

Virendra and Co Vs. Assistant Commissioner of

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Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : Aug-19-1996

Reported in : (1997)60ITD463(Mum.)

Appellant : Virendra and Co

Respondent : Assistant Commissioner of

Judgement :

1. Assessee has moved this applications alleging certain mistakes in the order of the Tribunal. The issue involved in the appeal before the Tribunal filed by the revenue was as to whether the assessee-company, which was engaged in ship breaking, was an industrial undertaking engaged in manufacturing activities and consequently whether the CIT(A) had erred in directing the ITO to allow the assessee deduction under section 80HHA and under section 80-I of the I.T. Act. The assessee had submitted a fairly large paper book containing 84 pages which included copies of orders of various Tribunal judgments and copies of extracts of various Acts and notifications from R.B.I., UCO Bank and Ministry of Industry. It had also filed a detailed statement of facts and summarised grounds of appeal in which it had cited several High Court decisions also.

2. When the case came up for hearing, the learned Departmental Representative submitted that although it was true that a large number of decisions on which the assessee relied were against the revenue, yet, in view of the change in concept of law the approach to the provisions of section 32A, section 80HHA and section 80-I had undergone a change after the decision of the Hon'ble Supreme Court in the

case of CIT v. N.C. Budharaja & Co. [1993] 204 ITR 412/70 Taxman 312. He had strongly relied on the order of the Assessing Officer who had rejected the claim of the assessee while the Id. counsel for the assessee vehemently argued in support of his claim. The Tribunal which included judicial members (Shri T.A. Bukte) who was the Author of one of the decisions of the Tribunal on which the Id. counsel for the assessee had very strongly relied, did not agree with the arguments of the Id.counsel for the assessee and after detailed reasoning and considering the interpretations, given to the word like "manufacture and production" by the Supreme Court and reproduced by the Hon'ble Bombay High Court, came to the conclusion that the claim of the assessee was not justified and agreed with the view taken by the Assessing Officer to the effect that breaking or dismantling of ship would perhaps be just the opposite of manufacturing or production of an article or a thing. Thereafter, the Tribunal gave its further reasons and reversed the order of the Id. CIT(A) which has caused grievance to the assessee.

In the first instance the assessee firm filed the M.A. affirming the facts regarding having taken pleas during the course of hearing like citing of cases by assessee's counsel and concession by the Id.Departmental Representative to the effect that he had no say against various submissions made in the paper book. This applications was given by a partner whose signature are illegible but whose name was stated to be Kirti S. Shah by Mr. Dastur who represented the assessee in the course of hearing of this miscellaneous application.

When his attention was drawn to the fact that no such person or partner was present at the time of hearing and hence, such facts could not be affirmed by him, he sought to file an affidavit from Mr. Mahendra S.Mathuria a practicing Advocate who has almost repeated similar affirmations. However, the affirmations in para 4 of his affidavit is patently incorrect inasmuch as as per our nothing in the log book the Departmental Representative only conceded that there were several cases in favour of the assessee, yet, he would rely on the case of N.C.Budharaja & Co. (supra) whereby the Hon'ble Supreme Court had reversed several decisions of various High Courts including that of Bombay High Court and hence, the entire issue had to be considered in the light of that decision. We may also mention that the affidavit of Shri Mathuria cannot be correct because the Departmental

Representative has no authority to make a concession against the department unless he is duly authorised by the CIT. There is nothing on record to show that he was so authorised.

3. In the applications filed by the assessee and the affidavit sworn by the Advocate of the assessee Shri Mathuria, the first objection is that there is a mistake in the order of the Tribunal because even when the Departmental Representative had agreed that he had no say against the various submissions made in the paper book, which we have already mentioned, includes assessee's statements of facts and summary of grounds of appeal, the Tribunal gave decision in favour of the revenue and against the assessee. As we have already mentioned the affidavit of Shri Mathuria practicing Advocate for the assessee and the submissions of the assessee in its miscellaneous application are patently wrong and hence, they are rejected.

