from the business profit of Rs.2,18,488/-. Assessee further contended that carry forward depreciation of Rs.46,696/- should have been clubbed with the current depreciation of Rs.27,047/- and should have been adjusted against the amount of Rs.48,105/- which was the income from other sources. That would have enabled the assessee to carry forward depreciation of the amount of Rs.25,638/- and also the carry forward loss of Rs.24,851/- for the Assessment Year 1968-69. The Appellate Assistant Commissioner dismissed the appeal of the assessee. It then approached the Appellate Tribunal. The Tribunal considered the provisions of sub- section (2) of Section 32, which contains the deeming fiction that carried forward depreciation should be treated as current year's depreciation by clubbing the same with the current year's depreciation. The Tribunal relied upon certain observations of this Court in Commissioner of Income Tax vs. Jaipuria China Clay Mines (P) Ltd. [(1996) 59 ITR 555 (SC)] and held that the lower authorities were not justified in not giving priority to the adjustment of the carried forward loss as against current year's depreciation in view of sub-section (2) of Section 72 of the Act. Tribunal, therefore, allowed the appeal of the assessee. It held that against the income of Rs.2,18,488/- for the Assessment Year 1967-68 first the carried forward loss of early years should be deducted and thereafter current depreciation and unabsorbed depreciation of early years should be deducted. Sub-section (2) of Section 72 provides that where an allowance or part thereof is, under sub-section (2) of Section 32 or sub-section (4) of Section 34, to be carried forward, effect shall first be given to the provisions of this Section. Section 72 provides for carry forward and set off business losses. Revenue thereafter took the matter to the High Court in reference. High Court was of the view that the observations of

the Supreme Court in Jaipuria China Clay Mines case "make it clear that the taxable profits or gains from a particular business cannot be ascertained without debiting the current year's depreciation to the profits and gains" It further said that the Supreme Court had held that current year's depreciation was always the first charge on the profit earned in the business in the current year. High Court finally observed:- "One more reason which impels us to take the view which we have taken is that carried forward depreciation cannot be put at par with current year's depreciation for all purposes because carried forward depreciation is made up of current depreciation of respective previous years and as such its components had the chance of being set off partially against the income of the relevant previous years. These components were carried forward only because they could not be fully set off against the income of those relevant years. Under the circumstances, it stands to reason that while working out the provisions of sub-section (2) of section 72 the carried forward depreciation cannot stand at par with the current year's depreciation, which like the components of the carried forward depreciation must get the chance of being first set off against the current year's income."

High Court, therefore, answered the reference in favour of the Revenue and against the assessee.

We do not think Gujarat High Court in the case of Gujarat State Warehousing Corporation [104 ITR 1] has taken correct view in respect of the issues with which we are concerned in the present appeal. High Court has not properly appreciated the context in which this Court made observations in the case of Jaipuria China Clay Mines (P) Ltd. [59 ITR 555] on which High Court has relied. In later two cases of Chokshi Metal Refinery [107 ITR 63] and Arun Textiles "C" [192 ITR 700] Gujarat High Court has itself taken, if we may say so, a different view falling in line with the views of Bombay, Punjab and Haryana, Karnataka, Andhra Pradesh, Calcutta and Kerala High Courts which view commends to us. Language of the provision of Sections 32 and 34 are specific and admits of no ambiguity. Section 32 allows depreciation as deduction subject to the provisions of Section 34. Section 34 provides that deduction under Section 32 shall be allowed only if prescribed particulars have been furnished. We have seen Rule 5AA of the Rules which though since deleted provided for the particulars required for the purpose of deduction under Section 32. Even in the absence of Rule 5AA return of income in the form prescribed itself requires particulars to be furnished if the assessee claims depreciation. These particulars are required to be furnished in great detail. There is a circular of the Board dated August 31, 1965, which provides that depreciation could not be allowed where the required particulars have not been furnished by the assessee and no claim for the depreciation has been made in the return. Income-tax Officer in such a case is required to compute the income without allowing depreciation allowance. Circular of the Board dated April 11, 1955 is of no help to the Revenue. It imposes merely a duty on the officers of the department to assist the tax-payers in every reasonable way, particularly, in the matter of claiming and securing relief. The Officer is required to do no more than to advise the assessee. It does not place any mandatory duty on the officer to allow depreciation if the assessee does not want to claim that. Provision for claim of depreciation is certainly for the benefit of the assessee. If it does not wish to avail that benefit for some reason, benefit cannot be forced upon him. It is for the assessee to see if the claim of depreciation is to his advantage. Rather Income-tax Officer should advise him not to claim depreciation if that course is beneficial to the assessee. That would be in our view the spirit of the circular dated April 11, 1955. Income under the head "profits and gains of business or profession" is

