

indures (P.) Ltd. Vs. Inspecting Assistant

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Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : Jul-11-1991

Reported in : (1991)38ITD635(Delhi)

Judge : R Rattan, M Bakshi

Appellant : indures (P.) Ltd.

Respondent : inspecting Assistant

Judgement :

1. This appeal by the assessee is directed against the order of CIT Delhi-III passed under Section 263 on 24th February, 1988. Assessee is a private limited company. Assessment under Section 143(3) had been completed vide order dated 31st March, 1986. On examination of assessment records of the assessee, the CIT was of the view that the order passed by the Assessing Officer was erroneous in so far as it was prejudicial to the interests of revenue on the ground that unpaid sales-tax of Rs. 2,99,520 had not been treated as trading receipts and disallowance under Section 43B not made. Second reason for initiating action under Section 263 was that disallowance under Section 37(2A) to 37(3D) of the Income-tax Act, 1961 had not been made on account of sole selling commission. Assessee objected to the proposed action which did not find favour with the CIT. He accordingly set aside the assessment order made by the Assessing Officer and directed him to make fresh assessment in accordance with law after giving reasonable opportunity of being heard to the assessee.

2. Assessee is aggrieved. It was contended by Shri H.P. Aggarwal, the learned counsel for the assessee that the action of the CIT under Section 263 was unwarranted for two reasons. Firstly, when the Assessing Officer passed the assessment order on 31st March, 1986 there were two decisions of the Tribunal in favour of the assessee which have presumably been followed by the Assessing Officer in not making any disallowance under Section 43B. These two decisions of the Tribunal were cited as ITO v. Thakersi Babubhai & Co. [1986] 18 ITD 593 (Ahd.) and S. Govindaraja Reddiar v. ITO [1986] 19 ITD 177 (Coch.). According to the learned counsel though the law has been amended later on yet the same could not be the basis for holding the order of assessment to be erroneous in so far as prejudicial to the interests of revenue. The Delhi High Court decision in the case of Sanghi Motors v. CIT [1991] 187 ITR 703 according to the learned counsel, was also rendered after the decision of the CIT and as such the same shall also have to be ignored in order to determine as to whether the order passed by the Assessing Officer was erroneous in so far as pre-judicial to the interests of revenue.

3. The second ground of attack to the validity of the impugned order under Section 263 advanced by the learned counsel for the assessee is that Explanation C to Section 263 was inserted w.e.f., 1st June, 1988 extending the powers of Commissioner to such matters of any appeal filed on or before or after the first day of June, 1988 as had not been considered and decided in such appeal. According to the learned counsel prior to insertion of Explanation C to Section 263 the issue as to whether the CIT was empowered to exercise powers under Section 263 in case where the order of assessment had been the subject matter of appeal before any authority was debatable and divergent views had been taken. However, after the law has been amended according to the learned counsel, it has become clear that before the amendment, the power of the Commissioner under Section 263 did not extend to such cases of assessment which had been subject matter of appeal before any authorities. The learned counsel explained that the powers of the Commissioner under Section 263 in respect of such matters as had not been decided upon by the Appellate authorities have now been extended by virtue of the amendment and by necessary implication such powers cannot be said to have existed prior to the amendment. The learned counsel has relied upon the decision

of the Bombay High Court in the case of Ritz Ltd. v. Union of India [1990] 184 ITR 599 in support of the contention. It was accordingly urged that the order passed by the CIT under Section 263 may be set aside and that of the Assessing Officer restored.

4. The learned D.R., on the other hand, supported the order of the CIT. According to Shri Tandon, in order to consider as to whether order passed by the Assessing Officer under Section 143(3) was erroneous in so far as pre-judicial to the interests of revenue, it is necessary to take into account retrospective amended law. It has to be deemed in force at the time when the order was passed by the Assessing Officer.

According to the learned D.R. same is true of the decision of the jurisdictional High Court. It was further contended that if the order of assessment is viewed with reference to the amended law and the decision of the Delhi High Court in the case of Sanghi Motors (supra), one will have no doubt that the order passed by the Assessing Officer was erroneous and pre-judicial to the interests of revenue. With regard to second contention on behalf of the assessee, learned D.R. contended that Explanation C to Section 263 is applicable retrospectively and even otherwise it has been held by various High Courts in number of cases that the CIT has the power to intervene under Section 263 in matters which have not been specifically considered and decided by the appellate authorities in appeals against the assessment orders. Shri Tandon accordingly urged to dismiss the appeal of the assessee.

5. We have given our careful consideration to the rival contentions. In a case where the Assessing Officer follows the decision of the Tribunal in respect of a particular view even if there is another view available taken by other benches of the Tribunal it cannot be said that the order passed by the Assessing Officer is erroneous and prejudicial to the interests of revenue. Recently Allahabad High Court in the case of K.N.Agrawal v. CIT [1991] 189 ITR 769 held that where the Assessing Officer has followed the order of the Tribunal in taking a particular view, the Commission does not have the power to invoke Section 263 as the order of the Assessing Officer cannot be said to be erroneous and pre-judicial to the

