(1996) 08 RAJ CK 0009

In the Rajasthan High Court

Case No : Civil IT Reference No''s. 36-37 of 1989

Commissioner of Income Tax — APPELLANT

Vs

Wolkem (P.) Ltd. — RESPONDENT

Date of Decision : 09-08-1996

Acts Referred:
Income Tax Act, 1922 — Section 66, 66(1), 66(4)
Income Tax Act, 1961 — Section 256, 256(1), 256(2), 258, 28

Citation : (1997) 92 TAXMAN 346

Hon'ble Judges : M.G. Mukherji, Acting C.J.;V.G. Palshikar, J

Bench : Division Bench

Advocate : D.S. Shishodia and Sandeep Bhandawat, for the Appellant; N.M. Ranka, R.K. Yadav, Vineet Kothari and Anjay Kothari, for the Respondent

Judgement

M.G. Mukherji, Actg. C.J.

1. In D.B. Civil income tax Reference No. 36 of 1989, the revenue has preferred the following question by way of reference to this Court: Whether, on the facts and in the circumstances, the Tribunal was right in law in holding that refund of excise duty amounting to Rs. 35,696.66 was not in the nature of income u/s 28(iv) or u/s 41(1) of the income tax Act, 1961?

In D.B. Civil income tax Reference No. 37 of 1989, the following question was referred to this Court for our considered opinion:

Whether on the facts and in the circumstances, the Tribunal was right in law in holding that refund of excise duty amounting to Rs. 1,61,316 was not in the nature of income u/s 28(iv) or u/s 41(1) of the income tax Act, 1961?

2. The assessee Wolkem (P.) Ltd., Udaipur, is a private limited company, which carries on the business of exploiting Calcite and Wollastonite Mines and sells the same after converting them into powder. In the years under review, the assessee had credited its profit and loss account on account of excise duty refund of Rs. 35,696.66 and Rs. 1,61,836 received by it. The assessee initially had shown it as

an income in its return of income filed in the department. During the course of assessment proceedings, the assessee raised its claim that the refund of excise duty is not liable to be taxed as income and placed reliance on the decisions in Commissioner of Income Tax, Gujarat-I Vs. Alchemic Pvt. Ltd., and CIT v. Nathuabhai Desabhai [1981] 130 ITR 238 (MP).

3. In Alchemic (P.) Ltd.''s case (supra), the assessee was served with a notice for payment of excise duty paid by it, a part of which was recovered from its constituents. The assessee contended before the excise authorities that the duty was not payable by it and obtained a refund of the amount from them in a particular calendar year. The assessee credited this amount to its profit and loss account and claimed it as exempted on the ground that it was a casual receipt. This contention was rejected by the ITO, but the AAC accepted the assessee''s claim. On further appeal, it was contended on behalf of the revenue that the amount was taxable u/s 28(iv) of the income tax Act, 1961 (''the Act'') or in the alternative, it was covered by section 41(1) of the Act. The Tribunal held that before the claim could be considered u/s 41(1) some investigation would be necessary as the ITO had not considered the provisions of section 41(1) at all. As altogether a new case requiring extensive investigation into the facts was sought to be made out, the Tribunal held that it would not be proper to allow the Department to agitate this point. The Tribunal also held that section 28(iv) would not apply to the facts of the case and dismissed the appeal. On a reference, it was contended on behalf of the revenue that the Tribunal was not justified in refusing permission to raise the question whether the amount was assessable u/s 41(1). It was held that while the Tribunal declined to allow the revenue to go into the question arising u/s 41(1) on the ground that extensive investigation into the facts would be necessary, the Tribunal was sitting in the exercise of its jurisdiction. The considerations which led the Tribunal to its conclusion not to allow the revenue to raise the contention u/s 41(1), viz., the necessity to investigate into the facts, would also apply to the question whether the amount was assessable under the general principles underlying section 41(1). The Tribunal was justified in its conclusion that the question could not be considered from the point of view of section 41 (1) or the general principles underlying section 41(1). It was further held in this case that the provisions of section 28(iv) would not apply to the instant case where the amount had been received in cash and the amount so realized was not taxable u/s 28(iv).

