
(1990) 03 BOM CK 0087
In the Bombay High Court
Case No : Writ Petition No. 1067 of 1987

Ritz Ltd. and another

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 23-03-1990

Acts Referred:

Income Tax Act, 1961 — Section 120, 143(3), 144A, 144B, 263

Citation : (1990) 83 CTR 177 : (1990) 184 ITR 599

Hon'ble Judges : T.D. Sugla, J

Bench : Single Bench

Advocate : Deokinandan, K.M.L. Majele, for the Appellant;

Judgement

T.D. Sugla, J.—By this petition under article 226 of the Constitution of India, the petitioners have challenged the legality of the two notices dated January 22, 1986, and March 18, 1987, issued by the Commissioner of Income Tax, Central, Bombay, u/s 263 of the Income Tax Act, 1961, for the assessment for the two petitioners for the assessment years 1982-83 and 1983-84.

2. The petitioners' assessment for the two years were completed by the Income Tax Officer u/s 143(3) read with section 144B of the Income Tax Act, 1962, respectively, on February 11, 1985, and March 24, 1986. Appeals were filed there against before the Commissioner of income tax (Appeals) on March 12, 1985 and April 4, 1986, those were dismissed Second appeals there against before the Tribunal are still pending.

3. At this stage, the Commissioner issued the impugned notices. The reason given for the issue of the notices was stated to be that the petitioners has collected Rs. 12,33,227 and Rs. 3,14,146 for the two years from the customers on account of "Hotel receipts tax" which amounts were neither paid to the Government nor refunded to the customers during the relevant previous years. Yet the Income Tax Officer had not treated these receipts as trading receipts and part of the income in these years, the orders of assessment were thus erroneous

and prejudicial to the interests of the Revenue.

4. Shri Rajgopal, learned counsel for the petitioners, challenged the jurisdiction of the Commissioner to start proceedings u/s 263 on the ground that the orders of assessment had merged in those of the Commissioner of Income Tax (Appeals) as held by this court in the case of Commissioner of Income Tax Vs. P. Muncherji and Company, . It was pointed out that the same view was taken by this court in the subsequent decision in the case Commissioner of Income Tax Vs. Smt. A.S. Narendrakumari Basaheba, .

5. Shri Jetley, learned counsel for the Department, on the other hand, submitted that the question whether the assessment order merged wholly or whether only that portion of it which was, in fact, the subject-matter of appeal merged in that of the appellate order was pending before the Supreme Court, there being a conflict of view amongst the high Courts. He fairly admitted that so far as this court is concerned, the binding decision is that once an appeal is filed against an assessment order and disposed of. The whole of the assessment order merges in the appellate order irrespective of the fact whether a particular aspect of the matter was or was or was not the subject-matter of appeal.

6. This argument, according to him, was, however, not of much consequence now in view of the retrospective amendment of section 263. Explanation (c) to section 263(1) was inserted with effect from June 1, 1987. After the insertion of the Explanation, only that part of the order of assessment merges in the appellate order which as a matter of fact has been the subject-matter of appeal.

7. Placing then reliance on the Supreme Court decisions in the cases of Chowringhee Sales Bureau (P) Ltd. Vs. Commissioner of Income Tax , West Bengal, and Sinclair Murray and Co. P. Ltd. v. CIT [1975] 97 ITR 615, Shri Jetley argued that the amounts collected by the petitioners as "Hotel receipts tax" were trading receipts and as such taxable as income. He fairly admitted that for the purpose of this petition this aspect is not very material as in the event of this court's upholding the Commissioner's jurisdiction to issue notices u/s 263, all these questions will have to and could be decided on merits by the Commissioner.

8. In view of this court's judgments in Commissioner of Income Tax Vs. P. Muncherji and Company, and in Commissioner of Income Tax Vs. Smt. A.S. Narendrakumari Basaheba, , the legal position is that once an order of assessment is the subject-matter of appeal, the whole of it merges in that of the appellate order. Thus, the only question that requires consideration is whether the retrospective amendment of section 263 overrides or nullifies the effect of those judgments. In order to appreciate the submissions made on behalf of the Revenue, it is desirable to refer to the provisions of section 263(1) along with the Explanations thereto. The provisions read 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 Assessing 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 canceling the assessment and directing a fresh assessment.

