Seshasayee Paper & Board Ltd vs The Deputy Commissioner Of Income Tax on 15 May, 2015

Author: A.K. Sikri

Bench: Rohinton Fali Nariman, A.K. Sikri

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 1812-1813 OF 2005

SESHASAYEE PAPER & BOARDS LIMITED	.....APPELLANT(S)	
VERSUS		
DEPUTY COMMISSIONER OF INCOME TAX	.....RESPONDENT(S)	

W I T H

CIVIL APPEAL NO. 4498 OF 2015

(ARISING OUT OF SLP (C) NO. 15251 OF 2008)

J U D G M E N T

A.K. SIKRI, J.

Leave granted in Special Leave Petition (Civil) No. 15251 of 2008.

Facts, as they appear in Civil Appeal Nos. 1812-1813 of 2005, are taken note of as the following substantial question of law, which arises for consideration, is common in these appeals:

> "Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is right in holding that the unabsorbed depreciation should be allowed before the allowance of the unabsorbed investment allowance in computing income of the appellant/assessee for the Assessment Year 1991-1992, when the assessee had not claimed the unabsorbed depreciation in its income-tax return though it had claimed depreciation for the current year?
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> The aforesaid question has arisen for consideration in the following set of facts:
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> The appellant/assessee is a public limited company engaged in the business of manufacturing paper. It had filed its return under Section 139 of the Income Tax Act, 1961 (for short, the 'Act') for the Assessment Year 1991-92 declaring its income as 'Nil'. In fact, the income for that year after showing exemptions, deductions and

additions, which are to be made in terms of Sections 28 onward relating to computation of the business income, was arrived at ?2,87,15,912. The assessee had unabsorbed investment allowance of previous years. It also had unabsorbed depreciation of the earlier years. In its income-tax return, however, it chose to carry forward investment allowance and claimed set off of the said unabsorbed investment allowance to the extent of ?2,87,15,912, thereby showing the returned income as 'Nil'. According to the Assessing Officer, it was not the investment allowance, but unabsorbed depreciation of the earlier years which had to be set off first by giving priority to the unabsorbed depreciation. Therefore, instead of allowing the assessee to carry forward investment allowance, the Assessing Officer adjusted the unabsorbed depreciation of the earlier years, namely 1983-84, 1985-86, 1986-87 and 1987-88 (part), and accepted 'Nil' income return as filed by the assessee, but on the aforesaid basis.

The assessee, however, was not satisfied with the aforesaid treatment of setting off of the unabsorbed depreciation instead of investment allowance. It filed appeal before the Commissioner (Appeals). This appeal was, however, dismissed following the judgment of the Madras High Court in Commissioner of Income Tax v. Coromandel Steels[1]. The assessee approached the Tribunal. The Tribunal also confirmed the order of the Commissioner (Appeals). The assessee, still not satisfied, approached the Madras High Court. Even the High Court, vide impugned judgment dated September 15, 2004, has affirmed the view taken by the authorities below and dismissed the appeal of the assessee. As the grievance still persists, the present appeal questions the treatment given to the income-tax return in the manner mentioned above, which has come up for consideration after special leave to appeal was granted.

It is in this backdrop the question of law, which is to be answered and formulated above, relates to the issue as to whether it is unabsorbed investment allowance which is to be allowed as set off in computing the income of the assessee for the assessment year in question or unabsorbed depreciation.

As pointed out above, in the income-tax return the assessee had claimed set off of unabsorbed investment allowance. However, this request is declined as according to the High Court, provisions of Section 32 of the Act mandate that precedence has to be given to unabsorbed depreciation before allowing unabsorbed investment allowance.

The plea of the assessee before the High Court was that in the absence of any claim by the assessee towards depreciation allowance, the assessing authority could not erroneously assume that such a claim would be untenable under the provisions of the Act and could not thrust the deduction of carrying forward depreciation allowance, when the assessee had chosen to have set off of unabsorbed investment allowance and it is the assessee whose option should prevail. It was also argued that even if the provision of law was not very clear and was susceptible to two interpretations, one which was more beneficial to the assessee had to be given effect to.

