
(2003) 04 BOM CK 0067
In the Bombay High Court
Case No : IT Appeal No. 256 of 2001

J.N. Marshall and Co.

APPELLANT

Vs

Income Tax Officer and Another

RESPONDENT

Date of Decision : 24-04-2003

Acts Referred:

Income Tax Act, 1961 — Section 254(2), 260A

Citation : (2003) 183 CTR 603 : (2003) 264 ITR 690 : (2004) 134 TAXMAN 557

Hon'ble Judges : S.H. Kapadia, J;J.P. Devadhar, J

Bench : Division Bench

Advocate : Porus Kaka, P.K. Parida and K. Gopal, for the Appellant; R.V. Desai and P.S. Jetly, instructed by L.S. Shetty, for the Respondent

Judgement

S.H. Kapadia, J.

1. Being aggrieved by the order of the Tribunal dt. 29th Dec., 2000, in Misc. Appln. No. 219/Bom/1999, the assessee has come by way of appeal u/s 260A of the IT Act, In this appeal, we are concerned with the financial year ending 31st Dec., 1985, relevant to the asst. yr. 1986-87.

Facts

2. The assessee-firm is a trader in grinding wheels, cutting tools and ingot steels. For the year under consideration, the stocks were valued at Rs. 16,64,320. Referring to the assessment order for the earlier assessment year, the AO found that there was no evidence to show that the market value of the stock had gone down by Rs. 8,30,996 as claimed by the assessee. According to the AO, no stock register was produced to show that the items purchased by the assessee, three to four years before, were still lying with the assessee. Therefore, the AO added Rs. 8,30,996 to the total income of the assessee. The matter was carried in appeal to the CIT(A), who took the view that the method of valuation of the closing stock (which is described in detail by us in our order delivered today in IT Appeal No. 79 of 1999) was the consistent method of valuation followed by the

assessee right from asst. yr, 1965-66 and, therefore, the appeal came to be allowed. This method of valuation was followed by the assessee as the items were of small value and of short life. That, these items got rusted quickly and, therefore, the ageing process was taken into account by the assessee by writing down its value periodically. Being aggrieved, the Department carried the matter in appeal to the Tribunal. Before coming to the order of the Tribunal, we may also mention that in the statement of fact before the CIT(A), filed by the assessee, the addition of Rs. 8,30,996, to the value of the closing stock, was specifically challenged. In the statement of facts, it was specifically pointed out by the assessee that this addition to the value of the closing stock was wrongly made by the AO on the ground that the assessee could not produce "evidence to show that the market value of the stock had come down and that the assessee had failed to produce the stock register to show that the stock had been purchased long ago and was still lying with the assessee. The assessee specifically pleaded before the appellate authority that, the above allegation of the AO viz., that the assessee did not produce any evidence was uncalled for. According to the assessee, at no point of time, it was called upon to produce evidence. This was also the ground of appeal before the CIT, apart from the statement of fact. As stated above, the Department carried the matter in appeal to the Tribunal against the order of the CIT(A) allowing the appeal and ordering deletion. We have perused the grounds of appeal preferred by the Department. Ground No. 1 stated that the CIT(A) erred in deleting the addition of Rs. 8,30,996 on account of under valuation of the closing stock. Be that as it may, the matter ultimately came before the Tribunal and the appeal came to be disposed of in favour of the Department on 10th Sept., 1998. It is interesting to note that the Tribunal, after quoting its own judgment for the earlier years, found that in this case, concerning asst. yr. 1986-87, the assessee had failed to produce evidence to show the age of various stocks and since this finding of the AO had remained uncontroverted, the Tribunal did not go into the correctness of the method of valuation and on that ground alone, the Tribunal directed restoration of addition of Rs. 8,30,996. On 21st April, 1999, therefore, the assessee moved an application u/s 254(2) of the Act, inter alia, seeking rectification of the mistake in the order passed by the Tribunal on 10th Sept., 1998, allowing the Department's case on various grounds. For the sake of brevity, we may call this application as Misc. Appln. No. 219/Bom/1999. As stated above, this miscellaneous application was filed on 21st April, 1999. We are informed that as per the practice prevalent in the Tribunal, the appellant has to serve a copy of the memo of appeal on the other side, though the appellant is required to file such memo of appeal with proper annexures under Rule 9 of the Income Tax Appellate Tribunal Rules, 1963. Our attention is also invited to Rule 4A, which states that for any reason if the Registry of the Tribunal finds any defect in the memo of appeal or if the requisite documents do not accompany the memo of appeal, then the matter remains under objection. Now, in the present case, when the miscellaneous application reached final hearing, the assessee realised that the Department had failed to enclose the assessee's ground of appeal, which they had filed before the CIT(A)

in which the assessee has categorically challenged the finding of the AO stating that no stock register was produced to show that the stocks were purchased a long time ago and they were still lying with the assessee. As stated above, while allowing the Department's appeal, the Tribunal has not gone into the validity of the method of accounting, but the appeal came to be allowed only on the ground that the above finding of the AO has gone uncontroverted, whereas in fact, the appeal filed by the assessee before the CIT(A) has categorically challenged that finding of the AO as erroneous. This was one of the main arguments advanced before the Tribunal when the miscellaneous application came for hearing. The Tribunal, however, concluded that this contention of non-compliance of Rule 9 was not raised in the miscellaneous application and, therefore, the miscellaneous application came to be dismissed. That, the Tribunal further took the view that in any event, Rule 9(3) gives discretion to the Tribunal to accept the memorandum of appeal which is not accompanied by relevant documents. Being aggrieved by the rejection of the miscellaneous application the matter has come by way of appeal to this Court u/s 260A of the IT Act. However, before coming to the arguments, we may point out that the order rejecting the miscellaneous application was passed on 29th Dec., 2000, for correcting the mistake of the order of the Tribunal in appeal, dt. 10th Sept., 1998, However, on 7th Dec., 1998, the assessee has already moved a reference application u/s 254(1) of the IT Act, 1961, which is pending before the Tribunal in which one of the questions raised by the assessee is as follows :

