(1968) 12 AHC CK 0004

Allahabad High Court

Case No: Income-tax Reference No. 359 of 1964

Raza Sugar Co.		APPELLANT
	Vs	
Commissioner of Income Tax		RESPONDENT

Date of Decision: Dec. 5, 1968

Acts Referred:

- Income Tax Act, 1922 - Section 10(5), 23(5)
- Income Tax Rules, 1922 - Rule 8

Citation: (1970) 76 ITR 541

Hon'ble Judges: T.P. Mukherjee, J; Jagdish Sahai, J

Bench: Division Bench

Advocate: Jagdish Swarup and G.P. Dixit, for the Appellant; Gopal Behari, for the Respondent

Final Decision: Disposed Of

Judgement

Jagdish Sahai, J.

This reference u/s 66(1) of the Income Tax Act, 1922 (hereinafter referred to as "the Act"), has been made by the Income Tax Appellate Tribunal, Delhi Bench "A" (hereinafter referred to as "the Tribunal"), at the instance of the assessee, the Raza Sugar Co. Ltd., Rampur (hereinafter referred to as "the assessee"). The reference and the statement of the case relates to the assessment years 1950-51, 1951-52 and 1953-54 to 1956-57. The relevant previous years ended on 31st May of each corresponding year. The assessee is a limited liability company and was incorporated in the erstwhile State of Rampur. It carries on the business of manufacturing sugar. Under an agreement dated May 10, 1933, between the assessee and Rampur State, the income of the assessee was exempted from Income Tax for a period of 15 years expiring on December 17, 1948. Under an agreement dated December 14, 1934 the erstwhile State of Rampur had agreed to grant to a separate concern to be constituted by the assessee and the Buland Sugar Company Ltd., leases of agricultural lands with adequate irrigation facilities and suitable for

the cultivation of sugarcane as may be required by such separate concern. In order to take advantage of the said agreement, the assessee and the Buland Sugar Company entered into a partnership agreement dated May 5, 1935, to establish a separate concern called the agricultural company. Clause 5 of the partnership agreement dated May 5, 1935, provided that the direction and control of the agricultural company is vested in a committee consisting of two nominees of each partner, subject to the policy and directions of the two partners. Clause 8 of the aforesaid agreement required both the partners to contribute the working funds in equal shares and further provided that "the expenses as well as the profits or losses, if any, shall be allocated between the partners as may be determined from time to time", Clause 12 of the aforesaid agreement provided for reference of disputes between the partners to arbitration. The assessee worked its factory for two shifts throughout the manufacturing season during the years under assessment.

2. After the merger of the Rampur State in Uttar Pradesh, the Act was extended to the territories of all the States including that of Rampur by virtue of Section 3 of the Taxation Laws (Extension to Merged States) Ordinance, 1949 (XXI of 1949) (hereinafter referred to as "the Ordinance") promulgated on August 26, 1949. Section 7 of the Ordinance repealed all laws relating to Income Tax, super-tax, etc, in force in any of the merged States immediately before the commencement thereof. Section 8 of the Ordinance authorised the Central Government to make such orders and to give such directions as may appear to it to be necessary for removal of difficulties arising in giving effect to the provisions of the Ordinance.

3. In exercise of its powers u/s 8 of the Ordinance, the Central Government passed on December 3, 1349, the Taxation Laws (Merged States) (Removal of Difficulties) Order, 1949 (hereinafter referred to as "the 1949 Order"). Paragraph 2 of the 1949 Order reads:

"2. Computation of aggregate depreciation allowance and the written down value.--In making any assessment under the Indian Income Tax Act, 1922, all depreciation actually allowed under any laws or rules of a merged State relating to Income Tax and super-tax, shall be taken into account in computing the aggregate depreciation allowance referred to in Sub-clause (c) of the proviso to Clause (vi) of Sub-section (2), and the written down value under Clause (b) of Sub-section (5) of Section 10 of the said Act:

Provided that where in respect of any asset, depreciation has been allowed for any year both in the assessment made in the merged State and in British India, the greater of the two sums allowed shall only be taken into account."

4. On December 31, 1949, the Ordinance was replaced by the Taxation Laws (Extension to Merged States and Amendment) Act, 1949 (hereinafter referred to as "the 1949 Act"). Section 6 of the 1949 Act is identical in terms to Section 8 of the Ordinance.

5. On August 20, 1962, the Central Government in exercise of the powers conferred by Section 6 of the 1949 Act issued the Taxtion Laws (Merged States) (Removal of Difficulties) Order, 1962 (hereinafter referred to as "the 1962 Order"), and added the following Explanation after the proviso to paragraph 2 of the 1949 Order :

"Explanation.--For the purpose of this paragraph, the expression '' all depreciation actually allowed under any laws or rules of a merged State , means and shall be deemed always to have meant--

(a) the aggregate allowance for depreciation taken into account in computing the written down value under any laws or rules in force in a merged State or carried forward under the said laws or rules, and

(b) in cases where income had been exempted from tax under any laws or rules in force in a merged State or under any agreement with a Ruler, the depreciation that would have been allowed had the income not been so exempted."

