

(2002) 03 GUJ CK 0030
In the Gujarat High Court
Case No : Tax Appeal No. 143 of 2002

Mercury Metals (P.) Ltd.	Vs	APPELLANT
Assistant Commissioner of Income Tax		RESPONDENT

Date of Decision : 26-03-2002

Acts Referred:

Citation : (2002) 257 ITR 297

Hon'ble Judges : R.K. Abichandani, J;Kundan Singh, J

Bench : Division Bench

Advocate : Swati Soparkar, for the Appellant; B.B. Naik, for the Respondent

Judgement

R.K. Abichandani, J.—Admit. The following question of law is formulated.

2. Has the Tribunal committed an error in exercise of its jurisdiction in setting aside the appellate order of the Commissioner of Income Tax (Appeals) without taking into consideration the reasons for which that order was made ?

3. At the request of learned counsel appearing for both the sides, since the matter involves a short point, it has been taken up for final disposal.

4. The matter pertains to the assessment year 1990-91 for which the appellant had declared on October 21, 1991, a total income of Rs. 1,06,542. The assessment was, however, made on the income of Rs. 3,10,950. An addition of Rs. 2,27,832 was made by the Assessing Officer by that assessment on account of sales of scrap outside the books of account on the ground that the shortage/wastage claimed by the appellant was more than the actual. The Commissioner of Income Tax (Appeals)-XII, Ahmedabad, allowed the assessee's appeal and deleted the addition of Rs. 2,27,832. The Tribunal partly allowed the appeal of the Revenue and sustained the addition to the extent of Rs. 1,50,000 in the following manner :

"5. After considering the rival submission and going through the material on record, we find that for the assessment year 1989-90, the assessee has admitted

the shortage of 0.5 per cent, since no appeal was preferred. The assessee has not brought anything on record contrary to the finding of the Commissioner of Income Tax (Appeals) for the assessment year 1989-90. We also find that regarding shortage of lead, MG silicon and wastage of tin, etc., the Commissioner of Income Tax (Appeals) has applied his common sense only while arriving at the conclusion in his appellate order. Taking into account whole circumstances of the case we sustain the addition of Rs. 1,50,000 on account of claim of excess, wastage of scrap of copper, lead, MG silicon and tin anode.

6. In the result, the appeal is partly allowed."

5. From the above reasons, it appears that the only ground on which the Tribunal set aside the order of the Commissioner of Income Tax (Appeals) is that he had applied his common sense only while arriving at the conclusion in his appellate order. While doing so, the Tribunal itself has sustained the addition to the tune of Rs. 1,50,000 without even resorting to common sense and just ipse dixit, totally oblivious of the reasoned order of the Commissioner of Income Tax (Appeals). This is evident from the reasoning given by the Commissioner of Income Tax (Appeals) in para. 4.3 of his order which is re-produced hereinbelow with a view to emphasise the cursory manner in which the Appellate Tribunal has brushed aside the order without even verifying the reasons given by the learned appellate officer.

"4.3. I have considered the facts and the submission made by counsel for the appellant. The Assessing Officer has obviously made the estimate of shortage on the basis of the shortage held as reasonable in copper in the appellant's case for the assessment year 1989-90 by the Commissioner of Income Tax (Appeals). He has not considered the relevant factors which lead to the shortage and whether the shortage in this year of 1.38 per cent, in copper is excessive and if so the reasons for the same. It is an admitted fact, as will be seen from the assessment order, there was no trading in lead and MG silicon in the assessment year 1989-90 and, therefore, no comparison can be made in regard to the shortage in these items with that of the assessment year 1989-90. The materials are also totally different and, therefore, shortage cannot be compared with that of copper. In fact, the Assessing Officer has not brought any evidences on record in support of the estimate of 0.5 per cent, as reasonable in regard to the shortage for lead and MG silicon. On the other hand, the appellant in support of the submission produced before me the samples of copper, manganese brass and silicon, and after seeing the samples, I am entirely in agreement that there is presence of moisturised content in the form of mud and plastic coating which need to be removed to make them acceptable lot in the market through the process of burning and subsequently made to cool by pouring water whereby material is subject to oxidization. It is also correct that this has to be followed by cleaning, sorting, handling manually by labourers. From the samples of the manganese metals produced, I find that they are in uneven sizes as claimed and its physical properties will not have uniform quality standards. It is also subject to oxidization

whereby the flakes are formed into powder. From the sample of lead scrap, it is found that the goods will have attachment like coal tar, greasy paper coating used on iron strapped copper cable consumed by the Electricity Board and the impurities could be separated only through the process of burning and manually cleaning process. I also agree with the appellant that calculation of shortage criteria should be based on purchases and not on sales. Considering these relevant facts and the evidence produced, I am of the view that the shortage as claimed under various items is neither excessive nor unreasonable."

6. We refrain from commenting on the correctness or otherwise of the order of the Commissioner of Income Tax (Appeals) because, we propose to remand the matter to the Tribunal for re-consideration on the ground that it has committed an error in exercise of its jurisdiction by not calling its attention to the above reasoning given by the Commissioner of Income Tax (Appeals) against whose order the appeal was preferred by the Revenue for its consideration.

7. We may recall here the decision of the Supreme Court in Omar Salay Mohamed Sait Vs. Commissioner of Income Tax, Madras, , in which the Supreme Court succinctly expressed the expectation from a Tribunal while deciding such appeals (page 170) :

"We are aware that the Income Tax Appellate Tribunal is a fact-finding Tribunal and if it arrives at its own conclusions of fact after due consideration of the evidence before it this court will not interfere. It is necessary, however, that every fact for and against the assessee must have been considered with due care and the Tribunal must have given its finding in a manner which would clearly indicate what were the questions which arose for determination, what was the evidence pro and contra in regard to each one of them and what were the findings reached on the evidence on record before it. The conclusions reached by the Tribunal should not be coloured by any irrelevant considerations or matters of prejudice and if there are any circumstances which required to be explained by the assessee, the assessee should be given an opportunity of doing so. On no account whatever should the Tribunal base its findings on suspicions, conjectures or surmises nor should it act on no evidence at all or on improper rejection of material and relevant evidence or partly on evidence and partly on suspicions, conjectures or surmises and if it does anything of the sort, its findings, even though on questions of fact, will be liable to be set aside by this court."

8. In Rajesh Babubhai Damania Vs. Commissioner of Income Tax, , the Division Bench of this court observed that it was a duty of the Tribunal to ascertain the reasons which were given by the Commissioner of Income Tax (Appeals) in whose order, the order of the Assessing Officer had merged.

9. We are, therefore, of the view that the impugned order cannot be sustained and the Tribunal should reconsider the matter on the merits in accordance with law. The appeal is, therefore, allowed. The impugned order is set aside with a direction to the Tribunal to reconsider the Revenue's Appeal No. I. T. A. 1605/

Ahd. of 1995 and take a decision in accordance with law expeditiously. There shall be no order as to costs.