

(1991) 07 RAJ CK 0020

In the Rajasthan High Court

Case No : Income Tax Reference Application No. 35 Of 1990

Commissioner of Income Tax

APPELLANT

Vs

Associated Garment Maker

RESPONDENT

Date of Decision : 09-07-1991

Acts Referred:

Income Tax Act, 1961 — Section 256, 256(1), 256(2), 260, 260(1)

Citation : (1991) 97 CTR 56 : (1992) 196 ITR 476

Hon'ble Judges : M.B. Sharma, J; Farooq Hasan, J

Bench : Division Bench

Advocate : V.K. Singhal, for the Appellant; N.M. Ranka, for the Respondent

Judgement

M.B. Sharma, J.—The Revenue not having succeeded u/s 256(1) of the Income Tax Act, 1961 (for short, "the Act") before the Income Tax Appellate Tribunal, Jaipur Bench (for short, "the Tribunal"), and the Tribunal having dismissed the application, has made this application u/s 256(2) of the Income Tax Act, 1961, with the prayer that the Tribunal may be directed to state the case and refer to this court the following questions of law for decision :

"(i) Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that no error in the Income Tax Officer's order was pointed out by the Commissioner of Income Tax in his order u/s 263 of the Income Tax Act, 1961?

(ii) Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the Commissioner of income tax had no power u/s 263 of the Income Tax Act, 1961, to revise the order of the Income Tax Officer which was passed by him after obtaining the approval of the Inspecting Assistant Commissioner u/s 144B of the Act ?

(iii) Whether for invoking the provisions of Section 263 of the Income Tax Act, 1961, it is necessary for the Commissioner of Income Tax to point out specific error and not only a possibility of an error in the Income Tax Officer's order ?

(iv) Whether, on the facts and in the circumstances of the case, the Tribunal was right in quashing the Commissioner of income tax's order u/s 263 of the Act ?"

2. Messrs. Associated Garments Maker, M. I. Road, Jaipur, the assessee, consists of two partners. It derives income from stitching of clothes. It observes Deewali year as its accounting year. For the assessment year 1981-82, the assessment was completed u/s 143(3) read with Section 144B of the Income Tax Act on September 26, 1984, on a total income of Rs. 41,010. The Commissioner of Income Tax, on examining the record of the assessee, noticed that, against the liabilities of Rs. 36,133, details of which have been given in the table in the order of the Commissioner, u/s 263 of the Income Tax Act (annexure 1), created during the previous assessment years which were also allowed as deduction in the assessment completed by the Income Tax Officer u/s 143(1), were squared up in the account for the subsequent year by showing the payments through cheques to nine parties, namely, Kedar Master, Messrs. Kurli Tailoring House, Messrs, fagdamba Tailors, Phool Mohid, Delhi Tailoring, Siddique Karigar, Messrs. Bombay Readymade Salai Kendra, Messrs. Stitch Well and Rattan Tailors, vide vouchers Nos. 239 dated November 7, 1980, for Rs. 3,768, 237 dated November 7, 1980, for Rs. 4,644, 236 dated November 7, 1980, for Rs. 2,760, 231 dated November 4, 1980, for Rs. 3,036, 230 dated November 4, 1980, for Rs. 3,054, 239 dated November 4, 1980, for Rs. 3,300, 228 dated November 4, 1980, for Rs. 6,088.40, 227 dated November 4, 1980, for Rs. 4,798.60 and 226 dated November 4, 1980, for Rs. 4,684, respectively. As the assessee observes the Deewali year as the accounting year and the cheques were issued at the fag end of the accounting year and they were not encashed up to the end of the year or for another six months, therefore, the Commissioner of Income Tax was of the opinion that the Income Tax Officer should have included the above amounts in the assessee's income under the provisions of Section 41(1) of the Income Tax Act, 1961. The Commissioner of income tax was of the opinion that the assessment order passed by the Income Tax Officer, City Circle II, Jaipur, was erroneous and prejudicial to the interests of the Revenue. Accordingly, a notice u/s 263 of the Income Tax Act was issued to the assessee on September 18, 1986, to show cause why the assessment be not suitably modified and/or cancelled for directing a fresh assessment. Written submissions were filed by the representative of the assessee and he also argued the case. The chartered accountant of the assessee, in the written submissions, as well as his counsel, challenged the validity of the initiation of proceedings u/s 263 of the Income Tax Act on the grounds that the order sought to be revised was an order passed by the Income Tax Officer after incorporating the directions of the Inspecting Assistant Commissioner u/s 144B and, according to him, the Income Tax Officer's order had merged with the Inspecting Assistant Commissioner's directions and, therefore, the Commissioner of Income Tax was not competent to initiate proceedings u/s 263 of the Income Tax Act, and all the liabilities were genuinely incurred for the purposes of business of the firm and payments were made by cheques which were encashed in the subsequent year. Therefore, there

