
(1990) 09 OHC CK 0021
In the Orissa High Court
Case No : S.J.C. No. 65 of 1982

B.J. Bhambhani

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 12-09-1990

Acts Referred:

Income Tax Act, 1961 — Section 184, 184(7), 185, 185(3), 246

Citation : (1991) 94 CTR 166 : (1991) 190 ITR 480

Hon'ble Judges : S.C. Mohapatra, J;J.M. Mahapatra, J

Bench : Division Bench

Advocate : S.C. Ghose and R. Sharma, for the Appellant; S.C. Ray, General, for the Respondent

Judgement

This Judgment has been overruled by : Commissioner of Income Tax, A.P. Vs. Ashoka Engineering Co., Grafik India and Syed Jaffar and Sons, Secundrabad, AIR 1993 SC 858(1) : AIR 1992 SC 858 : (1993) 109 CTR 491 : (1993) 1 SCC 754 Supp

S.C. Mohapatra, J.—This is a reference u/s 256(1) of the Income Tax Act, 1961 (hereinafter referred to as "the Act"), at the instance of the assessee.

2. The assessee is a firm. Since the assessment year 1965-66 it was enjoying the benefit of registration granted u/s 185(1)(a) of the Income Tax Act. In respect of the subsequent years, this registration had its effect as the assessee was filing the declaration as provided u/s 184(7) of the Act.

3. In respect of the assessment year 1978-79, the assessee was required to file the declaration before July 31, 1978, the time allowed u/s 139(1) of the Act for furnishing the return of income for the subsequent assessment year. Within that period the assessee did not file the declaration and, after expiry of the time, a declaration was filed u/s 184(7) of the Act on August 28, 1978. Along with such declaration, no explanation for the delay was furnished. Later on, however, an application was filed explaining that the partners of the firm were engaged in

arbitration cases and in obtaining loans for the purpose of continuing the business. The Assessing Officer was not satisfied that the firm was prevented by sufficient cause from furnishing the declaration within the time allowed.

4. Accordingly, the declaration was not accepted. The operative portion of the order is as follows :

"As the declaration in Form No. 12 has not been filed within the time allowed and the delay has not been satisfactorily explained, renewal of registration is not allowed for this year. Accordingly, the status of the firm is taken as unregistered firm."

5. This order dated March 24, 1979, was described to be one u/s 185(3) of the Act. In view of such description, the assessee preferred an appeal as provided u/s 246(1)(j) of the Act, The Appellate Assistant Commissioner held that the explanation offered indicates that the firm was prevented by sufficient cause from furnishing a declaration within the time so allowed. He directed the Income Tax Officer to allow registration to the firm. Against the appellate order, the Revenue preferred an appeal before the Income Tax Appellate Tribunal, Cuttack Bench, where, amongst other grounds, it was urged that an appeal before the Appellate Assistant Commissioner was not maintainable u/s 246 of the Act since the order passed was not u/s 185(3) of the Act.

6. Relying upon two decisions of this court in *New Orissa Traders Vs. Commissioner of Income Tax*, and *Commissioner of Income Tax Vs. Pohop Singh Rice Mill*, , the Tribunal accepted the contention of the Revenue and it held that an appeal before the Appellate Assistant Commissioner was not maintainable. Accordingly, the appellate order was reversed and the order of the Income Tax Officer was restored, The assessee filed an application u/s 256(1) of the Income Tax Act. On that basis, a statement of case has been made to this court by the Income Tax Appellate Tribunal for decision in accordance with our opinion on the following questions of law :

"(i) Whether the order of the Income Tax Officer, though labelled as an order u/s 185(3), was in fact an order u/s 184(4) ?

(ii) Whether the aforesaid order was an appealable one ?"

7. Mr. R. Sharma, learned counsel for the assessee, submitted that the order passed by the Income Tax Officer was one u/s 185(3) of the Act and, as such, is appealable u/s 246(1)(j) of the Act as it stood then. Mr. Sharma further submitted that in case the order of the Income Tax Officer is not appealable, no second appeal would lie to the Income Tax Appellate Tribunal and interference by the Tribunal would be without jurisdiction.

8. Mr. Sharma relied upon the decision of the Supreme Court in *Mela Ram and Sons Vs. The Commissioner of Income Tax Punjab*, , and submitted that an order rejecting the declaration u/s 184(7) of the Act on the grounds of limitation is appealable as an order decided on merits. Mr. Sharma submitted that a

declaration furnished in pursuance of Section 184(7) being not in order on account of delay is a defect and the Assessing Officer was required to intimate the defect and give an opportunity to the assessee to rectify the defect in the declaration as provided u/s 185(3). If the defect is not rectified, the Assessing Officer may declare, by an order in writing, that the registration granted to the firm shall not have any effect for the relevant assessment year. Against such an order, appeal is provided u/s 246(1)(j) of the Act.

9. As regards the two decisions of this court, Mr. Sharma submitted that the decision of the Supreme Court was not taken into consideration while rendering judgments in those cases and the decision of the Supreme Court would prevail over the two decisions of this court. Mr. Sharrha relied upon various decisions rendered by other courts in support of his contention that an appeal lies against the order. They are :

Income Tax Officer Vs. Vinod Krishna Som Prakash, , Addl. Commissioner of Income Tax Vs. Murlidhar Mathura Prasad, , Additional Commissioner of Income Tax Vs. Chekka Ayyanna and Others, , Commissioner of Income Tax, Gujrat Vs. Dineschandra Industries, , Durgaprasad Rajaram Adatiya Vs. Commissioner of Income Tax, , Commissioner of Income Tax Vs. Jabalpur Transport Development Co., , Commissioner of Income Tax Vs. Sitaram Bhagwandas, , Commissioner of Income Tax Vs. Beri Chemical Industries, , National Tractor Company Vs. Income Tax Officer, B-Ward and Others, .

