

(2010) 03 CAL CK 0013
In the Calcutta High Court

Case No : Income Tax A. No. 504 of 2004 (AY 1999-2000 and 2000-01)

Binani Industries Ltd.

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 04-03-2010

Acts Referred:

Companies Act, 1956 — Section 210

Constitution of India, 1950 — Article 136, 141

Income Tax Act, 1961 — Section 115J, 115JA, 115JA(1), 115JA(4), 115JB(5)

Citation : (2010) 03 CAL CK 0013

Hon'ble Judges : Kalyan Jyoti Sengupta, J; Kalidas Mukherjee, J

Bench : Division Bench

Advocate : J.P. Khaitan, for the Appellant; Shome and Chowdhury, for the Respondent

Final Decision : Allowed

Judgement

1. In this matter an interesting question has arisen for which this appeal has been admitted on the ground as follows:

Whether on a true and proper interpretation of the relevant provisions of the Income Tax Act, 1961, the provisions relating to payment of advance tax are applicable in case where the total income is deemed to be 30 per cent, of the book profit u/s 115JA and the Tribunal was justified in law in upholding the charging of interest under Sections 234B and 234C in the Appellants case for the assessment years 1999-2000 and 2000-01?

2. In this case we are concerned with Section 115JA. It provides, amongst others, for computation of fictional income for the purpose of levying taxes. We are, therefore, appropriately quoting Section 115JA which is part of Chapter XII-B.

115JA.(1) Notwithstanding anything contained in any other provisions of this Act, where in the case of an Assessee, being a company, the total income, as

computed under this Act in respect of any previous year relevant to the assessment year commencing on or after the 1-4-1997, but before the 1-4-2001 (hereafter in this section referred to as the relevant previous year) is less than thirty per cent, of its book profit, the total income of such Assessee chargeable to tax for the relevant previous year shall be deemed to be an amount equal to thirty per cent, of such book profit.

(2) Every Assessee, being a company, shall, for the purposes of this section prepare its profit and loss account for the relevant previous year in accordance with the provisions of Parts II and III of Schedule VI to the Companies Act, 1956 (1 of 1956):

Provided that while preparing profit and loss account, the depreciation shall be calculated on the same method and rates which have been adopted for calculating the depreciation for the purpose of preparing the profit and loss account laid before the company at its annual general meeting in accordance with the provisions of Section 210 of the Companies Act, 1956 (1 of 1956):

Provided further that where a company has adopted or adopts the financial year under the Companies Act, 1956 (1 of 1956), which is different from the previous year under the Act, the method and rates for calculation of depreciation shall correspond to the method and rates which have been adopted for calculating the depreciation for such financial year or part of such financial year falling within the relevant previous year....

(3) Nothing contained in Sub-section (1) shall affect the determination of the amounts in relation to the relevant previous year to be carried forward to the subsequent year or years under the provisions of Sub-section (2) of Section 32 or Sub-section (3) of Section 32A or Clause (ii) of Sub-section (1) of Section 72 or Section 73 or Section 74 or Sub-section (3) of Section 74A.

(4) Save as otherwise provided in this section, all other provisions of this Act shall apply to every Assessee, being a company, mentioned in this section.

3. It was the contention of the Assessee that the payment of advance tax is not attractable in cases of the fictional income as mentioned above. Therefore, logically payment of interest u/s 234B and also interest on deferment of payment of interest u/s 234C do not apply. This contention of the Appellant did not find favour with the assessing officer who held that the aforesaid fictional income is attracted for payment of advance tax as provided under Sections 207 and 208 of the Income Tax Act, 1961. Secondly, interest amount on both the counts is to be paid. So, the said amount of interest was levied.

4. On appeal being taken, the Commissioner (Appeals) allowed the appeal and deleted the aforesaid levy of interest as imposed by the assessing officer. On appeal being preferred by the department, the learned Tribunal by the impugned judgment and order has restored the order of the assessing officer and set aside the order of the Commissioner (Appeals).

