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**(1998) 06 MAD CK 0029**

**In the Madras High Court**

**Case No :** Tax Case No. 676 of 1990 (Reference No. 240 of 1990)

Commissioner of Income Tax

APPELLANT

Vs

Devi Enterprises

RESPONDENT

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**Date of Decision :** 18-06-1998

**Acts Referred:**

**Citation :** (2000) 245 ITR 625

**Hon'ble Judges :** R. Jayasimha Babu, J;N.V. Balasubramanian, J

**Bench :** Division Bench

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

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## **Judgement**

N.V. Balasubramanian, JJ.—At the instance of the Revenue, the Tribunal has stated a case and referred the following question of law u/s

256(1) of the Income Tax Act, 1961, for our consideration :

Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in holding that the rigs and compressors mounted on a

lorry used for drilling borewells is entitled for special depreciation at 30 per cent.

2. The assessee is a registered firm. During the course of assessment proceedings for the assessment year 1981-82, the assessee claimed

depreciation on rigs, compressors and wagon drills at the rate of 30 per cent. The Income Tax Officer rejected the claim of the assessee and

allowed depreciation at the rate of 10 per cent, on the cost of the rigs, etc. Aggrieved by the order of the Income Tax Officer, the assessee

preferred an appeal to the Commissioner of Income Tax (Appeals). Before the Commissioner (Appeals), a specific ground has been raised by the

assessee that the rigs, etc., were qualified for higher depreciation at 30 per cent, on the ground that rigs, compressors and wagon drills were used

in construction like dams and canals and the grant of depreciation at 10 per cent, by the Income Tax Officer was not correct in law. The order of

the Commissioner (Appeals) also disclosed the fact that the assessee had produced some materials to prove its claim before the Commissioner of

Income Tax (Appeals). The Commissioner of Income Tax (Appeals) allowed the claim of the assessee and held that the assessee was entitled to

depreciation on compressors and wagon drills at the rate of 30 per cent, on the cost of the rigs, compressors, etc.

3. The Department has challenged the order of the Commissioner of Income Tax (Appeals) before the Income Tax Appellate Tribunal. The

Tribunal proceeded on the basis that the rigs and compressors were mounted on a lorry and since they form part of the lorry, the assessee would

be entitled to depreciation at 30 per cent, under item No. III(ii)D(9) of Part I of Appendix I of the Depreciation Schedule to the Income Tax

Rules, 1962.

4. The Revenue has challenged the order of the Appellate Tribunal and obtained a reference. Learned counsel for the Revenue placed strong

reliance on the decision of this court in the case of Commissioner of Income Tax Vs. Popular Borewell Service and others, , and submitted that the

rigs and compressor mounted on a lorry and used for drilling bore-wells are not ""motor lorry"" within the meaning of the said term used in entry No.

III(ii)D(9) of Part I of Appendix I to the Income Tax Rules, 1962. Learned counsel for the assessee submitted that the case of the assessee was

that the rigs and compressors were earth moving machinery employed in heavy construction works such as dams, tunnels, etc., and they fall under

entry No. (4) in item No. III(ii)D in Part I of Appendix I of the Depreciation Schedule provided under the Income Tax Rules, 1962, but the case

of the assessee was not examined by the Tribunal. The order of the Appellate Tribunal shows that it proceeded on the basis that the assessee

claimed depreciation on rigs and compressors mounted on a lorry as part of a lorry. But, it was not the case of the assessee that they formed part

of the lorry. The case of the assessee was that the machinery in question were earth moving machinery falling under different items of the

Depreciation Schedule. We are of the opinion that the Tribunal has not considered the case of the assessee whether the machinery in question falls

under entry No. (4) in item No. III(ii)D of Part I of Appendix I to the Income Tax Rules, 1962. The Tribunal has proceeded on the assumption

that the assessee has claimed depreciation at 30 per cent, on the basis that they were part of the lorry and held the assessee was entitled to

depreciation at the rate of 30 per cent. Since the case of the assessee was that the rigs and compressors should be regarded as machinery

employed in heavy construction works, such as dams, tunnels, etc., and falling under different entries of the Depreciation Schedule and since that

question has not been considered by the Appellate Tribunal, we are of the view that the Tribunal should consider and decide the question as to

whether the machinery would be regarded as earth moving machinery under the relevant entry of the Depreciation Schedule. Though the Appellate

Tribunal cannot be faulted as there was no representation on behalf of the assessee before the Tribunal, still we are of the view that the Tribunal

has not decided the proper question. We are, therefore, of the opinion that the matter should be reheard by the Tribunal. Accordingly, we return

the reference without answering the question of law referred to us, but with the direction that the Tribunal should hear the matter once again and

determine whether the machinery in question falls under the relevant head "Earth moving machinery, etc." falling under entry No. (4) in item No.

III(ii)D of Part I of Appendix I to the Rules. There is no order as to costs.