

(1986) 05 CAL CK 0038

In the Calcutta High Court

Case No : Income-tax Reference No. 420 of 1975

Commissioner of Income Tax

APPELLANT

Vs

Shell Petroleum Co. Ltd.

RESPONDENT

Date of Decision : 19-05-1986

Acts Referred:

Income Tax Act, 1922 — Section 23, 34
Income Tax Act, 1961 — Section 154, 297(2)

Citation : (1987) 164 ITR 346 : (1986) 28 TAXMAN 298

Hon'ble Judges : Shyamal Kumar Sen, J; Dipak Kumar Sen, J

Bench : Division Bench

Advocate : A.C. Moitra and Sunil Mukherji, for the Appellant; D. Pal and M. Seal, for the Respondent

Judgement

Dipak Kumar Sen, J.—The Shell Petroleum Co. Ltd., the assessee, is a non-resident company. During the relevant accounting year, the assessee was a shareholder of Burmah-Shell Refineries Ltd., an existing company within the meaning of the Companies Act, 1956 (hereinafter referred to as "the Indian Company"). The assessee held 50% of the total share capital of the Indian company.

2. In the assessment year 1957-58, the assessee was assessed to Income Tax under the Indian Income Tax Act, 1922. Under the order of assessment passed on February 17, 1959, the total income of the assessee was computed at Rs. 1,40,07,571 which included dividends received from an Indian company. A certificate was issued by the Indian company u/s 20 of the Indian Income Tax Act, 1922, recording that 22.01% of the dividends declared by the Indian company came out of its profits exempt u/s 15C of the Act of 1922 and that the balance 77.99% had suffered full tax. The Income Tax Officer while assessing the assessee grossed up the dividend on the said basis.

3. The above assessment was reopened u/s 34 of the Act of 1922 and an order of reassessment was passed on September 27, 1962. The Income Tax Officer

recomputed the income of the assessee holding that the percentage of the taxable profit of the Indian company to the total sum out of which dividends had been declared was 58.27% and that the grossing factor was 11.804. Dividend received by the assessee was grossed up accordingly.

4. Aggrieved by the reassessment, the assessee went up in appeal to the Appellate Assistant Commissioner and thereafter to the Income Tax Appellate Tribunal. By its order dated November, 1966, the Tribunal set aside the order of reassessment and directed the Income Tax Officer to recompute the income of the assessee on the basis that no part of the dividends declared by the Indian company came out of the earlier year's profit and that the dividends had been declared out of the balance of profits after charging further depreciation. It was held that the Income Tax Officer was not right in adding the amounts of such further depreciation, viz., Rs. 2.12 crores, to arrive at the profits of the Indian company.

5. On June 29, 1967, the Income Tax Officer made a fresh assessment in accordance with the order of the Tribunal recomputing the gross dividend. The Income Tax Officer held that the percentage of taxable profits of the Indian company to the total sum out of which the dividend was declared was 78.78% and that the grossing factor was 1.261.

6. Later, in 1971, the Income Tax Officer sought to rectify the above order dated June 29, 1967. By an order passed on June 18, 1971, which was recorded as having been passed u/s 154 of the Income Tax Act, 1961, the earlier order dated June 29, 1967, was rectified. The Income Tax Officer made a fresh computation and held that the dividend should be grossed up at 71% instead of 78.78% and that the exemption u/s 15C should be granted at 29% instead of 21.22%. In the computation, the Income Tax Officer held further that loss of the Indian company in earlier years aggregating to Rs. 66,33,021 which was set off against the profits of the relevant assessment year should be added back to such profits and gains out of which dividends were declared for working out the grossing factor.

7. Being aggrieved by the aforesaid, the assessee preferred an appeal to the Appellate Assistant Commissioner. The Appellate Assistant Commissioner held that the proceedings for rectification initiated by the Income Tax Officer was not justified as the same had been initiated long after the lapse of the period allowed under the Act. The mistake which was sought to be rectified had occurred in the original order of the Income Tax Officer and not in his subsequent orders. There was no mistake which could be stated to be apparent from the records. The points on which rectification was effected involved consideration of different contentions and were not free from doubt. The appeal of the assessee was allowed.

