
(1994) 06 MAD CK 0050

In the Madras High Court

Case No : Tax Cases No"s. 954 and 955 of 1981 (References No"s. 450 and 451 of 1981)

Commissioner of Income Tax

APPELLANT

Vs

A.S.K. Rathinasamy Nadar

RESPONDENT

Date of Decision : 15-06-1994

Acts Referred:

Income Tax Act, 1961 — Section 256, 37

Citation : (1995) 212 ITR 527

Hon'ble Judges : Mishra, J;C. Shivappa, J

Bench : Division Bench

Advocate : C.V. Rajan, for the Appellant; P.P.S. Janarthana Raja, for the Respondent

Judgement

Mishra J.

1. After hearing learned counsel for the Revenue, we are constrained to observe that the Revenue has made an unnecessary exercise before the Tribunal for making a reference of a question which does not appear to arise in the case and before us in the instant case which has remained pending for more than a decade and it has been placed for hearing us only now.

2. The statement of the case discloses that after the Appellate Tribunal, Madras Bench, "A", disposed of the proceeding, the Revenue sought a reference to this court, and the Tribunal declined to make a reference, the Revenue approached this court in T. C. P. Nos. 140 and 141 of 1980 u/s 256(2) of the Income Tax Act, 1961 (hereinafter referred to as "the Act"), and this court directed, in the said proceeding, the Tribunal to refer the question to it for determination whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in law and had valid material to hold that the claim for the allowance of secret commission should be allowed even though the assessee could produce neither the receipt for the payment of secret commission and brokerage nor the name and address of the payees concerned to enable verification of the payment by

the Income Tax Officer. The Tribunal has, accordingly, referred the said question to this court on the facts, which are as follows :

The assessee is a registered firm doing business in timber. In its turnover submitted to the taxing authority, the assessee claimed an allowance as regards the brokerage commission on sales to Ashok Leyland limited and some other parties for the assessment years 1974-75 and 1975-76. The Income Tax Officer disallowed the entire commission paid for the sale of timber to Ashok Leyland limited and estimated the probable amount of commission paid on the sales effected to other parties at certain amounts and disallowed the entire amounts for the same reason for which he disallowed the commission payment to Ashok Leyland Limited. For the balance brokerage, the Income Tax Officer observed that there might be likelihood of inflation in the payments and disallowed further sums. On appeal by the assessee, the Appellate Assistant Commissioner held that the assessee was entitled to the deduction even though he was not in a position to give the names and addresses or produce the parties before the Income Tax officer for the purpose of examination especially as the amounts claimed were reasonable having regard to the trade practice. The Appellate Assistant Commissioner, however, disallowed 10 per cent. of the total brokerage payment on the ground that there might be some inflation in the brokerage expenses. The Revenue appealed before the Tribunal. The Tribunal confirmed the findings of the Appellate Assistant Commissioner.

3. It is seen from the orders of the Income Tax Officer, the Appellate Assistant Commissioner and the Tribunal and the statement of the case submitted to this court that the Income Tax Officer examined the vouchers given in support of the payment of brokerage in connection with the transaction with Ashok Leyland Limited and to others. He, however, disallowed the commission on the ground that there were no addresses available in the vouchers. The assessee, however, submitted a letter stating that all the payments made by them were genuine, that the payments were made to several persons like carpenters and that they were not in a position to produce any of the recipients for the examination in respect of Ashok Leyland Limited, though they would produce them in all other cases. The Income Tax Officer, however, observed that Ashok Leyland Limited was an established concern and that if the payments had been made to effect purchases then the person concerned must be a person of status and there should be no difficulty for the assessee to produce the recipient for cross-examination. The Appellate Assistant commissioner, however, mainly took notice of the trade practice and recorded his disagreement with the view of the Income Tax Officer as regards the brokerage paid to Ashok Leyland Limited and others were concerned.

4. The Tribunal, however, has agreed with the Appellate Assistant Commissioner that there is a general trade practice of paying commission and brokerage on the timber sales made which is generally dictated by business needs and exigencies, a fact which has not been denied by the Income Tax Officer also, and he himself

has allowed a small amount of commission on the said basis. It has, however further said that so long as the prevailing practice of payment of commission and brokerage is recognised in this line of business and the commission payment claimed is reasonable and comparable to commission paid by others in this line of business, it is only reasonable to presume that the assessee must also have paid such commission in respect of sales effected by it. Viewed in this light, it has said that the order of the Appellate Assistant Commissioner allowing brokerage payment for sales effected to Ashok Leyland Limited and other allied purchasers has to be upheld.