chargeable to income-tax under Section 28 and that income under Section 29 is to be computed in accordance with the provisions contained in Sections 30 to 43A. The argument that since Section 32 provides for depreciation it has to be allowed in computing the income of the assessee cannot in all circumstances be accepted in view of the bar contained in Section 34. If Section 34 is not satisfied and particulars are not furnished by the assessee his claim for depreciation under Section 32 cannot be allowed. Section 29 is thus to be read with reference to other provisions of the Act. It is not in itself a complete code.

In Ascharajlal Ram Prakash case [90 ITR 477] Allahabad High Court said that since it is not mentioned in Section 34 as to in what form the prescribed particulars of depreciation must be furnished and that, therefore, there is no requirement in that Section that particulars must be furnished. High Court further went on to say that merely because the form of return provides for a place where the statement of such particulars should be set out, would not mean that in absence of such statement the Income-tax Officer has no power to allow the depreciation. This is contrary to the mandate of Section 34 as well as the Board circular dated August 31, 1965. Madras High Court in Dasa Prakash Bottling Co. case [122 ITR 9] following Allahabad High Court in the case of Ascharajlal Ram Prakash said that Income-tax Officer can disallow the claim of depreciation if the assessee did not furnish the prescribed particulars. It further went on to hold that it would be open to the Income-tax Officer to grant depreciation even if the assessee had not furnished the prescribed particulars. In this case the assessee did not give the particulars relating to depreciation in the return form nor did it claim depreciation. On being called upon by the Income-tax Officer to furnish necessary particulars the assessee in response thereto furnished the particulars under protest. On that basis the Income-tax Officer granted the depreciation. We do not think that the views expressed by the Madras High Court lay down correct law. Section 34 is not in the nature of merely an enabling provision. In the absence of particulars of depreciation as required by Section 34, there is no mandate on the Income-tax Officer under Section 29 to compute the income by allowing depreciation under Section 32. In the second Madras case (CIT vs. Southern Petro Chemicals Industries Corporation Ltd. [233 ITR 400] the assessee did claim depreciation but he withdrew the same in the revised return. On that basis it was held that since the assessee had furnished the particulars regarding the claim of depreciation in the original return the assessee would not be able to withdraw his claim for depreciation. It would appear that High Court proceeded on the basis that the revised return was not a valid return under Section 139(5) of the Act. High Court followed its earlier decision in Dasa Prakash Bottling Co. To us it appears that if the revised return is a valid return and the assessee has withdrawn the claim of depreciation it cannot be granted relying on the original return when the assessment is based on the revised return.

We get support from the earlier decision of this Court in Dharampur Leather Co. Ltd. case [60 ITR 165]. Allowance of depreciation is calculated on the written down value of the assets, which written down value would be the actual cost of acquisition less the aggregate of all deductions "actually allowed" to the assessee for the past years. "Actually allowed" does not mean 'notionally allowed'. If the assessee has not claimed deduction of depreciation in any past year it cannot be said that it was notionally allowed to him. A thing is "allowed" when it is claimed. A subtle distinction is there when we examine the language used in Section 16 and that Sections 34 and 37 of the Act. It is rightly said that a privilege cannot be to a disadvantage and an option cannot become an obligation.

We thus uphold the views expressed by the High Courts of Bombay, Punjab and Haryana, Karnataka, Andhra Pradesh, Calcutta and Kerala. Accordingly the appeal is dismissed. We answer the question set out in the beginning of this judgment in affirmative, i.e., in favour of the respondent-assessee and against the Revenue. There shall be no order as to costs.

We record our appreciation to the assistance rendered by Mr. Soli Dastur, who appeared amicus curiae on our request. He made splendid presentation of law on the subject.