(2008) 03 BOM CK 0019

In the Bombay High Court

Case No : Income-tax Appeal No. 177 of 2008

Commissioner of Income Tax APPELLANT

Vs

Arthur Andersen and Co. RESPONDENT

Date of Decision : 11-03-2008

Acts Referred:
Income Tax Act, 1961 — Section 43B, 80HHE

Citation : (2010) 325 ITR 280

Hon'ble Judges : R.S. Mohite., J;F.I. Rebello, J

Bench : Division Bench

Advocate : A.D. Kangoand P.S. Sahadeven, for the Appellant; S.E. Dastur, Jitendra Jain, A.S. Rao, Ricabchand and R. Suvama, instructed by D.S.K. Legal, for the Respondent

Judgement

1. The Revenue has approached this Court on the following questions:

A. Whether the Tribunal was correct in law in deleting the disallowance of Rs. 9,25,02,953 on account of reimbursement of expenses and Rs. 1,17,59,722 being disallowance of deduction u/s 80HHE ?

B. Whether the action of the Tribunal in merely following its observations in relation to the assessment year 1997-98 while deleting disallowance on account of reimbursement of expenses without appreciating the differential facts of the two years is judicially justifiable ?

C. Whether in the absence of any proof from third parties other than those of the Arthur Andersen group it can be judicially concluded that software services were rendered ?

D. Without prejudice whether in cases where employees of Indian concern are merely assisting the foreign company which is rendering services to its clients for software development it can be legally said that the Indian company is rendering technical services in connection with development of computer software ?

2. There was a common order disposing of two appeals. The present appeal pertains to the assessment year 1998-99. In respect of the assessment year 1997-98, no appeal has been preferred by the Revenue.

3. In so far as part of question A and question B are concerned, the learned Tribunal while disposing of the said two questions had relied on the decision in respect of the assessment year 1997-98. As the Revenue has not preferred an appeal on the very question in respect of the same assessee for the year 1997-98, counsel for the respondents submits that it amounts to acceptance of the question as answered by the Tribunal. Our attention was also invited to the judgment in Commissioner of Income Tax Vs. Oswal Woollen Mills Ltd., which has referred to the principle laid down by the Supreme Court in Berger Paints India Ltd. Vs. Commissioner of Income Tax, Calcutta, . The Punjab and Haryana High Court and has held that the Revenue is not entitled to raise the issue as no appeal was preferred against the earlier order of the Tribunal and no valid cause had been pleaded for reconsideration of the issue.

4. The Revenue against the order passed by the Assessing Officer and confirmed by the Commissioner of income tax (Appeals) preferred two appeals being I. T. A. No. 6192/Mum/2004 for the assessment year 1997-98 and I. T. A. No. 1785/ Mum/2002 for the assessment year 1998-99. The Tribunal first dealt with the Revenue''s appeal for the assessment year 1997-98. The Tribunal noted that the only grievance raised by the Revenue in the appeal was as under:

On the facts and in the circumstances of the case and in law the learned Commissioner of income tax (Appeals)-XL, Mumbai, has erred in deleting the disallowance of Rs. 1,66,19,762 being 20 per cent. of the expenses of Rs. 8,30,98,810 reimbursed to Arthur Anderson World-wide Societe Co-operative.

5. The Tribunal from the facts on record noted that the assessee being a chartered accountants firm is a member of Arthur Anderson World-wide SC (AWSC, in short). The assessee had claimed deduction of Rs. 8,30,98,810 on account of reimbursement of expenses under the member-firm inter-firm agreement with Arthur Anderson World-wide Switzerland. This deduction was, however, disallowed by the Assessing Officer. The assessee carried the matter in appeal before the Commissioner of income tax (Appeals), but without any success. The matter when it came up before the Tribunal by way of second appeal, the Tribunal restored the matter to the file of the Assessing Officer to decide the issue afresh in accordance with law after providing adequate opportunity to the assessee of being heard.

6. On the matter being considered by the Assessing Officer and considering the material placed by the assessee, the Assessing Officer concluded that the payment to Arthur Anderson World-wide SC represent reimbursement of establishment costs, royalty for the use of name and access to knowledge and database and fees for technical services for provision for various other services. The Assessing Officer held that the expenditure was incurred wholly and

exclusively for the purposes of profession of the assessee, but disallowed an expenditure of 20 per cent. The assessee aggrieved by the disallowance preferred an appeal before the Commissioner of income tax (Appeals), who deleted the disallowance. The Revenue aggrieved by the order of the Commissioner of income tax (Appeals) preferred an appeal to the Tribunal. The Tribunal held that the very concept of token disallowance is bad in law, because such a disallowance is inherently based on surmises and conjectures and devoid of a legally sustainable foundation. It is a case where one accepts all the contentions but not the consequences following from accepting the same and accordingly upheld the conclusions arrived at by the Commissioner of income tax (Appeals) and accordingly dismissed the appeal.

