
(1986) 03 BOM CK 0013

In the Bombay High Court

Case No : Writ Petition No. 1351 of 1982

Remex Constructions/remex Electricals

APPELLANT

Vs

First Income Tax Officer and others

RESPONDENT

Date of Decision : 09-03-1986

Acts Referred:

Income Tax Act, 1961 — Section 263, 263(1)

Citation : (1986) 55 CTR 423 : (1987) 166 ITR 18

Hon'ble Judges : M.L. Pendse, J

Bench : Single Bench

Judgement

Pendse, J.—The petitioner is a registered firm carrying on business of construction of factory sheds in the name of M/s. Remex Constructions and of electrical installations in the name of M/s. Remex Electricals. The petitioner firm is assessed for the purpose of Income Tax and filed returns for the assessment years 1972-73, 1973-74 and 1974-75 along with copies of the profit and loss accounts and balance-sheets. The 1st Income Tax Officer (respondent No. 1 herein), on perusal of the returns and while passing the assessment orders, took the view that the petitioner did not maintain a day to day stock-book in respect of materials consumed in both the businesses and that in the absence of the same, it was not possible to verify and book results and that it was necessary to ascertain the book results on the basis of estimates. The gross profit shown by the petitioner in respect of construction business was 13.77%, 14.63% and 16.35% for the three years, respectively, while the Income Tax Officer estimated it at the flat rate of 17.5% for all the years. The gross profits shown by the petitioner in respect of electrical business and 11.64%, 11.82% and 22.87% respectively, for the relevant assessment years and that was estimated by the Income Tax Officer at 12.5% for the first two assessment years, while retaining the gross profit shown by the petitioner for the last assessment year.

2. The petitioner carried three appeals against the orders of assessment passed in respect of the three assessment years before the Appellate Assistant

Commissioner of Income Tax. The Appellate Assistant Commissioner by order dated February 10, 1977, deleted the addition of Rs. 8,486 and Rs. 16,558 for the assessment year 1972-73 in respect of electrical and construction business. For the assessment year 1973-74, relief of Rs. 9,463 in respect of electrical business and Rs. 56,323 in respect of construction business was granted. For the assessment year 1974-75 relief of Rs. 6,000 for electrical business and of Rs. 14,450 for construction business was granted.

3. The Commissioner of Income Tax, Bombay City V, Bombay (respondent No. 2 herein), in exercise of powers u/s 263 of the Income Tax Act, 1961, issued notices to the petitioner and thereafter passed an order setting aside the assessment orders for the relevant years and directing the Income Tax Officer to redo the assessments as observed in the order. The Commissioner of Income Tax came to the conclusion that payment made to M/s. Architect Combine and P. L. company were for the purpose of supervision work and the said payments related to trading account and could not have been debited to the profit and loss account.

4. In pursuance of the order passed by the Commissioner of Income Tax, the Income Tax Officer passed fresh of assessment in respect of the relevant assessment years on September 28, 1979. The petitioner carried appeals against the orders passed by the Income Tax Officer, but they were dismissed by the Commissioner Income Tax (Appeals). The Commissioner of Income Tax held that it was not open to the petitioner to challenge the orders passed by the Commissioner of Income Tax in exercise of powers u/s 263 of the Income Tax Act. According to the appellate authority, the orders u/s 263 have become final as the petitioner did not prefer as appeal against the said order before the Income Tax Appellate Tribunal. The appellate authority held that the Income Tax Officer has merely carried out the direction given by the Commissioner of Income Tax in exercise of the powers u/s 263 of the Act and that exercise is not open to appeal.

5. The orders passed by the Commissioner of Income Tax (Appeals) were challenged by the petitioner by filing three appeals before the Tribunal, they being against the three assessment orders for the three assessment years. The petitioner also preferred appeals against the orders passed u/s 263 of the Income Tax Act by the Commissioner of Income Tax. The appeals preferred against the orders passed u/s 263 of the Act were dismissed by upholding the preliminary objection raised on behalf of the Department that the appeals were barred by limitation and an application for condonation of delay was not filed. The appeals against the orders passed by the Commissioner of Income Tax (Appeals) were also dismissed on the ground that the orders passed by the Commissioner of Income Tax (Appeals) holding that the appeals were not competent did not suffer from any infirmity. The order of the Tribunal in respect of the six appeals filed by the petitioner has given rise to the filing of this petition on July 14, 1982, under article 226 of the Constitution of India.

6. Shri Pandit, learned counsel appearing on behalf of the petitioner, submitted that the exercise of powers by the Commissioner of Income Tax u/s 263 of the Act was entirely without jurisdiction and the orders u/s 263 of the Act are null and void. Learned counsel urged that the Commissioner of Income Tax could not have exercised the revisional powers conferred u/s 263 of the Act when the order of the Income Tax Officer had merged in the order passed by the Appellate Assistant Commissioner of Income Tax. Shri Pandit also submitted that the Tribunal had taken a technical view in not condoning the delay and not hearing the appeals against the orders of the Commissioner of Income Tax passed u/s 263 of the Act. There is considerable merit in the submission of learned counsel. Section 263(1) of the Income Tax Act reads as under :

"263. (1) The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Income Tax Officer is erroneous in so far as it is prejudicial to the interests of the Revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment."

