
(1982) 05 AHC CK 0054

In the Allahabad High Court

Case No : Income-tax Reference No. 154 of 1978

Vishnu Kumar Gupta

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 13-05-1982

Acts Referred:

Income Tax Act, 1961 — Section 143(2), 144, 146, 251(1), 254(1)

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Income Tax Act, 1961 — Section 143(2), 144, 146, 251(1), 254(1)

Citation : (1983) 143 ITR 69 : (1982) 10 TAXMAN 309

Hon'ble Judges : R.R. Rastogi, J;K.N. Seth, J

Bench : Division Bench

Advocate : R.K. Gulati, for the Appellant; M. Katju, for the Respondent

Final Decision : Disposed Off

Judgement

Rastogi, J.—The assessee, Sri Vishnu Kumar Gupta, karta of an HUF, filed his return for the assessment year 1970-71, the previous year ended March 31, 1970, on 22nd July, 1971. He declared his income at Rs. 33,838, the details being as under :

Rs.

1. Property income

152

2. Share from M/s. Radhey Lal Devicharan

33,011

3. Annuity deposit

1,400

34,563

Less : LIP rebate

725

33,838

2. During the course of assessment proceedings, the ITO issued a notice u/s 143(2) of the I.T. Act, 1961 (hereafter "the Act"). The assessee committed default and, hence, the ITO made an ex parte assessment u/s 144 of the Act on November 27, 1972. The share income from M/s. Radhey Lal Devicharan was taken at Rs. 30,932. Apart from that, income from money-lending business was taken at Rs. 7,700. Under the head " Other sources ", the following interest income was taken :

Rs.

1. Interest from Sheo Kumar Gupta

1,500

2. Interest from M/s. Devicharan Commercial Corporation

5,400

3. Interest from M/s. Ram Kumar Ram Krishna & Company

6,945

4. Interest from Ram Kumar Gupta and Company

6,734

5. Interest from M/s. Radhey Lal Devicharan

3,273

3. Besides this interest income, salary income from M/s. Devicharan Commercial Corporation was taken at Rs. 1,480. The total income thus determined was Rs. 65,530. The assessee's appeal having failed, he took up the matter in further appeal before the Income Tax Appellate Tribunal (hereafter "the Tribunal.") and disputed, income from money-lending, interest income under the head "Other sources" and income from salary. It may be noted that the basis for estimating these incomes was the assessment order for the immediately preceding year, that is 1969-70, The assessee brought it to the notice of the Tribunal that for that year, the assessment order had been set aside in appeal by the AAC and the case had been remanded to the ITO for making the assessment afresh and that being so that order could not be treated as a basis for estimating the income for the year under consideration. Apart from this, in regard to income from money-lending business, it was urged that the money that the assessee had invested in the money-lending business had been withdrawn by him in the relevant previous year and had been utilized to a large extent in starting a new cold storage at Kannauj and, therefore, there was no income from that business. For the

assessment years 1969-70 and 1970-71, this fact had been accepted by the ITO. The Appellate Tribunal does not appear to have passed any definite order in regard to the admission of this fresh evidence. It, however, took the view that the assessee could not question the validity of the ex parte assessment and all that it could examine was as to whether the ITO had exercised the discretion vested in him u/s 144 of the Act in a judicial manner or in an arbitrary or capricious manner and that the burden of satisfying the appellate court, in this behalf was on the party challenging the exercise of the best judgment of the ITO. On this legal view, the Tribunal confirmed the estimates of income from money-lending, income from salary and interest income from Sheo Kumar Gupta and M/s. Devicharan Commercial Corporation." As regards interest income from M/s. Ram Kumar Ram Krishna & Company and M/s. Ram Kumar Gupta and Company, the Tribunal accepted the assessee's contention that since the assessee had denied that any such interest was due to him from these two parties, there was no basis for the ITO to estimate this income unless he had some material to contradict the assertion of the assessee. In fact the ITO had no such material. On the contrary a reference to the assessment files of these two parties would have shown that the assessee was not entitled to receive any interest from those parties during the previous year. As regards the interest income from M/s. Radhey Lal Devicharan, the Tribunal found that the assessee was a partner in that firm and his share income shown in the return included the amount of interest received by him from the firm. Therefore, the interest income could not have been separately assessed. In the result, the appeal was partly allowed. This decision was given on 19th February, 1975.

