
(1996) 09 GAU CK 0047
In the Gauhati High Court
Case No : IT Ref. No. 3 of 1995

COMMISSIONER OF INCOME TAX

APPELLANT

Vs

HIGHWAY CONSTRUCTION CO. (P) LTD.

RESPONDENT

Date of Decision : 23-09-1996

Acts Referred:

Income Tax Act, 1961 — Section 254, 256

Citation : (1997) 140 CTR 482

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

Bench : Division Bench

Judgement

D. N. BARUAH, J. :

At the instance of the Revenue, the following two questions have been referred under s. 256(1) of the IT 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 AO for completion of the assessment de novo, the AO 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 CIT(A)s order deleting the addition of Rs. 8,96,713 made on account of non-disclosure of total correct receipt by the assessee ?

2. Whether in view of question No. 1 above, the Tribunal was legally correct in upholding the CIT(A)s 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 AO made assessment in respect of the asst. yr. 1975-76. The assessee, not being satisfied with the order of assessment made by the AO, preferred an appeal before the CIT(A), and, ultimately, the matter came before the Tribunal. The Tribunal after hearing the matter remanded the same to the AO to make de novo

assessment. The Tribunal also directed the AO to examine the issue afresh after giving reasonable opportunity of being heard to the assessee. Accordingly, the assessment matter went back to the ITO and he started making fresh assessment. While doing so, the ITO 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 CIT(A) who allowed the appeal by deleting the said income. While doing so, the CIT(A) observed thus :

"I have gone through the above Tribunals 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 ITO 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 Tribunals order as cited above and, therefore, the IAC (Asst.) had no jurisdiction over the same and the addition of Rs. 8,96,713 is deleted".

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

"The learned CIT(A) deleted the same because according to him the AO had no jurisdiction to travel beyond the order of the Tribunal passed in ITA No. 13/(Gau) of 1980 dt. 5th September, 1980. According to the CIT(A), 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 AO but while framing the assessment the AO made a further addition of Rs. 8,96,713 which was not permissible and so in that view of the matter he deleted the aforesaid amount".

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 CIT(A) to be justified and so we uphold his order on this point".

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

3. 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.

4. Mr. Joshi submits that the Tribunal set aside the entire assessment and sent back the matter to the ITO for fresh assessment.

It was open to the AO to make the assessment as if it was a new assessment. Therefore, the AO 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 AO 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 s. 254 of the Act. It is well-settled law that the Tribunal has all the powers to pass order 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 Tribunals 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 AAC. 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 ITO and affirmed by the AAC".

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 dt. 31st March, 1970, of the AAC, Shillong Range, Shillong, relating to the assessments for the asst. yrs. 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".

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.

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 AAC for redetermining the income from the property, it is certainly open to the AAC to give such a direction, because, this is not a new source of income which had not been considered by the ITO. But, to the extent that the AAC has directed the ITO to redetermine the income from property on the basis of material which was not considered by the ITO 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 AAC and the direction given by him in this behalf should be ignored by the ITO".

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

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

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 ITO and gave direction to the AO 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 AAC that there was no work-in-progress.

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 AAC that there was no work-in-progress. Dr. Saraf submits that the order of remand was a specific direction which is not permissible.

5. We have gone through the order of the 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 AAC 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 AO to make an assessment afresh and the AO 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.

Be that as it may, the order of the CIT(A) 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 CIT(A) that it was barred by limitation.

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 AO 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.

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