(2016) 02 CAL CK 0118

In the Calcutta High Court

Case No : ITA No. 825 of 2004

Sheo Kumar Mishra APPELLANT

Vs

Deputy Commissioner Income Tax RESPONDENT

Date of Decision : 26-02-2016

Acts Referred:

Income Tax Act, 1922 — Section 28, Section 31, Section 33, Section 33(4), Section 39, Section 66
Income Tax Act, 1961 — Section 131, Section 158B(b), Section 158BB, Section 253, Section 260A
Kerala General Sales Tax Act, 1963 - Section

Citation : (2016) 287 CurTR 75 : (2016) 382 ITR 424

Hon'ble Judges : G.C. Gupta and Shivakant Prasad, JJ.

Bench : Division Bench

Advocate : J.P. Khaitan, Sr. Advocate, S. Das, A. Chaudhury and R. Poddar, Advocates, for the Appellant; S. Chatterjee, Advocate, for the Respondent

Final Decision : Allowed

Judgement

G.C. Gupta, J.—1. The subject matter of challenge in the appeal is a judgment and order dated August 31, 2004, passed by the learned Income Tax Appellate Tribunal, "A" Bench, Kolkata, pertaining to the block period commencing from April 1, 1988 upto April 21, 1998, passed in I.T.(SS)A. No. 103/Kol/2003, partly allowing the appeal preferred by the assessee.

2. Aggrieved by the judgment and order of the learned Tribunal, the assessee has come up in appeal.

3. The following questions of law were formulated at the time of admission of the appeal:

"i) Whether the block assessment was valid, competent and justified in law as the seized material did not disclose any undisclosed income in respect of either Rs. 1,59,38,664/- or Rs. 5,40,000/- under Section 158B(b) read with Section 158BB of the Income-tax Act, 1961.

ii) Whether on the facts and in the circumstances of the case the Tribunal was competent and justified in making addition/disallowance of Rs. 1,59,38,664/- or any part thereof which the Assessing Officer and Commissioner of Income Tax Appeal did not make.

iii) Whether the disallowance of the expenses of Rs. 1,59,38,664/ or any part thereof was perverse, without lawful basis, vitiated by irrelevant consideration and violative of the principles of natural justice."

4. The facts and circumstances of the case, briefly stated, are as follows.

5. Pursuant to search and seizure carried out in the office of the assessee, who is the sole proprietor of M/s. Vikram Carriers, a block assessment was made for a period of ten years. The Assessing Officer arrived at the following conclusion:

"C. Excess claim of transportation charges by the assessee from oil companies:

Pages 56 & 57 of seized documents VC/4 is a letter dated 15.12.97 from the Constituted Attorney of Indian Oil Corporation Ltd. (IOCL) to the Director (Marketing), IOCL, Mumbai for arbitration arising out of the assessee''s excess claim of Rs. 1,19,20,777/- on a/c. of transportation charges.

Besides, Page-4O of seized documents VC/5 is a letter dated 24.7.97 from the Manager, Dis. & Trans. of Hindustan Petroleum Corpn.. Ltd. to Vikram Carriers requesting to refund excess payment of Rs. 23,14,827/- as the assessee delivered bitumen directly to the different Bihar Govt. Road Construction Departments (RCDs), instead of transporting the same via Barauni as per agreement.

Moreover, pages 25 to 27 of the seized documents VC/5 is a copy of a letter dt. 16.7.97 to Vikram Carriers from Bharat Petroleum Corpn. Ltd. for payment of the excess transportation charges paid of Rs. 60,01,379.53.

It is evident from the above that the oil Companies have accused M/s. Vikram Carriers of breaking the transportation agreement by not transporting via Barauni and thereby taking the excess transporting charges by overcharging the kilometers covered to the extent of the amounts. This means to these extents the assessee had not incurred any expenditure but received the transportation charges. The result of examination and verification of expenses and sundry creditors on a/c. of transportation charges, which is discussed in the next para, is corroborative of not incurring such huge expenses as claimed on a/c. Therefore, the total amount of excess claim of transportation charges which comes to Rs. 1,19,20,777/- + Rs. 23,14,827/- + Rs. 60,01,380/-) = Rs. 2,02,36,984/- is treated as Undisclosed income of the assessee."

The Assessing Officer was also of the opinion that the assessee had shown bogus expenditures and bogus creditors, the peak amount whereof was Rs. 1,59,38,774/-. The Assessing Officer, however, did not treat the said sum of Rs. 1,59,38,774/- on the undisclosed income as the same was "less than the amount of excess billing, as discussed earlier, no separate addition is made on this account."