Explanation. - For the removal of doubts, it is hereby declared that, for the purposes of this sub-section, -

(a) an order passed on or before or after June 1, 1988, by the Assessing Officer shall include -

(i) an order of assessment made by the Assistant Commissioner of the Income Tax Officer on the basis of the directions issued by the Deputy Commissioner u/s 144A;

(ii) an order made by the Deputy Commissioner of exercise of the powers or in the performance of the functions of an Assessing Officer conferred on, or assigned to, him under the orders or directions issued by the Board or by the Chief Commissioner or Director General or Commissioner authorized by the Board in this behalf u/s 120;

(b) "record" shall include and shall be deemed always to have included all records relating to any proceeding under this Act available at the time of examination by the Commissioner;

(c) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject-matter of any appeal filed on or before or after June 1, 1988, the powers of the Commissioner under this sub-section shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal."

9. The Explanation as such was, admittedly, inserted in section 263 by the Taxation Laws (Amendment) Act, 1984, with effect from October 1, 1984. The Explanation had only two clauses (a) and (b) at that time which are similar to Explanation (a) now, Clause (c) was inserted in the Explanation by the Finance Act, 1987, with effect from June 1, 1988. However, Explanation (c) then did not have the words "filed on or before or after June 1, 1988" after the words "filed on or before or after June 1, 1987" after the words "of any appeal" not the words "and shall be deemed always to have extended" between the words "shall extend" and "to such matters". These words were introduced in Explanation (c) by the Finance Act, 1988, some time in April/May 1989, with retrospective effect from June 1, 1988.

10. On first impression Explanation (c), as stands without anything more, appears to support Shri Jetley's submission that Explanation (c) was applicable in the present case also. On carefully examining the provisions of Explanation (c), however, the position is otherwise. Before its amendment by the Finance Act, 1988, Explanation (c) inserted by the Finance Act, 1988, read as under :

"Where any order referred to in this sub-section and passed by the Assessing Officer had been the subject-matter of any appeal. The powers of the Commissioner under this sub-section shall extend to such matters as had not been considered and decided in such appeal."

11. The Explanation was then evidently prospective with effect from June 1, 1988, in the present case, the appeals having been not only filed but also disposed of before that date, this Explanation would have no effect whatsoever. Coming then to the amendment of the Explanation in 1988 with retrospective effect from June 1, 1988, it is seen that on the face of it there is some contradiction, the insertion of the words "filed on or before or after June 1, 1988" and "and shall be deemed always to have extended" at two places in the Explanation may support the Department's contention on the fact of it that after the amendment in 1989, Explanation (c) means that to the extent matters have not been considered and decided in appeal the Commissioner will always have jurisdiction to revise the order of assessment u/s 263 subject to other conditions. The question. However, is if that was so, why did the Legislature not stop at that and went further to say that the insertion of these words though fact fully in 1989 was with retrospective effect from June 1, 1988, the date on and from which Explanation (c) itself was inserted by the Finance Act, 1988. In my judgment, Explanation (c) requires to be construed harmoniously. In inserted of the words at two places as well as the fact that the insertion is made retrospective from the date on which the Explanation itself was inserted can all be given proper meaning if it is held that these words are to be read in the Explanation right from the date the Explanation itself was inserted. Thus, only in cases where action u/s 263 is taken after June 1, 1988, the merger of the assessment order will be treated as confined to the issues actually considered and decided in appeal in terms of Explanation (c), in my judgment, the construction placed herein is based on sound logic, namely, irrespective of the language in which the amending provisions are couched. The amendment cannot be retrospective with effect from a date earlier to the date on which the provision sought to be amended itself was brought on the statute book.

12. In the above view of the matter, it has to be held that the impugned notices issued by the Commissioner are invalid inasmuch as after the merger of the assessment orders in the appellate orders in view of the court's judgments in Commissioner of Income Tax Vs. P. Muncherji and Company, and Commissioner of Income Tax Vs. Smt. A.S. Narendrakumari Basaheba, , he had no jurisdiction to take up proceeding u/s 263. Hence. The petition succeeds, rule is made absolute in terms of prayer (a). No order as to costs.