
(1973) 01 RAJ CK 0001

In the Rajasthan High Court

Case No : Income Tax Reference Application No's. 141 and 151 of 1972

Gopal Krishan Joshi

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 22-01-1973

Acts Referred:

Income Tax Act, 1961 — Section 145, 256, 256(2)

Citation : (1975) 101 ITR 260 : (1973) WLN 289

Hon'ble Judges : M.L. Joshi, J;B.P. Beri, J

Bench : Division Bench

Advocate : B.L. Purohit, for the Appellant; S.C. Bhandari and R. Balia, for the Respondent

Judgement

B.P. Beri, J.—These two applications u/s 256(2) of the Income Tax Act, 1961, are made by Gopal Kishan Joshi, an individual assessee, for the years 1965-66 and 1964-65, respectively.

2. The assessee is a confectioner carrying on business at Bikaner. He manufactures sweets and other eatables and also sells confectionery articles which he purchases on wholesale from another merchant. He submitted his return -for the year 1965-66, showing gross turnover in the sum of Rs. 2,34,576. Breaking up the aforesaid amount the assessee said that the sweets manufactured by him amounted to Rs. 75,000 and those that were purchased by him amounted to Rs. 1,59,576. According to the assessee the gross profit rate of the confectionery manufactured by him was 17.5% and for the one that was purchased by him it was 8"5%, yielding an average profit of 11.2%. The Income Tax Officer, not finding the books of account entirely reliable, estimated the turnover at Rs. 2,50,000 and calculated the average rate of profit at 17.5% and taxed the assessee accordingly. An appeal was taken before the Appellate Assistant Commissioner. He reduced the gross turnover to Rs, 2,44,000 and reduced the average rate to 15% profit. A second appeal before the Income Tax Tribunal, Jaipur Bench, was preferred and it was urged that the total turnover of

the assessee should be bifurcated into one relating to the confectionery manufactured by the assessee and sold by him and the other which he had only sold after purchasing it from elsewhere. The Tribunal for the purposes of calculation yielded to this request and, firstly, it reduced the total gross turnover to Rs. 2,40,000 and treating the portion relating to the confectionery manufactured by the assessee at Rs. 75,000, the profit rate assessed by the Tribunal was 20%. Regarding the sale of the confectionery which was purchased by the assessee and sold by him, the turnover was taken at Rs. 1,65,000 and the rate applied to it was 10% resulting in an average at 13.1%.

3. For the year 1964-65, the assessee disclosed the total turnover of Rs. 1,91,554 and the gross profit according to the assessee was 9.5%. His calculation was based on the break-up of Rs. 75,000 relating to the confectionery manufactured and sold by the assessee and Rs. 1,16,000 as the confectionery which the assessee had purchased and sold. The rate of profit according to the assessee was 17.5% in regard to the confectionery which he had manufactured himself and 8.5% in regard to the confectionery which he had purchased and sold. The average rate worked out at 9.5%. The Income Tax Officer not relying on the assessee's books of account estimated the assessee's total turnover to be Rs. 2,10,000 and the rate of profit at 17.5%. On appeal, the Appellate Assistant Commissioner reduced the estimate to 15% profit and the total turnover to Rs. 2,03,000. In second appeal before the Tribunal, Jaipur Bench, the total turnover was reduced to Rs. 2,00,000 and the confectionery manufactured by the assessee was at the request of the assessee separated from his total turnover and taken to be at Rs. 75,000 and that which was purchased and sold by him at Rs. 1,25,000, The Tribunal fixed the profit in regard to the confectionery made by the assessee at 20% and that which was purchased and sold by him at 10%, the average coming to 13.75%.

4. In regard to both the assessment years the assessee requested the Tribunal to make a reference to this court of the following four questions, namely :

"1. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was justified in increasing the gross profit rates from 15% or 17.5% to 20% for Rs. 75,000 representing the sales of the sweets manufactured by the assessee himself ?

2. Whether the Appellate Tribunal was competent to increase the rate of gross profit on Rs. 75,000 representing the sales of the sweets manufactured by the assessee himself without affording an opportunity to the assessee for showing cause against the same ?

3. Whether the Appellate Tribunal was competent to increase the rate of gross profit assessed by the Income Tax Officer and the Appellate Assistant Commissioner in the absence of an appeal by the department against the gross rate fixed by the Income Tax Officer and the Appellate Assistant Commissioner of Income Tax ?

4. Whether the increase of the rate of gross profit from 15% or 17.5% to 20% was not supported by any evidence on the record and whether the absence on the record of any evidence makes the order of increase of the rate bad in law ?"

5. The Tribunal declined to refer any one of the four questions to this court u/s 256(1) of the Act on the ground that there was no enhancement of tax and as a matter of fact the Tribunal observed that the tax liability in both the years aforesaid had been reduced by Rs. 3,000 and Rs. 5,100 respectively. Hence, the assessee has come up before us.

