IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL No.100 of 2000
With
TAX APPEAL No.103 of 2002
To
TAX APPEAL No.105 of 2002

Bhagwati Appliance (Now Dairyden Ltd.) - Appellant(s)

Versus

I.T.O. - Opponent(s)

MR SN DIVATIA for Appellant(s) : 1,
MR KM PARIKH for Opponent(s) : 1,

Coram: Ms. Justice HARSHA DEVANI and Ms.Justice BELA TRIVEDI

Date of Judgment: 01/04/2011

J U D G M E N T

(Per: Ms. Justice HARSHA DEVANI)

1.In these appeals under section 260A of the Income Tax Act, 1961 (the Act), common question of law is involved and the parties are also common, hence the appeals were heard together and are decided by this common judgment.

2.In Tax Appeal No.100 of 2000 the appellant assessee challenged the order dated 28.01.2000 made by the Income Tax Appellate Tribunal, Ahmedabad Bench 'C' in I.T.A.No.498/AHD/1994 for assessment year 1989-1990. In Tax Appeal No.103 of 2000 the appellant has challenged order dated 7.11.2001 made in I.T.A. No.5400/Ahmedabad/1994 for assessment year 1990-91 and in Tax Appeals No.104 and 105 of 2002 the appellant has challenged common order dated 28.9.2001 made in ITA No.548 and 549/Ahd/95 for assessment years 1991-92 and 1992-93.

3.While admitting the appeals, the Court had formulated the following question of law in each of the appeals:

"Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in law in holding that the appellant was not entitled to depreciation allowance under Entry No.III(2)(ii) of Appendix-I of Income Tax Rules, 1962, in respect of vehicles given on lease?"

4.The relevant assessment years are 1989-1990, 1990-1991, 1991-1992 and 1992-1993 respectively. The sole issue in the present cases relates to the claim of depreciation. The assessee company is a leasing company which is engaged in leasing of plant and machinery, motor-cars, etc. to its clients. The assessee had claimed depreciation on motor vehicles at the rate of 50%. The Assessing Officer, while framing assessment under section 143(3) of the Act, held that as the vehicles were not run on hire by the assessee, depreciation on the written down value was allowable at 33% and not 50% as claimed. Being aggrieved, the assessee preferred appeals before the Commissioner (Appeals) but did not succeed. The assessee carried the matters in second appeals before the Tribunal, but failed.

5.Mr. S. N. Divatia, learned advocate appearing on behalf of the appellant submitted that the Tribunal had erred in holding that the vehicles given on lease by the appellant were covered by Entry No.III(2)(i) of Appendix-I of the Income Tax Rules, 1962 (the Rules) so that the appellant was entitled to depreciation thereon at the rate of 33.33% as against 50% claimed under Entry No.III(2)(ii) of the Rules. It was submitted that the Tribunal had failed to appreciate that if the vehicles are used for the business of running them on hire which may be by the owner himself or by the lessee to whom the vehicles are given on lease, the higher depreciation would be admissible under Entry III(2)(ii) of Appendix-I of the Rules. According to the learned advocate, the test for deciding as to whether an assessee is entitled to depreciation under Entry III(2)(ii) of the Appendix-I is that once the vehicles are put to use by the third party in consideration of rent, then higher depreciation is available. In support of his submissions, the learned advocate placed reliance on the decision of the Karnataka High Court in the case of **Commissioner of Income Tax and Another v. BPL Sanyo Finance Private Ltd.,(2006) 287 ITR 69** as well as the decision of the Kerala High Court in the case of **Commissioner of Income Tax v. Balakrishna Transports, (1999) 233 ITR 133**, wherein the Court has held that the real question was that whether the assessee engaged in the business of plying vehicles as an activity used the concerned vehicles for hire or not. It was submitted that in the present case, the petitioner had leased the vehicle in question, which is a lorry being insulated vehicle on to Dharmendra Marketing Company and the vehicle is run by the contractor of that company on contract basis for transportation of ice-cream and other products of the said company. According to the learned advocate, there is no difference between 'lease' and 'hire' so far as motor vehicles are concerned and as such, the appellant is entitled to depreciation on the said motor vehicle at the rate of 50% instead of 33.33% allowed by the authorities below and as such the appeals deserve to be allowed.

