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Court : Kolkata

Decided On : Jun-22-2001

Reported in : [2001]118TAXMAN821(Cal)

Appeal No. : I.T.P. No. 120 of 1997 G.A. Nos. 799 & 800 of 2001 22 June 2001

Appellant : Sanjay Kumar Jain

Respondent : Cit

Judgement :

Meena, J.

By this application the applicant prayed that the Tribunal be directed to refer the questions of law answered in paragraph A of this application for the opinion of this Court.

2. The petitioner/assessee deals in jute goods and real estate business. There was a search carried out by the Income Tax Department in August 1995 at the residence and office of the petitioner under section 132 of the, Income Tax Act, 1961 (hereinafter referred to as the Act). During the search, the Department has seized various documents, which include those identifying as GNP 1, 2 and 3 and GNP 15. During the course of the investigation assessee has admitted that the transactions in GNP 1, 2 and 3 and also GNP 15 were not there but those were the entries of undisclosed income. But in the statement he clarified that the

amount referred to in the entries in GNP 15 which was up to 25-4-1985 has been shown as cash credit in GNP 1, 2 and 3 and on the basis of GNP 1, 2 and 3, the peak credit was calculated at Rs. 1,08,13,090. Therefore, the entries in GNP 15 showing the sum of Rs. 41,54,000 were part of the peak credit. That was not accepted by the income-tax authorities and by the Tribunal. This court rejected the application filed by the assessee under section 256(2) of the Act. The SLP filed by the assessee was also rejected.

3. Heard the learned counsels for the parties. The learned counsel for the assessee/applicant submits that rejection of SLP without reasons does not bar a review petition. If there is apparent mistake, that can be corrected. He placed reliance on the decision of the Apex Court in the case of Kunhayammed v. State of Kerala (2000) 245 ITR 3601. He further submits that peak cash credits found in GNP 1, 2 and 3 was taken for the purpose of income-tax. The entries about amount of Rs. 41,54,000 found in the GNP 15 should not be ignored as that was the unaccounted money before the period of entries in GNP 1, 2 and 3 and that was subsequently introduced as cash credit found in GNP 1, 2 and 3.

4. The learned counsel for the revenue submits that when the application under section 256(2) was rejected by this court and SLP has been rejected by the Supreme Court, no review petition is maintainable. Now this court should not direct the Tribunal for referring the questions proposed in application under section 256(2).

5. After rejection of the SLP, whether the order of this court dated 2-4-1998 merges with the order of the Supreme Court. The similar issue has been considered by their Lordship in case of Kunhayammed (supra). While concluding the issue of merger, their Lordships have observed as under:

'(ii) The jurisdiction conferred by article 136 of the Constitution is divisible into two stages. The first stage is up to the disposal of the prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and the, special leave petition is converted into an appeal.

(iii) The doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under article 136 of the Constitution, the Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of a petition for special leave to appeal. The doctrine of merger can, therefore, be applied to the former and not to the latter.

(iv) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the court was not inclined to exercise its discretion so as to allow the appeal being filed.' (p. 382)

Their Lordships further observed as under:

' The order is a non-speaking and unreasoned order. All that can be spelt out is that the court was not convinced of the need for exercising its appellate jurisdiction. The order of the High Court dated 17-12-1982, did not merge in the order dated 18-7-1983, passed by this court so it is available to be reviewed by the High Court' (p. 383)

6. In view of the observations of Their Lordships, in the latest decision, in our view, the review petition is maintainable.

7. From the very beginning assessee has claimed that the amount in figure found in the newspaper in GNP 15 was reintroduced as cash credit in GNP 1, 2 and 3. According to the Tribunal the assessee has not established from the evidence that the amount found in GNP 15 has been introduced as cash credit found in GNP 1, 2 and 3.

8. There is no dispute that the amount shown in GNP 15 pertains prior to 25-4-1985 and the cash credits found in GNP 1, 2 and 3 relate to subsequent period. Therefore, prima facie assessee has a case that the amount of Rs. 41,54,000 is found in GNP 15 that could have been introduced as cash credits in GNP 1, 2 and 3 which has been introduced as cash credits during the period from 29-4-1995 to 4-8-1995. The Tribunal has taken the view that no evidence has been laid to relate the amount of Rs. 41,54,000 to the peak cash credit amount that is Rs. 1,08,13,090, but what types of evidence is required to establish the nexus between the amount of Rs. 41,54,000 and the peak cash credit of Rs. 1,08,13,090, in these circumstances, that has not been spelt out. To find out the peak cash credit, out of so many bogus cash credit, taxable is only peak cash credit amount. On the same analogy why the undisclosed amount recorded in the loose paper sheets, prior to the period of cash credit, should not be treated as in case of bogus cash credit entries.

9. The issue has not been considered on that line. Therefore, the finding of the Tribunal requires reconsideration whether the amount of Rs. 41,54,000 forms part of peak cash credit. We are in advisory capacity and the Tribunal is the final fact-finding body. On these facts, we deem it proper to give liberty to the assessee to make miscellaneous application to the Tribunal to reconsider its finding whether the amount of Rs. 41,54,000 forms part of the peak cash credit, that is, amount of Rs. 1,08,13,090.

10. The assessee is directed to file a miscellaneous application before the Tribunal to reconsider its finding of fact whether Rs. 41,54,000 forms part of the peak cash credit, that is, Rs. 1,08,13,090 and in case assessee submits the miscellaneous application within 10 days from this order, the Tribunal shall dispose of his application within 2 months from the date of filing of the miscellaneous application.

11. The miscellaneous application stands disposed of with the above directions.