6. Aggrieved by the order of the Assessing Officer, an appeal was unsuccessfully preferred by the assessee to the CIT(Appeal).

7. The matter was thereafter carried to the Tribunal.

8. The Tribunal was of the opinion that there was no undisclosed income for the following reasons:

"we hold that the addition of Rs. 2.02 crores on account of excess transportation charges received by the assessee, which are already accounted for by the assessee in its account books, cannot be made in the hands of the assessee."

9. The Tribunal, however, proceeded to examine the correctness of the alleged bogus creditors and the bogus expenditures and held as follows:

"We find that even before us, the assessee was not able to produce any evidence to prove the genuineness of the expenses claimed by it. It seems that the extent of the bogus claim of expenses may be even more than the figure of Rs. 1,59,38,774/- held as bogus expenditure by the A.O. In our view, the A.O. was reasonable in taking only the total peak amount of the outstanding balances shown against these creditors at Rs. 1,59,38,774/- and treating the same as undisclosed income of the assessee for the relevant previous years. Regarding the objection of the Ld. Counsel for the assessee that in block assessment, only the assessment of undisclosed income can be made on the basis of the same seized material and the issuance of notice u/s. 131 to the sundry creditors is not a seized material, we find that the argument of the Ld. Counsel is not tenable. We find that it was only due to search operations carried out against the assessee that the documents evidencing the claim of 3 oil companies regarding the excess claim of transportation charges were detected and that the account books were seized and detailed enquiry was conducted which led to the conclusion that the expenses claimed by the assessee were bogus in nature. The CIT(Appeals) has observed that the amendment in the Act had clarified the position and had been given retrospective effect from 1.7.95. He has given a finding that the bogus nature of the expenses came to light because of the search which was conducted in the case of transporters involved in the bitumen scam and the documents which were recovered during the search had led to the conclusion that the expenses claimed by the assessee were bogus in nature. No evidence or material was produced before us to contradict the finding of the CIT (Appeals) in this regard. We find that the Revenue has produced enough evidence to prove that the expenses claimed by the assessee were bogus in nature. In this view of the matter, we hold that the Revenue authorities were justified in treating the total peak amount of outstanding balances shown against these creditors at Rs. 1,59,38,774/- as undisclosed income of the assessee for the relevant previous years. Accordingly, we confirm the addition of Rs. 1,59,38,774/-(against the addition of Rs. 2.02 crores made by the Revenue) on account of the bogus nature of the expenses claimed by the assessee and reflected in the total peak amount of outstanding balances shown against the creditors. Accordingly, the ground of appeal No. 5 and 8 of the assessee is partly allowed and grounds of appeal No. 6 and 7 are dismissed."

10. Aggrieved by the aforesaid order, the assessee is before us in appeal under section 260A.

11. The questions of law formulated have already been indicated above.

12. It is not in dispute that no cross objection was filed by the revenue challenging the order of the CIT (Appeal). The CIT (Appeal) had upheld the order of the Assessing Officer. In other words, he restricted the addition to a sum of Rs. 2.02 crores. He also approved the refusal of the Assessing Officer to add the sum of Rs. 1,59,38,774/-. The revenue was satisfied with such finding of the CIT (Appeal) and, therefore, no cross appeal was preferred by them.

13. Reference in this regard may be made to sub-section (4) of section 253 which provides as follows:

"[(4) The Assessing Officer or the assessee, as the case may be, on receipt of notice that an appeal against the order of the Deputy Commissioner (Appeals) or, as the case may be, the Commissioner (Appeals) or the Assessing Officer in pursuance of the directions of the Dispute Resolution Panel has been preferred under sub-section (1) or sub-section (2) or subsection (2-A) by the other party, may, notwithstanding that he may not have appealed against such order or any part thereof; within thirty days of the receipt of the notice, file a memorandum of cross-objections, verified in the prescribed manner, against any part of the order of the Assessing Officer (in pursuance of the directions of the Dispute Resolution Panel) or Deputy Commissioner (Appeals) or, as the case may be, the Commissioner (Appeals), and such memorandum shall be disposed of by the Appellate Tribunal as if it were an appeal presented within the time specified in subsection (3) or sub-section (3-A).]"

14. The revenue did not choose to avail itself of the benefit of filing a cross objection when the assessee preferred an appeal challenging the order of the learned CIT(A).

15. In the circumstances, it was rightly contended by Mr. Khaitan, learned Senior Advocate, that it was not open to the learned Tribunal to confirm the addition of the sum of Rs. 1,59,38,774/- because no such addition was made. In the absence of any such addition, there was no basis for the learned Tribunal to confirm the same. This addition was made by the learned Tribunal for the first time which the learned Tribunal could not have done.

