(1985) 03 MAD CK 0020

In the Madras High Court

Case No : T.C.P. No''s. 90 and 91 of 1984

Commissioner of Income Tax — APPELLANT

Vs

Carborandum Universal Ltd. — RESPONDENT

Date of Decision : 06-03-1985

Acts Referred:
Income Tax Act, 1961 — Section 256, 256(1), 256(2), 37(1), 37(2B)
Wealth Tax Act, 1957 — Section 5(1)

Citation : (1986) 50 CTR 145 : (1985) 156 ITR 1

Hon'ble Judges : M.N. Chandurkar, C.J;G. Ramanujam, J

Bench : Division Bench

Advocate : J. Jayaraman, for the Appellant; Maya J. Nichani, for the Respondent

Judgement

Chandurkar, C.J.—In view of the very extensive arguments which have been advanced before us by Mr. Jayaraman, learned counsel

appearing on behalf of the Revenue, it becomes necessary to deal with these cases in a little detail. The assessee had claimed in the assessment

proceedings for the assessment years 1974-75 and 1975-76, expenditure of Rs. 41,621 and Rs. 50,690, respectively, as business expenditure

incurred in providing customary hospitality to the customers. The ITO declined to treat these amounts as business expenditure and added them

back while computing the taxable income of the assessee. The assessee then filed appeals before the AAC who deleted the disallowance finding

that the expenditure related to coffee, tea and other expenses on customers and holding that strictly speaking, such expenditure cannot be called

entertainment expenditure though it was so styled by the assessee. The matter was taken up in appeal for both the years by the Department. The

Tribunal set aside the order of the AAC because the assessee could not furnish the necessary particulars before the Tribunal and remanded the

appeals to the AAC to enable the assessee to produce evidence in support of its claims. However, when the matter went back to the appellate

authority, the appellate authority confirmed the addition on the ground that the assessee had not produced any evidence regarding the expenditure.

2. The assessee took up the matter to the Tribunal. Before the Tribunal, the assessee had stated that no evidence of the actual expenditure incurred

would be possible to be produced because eight years had already elapsed and the relevant papers necessary were not to be found. Relying on

the decision of this court in Commissioner of Income Tax Vs. Karuppuswamy Nadar and Sons, , deduction of the entire amount was claimed. The

Tribunal, having regard to the view which was originally taken by the appellate authority that the expenditure related to the provision of coffee and

tea to the customers which was in the nature of customary hospitality, allowed only 50 per cent. of the amount claimed by the assessee in the two

years in question.

3. The Revenue, not being satisfied with the view taken by the Tribunal, called upon the Tribunal to refer the following two questions to this court

under s. 256(1) of the I.T. Act, 1961 :

1. Whether, on the facts and in the circumstances of the case, and having regard to the provisions of section 37(2B) of the Income Tax Act,

1961, the Appellate Tribunal was justified in deleting 50% of the total entertainment expenditure claimed ?

2. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal''s finding that 50% of the entertainment expenditure was spent

on customary hospitality and should be allowed is based on valid materials and a reasonable view to take on the facts of the case ?

4. The Tribunal declined to make the reference holding that the question with regard to the deductibility of expenses incurred on customary

hospitality was already concluded by the decision of this court in Commissioner of Income Tax Vs. Karuppuswamy Nadar and Sons, . With

regard to allowing only 50 per cent, of expenditure and disallowing the remaining 50 per cent., the Tribunal took the view that this decision rested

on facts and probabilities and there was, therefore, no basis for a reference with regard to the inference drawn by the Tribunal as to the quantum of expenditure. The Revenue has now filed these applications under s. 256(2) of the I.T. Act seeking a direction to the Tribunal to submit a statement

of the case referring the two questions reproduced earlier for the opinion of this court.

5. Now, it is not in dispute that as far as this court is concerned, the difference between expenditure incurred on customary hospitality and

expenditure incurred on entertainment has been clearly set out in the decision in the case of Commissioner of Income Tax Vs. Karuppuswamy

Nadar and Sons, . That decision also holds that an expenditure incurred by an assessee on supply of coffee, tea etc., to the customers is not in the

nature of entertainment expenditure but is expenditure incurred for purposes of its business and hence allowable as deduction under s. 37(1) of the

I.T. Act. The Division Bench has in that case taken the view that it was a misnomer to call coffee or tea as an item of entertainment. In arriving at

this decision, the Division Bench fell in line with the view taken by the Punjab and Haryana High Court in CIT v. Gheru Lal Bal Chand [1978] 111

ITR 134, the decision of the Allahabad High Court in Brij Raman Dass and Sons v. CIT [1978] 104 ITR 541 and the decision of the Bombay

High Court in Commissioner of Income Tax, Vidarbha And Marathwada Vs. Shah Nanji Nagsi, . In the last mentioned case, the Bombay High

Court has taken the view that any expenditure incurred for providing messing to customers or constituents or offering of teas and pan to them

actually an essential part of business and does not partake the nature of hospitality or entertainment.