4. Thereafter, the assessee moved an application u/s 256(1) of the Act, which was rejected by the Tribunal, and then he moved an application u/s 256(2) before this court." This court by its order dated November 21, 1977, directed the Tribunal to state a case and refer the following question for its opinion :

"Whether the Income Tax Appellate Tribunal was right in its view that in dealing with an ex parte assessment it was not competent to take into account the material which was not before the Income Tax Officer when he framed the assessment, although the material placed before it went to the root of the matter inasmuch as no income was earned from the various sources which have been subjected to tax in the hands of the applicant ?"

5. It may be noted that pending the disposal of the reference application, the assessee moved an application u/s 254(2) of the Act before the Tribunal. It was stated in that application that the Tribunal had omitted to consider certain facts which had been brought to its notice at the time of hearing of the appeal and thus a mistake apparent from the record had crept in its order. The Tribunal rejected this application by its order dated October 29, 1977. In its opinion no mistake as alleged existed in its order and as such the application was not maintainable.

6. It was submitted before us on behalf of the assessee by his learned counsel,

Sri R.K. Gulati, that the view taken by the Appellate Tribunal in regard to the scope of its powers u/s 254(1) was erroneous. After hearing counsel for parties, we find "merit in this submission. u/s 254(1), the Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit. It would be seen that the powers of the Tribunal in dealing with appeals are expressed in the widest possible terms and are similar to the powers of an appellate court under the Code of Civil Procedure, 1908.

7. Now, when an assessment is made u/s 144 of the Act, two remedies are open to the assessee. He may file an application u/s 146 of the Act for the cancellation of the assessment on the ground, inter alia, that he was prevented by sufficient cause from making his return u/s 139(2) or from complying with the notice issued u/s 142(1) or Section 143(2). In case the ITO is satisfied about the existence of such ground, he may cancel the assessment and proceed to make a fresh assessment in accordance with the provisions of Section 143 or Section 144. In case he is not so satisfied, he may reject the application. If aggrieved, the assessee may file an appeal against that order before the AAC and further appeal before the Tribunal. But the assessee can also file an appeal against the assessment order itself, first before the AAC and then before the Tribunal. The assessee may take recourse to these remedies simultaneously, may not file an application u/s 146(1) at all and may only prefer an appeal against the ex parte assessment order. This court in Chhotelal Gobardhan Das Vs. Commr. of Income Tax, U.P. and V.P. Lucknow, , took the view that the Appellate Tribunal had wide powers but they relate only to the quantum of tax payable. In Padampat Singhania Vs. Commr. of Income Tax, U.P. and Ajmer-Merwara, Lucknow, again it had occasion to consider this question and it held that in an appeal before the AAC against an order u/s 27 of the Indian I.T. Act, 1922, equivalent to Section 146 of the 1961 Act, the AAC could only consider the quantum of tax imposed but he could not go into the question about the propriety of passing the best judgment assessment. In Gaurishanker Kedia Vs. Commissioner of Income Tax, Bombay City II, as well, it was held by the Bombay High Court that the only limitation on the appellate jurisdiction is that the propriety of proceedings of best judgment assessment could not be questioned when no steps had been taken for setting aside the best judgment assessment. The same view has been taken by the Andhra Pradesh High Court in SUNDERMUL and CO. Vs. COMMISSIONER OF Income Tax A. P., , and by the Madras High Court in M. M. Muthuwappa Vs. Commissioner of Income Tax, Madras, . The Bombay High Court in Gridhar Javer and Co. Vs. Commissioner of Income Tax/Excess Profits Tax, Bombay City, expressed itself thus on this point (p. 547):