6. The assessee was for the first time assessed under the Act for the assessment year 1949-50. The Income Tax Officer by his letter dated August 23, 1950, informed the assessee :

"The dividends declared out of these profits will be taxable but the Government of India have decided that the profits of the company for the period up to December 17, 1948, would be exempt from Income Tax which please note."

7. The assessee contended before the Income Tax Officer that the written down value of its factory as also that of the plant and the machinery of the dairy farm for the purposes of depreciation allowance should be taken at its original cost. It added that, inasmuch as no depreciation had been actually allowed to it within the meaning of Section 10(5)(b) of the Act, the correct written down value was its original cost.

8. The Income Tax Officer rejected the claim of the assessee and allowed depreciation on the written down value determined as if the assessee had been actually allowed the depreciation for the years of previous to the extension of the Act to the territory of the erstwhile Rampur State.

9. Dissatisfied with the assessment made by the Income Tax Officer, the assessee appealed to the Appellate Assistant Commissioner, Range 2, Kanpur. The assessee reiterated its aforesaid contention before the Appellate Assistant Commissioner, who rejected the same, but modified the order of the Income Tax Officer as follows:

"Though this point has already been decided against the appellant by the Appellate Assistant Commissioner vide his order dated January 7, 1959, following the decision of the Income Tax Appellate Tribunal, Allahabad, in the case of M/s. Rampur Distillery Co. Ltd., the Income Tax Officer concedes that, instead of the written down value for the first assessment under the Indian Income Tax Act being taken at the

original cost, the same should be calculated by deducting from the original cost the depreciation allowable to the appellant at the rates in force in Rampur State from the assessment year 1944-45 to 1948-49. The relief due to the appellant due to this concession should be given by the Income Tax Officer."

10. The assessee appealed to the Tribunal. The following submissions were made before it:

" 1. That the 1962 Order is ultra vires.

2. That the agricultural company had suffered a loss during the years under assessment and the assessee was entitled to set off its share of the loss in the agricultural company against its profits in view of the second proviso to Sub-section (1) of Section 24 of the Act.

3. That the assessee is a seasonal factory and for that reason was entitled for the second shift 50% of the normal depreciation, i.e., 50% of the depreciation for the first shift."

11. The Tribunal rejected all the three submissions and dismissed the assessee''s appeal.

12. On the basis of the facts mentioned above, it has referred to us the following questions of law for our opinion :

"(1) Whether, on the facts and in the circumstances of the case, we rightly held that the written down value of the sugar factory, and the plant and machinery of the dairy farm, for the purpose of the depreciation allowance was their respective original cost minus the depreciation which but for the exemption granted to the company by the then Rampur State would have been allowed to it under the Rampur Income Tax Act?

(2) Whether, on the facts and in the circumstances of the case, we rightly held that the assessce-company was not entitled to set off its share of loss in the agricultural company in the respective years against its income ?

(3) Whether the assessee-company is entitled to exactly 50% of the full normal depreciation as depreciation for the second shift of its sugar factory, as the factory is a seasonal one and as it worked for two shifts for the full season ?"

13. We proceed to answer the three questions seriatim.

14. The Tribunal while disposing of the second appeal filed by the assessee was of the opinion that the instant case is governed by the 1962 Order and for that reason thought that "the depreciation allowance allowable under the Rampur Income Tax Act, though not actually allowed, has to be deducted from the cost price of the machinery". In Straw Products Ltd. Vs. Income Tax Officer, Bhopal and Others, , the Supreme Court held that the 1962 Order was unauthorised. The department cannot,

therefore, rely upon that provision any longer.

15. Section 10(2)(vi) of the Act reads :

"10. (1) The tax shall be payable by an assessee under the head ''profits and gains of business, profession or vocation'' in respect of the profits and gains of any business, profession or vocation carried on by him.

(2) Such profits or gains shall be computed after making the following allowances, namely:.....

(vi) in respect of depreciation of such buildings, machinery, plant or furniture being the property of the assessee, a sum equivalent.....to such percentage on the written down value thereof as may in any case or class of cases be prescribed.....

Provided that--;.....

(c) the aggregate of all allowances in respect of depreciation made under this clause and Clause (via) or under any Act repealed hereby or under the Indian Income Tax Act 1886 (2 of 1886), shall, in no case, exceed the original cost to the assessee of the buildings, machinery, plant or furniture, as the case may be."