The High Court took note of these contentions of the assessee predicated on the judgment of the Punjab and Haryana High Court in Ram Nath Jindal & Anr. v. Commissioner of Income Tax[2], in which the said High Court held that the Assessing Officer could not grant the depreciation allowance when it was not claimed by the assessee as there is no provision by which depreciation could be fictionally deemed to have been claimed and granted. It would be pertinent to point out that this judgment of the High Court was in the light of Section 32 of the Act which stood at the material time and this very provision existed even in respect of Assessment Years 1991-92 and 1992-93 with which we are concerned. Therefore, the High Court took cognizance of the said judgment. The High Court also noted another judgment of its own Court in Guindy Machine Tools P. Ltd. v. Commissioner of Income Tax[3], which had followed judgment of this Court in Commissioner of Income-Tax v. Mahendra Mills[4] wherein it was held that the provision in respect of depreciation was for the benefit of the assessee and if the assessee does not wish to avail the said benefit for some reason, it could not be forced upon him. Notwithstanding the aforesaid judgments, the High Court observed that the real issue was not whether the assessee could be compelled to claim depreciation, but, if he fails to claim, what would be the order of priority between unabsorbed depreciation allowance and unabsorbed investment allowance. On this purported 'real' issue, the High Court mentioned that since unabsorbed depreciation allowance gets precedence over the unabsorbed investment allowance under the provisions of the Act, which has been held by various High Courts (and those judgments of the High Courts are taken note of), it is the unabsorbed depreciation allowance which would be set off first.

Arguments before us remain the same which were advanced by the assessee as well as the Revenue in the High Court. In order to appreciate these arguments and to answer the controversy which has arisen, it is apposite to take note of provisions of Section 32 of the Act, as existed at the relevant time. The portion with which we are concerned reads 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-

xx xx xx (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 (ii) of sub-section (1)] 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." This Section deals with depreciation in respect of certain assets which are mentioned in sub-section (1) of Section 32 and owned wholly or partly by the assessee and used for the purpose of business or profession. The nature of deductions that is to be allowed is also mentioned in sub-section (1). We are not directly concerned with this provision inasmuch as it is not in dispute that the assessee herein was entitled to depreciation on its assets and the amount of depreciation is also not in dispute. As mentioned above, in fact, the depreciation of earlier orders could not be utilized by the assessee in those years. Since the provisions of the Act permit the assessee to accumulate the unabsorbed depreciation of the previous years with right to the assessee to choose the same in subsequent years, the assessee herein had unabsorbed depreciation of the previous years. This is so stipulated in sub-section (2) of Section 32., which has already been noted earlier.

As per the aforesaid provision, the depreciation allowance or part thereof to which effect has not been given in a particular assessment year owing to there being no profits or gains chargeable for that previous years or owing to profits and gains chargeable being less than the allowance, such unabsorbed depreciation allowance is to be added to the amount of the allowance for depreciation for the following previous year and it is 'deemed to be part of that allowance for that previous year or the succeeding previous years, as the case may be'. This is, however, subject to the provisions of sub-section (2) of Section 72 and sub-section (3) of Section 73 of the Act.

What follows from the above is that in case of loss in the business income or insufficient profits to absorb the depreciation allowance permitted by this Section, because of which reason depreciation allowance or some part thereof remains unabsorbed, it may be carried forward under this sub-section to the following year and set off against that year's profit, and so on for succeeding years. There is an amendment in the aforesaid provision with effect from April 01, 1996, which shall be taken note of subsequently at an appropriate stage. However, as per the provision which existed during the relevant period and extracted above, the carried forward depreciation allowance is deemed to be a part of, and stands on exactly the same footing as the current depreciation for the assessment year. The unabsorbed depreciation of the past years, thus, by legal fiction, becomes the depreciation of the year in question and can be set off against income chargeable under any head. There is, thus, actual depreciation which is to be calculated in that particular assessment year. To this, unabsorbed depreciation is to be added by the application of aforesaid deeming provision and this entire depreciation, namely, that of the current year as well as unabsorbed depreciation of the previous years, can be allowed as depreciation in that particular assessment year or succeeding assessment years. This is subject to the provisions of Sections 72(2) and 73(3) of the Act. Section 72 deals with carried forward and set off of business loss under the head 'business or profession'. This carried forward loss can be set off only against the profits of any business or profession and is carried forward only for a period of eight years. On the other hand, insofar as carry forward of depreciation allowance to any subsequent year is concerned, the same is without any time limit. Sub-section (2) of Section 72 stipulates that where any allowance or part thereof is under sub-section (2) of Section 32 or sub-section (4) of Section 35 and is to be carried forward, effect shall first be given to the provisions of this section. Section 73, on the other hand, deals with loss in speculation business and subsequently mentions that such loss of a speculation business shall not be

set off except against profits and gains, if any, of another speculation business. Thus, losses of speculation business can be set off only against profits and gains of another speculation business and not against profits earned from other kinds of businesses. Here sub-section (3) of Section 73, which finds mention in Section 32(2), states that provisions of sub-section (2) of Section 72 shall also apply in relation to speculation business. We are not concerned with the aforesaid situation arising out of sub-section (2) of Section 72 or sub-section (3) of Section

