
(1977) 05 CAL CK 0034

In the Calcutta High Court

Case No : Income-tax Reference No"s. 279 to 282 of 1969

N.K. Sengupta

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 12-05-1977

Acts Referred:

Income Tax Act, 1961 — Section 145, 147, 256

Citation : (1978) 113 ITR 413

Hon'ble Judges : S.C. Deb, J;Dipak Kumar Sen, J

Bench : Division Bench

Advocate : S.R. Sen, for the Appellant; A. Sengupta, for the Respondent

Judgement

Dipak Kumar Sen, J.—The following questions have been directed to be referred u/s 256(2) of the Income Tax Act, 1961 :

" 1. Whether, on the facts and in the circumstances of the case, it is perverse to hold that, in estimating the net profit of structural contracts entered into with the Government department, the percentage is to be calculated on the gross receipts inclusive of the value of materials supplied by the department themselves ?

2. Whether, on the facts and circumstances of the case, while holding that in estimating the net profit of the structural contracts the percentage is to be calculated on the gross receipts, it should have been decided also whether the percentage adopted by the authorities concerned need any modification ?"

2. The reference is at the instance of the assessee, N.K. Sengupta, Calcutta. The assessment years involved are 1957-58, 1958-59, 1959-60 and 1962-63. The facts found or admitted as appearing in the statement and the annexures thereto may be shortly noted as hereunder :

The assessee is a contractor and in the relevant assessment years undertook jobs under various Government departments like the Construction Board of the Government of West Bengal.

3. The books of accounts were maintained by the assessee. They were not accepted by the Income Tax Officer at the time of assessment and the assessee's income was determined on estimate. For the assessment years 1957-58 to 1959-60, estimated amounts were added to the net receipts of the assessee. For 1959-60, this figure was 10% on account of the materials supplied by the Government departments. For the assessment years 1957-58 and 1958-59, lump sum additions were made on this account.

4. For the assessment year 1962-63, the Income Tax Officer went into the matter in detail. The assessee was called upon to produce certificates from various authorities under which he had carried on the work. Independent enquiries were also made from such, authorities. On the basis of the aforesaid the Income Tax Officer came to the conclusion that the total gross receipts during the said year would be Rs. 7,76,000 as against the amount of Rs. 5,25,000 as shown by the assessee.

5. On such material the Income Tax Officer also reopened the proceedings for the earlier assessment years including the assessment years 1954-55, 1955-56 and 1956-57.

6. The assessee preferred appeals against the assessment of 1962-63 as also against reopening of assessments of the other assessment years. The Appellate Assistant Commissioner held that in all the years the assessee's income should be determined by applying a flat rate of 12.5% on the net receipts of the assessee and that the value of materials supplied to the assessee by the departments concerned should not be included in such net receipts for the purpose of application of this fiat rate.

7. From this order of the Appellate Assistant Commissioner, the department came up on further appeal before the Income Tax Appellate Tribunal. The assessee also filed cross objection. The Tribunal held that the Appellate Assistant Commissioner was not justified in directing the application of the flat rate of 12.5% on the net receipts only, i.e., receipts without the value of the materials, and held that the assessments made by the Income Tax Officer on the gross receipts of the assessee including the cost of materials supplied by the contractee were correct. But the Tribunal in disposing of the cross-objections filed by the assessee held that on the facts and circumstances the original assessment orders made for the assessment years 1957-58 to 1959-60 were correct and thus set aside the reassessments made u/s 147.

8. The appeal preferred by the department in respect of the assessment for the assessment year 1962-63 was allowed. It was held by the Tribunal that the assessment made by the Income Tax Officer was correct and the total receipts for the purpose of estimation of the assessee's profits should include the cost of materials supplied by the contractees.

9. Mr. S.R. Sen, learned counsel appearing for the assessee, has contended before us that the principle followed by the authorities below in estimating the

income of the assessee for the assessment year 1962-63 was patently incorrect. He submitted that the question before us in the instant case was covered by a decision of the Madras High Court in the case of Commissioner of Income Tax Vs. K.S. Guruswami Gounder and K.S. Krishnaraju (Contractors), . In this report a judgment of the Kerala High Court was also appended at page 92 (of ITR) : This judgment was in the case of M.P. Alexander and Co. Vs. Commissioner of Income Tax, . The facts before the Madras High Court were that the assessee was a registered firm engaged in construction of buildings for several departments of the Government under contracts. For computing its income for the assessment year 1961-62, the assessee did not include the cost of the materials supplied by the Government in the total receipts as the assessee contended that there was no element of profit in such an item. The contentions of the assessee were ultimately accepted by the Tribunal and the Tribunal held that the income of the assessee had to be calculated only on the actual receipts and that the cost of materials supplied by the Government should not be included in the assessee's receipts. The Madras High Court observed in the judgment as follows (page 91) :

" The question is whether the Tribunal was right in setting aside the addition of the cost of the materials to the actual receipts returned by the assessee. It is not the case of the revenue that the obligation to supply the materials like cement, steel, etc., was not undertaken by the Government even at the time of calling for the tenders. If the assessee gave its tender on the definite understanding that the department concerned is to supply the required materials for the construction of the buildings, the rates quoted by him would have been adjusted on that basis. Therefore, there is no question of the assessee purchasing the materials required for the buildings outside and putting itself to a disadvantage. Admittedly, the materials supplied by the departments had been used in the construction of the buildings and the assessee did not, in fact, earn any profit in relation thereto. We are not, therefore, in a position to say that the turnover represented by the cost of the materials supplied, in any manner, contributed to the profit of the assessee. "

10. In the case before the Kerala High Court in M.P. Alexander and Co. Vs. Commissioner of Income Tax, , the assessee had entered into two contracts with the State Government for execution of certain works. The contracts could be valued. The valuation figures were made up, inter alia, of the cost of materials supplied by the Government to the contractor and certain figures, being the amount of hire charges and other charges payable by the assessee for the purpose of executing the contract.