"It must be borne in mind that when the books of account are produced by the assessee and the assessment is an ordinary normal assessment u/s 23(2), unless the books are rejected u/s 13, the assessment proceeds on the basis of the books produced by the assessee. u/s 23(4) the assessment is according to the judgment of the Income Tax Officer, and even though books of account may be looked at by him under the direction of the Appellate Assistant Commissioner,

they would be looked at for an entirely different purpose from the purpose for which he would look at them if he was proceeding to assess the assessee u/s 23(3). Therefore, if the Appellate Assistant Commissioner directed the Income Tax Officer to look at the books of account, it could only be for the purpose of arriving at his best judgment. It is true that the further inquiry contemplated by Section 31(2) must be an inquiry for the purposes of disposing of the appeal, and the question in appeal before the Appellate Assistant Commissioner must be whether the judgment of the Income Tax Officer was properly exercised u/s 23(4) and whether the quantum arrived at by the Income Tax Officer was properly and fairly arrived at. But can it be said that under no circumstances is the Appellate Assistant Commissioner permitted to direct the Income Tax Officer to look at the books of account, which books have not been and cannot be produced for the purpose of the ordinary assessment ? We fully appreciate the point of view put forward on behalf of the Department that the assessee should not be allowed to sit on the fence, take the chance of a best judgment assessment without producing the books and if they find that the best judgment assessment is not in their favour and the production of the books of account which they have suppressed may result in an assessment more favourable to them, then ask for the examination of their books. We also appreciate the point of view of the Department that the weight to be attached to the books of account which have not been produced at the proper time must always be very slight. But what we are considering in this reference is not the right of the assessee to produce their books, but it is the power and the jurisdiction of the Appellate Assistant Commissioner to direct the Income Tax Officer to look into these books of account. The right that the assessee had to produce their books of account was taken away when their appeal u/s 27 was dismissed. They could not insist on the assessment being made on the basis of their books of account. But the question of the jurisdiction and the power of the Appellate Assistant Commissioner is entirely a different one. Even though in practice it may be in extremely rare cases that the Appellate Assistant Commissioner would direct the Income Tax Officer to look into the books of account of the assessee which the assessee has failed to produce, however rare the cases may be, we have got to answer the question of law on the provisions of the statute and not from the point of view of its practical application."

8. We express our respectful agreement with these observations. Also see *Arjan Dass v. CIT* [1978] 112 ITR 480 and *S.R. Kalani Vs. Commissioner of Income Tax*, .

9. It would be seen, therefore, that no limitation has been placed on the powers of the AAC or the Appellate Tribunal conferred u/s 251(1) or Section 254(1). The only limitation on their appellate jurisdiction which can be inferred from the decided cases is that they cannot go into the question of propriety of the ex parte proceedings and the best judgment assessment. The quantum of assessment, the quantum of tax or the question of registration of a firm can always be gone into. We may note that the learned standing counsel as well did

not seriously dispute this legal proposition. The Tribunal was, therefore, mistaken in its view that it had no power to look into the evidence which was not available on the record at the" time when the ITO made the ex parte assessment.

10. It was, however, urged by the learned standing counsel that the question referred to this court does not arise out of the Tribunal's order.

11. According to the learned counsel, if at all, the question arises out of the order passed on the assessee's application u/s 254(2) and since the assessee did not challenge that order by way of any reference application, the original order passed in the appeal remains and the question referred does not arise from that. We do not agree. We have mentioned above that the assessee had raised this contention before the Tribunal at the time of the hearing of the appeal. The Tribunal did not express itself on the question of admissibility of this evidence. It took the view that it had no power to examine this fresh material because it was not available on the record at the time when the assessment order was made. The position is that when a question of law is raised before the Tribunal but the Tribunal fails to deal with it, it must be held to be dealt with by it and is, therefore, one arising out of its order : vide Commissioner of Income Tax, Bombay Vs. Scindia Steam Navigation Co. Ltd., . It cannot be said, therefore, that the question of law referred to this court does not arise out of the Tribunal's order.

12. Accordingly, we answer the question by saying that the Appellate Tribunal was not right in its view that in dealing with an appeal against an ex parte assessment, it was not competent to take into account the material which was not before the ITO when he framed the ex parte assessment even though that material went to the root of the matter and disclosed that the disputed income had not been earned by the assessee. The assessee is entitled to costs which we assess at Rs. 250.