

(1957) 10 BOM CK 0004

In the Bombay High Court

Case No : Income-tax Reference No's. 39 and 44 of 1956

In Re: Trikamlal Maneklal

Date of Decision : 08-10-1957

Acts Referred:

Income Tax Act, 1922 — Section 33(4)

Citation : (1958) 33 ITR 725

Hon'ble Judges : Shah, J;H.R. Gokhale, J

Bench : Division Bench

Advocate : M.P. Amin, for the Appellant; N.A. Palkhivala, for the Respondent

Judgement

Shah, J.—The Income Tax Appellate Tribunal has referred the following two questions for decision to us :

"(1) Whether on the facts and in the circumstances of the case the question regarding allowability of the interest of Rs. 9,307 could be agitated by the Department before the Tribunal hearing the appeal after the order dated 12th January, 1954 ?

(2) If the answer to the first question is in the affirmative, whether on the facts and in the circumstances of the case the interest of Rs. 9,307 was an admissible deduction u/s 12(2) of the Indian Income Tax Act ?"

2. The facts which give rise to the two questions may be briefly set out. The assessee was assessed in the year 1951-52 for the accounting year Samvat year 2006 in respect of income from business in speculation, salary from Ind. Corporation Limited and T. Maneklal Ltd., income from partnership business in the names of Messrs. T. Maneklal Manufacturing Co. and T. Maneklal Ltd., and income from "other sources" such as interest, director's fees and net dividend. Against his income from "other sources" the assessee claimed a deduction of Rs. 9,464 being the interest paid on the capital of Rs. 1,80,000 borrowed for payment of Income Tax liability. This claim of the assessee was disallowed by the Income Tax Officer. The assessee appealed to the Appellate Assistant Commissioner. The Appellate Assistant Commissioner also disallowed the claim,

and the matter was brought in the appeal before the Income Tax Appellate Tribunal. It was contended before the Tribunal that the deduction claimed was allowable as the capital borrowed even though utilised for payment of tax liability was instrumental in not disturbing the protective assets, i.e., capital of the firm which was utilised for the purpose of earning income from other sources. The Tribunal accepted the contention of the assessee but observed that it was not in a position to verify the balance-sheet dated 31st March, 1951, produced before it. The Tribunal then proceeded to pass an order setting aside the order of the Appellate Assistant Commissioner and directed that officer to take the appeal again on his file and to dispose of it on the merits. The Tribunal also passed a formal order allowing the appeal.

3. Against this order no application was made for reference to this court u/s 66 of the Indian Income Tax Act. Pursuant to the order of remand, the Appellate Assistant Commissioner again took up the case on his file and verified the entries in the balance-sheet and held that the claim for deduction of Rs. 9,307 as interest paid on the capital borrowed was allowable. Against the order of the Appellate Assistant Commissioner, the Income Tax Officer appealed to the I Tribunal. Before the Tribunal the quantum of interest to be allowed was not contested but it was pleaded that deduction of interest claimed by the assessee could not be allowed u/s 12(2) of the Income Tax Act. That argument was founded on a decision of this court in *Bai Bhuriben Lallubhai v. Commissioner of Income Tax, Bombay*.

4. The Tribunal held that the question having been decided by its order dated 12th January, 1954, could not be reagitated in the appeal against the order of assessment wherein the claim for interest of the assessee was allowed. The Commissioner of Income Tax thereafter applied to the Tribunal for making a reference to this court u/s 66 of the Income Tax Act and the two questions which we have already set out above have been referred to this court.

5. Mr. Amin, who appears on behalf of the Commissioner has urged three contentions : (1) that the Appellate Tribunal was in error in assuming that a reference could be made u/s 66(1) of the Income Tax Act to this court against an order of remand which does not finally decide the question as to the liability of the assessee to pay the tax and in holding on that erroneous assumption that the question about the allowability of interest could not be reagitated; (2) that even if the order dated 12th January, 1954, was an order within the meaning of section 66(1) read with section 33(4) of the Income Tax Act, when the proceedings reached the Appellate Tribunal in appeal against the order of the Appellate Assistant Commissioner allowing interest to be deducted from income from other sources of the assessee, the Tribunal was bound to pronounce its decision in the light of the law declared by this court and to declare the liability of the assessee to pay tax accordingly; and (3) that the Tribunal was in exercise of its inherent jurisdiction entitled to reconsider its previous decision and was not bound by that decision if its earlier decision was erroneous in law. In our view,

these contention cannot be sustained.

