

Deputy Commissioner of Income Tax (Asstt.) Vs Surat Electricity Co. Ltd.

Court: Gujarat High Court

Date of Decision: April 7, 2011

Acts Referred: Income Tax Act, 1961 " Section 115J, 143(3), 250, 251, 251(2)

Citation: (2011) 337 ITR 271 : (2011) 14 TAXMAN 118

Hon'ble Judges: Harsha Devani, J; B.M. Trivedi, J

Bench: Division Bench

Advocate: M.R. Bhatt and Mrs. Mauna M. Bhatt, for the Appellant; Manish J. Shah and J.P. Shah, for the Respondent

Final Decision: Dismissed

Judgement

Ms. Harsha Devani, J.

In this appeal u/s 260-A of the Income Tax Act, 1961 (the Act), the appellant-revenue has challenged the order

dated 8.2.2000 made by the Income Tax Appellate Tribunal, Ahmedabad Bench "C" (the Tribunal) in ITA No. 3022/Ahd/04 for assessment year

1988-89. While admitting the appeal on 9.10.2000, this Court had formulated the following substantial question of law:

Whether the Appellate Tribunal is right in law and on facts in holding that the assessing officer was not empowered to travel beyond the two

specific issues contained in the order of remand passed by the Commissioner of Income Tax (Appeals) in the proceedings u/s 115J of the Income

Tax Act, 1961, to cover the tax liability of the assessee?

2. For assessment year 1988-99, the assessee received contribution from the consumers aggregating Rs. 62,44,745/-. The Assessing Officer

treated the receipt as revenue in nature and brought the same to tax for the said assessment year. The Assessing Officer also did not allow

deduction on account of investment allowance on the ground that the assessee did not create necessary reserves as per the provisions contained

under section 32A of the Act. Against the assessment order framed by the Assessing Officer u/s 143(3) of the Act, the assessee preferred appeal

before the Commissioner (Appeals), objecting to the Assessing Officer's action in treating the service line contribution collected from the

customers as revenue receipt, as well as in rejecting its claim for investment allowance. The Commissioner (Appeals), after considering the facts of

the case as well as the submissions advanced on behalf of the assessee, held that the assessee's submissions and claims deserve proper

examination by the Assessing Officer. He, therefore, set aside the impugned assessment order and directed the Assessing Officer to reframe the

assessment afresh as per law after giving the assessee a reasonable opportunity of being heard in the matter. Being aggrieved, the assessee went in

appeal to the Tribunal being ITA No. 3022/Ahd/1991.

3. In the meanwhile, pursuant to aforesaid order made by Commissioner (Appeals), the Assessing Officer framed assessment u/s 143(3) read with

section 250 of the Act wherein, he travelled beyond the adjudication of the issues involved before the Commissioner (Appeals) and proceeded to

invoke the provisions of section 115J of the Act. Being aggrieved, the assessee went in appeal to the Commissioner (Appeals), who did not accept

the contention of the assessee that the Assessing Officer was required to confine himself to the directions on the specific issues and not embark on

an omnibus enquiry and investigation into fresh issues not considered earlier. The assessee carried the matter in second appeal before the Tribunal.

Both the appeals, viz. the appeal against the earlier order passed by Commissioner (Appeals) as well as against the subsequent order came to be

decided by the Tribunal by a common order, which impugned in the present appeal. The Tribunal by the impugned order held that this was a case

of partial set aside which was justified by the facts and circumstances in respect of two issues viz., receipts on account of the service lines and

investment allowance which were raised before the Commissioner (Appeals) and had been considered by him while setting aside the assessments.

According to the Tribunal, there was no occasion for the Commissioner (Appeals) to take resort to total set aside of the assessments and no such

course had actually been adopted by him. The Tribunal was, therefore, of the considered opinion that the set aside order passed by the appellate

authority was a partial set aside in respect of the aforesaid two specific issues. Being aggrieved, the revenue is appeal before this Court, challenging

the aforesaid order of the Tribunal.

4. Heard Mr. M. R. Bhatt, learned Senior Advocate appearing on behalf of the appellant-revenue and Mr. Manish J. Shah, learned advocate

appearing on behalf of the respondent-assessee.

5. Mr. Manish Shah, learned advocate appearing on behalf of the respondent-assessee has drawn the attention of the Court to the decision of this

High Court in the case of Saheli Synthetics Pvt. Ltd. Vs. Commissioner of Income Tax, , to submit that the controversy involved in the present

case stands concluded by the said decision. Mr. M. R. Bhatt, learned counsel for the appellant, is not able to dispute the aforesaid position. In the

circumstances, it is not necessary to set out the rival contentions in detail.

