
(1993) 01 CAL CK 0011

In the Calcutta High Court

Case No : Income-tax Reference No. 140 of 1991

Commissioner of Income Tax

APPELLANT

Vs

Technico Enterprise Pvt. Ltd.

RESPONDENT

Date of Decision : 18-01-1993

Acts Referred:

Income Tax Act, 1961 — Section 263, 32(1), 32A(1)

Citation : (1994) 119 CTR 607 : (1994) 119 CTR 25 : (1994) 206 ITR 36 :
(1994) 73 TAXMAN 204

Hon'ble Judges : Shyamal Kumar Sen, J;Ajit K. Sengupta, J

Bench : Division Bench

Judgement

Shyamal Kumar Sen, J.—Pursuant to the direction of this court u/s 256(2) of the Income Tax Act, 1961, the following questions were referred by the Tribunal :

"1. Whether, on the facts and in the circumstances of the case, the Tribunal is justified in law in holding that the Commissioner had no jurisdiction to revise the order of assessment ?

2. Whether, in the light of the correct interpretation of the Act, the Tribunal is justified in law in holding that investment allowance and additional depreciation are admissible on a computer installed by the assessee at their office premises during the relevant period for accounting purpose and maintenance of records ?"

2. The facts, as appear from the statement of case, briefly stated, are that the assessee-company for the assessment year 1983-84 was allowed investment allowance u/s 32A(1) and additional depreciation u/s 32(1)(ia) of the Income Tax Act, 1961, on a computer purchased by the assessee during the previous year relevant to the said assessment year. The order of the Income Tax Officer was found by the Commissioner of Income Tax to be erroneous and prejudicial to the interests of the Revenue. He, therefore, revised the order of the Income Tax Officer u/s 263 of the Income Tax Act, 1961, and directed the Income Tax Officer to make a fresh assessment order. The Commissioner of Income Tax further

issued certain guidelines for finding out if the assessee was entitled to investment allowance and additional depreciation.

3. Being aggrieved, the assessee appealed to the Tribunal and contended that the assessment order was appealed against before the Commissioner of Income Tax (Appeals) and the appeal was decided by the Commissioner of Income Tax (Appeals) on January 17, 1984. The question of grant of investment allowance and additional depreciation on the computer, though not the subject-matter of appeal, could not survive as the entire assessment order merged in the appellate order of the Commissioner of Income Tax (Appeals) and as such there was no order of the Income Tax Officer which could be revised u/s 263. In support, reliance was placed upon a judgment of this court in the case of General Beopar Co. (Pvt.) Ltd. Vs. Commissioner of Income Tax, The learned Departmental representative, on the other hand, relied upon the order of the Commissioner of Income Tax.

4. The Tribunal, after hearing the parties and after considering the papers placed on record before it and also going through this court's decision in General Beopar Co. (Pvt.) Ltd. Vs. Commissioner of Income Tax, , held that the Commissioner had no right to revise the order of assessment.

5. On the merits of the issue, the Tribunal observed as under :

"The assessee-company is engaged in the manufacture of chemicals. It is plainly admitted before us by learned counsel for the assessee that the computer purchased by the assessee is not part of the manufacturing machinery. According to him, the computer is utilised for accounting purposes, that is to say, for maintaining the stock of raw materials and the finished goods and also for other accounts of the business of the assessee-company. It is also admitted before us by learned counsel for the assessee that, in the instant case, no outside job was done by the assessee through this computer. However, it is contended by him that the said computer was the tool of the trade of the assessee. According to him, in this modern world, even the manufacturing process becomes easy and convenient with the help of a computer through which the accounts of raw materials and finished goods are maintained. Further, it is contended by him that a computer cannot be treated as an office appliance. In support, he placed reliance upon the judgments of the Bombay High Court in the cases of Commissioner of Income Tax, Bombay City-I Vs. I.B.M. World Trade Corporation, and Commissioner of Income Tax Vs. IBM World Trade Corporation, . The contention of learned Departmental representative is that even if, as held by the Bombay High Court, the computer is taken outside the ambit of "office appliance", the assessee cannot get investment allowance unless it is established that the computer is used for the purpose of business of manufacture or production of any article or thing. The computer may not be directly employed for the purpose of manufacture or production of any article but it is certainly used for the purposes of such business. The word "business" used ;in Section 32A(2)(iii) is significant. The business of manufacture cannot be restricted to the

actual process of manufacture. We, therefore, find that the Income Tax Officer did not make a mistake in allowing investment allowance and additional depreciation on the computer. The order of the Commissioner of Income Tax is, therefore, reversed and that of the Income Tax Officer is restored."