6. Mr. B. L. Purohit appearing for the assessee urged that at this stage all that the court was required to consider was whether a question of law arose out of the order of the Tribunal and not what the fate of such question will be. He submitted that as for the increase of rate in regard to the confectionery manufactured by the assessee the Tribunal increased it from 15% or 17.5% to 20% without there being any evidence on record and this according to his submission amounted to a question of law which deserved to be referred. He relied on *Dhirajlal Girdharilal Vs. Commissioner of Income Tax, Bombay*, , *SREE MEENAKSHI MILLS LIMITED Vs. COMMISSIONER OF Income Tax, MADRAS.*, , *Omar Salay Mohamed Sait Vs. Commissioner of Income Tax, Madras*, , *JONNALAGADDA YEDUKONDALA RAO Vs. COMMISSIONER OF Income Tax, HYDERABAD.*, and *BAJRANGBALI ENGINEERING CO. PVT. LTD. Vs. COMMISSIONER OF Income Tax, WEST BENGAL.*, .

7. Mr. S. C. Bhandari, learned counsel for the revenue, urged that the total liability of the assessee having been, in point of fact, reduced, it was erroneous to urge that the Tribunal had enhanced any tax. He placed reliance on *The Commissioner of Income Tax Vs. Mcmillan and Co.*, The question relating to the calculation of the flat rate in the absence of reliable account books as envisaged by Section 131(5), equal to the proviso to Section 145(1), was the question relating to the flat rate and such a question was basically a question of fact and it did not give rise to any question of law. He placed reliance on *Feroz Shah v. Income Tax Commissioner* [1933] 1 ITR 219 . In this context he also urged that the Tribunal has actually reduced the tax from 17.5--15% in 1965-66 to 13.1 --13.75% in 1964-65. In all fairness to the assessee the order of the Tribunal disclosed the process of calculating the flat rate on the total benefit accruing to the assessee. If the Tribunal had merely said without breaking up that it had reduced the flat rate of profit to the aforesaid two figures probably there would not have been any ground or reason for raising a question of law. Lastly, he urged that the four questions which are required to be referred do not arise from the order of the Tribunal because no contest was raised in this behalf before the Tribunal and, therefore, according to the fourth test laid down by their Lordships of the Supreme Court in *Commissioner of Income Tax, Bombay Vs. Scindia Steam Navigation Co. Ltd.*, such a question cannot be required to be referred u/s 256(2) of the Act. The exact words of Section 256(1) which fall for our consideration are "any question of law arising out of such order" of the Tribunal.

It is in this situation that the Tribunal has to make a reference to the High Court failing which the High Court may require the Tribunal to make a reference. The principles relating to the interpretation of these words are to be found in Dhirajlal's case which lays down that if the court of fact whose decision on a question of fact is final, arrives at a decision of fact by considering material which is irrelevant to the enquiry, or by considering material which is partly relevant and partly irrelevant or bases its decision partly on conjectures, surmises and suspicions and partly on evidence, then in such a situation clearly an issue of law arises. To the same effect is the pronouncement in Omar Salay Mohamed Sait v. Commissioner of Income Tax. The principles enunciated in Sree Meenakshi Mills Ltd. v. Commissioner of Income Tax and summed up in the head-note deserve recall:

"(1) When the point for determination is a pure question of law such as construction of a statute or document of title, the decision of the Tribunal is open to reference to the court [Section 66(1)].

(2) When the point for determination is a mixed question of law and fact, while the finding of the Tribunal on the facts found is final, its decision as to the legal effect of those findings is a question of law which can be reviewed by the court.

(3) A finding on a question of fact is open to attack u/s 66(1) as erroneous in law when there is no evidence to support it or if it is perverse.

(4) When the finding is one of fact, the fact that it is itself an inference from other basic facts will not alter its character as one of fact."

8. I.C.I. (India) Private Ltd. Vs. The Commissioner of Income Tax, West Bengal, reiterates these principles. Jonnalagadda's case merely declares that any capricious fixation of rate adopted by the Appellate Tribunal was not sustainable in law. The concentrated attack of the learned counsel for the assessee before us is that there was no evidence to sustain the rate of 20% on the confectionery which was manufactured by the assessee. It is not disputed that the assessee placed before the taxation authorities its own account books and they were not found reliable and, therefore, the Income Tax Officer, the Appellate Assistant Commissioner and the Tribunal have acted under the provisions of Section 145(1) and the proviso thereto and this part of the decision has not been challenged. The only question is whether adopting such basis for the determination of the rate of tax of the assessee could be called as a determination without any evidence ? Could it be characterised as based on mere conjecture, suspicion or based on surmises ? Could it be called capricious ? The answer, in our opinion, is firmly in the negative. The flat rate when it is calculated on the basis of the available data cannot be called arbitrary or perverse. It has been said by the Tribunal that Chhotu Motu, the firm, from whom the assessee before us bought manufactured confectionery and sold it made a profit of 19% and the assessee made a profit of 10% which has been charged by the Tribunal and against which there is no grievance. Therefore, at least up to 19% there is

clear evidence about the flat rate being just. If the Tribunal made it 20% we are unable to call it capricious, conjectural or based on "irrelevant or no evidence. A question relating to the flat rate as held by the Privy Council in Feroz Shah's case is a pure question of fact. Although from the language of the questions which are asked to be referred to this court the grievance of enhancement is there yet it was not pressed before us. Therefore, it is not necessary to enter into the question whether the tax was enhanced because it is factually incorrect to say that the total liability of the assessee was increased. The case in point is Commissioner of Income Tax v. McMillan & Co. In our opinion, it is not necessary to enter into the argument whether the question arises from the order of the Tribunal or not because we are clearly of the opinion that no question of law arises in this case.

9. The applications fail and are dismissed with costs.