6. Now, what is vehemently pressed before us by the learned counsel appearing on behalf of the Revenue is that the Revenue has gone up in

appeal to the Supreme Court against another decision of the Bombay High Court in which the Bombay High Court has rejected a reference

application on the question whether messing expenses relating to upcountry constituents incurred by the assessee was allowable as deduction and

not hit by the provisions of s. 37(2B) of the I.T. Act. A short note with regard to the grant of leave by the Supreme Court is to be found in

Commissioner of Income Tax, Tamil Nadu-IV Vs. V.K. Balachandran, , which shows that leave has been granted on March 23, 1984. The

learned counsel for the Revenue has vehemently contended before us that since the question in respect of which the reference has been sought is pending before the Supreme Court, this Bench must take the view that there is a question of law in respect of which the Tribunal was bound to

make a reference. The learned counsel vehemently contended that undoubtedly it is not necessary to direct the Tribunal to make a reference if the

question is academic in nature but, according to the learned counsel, when the controversy raised in the question No. 1 is already before the

Supreme Court, the question cannot be said to be academic. Equally, according to the learned counsel, when the reference was sought from the

Tribunal, the answer to the question was not self-evident. Heavy reliance has been placed before us by the learned counsel for the Revenue on a

decision of this court in The Commissioner of Wealth Tax, Madras Vs. Sri Venkatesa Mills Ltd., Udumalpet, , in support of the proposition that if

a similar question is pending before the Supreme Court for decision, the Tribunal must be asked to send a statement of the case. We shall consider

this decision in a little detail. But so far as question No. 1 is concerned, it has to be pointed out that while deciding as to whether the Tribunal must

be directed to send a statement of the case referring question No. 1, we cannot lose sight of the fact that the controversy raised in question No. 1

is decided by a Division Bench of this court against the Revenue already. In so far as this High Court is concerned, therefore, the question as to

whether the expenditure incurred an assessee on supply of coffee, tea etc., to the customers must be treated as expenditure incurred for the

purpose of the business of the assessee has been decided against the Revenue and it has to be taken as settled law. With respect to the Division

Bench which decided Commissioner of Income Tax Vs. Karuppuswamy Nadar and Sons, , we find no reason to differ from that view. The

question which falls for consideration, therefore, is whether in spite of the of the fact that the controversy is already concluded by a decision of this

court, we must still require the Tribunal to go through the exercise of drawing up a statement of the case and refer question No. 1 to this court for

opinion. The further question is whether, when such reference is made, we should also be required to go through the exercise of merely recording

an answer in terms of the decision in Commissioner of Income Tax Vs. Karuppuswamy Nadar and Sons, . We need not point out that all this

exercise is ultimately going to result in an answer to question No. 1 against the Revenue in view of the very desirable practice of following earlier decisions of the same court, unless there is a decision of higher court to the contrary which requires reconsideration of the earlier decision. Judicial

discipline will require that we follow the earlier precedents of this court. The jurisdiction under s. 256(2) is not a mechanical jurisdiction which

requires the High Court to direct the Tribunal to submit a statement of the case, the moment either the assessee or the Revenue is able to spell out

a question of law arising from the order of the Tribunal. Under s. 256(2), there is a discretion in the High Court to require the Appellate Tribunal to

state a case and refer it and where the High Court requires the Tribunal to state a case, there is an obligation on the Tribunal to state a case and

refer the question as directed by the High Court. However, on a plain reading of sub-s. (2) of s. 256, it is clear that the discretion in the High Court

is to be exercised only ""if it is not satisfied with the correctness of the decision of the Appellate Tribunal"". Section 256(2) of the I.T. Act, therefore,

itself contemplates that if the High Court as satisfied with the correctness of the decision of the Appellate Tribunal, then the High Court may not

require the Tribunal to state a case. In order to satisfy itself about the correctness of the decision of the Appellate Tribunal, the High Court can

properly consider whether the decision of the Tribunal is in accordance with the settled law laid down by the High Court in respect of the question

which is argued before it and in respect of which reference is sought. In a matter like the present one, where the decision of the Tribunal is wholly

in accordance with the law laid down by this court in the case of Commissioner of Income Tax Vs. Karuppuswamy Nadar and Sons, , we fail to

see how we cannot be justified in rejecting the application under s. 256(2), A rejection of the application in the case like the instant one is, in our

view, expressly permissible having regard to the terms of s. 256(2). Where the law is settled by the High Court and while deciding the matters in

controversy raised before the Tribunal, the Tribunal is merely following the decision of the High Court and applying the said decision, then it is

obvious that even though a question of law may arise, it will be permissible for the High Court to reject the application under s. 256(2) on the

ground that the decision of the High Court has been followed by the Tribunal. We have gone through the decision of this court in the case of The