16. Section 10(5) of the Act, so far as relevant for our purposes, reads;

10. (5).....and ''written down value'' means--

(a) in the case of assets acquired in the previous year, the actual cost to the assessee .....

(b) in the case of assets acquired before the previous year the actual cost to the assessee less all depreciation actually allowed to him under this Act, or any Act repealed thereby, or under executive orders issued when the Indian Income Tax Act, 1886, was in force ;....." (Underlined by us)*

17. It will be clear from the two provisions reproduced above that it is only the depreciation, which is actually allowed and not one which is allowable, which goes to constitute the written down value. Paragraph 2 of the 1949 Order, which we have already reproduced above, also provides that it is the depreciation actually allowed (underlined by us)* which will constitute the written down value. In the present case no assessment of Income Tax was made on the assessee till the end of 1948, because of the exemption granted by the Government of the erstwhile State of Rampur.

18. The first time that the assesses was assessed was for the. year 1949-50, Even with regard to this year the Income Tax Officer "presumably acting under the instructions of the Government of India" informed the assessee by means of the letter dated August 4, 1950, the contents of which We have already reproduced above that no tax shall be levied on profits accruing up to 17th of December, 1943.

19. Inasmuch as there was no assessment made before the year 1949-50, either under the Act or under the Rampur Income Tax laws, there could be no question of any depreciation being actually allowed to the assessee-company either by the erstwhile State of Rampur or by the Government of India. We are, therefore, of the opinion that for any period before the 17th of December, 1948, the assessee cannot be held to have been allowed any depreciation with the result that the written down value of the sugar factory and the plant and the machinery of the dairy farm on 17th of December, 1948, should be considered to be the actual cost incurred by the assessee.

20. We would, therefore, answer the first question referred to us in the negative, against the department and in favour of the assessee.

21. Clearly, the agricultural company sustained a loss in the various years to which this reference relates. The submission on behalf of the assessee before the Tribunal was that the agricultural company is only a joint department of the assessee and the Buland Sugar Company Ltd. and the loss sustained by the agricultural company should be allowed to be set off against the profits of the assessee-company. The Tribunal did not accept the agricultural company to be a department of the assessee or the Buland Sugar Co. but a separate and distinct taxable entity. Admittedly, the agricultural company has been assessed to tax as an unregistered firm and the individual partners (the assessee and the Buland Sugar Co.) have not been assessed to their total income u/s 23(5)(b) of the Act. The said assessment has not been challenged by the assessee or by the Buland Sugar Company Ltd. or by the agricultural company itself and has become final. It was for this reason that the Tribunal was of the opinion that the assessee is not entitled to set off its share of the loss in the agricultural company against the profits in view of the second proviso to Sub-section (1) of Section 24 of the Act.

22. Section 24(1) of the Act, so far as relevant for our purposes, reads:

"24. (1) Where any assessee sustains a loss of profits or gains in any year under any of the heads mentioned in Section 6, he shall be entitled to have the amount of the loss set off against his income, profits or gains under any other head in that year : .. .

Provided further that where the assessee is an unregistered firm which has not been assessed under the provisions of Clause (b) of Sub-section (5) of section 23, any such loss shall be set off only against the income, profits and gains of the firm and not against the income, profits and gains of any of the partners of the firm; and where the assessee is a registered firm, any loss which cannot be set off against other income, profits and gains of the firm shall be apportioned between the partners of the firm and they alone shall be entitled to have the amount of the loss set off under this section.

23. It is clear from the second proviso to Section 24(1) of the Act that in the case of an assessee, which is an unregistered firm and in the case of which the provisions of

Clause (b) of Sub-section (5) of Section 23 of the Act have not been resorted to, i.e., where the total income of each partner of the firm, including therein his share of its income, profits and gains of the previous year has not been determined and assessment made on the partners accordingly, any loss sustained by the firm shall be set off only against the income, profits and gains of the firm and not against the income, profits and gains of the partners or any of the partners of the firm. In the present case, the agricultural company was assessed as an unregistered firm. Its partners were not assessed separately as provided by Section 23(5)(b) of the Act. The assessee, the Buland Sugar Co., and the agricultural company accepted the assessment on the unregistered firm and filed no appeal. That being the position, the second proviso to Section 24(1) is clearly attracted to the instant case and for that reason the assessee-company is not entitled to have the amount of the loss sustained by the agricultural company set off against its (assessee''s) income.

