

(1992) 12 RAJ CK 0031

In the Rajasthan High Court

Case No : Income Tax Reference Application No's. 18 and 35 of 1991

Commissioner of Income Tax

APPELLANT

Vs

Champalal

RESPONDENT

Date of Decision : 15-12-1992

Acts Referred:

Income Tax Act, 1961 — Section 256, 256(2), 32

Citation : (1995) 211 ITR 201

Hon'ble Judges : V.S. Dave, J; Farooq Hasan, J

Bench : Division Bench

Advocate : G.S. Bapna and Virendra Dangi, for the Appellant; N.M. Ranka, for the Respondent

Judgement

V.S. Dave, J.—These two applications have been moved u/s 256(2) of the Income Tax Act, 1961 (hereinafter referred to as "the Act"), in respect of the assessment years 1981-82 and 1983-84 after the application u/s 256(1) of the Act has been rejected, vide order dated November 6, 1990, and April 9, 1991, by the Income Tax Appellate Tribunal, raising the following question of law :

"Whether, on the facts and in the circumstances of the case and in law, the Tribunal was justified in confirming the order of the Commissioner of Income Tax (Appeals) who allowed depreciation on truck at the rate of 40 per cent. as against 30 per cent. allowed by the Income Tax Officer ?"

2. The assessee is an individual carrying on business in explosives. He claimed depreciation at the rate of 40 per cent. in respect of his vehicles. The Income Tax Officer allowed depreciation only at the rate of 30 per cent., as according to the Income Tax Officer, the vehicles were used in his own business and he was not carrying on the business of transportation. An appeal was filed by the assessee which was allowed by the Commissioner who held that depreciation should have been allowed at the rate of 40 per cent. inasmuch as the assessee was using the vehicle for letting out on hire besides using for his own business. The Department went before the Appellate Tribunal and the learned Departmental

Representative conceded that the point was covered by the order of the Bench in the case of an assessee in Income Tax Appeal No. 816/(JP) of 1983, where the order of the Commissioner of Income Tax (Appeals) was upheld, the appeal was dismissed. An application thereafter u/s 256(1) of the Act was filed which too was rejected, hence these applications.

3. It is contended by learned counsel for the Revenue that neither the Commissioner nor the Appellate Tribunal applied its mind to the facts and circumstances of this case because this appeal was allowed as the Appellate Tribunal had already taken a view in the case of Manjeet Stone Co. which judgment of the Tribunal has been set aside by this court in Commissioner of Income Tax Vs. Manjeet Stone Co., , wherein the view taken by this court is that merely because the vehicle has been registered as a public carrier, it does not mean that the assessee is carrying on the business of transportation or hiring the vehicle and, therefore, depreciation has to be allowed at the rate of 30 per cent. and not the rate of 40 per cent.

4. It is contended that in view of the fact that the decision in Commissioner of Income Tax Vs. Manjeet Stone Co., is reversed, the necessary corollary is that these two references should be decided in favour of the Revenue and it should be held that depreciation on truck is permissible only at the rate of 30 per cent. as allowed by the Income Tax Officer.

5. As against this, Shri Ranka, counsel for the assessee, has submitted that the facts of this case are not disputed and it has been clearly held that the vehicle is also being hired by the assessee. It is submitted that in these circumstances the assessee is entitled to depreciation at the rate of 40 per cent. Reliance has been placed on Karnani Properties Ltd. Vs. The Commissioner of Income Tax, West Bengal, and Aluminium Corporation of India Ltd. Vs. Commissioner of Income Tax, West Bengal, . It is submitted that there is no question of law involved so that the references should be answered. Whether the assessee is carrying on the business of transportation in respect of a particular vehicle, is always a question of fact. It is submitted that there is no dispute with the proposition in Commissioner of Income Tax Vs. Manjeet Stone Co., as there was no evidence or finding to the effect that the vehicle was being plied on hire and it was an admitted case that it was only engaged in the business of the assessee. While in the instant case it is admitted that the vehicle has been used for letting out on hire besides being used for the business. There is no evidence that mainly the business of the assessee is in explosives as depreciation is not on the business but is on the vehicle.

6. We have given our thoughtful consideration to the rival contentions and have perused the case law.

7. The rates on which depreciation is admissible have been provided in the depreciation Table given in Appendix I, Part I of the Income Tax Rules, 1962. In the Table of rates of depreciation, there are two entries relating to motor buses

and motor lorries which provide the "rate of depreciation" allowable on these items and the same read as under :

III(ii)D(9) Motor buses, motor lorries other than those used in a business of running them on hire . . . N.E.S.A. 30 per cent.

