

(1999) 12 GAU CK 0017

In the Gauhati High Court

Case No : Income-tax Reference No. 1 of 1996

B and A Plantations and Industries Ltd. (formerly Barasali Tea Co. Pvt. Ltd.) APPELLANT

Vs

Commissioner of Income Tax RESPONDENT

Date of Decision : 10-12-1999

Acts Referred:

Income Tax (Appellate Tribunal) Rules, 1963 — Rule 9
Income Tax Act, 1961 — Section 250(7), 37

Citation : (2000) 242 ITR 22

Hon'ble Judges : Brijesh Kumar, C.J;P.G. Agarwal, J

Bench : Division Bench

Advocate : R. Gogoi and R.K. Joshi, for the Appellant; U. Bhuyan, for the Respondent

Judgement

P.G. Agarwal, J.—In this case, the following seven references were made u/s 256(2) of the Income Tax Act, 1961 (for short "the Act"):

"1. Whether, on the facts and in the circumstances of the case and on the materials on record the Tribunal was justified in law in holding that the order of assessment was passed only on March 30, 1988, which was shown to have been passed on March 28, 1988, by the Assessing Officer in the assessment records reversing the decision of the Commissioner of Income Tax (Appeals) holding that the said order of assessment was passed beyond the normal period of limitation prescribed u/s 153(1) of the Income Tax Act, expiring on March 31, 1988 ?

2. Whether, on the facts and in the circumstances of the case, the finding of the Tribunal that the order of assessment was passed only on March 30, 1988, and not beyond the normal period of limitation prescribed u/s 153(I)(a) of the Income Tax Act is based on any evidence and/or material on record relevant to the assessment order passed in the case of the assessee and/or is perverse and unsustainable in law, it being clearly and conclusively established that the order of assessment and the notice of demand could not have been passed and issued

on March 28, 1988, as purported to be shown by the Assessing Officer in the assessment records ?

3. Whether, on the facts and in the circumstances of the case, the Tribunal on the materials on record could in law hold that the order of assessment was passed on March 30, 1988, and not beyond the normal period of limitation as held by the Commissioner of Income Tax (Appeals), it being found that the said order of assessment was not passed and the notice of demand was not issued on March 28, 1988, as purported to be shown in the assessment records and whether the Tribunal was justified in law in sustaining the order of assessment and not annulling the said assessment order ?

4. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the expenditure of Rs. 5,14,508 incurred by the assessee for making the bare concrete structure taken on lease for a period of five years only a nominal monthly rent at the rate of rupees two per sq. feet, on the 9th floor of premises No. 113, Park Street, Calcutta, fit for use for office purposes of the assessee considered to be necessary and expedient for business purposes was not revenue in nature but by way of capital expenditure ?

5. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in sustaining the addition of Rs. 3,53,486 by way of notional interest calculating such notional interest on the advance amount of rent paid by the assessee for securing office space at a nominal monthly rent at the rate of rupees two per sq. feet, in the important business locality of Park Street area of Calcutta considering such payment of advance rent as commercially expedient ?

6. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the appeal filed by the Revenue belatedly after 157 days was not barred by limitation ?

7. Whether, on the facts and in the circumstances of the case, the Tribunal was correct in law in directing for allowing depreciation on the assets acquired by the applicant only with effect from February 1, 1985, on pro rata basis and not the full amount of depreciation allowable ?"

2. We have heard Mr. R. Gogoi, learned senior counsel appearing for the assessee, and Shri U. Bhuyan, learned counsel for the Revenue.

3. We will take up reference No- 6 for consideration. The relevant facts are that-- the questions in issues Nos. 1, 2, 3 and 7 were decided against the Revenue by the Commissioner of Income Tax (Appeals). The Revenue thereafter filed an appeal before the Tribunal and it was stated that the appeal is barred by limitation by 157 days. The assessee raised the plea of limitation and prayed for dismissal of the appeal. The Tribunal held that the appeal was not barred by time and therefore admitted the same for consideration on the merits.

