

(1984) 09 AHC CK 0050

In the Allahabad High Court

Case No : Income-tax Application No. 36 of 1984

Commissioner of Income Tax

APPELLANT

Vs

Dev Jaimehi Ice and Cold Storage

RESPONDENT

Date of Decision : 14-09-1984

Acts Referred:

Income Tax Act, 1961 — Section 32

Citation : (1985) 156 ITR 825

Hon'ble Judges : N.D. Ojha, J;B. Kumar, J

Bench : Division Bench

Advocate : Bharatji Agrawal and M. Katju, for the Appellant; J.P. Agrawal, for the Respondent

Final Decision : Dismissed

Judgement

1. The assessee (opposite party), registered firm, completed construction of a cold storage. During the assessment year 1978-79, it claimed depreciation on the fibre glass utilised in the construction of the cold storage plant. Even though in the assessment proceedings, this claim was made by the opposite party, it was not considered. Consequently, the opposite party made an application u/s 154 of the Income Tax Act (hereinafter referred to as "the Act"). The Income Tax Officer allowed depreciation on the fibre glass at the rate of 5% treating it as a part of the building. The appeal filed by the opposite party against the order of the Income Tax Officer was allowed by the Appellate Assistant Commissioner. He took the view that the cold storage construction is a specialised construction where the plant consists of a freezing chamber which is made by a special process. The fibre glass used in the construction of a freezing chamber cannot be separated from the plant or machinery because they are an integral part of the cold storage. He accordingly allowed depreciation in respect of the fibre glass at the rate of 10% admissible in respect of machinery and plant. The Revenue preferred an appeal before the Appellate Tribunal against the order of the Appellate Assistant Commissioner and two grounds were raised by the Revenue

before the Tribunal :

(1) Whether the learned Appellate Assistant Commissioner has erred in law on facts in accepting the applicability of Section 154 as the point involved was debatable ?

(2) Whether the order of the Appellate Assistant Commissioner being erroneous in law and on facts be set aside and the order of the Income Tax Officer be restored ?

2. The Tribunal took the view that proceedings u/s 154 of the Act were applicable and it accordingly dismissed the appeal and upheld the order of the Appellate Assistant Commissioner. Thereafter, an application was made by the Revenue before the Tribunal for referring the following question of law to this court for its opinion :

" Whether, on the facts and in the circumstances of the case, the Tribunal was justified in allowing the change in the character of the fibre glass from the heading " building" to the heading " machinery " ? "

3. The Tribunal was of the view that the aforesaid question did not arise from its appellate order. Aggrieved, the Commissioner of Income Tax, Agra, has filed the present application u/s 256(2) of the Act requiring the Appellate Tribunal to draw the statement of the case and refer the aforesaid question of law to this court for its opinion.

4. It was urged by the learned counsel for the petitioner relying on the decision in the case of Commissioner of Income Tax, Bombay Vs. Scindia Steam Navigation Co. Ltd., that when a question of law is raised before the Tribunal but the Tribunal fails to deal with it, it must be deemed to have been dealt with by it and is, therefore, one arising out of its order.

5. For the assessee, on the other hand, it was urged by its counsel that . the question of law sought to be referred was not raised before the Tribunal in the appeal filed by the Revenue.

6. Having heard counsel for the parties, we are of the opinion that even if the contention of the learned counsel for the applicant is accepted that the aforesaid question arises from the order of the Tribunal, no useful purpose will be served in requiring the Tribunal to make a reference in view of the decision of a Division Bench of this court in Commissioner of Income Tax Vs. Kanodia Cold Storage, , where it. was held that where a building with insulated walls is used as a freezing chamber, though it is not machinery or part thereof, it is part of the air-conditioning plant of the cold storage and the assessee will be entitled to special depreciation on its written down value. A similar view was taken by a Division Bench of the Delhi High Court in COMMISSIONER OF Income Tax, DELHI Vs. PURE ICE CREAM CO., .

7. In this view of the matter, this application is dismissed with costs assessed at

Rs. 125.