6. It has been submitted on behalf of the Revenue that the doctrine of merger, it is well-settled, is not to be applied mindlessly. Its application depends upon the nature of the orders in question. In this connection, reference was made to the decision of the Supreme Court in the case of *State of Madras Vs. Madurai Mills Co., Ltd.*, .

7. It has been submitted on behalf of the Revenue that the Income Tax Act, 1961, does not bar the Commissioner from exercising his power u/s 263 merely because the prejudicial order of the Income Tax Officer is the subject-matter of appeal. In this connection, reference was made to the decision of the Madras High Court in the case of *Commissioner of Income Tax, Tamil Nadu-I, Madras Vs. EIMCO-K. C.P. Limited*, .

8. It has also been argued that the Commissioner of Income Tax and the Appellate Assistant Commissioner do not work at cross purposes. The Commissioner of Income Tax is competent to invoke the provisions of Section 263 in respect of the matters which are not covered in appeal but decided by the Income Tax Officer in a manner prejudicial to the interests of the Revenue. The fact that the appellate order has been passed by the Appellate Assistant Commissioner/Commissioner of Income Tax (Appeals) is totally irrelevant.

9. It has been argued on behalf of the assessee, on the other hand, that the assessment order was appealed against before the Commissioner of Income Tax (Appeals) and the appeal was decided by the Commissioner of Income Tax (Appeals) on January 17, 1984. Though the grant of investment allowance and additional depreciation on computer was not the subject-matter of appeal, the entire assessment order merged in the appellate order of the Commissioner of Income Tax (Appeals) and as such there was no order of the Income Tax Officer which could be revised u/s 263. In support of the contention, the assessee relied upon the judgment and decision of this court in the case of *General Beopar Co. (Pvt.) Ltd. Vs. Commissioner of Income Tax*, .

10. In our view, the principles decided therein cannot have any application to the facts of the instant case in view of the nature of the revisional order involved therein. The Division Bench of this court, in the case of *General Beopar Co. (Pvt.) Ltd. Vs. Commissioner of Income Tax*, , held that, in an appeal preferred from an order of assessment, the entire assessment is at large before the Appellate Assistant Commissioner who has jurisdiction and power to go into questions which are not the subject-matter of appeal. Hence, when an order of assessment is appealed against and an order is passed by the appellate authority, there is merger of the assessment order with the appellate order in all respects, including matters which have been merely affirmed by the appellate authority.

11. The exceptions to this doctrine of merger are cases where the question involved cannot be the subject-matter of appeal before the appellate authority.

12. Where there has been a merger of the order of the Income Tax Officer in that of the Appellate Assistant Commissioner, the Commissioner has no jurisdiction to revise the order of the Income Tax Officer. Once proceedings for reassessment are initiated, the original order of assessment loses its finality and at this stage it is no longer open to revision by the Commissioner.

13. On behalf of the Revenue, our attention was drawn to the judgment and decision in the case of *State of Madras Vs. Madurai Mills Co., Ltd.*, . In the aforesaid case, the assessee filed a revision petition against the assessment by the Deputy Commercial Tax Officer. The Deputy Commissioner of Commercial Taxes dismissed the revision on August 21, 1954. On August 4, 1958, the Board of Revenue issued notice to assessee stating that it proposed to revise the assessment of the Deputy Commercial Tax Officer as it excluded certain taxable amounts. The assessee took an objection that the proceeding was time-barred u/s 12(4)(b). The defence of the Revenue was that the order revised by the Board was the revisional order of the Deputy Commissioner dated August 21, 1954, and not the assessment order of the Deputy Commercial Tax Officer, dated November 28, 1952. It was held that the subject-matter of the revisional proceedings before the Board was the assessment order dated November 28, 1952, and the revision being beyond four years was invalid. It further held that there was no merger of the assessment order with the revisional order of the Deputy Commissioner of Commercial Taxes. In this connection, the Supreme Court observed (headnote of AIR) :

"The doctrine of merger is not a doctrine of rigid and universal application and it cannot be said that wherever there are two orders, one by the inferior authority and the other by a superior authority, passed in an appeal or revision, there is a fusion or merger of the two orders irrespective of the subject-matter of the appellate or revisional order and the scope of the appeal or revision contemplated by the particular statute. The application of the doctrine depends on the nature of the appellate or revisional order in each case and the scope of the statutory provisions conferring the appellate or revisional jurisdiction."

