

(1999) 06 MP CK 0013

In the Madhya Pradesh High Court

Case No : Income Tax R. No. 70 of 1994

Income Tax Commissioner

APPELLANT

Vs

Anupchand and Co.

RESPONDENT

Date of Decision : 25-06-1999

Acts Referred:

Income Tax Act, 1961 — Section 32, 32A

Citation : (1999) 156 CTR 19 : (2000) ILR (MP) 766 : (1999) 239 ITR 466

Hon'ble Judges : A.K. Mathur, C.J.; S.K. Kulshrestha, J

Bench : Division Bench

Advocate : Abhay Sapre, for the Appellant; Ravindra Shrivastava and Prem Francis, for the Respondent

Judgement

A.K. Mathur, C.J.—This is a reference u/s 256(1) of the Income Tax Act, 1961, at the instance of the Revenue and the following questions of law have been referred by the Tribunal for answer by this court :

"(1) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the assessee-firm is entitled to depreciation on trucks at 40 per cent. which are used in the assessee's own business ?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the assessee-firm was entitled to investment allowance u/s 32A of the Income Tax Act, 1961 ?

(3) Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the assessee was an industrial undertaking as contemplated u/s 32A(2)(b)(iii) of the Income Tax Act for claiming investment allowance u/s 32A(1) of the Act?

(4) Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the assessee was entitled to investment allowance u/s 32A(1) of the Income Tax Act without giving the specific findings as to whether the assessee had complied with the conditions as laid down under Sub-section

(4) of Section 32A of the Income Tax Act, 1961 ?"

2. For disposal of this reference application, necessary facts are as under :

The assessee, Anupchand and Company, Raipur, is a registered firm and derives income from contract work. For the assessment year 1985-86, it claimed depreciation at the rate of 40 per cent. on its trucks used for its business, whereas the Assessing Officer allowed the same at the rate of 30 per cent. Aggrieved by the order of the Assessing Officer, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals) who following his own order dated April 16, 1986, in Appeal No. 30/RJM/A of 1985-86, allowed the appeal filed by the assessee. The assessee further claimed investment allowance u/s 32A of the Income Tax Act, which was not allowed by the Assessing Officer. Against that, the assessee preferred appeal before the Commissioner of Income Tax (Appeals) who following the Tribunal's order dated October 19, 1992, allowed the claim of the assessee for investment allowance u/s 32A of the Income Tax Act. Thereafter, the Department took up the matter in second appeal before the Tribunal and the Tribunal dismissed the departmental appeal and held that the assessee-firm is entitled to depreciation on the trucks at the rate of 40 per cent. and also held that the assessee-firm is entitled to investment allowance u/s 32A of the Income Tax Act. Then the Department approached the Tribunal for making a reference and, accordingly, the Tribunal has made this reference on the questions aforementioned.

3. So far as question No. (2) quoted above is concerned, it is squarely covered by the Supreme Court decision in the case of Commissioner of Income Tax, Orissa and Others Vs. N.C. Budharaja and Company and Others, , wherein it was held thus (page 434) :

"We are, therefore, of the opinion that Sub-clause (iii) of Clause (b) of Sub-section (2) of Section 32A does not comprehend within its ambit construction of a dam, a bridge, a building, a road, a canal and other similar constructions."

4. Therefore, this question is answered in favour of the Revenue in view of the decision of the apex court and against the assessee.

5. So far as questions Nos. (3) and (4) are concerned, they are academic ; therefore, they need not be answered by this court.

6. Coming to question No. (1) which relates to grant of 40 per cent. depreciation allowance on the trucks of the assessee, learned counsel for the Revenue has invited our attention to the finding given by the Assessing Officer that some of the trucks were used by the assessee for carrying on his own business and the Assessing Officer granted depreciation only to the extent of 30 per cent. on the vehicles which were used for his own business and has given depreciation at the rate of 40 per cent. on the vehicles which were used for hire business. However, the appellate authority as well as the Tribunal did not dilate on the subject in detail but only made a reference to an earlier decision made by the Tribunal and

allowed the benefit of depreciation at the rate of 40 per cent. in favour of the assessee in view of the Board's Circular No. 609 [see Manian Transports and others Vs. S. Krishna Moorthy, Income Tax Officer, , dated July 29, 1991, because of the order passed by them in the case of an assessee for the assessment year 1984-85 dated October 19, 1992.

