Hindustan Aluminium Corpn. Ltd. Vs Commissioner of Income Tax

Court: Calcutta High Court

Date of Decision: March 9, 1988

Acts Referred: Income Tax Act, 1922 â€" Section 31
Income Tax Act, 1961 â€" Section 120, 139, 143, 144, 144A

Citation: (1989) 46 TAXMAN 142

Hon'ble Judges: S.C. Sen, J

Bench: Single Bench

Advocate: D. Pal, R.K. Murarka and A.K. De, for the Appellant; Ramchandra Prasad, for the Respondent

Final Decision: Dismissed

Judgement

S.C. Sen, J.
The petitioner, Hindustan Aluminium Corpn. Ltd., has challenged a notice issued by the Commissioner (Central) dated 1-12-

1977, u/s 263 of the income tax Act, 1961 ("the Act") for the assessment year 1973-74. The reasons for the issuance of the notice have been

stated in the affidavit-in-opposition filed on behalf of the respondents. In that affidavit, it has been stated that in the course of assessment

proceedings for the assessment year 1974-75, the petitioner-company claimed a sum of Rs. 13,59,794 as revenue expenditure. This liability arose

on account of exchange rate difference in connection with the repayment of a foreign loan. The petitioner-company was requested to furnish details

of break-up of the loan taken for payment on account of blocks, stores, spare parts together with break-up of exchange rate difference which led

to the payment of the additional sum of Rs. 13,59,794 incurred by the petitioner-company for repayment of the foreign loan. It was stated by the

petitioner-company that it was not possible for them to segregate this particular rate difference under the heads ''Capital equipment, raw material,

stores, spare parts''. It is the case of the respondents that the additional amount of liability incurred by the petitioner in repayment of the foreign

loan was not admissible as revenue expenditure to the extent the loan related to purchase of capital assets. It has been stated on affidavit on behalf

of the respondents that ""It is not a case where the petitioner purchased raw materials from the foreign party on credit and the petitioner had to pay

more towards the cost of such purchase due to exchange fluctuations in respect of the outstanding balance of purchase price payable to the foreign

party in foreign currency. It is a case of the petitioner obtaining a loan from the foreign party which was utilised for purchasing various items. As far

as the cost of those items are concerned, the payments were made in the year of purchase itself out of the borrowing and the cost of such

acquisition became fixed once for all. Excess liabilities arising out of exchange fluctuations in respect of the loan instalments payable in the

subsequent years is something different and cannot be treated as a trading loss of the year, irrespective of whether the loan amount was utilised for

purchase of capital goods, or spare parts and stores. As such enhanced liability has nothing to do with the carrying on of the petitioners'' business

during the year. The petitioner-company was requested to furnish the details of the break-up of loan taken, i.e., which was utilised for blocks,

spare parts, stores, etc., together with the break-up of exchange rate of difference of Rs. 19,27,347 incurred by them for the assessment year

1973-74 for repayment of the foreign loan. The petitioner-company did not furnish the same and it was again reminded but that also was not

furnished. However, when the said details were called for, the petitioner-company, in their letter dated November 15/18, 1976, claimed that the

exchange rate difference should be allowed as a revenue expenditure"".

2. The ITO had allowed the claim of revenue loss on account of exchange rate difference of Rs. 19,27,347 in the assessment year 1973-74. The

Commissioner initiated proceedings u/s 263 in view of the fact that he was of the opinion that the order passed by the ITO u/s 143 of the Act

allowing the claim of the assessee of revenue loss on account of exchange fluctuation was erroneous and prejudicial to the interests of the revenue.

3. On behalf of the petitioners, it has been urged that the entire proceedings are void because the order of the ITO has merged in the appellate

orders passed in this case. There was an appeal to the AAC from the order of the ITO which was disposed of by an order dated 17-5-1976.

There was a further appeal to the Tribunal which was decided on merits by an order passed on 30-4^1977. The contention of the petitioner is

that, under these circumstances, the power of the Commissioner *to exercise jurisdiction u/s 263 has ceased because the Commissioner can only

revise an order passed by the ITO. In a case where the ITO''s order has merged in an appellate order, the Commissioner ceases to have any

jurisdiction to pass any order of revision.

4. The points for consideration before the AAC or the Tribunal taken by the assessee related to disallowance of development rebate by the ITO

and also to the claim for depreciation disallowed by the ITO. Other grounds of appeal related to disallowance of payment of consultation fee and

gratuity. The question of admissibility or otherwise of any loss relating to any exchange fluctuation was neither raised before nor considered by the

AAC or the Tribunal.

