(2012) 02 P&H CK 0275

In the Punjab And Haryana At Chandigarh

Case No : IT Appeal No''s. 380 and 381 of 2011

Commissioner Of Income Tax — APPELLANT

Vs

Rakesh Jain — RESPONDENT

Date of Decision : 21-02-2012

Acts Referred:

Income Tax Act, 1961 — Section 143(1), 143(3), 260A, 271(1)(c), 32
Motor Vehicles Act, 1988 — Section 2

Citation : (2012) 250 CTR 381 : (2013) 350 ITR 230 : (2012) 206 TAXMAN 63

Hon'ble Judges : M.M. Kumar, J;Alok Singh, J

Bench : Division Bench

Advocate : Rajesh Katoch, for the Appellant;

Final Decision : Dismissed

Judgement

M.M. Kumar, J.—This order shall dispose of IT Appeal Nos. 380 and 381 of 2011 filed by the Revenue under s. 260A of the IT Act 1961 (for brevity ''the Act''), challenging order dt. 30th June, 2011 passed by the income tax Appellate Tribunal, Chandigarh Bench ''B'', Chandigarh (for brevity ''the Tribunal'') in respect of the asst. yrs. 2006-07 and 2007-08. The Revenue has raised the issue that the depreciation @ 40 per cent on tippers, vibrator and vibrator soil compactor is impermissible and the Tribunal has erroneously treated those vehicles as commercial vehicles. According to Revenue, these vehicles are qualified for depreciation @ 15 per cent and must be treated as original plant and machinery. Facts are being taken as disclosed in the assessment order. The assessee-respondent filed return declaring an income of Rs. 6,42,330 on 31st Oct., 2007. The return were processed under s. 143(1) of the Act and subsequently, it was selected for scrutiny. Accordingly, statutory notices along with detailed questionnaire was issued to the assessee-respondent. In response to the aforesaid notices, the assessee through its authorized chartered accountant attended the proceedings and filed reply to the questionnaire along with other information.

2. The assessee-respondent derives income from civil construction and contract work and these items are considered as part of machinery on which depreciation is allowable @ 15 per cent only. Accordingly, the AO allowed the depreciation @ 15 per cent under s. 42(1)(ii), Expln. II, unnumbered proviso 3. The view of the AO is discernible from a perusal of paras 4, 2 and 5 which are as under :

4.2. As regards assessee''s argument that the vibrator/soil compactor is not a roller, same is not acceptable. As per the brochure of the company ''Dynapac'' filed during the course of proceedings, the vibrator/soil compactor has been categorized under the ''road roller'' equipment and the named as vibratory rollers. The soil compactor is also heavy machinery utilized only for road construction and by no stretch of imagination it can be termed as heavy commercial vehicles. Likewise, the tipper is heavy machinery which is specifically designed and utilized in road construction. Even the assessee has admitted in its submissions that tipper is like a vibrator. Simply because it has been registered with the RTO will not make it heavy goods vehicle entitled for depreciation at higher rate of 30 per cent.

5. In view of the facts stated in foregoing paras, it is held that the assessee has claimed excessive depreciation on all the road equipment mentioned above. Accordingly, the excessive depreciation claimed to the tune of Rs. 6,56,606 is disallowed accordingly, added to the taxable income of the assessee. The assessee would be treated to have filed inaccurate particulars of income in respect of this addition, for which penalty proceedings under s. 271(1)(c) of the IT Act, 1961 have been initiated separately.

3. It is, thus, obvious that excessive depreciation claimed by assessee-respondent was added to his income.

4. Feeling aggrieved, the assessee-respondent filed appeal under s. 143(3) of the Act and the CIT(A) has accepted the functional tests as the basis for grant of 30 per cent depreciation and also on the ground that higher depreciation is on account of rigorous and hard use of commercial vehicles in comparison to the stationed and permanently installed machinery. In support of the aforesaid rationale, it has also been held that the vehicles have been registered with the DOT, which is an authority responsible for registration of commercial vehicle. These vehicles are moving vehicles, which are used to move earth and have to be treated at par with the commercial vehicles such as trucks. It was further held that these vehicles are special purpose vehicles and would not change the characteristics of the assets. Tippers are trucks with the hydraulic attachment for the unloading of earth. Likewise, the vibrators have the additional functions but basic character of the vehicles necessarily remained the same. Therefore, they cannot be treated as plant and machinery.

