(1980) 09 MP CK 0009

Madhya Pradesh High Court

Case No: Miscellaneous Civil Case No. 148 of 1977

Commissioner of Income Tax	APPELLANT
Vs	
Nathabhai Desabhai	RESPONDENT

Date of Decision: Sept. 16, 1980

Acts Referred:

- Income Tax Act, 1961 - Section 256, 256(1), 256(2), 41, 41(1)

Citation: (1981) 5 TAXMAN 214

Hon'ble Judges: K.N. Shukla, J; G.G. Sohani, J

Bench: Division Bench

Advocate: S.C. Bagadiya, for the Appellant; G.K. Puranik, for the Respondent

Judgement

K.N. Shukla, J.
Pursuant to the direction of this court, the income tax Appellate Tribunal, Indore, has referred the following question for our opinion :

Whether, oil the facts found by the Tribunal, section 41(1) of the income tax Act would be applicable and the amount of Rs. 76,578 as sales tax refund is taxable?

The assessee is a registered firm deriving income from wholesale business in tobacco. The assessment year in question is 1970-71, for which the accounting period ended on November 9, 1969. The assessee had imported tobacco from outside the State of Madhya Pradesh and sold the same within the State between S.Y. 2007-8 to 2014-15, relevant to the A.Ys. 1952-53 to 1959-60. The assessee had collected sales tax from its constituents on the sales of tobacco and paid the same to the State Govt. The total amount so paid during these years was Rs. 76,578. Later, the assessee brought a suit against the State Govt. claiming refund of this amount on the ground that the recovery was illegal and unconstitutional. The claim was decreed by the High Court of Madhya Pradesh during the previous year relevant to the assessment year 1970-71 and the State appeal against the judgment of the High Court was dismissed by the Supreme Court. In view of the judgment of the High

Court, the assessee during the accounting period credited its sales tax reserve account by Rs. 76,578. The ITO brought this amount to tax u/s 41(1) of the income tax Act, 1961, the ITO observed:

These sales tax amounts were duly allowed as a deduction in its income tax assessment in the past.

2. On the basis of this finding of fact, the ITO held that u/s 41(1) of the income tax Act, 1961, the amount refunded or accruing to the assessee during the previous year relevant to the assessment year in question was taxable as the income of that previous year.

3. The assessee went in appeal before the AAC challenging the finding of fact recorded by the ITO to the effect that deductions were allowed to the assessee in respect of sales tax paid by it between the years 1952-53 to 1959-60. The assessee claimed before the AAC that no such deductions were ever claimed or allowed by the department during those years and, therefore, section 41(1) of the income tax Act did not in terms apply to enable the department to treat the refund of sales tax as income of the previous year. This argument prevailed with the AAC, who, after examining the accounts, held as a fact that the assessee was not allowed any deduction in respect of sales tax paid by it during the earlier years and, therefore, section 41(1) of the income tax Act could not be resorted to.

4. When the matter came before the Appellate Tribunal, the department reiterated its contention that the assessee had claimed and was allowed deduction of sales tax during the assessment years 1952-53 to 1958-59, and the AAC had erred in holding that, in fact, no such deduction was claimed and allowed during those years. The prayer on behalf of the department before the Appellate Tribunal was that:

The matter should be sent back to the A AC for making proper verification.

5. The Appellate Tribunal observed as follows:

The question involved in this appeal is purely a factual one about the verification of facts by the AAC.

6. After posing this question and after examining the documents filed before the AAC by the assessee, the Tribunal observed:

This clearly shows that the assessee did not claim any deduction in respect of sales tax payment in its trading and profit and loss accounts of the relevant years in respect of which it got a refund as a result of the order of the Madhya Pradesh High Court.

7. After recording this finding, the Appellate Tribunal held that on those facts section 41(1) of the income tax Act was not applicable.

8. The department then filed an application u/s 256(1) of the income tax Act for referring the question about the taxability of the amount of sales tax refund u/s 41(1) of the income tax Act. The Appellate Tribunal rejected the application holding that no question of law "arose out of the order of the Tribunal as the issue was purely one of fact.

9. The department then applied u/s 256(2) of the income tax Act that the High Court direct the Appellate Tribunal to state the following question for opinion:

Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the amount of sales tax refund of Rs. 76,578 is not taxable in the hands of the assessee u/s 41(1) of the income tax Act, 1961?

10. The order of this court directing the Tribunal to state the case and refer the question for the opinion of this court shows clearly that the only point raised at all stages was whether the amount of sales tax refund was taxable in the assessment year 1970-71, u/s 41(1) of the income tax Act or not. To highlight this contention, we may reproduce the following passage from this court''s order u/s 256(2) of the Act in Miscellaneous Civil Case No. 465 of 1976 (CIT v. Nathuabhai Desabhai):

It was contended by the learned counsel for the petitioner (i.e., the Commissioner of income tax) that on these as to whether section 41(1) of the Act would be applicable...

