(2001) 07 P&H CK 0214

High Court Of Punjab And Haryana At Chandigarh

Case No: Income-tax Reference No''s. 84 and 85 of 1989

Ram Nath Jindal and Another		APPELLANT
	Vs	
Commissioner of Income Tax		RESPONDENT

Date of Decision: July 19, 2001

Acts Referred:

- Income Tax Act, 1961 - Section 143(1), 16, 32, 32(1), 34

Citation: (2001) 252 ITR 590

Hon'ble Judges: Jawahar Lal Gupta, J; Ashutosh Mohunta, J

Bench: Division Bench

Advocate: A.K. Mittal, Akshay Bhan, Arihant Jain and Arun Jindal, for the Appellant; R.P. Sawhney and Rajesh Bindal, for the Respondent

Judgement

Jawahar Lal Gupta, J.

We have two references made by the Income Tax Appellate Tribunal at the instance of the two assessees, viz., Shri Ram Nath Jindal and Shri Jagjiwan Kumar. The basic issue is--whether depreciation can be deemed to have been granted despite the fact that the assessee had not claimed it during the relevant years? The following two questions have been referred by the Tribunal for the opinion of this court:

"1. Whether, on the facts and circumstances of the case, the Income Tax Appellate Tribunal was right in law in having interpreted the orders passed by the Income Tax Officer for the assessment years 1980-81 and 1981-82 to mean that the depreciation had actually been worked out and separately allowed by the Income Tax Officer for these two years on truck No. HRN 345?

2. Whether, on the facts and circumstances of the case, the Income Tax Appellate Tribunal was right in law in holding that the Income Tax Officer had correctly worked out the profit u/s 41(2) on the sale of truck No. HRN 345 ?"

2. The relevant facts as disclosed in the statement of the case in respect of one of the cases may be briefly noticed.

3. Mr. Ram Nath Jindal had purchased a truck No. HRN 345 in the assessment year 1978-79 for Rs. 62,000. He had sold it for Rs. 64,300 and claimed depreciation at 30 per cent. This claim was allowed. From the assessment years 1979-80 to 1981-82, the assessee did not claim any depreciation. On this basis, the assessee claimed that the written down value of Truck No. HRN 345 was Rs. 43,400 (Rs. 62,000 minus Rs. 18,600). Thus, he claimed that the profit was Rs. 20,900 (Rs. 64,300 minus Rs. 43,400). The Income Tax Officer did not accept this position. If was held that the Department had allowed the depreciation "as per rules while completing the assessment proceedings". The assessees filed an appeal. It was dismissed by the Appellate Assistant Commissioner. He approached the Tribunal and contended that no depreciation having been claimed during the relevant years, it could not be deemed to have been granted. The Tribunal rejected this contention. Hence, the reference.

4. Mr. Ajay Mittal, counsel for the assessee, contended that the Department has erred in determining the written down value of the vehicles. The assessee having not claimed depreciation for a period of three years, the Department has erred in determining the written down value. Thus, both the questions should be answered in favour of the assessee. On the other hand, Mr. R.P. Sawhney, counsel for the Revenue submitted that the High Court cannot embark upon a reappraisal of the evidence. The reference has to be answered on the basis of the facts as found by the Tribunal.

5. "Depreciation" in its ordinary sense means "loss of value". In case of commercial vehicles, the loss usually occurs on account of wear and tear during use. Thus, the Legislature has made provision allowing the benefit of depreciation to the assessee "on the written down value at the prescribed rate". Specific provision in this behalf has been made in Section 32 of the Act. It is implicit in the provision that the assessee has to disclose the value of the vehicle and can claim depreciation at the prescribed rate. However, the provision as its exists till today does not provide that depreciation shall be deemed to have been claimed and granted even when the assessee has made no claim in that behalf. To put the matter beyond any shadow of doubt, the Central Board of Direct Taxes had issued Circular No. 29-D (XIX-14) on August 31, 1965. Paras. 2 and 3 are relevant and deserve to be noticed. These read as under :

"The Board consider 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. In all such cases the gross profit should be estimated and the deductions and allowances including the depreciation allowance should be separately deducted from the gross profit. If it is considered that the net profit should be estimated, it should be estimated subject to the

allowance for depreciation and the depreciation allowance should be deducted therefrom.

