(1986) 06 CAL CK 0036

In the Calcutta High Court

Case No : Income-tax Reference No. 183 of 1982

Commissioner of Income Tax APPELLANT

Vs

Shell Petroleum Co. Ltd. RESPONDENT

Date of Decision : 23-06-1986

Acts Referred:

Income Tax Act, 1922 — Section 15C(4), 16, 16(2), 34(1)
Income Tax Act, 1961 — Section 154

Citation : (1986) 56 CTR 59 : (1986) 56 CTR 134 : (1987) 164 ITR 357 : (1986) 28 TAXMAN 617

Hon'ble Judges : Monjula Bose, J;Dipak Kumar Sen, J

Bench : Division Bench

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

Judgement

Dipak Kumar Sen, J.—The Shell Petroleum Co. Ltd., the assessee, a non-resident company, was assessed to Income Tax in the assessment year 1957-58, the relevant accounting year ending on December 31, 1956. During the relevant accounting year, the assessee held 50% of the total share capital of Burmah-Shell Refineries Ltd., an existing company within the meaning of the Companies Act, 1956 (hereinafter referred to as "the Indian company").

2. In the Income Tax assessment for the said assessment year, the Income Tax Officer included in the total income of the assessee the dividend received from the Indian company. The Indian company issued a certificate u/s 20 of the Indian Income Tax Act, 1922, recording that 22.01% of the dividend came out of the profits of the Indian company exempt u/s 15C of the Act of 1922. The Income Tax Officer accepted the percentage provisionally pending final assessment of the Indian company. The dividend received from the Indian company was grossed up to Rs. 1,35,76,257.

3. On completion of the Income Tax assessment of the Indian company, the assessment of the assessee for the said assessment year was reopened u/s 34(1)

(b) of the Indian Income Tax Act, 1922, and the computation of the dividend income of the assessee was made as follows :

From the total income of the Indian company which was assessed at Rs. 5,42,46,753, losses carried forward from the previous year of Rs. 66,33,021 was deducted and the taxable balance was determined to be Rs. 4,76,12,732. Profits exempt u/s 15C of the Act were computed at Rs. 1,28,18,538 and the excess depreciation allowed was ascertained at Rs. 2,12,76,702.

4. The total sum out of which dividend was declared was held to be Rs. 8,17,08,972, the percentage of the taxable profits to the total sum out of which dividend was declared was calculated at 58.27% and the grossing up factor was held to be 1.1804. The net dividend in the hands of the asses- see was grossed up to Rs. 1,27,41,631.

5. The order u/s 34 of the Act of 1922 was passed on September 27, 1962. .

6. Being aggrieved, the assessee preferred an appeal to the Appellate Assistant Commissioner who upheld the computation of the grossed up dividend. There was a further appeal by the assessee to the Income Tax Appellate Tribunal. The Tribunal found that the total income of the Indian company had been determined at Rs. 5,42,46,753. After adjustment of the loss carried forward from the earlier year, the effective total income was held to be Rs. 4,76,13,732. The Tribunal also found that the excess depreciation adjusted for the earlier years was Rs. 2,12,76,702 and the same exceeded the balance of the profits brought forward from the earlier years which was Rs. 1,85,97,563.

7. On the basis of the aforesaid, the Tribunal held that no part of the dividend declared by the Indian company in the said year came out of the earlier years'' profits and further that such dividend was declared out of the balance of the profits after charging further depreciation. The Tribunal found that the Income Tax Officer had erred in calculating the percentage of the exempted profits u/s 15C of the Act of 1922. The total sum out of which dividend had been declared was found to be Rs. 8,17,08,972. The Tribunal accordingly set aside the assessment and directed the Income Tax Officer, inter alia, to recompute (a) the proportion of profits exempt u/s 15C of the Act of 1922, (b) the amount of profits out of which dividend was declared, and (c) the amount of dividend received by the assessee from the Indian company exempt u/s 15C of the Act in the light of the Tribunal''s observations in its order.