5. The Tribunal accepted the aforesaid view of the CIT(A) and the view of the Tribunal is discernible from paras 7, 8 and 9, which read as under :

7. We have heard both the parties and carefully considered their submissions

including the authorities referred to by them. The order of the learned CIT(A) with regard to depreciation is in two parts. In first part he directed the AO to allow depreciation @ 40 per cent as against 15 per cent allowed by the learned CIT(A) on the three aforesaid three items. In the second part of his order, he has held that the assessee is eligible to additional depreciation. We shall now deal with both the aspects as they have been specifically challenged by the Department.

8. Apropos the dispute as to whether the assessee is entitled to depreciation @ 40 per cent on tippers, vibrator and vibrator soil compactor, the issue is whether they are in the nature of commercial vehicles. The assessee is entitled to claim depreciation @ 40 per cent on commercial vehicles. The words ''commercial vehicles'' includes within its ambit all the vehicles which fall in the category of commercial vehicles. The learned CIT(A) has given detailed justification for treating the tipper, vibrator and vibrator soil compactor commercial vehicles. We are in agreement with his reasoning and decision in the matter. Similar view has been taken by other Benches of this Tribunal and also by the High Courts to which reference has already been made by the learned counsel for the assessee. In view of the matter, we hold that the learned CIT(A) has rightly directed the AO to allow depreciation @ 40 per cent on tippers, vibrator and vibrator soil compactor.

9. Apropos the issue as to whether the assessee is eligible to additional depreciation on the aforesaid items, the learned counsel for the assessee fairly conceded that the assessee had never pressed any claim towards additional depreciation; either before the AO or before the learned CIT(A) and therefore, the observations of the learned CIT(A) that the assessee is entitled to additional depreciation need to be vacated. We therefore vacate the observations made by the learned CIT(A) that the assessee is entitled to additional depreciation on the aforesaid items;

6. We have heard Mr. Rajesh Katoch, learned counsel for the Revenue at a considerable length. According to Mr. Katoch, the definition of commercial vehicle will not include tipper, vibrator and vibrator soil compactor. In that regard, our attention has been invited to Explanation of unnumbered proviso 3 to s. 32(1)(ii) of the Act.

7. Mr. Katoch, learned counsel has submitted that the expression ''commercial vehicle'' is a wider expression and it would not include the tippers, vibrator and vibrator soil compactor. Therefore, he has requested for interpretation, which would include these vehicles in the plant and machinery assessable to tax @ 40 per cent.

8. In order to appreciate submissions made by learned counsel, it would be appropriate to first notice the provisions of s. 32(1)(ii) of the Act, which reads as under :

"32. (1) In respect of depreciation of-

(i) buildings, machinery, plant or furniture, being tangible assets.

(ii).........................

(ii) in the case of any block of assets, such percentage on the WDV thereof as may be prescribed :

Provided that no deduction shall be allowed under this clause-in respect of-

(a) any motor car manufactured outside India, where such motor car is acquired by the assessee after the 28th day of Feb., 1975 (but before the 1st day of April, 2001), unless it is used--

(i) in a business of running it on hire for tourists; or

(ii) outside India in his business or profession in another country; and

(b) any machinery or plant if the actual cost thereof is allowed as a deduction in one or more years under an agreement entered into by the Central Government under s. 42 :

Provided further that where an asset referred to in cl. (i) or cl. (ii) or cl. (iia), as the case may be, is acquired by the assessee during the previous year and is put to use for the purposes of business or profession for a period of less than one hundred and eighty days in that previous year, the deduction under this sub-section in respect of such asset shall be restricted to fifty per cent of the amount calculated at the percentage prescribed for an asset under cl. (i) or cl. (ii) or cl. (iia), as the case may be :

Provided also that where an asset being commercial vehicle is acquired by the assessee on or after the 1st day of October, 1998 but before the 1st day of April, 1999 and is put to use before the 1st day of April, 1999 for the purposes of business or profession, the deduction in respect of such asset shall be allowed on such percentage on the WDV thereof as may be prescribed.