Commissioner of Wealth Tax, Madras Vs. Sri Venkatesa Mills Ltd., Udumalpet, , on which heavy reliance has been placed by the learned counsel for the Revenue. We cannot read this decision as laying down the law that whenever a matter is pending before the Supreme Court, the High

Court must call upon the Tribunal to submit a case even though the controversy is concluded by the decision on the High Court. As a matter of

fact, there are observations in this decision which indicate that even the Division Bench was of the view that if a decision of the Tribunal is so

obvious and self-evident and a contrary contention is patently inarguable, the High Court need not direct the Tribunal to refer the case. These

observations read as follows (p. 388 of 56 ITR) :

If a decision of the Tribunal is so obvious and self-evident and a contrary contention is patently inarguable and the High Court would automatically

without any consideration whatsoever affirm the decision of the Tribunal, it will be sheer waste of time for the Tribunal to refer a case or for the

High Court to direct the Tribunal to do so resulting in unnecessary expenses for the parties concerned.

With respect, we fully concur with these observations.

7. The Division Bench in The Commissioner of Wealth Tax, Madras Vs. Sri Venkatesa Mills Ltd., Udumalpet, was dealing with a matter arising

out of the provisions of the W.T. Act. The Tribunal had declined to refer the question as to whether certain assets were exempt under s. 5(1)(xxi)

of the W.T. Act. It was pointed out by the Division Bench that the Tribunal had undoubtedly decided the appeal before it in accordance with the

interpretation of s. 5(1)(xxi) made by this court in Ramaraju Surgical Cotton Mills Ltd. Vs. Commissioner of Wealth Tax, . The Revenue had

already obtained special leave to appeal in the Supreme Court against the said judgment. The contention of the Revenue before the High Court

was that since the correctness of the decision which was followed by the Tribunal was being tested in the Supreme Court, the Tribunal should be

called upon to make a reference. After referring to certain decisions and a decision of the Supreme Court in Sir Chunilal V. Mehta and Sons, Ltd.

Vs. The Century Spinning and Manufacturing Co., Ltd., , in which the Supreme Court has laid down the tests for determining when a question of

law can said to be a substantial question of law within the meaning of article 133 of the Constitution, the Division Bench observed as follows (p.

390 of 59 ITR) :

From this it will be seen that if a question of law is fairy arguable and if there are aspects giving scope or room for difference of opinion, the

question will be a substantial question of law. Such a question will be a question of law a fortiori. It is clear that if the question of law raised is not

finally decided by the Supreme Court and if the question is such that more than one view is fairly arguable and the answer to the question is not

self-evident and obvious, the Tribunal must state a case to the High Court.

8. The Division Bench, after referring to the decision of the Privy Council in Alcock Ashdown & Co. Ltd. v. Chief Revenue Authority, Bombay

ILR [1923] Bom 742 , has observed as follows (391 of 56 ITR) :

From these observations, it follows that the fact that ultimately the High Court is likely to agree with the decision of the Tribunal on the question of

law is not a ground for the Tribunal not to state a case nor even for the High Court not to direct the Tribunal to do so.

9. The Division Bench then further observed that the High Court has already granted special leave and the appeal is pending from the decision of

this court in Ramaraju in Ramaraju Surgical Cotton Mills Ltd. Vs. Commissioner of Wealth Tax, , which meant that the Supreme Court has been

satisfied that the decision of the High Court required security, that the point is a ""debatable one and that a substantial question of law is involved"".

The Division Bench then went on to observe as follows (p. 392 of 56 ITR) :

We perused the judgment of this Bench of this court in Ramaraju Surgical Cotton Mills Ltd. Vs. Commissioner of Wealth Tax, , and we may

observe that the learned judges felt some difficulty in construing the words ''set up''. They have observed that in the special context of the

exempting provisions of section 5(1)(xxi) of the Act, the words ''set up'' present some complexity, crating a stubborn indefiniteness.

The proper interpretation of an important provision of a statute, section 5(1)(xxi) is beyond doubt a question of law and the point decided by the

Tribunal is by no means inarguable or self-evident. On the other hand, it is quite a fairly arguable point.

10. With these observations, the Division Bench directed the Tribunal to state a case for reference as prayed for and set out in the beginning of the

judgment. The learned counsel for the Revenue wants us to read this judgment as laying down a proposition of the law that whenever the correctness of the decision of this court is challenged in the Supreme Court and there is a decision of the Tribunal applying the said decision of this

court and the Tribunal declined to make a reference, this court must of necessity direct the Tribunal declined to make a reference. With respect, it

is not possible for us to read this decision as laying down any such proposition of law. The observations in the concluding part of the judgment of

the Division Bench indicates that the Division Bench took the view that the learned judges who decided Ramaraju Surgical Cotton Mills Ltd. Vs.