5. Mr. J.P. Khaitan, learned senior advocate, appearing in support of the appeal contends that actually this issue has now been settled by the Supreme Court by necessary implications. The Karnataka High Court has dealt with almost identical issue in relation to the fictional income in the case of Kwaliti Biscuits Ltd. Vs. Commissioner of Income Tax, . This matter was taken to the Supreme Court. The Supreme Court admitted the appeal which on hearing dismissed the appeals by one line judgment. As such, he says that the doctrine of merger in this case will apply. Therefore, the ratio decided by the Karnataka High Court in Kwaliti Biscuits case is now holding principle and is applicable in this case. He has drawn our attention to the judgment of the Bombay High Court, post-Supreme Court decision as above. Before the Bombay High Court case related to Section 115JA, while accepting the judgment of the Karnataka High Court in Kwaliti Biscuits case it was held that the provisions of Sections 234B and 234C is not attracted in case of deemed income u/s 115JA. Before the Kerala High Court following the said decision of the Karnataka High Court, it was held dealing with the case that the provisions under Sections 115J, 115JA, 234B and 234C are not attracted. The Gujarat High Court has taken a similar view dealing with the case involving Section 115J. However, he is fair enough to say that the Madras High Court has taken a contra view. It has not followed the Karnataka view which was affirmed by the Supreme Court. He, therefore, submits that in view of the acceptance of the Karnataka High Court judgment by the Supreme Court the principle laid down therein has to be followed in this case also though it has not dealt with the case falling u/s 115JA but when the Bombay High Court has accepted the decision, he urges this Court that similar view may be taken as has been taken by the Bombay High Court.

6. Mr. Shome, learned senior advocate with Mr. Chowdhury, advocate appearing for the department, submits on the other hand that one-line order of the Supreme Court judgment cannot be said to be a binding precedent under Article 141 of the Constitution and as such the Madras High Court has taken a contrary view. He submits that this Supreme Court judgment as well as the Karnataka judgment in Kwaliti Biscuits case were in respect of the provisions of Section 115J and he says that there are distinguishable feature in Section 115JA from 115J. Hence, the said Supreme Court one-line order even applying the principle of merger should not be followed and this Court can take a view independent of the Karnataka High Court following the Madras High Court. He has also drawn our attention to Section 115JA, Sub-section (4), whereby and whereunder the provisions of other part of the Act is made applicable by making a subsequent amendment. Hence, the liability of payment of advance tax is automatically attracted, sequally the payment of interest in case of defaulted or deferment of payment of interest as contemplated in Sections 234B and 234C automatically applicable.

7. Heard respective contentions of the learned Counsel at length. We have gone through the judgment of the learned Tribunal. Precisely the contention is whether the fictional income as mentioned in Section 115JA in this case is attracted for

payment of advance tax or not. Payment of advance tax is provided in Sections 207 and 208 which is quoted hereunder:

207. Liability for payment of advance tax.--Tax shall be payable in advance during any financial year, in accordance with the provisions of Sections 208 to 219 (both inclusive), in respect of the total income of the Assessee which would be chargeable to tax for the assessment year immediately following that financial year, such income being hereafter in this Chapter referred to as current income.

208. Conditions of liability to pay advance tax.--Advance tax shall be payable during a financial year in every case where the amount of such tax payable by the Assessee during that year, as computed in accordance with the provisions of this Chapter, is ten thousand rupees or more.