4. In this case, there is no dispute at the Bar that the appeal filed by the Revenue before the Tribunal was barred by limitation. The plea of the Revenue is

that an application for certified copy of the order passed by the Commissioner of Income Tax (Appeals) was filed within time but the certified copy was not furnished and as such the appeal is deemed to be in time. The case of the assessee on the other hand is that a copy of the order passed by the Commissioner of Income Tax (Appeals) was furnished to the Revenue as per Section 250(7) of the Act, which provides that on the disposal of the appeal the Commissioner of Income Tax (Appeals) shall communicate the order passed by him to the assessee and to the Chief Commissioner or Commissioner. In this case, there is no dispute that such a copy was received by the Commissioner. As a matter of fact, the appeal in the present case was filed on the strength of the copy of the order received, as admittedly, although the certified copy was applied for, no such copy was received till the filing of the appeal.

5. Learned counsel for the Revenue has referred to rule 9 of the Income Tax (Appellate Tribunal) Rules, 1963. Rule 9(1) of the said rule provides as follows :

"Every memorandum of appeal shall be in triplicate and shall be accompanied by two copies (at least one of which shall be a certified copy) of the order appealed against, two copies of the order of the Income Tax Officer, two copies of the grounds of appeal before the first appellate authority and two copies of the statement of facts, if any, filed before the said appellate authority."

6. It is therefore submitted that the Revenue accordingly applied for the certified copy but as the same was not delivered the limitation will continue. It is well settled that the period taken for supplying certified copies is to be excluded in computing the period of limitation. However, it will be pertinent to refer to the provisions of Sub-rule (3) of Rule 9 and the Explanation thereto, which reads as follows :

"The Tribunal may in its discretion accept a memorandum of appeal which is not accompanied by all or any of the documents referred to in Sub-rule (1).

Explanation.--For the purpose of this rule, "certified copy" will include the copy which was originally supplied to the appellant as well as a photostat copy thereof duly authenticated by the appellant or his authorised representative as true copy."

7. When the Explanation provides that the copy supplied to the appellant as well as the photostat thereof shall be treated as certified copies for the purpose of filing the appeal, the period taken in furnishing the certified copy becomes irrelevant. The copy was admittedly received by the Revenue and in view of the above provisions, it is deemed to be a "certified copy" for the purpose of filing the appeal and as such the party cannot be allowed to sit tight on the ground that the certified copy has not been furnished. Moreover, as stated above, in the instant case the appeal ultimately filed by the Revenue against the impugned order of the Commissioner of Income Tax (Appeals) was on the strength of a copy of the order received u/s 250(7) of the Act and till the filing of the appeal no certified copy was obtained or furnished to the Revenue. Shri Bhuyan, learned

counsel for the Revenue, has submitted that the party has a right to obtain a certified copy of the order passed by the Commissioner of Income Tax (Appeals). Such right is not extinguished but in view of the deeming provisions the copy of the order received from the Commissioner of Income Tax (Appeals) was good enough for filing the appeal within time. We are therefore of the opinion that such copy for the above purpose is deemed to be a certified copy and the limitation will run from the date on which such copy is received by the party. In the instant case, the appeal was not filed within time and no prayer for condonation of delay was also made and as such the appeal is held to be barred by limitation.

8. The question is answered against the Revenue and in favour of the assessee.

9. In this case, the decisions in issues Nos. 1, 2, 3 and 7 were held against the Revenue by the Commissioner of Income Tax (Appeals) and these were reversed by the Appellate Tribunal. As the appeal is barred by limitation the decisions of the Appellate Tribunal are no longer good and the decision of the Commissioner of Income Tax (Appeals) stands restored. In view of the same, the questions in references Nos. 1, 2, 3 and 7 have become redundant and need not be answered.

