(1986) 03 GUJ CK 0023

In the Gujarat High Court

Case No : Income-tax Reference No''s. 312 of 1983 and 28 of 1985 (R.A. No''s. 18 and 19 of 1983)

Shiv Construction Co. APPELLANT

Vs

Commissioner of Income Tax RESPONDENT

Date of Decision : 07-03-1986

Acts Referred:
Income Tax Act, 1961 — Section 32

Citation : (1986) 55 CTR 37 : (1987) 165 ITR 160

Hon'ble Judges : R.C. Mankad, J;A.P. Ravani, J

Bench : Division Bench

Advocate : J.P. Shah, for the Appellant; S.N. Shelat, for the Respondent

Judgement

R.C. Mankad, J.—The assessee, a partnership firm, is engaged in the business of construction of roads and buildings. In the course of

assessment for the assessment years 1974-75 and 1975-76, the Income Tax Officer allowed depreciation at the rate of 30% on the dumpers used

by the assessee for the purpose of its business. The depreciation was so allowed on the assumption that dumpers were motor lorries or other road

transport vehicles entitled to such depreciation under Part III-D(9) of the depreciation schedule attached to the Income Tax Rules. However, the

assessee''s claim for development rebate on those dumpers was disallowed by the Income Tax Officer. The view taken by the Income Tax Officer

was confirmed by the Appellate Assistant Commissioner. The assessee carried the matter in appeal before the Income Tax Appellate Tribunal

(""Tribunal"" for short) and claimed that dumpers were machinery and that the assessee was entitled to development rebate on the dumpers. The

Tribunal accepted the assessee''s claim and allowed the assessee''s claim for development rebate. On the basis of the Tribunal''s decision, the

Income Tax Officer rectified the assessment order and held that dumpers being tools of business in the hands of assessee and not motor lorries or

other transport vehicles, the assessee was not entitled to claim depreciation at the rate at which it claimed. Rectification order passed by the

Income Tax Officer was confirmed by the Appellate Assistant Commissioner and the Tribunal. It is in the background of the above facts that the

following question has been referred to us u/s 256(1) of the Income Tax Act, 1961, in Income Tax Reference No. 312 of 1983 :

Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in upholding the rectification order passed by the Income

Tax Officer u/s 154 of the Income Tax Act, 1961, withdrawing 30% depreciation on dumpers granted by him in the order of assessment ?

2. An identical question, namely, whether the dumpers are road transport vehicles or not arose in the assessment year 1980-81. In that year also,

the assessee claimed depreciation at 30% on the dumpers on the ground that they were road transport vehicles. However, in view of the decision

of the Tribunal for the assessment year 1974-75 that dumpers were not road transport vehicles and they were machinery or tools used for the

assessee''s business, the assessee''s claim for depreciation at 30% was not held admissible. The view taken by the Income Tax Officer was

confirmed by the Appellate Assistant Commissioner and the Tribunal. The assessee being dissatisfied with the disdain of the Tribunal, the following

question has been referred to us for our opinion by the Tribunal for the assessment year 1980-81 in Income Tax Reference No. 28 of 1985 :

Whether the Tribunal was right in law in holding that the assessee was not entitled to depreciation at 30% on dumpers ?

3. So far as the assessment for the assessment year 1974-75 is concerned, the stand of the Revenue was that since the dumpers were road

transport vehicles, the assessee was not entitled to development rebate. The Tribunal, however, held that since the dumpers were machinery or

tools used for the purpose of construction work of the assessee, the assessee could not be denied development rebate on the ground that they

were road transport vehicles. In the result the Tribunal allowed the assessee''s claim for development rebate on the dumpers. The Revenue being aggrieved by the decision of the Tribunal, the following question was referred to us for our opinion in Income Tax Reference No. 533 of 1980

Commissioner of Income Tax Vs. Shiv Constructions, which arose for the assessment year 1974-75 :

Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in law in holding that the dumpers in the

hands of the assessee were not road transport vehicles, but were the tools of the business of the assessee and, consequently, the assessee was

entitled to get development rebate on the cost of dumpers ?

4. Now, learned counsel appearing for the assessee in Income Tax Reference NO. 533 of 1980, conceded that dumpers owned by the assessee

were road transport vehicles and consequently the assessee was not entitled to development rebate. In view of the concession made on behalf of

the assessee, the aforesaid question referred to us in Income Tax Reference No. 533 of 1980 was answered in the negative and against the

assessee.

5. In view of the answer given by us in Income Tax Reference No. 533 of 1980 Commissioner of Income Tax Vs. Shiv Constructions, , the

assessee must succeed in Income Tax References Nos. 312 of 1983 and 28 of 1985. The Revenue cannot take up an inconsistent stand that the

dumpers were road transport vehicles for the purpose of development rebate and they were not so for the purpose of depreciation. In fact, the

stand of the Revenue all along has been that dumpers were road transport vehicles and, therefore, the assessee was not entitled to development

rebate thereon. It was only when the Tribunal took the view that dumpers were machinery or tools used for the purpose of business of the

assessee and that, for that reason, the assessee cannot be denied development rebate on the ground that they were road transport vehicles that the

Revenue changed its stand and the assessment orders for the assessment years 1974-75 and 1975-76 came to be rectified and, as stated above,

for the assessment year 1980-81, the assessee was denied depreciation on the dumpers as road transport vehicles. However, in view of the fact

that the Revenue has succeeded in Income Tax Reference No. 533 of 1980, as a necessary corollary, the assessee must succeed in Income Tax

References Nos. 312 of 1983 and 28 of 1985. Dumpers are road transport vehicles as contended by the Revenue in Income Tax Reference No.

533 of 1980, and, consequently, the assessee is entitled to depreciation on that basis.

6. In the result, we answer the questions referred to us in Income Tax Reference No. 312 of 1983 and Income Tax Reference No. 28 of 1985, in

the negative and against the Revenue.

7. References answered accordingly with no order as to costs.

8. A copy of this judgment should be sent under the seal of this court and under the signature of the Registrar to the Income Tax Appellate

Tribunal, Ahmedabad Bench, Ahmedabad.