
(1987) 02 OHC CK 0012

In the Orissa High Court

Case No : S.J.C. No's. 53, 54, 55 and 56 of 1980

Builders Union

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 04-02-1987

Acts Referred:

Income Tax Act, 1961 — Section 143(3), 263

Citation : (1987) 64 CTR 310 : (1987) 165 ITR 716 : (1987) 31 TAXMAN 318

Hon'ble Judges : H.L. Agrawal, C.J.; R.C. Patnaik, J

Bench : Division Bench

Advocate : A. Pasayat, for the Appellant; Standing Counsel (I.T.), for the Respondent

Judgement

H.L. Agrawal, C.J.—The Income Tax Appellate Tribunal, Cuttack Bench, has drawn up a consolidated statement of case relating to four assessment years, namely, 1971-72, 1972-73, 1973-74 and 1974-75, and has referred the following question of law for the opinion of this court :

"Whether, on the facts and circumstances of the case, there was merger of the assessment order with the appellate orders of the Appellate Assistant Commissioner and, therefore, the Commissioner had no jurisdiction to cancel the assessments u/s 263 of the Income Tax Act, 1961 ?"

2. The assessee is a partnership firm. For the assessment years 1971-72 and 1972-73, assessments were made u/s 143(3) of the Income Tax Act, 1961 (for short "the Act"), raising the amount of taxability on January 29, 1973. On the assessee's appeal, the Appellate Assistant Commissioner confirmed the assessments. On further appeal, the Tribunal by its order dated June 4, 1974, accepted the book results shown by the assessee except for the contract works done at some particular places and remanded the matter to the Income Tax Officer for fresh assessments after examining the claim of the assessee that these works were done through subcontractors. Pursuant to the remand order, the Income Tax Officer made the reassessment on November 20, 1976, for both

the assessment years mentioned above and accepted the returned income of the assessee.

3. Thereafter, the Commissioner of Income Tax examined the records and found that the Income Tax Officer had accepted the returned figures without examining the points referred to by the Tribunal. Accordingly, he issued a notice u/s 263 of the Act to revise the orders of the Income Tax Officer and ultimately set aside the reassessments and gave certain directions on the view that the reassessment orders passed by the Income Tax Officer were erroneous and prejudicial to the interests of the Revenue.

4. The assessee challenged the order of the Commissioner before the Tribunal.

5. For the assessment year 1973-74, the Income Tax Officer had made assessment u/s 143(3) of the Act and the appeal filed by the assessee before the Appellate Assistant Commissioner was dismissed. The Commissioner of Income Tax examined the records and found that the Income Tax Officer had committed a similar mistake in this year also and that the Income Tax Officer having not passed any specific order u/s 186 of the Act had accepted the status of the assessee as a "registered firm". The Commissioner accordingly after issuing notice u/s 263 set aside the assessment order on similar grounds and after pointing out certain defects, directed the Income Tax Officer to make a fresh assessment in accordance with the observations and directions made in his order.

6. The facts of the case relating to the assessment year 1974-75 are similar to those in the case relating to the assessment year 1973-74 as stated above except that there was no earlier assessment order. The assessee filed an appeal against the order of the Commissioner also before the Tribunal.

7. The main point that was canvassed before the Tribunal was that the Commissioner was not justified in assuming the jurisdiction u/s 263 of the Act in this case for the first three assessment years inasmuch as the orders of the Income Tax Officer had merged in the orders passed by the Appellate Assistant Commissioner. It is only this part of the order of the Tribunal with which we are concerned in these cases and, therefore, deliberately I am not referring to other facts which have been stated in the statement of facts.

8. The stand of the Revenue on this aspect of the matter was that the Commissioner was not precluded from invoking the jurisdiction u/s 263 of the Act inasmuch as the Income Tax Officer had not applied his mind to the directions given by the Tribunal and, accordingly, the orders were clearly prejudicial to the interests of the Revenue and in any case for the assessment year 1973-74, the question of merger did not arise as no appeal had been filed against the order of the Income Tax Officer.

9. The Tribunal took the view that the Income Tax Officer had made the assessments in a casual manner without appreciating the issues involved and the orders being prejudicial to the interests of the Revenue were rightly interfered

with by the Commissioner.

10. In regard to the question of merger, the Tribunal observed as follows :

"We do not find any force in the contention that the orders which were set aside by the Commissioner were actually those of the Appellate Assistant Commissioner. As pointed out by the learned representative for the Department, the appellate orders of the first two years have been set aside by the Tribunal and so they do not exist. In the third year, there was no appellate order against the reassessment made u/s 146. The appeal against the original ex parte order was dismissed as infructuous and the original assessment was not confirmed by the said appellate order. Hence, in this year also, there was no operative appellate order."

11. But, on the petitioner's application, the Tribunal has stated the case and referred the question for opinion of this court.

12. In order to appreciate the submission made by Mr. Pasayat, appearing for the petitioner-assessee, on the basis of the provision contained in Section 263(1) of the Act, it is useful to quote the section :

"263(1). The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Income Tax Officer is erroneous in so far as it is prejudicial to the interests of the Revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment." (emphasis* supplied)

13. The whole basis of Mr. Pasayat's approach was that as the orders of the Income Tax Officer had merged in the order of the Appellate Assistant Commissioner, the Commissioner was not authorised in law to revise the said orders inasmuch as the Commissioner had power to revise the orders of the Income Tax Officer only. In the first instance, the argument appears to be somewhat interesting, but it is devoid of any substance inasmuch as after the remand orders of the Tribunal, the Income Tax Officer had passed fresh orders and it was these assessment orders which were interfered with by the Commissioner under his revisional jurisdiction u/s 263 of the Act on various grounds with which we are not concerned. The original orders of assessment to which the theory of merger might apply were all set aside, including the appellate orders, by the Tribunal and the Income Tax Officer had passed fresh orders under the direction of the second appellate authority, namely, the Tribunal. The answer to the question, therefore, must be given against the assessee and in favour of the Revenue.

14. Since the point raised by the assessee has no substance either on facts or in law, it must pay costs of these references to the Revenue. Hearing fee is

assessed at Rs. 450 (Rupees four hundred and fifty) only.

R.C. Patnalk , J.

15. I agree.