16. Mrs. Chatterjee, learned Advocate appearing for the revenue, drew our attention to the grounds of appeal noticed by the learned Tribunal, which are as follows:

"The grounds of appeal No. 5 to 8 of the assessee are as under:--

5. "For that the Commissioner of Income-tax(Appeals) erred in confirming the addition of Rs. 202,36,984/- on the basis of certain claims made by certain companies for refund of alleged excess payment made by them which are pending in arbitration proceedings and are not yet final. The Commissioner of Income- tax (Appeals) failed to appreciate that no addition could be made in the hands of the Appellant on the basis of the claim made which are not yet final and adjudicated."

6. "For that further and in any event various prejudicial findings of the Assessing Officer in respect of Sundry Creditors of the Appellant and confirmed by the Commissioner of Income- tax(Appeals) are without any basis and/or material and have been arrived at by ignoring relevant materials and evidence and are based on surmises and conjectures."

7. "For that no proper enquiry was made by the Assessing Officer in respect of genuineness of the Sundry Creditors and the said enquiry was in violation of natural justice and fairplay and the Commissioner of Income-tax(Appeals) erred in confirming the addition on the basis of the said perverse findings."

8. "For that further and in any event and without prejudice to the above the alleged discrepancy in the sundry creditors as found by the Assessing Officer was to the extent of Rs. 1,59,38,774/- only and the addition in excess of the said amount is illegal, arbitrary and perverse."

17. She submitted that the issue had been raised by the assessee himself.

18. We are unable to accept this submission. The assessee did not raise the issue of any addition of a sum of Rs. 1,59,38,774/- because there was no addition of the sum of Rs. 1,59,38,774/- or any part thereof. The assessee attempted to demonstrate the fallacy in the finding arrived at by the Assessing Officer by holding at one place that there was an undisclosed income of Rs. 2.02 crores and at another place by holding that there was an undisclosed income of Rs. 1.59 crores approximately. When the Assessing Officer had not made the addition of Rs. 1,59,38,774/-, the assessee had no occasion to challenge the same. When the assessee carried the matter to the CIT (Appeal), the latter, without anything more, could have enhanced the addition. But the CIT (Appeal) did not do so. He merely confirmed the order of the Assessing Officer. Therefore, the subject matter of challenge before the learned Tribunal was the addition of Rs. 2.02 crores. The learned Tribunal could either have upheld the same or could have set aside the same. The learned Tribunal chose to set aside that addition. The matter should therefore have come to an end in the absence of any cross objection by the revenue.

19. Reference, in this regard, may be made to a Division Bench judgment of the Bombay High Court in the case of Motor Union Insurance Co. Ltd. v. Commissioner of Income Tax, Bombay, reported in , (1994) 13 ITR 272, wherein

the following views were expressed:

"Apart from statute, it is elementary that if a party appeals, he is the party who comes before the Appellate Tribunal to redress a grievance alleged by him. If the other side has any grievance, he has a right to file a cross-appeal or cross-objections. But if no such thing is done, the other party, in law, is deemed to be satisfied with the decision. He is, of course, entitled to support the judgment of the first Officer on any ground open to him, but he is not entitled to raise a ground so as to work adversely to the appellant and in his favour. Apart from that, the section, in our opinion, does not permit the course adopted by the Tribunal in this case. Under S. 31, when the Legislature thought of giving power to the Appellate Assistant Commissioner to enhance the assessment, it has in terms enacted that. In our opinion, that fact is against the contention that the words of S. 33(4) are wide enough to include a power of enhancement, without an appeal by the Commissioner. The, word "thereon" used in S. 33(4) only means "on the appeal," which must mean on the grounds raised in the appeal. Read in that way, the sub-section only gives power to the Appellate Tribunal to give its decision and pass orders in respect of all grounds urged (which must be on behalf of the appellant) in respect of the decision, appealed against. In deciding those grounds it can pass appropriate orders. But, in our opinion, it is not open to the Tribunal itself to raise a ground or permit the party, who has not appealed, to raise a ground, which will work adversely to the appellant."

20. It will be of some interest to notice section 33 of the 1922 Act, which was as follows:

"Section 33. Appeals against orders of Appellate Assistant Commissioner

(1) Any assessee objecting to an order passed by an Appellate Assistant Commissioner under Section 28 or Section 31 may appeal to the Appellate Tribunal within sixty days of the date on which such order is communicated to him.