4. In Nathuabhai Desabhai''s case (supra) it was held that the jurisdiction of the High Court in a reference u/s 256 of the Act, is only advisory and a question of law has to be answered within the ambit of this jurisdiction. However, the basic frame of the question cannot be altered nor the Court can embark on the other provisions of the Act to justify the chargeability or otherwise of a particular item of income. It is imperative that the question itself would arise out of the Tribunal''s order and this is possible only if all the necessary facts on which the order is based have been placed before the Tribunal. If those facts are not present, the Tribunal cannot refer to them and in such a case no question outside

the parameter of the case as presented before the Tribunal can be enquired into. Unless it is proved that an allowance or deduction has been made in the assessment in any previous year in respect of loss, expenditure or trading liability, it is not open to the revenue to refer to section 41(1) for charging tax on the receipt by the assessee by refund or otherwise of such expenditure in a subsequent year.

In Nathuabhai Desabhai''s case (supra), the assessee had collected sales tax from its constituents during certain assessment years and paid the same to the State Government. Later, the amount was refunded to the assessee during the previous year relevant to the assessment year as the levy was found to be illegal and unconstitutional. The ITO assessed the amounts of refund of sales tax as income u/s 41(1) in the assessment year on the ground that the amounts were allowed as deduction in the assessments of the assessee in the past. On appeal, the AAC held that no deduction was ever claimed by the assessee or allowed by the revenue during the previous years and, therefore, section 41(1) did not apply and the refund of sales tax could not be treated as income in the previous year. On a further appeal, the Tribunal affirmed the order of the AAC. On a reference, the Madhya Pradesh High Court held that the refund of sales tax could not be assessed as income u/s 41(1) in the previous year relevant to the assessment year and if the revenue''s contentions were to be accepted, the High Court would have to enquire into not only the taxability of the receipt but also about the year or years in which various amounts paid in numerous instalments could be chargeable to tax. There was no factual foundation for such an enquiry and, therefore, within the limited jurisdiction of the High Court u/s 256, the High Court could not make a general enquiry and answer the question in a way different from the one which had been posed and referred to the High Court by the Tribunal.

5. The claim was made by the assessee on the plea that though it raised on the customers the bills for the supply of the powder, which included the excise duty amount as well, it was specifically mentioned that this was being charged only as a precautionary measure and that the company was really contending that no excise duty was payable on it. However, the ITO arrived at the conclusion that the company had no intention of providing the names of the customers and of refunding the amount to the customers and had intention only to grab the amount which was clear from the fact that the amount was credited to the profit and loss account.

6. The view of the ITO was upheld by the Commissioner (Appeals). According to him, it was a receipt in the nature of revenue directly springing from day to day conduct of the business and taxable under normal commercial principles in computing the business income u/s 28 of the Act itself. The Commissioner (Appeals) also observed that in order to be fair to the assessee, as and when the amounts are refunded to the customers, the same was to be allowed in respect of the years. The order of the Commissioner (Appeals) not having satisfied the

assessee, it took the matter before the Tribunal. The Tribunal found that the process of conversion according to excise authorities was chargeable to excise duty. Against this contention of the assessee that it is outside the ambit of excise duty laws, the assessee along with its rate chart mentioned the terms and conditions for the sale which make it clear that ''applicable excise duty and sales tax will be charged extra'', excise duty was recovered along with the sale value of merchandise separately, excise duty so collected was credited to an account titled ''Central Excise Duty Deposit Account'', all amounts that were paid to the excise authorities under protest were debited to this account. This treatment was started some time in March 1976 and continued till December 1978 and in the years under reference the excise authorities came to the conclusion that the products dealt with by the assessee were exempt from the excise duty levied and, consequently, refunded the excise duty so deposited. While refunding the amount the excise authorities had refunded a certain amount directly to various parties from whom the amount was collected by the assessee and deposited by the assessee. The assessee furnished a detailed paper book wherein it included the rate chart, terms and conditions for the sale, photostat copies of the bills showing charging of the excise duty separately, copy of the Central Excise Duty Deposit Accounts for the period under review, copies of audited balance sheets and profit and loss accounts for the two years, details of advances recoverable for the years 31-12-1976 to 31-12-1979, details of claim of refund of excise duty, copy of Notification by which the excise duty was declared as not refundable, reconciliation statement of Central excise duty paid and refund received from the excise duty, list of customers to whom Central excise duty is refundable pertaining to period 18-6-1977 to 31-12-1978, party-wise summary of excise duty refundable to the customers on lumps from 1-3-1975 to 20-5-1978, copy of the letter to the Assistant Collector Excise, copy of letter from R.P. Sales Corpn. in respect of reimbursement of excise duty paid by them to the company under trust, etc.

