(1996) 05 GAU CK 0015

In the Gauhati High Court

Case No : Civil Rule No. 1 (M) of 1996

Commissioner of Income Tax	APPELLANT
Vs	
Assam Frontier Tea Ltd.	RESPONDENT

Date of Decision : 27-05-1996

Acts Referred:
Income Tax Act, 1961 — Section 256(2)

Citation : (1996) 135 CTR 486 : (1996) 221 ITR 311

Hon'ble Judges : N.S. Singh, J;D.N. Baruah, J

Bench : Division Bench

Advocate : G.K. Joshi and U. Bhuyan, for the Appellant; A.K. Saraf, K.K. Gupta and R.K. Agarwal, for the Respondent

Judgement

D.N. Baruah, J.—This application u/s 256(2) of the Income Tax Act, 1961, is against the order dated October 24, 1994, passed by the Income Tax Appellate Tribunal, Guwahati, in Reference Application No. 4/(Gau) of 1994 arising out of the Income Tax Appeal No. 403/(Gau) of 1991, for the assessment year 1987-88 rejecting the application u/s 256(1) of the Income Tax Act, and praying for a direction to refer the questions mentioned in the petition for opinion of this court.

2. Facts in short may be stated as follows ;

The assessee, Assam Frontier Tea Ltd. and the assessment involved in this present case relates to the year 1987-88. The assessee entered into a forward contract with another company Apeejay Pvt. Ltd., to sell tea of different quantities at various rates pursuant to an agreement entered into by and between the assessee-company and Apeejay Pvt. Ltd. on November 1, 1985. This agreement was in the form of a letter issued by the director, the assessee-company, to Apeejay Pvt. Ltd. As per the said agreement, the assessee-company agreed to sell 16,30,000 kgs. of tea comprising the production of various tea gardens of the assessee-company, namely, Talup, Hokonguri, Khobong, Hapjan, Budlabeta, Kharjan, Pengaree and Budlepara Tea Estates. While making the assessment, the Assessing Officer held that the agreement was an arrangement to understate the assessee''s sale proceeds and thereby to reduce the tax liability. According to him, the transaction between the assessee-company and the Apeejay Pvt. Ltd. was not a genuine transaction and also not a bona fide business deal. The Assessing Officer further observed that this agreement was made with an intention of reducing profits with a view to reduce tax liability and, accordingly, the Assessing Officer added Rs. 34,80,707. Being aggrieved by the assessment order, the assessee-company preferred an appeal before the Commissioner of Income Tax (Appeals). The Commissioner of Income Tax (Appeals) held that the agreement was like a forward contract for sale of tea irrespective of price fluctuation in the auction market. The assessee was bound to abide by and honour the said contract and, accordingly, he held that the Assessing Officer could not determine the notional income by bringing on record the evidence to support the same and the entire addition was deleted. The Revenue preferred the matter before the Income Tax Appellate Tribunal who held that the transaction between the assessee and the Apeejay Pvt. Ltd. could not be said to be not bona fide. The Tribunal, therefore, upheld the decision of the Commissioner of Income Tax (Appeals).

3. An application u/s 256(1) of the Income Tax Act, 1961, was filed by the Revenue with a request to draw up a statement of the case and to refer the following questions for opinion of this court :

"(1) Whether, on the facts and in the circumstances of the case, the findings of the Tribunal that the transactions between the assessee and the Apeejay Pvt. Ltd. cannot be said to be not bona fide is based on relevant consideration and whether the decision based on such consideration is not tenable in law ?

(2) Whether, on the facts and in the circumstances of the case, the transactions between the assessee and the Apeejay Pvt. Ltd. based on the agreement dated November 1, 1985, is not a sham transaction, and whether such agreement is not a colourable device used for reducing tax liability by the assessee ? If so, whether the decision of the Tribunal based on such agreement is not tenable in law ?

(3) Whether, on the facts and in the circumstances of the case and in view of questions Nos. 1 and 2 above, the decision of the Tribunal upholding the Commissioner of Income Tax (Appeals) order deleting addition of Rs. 34,80,707 is justified ?"

4. The Tribunal, however, rejected the prayer for referring the said questions on the ground that no question of law arose in respect of the aforesaid three (3) questions. Hence, the present petition.

