

(1976) 04 GAU CK 0002

Gauhati High Court

Case No: Civil Rule No. 31 (M) of 1975

Saharaj Tea Company

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision: April 21, 1976

Acts Referred:

- Income Tax Act, 1961 - Section 251, 254

Citation: (1978) 114 ITR 805

Hon'ble Judges: M.C. Pathak, C.J; K.M. Lahiri, J

Bench: Division Bench

Advocate: J.P. Bhattacharjee, D.K. Hazarika and B.R. Dey, for the Appellant; G.K. Talukdar and D.K. Talukdar, for the Respondent

Judgement

Pathak, C.J.

By this application u/s 256 of the Income Tax Act, 1961 (hereinafter referred to as "the Act"), the petitioner has prayed for calling for a statement of the case from the Income Tax Appellate Tribunal, Gauhati, on the following proposed questions of law :

"(1) Whether, on the facts and in the circumstances of the present case and in view of the respective cases put forward by the parties to the appeal and the findings recorded thereon, the Tribunal was justified in law in remanding the case to the Appellate Assistant Commissioner of Income Tax on the reasons and grounds given in the order passed on appeal?

(2) Whether, on the facts and in the circumstances of the present case, the Tribunal was justified in law in setting aside the order of cancellation of protective assessment made by the Appellate Assistant Commissioner of Income Tax on appeal?

(3) Whether, on the facts and in the circumstances of the present case, the income derived from Seconee Tea Estate for the calendar year 1962 can in law be said to accrue to the purchaser and is assessable during the assessment year 1963-64?"

2. The assessee-petitioner is M/s. Saharaj Tea Company.

3. The facts of the case are briefly stated below:

The relevant assessment year is 1963-64. The Income Tax Officer while assessing the petitioner, M/s. Saharaj Tea Company, observed that the company filed several returns and the last revised return was filed on May 26, 1965. After hearing the assessee, the Income Tax Officer completed the assessment u/s 143(3) of the Act as a protective measure in the status of the firm. The Income Tax Officer in the assessment order relating to M/s. Saharaj Tea Company has pointed out that the assessee is the owner of the Seconee Tea Estate. The agreement of sale was made on March 31, 1962, for purchase of Seconee Tea Estate from M/s. Koliabor and Seconee Tea Company by Al Haj J. Ahmed and M. A. Rahman and it was stipulated that the deed of conveyance in respect of the Seconee Tea Estate, would be executed in favour of the purchaser, J. Ahmed, and/or his nominee or nominees to be named afterwards and that the sale would be deemed to have taken effect as from January 1, 1962, and that from that date the vendor, Messrs. Koliabor and Seconee Tea Company Ltd., would be deemed to have carried on the business of managing the said tea estate on behalf of the purchaser as an agent and would account for and be indemnified by the purchaser accordingly. It was also provided in the deed of agreement that the purchaser would be entitled to the sale proceeds of the tea manufactured after January 1, 1962, subject to the deduction of all reasonable expenditure incurred by the vendor as his agent in connection therewith. J. Ahmed made the payment of Rs. 2,15,500 to the vendor-company by way of earnest money. The Income Tax Officer also found that the purchaser, J. Ahmed, took charge of the said tea estate with effect from January 1, 1962. The Income Tax Officer has held that the purchaser, J. Ahmed, was the owner of the Seconee Tea Estate with effect from January 1, 1962, and the vendor-company carried on the business of running the tea estate as his agent as stipulated in the agreement of sale and the risk of profit or loss was borne by the purchaser, J. Ahmed, who in fact carried on from time to time supervision by issuing orders, instructions and advices. The Income Tax Officer considered various other circumstances in his assessment order and held that there was no genuine firm in existence during the relevant previous year and that J. Ahmed was the owner of the Seconee Tea Estate and so the whole income was required to be taxed in the hands of J. Ahmed. But as the return had been filed in the status of firm in the name of Messrs. Saharaj Tea Company showing net profit of Rs. 2,99,809.66 along with the audited profit and loss account and balance-sheet, the Income Tax Officer completed the assessment of the assessee, Messrs. Saharaj Tea Company, as a protective measure, taking the status as a firm but not as registered firm and he

assessed 40% of the income of the assessee at Rs. 3,23,886. The Income Tax Officer held that the entire income for 1962 calendar year in respect of the Seconee Tea Estate had to be treated as income of the assessee, J. Ahmed, and he, accordingly, assessed the total income of J. Ahmed at Rs. 4,75,770.

4. Both the assessees, namely, Messrs. Saharaj Tea Company and J. Ahmed, filed two appeals before the Appellate Assistant Commissioner. The Appellate Assistant Commissioner cancelled the assessment relating to Messrs. Saharaj Tea Company. While dealing with the appeal of J. Ahmed, the Appellate Assistant Commissioner held that he was not the owner of the tea estate during the calendar year 1962. The Appellate Assistant Commissioner further held that it could not be said that the purchaser was in possession of the tea estate or carried on the business of the tea estate during the calendar year 1962. The Appellate Assistant Commissioner also held that the income of the Seconee Tea Estate during the calendar year 1962 was not the income of J. Ahmed, since he was not the owner of the tea estate nor did he carry on the business of the said tea estate during the calendar year 1962. He, accordingly, deleted the amount of Rs. 3,23,886 from the assessment of J. Ahmed.

