
(1996) 09 GAU CK 0002

In the Gauhati High Court

Case No : Income-tax Reference No. 3 of 1995

Commissioner of Income Tax

APPELLANT

Vs

Highway Construction Co. (P.) Ltd. (No. 2)

RESPONDENT

Date of Decision : 23-09-1996

Acts Referred:

Income Tax Act, 1961 — Section 143, 254

Citation : (1997) 223 ITR 498

Hon'ble Judges : N.S. Singh, J;D.N. Baruah, J

Bench : Division Bench

Advocate : G.K. Joshi and U. Bhuyan, for the Appellant; A.K. Saraf, K.K. Gupta and R.K. Agarwalla, for the Respondent

Judgement

D.N. Baruah, J.—At the instance of the Revenue, the following two questions have been referred u/s 256(1) of the Income Tax Act, 1961 (for short, "the Act"), for opinion of this court :

" 1. Whether, on the facts and in the circumstances of the case, when the Tribunal had set aside the order of the Assessing Officer for completion of the assessment de novo, the Assessing Officer while making fresh order is precluded from assessing income which has escaped assessment in the original assessment. If so, whether the Tribunal was legally correct in upholding the Commissioner of Income Tax (Appeals)" order deleting the addition of Rs. 8,96,713 made on account of non-disclosure of total contract receipt by the assessee ?

2. Whether in view of question No. 1 above, the Tribunal was legally correct in upholding the Commissioner of Income Tax (Appeals)" order deleting the addition of Rs. 50,310 made on account of undisclosed interest ?"

2. The assessee is a company incorporated under the Companies Act. The Assessing Officer made assessment in respect of the assessment year 1975-76. The assessee, not being satisfied with the order of assessment made by the

Assessing Officer, preferred an appeal before the Commissioner of Income Tax (Appeals), and, ultimately, the matter came before the Income Tax Appellate Tribunal. The Tribunal after hearing the matter remanded the same to the Assessing Officer to make de novo assessment. The Tribunal also directed the Assessing Officer to examine the issue afresh after giving reasonable opportunity of being heard to the assessee. Accordingly, the assessment matter went back to the Income Tax Officer and he started making fresh assessment. While doing so, the Income Tax Officer took into consideration certain incomes which were left out and accordingly added the same in the income of the assessee. Being aggrieved, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals) who allowed the appeal by deleting the said income. While doing so, the Commissioner of Income Tax (Appeals) observed thus :

" I have gone through the above Tribunal's order and noted that the only point in dispute before the Tribunal was the addition in contract account and not on other point. Thus, the Tribunal set aside the order of the Income Tax Officer for a limited purpose and not for making fresh assessment on all these points. In view of this, I am of the opinion the addition of Rs. 8,96,713 did not arise out of the Tribunal's order as cited above and, therefore, the Inspecting Assistant Commissioner (Assessment) had no jurisdiction over the same and the addition of Rs. 8,96,713 is deleted."

3. The Revenue being dissatisfied preferred an appeal before the Tribunal and the Tribunal after considering all the points confirmed the order passed by the Commissioner of Income Tax (Appeals). In respect of the addition of the amount, the Tribunal observed thus :

" The learned Commissioner of Income Tax (Appeals) deleted the same because according to him the Assessing Officer had no jurisdiction to travel beyond the order of the Tribunal passed in I. T. A. No. 13/(Gau) of 1980 dated September 5, 1980. According to the Commissioner of Income Tax (Appeals), the Tribunal had set aside the first appellate order to consider the trading addition of Rs. 48,896 only. That was the limited point to be considered by the Assessing Officer but while framing the assessment the Assessing Officer made a further addition of Rs. 8,96,713 which was permissible and so in that view of the matter he deleted the aforesaid amount."

4. The Tribunal further observed thus :

" On a due consideration of the submissions of both the sides and the material available in the appeal record we find the order of the Commissioner of Income Tax (Appeals) to be justified and so we uphold his order on this point."

5. The Revenue requested the Tribunal to refer the questions for opinion of this court. Hence, the present reference.

6. We have heard Mr. G.K. Joshi, learned senior standing counsel assisted by Mr. U. Bhuyan, learned junior standing counsel appearing on behalf of the Revenue,

and Dr. A.K. Saraf, learned counsel appearing on behalf of the assessee.

7. Mr. Joshi submits that the Tribunal set aside the entire assessment and sent back the matter to the Income Tax Officer for fresh assessment.

8. It was open to the Assessing Officer to make the assessment as if it was a new assessment. Therefore, the Assessing Officer having found that certain amounts were left out he had the jurisdiction to take into consideration of the said matter. Dr. Saraf has vehemently opposed the same. He submits that the Tribunal had the power to pass an order of remand only on the subject-matter of the appeal. The Tribunal had no jurisdiction whatsoever to allow the Assessing Officer to make assessment afresh taking into consideration new matters which were not the subject-matter of the appeal. In this connection, Dr. Saraf has drawn our attention to Section 254 of the Act. It is well-settled law that the Tribunal has all the powers to pass orders as it thinks fit ; but the only restriction is that it must arise out of the appeal. A reference can be made to a decision of this court in ASSAM CO-OPERATIVE APEX BANK LTD. Vs. COMMISSIONER OF Income Tax, ASSAM., In the said judgment, at page 269, this court observed thus :

" That being so, the Tribunal's order in disposing of the appeals cannot travel beyond the disputed taxable amounts in question. But by the impugned remand order the learned Tribunal has in fact enlarged the scope of the subjects of the appeals, inasmuch as the securities other than the Government securities are also directed to be considered by the Appellate Assistant Commissioner. This, it is submitted on behalf of the assessee, is illegal, and without jurisdiction inasmuch as the Tribunal has no power of enhancement of tax as assessed by the Income Tax Officer and affirmed by the Appellate Assistant Commissioner."

