

(1983) 06 MP CK 0004

In the Madhya Pradesh High Court

Case No : Miscellaneous Civil Case No. 207 of 1980

Commissioner of Income Tax

APPELLANT

Vs

Dr. Kishanchand

RESPONDENT

Date of Decision : 22-06-1983

Acts Referred:

Income Tax Act, 1961 — Section 41(2)

Citation : (1983) 144 ITR 1

Hon'ble Judges : G.P. Singh, C.J.;K.K. Adhikari, J

Bench : Division Bench

Advocate : B.K. Rawat, for the Appellant; B.L. Nema, for the Respondent

Judgement

G.P. Singh, C.J.—The following questions of law have been referred by the Income Tax Appellate Tribunal u/s 256(1) of the I.T. Act, 1961 :

" 1. Whether, on the facts and in the circumstances of the case and on the basis of the material available on the record, the Tribunal was right in holding that no depreciation was deemed to have been allowed while working out the net income from the trucks in the past ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that no addition on account of the profit on the sale of the truck could be made to the total income of the assessee u/s 41(2) of the Income Tax Act, 1961 ?"

2. The reference relates to the assessment year 1974-75. The assessee derives income from sale of medicine, medical practice, house property and truck business. The truck was sold in the accounting period relevant to the assessment year 1974-75 for Rs. 40,000. The ITO calculated the written down value of the truck at Rs. 15,295 and added Rs. 25,705 as profits u/s 41(2) of the Act. The same order was maintained in appeal. Before the Tribunal it was contended by the assessee that as no depreciation was actually allowed in the earlier years, Section 41(2) was inapplicable. It was this contention which was accepted by the

Tribunal.

3. In the draft statement of the case submitted by the Department before the Tribunal it was stated that in the assessment years 1972-73 and 1973-74 the income from truck business was determined by the ITO after taking into account the depreciation. The assessment orders were, however, not filed before the Tribunal. They do not form part of the statement of the case. The Tribunal has also not stated in the statement of the case that in the assessment orders for the assessment years 1972-73 and 1973-74 any depreciation was either expressly or impliedly allowed in arriving at the net profits from the truck business. Learned counsel for the Department has placed before us the decision of the Punjab and Haryana High Court in *Kanshi Ram Wadhwa Vs. Commissioner of Income Tax*, . That case is distinguishable, because in that case the assessment orders expressly mentioned that the agreed net profits were assessed after taking into account the depreciation. In the instant case, as earlier mentioned by us, the assessment orders have not been filed and there is no material to hold that depreciation (in respect) of the truck business was taken into account either expressly or impliedly in arriving at the figures of net profits in the assessment years 1972-73 and 1973-74. The expression "written down value " is defined in Section 43(6) to mean "in the case of assets acquired before the previous year, the actual cost of the assets to the assessee less all depreciation actually allowed to him under the Act ". Even assuming that the words " actually allowed " may also cover a case where depreciation is impliedly allowed by an assessment order, there is no finding of the Tribunal, either in its order or in the statement of the case, that depreciation was impliedly allowed in the assessment orders for the years 1972-73 and 1973-74. When the Department seeks to tax the difference between the price at which an asset is sold and its written down value u/s 41(2), the burden would be on the Department to show that depreciation was allowed in the earlier years in respect of that asset. That burden was not discharged in the instant case. Learned counsel for the Department submitted that as this point was not taken before the ITO or the AAC, the Department had no opportunity to produce the relevant material. We are not impressed by this argument. At the stage when the point was raised before the Tribunal the Department could have taken time to produce the relevant material. We have already mentioned that although it is mentioned in the draft statement of the case submitted before the Tribunal that depreciation was impliedly allowed in the assessment years 1972-73 and 1973-74, no material was placed even at that stage in support of that assertion. In our opinion, the Tribunal was right in holding that Section 41(2) was not attracted.

4. For the reasons given above, we answer both the questions in the affirmative, in favour of the assessee and against the Department. There will be no order as to costs of this reference.