5. Thereafter, the department filed two appeals against the aforesaid orders of the Appellate Assistant Commissioner before the Income Tax Appellate Tribunal. The Tribunal discussed the facts of the case in its common order and has observed that the sale deed and the deed of agreement clearly showed that the sale deed was executed with effect from the 1st day of January, 1962, that according to the deed of agreement dated March 31, 1962, the purchaser was entitled to the sale proceeds of the tea manufactured after January 1, 1962, relating to the tea season 1962, subject to the deduction of reasonable expenditure incurred by the vendor in connection therewith and that the ownership of the tea estate was to pass to the purchaser after execution and registration of the sale deed with effect from the 1st day of January, 1962. It was further observed by the Tribunal that on execution of the sale deed the possession of the movable and immovable properties were given to the purchaser. After considering the materials on record, the Tribunal came to the finding that neither Messrs. Saharaj Tea Company nor J. Ahmed alone was the owner of the Seconee Tea Estate in the assessment year 1962-63. The Tribunal also held that J. Ahmed was neither the owner of the Seconee Tea Estate nor did he carry on the business in the calendar year 1962 and on that basis the appeal filed by the department in the case of J. Ahmed was dismissed.

6. While discussing the case of Messrs. Saharaj Tea Company, the Tribunal has pointed out that the Income Tax Officer while assessing Messrs. Saharaj Tea Company made a protective assessment. After discussing the relevant facts, the Tribunal has held that the Appellate Assistant Commissioner was not justified in cancelling the assessment of Messrs. Saharaj Tea Company only on the ground that the protective assessment was not justified. The Tribunal has pointed out that the Appellate Assistant Commissioner was also a revising authority and that the scope

of the powers of the Appellate Assistant Commissioner was coterminous with that of the Income Tax Officer and he could do what the Income Tax Officer could do and could also direct the Income Tax Officer to do what he had failed to do. The Tribunal further observed that the Appellate Assistant Commissioner was bound to consider whether Messrs. Saharaj Tea Company was liable to assessment or not even though a protective assessment had been made and the Appellate Assistant Commissioner had to apply his mind whether if the business was not carried on by J. Ahmed then who was carrying on the business and whether Messrs. Saharaj Tea Company could be said to have carried on the business in the calendar year 1962. The Tribunal further held that although the Income Tax Officer made the protective assessment on a different ground, the Appellate Assistant Commissioner could have supported the assessment if he had come to a finding that the business was carried on by the assessee-firm in the calendar year 1962. Having so found, the Tribunal held that the order of the Appellate Assistant Commissioner in the case of Messrs. Saharaj Tea Company was liable to be set aside. The Tribunal in its order further observed that the Appellate Assistant Commissioner should have given a finding whether the assessee could be registered as a firm for the assessment year 1963-64 or whether it was to be treated as an unregistered firm. The Tribunal, after considering the facts and circumstances of the case, has further observed that in the present case it had to be considered whether the sale deed was in fact in favour of the firm, whether the firm was in existence in the calendar year 1962 and whether the firm could be said to have carried on the business in the calendar year 1962. After discussing the materials on record, the Tribunal has held that the Appellate Assistant Commissioner while disposing of the appeal for the assessment year 1963-64 relating to Messrs. Saharaj Tea Company had practically failed to give definite findings in the case. The Tribunal thus set aside the order of the Appellate Assistant Commissioner in the case of the assessee, Messrs. Saharaj Tea Company, and remanded the appeal to the Appellate Assistant Commissioner for fresh disposal in accordance with law after making further enquiries on the lines indicated in the order of the Tribunal and after giving an opportunity of being heard to both the parties.

7. On the above facts, the petitioner has prayed for referring the above mentioned questions of law. It may be mentioned here that the proposed questions of law quoted hereinabove are not identical in language with the proposed questions of law mentioned in the reference petition filed before the Tribunal.

8. The learned counsel for the petitioner submits that in the appeal of J. Ahmed, the Tribunal has held that the assessee, J. Ahmed was not the owner of the Secone Tea Estate during the calendar year 1962 and that neither M/s. Saharaj Tea Company nor J. Ahmed were the owners of the said tea estate in the assessment year 1962-63.

9. The learned counsel for the petitioner submits that the learned Tribunal in its common order has upheld the order of the Appellate Assistant Commissioner in the

case of J. Ahmed, wherein he has held that J. Ahmed was neither the owner of the Seconee Tea Estate nor did he carry on the business in the calendar year 1962 and in that view the appeal of the department in the case of the assessee, J. Ahmed, was dismissed.

