
(1979) 02 BOM CK 0023

In the Bombay High Court

Case No : Income-tax Reference No. 175 of 1970

Commissioner of Income Tax

APPELLANT

Vs

Associated Cement Co. Ltd.

RESPONDENT

Date of Decision : 26-02-1979

Acts Referred:

Income Tax Act, 1922 — Section 23(3), 30

Citation : (1979) 13 CTR 137 : (1979) 119 ITR 855

Hon'ble Judges : M.N. Chandurkar, J; Desai, J

Bench : Division Bench

Advocate : R.J. Joshi, for the Appellant; R.J. Kolah, for the Respondent

Judgement

Desai, J.—This is a reference at the instance of the Commissioner under s. 66(1) of the Indian I. T. Act, 1922. The question referred to us reads as follows :

"Whether, on the facts and in the circumstances of the case, an appeal lay to the Appellate Assistant Commissioner on the orders passed by the Income Tax Officer determining the ultimate tax liability of the assessee after making adjustments for the proper amount of abatement under the Double Taxation Avoidance Agreement with Pakistan ?"

2. The reference arises from the common order of the Tribunal in Income Tax Appeal Nos. 19376 to 19381 of 1967-68. We are concerned with the assessment years 1952-53 to 1957-58. The assessee-company is a well-known cement manufacturing company. Two of its factories are located in Pakistan. The products of these factories are sold in Pakistan itself. Thus, the assessee-company would have a certain income chargeable in Pakistan. We are concerned in this reference with the scheme for avoidance of double taxation of income in India and Pakistan. Broadly speaking, the procedure prescribed in the agreement for the avoidance of double taxation is for the ITO to keep the estimated amounts of tax which would have to be given by way of abatement, in abeyance, till the figures are finally settled. The assessment would be made on the entire

income in the usual manner and the demand would be completed, but a portion of the demand would be held over. A time is prescribed within which the assessee has to produce the certificate of assessment in Pakistan and on production of this certificate the uncollected portion of the demand would be adjusted against the abatement allowable under the agreement. If the certificate is not produced within the prescribed time or the extended time, the abatement shall cease to be operative and it would follow that the entire amount of tax which was kept back would be collected from the assessee.

3. In the assessee-company's case, the particulars of the Pakistan assessments were unknown when the material assessments were completed. The ITO, to whose orders we shall refer a little later on, followed the procedure described earlier to enable the assessee-company to get the abatement in due course. As and by way of example, for the assessment year 1952-53, the ITO computed the total income of the company at Rs. 2,13,68,065. The above sum was assessed under s. 23(3). The company, however, estimated that an amount of Rs. 27,71,496 was its profit arising or accruing in Pakistan. In para. 6 of the order of the ITO, to which we shall advert later on, the ITO dealt with this estimate and abeyance of the tax thereon till the necessary certificate was produced by the assessee-company.

4. After the Pakistan assessments were completed, the assessee furnished the ITO with copies of the relevant assessment orders and the necessary certificate. The assessee-company also filed applications under s. 48 of the Indian I. T. Act, 1922, claiming refund of the amount of abatement due under the agreement. The ITO thereafter scrutinised the assessee's claim and passed orders fixing the quantum of abatement for various years. These orders were captioned "Double Taxation Relief Order". For example, as against the amount of Rs. 27,71,496, which was the amount mentioned in para 6 of the ITO's original order for the assessment year 1952-53, the ITO after production of the certificate decided that relief was due only on Rs. 15,76,218. The amount of tax which had been kept in abeyance for this year was Rs. 11,89,734.24 and as a result of his subsequent decision the ITO decided that relief due to the assessee under the said agreement was only in the amount of Rs. 6,77,445.31. Accordingly, Rs. 5,12,288.93 represented the further amount of tax which was now collectable from the assessee. Accordingly, a notice of demand was issued and served.

5. The assessee did not agree with the calculations and the basis of computation made by the ITO on the quantum of relief it was entitled to and accordingly took the matter in appeal before the AAC. We may observe that a similar situation exists for all the years under consideration, though we need not advert to the actual figures of the amount of the original estimate, the amount as per the certificate issued by Pakistan authorities and what amount was actually determined by the ITO after production of the Pakistani assessments as being the amount on which the assessee-company was entitled to relief under the said agreement.

