
(1994) 09 DEL CK 0079

In the Delhi High Court

Case No : Income-tax Case No. 196 of 1992

Commissioner of Income Tax

APPELLANT

Vs

Modipon Ltd. (No. 2)

RESPONDENT

Date of Decision : 22-09-1994

Acts Referred:

Income Tax Act, 1961 — Section 17(1), 216, 256, 32A, 37
Income Tax Rules, 1962 — Rule 6D

Citation : (1994) 122 CTR 119 : (1995) 212 ITR 656

Hon'ble Judges : Y.K. Sabharwal, J;D.K. Jain, J

Bench : Division Bench

Advocate : B. Gupta and R.K. Chaufla, for the Appellant; S.K. Aggarwal, for the Respondent

Judgement

D.K. Jain, J.—By this petition u/s 256(2) of the Income Tax Act, 1961 (for short, "the Act"), the Revenue, seeks a direction to the Income Tax Appellate Tribunal (hereinafter referred to as "the Tribunal") to state a case and refer the following questions stated to be questions of law and arising out of Income Tax Appeal No. 3272/(Del) of 1985 pertaining to the assessment year 1977-78 :

" 1. (a) Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was correct in law in holding that Sterling Apartment Flat, Cottage at Marve Malad and Jindal House could not be treated as guest houses and, as such, the expenses incurred thereupon were allowable ?

(b) Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was correct in law in holding that only 1/3rd portion of Maharani Bagh house was a guest house and remaining portion was for business purposes ?

2. Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was correct in law in holding that the premium of personal accident insurance policy in respect of the managing director could not be

considered to be a perquisite within the meaning of Section 40(c) of the Income Tax Act ?

3. Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was correct in law in directing the Income Tax Officer to calculate the disallowance under Rule 6D with reference to the total journeys undertaken in a year and not with reference to each journey undertaken by an employee or director on day-to-day basis ?

4. Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the investment allowance of Rs. 3,72,700 was wrongly disallowed by the Income Tax Officer u/s 32A of the Income Tax Act ?

5. Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the interest u/s 216 was wrongly charged ?

6. Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that 25 per cent. of expenses incurred under the head "Public relations expenses" should be considered towards employees and should be allowed accordingly ?

7. Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that 25 per cent. of the expenses incurred under the head "Business, promotion expenses" should be considered towards employees and should be allowed accordingly ?

8. Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that 25 per cent. of expenses incurred under the head "Boarding expenses" should be considered towards employees and should be allowed accordingly ?"

2. Briefly stated, the material facts relevant to the controversy involved in question No. 1(a) are that the assessed incurred certain expenses for the maintenance of : (i) Flat in Sterling Apartments in Bombay, (ii) Cottage at Marve Malad, Bombay, and (in) Jindal House at Calcutta. During the course of assessment proceedings, the Income Tax Officer took the view that these residential accommodations were in the nature of guest houses and, Therefore, the expenses incurred on their maintenance were disallowable u/s 37(4) of the Act, which prohibits allowance of any expenditure incurred by the assessed after February 28, 1970, on the maintenance of any residential accommodation in the nature of a guest house. The disallowance was upheld by the Commissioner of Income Tax (Appeals) primarily on the ground that no visitors' register had been maintained at these places. On appeal by the assessed, the Tribunal, following its earlier orders in respect of the assessment years 1972-73 and 1976-77, came to the conclusion that all the three accommodations were not in the nature of guest houses and, Therefore, the provisions of Section 37(4) of the Act were not attracted.

3. It is contended before us by learned counsel for the assessed that although for

the assessment year 1972-73, on the Revenue's application u/s 256(2) of the Act, reference was called for by the Allahabad High Court on the question pertaining to the expenses incurred on the maintenance of the flat in Sterling Apartments, Bombay, for the subsequent years, viz., assessment years 1973-74 to 1976-77, no reference was sought by the, Revenue on this issue and, Therefore, reference on the question may not be directed for the present assessment year as well.

