(1991) 11 BOM CK 0030

In the Bombay High Court

Case No : IT Application No. 2 of 1985

Commissioner of Income Tax — APPELLANT

Vs

Mrs. Ziabanu Malak — RESPONDENT

Date of Decision : 26-11-1991

Acts Referred:
Income Tax Act, 1961 — Section 139(8), 143, 144, 147, 148

Citation : (1995) 79 TAXMAN 406

Hon'ble Judges : V.A. Mohta, J;C.D. Patil, J

Bench : Division Bench

Advocate : P.N. Chandurkar, for the Appellant;

Final Decision : Dismissed

Judgement

Mohta, J.—This is an application u/s 256(2) of the income tax Act, 1961, (''the Act'') for directing the Tribunal to state the case and to refer to the High Court for its opinion following question of law :

Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was justified in cancelling the interest levied by the income tax Officer u/s 139(8) and section 215 and sustained in appeal by the AAC?

The regular assessment made for the assessment years 1970-71, 1971-72, 1972-73, 1973-74, 1976-77 were reopened and reassessment made u/s 147, read with section 144, of the Act. Interest u/s 139(8) and section 215 of the Act was levied by the ITO on the basis of reassessments. The assessee challenged the said levy of interest before the Commissioner in appeal. Being unsuccessful, the assessee resorted to second appeal before the Tribunal. The assessee had contended that the assessments reopened u/s 147 and completed thereafter u/s 144 were not ''regular assessments'' as contemplated u/s 2(40) of the Act and, hence, the provisions of section 139(8) and section 215 regarding levy of interest were not attracted. The Department had contended that ''assessment'' as defined by section 2(28) includes also reassessment and, hence, restricted view of section 139(8) and section 215 was put forth on behalf of the assessee and as a result the second appeals were allowed by a common order. The application for reference u/s 256(2) made on behalf of the Commissioner was rejected on the ground that the point involved was covered by a binding decision of this Court in the case of D. Swarup, Income Tax Officer, Companies Circle, Bombay Vs. Gammon India Ltd., .

2. It is true that the aforesaid decision pertains to levy of penalty u/s 273 of the Act. But that would make no difference to the ratio since the provisions regarding levy of penalty u/s 273 and provisions regarding levy of interest u/s 139(8) and section 215 use the same phraseology ''regular assessment''. Now the term ''regular assessment'' is defined u/s 2(40) as meaning ''the assessment made under sub-section (3) of section 143 of the Act or section 144''. Sub-section 3 of section 143 is also now added in the said definition but that aspect is not relevant to deal with the controversy.

3. Case of Charles D''souza Vs. Commissioner of Income Tax, Karnataka-II, is a direct decision of the Karnataka High Court on the question of interest u/s 217 of the Act. It has taken a similar view of the definition of the term ''regular assessment'' as meaning only assessment u/s 143/144 and not including reassessments done u/s 147 or completed after issue of notice u/s 148 of the Act. It may be noticed that the SLP filed by the department against the said decision has been dismissed by the Supreme Court [SLP (Civil) No. 8215 of 1985 decided on 10-9-1990 CIT v. Charles D''Souza [1990] 186 ITR (St.) 28.

4. On behalf of the department our attention was invited to the decision of the Calcutta High Court in case of Kashiram Tea Industries Ltd. Vs. Income Tax Officer and Others, which has taken a contrary view. The Calcutta High Court has relied upon earlier Bombay High Court decision in the case of Deviprasad Kejriwal Vs. Commissioner of Income Tax (Central), Bombay, , but that is under the old income tax Act, 1922 which did not contain a special definition of the term ''regular assessment''. In Gammon India Ltd.''s case (supra), the said judgment has been noticed and distinguished. The Calcutta High Court has observed :

...In this connection it may not be out of place to mention that ''assessment'' has been defined in the Act to mean ''reassessment'' and ''regular assessment'' has not been defined to mean an initial assessment, in which case, however, the contention of Mr. Haldar might have been accepted....(p. 788)

We respectfully disagree with the aforesaid line of reasoning because quite obviously assessment contemplated under section(s) 143/144 means initial assessment. The Andhra Pradesh High Court in the case of Commissioner of Income Tax Vs. Padma Timber Depot, has taken the same view. It was also a case of levy of interest.

5. We may also mention that the Legislature has clarified the position by adding sub-section (b) to section 215 and Explanation 2 to section 139(8) by the Taxation Laws (Amendment) Act, 1984 with effect from 1-4-1985. To conclude

this application is summarily dismissed.

