
(2001) 03 BOM CK 0123

In the Bombay High Court

Case No : Income-tax Appeal No's. 13 and 18 of 1999

Commissioner of Income Tax

APPELLANT

Vs

Rajkumar Dipchand Phade

RESPONDENT

Date of Decision : 30-03-2001

Acts Referred:

Income Tax Act, 1961 — Section 143(1), 260A, 263, 37

Citation : (2001) 168 CTR 335 : (2001) 249 ITR 520

Hon'ble Judges : V.C. Daga, J; S.H. Kapadia, J

Bench : Division Bench

Advocate : R.V. Desai, P.S. Jetly and J.P. Devdhar, instructed by H.D. Rathod, for the Appellant; None, for the Respondent

Judgement

S.H. Kapadia, J.—The following question of law arises for determination in the above two appeals which are disposed of by this common judgment.

"Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that since the assessment was framed u/s 143(1) of the Income Tax Act, the Commissioner of Income Tax was not justified in invoking the jurisdiction u/s 263 of the Income Tax Act, even if the assessment was erroneous and prejudicial to the interests of the Revenue ?"

Facts:

2. During the period January 15, 1983, up to November 4, 1983, Deepchand Lalchand Phade Family Trust, was the proprietor of the business. On April 9, 1984, a partnership deed was executed with effect from November 5, 1983. Therefore, a partnership firm consisting of the trust and seven other partners came to be formed with effect from November 5, 1983. On May 15, 1984, the trust retired from the firm. On May 16, 1984, the firm got reconstituted between the seven partners with effect from November 5, 1983. In these appeals, we are concerned with the assessment years 1986-87, 1987-88 and 1988-89. A return of income declaring the total income of the firm was filed on August 26, 1987. It

was accepted by the Assessing Officer u/s 143(1). However, the Commissioner of Income Tax, on the above facts, came to the conclusion that the above arrangement was entered into in order to evade the tax. The Commissioner further found that the goodwill of Rs. 2,50,000 was credited in the books of the firm which was to be collectively paid to the trust by the incoming partners. That, under the partnership deed the goodwill was payable by the incoming partners and not by the firm and, therefore, the firm was not liable to pay any interest for the liability of the goodwill and since the firm was not liable to pay interest, the interest amount paid for each of the aforesaid assessment years 1986-87, 1987-88 and 1988-89 at the rate of Rs. 52,500 for each assessment year cannot be claimed as a deduction by the firm. Accordingly, the Commissioner modified the assessment order passed by the Assessing Officer u/s 143(1) and the interest paid by the firm to the trust came to be disallowed. Being aggrieved by the order passed by the Commissioner, the assessee went in appeal to the Tribunal. The Tribunal, however, came to the conclusion that once an assessment is made u/s 143(1), it was not open to the Commissioner to invoke Section 263 of the Income Tax Act. The Tribunal further came to the conclusion that since the proposed addition made by the Commissioner was not within the ambit of Section 143(1), the order of the Assessing Officer cannot be considered as erroneous and the Commissioner erred in assuming jurisdiction u/s 263 of the Income Tax Act. Being aggrieved, the Department has come in appeal u/s 260A of the Income Tax Act.

3. Although notice has been given to the assessee, they have chosen to remain absent. Affidavit proving service is taken on record and marked "X".

Findings :

4. In the case of MALABAR INDUSTRIAL CO. LTD. Vs. COMMISSIONER OF INCOME TAX, , the apex court has laid down two pre-requisites for exercise of jurisdiction by the Commissioner suo motu, viz., that the order of the Assessing Officer was erroneous and, secondly, that the order of the Assessing Officer was prejudicial to the interests of the Revenue. In the light of the said judgment, it is clear that merely because an order is passed u/s 143(1) by the Assessing Officer, there is no bar for the Commissioner to invoke Section 263 of the Income Tax Act. In the present matter, the above facts clearly show that the assessee claimed deduction in respect of the interest amount paid to the trust on the goodwill during the assessment years 1986-87, 1987-88 and 1988-89 whereas under the partnership deed, the goodwill amount was payable by incoming partners and, therefore, no amount was payable by the firm as and by way of interest for the liability of the goodwill and, therefore, the firm was not entitled to claim any deduction in respect of the interest paid to the trust. Under the order of the Assessing Officer, the relevant facts have not been examined. The order of the Assessing Officer was erroneous. The order of the Assessing Officer was prejudicial to the interests of the Revenue.

5. In the circumstances the above question is answered in the negative, i.e., in

favour of the Department and against the assesseees.

6. Accordingly, both the above appeals stand disposed of with no order as to costs.