Commissioner of Wealth Tax, , themselves found some difficulty in deciding that case which, according to the Division Bench, was a matter of

some complexity creating a stubborn, indefiniteness"". On a fair reading of the judgment of the Division Bench, undoubtedly, it appears that the

Division Bench has taken the view that the question of law raised in that case was a substantial question of law because the Supreme Court had

granted leave to appeal, but that is not the only consideration on which a statement of the case was called for. In our view, this judgment must be

restricted to the facts of the case before the Division Bench and that judgment cannot be read as laying down a proposition, and indeed, where a

question of discretion arises under s. 256(2), no proposition of law can be laid down, that in each case where a matter has been taken to the

Supreme Court either by the assessee or by the Revenue, a statement of the case must necessarily be called for. The proper course, in our view, is

that the assessee and the Revenue within the jurisdiction of this court must be held to be bound by the law laid down by this court as long as that

decision has not been set aside by the Supreme Court. We would not appreciate the practice of entertaining applications under s. 256(2) merely

because a similar matter is pending before the Supreme Court. If either the assessee or the Revenue wants to keep the matter alive to avail of the

benefit of the decision of the Supreme Court when it comes, it is for them to take the matter to the Supreme Court and not use this Court as a

place where matters can be kept pending for an indefinite length of time.

11. Learned counsel appearing on behalf of the assessee has brought to our notice decision of the Punjab and Haryana High Court in

Commissioner of Income Tax (Central) Vs. Shiv Parshad, . A similar question arose before the Division Bench of the Punjab and Haryana High

Court and that High Court had taken the view in Commissioner of Income Tax Vs. Anand Sarup, , that if a karta of an HUF is a partner in a firm

and his minor daughter is also admitted to the benefits of partnership in that firm, the income of the minor daughter cannot be clubbed with the

income of the karta of the HUF and the income in the hands of the karta of the HUF cannot be treated as the income of an individual under s.

64(1). When this decision was given effect to in another matter, and a reference of a similar question was sought on behalf of the Revenue, the

Tribunal rejected the application for reference and when an application under s. 256(2) was filed by the Revenue, it was contended that since there

was a conflict of opinion between the Punjab and Haryana High Court and the Tribunal Allahabad High Court and, therefore, a question of law

arises and that the Tribunal should be called upon to send a statement of the case, the Division Bench took the view that it would be a futile

exercise for the Tribunal to refer the matter to the High Court and if the Tribunal declined, then to issue a mandamus to the Tribunal to refer the

matter, because in either eventuality, the answer would be a foregone conclusions. The Division Bench took the view that if a question of law has

been settled by a High Court after dissenting from the view taken by another High Court and if thereafter similar cases come up before the Tribunal

within the jurisdiction of that court or before that court, it could not be said that a question of law arises within the meaning of s. 256(1) or s.

256(2) of the I.T. Act. 1961.

12. Now, undoubtedly in that case, the correctness of the view of the Punjab and Haryana High Court was not the subject of challenge in the

Supreme Court. But, on principle, we do not think there is any difference because the mere fact that leave has been granted against the decision of

this court would not automatically create any infirmity in the precedential value of the decision of this court or the value of the decision as laying

down the law binding the assessee and the Revenue within the jurisdiction of this court. Accordingly, we do not think that it is necessary t call for a

statement of the case from the Tribunal in respect of question No. 1.

13. So far as question No. 2 is concerned, the learned counsel for the Revenue has contended that the allowance of 50 per cent. of the

expenditure is arbitrary in nature and the finding recorded by the Tribunal is without any evidence. The Tribunal has noticed the fact that in view of

the long period of time which has lapsed since the expenditure was incurred, no record or vouchers evidencing the expenditure was possible of

being produced according to the assessee. In view of this and in view of the finding earlier recorded by the appellate authority that the expenditure

did in fact relate to monies spent on coffee or tea on customers, the Tribunal, having regard to the large business of the assessee, has made a rough

and ready estimate at 50 per cent. This would hardly raise any question of law. Strictly speaking, how much amount should be allowed as

deductible in the absence of any material which cannot be produced because of the lapse of time must essentially relate to the exercise of discretion

having regard to the nature and extent of the business of the assessee. Accordingly, we do not think that even with regard to the second question,

any statement can be called for from the Tribunal. In this view of the matter, we reject these petitions. The assessee would get costs of these

petitions from the Revenue. Counsel''s fee Rs. 250 (one set).