14. We may also take note of the judgment and decision in the case of *Commissioner of Income Tax, Tamil Nadu-I, Madras Vs. EIMCO-K. C.P. Limited*, . In that case, it was found that, at the time of promotion of the assessee-company, it was agreed that half its share capital would be subscribed by a foreign company which was one of the promoters and a portion of these shares would be allotted without receiving any consideration in cash but in consideration of their undertaking to make available its technical know-how to the assessee-company. The assessee-company allotted to the foreign company on April 12, 1968, shares worth Rs. 2,35,000 towards the technical know-how and claimed deduction of this amount as a revenue expenditure in its assessment for 1969-70. Though the Income Tax Officer rejected this claim and held that it was

a capital expenditure, he treated the amount as having gone in for the acquisition of patent rights by the assessee from the foreign company and, accordingly, allowed 1/14th of this amount as a deduction u/s 35A of the Income Tax Act, 1961. The view of the Income Tax Officer that the payment was a capital expenditure was upheld by the Appellate Assistant Commissioner. The Tribunal, however, upheld the claim of the assessee that it was a revenue expenditure.

15. During the pendency of the appeal before the Appellate Assistant Commissioner, the Commissioner, by exercising his suo motu revisional powers u/s 263 of the Income Tax Act, cancelled the deduction of Rs. 16,786 being 1/14th of Rs. 2,35,000. The Tribunal accepted the assessee's contention that as an appeal against the assessment order was pending, the Commissioner was debarred from exercising his revisional powers. On a reference, it was held :

(i) that the subscription for shares otherwise than for cash could not have the effect of making the non-cash consideration an item of the company's expenditure. Even otherwise, the admissibility of expenditure as a deduction would arise only where the company after formation gets going with its business. On the allotment of shares to the foreign company, the assessee-company could not be treated as having incurred or laid out any expenditure for the purpose of its business. As no expenditure in the trading sense of the term had arisen in the instant case, there was no question of the further issue as to whether it would be a capital or revenue expenditure. Further, the offer of the know-how by the foreign company to the assessee only represented its way of discharging its capital contribution for the floatation of the assessee-company and in that sense it could involve no expenditure. The Tribunal was, therefore, in error and the sum of Rs. 2,35,000 was not revenue expenditure.

(ii) That the Commissioner, in the instant case, was within his jurisdiction in exercising his revisional power to cancel the relief u/s 35A granted by the Income Tax Officer.

16. In the case of Hamilton and Co. Pvt. Ltd. Vs. Commissioner of Income Tax, , it has been held that a narrow construction of the power of the Commissioner u/s 263 of the Income Tax Act, 1961, will defeat the purpose for which the provision was enacted. The order of the Income Tax Officer will merge with the order of the Appellate Assistant Commissioner only with respect to that part of the order of the Income Tax Officer which relates to the matters considered and decided by the appellate authority. Thus, there will be partial merger and not merger of the whole order. By the Finance Act, 1988, the provisions of Section 263 have been amended to clarify that the Commissioner would be competent to revise an order of assessment passed by an Assessing Officer on all matters except those that have been considered and decided in appeal. The Explanation which was added to Section 263 with effect from June 1, 1988, has been further amended by the Finance Act, 1989, to clarify that the said Explanation incorporated in the Finance Act, 1988, must be deemed to have always been in existence.

17. It was further held that the Tribunal was right in holding that the Commissioner of Income Tax had jurisdiction to initiate proceedings u/s 263 of the Act as there was only a partial merger and that the revision would relate only in the facts of the present case to those matters which had not been considered and decided by the Appellate Assistant Commissioner.

18. The aforesaid decision, in the case of General Beopar Co. (Pvt.) Ltd. Vs. Commissioner of Income Tax, , was considered and distinguished by the Division Bench and the Division Bench observed (at pages 576-579) : "It appears to us that there is, apparently, a conflict between the decision of this court in Singho Mica Mining Co. Ltd. Vs. Commissioner of Income Tax, Central, and the decision in General Beopar Co. (Pvt.) Ltd. Vs. Commissioner of Income Tax, . In Singho Mica Mining Co. Ltd. Vs. Commissioner of Income Tax, Central, , this court held that where the Income Tax Officer omitted to charge interest u/s 217 and the Commissioner, in revision, directed the Income Tax Officer to compute and recover interest, although, in the meantime, the order of assessment was the subject-matter of appeal before the Appellate Assistant Commissioner, the merger of the order of assessment was only in respect of matters which were taken up in appeal. The question of charging interest was not involved in the appeal. Accordingly, the Commissioner could direct the Income Tax Officer to charge interest u/s 217. It appears that this decision was distinguished in General Beopar Co. (Pvt.) Ltd. Vs. Commissioner of Income Tax, in the following manner (at page 94) :

"(g) Singho Mica Mining Co. Ltd. Vs. Commissioner of Income Tax, Central, . In this case, it was held by a Division Bench of this court to which I was a party that where there was an appeal from an order of assessment and the question of levy of interest could not have been the subject-matter of the appeal, the order appealed from could not be held to have merged with the order passed in the appeal on the question of levy of interest. Even after the order was passed in appeal, the Commissioner would be competent to revise the assessment on the question of interest."