8. Pursuant to the direction of the Tribunal, the Income Tax Officer recomputed the dividend income of the assessee on June 29, 1967. The total income of the Indian company for the relevant assessment year was computed at Rs. 5,42,46,753. The loss carried forward from the earlier years computed at Rs. 66,33,021 was deducted from such income and the balance of taxable income was determined to be Rs. 4,76,13,732. The amount of profits exempt u/s 15(C) of the Act of 1922 was found to be Rs. 1,28,18,538, which was added to the taxable balance and the total sum out of which the dividend was declared was

determined to be Rs. 6,04,32,270.

9. On the basis of the aforesaid, the percentage of taxable profits, viz., Rs. 4,76,13,732, to the said total sum out of which dividend had been declared was calculated at 78.78% and the grossing factor was calculated at 1.261. The net dividend was grossed up to Rs. 1,36,14,852.

10. Thereafter, the Income Tax Officer sought to rectify the last assessment order made pursuant to the direction of the Tribunal u/s 154 of the Income Tax Act, 1961. He held that in respect of the Indian company, the loss carried forward computed at Rs. 66,33,021 was to be added to the total sum out of which dividend had been declared computed earlier at Rs. 6,04,32,270 tinder Section 16(2) of the Indian Income Tax Act, 1922 and, thereafter, the percentage of taxable profits as determined earlier, namely, Rs. 4,76,13,732, to the total sum out of the dividend was declared had to be calculated. On this basis, the dividend had to be grossed up at 71%. It was found also that exemption u/s 15C of the Act should have been granted at a percentage different from that allowed earlier. The Income Tax Officer found that there had been undercharge of tax of Rs. 5,00,532.28 and the order of assessment was rectified by him u/s 154 of the Income Tax Act, 1961, on June 28, 1971.

11. Being aggrieved, the assessee preferred an appeal before the Appellate Assistant Commissioner, who found, inter alia, that the original assessment having been made on February 17, 1959, and the reassessment in 1962, the period of four years prescribed u/s 154(7) of the Act of 1961 had expired and that the Income Tax Officer had no right to initiate rectification of his earlier order. The Appellate Assistant Commissioner held further that the Income Tax Officer by his last order passed on June 29, 1967, had given effect to the decision of the Appellate Tribunal. It was also found that there was no mistake which was apparent from the record which could be rectified by the Income Tax Officer. The rectification as was done by the Income Tax Officer involved fresh thinking on contentious points which were not free from doubt and was debatable.

12. It was held further that the order of the Tribunal on the basis of which the Income Tax Officer recomputed the dividend income of the assessee on June 29, 1967, was on a limited point and had nothing to do with the aspect of the assessment which was now being rectified by the Income Tax Officer. The Appellate Assistant Commissioner allowed the appeal and cancelled the order passed by the Income Tax Officer u/s 154 of the Income Tax Act, 1961.

13. Being aggrieved, the Revenue went up in appeal before the Income Tax Appellate Tribunal. It was contended before the Tribunal, on behalf of the Revenue, inter alia, that the amount of Rs. 66,33,021, being the loss carried over from earlier years, had been utilised to reduce the available profits for distribution in the year artificially and that profits to the extent of such loss were available for distribution. It followed that the total sum out of which the

dividends were declared was rightly increased by adding back the said amount of Rs. 66,33,021. This was not done in the order dated June 29, 1967, by the Income Tax Officer by mistake and this mistake could be corrected by the Income Tax Officer u/s 154 of the Act, It was further contended that the period of limitation started to run from June 29, 1967, being the last order of the Income Tax Officer prior to rectification where the mistake occurred and, as such, the rectification was within time. It was further contended that in its order dated November 3, 1966, the Tribunal had specifically adverted to the question of the carried forward loss of Rs. 66,33,021 and the matter in respect of the said loss did not stand concluded by the order of the Tribunal.

