

(1985) 02 MAD CK 0013

In the Madras High Court

Case No : Tax Case Petition No. 244 of 1984

Indian Textiles

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 06-02-1985

Acts Referred:

Income Tax Act, 1961 — Section 251, 254, 263, 35B, 35B(1)

Citation : (1986) 53 CTR 104 : (1986) 157 ITR 112

Hon'ble Judges : N.A. Sathar Sayeed, J;G. Ramanujam, J

Bench : Division Bench

Advocate : T.S. Ramu, for the Appellant; J. Jayaraman, for the Respondent

Judgement

Ramanujam, J.—In this petition filed u/s 256(2) of the Income Tax Act, 1961, the assessee seeks a reference to this court on the following

questions :

(i) Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the order u/s 263 a passed by the

Commissioner is valid in law ?

(ii) Whether the Tribunal was right in law and justified in modifying the order of the Commissioner and restoring the matter to the Income Tax

Officer when the appeal is against the order u/s 263 of the Income Tax Act, 1961 ?

(iii) Whether it is open to the Tribunal to restore the matter to the Income Tax Officer after having held that the Commissioner had failed to

positively establish that the expenditure on commission will not qualify for weighted deduction ?

(iv) Whether the Tribunal was right in law in not cancelling the disallowance of

weighted deduction on commission payments when their finding is that the Commissioner had failed to discharge the mandatory duties enshrined in section 263 of the Income Tax Act, 1961, by making a judicious enquiry before concluding that the relevant portion of the order of the Income Tax Officer relating to weighted deduction in respect of commission is erroneous and prejudicial to the interests of the Revenue ?

(v) Whether the Tribunal was right in law in restoring the matter to the Income Tax Officer to give a fresh period of limitation to the authorities

which has already expired, to fill up the lacuna, if any, omitted to be considered by the authorities ?

2. However, after going through the facts and circumstances of this case, we are not satisfied that the reference is called for on the above or any

one of the questions set out. The assessee, in this case, is engaged in the export of ready-made garments for the assessment year 1979-80. The

assessee deducted a sum of Rs. 2,16,061.72 as export markets development allowance u/s 35B(1). The working sheet annexed to the profit and

loss adjustment statement showed the following sums to make up a total of Rs. 6,48,185 as being eligible for deduction and supporting the claim

for one-third of such expenditure.

Rs. Rs.

1. Air freight insurance,
etc., incurred on carriage of goods
up to 31-3-1978 2,71,869.04

2. Commission paid outside
India on export sales 68,562.00

3. Commission paid inside
India on export sales 2,88,487.50 2,77,849.50

4. Postage and telegram
(Overseas) 3,403.35

5. Telephone charges (Overseas) 11,650.00

6. Travelling outside India 28,504.78

7. Bank charges on freight bill 53,188.89

8. Guarantee charges to CGC 2,519.60

6,48,185.16

3. The Income Tax Officer in the assessment order dated March 20, 1981, disallowed items relating to postage and telegrams, telephone charges

and bank charges totalling to Rs. 68,222 with the result that he added back a sum of Rs. 22,748 being one-third thereof and completed the

assessment. On a perusal of the said assessment order, the Commissioner felt that the assessment in so far as it gave relief in respect of expenditure

incurred on air freight, insurance, carriage of goods and also on commission paid in India on export sales which are not eligible for allowance,

issued a show-cause notice on March 1, 1983, u/s 263 of the Income Tax Act, proposing to revise the assessment and calling upon the assessee

to show cause against such proposal. The assessee filed his representation on February 14, 1983, stating that the allowance was properly granted

by the Income Tax Officer on the basis of the Circular No. 240 dated May 17, 1978, of the Central Board of Direct Taxes. The assessee also

gave a further reply on March 15, 1983, relying on another Circular No. 1382 dated January 29, 1980, in respect of admissibility of weighted

deduction of, commission payments. There was a further representation by the assessee to the Commissioner on March 16, 1983, stating that the

decision of this court in Commissioner of Income Tax, Tamilnadu-III Vs. Southern Sea Foods (P.) Ltd., , will not apply to the facts of the

assessee's case. The Commissioner, after considering the various representations made by the assessee, overruled the same and held by his order

dated March 17, 1983, that the grant of the relief in relation to Rs. 1,60,119 by the Income Tax Officer was not proper and, therefore, in that view

he directed the Income Tax Officer to amend the original order and issue a demand for the difference in tax. Aggrieved by the order of the

Commissioner, the assessee filed an appeal to the Tribunal contending that the Commissioner had no jurisdiction to pass the order in question u/s

