

K. L. Mathew Vs. Commissioner of Income-tax.

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Court : Kerala

Decided On : Sep-12-1991

Reported in : (1992)101CTR(Ker)139; [1992]197ITR283(Ker); [1992]63TAXMAN271(Ker)

Appeal No. : Original Petition No. 1594 of 1990-S.

Appellant : K. L. Mathew

Respondent : Commissioner of Income-tax.

Judgement :

K. S. PARIPOORNAN J. - The petitioner is an assessee to income-tax. This petition is filed under section 256(2) of the Income-tax Act, 1961. The petitioner prays that the following three question of law, formulated in paragraph 20 of the original petition, may be directed to be referred to this court by the Income-tax Appellate Tribunal :

'(i) Whether, on the facts and in the circumstances of the case and also in the light of the facts repeated in the enclosure to the reference application, the Honble Tribunal is justified in coming to the previous year ended March 31, 1974, and incurred business loss and hence rejecting the claim for set off of business loss against capital gains ?

(ii) On the facts and in the circumstances of the case, was the Tribunal correct in concluding that the assessee had done no business during the previous year 1973-74 ?

(iii) On the evidence placed by the assessee, was the Tribunal justified in rejecting the claim of the assessee for set off of the loss incurred in the disposal of the stock-in-hand during the previous year 1973-74 against the capital gains on the sale of the factory premises and machinery in the same year ?'

We heard counsel for the petitioner, Mr. N. Venkatarama Iyer. We find from the paper book that the question of law set out by the petitioner/assessee in the application filed under section 256(1) of the Income-tax Act, 1961, is as follows :

'Whether, on the facts and in the circumstances of the case and also in the light of the facts repeated in the enclosure to the reference application, the Honble Tribunal is justified in coming to the conclusion that the applicant had not carried on any business during the previous year ended March 31, 1974, and incurred business loss and hence rejecting the claim for set off of business loss against capital gains ?'

The jurisdiction vested in this court under section 256(2) of the Income-tax Act, 1961, is co-equal to the jurisdiction vested in the Tribunal under section 256(1) of the Act. This court is competent to direct the Appellate Tribunal to refer to this court only that question of law which the assessee requested the Tribunal to refer to this court in the application filed under section 256(1) of the Act. It is not open to a petitioner, in a petition filed under section 256(2) of the Act, to pray for directing the Tribunal to refer a question which was not formulated in an application filed before the Tribunal under section 256(1) of the Act. What is attempted

in this case is for a direction to the Appellate Tribunal to refer two questions in addition to the one formulated in the application filed under section 256(1) of the Act. We should say that it is not open to the petitioner to do so. The original petition filed praying that this court refer three questions formulated in paragraph 20 of the original petition will not lie. To that extent, the prayer in the original petition is unsustainable. It cannot be granted. On this short ground, the original petition should fail.

However, the first question formulated in paragraph 20 of the original petition is the question that was formulated in the application filed before the Tribunal under section 256(1) of the Act. Therefore, we proceed to consider the said question.

The short facts necessary to understand as to whether the question set out in the petition filed under section 256(1) of the Act arises out of the order of the Appellate Tribunal and whether there is any referable question at all can be considered now. We are concerned with the assessment year 1974-75. The accounting period ended on March 31, 1974. The assessee is a cashew dealer. He was carrying on the business of processing of raw cashew nuts and sale and export of cashew kernels. He sold the factory and machinery by a document dated September 7, 1973. That date fell within the accounting period relevant to the assessment year 1974-75. In the return filed for the assessment year 1974-75, the assessee did not claim any loss. The original assessment was concluded on April 28, 1980. In the appeal, the assessee put forward a plea that he suffered great loss when the factory and machinery were sold on September 7, 1973. The Appellate Assistant Commissioner, by his order dated March 30, 1983, ordered a remit. A fresh assessment was made by the Income-tax Officer on December 12, 1984, when the appeal filed against the order of the Appellate Assistant Commissioner was pending before the Appellate Tribunal. The Tribunal finally dismissed the appeal on June 27, 1989.

After the remit, the Income-tax Officer fixed the date of hearing on August 2, 1984. It was adjourned to August 24, 1984. The assessee was throughout applying for time. The case was posted for hearing on October 17, 1984, November 5, 1984, etc., and the assessee filed the return of income on November 6, 1984, declaring a loss of Rs. 1,10,000. The assessee's representative, in the course of the fresh assessment proceeding, stated that no vouchers, books or other evidence were available for production before the Income-tax Officer. During the course of the original assessment, the assessee had given a statement on July 4, 1978, to the effect that he did not remember having done any business during 1973-74. The assessee's auditor appeared before the Income-tax Officer and stated that no books, vouchers, purchase bills or connected records were available with him to support the claim of loss. On November 5, 1984, the assessee filed a return of income for the assessment year 1973-74 showing some figures in the form of a trading and profit and loss account were held to be a cooked up one by the assessing authority. He concluded that the assessee had not done any business during the previous year relevant to the assessment year 1974-75. This finding was upheld by the Appellate Assistant Commissioner. The Appellate Tribunal, after referring to the said plea, adverted to the fact that though the Income-tax Officer, during the course of fresh assessment proceedings, gave an opportunity to the assessee to produce all evidence available in support of the claim of loss, the assessee did not avail of that opportunity to prove his case. The Income-tax Appellate Tribunal concluded that the Income-tax Officer had no other go except to come to the conclusion that the assessee did not carry on any business during the year under consideration or even if he had suffered any loss in that business, he had no evidence to show that he had suffered any loss in that business. The Appellate Tribunal pointedly held that, in the fresh assessment proceedings, the assessee did not take care to protect his interests and furnish proper evidence before the assessing authority. In this background, the Appellate Tribunal found that there was no infirmity in the order of the Appellate Assistant Commissioner confirming the order of the Income-tax Officer rejecting the assessee's claim for set off of business loss.

We should say that the question as to whether the assessee had carried on any business during the previous year ended on March 31, 1974, is largely a question of fact. The further aspect as to whether the assessee incurred any business loss and so his plea, for set off of business loss against capital gains is tenable is also a question of fact. These pleas, affirmatively put forward by the assessee, should be proved by him. It should be

based on material. Though sufficient opportunity was given to the assessee, the assessee did not substantiate the plea by producing any material. The Appellate Tribunal found that, in such circumstances, it cannot be said that the assessee carried on any business during the previous year relevant to the assessment year and even so the assessee led no evidence to show that he had suffered any loss in the business. The assessee failed to avail of the opportunity afforded to him to furnish proper evidence. These are all findings of fact and it is based on such findings that the ultimate question as to whether the petitioner is entitled to claim set off of business loss will actually arise. For answering the question, the basic fact of vital facts to substantiate the plea made should have been established by the assessee. He failed to do so. The resultant conclusion that the assessee did not carry on any business during the previous year ended on March 31, 1974, and so he is not entitled to the benefit of set off of business loss was arrived at due to the failure of the assessee to substantiate his plea by producing proper materials before the authorities.

We are of the view that no referable question of law arises either as formulated in the application filed under section 256(1) of the Act or as now attempted to be formulated in paragraph 20 of the original petition.

The original petition is without merit. It is dismissed.

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