14. It was contended on behalf of the assessee before the Tribunal that the Tribunal had applied its mind and held that the dividends came out of the current year''s profits. The Tribunal only directed the Income Tax Officer to recompute the grossing up factor in the light of its observations. The Income Tax Officer was not entitled to anything more on such directions of the Tribunal. It was contended that the loss carried forward, viz., Rs. 66,33,021, was not relevant to the grossing up factor of dividend within the meaning of Section 16(2) of the Indian Income Tax Act, 1922, as the brought forward loss could not be treated either as allowance made in the computation of its profits nor was it an income on which Income Tax was not payable. The sum out of which dividends had been declared came entirely out of the current year''s profits and there was no question of increasing of such a sum by the loss brought forward. It was contended that the rectification was barred by time and in any event was not permissible in view of the debatable issues involved.

15. The Tribunal held that the Appellate Assistant Commissioner was justified in cancelling the order u/s 154 of the Act of 1961. The Tribunal accepted the contention of the assessee that whether the loss of Rs. 66,33,021 should go to increase the sum out of which the dividends were declared for the year in question was a debatable issue as the loss brought forward could not be conveniently included either "within" an amount on which Income Tax is "not payable" or to any allowance. It was noted that the Tribunal, by its earlier order dated November 3, 1966, had clearly found that the entire dividend had been declared out of the current year''s profits which had not been disturbed by any higher authority. The appeal of the Revenue was dismissed by the Tribunal.

16. On an application of the Revenue u/s 256(2) of the Income Tax Act, 1961, the Tribunal was directed to refer the following questions as questions of law arising out of its order for the opinion of this court. The questions are corrected as follows :

"1. Without prejudice to the question of appealability of the order of rectification, whether, on the facts and circumstances of the case, the Tribunal was justified in law in holding that the order u/s 154 was vitiated because it was barred by time?

2. Without prejudice to the question of appealability of the order of rectification,

whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the mistake sought to be rectified by the Income Tax Officer involved a highly debatable issue and in that view cancelling the order u/s 154 ?"

17. At the hearing before us, the learned advocate for the Revenue reiterated the contentions of the Revenue raised before the authorities below. He submitted that the mistake in the instant case occurred in the order of the Income Tax Officer which was passed on June 29, 1967. This was a fresh order of assessment and if any mistake occurred in this order, the same could be rectified at any time within four years from the date of the order. In the instant case, the order of rectification was passed on June 28, 1971, clearly within four years from the date of the order in which the mistake occurred. It was submitted that the order of rectification was not barred by limitation.

18. It was further submitted that the mistake rectified was apparent from the record. The provisions of Section 16 of the Indian Income Tax Act, 1922, it was submitted, were clear and the loss of Rs. 66,33,021 necessarily had to be included in the total sum out of which dividend had been paid by the Indian company inasmuch as the same were either profits and gains of the Indian company not included in its total income or was attributable to an allowance given in computing the profits and gains of the Indian company.

19. The learned advocate for the assessee contended to the contrary. He submitted that the order passed by the Income Tax Officer on June 29, 1967, was limited to the direction of the Tribunal to, recompute the dividend income of the assessee in terms of the order of the Tribunal passed on November 3, 1966, where the Tribunal noted specifically that the loss carried forward from earlier years, namely, Rs. 66,33,021, had been deducted from the total income of the Indian company for the year in question, that no part of the dividend declared by the Indian company came out of its earlier years'' profits and that the dividend had been declared by the Indian company out of the balance of its profits and after charging further depreciation.

20. The learned advocate for the assessee submitted further that the mistake, if any, occurred earlier on September 27, 1962, when the Income Tax Officer passed the order of reassessment and such mistake crept thereafter into every subsequent order. The period of limitation should start to run from September 27, 1962, or at the latest when the Tribunal passed the order on November 3, 1966, and the same could not be corrected by way of rectification on June 28, 1971.

