
(1997) 10 BOM CK 0055

In the Bombay High Court

Case No : R.A. No. 362/Bom of 1994 in ITA No. 6554/Bom of 1989;

COMMISSIONER OF Income Tax

APPELLANT

Vs

D. R. DESAI.

RESPONDENT

Date of Decision : 06-10-1997

Acts Referred:

Income Tax Act, 1961 — Section 256(1)

Citation : (1998) 60 TTJ 18

Hon'ble Judges : J. K. Verma, A.M.

Bench : Division Bench

Judgement

J. K. VERMA, A.M. :

The Revenue has required the Tribunal to refer the following question claimed to be a question of law to the Hon"ble Bombay High Court for its valuable opinion under s. 256(1) of the IT Act, 1961 :

Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that a sum of Rs. 10,99,024 being the excise duty refund obtained by the assessee and not returned to the customers, cannot be assessed as the income of the assessee under s. 41(1) of the IT Act, 1961 ?

2. The brief facts giving rise to this question are that the assessee was sanctioned, during the assessment year under consideration, refund of Rs. 10,99,024 by the Central Excise Department, Mumbai. The assessee had shown this refund amount as a liability in his balance sheet. On being questioned by the AO the assessee had explained that the refund received by him from the Excise Department had to be refunded back to various customers from whom the assessee had recovered the excise duty and that he had already paid back Rs. 35,270 to various customers and that he had undertaken to pay the balance amount to the customers. The AO did not agree with the contentions of the assessee on the ground that the assessee received the refund as a revenue receipt in the year under consideration, whereas the same was refunded to the

customers in the subsequent year. The assessees claim that the refund received during the year was repayable to the customers and, hence, was exempt was not accepted by the AO. In the appeal filed before the learned CIT(A), he also rejected the contentions of the assessee for various reasons given in his order. He treated the excise duty realised as income chargeable to tax under s. 41(1) of the IT Act. While he relied on various decisions of High Courts dealing with the question of refund of sales-tax, he did not accept the decision of the Jaipur Bench of the Tribunal in the case of Walkem (P) Ltd. vs. ITO (1986) 50 CTR (Jp) 8 dealing with the refund of excise duty.

3. The assessee came in appeal before the Tribunal. The learned Judicial Member dealt with the issue in paras 14 to 29 of his order and in para 30 of the order he allowed the appeal of the assessee. However, the learned Accountant Member did not agree with the various reasons given by the learned Judicial Member in his order and in his order running into 12 paras dt. 6th May, 1990 took the view that the appeal was to be dismissed. The matter was referred to the Third Member and the then President of the Tribunal acting as the Third Member dealt with the issue in great detail. Finally in para 7 of his order dt. 26th August, 1993, he observed that he was inclined to agree with the view expressed by the learned Judicial Member. It may be mentioned that in para 5 of his order he also observed that without making a reference to the cases referred to by his learned brothers in their orders and following the decision of the jurisdictional High Court which without dispute was binding on the Tribunal, the sum in question could not be brought to tax as income under s. 41(1) of the Act. In para 6 of his order he observed that the nature of the amount of excise duty collected by the assessee was more by way of a deposit from the customers as the assessee was contesting the very levy of excise duty and that the amount refunded to the assessee by the Excise Department was also with a direction to refund it to the customers. He further wrote in continuation in the same paragraph that the assessee did refund the amounts to the customers the details of which were available on record. Further, he observed that those who claimed the refund got it and those who did not claim did not get it but the liability to refund persists. There were some further observations to this effect. In that para he finally held that it cannot, therefore, be said that the assessee had appropriated the money or the liability to refund had ceased. It was on this basis that he had come to his conclusion to agree with the learned Judicial Member, as already mentioned by us, in para 7 of his order.

