(1995) 09 GAU CK 0018

In the Gauhati High Court

Case No : Income-tax Reference No. 28 of 1989

Commissioner of Income Tax — APPELLANT

Vs

Highway Construction Co. (P.) Ltd. — RESPONDENT

Date of Decision : 22-09-1995

Acts Referred:
Income Tax Act, 1961 — Section 143(3), 253, 254

Citation : (1999) 105 ELT 14 : (1996) 217 ITR 234

Hon'ble Judges : V.D. Gyani, J;D.N. Baruah, J

Bench : Division Bench

Advocate : D.K. Talukdar and B.J. Talukdar, for the Appellant; A.K. Saraf and N. Choudhury, for the Respondent

Judgement

D.N. Baruah, J.—In pursuance of this court''s order dated March 1, 1989, u/s 256(2) of the Income Tax Act, 1961, the following questions of law are referred for opinion :

"(i) Whether, on the facts and in the circumstances of the case, the Tribunal, after setting aside the assessment for the assessment year 1975-76 by its order dated September 5, 1980, in Income Tax Appeal No. 12/(Gau) of 1979 on the Departmental appeal, was justified in taking up the case again, on the assessee''s appeal against the same assessment and in passing orders thereon again in I. T. A. No. 296/(Gau) of 1979 ?

(ii) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that it has got no option but to follow the decision of the High Court if no contrary decision is available ?

(iii) Whether, on the facts and in the circumstances of the case, the Special Bench of the Tribunal which was constituted for deciding only the validity of the assessment, was justified in deciding the other issues also, raised by the assessee ?

(iv) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in setting aside the order relating to the assessee''s claim for treating it as an industrial company for redeciding the same in the light of the decision of the Tribunal (Special Bench), Delhi, in the case of Hydle Construction (P.) Ltd. which was not available at the time of deciding the present appeal by the Tribunal and thereby putting a fetter on the Assessing Officer ?"

2. A few basic facts may now be noted. The assessee is a private limited company engaged in the business of building construction and the matter relates to the assessment year 1975-76, and it was completed by the Assessing Officer u/s 143(3) on March 30, 1978. The assessee was served with the assessment order and a demand notice of the same date but no papers indicating the determination of tax as payable by the assessee on its total income were received. Placing reliance on a judgment as in S. Mubarik Shah Naqshbandi Vs. Commissioner of Income Tax, and a decision of the Delhi Bench of the Tribunal in I. T. A. No. 4756/(Del) of 1975-76, it was contended by the assessee that the order passed by the Income Tax Officer was invalid. The Tribunal, however, referring to the case of ITO v. D.K. Sen in I. T. A. No. 251/(Cal) of 1976-77, considering the judgment as in S. Mubarik Shah Naqshbandi Vs. Commissioner of Income Tax, took a contrary view and, accordingly, the matter was referred to the President for constituting a Special Bench. The Special Bench of the Tribunal so constituted instead of confining itself to the special grounds disposed of the case on other grounds as well, as raised by the assessee in his appeal. The facts relating to the questions, taking them in their serial order, are as follows :

3. Taking up the first question as noted above, which relates to the appeals preferred by both the assessee as well as the Department before the Tribunal against the order passed by the Appellate Assistant Commissioner, the Department''s appeal was on the limited question against the relief of Rs. 48,896 allowed by the Appellate Assistant Commissioner in the contract account. This appeal was heard separately and disposed of by the Tribunal, vide its order dated September 5, 1980, resulting in the setting aside of the order of the Appellate Assistant Commissioner on the point and the reference application filed by the assessee against the said order of the Tribunal was rejected in R. A. No. 113/(Gau) of 1980 on May 26, 1981. It was contended by the Department that once the assessment was set aside by the Tribunal on an appeal by the Department, the order became final and the Tribunal could not rehear the appeal of the assessee. Placing reliance on a judgment as in S.P. Kochhar Vs. Income Tax Officer, , the assessee contended that the Department''s appeal was only limited to the question of relief of Rs. 48,986 in the contract account and it was confined to this finding only as recorded by the Appellate Assistant Commissioner, whereas the assessee had filed the appeal on other grounds as well and the Tribunal was duty-bound to dispose of the assessee''s appeal irrespective of its decision in the appeal preferred by the Department, The grounds raised in the Department''s appeal were :

"1. For that the learned Appellate Assistant Commissioner erred in allowing relief of Rs. 48,896 in the contract account.

