

(1978) 01 AP CK 0008

In the Andhra Pradesh High Court

Case No : Case Referred No. 67 of 1976

Commissioner of Income Tax

APPELLANT

Vs

Warner Hindustan Ltd.

RESPONDENT

Date of Decision : 18-01-1978

Acts Referred:

Income Tax Act, 1961 — Section 256(1), 43(3), 80J
Income Tax Rules, 1962 — Rule 19A(3)

Citation : (1979) 117 ITR 68

Hon'ble Judges : Obul Reddi, C.J; Narasinga Rao, J

Bench : Division Bench

Advocate : P. Rama Rao, for the Appellant; P. Ramachandra Rao, for the Respondent

Judgement

Obul Reddi, C.J.—The following first two questions at the instance of the revenue and: the third question at the instance of the assessee are referred to us for our decision :

"1. Whether, on the facts and in the circumstances of the case, the assessee was entitled to depreciation on the cost of digging a well ?

2. Whether, on the facts and in the circumstances of the case, the method of computing the capital as indicated by the Tribunal for allowing relief u/s 80J of the Act is correct in law ?

3. Whether the deduction u/s 80J of the Act was allowable on the entire capital employed by the assessee, viz., the value of the assets as on the first day of the computation period computed as per Rule 19A(2) of the I.T. Rules and without its being reduced by the borrowed monies and debts due by the assessee ? "

2. The facts necessary for answering the questions referred to us are these: In this reference, we are concerned only with the assessment year 1969-70. The assessee is a public limited company carrying on business of manufacturing pharmaceuticals in Hyderabad, For purposes of computing the capital under Rule

19A(2) and determining the relief u/s 80J of the I.T. Act, 1961 (hereinafter referred to as "the Act"), the assessee claimed that certain liabilities, which are due but not payable, should be deducted for arriving at the figure of capital employed. Against the figure of total credits of Rs. 26,010, the assessee claimed that the liability to the extent of Rs. 6,28,028 should not be taken as liability, as the same is not due and payable as on December 31, 1967, i.e., at the end of the previous year. The ITO did not agree with this plea and took the total figure as liability since, in his view, the proper date to be taken into account to determine the question whether the amount is due or not is not the closing date of the previous year but the first day of the computation period according to Rule 19A(2). The AAC did not agree with the view of the ITO and upheld the assessee's contention that borrowed moneys and debts due by the assessee as contemplated in Sub-rule (3), Rule 19 A, must be moneys and debts due and payable and not merely moneys and debts owed on the first date of the computation period. On appeal by the revenue, the Tribunal, relying upon the decision of the Bench of the Bombay Tribunal, confirmed the order of the AAC.

3. The assessee also made a claim for depreciation and development rebate in a sum of Rs. 1,26,254 spent by it for digging a well in its factory premises. The ITO, relying upon the decision of the Bombay High Court in Jayasingrao Piraji Rao Ghatge Vs. Commissioner of Income Tax, Bombay South, disallowed that claim on the ground that the well did not come within the definition of "plant". On appeal by the assessee, the AAC allowed its claim and directed that depreciation should be allowed at 10%. Against that order, the revenue preferred an appeal and the Tribunal, applying the ratio of the decision of the Supreme Court in Commissioner of Income Tax, Andhra Pradesh Vs. Taj Mahal Hotel, Secunderabad, held that the well which formed part and parcel of the factory, comes within the expression "plant" and allowed depreciation and development rebate. It is against those findings that, at the instance of the revenue, questions Nos. 1 and 2 were referred to this court and at the instance of the assessee, the third question was referred.

4. In R.C. No. 66 of 1976 decided on 17-1-1978 [Commissioner of Income Tax Vs. Warner Hindustan Ltd.,] the same question as question No. 1 was referred to us and we opined that the expression "plant" will take within its sweep the well admittedly sunk for the purpose of carrying on the business of manufacturing pharmaceuticals by the assessee. The well in the factory premises was dug for pumping water to the factory as there was no adequate supply of water by the Municipal Corporation to the factory. The case of the assessee is that, without digging the well, it would have been well nigh impossible for it to carry on its business of manufacturing pharmaceuticals and the well formed part and parcel of the " plant". In holding that the definition of "plant" is an inclusive definition of wide amplitude so as to take in the well dug for the purpose of carrying on the business of the factory, we applied the ratio of the decision of the Supreme Court in Commissioner of Income Tax, Andhra Pradesh Vs. Taj Mahal Hotel, Secunderabad, .