4. In this context we would further like to refer to the discussions of the learned Judicial Member in para 29 of his order where he had observed :

In these circumstances, there is no benefit to the assessee as contemplated by s. 41(1) of the Act, by way of complete remission or cessation of the liability, as laid down by the High Court of Allahabad, Madras, Madhya Pradesh, Calcutta, Punjab & Haryana, Rajasthan and Bombay in the cases cited above ... Considering these facts, the ratio laid down by the Tribunal in the case of Walkem

(P) Ltd. reported in (1986) 50 CTR (Trib) 8 (Jp), wherein exactly the same facts and circumstances were involved ... squarely apply to the present case. Respectfully following these decisions we are of the view that the refund received by the assessee from the Govt. on account of excise duty is not liable to tax under the provisions of s. 41(1) of the IT Act

5. On the basis of this difference of opinion between the two Members, the following question was referred to the Third Member :

Whether, on the facts and in the circumstances of the case, the amount of excise duty refund of Rs. 10,24,652 or any part thereof received from the Central Excise Department, Bombay, is taxable in the hands of the assessee under s. 41(1) of the IT Act, 1961 ?

6. Later on, it appears that it was brought to the notice of the then Hon''ble President who had acted as a Third Member that the assessee's case fell within the jurisdiction of the Hon''ble Bombay High Court and not the Madhya Pradesh High Court, which he had considered to be the jurisdictional High Court for the assessee and on whose decision in the case of Commissioner of Income Tax Vs. Nathuabhai Desabhai, , he had observed in his order that the decision of the jurisdictional High Court was binding on him, he passed a corrigendum order dt. 22nd October, 1993 wherein he modified his order dt. 26th August, 1993. In the corrigendum order he directed that the references to the decision of the Madhya Pradesh High Court as jurisdictional High Court may be omitted but the words "which without dispute is directly on the point in issue" be substituted. With this background, an order giving effect to the order of the Third Member was passed by the Bombay, A Bench of the Tribunal and which is dt. 30th November, 1993. In that order while the learned Members wrote that the President of the Tribunal acting as Third Member had agreed with the view of the Judicial Member, yet while giving effect to that order they wrote, "we find that a sum of Rs. 10,99,024, being the excise duty refund obtained by the assessee and not returned to the customers, cannot be assessed as the income of the assessee under s. 41(1) of the Act". It is on this basis that the Revenue has come with the reference application and has proposed the above-mentioned question for being referred to the Hon''ble High Court by the Tribunal and a draft statement of the case dt. 15th May, 1995 was circulated for finalisation.

7. However, at the time of final hearing for finalisation of the statement, the learned counsel for the assessee pointed out along with his application dt. 24th January, 1997, that as per the opinion of the Hon''ble Third Member, given in his order dt. 26th August, 1993, and also the corrigendum order dt. 22nd October, 1993, factually the correct question should have been :

Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that a sum of Rs. 10,99,024 being the excise duty refund obtained by the assessee and partly returned and partly returnable to the customers cannot be assessed as income of the assessee under s. 41(1) of the

IT Act, 1961 ?

In this context he drew our attention to the observations of the Hon"ble Judicial Member in para 29 of his order wherein he had held that the assessee is under an obligation to return the amount to its customers and in fact, the assessee had already returned an amount of Rs. 35,270 in the subsequent year and that the assessee also undertook to refund to the customers the balance amount and that in these circumstances there was no benefit to the assessee as contemplated in s. 41(1) of the Act by way of complete remission or cessation of the liability as laid down by the High Courts of Allahabad, Madras, Madhya Pradesh and particularly the jurisdictional Bombay High Court. In this context he also drew our attention to the decision of the Third Member who had observed in para 6 of his order that the amount refunded to the assessee by the Excise Department was also with a direction to refund it to the customers and that the assessee did refund amounts to the customers, the details of which were available on record and that those who had claimed the refund got it and those who did not claim did not get it but the liability to refund persists. In these circumstances, according to the learned counsel, the question proposed by the Revenue and circulated in the draft statement of the case was not factually correct because according to that question no amount has been refunded to the customers which is factually incorrect and which has specifically been dealt with by the learned Judicial Member and by the Hon"ble Third Member.