19. In Singho Mica Mining Co. Ltd. Vs. Commissioner of Income Tax, Central, the Income Tax Officer did not charge interest in the assessment. The assessment order was taken up in appeal. Even after the appellate order was passed, this court held that the Commissioner of Income Tax retained the jurisdiction to revise the order of assessment since the question of levy of interest could not have been the subject-matter of appeal and the order appealed from could not have merged with the appellate order. This is how in General Beopar Co. (Pvt.) Ltd. Vs. Commissioner of Income Tax, , the decision of Singho Mica Mining Co. Ltd. Vs. Commissioner of Income Tax, Central, was distinguished. According to the Madhya Pradesh High Court in Commissioner of Income Tax Vs. Mandsaur Electric Supply Co. Ltd., , the Calcutta High Court in Singho Mica Mining Co. Ltd. Vs. Commissioner of Income Tax, Central, , held that the merger of the order of assessment was only in respect of matters which were taken up in appeal and as

the question of charging interest was not involved in the appeal, the Commissioner could direct the Income Tax Officer to charge interest. According to the Madhya Pradesh High Court, another distinguishable feature in *Singho Mica Mining Co. Ltd. Vs. Commissioner of Income Tax, Central*, was that the Commissioner directed the Income Tax Officer to compute and recover interest without disturbing the order of assessment.

20. In *General Beopar Co. (Pvt.) Ltd. Vs. Commissioner of Income Tax*, this court held that once the order of assessment was under appeal before the Appellate Assistant Commissioner and order is passed by the appellate authority, there is merger of the assessment order with the appellate order in all respects. It was also laid down that, when an appeal is preferred from an order of assessment, the entire assessment is at large before the Appellate Assistant Commissioner who has jurisdiction and power to go into the questions which are not the subject-matter of appeal. The exceptions are only where the question involved cannot be the subject-matter of appeal before the appellate authority.

21. Thus, in *General Beopar Co. (Pvt.) Ltd. Vs. Commissioner of Income Tax*, this court has in fact recognised the exceptions where there will be no merger.

22. It is now well-settled that an appeal lies against an order imposing interest, if the appellant limits himself to the ground that he is not liable to the levy at all. In the case of *Central Provinces Manganese Ore Co. Ltd. Vs. Commissioner of Income Tax*, the Supreme Court held that, inasmuch as the levy of interest is a part of the process of assessment, it is open to an assessee to dispute the levy in appeal provided he limits himself to the ground that he is not liable to the levy at all.

23. This court has also held in *Commissioner of Income Tax Vs. Bengal Jute Mills Co. Ltd. (No. 1)*, that the assessee could raise the question regarding levy of interest u/s 139 before the Appellate Assistant Commissioner. It has also been held in *Commissioner of Income Tax Vs. United Provinces Electric Supply Co. Ltd.*, that the assessee is entitled to raise an objection to the charging of interest u/s 215 in the appeal before the Appellate Assistant Commissioner.

24. Therefore, the charging of interest can be the subject-matter of appeal before the appellate authority. In our view, the question is not whether the question involved before the Commissioner of Income Tax could be the subject-matter of appeal before the appellate authority or whether the Commissioner directed the inclusion of certain income originally omitted from the assessment. Where the assessee is not aggrieved by a part of the order of the Income Tax Officer, such determination would not be the subject-matter of appeal. Therefore, in such a case, if it is to be held that the Commissioner loses his jurisdiction to revise the assessment simply because an appellate order has been passed even without touching on the matter in respect of which the assessee did not prefer an appeal, the intention of the Legislature in enacting Section 263 would be frustrated.

25. In our view, this apparent conflict has to be resolved harmoniously. That apart, the recent amendments, to which we shall presently refer, have set at rest the controversy or conflict, if any.