8. Being aggrieved, the Revenue preferred a further appeal before the Income Tax Appellate Tribunal. In the appeal before the Tribunal, the Revenue contended for the first time that the proceedings for rectification were initiated and had

been taken u/s 35 of the Indian Income Tax Act, 1922. Though the order had apparently been made u/s 154 of the Act of 1961, the same was to be treated as proceedings u/s 35 of the Act of 1922, in view of the provisions of Section 297(2)(d)(i) of the Income Tax Act, 1961. The proceedings having been taken u/s 35 of the Act of 1922, it was contended that no appeal lay from the same before the Appellate Assistant Commissioner who had erred in entertaining the appeal. It was further urged that though an error was committed by the Appellate Assistant Commissioner in his order, the same, however, remained an appealable order and that the Tribunal was competent to adjudicate upon the issue. The Tribunal was invited to hold that the Appellate Assistant Commissioner was not competent to entertain the appeal.

9. Submissions on behalf of the Revenue were also made on the merits of the appeal. It was contended that as the Tribunal by its order dated November 3, 1966, had set aside the order u/s 34 of the Indian Income Tax Act, 1922, the Income Tax Officer was free to recompute the grossing factor according to law. In making the subsequent assessment on June 29, 1967, the Income Tax Officer erred in not increasing the sum out of which dividends had been declared by the brought forward losses of the earlier years which in effect had not borne tax in so far as they went to reduce the taxable profits. Such mistake was rectifiable by the Income Tax Officer as the same was clear and obvious.

10. It was submitted further that the period of limitation started to run from June 29, 1967, on which date the Income Tax Officer passed the last order u/s 143(3) of the Income Tax Act, 1961, while giving effect to the order of the Tribunal dated November 3, 1966. The rectification of the said order was made within four years from its date and was within the period of limitation. It was submitted that the Tribunal, in its earlier order dated November 3, 1966, had not specifically touched upon the question of loss carried over from the earlier years and, therefore, the action of the Income Tax Officer in respect of the carried forward losses was not illegal as the issue had not been concluded by the earlier order of the Tribunal.

11. It was contended on behalf of the assessee that the order of rectification was passed u/s 154 of the Act of 1961, and not u/s 35 of the earlier Act of 1922. The Revenue had accepted the same and the appeal had been filed under the provisions of the Act of 1961, and not under the provisions of the Act of 1922, without any objection from the Revenue. No amendment was sought for to bring on record the sections of the Act of 1922.

12. It was further contended that the sum out of which dividends had been declared by the Indian company came entirely out of the current year's profits and there was no question of increasing the amount by brought forward losses. Such loss had no relevance to the question of grossing up factor of dividend within the meaning of Section 16 of the Act of 1922. It was contended further that such mistake, if any, had occurred in the assessment passed originally in 1959. The same mistake was repeated in the assessment which was made u/s

34 in 1962. In 1967, the Income Tax Officer in making a fresh assessment as directed by the Tribunal had repeated the mistakes. The rectification of the original mistake, not having been made within four years from the date of the earlier orders passed in 1959 and 1962, was barred by limitation.

13. Following the decision of the Madras High Court in *Vr. C. Rm. Adaikkappa Chettiar Vs. Commissioner of Income Tax*, and of the Delhi High Court in *The Commissioner of Income Tax Vs. The National Small Industries Corporation Limited, New Delhi*, the Tribunal held that as the assessments were made u/s 34 of the Act of 1922, the subsequent proceedings should have been taken under the earlier Act of 1922, in view of the provisions of Section 297(2)(d)(i) of the Act of 1961. Accordingly, it was held that no competent appeal lay before the Tribunal. On the other issues, the Tribunal held that it was highly debatable whether the loss brought forward could be fitted into either of the limbs of the proviso to Section 16(2) of the Act of 1922. The Tribunal also held that the mistake, if any, had occurred in the original order passed in 1959 u/s 23(3) of the Act of 1922 and also in the order passed in 1962 u/s 34 of the Act of 1922. The Tribunal held that the rectification was barred by limitation.