"Was the Tribunal justified without going into correct facts on record, in wrongly restoring the addition of Rs. 8,30,996 to the value of the closing stock ?" This point is of some relevance.

Arguments

3. Mr. Porus Kaka, learned counsel appearing on behalf of the assessee, contended that in this matter, he does not seek to argue on the merits. He contended that in this case, the Tribunal has not decided the issue of the validity of the method of valuation. He contended that in this case, the AO had never called upon the assessee to produce the stock books/register/card. That, in this case, as stated above, the assessee has "been following a particular method of valuation right from asst, yr, 1965-66. That, the figures of the writing down of value were given by the assessee to the AO, but the AO never called upon the assessee to produce the supporting evidence. That, had the AO called upon the assessee to produce such evidence on ageing of a particular item of stock, then the assessee would have certainly produced the stock register. He submitted further that in this case, the Tribunal has rejected the assessee's appeal on the ground that the finding of the AO remained uncontroverted. He submitted that this finding of the Tribunal was erroneous as the assessee had challenged that finding in the memo of appeal which the Government did not enclose along with its memo of appeal before the Tribunal, He contended that even at the stage of arguments of the miscellaneous application, the copy of the memo of appeal was

shown to the Tribunal pointing out the challenge made by the assessee to the above findings of the AO. He contended that the assessee cannot be punished for the wrong doings of the Department, which did not enclose the relevant documents as required under Rule 9, of the Income Tax Appellate Tribunal Rules, 1963. He, therefore, submitted that the Tribunal erred in rejecting the miscellaneous application.

4. Mr. K.V. Desai, learned senior counsel for the Department, contended that in this matter, this Court should not interfere u/s 260A of the IT Act for two reasons. Firstly, he contended that the points urged before the Tribunal on non-compliance of Rule 9 were not there in the miscellaneous application originally filed. Secondly, in any event, it was argued that the point now raised by the assessee is a subject-matter of the Ref. Appln, No. 1784/M/1998 and in the circumstances, this Court should not interfere with the order of the Tribunal. He contended that this very submission is the subject-matter of the reference application before the Tribunal and, therefore, this Court should not interfere u/s 260A of the IT Act as the said section warrants appeal to be filed on substantial grounds and if, in a given case, assuming without admitting there is a perverse finding, then the assessee has a remedy by way of reference or an appeal, as the case may be. He denies any perversity in this case in the said findings. He contended that in this case, the miscellaneous application drafted by the assessee was so wide that the assessee was virtually seeking retrial of the entire appeal and, therefore, the Tribunal was justified in dismissing the miscellaneous application. He, therefore, contended that this Court should not interfere u/s 260A of the IT Act.

Findings

5. At the outset we may point out that in the decision of the Tribunal, dt. 10th Sept., 1998, the Tribunal has not gone into the validity of the method of valuation of closing stock followed by the assessee. The appeal has been rejected only on the ground that material evidence was not produced and that the finding of the AO remained uncontroverted. However, on perusal of the record, as discussed above, we are of the view that the assessee had challenged the finding of the AO and there is nothing to show that the assessee was called upon by the AO to produce the material supporting evidence regarding ageing of stock. This point is further relevant because the assessee has been following a particular method of valuation right from 1965-66 and in some of the earlier assessment years, the assessee had succeeded even before the Tribunal on the question of validity of the method of valuation. It is correct to say that each year constitutes a separate unit of assessment. It is correct to say that the AO certainly has the authority to call upon the assessee to furnish the supporting evidence. However, in this case, the AO has not done so. It is for this reason that against the said finding in appeal, the assessee had challenged the finding of the AO as erroneous. However, we do not wish to interfere in this appeal u/s 260A for two reasons. Firstly the miscellaneous application, as filed before the Tribunal, is all

pervasive. It raises numerous points apart from the incorrectness of the findings of the Tribunal on the above question. Secondly, u/s 260A of the IT Act, appeal is entertainable only on substantial grounds, In this connection, as stated above, the assessee has already taken up the plea in the reference application before the Tribunal. However, the assessee contends that the Tribunal may not allow the assessee to raise this point on the ground that it is a factual finding. In the above circumstances, looking to the facts of this case, we are of the view that ends of justice would be sub served if the assessee is allowed and permitted to raise this plea in the reference application. This course of action is taken by us because in this case, we do not wish to go into the controversy of what constitutes substantial ground of appeal for the purposes of Section 260A of the IT Act. It is purely on facts of this case and in the interest of justice that we are permitting the assessee to raise this ground in the reference application. Which they have, in fact, raised and to that extent the reference application is directed to be granted by the Tribunal.

6. Subject to above, this appeal is disposed of with no order as to costs.