
(1993) 03 BOM CK 0088

In the Bombay High Court

Case No : Income-tax Reference No. 252 of 1979

Warner Lambert Co.

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 16-03-1993

Acts Referred:

Income Tax Act, 1961 — Section 143(3), 263, 70, 71, 71(1)

Citation : (1994) 120 CTR 335 : (1994) 205 ITR 395

Hon'ble Judges : U.T. Shah, J;B.P. Saraf, J

Bench : Division Bench

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

Judgement

Dr. B.P. Saraf, J.—By this reference made at the instance of the assess, the Income Tax Appellate Tribunal has referred four question so law to this court for its opinion. The first three questions pertain to the assessment year 1971-72 and the fourth question to the assessment year 1972-73. The questions are as follows :

"(1) Whether, on the facts and in the circumstances of the case, the Tribunal ought to have held that the regular assessment order of the Income Tax Officer having been adjudicated upon by the Appellate Assistant Commissioner, the Commissioner of Income Tax was not competent to revise the order of the Officer giving effect to the order of the Appellate Assistant Commissioner ?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal ought to have held that the appellant was entitled to have the business loss of Rs. 3,04,734 carried forward to the assessment year 1972-73 ?

(3) Whether, on the facts and in the circumstances of the case, the Tribunal ought to have held that the assessee was entitled to claim full deduction u/s 80K and 80L of the Income Tax Act, 1961, before taking into account the net business loss ?

(4) Whether, on the facts and in the circumstances of the case, the Tribunal ought to have held that there was no mistake as such in the order for the assessment year 1972-73 as made by the Income Tax Officer which could be revised by the Commissioner as the mistake, if any, was in the order for the assessment year 1971-72 alone ?"

2. The assessee is a company. For the assessment year 1971-72, the assessment of the income of the assessee was made u/s 143(3) of the Income Tax Act, 1961 ("the Act"), by the Income Tax Officer on November 27, 1973, whereby the total income of the assessee was determined at Rs. 1,58,467. This figure was arrived at by reducing from the gross dividend of Rs. 4,65,000. the permissible deductions under sections 80K and 80L of the Act and to this was added, inter alia, technical assistance fees of Rs. 1,56,777 on accrual basis. While arriving at the business income "from technical assistance fees", the Income Tax Officer did not allow any deduction for expenditure claimed to have been incurred for earning the said technical fees. On appeal by the assessee, the Appellate Assistant Commissioner of Income Tax ("the A.A.C.") directed the Income Tax Officer to grant deduction on the business expenditure claimed by the assessee. The Income Tax Officer gave effect to this order of the Appellate Assistant Commissioner on September 20, 1975, and arrived at a business loss of Rs. 3,04,734. However, while doing so the Income Tax Officer did not set off this business loss against the gross dividend income. He calculated the income from other sources at nil figure by reducing from the gross dividend and interest deductions under sections 80K and 80L of the Act and held that the business loss of Rs. 3,04,734 was carried forward to the subsequent year for set off.

3. Similar was the position for the assessment year 1972-73. As per the original order u/s 143(3) dated March 16, 1974, deduction of Rs. 4,65,000 had been made from the gross dividend of Rs. 4,65,000 and income from other sources was calculated at Rs. 4,222 being the interest income only. To this was added gross technical fees amounting to Rs. 1,49,847 thereby bringing the total income to Rs. 1,54,069. To give effect to the order of the Appellate Assistant Commissioner, the Income Tax Officer passed an order on October 26, 1974, allowing expenses of Rs. 60,147 against the gross technical fees as a result of which the business income was determined by him at Rs. 93,922. Against this, he set off the brought forward loss from the assessment year 1971-72 and arrived at the total income of Rs. 4,222 consisting of interest income taxed under other sources. He indicated in his order that the balance of loss of Rs. 2,15,034, which could not be set off this year, was being carried forward to the subsequent year for set off.