7. It is thus clear that the Assessing Officer himself for the assessment year 1997-98 allowed the expenditure. However, disallowed 20 per cent. of the said expenditure which was set aside by the Commissioner (Appeals). In an appeal preferred by the Revenue, that order was upheld. Relying on the said order for the assessment year 1998-99 the Tribunal observed as under:

Following our order for the assessment year 1997-98 and in the light of the Assessing Officer''s categorical findings in the remand proceedings, we deem it fit and proper to direct the Assessing Officer to delete the impugned disallowance. The assessee gets relief accordingly.

8. The Revenue did not prefer an appeal for the assessment year 1997-98, but has preferred an appeal only in respect of the assessment year 1998-99. In so far as that question is concerned, it will thus be apparent that the Assessing Officer for the assessment year 1997-98 allowed the expenditure. It is in that context that we have to consider what is the effect of non-filing of appeal by the Revenue for the assessment year 1997-98 on the first question.

9. The assessee had relied on the judgment of the Punjab and Haryana High Court in Commissioner of Income Tax Vs. Oswal Woollen Mills Ltd., which following the judgment of the Supreme Court in Berger Paints India Ltd. Vs. Commissioner of Income Tax, Calcutta, came to the conclusion that even in respect of an order passed by the income tax Appellate Tribunal in respect of the very issue if appeal had not been filed in respect of the previous assessment year it was not open to the Revenue to maintain an appeal for the subsequent years unless valid cause was shown. In Berger Paints India Ltd. Vs. Commissioner of Income Tax, Calcutta, , the Supreme Court considering that the High Courts of Gujarat, this Court (Bombay High Court) and the Madras High Court had interpreted the provisions of Section 43B and this interpretation has not been challenged by the Revenue following the judgment in the case of Union of India and Others Vs. Kaumudini Narayan Dalal and Another, and other judgments held that the principle established is that if the Revenue has not challenged the correctness of law laid down by the High Court and has accepted in the case of an assessee then it is not open to the Revenue to challenge its correctness in the case of other assessees without just cause. Therefore, the law laid down in

Berger Paints India Ltd. Vs. Commissioner of Income Tax, Calcutta, was based on acceptance of the judgment of the High Courts. This is further so as the judgment of the High Court would be binding on all authorities functioning within its jurisdiction and more so considering the interpretation of law which were binding on the Revenue. The Punjab and Haryana High Court in Commissioner of Income Tax Vs. Oswal Woollen Mills Ltd., has sought to extend the said proposition of law even to the judgment before the Tribunal, if an appeal not been preferred by the Revenue. The correctness of the judgment in our opinion need not be gone into as in this case admittedly for the assessment year 1997-98 under the very head the Assessing Officer allowed the deduction except to the extent of 20 per cent. which disallowance has been set aside in appeal.

10. Once the Assessing Officer allowed the deduction and the Revenue did not prefer an appeal against the said order of the Assessing Officer in so far as the present issue is concerned that would be binding on the Revenue. At the highest the issue would be whether 20 per cent; disallowance ought to be considered. In our opinion, considering that the Commissioner (Appeals) and the Tribunal set aside the 20 per cent. disallowance in respect of the same assessee the Revenue was bound to follow the judgment, having not challenged the order for the assessment year 1997-98 neither has any valid cause being shown for reconsideration. In so far as this issue is concerned the Revenue is precluded from raising the issue in the present appeal.

11. Considering that the very issue was in issue for the assessment year 1997-98 and as the Revenue did not prefer an appeal in respect of the said assessment year in our opinion that part of questions A and B as framed to the extent of disallowance of the sum of Rs. 9,25,02,953 would not arise.

12. In so far as questions C and D and part of question A, the learned Tribunal reversed the findings of the Commissioner (Appeals) which had confirmed the order of the Assessing Officer. On a prima facie consideration of the findings recorded we are of the opinion that the contentions as urged in part in question A and questions C and D the appeal will have to be admitted. We, however, reframe the question as under:

Whether, on the facts and circumstances of the case, the learned Tribunal was right in holding that the respondent-assessee is engaged in the business of providing technical services outside India in connection with the development or production of computer software ?

13. In so far as question E is concerned, we do not find that the said question arises from the order of the Tribunal as the same was not raised before the Tribunal. Question F is consequential to answering question E. In our opinion, questions E and F also consequently would not arise.

14. Appeal admitted on the question earlier reframed. Respondents waive service.