
(1978) 11 GUJ CK 0004

In the Gujarat High Court

Case No : Special Civil Application No. 2347 of 1978

Bharat Suryodaya Mills Co. Ltd.

APPELLANT

Vs

C.N. Vaishnav

RESPONDENT

Date of Decision : 30-11-1978

Acts Referred:

Income Tax Act, 1961 — Section 147, 148, 256(2), 264(1)

Citation : (1980) 121 ITR 694

Hon'ble Judges : B.J. Diwan, C.J.; S.B. Majmudar, J

Bench : Division Bench

Advocate : K.H. Kaji, for the Appellant; G.N. Desai, for the Respondent

Judgement

Divan, C.J.—This application under art. 226 of the Constitution has been filed challenging the order dated August 21, 1978, passed by the respondent herein under s. 264(1) of the I.T. Act for the assessment years 1963-64, 1964-65, 1965-66 and 1967-68.

2. The petitioner's case as set out herein is that it is a limited company engaged in the manufacture of textiles. The respondent is the Commissioner having jurisdiction over the petitioner. Prior to 1956, the petitioner had installed certain machinery and plant and in respect thereof had claimed normal depreciation as well as initial depreciation as provided by the I.T. Act, which was then in force. The ITO was allowing depreciation, both initial and ordinary, as per his own calculations from year to year. It has been provided in the I.T. Act that the initial depreciation granted would not reduce the written down value of the assets on which it is granted. The ITO in connection with the assessment for the assessment year 1962-63 granted depreciation in his original order for the said year which, taking into account the aggregate depreciation allowance granted in the preceding years and the initial depreciation granted in the year of installation, exceeded the original cost of assets. The ITO thereafter reopened the assessment by a notice under s. 147(a) on the ground that income had escaped assessment because of omission or failure on the part of the petitioner

to disclose fully and truly material facts necessary for assessment. The ITO by his order dated March 15, 1972, in the reassessment proceedings added Rs. 10,996 as excess depreciation granted by him in the original order as the total depreciation allowed on such assets exceeded the original cost. The petitioner filed an appeal against the said decision to the AAC who dismissed the same by his order dated February 22, 1974. The petitioner preferred a further appeal to the Income Tax Appellate Tribunal which by its order dated June 19, 1975, allowed the petitioner's appeal following the decision of this High Court in Ahmedabad Cotton Mfg. Co. Ltd. Vs. Union of India and Another, . The Tribunal in the case of the petitioner held that the notice under s. 147(a) was invalid on the ground that there was no omission on the part of the assessee which led to escapement of income and this view was supported by the decision of the Gujarat High Court in the case of Ahmedabad Cotton Mfg. Co. Ltd. Vs. Union of India and Another, . Thereafter, the department preferred a reference application against the decision of the Tribunal requesting that a reference on the question of law be made to the High Court. The Tribunal rejected that application by its order October 15, 1975, but ultimately it appears that in pursuance of an order passed under s. 256(2) on the application of the revenue, the matter has been referred and that reference is Income Tax Reference No. 222 of 1976 pending in this High Court.

3. While the reassessment order in connection with the assessment year 1962-63, was being challenged by the petitioner before the AAC and the Income Tax Appellate Tribunal as stated earlier, the ITO also reopened the assessments by notices under s. 147(a) read with s. 148 of the I.T. Act, so far as assessment years 1963-64, 1964-65, 1965-66 and 1967-68 were concerned. The ground for reopening of the said assessments was identical in the case of each year, namely, that the petitioner had been allowed depreciation exceeding 100 per cent. of the original cost of some assets by reason of the fact that initial depreciation on the said assets was allowed in the first year of installation which depreciation did not reduce the written down value of the said assets. Hence, the ITO passed reassessment orders in respect of these four subsequent years and all these reassessment orders were passed on March 15, 1973. In the said reassessment orders the ITO added amounts by way of excess depreciation allowed earlier and also made some further alterations or additions in respect of depreciation on humidification plant which, according to the ITO, had been allowed at the rate of 10 per cent. and 10 per cent. shift allowance instead of 15 per cent. depreciation without any extra shift allowance in some years. It is the case of the petitioner that these assessments were not reopened for the purpose of correcting the depreciation in respect of the humidification plant but they were reopened only on account of the excess depreciation in respect of machinery wherein the total depreciation had exceeded the cost of the assets, according to the ITO. The petitioner filed an appeal before the AAC and by a combined order passed in respect of all the four years on February 18, 1974, the AAC upheld the initiation of the reassessment proceedings under s. 147(a) and he confirmed the orders of