4. The Commissioner of Income Tax called for the records of the case and, on perusal of the same, he was of the opinion that the orders of the Income Tax Officer giving effect to the orders of the Appellate Assistant Commissioner were erroneous and prejudicial to the interests of the revenue because the Income Tax Officer, while giving effect to the order committed a mistake of law. According to

the Commissioner of Income Tax, for the assessment year 1971-72, the Income Tax Officer should have first set off the business loss against the gross income from other sources and then he should have reduced the balance to nil by giving relief to the extent permissible under sections 80K and 80L. As a consequence, in his opinion, business loss was available for being carried forward to the subsequent year and no question could, therefore, arise of setting off any business loss in the subsequent year. He issued a show-cause notice to the assessee and, on consideration of the cause shown rejected the assessee's claim that the order passed by the Income Tax Officer was correct in law. The assessee's contention before the Commissioner of Income Tax was that the assessee was entitled u/s 71 to claim set off of the loss in the year and partly in the other year according to his choice. The Commissioner of Income Tax did not accept this contention of the assessee and, by his revisional order for the assessment year 1971-72, held that, because of the definition of "gross total income" as contained in section 80B(5) of the Act, neither gross total income nor total income could be varied, depending upon the assessee's choice as claimed by the assessee. According to the Commissioner of Income Tax, business loss has to be set off first against the gross dividend income and the deductions u/s 80K and 80L could be made only then from the balance so as to reduce it to "nil" figure. He, therefore, directed the Income Tax Officer to do the calculation accordingly. He also passed a consequential order for the assessment year 1972-73 directing the Income Tax Officer to withdraw the set off of the business loss wrongly brought forward and set off by him.

5. Against the order of the Commissioner of Income Tax passed on revision u/s 263 of the Act, the assessee went in appeal to the Income Tax Appellate Tribunal ("the Tribunal"). Before the Tribunal, it was, inter alia, contended by the assessee that the original order of the Income Tax Officer for the two assessment years got merged in the appellate order and, consequently, the Commissioner of Income Tax had no jurisdiction to revise the orders passed by the Income Tax Officer to give effect to the appellate order of the Appellate Assistant Commissioner. This contention of the assessee was rejected by the Tribunal. The Tribunal observed :

"We do not think that it is necessary to go into this question in this case. The matters touched upon by Commissioner of Income Tax arise not out of the original assessment orders but out of the orders passed by the Income Tax Officer giving effect to the Appellate Assistant Commissioners orders, whereby some relief in quantum was obtained by the assessee. The real issue arises from the orders passed by the Income Tax Officer subsequent to the passing of the orders by the Appellate Assistant Commissioner and there is, therefore, no question of merger involved. We, therefore, do not consider it necessary to deal with this objection for either of the two years."

6. The next contention of the assessee before the Tribunal was that the Commissioner of Income Tax had no jurisdiction to revise the order for the

assessment year 1972-73 because, as things stood at that time, there was no error in the order of the Income Tax Officer to give effect to the appellate order for that year and if at all there was any error, it was in the order of assessment for the assessment year 1971-72. This contention was also repelled by the Tribunal on the ground that the error in the order for the assessment year 1972-73 was apparent in view of the order of the Commissioner of Income Tax in connection with the assessment year 1971-72.

7. The assessee's contention dealing with its right to claim set off and carry forward of loss in an year at its option was also turned down by the Tribunal on the ground that the set off of loss under one head of income against income under another head of income was governed by section 71(1) of the Income Tax Act and that being so, the assessee had no option in the matter. In that view of the matter, the contention of the assessee that he was entitled to claim full deduction u/s 80L of the Income Tax Act after taking into account the net business loss was also turned down by the Tribunal. Hence, this reference at the instance of the assessee.

8. We have heard learned counsel for the assessee at length. So far as the first question is concerned, counsel for the assessee submits that the order of assessment passed by the Income Tax Officer got merged in the order of the Appellate Assistant Commissioner and, as such, the Commissioner of Income Tax had no jurisdiction to revise the same. Reliance was placed in this connection on the decision of this court in Commissioner of Income Tax Vs. P. Muncherji and Company, and Brihan Maharashtra Sugar Syndicate Ltd. and another Vs. P.R. Joglekar Dy. Commr. of Agrl. Inc. Tax and others, . We have considered the submission of learned counsel. We have also perused the above decisions. We do not find that these decision in any way help the assessee in the present case. This is not a case where the Commissioner of Income Tax has sought to revise anything that was there in the original order of assessment which was the subject-matter of appeal before the Appellate Assistant Commissioner. In the original order of assessment, the Income Tax Officer did not allow deduction of certain expenses. As a result thereof, there was no loss. So the question of setting off of the loss or carrying forward did not arise at that stage. There cannot be merger of a question which was not even a part of the order which is said to have merged. Merger can be of something which existed at the time when the subsequent order was passed. An existing thing can merge in another thing. But what did not exist when the order of the higher authority was passed, cannot at any rate, merge in that order. In the instant case, the issue of set off and carry forward of loss and the question of deduction under sections 80K and 80L arose only after effect was given by the Income Tax Officer to the appellate order. So these issues had arisen for the first time after the appellate order and, in fact, while giving effect to the appellate order. By no stretch of imagination, can there be a merger of this part of the order which came into being for the first time while giving effect to the appellate order. If such order is erroneous, the Commissioner has definitely the jurisdiction to revise the same u/s 263 of the Act