6.On the other hand, Mr. K. M. Parikh, learned Standing Counsel for the respondent supported the orders passed by the authorities below. It was submitted that the case of the appellant throughout, till the High Court, is that it has given the vehicles in question on lease. Inviting attention to the question formulated at the time of admitting the appeal, it was submitted that from the very frame of the question it is apparent that it is the specific case of the appellant that the vehicles have been given on lease. According to the learned counsel, it is not the case of the appellant that the vehicles are given on hire and as such,

in second appeal the assessee cannot be permitted to change the factual matrix. It was submitted that the source of income of assessee is lease rent and not hire charges and that all the authorities below have recorded findings of fact to the effect that the assessee is not carrying on the business of hire. Inviting attention to Entry No.III of Appendix-I of the Rules, it was submitted that from the language of the entry it is apparent that the same does not contain the expression 'lease' and that while interpreting the said entry, the Court cannot change its language by interpreting 'hire' to mean 'lease' as the Legislature has consciously used the word 'hire'. Reliance was placed upon the decision of the Supreme Court in the case of **Commissioner of Income Tax v. Gupta Global Exim P. Ltd., (2008) 305 ITR 132 (SC),** wherein the Court had held that under item (2)(ii) of heading III in Appendix-I to the Rules, the higher rate of depreciation is admissible on motor trucks used in a business of running them on hire. Therefore, the user of the same in the business of the assessee of transportation was the test. It was, accordingly, submitted that in the present case, from the findings of fact recorded by the authorities below, it is apparent that the appellant is not carrying on the business of running the motor vehicles on hire and as such, the test regarding user of the same in the business of transportation is not satisfied. It was submitted that in the circumstances, the impugned orders being just, legal and proper do not warrant any interference by this Court.

7. The facts are not in dispute. The Assessing Officer, the Commissioner (Appeals) as well as the Tribunal have recorded that the assessee company is a leasing company which is engaged in leasing plant, machinery, motor vehicles, etc. to its clients. Before the Tribunal, it was the case of the appellant–assessee that the Commissioner (Appeals) was not correct in observing that the vehicles were not running on hire because the assessee company was not carrying on any such business. According to the assessee, there was no difference between 'lease' and 'hire' so far as motor vehicles were concerned. The Tribunal, after considering the rival submissions and going through the provisions of Entry No.III(2)(ii) and Entry No.III(2)(i) of Appendix-I of the Rules, was of the view that if the assessee is doing the business of plying motor buses, motor lorries, motor taxies, then it is entitled to 50% depreciation. In other words, if the said vehicles are used in a business of running them on hire, then those motor vehicles are covered under Entry No.III(2)(ii) of Appendix-I and are entitled to depreciation at the rate of 50%. According to the Tribunal, the paramount consideration is that the assessee must be doing the business of running the vehicles on hire. To put it differently, if the owner is doing business of giving his motor-cars on hire as taxis then he is entitled to depreciation at the rate of 50% and qua the motor cars other than those used in the business of running them on hire the assessee is entitled to depreciation at the rate of 33.33%. The Tribunal was further of the view that a motor car running on hire cannot be equated with a motor car running on lease and accordingly did not find any infirmity in the order passed by the Commissioner (Appeals).

8. Before considering the merits of the case, it may be pertinent to refer to the case law in this regard. On behalf of the appellant the learned advocate has placed reliance on the decision of the Karnataka High Court in the case of **Commissioner of Income Tax and Another v. BPL Sanyo Finance Private Ltd.,(2006) 287 ITR 69**, wherein the Court had held that when the assessee was carrying on the business of hiring its vehicles and

was not using them for its own business, it was immaterial whether the vehicles were hired to a sister concern or to a third party or to a total stranger. The Court accordingly held that the assessee therein was entitled to 40% depreciation as provided in item III(3)(ii) of Appendix-I to the Rules. Reliance has also been placed upon the decision of the **Kerala High Court in the case of Commissioner of Income Tax v. Balakrishna Transports, (1999) 233 ITR 133**, wherein the Court has held that the real question was that whether the assessee engaged in the business of plying vehicles as an activity used the concerned vehicles for hire or not. The Court found that the assessee was a partnership firm engaged in transport activity. The transport activity was as regards plying of transport buses carrying passengers on different routes determined by the transport authorities. The passengers who travelled in such buses travelled on hire as such, the assessee was entitled to higher depreciation. Thus, it is apparent that both the aforesaid decisions clearly lay down that the real question which is to be seen as to whether the assessee is engaged in the activity of using the vehicles for hire or not.

9. The Supreme Court, in the case of Commissioner of Income Tax v. Gupta Global Exim Pvt. Ltd. (supra), on which reliance has been placed by the learned counsel for the revenue has, while construing the provisions of Entry No.III of Appendix-I of the Rules, held that under item 2(ii) of heading III, the higher rate of depreciation is admissible on motor trucks used in a business of running them on hire, therefore the user of the same in the business of the assessee of transportation is the test. The Court, however, held that what is relevant for consideration under item (2)(ii) of heading III of Appendix-I to the Rules is whether the assessee was in the business of hiring out his trucks in addition to his business of trading in timber. The Court observed in the facts of the said case that the order of assessment clearly indicates that the assessee was only in the business of trading in timber and there was no evidence to indicate that the assessee was in the business of hiring out motor lorries for running them to earn business income.

