
(1988) 06 CAL CK 0005

In the Calcutta High Court

Case No : Income-tax Reference No. 8 of 1984

STAR ROLLING MILLS (P.) LTD.

APPELLANT

Vs

COMMISSIONER OF Income Tax.

RESPONDENT

Date of Decision : 08-06-1988

Acts Referred:

Citation : (1988) 74 CTR 68 : (1988) 174 ITR 396 : (1988) 41 TAXMAN 284

Hon'ble Judges : K. M. Yusuf, J;Ajit Kumar Sengupta, J;Ajit Kumar Sen Gupta, J

Bench : Full Bench

Judgement

AJIT KUMAR SENGUPTA J. - At the instance of the assessee, the following question of law has been referred to this court u/s 256 (2) of the Income Tax Act, 1961.

"Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding the order u/s 263 passed by the Commissioner of Income Tax for the assessment year 1974-75 as correct ?"

The facts admitted and/or found by the Appellate Tribunal and incorporated in the statement of case are stated hereafter :

The assessee is a private limited company. By the assessment order dated July 28, 1977, for the assessment year 1974-75, the Income Tax Officer determined the assessee's total income at Rs. 18,322. Subsequently, by the rectification order dated January 16, 1978, u/s 154 of the Act, the Income Tax Officer allowed the assessee the benefit of deduction of business losses of Rs. 18,322 pertaining to the assessment years 1968-69, 1971-72 and 1972-73. Thus, the total income was reduced to "nil" and further business loss of Rs. 14,226 for the assessment year 1972-73 was carried forward.

The Commissioner of Income Tax, on going through the records, found the order of rectification passed by the Income Tax Officer erroneous and prejudicial to the interests of the Revenue because the total income originally assessed at Rs.

18,322 was computed under the head "Other sources". Accordingly, the Commissioner of Income Tax, after issuing a show-cause notice and after hearing the assessee, passed an order u/s 263 of the Act, cancelling the said rectification order u/s 154 of the Act.

Aggrieved by the said order of the Commissioner of Income Tax, the assessee brought the matter by way of appeal to the Tribunal.

The Tribunal held that in the original assessment, the Income Tax Officer determined the assessee's income as "income from other sources". Admittedly, there was no appeal against the said order as to the issue of the head of income. So, the assessment was final. Subsequently, the Income Tax Officer, without giving any reason in the rectification order, allowed the assessee the benefit of deduction of business losses for the earlier years. The Commissioner was, therefore, justified in cancelling the Income Tax Officer's order and restoring the original assessment order.

At the hearing, Mr. Roy Chowdhury, learned counsel appearing for the assessee, has contended that if it is found that the Income Tax Officer was justified in allowing set off of the losses claimed by the assessee, there was a mistake apparent from the record and, accordingly, the Income Tax Officer was justified in making the rectification. He has relied on several decisions in support of his contention that when the assessee carries on business, whether a part of that income has been shown under one source or the other would not make any difference and the loss, if any, has to be allowed as a business loss to be set off against the income of the following years. According to him, the Income Tax Officer rightly invoked the jurisdiction u/s 154 of the Act. He has relied on the decision of the Supreme Court in *Commissioner of Income Tax, Andhra Pradesh Vs. Cocanada Radhaswami Bank Ltd.*, .

In that case, the assessee-company, which carried on banking business, held securities as part of the trading assets of its business. For the assessment year 1949-50, it incurred a loss of Rs. 64,400 under the head "Business" and earned Rs. 8,488 as interest on the securities and the net loss amounted to Rs. 55,912. For the three succeeding assessment years, the Income Tax Officer allowed this loss to be set off against income under the head "Business" but refused to set it off against the income computed under the head "Interest on securities".

On those facts, it was held that the assessee was entitled to set off the loss of Rs. 55,912 brought forward from the assessment year 1949-50 against the entire income including the interest on securities in the succeeding years. u/s 24 (2) of the Indian Income Tax Act, 1922, income from securities which formed part of the assessee's trading assets was part of its income from business and, therefore, the loss incurred in the business in the earlier year could be set off against the income from securities also in the succeeding years.

The Supreme Court further held that the scheme of the Income Tax Act is that Income Tax is one tax. Section 6 of the Income Tax Act, 1922, classifies the

taxable income under different heads for the purpose of computation of the net income of the assessee. Though, for the purpose of computation of the income, interest on securities is separately classified, income by way of interest from securities does not cease to be part of income from business if the securities are part of the trading assets. Whether a particular income is part of the income from a business has to be decided not on the basis of the provisions of section 6 but on commercial principles.