5. Questions Nos. 2 and 3 go together. Mr. Rama Rao, the learned counsel appearing for the revenue, contended that the Tribunal was in error in holding that the ITO has to take into account only the borrowed moneys and debts, which are due and payable as on January 1, 1968, for making deductions under Sub-rule (3) of Rule 19A, but not all amounts which the assessee owed as per the figures available from the balance-sheet. The Tribunal came to this conclusion on the basis of the decision of the Tribunal, Bombay Bench "E".

6. The contention of Mr. P.R. Ramachandra Rao, the learned counsel for the assessee, are these : (1) The expression used in Rule 19A(3), prior to the amendment of the said rule in 1972, is "debts due" and not "debts owed" by the assessee and in view of the amendment made by the legislature, the view expressed by the Supreme Court in *Kesoram Industries and Cotton Mills Ltd. Vs. Commissioner of Wealth Tax, (Central) Calcutta*, is not applicable; (2) Rule 19A(3) cannot over ride, abridge or take away the benefit conferred by Section 80J of the Act and, as such, Rule 19A(3) is ultra vires; and that the rule must yield to the statutory provision.

7. Mr. Rama Rao, the learned counsel appearing for the revenue, submitted that it is not open to the assessee to raise the question of vires of the rule in a reference to this court by the Tribunal and besides, that question was not raised by the assessee or decided by the Tribunal and, therefore, this court cannot go into questions which are not the subject-matter of reference.

8. Mr. P.R. Ramachandra Rao invited our attention to two decisions, one is of the Calcutta High Court in *Century Enka Ltd. Vs. Income Tax Officer, "D" Ward and Others*, and the other is of the Madras High Court in *Madras Industrial Linings Ltd. Vs. Income Tax Officer and Others*, to contend that this court would be entitled to go into the question whether the rule should yield to the statutory provision. A single judge of the Calcutta High Court in *Century Enka Ltd. Vs. Income Tax Officer, "D" Ward and Others*, has no doubt held that Rule 19A(3) is violative of the authority given u/s 80J of the Act and is not carrying out "the purposes of the Act ". The learned judge was of the opinion that Rule 19A(3), in so far as it directs exclusion of borrowed capital except from the approved sources, is ultra vires, being beyond the power of the rule-making authority. This decision was relied upon by a Division Bench of the Madras High Court in *Madras Industrial Linings Ltd. Vs. Income Tax Officer and Others*, . The learned judges were of the view that Sub-rule (3) of Rule 19A does not prescribe any manner of computation of the capital employed but is a provision which enables deduction being made from the capital employed of certain amounts specified and that the section does not warrant any such rule being made nor does it confer any power on the rule-making authority to make any such provision. In their view, the framing of such a rule is not for carrying out the purposes of the Act and the rule-making authority cannot amend the provisions of the Act. It is of course well settled that the rule-making authority cannot amend the provisions of the Act. But it should be remembered that the Calcutta and Madras High Courts had not