if the requirements of that section are fulfilled. This view gets full support from the judgment of this court in Brihan Maharashtra Sugar Syndicate Ltd. and another Vs. P.R. Joglekar Dy. Commr. of Agrl. Inc. Tax and others, , where at page 290 of the report, it has been clarified that, if the Income Tax Officer makes any mistake in carrying out the directions given by the Tribunal, to that extent, his order would be liable to be revised by the Deputy Commissioner or the Commissioner. In that view of the matter, we are of the clear opinion that, in the facts and circumstances of this case, the Commissioner was fully competent to exercise his revisional powers u/s 263 of the Act and the plea of merger is not available to the assessee. The first question is, therefore, answered in the negative, i.e., against the assessee and in favour of the Revenue.

9. As regards the second question, we find that there is a latest decision of this court dated January 22, 1993, in Income Tax Reference No. 513 of 1977 Commissioner of Income Tax Vs. British Insulated Calender's Ltd., , wherein a question had arisen as to whether it was open to the assessee not to claim a set off of its business loss against its dividend income in the same year but to claim a carry forward of the same in order that it might be set off against the business income of the subsequent year or years. This court, on consideration of sections 70, 71 and 72 of the Act, came to a definite conclusion that no such option was available to the assessee. It was observed by this court (at page 359) :

"On a careful reading of section 71 of the Act, it is very much apparent that the assessee has no option of exercising setting off of business loss against income under any other head other than the income under the head "Capital gains ". In our opinion, the Tribunal has wrongly construed the expression "be entitled to" used in section 71 to mean that the assessee had an option in the matter of set off of business loss against the income under any other head. In our considered view, that expression simply enables the assessee to set off business loss against income under any other head and, but for that expression, the assessee would not be entitled to set off loss under another head in the same year."

10. Learned counsel for the assessee submits that this judgment should not be followed as it was given per incuriam. A number of book on jurisprudence were referred to in support of his contention. Reference was also made to a decision of this court in Commissioner of Income Tax Vs. Shri Someshwar Sahakari Sakhar Karkhana Ltd., to contend that the view taken in this judgment is in conflict with the view taken by this court earlier in the above case. We have carefully considered the submission. We do not find force in any of these submissions. It is well-settled that the per incuriam rule is of limited application. A decision can be said to be given per incuriam when it is given in ignorance of a statutory provision or a binding precedent. That is not the position here. The issue involved before this court in Commissioner of Income Tax Vs. British Insulated Calender's Ltd., (income tax Reference No. 513 of 1977), was directly regarding the right of the assessee to set off his business loss not in the year under consideration but in any year of his choice and it was this question which was decided by this court

on consideration of all the relevant sections of the Act which have also been set out in the body of the judgment itself. Under the circumstances, we fail to understand how it can be brought within the per incuriam rule. We are, therefore, of the clear opinion that this is a clear judgment on the point in issue and is fully binding on us.

11. We have also considered the submission based on the alleged conflict between the above decision and an earlier decision of this court in Commissioner of Income Tax Vs. Shri Someshwar Sahakari Sakhar Karkhana Ltd., . On a plain reading of the two judgments, we do not find that there is any conflict between the two because the issue involved in the latter case was completely different so also the provisions of the law which came up for consideration before this court. The issue in that case related to a claim for depreciation. The provisions relating to depreciation are completely different from the provisions regarding carry forward and set off of loss. So also, the nature of depreciation. The subject of carry forward and set off of loss is governed by different sections of the Act which have been interpreted by this court in Commissioner of Income Tax Vs. British Insulated Calender's Ltd., (income tax Reference No. 513 of 1977). In that view of the matter, we are of the clear opinion that the above decision in Commissioner of Income Tax Vs. British Insulated Calender's Ltd., (income tax Reference No. 513 of 1977) clearly covers the second question. Counsel also stated that, because the respondent was not present in that case and the case had to be heard ex parte, the judgment will have no binding effect. This submission, in our opinion, is misconceived and we reject the same. Following the same, we answer the question in the negative, i.e., against the assessee and in favour of the Revenue.

