(2000) 09 KL CK 0023

High Court Of Kerala

Case No: Income-tax Reference No. 299 of 1997

Commissioner of Income Tax		APPELLANT
	Vs	
Malabar Building Products Ltd.		RESPONDENT

Date of Decision: Sept. 23, 2000

Acts Referred:

- Income Tax Act, 1961 - Section 37(1), 37(2A), 57, 80, 80AB

Citation: (2001) 248 ITR 72

Hon'ble Judges: S. Sankarasubban, J; A. Lekshmikutty, J

Bench: Division Bench

Advocate: P.K.R. Menon and George K. George, for the Appellant; S. Sarangan and K. Vinod Chandran, for the Respondent

Judgement

S. Sankarasubban, J.
This Income Tax reference is at the instance of the Revenue. The assessment year in question is 1992-93. The questions of law referred for decision of this court are as follows :

"(1) Whether, on the facts and in the circumstances of the case, the Tribunal is right in law and fact in holding that the assessability of the dividend under the head ''Other sources'' or under the head ''Profits and gains of business'' is a debatable issue and so no adjustment is permissible in the proceeding u/s 143(1)(a) of the Income Tax Act in regard to the deduction allowable u/s 37(2A) ?

(2) Whether, on the facts and in the circumstances of the case, and in an appeal arising out of the order on an application u/s 154 of the Income Tax Act as against an intimation u/s 143(1)(a), the Tribunal is justified in relying on the findings entered in an earlier order of the Tribunal arising out of an order u/s 143(1)(a) of the Income Tax Act ?

(3) Whether, on the facts and in the circumstances of the case, the Tribunal is right in law and fact in interfering with the disallowance made in a sum of Rs. 3,571 u/s 37(2A) of the Income Tax Act ?

(4) Whether, on the facts and in the circumstances of the case, the Tribunal is right in law and fact in deleting the disallowance of Rs. 7,31,127 made in the deduction u/s 80HH and of Rs. 9,16,910 made in the deduction u/s 80-I of the Income Tax Act ?

(5) Whether, on the facts and in the circumstances of the case, the Tribunal is right in law and fact in holding that the manufacturing activity and dealing in units of the Unit Trust of India constituted the same business and that a contrary view could be taken only by sorting out the facts and after a process of reasoning and so the issue being debatable, no adjustment u/s 143(1)(a) is permissible in the computation of the relief u/s 80HH and u/s 80-I of the Income Tax Act?

(6) Whether, on the facts and in the circumstances of the case and also in view of the finding by the Tribunal that ''the issues are debatable'' and requires ''a process of reasoning, the Tribunal is right in law in entertaining the application filed by the assessee u/s 154 and in deciding the same ?

(7) Whether, on the facts and in the circumstances of the case, the Tribunal is right in law in holding that for computing the deductions u/s 80HH and u/s 80-I the gross income should be considered before adjusting the loss in trading without applying the restrictions in Section 80AB ?"

2. The question that arises in this case is regarding the exercise of power u/s 143(1)(a) of the Income Tax Act, 1961 (hereinafter referred to as "the Act"). The Income Tax Officer, in the present case, exercising the power under the above section disallowed certain deductions claimed by the assessee.

3. The assessee filed a return for the assessment year 1992-93 declaring a total income of Rs. 6,74,240. The return was processed u/s 143(1)(a) of the Act. As per the intimation dated January 22, 1993, the total income comes to Rs. 23,33,350. The prima facie adjustment made u/s 143(1)(a) of the Act comes to Rs. 16,59,108. The details of these adjustments are described in the intimation as under :

	Rs.
"Adjustments:	
Total income returned	6,74,240

(1) Excess claim under section 37(2A) : The assessee has claimed deduction in respect of income from other sources dividend Rs. 20,47,500 also. The deduction is admissible in respect of income chargeable under the head ''Profits and gains of business or profession'' only. Admissible deduction amounts to Rs. 5,476 as against Rs. 16,547	11,071
(2) Excess claim u/s 80HH. The deduction admissible is on the profits and gains derived from the industrial undertaking included in the gross total income. Whole of the profits and gains from business included to Rs. 63,18,453 only as against Rs. 79,21,590 as worked out by the assessee. Hence, deduction is restricted to 20 per cent. of Rs. 42,65,953 which works out to Rs. 8,84,318 as against Rs. 15,84,318 claimed.	7,31,127

(3) Excess claim u/s 80-I: As in the case of deduction u/s 80HH. Here also, the deduction is restricted to 35 per cent. of Rs. 42,65,953 which works out to Rs. 10,66,488 as against Rs. 19,83,398	9,16,910
Adjusted total income	23,33,348
Rounded off to	23,33,350".