5. This observation in the Appellate tribunal's order has been vehemently attacked by learned counsel for the Revenue, who has, on specific queries by the court, urged that the Tribunal has only gone by a so-called presumption that the assessee must also have paid such commission, which does not constitute a valid material and besides the above there being no valid materials, the Tribunal ought to have allowed the Revenue's appeal and reversed the findings of the Appellate Assistant Commissioner. Learned counsel for the Revenue has heavily relied upon a judgment of the supreme Court in the case of Lachminarayan Madan Lal Vs. Commissioner of Income Tax, West Bengal, . The assessee in this case had claimed deduction u/s 37 of the Act a certain amount of selling agency commission. The Income Tax Officer rejected the claim. But the Appellate Assistant Commissioner allowed the claim and observed as follows (at page 441) :

"On a careful consideration of the facts and circumstances, I am inclined to take the view that the discount should be allowed as a deduction, as having been laid out wholly and exclusively for the purpose of the appellant's business. The facts narrated above clearly indicate that there has been a phenomenal increase in the sales of the appellant, after the appointment of the selling agents. The mere fact of the partners of the selling agents being closely related to the partners of the appellant-firm is of little consequence, in the absence of proof of collusion between the two concerns. Instead of the payment being made to total strangers, the discount in the present case has been paid to a firm, constituted by the near relations of the partners of the appellant and, what is more, the payment was against actual service rendered. The depositions recorded by the Income Tax Officer referred to above clearly bring out that the selling agency firm contacted the customers and thereby improved the sales of the appellant."

6. Aggrieved by the decision of the Appellate Assistant Commissioner, the Revenue took the matter up in appeal to the Tribunal. The Tribunal reversed the order of the Appellate Assistant Commissioner and restored that of the Income Tax Officer. It came to the conclusion that the so-called selling agency agreement between the assessee-firm and the selling agency firm was only a make-believe arrangement. It was merely a device to minimise the tax liability of the assessee-firm and it was not a genuine business arrangement. It arrived at that conclusion on the basis of the set of facts as disclosed in the said judgment. The Tribunal

held, on facts, that it was unable to accept the oral evidence at its face value in view of the surrounding circumstances of the case. The Supreme Court has, on the above facts, said about the Tribunal : "It was open to the Tribunal to do so." The Supreme Court has also said that the Tribunal's observations were based on the oral evidence in the case and the Tribunal had disbelieved the oral evidence led on behalf of the assessee that the darwan of the selling agency firm went in the lorry for delivering the goods sold. The Supreme Court has, on the said basis, observed as follows (at page 446) :

"In our opinion, the facts of this case come within the rule laid down by this court in *Swadeshi Cotton Mills Co. Ltd. Vs. Commissioner of Income Tax, Uttar Pradesh (No. 1)*, . The question whether an amount claimed as an expenditure was laid out or expended wholly and exclusively for the purpose of the business has to be decided on the facts and in the light of the circumstances in each case. The mere existence of an agreement between the assessee and its selling agents or payment of certain amounts as commission, assuming there was such payment, does not bind the Income Tax Officer to hold that the payment was made exclusively and wholly for the purpose of the assessee's business. Although there might be such an agreement in existence and the payments might have been made, it is still open to the Income Tax Officer to consider the relevant factors and determine for himself whether the commission said to have been paid to the selling agents or any part thereof is properly deductible u/s 37 of the Act."

7. The Supreme Court, in such circumstances, agreed with the opinion of the High Court and observed that the High Court was justified in not calling for a statement of case under sub-section (2) of section 256.

8. We are of the view that in the instant case also, had the full facts been placed before this court in *T. C. P. Nos. 140 and 141 of 1980*, this court would have declined to call for any statement of facts under sub-section (2) of section 256 of the Act. Since, however, a reference has been called for and it is before us, we record that the Supreme Court has laid down the limitations as to the question of law that may be called for by the courts in a proceedings of this kind. The observation of the Supreme Court that it is open to the Tribunal to analyse the facts and evidence and to give reasons of its own in support of any conclusion is one which cannot be ignored. The Tribunal in the instant case has taken notice of the evidence as well as the trade practice and has accepted the case of the assessee as genuine. Once a court or a Tribunal, on the facts, has found certain evidence genuine and sufficient, it is not open to any appellate or supervisory authority to reverse the same merely on the ground that it has any other view on the sufficiency of the evidence and genuineness of the case of the assessee. One of the settled principles of law is that the High Court while answering any question shall not record its own findings on issues of facts. It can, undoubtedly, see whether there is any invalid material taken into consideration by the Tribunal or whether any valid material has been omitted and not taken into consideration.

The High Court cannot, however, go into the facts first to decide any issue of fact which is opposite to the opinion and come to a finding opposite to that of the Tribunal and then hold that the Tribunal has committed an error of law. Learned counsel for the assessee has drawn our attention to a Bench decision of the Bombay High Court in the case of Goodlas Nerolac Prints Ltd. Vs. Commissioner of Income Tax, Bombay City-II, , which has taken notice of the trade practice of secret commission paid to the customers and others and found no error in granting deduction of such expenditure u/s 37 of the Act. To conclude, we hold that the Tribunal had full materials to support its conclusion and it has committed no error of law. The reference is answered accordingly. Fee for learned counsel for the Revenue on the usual rate.