the ITO. So far as depreciation exceeding the cost of assets was concerned, in respect of the humidification plant, the AAC followed the decision of this High Court in *Industrial Machinery Manufacturers Pvt. Ltd. v. State of Gujarat* [1965] 16 STC 380, where it was held that humidifiers were textile machinery and the AAC accordingly held that the depreciation originally granted in respect of humidifiers was correct and the different view taken by the ITO in the reassessment proceedings was not justified on merits. The petitioner filed revision applications before the Commissioner of Income Tax, the respondent herein, on March 1, 1975, in respect of the four years 1963-64 to 1965-66 and 1967-68. Before the respondent gave his decision on the revision applications, the Tribunal decided the appeal of the petitioner with regard to the assessment year 1962-63 as stated above. The decision of the Appellate Tribunal and the decision of the Gujarat High Court in *Ahmedabad Cotton Mfg. Co. Ltd. Vs. Union of India and Another*, were cited before the respondent but the revision petitions were decided by the respondent by his order dated August 21, 1978, Annex. "E" to this petition, by stating as follows :

"I have gone through the facts of the case. The revision petitions are against the order of the AAC refusing to allow the assessee's claim and I find that the order of the learned AAC was within the purview of the law."

3. It is against this order passed by the respondent on August 21, 1978, that the present Special Civil Application has been filed.

4. In the decision in *Ahmedabad Cotton Mfg. Co. Ltd. Vs. Union of India and Another*, this High Court observed :

"Just as there was a duty on the part of the petitioner to see to it that the allowance of initial depreciation was disclosed by it, there was also a duty on the part of the Income Tax Officer concerned to see to it that the aggregate of all allowances in respect of depreciation made u/s 10(2)(vi) of the Act of 1922 did not exceed the original cost to the petitioner-company. If that duty had been properly discharged by the Income Tax Officer, it is obvious that no excess depreciation would have been allowed in the assessment years 1962-63 to 1965-66. It was because of the combined operation of the omission or failure on the part of the petitioner-company to disclose these material facts to the Income Tax Officer and dereliction of duty on the part of the Income Tax Officer in failing to see whether the aggregate of all allowances in respect of depreciation u/s 10(2)(vi) had exceeded the original cost to the petitioner-company that the situation came about under which the petitioner was in fact allowed excess depreciation in the assessment years under consideration. It was, therefore, not possible to say that it was by reason of the omission or failure on the part of the petitioner to disclose fully and truly all material facts necessary for its assessment for the relevant years that the income chargeable to tax escaped assessment for those years, and the Income Tax Officer could not be said to have reason to so believe for the purpose of section 147(a) of the Act of 1961."

5. and by its order the High Court set aside the notices under s. 148. In that particular case the Division Bench of this High Court that decided the matter was dealing with the stage of notices having been issued by the ITO.

6. In Parashuram Pottery Works Co. Ltd. Vs. Income Tax Officer, Circle I, Ward A, Rajkot, , the Supreme Court held, reversing the decision of the Gujarat High Court in Parashuram Pottery Works Co. Ltd. v. ITO, that when an ITO relies upon his own records for determining the amount of depreciation allowable to the assessee and makes a mistake in doing so, the responsibility for that mistake cannot be ascribed to an omission or failure on the part of the assessee. It was further observed :

"Where in working out the figures of depreciation for certain items of capital assets, the Income Tax Officer lost sight of the fact that the aggregate of the depreciation, including the initial depreciation allowed under the different heads, could not exceed the original cost to the assessee of those items of capital assets, the assessee cannot be held responsible for the remissness on the part of the Income Tax Officer in not applying the law contained in proviso (c) to section 10(2)(vi) of the Indian Income Tax Act, 1922, and it cannot be said that excess depreciation allowed because of the mistake in the calculation of the depreciation was allowed and income escaped assessment because of the assessee's omission or failure to disclose fully and truly all material facts and no action can be taken for reopening the assessment u/s 147(a) of the Income Tax Act, 1961, on the basis of detection of that mistake alone after the expiry of four years from the end of the assessment year."

7. In view of this decision of the Supreme Court it is clear that the view taken by the Division Bench of this High Court in Ahmedabad Cotton Mfg. Co. Ltd. Vs. Union of India and Another, has now received the imprimatur of the Supreme Court and thus in view of these two decisions the order of the respondent dismissing the revision petitions filed by the petitioner herein for the assessment years 1963-64 to 1965-66 and for the year 1967-68 was contrary to law as laid down by this High Court and by the Supreme Court. Under these circumstances, the order dated August 21, 1978, contains errors of law apparent on the face of the record and in exercise of the powers under art. 226 of the Constitution we set aside the order passed by the respondent, being Order annex. "E" to the petition.

8. This Special Civil Application is, therefore, allowed. The order dated August, 21, 1978, annex. "E" to the petition, is quashed and set aside. Rule is made absolute with costs. The Commissioner of Income Tax is directed to dispose of the revision petitions in accordance with law as set out in Parashuram Pottery Works Co. Ltd. Vs. Income Tax Officer, Circle I, Ward A, Rajkot, and this judgment.