
(1975) 12 RAJ CK 0013

In the Rajasthan High Court

Case No : Civil Miscellaneous Income Tax Application No. 28 of 1972

Azimulla Wazir

APPELLANT

Vs

The Commissioner of Income Tax

RESPONDENT

Date of Decision : 03-12-1975

Acts Referred:

Income Tax Act, 1961 — Section 144, 147, 148, 256, 41

Citation : (1975) WLN 492

Hon'ble Judges : M.L. Jain, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

M.L. Jain, J.—This is an application under Sub-section (2) of Section 256 of the Income Tax Act, 1961, (hereinafter referred to as "the Act").

2. The assessee's firm was purchased for Rs. 32,000/-. It filed a return for the assessment year 1963-64 showing a loss of Rs. 5,600/- after claiming depreciation of Rs. 8000/- on the original cost of the truck. The Income Tax Officer Ajmer determined the net income at Rs. 5,000/- on agreed basis.

3. In respect of the assessment year 1964-65, the assessee filed a return again showing a loss of Rs. 1,200/- after claiming depreciation of Rs. 6,000/-. Here again the Income Tax Officer assessed the net income of the assessee at Rs. 5,000/- on agreed basis.

4. In the assessment year 1965-66, the Income Tax Officer again assessed the firm at Rs. 5,000/- on agreed basis. The truck was sold for Rs. 33,251/- in February, 1965. The assessment was completed on 23.9.66.

5. Subsequently, it was discovered that the income of the assessee had escaped assessment and therefore, a notice u/s 148 read with Section 147 of the Act was issued to the assessee on June 30, 1967. The assessee failed to file any return and the assessment was completed u/s 144 of the Act for non-compliance of the

notice issued as aforesaid. The written down value of the truck was calculated at Ra 18, 500/- and the balance which was considered taxable u/s 41(2) of the Act was Rs. 18, 500/- Thus, the assessee was re-assessed on the total income of Rs 23,500/-.

6. On appeal, the Appellate Assistant Commissioner of Income Tax, Ajmer by his order dated 7.11.1969 held that there was no profit made by the assessee under Sub-section (2) of Section 41 of the Act and the proceedings u/s 147 were misdirected. Consequently, the order of the Income tax Officer was set aside by him.

7. On appeal by the Income Tax Officer, the Income Tax Appellate Tribunal vide its order dated 27.11.71, set aside the order of the Appellate Assistant Commissioner and restored the order of the Income Tax Officer.

8. Aggrieved by this order, the assessee made an application to the Tribunal u/s 256(1) of the Act for statement of the case and reference thereof to this Court of a certain question which it was urged, was a question of law arising out of the order of the Tribunal dated 27.11.71. The Tribunal after considering the matter held that the earlier finding of the Tribunal was a finding of fact and did not give rise to any question of law. Therefore, the application was rejected. Hence, this application by which the applicant wants this court to direct the Tribunal to refer three questions which are set out in para 5 of the application and need not be reproduced here.

9. The learned counsel for the assessee contends that according to Sub-section (6) of Section 43 of the Act it is necessary for the Income Tax Officer, in these proceedings to record specifically that depreciation was "actually allowed" to the assessee, while the assessment orders in question did not disclose how much depreciation on the truck was in fact allowed to the assessee. In this connection he relied on KARAMAT KHAN Vs. COMMISSIONER OF Income Tax, U.P., in this case, there appears an observation by the Allahabad High Court at page 647 that the phrase "actually allowed" in Section 43(6) can only mean that the actual figure must have been duly worked out and factually allowed in the assessment order of the earlier year itself. It was urged that while making an assessment on agreed basis in the preceding years, the Income tax Officer did not work out any amount admissible nor did he actually allow any depreciation. The learned counsel for the assessee further drew our attention to *Madeva Upendra Sinai and Others Vs. Union of India (UOI) and Others*, wherein at page 223 it has been observed that the connotation of the phrase "actually allowed" is limited to depreciation actually taken into account or granted and given effect, to, i. e. debited by the Income tax Officer against the incomings of the business in computing the taxable income of the assessee; it cannot be stretched to mean "notionally allowed" or merely allowable on a notional basis. It was now, urged in the light of these observations that since no mention has been made in the assessment orders regarding the amount of depreciation that was actually allowed to the applicant by the Income Tax Officer, it should be held that no

depreciation allowance was in fact allowed and therefore no taxable profit could be determined u/s 41 of the Act.

10. We have considered this argument and to us this contention appears to be untenable. When the assessed furnished the return claiming a depreciation allowance and the assessment was made on agreed basis so much so that while the assessee returned loss he ultimately agreed to an income of Rs. 5, 000/- per year, that obviously means that depreciation allowance was actually allowed to him. The learned counsel for the Revenue submits that the Income tax Officer simply added to the return of the assessee with his consent a net income of Rs. 5, 000/- If no depreciation allowances as claimed in the returns were allowed then the total income should have been arrived at by adding these amounts also to the agreed income. The assessee had returned loss but eventually agreed to an income even after claiming the depreciations. The Tribunal therefore was correct in holding that the income Tax Officer had in fact allowed depreciation allowance against the income of the truck business. We agree with this submission. We also agree with the Tribunal that this certainly is a finding of fact and no question of law of any kind arises. We, therefore, see no force in this application and it is hereby dismissed. In the circumstances of the case we would not like to make any order as to costs.