

(1992) 03 RAJ CK 0002

In the Rajasthan High Court

Case No : Income Tax Reference Application No. 13 of 1991

Commissioner of Income Tax

APPELLANT

Vs

Associated Garments Makers

RESPONDENT

Date of Decision : 13-03-1992

Acts Referred:

Income Tax Act, 1961 — Section 246, 251, 256

Citation : (1992) 197 ITR 350

Hon'ble Judges : V.S. Dave, J; N.C. Sharma, J

Bench : Division Bench

Advocate : Virendra Dangi, for the Appellant; N.M. Ranka, assisted by J.K. Ranka and V.S. Yadav, for the Respondent

Judgement

1. This application u/s 256(2) of the Income Tax Act, 1961, has been filed by the Commissioner of Income Tax, Jaipur, praying that the Income Tax Appellate Tribunal (hereinafter referred to as "the Tribunal") should be directed to refer the following questions in the same form or in any modified form as this court deems proper and thereafter answer the reference :

" 1. Whether, on the facts and in the circumstances of the case and in law, the Tribunal was justified in holding that the Appellate Assistant Commissioner had wrongly issued notices for enhancement of income on new items or sources of income ?

2. Whether, on the facts and in the circumstances of the case and in law, the Tribunal was justified in holding that the Income Tax Officer had no power to consider the fresh sources of income or new sources of income for enhancement in the income of the assessee when the assessment was set aside as per directions of the Appellate Assistant Commissioner ?

3. Whether, on the facts and in the circumstances of the case and in law, the Tribunal was justified in holding that the Appellate Assistant Commissioner had set aside the assessment without restrictions ?"

2. The facts leading to this application are that the Income Tax Officer, Central Circle-II, Jaipur, made the assessment of the assessee-firm for the assessment year 1982-83 u/s 143(3) of the Income Tax Act, 1961. The assessee-firm had declared an income of Rs. 18,300 and the main source of income shown by the assessee is from tailoring and interest. The Income Tax Officer had asked for the details regarding payments for tailoring jobs which were furnished but, according to the Income Tax Officer, the same were not complete and, therefore, he was of the opinion that tailoring income was shown in order to reduce the profit of the firm, Messrs. Saraf Textile Mills Pvt. Ltd. Regarding interest, the Income Tax Officer has taxed the interest receipt shown, i.e., Rs. 74,377, but interest paid, i.e., Rs. 30,846 was not allowed. According to the Income Tax Officer, interest was not paid, it was only credited in the creditor's account ; therefore, he assessed the income at Rs. 79,040 as against income of Rs. 18,300 shown by the assessee.

3. The assessee-respondent, being aggrieved by the order of the Income Tax Officer, filed an appeal before the Appellate Assistant Commissioner, "A" Range, Jaipur. The grievance raised by the assessee was that the action of the learned Income Tax Officer in completing the assessment proceedings on a protective basis, disallowing expenses claimed by the assessee, on a total income of Rs. 79,040 was improper as the income of the assessee entirely belonged to Messrs. Saraf Textile Mills Pvt. Ltd. The Appellate Assistant Commissioner, in the appeal by the assessee, instead of confining himself to the issues raised by the assessee, issued a notice for enhancement on the items which were neither considered by the Income tax Officer nor were raised by the assessee before the Appellate Assistant Commissioner. Notice for enhancement was in regard to an income of Rs. 3,24,000 u/s 2(22)(e), Rs. 97,303 u/s 2(24)(iv) and cash credits of Rs. 1,32,000. The learned Appellate Assistant Commissioner made a very detailed enquiry and, considering the various submissions of either side, held that the income of the assessee should be enhanced. While doing so, he considered the fresh material which was not before the Income Tax Officer and, on that basis, held that a sum of Rs. 3,24,000 has been made available to the assessee-firm by Messrs. Saraf Textiles Mills Pvt. Ltd. during the period, relevant to the impugned assessment proceedings which was enjoyed by the partners. He came to the conclusion that there being no distinction between the assessee-firm and its partners in the Indian Partnership Act, this is an income of the assessee-firm in terms of Section 2(22)(e) of the Act. Similarly, he concluded that the benefit accrued in terms of Section 2(24)(iv) of the Act, there was an enhancement of Rs. 97,303. He made a calculation as shown in his order and similarly about enhancement of Rs. 1,32,000. Aggrieved by this order, a further appeal was filed by the assessee before the Income Tax Appellate Tribunal which was partly allowed by the Income Tax Appellate Tribunal. The Tribunal considered the various decisions of the High Courts and the Supreme Court and came to the conclusion that the Appellate Assistant Commissioner has no jurisdiction to consider the new source of income which was neither considered by the Income

Tax Officer nor was raised by the assessee before him ; the Appellate Assistant Commissioner, therefore, had no jurisdiction to issue notice for enhancement. It was also stated that the Income Tax Officer had no power to consider the fresh source of income or new source of income for enhancement in the income of the assessee. A reference application was filed u/s 256(1) of the Income Tax Act, 1961, which has been rejected by the Income tax Appellate Tribunal and, it is in these circumstances, that the present application was filed.