21. The learned advocate for the assessee next drew our attention to Section 16 of the Indian Income Tax Act, 1922, and submitted that whether the carried over loss would come within the mischief of the said section for the purpose of being included in the total amount out of which dividend had been paid or distributed was a highly debatable issue and, in any event, could not be corrected or

rectified u/s 154 of the Income Tax Act 1961.

22. In support of the respective contentions of the parties, the following decisions were cited at the bar :

(a) Commissioner of Income Tax, Bombay North Vs. Tejaji Farasram, . This decision was cited for the proposition that when an appeal was preferred from the decision of the Tribunal and the appeal court passed an order in the appeal, the order of the original court ceased to exist and merged in the order of the appeal court though the appeal court might merely affirm the order of the trial court. It was held in that view that the Commissioner of Income Tax was not competent to pass an order u/s 33B of the Indian Income Tax Act, 1922, enhancing an assessment where an appeal had been preferred against an order of the Income Tax Officer and had been affirmed by the Appellate Assistant Commissioner.

(b) M.A. Chidambaram Chettiar and Others Vs. Commissioner of Income Tax, Madras, Here, it was held by a Division Bench of the Madras High Court that an assessee was not entitled to grossing up of his dividend income u/s 16(2) of the Indian Income Tax Act, 1922, and to obtain relief u/s 18(5) of the Act, unless the income of the company concerned had been assessed to tax under the Indian Income Tax Act, even though tax had been paid by deduction at source. This decision is not of much relevance to the facts before us.

(c) M. M. Aishoe Vs. Income Tax Officer, Alwaye Circle, And Another, . In this case, it was held by the learned judge of the Kerala High Court that where a company had no income in the relevant accounting year and had paid dividend out of its accumulated profits, the shareholder who received such dividend was not entitled to the benefit of grossing up u/s 16(2) and the consequential relief u/s 18(5) of the Act of 1922. This decision is also of little relevance to the facts before us.

(d) 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 where a higher appellate authority such as the Appellate Assistant Commissioner or the Tribunal had directed or ordered an Income Tax Officer to do something in respect of an assessment by way of revision or amendment, the Income Tax Officer must be held to be acting u/s 23 of the Indian Income Tax Act, 1922, and from such an order, the assessee would have a right of appeal.

(e) GOPI LAL Vs. COMMISSIONER OF Income Tax, DELHI AND RAJASTHAN., . This decision of the Punjab High Court was cited for the proposition that an appeal lay to the Appellate Assistant Commissioner against an order of the Income Tax Officer, made in pursuance of a direction of the Tribunal u/s 33(5) of the Indian Income Tax Act, 1922, reallocating the profits of a firm in the hands of its partners. A further appeal also lay to the Tribunal from the order of the Appellate Assistant Commissioner.

(f) T.S. Balaram, Income Tax Officer, Company Circle IV, Bombay Vs. Volkart Brothers, Bombay, . In this case, the Income Tax Officer concerned initiated rectification proceedings u/s 154 of the Income Tax Act, 1961, holding that there was a mistake apparent on the record to the effect that the assessee, a firm, had not been charged at the maximum rate of tax u/s 17(1) of the Indian Income Tax Act, 1922. On these facts, the Supreme Court held that the question whether Section 17(1) of the Act was applicable in the facts was not free from doubt and it was not open to the Income Tax Officer to go into the true scope of the provisions of the Act in rectification proceedings u/s 154. It was held that there was no mistake apparent from the record. The Supreme Court observed that something which could be established by a long-drawn process on which there may conceivably be two opinions was not a mistake apparent from the record.

