
(2001) 04 DEL CK 0116

In the Delhi High Court

Case No : Civil Writ Petition No. 1432 of 2001 11 April 2001

Maruti Udyog Ltd.

APPELLANT

Vs

Income Tax Appellate Tribunal

RESPONDENT

Date of Decision : 11-04-2001

Acts Referred:

Citation : (2001) 117 TAXMAN 122

Hon'ble Judges : Arijit Pasayat, C.J.;D.K. Jain, J

Bench : Full Bench

Advocate : Dr. Debi Pal, S.K. Aggarwa and Vinay Vaish, for the assessee Sanjiv Khanna Ajay Jha and Ms. Prem Lata Bansal, for the Revenue, for the Appellant;

Judgement

Arijit Pasayat, C.J.

This is assessed-petitioners second journey to this court on the question, whether permission has been rightly granted by the Tribunal, Delhi Bench C, to the revenue to urge additional grounds of appeal ?

2. For the assessment years 1991-92 to 1995-96, five appeals have been filed by the revenue before the Tribunal. Separate applications dated 13-8-1999 were moved by the revenue under rule 11 of the Income Tax (Appellate Tribunal) Rules, 1963 (Tribunal Rules) seeking permission to urge the following additional grounds :

"1. On the facts and in the circumstances of the case, the learned Commissioner (Appeals) has erred in not holding that the claim of enhancement in the liability of foreign loan on account of foreign exchange fluctuations debited in the profit and loss account by the assessed-company was a capital loss.

2. On the basis of the facts of the case and on the principles of law, the learned Commissioner (Appeals) should have held that the liability to repay the increased loan amount due to the foreign exchange rate fluctuation was not a revenue loss and was, thus, not allowed to be debited in the profit and loss account."

The said move of the revenue was strongly resisted by the assessed. Originally, by order dated 30-3-2000, the Tribunal admitted additional grounds with the following order :

"30-3-2000 : After going through the request for admission of additional grounds of appeal filed by the department hearing both the sides, going through case laws as well as written submissions made in this regard, we admit the additional grounds of appeal sought to be admitted by the department and treat these appeals as part heard to come up for hearing on 28-4-2000, however, reasons for admitting the additional grounds shall be incorporated in the order to be passed in appeals."

3. Aforesaid order of the Tribunal was assailed before this court in CWP No. 1884 of 2000. By order dated 15-5-2000, the court held that reasons have to be indicated by the Tribunal first. It directed the parties to appear before the Tribunal on 4-7-2000 and place further material, if any, in respect of the acceptability of application for additional grounds. The Tribunal heard the matter afresh and by impugned order dated 28-8-2000 accepted the revenues prayer holding that the grounds raised are legal and appear to have been left inadvertently. Further, facts were not required to be investigated and it would be necessary to correctly assess the tax liability of the assessed and, Therefore, the additional grounds deserved to be admitted. Direction was given for listing the appeals in the month of October, 2000. It is of significance to note that an application (CM 5965 of 2000) was filed in CWP 1884 of 2000 for clarification. Same was dismissed by order dated 20-7-2000 holding that order passed in the writ petition is very clear as regards the follow up action to be taken by the parties. Appeals were listed before the Tribunal for hearing on 19-10-2000. The petitioner sought for an adjournment on the ground that it had not received the order passed on the application for acceptance of additional grounds. Hearing was adjourned to 12-12-2000. This petition has been filed on 2-3-2001.

4. The order dated 28-8-2000 of the Tribunal is under challenge in this writ petition. According to the learned counsel for the petitioner, by admitting the additional grounds, entire assessment as was made by the assessing officer is sought to be reversed and changed. In essence, it is urged that though the Tribunal has no power or jurisdiction to enhance the assessment by deciding a ground taken in the original grounds of appeal or allowing the additional grounds sought for by the revenue, ultimately the result would be that admission of additional grounds would have the effect of taking away the basis of assessment and increase the liability of the assessed which is not permissible. The Tribunal has no power to enhance the assessment by completely reversing the basis on which assessment was made and, Therefore, the Tribunal cannot be permitted to do, which it cannot directly do. Additional grounds now allowed would have the effect of enhancing the assessment and may result in withdrawing the relief allowed to the assessed.