8. It would appear from Section 208 that liability of payment of advance tax is under Chapter XVII and the methodology of computation has been provided in that Chapter. In the said Chapter we do not find the method of computation of advance on fictional income which is provided in Sections 115J and 115JA of the Act. However, Mr. Shome contends that by virtue of Sub-section (4) of Section 115JA, all the provisions of the Act will be attractable meaning thereby the liability of payment of advance tax as well as method of computation of the advance tax is automatically attractable. According to him, it is an income whether it is a real or fictional. We are unable to accept this extreme view when we find in this Chapter XVII there is no mention of the deemed income, we cannot bring any interpretation which is not expressly provided by the Legislature. No inference can be drawn while interpreting any provision of the fiscal statute. It is true the Kwaliti Biscuits case was dealt with under Sections 115J, 115JA but the object and scheme of Sections 115J and 115JA are almost same as in the judgment it has been held that deemed income is not attracted with the liability of payment of advance tax and this judgment was appealed against as we have noted above. The Supreme Court after admitting the appeal and having heard finally dismissed the same meaning thereby the judgment of the Karnataka High Court has been accepted and as such the principle of doctrine of merger will be applicable. When the Supreme Court by necessary implication accepts any pronouncement of any High Court it becomes the pronouncement of the Supreme Court itself by ratification. The position of law in this regard has been correctly propounded by the Karnataka High Court in the case of Commissioner of Income Tax Vs. Nilgiri Tea Estate Ltd., . In paragraph 8, it is stated that even though by later amendment, Sections 115JA(4) and 115JB(5) provide that all other provisions of the Income Tax Act will apply for the purpose of Chapter XII-B, we do not think the provisions of Chapter XVII has any application for the tax payable u/s 115J.

9. Though this judgment was rendered in connection with Section 115J but by applying the principle of in pari materia the ratio can be applied in this case also. However, the Bombay High Court in the case of Snowcem India Ltd. Vs. Deputy Commissioner of Income Tax, dealing with the case u/s 115JA has held taking

note of the Karnataka High Court judgment as well as the Supreme Court judgment as follows (page 174):

...in Kwaliti Biscuits Ltd. Vs. Commissioner of Income Tax, has been affirmed by the Supreme Court by dismissing the appeals, in our opinion, the law binding on us would be the judgment in Commissioner of Income Tax Vs. Kwaliti Biscuits Ltd., .

10. In that case, following the said decision, the Bombay High Court held as follows (page 173):

In the instant case, we are concerned with Section 115JA under Chapter XII-B. The terminology used in Section 115JA is same or similar as contained in Section 115J.

11. In this case it has also been held that Sections 234B and 234C were not attracted. The Madras High Court judgment in our view has not exposed the correct position of law while taking note of the judgment of the Supreme Court dismissing the appeal against the judgment of the Karnataka High Court in Kwaliti Biscuits case (supra). With respect the Division Bench of the Madras High Court observed that the one-line dismissal order of the Supreme Court is not the binding precedent and, therefore, the Division Bench differed with the decision of the Karnataka High Court in Kwaliti Biscuits case.

12. With great respect to their Lordships the principle laid down therein applies in case of dismissal of a SLP with one-line order but does not apply in case of a regular appeal which after having admitted and hearing the same dismissed it. According to the scheme of the Article 136 of the Constitution of India, grant or refusal of special leave is a matter of discretion. It is examined at the threshold whether the case is such that needs to be dealt with under extraordinary power, naturally in case of summary dismissal the court does not go into the merits of the case, it only decides exercise of extraordinary jurisdiction is not called for and in that case regular appeal is the remedy as the matter on the merits remains undecided. We, therefore, are of the opinion that the views of the Madras High Court is not acceptable in view of the decision taken by the Supreme Court in Kwaliti Biscuits case followed by the Bombay High Court as noted above. The Gujarat High Court has also taken the same view in connection with a matter u/s 115J. We quote the observation of the Gujarat High Court judgment as follows:

Since the decision of the Karnataka High Court has been approved by the Hon'ble Supreme Court, we decide this question in favour of the Assessee and against the revenue. We are of the view that the Tribunal has correctly decided the issue and held that interest under Sections 234B and 234C is not chargeable when income is computed u/s 115J of the Act.

13. In view of the above discussions, we are of the view that the Tribunal is not correct in law while upsetting the judgment and order of the Commissioner

(Appeals). The same is not sustainable. We, therefore, answer the question formulated before us in the negative. This appeal is allowed and we direct the assessing officer to do the needful.

14. Urgent xerox certified copy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.