10. In the decision reported in Commissioner of Income Tax Vs. Pohop Singh Rice Mill, this court considered Additional Commissioner of Income Tax Vs. Chekka Ayyanna and Others, , Commissioner of Income Tax, Gujrat Vs. Dineschandra Industries, , Income Tax Officer Vs. Vinod Krishna Som Prakash, , Commissioner of Income Tax Vs. Beri Chemical Industries, and dissented from them. In New Orissa Traders Vs. Commissioner of Income Tax, this court relied upon the decisions of the Madras High Court in Pannalal Ramkumar and Co., Coimbatore Vs. The Income Tax Officer, City Circle II, Coimbatore, and A.S.S.S.S. Chandrasekaran and Brothers Vs. The Commissioner of Income Tax, Madras, . Therefore, unless the decision of the Supreme Court in Mela Ram and Sons Vs. The Commissioner of Income Tax Punjab, would prevail, the decision of this court would have full effect in preference to the decision of other High Courts having persuasive effect only.

11. In the decision in Mela Ram and Sons Vs. The Commissioner of Income Tax Punjab, , the Supreme Court was considering the right of appeal u/s 31 against an order u/s 30 of the Indian Income Tax Act, 1922. It was observed that (p. 618) :

"There is thus abundant authority for the position that Section 31 should be liberally construed so as to include not only orders passed on a consideration of the merits of the assessment but also orders which dispose of the appeal on preliminary issues such as limitation and the like." In the said decision, the

Supreme Court was considering a case where an appeal was dismissed as barred by limitation. It was held that, against such an order, a further appeal lies to the Income Tax Appellate Tribunal. An earlier decision of the Supreme Court in Commissioner of Income Tax, Madras Vs. Mtt. Ar. S. Ar. Arunachalam Chettiar, was distinguished. In this decision the maintainability of a reference application from an order in a miscellaneous petition before the Tribunal was the question. It was held that the order having been made in exercise of its supposed inherent power and not in an appeal u/s 33(1) of the Indian Income Tax Act, 1922, there could be no reference u/s 66(1) or (2) of the Act.

12. When an appeal was not admitted by the Appellate Assistant Commissioner against an order of assessment on the grounds of the same having been filed beyond the time prescribed, a second appeal was filed which was dismissed as not maintainable and a reference was made to this court u/s 66(1) of the Act. Relying upon the decision of the Supreme Court in Commissioner of Income Tax, Madras Vs. Mtt. Ar. S. Ar. Arunachalam Chettiar, , this court held, in the decision in Bansidhar Mohanti Vs. Commr. of Income Tax, , that no appeal lies against an appellate order dismissing the appeal as barred by limitation. However, after the decision of the Supreme Court in Mela Ram and Sons Vs. The Commissioner of Income Tax Punjab, , this court held in CST v. Ramakaran Agarwalla [1962] 13 STC 407(SC) : ILR 1961 Cut 585, that an appeal lies against such order and declared that the decision in Bansidhar Mohanti Vs. Commr. of Income Tax, is no longer good law. In CST v. Aurobindo Auto Service [1963] 14 STC 46(SC) :ILR 1963 Cut 140, relying on Mela Ram and Sons Vs. The Commissioner of Income Tax Punjab, , it was held that an appeal lies against an order summarily dismissing an appeal where the Appellate Tribunal can consider not only the correctness of the order refusing to condone delay but also the merits of the assessment. The same principle has been decided in S. J. C. No. 102 of 1973 decided on September 22, 1975 (Natabar Sahoo v. State of Orissa) and in Bhubaneswar Flour Mills v. State of Orissa [1982] 53 CLT 573. Thus, it is clear that where an appeal, otherwise maintainable, is not decided on merits but on grounds of limitation and the like, a second appeal would lie.

13. Such a principle would not be applicable to a case where the declaration u/s 184(7) is not accepted on account of unexplained delay since no appeal lies against such non-acceptance u/s 246(1)(j) of the Act. An order passed to that effect is not, an order u/s 185(3) of the Act even though the same is described by the Income Tax Officer to be such an order.

14. In The Board of Revenue, Madras Vs. Raj Brothers Agencies, , it was held (p. 2308) :

"It has accepted that interpretation to be correct ever since 1969. Under these circumstances it is not proper for this court to upset that decision at this late stage and disturb a settled position in law .. ."

15. Applying the aforesaid principle, when interprriation has been made as early

as in New Orissa Traders Vs. Commissioner of Income Tax, , which has been affirmed in a direct decision of this court in Commissioner of Income Tax Vs. Pohop Singh Rice Mill, , the settled position should not be unsettled so far as this court is concerned.

16. In support of the second contention, Mr. Sharma has relied upon a decision of this court in CIT v. Narayandas Satyarnanjan [1987] 167 ITR 280(SC), where the decision in New Orissa Traders Vs. Commissioner of Income Tax, was distinguished. In this decision the declaration was not rejected on the ground that it was not furnished within the time allowed. There was a defect in the application and on that ground, the order u/s 185(3) was passed. It was held that an appeal lies against such order. The said decision has no application to the facts of this case since the defect envisaged u/s 185(3) is a defect, in the declaration but does not include a delayed declaration.

17. In view of the aforesaid discussion, both the questions are answered against the assessee. There shall be no order as to costs.

J. M. Mahapatra, J.

18. I agree.