6. Section 66(1) of the Income Tax Act provides in so far as it is material :

"Within sixty days of the date upon which he is served with notice of an order under sub-section (4) of section 33 the assessee or the Commissioner may, by application in the prescribed form..... require the Appellate Tribunal to refer to the High Court any question of law arising out of such order,....."

7. Section 33(4) provides that "the Appellate Tribunal may, after giving both parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, and shall communicate any such orders to the assessee and to the Commissioner." The expression used in section 66(1) and section 33(4) is "order", and there is nothing express or implicit in the context which supports the submission that the order passed by the Appellate Tribunal, against which an application for reference may be made, must be an order finally disposing of the assessment of the assessee. Sub-section (4) of section 33 confers upon the Appellate Tribunal the power to pass such orders on the appeal filed under sub-section (1) as the Tribunal thinks fit. The order may be one confirming the order of the Appellate Assistant Commissioner or setting aside the order of the Appellate Assistant Commissioner or remanding the proceeding to the Appellate Assistant Commissioner; and against all orders which, so far as the Tribunal is concerned, decide questions about the rights or obligations of the assessee, an application for making a reference u/s 66(1) may in our judgment lie. Our attention has not been invited to any decision of any court in India in support of the submission that the expression "order" used in sub-section (4) of section 33 and section 66(1) must be an order finally disposing of the assessment. It may be pointed out that by section 30 an appeal lies against an assessment made by the Income Tax Officer to the Appellate Assistant Commissioner and section 31 confers upon the Appellate Assistant Commissioner the power to make the orders set out in sub-section (3). The order which may be made may, inter alia, be an order confirming, reducing, enhancing or annulling the assessment or setting aside the assessment and directing the Income Tax Officer to re-assess the assessee; and an appeal which lies to the Appellate Tribunal u/s 33(1) is not an appeal against an order of assessment by the Appellate Assistant Commissioner but against any order which may be passed by that authority. If for the purpose of appeal to the Appellate Tribunal the expression "order" includes all adjudications specified in section 31(3) , we fail to see why the expression "order" used in sub-section (4) of section 33 and section 66(1) should have a connotation different from the connotation that it has in sub-section (1) of section 33.

8. The second argument advanced by Mr. Amin also in our judgment has no substance. By sub-section (6) of section 33 it is provided that "save as provided in section 66 orders passed by the Appellate Tribunal on appeal shall be final." If the expression "order" includes an order of remand, then the order of remand must also in our judgment be deemed to be final and it will not be open to the

Appellate Tribunal to permit the correctness of the order passed at an earlier stage to be questioned when the proceedings are brought again before it against the final order of assessment.