4. At this stage we may also mention that Mr. Dastur very vehemently argued that it was wrong on the part of the Departmental Representative to have affirmed in the counter affidavit that he had cited the case of CIT v. Sterling Foods (Goa) [1995] 213 ITR 851/79 Taxman 381 (Bom.) and that it was a wrong affirmation because that part of the ITR in which this case was reported is dated 19-6-1995 whereas hearing before the Tribunal was on 20-6-1995 and hence, this particular case could not have been cited before the Tribunal on 20-6-1995. We have considered this objection but we may point out that the Tribunal has not mentioned in its order that this case was cited by the Id. Departmental Representative which appears to be the impression of the assessee and its learned counsel. In fact, para 5 of the Tribunal's order starts with the sentence - "We have carefully considered the arguments advanced from both the sides, the orders of the authorities below as well as the materials on record which includes citations and extracts from various decisions of Tribunals and High Courts. At the outset we would like to point out that with the pronouncement of the decision of the Hon'ble Supreme Court in the case of N.C. Budharaja & Co. (supra) the concepts of "industrial undertaking", "manufacture", "production" and "articles" have undergone a sea change. It will not be out of place, before referring to some of the law laid down by their Lordships in that decision, to mention that through that decision their

Lordships have reversed decisions of the Hon'ble Orissa, Bombay and Karnataka High Courts which were being accepted and followed almost throughout the country. In the decision reported in 204 ITR 412 (supra) their Lordships have specifically reversed the decision of the Hon'ble Bombay High Court in the case of CIT v. Pressure Pilling Co. (India) Pvt. Ltd. [1980] 126 ITR 333 and thereafter, in one of the most recent decisions of the Hon'ble Bombay High Court in the case of CIT v. Sterling Foods (Goa) [1995] 213 ITR 851, the Hon'ble Bombay High Court has discussed the legal propositions associated with the expressions "industrial undertaking" and "manufacture" and "production of articles", which issues are covered by the provisions of section 80HHA of the I.T. Act. It would be worth quoting from pages 856 and 857 of the report in the case of Sterling Foods (supra) to the following effect : * * * * * This would show that the Tribunal has not mentioned in its order that the case of Sterling Foods (Goa) (supra) was cited by the Departmental Representative. We would like to mention that we are not inclined to accept what appears to be suggested through the affidavit of Shri Mathuria the practicing Advocate of the assessee and Mr. Dastur the Sr. Advocate who represented the assessee in its miscellaneous applications that the Members of the Tribunal are supposed to know only that much of law or facts or the applications of law to the facts of a case as is told to them either by the learned members of the Bar or by the Id. Departmental Representative. It appears to be the substance of the arguments and pleadings on behalf of the assessee that even if the Members of the Tribunal know some law they should first get the correctness of their understanding approved by the members of the Bar and unless they do so, their order on the basis of their understanding of law laid down by the Hon'ble Supreme Courts or the jurisdictional High Court if it is referred to in the order of the Tribunal, would be a mistake apparent from record which the Tribunal is bound to rectify.

As already mentioned we are not inclined to subscribe to this view.

In our opinion, the law requires that the Tribunal shall hear both the parties in an appeal and shall thereafter "pass such orders thereon as it thinks fit". No doubt, such an order has to be a speaking order and the decision of the Tribunal has to be supported with some reasoning, which has to be reasoning of the Tribunal

based on material on record, arguments advanced before it and also own knowledge and understanding of law. We feel that if the submissions of Mr. Mathuria and Mr. Dastur are accepted, it may lead to a situation where the Id. counsel of an assessee may argue that the entire business income of an assessee is not taxable and if the Id. counsel for the assessee later on filed an affidavit that the Departmental Representative had not objected to such a statement, any order of the Tribunal holding that the business income of the assessee is taxable, would be a mistake apparent from record which the Tribunal shall have to rectify and allow the appeal of the assessee to the effect that the business income of the assessee is not taxable. Obviously, no such proposition can be accepted. Even at the risk of citing from a Supreme Court decision, which was not cited before us either by the Id. counsel for the assessee or by the Id. Departmental Representative and which practice is objected to by the Id. counsel for the assessee, we may quote from a decision of the Hon'ble Supreme Court as under : "It is, however, difficult to agree with the submissions made on behalf of the assessee that the duty of the Tribunal ends with making a declaration that the assessments are illegal and it has not duty to issue any further direction. It is well known that an appellate authority has the jurisdiction as well as the duty to correct all errors in the proceedings under appeal and to issue, if necessary, appropriate directions to the authority against whose decisions an appeal is preferred to dispose of the whole or any part of the matter afresh unless forbidden from doing so by the Statute.