was no justification for making any disallowance on this account. The Commissioner of Income Tax considered the aforesaid objection and, under his order dated September 25, 1986, made u/s 263 of the Income Tax Act, set aside the assessment order and observed that, after giving the assessee an opportunity of being heard and allowing him to place any evidence to substantiate its contention, a fresh order in accordance with the directions given in the earlier paragraphs of the Commissioner's order shall be made. The assessee preferred an appeal before the Tribunal and the Tribunal, by its order dated August 19, 1988, allowed the appeal and the view taken by the Tribunal was that the Commissioner cannot get jurisdiction, that the Explanation to Section 263 of the Income Tax Act was not retrospective and that the assessment order dated September 26, 1984, having been made after receiving the directions u/s 144B of the Income Tax Act from the Inspecting Assistant Commissioner (Assessment-II) Jaipur, the Explanation to Section 263(1) will not be attracted. It was further held that the mere possibility of the amount having been received by other relatives of the partners is nothing but surmise and, therefore, no error could be said to have occurred in the assessment order of the Income Tax Officer and the power u/s 263 of the Income Tax Act could not have been exercised by the Commissioner of Income Tax. An appeal was filed by the Revenue before the Tribunal for making a reference and the Tribunal, under its order dated February 22, 1989, dismissed the application. In the opinion of the Tribunal, the finding is based on record and existence of error and accordingly is a factual finding and not a question of law. In the opinion of the Tribunal, because question No. 1 fails, as a consequence, questions Nos. 2, 3 and 4 are only of academic interest. The Revenue has made the present application before this court.

3. So far as the question that, if an assessment order has been made by the assessing authority after receiving directions u/s 144B of the Income Tax Act from the Inspecting Assistant Commissioner (Assessment-II), Jaipur, and as per those directions, whether the power of revision vested in the Commissioner of Income Tax u/s 263(1) of the Income Tax Act can be exercised or not, being a question of jurisdiction, is a question of law and even Mr. N.M. Ranka, learned counsel for the assessee, could not dispute this position of law. If that be so, the Tribunal could not have declined to refer the above extracted question No. 2 to this court for its opinion. A look at the order u/s 256(1) of the Income Tax Act made by the Tribunal will show that the Tribunal has declined to make a reference to this court of the aforesaid question of law on the ground that, so far as question No. 1 is concerned, the finding of the Tribunal was that the Commissioner of Income tax did not point out any error in the order of the Income Tax Officer and thereby no prejudice has been caused and this finding is based on the evidence on record and existence of error and, accordingly, is a factual finding. We are of the opinion that question No. 2 sought to be referred to this court for its opinion is a question of jurisdiction of the Commissioner of Income tax u/s 263 of the Income Tax Act, and, therefore, but for the view of the

Tribunal on question No. 1, the Tribunal could not have and should not have refused to make a reference to this court for its opinion.

4. It was contended by Mr. N.M. Ranka, learned counsel for the assessee, that, even if a question of law is there, if it is of academic interest, the Tribunal could have declined to make a reference and, therefore, no interference in the order of the Tribunal is called for. The question whether there was no error in the Income Tax Officer's order and no such error was pointed out by the Commissioner of Income Tax in his order u/s 263 of the Income Tax Act is based on the evidence on record. Mr. Ranka, learned counsel for the assessee, in support of his contention, has referred to the case of Karnani Properties Ltd. Vs. The Commissioner of Income Tax, West Bengal, The Supreme Court, in the aforesaid case, said that when the question referred to the High Court speaks of "on the facts and in the circumstances of the case", it means on the facts and circumstances found by the Tribunal and not facts and circumstances that may be found by the High Court on a reappraisal of the evidence. In the absence of a question whether the findings were vitiated for any reason being before the High Court, the High Court has no jurisdiction to go behind or question the statements of fact made by the Tribunal. In Commissioner of Income Tax, Bombay City I Vs. Greaves Cotton and Co. Ltd., , the Supreme Court, dealing with the scope of the power of the High Court in a reference u/s 66 of the Indian Income Tax Act, 1922, said that (headnote) :

"It is well established that the High Court is not a court of appeal in a reference u/s 66 of the Indian Income Tax Act, 1922, and it is not open to the High Court in such a reference to embark upon a reappraisal of the evidence and to arrive at findings of fact contrary to those of the Appellate Tribunal. The High Court should confine itself to the facts as found by the Appellate Tribunal and to answer the question of law referred to it in the context of those facts. A finding of fact may be defective in law if there is no evidence to support it or if the finding is unreasonable or perverse, but it is not open to the assessee to challenge such a finding of fact unless he has applied for a reference of the specific question u/s 66(1). It is for the party who applies for a reference to challenge those findings of fact first by expressly raising the question about the validity of the findings of fact, and if he has failed to do so, he is not entitled to urge before the High Court that the findings of the Appellate Tribunal are vitiated for any reason."