8. The learned counsel for the assessee further drew our attention to the fact that in para 29 of his order, the learned Judicial Member had specifically mentioned that his decision was based on the decision of several High Courts including that of the Bombay High Court. He pointed out that prior to that in the last half of para 12, he had referred to the decisions of the Bombay High Court in the case of J.K. Chemicals Ltd. Vs. Commissioner of Income Tax, Bombay City-II, on which he had relied and also to the decision in the case of Kohinoor Mills Co. Ltd. Vs. Commissioner of Income Tax, Bombay City I, of his order the learned Judicial Member had referred to the Bombay High Court decision in the case of I.T.C. Limited Vs. M.K. Chipkar and others, which in turn was based on two Supreme Court decisions the extracts from which were quoted by him in that paragraph. In para 15 of his order he had referred to and relied upon the decision of the Bombay High Court in the case of Commissioner of Income Tax, Bombay City-VI Vs. Sadabhakti Prakashan Printing Press (P.) Ltd., . In para 16 of his order he had referred to and relied upon the decision of the Bombay High Court in the case of Commissioner of Income Tax Vs. Chase Bright Steel Ltd. (No. 2), , the ratio of which he had given in that paragraph. In this background, the learned counsel further drew our attention to his application dt. 24th January, 1997, where he had referred to the above-mentioned decisions of the Bombay High Court with the submissions that the decision of the Tribunal was based on the ratio of these Bombay High Court decisions. He further drew our attention to para 2 of that application where he had submitted that as per the decisions of the Bombay High Court in the case of Commissioner of Income Tax Vs. Morris

Electronics Ltd., and Commissioner of Income Tax Vs. American President Lines Ltd., , since this issue stands by the decisions of the Bombay High Court the question is not fit to be referred to the Hon''ble High Court under s. 256(1) for its valuable opinion.

9. The learned Departmental Representative, on the other hand submitted that since Tribunal had circulated the draft, it implied that it had found the question proposed by the Revenue to be fit for being referred to the Hon''ble High Court and at this state only some typographical errors or some glaring mistakes in the draft statement could be rectified and the merits of the case or the basic question as to whether a reference had to be made or not to the Hon''ble High Court cannot be taken up at this stage. Similarly, since the question proposed by the Revenue could not be modified because this had arisen from the order of the Bench of the Tribunal giving effect to the decision of the Hon''ble Third Member.

10. We have carefully considered the rival submissions. In our view the following facts emerged from the facts and circumstances narrated by us in the preceding paragraphs of this order :

(i) In this case there was a difference of opinion between the learned Judicial Member and the learned Accountant Member on the question as to whether the refund of Rs. 10,99,024 obtained by the assessee from the Central Excise Department was taxable under s. 41(1) of the IT Act.

(ii) Secondly, while both the Members had relied on various High Courts and Supreme Court decisions, the Judicial Member inter alia had relied on the decisions of the Hon''ble Bombay High Court in the cases of J.K. Chemicals Ltd. vs. CIT (supra); Kohinoor Mills Co. Ltd. vs. CIT (supra), CIT vs. Sadabhakti Prakashan Printing Press P. Ltd. (supra) and CIT vs. Chase Bright Steel Ltd. (supra) which were in favour of the assessee and on the basis of which he had held that the impugned amount was not taxable under the provisions of s. 41(1) of the IT Act in the hands of the assessee.

(iii) The Hon''ble Third Member to whom the case was referred under s. 255(4) of the IT Act had stated that he agreed with the view expressed by the learned Judicial Member and thus, the majority view was that the impugned amount was not taxable in the hands of the assessee.

(iv) It is also implied that the Hon''ble Third Member had accepted that inter alia the ratio of the decisions of the Hon''ble Bombay High Court as interpreted by the learned Judicial Member and not the High Court decisions as interpreted by the learned Accountant Member, were applicable to the facts and circumstances of this case.