26. Where the assessee is not aggrieved by any part of the assessment order and in fact derives a benefit from an erroneous assessment order, he will not prefer an appeal to the Appellate Assistant Commissioner. The Department has got no right to prefer an appeal against the order of the Income Tax Officer. The only way in which an erroneous order in so far as it is prejudicial to the interests of the Revenue as made by the Income Tax Officer either in not charging interest or by not including some income, which ought to have been included or by allowing deductions or reliefs which ought not to have been allowed can be set right by the Commissioner of Income Tax is by resorting to his revisional power. The power of rectification u/s 154 or reopening of the assessment u/s 147 has to be exercised by the Income Tax Officer. It is not open to the Commissioner of Income Tax to direct the Income Tax Officer either to rectify the assessment or reopen the assessment. In such a case, in our view, when the order of assessment passed by the Income Tax Officer is made the subject-matter of appeal before the first appellate authority, and an order is passed by such appellate authority, the Commissioner of Income Tax is not competent to set aside the entire assessment order in exercise of his revisional jurisdiction. He can only revise the assessment to the extent to which it was not the subject-matter of appeal before the first appellate authority. The omission to charge interest is a matter which the Commissioner of Income Tax may hold to be erroneous in so far as it is prejudicial to the interests of the Revenue. An assessee would not prefer an appeal against that part of the order which was in his favour. In such a case, preferring an appeal regarding the order of assessment before the Appellate Assistant Commissioner would not take away the jurisdiction of the Commissioner to revise the assessment. The doctrine of merger can only operate on matters which are the subject-matter of decision by the first appellate authority. It cannot have any application to matters which are not being taken on appeal either by the assessee or which had not been considered by the Appellate Assistant, Commissioner which, in other words, have not or could not have been touched upon by the appellate authority.

27. A narrow construction of the power of the Commissioner u/s 263 will defeat the purpose for which the provision was enacted. In our judgment, the order of the Income Tax Officer will merge with the order of the first appellate authority only with respect to that part of the order of the Income Tax Officer which relates to the matters considered and decided by the appellate authority. Thus, there will be partial merger and not merger of the whole order.

28. By the Finance Act, 1988, the provisions of Section 263 have been amended to clarify that the Commissioner would be competent to revise an order of assessment passed by an Assessing Officer on all matters except those that have been considered and decided in appeal. The Explanation which was added to

Section 263 with effect from June 1, 1988, has been further amended by the Finance Act, 1989, to clarify that the said Explanation incorporated in the Finance Act, 1988, must be deemed to have always been in existence.

29. For the reasons aforesaid, we are of the view that the Tribunal was right in holding that the Commissioner of Income Tax had jurisdiction to initiate proceedings u/s 263 of the Income Tax Act, 1961, as there was only a partial merger. The revision will relate only to those matters which had not been considered and decided by the Appellate Assistant Commissioner."

30. In our view, the assessee got the benefit of the assessment order and it is the admitted position that the appeal was preferred by the assessee on other grounds and the question involved in the exercise of revisional power u/s 263 of the Commissioner was not the subject-matter of appeal, and, as such, it cannot be said that the order of the Income Tax authority merged with the order of the appellate authority on the question whether the assessee is entitled to investment allowance u/s 32A(1) and additional depreciation u/s 32(1)(iia) of the Income Tax Act, 1961, on a computer purchased by the assessee. There was in fact no appeal on the said question. The Commissioner, therefore, was entitled to exercise his revisional jurisdiction u/s 263 on the said question. The doctrine of merger can only operate on matters which are the subject-matter of decision by the first appellate authority. It cannot have any application to matters which are not being taken on appeal either by the assessee or which had not been considered by the Appellate Assistant Commissioner. In the instant case, the assessee did not prefer an appeal on the question on which the Commissioner exercised his jurisdiction and the appellate authority did not also give any finding thereon. Under such circumstances, in our view, the Tribunal was not justified in holding that the Commissioner had no jurisdiction to revise the order of assessment.

31. With regard to the merits of the case, namely, that the assessee was entitled to investment allowance u/s 32A(1) in the sum of Rs. 39,784 and additional depreciation u/s 32(1)(iia) of the Income Tax Act, 1961, on a computer purchased by the assessee during the previous year relevant to the assessment year, it appears to us from the order of the Tribunal that there is no dispute that the computer purchased by the assessee is not part of the manufacturing machinery. According to the learned advocate for the assessee, the computer is utilised for accounting purposes, that is to say, for maintaining the stock of raw material and the finished goods and so also for other accounts of the business of the assessee-company. It is also admitted that, in the relevant order, no outside job work was done by the assessee through this computer. The only contention of the assessee was that the said computer was the tool of the trade of the assessee. It was submitted that the manufacturing process becomes easy and convenient with the help of a computer through which the accounts of raw materials and finished goods are maintained. It is also contended that a computer cannot be treated as an office appliance. The Division Bench of the

Bombay High Court in the case of Commissioner of Income Tax, Bombay City-I Vs. I.B.M. World Trade Corporation, held that, even if the computer is taken outside the ambit of office appliances, the assessee cannot get investment allowance unless it is established that the computer is used for the purposes of business of manufacture or production of any article or thing.