expressed their opinion regarding the vires of Rule 19A(3) in a case referred u/s 256(1) of the Act. The vires of the rule was challenged before them under Article 226 of the Constitution. It should be borne in mind that, in answering the questions referred to us, this court is not exercising its jurisdiction under Article 226 of the Constitution. Nevertheless, it is contended by Mr. P.R. Ramachandra Rao that this court, even in a case of reference, can go into the challenge that the rule is ultra vires. The learned counsel relied upon the decision of the Jammu & Kashmir High Court in Commissioner of Income Tax Vs. Shri Krishen Chand Charitable Trust, to which reference has also been made by Palkhivala in his Law and Practice of Income Tax, Vol. I, 7th Edn., at page 1156. No doubt, the learned judges there have stated that the scope of the section, which provides for exemption, was restricted by the rule and that the exemption granted by that section cannot be taken away by the rule. It is true that that was also a case of reference under the Act; but it does not appear that the attention of the learned judges was invited to the decisions of the Supreme Court in K.S. Venkataraman and Co. Vs. State of Madras, ; C.T. Senthilnathan Chettiar Vs. State of Madras, and Kanpur Vanaspati Stores v. CST [1973] 32 STC 655. Mr. Ramachandra Rao, in this connection, invited our attention to the decisions in Navinchandra Mafatlal Vs. The Commissioner of Income Tax, Bombay City, , Commissioner of Income Tax Vs. Sardar Lakhmir Singh, , PUNJAB DISTILLING INDUSTRIES LTD. Vs. COMMISSIONER OF Income Tax, PUNJAB., A. H. Wadia v. CIT [1949] 17 ITR 63 and Wallace Brothers and Co. Ltd. v. CIT [1948] 16 ITR 240 where the challenge to the vires of the provisions was considered by the Supreme Court, Federal Court and the Privy Council. But it may be straightaway stated that all those cases were prior to the decision of the Supreme Court in K.S. Venkataraman and Co. Vs. State of Madras, . Subba Rao J. (as he then was), speaking for the majority, observed at page 131 of the report:

"The question of ultra vires is foreign to the scope of its jurisdiction. If an assessee raises such a question, the Tribunal can only reject it on the ground that it has no jurisdiction to entertain the said objection or decide on it. As no such question can be raised or can arise on the Tribunal's order, the High Court cannot possibly give any decision on the question of the ultra vires of a provision. At the most the only question that it may be called upon to decide is whether the Tribunal has jurisdiction to decide the said question. On the express provisions of the Act it can only hold that it has no such jurisdiction. The appeal u/s 66A(2) to the Supreme Court does not enlarge the scope of the said jurisdiction. This Court can only do what the High Court can..... Any assessment made on the basis of such a void provision cannot be a decision under the provisions of the Act. Briefly stated, the procedural machinery under the Act can be utilised only to decide disputes that arise under the substantive provisions of the Act which are not ultra vires.

The proposition that an authority constituted under the Act cannot, unless expressly so authorised, question the validity of the Act or any provisions thereof, is sound and is also supported by authority."

9. The learned judge explained the legal position in these terms at page 133 of the report:

"If a statute imposes a liability and creates an effective machinery for deciding questions of law or fact arising in regard to that liability, it may, by necessary implication, bar the maintainability of a civil suit in respect of the said liability. A statute may also confer exclusive jurisdiction on the authorities constituting the said machinery to decide finally a jurisdictional fact thereby excluding by necessary implication the jurisdiction of a civil court in that regard. But an authority created by a statute cannot question the vires of that statute or any of the provisions thereof whereunder it functions. It must act under the Act and not outside it. If it acts on the basis of a provision of the statute, which is ultra vires, to that extent it would be acting outside the Act. In that event, a suit to question the validity of such an order made outside the Act would certainly lie in a civil court."

10. This view was endorsed in the subsequent decision of the Supreme Court in *C.T. Senthilnathan Chettiar Vs. State of Madras*, . In that case, the appellant was not allowed to question the vires of Section 9(1) of the Madras Agrl. I.T. Act, 1955, since the question could not be raised before the agricultural Income Tax authorities and neither the High Court nor the Supreme Court could go into that question in a revision or reference from the decision of those authorities. In *Kanpur Vanaspati Stores v. CST* [1973] 32 STC 655 the Supreme Court, following the earlier cases, reiterated the legal position thus (p. 660) :

"Further, it is now well settled by the decision of this court that no one can challenge the validity of a provision of an Act or rule made thereunder or even a notification issued either under the Act or under the Rules made before the authorities constituted under the Act. It is true as contended by Mr. Gupte that these decisions were rendered long after 1962, but the fact remains that the decisions in question merely interpret what the law is."

11. We must, therefore, hold that this court cannot go into the challenge of the assessee that Rule 19A(3) is ultra vires and beyond the competence of the rule-making authority.

12. The learned counsel next contended that he would be entitled to canvass before us that Rule 19A(3) should yield to Section 80J.

