

(1979) 10 MP CK 0009

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 55 of 1978

JAORA SUGAR MILLS LTD.

APPELLANT

Vs

UNION OF INDIA AND ANOTHER

RESPONDENT

Date of Decision : 12-10-1979

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Income Tax Act, 1961 — Section 143, 246, 263

Citation : (1982) 134 ITR 385

Hon'ble Judges : Vijayvargiya, J;Vijayavrgiya, J

Bench : Division Bench

Judgement

VIJAYVARGIYA J. - This is a petition under arts. 226 and 227 of the Constitution of India.

The material facts giving rise to this petition are as follows : The petitioner is a limited company carrying on business at Jaora. The petitioner-company filed its return of income for the assessment year 1972-73 on July 31, 1972, the accounting year having ended on October 31, 1971. The ITO, respondent No. 3, completed the assessment on February 14, 1975, under s. 143(3) of the I.T. Act (hereinafter referred to as "the Act"). The respondent No. 3 allowed a rebate of Rs. 3,98,290 as admissible deduction being business expenditure. The rebate claimed by the company and allowed was at Rs. 10 per quintal paid to M/s. Madanlal Nandlal on the sales of sugar. The petitioner filed an appeal against the order of assessment to the AAC, Special Range, Indore, under s. 246(c) of the Act which was partly allowed on May 22, 1975. It is not in dispute that the claim for rebate made by the petitioner and allowed by the ITO was not the subject-matter of the appeal and the same was not considered by the AAC in appeal.

On December 20, 1976, the Commissioner of Income Tax issued a notice to the petitioner under s. 263 of the Act asking it to show cause why the order of assessment passed by the ITO, on February 14, 1975, be not revised as the same was erroneous and was prejudicial to the interests of the revenue. By its

reply dated January 2, 1977, filed on January 4, 1977, the petitioner showed cause and, after hearing the petitioner, the Commissioner by his order dated January, 1977, set aside the order of assessment dated February 14, 1975, passed by the ITO, Indore, on the ground that the ITO had not given due consideration before allowing the claim of the petitioner for the amount of rebate paid by it to M/s. Madanlal Nandlal and the said order was erroneous and was prejudicial to the interests of the revenue. The Commissioner directed the ITO to reconsider the claim after examining it in great detail and decide it according to law after giving an opportunity to the petitioner for being heard into the matter and to place all materials before him. The petitioner preferred an appeal against the order of the Commissioner to the Income Tax Appellate Tribunal, Indore Bench, which was dismissed by the Tribunal on November 15, 1977. The petitioner has filed this petition on January 28, 1978, challenging the notice dated December 20, 1976, issued by the Commissioner and the order passed by him in January, 1977, under s. 263 of the Act, the order of the Income Tax Appellate Tribunal dated November 15, 1977, and the notice dated November 7, 1977, issued by the ITO, respondent No. 3, pursuant to the order passed by the Commissioner under s. 263 of the Act.

The learned counsel for the petitioner contended that the Commissioner had no jurisdiction to proceed under s. 263 of the Act and to revise the order of assessment passed by the ITO because the said order of assessment was merged in the order passed by the AAC in the appeal preferred by the petitioner. He, therefore, submitted that the notice issued by the Commissioner under s. 263 of the Act and the final order passed by him and the order of Income Tax Appellate Tribunal in appeal and all other subsequent proceedings are void and deserve to be quashed by this court. The learned counsel for the petitioner also contended that the Commissioner did not initiate proceedings under s. 263 of the Act of his own motion but he acted at the dictates and on the direction of the IAC (Audit), Bhopal, and, therefore, the order passed by the Commissioner under s. 263 of the Act was invalid.

The learned counsel for the department contended that in the present case the order of assessment passed by the ITO in so far as it related to the allowing of the rebate paid by the petitioner to M/s. Madanlal Nandlal as business expenditure was not merged in the order passed by the AAC in appeal because the same was not a subject-matter of appeal and was not considered by the AAC and, therefore, the Commissioner had jurisdiction to initiate proceedings under s. 263 of the Act. He also contended that the Commissioner had acted on his own initiative and the allegation of the petitioner that he acted on the dictates of the IAC (Audit) has no basis whatsoever. The learned counsel for the department further contended that the petitioner having failed to avail of the normal remedy provided by the Act of applying to the Tribunal under s. 256(1) of the Act to state a case to this court, this petition under art. 226 of the Constitution is liable to be dismissed on this ground alone.

Having heard learned counsel for the parties we are of the opinion that this petition has no merit and deserves to be dismissed.

As regards the first question, as stated above, it is common ground that the question whether the ITO rightly allowed the claim of rebate paid by the petitioner to M/s. Madanlal Nandlal as business expenditure was not involved, and was not examined by the AAC, in the appeal preferred by the assessee. In the circumstances, the question of merger of the order of assessment passed by the ITO in the order of AAC passed in appeal does not arise. In *State of Madras Vs. Madurai Mills Co., Ltd.*, , the assessee filed a revision against the assessment order passed by the Dy. CTO to the Dy. CCT. The revision was dismissed. Thereafter, the Board of Revenue issued notice to the assessee stating that it proposed to revise the assessment order passed by the Dy. CTO, as it excluded certain taxable amount. The assessee raised an objection on the ground that the proceedings sought to be initiated by the Board of Revenue were time barred. The revenue contended that the order of the Dy. CTO was merged in the order of the Dy. CCT and the proceedings initiated by the Board were within limitation. On these facts, their Lordships of the Supreme Court held that there was no merger of the assessment order passed by the Dy. CTO with the order passed in revision by the Dy. CCT because the exemption which was allowed by the Dy. CTO in the order of assessment was not challenged before the Dy. CCT in revision. In that case, reliance was placed by the revenue upon a decision of the Supreme Court in *Commissioner of Income Tax, Bombay Vs. Amritlal Bhogilal and Co.*, , which has also been relied upon by the learned counsel for the petitioner in this case. The Lordships of the Supreme Court distinguished that case and held as follows (p. 683):