6. The common order of the AAC for all these years is annexed as annex."B" to the statement of case and in that order the AAC has set out the figures of the income on which abatement was estimated originally, the Pakistan income on which abatement was allowed, and what, according to the assessee, the ITO ought to have allowed. The basis of this difference of opinion need not be gone into since a very limited question arises in this reference and, in the view which we are inclined to take, the merits of the respective contentions will have to be gone into by the AAC. According to the AAC, the orders of the ITO which were the subject-matter of appeals before him were passed to give effect to the Double Taxation Avoidance Agreement, but did not amount to assessments. In the AAC's view, the assessments which had been originally made, had been made under s. 23(3) and these assessments had become final and conclusive long ago. According to the AAC, if the assessee-company had any grievance about the original assessment it could have filed an appeal at that time, but not having done so, it could not prefer an appeal at a later stage. However, according to the AAC, what the ITO had done subsequently at the stage of production of certificates was illegal and in the AAC's view all the orders designated double taxation relief orders passed by the ITO (annex."E" collectively) were illegal orders as being beyond the competence and jurisdiction of the ITO and no appeal lay from such illegal orders. This conclusion of the AAC is to be found in para. 5 of his common order.

7. The assessee carried the matter in appeal of the Income Tax Appellate Tribunal. After summarising the factual position and the respective contentions, the Tribunal noted that according to the departmental representative the orders passed by the ITO giving relief under the double taxation avoidance agreement were merely in the nature of appendices to the original assessment orders. According to the departmental representative, the original orders had become final and conclusive and no appeals could be preferred against these appendices. It is rather curious to note that the departmental representative did not fully accept the reasoning of the AAC that the subsequent determination and recomputation by the ITO was not appealable inasmuch as the ITO had acted beyond his competence and jurisdiction in revising and recomputing the Pakistani income in order to give relief under the Double Taxation Avoidance Agreement. The Tribunal did not find substance in the approach or the argument of the departmental representative. In its view, the orders passed by the ITO (annex."E" collectively) could only be regarded as orders under s. 23(3) of the Indian I. T. Act, 1922, and they were, therefore, appealable under s. 30 of the Act when the assessee was dissatisfied with the amount of tax which was held to be payable by him.

8. Mr. Joshi, appearing on behalf of the Commissioner, took us through the decision of the Bombay High Court in Commissioner of Income Tax, Bombay City II Vs. Shanti K. Maheshwari, , where a Division Bench of this court had gone into the Agreement for Avoidance of Double Taxation between India and Pakistan and the articles with which we are concerned, and has indicated its views on the

procedure to be followed. The question of procedure was in the forefront of the decision of the Calcutta High Court in *SHELL CO. OF INDIA LTD. Vs. COMMISSIONER OF Income Tax, CALCUTTA.*, , where an assessee which had not followed the proper procedure, was denied relief which otherwise it might have been entitled to. In a later decision of that very High Court, viz., *Income Tax Officer, 'A' Ward, Companies District I, Calcutta and Another Vs. State Bank of India*, , the scope of what the ITO can do at a subsequent stage, i.e., when the certificate is produced before him, has been indicated.

9. Based on the observations in these decided cases, Mr. Joshi on behalf of the Commissioner contended that the claim for abatement has to be made at the time of the original assessment. In his view if at that time the Pakistani assessment had been completed, then the claims would have been gone into by the ITO and it was at that time that the assessee could have gone in appeal if dissatisfied with the relief allowed by the ITO since this was the stage of assessment according to the learned counsel for the Commissioner. In answer to a query from the Bench he fairly stated that if this question, i.e., the question of giving double taxation avoidance relief had been determined at the stage of the original assessment (on the footing that necessary certificate was then available from the Pakistani authorities) then the assessee-company could have, in its appeal, agitated the question of relief allowed to it by the ITO if it had been dissatisfied with the quantum of relief allowed. However, according to him, once that stage had been passed and a certificate subsequently produced, then the order of the ITO is merely an order under s. 49A of the Agreement for Avoidance of Double Taxation between India and Pakistan and such an order cannot be regarded as part of the assessment. If it is not a part of the assessment of the assessee, then, according to him, there was no appeal. There was considerable discussion at the Bar as to the scope of the jurisdiction of the ITO at the subsequent stage, but in the view that we are taking, we will not go into this aspect inasmuch as that will be really a matter concerning the merits of the order of the ITO rather than the question of appealability.