24. Mr. Jagdish Swarup has relied upon the following cases:

(a) Commissioner of Income Tax Vs. P.M. Muthuraman Chettiar and Another, . This case is clearly distinguishable: firstly, because it is a case of a registered and not an unregistered firm; secondly, because it does not appear that the firm as a separate unit have been assessed and no appeals were filed against their assessment; and, lastly, the Supreme Court has itself made a distinction between a registered and an unregistered firm and observed:

"...that whether a firm was registered, or unregistered, a partner''s share of the loss in the firm could be set off against the profits and gains made by him in his individual business. That principle applies in the present cases, even though after the amendment of the Income Tax Act in 1939, the position of a partner in an unregistered firm may stand on a different footing, a distinction which is not material for the present cases."

(b) Jagannath Mahadeo Prasad Vs. Commissioner of Income Tax, . It is not clear from the judgment of this case whether the firm in question was a registered or an unregistered firm. Besides, as the report of the case would show, the learned judges were in that case considering different provisions from the one before us.

(c) Commissioner of Income Tax, Bombay South Vs. Jagannath Narsingdas, In that case the unregistered firm was not assessed at all. In our case not only the unregistered firm was assessed, but the assessment has become final.

(d) The Commissioner of Income Tax, Gujarat, Ahmedabad Vs. Jethalal Zaverchand Patalia, . In this case also the firm in question was unregistered and unassessed unlike the case before us where the firm has been assessed and the assessment has become final. In our opinion, therefore, this case is also distinguishable.

25. We find some support for our view from Commissioner of Income Tax v. Jadavji Narsidas and Company [1963] 48 ITR 41(SC). Hidayatullah J., who spoke for the

majority, observed:

"What then is the position here ? The unregistered firm has not been assessed. The assessee-firm alone has been assessed and on its own assessment it has shown a profit. It seeks to set off against its profits a loss of Rs. 1,05,641 which, it is said, was incurred by it in partnership with Damji. We have shown above that there can be no partnership between the assessee-firm and Damji. There was, however, a partnership between Damji and the four partners of the assessee-firm in their individual capacity. Now u/s 24(1), second proviso, the losses of the unregistered firm of Damji and these four partners can only be set off against the income, profits and gains of the unregistered firm, and not those of its partners."

26. We would, therefore, answer the second question in the affirmative, in favour of the department and against the assessee.

27. The assessee is a seasonal factory, that is, that it does not work for the entire year, but only during the cold weather when sugarcane is available for crushing and for manufacturing sugar. The assessee ran second shift also. Its case is that during the operational season in the years under assessment it is entitled to 50% over the normal depreciation, that is normal depreciation for the first shift and the extra 50% for the second shift.

28. Rule 8 of the Rules framed tinder the Act reads :

"8....the allowance u/s 10(2)(vi) of the Act in respect of depreciation of buildings, machinery, plant or furniture shall be at percentage of the written down value or original cost, as the case may be, equal to one-twelfth the number shown in the corresponding entry in the second column of the following statement:

Provided that if the buildings, machinery, plant or furniture have been used by the assessee in his business for not less than two months during the previous year, the percentage shall be increased proportionately according to the number of complete months of user by the assessee:

Provided further that in the case of a seasonal factory worked by the assessee during all the working seasons of the previous year, the percentage shall "be increased as if the buildings, machinery, plant or furniture had been in use throughout the period the assessee was the owner thereof during the previous year.

Class of asset.	Rate Number of the basis of which the percentage is to be calculated on the written down value, except where otherwise indicated in the case of oceangoing steamers.	Remarks.

III. Machinery and plant (1) General rate.	An extra allowance upto a maximum of 50 per cent, of the normal allowance will be allowed by the Income Tax Officer where a concern claims such allowance on ac-countof double shift working and satisfies the Income Tax Officer that the concern has actually worked double shift..

For the purpose of granting this extra allowance the normal number of working days throughout the year will be taken as 300 and if, for example, a concern has worked only double shift for 100 days, and triple shift for another100 days, the extra allowance for double shift will be 1/3 of 50 per cent, of the normal allowance for the whole year and that for triple shift will be 1/3 of 100 per cent. of the normal allowance for the whole year. This applies to all concerns whether the general rate or any special rate applies to them; but does not apply to an item of machinery or plant specifically excepted by the letters "N.E S.A. "* being shown against it.

*Letters N.E.S.A. are contraction of the expression "No extra shift allowance."

29. The rule read along with what is stated in the remarks column in the statement leads to the conclusion that for purposes of granting the extra allowance for the double shift, the normal number of working days through out the year will be taken as 300 days. As for example if a concern" has worked only double shift for 100 days, the extra allowance for double shift will be 1/3rd of 50 per cent. of the normal allowance for the whole year. The rule and the statement do not support the claim of the assessee that it is entitled to just 50 per cent. of the normal depreciation for the second shift. The Income Tax authorities have calculated as provided for in the remarks column of the statement.

30. Our answer to the third question referred to us, therefore, is in the negative, against the assessee and in favour of the department. In the circumstances of the case, we direct the parties to bear their own costs.