

IN THE HIGH COURT OF GUJARAT

AT AHMEDABAD

Tax Appeal No. 311 of 2001

DY COMMISSIONER OF INCOME TAX-(A)

Vs

PRADIP N DESAI (HUF)

Akil Kureshi and Sonia Gokani, JJ

Dated: July 6, 2011

Appellant Rep by : Mr M R Bhatt, Sr Adv with Mrs Mauna M Bhatt

Respondent Rep by : Mr Saurabh N Soparkar, Sr Adv with Mrs Swati Soparkar

JUDGEMENT

Per: Akil Kureshi:

1. Revenue is in appeal against the judgment of the Tribunal dated 17.5.2001. While admitting the appeal on 9.11.2001 following question was framed by the Bench: -

"Whether, the appellate Tribunal is right in law and on facts in holding that the assessee is entitled to depreciation at the higher rate of 50% on truck though as per appendix-I appended to Rule 5 of the Income Tax Rules 1961, higher rate of depreciation is allowable only if the vehicles are used in business of running them on hire?"

2. Briefly stated the facts leading to filing of this appeal are as under: -

2.1 During the previous year, relevant to the assessment year, 1991-92, respondent assessee purchased one truck. The Truck was given on lease. In turn it was the case of the assessee that the truck was run on hire by the lessee. On the investment so made in purchase of truck, the assessee claimed higher rate of depreciation at the rate of 50% in terms of Clause (2)(ii) of Entry III of Appendix-I of the Income Tax Rules, 1962. The Assessing Officer, however, allowed normal rate of depreciation. The issue was carried in appeal. The CIT(Appeals) ruled in favour of the assessee. The issue was, thereafter, carried in appeal by the Revenue before the Tribunal. The Tribunal was of the opinion that if the lessee had used the truck for running it on hire, the present assessee would not be entitled to seek higher rate of depreciation. Since these facts were not on record, the Tribunal remanded the proceedings before the Assessing Officer to gather necessary facts and to verify whether the truck in question was used by the lessee in the business of running on hire and in that event to grant depreciation at the higher rate of 50% as claimed by the assessee. Observations and conclusions of the Tribunal in this regard may be noted thus: -

"5. Having heard both the sides, we have carefully gone through the orders of authorities below as well as decisions cited during the course of hearing. In the profit and loss account, the assessee has credited assessment of Rs.66,700/- under the head truck (lease) rent income account and claimed depreciation at the rate of 50%. The Assessing officer allowed the depreciation at normal rate without verifying whether the truck was used by the lessee in business of running them on hire. We, therefore, set-aside the order of learned CIT(A) on this issue and restore the issue regarding the allowance of depreciation on truck to the file of Assessing Officer with the direction that he should verify whether the truck in question was used by the lease in a business of running it on hire in that event Assessing Officer should allow the depreciation at a higher rate is at the rate of 50% as claimed by the assessee in the return of income."

3. Aggrieved by the said decision and the directions contained in the order of the Tribunal, Revenue is in appeal before us in the present Tax Appeal.

4. Counsel for the Revenue submitted that it is not in dispute that the assessee is not involved in the business of hiring the vehicle on rent and in that view of the matter, higher depreciation under Clause (2)(ii) of Entry-III of Appendix-I would not be available. He, therefore, contended that the Assessing Officer's decision to permit normal rate of depreciation was not incorrect. He contended that irrespective of whether the lessee runs the vehicle on hire or not, the present assessee would not be entitled to claim higher rate of depreciation since admittedly the assessee was not involved in the business of hiring vehicle on rent.

5. Heavy reliance was placed on the decision of the Division Bench of this Court in Tax Appeal No.100 of 2000 rendered on 1.4.2011 in which case the Bench referring to and relying upon the decision of various High Courts as well as the decision of the Apex Court in the case of *Commissioner of Income Tax vs. Gupta Global Exim Pvt. Ltd. reported in (2008) 305 ITR 132 (SC)* upheld the view of the Tribunal, denying higher rate of depreciation to the assessee, who was not involved in the business of hiring out the vehicle.

6. Counsel drew our attention to the decision of the Apex Court in the case of *Commissioner of Income Tax vs. Gupta Global Exim Pvt. Ltd. (supra)*, wherein the Apex Court observed as under:-

"12. What is relevant for consideration under item (2)(ii) of heading III of Appendix I to the Income-Tax Rules, 1962 is whether the assessee was in the business of hiring out his trucks in addition to his business of trading in timber. The order of assessment clearly indicates that the assessee was only in the business of trading in timber. We do not have the returns filed by the assessee before us. We do not have the constitution of the assessee-company before us. There is no evidence to indicate that the assessee was in the business of hiring out motor lorries for running them to earn business income. The entire inference is drawn by the Commissioner of Income-Tax (Appeals) only on the footing that the Assessing Officer had treated Rs. 12,59,639 as part of total business income which is not determinative of the above test, viz., whether the trucks were used in the transportation business as claimed by the assessee."

7. On the other hand, counsel for the respondent submitted that the Tribunal's order requires no interference. Cogent reasons have been given for the conclusions. Tax Appeal may be dismissed.

8. Before adverting to the rival submissions, for ready reference, we reproduce relevant entries for depreciation as under: -

Block of assets	Depreciation allowance as percentage of written down value
III. Machinery and Plant	
(2)(ii) Motor buses, motor lorries and motor taxis used in a business of running them on hire	[40]

9. Having thus heard learned counsel for the parties, we are of the opinion that the issue is squarely covered by the decision of the Division Bench of this Court in Tax Appeal No.100 of 2000. In the said case before the Division Bench, facts were that the assessee, a lessee company, was engaged in the business of leasing plant and machinery, motor cars, etc. to its clients. The assessee had claimed depreciation on motor vehicles at a higher rate of 50%, which was denied by the Assessing Officer on the ground that the vehicles were not run on hire by the assessee. The issue ultimately reached the Tribunal which confirmed the view of the Revenue authorities denying higher depreciation to the assessee on the terms that the assessee was not carrying on the business of hiring of the vehicle. Bench, referring to the decision of the Karnataka High Court in the case of *Commissioner of Income Tax and another vs. BPL Sanyo Finance Private Ltd. reported in [2006] 287 ITR 69* and decision of the Bombay High Court in the case of *Kotak Mahindra Finance Ltd. vs. Deputy Commissioner of Income-Tax reported in [2004] 265 ITR 114* and other decisions of other High Courts, held as under:

"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."

10. We are convinced that the above mentioned decision squarely covers the present fact situation also. We are also of the opinion that the observations made by the Apex Court in the case of Commissioner of Income Tax vs. Gupta Global Exim Pvt. Ltd. (supra) noted hereinabove would also apply in the case on hand.

11. In the result, question is answered in favour of the Revenue. Decision of the Tribunal of remanding the issue to the Assessing Officer for fresh consideration, in the light of the observations made in the order, is set aside. Resultantly, CIT(Appeals) order with respect to this issue is also reversed. Tax Appeal is allowed.