(1978) 11 CAL CK 0020

In the Calcutta High Court

Case No : Income-tax Reference No. 288 of 1972

Orissa Minerals Development Co. Ltd. APPELLANT

Vs

Commissioner of Income Tax (Central) RESPONDENT

Date of Decision : 23-11-1978

Acts Referred:
Income Tax Act, 1961 — Section 33

Citation : (1979) 117 ITR 434

Hon'ble Judges : Dipak Kumar Sen, J;Bimal Chandra Basak, J

Bench : Division Bench

Advocate : Kalyan Ray and S.N. Dutt, for the Appellant;Ajit Sengupta, for the Respondent

Judgement

Dipak Kumar Sen, J.—In the year of assessment 1963-64, the accounting period being the year ending the 30th June, 1962, the Orissa Minerals Development Co. Ltd., Calcutta, the assessee, claimed development rebate in respect of dumpers owned by it. The ITO disallowed this claim on the ground that the dumpers were road transport vehicles for transporting materials from one site to another.

2. On an appeal preferred by the assessee, the AAC accepted the contentions of the assessee and held that dumpers were not road transport vehicles and accordingly allowed the claim for development rebate.

3. On a further appeal by the revenue, it was contended before the Tribunal that dumpers should be treated as road transport vehicles. The assessee contended that in the Table under the I.T. Rules, 1962, prescribing rates for depreciation dumpers have been categorised as earth moving machinery and not as road transport vehicles. It was contended further that under a circular issued by the Board of Revenue, tractors and bulldozers, etc., though road transport vehicles, were to be allowed development rebate and the same directive should apply to dumpers.

4. The Tribunal held that motor cars and lorries were admittedly road transport

vehicles and that dumpers were nothing but lorries with special attachment for loading excavated materials. Otherwise they were indistinguishable from lorries or trucks. Accordingly, the Tribunal concluded that a dumper should be treated as a road transport vehicle and, therefore, development rebate should not be allowed for dumpers.

5. On an application of the assessee u/s 256(2) of the I.T. Act, 1961, this court directed the Tribunal to draw up a statement of case and refer the following question of law for the opinion of this court:

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that dumpers, being earth moving machinery employed in the assessee''s mining business, were road transport vehicles not entitled to development rebate u/s 33 of the Income Tax Act, 1961?"

6. Mr. Kalyan Ray, learned counsel for the assessee, drew our attention to Section 33 of the I.T. Act, 1961, which provides for allowance of development rebate. The material part of the section is as follows :

"In respect of a new machinery or plant (other than office appliances or road transport vehicles) which is owned by the assessee and is wholly used for the purposes of the business carried on by him, there shall, in accordance with and subject to the provisions of this section and of Section 34, be allowed a deduction, in respect of the previous year in which .....the machinery or plant was installed or, if the machinery or plant is first put to use in the immediately succeeding previous year, then, in respect of that previous year, a sum by way of development rebate as specified in Clause (b)."

7. Mr. Ray also drew our attention to the I.T. Rules, 1962, where statement of rates at which depreciation was admissible had been set out in Appendix I, Part I. The item under the general heading "Machinery and Plant" under the sub-heading '' E '' read, at the material time, as follows:

"(1) Earth moving machinery employed in heavy construction works such as dams, tunnels, canals, etc. (N.E.S.A.):

(a) Tractors

(b) Dumpers." Under another sub-heading ''M'', items 4 and 5 read as follows :

"(4) Motor buses, motor lorries, motor taxies, motor tractors (N.E.S.A.)

(5) Motor cars (N.E.S.A)"

8. Mr. Ray contended for the purposes of the I.T. Act, dumpers had been specifically put in a separate category other than that of motor buses and other motor vehicles and lorries. Therefore, there was no reason to disallow the development rebate for dumpers. Mr. Ray submitted that the Tribunal erred in basing its decision only on the superficial resemblance between a dumper and a motor lorry without going further into the matter. As recorded in the statement

of case the Tribunal decided the question by only looking at a photograph. Mr. Ray further submitted that under the Road Transport Corporations Act, 1950, the expressions "Road transport service", "Vehicle", has been defined as follows :

" ''Road transport service'' means a service carrying passengers or goods or both by road in vehicles for hire or reward."

