
Commissioner of Income Tax Vs Associated Food Products P. Ltd. and Popular Bread Factory

M.A.I.T. No. 52 and 53 of 2004

Court: Madhya Pradesh High Court

Date of Decision: Nov. 21, 2005

Acts Referred:

Income Tax Act, 1961 – Section 120, 129, 132, 133A, 142(1)

Citation: (2006) 202 CTR 192 : (2006) 280 ITR 377 : (2006) 153 TAXMAN 3

Hon'ble Judges: K.K. Lahoti, J; Dipak Misra, J

Bench: Division Bench

Advocate: Rohit Arya, for the Appellant; G.N. Purohit, for the Respondent

Final Decision: Dismissed

Judgement

1. These two appeals were admitted on the following substantial question of law :

Whether, the Income Tax Appellate Tribunal was justified in overturning and unsettling the order of the Commissioner of Income Tax passed u/s

263 of the Income Tax Act, 1961, on the ground that the Commissioner had not recorded reasons that there had been prejudice to the interests of

the Revenue but solely on the foundation that the Assessing Officer did not have the ample opportunity to proceed with the assessment and there

was no sufficient time on the part of the Additional Commissioner to check the order of assessment passed by the original authority ?

2. It is pertinent to mention at the very beginning that the only difference in these two appeals is that the assesseees are different. Hence, for the sake

of clarity and convenience, we shall state the facts in M. A. I. T. No. 52 of 2004.

3. The assessee-respondent is a private limited company deriving income from manufacturing of bread and allied products and sale thereof. The

office and residential premises of the assessee and its directors were searched u/s 132 of the Income Tax Act, 1961 (for brevity ""the Act"") and a

survey u/s 133A of the Act in the factory was taken on October 7, 8 and 9, 1998. Besides books of account other documents were found and

seized during the proceedings. A notice u/s 158BC of the Act was issued on August 3, 2000, and served upon the assessee on August 4, 2000.

The assessee was required to file a block return within 20 days. A return in the Form No. 2B for the relevant block period for the assessment

years 1989-90 to 1999-2000 was filed on October 6, 2000, declaring total undisclosed income at Rs. 1,23,150 in response to the notice issued

under Sections 142(1) and 143(1) of the Act. The representative of the assessee attended the proceedings from time to time. Written replies were

filed along with copies of documents in compliance of queries specially in reference to seized books of account, loose papers and other

documents. The Assessing Officer after hearing the authorised representative of the assessee determined the total undisclosed income at Rs.

13,93,369 and accordingly issued demand notice and challan. A notice u/s 271(1)(c) of the Act was issued for imposition of penalty. As is

perceptible an order was passed u/s 154 of the Act and total undisclosed income was determined at Rs. 15,93,369. After such determination the

Commissioner, income tax-1, Jabalpur, vide annexure A/3 passed an order u/s 263 of the Act holding that the order passed by the Assessing

Officer for the block assessment period was prejudicial to the interests of the Revenue and, therefore, deserved to be cancelled and accordingly

the authority cancelled the order and issued directions to the Assessing Officer to carefully examine the matter and pass a fresh assessment order

for the period in question.

4. Being aggrieved by the aforesaid order passed by the Commissioner the assessee preferred an I. T. A. No. 113/JAB of 2003 before the

Income Tax Appellate Tribunal (in short "the Tribunal"), and the Tribunal after narrating the facts came to hold that the Commissioner had passed

the order u/s 263 of the Act on the ground that the Assessing Officer had passed the order to meet the requirement of limitation though the

Assessing Officer had conducted 13 sittings wherein seized documents, loose papers, etc., were scrutinised and examined in relation to the queries

and explanations offered/filed during the assessment. The Tribunal took note of the fact that the assessee had filed detailed reply and reply to the

notice issued by the Assessing Officer and submitted answers to the queries before the Assessing Officer. The Tribunal relied on its earlier

decisions to come to hold that the Commissioner had not really found any adverse material in the explanation/evidence and proceeded in a vague

manner that the assessment was made in a hurry without proper examination of the seized documents without application of mind. It also expressed

the view that the assessment proceeding commenced late by the Assessing Officer for which the assessee should not be penalised inasmuch as he

had filed replies within a short span of time as per directions of the Assessing Officer without seeking any adjournment and excuses. In addition,

the Tribunal also held that the Assessing Officer had examined all the documents and there had been proper application of mind and the

Commissioner, Income Tax, had not recorded any specific defect except stating that it was prejudicial to the interests of the Revenue. In view of

the aforesaid analysis, the Tribunal set aside the order passed by the Commissioner and restored the order passed by the Assessing Officer.