10. The learned counsel further submits that the protective assessment made in the case of M/s. Saharaj Tea Company also has been found to be bad both by the Appellate Assistant Commissioner and the Tribunal and on that ground the assessment was set aside by the learned Appellate Assistant Commissioner. That being the position, it is submitted by the learned counsel for the petitioner that there was no justification for the Tribunal to remand the appeal in the case of M/s. Saharaj Tea Company. Hence, the above-mentioned questions of law, it is submitted by the learned counsel, do arise from the order of the Tribunal.

11. We have given due consideration to the submissions made by the learned counsel. In the instant case, there is no doubt that considerable income accrued from the Seconee Tea Estate during the calendar year 1962 (relevant assessment year 1963-64).

12. In its common order, the Tribunal has observed that the Appellate Assistant Commissioner was not justified in cancelling the assessment only on the ground that the protective assessment was not justified, that the Appellate Assistant Commissioner was bound to decide as to whether the assessee was to be treated as a registered firm or as an unregistered firm during the assessment year 1963-64, that the Appellate Assistant Commissioner has considered the circumstances regarding the shares of profits and losses of the partners of the firm as shown in the return filed by M/s, Saharaj Tea Company and even if the partnership deed dated February 14, 1962, was not accepted as ante-dated still whether the firm, M/s. Saharaj Tea Company, was in existence in the calendar year 1962, should have been ascertained inasmuch as the documents mentioned in the order clearly showed that the assessee, M/s. Saharaj Tea Company, throughout asserted that it was in existence as a firm in the calendar year 1962, that in the present case it was necessary to consider whether the sale deed was in fact in favour of the firm, whether the firm was in existence in the calendar year 1962 and whether the firm could be said to have carried on the business in the calendar year 1962.

13. Thus, after having pointed out a number of things which the Appellate Assistant Commissioner ought to have decided in disposing of the appeal before him, the Tribunal has observed that the Appellate Assistant Commissioner, while disposing of the appeal for the assessment year 1963-64 relating to M/s. Saharaj Tea Company, had practically not given any decision. Having thus observed, the Tribunal set aside the order of the Appellate Assistant Commissioner in the case of M/s. Saharaj Tea Company and remanded the appeal to the Appellate Assistant Commissioner with the directions as noticed hereinabove.

14. In this connection, the powers of the Appellate Assistant Commissioner as laid down in Section 251 and the powers of the Appellate Tribunal as laid down in Section 254 of the Act may be considered

"251. Powers of the Appellate Assistant Commissioner.--(1) In disposing of an appeal, the Appellate Assistant Commissioner shall have the following powers--

(a) in an appeal against an order of assessment, he may confirm, reduce, enhance or annul the assessment; or he may set aside the assessment and refer the case back to the Income Tax Officer for making a fresh assessment in accordance with the directions given by the Appellate Assistant Commissioner and after making such further inquiry as may be necessary, and the Income Tax Officer shall thereupon proceed to make such fresh assessment and determine, where necessary, the amount of tax payable on the basis of such fresh assessment;

(b) in an appeal against an order imposing a penalty, he may confirm or cancel such order or vary it so as either to enhance or to reduce the penalty;

(c) in any other case, he may pass such orders in the appeal as he thinks fit.

(2) The Appellate Assistant Commissioner shall not enhance an assessment or a penalty or reduce the amount of refund unless the appellant has had a reasonable opportunity of showing cause against such enhancement or reduction.

Explanation.--In disposing of an appeal, the Appellate Assistant Commissioner may consider and decide any matter arising out of the proceedings in which the order appealed against was passed, notwithstanding that such matter was not raised before the Appellate Assistant Commissioner by the appellant."

"254. Orders of Appellate Tribunal.--(1) The Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit.

(2) The Appellate Tribunal may, at any time within four years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it under Sub-section (1), and shall make such amendment if the mistake is brought to its notice by the assessee or the Income Tax Officer:

Provided that an amendment which has the effect of enhancing an assessment or reducing a refund or otherwise increasing the liability of the assessee, shall not be made under this sub-section unless the Appellate Tribunal has given notice to the assessee of its intention to do so and has allowed the assessee a reasonable opportunity of being heard.

(3) The Appellate Tribunal shall send a copy of any orders passed under this section to the assessee and to the Commissioner.

(4) Save as provided in Section 256, orders passed by the Appellate Tribunal on appeal shall be final."

15. Considering the above provisions of law and the findings and observations of the Tribunal in its order, we find that the order of remand passed in the instant case by the Tribunal cannot be made the subject-matter of a reference on the proposed questions of law. The Tribunal in setting aside the order of the Appellate Assistant Commissioner and remanding the appeal to him for fresh disposal in accordance with law after making further enquiries on the lines indicated by it in its order and after giving opportunities to both the parties of being heard, has acted clearly within its jurisdiction and, therefore, the present petition is liable to be rejected. The petition is accordingly rejected. We make no order as to costs.

K. Lahiri, J.

16. I agree.