
(1995) 02 GAU CK 0032

In the Gauhati High Court

Case No : Income-tax Reference No. 42 of 1990

Commissioner of Income Tax

APPELLANT

Vs

Samsul Huda

RESPONDENT

Date of Decision : 03-02-1995

Acts Referred:

Income Tax Act, 1961 — Section 254

Citation : (1995) 02 GAU CK 0032

Hon'ble Judges : V. Dutta Gyani, J;J. Sangma, J

Bench : Division Bench

Advocate : D.K. Talukdar and B.J. Talukdar, for the Appellant; None, for the Respondent

Judgement

V. Dutta Gyani, J.—This is a reference at the instance of the Revenue u/s 256(1) of the Act referring the following question of law for "this court's opinion :

"Whether the Tribunal did not err in law as well as on the facts to consider that it was fair for both the parties and direct that the assessee should be given an opportunity to establish the loss so that if at all there is business loss and if the other conditions are fulfilled, the loss, if any, may be considered for being carried forward, when there was no decision by the Appellate Assistant Commissioner on the point of determination and carry forward of loss in all the appeals filed by the Department and to which no cross-objection has been filed by the assessee thereby putting the Department to a more disadvantageous position than it was at the time of filing the appeal ?"

2. The assessee is assessed in the status of an individual u/s 143(3) of the Income Tax Act, 1961, for the assessment years 1980-81 and 1981-82. The Income Tax Officer in the assessment orders noted that the assessee had not shown income from the business of his wife, which was included in the previous year and which was sustained on appeal as well. In the absence of details, he estimated the income at Rs. 3,000 and added the same. On appeal, the Appellate Assistant Commissioner, accepting the assessee's contention that he

had taken over the business and whatever profit or loss therefrom was to be assessed in the hands of the assessee (the assessee agreeing to it before the Appellate Assistant Commissioner) and since there was no profit at all, rather loss on account of interest, nothing could be added to his income, allowed the appeal and the addition of Rs. 3,000 was ordered to be deleted. The Revenue came in appeal before the Tribunal. The Tribunal, while agreeing with the Appellate Assistant Commissioner's conclusion and observation, held as follows :

"4. Since, it has been admitted before the Appellate Assistant Commissioner that the income or loss from the business should be assessed in the hands of the assessee husband, we agree with the conclusion and observations of the Appellate Assistant Commissioner. But it appears that there is a loss which was yet to be finalised or dealt with by the lower authorities. We consider that it is fair to both the sides that the assessee should be given an opportunity to establish the loss, so that if it is a business loss at all, and if the other conditions are fulfilled, the loss may be considered for carry forward, if any. Thus, the order of the Appellate Assistant Commissioner is modified to the above extent, for this year."

3. It precisely forms part of the order which forms the subject-matter of the question of law as referred.

4. Mr. Talukdar, learned standing counsel for the Revenue, submitted that the above direction by the Tribunal was wrong, more so when the assessee had not filed any cross-objection and the Tribunal exceeded its jurisdiction making the above order. He has placed reliance on the following two judgments--(1) ASSAM CO-OPERATIVE APEX BANK LTD. Vs. COMMISSIONER OF Income Tax, ASSAM., and (2) Income Tax Officer, "A" Ward and Others Vs. R.L. Rajghoria, .

5. The cases relied upon by learned counsel for the Revenue turn on their own peculiar facts. In Income Tax Officer, "A" Ward and Others Vs. R.L. Rajghoria, the Calcutta High Court held as follows (at page 876) :

". . . . The question whether the loss was capital loss or revenue loss did never arise before the Income Tax Officer or the Appellate Assistant Commissioner. Now, a reference to the grounds taken in appeal before the Tribunal which have been quoted at length earlier in our judgment would show unmistakably that the question as to whether the loss of Rs. 23,100 was speculative loss was the only question which was sought to be agitated before the Tribunal. Admittedly, the question whether the loss was a capital loss was neither included in the grounds taken before the Tribunal originally nor permitted to be taken subsequently by the Tribunal. The Tribunal, in deciding the case, went out of its way and though the question whether the loss was a capital loss was not within the scope of its authority did take up that question and the determination of that question necessitated the sending of the case on remand to the Appellate Assistant Commissioner. In the circumstances aforesaid, the learned judge rightly held that the Tribunal exceeded its jurisdiction in requiring the Appellate Assistant

Commissioner to decide the question whether the loss was a capital loss or a revenue loss. We, accordingly, hold, in agreement with Sabyasachi Mukharji J., that the impugned part of the order of the Tribunal ought to be set aside."

6. It is not a case of remand, but the Tribunal referred the matter in deciding the case.

7. In ASSAM CO-OPERATIVE APEX BANK LTD. Vs. COMMISSIONER OF Income Tax, ASSAM., , as can be seen from the following (at page 275) ;

"The Tribunal has found that the Appellate Assistant Commissioner was not correct in holding that the interest on Government securities was liable to tax in the instant case. We have also noticed that the basis of the orders of the Income Tax Officer and the Appellate Assistant Commissioner, that is, Commissioner's order relating to the preceding year, was removed as illegal by the judgment of this court, That being so, the Tribunal itself having come to the conclusion that the Appellate Assistant Commissioner's order was not sustainable, it could not pass the remand order on the terms it has been passed in the instant case."

8. Following the same obviously the Tribunal having concluded that the Appellate Assistant Commissioner's order was not sustainable (sic). Although Rule 28 of the Income Tax (Appellate Tribunal) Rules provides for remand of cases by the Tribunal, in view of the facts as found by the Tribunal, and there being no cross-objection or other materials available on record, we find no reason to take a different view. Our answer to the question, as referred, is in the negative, that is, in favour of the Revenue and against the assessee.

9. The reference is answered accordingly.