4. From a bare reading of the Tribunal's order, it is clear that while accepting the assessed's view point, the Tribunal has merely relied on its earlier order for the assessment year 1972-73, which, we are told, is the main order. Reference on a similar question in respect of the assessment year 1972-73 having been called for, we are of the view that the question involving the same controversy in the present assessment year also is fit for reference.

5. As regards, the expenses incurred on the maintenance of cottage at Marve Malad, Bombay, and Jindal House, Calcutta, it is the admitted position that right from the assessment years 1972-73 to 1976-77, the Tribunal has consistently been accepting the assessed's view point and in respect of all these years the Revenue has either not sought a reference on this issue or the same has been declined by the High Court. Faced with the situation, learned counsel for the Revenue submits that each assessment year being independent, the rule of res judicata does not apply to taxation proceedings and, Therefore, there is no legal bar to calling for, a reference on this issue as well. The proposition adumbrated by learned counsel for the Revenue, is too broad and general. It is true that generally speaking, the rule of res judicata does not apply to proceedings under the Act, like assessment or appellate proceedings under the Act because findings therein do. not fulfill the. two essential elements of res judicata, viz., (i) the judex (a decision on question of law or fact by a judge or judicial Tribunal), and (ii) a lis However, the position is different in proceedings u/s 256 of the Act. Unlike various authorities under the Act, the High Court is a court of record. Before it, there is a lis between two parties : the assessed on the one hand and the Revenue on the other. The court dealing with a question of law or fact is a court having power and authority of law to decide the issues. A decision by it is binding on the parties and the authorities under the Act. The rule of res judicata, or for that matter the rule of constructive res judicata in any case, would apply to the decision rendered by the High Court. In that view of the matter, we are of the opinion that the Revenue cannot be permitted to rake up the present controversy over again. We, Therefore, reject the Revenue's request for reference on this issue.

6. In so far as question No. 1(b) is concerned, while framing the assessment, the Income Tax Officer disallowed the expenses incurred by the assessee on the maintenance of a hired accommodation at A-1, Maharani Bagh, New Delhi, on the ground that the said accommodation was also in the nature of a guest house. Dealing with the issue, the Tribunal has observed that even though the affidavits

were filed by the assessed in support of its claim that the building was used for holding business meetings and as a transit house, its user as a guest house could not altogether be ruled out. The Tribunal has accordingly estimated that one-third portion of the said building was used as a guest house and the remaining portion for the purposes of the business of the assessed. This conclusion of the Tribunal is a pure finding of fact which has not been challenged in the proposed question as being perverse, which finding of fact cannot otherwise be disturbed even on the ground that there is no evidence to support it. We cannot also accept the suggestion of counsel for the Revenue that the question may be refrained because, it is beyond the jurisdiction of this court in these proceedings to alter the basic frame of the question. We may also take note of the statement made at the Bar by learned counsel for the assessed that in respect of the assessment years 1981-82 and 1982-83, the Tribunal's orders on the issue have been accepted by the Revenue, In our opinion, the question proposed is not a testable question of law.

7. As regards question No. 2, it is not disputed by Mr. Gupta, learned counsel for the Revenue, that a similar controversy has been considered by this court in Commissioner of Income Tax, Delhi-I Vs. Bharat Ram Charat Ram P. Ltd., , wherein it has been held that the insurance premium paid by a company in respect of accident insurance of its directors is not a "perquisite" within the meaning of Section 17(1) and this cannot be taken into account for the purpose of Section 40(c) of the Act; It appears that against the said decision, the Revenue preferred a SLP but the same was dismissed (see [1990] 186 ITR 28. Having regard to this decision, in our opinion, the proposed question is not a testable question of law.

8. In so far as question No. 3 is concerned, a reference of a similar question having been called for in the case of the assessed itself in respect of the assessment year 1976-77 Commissioner of Income Tax Vs. Modipon Limited (No. 1), , in our opinion, a reference on the question posed has to be called for.