10. Mr. Kolah on behalf of the assessee supported the order of the Tribunal and also referred us to the observations of the Supreme Court in *S. Sankappa and Others Vs. The Income Tax Officer, Central Circle II, Bangalore*, . It appears from these observations that the Supreme Court was primarily concerned with the procedure for assessing registered firms to be found ins. 23(5) of the Indian I. T. Act, 1922. These observations, therefore, cannot be considered as having a binding effect on the question under consideration before us though they do throw some light on the views of the Supreme Court on the question of proper approach to such questions.

11. In our opinion, it is impossible to accept as correct the view expressed by the AAC that the assessee-company should have gone in appeal, if at all at the stage of the original assessment. For example, according to the AAC, for the assessment year 1952-53, the assessee-company should have preferred an

appeal within the prescribed period from the assessment order of the ITO, annex."A-1". To consider the correctness of this conclusion, it will be necessary to scrutinise the said order and in particular the portion thereof dealing with the question of giving relief to the assessee-company under the aforesaid agreement. As stated earlier, para. 6 of the order of the ITO deals with the question of this relief. Paragraph 6 may be fully extracted and it reads as follows :

"The company also claims abatement of tax on profits accruing or arising in Pakistan. Statement showing computation of profits on estimated basis is put in. Tax is, therefore, kept in abeyance in respect of Rs. 27,71,436 for the present. The company will have to produce certificate of assessment in Pakistan within one year in respect of profits arising in Pakistan as provided in the agreement."

12. Now it is easily perceivable that this order could in no way have aggrieved the assessee-company or given rise to any appeal on its part inasmuch as the full amount of the estimate by the company was accepted, but as the officer himself made it clear, it was accepted for the present, i.e., tentatively for the time being. This was clearly not a final determination of the amount of relief to be given to the assessee-company but a provisional decision taken pending production of the certificate of assessment from Pakistan within one year as indicated in the order itself. When that certificate was produced within the prescribed time, the officer (whether he be the same officer or his successor) went on to complete the process of assessment and finally determine the quantum of relief allowable to the assessee-company and the amount of tax collectable from the assessee-company. Once this order and the subsequent order (part of annex. "E") are properly perused, there is no doubt that the process of assessment was, in the instant case, at any rate, not completed and there was no question of any appeal by the assessee-company at the first stage from a tentative determination. The assessee-company could be aggrieved only at the stage when the subsequent order was passed which was on March 26, 1959 (for the assessment year 1952-53) and it actually preferred an appeal from that decision which the AAC declined to go into on the ground that no appeal lay from that order.

13. It appears to us unnecessary to go into the broader legal questions raised by the learned counsel for the Commissioner in this reference. If the orders are properly perused, one is forced to concur with the view taken by the Tribunal, though perhaps on a narrower footing. In this we need not be taken to mean that the broader footings indicated by the Tribunal are incorrect; but it appears to us unnecessary to go into all those considerations in the present reference in view of the clear phraseology employed by the ITO at the initial stage. Para. 6 of his initial order makes it clear that he was not completing the process of assessment but was determining something tentatively for the time being, and the question was to be gone into fully and finally only after the Pakistani assessments were produced by the assessee-company. It was at that stage that the ITO passed his order on March 26, 1959, which, on the facts and in the

circumstances of the case, was clearly appealable. We need not add anything further since such observations may have some bearing on the merits of the case which will have to be gone into by the AAC in the view that we have taken.

14. In the result, the question referred to us is answered in the affirmative and in favour of the assessee. The Commissioner will pay to the assessee the costs of the reference.