" ''Vehicle'' means any mechanically propelled vehicle, used or capable of being used for the purpose of road transport, and includes a tramcar, a trolly-vehicle and a trailer."

9. He submitted that if such definitions were kept in view it could not be said that dumpers were road transport vehicles within the accepted meaning of the term.

10. Mr. Ajit Sengupta, learned counsel for the revenue, contended on the other hand that whether dumpers were road transport vehicles or not was a question of fact and that the Tribunal had found as a fact that dumpers were road transport vehicles. This finding not having been challenged, the assessee cannot ask the court now to hold otherwise.

11. Mr. Sengupta cited the departmental circular relied on by the assessee, which reads as follows :

"2. Development rebate is not admissible for and from the assessment year 1960-61 in respect of such vehicles as can be properly described as road transport vehicles, e.g., motor cars, motor lorries, buses, trucks, trailers, etc. The benefit of development rebate, should not, however, be refused in respect of tractors, bull-dozers, etc."

12. Mr. Sengupta submitted that dumpers were specifically excluded from the said circular, and, therefore, the assessee could not obtain any assistance from the same. Mr. Sengupta also submitted that Appendix I in Part I of the I.T. Rules, 1962, related to depreciation and had nothing to do with the allowance or disallowance of development rebate. The difference in category made between a dumper and other motor vehicles in those rules was only for the purpose of application of special rates of depreciation and for no other reason.

13. Mr. Sengupta lastly cited a decision of the Supreme Court in Bolani Ores Ltd., , where the Supreme Court considered, inter alia, the question whether dumpers could be motor vehicles within the meaning of the respective State Motor Vehicles Taxation Acts. The present assessee was a party to the said proceedings before the Supreme Court. The Supreme Court considered the functions and the mechanism of a dumper and held that they were adapted for use on roads and thus came within the definition of motor vehicles as in the relevant motor vehicles taxation legislation.

14. Mr. Sengupta invited us to follow the said decision and hold that dumpers were motor vehicles and necessarily road transport vehicles.

15. The form in which the question has been referred precludes the answer as

suggested on behalf of the revenue. We also feel that the question in this form does not arise from the order of the Tribunal. It does not appear from the order of the Tribunal that dumpers were found or held to be earth moving machinery employed in the mining business of the assessee.

16. But it also appears to us that the Tribunal has taken into account only one aspect of the matter, namely, the resemblance of dumper with a motor lorry and nothing else. The Tribunal apparently did not consider the effect of the categorisation in Part I, Appendix I of the I.T. Rules, 1962. The Tribunal also did not consider at what rate depreciation was in fact allowed in the instant case to the dumpers in question, that is, whether they were allowed depreciation in the category of earth moving machinery or in the category of ordinary motor lorries. The Tribunal did not consider the exact function of the dumpers nor did it make any enquiry as to what use the said dumpers were being put by the assessee. AH these are relevant aspects of the enquiry which it will be necessary to undertake in order to arrive at the correct answer.

17. In our view, the decision of the Supreme Court in the case of Bolani Ores Ltd., , has no application in the facts and circumstances before us. We cannot take into account the facts as found by the Supreme Court and import the same into this reference. In any event, the question whether a dumper is a motor vehicle within the meaning of a State Motor Vehicles Taxation Acts or not has no bearing on the question before us, which is whether a dumper is a road transport vehicle within the meaning of Section 33 of the I.T. Act.

18. For the reasons given above, we decline to answer the question. We direct the Tribunal to dispose of the matter in accordance with law after enquiries on the lines indicated earlier. The reference is disposed of accordingly. There will be no order as to costs.

Bimal Chandra Basak, J.

19. I agree.