5. In that case, the Income Tax Officer had disallowed the amount of Rs. 18 lakhs claimed as legal expenses, which amount was claimed as revenue deduction. The assessee was unsuccessful up to the stage of the Income Tax Appellate Tribunal inasmuch as the appeal was dismissed and, at his instance, the Appellate Tribunal stated a case to the High Court on the following question of law (at page 205) :

"Whether, on the facts and circumstances of this case, the amount of Rs. 18 lakhs paid by the assessee-company to the managing agents on the termination of their managing agency agreement dated May 10, 1950, was an admissible

deduction u/s 10(2)(xv) of the Income Tax Act, 1922 ?"

6. The High Court answered the reference in favour of the respondent-company and against the Commissioner of Income Tax. The Supreme Court said that it is for the party who applied for reference to challenge the finding and if the finding is not challenged, even if it may be defective and unreasonable or perverse, there being no evidence in support thereof, it could not be challenged but dealing with the argument of learned counsel for the assessee that the order of the Appellate Tribunal itself was defective in law inasmuch as there was no clear finding recorded by the Appellate Tribunal that the termination of the managing agency was not bona fide or made with ulterior or oblique motive, the court said that there is considerable justification for the aforesaid argument and the order of the Appellate Tribunal is highly unsatisfactory as it has not taken into account all the relevant material adduced by the parties, in the case on the question in controversy and the finding of the Appellate Tribunal is not clear and, therefore, defective in law. The Supreme Court reached the conclusion that the question of law referred to the High Court cannot be answered in view of the defective finding by the Appellate Tribunal which is recorded without consideration of all the evidence. It was left open to the Appellate Tribunal to rehear the appeal and record a clear finding after hearing the parties and after considering all the relevant material in the case as to whether the amount of Rs. 18 lakhs paid by the assessee to the managing agents on the termination of the managing agency agreement was an admissible deduction or not. It is, therefore, clear from the aforesaid view of the Supreme Court that unless the finding of fact is specifically challenged by the aggrieved party, so far as the High Court is concerned, it cannot reappraise the evidence, the Appellate Tribunal being the last court on facts. But, if the High Court comes to the conclusion that the order of the Appellate Tribunal is highly unsatisfactory and all the relevant material adduced by the parties to the case on the question or controversy has not been considered and the finding of the Tribunal is not clear and therefore, defective in law, the High Court, in exercise of its power u/s 260(1) of the Income Tax Act, can send the case back to the Appellate Tribunal leaving it open to rehear the appeal and to record its finding after hearing the parties and after considering all the relevant material. The Supreme Court, in the case of Aluminium Corporation of India Ltd. Vs. Commissioner of Income Tax, West Bengal, reiterated its earlier view that, when a question refers to the facts and circumstances in the case, it means the facts and circumstances found by the Tribunal. If any party wants to challenge the correctness of the finding given by the Tribunal either on the ground that the same is not supported by any evidence on record or is based on irrelevant or inadmissible evidence or is unreasonable or perverse, a reference raising any one of these grounds must be sought for and obtained. The Supreme Court also said that the jurisdiction of the High Court on a reference u/s 66 of the Indian Income Tax Act, 1922, is only an advisory jurisdiction. The High Court can only pronounce its opinion on the questions referred to it. It cannot sit as an appellate court from the decision of the Tribunal. In Patnaik and Co. Ltd. Vs.

Commissioner of Income Tax, Orissa, the aforesaid view was reiterated.

7. From the above cases of the apex court, it can, therefore, be taken as a settled proposition of law that the Income Tax Appellate Tribunal is the final fact-finding authority under the Income Tax Act, and, so far as this court is concerned, on a reference to it u/s 256(1) or even u/s 256(2) of the Income Tax Act, unless the party who applies for reference challenges the finding of facts by raising a question, this court has to take the finding of fact as arrived at by the Tribunal as final. But, if, in a given case, this court comes to the conclusion that, in arriving at the finding of fact, the last court of fact, namely, the Appellate Tribunal, has not taken into account all the relevant material adduced by the parties in the case on the question in controversy or the finding of fact is not clear and is defective in law and, therefore, it is highly unreasonable or unsatisfactory, and, with such a defective finding, the question of law arising out of the order of the Tribunal cannot be answered by this court, it will be open to this court, in exercise of its power u/s 260(1) of the Income Tax Act, to leave the matter open to the Appellate Tribunal to rehear the appeal and then to record a clear finding after rehearing the parties on the question in controversy and to direct the Appellate Tribunal to dispose of the appeal.