(2) The Commissioner may, if he objects to any order passed by an Appellate Assistant Commissioner under Section 31, direct the Income-tax Officer to appeal to the Appellate Tribunal against such order, and such appeal may be made within sixty days of the date on which the order is communicated to the Commissioner by the Appellate Assistant Commissioner.

(2-A) The Tribunal may admit an appeal after the expiry of the sixty days referred to in sub-sections (1) and (2) if it is satisfied that there was sufficient cause for not presenting it within that period.

(3) An appeal to the Appellate Tribunal shall be in the prescribed form and shall be verified in the prescribed manner, and shall, except in the case of an appeal referred to in sub-section (2), be accompanied by a fee of one hundred rupees.

(4) The Appellate Tribunal may, after giving both parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, and shall

communicate any such orders to the assessee and to the Commissioner.

(5) Where as the result of an appeal any change is made in the assessment of a firm or association of persons or a new assessment of a firm or association of persons is ordered to be made, the Appellate Tribunal may authorise the Income-tax Officer to amend accordingly any assessment made on any partner of the firm or any member of the association.

(6) Save as provided in Section 66 orders passed by the Appellate Tribunal on appeal shall be final."

21. We already have quoted sub-section (4) of section 253. Upon comparison of section 253 with section 33 of the 1922 Act, it would appear that the Act of 1922 did not contain any express provision enabling a respondent to the appeal to file a cross objection although latently it was there. The judicial principle pressed into service by the Division Bench of the Bombay High Court was later followed by another Division Bench of the Bombay High Court in the case of New India Life Assurance Co. Ltd. v. Commissioner of Income Tax, reported in , (1957) 31 ITR 844, and the same view was also endorsed by the Apex Court in the case of State of Kerala v. Vijaya Stores, reported in , (1979) 116 ITR 15. Their Lordships were considering the question in connection with the powers of the Sales Tax Appellate Tribunal which was similar to the provisions of section 33 of the Income Tax Act of 1922 and this is what Their Lordships observed:

"The normal rule that a party not appealing from a decision must be deemed to be satisfied with the decision, must be taken to have acquiesced therein and be bound by it, and, therefore, cannot seek relief against a rival party in an appeal preferred by the latter, has not been deviated from in sub-s. (4)(a)(i) above. In other words, in the absence of an appeal or cross-objections by the department against the AAC''s order the Appellate Tribunal will have no jurisdiction or power to enhance the assessment. Further, to accept the construction placed by the counsel for the appellant on sub-s. (4)(a)(i) would be really rendering sub-s. (2) of s. 39 otiose, for if in an appeal preferred by the assessee against the AAC''s order, the Tribunal would have the power to enhance the assessment, a provision for cross-objections by the department was really unnecessary. Having regard to the entire scheme of s. 39, therefore, it is clear that on a true and proper construction of sub-s. (4)(a)(i) of s. 39 the Tribunal has no jurisdiction or power to enhance the assessment in the absence of an appeal or cross-objections by the department. It is true that the two Bombay decisions reported in , [1945] 13 ITR 272 and , [1957] 31 ITR 844, on which the High Court has relied, have been rendered in relation to s. 33(4) of the Indian I.T. Act, 1922, but, in our View, the said provision of I.T. Act is in pari malaria with the provision of s. 39(4) of the Kerala General Sales Tax Act, 1963. Moreover, the Bombay High Court has pointed out in those decisions that s. 33(4) merely enacted what was the elementary principle to be found in the Civil Procedure Code that the respondent who has neither preferred his own appeal nor filed cross-objections in the appeal preferred by the appellant, must be deemed to be satisfied with the decision of the lower authority and he will not be entitled to seek relief against a rival party in an appeal preferred by the latter. In the first mentioned case, the elementary principle is stated at page 282 of the report thus:

"Apart from statute, it is elementary that if a party appeals, he is the party who comes before the Appellate Tribunal to redress a grievance alleged by him. If the other side has any grievance, he has a right to file a cross-appeal or cross-objections. But, if no such thing is done, the other party, in law, is deemed to be satisfied with the decision. He is, of course, entitled to support the judgment of the first officer on any ground open to him, but he is not entitled to raise a ground so as to work adversely to the appellant and in his favour."

22. For the aforesaid reasons, we are of the opinion that the addition of a sum of Rs. 1,59,38,774/- was clearly in excess of jurisdiction. Therefore, the question No. 2 is answered in the negative and in favour of the assessee. In view of the answer to question No. 2, we need not examine the question No. 3. The question No. 1 was not pressed by Mr. Khaitan.

23. The appeal is thus allowed. The parties shall however bear their own costs.

Shivakant Prasad, J.—I agree.