13. It should be borne in mind that Rule 19A provides that, for purposes of Section 80J, the capital employed in an industrial undertaking will be computed as prescribed in Sub-rules (2) to (4). Sub-rule (3) provides for the deduction of the aggregate amount of the moneys borrowed or debts owed from the aggregate of the amounts ascertained in accordance with Sub-rule (2). Section 80J does not provide either for ascertainment of the amounts representing the value of the assets as on the first date of the computation period nor does it provide for deduction of the moneys borrowed or the debts owed. When the section itself does not provide for the manner in which the computation of the

capital employed in the industrial undertaking is to be made and says that it shall be "computed in the prescribed manner", the question of the rule yielding to the section does not arise. If the section has provided for the manner in which the capital employed in the industrial undertaking has to be computed and if what is provided in the rule is contrary to the manner prescribed in the section itself, then the manner of computation provided in the rule could be ignored, as indisputably the rule must yield to the section.

14. We would like to make it clear that it was not the case of the assessee, as now sought to be contended by Mr. Ramachandra Rao, before the Tribunal or any of the authorities below, that there was any conflict between Rule 19A(3) and Section 80J regarding the manner in which the capital employed should be computed, nor had the assessee questioned the power of the rule-making authority to make the rules. The point urged before the AAC by the assessee was that, in the computation of capital employed pursuant to Rule 19A, the liabilities to be deducted should only be in respect of "debts due" at the commencement of the year as required by the rules and not "debts owed" by the assessee. The controversy before the AAC and before the Tribunal was over the interpretation to be given to the words "debts owed by the assessee". It was only the interpretation of the rule that was in issue and decided by the AAC and the Tribunal. The question that Rule 19A(3) should be ignored and that, for purposes of entitling the assessee to the benefit of deduction, only Section 80J should be taken into consideration was never raised. This court cannot permit the assessee to raise a new question or a new plea which has not been referred and which is not connected with the questions referred to us. In R. C. No. 18 of 1976 decided on 27th September, 1977 [Addl. Commissioner of Income Tax Vs. G.M. Omarkhan,], after referring to the relevant provisions of the Act, a Bench of this court, of which one of us (Obul Reddi C.J.) was a member, expressed the opinion that it is not open to an assessee or the Commissioner to move this court u/s 256(2) unless there was an application in the first instance under Sub-section (1) of Section 256 and the Tribunal had failed to make a complete statement of the case and draw up the question of law which really arises. It is not as if the assessee in this case had not sought reference u/s 256(1) and it is only at its instance that question No. 3 has been referred. It should also be borne in mind that the assessee had not questioned the power of the rule-making authority to make the rule. For the above reasons, we cannot permit the assessee to raise a question which has not been referred to us under the provisions of Section 256 of the Act. The next question to be considered is whether the Tribunal was right in interpreting the words "debt due" in the manner it did following the decision of the Bench of the Bombay Tribunal. Rule 19(3), as it stood prior to April 1, 1972, reads:

"19. Computation of capital employed in an industrial undertaking or a hotel.--... (3) Any borrowed money and debt due by the person carrying on the business shall be deducted and in particular there shall be deducted any debts incurred in respect of the business for Income Tax and super-tax or for advance

payments due under any provision of the Act..... "

15. The Bombay Tribunal noted the difference in language between the rule as it stood prior to April 1, 1972, and after amendment. The Tribunal then referred to the decisions of the Calcutta and Madras High Courts in *Century Enka Ltd. Vs. Income Tax Officer, "D" Ward and Others*, and *Madras Industrial Linings Ltd. Vs. Income Tax Officer and Others*, and observed that the learned judges there had occasion to deal with all aspects which were urged before them. So, it is because of the difference in language between Rule 19(3) as it stood prior to April 1, 1972, and Rule 19A(3) after amendment that the Bombay Tribunal found that the only and appropriate interpretation of the expression "capital employed in the industrial undertaking" has to be the total amount invested in the assets of the undertaking. In view of that finding, the Tribunal held that the provisions of Rule 19A(3) are in conflict with the provisions of Section 80J(1). The Tribunal, therefore, accepted the contention of the assessee therein that, in determining its capital, the borrowed capital shall not be excluded from the computation.