(v) In these circumstances, the final decision stands that the impugned amount of Rs. 10,99,024 is held by the Tribunal not to be taxable in the hands of the assessee on the basis of at least four decisions of the Hon''ble Bombay High Court which is the jurisdictional High Court.

11. Proceeding on these premises, it has to be decided whether the question proposed by the Revenue in its present form, or even if it is modified, can be referred to the Hon''ble Bombay High Court for its valuable opinion. Obviously, the question as proposed by the Revenue does not emerge from the question as proposed by the dissenting Judicial and Accountant Members nor from the opinion given by the Hon''ble Third Member. However, even if it is to be taken as such, the final decision remains that the impugned amount is not taxable in the hands of the assessee. Further, it also emerges that the decision of the Tribunal is based, inter alia, at least on four decisions of the Bombay High Court which is the jurisdictional High Court for us. In this context, we do find force in the submissions of the learned counsel for the assessee that as per the ratio of the decisions in the cases of CIT vs. Morris Electronic Ltd. (supra) and CIT vs. American President Lines Ltd. (supra) of the Hon''ble Bombay High Court itself, the question proposed by the Revenue is not fit to be referred to the Hon''ble High Court for its opinion. In this context we may also refer to another decision of the Hon''ble Bombay High Court in the case of Commissioner of Income Tax Vs. Desai Brothers Ltd., where their Lordships had held that if a question had been answered by the jurisdictional High Court, even if an SLP had been admitted and was pending before the Supreme Court, it could not be held to be a fit case for reference to the High Court even under s. 256(2) of the Act. In our view the ratio of the above-mentioned three decisions would prohibit us for referring this issue to the Hon''ble Bombay High Court for its opinion under s. 256(1) of the Act.

12. Now, coming to the objection of the learned Departmental Representative to the effect that since the draft statement had been circulated, we do not have the option of withdrawing that statement and not referring the case to the Bombay High Court, we may mention that the C Bench, Bombay consisting of both of us as its Members had taken a decision in respect of a similar situation in RA No. 238/Bom/95 and RA No. 287/Mum/96 in the case of CIT vs. Mont Blanc Properties & Industries (P) Ltd. vide our order dt. 20th March, 1997. In that case also a draft statement had been circulated but when the draft statement came for finalisation, our attention was drawn to the decisions of the Hon''ble Supreme Court in the cases of Seth Mathuradas Vs. Commissioner of Income Tax, Madhya Pradesh and Bhopal, , M.M. Ipoh and Others Vs. Commissioner of Income Tax, Madras, and Commissioner of Income Tax, West Bengal Vs. Brij Lal Lohia and Mahabir Prasad Khemka, where it had been held by the Hon''ble apex Court that the principle of res judicata does not apply to the decisions of the Tribunal and that if some additional material was brought before the Tribunal, which was not before it when it took its earlier decisions, the Tribunal can take a different view than what it had taken earlier in the case of the same assessee. Our attention was further drawn to the decision of the Hon''ble Bombay High Court in the case of Commissioner of Income Tax, Bombay City-I, Bombay Vs. Kamini Kaushal, to the effect that the Tribunal should not refer a question to the High Court unless its decision was perverse. We had also taken note of the decision of the Hon''ble

Gujarat High Court in the case of Commissioner of Wealth-tax Vs. Sayaji Mills Ltd., to the effect that even up to the final draft order stage the order of the Tribunal is not final and the Tribunal can change that order. Applying the ratio of those decisions we passed an order dismissing the reference applications filed by the Revenue, the draft statement of which had earlier been circulated. We find that in the present case also the circumstances are similar. The earlier draft statement had been circulated without taking note of the decisions of the Hon"ble Bombay High Court referred to by the learned counsel or the assessee so also cited by us in the preceding paragraphs of this order to the effect that it is not advisable for us to refer a question to the Hon"ble High Court which already stands answered by the jurisdictional High Court.