7. The Tribunal ultimately observed that the department has not disputed that it was the income as such of the assessee and it was also not disputed that the amount was payable to several parties. The Tribunal further found that the department had sought to tax the amount of refund u/s 41(1) on the premise that the liability might not be ultimate and the same was to be appropriated by the assessee in which case it would escape tax altogether.

8. Being aggrieved by the order of the Tribunal, the revenue made a reference application u/s 256(1). Initially, there was a difference of opinion between the Members of the Tribunal, which was ultimately resolved by the Third Member who held that the conclusions arrived at by the Tribunal are mixed questions of law and fact and the reference was ultimately made. The reference is practically in respect of two years and covered by two separate reference orders and the questions posed in both the cases have already been delineated as above.

9. It is made clear from the findings of the Tribunal that it held that (i) the

assessee was not liable to tax u/s 28(iv) as regards cash amount; (ii) it could not be taxed u/s 41(1); (iii) there existed a liability to repay to various customers and the receipt does not bear the character of income. The Tribunal expressed its opinion that the apprehension of the department that most of the claim may not be paid, could not really form the basis for taxing the said refund as income of the assessee. The Tribunal found that the term ''Income'' was not exhaustively defined, but then it must have to be seen as to whether the receipts really did bear the character of income or not and ultimately reached a conclusion that the refund of excise duty was not liable to be taxed and, hence, its inclusion was, accordingly, deleted.

10. The assessee-respondent in its reply has already contended that the question formulated by the applicant was not a question of law, it being a pure question of fact. The Tribunal appreciated the evidence on record and on such appreciation came to the conclusion that the impugned amount was trust money with the assessee and was refundable to the dealers. It was not an income of the assessee. The Tribunal being the final fact-finding body could arrive at a conclusion on facts and its findings of fact were unassailable. The conclusion arrived at by the Tribunal was supported by the decisions and was in consonance with the rulings of the Supreme Court in Commissioner of Income Tax, West Bengal Vs. Tollygunge Club Ltd., and Commissioner of Income Tax (Central), New Delhi Vs. Bijli Cotton Mills (P.) Ltd., The view was also supported by the decision of this Court in Sukhdeo Charity Estate Vs. Commissioner of Income Tax, The ultimate stand taken by the assessee-respondent was that no referable question of law did arise out of the order of the Tribunal.

11. It has to be borne in mind that after the question was referred for consideration of this Court, the applicant-revenue did not raise any objection before the Tribunal as well as did not make any application u/s 256(2) before this Court. It was submitted by Mr. Ranka, the learned senior advocate appearing for the assessee-respondent, that in totality of the circumstances and on account of inaction or non-action and for the reason that remedy available to the applicant not having been availed of within 180 days from the date of receipt of statement of the case a fresh request made on 4-4-1996 while the reference application was heard out that this Court should require the statement to be amended u/s 258 is a stand much too belated. A reference could be made u/s 258 of the Act for requiring the statement to be amended, only if we are satisfied that the statements already made are not sufficient to enable us to determine the question raised thereby. We may refer the case back to the Tribunal for the purpose of making such additions thereto or alterations therein as we may direct in that behalf.