4. Mr. Virendra Dangi, appearing on behalf of the petitioner, vehemently argued that, from the order of the Appellate Assistant Commissioner, it is amply clear that the assessee had deliberately withheld the correct information and they have not filed the returns correctly and thus the assessee, not having come with clean hands, should not have been heard by the Income Tax Appellate Tribunal, firstly, on the ground of his being guilty of suppression of material facts and, secondly, that it was a case of escaped income. Mr. Dangi submitted that as to whether the Appellate Assistant Commissioner had power to consider the fresh source of income or new source of income for enhancement of income, is a pure question of law and when, as a matter of fact, a case for enhancement has been found, no interference was required at the stage of appeal before the Income Tax Appellate Tribunal. It is submitted that the Tribunal made an error in holding that the Appellate Assistant Commissioner had no power to issue the notice of enhancement. It is submitted that the law is that assessment has to be made on the correct income and once the assessment made has been set aside, it was essential that the same should have been done in accordance with law and precisely (sic) the Tribunal had done. Learned counsel relied on *Kundanlal Maru Vs. Commissioner of Income Tax*,

5. On the other hand, Mr. Ranka, appearing on behalf of the assessee-respondent, has submitted that no power, express or implied, is vested in the Appellate Assistant Commissioner to issue notice for enhancement or to consider any fresh material which was not before the Income Tax Officer. It is submitted that the scope of an appeal before the Appellate Assistant Commissioner is highly limited. It is all the more so when the Legislature itself has not provided any appeal by the Department before the Appellate Assistant Commissioner. It is submitted by him that there are other provisions of law for reopening cases of escaped income for which a different procedure is provided but the law cannot be circumvented and it is not open to the Appellate Assistant Commissioner to reopen the whole case. Learned counsel, in this respect, has relied on the decisions of their Lordships of the Supreme Court in *Commissioner of Income Tax, Calcutta Vs. Rai Bahadur Hardutroy Motilal Chamaria*, and *The Commissioner of Income Tax Vs. Shapoorji Pallonji Mistry*,

6. We have given our thoughtful consideration to the rival contentions and have looked into the provisions of law.

7. Appeals are provided u/s 246 of the Income Tax Act, 1961, before the Appellate Assistant Commissioner and the Commissioner (Appeals). These

appeals are by assessees aggrieved by the orders mentioned in Section 246. Any order made u/s 143(3) is appealable and the powers of the appellate court are provided in Section 251, wherein the appellate authority has power to confirm, reduce, enhance or annul the assessment or he may set aside the assessment and refer the case back to the Income Tax Officer for making fresh assessment in accordance with the directions given in appeal and after making such further enquiry as may be necessary. These powers are, inter alia, mentioned as the other powers. According to Sub-section (2) of Section 251, the Appellate Assistant Commissioner has no power to enhance an assessment or penalty or reduce the amount of refund unless the appellant had a reasonable opportunity of showing cause against such enhancement or reduction. An Explanation has been provided according to which the Appellate Assistant Commissioner may consider and decide any matter arising out of the proceedings in which the order appealed against was passed notwithstanding that such matter was not raised before him. A perusal of Sections 246 to 251 makes it clear that any questions arising out of the assessment orders in an appeal by the assessee can be possible and wide powers are given to the appellate authority, but these powers are circumscribed to the assessment order in the matters arising therefrom or a matter arising out of the proceedings, even the appellate authority has suo motu considered the questions arising thereof but there is no provision to go beyond the matter arising out of the proceedings before the assessing authority, more particularly for which separate provisions are made in the Act. The Tribunal had elaborately discussed the provisions of the Act and the case-law on the subject and has rightly come to the conclusion that new sources not mentioned in the return or considered by the Income Tax Officer are beyond the scope of the powers of the Appellate Assistant Commissioner. The case relied on by learned counsel for the petitioner that the power of setting aside the assessment order remanding the case for reconsideration of the whole matter including the evasion of tax by the assessee is not applicable in the facts of the present case because the matter arising in that case was one which arose out of the proceedings before the Income Tax Officer. The question was not about new or fresh material for the purposes of enhancement. On the contrary, the case is clearly covered by the decision of the Supreme Court in *The Commissioner of Income Tax Vs. Shapoorji Pallonji Mistry*, wherein it has been held that (headnote), "In an appeal filed by the assessee, the Appellate Assistant Commissioner has no power to enhance the assessment by discovering new sources of income not mentioned in the return of the assessee or considered by the Income Tax Officer in the order appealed against.", and the case reported in *Commissioner of Income Tax, Calcutta Vs. Rai Bahadur Hardutroy Motilal Chamaria*, , wherein it has been held that (headnote), " It is not, therefore, open to the Appellate Assistant Commissioner to travel outside the record, i.e., the return made by the assessee or the assessment order of the Income Tax Officer, with a view to finding out new sources of income and the power of enhancement u/s 31(3) is restricted to the sources of income which have been the subject-matter of consideration by the Income Tax Officer from the point of view of taxability". Their Lordships

considered the meaning of the word " consideration" and held that "consideration" does not mean "incidental" or "collateral" examination of any matter by the Income Tax Officer in the process of assessment ; therefore, there must be something in the assessment order to show that the Income Tax Officer had 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. In the instant case, the Appellate Assistant Commissioner has, after issuing notice, himself considered the new material and has gone into new sources of income for the consideration of which he had no jurisdiction.

8. In fact, we fail to understand as to why when the order was brought to the notice of the Commissioner, he himself proceeded to issue direction when he had ample powers under other provisions of this Act. There are various other provisions under the Income Tax Act which can be invoked in cases of escaped income or such situations where the new sources had been left to be considered, but that would not give powers to the Appellate Assistant Commissioner to transgress his jurisdiction.

9. We, therefore, find no case for reference and the reference application is rejected.