

(2001) 252 ITR 412**High Court Of Punjab And Haryana At Chandigarh****Case No:** Income-tax Reference No. 55 of 1994 and I.T.A. No"s. 68, 69 and 122 of 2000Commissioner of
Income Tax

APPELLANT

Vs

Chopra Brothers India
(P.) Ltd.RESPONDENT

Date of Decision: Sept. 20, 2001**Acts Referred:**

- Income Tax Act, 1961 - Section 119, 119(1), 119(2), 144, 145

Citation: (2001) 252 ITR 412**Hon'ble Judges:** Jawahar Lal Gupta, J; Ashutosh Mohunta, J**Bench:** Division Bench**Advocate:** R.P. Sawhney and Rajesh Bindal, for the Appellant; A.K. Mittal and Akshay Bhan, for the Respondent

Judgement

Jawahar Lal Gupta, J.

These four cases raise a common question regarding the claim of the assessee for deduction on account of depreciation. Learned counsel for the parties have referred to the facts in ITR No. 55 of 1994. These may be briefly noticed.

2. The assessee is a private limited company. It is engaged in the execution of contracts for construction. For the assessment year 1988-89, the assessee filed a return declaring an income of Rs. 48,810. During the accounting period, it had received a total amount of Rs. 48,39,648. Out of this, a sum of Rs. 9,17,104 was paid to sub-contractors. Resultantly, the assessee had received gross payments of Rs. 39,22,544.

3. On a consideration of the matter, the Income Tax Officer found that there were defects in the maintenance of accounts. The provisions of Section 145 were invoked. The book results were rejected. The taxable income was worked out by applying a net profit rate of 10 per cent. Certain additions and deductions were made. The total taxable income was

fixed at Rs. 3,91,340.

4. The assessee appealed to the Commissioner. It was, inter alia, contended that the Assessing Officer should have allowed depreciation on the machinery used in the execution of works as claimed in the return of income. The action of the Assessing Officer was contrary to the circular issued by the Board on August 31, 1965. The Commissioner rejected the assessee's claim. It was held that "when net profit was estimated, it must be presumed that all permissible allowances were made and income so determined should be deemed to have covered all the expenses including depreciation . . ." The circular issued by the Board was held to be inapplicable.

5. Aggrieved by the order of the Commissioner, the assessee filed an appeal before the Tribunal. On a difference of opinion, the matter was placed before the President. Vide order dated March 31, 1993, the President accepted the assessee's claim. In view of the opinion of the majority, the assessee's claim with regard to deduction on account of depreciation was accepted.

6. The Revenue filed a petition u/s 256(1) of the Income Tax Act, 1961. Accepting the Revenue's claim, the Tribunal has referred the following question for the opinion of this court :

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in separately allowing depreciation on machinery when the net profit rate of 10 per cent, on contract receipts had been adopted ?"

7. This is how the matter has travelled to this court. In the connected cases, the claim for deduction on account of depreciation was disallowed by different orders of the Tribunal. Aggrieved by the orders, the assessees have filed these three appeals.

8. Mr. R.P. Sawhney, counsel for the Revenue, contended that the taxable income having been determined by applying the principle of net profit, all admissible allowances should be deemed to have been taken into consideration. The claim made on behalf of the Revenue was controverted by Mr. A.K. Mittal, counsel for the assessees.

9. It is undoubtedly true that if the Assessing Officer is not satisfied about the correctness or completeness of the accounts of the assessee, he can proceed to make best judgment assessment. However, even while doing so, the Assessing Officer is bound to take into account all relevant material on the record. The consideration cannot be assumed. It must be apparent from the order.

10. What is the position in the present case ? The assessee had claimed depreciation. It had furnished all the relevant particulars. Yet, the Assessing Officer had not said a word about the claim. It was not even suggested that he was fixing the net profit rate at 10 per cent, after allowing the claim for depreciation. In this situation, it cannot be said that the Assessing Officer had taken all the material into consideration as required u/s 144 of the

Act.