13. Even on merits, in our opinion, it would not be a referable case to the Hon"ble High Court because it would be clear that the difference of opinion between the learned Judicial Member and the learned Accountant Member was based mainly on the facts as to whether the assessee had refunded any amount to the customers from the refund of excise duty received from the Central Excise Department. Thus, in para 29 of his order the learned Judicial Member had written, "the assessee is under an obligation to return the amount to its customers and in fact, the assessee has already returned an amount of Rs. 35,270 in the subsequent assessment year. The assessee also undertook to refund to the customers the balance amount. Under these circumstances it cannot be said that there is any complete cessation of liability and there is no real income or profit to the assessee on account of the refund of the excise duty". On the other hand, the learned Accountant Member had written in para 10 of his order, "the assessee has actually received the refund of Central excise which was claimed and allowed on the basis of actual payments. It was the assessee's real income and there was no overriding title involved". In the last line of p. 37 of the order in para 11 the learned Accountant Member had written, "actually, there is no correlation shown between the central excise collected from the customers and the central excise actually paid for any period". The learned Third Member, however, not only agreed with the opinion of the Judicial Member but specifically wrote in para 6 of his order, "What is more, the nature of the amount of excise duty collected by the assessee was more by way of a deposit from the customers as the assessee was contesting the very levy of excise duty. The amount refunded to it by the Excise Department was also with a direction to refund it to the customers. The assessee did refund the amounts to the customers, details of which were available on record. Those who claimed the refund got it and those who did not claim did not get it but the liability to refund persists."

14. Thus, on the basis of opinion of the majority of Members the facts found by the Tribunal are that the amount received by the assessee was in the nature of deposits, part of which he had already paid and regarding the remaining part he was under an obligation to pay the amount and that there was no remission or cessation of liability. In these circumstances, the correct question which could be

formulated would be - "whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that a sum of Rs. 10,99,024 being the excise duty refund obtained by the assessee out of which an amount of Rs. 35,270 was refunded to various customers and regarding the balance, the assessee was under an obligation and liability to repay to its customers, cannot be assessed as the income of the assessee under s. 41(1) of the Act." It can be seen that the answer to this question is self-evident, i.e., the Tribunal was right and hence, in view of the decision of the Hon''ble Supreme Court in the case of Commissioner of Income Tax, Punjab Vs. Chander Bhan Harbhajan Lal, , it is not a fit case to be referred to the Hon''ble High Court. Almost a similar opinion was expressed by the Hon''ble apex Court in the case of Commissioner of Gift Tax, Bombay Vs. Smt. Kusumben D. Mahadevia, .

15. In continuation of this, we may also refer to the observation of the Hon''ble Supreme Court in the cases of Karnani Properties Ltd. Vs. The Commissioner of Income Tax, West Bengal, and Commissioner of Income Tax, Poona Vs. Manna Ramji and Co., to the effect 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 in the circumstances" as found by the Tribunal and not about the facts and circumstances as may be found by the High Court. Since in the instant case the majority of the Members of the Tribunal have already given a finding on facts, on which in fact, there was difference of opinion between the learned Judicial Member and the learned Accountant Member, in our opinion, there remains no question of law to be referred to the Hon''ble High Court.

16. Thus, we may sum up that firstly, since the question proposed by the Revenue is covered by the decisions of the jurisdictional High Court, it is not a fit question to be referred to the High Court. Secondly, since finally the decision of the Tribunal is on facts; it would not give rise to a question of law and thirdly, even if it can be said that it gives rise to a question of law, in our opinion, the answer to the question is self-evident and hence, it would not be a fit case to be referred to the Hon''ble High Court for its opinion under s. 256(1) of the IT Act, 1961.

17. Taking all these factors into account we decline to refer the question proposed by the Revenue to the Hon''ble High Court for its esteemed opinion.

18. The reference application filed by the Revenue is, therefore, rejected.