7. A plain reading of section 263(1) of the Act establishes that the Commissioner could exercise revisional powers only in cases where any order passed by the Income Tax Officer is found to be erroneous and prejudicial to the interest of the Revenue. Shri Pandit is right in his submission that the order of the Income Tax Officer in respect of the three assessment years was carried in appeal before the Appellate Assistant Commissioner and the appellate authority granted relief to the petitioner by modifying the orders passed by the Income Tax Officer. Shri Pandit did not dispute that revisional powers could be exercised by the Commissioner of Income Tax in cases where the order of an Income Tax Officer is not carried in appeal or where the appeal is restricted only to a part of the order. The order of the Income Tax Officer would merge in the appellate order provided the entire order of the Income Tax Officer is challenged and considered by the appellate authority and if any part of the order of the Income Tax Officer is not challenged, then that part of the order is open for revision by the Commissioner of Income Tax. Shri Jetly, learned counsel appearing on behalf of the Department, submitted that the Commissioner of Income Tax exercised the power to ascertain whether the expenses claimed by the petitioner are of trading nature and that was not an aspect which was considered by the Appellate Assistant Commissioner. The submission is not correct. The order u/s 263 of the Act clearly sets out that the point for consideration was that the payments made by the company and M/s. Architect Combine were expenses of trading nature and, therefore, deemed to have been covered by the estimate of gross profits. The petitioner had filed the appeals before the Appellate Assistant Commissioner because of the decision of the Income Tax Officer that the gross profits disclosed by the assessee could not be accepted in the absence of day to day stock book,

and therefore, gross profit has to be ascertained by estimate. It is, therefore, obvious that on this aspect of the matter, the Commissioner should not have exercised revisional powers.

8. In this connection, reference can be usefully made to the decision of the Division Bench of this court in the case of Commissioner of Income Tax, Bombay North Vs. Tejaji Farasram, . The Division Bench held that the power of revision conferred on the Commissioner was restricted to any order passed by the Income Tax Officer. It was further held that when the appeal court passes an order, the order of the Income Tax Officer ceases to exist and merges in the order of the appeal court and although the appeal court may confirm the order of the trial court, the order that stands and is operative is not the order the trial court but the order of the appeal court. It is, therefore, obvious that the exercise of revisional powers by the Commissioner of Income Tax was wholly without jurisdiction and the contention of the petitioner that the order is null and void is correct.

9. The grievance of Shri Pandit the Tribunal was very technical in not condoning the delay of about three years in filing the appeal against the orders passed u/s 263 of the Act is not without merit. The Tribunal held that the petitioner ought to have filed an application for condonation of delay duly supported by an affidavit at the time of presentation of appeal, but instead of that, merely appeals were lodged and an affidavit of a partner of the firm was tendered only when the objection was raised about the delay of filing the appeals. It is undoubtedly true that the explanation given in the affidavit for delay in lodging the appeals is not very substantial, but, in my judgment, taking into consideration the fact that the revisional authority had acted without jurisdiction, was enough for the Tribunal to condone to delay and entertain the appeals. It is true that the Tribunal could not entertain the appeals beyond the period of limitation as a matter of course, but equally the Tribunal would not defeat the ends of justice merely because the parties failed to resort to proper procedure in filing the appeals. In my judgment, the Tribunal ought to have condoned the delay in filing the appeals in the facts and circumstances of the case.

10. Once it is found that the appeal against the order of the revisional authority should have been entertained and it is further found that the order of the revisional authority was wholly without jurisdiction, then the sequitur is that the appeals filed against the revisional authority must be allowed. Shri Jetly did not seriously dispute that if the appeals were maintainable and were entertained, the order of the revisional authority could not be sustained. In these circumstances, in my judgment, the petitioner is entitled to succeed. Shri Jetly submitted that the petitioner had an alternate remedy of seeking reference against the order of the Tribunal and as the petitioner has failed to adopt that remedy, the relief should not be granted. Normally, I would not have permitted the petitioner to approach the writ court for relief when there was remedy of seeking reference, but taking into consideration the fact that this petitioner is pending in this court

for the last four years and the fact that the petitioner is a small concern having a small turnover and the fact that the order passed by the revisional authority was wholly without jurisdiction, I am not inclined to refuse the relief on the ground of availability of alternate remedy.

11. Accordingly, the petition succeeds and the rule is made absolute in terms of prayer (a). The assessment orders passed by the Income Tax Officer and copies of which are annexed as exhibits "A", "B" and "C" to the petition are upheld and will stand. In the circumstances of the case, there will be no order as to costs.