

(1991) 12 GUJ CK 0024
In the Gujarat High Court

Case No : Income-tax Reference No. 206 of 1982

Commissioner of Income Tax

APPELLANT

Vs

M.M. Khambhatwala

RESPONDENT

Date of Decision : 02-12-1991

Acts Referred:

Income Tax Act, 1961 — Section 154, 263, 35B, 35B(1)

Citation : (1992) 198 ITR 144

Hon'ble Judges : R.C. Mankad, Acting C.J.; J.N. Bhatt, J

Bench : Division Bench

Advocate : M.J. Thakore, for the Appellant; K.H. Kaji, for the Respondent

Judgement

R.C. Mankad, Actg.C.J.

1. The assessee is a registered partnership firm and the assessment year under reference is 1978-79, the year of account being Samvat year 2033. The assessee had incurred expenditure of Rs. 27,894 for insurance and Rs. 2,14,086 for port fees, freight charges, etc., in the previous year relevant to the assessment year 1978-79. In the course of assessment for the assessment year 1978-79, the Income Tax Officer of assessment for the assessee's claim for weighted deduction in respect of the said expenditure u/s 35B(1)(b) of the Income Tax Act, 1961 ("The Act" for short). The commissioner of Income Tax (the "commissioner" for short) invoked the provisions of section 263 of the Act as, in his view, the assessment made by the Income Tax Officer was erroneous and prejudicial to the interest of the Revenue to the extent that the had allowed weighted deduction in respect of the aforesaid expenditure u/s 35B(1)(b) of the Act. He, therefore, issued a show-cause notice to the assessee and, after hearing it disallowed, the aforesaid expenditure u/s 35B(1)(b) of the Act. He, therefore, issued a show-cause notice to the assessee and, after hearing it, disallowed the aforesaid claim for weighted deduction made by the assessee, being aggrieved by the order passed by the Commissioner, the assessee carried the matter in appeal before the Income Tax Appellate Tribunal ("the Tribunal" for short). The

Tribunal held to the effect that the assessee was entitled to weighted deduction u/s 35B(1)(b) of the Act, as claimed by it. It further held that since two views on the question were possible, it could not be said that the order passed by the Income Tax Officer was erroneous and prejudicial to the interests of the Revenue. Therefore, in the view of the Tribunal, the Commissioner could not have invoked the provisions of section 263 of the Act. The revenue, being aggrieved by the order of the Tribunal the following two questions have been referred to us, for our opinion, at its instance :

"(1) Whether, on the facts and in the circumstances of the case the Appellate Tribunal was right in taking the view that the claims of the assessee for insurance premium, port fees, were allowable u/s 35B of the Act ?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal was correct in giving a finding that the order of the Income Tax Officer was not erroneous and the Commissioner of Income Tax was not on the facts of the case, competent to pass an order u/s 263 ?"

2. The first question which has been referred to us is directly covered by our decision in M.M. Khambhatwala Vs. Commissioner of Income Tax, , Income Tax Reference No. 289 of 1980, disposed of by our judgment delivered today (December 2, 1991). Following the said decision and for the reasons recorded therein, question No. 1 shall have to be answered in the negative and against the assessee.

3. So far as the second question is concerned, as pointed out above the Tribunal took the view that the Commissioner could not have invoked the provisions of section 263 of the Act since two views are possible on the question whether the assessee was entitled to weighted deduction u/s 35B of the Act. This is a strange view taken by the Tribunal and it is conceded that this view taken by the Tribunal is not supported by any provision of the act or any decision. The Commissioner would be entitled to revise the order of the Income Tax Officer if he is of the view that the order of the Income Tax Officer is erroneous and prejudicial to the interests of the Revenue. The Commissioner can exercise the power u/s 263 even in a case where the issued is debatable. Revisional power u/s 263 is not comparable with the power of rectification of mistake u/s 154 of the Act. It was only in the context of section 154 of the Act that the Supreme Court has in T.S. Balaram, Income Tax Officer, Company Circle IV, Bombay Vs. Volkart Brothers, Bombay, , observed that, when the issue is debatable, the power of rectification cannot be exercised. This decision of the Supreme Court has no application whatsoever so far as powers u/s 263 are concerned. Therefore, with respect, the view taken by the Tribunal is patently erroneous and illegal. We, therefore, answer question No. 2 in the negative and against the assessee.

4. Reference accordingly with no order as to costs.