He has relied on the decision of the Division Bench of the Orissa High Court in the case of Commissioner of Income Tax Vs. Orissa State Co-operative Housing Corporation Ltd., . There, the Orissa High Court, following the decision in the case of Commissioner of Income Tax, Andhra Pradesh Vs. Cocanada Radhaswami Bank Ltd., , held that though for the purpose of computation of income, interest on securities is separately classified, income by way of interest on securities would not cease to be part of income from business if the securities are part of the trading assets of the assessee. Whether a particular income is part of income from business falls to be decided not on the basis of the provisions of the section dealing with it, but on commercial principles. In that case, a co-operative society claimed deduction u/s 81 in respect of interest on securities and fixed deposits and the Appellate Tribunal, on an investigation of the facts, found that the income came within the ambit of profits and gains of business carried on by the assessee.

Reliance has also been placed on the decision of the Division Bench of this court in the case of Commissioner of Income Tax Vs. New India Investment Corporation Ltd., . There, the court held that where an assessee was holding shares and securities as its stock-in-trade and dividend was received by the assessee from such stock-in-trade and none of the holdings of the assessee were held by way of investment only and the assessee had incurred expenditure to earn its income, then the dividend earned by the assessee, though assessable under a particular head, i.e., "Income from other sources", was really the "business income" of the assessee and the expenditure incurred by the assessee should be allowed under that head and cannot be apportioned against income arising under two different heads, i.e., "Business" and "Dividend". Even if the income of the assessee was solely referable to dividend, there cannot be any apportionment, as the entire expenditure would then be allowable against the dividend earned.

In our view, the decision relied on by the learned advocate for the assessee has no application to the facts of this case.

Section 72 has laid down certain conditions for carry forward of business loss. The business loss shall be set off against the profits and gains, if any, of any business carried on by the assessee. In the regular assessment, carried forward loss was not set off as the assessee did not claim for such set off. The assessee derived rental income from land, building and machinery which were let out to several persons and the entire income was assessed under the head "Other

sources".

It is no doubt true that in case any business assets are hired out as part of the business activity carried on by the assessee or as commercial assets belonging to the assessee, income derived therefrom is assessable as business income. But whether or not a business activity is being carried on by the owner of the assets or, in other words, whether a particular letting is business has to be decided on the facts and in the circumstances of each case. Investigation of facts has to be made to find out whether the letting was carrying on of a business or the exploitation of the property by its owner. There was no finding to that effect in the regular assessment made by the Income Tax Officer. Unless there is a business income in the relevant assessment year, the carried forward business loss cannot be set off. The entire income derived from letting out of the assets has to be assessed under the head "Other sources". The cases relied on by the assessee have no application to the facts of this case. Where the shares or securities are held by the assessee as a part of the trading assets, the dividend on those shares would still form part of the business and the carried forward business loss can be set off against the dividend income. In *Commissioner of Income Tax, Andhra Pradesh Vs. Cocanada Radhaswami Bank Ltd.*, , the company carried on banking business and it was held on investigation of facts that the Government securities were held as part of the trading assets and that accordingly unabsorbed loss from banking business was allowed to be carried forward and set off against the entire income including the interest on securities. It is not the case here. Whether income derived from commercial assets is to be assessed as income from business or as income from "other sources" will depend on investigation of facts. The Income Tax Officer allowed set off of the carried forward loss treating the entire Income originally assessed as income from "other sources" as income from business without ascertaining the facts and that too in a proceeding u/s 154 of the Act.

Under section 154 of the Income Tax Act, 1961, only an obvious mistake can be rectified. There must be a mistake apparent on the face of the records. It does not cover any mistake which may be discovered by a process of investigation, argument or proof. The Income Tax Officer allowed the business loss to be set off against the income from "other sources" of the assessment year in question in a proceeding u/s 154 of the Act without determining whether such income could be treated as business income or not. There are no materials on record to justify the inference that the assessee was carrying on business in letting out the plant, machinery and building. The Commissioner of Income Tax, in the order passed u/s 263 of the Act, held as follows :

"It is true that the question whether the income from letting out machinery, factory, buildings, etc., would constitute business income depends on the facts of each case and the consensus of the High Court and the Supreme Court decisions in the matter, and unless the business of the owner had been stopped before letting out the machinery and the building, the rental income could be assessed

under the head Business. Unfortunately, in this case, the assessee never challenged the treatment of the lease rent under the head "Other sources" even though certain disallowances and additions had been appealed against. I am here dealing with an order u/s 154 of the Income Tax Act, according to which, only the errors apparent from the record could be rectified. In this case, it was in response to the assessee's request for such a rectification that the rectification order was passed by the Income Tax Officer clearly overlooking the fact that the income from lease of the machinery, building, etc., was being assessed from 1972-73 onwards under the head Other sources."

On those facts, the Tribunal upheld the said order passed by the Commissioner of Income Tax u/s 263. In our judgment, the Tribunal was justified in sustaining the order passed by the Commissioner of Income Tax u/s 263 of the Act.

For the reasons aforesaid, the question in this reference is answered in the affirmative, against the assessee and in favour of the Revenue.

There will be no order as to costs.

K. M. YUSUF J. - I agree.