9. In the said case, at page 276 of the judgment, this court observed thus :

" In the circumstances, we find that the Tribunal was justified in setting aside the consolidated order dated March 31, 1970, of the Appellate Assistant Commissioner of Income Tax, Shillong Range, Shillong, relating to the assessments for the assessment years 1967-68, 1968-69 and 1969-70 ; but it was not justified in remanding the case with a direction to give a finding on the point as to what amount out of the securities is the stock in-trade or circulating capital of the assessee and which amount is the capital investment of the assessee-bank."

10. Dr. Saraf has also referred to a decision in Pathikonda Balasubba Setty (Deceased) Vs. Commissioner of Income Tax, Mysore, In the said case, the Mysore High Court (as it then was) observed that the Tribunal while remanding a case cannot confer a jurisdiction which the court does not possess. We have no dispute so far this proposition of law is concerned. By citing the said decision, Dr. Saraf submits that the inclusion of the amount which was left out being barred by limitation the authority had no jurisdiction to make assessment in respect of the said amount and, therefore, the Tribunal also had no justification to give any

direction for inclusion of the amount.

11. Dr. Saraf has also referred to a decision of the Jammu and Kashmir High Court in Mohd. Ahsan Wani Vs. Commissioner of Income Tax, In the said case, the Jammu and Kashmir High Court had the occasion to consider a similar point. In the said case, at page 97 of the judgment, it was observed thus :

" As regards the direction of the Appellate Assistant Commissioner for redetermining the income from the property, it is certainly open to the Appellate Assistant Commissioner to give such a direction, because, this is not a new source of income which had not been considered by the Income Tax Officer. But, to the extent that the Appellate Assistant Commissioner has directed the Income Tax Officer to redetermine the income from property on the basis of material which was not considered by the Income Tax Officer like the net wealth statement and the capital accretion of the assessee or the income from agricultural property for the earlier assessment years, it is clearly outside the scope of the powers of the Appellate Assistant Commissioner and the direction given by him in this behalf should be ignored by the Income Tax Officer."

12. It is true that the appellate authority has jurisdiction to pass any order on the basis of the matter placed before the authority. Section 254 of the Act also gives power to the Appellate Tribunal to pass any order which arises out of the appeal.

13. It is to be seen whether the Assessing Officer had the jurisdiction to include the additional income which was earlier left out.

14. In this connection, it will be apposite to refer to the decision of the appellate court. While dismissing the appeal preferred by the Revenue, the Tribunal set aside the order of the lower authority and remanded the case to the file of the Income Tax Officer and gave direction to the Assessing Officer to make a fresh assessment in accordance with law and after giving a reasonable opportunity of being heard to the assessee and specially in the light of the categorical finding of fact by the Appellate Assistant Commissioner that there was no work-in-progress.

15. From the order it is clear that the assessment was set aside and a de novo assessment was directed to be made in accordance with law. Dr. Saraf has given much emphasis on the portion of the order saying that the assessment was to be made in the light of the categorical finding of the Appellate Assistant Commissioner that there was no work-in-progress. Dr. Saraf submits that the order of remand was a specific direction which is not permissible.

16. We have gone through the order of the Appellate Tribunal. It is very clear and patent that the entire assessment was set aside and an assessment was directed to be made de novo. The categorical finding made by the Appellate Assistant Commissioner that there was no work-in-progress was only an observation made. It was not a direction. The direction was to make a fresh assessment. A fresh assessment means as if there was no assessment order

earlier. In other words, the earlier assessment was non est. That being so it was open to the Assessing Officer to make an assessment afresh and the Assessing Officer is entitled to make the assessment anew in accordance with law. In this connection, Dr. Saraf submits that the assessment in respect of the additional amount was already barred by limitation and the authority ought to have considered that aspect of the matter. However, this aspect of the matter was opposed by Mr. Joshi. According to him, it was not barred by limitation.

17. Be that as it may, the order of the Commissioner of Income Tax (Appeals) is very clear. According to the order, the inclusion of the amount was not within the jurisdiction on the ground that the Tribunal gave a limited direction. It is sufficient to indicate that the point was never raised before the Commissioner of Income Tax (Appeals) that it was barred by limitation.

18. In view of the above, in our opinion, there is no scope for the assessee to make any submission before this reference court that the matter was barred by limitation. As the Tribunal had given an order for making a fresh assessment it was open to the Assessing Officer to make a fresh assessment and for the same purpose if certain amount is left out, in our opinion, that can be added. However, it must be done in accordance with law. We are asked to give opinion whether inclusion of the amount is permissible or not. In our view, this can be done in accordance with law.

19. In view of the above, we answer both the questions in the negative, in favour of the Revenue and against the assessee.

20. A copy of this judgment under the signature of the Registrar and the seal of the High Court shall be transmitted to the Income Tax Appellate Tribunal.