2. For that the learned Appellate Assistant Commissioner erred both on facts and in law.

3. For that the decision of the Appellate Assistant Commissioner on the above point may be reversed and the addition may be restored."

4. Finally, the Tribunal concluded as follows :

"The Appellate Assistant Commissioner, in granting relief to the assessee, has been very categorical that there was no work-in-progress. In view of these contra findings by the lower authorities, the facts of the case merit that we set aside the orders of the lower authorities and restore the case to the file of the Income Tax Officer which we do with the specific direction that the assessment in the case of the assessee be framed afresh in accordance with law and after giving a reasonable opportunity of being heard to the assessee and specifically in the light of this categorical finding of fact by the Appellate Assistant Commissioner that there was no work-in-progress. This fact finds mention in paragraph 7 of the impugned order of the Appellate Assistant Commissioner. The Income Tax Officer; having based the addition mainly on this score and the Appellate Assistant Commissioner having granted relief to the assessee on this very score, this aspect of the case requires to be discussed and thrashed out afresh and for the purpose the Income Tax Officer will call for additional evidence from the assessee if necessary and the assesses shall be at liberty to place on the file of the Income Tax Officer any further evidence, the assessee so chooses."

5. So far as question No. 2 is concerned, referring to Sections 143(3) and 156 of the Act and placing reliance on S. Mubarik Shah Naqshbandi Vs. Commissioner of Income Tax, it was contended on behalf of the assessee that the decision of the Jammu and Kashmir High Court was binding upon the Tribunal.

6. The order of the Tribunal has to be read in the light of the subject-matter of the appeal. The Departmental appeal was limited to the issue of relief of Rs. 48,896 which was allowed by the Appellate Assistant Commissioner in respect of the contract. Section 253 of the Act confers a right to the assessee to prefer appeal to the Appellate Tribunal against an order as mentioned in Section 253(1) (a), (b) and (c). This section confers an inherent right on the assessee to prefer appeal against those orders. The Supreme Court in Commissioner of Income Tax, Bombay Vs. Walchand and Co. Private Ltd., had occasion to deal with a similar matter. In the said case, the apex court held thus (at page 384) :

"It is necessary to emphasise that, though the Tribunal is not a court, it is invested with judicial power to be exercised in a manner similar to the exercise of power of an appellate court acting under the Code of Civil Procedure."

7. In the instant case, the Department''s appeal was only in respect of Rs. 48,896. However, the assessee''s appeal was on some other grounds also. Therefore, the Tribunal was justified in taking up the appeal and passing the

order.

8. So far question No. 2 is concerned, counsel for the assessee contended that the Tribunal''s decision to follow the decision of the Jammu and Kashmir High Court in S. Mubarik Shah Naqshbandi Vs. Commissioner of Income Tax, was justified inasmuch as the Tribunal had no option but to follow the decision as there was no other decision.

9. The Jammu and Kashmir High Court in S. Mubarik Shah Naqshbandi Vs. Commissioner of Income Tax,

"In the present case the assessment order has not been made in terms of Section 144 of the Act inasmuch as the tax payable by the assessee has not been determined. u/s 246(c) of the Act, an assessee has a right of appeal against an order of assessment not only where he objects to the amount of income assessed but also to the amount of tax determined. In the present case, the amount of tax not having been determined in the assessment order, the assessee is deprived of the right of appeal. It is no doubt true that the tax payable by the assessee has been shown in the demand notice, but, as already stated, there is no right of appeal against a notice of demand."