14. On an application of the Revenue u/s 256(1) of the Income Tax Act, 1961, the following question has been referred as a question of law arising out of the order of the Tribunal for the opinion of this court:

"Whether, on the facts and in the circumstances of the case and in view of the Tribunal's finding that the order purported to have been passed u/s 154 of the new Act should be held as having been passed u/s 35 of the old Act, and that no appeal lay against the said order u/s 35 of the old Act, the Tribunal misdirected itself in law by not cancelling the order of the Appellate Assistant Commissioner against the said order and instead dismissing the departmental appeal against the order of the Appellate Assistant Commissioner holding that no competent appeal lay before the Tribunal ?"

15. At the hearing of this reference, the learned advocate for the Revenue submitted that in the instant case, the proceedings were governed by the provisions of the Act of 1922. The rectification proceedings, though apparently made u/s 154 of the Act of 1961, must be held to have been initiated and concluded u/s 35 of the Act of 1922, in view of the provisions of Section 297 of the Act of 1961. By reason of the aforesaid, it was submitted that it should be held that the appeal of the assessee to the Appellate Assistant Commissioner was incompetent. It was further submitted that the appeal of the Revenue against the order of the Appellate Assistant Commissioner should, however, be held to be competent. Law on the question stood settled by the Supreme Court and by the decisions of other High Courts. It was submitted that the Tribunal should have cancelled the order of the Appellate Assistant Commissioner passed in appeal and should not merely have held that the appeal before the Tribunal was not competent.

16. In support of his contentions, the learned advocate cited the following decisions:

(a) *Mela Ram and Sons Vs. The Commissioner of Income Tax Punjab*, . In this case, it was held by the Supreme Court that where an appeal was filed before the Appellate Assistant Commissioner out of time and he rejected the appeal as time-barred, such order of rejection would be an order passed u/s 31 of the Indian Income Tax Act, 1922, and an appeal lay from that order to the Income Tax Appellate Tribunal. It made no difference whether the order of dismissal was made before or after the appeal was admitted.

(b) *Kooka Sidhwa and Co., Calcutta Vs. The Commissioner of Income Tax, W.B.*, . This decision of a Division Bench of this court was cited for the proposition that if a higher appellate authority such as the Appellate Assistant Commissioner or the Tribunal directed or ordered an Income Tax Officer to do something further with regard to an assessment by way of revision or amendment, the Income Tax Officer must be held to be still u/s 23 of the Indian Income Tax Act, 1922, for assessing the total income of the assessee and determining the sum payable on the basis of the return already filed by him.

(c) *S. Sankappa and Others Vs. The Income Tax Officer, Central Circle II, Bangalore*, . This decision of the Supreme Court was cited for the proposition that proceedings taken for rectification of assessment u/s 35 of the Indian Income Tax Act, 1922, were proceedings for assessment and orders passed by the Income Tax Officer under the said section and all notices issued thereunder were for computation and charging of tax. u/s 297(2)(a) of the Act of 1961, the Income Tax Officer would be entitled to proceed u/s 35 of the Act of 1922 even after the repeal thereof.

(d) *Maheshwari Devi Jute Mills Ltd., Kanpur Vs. Commissioner of Income Tax, U.P., Lucknow*, . This decision of a Division Bench of the Allahabad High Court was cited for the following observations (at p. 449):

"In any event, in view of the decision of the Supreme Court in *Mela Ram and Sons Vs. The Commissioner of Income Tax Punjab*, , the position must be taken to be settled that an appeal is no less an appeal because it is irregular or incompetent and an order refusing to admit or reject the appeal on a preliminary ground, for example, because of irregularity and incompetency, is likewise, in all cases an order passed in the appeal and must be regarded as one passed u/s 31 of the Act."

In the facts, the Allahabad High Court upheld the decision of the Tribunal that the order passed by the Appellate Assistant Commissioner was not an order u/s 31 of the Income Tax Act and, as such, no appeal lay against the order which was passed u/s 35 of the Act of 1922.

(e) *MANDAL GINNING AND PRESSING CO. LTD. Vs. COMMISSIONER OF Income Tax. KESHAVLAL HIRACHAND v. COMMISSIONER OF Income Tax. DIGVIJAY*

WOOLLEN MILLS LTD. v. COMMISSIONER OF Income Tax., . In this case, the Division Bench of the Gujarat High Court followed and applied the principles laid down by the Supreme Court in S. Sankappa and Others Vs. The Income Tax Officer, Central Circle II, Bangalore, and held that an assessee had no right of appeal u/s 30 of the Act of 1922 against an order of rectification passed u/s 35(1) of the said Act.