73. However, the same are mentioned for the purpose of clarity as there is a reference to these provisions in Section 32(2). Insofar as the instant case is concerned, it depends upon the meaning that is to be given to the deeming provision, as explained above.

Before we discuss this effect, let us take note of some of the nuances regarding claim of depreciation allowance, which have been laid down by judicial pronouncements on interpretation of this provision.

It has been the consistent view of the Courts that unabsorbed depreciation allowance should be allowed before the unabsorbed investment allowance. To put it differently, unabsorbed depreciation is to be given precedence and is allowed to be set off first. Some of the High Courts had earlier taken the view that this would be so even if the assessee had not claimed the unabsorbed depreciation. It is the necessary consequence of the scheme of various provisions of the Act. Section 32A of the Act, which deals with investment allowance, was inserted by the Finance Act, 1976 with effect from 01.04.1976. According to Circular No. 202 dated 05.07.1976 issued by CBDT [(1976) 105 ITR St 17], the combined effect of the provisions of Sections 32, 32A, 33, 33A and 72 is that in a case where there are allowances in the nature of depreciation allowance, investment allowance, development rebate, development allowance and losses, such allowances and losses would be deductible in the order given below, in cases where the profits are insufficient to absorb all of them:

(i) Current depreciation (Section 32(1))

(ii) Carried forward losses of earlier years (Section 72(1))

(iii) Unabsorbed depreciation of earlier years (Section 32(2))

(iv) Unabsorbed development rebate of earlier years (Section 33(2)(ii)

(v) Current development rebate (Section 33(2)(i))

(vi) Unabsorbed development allowance of earlier years (Section 3A(2)(ii))

(vii) Current development allowance (Section 33A(2)(ii))

(viii) Unabsorbed investment allowance of earlier years (Section 32A(3)(ii))

> (ix) Current investment allowance (Section 33A(3)(i)) It emerges from sub-section (3) of Section 32A that unabsorbed investment allowance takes precedence over current investment allowance.

However, this Court in Mahendra Mills (supra) took the view that since the provision for depreciation is a benefit which enures to the assessee, if the assessee does not wish to avail of that benefit for some reason, such a benefit cannot be forced upon him. In that case, the Court held that the language of the provisions of Sections 32 and 34 of the Act is 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 the prescribed particulars have been furnished. It was specifically held that there is no mandatory duty on the officer to allow depreciation if the assessee does not want to claim that. The provision for claim of depreciation is certainly for the benefit of the assessee. If he does not wish to avail of that benefit for some reason, the benefit cannot be forced upon him. It is for the assessee to see if the claim of depreciation is to his advantage. Income under the head "Profits and gains of business or Profession" is chargeable to income-tax under Section 28 and 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 the 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.

This principle, thus, is grounded in the reasoning that there is no provision by which depreciation could be fictionally deemed to have been claimed and granted and it is to be specifically claimed by the assessee. Further, when claiming of depreciation is a privilege given to the assessee, it cannot be turned into a disadvantage even when the assessee does not claim the depreciation. Therefore, option in this behalf rests with the assessee.

In the impugned judgment as well, the High Court accepts the aforesaid legal position as this is so decided by this Court in Mahendra Mills's case (supra) and is a binding precedent. However, the aforesaid judgment is not followed on the ground that real issue is something else. Such an issue, though already noted above, is stated in para 10.1 of the impugned judgment, which reads as under:

> "10.1 But, in the case on hand, it is not the issue whether the assessee could be compelled to claim depreciation allowance, but, if he fails to claim, what would be the order of priority between unabsorbed depreciation allowance and unabsorbed investment allowance." Strangely, the issue is somewhat different, namely, when the depreciation allowance is not claimed, can it be said that the assessee has failed to claim and in that case what would be the position? According to us, there is no question of failing to claim. Situation in such an event would be that depreciation is not claimed at all and, therefore, the position mentioned in Mahendra Mills's case (supra) would follow. To this extent we find that it was a wrong question posed by the High Court, which led to a wrong answer.

