(1986) 10 MP CK 0043

In the Madhya Pradesh High Court

Case No : Miscellaneous Civil Case No. 99 of 1980

Commissioner of Income Tax APPELLANT

Vs

K.C. Rajput RESPONDENT

Date of Decision : 07-10-1986

Acts Referred:
Income Tax Act, 1961 — Section 256(1), 263

Citation : (1986) ILR (MP) 618 : (1987) 164 ITR 197 : (1987) 32 MPLJ 247 : (1987) MPLJ 217 : (1987) 32 TAXMAN 326

Hon'ble Judges : G.G. Sohani, Acting C.J.;S.K. Seth, J;Faizanuddin, J;C.P. Sen, J;B.L. Verma, J

Bench : Full Bench

Advocate : B.K. Rawat, for the Appellant; B.L. Nema, for the Respondent

Judgement

Sohani, Actg. CJ.

1. By this reference u/s 256(1) of the income tax Act, 1961 (''the Act''), the Tribunal, Jabalpur Bench, has referred the following question of law to this Court for its opinion:

Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was justified in law in holding that the ITO''s order had merged with the order of the AAC and, therefore, the Commissioner was not competent to revise the order u/s 263 of the income tax Act, 1961?

The material facts giving rise to this reference briefly are as follows: The assessee who is assessed in the status of an individual, carries on the business of a contractor. The assessee also derives income from plying trucks. While framing assessment for the assessment year 1973-74, the ITO estimated the income of the assessee from PWD contracts by applying a net profit rate of 15 per cent. The ITO also allowed depreciation on the cost of the truck purchased on hire-purchase basis. Aggrieved by the order passed by the ITO, the assessee preferred an appeal before the AAC. In that appeal, the assessee assailed the adoption of net profit rate of 15 per cent and computation of income on the basis of estimate of receipts. The AAC upheld the computation of the assessee and held that the receipts should not have been estimated when the assessee had produced certificates from Government departments showing receipts. The AAC also held that the net profit rate of 12.5 per cent should have been applied by the ITO. The order of assessment was accordingly modified. Thereafter the Commissioner, exercising powers u/s 263 of the Act, found that the. assessee was not entitled to depreciation on the cost of truck, purchased on hire-purchase basis. The Commissioner, therefore, by order dated 18-3-1978, set aside the order of the assessment and directed the ITO to make a fresh assessment according to law. Aggrieved by the order passed by the Commissioner, the assessee preferred an appeal before the Tribunal. It was urged on behalf of the assesses before the Tribunal that the order of the ITO had merged with the order of the AAC and the Commissioner had, therefore, no jurisdiction to revise the order of assessment. The contention was upheld by the Tribunal. Aggrieved by the order passed by the Tribunal, the revenue sought a reference and it is at the instance of the revenue that the aforesaid question of law had been referred to this Court for its opinion.

2. When this reference came up for hearing before a Division Bench of this Court on 7-4-1983, it was urged by the learned counsel for the parties that there was a conflict between the two Full Bench decisions of this Court in COMMISSIONER OF Income Tax, M.P. -II Vs. R. S. BANWARILAL., and Commissioner of Income Tax Vs. Mandsaur Electric Supply Co. Ltd., . It was in these circumstances that a larger Bench was constituted for hearing this reference. That is how the matter has come up for consideration.

3. At the time of hearing, the learned counsel for the parties conceded that on the question of the applicability of the doctrine of merger to the power of the Commissioner u/s 263 to revise the order of the ITO when that order was the subject-matter of an appeal before the AAC there was no conflict in the two Full Bench decisions of this Court- B.S. Banwarilal''s case (supra) and Manasaur Electric Supply Co. Ltd.''s case (supra). Both these decisions lay down correctly, if we may say so with respect that the Commissioner has jurisdiction u/s 263 to revise that part of the order of assessment which was not the subject-matter of appeal before the AAC and was not touched by him in appeal. It has further been held in Mandsaur Electric Supply Co. Ltd.''s case (supra), that when the Commissioner in exercise of revisional powers, sets aside the entire order of assessment which has been the subject-matter of an appeal preferred before the AAC the effect of the order of the Commissioner is to set aside the order of the AAC which the Commissioner has no jurisdiction to do. We are in full agreement with this view.