4. On receiving this intimation, the assesses filed a letter dated March 10, 1993, objecting to the adjustment. It was claimed before the Assessing Officer that the adjustments were not prima facie admissible.

5. The assessee filed an application for rectification when it received intimation. That application was rejected by the Assessing Officer subject to certain deductions on the ground of arithmetical mistake in the claim u/s 37(2A) of the Act. The appeal filed against that order was dismissed. Against the above order, the assessee approached the Tribunal in I. T. A. No. 163 (Coch.) of 1994. With regard to the claim u/s 37(2A) of the Act, the Tribunal took the view that whether the dividend income is to be assessed under the head "Other sources" or under the head "Profits and gains of business" is a debatable issue which has to be determined on the facts and circumstances of the case. Secondly, whether the expenditure incurred by the assessee is allowable u/s 57(1) or u/s 57(iii) of the Act is again a debatable issue depending on the finding rendered in respect of the earlier issue. In either case, a debatable issue cannot form part of a prima facie adjustment. Further, it took the view with regard to the immediately preceding assessment year that the assessee had entered into an adventure in the nature of trade in respect of purchase and sale of units of the Unit Trust of India, and, hence, the income by way of dividend is assessable under the head "Profits and gains of business". Regarding the claim u/s 80HH and Section 80-I, it took the view that the profits derived from the industrial undertaking were inclusive of the income from the purchase and sale of units. Further, even granting that it might be possible to take a view that the income from units cannot be considered as forming part of the profits derived from the industrial undertaking, such a view can be taken only after sorting out the facts and after a process of reasoning. Thus, the prima facie adjustments made by the Assessing Officer were deleted by the Tribunal.

6. We heard learned senior counsel for the Revenue, Shri P.K.R. Menon, and senior counsel, Shri S. Sarangan, for the respondent.

7. Shri Menon contended that the Tribunal has actually travelled beyond the powers in so far as it has adjudged the merits of the claim. According to him, in a rectification proceeding from an order u/s 143(1)(a) of the Act, the Tribunal has only to look into the question whether prima facie the assessment made by the officer was proper or not. The Tribunal cannot travel beyond that and hold that the claim made by the assessee was legal and should have been included. He further contended that regarding the claim u/s 37(2A) of the Act, the Tribunal went wrong in relying on the decision made by it with regard to the same asses-see in the previous years. Learned senior counsel, Shri Sarangan, for the assessee, contended that the Assessing Officer travelled beyond the jurisdiction u/s 143(1)(a) of the Act. He pointedly relied on the fact that any demand or addition can be made only within the framework of the return. The Assessing Officer cannot travel beyond the return filed by the assessee. He further submitted that by exercising the power u/s 143(1)(a) of the Act, the Assessing Officer cannot reject the case set up by the assessee without finally deciding the question on the basis of further evidence. Section 143(1)(a) of the Act is as follows :

"143. (1)(a) Where a return has been made u/s 139, or in response to a notice under Sub-section (1) of Section 142,--

(i) if any tax or interest is found due on the basis of such return, after adjustment of any tax deducted at source, any advance tax paid and any amount paid otherwise by way of tax or interest, then, without prejudice to the provisions of Sub-section (2), an intimation shall be sent to the assessee specifying the sum so payable, and such intimation shall be deemed to be a notice of demand issued u/s 156 and all the provisions of this Act shall apply accordingly ; and

(ii) if any refund is due on the basis of such return, it shall be granted to the assessee :

Provided that in computing the tax or interest payable by, or refundable to, the assessee, the following adjustments shall be made in the income or loss declared in the return, namely :--

(i) any arithmetical errors in the return, accounts or documents accompanying it shall be rectified ;

(ii) any loss carried forward, deduction, allowance or relief, which, on the basis of the information available in such return, accounts or documents, is prima facie admissible but which is not claimed in the return, shall be allowed ;

(iii) any loss carried forward, deduction, allowance or relief claimed in the return, which, on the basis of the information available in such return, accounts or documents, is prima facie inadmissible, shall be disallowed :

Provided further that where adjustments are made under the first proviso, an intimation shall be sent to the assessee, notwithstanding that no tax or interest is

found due from him after making the said adjustments."

8. Under the above section, on the basis of the return filed by the assessee, if any tax or interest is found due after adjustments, an intimation shall be sent to the assessee specifying the sum payable. Similarly, on the basis of the above return filed by the assessee if excess tax has been paid, then the Assessing Officer shall refund the same. This has to be made on the basis of the return filed. The proviso to the above section permits certain adjustments to be made while Calculating tax or interest payable : (1) any arithmetical error in the return, accounts or documents accompanying it can be rectified ; (2) any loss carried forward, deduction, allowance or relief, which, on the basis of the information available in such return, accounts or documents; is prima facie admissible but is not claimed in the return, can be allowed ; and similarly (3) any such loss carried forward, deduction, allowance or relief which is claimed in the return but which, on the basis of the information available in such return, accounts or documents, is prima facie inadmissible, shall be disallowed. Thus, on going through the above section, it can be seen that the Income Tax Officer is given power u/s 143(1)(a) of the Act to make some adjustments within the framework of the return filed by the assessee.