"But the doctrine of merger is not a doctrine of rigid and universal application and it cannot be said that wherever there are two orders, one by the inferior Tribunal and the other by a superior Tribunal, passed in an appeal or revision, there is a fusion or merger of two orders irrespective of the subject-matter of the appellate or revisional order and the scope of the appeal or revision contemplated by the particular statute. In our opinion, the application of the doctrine depends on the nature of the appellate or revisional order in each case and the scope of the statutory provisions conferring the appellate or revisional jurisdiction. For example, in *Commissioner of Income Tax, Bombay Vs. Amritlal Bhogilal and Co.*, , it was observed by this court that the order of registration made by the Income Tax Officer did not merge in the appellate order of the Appellate Commissioner, because the order of registration was not the subject-matter of appeal before the appellate authority. It should be noticed that the order of assessment made by the Income Tax Officer in that case was a composite order, viz., an order granting registration to the firm and making an assessment on the basis of the registration. The appeal was taken by the assessee to the Appellate Commissioner against the composite order of the Income Tax Officer. It was held by the High Court that the order of the Income Tax Officer granting registration to the respondent must be deemed to be

merged in the appellate order and that the revisional power of the Commissioner of Income Tax cannot, therefore, be exercised in respect of it. The view taken by the High Court was overruled by this court for the reason that the order of the Income Tax Officer granting registration cannot be deemed to have merged in the order of the Appellate Commissioner in an appeal taken against the composite order of assessment."

In the present case, the ITO allowed the claim of the petitioner for rebate said to have been paid to M/s. Madanlal Nandlal as business expenditure. The petitioner preferred an appeal against the other part of the assessment order by which it was aggrieved. As stated above the question whether the claim for rebate was rightly entertained by the ITO was not the subject-matter of appeal and was not considered by the AAC. In the circumstances, the ratio of the decision of the Supreme Court in *State of Madras Vs. Madurai Mills Co., Ltd.*, is clearly applicable to the present case and the contention of the learned counsel for the petitioner that the order of the ITO was merged in the appellate order and, therefore, the Commissioner had no jurisdiction to initiate proceedings under s. 263 of the Act has no substance and has to be rejected.

The Commissioner, respondent No. 2, has denied that he initiated proceedings under s. 263 of the Act at the dictates and/or direction of the IAC (Audit), as alleged by the petitioner. No material has been placed by the petitioner on record to suggest that the Commissioner has not acted on his own initiative and has acted on the dictates or direction of any other officer. It is difficult to appreciate how the Commissioner would act on the dictates of an officer who is subordinate in rank to him. In the circumstances, the second contention raised by the learned counsel for the petitioner has also no substance and the decision of the Supreme Court in *Sirpur Paper Mills Ltd. Vs. The Commissioner of Wealth Tax, Hyderabad*, relied upon by him, is not helpful to the petitioner. The facts of that case were entirely different.

There is another hurdle in the way of the petitioner. The order passed by the Commissioner under s. 263 of the Act was challenged by the petitioner in appeal before the Income Tax Appellate Tribunal. The appeal was dismissed. The petitioner had a remedy under s. 256(1) of the Act if he was aggrieved by the order of the Tribunal in appeal. The petitioner failed to avail of the same. The order of the Tribunal was passed on November 15, 1977, and this petition has been submitted on January 28, 1978, after the expiry of 60 days from the order of the Tribunal. It appears that either on account of the expiry of time for making an application under s. 256(1) of the Act or for some other reason best known to him the petitioner has chosen not to pursue the normal remedy and has filed this petition. It is not the case of the petitioner that the alternative remedy was not efficacious. No question of fundamental right is involved in the present petition. The petitioner has not explained in his petition how the remedy available under the Act is not suitable or efficacious. On the contrary, the petitioner has falsely stated in the petition that no other remedy was available to the petitioner. In the

circumstances, we are of the opinion that the petition is liable to be dismissed also on the ground that the petitioner had an alternative remedy available to him under the provisions of the Act.

The learned counsel for the petitioner contended that as this petition was initially entertained, it is not open to this court to dismiss it on the ground of availability of alternative remedy because the petitioner would not now be able to pursue the said remedy and would suffer great hardship. There is no merit in the said submission. It may be that in an appropriate case if it is shown that a party not at fault may suffer hardship on account of the dismissal of a petition on the ground of availability of alternative remedy by lapse of time, the court may in its discretion give relief to the petitioner in spite of the fact that an alternative remedy was available to him and may not dismiss the petition at the final hearing only on that ground. But such is not the case on hand. As state above, on the materials placed on record when this petition was filed, an application under s. 256(1) of the Act probably was already barred by limitation. Moreover, the petitioner falsely stated in the petition that no alternative remedy was available to the petitioner. In the circumstances, we see no valid reason why this petition should not be dismissed on the ground of availability of an alternative remedy.

As a result of the discussion aforesaid, this petition has no substance and is dismissed with costs. Counsels fee Rs. 200, if certified.