
Commissioner of Income Tax Vs K.C. Rangaiah and Co.

RC No. 206 of 1991

Court: Andhra Pradesh High Court

Date of Decision: Sept. 23, 1997

Acts Referred:

Income Tax Act, 1961 – Section 120, 129, 144A, 147, 155

Citation: (1998) 146 CTR 694 : (1998) 230 ITR 385 : (2000) 110 TAXMAN 10

Hon'ble Judges: S.S. Mohammed Quadri, J; J. Chelameswar, J

Bench: Division Bench

Advocate: Deokinandan, for the Appellant; K.M.L. Majele, for the Respondent

Judgement

Syed Shah Mohammed Quadri, J.

This is a reference under s. 256(2) of the IT Act, 1961 (for short "the Act"). Pursuant to a direction of

this Court in ITC no. 62 of 1986, made on 26th November, 1987, the Tribunal referred the following questions of law to this Court for its opinion

:

(1) Whether, on the facts and in the circumstances of the case, the Tribunal is correct in law in cancelling the order passed by the CIT under s.

263 of the IT Act, 1961 ?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal ought to have held that the CIT had jurisdiction to pass orders under s.

263 since the facts subsequently revealed showed that the ITO did not make proper enquiries when granting registration to the firm ?

(3) Whether, on the facts and in the circumstances of the case, the Tribunal is correct in law in directing that the material available at the time of

passing the order under s. 263 but which was not available at the time the ITO passed the impugned order dt. 29th August, 1981, under s. 185

should be ignored though the material disclosed that the ITO had passed an order without making proper enquiries ?

2. The respondent/assessee is a firm (hereinafter referred to as ""the firm""). For the asst. yr. 1980-81, the firm was granted registration under s. 185

of the Act. In exercise of his revisional power under s. 263 of the Act, the CIT set aside the order of registration on 12th August, 1983. The firm

carried the matter in appeal before the Tribunal. The Tribunal took the view that the CIT was in error in cancelling the registration and thus allowed

the appeal on 31st October, 1985. That order has given rise to the aforementioned questions of law.

3. Sri Prasad, learned standing counsel for the Revenue, contends that in view of the amendment of s. 263 of the Act, the exercise of power by the

CIT was justified and the Tribunal was in error in coming to the conclusion that the material relied on by the CIT was not on record when the

registration was granted; so, that cannot form the basis for cancellation of the registration.

4. Sri Kodanda Ram, learned counsel appearing for the firm, submits that in exercise of power under s. 263, the CIT can only rely upon the

material available on record at the time of granting of the registration and that the amendment of the said provision was subsequent to the passing of

the order of the CIT; therefore, the amended provision would be of no avail to the Revenue.

5. To appreciate the contentions of learned counsel for the parties, we shall refer to s. 263 as it stood in the year of assessment and as it stands

after the amendment. Section 263 of the Act, as it stood in the year of assessment, read as follows :

263. Revision of orders prejudicial to Revenue. - (1) The CIT may call for and examine the record of any proceeding under this Act, and if he

considers that any order passed therein by the ITO 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.

(2) No order shall be made under sub-s. (1) -

(a) to revise an order of reassessment made under s. 147, or

(b) after the expiry of two years from the date of the order sought to be revised.

(3) Notwithstanding anything contained in sub-s. (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 Tribunal, the High Court or the

Supreme Court.

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

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

shall be excluded"".

Section 263 of the Act as it stands after the amendment reads as follows :

263. Revision of orders prejudicial to Revenue. - (1) The CIT may call for and examine the record of any proceeding under this Act, and if he

considers that any order passed therein by the AO 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 AO shall include -

(i) an order of assessment made by the Asstt. CIT or the ITO on the basis of the directions issued by the Dy. CIT under s. 144A;

(ii) an order made by the Dy. CIT in exercise of the powers or in the performance of the functions of an AO conferred on, or assigned to, him

under the orders or directions issued by the Board or by the Chief CIT or Director-General or CIT authorised by the Board in this behalf under 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 CIT;

(c) where any order referred to in this sub-section and passed by the AO had been the subject-matter of any appeal filed on or before or after the

1st day of June, 1988, the powers of the CIT 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-s. (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-s. (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 Tribunal, the High Court or the

Supreme Court.

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

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

shall be excluded.