interests of revenue. However, in this case we have to consider as to whether the retrospective legislation in respect of Section 43B and the decision of the Jurisdictional High Court in the case of Sanghi Motors (supra) would have different effect. In the case of retrospective legislation it is well established principle of law that full effect must be given to a statutory fiction and it should be carried to its logical conclusion. In the case of retrospective legislation it is the amended law which is deemed to be in force at the time when the order was sought to be rectified was passed. This view has been taken in the following cases: 1. Venkatachalam v. Bombay Dyeing & Mfg. Co. Ltd. [1958] 34 ITR 143 (SC); 6. For the purposes of considering as to whether the order passed by the Assessing Officer in view of amended law could be said to be erroneous and pre-judicial to the interests of revenue, the law laid down in the above noted cases, in our view, will squarely apply as the retrospective amendment defining the word 'tax payable' under Section 43B shall have to be taken into consideration for the purposes of such determination. If we taken into account Section 43B and the retrospective insertion in regard to the definition of 'tax payable' we have to consider as to whether the Assessing Officer has rightly allowed the deduction in respect of unpaid sales-tax, Under Section 43B deduction in respect of sales-tax was permissible in the year of payment. Assessee had not claimed any deduction in the profit and loss account but at the same time the amount of Rs. 2,99,520 had not been disclosed as a trading receipt. In view of the decision of the Supreme Court in the case of Chowringhee Sales Bureau (P.) Ltd. v. CIT [1973] 87 ITR 542 the amount collected as sales-tax partakes the character of trading receipt. However, the assessee's maintaining books of accounts in mercantile basis would be entitled to a corresponding deduction in respect of the sales-tax liability but for Section 43B which was incorporated w.e.f., 1-4-1984. Whether Section 43B could be invoked in a case where the amount had not become payable under the relevant sales-tax law was doubtful in view of some of the decisions of the Tribunal in favour of the assessee. The Andhra Pradesh High Court in the case of Srikakollu Subha Rao & Co. v. Union of India [1988] 173 ITR 708 also decided the issue in favour of the assessee. An Explanation was, however, added to Section 43B with retrospective effect defining the word 'tax payable' overriding the decision of the High Court and the Tribunal. The ITO did not make any disallowance under

Section 43B in the case of the assessee. Since the amended law is deemed to have been in force as on 1-4-1984 the Assessing Officer was duty bound to make a disallowance in respect of the unpaid sales-tax collected during the year in appeal. The retrospective amendment of Section 43B had rendered the order of the Assessing Officer erroneous and pre-judicial to the interests of revenue. As such the CIT(A) was justified in invoking his jurisdiction under Section 263 and setting aside the assessment.

7. We may now consider the second issue raised on behalf of the assessee. Assessee's contention is that the CIT has no jurisdiction under Section 263 in respect of orders which had become subject matter of appeal, even if the issues on which the order is sought to be revised had not been considered or agitated before the appellate authorities. Prior to insertion of Explanation C to Section 263 one.

view is that there is total merger of the assessment order with the appellate order even if some of the issues had not been agitated before the appellate authorities. The other view is that the merger is to the extent of the issues considered by the appellate authority and that it would be open to the CIT to consider the other issues not having been the subject matter of appeal before the appellate authority.

Explanation C to Section 263(1) has been inserted with retrospective effect which reads 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 filed or on before or after the first day of June, 1988, the powers of the Commissioner under this Sub-section shall extend and shall be deemed always to have been extended to such matters as had not been considered and decided in such appeal.

It is evident from Explanation 'C' to Section 263(1) that the CIT has specifically been empowered with retrospective effect to exercise his power to respect of such matters as had not been considered and decided in appeal before the first appellate authority. The Bombay High Court, however, in the case of Ritz Ltd. (supra) has held that after 1st June, 1988. In this case after having held that the said Explanation was not applicable prior to 1st June, 1988, the Hon'ble High Court followed its own decisions in the case of CIT v. P. Muncherji & Co. [1987]

167 ITR 671 (Bom.) and CIT v. A.S. Narendra Kumari Basahera [1989] 176 ITR 515 wherein it was held that once an order of assessment is subject matter of appeal the whole of it merges in that of the appellate order. It was accordingly held that action under Section 263 could not be taken in a case where the assessment order had been subject matter of appeal.

8. This decision of the Bombay High Court referred to above in the case of Ritz Ltd. (supra) has been relied upon by the learned counsel in support of the contention that the CIT could not invoke his jurisdiction under Section 263 in respect of an order which had become the subject matter of an appeal. In our view, the decision of the Bombay High Court has two parts. The first part of the decision is that Explanation C to Section 263(1) is applicable only in respect of actions taken from 1-6-1988. The second part of the decision is that there is total merger of the order in the appellate order and the Commissioner has no powers to exercise jurisdiction under Section 263 in respect of such matters. As far as the first part is concerned no other decision has been brought to our notice and as such revenue does not succeed on account of retrospective amendment of Section 263.

However, with regard to the view that there is total merger of the order which had become subject matter of an appeal, there is divergence of opinion amongst various High Courts. The view that there is partial merger of the order having been subject matter of appeal and that the Commissioner has the power subject to other conditions being satisfied to invoke Section 263 in respect of such matters that have not been considered by the appellate authority has been taken in the following cases : 7. CIT v. Travancore Tea Estates Co. Ltd. [1988] 172 ITR 733 (Ker.); and 8. Hindustan Aluminium Corporation Ltd. v. CIT [1989] 178 ITR 74 (Cal.).

We respectfully following the view taken in the above noted cases hold that there is partial merger of the order appealed against in the order of the appellate authority and the CIT has the jurisdiction to invoke his powers under Section 263 in respect of matters not considered by the appellate authority. It is nobody's case that the CIT has exercised powers in respect of matters that had been the subject

matter of appeal before the first appellate authority. We accordingly consider the order of the CIT passed under Section 263 in order warranting no interference.

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