32. It was submitted on behalf of the assessee that the computer cannot be called a mere office equipment, that the computer in question was capable of performing diverse complicated tasks ; that the computer was used for the purposes of the assessee's business, and particularly the purposes of an preparing inventory control, etc., at the relevant time that the computer was also hired out for a fee to outsiders ; and that even in law the assessee's claim for investment allowance and additional depreciation was rightly allowed. From the admitted facts, it cannot be said that the said computer used in the business of the assessee was the tool of the trade.

33. It is well-settled that, even if the computer is taken outside the ambit of "office appliance", the assessee cannot get investment allowance unless it is established that the computer is used for the purpose of business of manufacture or production of any article or thing.

34. It appears that the Commissioner of Income Tax held the assessment order to be erroneous and prejudicial to the interests of the Revenue for the following reasons :

Under the scheme of the Act, both investment allowance and additional depreciation are allowed in certain circumstances, inter alia, on plant and machinery. The granting of these benefits is, however, subject to an important rider, viz., that the allowances are not admissible on any office appliances or road transport vehicles. The allowances are also not admissible on any plant or machinery installed in any office premises or any residential accommodation including any accommodation in the nature of guest house.

35. Now, the term "machinery" had not been defined in the Act. Courts have held that machinery is that which produces goods, articles or things, or that which assists the manufacturing process.

36. The Act has defined "plant" in an inclusive manner. And the courts have held that, conceptually speaking, anything that is a tool of the trade is plant. For example, in the case of a lawyer, law books are the tools of his trade and it is for this purpose that books are included in the inclusive definition of the term "plant". But one thing is clear, that the term "tool of trade" signifies close and direct connection between the tool and the assessee's trade, that is to say, a plant must be employed directly in the manufacture or production of goods, etc.

37. The courts have also made a significant distinction between tools of trade and the setting in which the trade is conducted. If a particular item can properly be called a tool of trade, then it is plant. If, on the contrary, a particular item,

even though called plant in popular parlance, will not be plant if it is just a part of the setting in which the trade is conducted.

38. For example, an air-conditioner installed in the office premises of an assessee cannot be called a plant so as to be eligible to investment allowance and additional depreciation. If, on the contrary, an air-conditioner is indispensable for the manufacture of, say, medicines, then the air-conditioner becomes the tool of the assessee's trade and can properly be regarded as plant for purposes of investment allowance and additional depreciation.

39. In the case of Commissioner of Income Tax, Bombay City-I Vs. I.B.M. World Trade Corporation, , it was held by the Division Bench of the Bombay High Court that the word "apparatus" is a word of much wider import than the word "appliances" and the definition of "plant" in Section 43(3) of the Income Tax Act, 1961, shows that scientific apparatus is included in the word "plant". But, while a given appliance may be in the form of an apparatus, the converse will not always be true and every apparatus will not necessarily be an appliance. The word "appliances" is qualified by the word "office" in Section 33 and the words have to be construed in the context of appliances which are generally used in an office as an aid or a facility for the proper functioning of the office.

40. Data processing machines are complicated machinery which could not be easily operated by laymen and special training for a period which may cover three months in some cases and a much longer period in others is necessary in order to equip a person with the knowledge and art of operating these machines. The installation and operation of the machines is on a scientific basis and, even for the purposes of installation, certain special conditions have to be provided in the form of air-conditioning or a particular temperature. The purposes for which such machines which can be described as computers are used are well-known and in highly scientifically developed systems, they have their own roles to play and they cannot be equated, therefore, with office appliances which would be of a much simpler nature. They are really substitutes for human labour not in the sense of manual labour but in the sense they perform intellectual functions which would normally be performed by highly qualified engineers. One machine by itself serves no purpose, but what has to be used is a group of machines which make up a "system". The basic functions of a computer are : (i) input ; (ii) storage ; (iii) control ; (iv) processing; and (v) output. The processor has to translate the language of the programmer into the computer code form which is used internally by the computer. A computer system or an electronic data processing system is physically a collection of electro-mechanical and electronic components and devices assembled in metal cases (modules) and cabinets. These contain switching and communication components such as transistors, diodes, capacitors, resistors and integrated circuits, all combined into various types of circuitry, together with memory systems, power supplies, delay lines and various types of magnetic media such as tapes and wires for carrying and transforming data and information, as coded, into instructions and computations.

In view of the varied functions which the "system" is capable of performing, data processing machines cannot be classified as "office appliances" and are eligible for allowance of development rebate u/s 33(1) of the Income Tax Act, 1961 (corresponding to Section 10(2)(vib) of the Indian Income Tax Act, 1922).

