(1996) 07 MP CK 0072

In the Madhya Pradesh High Court

Case No : Miscellaneous Civil Case No''s. 60, 61 and 66 of 1989 and 386 of 1991

Kamal Kishore and Co., Iqbal and Co. and Chetan Swaroop Omprakash and Co. — APPELLANT

Vs

Commissioner of Income Tax — RESPONDENT

Date of Decision : 24-07-1996

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 41 Rule 2
Income Tax Act, 1961 — Section 133A, 253, 253(2)

Citation : (1998) 232 ITR 668

Hon'ble Judges : Subhash Balwant Sakrikar, J;Asha Ram Tiwari, J

Bench : Division Bench

Advocate : G.M. Chaphekar, S.S. Samvatsar and H.C. Sarda, for the Appellant; A.M. Mathur and A.K. Shrivastava, for the Respondent

Judgement

A.R. Tiwari, J.—These miscellaneous civil cases are heard as connected matters and are being disposed of by this common order.

Miscellaneous Civil Case No. 60 of 1989 :

2. On application u/s 256(2) of the Income Tax Act, 1961 (for short "the Act"), filed by the assessee (Kamal Kishore and Co., Khachrod), this court directed the Tribunal to state the case and refer the under-noted question of law for our opinion arising out of the common order dated May 8, 1986, passed by the Tribunal in 1. T. A. Nos. 559 to 561/Ind. of 1985 for the assessment years 1977-78 to 1979-80 ;

"Whether, on the facts and in the circumstances of the case, the Tribunal, in view of the ground of appeal taken before it, erred in law in setting aside the order passed by the Appellate Assistant Commissioner whereby the order of the Income Tax Officer cancelling registration/continuation of registration of the assessee-firm was set aside ?"

3. The facts in brief are that the assessee observed the financial year as its

accounting period. It came into existence by a partnership deed dated March 25, 1976, with three partners. The said firm was granted registration for the assessment year 1977-78 which was continued for the subsequent years 1978-79 and 1979-80. In September, 1980, a survey u/s 133A of the Act was conducted at the business premises of the assessee at Khachrod and also at the premises of Iqbal and Co., Unhel and the premises of Chetan Swaroop Omprakash and Co., Nagda. The said survey was conducted on the basis of information that the business done in the names of Kamal Kishore and Co. and Iqbal and Co. belonged to the members of the family of three brothers, namely, Chetan Swaroop, Omprakash and Baleshwar Dayal. The Income Tax Officer collected material and concluded that the assessee-firm was not genuine and was owned by Chetan Swaroop Omprakash and Co. The Income Tax Officer issued show-cause notice on April 2, 1981, to the assessee inviting objection as to why registration should not be cancelled u/s 186. The Income Tax Officer found the reply unsatisfactory and after obtaining approval from the Inspecting Assistant Commissioner cancelled the registration for the aforesaid three assessment years. The asses-see then filed the appeal before the Appellate Assistant Commissioner. The Appellate Assistant Commissioner allowed the appeal. The Department then filed the appeal before the Tribunal. The Tribunal allowed the appeals of the Department relating to the assessee and to Iqbal and Co. and Chetan Swaroop Omprakash by common order dated May 8, 1986. Aggrieved, the assessee filed the application u/s 256(1) of the Act which was rejected. The assessee then filed an application u/s 256(2) of the Act in this court which was registered as miscellaneous civil case. That miscellaneous civil case was allowed and a direction was issued to state the case and refer the aforesaid question. Miscellaneous Civil Case No. 66 of 1989 :

In compliance of the direction issued by this court on August 4, 1988, on application presented by the assessee (Iqbal and Co., Unhel) arising out of the common order dated May 8, 1986, passed by the Tribunal in ITA No. 563 to 567/ Ind. of 1983, the Tribunal stated the case and referred the undernoted questions for our opinion :

"(i) Whether, on the facts and in the circumstances of the case, the Tribunal, in view of the grounds of appeal taken before it, erred in law in setting aside the findings given by the Appellate Assistant Commissioner that the assessee was a separate entity and the assessment made in the case of the assessee should be treated as substantive ?

(ii) Whether, on the facts and in the circumstances of the case, the Tribunal, in view of the grounds of appeal taken before it, erred in law in setting aside the order passed by the Appellate Assistant Commissioner, whereby the order of the Income Tax Officer cancelling registration/continuation of registration of the assessee-firm was set aside ?" Miscellaneous Civil Case No. 61 of 1989 :

In compliance with the direction issued by this court on August 4, 1988, on application presented u/s 256(2) of the Act filed by the assessee (Chetan

Swaroop Omprakash and Co., Nagda) arising out of the order dated May 8, 1986, passed by the Tribunal in I. T. A. No. 616/ Ind of 1983 for the assessment year 1979-80, the Tribunal stated the case and referred the undernoted question of law for our opinion :

"Whether, on the facts and in the circumstances of the case, the Tribunal, in view of the grounds of appeal taken before it, erred in setting aside the entire order passed by the Commissioner of Income Tax (Appeals) ?"