Admittedly, the learned Members of the Tribunal also held that as no deduction was sought specifically in the years 1953-54 to 1958-59, section 41 of the Act will not be applicable. The order, therefore, clearly indicates that the learned Member''s of the Tribunal accepted the findings of fact arrived at by the Appellate Assistant Commissioner. The only question which remained to be considered was as to whether section 41(1) of the Act could be applicable to the facts of the present case.

11. Then, in para. 7, this court proceeded to remark:

It is apparent that the facts found by the Appellate Assistant Commissioner having been accepted by the Tribunal, the only question that deserved consideration was as to whether section 41(1) of the Act would be applicable or not to the facts found by the Tribunal and the Appellate Assistant Commissioner."

(underlined by us).

12. On the basis of this finding this court directed the Tribunal to refer the question mentioned earlier for our opinion. We have given in some detail the resume of the facts and circumstances so that the entire picture leading to the present question may be clearly brought out in the proper perspective. This became necessary because the learned counsel for the department, Shri Bagadiya, after realising the weakness of the department''s case u/s 41(1) of the income tax Act, attempted to raise an alternative argument that even if section 41(1) was not in terms applicable,

the sales tax refund could still be charged to tax as income of the assessee for the previous year.

13. It is not necessary for us to discuss in detail the applicability of section 41(1) of the income tax Act to the facts found by the Appellate Tribunal. Section 41(1) of the income tax Act, 1961, is as follows:

Where an allowance or deduction has been made in the assessment for any year in respect of loss, expenditure or trading liability incurred by the assessee, and subsequently during any previous year the assessee has obtained, whether in cash or in any other manner whatsoever, any amount in respect of such loss or expenditure or some benefit in respect of such trading liability by way of remission or cessation thereof, the amount obtained by him or the value of benefit accruing to him, shall be deemed to be profits and gains of business or profession and accordingly chargeable to income tax as the income of that previous year, whether the business or profession in respect of which the allowance or deduction has been made is in existence in that year or not.

14. The condition prescribed for charging profits to tax u/s 41(1) of the Act is:

Where an allowance or deduction has been made in the assessment for any year in respect of loss, expenditure or trading liability incurred by the assessee....

15. Unless it is proved that an allowance or deduction has been made in any previous year, it is not open to the department to refer to section 41(1) for charging tax on receipt by the assessee by refund or otherwise of such expenditure in a subsequent year. This clear legal position, indeed, could not be challenged before us. Our answer to the question referred to us will be in the negative and against the department.

16. However, Shri Bagadiya contended that even though the amount in question could not be charged to tax under the provisions of section 41(1) of the income tax Act, this court had the power to examine the chargeability of the amount to tax de hors section 41(1). According to him, the main question was whether this amount could be charged to tax and all the necessary facts were before the court on the basis of which this question could be answered. He referred to two decisions: Addl. Commissioner of Income Tax Vs. M.P. Rungta, and Commissioner of Income Tax (Central) Vs. Assam Co. Ltd., . We are unable to accept Shri Bagadiya''s contention. It is clear that the jurisdiction of the court in a reference u/s 256 is only advisory and a question of law has to be answered within the ambit of this jurisdiction. True, a departure is allowed within certain permissible limits, inasmuch as an aspect of the same question can be decided by the court even if that aspect is not directly referred by the Tribunal. However, the basic frame of the question cannot be altered nor the court can embark on other provisions of the income tax Act to justify chargeability or otherwise of a particular item of income. It is imperative that the question itself arises out of the Tribunal''s order. This is possible only if all the

necessary facts on which the order is based have been placed before the Tribunal. If those facts are not present, the Tribunal naturally cannot refer to them and in such a case no question outside the perimeter of the case as presented before the Tribunal can be enquired into.

17. If Shri Bagadiya''s contention is accepted, we will have to enquire not only about the taxability of this receipt, but also about the year or years in which various amounts paid in numerous instalments could be chargeable. There is no factual foundation for such an inquiry and, therefore, within the limited jurisdiction of this court u/s 256 of the Act, we cannot make a general inquiry and answer the question in a way different from the one which has been posed and referred to us by the Tribunal.

18. The cases cited by Shri Bagadiya are not in point because in both the above cases all the necessary facts had already been referred to in the Tribunal''s order and the court had merely to decide the law applicable which incidentally had been misquoted by the Tribunal in the questions referred to the court. That is not the case here and, therefore, we are constrained to confine our opinion to the facts and circumstances mentioned in the Tribunal''s order and the question arising therefrom as referred to us.

19. Our answer to the question, as already observed, is that on the facts found by the Tribunal, section 41(1) of the income tax Act was not applicable and the amount of Rs. 76,578 as sales tax refund could not be brought to tax under the above provision. There will be no order as to costs.