5. Questioning the correctness of the order passed by the Tribunal it is submitted by Mr. Rohit Arya, learned standing counsel for the Revenue,

that the Commissioner has exercised jurisdiction u/s 263 of the Act in an appropriate manner taking into consideration the factual matrix in its

entirety and the Tribunal has dislodged the same only on the ground that no specific defect had been pointed out. It is contended by him that the

authority while exercising power u/s 263 of the Act had noticed that the Assessing Officer to save the period of limitation had acted in a hurry

without proper application of mind, as a consequence of which detriment had been caused to the Revenue and when such a facet was noticed the

order of assessment was cancelled and the same being founded on proper base should not have been regarded as faulty or erroneous by the

Tribunal.

6. Mr. G. N. Purohit, learned Counsel appearing for the assessee-respondent, in both the appeals, submitted that the order passed by the

Commissioner expositis the laconism and crypticness of approach which runs counter to the basic requirement as envisaged u/s 263 of the Act. The

submission of Mr. Purohit is that the jurisdiction u/s 263 of the Act does not show satisfaction in the proper sense of the term and the statutory

satisfaction is a sine qua non for setting aside the order of assessment, and every order or mistake does not clothe the Commissioner with the

power to resort to exercise of jurisdiction u/s 263 of the Act.

7. To appreciate the rivalised submissions it is appropriate to reproduce section 263 of the Act :

263. (1) The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed

therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the Revenue, he may, after giving the assessee an

opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the

circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh

assessment.

Explanation.--For the removal of doubts, it is hereby declared that, for the purposes of this Sub-section,--

(a) an order passed on or before or after the 1st day of June, 1988, by the Assessing Officer shall include--

(i) an order of assessment made by the Assistant Commissioner or Deputy Commissioner or the Income Tax Officer on the basis of the directions

issued by the Joint Commissioner u/s 144A;

(ii) an order made by the Joint Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred

on, or assigned to, him under the orders or directions issued by the Board or by the Chief Commissioner or Director General or Commissioner

authorised by the Board in this behalf u/s 120 ;

(b) "record" shall include and shall be deemed always to have included all records relating to any proceeding under this Act available at the time of

examination by the Commissioner ;

(c) where any order referred to in this Sub-section and passed by the Assessing Officer had been the subject matter of any appeal filed on or

before or after the 1st day of June, 1988, the powers of the Commissioner under this Sub-section shall extend and shall be deemed always to have

extended to such matters as had not been considered and decided in such appeal.

(2) No order shall be made under Sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be

revised was passed.

(3) Notwithstanding anything contained in Sub-section (2), an order in revision under this section may be passed at any time in the case of an order

which has been passed in consequence of, or to give effect to, any finding or direction contained in an order of the Appellate Tribunal, the High

Court or the Supreme Court.

Explanation.--In computing the period of limitation for the purposes of Sub-section (2), the time taken in giving an opportunity to the assessee to

be reheard under the proviso to Section 129 and any period during which any proceeding under this section is stayed by an order or injunction of

any court shall be excluded.

8. On a scanning of the anatomy of the said provision, it is demonstrable that certain statutory satisfactions are to be arrived at on acceptable

parameters before exercise of the said jurisdiction. As the provision stipulates the order passed by the Assessing Officer should appear to be

grossly erroneous and at the same time prejudicial to the interests of the Revenue, both the things should exist together and they should not be

considered in an isolated manner; and that the time gap between the act and invocation of jurisdiction and passing of the order has to be taken into

consideration. The said provision has been considered on many occasions. In the case of Commissioner of Income Tax Vs. Gabriel India Ltd., a

Division Bench of the Bombay High Court has expressed the view as under (page 113) :

From a reading of Sub-section (1) of Section 263, it is clear that the power of suo motu revision can be exercised by the Commissioner only if, on

examination of the records of any proceedings under this Act, he considers that any order passed therein by the Income Tax Officer is "erroneous

in so far as it is prejudicial to the interests of the Revenue". It is not an arbitrary or unchartered power. It can be exercised only on fulfilment of the

requirements laid down in sub-section (1). The consideration of the Commissioner as to whether an order is erroneous in so far as it is prejudicial

to the interests of the Revenue, must be based on materials on the record of the proceedings called for by him. If there are no materials on record

on the basis of which it can be said that the Commissioner acting in a reasonable manner could have come to such a conclusion, the very initiation

of proceedings by him will be illegal and without jurisdiction. The Commissioner cannot initiate proceedings with a view to starting fishing and

roving enquiries in matters or orders which are already concluded. Such action will be against the well-accepted policy of law that there must be a

point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage and that lapse of time must induce

repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity, (see Parashuram Pottery Works Co.

Ltd. Vs. Income Tax Officer, Circle I, Ward A, Rajkot,).

As observed in Sirpur Paper Mills Ltd. Vs. Income Tax Officer, ""A"" Ward and Another, by Raghuveer J. (as his Lordship then was), the

Department cannot be permitted to begin fresh litigation because of new views they entertain on facts or new versions which they present as to

what should be the inference or proper inference either of the facts disclosed or the weight of the circumstances. If this is permitted, litigation would

have no end, "except when legal ingenuity is exhausted". To do so, is ". . . to divide one argument into two and to multiply the litigation ".