6. In the case of Saheli Synthetics (P.) Ltd. (supra), this Court has held as follows:

12 On a plain reading of the aforesaid provisions it becomes apparent that the Appellate Authority is entitled to either confirm, reduce, enhance or

annul the assessment; or the Appellate Authority may set aside the assessment and refer the case back to the Assessing Officer for making a fresh

assessment in accordance with the directions given by the Appellate Authority after making such further inquiry as may be necessary, and the

Assessing 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. Thus, the section, or more specifically the clause stipulates confirmation, reduction, enhancement or annulment of the

assessment. Alternatively, the section envisages setting aside of assessment and referring the case back to the Assessing Officer for making a fresh

assessment in accordance with the directions given, and such fresh assessment may either result in some tax becoming payable or there may be a

situation where tax may not be payable on the basis of such fresh assessment. However, the material words in provisions are: "make such fresh

assessment", viz. the word "such" qualifies the assessment to be made afresh in context of the directions given by the Appellate Authority.

Therefore, it is not possible to define a set aside assessment as either open set aside or a conditional set aside or a limited set aside. The set aside

of assessment made by the Appellate Authority is always in accordance with the directions given by the Appellate Authority for making a fresh

assessment. But, the most material part of the provision is the opening portion which stipulates "In an appeal against an order of assessment". In

other words, the entire gamut of powers which are available to the Appellate Authority is governed within the four corners of the subject matter of

appeal. The subject matter of appeal is the assessment of income which forms part of the order of assessment in light of the return of income filed

by an assessee. There is a subtle, fine distinction between assessment simpliciter, namely assessment of income, and the assessment order. In

practice and in effect an assessment order may contain number of assessments of incomes under one head, depending upon the source of income,

and/or under more than one head. Even in case where, an Appellate Authority wants to exercise powers of enhancement, under sub-section (2) of

section 251 of the Act such powers have to be exercised after giving a notice for enhancement providing for a reasonable opportunity of showing

cause and not in absence of such a notice. This provision itself gives an indication that even if the Appellate Authority wants to process a new

source of income which forms part of either return of income or the order of assessment, but was not in challenge in appeal before the Appellate

Authority, the Appellate Authority has to give a reasonable opportunity of hearing before processing such a source of income and enhancing the

assessment.

13. A fortiori if it is not open to the Appellate Authority to enhance an assessment of income without issuing show cause notice one can never

contemplate that the Appellate Authority can set aside an assessment so as to enable the Assessing Officer to exercise powers of enhancement

vested in the Appellate Authority without the Appellate Authority discharging the statutory obligation cast on the Appellate Authority by virtue of

provisions of section 251(2) of the Act.

14. Similarly even where an assessment is set aside simpliciter, without any enhancement proposal, it is always in context of the appeal against an

order of assessment and cannot be read to mean that the Appellate Authority granted powers to the Assessing Officer in relation to items of

assessment which were never forming part of Appeal before the Appellate Authority. At the cost of repetition it is required to be noted that

processing a new source of income which was on the record before the Assessing Officer but is not forming part of subject matter of appeal

before the Appellate Authority can be undertaken by the Appellate Authority only in the course of enhancement of the assessment and therefore

any set aside, which does not involve a proposal for enhancement, cannot be used for the purpose of expanding the scope of the powers available

to the Assessing Officer while making fresh assessment pursuant to a set aside.

7. Thus, this Court in the above quoted decision has held that the set aside of assessment made by the Appellate Authority is always in accordance

with the directions given by the Appellate Authority for making a fresh assessment. But, the most material part of the provision is the opening

portion which stipulates ""In an appeal against an order of assessment"". In other words, the entire gamut of powers which are available to the

Appellate Authority is governed within the four corners of the subject matter of appeal. The subject matter of appeal is the assessment of income

which forms part of the order of assessment in light of the return of income filed by an assessee. Examining the facts of the present case in the light

of the aforesaid decision, it is apparent that the Assessing Officer was required to make a fresh assessment in accordance with the directions given

by the Commissioner (Appeals) and could not have travelled beyond the same. The impugned order of the Tribunal is, therefore, in consonance

with the aforesaid decision of this High Court and does not warrant any interference.

8. In the aforesaid premises, following the decision of this High Court in the case of Saheli Synthetics (P.) Ltd. (supra), the question is answered in

the affirmative, that is, the Appellate Tribunal was right in law and on facts in holding that the assessing officer was not empowered to travel

beyond the two specific issues contained in the order of remand passed by the Commissioner of Income Tax (Appeals) in the proceedings u/s

115J of the Income Tax Act, 1961, to cover the tax liability of the assessee. The appeal is, accordingly, dismissed with no order as to costs.