However, the matter does not rest there. In the present case, the assessee in fact claimed the depreciation allowance insofar as it pertained to the current year. At the same time, it did not want to claim the set off of the unabsorbed depreciation allowance of the previous years. In such situation, the question is as to whether it is open to the assessee to invoke the provisions of Section 32 of the Act by claiming depreciation of the current year, but at the same time choose not to make a claim of set off of unabsorbed depreciation allowance of the previous years. As noted above, by legal fiction unabsorbed depreciation becomes depreciation of the year in question and gets added to the depreciation of the current year. If that be so, is it the right of the assessee to partly invoke the provisions of Section 32 when it comes to depreciation of the current year and still claim that it has right not to claim unabsorbed depreciation allowance? On a plain reading of Section 32, it does not appear to be the position. Once the entire depreciation, namely, unabsorbed depreciation allowance of the previous year gets merged into the depreciation of the current year, it would become an integral part thereof. Legal fiction makes it one whole thereby making it possible to the assessee to claim set off of unabsorbed carried forward depreciation as well. A fortiorari, bifurcation thereof with option to claim depreciation of current year only and contending at the same time that portion of unabsorbed carried forward depreciation is not to be thrusted upon him as it is not claimed, would not be permissible.

Notwithstanding the above, the endeavour of the learned counsel for the assessee is to show that the assessee has such a right. In this direction it is argued that though by legal fiction unabsorbed depreciation allowance is carried forward to the assessment year in question and becomes a part of depreciation allowance of that year, it retains its identity inasmuch as it is brought forward only because of deeming provision which is to be applied to that limited extent and no further. In order to support this hypothesis, learned counsel referred to the judgment in Commissioner of Income-Tax, Kanpur v. Mother India Refrigeration Industries P. Ltd.[5] where nature of carried forward depreciation allowance on application of deeming provision is explained by the Court. She specifically referred to the following discussion in this behalf:

“Having regard to the aforesaid rival contentions, it will be clear that the real issue that arises for our consideration in this case is whether, on a proper construction of the relevant provisions of the concerned enactment, unabsorbed carried forward losses should have preference over current depreciation in the matter of set off or is the position vice versa while computing the total income of an assessee in the concerned assessment year? And the answer to this question depends on what is the true scope and purpose of the legal fiction created under proviso (b) to s. 10(2)(vi) of the 1922 Act or under s. 32(2) of the 1961 Act.

At the outset, it may be stated that a close scrutiny of the relevant provisions of the 1922 Act as also the 1961 Act clearly shows that the computation of income under the

head "Profits and gains of business" of any particular assessment year is required to be done after making certain allowances specified in sub-s.(2) of s. 10 of the 1922 Act and after allowing certain deductions in accordance with the provisions contained in ss. 30 to 43A of the 1961 Act; in other words, it is the net profits and gains after the specified deductions are made that are subjected to tax; one of such deductions pertains to depreciation allowance at the prescribed rate of percentage of the written down value of the business asset; and this is provided in s. 10(2)(vi) of the 1922 Act and in s. 32(1) of the 1961 Act. Up to this stage of computation, no question of either carry forward of unabsorbed depreciation of the earlier years or carry forward of unabsorbed business losses of earlier years arises. In other words, the normal accountancy principle has to be applied in arriving at the net income from business for that year by debiting the current year's depreciation. The question is whether any deviation from this normal rule of accountancy is contemplated by proviso (b) to s. 10(2)(vi) read with proviso (b) to s. 24(2) of the 1922 Act or by s. 32(2) read with s. 72(2) of the 1961 Act, and it is here that the aspect of proper construction of these provisions arises. Dealing with the provisions of the 1922 Act first, it will be clear that proviso (b) to s. 10(2)(vi) is in two parts and provides for two things; its first part provides for a carry forward of unabsorbed depreciation and its second part provides for clubbing the said carried forward depreciation with the current year's depreciation and deeming the aggregate to be the current year's depreciation. However, carrying forward of the unabsorbed depreciation and the deeming provision in proviso (b) are not absolute but are subject to the proviso (b) to s. 24(2). Had proviso (b) to s. 24(2) not been enacted by the Legislature, the result would have been that the aggregate depreciation would have been deducted first out of the profits and gains in preference to unabsorbed business losses which might have been carried forward under s. 24(2) but as such losses can be carried forward only for limited number of years, the assessee would in certain circumstances have in his books losses which he might not be able to set off even within the time-limit during which the set off is permitted. In order to prevent such a situation, the Legislature enacted the proviso (b) to s. 24(2). And proviso (b) to s. 24(2) expressly stated "where depreciation allowance is, under cl. (b) of the proviso to cl. (vi) of sub-s. (2) of s. 10, also to be carried forward, effect shall first be given to the provisions of this sub-section". In other words, it clearly provides that in the matter of set off, the unabsorbed depreciation that is required to be carried forward under proviso (b) to s. 10(2)(vi) and no preference over the current depreciation is intended.