12. Mr. Ranka further submitted that this Court cannot ask the Tribunal to state a case on a question which the Tribunal has not referred to and thus impliedly refused to refer. The Supreme Court in Kamlapat Motilal Vs. Commissioner of Income Tax, Uttar Pradesh and V.P., has held that section 258 cannot obviously

do service for section 256(2). If the assessee was dissatisfied with the order of the Tribunal refusing to state a case on certain questions, the clear duty of the assessee was to move the High Court for making a reference within the time allowed by law. If we, on the other hand, took resort to the other provisions where the High Court or the Supreme Court was not satisfied that the statements were sufficient to enable it to re-determine the question raised thereby, it might refer the case to the Tribunal for the purpose of making such additions thereto or alterations therein as it might direct in that behalf and this really is not called into play in such matters. The Supreme Court in Lakshmiratan Cotton Mills Co. Ltd. Vs. Commissioner of Income Tax, Uttar Pradesh, held that the power u/s 66(4) of the Indian income tax Act, 1922 might be exercised to call for a supplementary statement only when the Court is satisfied that the statements in a case referred u/s 66(1) and (2) were not sufficient to enable it to determine the question raised by the statement. Section 66(4), now section 258, did not confer a power to raise any additional questions or to call for a statement of case on questions not referred by the Tribunal. The Supreme Court in C.P. Sarathy Mudaliar Vs. Commissioner of Income Tax, Andhra Pradesh, held that in a reference u/s 66 the High Court can exercise advisory jurisdiction and it does not sit in appeal over the judgment of the Tribunal. If the High Court finds that the material facts are not stated in the statement of the case or the Tribunal has not stated its conclusions on material facts, the High Court may call upon the Tribunal to submit a supplementary statement of the case u/s 66(4); but the High Court has no power to set aside the order of the Tribunal even if it is of the view that the Tribunal has not considered the question which in its opinion should have been considered and the High Court must answer the question posed before it and, thereafter, it is the duty of the Tribunal to pass such orders as are necessary to give effect to the judgment of the High Court. The Bombay High Court in Cursetji J. Dubash Vs. Commissioner of Income Tax, Bombay City II, observed that the High Court will not direct the Tribunal to make a supplementary statement of the case merely because the facts stated in the Statement of the case agreed to by the parties are challenged at the stage of the argument of the reference before the High Court. It is a well-settled proposition of law that the jurisdiction u/s 256 as exercised by the High Court is advisory, not appellate or revisional or writ and the High Court is to express its opinion only on the question of law as formulated and forwarded by the Tribunal u/s 256(1) or called for by the High Court u/s 256(2). The High Court has no jurisdiction to widen the controversy and to call for a supplementary statement of the case u/s 258 of the income tax Act when the applicant failed to object while finalisation of statement of the case by the Tribunal and if failed to make an application u/s 256(2) of the Act requesting the High Court to call for a reference on the question formulated by the applicant-revenue. The power of the High Court to re-frame the question and/or to call for a supplementary statement of the case is restricted to the question formulated and forwarded by the Tribunal u/s 256(1) or called for by the High Court u/s 256(2).

13. Mr. D.S. Shishodia, the learned senior advocate appearing for the department, sought to rely on the Supreme Court decision in Agha Abdul Jabbar Khan Vs. Commissioner of Income Tax, M.P., The Supreme Court in this decision expressed its view clearly that the High Court had no jurisdiction to raise new questions of law. The questions raised by it do not flow from the question referred to it for its opinion. The High Court''s power under the Act is only to give its opinion on the questions of law referred to it by the Tribunal. It cannot take into consideration the questions of law which have not been referred to it for its opinion. The observations of the Supreme Court that if the High Court thought that the question referred to it did not bring out the real point in issue, it was open to it to call for a fresh statement of the case and direct the Tribunal to submit for its opinion the real questions arising for decision as are indeed there, but such an exercise of jurisdiction is to be sparingly so done.