9. The question often arose whether by exercising the above power, the Income Tax Officer can answer a debatable issue. The section is very clear that unless deduction or claim is prima facie inadmissible, the Assessing Officer cannot alter the claim made by the assessee. "Prima facie inadmissible" means without much debate or on the face of the document itself it can be stated that a mistake has been committed by the assessee. But it is seen that after the return is filed, the assessee may claim certain deductions, which according to it, it is entitled to. For example, in the present case itself, the assessee is engaged in the manufacture and sale of asbestos cement sheets making use of the company''s amount and as the company''s business itself and it may be engaged in some other trade or business. The assessee takes the view that such income forms part of the income of the trade and cannot be put under any other head. These are all cases where the assessee is of the opinion that it can make such claims and the question is whether such claim can be included or not. Of course, if a claim is made which has no basis to stand and was opposed to any decision of the apex court of this country by which there cannot be any doubt, probably the Assessing Officer will be justified in exercising his power u/s 143(1)(a) of the Act. But as observed by various courts, this power should be exercised only sparingly, because it causes some hardship to the assessee.

10. Section 143(1)(a) of the Act came for interpretation before various courts. A Division Bench of the Bombay High Court in Khatau Junkar Ltd. and another Vs. K.S. Pathania and another, , considered this question. In the above decision, it was held thus (page 71) :

"The use of the phrases ''prima facie admissible'' in Clause (ii) to the proviso and ''prima facie inadmissible'' in Clause (iii) to the proviso, also lend support to this

interpretation. In its literal sense, "prima facie" means on the face of it. Hence, on the face of the return and the documents and accounts accompanying it, the deduction claimed must be inadmissible. Only then, can it be disallowed under the proviso to Section 143(1)(a). If any further enquiry is necessary, or if the Income Tax Officer feels that further proof is required in connection with the claim for deduction, he will have to issue a notice under Sub-section (2) of Section 143."

11. In Kamal Textiles and Others Vs. Income Tax Officer and Others, , the Madhya Pradesh High Court held that the provisions of Section 143(1)(a)(i) of the Income Tax Act, 1961, are not opposed to natural justice and are not ultra vires. It says that the intimation under the provision is issued on the basis of the assessee"s own return. Permissible adjustments are, inter alia, only of those claims which are, on the basis of information available in the return, prima facie inadmissible. The assessing authority is not permitted under the guise of making adjustments to adjudicate upon any debatable issue. In Indian Rayon and Industries Ltd. and another Vs. J.R. Kanekar, Assistant Commissioner of Income Tax and another, , a Division Bench of the Bombay High Court followed an earlier decision, wherein also the Assessing Officer had totally disallowed the claim u/s 115J of the Act on the ground that the petitioners therein had not filed the prescribed report from an accountant as provided u/s 80HHC(4) certifying the export turnover on which basis the deductible profits u/s 80HHC(3) were computed. Prima facie, there was no warrant for this finding, since Section 115J did not require an assessee to produce any such certificate in order to claim the deduction prescribed therein.

12. The Rajasthan High Court had an occasion to deal with this question in the case reported in JKS Employees" Welfare Fund Vs. Income Tax Officer, In the above decision, it was held thus (headnote) :

"The object of a summary assessment contemplated u/s 143(1)(a) of the Income Tax Act, 1961, is not only to reduce the work of the Department but is also to minimise litigation and create confidence in taxpayers for submitting true and correct returns, if it appears that the return submitted by the assessee cannot be accepted for the purpose of taking action u/s 143(1)(a) then the powers of the Income Tax Officer are not fettered and he can proceed to finalise the assessment after giving an opportunity to the assessee to be heard in respect of any arguable point u/s 143(2). A bare perusal of Section 143(1)(a) shows that the Income Tax Officer has to accept the return as it is and in the proviso, three exceptions have been given, conferring jurisdiction on him for making adjustment. The action under this section cannot be taken beyond the power permitted by these three exceptions. The third exception provides that any loss carried forward, deduction, allowance or relief claimed in the return which, on the basis of the information available in such return, accounts or documents, is prima facie inadmissible, shall be disallowed."