8. Let us examine the order of the Tribunal to see whether the Tribunal has not taken into consideration any material on record in arriving at its finding on the question in controversy and, therefore, its finding is unreasonable and the Tribunal should, therefore, rehear the appeal ? After referring to the arguments raised by the assessee as well as the Revenue in paragraph 4, the Tribunal mentioning that the arguments have been considered said that an error in the order of the lower authorities could be absence of examination of a particular fact. In the words of the Tribunal :

"There is no dispute that the payments to the various tailors was in issue for examination at the time of assessment proceedings as well as before the Inspecting Assistant Commissioner in Section 144B proceedings. It is not the case of the Revenue that the amounts paid to the tailors, in fact, flowed back to the assessee. What the Revenue is contending is about a possibility of the amount having been received by either relatives or the partners, which is nothing but a surmise and no error can be said to have occurred in the order of the Income Tax Officer. We are, therefore, of the view that there being no error, there is no prejudice caused to the Revenue."

9. It will, therefore, be clear that the order of the Tribunal is primarily based on the ground that mere possibility of the amount flowing back to the assessee cannot be said to be an error in the order of the Income Tax Officer in respect of which powers under the provisions of Section 263 of the Income Tax Act could have been invoked by the Commissioner of Income Tax. A look at the order of the Commissioner of Income Tax u/s 263 of the Income Tax Act will show that the Commissioner of Income Tax in paragraph 7 has said :

"Another point which needs consideration is that these cheques were encashed after the expiry of six months and all the cheques were revalidated afterwards. It is an uncommon feature and creates doubt about the genuineness of the payments."

10. It will, therefore, be clear that it was one of the points that the Commissioner of Income Tax did not proceed on the aforesaid ground and it will appear from the order dated September 25, 1986, of the Commissioner of Income Tax that there were many other grounds considered by it and they were :

(i) the assessee observed Diwali year as the accounting year and the cheques to 9 parties of the total value of Rs. 36,133, most of which were issued at the fag end of the accounting year ; (ii) they were not encashed up to the end of the year or for another six months ; (iii) they were revalidated after the expiry of six months ; (iv) though the assessee claims that payments were made through crossed cheques, but on verification, the cheques issued in favour of Shri Siddique Karigar (Rs. 3,300), Messrs. Stitch Well (Rs. 4,798.60) and Rattan Tailors (Rs. 4,684) were payee's cheques/bearer cheques by cancelling the marking "and Co." by Shri S.M. Saraf, partner of the firm, and thereby the provisions of Section 40A(2) of the Income Tax Act were flouted and the encashment of the cheques proved to be a fishy one ; (v) cheques issued in the names of alleged karigars were subsequently endorsed in favour of some other persons and the persons taking the payments happened to be the persons either directly or indirectly connected with the business of the assessee-firm, i.e., relations, partners, sister concerns or employees ; (vi) there was no document/evidence found to show that the assessee had in fact got the above job work done from the above parties or that any amount was due to them for the alleged work done in earlier years, nor there was found any register, file or any other notebook to show the issue of raw materials for the work assigned to them ; (vii) no job work register was found at the time of search, which could establish that the assessee issued raw materials to the parties regularly.

11. This shows that all this is a cooked up story and the assessee had got no job work done by the parties. It will, therefore, be clear that the order of the Commissioner of Income Tax did not proceed only on the possibility of the amount of cheques flowing back to the assessee, but the Commissioner of Income Tax can be said to have reached that finding that the amount of cheques flowed back to the assessee. As said earlier, the finding of fact arrived at by the Tribunal, in our opinion, is vitiated and perverse because it proceeds on the ground that mere possibility of the amounts flowing back to the assessee cannot be an error envisaged u/s 263 of the Income Tax Act and more so it cannot be said to be such an error in so far as it can prejudice the interests of the Revenue, but because the Tribunal did not take relevant material on record as well as all the reasons contained in the order of the Commissioner of Income Tax, the finding of fact is vitiated as being perverse.

12. Consequently, while, as stated earlier, in the absence of any question relating

to the finding of fact being perverse, this court cannot direct the Income Tax Appellate Tribunal to draw up a statement and refer the questions sought to be raised to this court for its opinion, but in the facts and circumstances of the case, for the reasons stated earlier, we exercise the powers u/s 260(1) and leave the matter open to the Tribunal to consider all the relevant material on record and the reasoning of the Commissioner of Income Tax given in his order u/s 263 of the Income Tax Act and to leave it open to rehear the appeal and dispose of it in accordance with law. But, so far as the application u/s 256(2) of the Income Tax Act is concerned, for the reasons stated earlier, this court cannot allow it.