The power of suo motu revision under Sub-section (1) is in the nature of supervisory jurisdiction and the same can be exercised only if the

circumstances specified therein exist. Two circumstances must exist to enable the Commissioner to exercise power of revision under this Sub-

section, viz., (i) the order is erroneous ; (ii) by virtue of the order being erroneous prejudice has been caused to the interests of the Revenue. It has,

therefore, to be considered firstly as to when an order can be said to be erroneous. We find that the expressions "erroneous", "erroneous

assessment" and "erroneous judgment" have been defined in Black's Law Dictionary. According to the definition, "erroneous" means "involving

error ; deviating from the law". "Erroneous assessment" refers to an assessment that deviates from the law and is, therefore, invalid, and is a defect

that is jurisdictional in its nature, and does not refer to the judgment of the Assessing Officer in fixing the amount of valuation of the property.

Similarly, "erroneous judgment" means "one rendered according to course and practice of court, but contrary to law, upon mistaken view of law,

or upon erroneous application of legal principles".

9. The Division Bench proceeded further to state as under (page 116) :

We, therefore, hold that in order to exercise power under Sub-section (1) of Section 263 of the Act there must be material before the

Commissioner to consider that the order passed by the Income Tax Officer was erroneous in so far as it is prejudicial to the interests of the

Revenue. We have already held what is erroneous. It must be an order which is not in accordance with the law or which has been passed by the

Income Tax Officer without making any enquiry in undue haste. We have also held as to what is prejudicial to the interests of the Revenue. An

order can be said to be prejudicial to the interests of the Revenue if it is not in accordance with the law in consequence whereof the lawful revenue

due to the State has not been realised or cannot be realised. There must be material available on the record called for by the Commissioner to

satisfy him prima facie that the aforesaid two requisites are present. If not, he has no authority to initiate proceedings for revision. Exercise of

power of suo motu revision under such circumstances will amount to arbitrary exercise of power. It is well-settled that when exercise of statutory

power is dependent upon the existence of certain objective facts, the authority before exercising such power must have materials on record to

satisfy it in that regard. If the action of the authority is challenged before the court it would be open to the courts to examine whether the relevant

objective factors were available from the records called for and examined by such authority. Our aforesaid conclusion gets full support from a

decision of Sabyasachi Mukharji J. (as his Lordship then was) in Russell Properties Pvt. Ltd. Vs. A. Chowdhury, Addl. Commissioner of Income

Tax and Others, . In our opinion, any other view in the matter will amount to giving unbridled and arbitrary power to the revising authority to initiate

proceedings for revision in every case and start re-examination and fresh enquiries in matters which have already been concluded under the law.

As already stated it is a quasi-judicial power hedged in with limitation and has to be exercised subject to the same and within its scope and ambit.

So far as calling for the records and examining the same is concerned, undoubtedly, it is an administrative act, but on examination "to consider" or

in other words, to form an opinion that the particular order is erroneous in so far as it is prejudicial to the interests of the Revenue, is a quasi-

judicial act because on this consideration or opinion the whole machinery of re-examination and reconsideration of an order of assessment, which

has already been concluded and controversy which has been set at rest, is set again in motion. It is an important decision and the same cannot be

based on the whims or caprice of the revising authority. There must be materials available from the records called for by the Commissioner.

10. In view of the aforesaid pronouncement of law and taking into consideration the language employed u/s 263 of the Act, it is clear as crystal that

before exercise of powers two requisites are imperative to be present. In the absence of such foundation exercise of a suo motu power is

impermissible. It should not be presumed that initiation of power under suo motu revision is merely an administrative act. It is an act of a quasi-

judicial authority and based on formation of an opinion with regard to existence of adequate material to satisfy that the decision taken by the

Assessing Officer is erroneous as well as prejudicial to the interests of the Revenue. The concept of ""prejudicial to the interests of the Revenue"" has

to be correctly and soundly understood. It precisely means an order which has not been passed in consonance with the principles of law which has

in ultimate eventuate affected realisation of lawful revenue either by the State has not been realised or it has gone beyond realisation. These two

basic ingredients have to be satisfied as sine qua non for exercise of such power. On a perusal of the material brought on record and the order

passed by the Commissioner it is perceptible that the said authority has not kept in view the requirement of Section 263 of the Act inasmuch as the

order does not reflect any kind of satisfaction. As is manifest the said authority has been governed by a singular factor that the order of the

Assessing Officer is wrong. That may be so but that is not enough. What was the sequitur or consequence of such order qua prejudicial to the

interest of the Revenue should have been focussed upon. That having not been done, in our considered opinion, exercise of jurisdiction u/s 263 of

the Act is totally erroneous and cannot withstand scrutiny. Hence, the Tribunal has correctly unsettled and dislodged the order of the

Commissioner.

11. Consequently, we are disposed to think, the appeals are sans merit and accordingly they are dismissed without any order as to costs.