13. The Calcutta High Court had an occasion to deal with that question i Modern Fibotex India Ltd. and Another Vs. Deputy Commissioner of Income Tax and Others,

. Ruma Pal J. (as she then was) in the above decision held as follows (headnote) :

"The power u/s 143(1)(a) though described as a prima facie determination is not a temporary one in the sense that an interlocutory order is passed which is subject to a final order on further scrutiny. The intimation as far as the Assessing Officer is concerned is final and it entails immediate and drastic consequences unless corrected or revised by a higher authority u/s 154 or 264, as the case may be. The exercise of power u/s 143(1)(a) of the Act is, therefore, required to be scrutinised carefully and kept strictly within the bounds of the statute, any dispute being resolved in favour of the assessee.

There is a second limitation on the power u/s 143(1)(a) and that is that the Assessing Officer must determine the question of adjustment thereunder by applying the law prevailing when the return was filed. This follows first from the nature of the obligation to which an assessee is subjected in filing his return and second from the object sought to be achieved by the introduction of Section 143(1A) and Section 143(1)(a). One of the objects of the introduction of Sections 143(1A) and 143(1)(a), having regard to the Circulars Nos. 549 and 581, appears to be to put assessees on guard against filing incorrect returns."

14. In this context, it is also useful to refer to Circular No. 689 (see [1994] 209 ITR 75), dated August 24, 1994, issued by the Central Board of Direct Taxes. The relevant portions of the circular are as follows :

"Section 143(1)(a) authorises, with effect from the assessment year 1989-90, inter alia, disallowance of any loss carried forward, deduction, allowance or relief claimed which, on the basis of information available in the return or the accompanying accounts or documents, is prima facie inadmissible. The earlier instructions of the Board were to the effect that no disallowance should be made of items on which two opinions are possible. The matter has been further considered by the Board in the light of the recommendations of the Tax Reforms Committee (see Commissioner of Income Tax Vs. Builders Union,), headed by Prof. Raja J. Chelliah and it has been decided that prima facie disallowances shall be made only in respect of the following types of claims :

(a) an incorrect claim, if such incorrect claim is apparent from the existence of other information in the return or the accompanying accounts or documents . . .

(b) any claim in respect of which there is an omission of information which is required, under the specific provisions of the Act or the rules, to be furnished along with the return to substantiate such claim . ..

(c) A claim for deduction or rebate of any amount which exceeds statutory limit imposed, if such limit is expressed either as a specific mandatory amount or as a percentage, ratio or a fraction, and if the information relevant to application of the statutory limits appear in the return or the accompanying accounts or documents . .

.

(d) Any claim which is patently inadmissible in law . . .

3. The Board desires that no other prima facie disallowance should be made except with the previous approval of the Commissioner of Income Tax who will, after according approval in suitable cases, bring the same to the notice of the Board."

15. Another decision cited was Commissioner of Income Tax Vs. K.V. Mankaram and Co., . There, a Division Bench of this court held as follows (page 359) : "Under Section 143(1)(a)(i), the intimation is deemed to be a notice of demand u/s 156 of the Act. It is not treated as an order of assessment. The two are conceptually different. Except intimation, no other order is contemplated u/s 143(1)(a). Section 156 provides that when any tax, interest, penalty, fine or any other sum is payable in consequence of any order passed under the Act, the Assessing Officer shall serve upon the assessee a notice of demand in the prescribed form. That clearly brings about the distinction between an order of assessment and a notice of demand. As indicated above, intimation u/s 143(1)(a) is deemed to be the latter. u/s 246 also, a clear distinction is made between an intimation and an order of assessment."

16. In the light of the above, we have to see whether the exercise of power by the Income Tax Officer is correct or not. According to us, the question whether the claims made by the assessee in this case can be acceptable or not cannot be decided unilaterally. According to the assessee, the claims made by it are genuine and they are entitled to acceptance of the same by the Assessing Officer. The question whether such claims are legally admissible is a different question. But on the question whether the income from dividend and expenditure with regard to the same form part of the profession or cannot be decided by the Assessing Officer without issuing notice to the assessee. According to the assessee, they are maintaining a single account for all these transactions, that is, with regard to the business of the firm as well as other activities for which claims are made in the return. The Income Tax Officer could not have decided the question raised by the assessee without further enquiry. They cannot be said to be prima facie inadmissible.

17. In the above view of the matter, we answer questions Nos. (1), (3), (4) and (6) raised in this case in favour of the assessee and against the Department, So far as question No. (2) is concerned, we answer it in favour of the Revenue and against the assessee. According to us, it was not proper on the part of the Tribunal to give a finding with regard to the matters mentioned in questions Nos. (5) and (7). With regard to questions Nos. (5) and (7) we hold that the Tribunal was not correct in giving the finding inasmuch as according to us, it does not arise for consideration in the appeal.