11. There is another aspect of the matter. Section 119 of the Income Tax Act authorises the Board to issue orders, instructions and even directions to the Income Tax authorities for the proper administration of the Act. The authorities are required to "observe and follow such orders, instructions and directions of the court". It is apparently in exercise of this power that the Board had issued the circular dated August 31, 1965. In this circular, it has been, inter alia, provided that the "mere fact that net profits had been estimated could not be a ground for saying that depreciation claimed in the returns had been duly allowed as provided under the Act". Thus, the Board had instructed the authorities that where "it is proposed to estimate the profit and the prescribed particulars have been furnished by the assessee, the depreciation allowance should be separately worked out". Still further, it was directed that "even where best judgment is made, the above procedure should be adopted provided the required particulars have been furnished by the assessee".

12. Section 119 makes it mandatory for the Income Tax authorities to follow the orders, instructions and directions issued by the Board. The directions given in the circular do not fall within the exceptions embodied in the proviso to Sub-section (1) of Section 119. It was not even suggested that these are contrary to any statutory provision. Thus, these were binding on the authorities. These had to be followed. Since the instructions of the Board had not been observed, the contention raised on behalf of the Revenue cannot be accepted. The rule in this behalf has been clearly enunciated by their Lordships of the Supreme Court in [Navnitlal C. Javeri Vs. K.K. Sen, Appellate Assistant Commissioner of Income Tax, "D" Range, Bombay](#), and [Paper Products Ltd. Vs. Commissioner of Central Excise](#), .

13. Mr. Sawhney referred to the decision of their Lordships of the Allahabad High Court in [Saraya Engineering Works Vs. Commissioner of Income Tax](#), , to contend that where the income is estimated, the claim for depreciation should be deemed to have been taken into consideration.

14. With utmost respect, we are unable to follow the view taken by the Bench. The necessity for a detailed examination of the judgment is obviated by the fact that in a later decision in [Commissioner of Income Tax Vs. Bishambhar Dayal and Co.](#), , another Bench of the Allahabad High Court had distinguished the decision in [Saraya Engineering Works Vs. Commissioner of Income Tax](#), on the basis of the circular dated March 31, 1965. Their Lordships were pleased to hold that (headnote): "where income was proposed to be computed by applying a flat rate and the assessee had furnished the prescribed particulars for the claim in respect of depreciation, the depreciation should be allowed separately and deducted out of the gross profits".

15. Mr. Sawhney contended that u/s 29, the income is determined by the Assessing Officer after taking into consideration all relevant factors. Thus, it should be assumed that the authority had allowed the admissible deductions.

16. The contention is untenable. A perusal of Section 29 shows that the taxable income has to be computed after taking into consideration the provisions contained in Sections 30 to 43. u/s 32, the assessee is entitled to claim depreciation. u/s 144, the Assessing Officer is bound to take into consideration the entire material on the record. Thus, in a case where the assessee makes a specific claim for depreciation and gives the information as required u/s 32, the Assessing Officer is bound to take the claim of the assessee into consideration. This consideration of the material should be apparent from the order. There is no room for any assumption.

17. In this context, it deserves notice that with effect from April 1, 1994, Parliament has made a special-provision for computing profits and gains of business of civil construction, etc., by introducing Section 44AD. It was, inter alia, provided that in the case of an assessee engaged in the business of civil construction or supply of labour for that purpose, "a sum equal to 8 per cent, of the gross receipts paid or payable to the assessee in the previous year on account of such business . . . shall be deemed to be the profits and gains.. . chargeable to tax .. ,". In Sub-section (2), it has been stipulated that "any deduction allowable under the provisions of sections 30 to 38 shall, for the purposes of Sub-section (1), be deemed to have been already given full effect to and no further deduction under those sections shall be allowed". Thus, it is only with effect from April 1, 1994, that Parliament has provided for a fictional assumption that the deduction shall be deemed to have been allowed. This provision clearly militates against the assumption sought to be raised by counsel for the Revenue in the present case.

18. No other point was raised.

19. In view of the above, the question as noticed above is answered in favour of the assessee. The majority view of the Income Tax Appellate Tribunal is upheld. It is further held that in all cases (relating to the period prior to April 1, 1994) where best judgment assessment is made by fixing a rate of net profit, the assessee's claim for deduction on account of depreciation, cannot be deemed to have been considered. It has to be separately taken into account provided the prescribed particulars have been furnished by the assessee.

20. The appeals filed by the assessees are, accordingly, allowed. Consequential orders shall be passed by the concerned authorities. In the circumstances, there will be no order as to costs.