5. The learned counsel for the revenue, on the other hand, submitted that by

admitting additional grounds, no final decision on merit is taken. Whether the additional grounds permitted to be added have any substance is to be adjudicated in the appeal itself. Mere admission of the ground of appeal does not result in enhancement of liability or withdrawal of relief.

6. At this juncture, it would be appropriate to take note of the concept of appeal and various facets of the act of appealing. An appeal posits the existence of a superior forum with competence to deal with the subject matter of appeal. A remedy by way of appeal is statutory bounty. The modality of the exercise of the right is conditioned by the provision which confers that right. It is fairly well-settled that creation of appellate remedy is a matter of substance. The modality of the exercise of appeal is a matter of procedural or adjective law. When an aggrieved party approaches the appellate forum for modification of the order of inferior authority, there would be an appeal. The appeal may have very many defects or disabilities and even some of them may be fatal. The difficulties and disabilities do not obliterate the factual existence of the appeal. Whether the appeal is valid or competent is a question entirely for the Appellate Court before whom the appeal is filed to determine and this determination is possible only after the appeal is heard but there is nothing to prevent a party from filing an appeal, which may ultimately be found to be incompetent. Observations to similar effect were made by the Apex Court in *Raja Kulkarni v. State of Bombay* AIR 1954 SC 73.

7. An appeal in legal parlance is held to mean the removal of a cause from an inferior or subordinate forum in order to test and scrutinise correctness of the impugned decision. It amounts in essence and pith to a complaint to a higher forum that the decision of subordinate forum is erroneous and, Therefore, liable to be rectified or set right. An appeal strictly so-called is one in which the question is whether the order of the forum from which the appeal is brought was right on the materials which that forum had before it (per Lord Davery in *Ponnamma v. Arumagam* (1905) AC 390?) A classic definition of appeal was given by Lord Westbury, L.C. in *A.G. v. H.I Sitlem* (1864) 11 ER 1200. It was said : An appeal is the right of entering a superior court and invoking its aid and interposition to redress an error of the court below. According to Websters Dictionary, it is the removal of a cause or suit from an inferior to a superior judge or court for re-examination or review. In Law Dictionary by Sweet, it is defined as a proceeding taken to rectify an erroneous decision of a court by submitting the question to a higher court or Court of Appeal.

8. In AIR 1932 165 (Privy Council) while considering the scope of appeal vis-a-vis article 182 Schedule 1 of the Limitation Act, 1872 observed that there is no definition of appeal but their Lordships have no doubt that any application to the Appellate Court asking it to revise a decision of a subordinate court, is an appeal within the ordinary acceptation of the term, and that it is no less an appeal because it is irregular or incompetent.

9. An appeal is judicial examination of a decision of an inferior court by a higher

forum. According to Halsburys Laws of England, an appeal is all application to reverse, vary or set aside the judgment or decision or award of an inferior court on the ground that it was wrongly decided or that as a matter of justice or law it requires to be corrected.

Ground or memorandum of appeal constitutes the basis on which such an application is made. A right to appeal is conferred by a statute or equivalent legislative assembly.

10. While appeal is the judicial examination, the memorandum of appeal contains the grounds on which the judicial examination is invited *Lakshmi Rattan Engineering Works Ltd. Vs. Asstt. Commr. Sales Tax, Kanpur and Another*,

11. In *National Thermal Power Co. Ltd. Vs. Commissioner of Income Tax*, , it was observed by the Apex Court that there may be several factors justifying, raising of a new plea in an appeal and each case should be considered on its own facts. Referring to an earlier decision in *Jute of Corporation of India Ltd. Vs. Commissioner of Income Tax and another*, , it was observed that the Tribunal must be satisfied that the ground raised is bona fide and that same could not been raised earlier for good reasons. The appellate authority should exercise discretion in permitting an assessed in raising additional ground in accordance with law and reasons. It was further observed that u/s 254 of the ActS, the Tribunal, after giving both the parties to the appeal an opportunity of being heard, can pass such orders thereon as it thinks fit. The power of the Tribunal in dealing with appeals is, thus, expressed in the widest possible terms.