16. For the reasons already recorded, we must hold that the Tribunal was in error in law in not following the decisions of the Supreme Court as to the jurisdiction of the Tribunal to determine the question of the vires of the rule which was challenged before it.

17. Section 80J provides for allowing deductions on the capital employed in an industrial undertaking. The computation of the capital employed in the industrial undertaking has to be made in accordance with and in the manner prescribed in Rule 19A. Sub-rule (1) of the said rule lays down that the capital employed in an industrial undertaking or the business of a hotel shall be computed in accordance with Sub-rules (2) to (4). Sub-rule (2) only speaks of the aggregate of the amounts representing the values of the assets as on the first day of the computation period of the undertaking or of the business of the hotel and also provides for the mode of ascertainment of the capital employed. Sub-rule (3), with which we are now concerned, says that from the aggregate of the amounts as ascertained under Sub-rule (2), the borrowed moneys and debts owed by the assessee as on the first day of the computation period shall be deducted. According to Mr. Ramachandra Rao, the words "debts owed by the assessee" should mean the debts due and payable as on the first day of the computation period. It is not in dispute that, in this case, the first day of the computation period is January 1, 1968. We do not get from the words "debts owed" or "debts due" that the debts should be due and payable as on the first day of the computation period. The fact that the words "debts due" have been so amended as to read "debts owed", in our opinion, makes no difference. The word "due", as defined in Chambers' Twentieth Century Dictionary (revised edn.), means "owed, that ought to be paid". The same meaning is given to the word "owe", viz., "to be under an obligation to repay or render ; to feel as a debt or as due".

18. In *Kesoram Industries and Cotton Mills Ltd. Vs. Commissioner of Wealth Tax, (Central) Calcutta*, , Subba Rao J. (as he then was), after an elaborate reference

of the English and Indian cases, observed (p. 780):

"There is no conflict on the definition of the word "debt". All the decisions agree that the meaning of the expression "debt" may take colour from the provisions of the concerned Act: It may have different shades of meaning. But the following definition is unanimously accepted :

"A debt is a sum of money which is now payable or will become payable in future by reason of a present obligation: debitum in praesenti solveridum in Juturo".

19. The learned judge also referred to the following passage from the judgment of the Supreme Court of California in *People v. Arguello* [1869] 37 Calif. 521 which was quoted with approval by Mookerjee J. (p. 779):

""Standing alone, the word "debt" is as applicable to a sum of money which has been promised at a future day as to a sum now due and payable. If we wish to distinguish between the two, we say of the former that it is a debt owing, and of the latter that it is a debt due. In other words debts are of two kinds : solvendum in praesenti and solvendum in futuro... A sum of money which is certainly and in all events payable is a debt, without regard to the fact whether it be payable now or at a future time, A sum payable upon a contingency, however, is not a debt, or does not become a debt, until the contingency has happened." "

20. It was, therefore, held by the Supreme Court that the expression "debt" also indicates that a debt owing is a debt payable in future. It also distinguishes a debt from a liability for a sum payable upon a contingency.

21. It was nowhere contended by the assessee that debts owed by it formed the liability for payment upon a contingency. Therefore, the expression "debt due" does not take in liability for payment upon a contingency. It is enough if it is payable in all events whether in praesenti or in futuro. It is the liability to pay the debt in praesenti or in futuro that is relevant and not the debt payable on the happening of a contingency. If there was a debt due existing at the first day of the computation period, the fact that it was payable later makes no difference. The debt due need not be payable as on the date of computation period. We, therefore, hold that, to attract Rule 19A(3), it is enough if the debt was due at the date of the computation period and need not be payable on that date.

22. For the reasons recorded, we answer the first question in the affirmative and against the revenue and questions Nos. 2 and 3 in the negative and against the assessee. There will be no order as to costs. Advocate's fee Rs. 250.

23. Mr. Ramachandra Rao made an oral application u/s 261 of the Act for a certificate to appeal to the Supreme Court. We are unable to certify that this is a fit case for grant of a certificate to appeal to the Supreme Court. Oral application is rejected.