(g) Karsandas Bhagwandas Patel Vs. G.V. Shah, Income Tax Officer, Rajkot and Others, . In this case, a Division Bench of the Gujarat High Court held that whether an order of assessment of the Income Tax Officer would merge in the earlier order of the Appellate Assistant Commissioner would depend on the subject-matter of the appellate order. The order of assessment of the Income Tax Officer would merge in the order of the Appellate Assistant Commissioner only in so far as it related to items considered and decided by the Appellate Assistant Commissioner. The items which did not form the subject-matter of the appellate order would be left untouched and the part of the order of the Income Tax Officer dealing with such items would not merge with the order of the Appellate Assistant Commissioner. Any mistake in such untouched part of the order of the Income Tax Officer which did not merge in the appellate order would be rectifiable by the Income Tax Officer.

(h) Ahmedabad Sarangpur Mills Company Ltd. Vs. A.S. Manohar, Income Tax Officer, Circle IV, Ward-a (Companies), Ahmedabad, . In this case, a Division Bench of the Gujarat High Court held that merely because an assessment order was rectified, the same would not enlarge the period of limitation laid down u/s 35. The period for rectifying the mistakes should be four years from the date of the original assessment order.

(i) Jeewanlal (1929) Ltd. Vs. Commissioner of Income Tax (Central) and Others, . In this case, it was held by a learned judge of this court that there cannot be any merger of the order of the appellate authority with the order of the subordinate authority. It was held in the facts that where the Appellate Assistant Commissioner had directed the Income Tax Officer to consider the claim of the assessee and to grant him permissible rebates and allowances and the Income Tax Officer in carrying out such directions acted erroneously or illegally, it could not be said that such error or illegality formed part of the order of the Appellate Assistant Commissioner. The same would be an independent order subject to the revisional powers of the Commissioner.

(j) Mettur Chemical and Industrial Corporation Ltd. Vs. Commissioner of Income Tax, . In this case, it was held by a Division Bench of the Madras High Court that where proceedings for reassessment had been completed u/s 147 of the Act of 1961, it could not be held that the entire order of assessment originally passed ceased to exist and that the only order which remained in force was the reassessment order. The limitation for initiation of proceedings u/s 154 had to be reckoned from the original assessment order.

(k) STANDARD CHEMICAL CO. PVT. LTD. Vs. Income Tax OFFICER, COMPANY CIRCLE, A-WARD, KANPUR., . Here, it was held by the learned single judge of the Allahabad High Court that an order u/s 148 of the Income Tax Act, 1961, was a separate order dealing with income which had escaped assessment. The original assessment order did not merge in the order passed u/s 148 where reassessment was made. u/s 148, the jurisdiction of the Income Tax Officer would be confined to the income which had escaped assessment and did not extend to revising, reopening or reconsidering the entire assessment made earlier. In the facts before the Allahabad High Court, it was held that an order of assessment which had been followed by an order of reassessment u/s 148 could be rectified within the period of limitation to be counted from the date of the original order of assessment and not from the date of the order of reassessment.

(l) Bengal Assam Steamship Co. Ltd. Vs. Commissioner of Income Tax, . In this case, it was held by a Division Bench of this court that the period of limitation to make an application for rectification of mistakes in an assessment order u/s 154 of the Income Tax Act, 1961, should be computed from the date of the earlier orders of the Income Tax Officer and not from the subsequent orders passed in rectification of the earlier orders.

23. On consideration of the facts on record, the respective submissions of the parties and the decisions cited before us, it appears that the contention of the assessee that the impugned order of rectification by the Income Tax Officer involved a highly debatable issue is not without substance. The relevant portions of Section 16 of the Indian Income Tax Act, 1922, may be noted as set out hereunder :

Section 16: "Exemptions and exclusions in determining the total income.--.......

(2) For the purposes of inclusion in the total income of an assessee any dividend shall be deemed to be income of the previous year in which it is paid, credited or distributed or deemed to have been paid, credited or distributed to him and shall be increased to such amount as would, if Income Tax (but not super-tax) at the rate applicable to the total income of the company (without taking into account any rebate allowed or additional Income Tax charged) for the financial year in which the dividend is paid, credited or distributed, or deemed to have been paid, credited or distributed, were deducted therefrom, be equal to the amount of the dividend : Provided that when the sum out of which the dividend has been paid, credited or distributed or deemed to have been paid, credited or distributed includes-

(i) any profits and gains of the company not included in its total income, or

(ii) any income of the company on which Income Tax was not payable, or

(iii) any amount attributable to any allowance made in computing the profits and gains of the company,

the increase to be made under this section shall be calculated only upon such proportion of the dividend as the said sum after deduction of the inclusions enumerated above bears to the whole of that sum."