(f) V.P. Minocha, Income Tax Officer, Special Investigation Circle VII, Ahmedabad Vs. Income Tax Appellate Tribunal, Ahmedabad Bench and Another, . In this case, it was held by a Division Bench of the Gujarat High Court following the decision of the Supreme Court in S. Sankappa and Others Vs. The Income Tax Officer, Central Circle II, Bangalore, that where a return of income was filed before the commencement of the 1961 Act, proceedings for assessment of the assessee had to be taken and continued as if the 1961 Act had not been passed. An order of rectification of such an assessment had to be made u/s 35(1) of the Act of 1922 and from such order, no appeal lay to the Appellate Assistant Commissioner.

(g) Commissioner of Wealth Tax Vs. M.K.S. Vanavarayar, . In this case, a Division Bench of the Madras High Court held that appeals to the Appellate Assistant Commissioner against the order of the Wealth-tax Officer passed pursuant to the direction of the Commissioner u/s 18(2A) of the Wealth-tax Act were competent. It was also laid down that it was solely within the discretion of the Tribunal in an appeal from an order of the Appellate Assistant Commissioner dismissing the appeal before him as incompetent to dispose of the appeal on merits or remand the appeal to the Appellate Assistant Commissioner.

(h) Commissioner of Income Tax, Delhi-III Vs. Srikishan Dass, . In this case, the assessment of the assessee for the assessment year 1961-62 had been completed under the Act of 1922. Thereafter, a mistake in the assessment was corrected by the Income Tax Officer u/s 154 of the Income Tax Act, 1961. It was held by a Division Bench of the Delhi High Court that though the rectification could be made only under the provisions of the Act of 1922, the same was not invalid merely because it was made u/s 155 of the Act of 1961. It would be a case of wrong labelling.

(i) Guru Prasad v. CIT [1986] 158 ITR 27. In this case, it was held by a Division Bench of the Patna High Court that an order of rectification made u/s 154 of the Act of 1961 must be deemed to have been made u/s 35 of the earlier Act of 1922 inasmuch as the original orders of assessment for the assessment years 1940-41 to 1942-43 had been made under the provisions of the earlier Act. It was further held that from such an order of rectification, no appeal lay before the Appellate Assistant Commissioner. But the Tribunal was correct in entertaining the departmental appeal from the order of the Appellate Assistant Commissioner and in setting aside the same though the Tribunal held that no competent appeal lay before the Appellate Assistant Commissioner.

17. The learned advocate for the assessee contended on the other hand that the

question which has been referred was academic inasmuch as the controversy was covered by a decision of this court in *Imperial Chemical Industries Ltd. Vs. Commissioner of Income Tax*, . In this case, a Division Bench of this court construed Section 297(2) of the Income Tax Act, 1961, and noted that in some of the clauses of the said section, the expression "may" occurs, while in other clauses, the word "shall" has been used. It was held that the choice of two different words, namely, "may" and "shall", was deliberate and due significance and weight had to be given to the choice of language by Parliament. It was held that though under Clause (a) of Section 297(2), a power had been given to the Income Tax Officer to proceed under the provisions of the Indian Income Tax Act, 1922, no absolute duty was cast upon him directing him to proceed under the old Act and not under the new Act even if the situation so warranted. It was held that there was no compelling obligation on the Revenue to proceed under the old Act in case a return is filed under the old Act.

18. On the strength of the said decision, the learned advocate for the assessee submitted that in the instant case, the Income Tax Officer had authority to and had duly proceeded u/s 154 of the Income Tax Act, 1961. Under sections 297(2) (a) and 297(2)(d), the Income Tax Officer had the option to proceed either under the old Act or under the new Act. It was submitted that in the instant case, it was apparent from the records that the Income Tax Officer had proceeded u/s 154 of the Act of 1961. No alteration or amendment had been made in the proceedings to show that the same had been initiated and continued under the old Act. Therefore, it could not be held that the appeal to the Appellate Assistant Commissioner was incompetent.

19. The learned advocate for the assessee drew our attention also to the following decision :

(a) *Commissioner of Income Tax, U.P., Lucknow Vs. Kanpur Coal Syndicate*, . It was laid down in this case that the power given by the Income Tax Act to the Appellate Assistant Commissioner and the Appellate Tribunal were ample and plenary and that the appellate authorities had ample jurisdiction to direct the Income Tax Officer to make necessary amendments to the assessments as directed.