10. Counsel for both sides informed this court that there was no other decision contrary to the decision of S. Mubarik Shah Naqshbandi Vs. Commissioner of Income Tax, In this connection, we can refer to a decision in Commissioner of Income Tax Vs. Thana Electricity Supply Ltd., . In that case, the Bombay High Court observed thus (at page 734) :

"Though there is no provision like Article 141 which specifically lays down the binding nature of the decision of the High Courts, it is a well-accepted legal position that a single judge of a High Court is ordinarily bound to accept as correct judgments of courts of co-ordinate jurisdiction and of the Division Benches and of the Full Benches of his court and of the Supreme Court. Equally well-settled is the position that when a Division Bench of the High Court gives a decision on a question of law, it should generally be followed by a co-ordinate Bench of the same High Court. If the co-ordinate Bench in the subsequent case wants the earlier decision to be reconsidered, it should refer the question at issue to a larger Bench."

11. In the said case, it was further held that the decision of one High Court is not a binding precedent on another High Court.

12. In the said case, it was further held thus (at page 738) :

"(d) The decision of one High Court is neither binding precedent for another High Court nor for courts or Tribunals outside its own territorial jurisdiction. It is well-settled that the decision of a High Court will have the force of binding precedent only in the State or territories on which the court has jurisdiction. In other States or outside the territorial jurisdiction of that High Court it may, at best, have only persuasive effect. By no amount of stretching of the doctrine of stare decisis, can judgments of one High Court be given the status of a binding precedent so far as other High Courts or courts or Tribunals within their territorial jurisdiction are concerned. Any such attempt will go counter to the very doctrine of stare decisis and also the various decisions of the Supreme Court which have interpreted the scope and ambit thereof. The fact that there is only one decision of any one High Court on a particular point or that a number of different High Courts have taken identical views in that regard is not at all relevant for that purpose. Whatever may be the conclusion, the decisions cannot have the force of binding precedent on other High Courts or on any subordinate courts or Tribunals within their jurisdiction. That status is reserved only for the decisions of the Supreme Court which are binding on all courts in the country by virtue of Article 141 of the Constitution."

13. We respectfully agree with the ratio of the above decision. But then when there is a decision of a different High Court and there is no contrary decision, it will be just and proper for the Tribunal to follow the said decision.

14. In view of the above, we hold that the Tribunal was justified in following the decision in S. Mubarik Shah Naqshbandi Vs. Commissioner of Income Tax,

15. As regards question no. 3, a Special Bench of the Tribunal was constituted in the present case for a decision in respect of the points referred by the President to the Special Bench. While considering the points referred, the said Special Bench also disposed of some other matters which were not referred. When the Special Bench took up the points besides the points referred, there was no objection. Counsel for the assessee submitted that as no objection was raised at the time of hearing, this could not be challenged thereafter. The Special Bench of the Tribunal was constituted to decide the points referred. In the absence of such reference, the Special Bench did not have any jurisdiction to consider the points other than those referred.

16. In view of the above, we are of the opinion that the Special Bench had no jurisdiction to decide the matters which were not referred to. Question No. 3 is accordingly answered.

17. As regards question No. 4, it was contended by learned counsel that the assessee had been engaged in the business of builders and general construction works. The claim of the assessee was that it was an industrial company. However, the Income Tax Officer, by following a decision of the Appellate Assistant Commissioner for the assessment year 1973-74, rejected the contention. However, the Special Bench constituted for the purpose set aside the order passed by the Income Tax Officer as stated above and referred the matter back to the Income Tax Officer for a reconsideration in the light of the decision given by the Special Bench. As such, the order of the Tribunal cannot be said to be illegal and without jurisdiction.

18. In view of our foregoing observations, we answer questions Nos. 1, 2 and 4 in the affirmative and in favour of the assessee. However, question No. 3 is

answered in the negative and against the assessee. 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.

19. In the facts and circumstances of the case, there shall be no direction as to costs.

V.D. Gyani, J.

20. I agree.