10. In issues Nos. 4 and 5, the relevant facts are that the assessee took on lease a newly constructed super built up area of 3,360 sq. feet, at a monthly rent of rupees two per sq. feet and renovated the same for office purpose by spending a sum of Rs. 5,14,508. The said amount was claimed as deduction as revenue expenditure. Further, the assessee for the above lease made an advance of Rs. 19,58,256 to the lessor without any interest. Both the Commissioner of Income Tax (Appeals) and the Appellate Tribunal were of the view that the expenditure is capital in nature and as such is not deductible. The Assessing Officer added a notional interest at 18 per cent, on the said advance and added a sum of Rs. 3,53,486 as interest income. The said decision was upheld by the Commissioner of Income Tax (Appeals) as well as the Appellate Tribunal. The amount of Rs. 5,14,508 was under the following heading :

1. Construction of wall, partition, etc., plastering thereof;
2. German wall paper ;
3. Marble for the flooring ;
4. Supply of electrical goods.

11. The case of the assessee is that the expenditure was for renovation and incurred to facilitate carrying on of the business more efficiently and it did not result in an enduring benefit. In the case of Commissioner of Income Tax, Tamil Nadu II, Madras Vs. Madras Auto Service (P) Ltd., , the apex court held as below (head-note) :

"The general principles applicable in determining whether a particular expenditure is capital or revenue expenditure are as follows: (1) Outlay is

deemed to be capital when it is made for the initiation of a business, for extension of a business, or for a substantial replacement of equipment ; (2) Expenditure may be treated as properly attributable to capital when it is made not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade. If what is got rid of by a lump sum payment is an annual business expense chargeable against revenue, the lump sum payment should equally be regarded as a business expense, but if the lump sum payment brings in a capital asset, then that puts the business on another footing altogether ; (3) Whether for the purpose of the expenditure, any capital was withdrawn, or, in other words, whether the object of incurring the expenditure was to employ what was taken in as capital of the business. Again, it is to be seen whether the expenditure incurred was part of the fixed capital of the business or part of its circulating capital".

12. In the light of the above and considering the nature of the expenditure and the items involved it cannot be said that the expenditure was capital in nature as it will not endure any capital benefit to the assessee and the assessee has not acquired any capital asset. The wall papers, partition walls, marble flooring provided in the premises will not be assets when the premises will be vacated. The expenditure was apparently in the nature of business expenditure for proper carrying on of the business.

13. We are, therefore, of the opinion that the expenditure was revenue expenditure and the Appellate Tribunal was wrong in terming it capital expenditure.

14. As regards the addition of notional interest the assessee made an interest free advance of Rs. 19,58,256 to Jorhat Investments Ltd., which is a sister concern. The case of the assessee is that they did not charge interest on that advance and in consideration of the same the assessee got the premises at a very low rent of rupees two per sq. feet in a prime locality of Calcutta.

15. The Assessing Officer added a notional interest of 18 per cent. on the advance amount and added the income as the amount of interest. The said addition was approved by the Commissioner of Income Tax (Appeals) and the Tribunal.

16. In this case there is no finding when the assessee had in fact received the interest or that the Jorhat Investments Ltd., had in fact paid the interest to the assessee and the interest was not reflected in the accounts. The finding is that the assessee ought to have charged interest.

17. The facts in the instant case are more or less identical with the case of Highways Construction Co. Pvt. Ltd. Vs. Commissioner of Income Tax, wherein this court held (page 708) :

"There is no finding of fact to the effect that actually the loan had been granted to the managing director or any other person on interest, or that interest had

actually been collected and the collection of the interest was not reflected in the accounts. The finding of the Income Tax Officer is that the assessee ought to have collected interest. In other words, the view of the Income Tax Officer, which has been accepted by the Tribunal, was that the assessee, as a good business concern, should not have granted interest-free loan, or should have insisted on payment of interest. If the assessee had not bargained for interest, or had not collected interest, we fail to see how the Income Tax authorities can fix a notional interest as due, or collected by the assessee. Our attention has not been invited to any provision of the Income Tax Act empowering the Income Tax authorities to include in the income, interest which was not due or not collected. In this view, we answer question No. (ii) in the negative, that is, in favour of the assessee and against the Revenue."

18. We reiterate our above decision and answer the reference in questions Nos. 4 and 5 in favour of the assessee and against the Revenue.