263 of the Income Tax Act and that even otherwise, on the facts and in the circumstances of the case, the expenditure incurred on air freight,

insurance and carriage of goods will be eligible for weighted deduction u/s 35B(viii) as amended by section 8 of the Finance Act, 1970. Both the grounds of attack had been rejected by the Tribunal. The Tribunal held that the Commissioner was justified in invoking his original jurisdiction u/s 263 of the Income Tax Act as the grant of relief by the Income Tax Officer in relation to air freight, insurance and carriage of goods without verifying the facts is prejudicial to the Revenue and that is sufficient to sustain the jurisdiction of the Commissioner u/s 263 of the Income Tax Act.

The Tribunal, however, did not agree with the Commissioner that the assessee can be denied relief in respect of the said expenditure straightaway without further enquiry with reference to the judgment of this court in Commissioner of Income Tax, Tamilnadu-III Vs. Southern Sea Foods (P.) Ltd., . The Tribunal, therefore, allowed the appeal in part directing the Income Tax Officer to verify the facts in the light of the above decision of this court and finalise the assessment on the basis of such verification. Though the decision of the Tribunal on this aspect of the case was in favour of the assessee, the assessee, in view of the order of the Commissioner directing the disallowance of the relief claimed by the assessee on the expenditure of Rs. 1,60,119 being set aside instead of an order remitting the matter to the Income Tax Officer being passed, has chosen to file a reference application questioning the jurisdiction of the Commissioner u/s 263 of the Income Tax Act and the nature of the order passed by the Tribunal remitting the matter to the Income Tax Officer. According to the learned counsel for the petitioner, the Commissioner can invoke the revisional jurisdiction u/s 263 of the Income Tax Act only when he finds that the order passed by the Income Tax Officer is prejudicial to the Revenue and in this case as the order of the Commissioner directing the Income Tax Officer to deny the relief claimed by the assessee has been set aside, the order of the Income Tax Officer cannot be said to be prejudicial to the assessee. As already stated, in this case, the Income Tax Officer gave relief to the assessee in respect of certain matters which, according to the Commissioner, is not justified. Once that finding is reached by the Commissioner, the revisional jurisdiction u/s 263 of the Income Tax Act could be validly invoked by the Commissioner as part of the order passed by the Income Tax Officer is in his opinion prejudicial to the assessee. In this case, without any proper verification, the Income Tax Officer has

given relief, and that such an order being an order prejudicial to the Revenue, it could properly form the subject-matter of the revision u/s 263 of

the Income Tax Act by the Commissioner. The mere fact that subsequently the Tribunal modifies the order of the Commissioner as one remitting

the matter to the Income Tax Officer will not mean that the Commissioner has no jurisdiction to deal with the matter earlier u/s 263 of the Income

Tax Act. We are, therefore, in entire agreement with the view of the Tribunal that the Commissioner had jurisdiction to deal with the matter u/s 263

of the Income Tax Act. According to the learned counsel for the assessee, the Tribunal should have remitted the matter to the Commissioner and

such an order could not be taken exception to. But, in this case, the Tribunal has remitted the matter to the Income Tax Officer and such an order

cannot be sustained in law. We do not see how the Appellate Tribunal, which is acting as an appellate authority over the order of the

Commissioner passed u/s 263 of the Income Tax Act, could be taken to have no power to remit the matter to the Income Tax Officer sitting as an

appellate authority. In this case, it cannot be disputed that the Commissioner, acting u/s 263 of the Income Tax Act, can either set aside that

portion of the order of the assessing authority which is against the Revenue straightaway or he may remit the matter to the Income Tax Officer for

further enquiry after setting aside the relief given by him. Such a power which the Commissioner could exercise could also be exercised by the

appellate authority. We do not see any error in the order of the Tribunal giving a direction to the Income Tax Officer to consider the matter afresh

and pass an order with reference to the assessee's claim to the weighted deduction u/s 35B(1)(b)(iii).

4. It is significant to note that the assessee's claim for weighted deduction in respect of freight charges falling under item 3 has been set aside by the

Commissioner and that view has been accepted by the Tribunal and it is only in respect of other matters, the Tribunal has remitted the matter to the

Income Tax Officer. If at least in respect of one item the Income Tax Officer's order is found to be prejudicial to the Revenue, the initiation of the

proceeding by the Commissioner u/s 263 of the Income Tax Act cannot be questioned. We are not, therefore, inclined to direct a reference in this

case. This petition is, therefore, dismissed.