14. The decision of the Punjab and Haryana High Court in Mahabir Parshad Vs. Commissioner of Income Tax, as relied on by Mr. Shishodia is also inapplicable on the facts of the present case and the principles enunciated in that case are not called into play. In that case, the Tribunal had forwarded the question which was wide enough and general in nature and the High Court was of the opinion that the question of law referred to the Court cannot be decided on the facts found by the Tribunal and it would be necessary to ask the Tribunal to submit a supplementary statement of the case on certain points as such. The High Court, accordingly, called the Tribunal to submit a supplementary statement of the case on two points. It did not re-frame the question and did not widen the controversy. It restrained itself to the question forwarded to it for its opinion.

15. We are constrained to hold that the question forwarded to this Court is really very specific and requires interpretation and construction of the provisions contained in sections 28(iv) and 41(1) only. The High Court has not been requested to express its opinion on the wider question of nature of income or taxability under the provisions, apart from what are provided in the two specific sections 28(iv) and 41(1). We are of the considered view that section 258 confers power on this Court to reframe the question so as to widen the controversy and to call for a supplementary statement of the case, more so when the facts of the present case do not justify exercise of such a power.

16. Mr. Ranka drew our pointed attention to the statement of the case as made by the Tribunal. As per the rules of the Tribunal, the paper book has to be submitted in triplicate and two copies are retained by the Tribunal for the two Members and one copy is provided to the respondent. In this case, the paper book was duly provided and it was not objected to on behalf of the revenue. It was considered by the Accountant Member who subscribed to the main order.

17. Last but not the least we answer the question by holding, inter alia, that section 28(iv) is not applicable and we rely in this context on the decision in Alchemic (P.) Ltd. s case (supra). We are further of the opinion that section 41(1) is also not called into play and in reaching such conclusion we have taken into

account the following decisions:-

(a) Nathuabhai Desabhai''s case (supra).

(b) Commissioner of Income Tax, Tamil Nadu-III Vs. Thirumalaiswamy Naidu and Sons.,

(c) Commissioner of Income Tax Vs. Sita Ram Sri Kishan Das,

(d) Commissioner of Income Tax, Andhra Pradesh Vs. Devatha Chandraiah and Sons,

(e) Commissioner of Income Tax Vs. A. Tosh and Sons (P.) Ltd.,

(f) Commissioner of Income Tax Vs. Kharaiti Lal and Co.,

(g) Commissioner of Income Tax Vs. Lal Textile Finishing Mills (P.) Ltd.,

(h) Commissioner of Income Tax Vs. Ancherry Pavoo Kakku,

(i) Commissioner of Income Tax Vs. East Asiatic Co. India Pvt. Ltd.,

(j) Commissioner of Income Tax Vs. Tara Chand Suraj Mal,

18. Making of entry in the books of account or transferring to Profit and Loss Account for the assessment year 1980-81 was an unilateral action, which has no consequences of its own and in this perspective we rely upon the decisions in Sutlej Cotton Mills Limited Vs. Commissioner of Income Tax, Calcutta, , J.K. Chemicals Ltd. Vs. Commissioner of Income Tax, Bombay City-II, Commissioner of Income Tax, Bombay City-VI Vs. Sadabhakti Prakashan Printing Press (P.) Ltd., , Commissioner of Income Tax Vs. Sugauli Sugar Works P. Ltd., , Commissioner of Income Tax Vs. A.V.M. Ltd., Commissioner of Income Tax Vs. B.N. Elias and Co. (P.) Ltd., Commissioner of Income Tax Vs. Sadul Textiles Ltd., and COMMISSIONER OF Income Tax Vs. COMBINED TRANSPORT CO. PVT. LTD., .

19. Diversion at source on account of overriding title, where the deposit was of the nature of trust fund, does not really amount to revenue receipt. The liability for payment to the Central excise or/and to return to the customer really takes the entire matter to the perspective of a financial transaction and it does not amount to trading receipt.

20. We answer the questions thus that in our view the refund of excise duty received by the assessee from the Excise Department is not the income of the assessee and since it is not an income, it is neither covered by section 28(iv) nor section 41(1) and it will be considered to be not a revenue receipt. On account of it, there is no liability for payment of income tax. It amounts to only a financial transaction and nothing beyond. Both the references stand answered accordingly.