(b) *Controller of Estate Duty Vs. P.E. Venkitraman*, . In this case, a Division Bench of the Kerala High Court held that an appeal lay from an order of rectification in view of the widely worded provision of Section 62(1)(b) of the Estate Duty Act, 1953.

(c) *Controller of Estate Duty Vs. Late Jayantilal Keshav Mehta (Executor, Navinchandra J. Mehta), Late Ansuyaben Sarabhai (By Accountable Person, R.P. Shah) and Late Champaben Sakarlal (By Accountable Person, Nandkishore Sakarlal)*, . In this case, a Division Bench of the Gujarat High Court, following the Kerala High Court in *Controller of Estate Duty Vs. P.E. Venkitraman*, , held that an appeal lay to the Appellate Controller against the order of the Assistant

Controller of Estate Duty of rectification u/s 62(1)(b) of the Estate Duty Act 1953.

(d) H.H. Maharaja Martand Singh Ju Deo Vs. Commissioner of Expenditure-tax, . In this case, a Division Bench of the Madhya Pradesh High Court considered the Expenditure Tax Act, 1957, and, in particular, Section 21 thereof providing for appeals against the orders passed under the said Act.

20. In the instant case, admittedly, the original order of assessment was made u/s 23 of the Indian Income Tax Act, 1922, and thereafter an order was passed u/s 34 of the Act of 1922 by way of reassessment.

21. The reassessment was set aside and a fresh order was passed pursuant to the directions of the Tribunal on June 29, 1967, when the Act of 1961 had come into force. This assessment appears to have been made u/s 143(3) of the Act of 1961. The order of rectification was passed on June 28, 1971, when also the Act of 1961 was in force.

22. The rectification proceedings in this case can be held to be either proceedings in assessment or proceedings held pursuant to a notice u/s 34 of the Act of 1922. Such proceedings could be initiated, continued and disposed of. either under the Act of 1922 or the Act of 1961 as provided in Section 297, the relevant part whereof is as follows :

"Section 297(1) The Indian Income Tax Act, 1922(11 of 1922), is hereby repealed.

(2) Notwithstanding the repeal of the Indian Income Tax Act, 1922 (11 of 1922) (hereinafter referred to as the repealed Act),--

(a) where a return of income has been filed before the commencement of this Act by any person for any assessment year, proceedings for the assessment of that person for that year may be taken and continued as if this Act had not been passed ; ...

(d) where in respect of any assessment year after the year ending on the 31st day of March, 1940,--

(i) a notice u/s 34 of the repealed Act had been issued before the commencement of this Act, the proceedings in pursuance of such notice may be continued and disposed of as if this Act had not been passed."

23. It is laid down by this court in Imperial Chemical Industries Ltd. Vs. Commissioner of Income Tax, , that sections 297(2)(a) and 297(2)(d)(i) permit the Income Tax Officer to proceed under the provisions of the new Act and that he is not bound to initiate and continue the proceedings under the old Act. The said decision is binding on us and we do not see any reason to differ from the same.

24. Following the said decision, we hold that in the instant case, the Income Tax Officer had jurisdiction to proceed to rectify the order of assessment u/s 154 of

the Act of 1961 and that he in fact did so. The order u/s 154 of the Act of 1961 is admittedly an appealable order and that an appeal had been duly filed therefrom in the first instance before the Appellate Assistant Commissioner before whom no objection was raised by the Revenue as to the maintainability of the appeal.

25. For the above reasons, in our view, the question referred to us is academic because the appeal had been properly entertained and disposed of ultimately on merits. We refuse to answer the question referred.

26. There will be no order as to costs.

27. The learned advocate for the Revenue prays for a certificate from us that this is a fit case for appeal to the Supreme Court. It appears to us that the decision of this court in Imperial Chemical Industries Ltd. Vs. Commissioner of Income Tax, which we have followed, has not been expressly dissented from by any other High Court including the Patna High Court. In that view, we direct the Revenue to make a formal application setting out therein the substantial and important question of law, if any, which may be said to arise from the judgment for proper consideration.

Shyamal Kumar Sen, J.

28. I agree.