7. Shri Sapre, learned counsel for the Revenue, submitted that the order of assessment year 1984-85 is not binding on this court. This court can come to its own finding without prejudice to the earlier finding of the Tribunal. The submission of learned counsel is correct. The finding in the previous assessment order of the Tribunal is not binding on this court. This court can examine the matter independently and come to its own conclusion. More so, in the present case, as an interpretation of statutory provision is involved. Therefore the earlier finding of fact given in the case of an assessee will have no bearing. We have to interpret the provisions of Entry No. III(ii)E(1A) of Part I of Appendix I appended to the Income Tax Rules, 1962, which reads as under ;

"(1A) Motor buses, motor lorries and motor taxis used in a business of running them on hire (N. E. S. A)--40 per cent."

8. A plain reading of this provision shows that the assessee is only entitled to a depreciation at the rate of 40 per cent. on vehicles used for business of hire, i.e., if the assessee gives on hire his vehicles for transportation of goods of other persons as a business of transporter, then he is entitled to the benefit of 40 per cent. depreciation allowance ; but whenever the vehicles are used for his own business of transporting his goods then he is not entitled to 40 per cent. depreciation allowance and only 30 per cent. depreciation is admissible. Learned counsel invited our attention to a decision of the Rajasthan High Court in the case of CIT v. Sardar Stones [1995] 215 ITR 350, where almost in an identical situation, the assessee was a trader in stones and owned two trucks which were used for transportation of stones from the site of the mines to the depot of the assessee as well as to the customers' premises. The claim of the assessee therein was that the trucks were occasionally used for hiring but to its sister concern when not in use by the assessee. The assessee claimed depreciation at 40 per cent. on the trucks which was allowed by the Income Tax Officer, but subsequently the Commissioner of Income Tax exercising his power u/s 263 of the Income Tax Act came to the conclusion that the rate of depreciation at 40 per cent; is allowable only when the assessee was carrying on the business of running trucks on hire, accordingly, the reference was answered by the court in favour of the Revenue and against the assessee. Similar view was taken in another decision of the Rajasthan High Court in the case of Commissioner of Income Tax Vs. Manjeet Stone Co., .

9. The Karnataka High Court has, also taken the same view in the case of Veeneer Mills Vs. Commissioner of Income Tax, , wherein the assessee "was a manu- facturer of plywood and used to transport the timber which is the raw material in the manufacture of plywood through its own lorries. The dominant

purpose of these lorries was the transportation of the material belonging to the assessee in connection with its manufacturing work. However, on some occasions, when the lorries were idle, they were given on hire. In this case, their Lordships observed that the facts speak for themselves. The provision is only attracted in the case of motor buses, motor lorries and motor taxis used in a business of running them on hire. The assessee should be engaged in the business of running the vehicles on hire. Therefore, the question was answered in favour of the Revenue and against the assessee.

10. Learned counsel for the assessee invited our attention to a decision of the Kerala High Court in the case of CIT v. Dr. K.R. Jayachandran [1995] 212 ITR 637. There the ambulance was used on hire. It was observed by their Lordships that the Tribunal had found that the plying of the ambulance van on hire itself constituted the business of the assessee though it may be incidental to the running of the hospital. The hire charges received were assessed under the head "Business". The Tribunal held that the assessee is entitled to depreciation on the ambulance at the higher rate of 40 per cent. Their Lordships held that depreciation of 40 per cent. is allowable. That may be so in the peculiar facts and circumstances of that case. In our opinion, the aforesaid Entry No. III(ii)E(1A) of Part I of Appendix I has been rightly interpreted by the Rajasthan High Court and Karnataka High Court in the aforesaid two cases that depreciation is only applicable to the extent of 40 per cent. if the vehicles are used by the assessee for hire purposes. If any assessee uses a fleet of vehicles for transportation on hire business, then he is entitled to depreciation of 40 per cent. but in case he uses the vehicles for transporting the goods for his own business, then he will not be entitled to depreciation at the rate of 40 per cent. Thus, we are of the opinion that the assessee who uses his vehicles on hire, is entitled to 40 per cent. depreciation allowance and if the vehicles are used for running his own business then he is not entitled to 40 per cent. depreciation allowance. Therefore, question No. (1) is answered in favour of the Revenue and against the assessee.

11. Reference is answered accordingly.