6. It may be noted here that the Expln. to s. 263 was inserted by the Taxation Laws (Amendment) Act, 1984, w.e.f. 1st October, 1984. But then,

this Explanation was substituted by the Finance Act, 1988, w.e.f. 1st June, 1988. Of the amendments which are introduced, the one relevant for

purposes of the present discussion is clause (b) of the Explanation. The ambit of the word ""record"" has been clarified to mean that it shall include

and shall be deemed always to have included all records relating to any proceeding under the Act available at the time of examination by the CIT.

The provision as it stood prior to amendment authorised the CIT to call for and examine the ""record of any proceeding under the Act"". The power

under that section could be exercised if the CIT considers that any order passed by the ITO is erroneous in so far as it is prejudicial to the interests

of the Revenue; then, after giving the assessee an opportunity of being heard and on making such enquiry as he may deem necessary, he may pass

such orders as the circumstances of the case may justify. The word ""record"" was interpreted by the Courts to mean record available with ITO on

the date of the passing of the order by the ITO which was sought to be revised. The Courts also took the view that material which came to light

after the passing of the order of the ITO does not form part of the record to justify exercise of revisional power under s. 263. That was the view

taken by the Calcutta High Court in Ganga Properties Vs. Income Tax Officer, . In that case a learned single judge of the Calcutta High Court

took the view that under s. 263 the CIT may call for the record of the proceeding which was before the ITO and examine it in order to consider

whether, on the basis of the materials which were before the ITO and formed part of that record, the order passed by the ITO was erroneous and

prejudicial to the interests of the Revenue. The learned judge also observed that the materials which were not in existence at the time of assessment

but came into existence afterwards cannot form part of the record of the proceedings of the ITO and cannot be taken into consideration by the

CIT for the purpose of invoking his jurisdiction under s. 263(1) of the Act. It may be pointed out here that the amended provision was not before

the Calcutta High Court. The same view is shared by the Kerala High Court in Commissioner of Income Tax Vs. M.A. Unneerikutty and Kalpaka

Tourist Home P. Ltd., . There, the order of the ITO passed for the asst. yr. 1975-76 was revised by the CIT under s. 263. That power was

exercised on taking into consideration the material which was not available to the ITO at the time of the assessment. The assessee questioned the

order of the CIT before the Tribunal. Holding that the CIT was not justified in relying on material which was not before the assessing authority at

the time of assessment, it allowed the appeal. The judgment of the Calcutta High Court referred to above was relied upon by the Tribunal. On a

reference, the Division Bench of the Kerala High Court held that the Expln. to s. 263(1) was inserted only w.e.f. 1st June, 1988, and there was no

occasion for the Tribunal to consider the scope of that section because the Tribunal passed the order before the amendment of s. 263(1);

therefore, it held that the Explanation could not be relied upon. In that view of the matter, it answered the question in the affirmative, i.e., in favour

of the assessee, taking the view that the CIT was not justified in invoking his power under s. 263 of the Act with reference to the material which

came on record very much later, after the making of the assessment for the year 1975-76.

7. In K.A. Ramaswamy Chettiar and Another Vs. Commissioner of Income Tax, , the assessee had purchased some properties. Without making

any enquiries about the value of the properties, the order of assessment was made for the asst. yrs. 1974-75 and 1975-76. It appears that search

in the premises of the sellers was conducted and certain documents were recovered from their possession. On the basis of that record the CIT

exercised jurisdiction under s. 263 of the Act and set aside the assessment. On appeal, the order of the CIT was upheld by the Tribunal. On a

reference to the High Court of Madras, one of the questions that was referred related to exercise of power by the CIT under s. 263(1), based on

material which came to light after the order of assessment. The Division Bench of the Madras High Court has held that clause (b) of the

Explanation was inserted in s. 263(1), which provides that the word ""record"" shall include and shall be deemed always to have included all records

in relation to any proceeding under the Act available at the time of examination of an order by the CIT to revise the same even if the order under

revision was passed during the period prior to 1st June, 1988, and, therefore, the CIT could make use of the materials gathered by him on the date

when he assumed jurisdiction under s. 263 of the Act. It held that there was no infirmity in the order of the Tribunal upholding the order of the CIT.