It is true that proviso (b) to s. 10(2)(vi) creates a legal fiction and under that fiction, unabsorbed depreciation either with or without current year's depreciation is deemed to be the current year's depreciation but it is well settled, as has been observed by this court in Bengal Immunity Company Limited v. State of Bihar [1955] 2 SCR 603, 606; 6 STC 446, that the legal fictions are created only for some definite purpose and these must be limited to that purpose and should not be extended beyond that legitimate field. Clearly, the avowed purpose of the legal fiction created by the deeming provision contained in proviso (b) to s. 10(2)(vi) is to make the unabsorbed carried

forward depreciation partake the same character as the current depreciation in the following year, so that it is available, unlike unabsorbed carried forward business loss, for being set off against other heads of income of that year." It is clear from the above that though the question there was different, namely, precedence of carried forward business loss over the carried forward unabsorbed depreciation or vice versa, what is important is the interpretation that is given to Section 32(2) of the Act and particularly the deeming provision thereof which creates legal fiction. The Court clarified that the avowed purpose of the legal fiction created by deeming provision contained in Section 32(2) of the Act is to make the unabsorbed carried forward depreciation partake the same character as the current depreciation in the following year, so that it is available, unlike unabsorbed carried forward business loss for being set off against other heads of income of that year. On that basis, the Court answered that since unabsorbed carried forward depreciation had become part of the current depreciation, the entire depreciation had to be given preference (current as well as unabsorbed carried forward depreciation) over unabsorbed carried forward losses.

We do not understand as to how the aforesaid judgment helps the assessee. On the contrary, it goes against the assessee while answering the question which has arisen in the instant appeals. Once the unabsorbed carried forward depreciation has become a part of the depreciation of the current year, it is not open to the assessee to bifurcate the two again and exercising its choice to claim the depreciation of the current year under Section 32(1) of the Act and take a position that since unabsorbed depreciation of the previous years is not claimed, it cannot be thrusted upon the assessee. The position would have been different if the assessee had not claimed any depreciation at all. However, once the depreciation is claimed and while giving deductions the depreciation is to be set off against the profits of the current year prior to the unabsorbed carried forward investment allowance, it is the entire depreciation, namely, the depreciation of the current year as well as the unabsorbed carried forward depreciation, which is to be taken into account as by virtue of the fiction created under Section 32(2) of the Act, carried forward depreciation also partakes the character of depreciation of the current year. This scrambled egg cannot be unscrambled now. Otherwise, it would amount to negating the legal fiction that is created by the said provision, even to the limited extent. In fact, the case falls within the ambit of the said limited extent of legal fiction and gets covered by it.

Once we read the provision in the aforesaid manner, the aid of other interpretative tools which is sought to be taken by the learned counsel for the assessee, namely, the provision is to be given liberal construction; the scheme of the Act envisages giving preference in the matter of deduction from income to those expiring by afflux of time, etc. would become irrelevant and pales into insignificance.

The upshot of the aforesaid discussion is to decide the question formulated against the assessee and in favour of the Revenue, though for our reasons contained in this judgment. The appeals are, accordingly, dismissed with costs.

.....J. (A.K. SIKRI) .....J. (ROHINTON FALI NARIMAN) NEW DELHI;

MARCH 15, 2015.

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[1] (1981) 130 ITR 856 [2] (2001) 252 ITR 590 [3] (2002) 254 ITR 780 [4] (2000) 243 ITR 56 [5] (1985) 155 ITR 711