
(1986) 10 MP CK 0013

In the Madhya Pradesh High Court

Case No : Miscellaneous Civil Case No. 99 of 1980

Commissioner of Income Tax

APPELLANT

Vs

K.L. Rajput

RESPONDENT

Date of Decision : 07-10-1986

Acts Referred:

Income Tax Act, 1961 — Section 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.C. Varma, J

Bench : Full Bench

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

Judgement

G.G. Sohani, Actg. C.J.

By this reference u/s 256(1) of the Income Tax Act, 1961 (hereinafter referred to as "the Act"), the Income Tax Appellate 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 Income Tax Officer's order had merged with the order of the Appellate Assistant Commissioner 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 was assessed in the status of an individual, carried on the business of a contractor. The assessee also derives income from plying trucks. While framing the assessment for the assessment year 1973-74, the Income Tax Officer estimated the income of the assessee from P.W.D. contracts by applying a net profit rate of 15%. The Income Tax Officer also allowed depreciation on the cost of the truck purchased on hire purchase basis. Aggrieved by the order

passed by the Income Tax Officer, the assessee preferred an appeal before the Appellate Assistant Commissioner. In that appeal, the assessee assailed the adoption of net profit rate of 15% and computation of income on the basis of estimate of receipts. The Appellate Assistant Commissioner upheld the computation of the assessee and held that the receipts should not have been estimated when the assessee had produced certificates from the Government Departments showing receipts. The Appellate Assistant Commissioner also held that a net profit rate of 12.5% should have been applied by the Income Tax Officer. The order of assessment was accordingly modified. Thereafter, the Commissioner of Income Tax, exercising powers u/s 263 of the Act, found that the assessee was not entitled to depreciation on the cost of the truck purchased on hire purchase basis. The Commissioner of Income Tax, therefore, by order dated March 18, 1978, set aside the order of the assessment and directed the Income Tax Officer 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 assessee before the Tribunal that the order of the Income Tax Officer had merged with the order of the Appellate Assistant Commissioner and the Commissioner had, therefore, no jurisdiction to revise the order of assessment. This 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.

When this reference came up for hearing before a Division Bench of this court on April 7, 1983, it was urged by 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 before us for consideration.

At the time of hearing, 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 of the Act to revise the order of the Income Tax Officer when that order was the subject-matter of an appeal before the Appellate Assistant Commissioner, there was no conflict in 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., . Both these decisions lay down correctly, if we may say so with respect, that the Commissioner has jurisdiction u/s 263 of the Act to revise that part of the order of assessment which was not the subject-matter of appeal before the Appellate Assistant Commissioner and was not touched by him in appeal. It has further been held in CIT v. Mandsaur Electric Supply Co. Ltd. [1983] 143 ITR 677 , 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 Appellate Assistant Commissioner, the effect of the order of the

Commissioner is to set aside the order of the Appellate Assistant Commissioner which the Commissioner has no jurisdiction to do. We are in full agreement with this view.

In COMMISSIONER OF Income Tax, M.P. -II Vs. R. S. BANWARILAL., 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 of the Act (at p. 15) :

"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 Appellate Assistant Commissioner from an order of assessment made by the Income Tax Officer in respect of only some of the items covered by the Income Tax Officer's order and the remaining items, forming part of the Income Tax Officer's assessment order, were not agitated by either party, though it was open also to the Revenue to agitate them or the Appellate Assistant Commissioner to consider them suo motu and no decision of the Appellate Assistant Commissioner is, therefore, made in respect of the remaining items, the Income Tax Officer's order merges with the appellate order of the Appellate Assistant Commissioner only to the extent it was considered and decided by the Appellate Assistant Commissioner but the matters which are not covered by the appellate order of the Appellate Assistant Commissioner are left untouched and to that extent, the Income Tax Officer'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 Appellate Assistant Commissioner in his appellate order are beyond the scope of the revisional power of the Commissioner of Income Tax u/s 263 inasmuch as the Income Tax Officer's order merges to that extent with that of the Appellate Assistant Commissioner and the Commissioner has no revisional power over the Appellate Assistant Commissioner. The question whether the Income Tax Officer's order has merged with that of the Appellate Assistant Commissioner has to be answered on this basis."

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 Appellate Assistant Commissioner 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 Appellate Assistant Commissioner 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 of the Act, the order of assessment framed by the Income Tax Officer which has been the subject-matter of appeal before the Appellate Assistant Commissioner, 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 an appeal either because the Appellate Assistant Commissioner had no jurisdiction to consider that matter or because the Appellate Assistant Commissioner, 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 of the Act to revise the order of the Appellate Assistant Commissioner. In this view of the matter, the decision in COMMISSIONER OF Income Tax, M.P. -II Vs. R. S. BANWARILAL., does not lay down the correct law in so far as it impliedly holds that the Commissioner could, in exercise of revisional power, set aside the entire order of assessment passed by the Income Tax Officer though it had been the subject-matter of an appeal before the Appellate Assistant Commissioner.

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 Act to set aside the entire order of assessment passed by the Income Tax Officer when that order was the subject-matter of an appeal preferred by the assessee before the Appellate Assistant Commissioner ?"

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 Income Tax Officer which was not touched by the Appellate Assistant Commissioner, 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 which arose before the Tribunal and which 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 Income Tax Officer in exercise of his revisional powers u/s 263 of the Act when the order of assessment passed by the Income Tax Officer was the subject-matter of an appeal before the Appellate Assistant Commissioner. 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 Income Tax Officer.

For the 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.