24. Under the proviso to the said section, for the purpose of computing the total income of the assessee out of which dividends would be deemed to have been paid or distributed any profits or gains not included in the total income of the company, any income of the company on which Income Tax was not payable and also any amount attributable to any allowance made in computing the profits and gains of the company have to be taken into account. On a plain reading of the said section, it is not evident that losses carried over from the previous years which have to be adjusted for the purpose of determining the net taxable income of the company are either profit or gain of the company not included in its total income or are an income of the company on which Income Tax was not payable or the same is an allowance made in computing the profits and gains of the company. A distinction is made in the Income Tax Act between an allowance and deduction. It cannot be said that every deduction is necessarily an allowance or vice versa.

25. Two conceivable views are possible on the controversy and following the decision of the Supreme Court in T.S. Balaram, Income Tax Officer, Company Circle IV, Bombay Vs. Volkart Brothers, Bombay, , we hold that the issue being debatable, the Income Tax Officer was not entitled to rectify the same u/s 154 of the Act.

26. It remains to be considered whether the order of rectification was barred by limitation. It is apparent from the record that in the earlier orders passed by him, the Income Tax Officer did not increase the net amount out of which dividends had been declared by the Indian company by including therein, the loss carried over by the Indian company from the previous years. An order was passed u/s 34 of the Indian Income Tax Act, 1922, on September 27, 1962. Thereafter, the matter went up before the Tribunal on appeal. The Tribunal considered the loss of earlier years carried forward by the Indian company but did not direct the Income Tax Officer to apply Section 16 of the Indian Income Tax Act, 1922, and include the carried forward loss in computing the total income of the Indian company out of which dividends had been declared. On the contrary, the Tribunal noted that no part of the dividends declared came out of the earlier years'' profits and that dividends had been declared out of the balance of the profits of the Indian company after charging further depreciation. It appears to us that the mistake, if any, was also inherent in the order of the Tribunal and the Income Tax Officer had no jurisdiction to rectify the mistake which had occurred also in the order of the Tribunal.

27. In the view we have taken as to the debatability of the controversy which forms the basis of rectification, we, however, need not express a final opinion on this point.

28. For the reasons aforesaid, we answer question No. 2 in the affirmative and in favour of the assessee and we decline to answer question No. 1.

29. The learned advocate for the Revenue brought to our notice the earlier judgment of this court in CIT v. Shell Petroleum Co. Ltd. dated May 19, 1986, in the case of the same assessee in a reference u/s 256(1) of the income tax Act, 1961, marked as Income Tax Reference No. 420 of 1975 in Commissioner of Income Tax Vs. Shell Petroleum Co. Ltd., for the same assessment year. In the said reference this court decided, whether the orders of rectification, which are also before us in this reference, passed at a time when the Income Tax Act, 1961, was in force were appealable orders or not as in the assessment year concerned the Act of 1922 was in force. It was held that the Income Tax Officer had jurisdiction to rectify the order of assessment u/s 154 of the Act of 1961, though in the assessment year concerned, the Act of 1922 was in force and that in fact he did so. It was further held that the order u/s 154 of the Act of 1961 was admittedly an appealable order from which appeals had been filed. In that reference, the court refused to answer one of the questions, viz., whether, a competent appeal lay before the Tribunal as it felt that the question was only academic.

30. It is made clear that we have not gone into the question of appeal-ability in this reference. The reference is disposed of accordingly. There will be no order as to costs.

Mrs. Monjula Bose, J.

31. I agree.