5. We have heard Mr. G.K. Joshi, learned standing counsel for the Revenue, assisted by Mr. U. Bhuyan, and Dr. A.K. Saraf, learned counsel for the assessee, assisted by Mr. K.K. Gupta.

6. According to Mr. Joshi, learned standing counsel for the Revenue, all these

three questions involved questions of law and the Tribunal ought to have referred those three questions for opinion of this court. So far as the first question is concerned Mr. Joshi has drawn our attention to the judgment of the Tribunal specially in sub-paragraph (3) of paragraph 4, wherein the Tribunal specifically mentioned that the Senior Departmental Representative and the Departmental Representative in a written submission urged that the Assessing Officer made the addition of Rs. 34,80,707 on the following amongst other grounds :

" (i) The sale was made in terms of the assessee''s agreement dated November 1, 1985, referred to above.

(ii) Actual transfer of goods from the assessee-company to allied company did not take place.

(iii) Tea was sent to the warehouse in the name of the assessee-company."

7. Mr. Joshi, learned standing counsel for the Revenue, submits that there was non-consideration of materials and, therefore, it is a question of law.

8. Dr. A.K. Saraf, learned counsel for the assessee, on the other hand, fairly concedes that non-consideration of the relevant materials may give rise to a question of law. However, this court before giving a direction must be prima facie satisfied that there was really some non-consideration of the material facts. This court may not give a direction without being satisfied about the existence of such grounds, namely, non-consideration of certain materials. In this connection, Dr. Saraf, has drawn our attention to a decision of the Mysore High Court in Venkateswara District Motor Service Vs. Commissioner of Income Tax, Mysore, . In the said decision, the Mysore High Court has held thus (page 604):

"If in an application u/s 66(2) of the Indian Income Tax Act, 1922 (which is in pari materia similar to Section 256(2) of the Income Tax Act, 1961), it is asserted that the conclusion reached by the Tribunal does not properly flow from the material on which it depended, it would be the duty of the High Court to decide whether what is asserted is prima facie supportable. It is only then that a question of law can arise".

9. Mr. Joshi, learned standing counsel for the Revenue, fairly concedes the said legal proposition.

10. We find sufficient force in the submission of Dr. Saraf. We are also in respectful agreement with the decision of the Mysore High Court (see Venkateswara District Motor Service Vs. Commissioner of Income Tax, Mysore, It is true that each and every assertion that a question of law is involved will not enable a court to give direction to the Tribunal for referring the said question to the court without the court being prima facie satisfied about the existence of the basis of the said assertion.

11. Bearing in mind the above proposition of law, we are to see whether the contention of the petitioner that there is a prima facie case for giving a direction

to the Tribunal to refer the above questions whether exists or not. In this connection, Mr. Joshi, learned standing counsel appearing on behalf of the Revenue, has drawn our attention to paragraphs 4(1) and 4(2) of the judgment where the submission made by the learned Senior Departmental Representative is reflected. Mr. Joshi has also drawn our attention to sub-paragraph (3) of paragraph 4 of the judgment wherein the Tribunal noted that the Assessing Officer made an addition of Rs. 34,80,707 on the ground that the actual transfer of tea from the assessee-company to the allied company did not take place. Tea was sent to the warehouse in the name of the assessee. As per the agreement invoices of tea were supposed to be sent to the buyers but the tea continued to remain in the warehouse, was thereafter straightaway sold by the brokers. According to Mr. Joshi, these are the sufficient materials which the Tribunal ought to have taken into consideration before arriving at the decision. Mr. Joshi submitted that the Tribunal though noted did not decide those matters.

12. Dr. Saraf, on the other hand, submits that these observations were made by the Assessing Officer, not by the appellate authority or the Commissioner of Income Tax (Appeals) and, therefore, it is not necessary on the part of the Tribunal to consider those contentions. Dr. Saraf has further submitted that even then the points were considered in paragraph 8 of its judgment, it was not necessary on the part of the Tribunal to decide those contentions. Dr. Saraf has also drawn our attention to the second paragraph of paragraph 8 of the said judgment. We have gone through the said submission.

13. Similarly, Mr. Joshi has also drawn our attention to sub-paragraph (3) of paragraph 4 and subsequent Clauses (iii) and (vi) of the aforesaid sub-paragraph (3) of paragraph 4 of the Tribunal''s order. We find that prima facie these were not at all discussed by the Tribunal at the time of passing of the order. Accordingly, in our opinion, this point of question No. 1 is referable u/s 256 of the Act and, as such, this is to be referred to the court for opinion.