9. Our attention was invited to certain decisions in support of the contention that the Tribunal is bound to give effect to the state of law as it prevails at the date when the appeal against the final order of assessment by the Appellate Assistant Commissioner was brought before it. In *Kamakshya Narain Singh v. Commissioner of Income Tax, Bihar*, the Federal Court of India held that the Appellate Tribunal was bound to give effect to a Regulation which was enacted when the appeal of the assessee was pending before it and the Tribunal had to decide, and the Tribunal acted rightly in deciding, the appeal by applying the provisions of the Regulation passed during the tendency of the appeal. It appears that in that case the assessee who was residing in a "partially excluded area" was assessed on 14th February, 1940, to Income Tax for the accounting year 1938-39. The Governor of Bihar enacted Regulation 1 of 1941 which declared, inter alia, that the Indian Finance Act, 1940, should be deemed to have come into force in the area on 6th April, 1940. This regulation received the assent of the Governor-General on 13th June, 1941. It was subsequently discovered that the Indian Finance Acts of 1938 and 1939 were not applied to this area and therefore Regulation IV of 1942 was enacted which provided, inter alia, that the Indian Finance Act of 1938 and 1939 should be deemed to have come into force in this area on 26th March, 1938, and 30th March, 1939, respectively. This Regulation received the assent of the Governor-General on 30th June, 1942, and was expressly made retrospective. In the meanwhile the assessee had appealed to the Appellate Assistant Commissioner and his appeal was dismissed on 3rd March, 1942, and he appealed to the Appellate Tribunal. The Federal Court on these facts decided that Regulation IV of 1942 which was enacted when the appeal of the assessee was pending before the Appellate Tribunal was applicable to the assessment of the assessee and the Tribunal was bound to decide the appeal by applying the provisions of Regulation IV of 1942. We are unable to see how this case can have any application to the facts of the present case. That was a case in which during the pendency of an appeal a statute which was made expressly retrospective was brought into operation and the Appellate Tribunal was held bound to apply that statute. In the present case, the Tribunal decided the appeal on 12th January, 1954, and no application having been made within sixty days from the date on which the order was made, by the operation of sub-section (6) of section 33 that order became final and that finality of the order is not liable to be challenged merely because the Tribunal at a subsequent stage of the remand proceedings which are brought before it by way of an appeal is advised that the previous order was erroneous in law.

10. In *Commissioner of Income Tax v. Mahomed Yusuf Ismail* this Court considered the effect of section 34 of the Income Tax Act. It was observed by Sir John Beaumont, C.J., in delivering the principal judgment that in order to take action u/s 34, there must be some information as to a fact which lead the

Income Tax Officer to discover that income has escaped assessment or has been under-assessed and Mr. Justice Chagla (as he then was), observed that the word "discover" in section 34 does not mean a mere change of opinion on the same facts or on a question of law, or the mere discovery of a mistake of law. Evidently in this case the Tribunal is incompetent to reopen the assessment u/s 34 of the Income Tax Act. The proceedings which were pending in this case before the Tribunal were not proceedings u/s 34 : they were proceedings by way of an appeal u/s 33 of the Act and the authority of the Tribunal to allow a question which had been finally decided on a previous occasion in favour of the same assessee for the assessment year was in issue.

11. The decision of the Patna High Court in *Maharaj Kumar Kamal Singh v. Commissioner of Income Tax* merely affirmed the view that a decision of the Privy Council overruling a decision of the High Court is "definite information" within the meaning of section 34 of the Indian Income Tax Act, 1922, before its amendment in 1948. That decision in our judgment can again have no bearing in deciding the present case.

12. We are therefore of the view that the Tribunal was not entitled once having delivered a judgment, which had by the operation of law become final, to review its decision in proceeding for assessment for the same year in a subsequent appeal filed against the order made pursuant to its earlier direction.

13. The other argument that the court has an inherent power to review its earlier judgment based upon an erroneous view cannot, in our judgment, be countenanced, having regard to the express language used in section 33 of the Income Tax Act. It may be that if a court or a Tribunal decides a case before it on an assumption of fact and remands the proceeding to the court of first instance to decide it according to the view expressed by it, the court or Tribunal may be entitled to ignore the previous decision if it transpires that the previous decision was given on an assumption which cannot be sustained. See *Balvant Ramchandra v. Secretary of State*. But in the present case the earlier decision was not given by the Tribunal on any erroneous assumption of fact. The Tribunal considered the merits of the contention urged before it and arrived at a certain decision. That decision is made by Legislature final, and the Tribunal had no inherent authority to review that decision in the light of fresh arguments or authority.

14. In our judgment, the answer to the first question must be in the negative. The second question does not fall to be decided. The Commissioner to pay the costs of this reference to the assessee.

15. Income Tax Reference No. 44 of 1956.

16. In this case the facts which give rise to the reference are practically identical with the facts in the reference which we have already disposed of. For reasons stated by us in disposing of the other reference we answer the first question in the negative; and on that view the second question does not arise not arise for

decision. The Commissioner to pay the costs of the assessee.

17. References answered accordingly.