Explanation : For the purposes of this proviso,--

(a) the expression ''commercial vehicle'' means ''heavy goods vehicle'', ''heavy passenger motor vehicle'', ''light motor vehicle'', ''medium goods vehicle'' and ''medium passenger motor vehicle'' but does not include ''maxi-cab'', ''motor-cab'', ''tractor'' and ''road roller'';

(b) the expressions ''heavy goods vehicle'', ''heavy passenger motor vehicle'', ''light motor vehicle'', ''medium goods vehicle'', ''medium passenger motor vehicle'', ''maxi-cab'', ''motor-cab'', ''tractor'' and ''road roller'' shall have the meanings respectively as assigned to them in s. 2 of the Motor Vehicles Act, 1988 (59 of 1988).

9. A perusal of s. 32 of the Act would show that it deals with the depreciation of building, machinery, plant or furniture being tangible assets. It also deals with the expression ''commercial vehicle'' in unnumbered proviso 3, which is acquired

by the assessee on or after the 1st day of October, 1998, but before the 1st day of April 1999. According to explanation, the commercial vehicle is to include heavy goods vehicle. heavy passenger motor vehicle, light motor vehicle, medium goods vehicle but is not to include maxi-cab, motor-cab, tractor and road roller. Therefore, the question which falls for consideration is whether tippers, vibrator and vibrator soil compactor would be covered by the expression ''commercial vehicle'' or such vehicles have to be regarded as plant and machinery to attract less percentage of depreciation ? The reasoning adopted by the Tribunal would not suffer from any legal infirmity because the tippers are registered under the Motor Vehicles Act, 1988 (for brevity ''the 1988 Act'') as road transport vehicle as would be vibrator and vibrator soil compactor. Insofar as tippers are concerned, a Division Bench of the Karntaka High Court in the case of Commissioner of Income Tax Vs. Mahalinga Setty and Co., has opined against the Revenue by giving the benefit of investment allowance to the assessee. If that be so then vibrator and the vibrator soil compactor would follow the suit because the reasoning adopted is that the vehicles are registered under the 1998 Act and it is essential machinery to carry on the construction work. The view of the Karnataka High Court is discernible from following para of the judgment which reads as under :

3. The second question pertains to the dumpers and tippers belonging to the assessee. The assessee used them to lift earth which was necessary to perform the assessee''s part of the work. The contention of the Revenue is that these dumpers and tippers are not used in the manufacture of any article and, therefore, the provisions of s. 32A are not at all attracted. Under s. 32A, investment allowance is granted, inter alia, in respect of machinery or plant specified in sub-s. (2) which is owned by the assessee and is wholly used for the purpose of business carried on by the assessee. The second proviso to s. 32A(1) states that no deduction shall be allowed in respect of certain machinery or plant installed in the office premises or in respect of road transport vehicles, etc. Sub-s. (2) of s. 32A was strongly relied upon by learned counsel for the Revenue to contend that the machinery which is eligible for the investment allowance is machinery which produces an article. In other word, the machinery should be directly employed to produce an end product. It was contended that the machinery used just to lift earth and transport the same would not be the machinery contemplated by sub-s. (2) which creates the eligibility for investment allowance. Learned counsel referred to sub-cl. (iii) of cl. (b) of sub-s. (2) of s. 32A as it then stood. This clause actually states that the machinery installed in any industrial undertaking for the purposes of the business of construction, manufacture or production of any article or thing, not being an article or thing specified in the list in the Eleventh Schedule, is eligible for the allowance. The subject-matter, certainly, is not enumerated in the Eleventh Schedule and there is no dispute about it. Therefore, the question is whether the dumpers and tippers used for the purpose of business of construction result in the production of an article or thing as contended by learned counsel for the Revenue. The word

''thing'' had a wide connotation as pointed out by the Madras High Court in I. Devarajan and Others Vs. Tamil Nadu Farmers Service Co-operative Federation and Others, the Bench has observed thus :

The word ''thing'' is shown in Earl Jowitt''s Dictionary, Vol. 2, as meaning ''the subject of dominion or property as distinguished from persons''. They are of three kinds; things real or immovable, comprehending lands, tenements, and hereditaments; things personal or movable, comprehending goods and chattels; and things mixed partaking of the characteristics of the two former, as a titled deed, a term for years. The civil law divided things into corporeal and incorporeal''. See Earl Jowitt''s Dictionary of English Law, Vol. 2, p. 1746. Thus, incorporeal items like debts would be things. Therefore, the word ''things'' appears to comprehend incorporeal assets also''.

In view of the above, we are not inclined to admit the appeals of the Revenue. Accordingly, the appeals fail and the same are hereby dismissed.