10. The Rajasthan High Court in the case of **Commissioner of Income Tax v. Sardar Stones, (1995) 215 ITR 350,** has, while construing the provisions of aforesaid entry, held that a plain reading of both the entries, that is, entry No.III(ii)D(9) and III(ii)E(1-A), given in Part I of Appendix I, appended to the Rules, shows that if the motor buses, motor lorries and motor taxis are used in a business of running them on hire then those motor vehicles are covered under entry III(ii)E(1A) of Appendix I and are entitled to depreciation at 40 per cent and the motor buses and motor lorries other than those used in the business of running them on hire are entitled to depreciation at 30 per cent. The Court observed that it is true that the relevant clause does not lay down the requirement of hiring wholly or exclusively, but the entry has maintained the distinction about the entitlement to depreciation at 40 per cent and 30 per cent. In the case of motor buses and motor lorries other than those used in a business of running them on hire, they are entitled to depreciation at 30 per cent while the motor buses, motor lorries and motor taxis used in a business of running them on hire are entitled to depreciation at 40 per cent. If a truck is not used for hiring but for the purpose of one's own business, then it would be entitled to depreciation at 30 per cent and not 40 per cent. The Court observed that the limit of 40 per cent depreciation to motor buses, motor lorries and motor taxis is provided because more running is required in the business of running them on hire.

11. The Bombay High Court in the case of **Kotak Mahindra Finance Ltd. v. Deputy Commissioner of Income-Tax, (2004) 265 ITR 114**, was dealing with a case similar to the present one. The assessee there in was a leasing and financing company having its income from lease rent, bill discounting and service charges. The Court held that there is a basic difference between "lease" and "hire". This difference is borne out by the basic difference in the meaning of the expression "property" and the expression "possession". A transaction of hire is essentially a contract of bailment of a vehicle. In the case of a hire, only a licence is given to the hirer to use the vehicle for a temporary period the vehicle so hired. In the case of hire, the hirer has an option to buy the equipment which is one of the main distinguishing features between the words "hire" and "lease". Before the Court, it has been argued on behalf of the assessee that for the purpose of the above entry, the word "hire" and the word "lease" should be read as equivalent. The Court held that the entry, read as a whole, states that the assessee must run the vehicle on hire or that the assessee must carry on the business of running the vehicles on hire. In the facts of the said case the Court noted that the assessee was a leasing and financing company. Its income was from lease rent, bill discounting and service charges, therefore, merely because the assessee let out motor buses, motor trucks and motor vans to its customers, it could not be stated that the assessee was using the said vehicles in the business of running them on hire.

12. This Court is in agreement with the view taken by the Rajasthan High Court as well as the Bombay High Court in the decisions referred to hereinabove. The decisions of the Karnataka High Court as well as of the Kerala High Court on which reliance has been placed on behalf of the appellants are also along the same lines and do not in any manner support the case of the appellant. Moreover, the controversy involved in the present case stands more or less concluded by the decision of the Supreme Court in the case of Commissioner of Income Tax v. Gupta Global Exim Pvt. Ltd. (supra), wherein the Court has held that under item (2)(ii) of heading III of the depreciation table given in Appendix I to the Income Tax Rules, 1962, the higher rate of depreciation is admissible on motor trucks used in a business of running them on hire. Therefore, the user of the same in the business of the assessee of transportation is the test.

13. In the facts of the present case, as noticed hereinabove, all the authorities below have recorded that the assessee company is a leasing company which is engaged in leasing of plant and machinery, motor cars, etc. to its client. It is neither the case of the assessee nor is there anything on record to indicate that the assessee uses the vehicles in question in its business of transportation or that the assessee is engaged in the business of hire. In the circumstances, the basic requirement for being entitled to depreciation at the higher rate of 50 per cent under Entry No.III(2)(ii) of Appendix-I to the Rules is not satisfied by the appellant. In other words, appellant does not pass the test for the applicability of Entry No.III(2)(ii) of Appendix-I appended to the Rules, viz., the user of the vehicles in the business of the assessee of transportation or the business of hire. The Tribunal was, therefore, justified in holding that the appellant is entitled to depreciation at the rate of 33.33 per cent and not at the rate of 50 per cent as claimed by it.

14. In the light of the above discussion, the question is answered in the affirmative, that is, in favour of the revenue and against the appellant-assessee. On the facts and in the circumstances of the case, the Income-Tax Appellate Tribunal was right in law in holding that the appellant was not entitled to depreciation allowance under Entry No.III(2)(ii) of Appendix-I of the Income Tax Rules, 1962, in respect of vehicles given on lease. The appeals are accordingly dismissed with no order as to costs.