12. So far as the third question is concerned, we find that the decision of the Supreme Court in Cambay Electric Supply Industrial Co. Ltd. Vs. The Commissioner of Income Tax, Gujarat-II, Ahmedabad, , clearly covers the point at issue. Counsel for the assessee, however, pointed out that the above decision has no application and referred to another decision in Commissioner of Income Tax (Central), Madras Vs. Canara Workshops (P) Ltd., Kodialball, Mangalore, . We have considered this submission. We have also perused both the judgments as also Chapter VI-A and the relevant sections therein. Chapter VI-A deals with the deductions to be made in computing total income. This Chapter contains a number of sections from sections 80A to 80U. Section 80A(1) and (2) which are relevant for the present purpose are set out below :

"Section 80A. Deductions to be made in computing total income. - (1) In computing the total income of an assessee, there shall be allowed from his gross total income, in accordance with and subject to the provisions of this Chapter, the deductions specified in sections 80C to 80U.

(2) The aggregate amount of the deductions under this Chapter shall not, in any case, exceed the gross total income of the assessee."

13. Another relevant provision is section 80B(5) which defines "gross total income". It is in the following terms :

""gross total income" means the total income computed in accordance with the provisions of this Act, before making any deduction under this Chapter."

14. From a conjoint reading of these two provisions, it is clear that the deductions specified in the various sections of this Chapter are to be allowed from the gross total income which, as defined in section 80B(5), means the "total income" computed in accordance with the provisions of this Act before making any deduction under this Chapter. The above two provisions leave no scope for doubt that, for making deductions under this Chapter, the first thing that has to be done is to determine the total income in accordance with the provisions of this Act. If that is so, we fail to understand how the benefit of sections 80K and 80L can be given before computing the total income under a particular head which forms part of the total income. Doing so will go counter to the provisions of sections 80A and 80B(5). It will amount to doing indirectly what is specifically prohibited by the statute. Besides, sections 80K and 80L also do not say to the contrary. We may refer to section 80L which deals with interest on certain deposits, dividends, etc. It provides that, where the total income of an assessee includes any income specified in the various clauses of sub-section (1), there shall be allowed in computing the total income of the assessee a deduction specified thereunder. On a plain reading of this section, it is clear that this section also speaks of allowance of deduction in computing the total income of the assessee, not in computing the income under a particular head. Similar is the position u/s 80K.

15. In the light of the above provisions of law, we are of the clear opinion that the assessee is entitled to claim deduction under sections 80K and 80L only from the gross total income and not from the income before taking into account the net business loss. The third question is, therefore, also answered in the negative, i.e., against the assessee and in favour of the Revenue.

16. So far as the fourth question is concerned, we do not find any difficulty in answering the same. The Commissioner of Income Tax in this case initiated proceedings for revision of the orders passed by the Income Tax Officer. For both the years 1971-72 and 1972-73, the initiation of the proceedings was on the basis that the Income Tax Officer, while giving effect to the appellate order, committed a mistake in calculating the income for the assessment year 1971-72 which resulted in a loss which was carried forward to the assessment year 1972-73. That being the position, there was, prima facie, a basis for forming the opinion that the orders for both the years 1971-72 and 1972-73 were erroneous so far as the question of set off of loss and carrying forward the same respectively is concerned. If the Commissioner had finally held that there was no loss for the year 1971-72, he would have dropped the proceedings for the year 1972-73 also. But, having come to a finding that the order for the assessment year 1971-72 was erroneous, he was definitely justified in coming to the

conclusion that the order for the assessment year 1972-73 was also erroneous and prejudicial to the interests of the Revenue because loss had been carried forward which, in fact, was not there in the assessment year 1971-72.

17. That being so, we are of the opinion that the Tribunal was right in upholding the action of the Commissioner of Income Tax in revising the order for the assessment year 1972-73 also. The fourth question, accordingly, is answered in the negative, i.e., against the assessee and in favour of the Revenue.

18. In the facts and circumstances of the case, we make no order as to costs.