
(1996) 06 GAU CK 0025
In the Gauhati High Court
Case No : IT Ref. No. 4 of 1991

COMMISSIONER OF Income Tax

APPELLANT

Vs

SIBSON CONSTRUCTION and CO.

RESPONDENT

Date of Decision : 05-06-1996

Acts Referred:

Income Tax Act, 1961 — Section 256, 32A

Citation : (1997) 142 CTR 4

Hon'ble Judges : D. N. Baruah, J

Bench : Division Bench

Judgement

D. N. BARUAH, J. :

At the instance of the Revenue, the following four questions have been referred for opinion of this Court under s. 256(1) of the IT Act, 1961 :

"(1) Whether the Tribunal did not err in law as well as in facts in holding that dumpers are not road transport vehicles ?

(2) Whether the Tribunal did not err in law as well as in facts in holding that as dumpers are not road transport vehicles, additional depreciation is to be allowed after examining certain particulars by the ITO ?

(3) Whether the Tribunal did not err in law as well as in facts in holding that deduction under s. 32A is allowable even though the assessee's business is not covered by s. 32A(2)(b) of the IT Act, 1961 ?

(4) Whether the Tribunal did not err in law as well as in facts in holding that the pucca structures built of cement, M.S. rod, G.I. pipes, etc., in addition to wood, etc., are temporary structures and depreciation is allowable at 20% in place of 7-1/2% as allowed by the AO ?"

2. The assessee is a registered partnership firm. The firm follows the mercantile method of accounting. The AO made assessment under ss. 143(3) and 153(1)(c) of the IT Act, 1961 (for short, "the Act") for the asst. yrs. 1983-84 and 1984-85.

The assessee-firm, at the material time, was carrying on business of the construction of dams in a hydel project near the eastern part of Meghalaya. The firm claimed deduction on account of investment allowance in respect of a dumper. The ITO considered it to be a "road transport vehicle" and disallowed the claim. According to him, the "dumper" was a lorry used for dumping materials having special device for removal of the contents.

On appeal, the CIT(A) found that the vehicle used by the assessee-firm as dumper used to ply on the road within the project area and, therefore, in his opinion, deduction was not allowable and accordingly he held that the ITO correctly treated the "dumper" as a road transport vehicle. The order of the ITO was thus confirmed.

Being aggrieved, the assessee made a further appeal before the Tribunal. The Tribunal found that the assessee's claim was quite justified and held, *inter alia*, that "the dumper" by its very name would signify a mechanical device for picking up things from somewhere for dumping them elsewhere, that a path inside the dam site could hardly be called a road and that by no stretch of imagination could the earmarked portion of the land on the dam site be termed as a "road" in common parlance. Therefore, the Tribunal modified the orders passed by the ITO which was confirmed by the CIT(A) and gave relief to the assessee accordingly.

Regarding the depreciation on the temporary camp shed, which had been used by the assessee for residence and as godown to carry out the contract works at the site, the assessee claimed depreciation of 20% and not at 100% on certain construction raised at the site. As required by the ITO, the assessee furnished better particulars regarding the nature of construction. From the particulars, we find that cement, M.S. rod, G.I. pipes, etc., had also been used in the said construction. The ITO disallowed depreciation of 20% and allowed 7.5% as per old Appendix I of the IT Rules.

On appeal, the Tribunal, however, held that the assessee was entitled to receive depreciation at the rate of 20%.

Hence, at the instance of the Revenue, the four questions as stated above have been referred to this Court for opinion.

3. We have heard Mr. G. K. Joshi, learned standing counsel appearing on behalf of the Revenue assisted by Mr. U. Bhuyan, learned junior standing counsel. We have also heard Mr. A. R. Barthakur, learned senior counsel appearing on behalf of the assessee.

4. Mr. Joshi submits that the "dumper" is not an earthmoving machinery and, therefore, 30% depreciation is not allowable. Thirty per cent depreciation is allowable only in case of earthmoving machinery engaged in heavy construction works, such as dams, tunnels, canals, etc. Mr. Joshi further submits that the "dumper" should come in the general entry under item III(i) of Appendix I of the IT Rules, 1962, which prescribes the rate of depreciation applicable to machinery

and plant for which no special rate has been prescribed under item (ii). According to Mr. Joshi, in order to get 30% depreciation it must be an earthmoving machinery. A "dumper" does not perform any action of cutting/digging earth. The very expression "earthmoving machinery" indicates a machinery which should cut and dig earth. A dumper does not do any such thing. Therefore, it cannot come under item III-D(4) of Appendix I of the IT Rules, 1962. On the other hand, Mr. A. R. Barthakur submits that the dumper comes under item III-D(4) of Appendix I as it has a device for movement of earth.