41. The same principle has been reiterated and followed in the subsequent assessment order by another Division Bench of the Bombay High Court in respect of the same assessee, in the case of Commissioner of Income Tax Vs. IBM World Trade Corporation, , wherein it was held that data processing machines are not office appliances and are entitled to development rebate u/s 33 of the Income Tax Act, 1961.

42. Accordingly, Section 263 of the Act could be invoked to set aside the impugned assessment order with direction to the Income Tax Officer to make a fresh assessment in accordance with law.

43. In view of the position in law that the assessee cannot get investment allowance unless it is established that the computer is used for the purpose of business of manufacture or production of any article or thing and, in view of the admitted facts of the instant case that the computer has not been so used, we are of the view that the Commissioner was justified in passing the said order.

44. Accordingly, in our view, the Tribunal was not justified in holding that investment allowance and additional depreciation are admissible on a computer installed by the assessee at its office premises during the relevant period for accounting purpose and maintenance of records.

45. Accordingly, question No. 1 is answered in the negative and against the assessee and in favour of the Revenue.

46. Question No. 2 is also answered in the negative and in favour of the Revenue and against the assessee.

47. There will be no order as to costs.

Ajit K. Sengupta, J.

48. I am fully in agreement with the judgment prepared by my learned brother, Shyamal Kumar Sen J. I take this opportunity to dispel the possible misapprehension that the Division Bench in Hamilton and Co. Pvt. Ltd. Vs. Commissioner of Income Tax, made a material departure from the decision of the Division Bench of this court in General Beopar Co. (Pvt.) Ltd. Vs. Commissioner of Income Tax, . In General Beopar Co. (Pvt.) Ltd. Vs. Commissioner of Income Tax, heavily relied upon by learned counsel for the assessee, the said Division Bench doubtless held that the assessment gets open and is at large before the first appellate authority. Therefore, the assessment order, even if dealt with in appeal only in one part gets merged in the appeal order in entirety. But the said Division Bench did not rule out the situation where a part of the assessment order not dealt with by the first appellate authority remains outside the scope of

merger and is open to revision u/s 263 of the Income Tax Act, 1961. In that connection, the Division Bench, in *General Beopar Co. (Pvt.) Ltd. Vs. Commissioner of Income Tax*, observed that, where the Income Tax Officer omits to charge interest u/s 217, revisionary powers can be invoked by the Commissioner of Income Tax irrespective of the fact that the assessment order as such, has been the subject-matter of appeal. Thus, survival of some part of the assessment order for revision u/s 263 is not precluded by the ratio decidendi in *General Beopar Co. (Pvt.) Ltd. Vs. Commissioner of Income Tax*, .

49. There was a peculiar aspect on the factual plane which guided the decision in the said earlier decision. There was pendency of reassessment proceedings. If the invocation of the revisionary power was upheld, the said proceeding would have become abortive. This was also a factor that largely weighed with that Bench in coming to the decision as it did. This factual aspect has already been stressed by my learned brother, Sen J. But, essentially, the said decision did not rule out partial application of the doctrine of merger.

50. In *Hamilton and Co. Pvt. Ltd. Vs. Commissioner of Income Tax*, , the Division Bench of this court examined threadbare the decision in *General Beopar Co. (Pvt.) Ltd. Vs. Commissioner of Income Tax*, as would appear from the following extract (at page 576) :

"It appears to us that there is apparently a conflict between the decision of this court in *Singho Mica Mining Co. Ltd. Vs. Commissioner of Income Tax, Central*, and the decision in *General Beopar Co. (Pvt.) Ltd. Vs. Commissioner of Income Tax*, . In *Singho Mica Mining Co. Ltd. Vs. Commissioner of Income Tax, Central*, , this court held that where the Income Tax Officer omitted to charge interest u/s 217 and the Commissioner, in revision, directed the Income Tax Officer to compute and recover interest, although, in the meantime, the order of assessment was the subject-matter of appeal before the Appellate Assistant Commissioner, the merger of the order of assessment was only in respect of matters which were taken up in appeal. The question of charging interest was not involved in the appeal. Accordingly the Commissioner could direct the Income Tax Officer to charge interest u/s 217. It appears that this decision was distinguished in *General Beopar Co. (Pvt.) Ltd. Vs. Commissioner of Income Tax*, in the following manner (at page 94) :

"(g) *Singho Mica Mining Co. Ltd. v. CIT* [1987] 111 ITR 231 . In this case, it was held by a Division Bench of this court to which I was a party that where there was an appeal from an order of assessment and the question of levy of interest could not have been the subject-matter of appeal the order appealed from could not be held to have merged with the order passed in the appeal on the question of levy of interest. Even after the order was passed in appeal; the Commissioner would be competent to revise the assessment on the question of interest."