14. Dr. Saraf has also submitted in this connection that the Income Tax Officer or the Tribunal is only required to consider and apply his mind to a particular subject-matter or a particular source of income from the point of view of its taxability or non-taxability and not to any incidental facts connected with it. In this connection, he drew our attention to the decision of the apex court in Commissioner of Income Tax, Calcutta Vs. Rai Bahadur Hardutroy Motilal Chamaria, wherein the apex court held that "consideration" does not mean "incidental" or "collateral" examination of any matter by the Income Tax Officer in the process of assessment. There must be something in the assessment order to show that the Income Tax Officer applied his mind to the particular subject matter or the particular source of income with a view to its taxability or to its non-taxability and not to any incidental connection". Dr. Saraf relying upon the aforesaid decision has urged before us that it is only the subject matter of tax that should be considered but not inference of facts. According to him, these above points referred by the Assessing Officer are incidental inferences of facts,

therefore, there is no necessity on the part of the Tribunal to consider this matter. We are afraid we cannot agree with Dr. Saraf in this connection. In this case whether there was an actual transfer or there was no such transfer was the issue. In our opinion, these points are vital in nature and, therefore, it is necessary for the Tribunal to apply its mind on those points. Accordingly, we reject the contention of Dr. Saraf on this point. In our opinion, question No. 1 is a question of law and the same should be referred to this court for opinion.

15. Regarding question No. 2, Mr. Joshi, learned standing counsel for the Revenue, vehemently argued before us that along with the agreement annexed with the additional affidavit as in annexure "I" is not an agreement in a proper sense. According to him, it is not in the proper form. He submitted that this agreement should be rejected inasmuch as it is not in a proper form. There was no clause regarding mode of payment and there was no provision for interest. Although the transaction was more than Rs. 3 crores only a sum of Rs. 59,701 was received by the assessee-company in the relevant year and it was shown in the accounts of the relevant year. Mr. Joshi further submits that this cannot be a business tactics. No businessman will defer payment to the next year. To this, Dr. Saraf has drawn our attention to a decision of the Rajasthan High Court in Commissioner of Income Tax Vs. Shri Prithvi Raj Daga, In the said decision, the Rajasthan High Court held that (headnote):

"the question whether the sale of immovable property is genuine or a colourable transaction is a question of fact and no question of law would arise from the decision of the Tribunal on this question".

16. Dr. Saraf has also relied upon a decision of the Allahabad High Court in the case of Commissioner of Income Tax Vs. Govind Narain, wherein the Allahabad High Court dealing with a similar question, held that (headnote) :

"the finding that the deed was genuine and not sham was a finding of fact and the Tribunal was justified in allowing the claim of partial partition ".

17. It is true that whether a particular document is a colourable or sham transaction is a finding of fact and no question of law arises. We have examined the document. The director, Frontier Tea Limited, the assessee-company wrote a letter to Apeejay Pvt. Ltd. making the offers for sale of about 16,30,000 kgs. of tea at the price and quantity mentioned in the said letter and also incorporating certain terms and conditions and Apeejay Pvt. Ltd. accepted the same. In our opinion, this becomes a valid contract. We do not find anything wrong in it. There may be clauses for prescribing the mode of payment,, or penalty or the provision for interest. In the absence of those provisions the document cannot be rejected as not genuine.

18. In view of the aforesaid discussion, we are of the opinion that no referable question of law arises in this case and question No. 2 is a question of fact, and, accordingly, we are not inclined to give any direction to the Tribunal to refer question No. 2.

19. In view of our decision, in respect of questions Nos. 1 and 2, in our opinion, question No. 3 does not arise at all from the order of the Tribunal at this stage. We are not inclined to give any direction to the Tribunal to refer question No. 3 also. Accordingly, we partly allow this petition directing the Tribunal to refer question No. 1 to this court for opinion.

20. The annexures to the additional affidavit filed by the Department on May 27, 1996, shall form part of the statement of the case.

21. Considering the entire facts and circumstances of the case, however, we make no order as to costs.

22. A copy of this judgment under the signature of the Registrar and the seal of the High Court shall be transmitted to the Income Tax Appellate Tribunal.