

**(1996) 03 MAD CK 0092**

**Madras High Court**

**Case No:** T.C. No"s. 711, 713 and 714 of 1984 (References No"s. 626, 628 and 629 of 1984)

Commissioner of Income Tax

APPELLANT

Vs

B. Vijayalakshmi and others

RESPONDENT

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**Date of Decision:** March 28, 1996

**Acts Referred:**

- Income Tax Act, 1961 - Section 32(2), 72

**Citation:** (1998) 232 ITR 637

**Hon'ble Judges:** N.V. Balasubramanian, J; K.A. Thanikkachalam, J

**Bench:** Division Bench

**Advocate:** C.V. Rajan, for the Appellant; R. Janakiraman, for the Respondent

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**Judgement**

K.A. Thanikkachalam, J.

At the instance of the Department in the case of three assesseees who are partners in the same firm, the Tribunal

referred the following question of law, relating to the assessment year 1978-79, u/s 256(1) of the Income Tax Act, 1961, for the opinion of this

court :

Whether, in the case of a partner of a firm, which had become defunct, the Appellate Tribunal is correct in law in coming to the conclusion that the

unabsorbed depreciation relating to the defunct firm which had closed its business in the assessment year 1978-79 must be carried forward and set

off against the profits of the assessee from other business in the assessment year 1979-80 ?

2. The assesseees were partners in a firm by name Sree Abirami Cotton Mills. This firm had been incurring losses year after year right from its

inception. The firm was sold as a going concern in the course of the year 1978-79. The assessee had certain carried forward losses and

unabsorbed depreciation relating to this firm. The assessee claimed that this carried forward business loss and unabsorbed depreciation should be

set off against his or her income for 1979-80, the year under consideration. The Income Tax Officer negated the assessee's claim on the ground

that as the business of Sree Abirami Cotton Mills in which the loss was incurred had been closed, the carried forward loss relating to it cannot be

set off. The assessee preferred an appeal before the Appellate Assistant Commissioner and contended that the assessee is a partner in a number

of firms, and the business of all these firms forms but one business and so long as one of these businesses exists, the carried forward loss of a

defunct firm should be allowed to be set off against other business income of all the partners.

3. The Appellate Assistant Commissioner while rejecting the assessee's claim for carry forward and set off of business loss, accepted the

assessee's alternative ground and held that the unabsorbed depreciation relating to this defunct firm should be carried forward and set off against

other business incomes of the assessee. Aggrieved, the Department filed appeals before the Tribunal. The Tribunal dismissed the appeals filed by

the Department. Relying on the observation of the author in Sampath Iyengar's Law of Income Tax, Seventh Edition, at page 1294, the Appellate

Tribunal held that the unabsorbed depreciation of the defunct firm should be set off against the other incomes of the assessee. According to the

Appellate Tribunal, the set off of unabsorbed depreciation is permissible even in cases where the firm has become defunct.

4. A similar question came up for consideration before the Supreme Court in the case of Commissioner of Income Tax, Meerut and Others Vs.

Virmani Industries Pvt. Ltd. and Others, wherein the Supreme Court while considering the set off of unabsorbed depreciation u/s 32(2) of the Act

held as under (at page 617) :

The next question is whether for availing of the benefit of section 32(2), is it necessary that the business carried on in "the following previous year"

should be the same business as was carried on in the preceding previous year as has been held by the Madras High Court in East Asiatic

Company (India) P. Ltd. Vs. Commissioner of Income Tax, . We are of the opinion that in the absence of any words to that effect, no such

requirement ought to be read into the said sub-section. A look at section 72 shows that where Parliament intended to provide such a limitation, it

did so expressly. Section 72 deals with carry forward and set-off of business loss. The proviso to clause (i) of sub-section (1) of section 72

expressly provides that such a course is permissible only where "the business or profession for which the loss was originally computed continued to

be carried on by him in the previous year relevant for that assessment year". In the absence of any words to that effect, it must be held that for

availing of the benefit of section 32(2), it is not necessary that the business carried on in the following year is the same business as was carried on in

the previous year.

5. In view of the above decision of the Supreme Court, we hold that there is no infirmity in the order passed by the Tribunal in allowing the set-off

of the carried forward unabsorbed depreciation of the defunct firm against the profits of the assessee from other business. Accordingly, we

answer the question referred to us in the affirmative and against the Department. No costs.