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Court : Kerala

Decided On : Jun-08-1976

Reported in : [1977]108ITR1(Ker)

Appeal No. : Income-tax Reference No. 100 of 1974

Appellant : C.

Respondent : Mathukutty V. Commissioner of Income-tax, KeralaA.

Judgement :

GOVINDAN NAIR C.J. - The question referred to us by the Income-tax Appellate Tribunal, Cochin Bench, in relation to the assessment year 1965-66 reads as follows :

'Whether, on the facts and in the circumstances of the case, there was non-compliance of the provisions of section 142(3) and if so whether the assessment order passed under section 142(3) was vitiated ?'

The books of account of the assessee were rejected and an estimate was made by the Income-tax Officer. It is clear from the assessment order, annexure 'A', paragraph 2, and note at page 5, that the estimate was based on the 'normal gross profit rate obtainable in such business'. The normal gross profit rate obtainable in such business was ascertained by the Income-tax Officer on the basis of the percentage of profit disclosed by two assesseees whose names have been mentioned in the assessment order and styled as comparable cases. In the appeal

before the Appellate Assistant Commissioner the assessee contended that this data collected by the Income-tax Officer had not been disclosed to the assessee and, therefore, there has been violation of the principles of natural justice and the provisions of section 142(3) of the Income-tax Act, and hence, the order should be set aside. This contention as such had not been dealt with by the Appellate Assistant Commissioner but it appears to us that the Appellate Assistant Commissioner chose to rely on the percentage of profit disclosed by the assessee for the previous year of assessment which was 10 per cent. and rested his decision and sustained the addition on that ground alone. The relevant paragraph of the Appellate Assistant Commissioners order is paragraph 3 which we shall extract.

'3. For the immediately preceding assessment year, viz., assessment year 1964-65, the appellant had shown a margin of 10 per cent. The Income-tax Officer for this year has estimated a margin of only 8.5 per cent. Considering the defects in the accounts, especially the non-verifiability of purchases and expenses, this estimate is quite reasonable and it does not call for any modification. The gross profit addition of Rs. 12,500 made by the Income-tax officer is, therefore, sustained.'

There was a further appeal before the Tribunal by the assessee and the main contention that was raised before the Appellate Assistant Commissioner was again taken before the Tribunal. There is little doubt that this contention was urged before the Tribunal because paragraph 7 of the Tribunals order clearly indicates that the Tribunal adverted to this contention. Nevertheless the point had not been dealt with in the Tribunals order. It only considered whether the percentage determined by the Appellate Assistant Commissioner confirming the order of the assessing authority was justifiable or not on other material that was available. It relied on the fact that the assessee himself had returned 10 per cent. profits in the previous year. It considered the explanation given by the assessee for the fall in gross profit rate for the particular year in question and held that the explanation had not been made out. For these reasons and these reasons alone the addition was sustained. The first question that arises for our consideration is whether in these circumstances the question referred to us really arises from the Tribunals

order.

There is no gainsaying the fact that if it was necessary that the question raised before the Tribunal should be decided in deciding the appeal, that decision on that question would have repercussions in the conclusions reached by the Tribunal and the question will thus arise from the Tribunal's order. It is clear from the decision in *Gnanambika Mills Ltd. v. Commissioner of Income-tax* : [1965]58ITR802(Mad) that no reliance can be placed on comparable cases without the assessee being informed about the material collected from such comparable cases.

Counsel for the assessee relied on the well-known decision of the Supreme Court in *Commissioner of Income-tax v. Scindia Steam Navigation Co. Ltd.* : [1961]42ITR589(SC) and referred to item 2 mentioned at page 611, which reads as follows :

'When a question of law is raised before the Tribunal but the Tribunal fails to deal with it, it must be deemed to have been dealt with by it, and is, therefore, one arising out of its order.'

Counsel contended that the question was raised before the Tribunal and even though the Tribunal had not dealt with that question, it must be deemed to have been dealt with by the Tribunal. We think that the principles laid down by the Supreme Court will only apply to cases where an advertence to that question and a consideration of the same and decisions on the question is necessary for disposing of the appeal before the Tribunal. If it was unnecessary to consider the contention raised as the case could be disposed of on other material, and was in fact disposed of on other material, the fact that the assessee had raised a contention, the consideration of which was unnecessary for disposing of the appeal and the fact that that contention had not been considered, would not give rise to a question of law which can be said to arise from the order of the Tribunal. On this aspect no decision of any court had been placed before us. We are of the view that a question of law can be said to arise from an order of the Tribunal only when a consideration of that question was necessary for disposing of the appeal before the Tribunal. Otherwise, any question unnecessary for the decision of a case which the Tribunal rightly refrained from taking into consideration can be said

to arise from the order of the Tribunal.

The question referred to us does not arise from the order of the Tribunal. We, accordingly, decline to answer the question. We direct the parties to bear their respective costs.

A copy of this judgment under the seal of the High Court and the signature of the Registrar will be sent to the Appellate Tribunal, Cochin Bench.

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