Here we refer to an earlier judgment of the Madras High Court in South India Steel Rolling Mills Vs. Commissioner of Income Tax, Madras, ,

which arose out of an order passed by the CIT in exercise of revisional power under s. 263(1) cancelling the development rebate granted by the

ITO. There, both learned counsel conceded that the CIT had jurisdiction to take proceedings in exercise of the revisional power on the basis of the

material which was not before the assessing authority. That judgment of the Madras High Court was affirmed by the Supreme Court in South India

Steel Rolling Mills, Madras Vs. Commissioner of Income Tax, Madras, . Before the Supreme Court, one of the contentions urged was that the

CIT should not have invoked his jurisdiction under s. 263 of the Act as the matter could have been dealt with by the ITO in exercise of his power

of rectification under s. 155 of the Act. That contention was negatived holding that the revisional power conferred on the CIT under s. 263 is of

wide amplitude and that power cannot be limited with reference to s. 155. It was observed as follows :

As regards his taking into consideration an event which had occurred subsequent to the passing of the order by the ITO, it may be stated that in

Expln. (b) in s. 263 there is an express provision wherein it is prescribed that "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 CIT". The death of one of the two partners resulting in

the dissolution of the assessee-firm on account of such death took place prior to the passing of the order by the CIT and it could, therefore, be

taken into consideration by him for the purpose of exercising his powers under s. 263 of the Act"".

From the above observation of the Supreme Court it has to be now taken as settled law that the material which came to light, after the order of the

ITO but before the revisional power was exercised, could be taken into consideration for exercise of revisional power under s. 263(1). In view of

the above judgment of the Supreme Court, the law declared by the Calcutta High Court in Ganga Properties" case (supra) and the Kerala High

Court in CIT vs. M. A. Unneerikutty (supra) cannot be said to be good law.

We may note here that in S. Sundaram Pillai and Others Vs. `R. Pattabiraman and Others, , the Supreme Court pointed out the object of adding

an Explanation to a statutory provision and observed :

It is now well-settled that an Explanation added to a statutory provision is not a substantive provision in any sense of the term but, as the plain

meaning of the word itself shows, it is merely meant to explain or clarify certain ambiguities which may have crept in the statutory provision"".

8. Having regard to the nature of clause (b) of the Explanation it has to be held that it is clarificatory in nature and retrospective in operation. The

fact that it is inserted w.e.f. 1st June, 1988, would not mean that the Courts should confine its application and apply the meaning only from 1st

June, 1988.

9. However, Sri Kodanda Ram has relied upon the observation of the Supreme Court in Commissioner of Sales Tax, U.P. Vs. Bijli Cotton Mills,

Hathras, to hold that the amended law cannot be made applicable. We are afraid we cannot accept the contention of learned counsel. In that case,

the Supreme Court observed :

If the law which the Tribunal seeks to apply to the dispute is amended, so as to make the law applicable to the transaction in dispute, it would be

bound to decide the question in the light of the law so amended. Similarly when the question has been referred to the High Court and in the

meanwhile the law has been amended with retroactive operation, it would be the duty of the High Court to apply the law so amended if it applies.

By taking notice of the law which has been substituted for the original provision, the High Court is giving effect to the legislative intent and does no

more than what must be deemed to be necessarily implicit in the question referred by the Tribunal, provided the question is couched in terms of

sufficient amplitude to cover an enquiry into the question in the light of the amended law, and the enquiry does not necessitate investigation of fresh

facts"".

These observations are of no assistance to the respondent.

It is then contended that the judgment of the Supreme Court in South India Steel Rolling Mills case (supra) is obiter. We are not persuaded to

accept the contention of learned counsel.

10. For the above reasons, we answer question No. 1 in the negative, i.e., in favour of the Revenue and against the assessee, and question No. 2

in the affirmative, i.e., in favour of the Revenue and against the assessee. So far as question No. 3 is concerned, the words ""though the material

disclosed that the ITO had passed an order without making proper enquiries"" are contrary to the findings in the present case. Therefore, the

question has to be reframed deleting those words :

Whether, on the facts and in the circumstances of the case, the Tribunal is correct in law in directing that the material available at the time of

passing the order under s. 263 but which was not available at the time the ITO passed the impugned order dt. 29th August, 1981, under s. 185

should be ignored ?

This question, we answer in the negative, i.e., in favour of the Revenue and against the assessee.

11. The reference is accordingly answered.