9. Coming to question No. 4, the claim of the assessed for investment allowance u/s 32A of the Act was disallowed by the Assessing Officer on three grounds, viz., (i) the plant and machinery on which the investment allowance had been claimed was not covered by item No. 27 of the Ninth Schedule, (ii) no evidence was adduced to show that the machinery in question was new, and (iii) no evidence was adduced to prove that the machinery was actually installed or first put to use during the relevant previous year. The Commissioner of Income Tax (Appeals) though he held that the assessed was producing "organic heavy Chemicals" falling in entry 27 of the Ninth Schedule he concurred with the Assessing Officer that the claim was to be otherwise disallowed on grounds (ii) and (iii) above. Although, the Revenue was not in appeal before the Tribunal against the finding of the Commissioner of Income Tax (Appeals) that the assessed was producing "organic heavy Chemicals", yet the Tribunal went on to re-examine the issue and did endorse the view taken by the Commissioner of Income Tax (Appeals). We

feel that the Revenue having accepted the order of the Commissioner of Income Tax (Appeals), it is too late in the day for it to reagitate the issue as to whether the assessed is producing "organic heavy Chemicals" or not, as has been attempted before us by learned counsel for the Revenue. As regards the remaining two grounds on which the claim of the assessed was rejected, the Tribunal held as follows :

"One of the grounds was that no evidence was produced by the assessed regarding the installation and user of the machinery in question. This has been found to be not correct. At the time of original assessment, the Income Tax Officer himself allowed depreciation on these machineries on tentative basis and subsequently modified his order u/s 154 to allow depreciation. Depreciation on plant and machinery u/s 32 is allowable with reference to ownership, installation and user of the machinery. When depreciation has been allowed by the Assessing Officer, the fact that the machinery was owned and installed and used by the assessed during the assessment year 1976-77 is established."

10. It is evident from the above extracted portion of the Tribunal's order that it has failed to address itself to the question as to whether the machinery on which investment allowance had been claimed by the assessed was new machinery, which is one of the essential conditions for allowance of such a relief. In this view of the matter, we are of the opinion that the proposed question is a question of law requiring consideration by this court.

11. With regard to question No. 5, it could not be disputed by learned counsel for the assessed that identical facts involving the controversy contained in the question came up for consideration of this court in Commissioner of Income Tax Vs. J.K. Synthetics Ltd. (No. 1), , wherein it was held that a question similar to the one raised in the present petition involved the interpretation of Section 216 of the Act to a given set of facts and thus giving rise to a question of law. In view of this decision, in our opinion, a reference of the question has to be called for.

12 In so far as questions Nos. 6 to 8 are concerned, the controversy involved therein was the subject-matter of consideration before this court in Commissioner of Income Tax Vs. Expo Machinery Ltd., . In that case, the issue involved was regarding the estimation out of the composite expenditure incurred in hotels in entertaining the company's customers by the employees of the company and it was held that under these circumstances, it was necessary to resort to an estimate in ascertaining that part of the expense incurred on food and beverages of the employees which is to be excluded from the purview of Section 37(2A) of the Act and such an estimation by the Tribunal would be a question of fact.

13. Besides, it is pointed out by learned counsel for the assessed that no question in respect of any of the expenses involved in these questions was sought to be referred by the Revenue from the orders of the Tribunal for the earlier years, which orders have been relied upon by the Tribunal while granting

relief to the assessed in the present assessment year, It is also stated that from the assessment year 1981-82 onwards, the Assessing Officer has been himself allowing similar expenses on approximate basis at 25 per cent. as pertaining to the employees.

14. Having regard to the aforesaid decision and the stated factual position, in our opinion, these questions do not give rise to testable questions of law.

15. Consequently, we direct the Tribunal to refer questions Nos. 1(a) (limited to the expenses incurred on the maintenance of the flat in Sterling Apartments, Bombay) 3, 4 and 5 along with an appropriate statement of the case for the opinion of this court. There will, however, be no order as to costs.