The statute does not say that such direction cannot be issued by the appellate authority in a case of this nature." Kapurchand Shrimal v. CIT[1981] 131 ITR 451 (SC) at page 460.

We, therefore, reject the arguments of Mr. Dastur both on the ground that what he has argued is not factually correct and also on the ground that merely because the Tribunal has relied on its own knowledge by referring to some Supreme Court or jurisdictional High Court decision, and that too not to come to a final decision but only to support its own reasoning for coming to a particular conclusion, it cannot be termed as a mistake apparent from record in the order of the Tribunal.

We may only clarify that when we referred to the decision of the Sterling Foods (Goa) (supra) he never said that this case was cited by the Departmental Representative. The Tribunal had only explained its understanding of the terms manufacture, production of an articles or thing etc., which found support from the decision of the Bombay High Court in the case of Sterling Foods (Goa) (supra), which in turn had sought support from the decision of the Supreme Court in the case of N.C. Budharaja & Co. (supra) on which the learned Departmental Representative had relied. In fact, Shri Dastur's arguments to the effect that an opportunity to differentiate and distinguish the decision in the case of N.C. Budharaja & Co. (supra) should have been given to the assessee's counsel or should now be given has no force because as mentioned earlier, the Id. Departmental Representative had relied and cited this case in this arguments which is noted in our log book and had submitted that although a large number of Tribunal and some High Court decisions were in favour of the assessee, they were no longer goods law after the decision of the Supreme Court in the case of N.C. Bhudharaja & Co. (supra). In our opinion, it is not obligatory on the part of the Tribunal to permit citations and counter citations to go on ad infinitum by giving a fresh opportunity to the opposite party after one case is cited by one side. We believe that the Id. counsel for the assessee and the Id. Departmental Representative are officers of the court and have got the duty to assist the court in reaching a correct decision. We also believe that they are both knowledgeable persons who are supposed to know law concerning the subject on which they are representing the parties and atleast are supposed to be well versed with the relevant Supreme Court decision which is cited by the either side. If at all one of them is ignorant about it, he may make a specific request to the Tribunal to give him an opportunity to study the Supreme Court decision and the Tribunal may in its discretion give him that opportunity. However, in our opinion, it is not obligatory on the part of the Tribunal to give an opportunity to the other party to go and study every case that is cited before us and then come back to argue against it. Therefore, the argument of Mr. Dastur that we may recall our order and give an opportunity to the opposite party to distinguish and differentiate the ratio of the decision of the case of N.C. Budharaja & Co.

(supra) also does not find favour with us.

5. So far as a similar request with reference to the citation of Sterling Foods (Goa) (supra) is concerned, as already mentioned the Tribunal has only supported its reasoning with that decision of the Bombay High Court otherwise the reasoning is Tribunal's own and hence, we do not consider it obligatory on the part of the Tribunal to first give a draft assessment order along with its reasoning to both the parties, get their approval and, only when they have approved of passing such an order, pass the order in accordance with the approval given by the Id. counsel for the assessee.

6. At this point we would like it to be prominently mentioned that Shri A.K. Sahay through a counter affidavit has denied all the allegations made by the Id. counsel for the assessee in his affidavit. It is true that Shri Sahay has mentioned in his affidavit that he had referred to the decision in the case of Sterling Foods (Goa) (supra) in his arguments, which again is factually incorrect, but this only shows that the affidavits or counter affidavits given by representatives of either side on the basis of their memory, which is not supported by any written notes taken by them, cannot be fully accepted. Although, Mrs.