4. In R.S. Banwarilal''s case (supra), the Full Bench correctly enunciated the following principle as regards the applicability of the doctrine of merger to the power of the Commissioner u/s 263:

The result, therefore, is that the doctrine of merger applies to income tax proceedings but the extent of its application depends on the scope and subject-matter of the appeal and the decision rendered by the appellate authority. Where an appeal has been preferred by the assessee to the AAC from an order of assessment made by the ITO in respect of only some of the items covered by the ITO''s order and the remaining items, forming part of the ITO''s assessment order, were not agitated by either party, though it was open also to the revenue to agitate them or the AAC to consider them suo motu and no decision of the AAC is, therefore, made in respect of the remaining items, the ITO''s order merges with the appellate order of the AAC, only to the extent it was considered and decided by the AAC but the matters which are not covered by the appellate order of the AAC are left untouched and to that extent, the ITO''s assessment order survives, permitting exercise of revisional jurisdiction by the Commissioner u/s 263 of the income tax Act, 1961. It necessarily follows that the items considered and decided by the AAC in his appellate order are beyond the scope of the revisional power of the CIT u/s 263 inasmuch as the ITO''s order merges to that extent with that of the AAC and the Commissioner has no revisional power over the AAC. The question whether the ITO''s order has merged with that of the AAC has to be answered on this basis. (p. 15)

It seems that after correctly enunciating the aforesaid principle, the Full Bench, with respect, failed to notice that in that case, the Commissioner had set aside the entire order of assessment, a part of which had been modified by the AAC on appeal. In such a case, in our opinion, the Commissioner is not competent to set aside the entire order of assessment, because in doing so, the Commissioner, in effect disturbs the order of the AAC which he has no jurisdiction to do. In our opinion, therefore, whenever a question arises as to whether the Commissioner is or is not competent to revise u/s 263, the order of assessment framed by the ITO which has been the subject-matter of appeal before the AAC, it has to be ascertained as to whether the Commissioner has set aside the entire order of assessment or only that part of the order of assessment which was not the subject-matter of appeal either because the AAC had no jurisdiction to consider that matter or because the AAC though having jurisdiction to examine that subject-matter, did not do so. If the Commissioner has set aside the entire order of assessment, then it could not be held that he has exercised power conferred upon him because he has no power u/s 263 to revise the order of the AAC. In this view of the matter, the decision in B.S. Banwarilal''s case (supra) does not lay down correct law insofar as it impliedly holds that the Commissioner could, in exercise of revisional power, set aside the entire order of assessment passed by the ITO though it had been the subject-matter of an appeal before the AAC.

5. In the instant case, the question framed by the Tribunal is too wide and it does not bring out the real issue which arose before the Tribunal for consideration. We, therefore, reframe that question as follows:

Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the Commissioner was not competent u/s 263 of the income tax Act, 1961 to set aside the entire order of assessment passed by the ITO when that order was the subject-matter of appeal preferred by the assessee before the AAC?

6. The learned counsel for the revenue contended that the Tribunal had jurisdiction to modify the order passed by the Commissioner so that only that part of the order of assessment passed by the ITO which was not touched by the AAC, would be set aside. This aspect of the matter, however, as to whether in the circumstances of the case, the Tribunal could or could not modify the order passed by the Commissioner, does not arise out of the order passed by the Tribunal and a question in that behalf has not been referred to us. We, therefore, refrain from expressing any opinion in that behalf. The only question that arose before the Tribunal and that arises in this reference is whether in the circumstances of the case, the Tribunal was right in holding that the Commissioner was not justified in setting aside the entire order of assessment passed by the ITO in exercise of revisional powers u/s 263 when the order of assessment passed by ITO was subject- matter of appeal before the AAC. In our opinion, on the facts and in the circumstances of this case, the Tribunal was justified in holding that the Commissioner was not competent to set aside the entire order of assessment passed by the ITO.

7. For aforesaid reasons, our answer to the question framed by us is in the affirmative and in favour of the assessee. In the circumstances of the case, parties shall bear their own costs of the reference.