12. The Tribunals Rules have been framed in exercise of power conferred by sub-section (5) of section 255 of the Act. Rule 6 deals with procedure for filing appeals and sub-rule (1) stipulates that the memorandum of appeal to the Tribunal shall be presented at the designated place. Rule 8 deals with contents of memorandum of appeal. Rules 6 and 8 read as follows :

"6 Procedure for filing appeals.(1) A memorandum of appeal to the Tribunal shall be presented by the appellant in person or by an agent to the Registrar at the headquarters of the Tribunal at Bombay, or to an officer authorised in this behalf by the Registrar, or sent by a registered post address to the Registrar or to such officer.

(2) A memorandum of appeal sent by post under sub-rule (1) shall be deemed to have been presented to the Registrar or to the officer authorised by the Registrar on the day on which it is received in the office of the Tribunal at Bombay, or, as the case may be, in the office of such officer.

8. Contents of memorandum of appeal. Every memorandum of appeal shall be written in English and shall set forth concisely and under distinct heads, the grounds of appeal without any argument or narrative; and such grounds shall be numbered, consequently."

Rule 11, which is pivotal provision so far as this case is concerned, deals with

grounds which may be taken in appeal. The same reads as under :

"11. Grounds which may be taken in appeal. The appellant shall not, except by leave of the Tribunal, urge or be heard in support of any ground not set forth in the memorandum of appeal but the Tribunal, in deciding the appeal, shall not be confined to the grounds set forth in the memorandum of appeal or taken by leave of the Tribunal under this rule 7."

Provided that the Tribunal shall not vest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of being heard on that ground."

Rule 12 deals with rejection or amendment of Memorandum of Appeal. The same reads as follows :

"12. Rejection or amendment of memorandum of appeal. The Tribunal may reject a memorandum of appeal, if it is not in the prescribed form or return it for being amended within such time as it may allow. On representation after such amendment, the memorandum shall be signed and dated by the officer competent to make an endorsement under rule ?"

The said rule permits the Tribunal to reject a memorandum of appeal if it is not in the prescribed form. It has the power to return it for being amended within such time as it may allow.

13. Rule 11 in terms provides that the appellant shall not, except by leave of the Tribunal, be heard in support of any ground not set forth in the memorandum of appeal. However, for deciding the appeal, the Tribunal shall not be confined to the grounds set forth in the memorandum of appeal or taken with the leave of the Tribunal under the rule.

14. As was observed by the Apex Court in Lakshmiratan Engg. Works Ltd.s case (supra), the expressions appeal and memorandum of appeal are used to denote two different things. It is not proper to make appeal equivalent to memorandum of appeal. While the appeal is judicial examination, memorandum of appeal contains grounds on which judicial determination is invited. It is to be noted that rule 11 of the Tribunal Rules is contextually similar to order 41 rule 2 of the Code of Civil Procedure, 1908 (CPC). Normally, grounds are to be set out in the memorandum of appeal before the Tribunal. The parties are not prohibited from taking additional grounds at the time of hearing subject, of course by having leave of the Tribunal to do so. Merely because the Tribunal has admitted additional grounds, it does not automatically follow that it has the effect of enhancing the assessment. Acceptability of a ground urged originally or permitted to be urged by way of additional grounds is a matter for determination by the Tribunal at the time of final hearing. Merely accepting the prayer to urge additional grounds does not mean that stand contained in the ground(s) has been accepted to be correct. The Tribunal after analysing the factual and legal position has come to hold that the grounds were fit to be admitted. It has been

observed by the Tribunal that while allowing additional grounds, parties can be afforded reasonable opportunity to put across their points of view. It is noted that the stand of the revenue before it that even if there was scope for enhancement, it would come after revenues point is accepted and, thus, may or may not result in enhancement. It is elementary that final determination of issues involved in the appeal is done while deciding the appeal. At that stage the acceptability of stand set out in the memorandum of appeal and/or permitted to be urged as additional ground(s) is adjudicated. The plea that grounds originally taken or permitted to be urged as additional ground(s) has the automatic effect of enhancement of assessment or reversal of basis of assessment is thoroughly misconceived and without legal foundation. Above being the position, we find no merit in this writ petition. It is, accordingly, dismissed.