3. Even where best judgment is made, the above procedure should be adopted provided the required particulars have been furnished by the assessee. In cases where required particulars have not been furnished by the assessee and no claim for depreciation has been made in the return, the Income Tax Officer should estimate the income without allowing depreciation allowance. In such cases, the estimate of net profit would be naturally higher than otherwise and the fact that the estimate has been made without considering depreciation allowance may be clearly brought out in the assessment order. In such cases, the written down value of depreciable assets would continue to be the same as at the end of the preceding year as no depreciation would actually be allowed in the assessment year."

6. A perusal of the above shows that the depreciation allowance has to be "separately worked out". The assessee has to furnish the "required particulars". In a case where the assessee does not furnish the particulars and makes "no claim for depreciation in the return", the Income Tax Officer is expected to "estimate the income without allowing depreciation allowance". The circular is based on a simple principle, namely :-

"Depreciation is a benefit. It can be allowed only when claimed, it cannot be ''thrust'' upon the assessee."

7. The circular and the legal position was clearly noticed by a Bench of this court in Beco Engineering Co. Ltd. Vs. Commissioner of Income Tax, . The principle was reiterated in Commissioner of Income Tax Vs. Friends Corporation, . It was approved by their Lordships of the Supreme Court in CIT v. Mahendra Mills [2000] 243 ITR 56, in the following words (headnote) :

"Allowance of depreciation is calculated on the written down value of the assets, which written down value would be the actual cost of acquisition less the aggregate of all deductions ''actually allowed'' to the assessee for the past years. ''Actually allowed'' does not mean ''notionally allowed''. If the assessee has not claimed deduction of depreciation in any past year it cannot be said that it was notionally allowed to him. A thing is ''allowed'' when it is claimed. A subtle distinction is there when we examine the language used in Section 16 and Sections 34 and 37 of the Act. It is rightly said that a privilege cannot be to a disadvantage and an option cannot become an obligation. The Assessing Officer cannot grant depreciation allowance when the same is not claimed by the assessee."

8. Thus, it is clear that the Assessing Officer cannot grant the benefit of depreciation when it has not been claimed by the assessee. This position is further obvious from the fact that in the Finance Act, 2001, Explanation 5 has been inserted in Section 32(1)(ii) with effect from April 1, 2002. It has been, inter alia, provided that the provision shall apply "whether or not the assessee has claimed the deduction in

respect of depreciation in computing his total income". It is no doubt true that the Explanation appears to have been added "for the removal of doubts". However, the fact remains that prior to the insertion of the Explanation, there was no express provision by which depreciation could be fictionally deemed to have been claimed and granted.

9. What is the position in the present case? In the statement of case, reference has been made to the order of the Income Tax Officer. A copy has been produced as annexure A. At pages 11-12 of the paper book, the following position has been noticed:

"The assessee has purchased a Truck No. 345 in the assessment year 1978-79 at Rs. 62,000. During the assessment year 1978-79, the assessee has claimed depreciation and allowed at 30 per cent. But in the assessment year 1979-80, the assessee has not claimed depreciation but depreciation has been allowed as per rules while completing the assessment proceedings. In the assessment year 1981-82, the assessee has not claimed depreciation but depreciation is allowed as per rules while completing the assessment proceedings. This was not agitated by the assessee in appeal."

10. On this basis, the written down value of the vehicle was computed. It is, thus, clear that the assessee had not claimed the depreciation. Resultantly, it could not be allowed. It is the admitted position that the Assessing Officer had passed orders u/s 143(1) during the relevant years. Since the assessee had not claimed any depreciation, it was not possible for the authority to allow it. Even otherwise, nothing has been pointed out from the record to show that, in fact, a specific order allowing the depreciation had been passed by the Assessing Officer during the relevant years. Resultantly, the claim as made by the assessee with regard to the written down value of the vehicle had to be accepted on the basis that the depreciation had not been claimed during the relevant years. The finding of the Tribunal that "it should be presumed that the depreciation would have been allowed to the assessee in accordance with law" cannot be sustained.

11. Mr. Sawhney contended that the High Court cannot embark upon a reappraisal of the evidence. It is undoubtedly so. However, we have proceeded on the admitted facts.

12. No other point has been raised in either of the references.

13. In view of the above, we answer both the questions in the negative and in favour of the assessee. No costs.