(1993) 02 KL CK 0051

In the High Court Of Kerala

Case No : Income-tax Reference No''s. 156 and 157 of 1989

Commissioner of Income Tax APPELLANT

Vs

M.C. Jacob RESPONDENT

Date of Decision : 25-02-1993

Acts Referred:
Income Tax Act, 1961 — Section 254, 80J

Citation : (1993) 111 CTR 14 : (1993) 203 ITR 972

Hon'ble Judges : K.S. Paripoornan, J;K.P. Balanarayana Marar, J

Bench : Division Bench

Advocate : P.K.R. Menon and N.R.K. Nair, for the Appellant; K.P. Dandapani, for the Respondent

Judgement

K. S. Paripoornan, J.—At the instance of the Revenue, the Income Tax Appellate Tribunal has referred the following questions of law for the decision of this court :

"1. Whether, on the facts and in the circumstances of the case, the remand of the case to the Appellate Assistant Commissioner is justified ?

2. On the facts and in the circumstances of the case, the order of the Tribunal is vitiated for non-exercise of the jurisdiction and authority vested in it in accordance with law ?"

2. The respondent is an assessee to Income Tax. We are concerned with the assessment years 1974-75 and 1975-76. Identical questions arose for consideration in both the years.

3. We heard counsel. It is seen that the respondent-assessee has claimed deduction u/s 80J of the Income Tax Act, 1961. The dispute between the assessing authority and the respondent centred round the question of capital employed in the business. According to the assessee, it will include borrowed funds. The Revenue held that it will not be so. The Income Tax Officer negatived the relief. It was upheld by the first appellate authority. In second appeal, the Appellate Tribunal ordered a remit of the matter to the first appellate authority.

When the appeal came up before the Tribunal, Section 80J stood in an amended form. The Tribunal found that the amended Section 80J will support the Revenue. But it was noticed that the amendment was the subject of challenge in a proceeding in the Supreme Court and that was pending. The Calcutta and Madras High Courts and a Special Bench of the Tribunal at Bombay have taken a view in favour of the assessee. Placed in such circumstances, the Appellate Tribunal set aside the appellate order and ordered a remit of the matter to the Appellate Assistant Commissioner. He was directed to bear in mind the principle of the Calcutta and Madras High Court judgments and also the order of the Special Bench of the Tribunal. It was also stated that it will be advisable for the first appellate authority to wait till the Supreme Court decides the validity of the amendment u/s 80J. The order of the Appellate Tribunal is dated October 15, 1980. the Revenue moved the Appellate Tribunal for reference of questions of law which arose from the said appellate order for the decision of this court. It was rejected. The Revenue moved this court in O. P. No. 4221 of 1987 and this court directed the Appellate Tribunal to refer the questions of law formulated hereinabove for the decision of this court. It is in pursuance thereof that the two questions of law mentioned hereinabove have been referred by the Income Tax Appellate Tribunal for the decision of this court.

4. We heard counsel for the Revenue and also counsel for the respondent-assessee, Mr. Dandapani. Counsel for the Revenue submitted that the Appellate Tribunal was in error in ordering a remit. It was further submitted that the Appellate Tribunal abdicated its function when it ordered the remit. Having noticed that Section 80J as amended supported the plea of the Revenue, the Appellate Tribunal should have proceeded to decide the matter on that basis, instead of remitting the matter to the Appellate Assistant Commissioner with certain directions which were uncalled for. On the other hand, counsel for the respondent-assessee submitted that there is no error of jurisdiction or illegality in the Tribunal remitting the matter to the first appellate authority. It was pleaded that it is open to the Tribunal to direct the first appellate authority to consider the matter again.

5. We are of the view that the order of the Appellate Tribunal is erroneous in law. At a time when the appeals came up before the Appellate Tribunal, Section 80J of the Act has been amended, according to the Tribunal, in support of the view taken by the Revenue. The Tribunal was duty bound to give effect to the law as amended. By failing to do it, it abdicated its duty. The fact that a writ petition was filed in the Supreme Court challenging the validity of the amendment was of no consequence or relevance. The Appellate Tribunal has no case that the operation of Section 80J as amended was stayed or further directions were given by the Supreme Court. Instead of disposing of the appeal on the basis of the amended Section 80J, the Tribunal remitted the case to the first appellate authority with an added direction that the appellate authority will bear in mind the Calcutta and Madras High Court judgments and also the order of the Special Bench at Bombay. It was for the Appellate Tribunal to consider the matter on the

basis of the law as it stood at the time when the appeal was heard. Since it was not done, the Appellate Tribunal failed to discharge the duty imposed on it by law. We hold so. The order of remit was unauthorised and illegal. It was unnecessary and uncalled for. We hold that the order of the Appellate Tribunal dated October 15, 1980, is infirm.

6. We answer question No. 1 in the negative, i.e., against the assessee and in favour of the Revenue. We answer question No. 2 in the affirmative, i.e., in favour of the Revenue and against the assessee.

7. The references are disposed of as above.

8. A copy of this judgment under the seal of the court and the signature of the Registrar shall be forwarded to the Income Tax Appellate Tribunal, Cochin Bench, forthwith.