Dastur pointed out various technical flaws with the counter affidavit of Mr. Sahay, but so far as its contents to the effect that "the learned deponent (meaning Shri Mathuria the practicing Advocate of the assessee) has erroneously stated that the undersigned has stated that he had nothing to argue in the face of plethora of cited cases in assessee's favour" and that he had pointed out "that in view of the Supreme Court's decision in CIT v. N.C. Bhudharaja & Co. [1993] 204 ITR 212 (SC)" the earlier decisions holding ship breaking to be manufacturing activity, needed to be taken a fresh look, is supported with the notings in our log book.

7. The Id. counsel for the assessee has made allegations in its miscellaneous applications as well as in the affidavit that the Tribunal had not considered several decisions which are given in the paper book and other materials on record is also not correct. We have already mentioned that before giving its decision the Tribunal had specifically mentioned that it had considered the arguments advanced from both the sides, the orders of the authorities below as well as the materials on record which included citations and extracts from various decisions of the Tribunal

and High Courts. This would make it clear that the Tribunal had consciously noted that it had considered the various decisions of Tribunal and High Courts cited on behalf of the assessee and in view of the Supreme Court decision on which the Tribunal relied while giving its decision and in view of its own reasoning which was supported with the Supreme Court and the latest Bombay High Court decisions, we do not think that it was necessary to reproduce the facts, arguments and the decision given in each of the cases cited by the assessee. The Tribunal had considered it necessary to refer to the decision of the Bombay High Court cited by the counsel for the assessee in the case of CST v. Indian Metal Traders [1978] 41 STC 169 and had referred to it in its order and had also given its reasoning as to why that law was no longer to be applied after the Supreme Court decision. At this juncture we may also point out that the view taken by the Tribunal in the case of the assessee has turned out to be in consonance with one of the latest decisions of the Hon'ble Bombay High Court in the case of CST v. Delhi Iron & Steel Co. (P.) Ltd. [1995] 98 STC 202 (Bom.) which in turn is based on a Supreme Court decision in the case of State of Tamil Nadu v. Raman & Co. [1994] 93 STC 185 (SC). This would only mean that the reasoning given by the Tribunal in its order was a plausible reasoning and the decision given by the Tribunal was a decision which any reasonable and prudent person duly conversant with law would have given in the facts and circumstances of the case. When we say, as we have stated above, that our view has turned out to be in consonance with the decision of the Hon'ble Bombay High Court in the case of Delhi Iron & Steel Co. (P.) Ltd. (supra) and the Supreme Court decision in the case of Raman & Co.

(supra) it would not mean that we have relied on those decisions and hence, we were duty bound to confront the Id. counsel of the assessee with those decisions before making their mention in our order.

8. Another allegations in the miscellaneous applications is that the Tribunal had earlier given a decision in which Shri T.A. Bukte (Judicial Member) was a party and even the Reference application was rejected and hence, the contrary decision of the Tribunal by a Bench consisting of Shri Bukte was a mistake. We are conscious of the fact that normally a Bench of the Tribunal should not take a decision contrary to the decision taken by an another Bench of equal constitution

and in such situations normally the matter should be referred to a larger Bench. However, in the instant case the situation was different. In the first instance, as pointed out by the assessee itself, in the instant case one of the Members of the Bench giving this decision was one who was the Author of another decision of the Tribunal in the case of Arya Steel on which assessee has relied and hence, he could be conscious of the fact that the facts and circumstances of the instant case were different from the facts and circumstances of the case of Arya Steel in which he had given a decision in that assessee's favour and had even rejected the reference application. Secondly, the proposition that a Bench of coordinate jurisdiction should not differ from the decision of a Bench of equal strength, is subject to some exceptions and one of them is that if subsequently there is a Supreme Court decision which is the law of the land or the decision of the jurisdictional High Court which is binding on the Tribunal working under it, or if more evidence is adduced than what was available before the earlier Bench which took a different view (Ref : CIT v. Brijlal Lohia & Mahabir Prasad Khamka [1972] 84 ITR 273 (SC), it is not only possible for the subsequent Bench but even obligatory on the subsequent Bench to take a decision which is different from an earlier decision of another Bench and which is in consonance with the decision of the Supreme Court and the jurisdictional High Court.

9. Taking all these factors into account, we find no substance in the miscellaneous applications moved by the assessee. It is, therefore, dismissed.

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