(1998) 11 MAD CK 0072

In the Madras High Court

Case No : Tax Case No. 109 of 1991 (Reference No. 44 of 1991)

Commissioner of Income Tax APPELLANT

Vs

Mill Stores (P.) Ltd. RESPONDENT

Date of Decision : 04-11-1998

Acts Referred:
Income Tax Act, 1961 — Section 263

Citation : (2002) 254 ITR 789

Hon'ble Judges : R. Jayasimha Babu, J;A. Subbulakshmy, J

Bench : Division Bench

Advocate : Chitra Venkataraman, for the Appellant; P. Kumar, for T.M. Seetharaman, for the Respondent

Judgement

R. Jayasimha Babu, J.—The question referred to us at the instance of the Revenue is set out in page 2 of the typed set and it reads as under

:

Whether, on the facts and in the circumstances of the case, the Appellate Tribunal is right in law in holding that the entire subject of the assessment

is open before the appellate authority and, therefore, the assessment order has not merged with the order of the Commissioner of Income Tax

(Appeals) even in respect of the matters not agitated in appeal and consequently, the assessment order is no longer amenable to review u/s 263

and accordingly cancelling the order of the Commissioner of Income Tax u/s 263 ?

2. The assessment year is 1981-82. The assessment order had been made on February 9, 1984, and the order in appeal on March 23, 1985.

That part of the assessment order which was not the subject matter of appeal was revised by the Commissioner by an order dated March 17,

1986. His order was set aside by the Tribunal on the ground that the revisional power was not available to the Commissioner, as in the view of the

Tribunal the order of assessment had merged with the order in appeal.

3. Counsel for the Revenue rightly invited our attention to the language of the Explanation below Section 263(1) which after its insertion by the

Finance Act, 1988, and the amendment thereto by the Finance Act, 1989, sets out a declaration by Parliament, inter alia, ""for the removal of

doubts"" that an order passed ""on or before or after the 1st day of June, 1988"" by the Assessing Officer, if it had been the subject-matter of appeal

filed on or before or after the 1st day of June, 1988, the powers of the Commissioner u/s 263(1) shall extend and shall be deemed always to have

extended to such matters as had not been considered and decided in such appeal.

4. Relying on that Explanation as also on the decisions of the apex court in the cases of COMMISSIONER OF Income Tax Vs. SHRI ARBUDA

MILLS LTD., and CIT v. Shree Manjunathesware Packing Products and Camphor Works [1998] 231 ITR 53, it was submitted by counsel that

the view taken by the Tribunal is patently erroneous.

5. Counsel for the assessee sought to support the order of the Tribunal by placing reliance on the decision of a learned single judge of the Bombay

High Court in the case of Ritz Ltd. and another Vs. Union of India and others, , wherein the court held that even after the amendment by the

Finance Act, 1989, Section 263 could not be invoked in respect of the assessment orders against which appellate orders had been made prior to

the 1st day of June, 1988. We are wholly unable to subscribe to that view. The express language of the Explanation leaves no manner of doubt

that all orders passed in appeal whether on or before or after the 1st day of June, 1988, did not result in the merger of the assessment order with

the order in appeal in respect of the matters which were not the subject-matter of appeal. To hold otherwise is to do violence to the lucid language

used in the Explanation.

6. Counsel for the assessee also sought to submit that in the decision of the apex court in the case of COMMISSIONER OF Income Tax Vs.

SHRI ARBUDA MILLS LTD., , the court did not expressly advert to the scope of the Explanation though the same had been set out. We see no

substance whatever in this submission of counsel. The apex court dealt with the reference which is set out in the question, and which referred to the dates of the assessment order and the order in appeal both of which related to a period prior to 1980. Explanation (c) u/s 263(1) was set out and

the words used being plain and unambiguous did not require further discussion and it was held that in respect of an appellate order passed in the

year 1979, there was no merger of the assessment order with the appellate order in respect of the matters which were not the subject-matter of

appeal. That decision was rendered by a Bench of three learned judges of the court.

7. In the case of Shree Manjunathesware Packing and Camphor Works [1998] 231 ITR 53, the memorandum explaining the provisions in the

Finance Bill, 1989, has been extracted. In that memorandum it was stated, inter alia, with reference to the Finance Act, 1988, that, it was also

clarified that the Commissioner is competent to reverse the order of assessment passed by an Assessing Officer on all matters except those which

have been considered and decided in an appeal. The above Explanation was incorporated in the Finance Act, 1988, to clarify this legal position

which is deemed always, to have been, in existence. By the Finance Act, 1989, the Explanation (a) u/s 263(1) was amended to make the intention

of Parliament crystal clear and the words, ""on or before or after the 1st day of June, 1988,"" were substituted in Section 263(1), Explanation (a),

Clause (i), which words are also applicable to Clause (c) of the Explanation.

8. The assessee''s contention that the Commissioner had no power to exercise his revisional jurisdiction in view of the alleged merger of the

assessment order with the appellate order, in respect of the matters not considered in appeal is without any substance and it is required to be

rejected and is accordingly rejected. The question referred to us is answered in favour of the Revenue and against the assessee.