5. In order to appreciate the submissions made by learned counsel for the parties it is to be seen whether the earthmoving machinery is required to do extra work like cutting/digging any earth. The rule-making authority has specifically mentioned "earthmoving machinery" which is engaged in heavy construction like dam, canals, etc., come under this category. On a close reading of the expression, it will appear that the rule-making authority is absolutely silent regarding additional work to be done, viz., cutting and digging earth. There is no presumption that the legislature or the rule-making authority makes any omission in making the rule. In Maxwell on the Interpretation of Statutes (Twelfth Edn., at page 33), it is stated as follows :

"It is a corollary to the general rule of literal construction that nothing is to be added to or taken from a statute unless there are adequate grounds to justify the inference that the legislature intended something which it omitted to express. Lord Mersey said : It is a wrong thing to read into an Act of parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do. We are not entitled, said Lord Loreburn L.C., to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself. A case not provided for in a statute is not to be dealt with merely because there seems no good reason why it should have been omitted, and the omission appears in consequence to have been unintentional."

The first and most elementary rule of construction is that it is to be assumed that the words and phrases of technical legislation are used in their technical meaning if they have acquired one, and, otherwise, in their ordinary meaning, and the second, that the phrases and sentences are to be construed according to the rules of grammar. Nor should there be any departure from them where the language under consideration is susceptible of another meaning, unless adequate grounds are found, either in the history or cause of the enactment or in the context or in the consequences which would result from the literal interpretation, for concluding that interpretation does not give the real intention of the legislature.

6. In this case item III-D(4) of Appendix I is very clear. It means "earthmoving machinery which is engaged in heavy construction works, such as dams, tunnels, canals, etc.", and these are entitled to get 30% depreciation. The rule making authority has not stated that the earthmoving machinery is required to do something more for movement of earth. Therefore, the earthmoving machinery

is not required to do extra work like cutting/digging.

7. Mr. Joshi has drawn our attention to a decision of the Gujarat High Court in the case of *The State of Gujarat Vs. Minu Chemical Pvt. Ltd.*, In the said case, their Lordships had occasion to deal with the point whether a steel tank could be said to be a machinery. After considering all aspects of the matter, the High Court came to the conclusion that a steel tank could not be said to be machinery. While coming to the conclusion, the Gujarat High Court considered the decision of *Corporation of Calcutta vs. Cossipore Municipality* AIR 1922 PC 27. In that case, the question was whether a steel tank with the supporting structure for storage of water was machinery within the meaning of the third proviso to s. 101 of the Bengal Municipal Act, 1884. There it was observed that it was not an easy task to define the meaning of the word "machinery" in the absence of the definition of the said term. It was further observed that there would be great danger in attempting to give a definition of the word "machinery" which would be applicable in all cases.

From the said decision it cannot be said that there is a complete and exhaustive definition of the word "machinery". As per Websters Dictionary, 2nd Edn., the word "machinery" means the component parts of a complex machine. Therefore, machinery means a combination of some parts of a complex machine. Accordingly, we are of the opinion that the word "dumper" can also be said to be machinery because it has got devices to slide down a portion of the "dumper", for removal of the contents.

8. In view of the above, we have no hesitation to say that a "dumper" comes within expression "earthmoving machinery" and we hold that the assessee is entitled to get 30% depreciation. Accordingly, we answer questions Nos. 1, 2 and 3 in the affirmative against the Revenue and in favour of the assessee. So far question No. 4, the Tribunal allowed 20% depreciation though the facts placed before the Tribunal were that the structures used at construction site were made of cement, M.S. rods, G.I. pipes, etc., over and above wood. It is no doubt, temporary. The temporary constructions come under various categories, viz., 1st class, 2nd class and 3rd class temporary constructions. Mr. Joshi submits that 20% depreciation is not prescribed. Depreciation of construction can be allowed depending on the nature of constructions, such as, 1st class, 2nd class and 3rd class. The rate of depreciation has been mentioned in the rule. Considering all the aspects we come to the conclusion that the Tribunal was not correct in holding that the assessee was entitled to get 20% depreciation in respect of temporary construction. In our opinion, the assessee is entitled to get 7.5% in the facts and circumstances. Accordingly, we answer question No. 4 in the negative and in favour of the Revenue and against the assessee.