51. Thus, the only point where the Division Bench of this court in *Hamilton and Co. Pvt. Ltd. Vs. Commissioner of Income Tax*, , departed from the ratio in

General Beopar Co. (Pvt.) Ltd. Vs. Commissioner of Income Tax, is with regard to its reading of the still earlier decision of this court in Singho Mica Mining Co. Ltd. Vs. Commissioner of Income Tax, Central, . It was pointed out that, in General Beopar Co. (Pvt.) Ltd. Vs. Commissioner of Income Tax, , the ratio in Singho Mica Mining Co. Ltd. Vs. Commissioner of Income Tax, Central, was not correctly appreciated. In General Beopar Co. (Pvt.) Ltd. Vs. Commissioner of Income Tax, , it was held that in Singho Mica Mining Co. Ltd. Vs. Commissioner of Income Tax, Central, , the omission to levy interest u/s 217 . could be a ground for invoking the jurisdiction u/s 263 as the levy of the interest was not appealable. But the Division Bench in Hamilton and Co. Pvt. Ltd. Vs. Commissioner of Income Tax, read the said decision as implying that the levy of interest not being the subject of appeal, the said matter is open to revision. The dissent was only to the extent that in Singho Mica Mining Co. Ltd. Vs. Commissioner of Income Tax, Central, non-appealability was not the consideration but the fact of not being appealed against was the consideration for holding that the non-levy is a ground for revision. As a matter of fact, a reading of the ratio in Singho Mica Mining Co. Ltd. Vs. Commissioner of Income Tax, Central, made by the Division Bench of this court in Hamilton and Co. Pvt. Ltd. Vs. Commissioner of Income Tax, has corroboration from the identical reading of the decision by the Full Bench of the Madhya Pradesh High Court in Commissioner of Income Tax Vs. Mandsaur Electric Supply Co. Ltd., . The said Full Bench construed the implication of the ratio in Singho Mica Mining Co. Ltd. Vs. Commissioner of Income Tax, Central, as laying down the proposition that since the question of charging interest was not involved in the appeal, the same issue could be open for revision u/s 263. appealability or non-appealability is not a material consideration. In any case, the premise in General Beopar Co. (Pvt.) Ltd. Vs. Commissioner of Income Tax, that chargeability of interest is not appealable has become obsolete because of the decision of the Supreme Court in Central Provinces Manganese Ore Co. Ltd. Vs. Commissioner of Income Tax, . The Supreme Court held that the levy of interest can be disputed in appeal provided the denial is total.

52. My learned brother, Sen J., has already extracted a passage from the decision in State of Madras Vs. Madurai Mills Co., Ltd., , which throws light on the essential nature of the doctrine of merger. The said passage bears repetition (headnote) :

"The doctrine of merger is not a doctrine of rigid and universal application and it cannot be said that wherever there are two orders, one by the inferior authority and the other by a superior authority, passed in an appeal or revision, there is a fusion or merger of two orders irrespective of the subject-matter of the appellate or revisional order and the scope of the appeal or revision contemplated by the particular statute. The application of the doctrine depends on the nature of the appellate or revisional order in each case and the scope of the statutory provisions conferring the appellate or revisional jurisdiction."

53. The line taken by the Division Bench in Hamilton and Co. Pvt. Ltd. Vs.

Commissioner of Income Tax, has a meeting point with the general principles as laid down by the Supreme Court in the said decision in State of Madras Vs. Madurai Mills Co., Ltd., . In line with the said decision in Hamilton and Co. Pvt. Ltd. Vs. Commissioner of Income Tax, , it had to be held that there will be partial merger and not the merger of the whole order of assessment where the whole order as such is not the subject-matter of appeal.

54. In the said decision, it was further emphasised that the Explanation inserted below Section 263 by the Finance Act, 1988, as modified by the Finance Act, 1989, clarifies that the effect of the appeal order is only that of partial merger of the matters dealt with in appeal. The remaining part survives for revision u/s 263. This Explanation further clarifies that the Explanation shall have retrospective effect as it has to be deemed to have always been in existence. This later amendment makes the legislative intent manifest that the Legislature had always in mind the revisionary power to operate and apply in relation to any part of the assessment order which has not been considered and decided in the first appeal. Therefore, there is essentially no question of dissent in Hamilton and Co. Pvt. Ltd. Vs. Commissioner of Income Tax, from the ratio in General Beopar Co. (Pvt.) Ltd. Vs. Commissioner of Income Tax, . Because facts in the earlier decision were distinguishable and the state of law with regard to the powers of revision have undergone change and it is in this light that the ratio in Hamilton and Co. Pvt. Ltd. Vs. Commissioner of Income Tax, was decided.