Miscellaneous Civil Case No. 386 of 1991 :

At the instance of the assessee (Chetan Swaroop Omprakash and Co., Nagda), the Tribunal has stated the case and referred the undernoted question of law, arising out of the order dated November 6, 1990, passed by the Tribunal in I. T. A. No. 1084/Ind of 1985 for the assessment year 1981-82, for our opinion :

"Whether, on the facts and in the circumstances of the case, the Tribunal, in view of the grounds of appeal taken before it, erred in setting aside the entire order passed by the Commissioner of Income Tax (Appeals) ?"

4. We have heard Shri G. M. Chaphekar, learned senior counsel, with Shri S. S. Samvatsar and Shri H. C. Sarda, for the applicant/assessee, and Shri A. M. Mathur, learned senior counsel, with Shri A. K. Shrivastava, for the non-applicant/ Department, in all these cases.

5. Shri Chaphekar submitted that against the assessee, Kamal Kishore and Co., Khachrod (Miscellaneous Civil Case No. 60 of 1989), the Department filed no appeal yet the Tribunal interfered with the order passed by the lower appellate court and disturbed the order passed in favour of the assessee despite the fact that the order so disturbed had attained finality. Shri Chaphekar, therefore, submitted that the Tribunal erred in law in setting aside the order passed by the Appellate Assistant Commissioner without there being any appeal by the Department. Shri Chaphekar with regard to Miscellaneous Civil Case No. 66 of 1989 submitted that the Tribunal committed a grave error of law in upsetting the finding with regard to entity in the absence of any ground in the appeal in that regard. He also submitted that the second question could not arise in the absence of the first question and the first question arose because the Tribunal set aside the favourable finding despite the absence of a ground in the memorandum of appeal. He submitted that the status was not challenged and the litigation was restricted only to the quantum. He, therefore, submitted that both the questions in this miscellaneous civil case deserve to be answered in favour of the assessee. As regards Miscellaneous Civil Cases Nos. 61 of 1989 and 386 of 1991, counsel for the applicant submitted that the orders passed by the Tribunal are consequential in nature and if the answers in Miscellaneous Civil Cases Nos. 60 of 1989 and 66 of 1989 go in favour of the assessee, then the answers in these two miscellaneous civil cases deserve to be answered in favour of the assessee ipso facto being consequential in nature.

6. Counsel for the non-applicant/Department was unable to point out as to how the Tribunal had the jurisdiction to set aside the finding in the absence of the appeal so far as Miscellaneous Civil Case No. 60 of 1989 is concerned and was also unable to explain as to how the question of status was disturbed in the absence of any challenge by the Department in that regard. He was also unable to point out as to how the orders relating to Miscellaneous Civil Cases Nos. 61 of 1989 and 386 of 1991, consequential in nature, are sustainable independent of the orders passed in Miscellaneous Civil Cases Nos. 60 of 1989 and 66 of 1989.

7. Section 253 of the Act permits appeals to the Appellate Tribunal. Under Sub-section (2) of this section, the Commissioner may, if he objects to any order, direct the Assessing Officer to appeal to the Appellate Tribunal against the order. It is thus clear that there has to be an appeal and there has to be a specific objection. Under Order 41, Rule 2, of the CPC also it is clear that the appellant shall not, except by leave of the court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal. Admittedly, the ground of status was not taken by the Department in appeal in terms of Section 253(2) of the Act, so far as Miscellaneous Civil Case No. 66 of 1989 is concerned. It is also irrefragable that no appeal was filed in terms of Section 253(2) of the Act so far as Miscellaneous Civil Case No. 60 of 1989 is concerned. No leave was obtained to urge the ground in regard to the status as regards the liability to tax. It is further luculent that the orders passed related to Miscellaneous Civil Cases Nos. 61 of 1989 and 586 of 1991 are consequential in nature.

8. In view of the aforesaid peculiar position, we answer the questions referred in the aforesaid four miscellaneous civil cases in the affirmative, i.e., in favour of the assessee and against the Department, in the light of the infirmity as pointed out above.

9. These miscellaneous civil cases are thus disposed of in terms indicated above. We, however, grant liberty to the non-applicant/Department to resort to appropriate remedy, if permissible under the law, so far as the orders in the aforesaid appeals referred to are concerned. In case of such proceedings for remedy, the applicant/assessee shall have freedom to contest the same in conformity with law.

10. These miscellaneous civil cases are thus disposed of with no orders as to costs.

11. Counsel fee for each side in each case is, however, fixed at Rs. 750, if certified.

12. Transmit a copy of the order in each case to the Tribunal.

13. Retain this order in the records of Miscellaneous Civil Case No. 60 of 1989 and place its copy each in the records of connected miscellaneous civil cases, as particularised above, for ready reference.