III(ii)E(1A) Motor buses, motor lorries and motor taxis used in a business of running them on hire . . . N. E. S. A. 40 per cent.

8. The Division Bench of this court has interpreted the aforesaid entries and held as under :

"A plain reading of both these entries, i.e., entry No. III(ii)D(9) and III(ii)E(1A) given in Part I of Appendix I, appended to the Rules, shows that if the motor buses, motor lorries and motor taxis are used in the business of running them on hire, then those motor vehicles are covered under entry No. III(ii)E(1A) of Appendix I and are entitled to depreciation at 40 per cent. and the motor buses and motor lorries other than those used in the business of running them on hire are entitled to depreciation at 30 per cent. It is true that the relevant clause does not lay down the requirement of hiring wholly or exclusively, but the entry has maintained the distinction about the entitlement to depreciation at 40 per cent. and 30 per cent. In the case of motor buses and motor lorries other than those used in a business of running them on hire, they are entitled to depreciation at 30 per cent. while the motor buses, motor lorries and motor taxis used in a business of running them on hire are entitled to depreciation at 40 per cent. If a truck is not used for hiring but for the purposes of one's own business, then it would be entitled to depreciation at 30 per cent. and not 40 per cent. The context of the relevant entry does indicate the same. Commissioner of Income Tax Vs. Manjeet Stone Co., .

9. In the aforesaid case, the court held that the business of the assessee was mining and sale of stones excavated from the mines and the trucks were used mainly for its business of mining. The court held that only because the registration was as a public carrier will not, in any way, affect the eligibility to depreciation as the main consideration as per entry No. III(ii)E(1A) is that the assessee is using the vehicle in the business of running them on hire. The court, therefore, as a question of fact, answered the question in the negative, i.e., in favour of the Revenue and against the assessee holding that the assessee was entitled to depreciation at 30 per cent. and not at 40 per cent.

10. In the aforesaid case, this court has laid down the principle that mere registration as a public carrier is not enough to conclude that the vehicle is used for transportation business and not the business of the company. Thus, the broad proposition is that the assessee has to show that the vehicle has been used for purposes of transportation business on hire by others rather than using the vehicle only for the business of the company. Thus, it has to be seen in the facts and circumstances of each case whether the Tribunal has considered the facts and circumstances of the case according to the evidence available on record.

When the question referred to the High Court or sought to be referred to the High Court speaks of, "on the facts and in the circumstances of the case", it means on the facts and circumstances found by the Tribunal and not the facts and circumstances as may be found by the High Court on a reappraisal of the evidence. Their Lordships of the Supreme Court in *Karnani Properties Ltd. Vs. The Commissioner of Income Tax, West Bengal*, held as under (headnote) :

"Reversing the decision of the High Court, (i) that the Department having all along proceeded on the basis that the income of the assessee was from two different sources, it should not have been allowed by the High Court to change its case ;

(ii) that, on the facts, the services rendered by the assessee to its tenants were the result of its activities carried on continuously in an organised manner, with a set purpose and with a view to earn profits ; those activities were business activities and the income arising therefrom was assessable u/s 10."

11. An identical view has been taken in *Aluminium Corporation of India Ltd. Vs. Commissioner of Income Tax, West Bengal*, and *Commissioner of Income Tax, Poona Vs. Manna Ramji and Co.*, .

12. It is in the light of the aforesaid case-law that this case has to be decided. We have gone through the order of the Tribunal and we find that the Tribunal has not at all discussed the evidence. They decided the case on the basis of their findings in *Commissioner of Income Tax Vs. Manjeet Stone Co.*, . Thus, the Tribunal has not applied its mind to "the facts and in the circumstances of the case" and, in our opinion, the matter requires to be decided by the Tribunal afresh keeping in view the law laid down by this court in *Commissioner of Income Tax Vs. Manjeet Stone Co.*, , referred to above. This court, therefore, cannot direct the Income Tax Appellate Tribunal to draw up the statement of case and refer the question sought to be raised to this court for its opinion, but in the facts and circumstances of this case, for the reasons stated earlier, we deem it proper to leave the matter open to the Tribunal to consider all the relevant material on record and the reasoning of the Commissioner of Income Tax and leave it open to rehear the appeal and dispose of it in accordance with law.