11. The accounts of the assessee were rejected and estimate was made on the basis of a percentage on the total turnover. In computing the turnover the Tribunal did not accept the contention of the assessee that the cost of materials supplied by the Government should not be included in such turnover. On a reference therefrom the Kerala High Court held as follows (page 93):

"It is clear that the Tribunal has proceeded on the basis that there is an element

of profit involved even in the supply of materials by the State Government. Even so they were prepared to say that there was no such element involved in the hire charges. We are unable to discern any difference between these. Further, we are unable to see any material on the basis of which it was possible to postulate that the turnover represented by the cost of materials in any manner contributed to the profit of the assessee. If anything, the materials indicate that there is no such element of profit.

Annexures " D " and "F", two certificates that have been produced by the assessee, issued by the Executive Engineer, Building Division, Alwaye, and by the Executive Engineer, Panniar Division, Kallarkutty, clearly state that, for estimating purposes, the percentage of profit was calculated on the labour charges alone and that it was not calculated on the cost of departmental materials supplied for the work. In the light of the above, we feel that this is a case in which a conclusion has been reached without any materials and against whatever material was available. The conclusion is unsustainable, supported as it is by no material. "

12. Mr. Ajit Sengupta, learned counsel for the revenue, has contended that in the instant case, the revenue, from the very beginning, has proceeded on estimate u/s 145 of the Income Tax Act, 1961, and a flat rate has been applied on an amount determined as gross receipts of the assessee. The Tribunal has upheld the order of the Income Tax Officer. This finding or conclusion as to a fact cannot be agitated further.

13. On the question of the principle to be followed in making such an estimate, Mr. Sengupta relied upon two unreported judgments of this court in Income Tax Ref. No. 184 of 1969 and Income Tax Ref. 198 of 1971, respectively intitled Gopendra Krishna Saha Vs. Commissioner of Income Tax, and Rakhal Chandra Banerjee Vs. Commissioner of Income Tax,

14. In the Income Tax Reference No. 184 of 1969 [Gopendra Krishna Saha Vs. Commissioner of Income Tax,], Sabyasachi Mukharji J. decided a similar question and held that the rate of gross profits was to be applied on the gross value of the bill. In that case, the contractor was not able to satisfy the authorities below as to the terms of the contract and estimate had to be made u/s 13 of the Indian Income Tax Act, 1922, Mukharji J. held that where there was a contract which provided sufficient limit beyond which the tender could not be quoted and there was a stipulation that the contract was to be quoted at a particular rate excluding the cost of materials to be supplied by the contractee, then in such a case the principles laid down in Commissioner of Income Tax Vs. K.S. Guruswami Gounder and K.S. Krishnaraju (Contractors), might be applied.

15. In the Income Tax Reference No. 198 of 1971 [Rakhal Chandra Banerjee Vs. Commissioner of Income Tax,] Mukharji J. again held that where the assessee had tendered for the contract as a whole including the cost of materials which were subsequently supplied by the Government and there was no evidence on

record to show that the assessee did not know of such supply of materials to be made by the Government and the price thereof, then the gross profits of the assessee could be computed on his total gross bills and there was no question of excluding the cost of the materials supplied. Commissioner of Income Tax Vs. K.S. Guruswami Gounder and K.S. Krishnaraju (Contractors), and M.P. Alexander and Co. Vs. Commissioner of Income Tax, were distinguished on facts.

16. In the facts and circumstances of the instant case, it appears that it is not possible to answer the questions referred without further findings on fact. It is not clear whether the authorities below had seen or considered the terms and conditions of the contracts under which the assessee had carried on the work of construction. The terms and conditions as to supply of materials by the contractee are also not known. Such terms are of some importance. It will be necessary to determine whether the materials to be supplied would be free of cost or price on the basis of market value or otherwise would be charged. On such facts it may be found that an element of profit was there on such supply. Whether the assessee submitted its tenders for the said contracts anticipating on being assured of supply of such materials are also not known. These material facts have to be found before the questions referred can be answered.

17. In this view, we remand the matter back to the Tribunal. The Tribunal is directed to ascertain the terms and conditions of the contracts in question, if any, in respect of supply of materials and determine whether the assessee bid for such contracts taking into account such materials which were in fact supplied. If it is found on such facts that there was an element of profit involved in the materials supplied then the profits of the assessee will be estimated on the gross receipts of the assessee computed by including the value of the materials supplied to the net receipts. The Tribunal will be at liberty to take further evidence in the matter and will afford opportunity to the parties to adduce further evidence and to make further representations in the matter.

18. We make it clear that the remand is in respect of only the assessment year 1962-63. In the other assessment years the assessee having succeeded in its cross-objections the matter appears to be concluded.

19. In the facts and circumstances we make no order as to costs.

Deb, J.

20. I agree.