

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/TAX APPEAL No. 414 of 2018
With
R/TAX APPEAL No. 415 of 2018
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With
R/TAX APPEAL No. 420 of 2018
With
R/TAX APPEAL No. 421 of 2018
With
R/TAX APPEAL No. 422 of 2018
With
R/TAX APPEAL No. 423 of 2018
With
R/TAX APPEAL No. 424 of 2018
With
R/TAX APPEAL No. 425 of 2018

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PR. COMMISSIONER OF INCOME TAX, RAJKOT-1

Versus

DURGA CONSTRUCTION COMPANY

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Appearance :

Mrs MAUNA M BHATT, Advocate for the PETITIONER

Mr SN DIVATIA, Advocate for the RESPONDENT

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CORAM: HONOURABLE Mr. JUSTICE AKIL KURESHI
and
HONOURABLE Mr. JUSTICE B.N. KARIA
1st May 2018

COMMON ORDER (PER : HONOURABLE Mr. JUSTICE AKIL KURESHI)

All these appeals arise out of common background, though involving different assesses.

We may record facts from Tax Appeal No. 414 of 2018, which is treated as a lead matter.

This appeal is filed by the Revenue challenging the judgment of the Income Tax Appellate Tribunal dated 29th August 2017, raising following questions for our consideration :

[A] “Whether on the facts and in circumstance of the case of the Appellate Tribunal is right in law in defining the nature of business of the assessee as transporter and in confirming the findings of the CIT [A] that the assessee is entitled to higher rate of depreciation @ 30% on dumpers as against depreciation @ 15% allowed by the A.O ?”

[B] “Whether the Appellate Tribunal has erred in law to appreciate the fact that if the vehicle/dumpers were given on hire, then the assessee must have earned income from hiring out of these equipments ?”

The respondent-assessee is a partnership firm and is engaged in the business of providing earth moving equipments on hire and

undertaking mining contracts, cargo handling and transportation contracts. For the assessment year 2012-2013, the assessee filed return of income in which the assessee had claimed depreciation at a higher rate on dumpers, tripper which were used by the assessee in its business of running them on hire. The Assessing Officer disputed such a claim and called upon the assessee to justify the same. In response to the queries raised by Assessing Officer, the assessee contended that the claim of the assessee would fall under sub-item 2[ii] of Item III of Appendix I to the Income-tax Rules, 1962 which provides for higher rate of depreciation on motor buses, motor lorries and motor taxis used in a business of running them on hire. The assessee relied on various judgments of different High Courts and the Supreme Court. The assessee also relied on CBDT Circulars No. 609 and 652 dated 29th July 1991 and 14th June 1993 respectively. The Assessing Officer, however, was unmoved. He rejected the assessee's claim for higher depreciation and granted only the normal rate of depreciation on such equipments. The principal reason for his decision was that in his opinion, the assessee was not in the business of running motor lorries on hire. Therefore, the assessee carried the matter in appeal.

Before the CIT [A], assessee pointed out that the assessee was granted contract for providing equipments and manpower for

mining and transportation of mined material. The assessee relied on the tender notices and the tender terms which *inter alia* provided that the tender was for hiring of such machinery for all kinds of strata excavation and transportation. On the basis of such tender terms, the assessee argued that the mines or cargo do not belong to the assessee.

The assessee has been awarded contract for providing equipments on hire with manpower to execute the work of excavation, loading and removal of minerals from one place to another. The entire operation is scheduled and controlled by the principal. The assessee is required to provide stipulated equipments and vehicles on hire. The assessee would not be allowed to remove any equipments or vehicles provided under the contract without prior permission of the principal. The business of the assessee-firm itself was providing equipments and motor vehicles on hire.

CIT [A] accepted the assessee's contention and reversed the decision of Assessing Officer, relying on the earlier decision. The Appellate Commissioner has also relied on CBDT Circular No. 652 which provides that under sub-item 2[ii] of Item III of Appendix I to the Rules, higher rate of depreciation would be admissible on motor buses, motor lorries and motor taxis used in the business of running them on hire. It was clarified that higher depreciation will

also be admissible on motor lorries used in the assessee's business of transportation of goods on hire.

The revenue carried the matter in appeal before the Tribunal. The Tribunal confirmed the view of the CIT [A] taking note of the scope of work awarded to the assessee under the tender terms as also placing reliance on the CBDT Circular No. 652 dated 14th June 1993.

Against such judgment, the Revenue has filed the present appeal.

Facts in all other appeals are substantially similar and are therefore not separately recorded.

Section 32 [1] of the Income-tax Act, 1961 [**“the Act”** for brevity] provides for depreciation in respect of buildings, machinery, plant or furniture, being tangible assets as well as certain intangible assets owned wholly or partly by the assessee and used for the purpose of the business or profession, at the prescribed rates. New Appendix I, which is applicable for AY 2006-2007 and onwards, in Part-A contends specific rate of depreciation for *“tangible assets”*. Capital-III thereof pertains to *“machinery and plant”*. Under sub-item [2] of Item [3] (iii), the rate of depreciation on *“motor buses, motor lorries and motor taxis used in the business of running them on hire”* is prescribed @

30%. It is in this context, we have to test the correctness of the view taken by CIT [A] and the Tribunal. Revenue's main contention appears to be that the assessee had not given the said machinery on hire since the assessee was awarded the contract for mining. However, we have noticed some of the leading terms of the tender. These terms *inter alia* required the assessee to provide machinery for hire for excavation of overburden; transportation of such excavated overburden minerals; transportation of minerals from mines to pit-head, stock piles or at any other place, and the transportation of overburden of minerals and excavated minerals to be done by running motor vehicles such as tippers, dumpers, etc. Essentially, therefore, the assessee was awarded contract for providing such equipments on hire. It was in this context, the assessee has highlighted that the assessee has no control over the equipments so hired and it was the principal which would decide to deploy the equipments at the appropriate place.

From the material available on record though the assessee essentially was awarded contract for providing specialized equipments and trained manpower for mining and transportation of excavated minerals on hire, the terms of the tender and the eventual contract awarded would suggest that the assessee was given the work of mining. The assessee was essentially required to

provide equipments and manpower on hire. In view of such discussion, we find no error in the view taken by the Tribunal. Even if the assessee had used such equipments and manpower for its direct mining operations for the contract, if it was so awarded, we wonder whether that would make any difference particularly in view of CBDT Circulars No. 609 and 652 and the decision of the Supreme Court in case of **I.C.D.S Limited v. Commissioner of Income-Tax & Anr.**, reported in [2013] 350 ITR 527 (SC). However, when this issue does not arise for direct consideration, we need not conclude the same.

All in all, we see no error in the view taken by the Tribunal. No question of law arises.

Tax Appeals are dismissed.

[Akil Kureshi, J.]

[B.N Karia, J.]

Prakash