5. It has been contended by the assessee that the entire order of the ITO has merged in the appellate order. It has been argued that this

proposition is well-settled and reliance has been placed on a number of judgments, particularly on the judgment delivered by the Bombay High

Court in the case of Commissioner of Income Tax Vs. P. Muncherji and Company, and also on a judgment of this Court in the case of General

Beopar Co. (Pvt.) Ltd. Vs. Commissioner of Income Tax, .

6. On behalf of the respondents, my attention was drawn to the judgment In the case of Jagadhri Electric Supply and Industrial Co. Vs.

Commissioner of Income Tax, , and also to the Full Bench judgment of the Madhya Pradesh High Court in the case of COMMISSIONER OF

Income Tax, M.P. -II Vs. R. S. BANWARILAL., . I was referred to a number of other decisions of various High Courts including this Court

where a contrary view was taken. The dispute, however, appears to be settled by two judgments delivered by the Supreme Court.

7. In the case of Commissioner of Income Tax, Bombay Vs. Amritlal Bhogilal and Co., , the Supreme Court held that whether or not the revisional

power of the Commissioner can be exercised in a given case must be determined solely by reference to the terms of section 33B of the Act itself.

The Courts are not justified in imposing an additional limitation on the exercise of the said power on a hypothetical consideration of policy or the

extraordinary nature and power.

The Supreme Court further held:

There can be no doubt that, if an appeal is provided against an order passed by a Tribunal, the decision of the appellate authority is the operative

decision in law. If the appellate authority modifies or reverses the decision of the Tribunal, it is obvious that it is the appellate decision that is

effective and can be enforced. In law the position would be just the same even if the appellate decision merely confirms the decision of the

Tribunal. As a result of the confirmation or affirmance of the decision of the Tribunal by the appellate authority the original decision merges in the

appellate decision and it is the appellate decision alone which subsists and is operative and capable of enforcement; but the question is whether this

principle can apply to the income tax Officer"s order granting registration to the respondent."" (p. 136)

The Supreme Court thereafter observed:

It is therefore necessary to inquire whether the order of registration passed by the income tax Officer can be challenged by the Department before

the Appellate Assistant Commissioner where the assessee-firm has preferred an appeal against the order of assessment. The decision of this

question would obviously depend upon the relevant provisions of the Act in respect of appeals to the Appellate Assistant Commissioner and the

powers of the Appellate Assistant Commissioner. Section 30 gives the assesses the right to prefer appeals against the orders specified in the said

section. The assessee-firm can, for instance, object to the amount of income assessed u/s 23 or section 27. The assessee-firm can also object to

the order passed by the income tax Officer refusing to register it u/s 23 or section 26A. It can likewise object to the cancellation by the income tax

Officer of its registration u/s 23. It is significant that, whereas an appeal is provided against orders passed by the income tax Officer u/s 23 or

section 26A either refusing to register the firm or cancelling registration of the firm, no appeal can be filed by the Department against the order

granting registration. Indeed it is patent that the scheme of the Act in respect of appeals to the Appellate Assistant Commissioner is that it is only

the assessee who is given a right to make an appeal and not the Department. Thus there can be no doubt that the income tax Officer''s order

granting registration to a firm cannot become the subject-matter of an appeal before the Appellate Assistant Commissioner.'''' (p. 137)

In the case of Amritlal Bhogilal & Co. (supra), the Supreme Court dealt with a case where the ITO had passed a composite order of assessment.

One part of the order related to registration of the firm, which was the assessee in that case. The other part related to computation of the income of

the firm. There was no appeal on the aspect of registration of the firm. In fact, that part of the order was not appealable at all. The Supreme Court

held that in such a case, it could not be said that the entire order of the ITO had merged in the order of the AAC.

8. The question, however, is whether, in a case where the entire order is appealable but the grounds of appeal are confined to only some of the

points involved in the order and the appellate order is also confined only to those aspects which have been taken in the grounds of appeal, it can be

said that the issues that were neither raised in the grounds of appeal nor considered by the AAC had merged in the order of the AAC. This

question directly came up for consideration before the Supreme Court in the case of State of Madras v. Madurai Mills Co. Ltd. [1967] 19 STC

144. In this case, in the sales tax assessment for the year 1950-51, the Dy. Commercial Tax Officer. Madurai, determined the net turnover of the

dealer at Rs. 15,44,09,109-3-11. In the appeal before the appellate authority, it was contended on behalf of the respondents that a sum of Rs.

1,44,294-14-4 was wrongly included toy the assessing authority in the purchase value of cotton as that amount only represented the commission

paid by it to Comorin Investment Trading Co. Ltd. It was also contended that another sum of Rs. 81,546-0-1, which re presented sale proceeds

realised by selling empty drums, was not a realisation in the course of its business. The appellate authority upheld the first contention in respect of

the payment of commission and rejected the second contention with regard to sale of empty drums.

9. A revision petition was thereafter presented before the Dy. Commissioner of Commercial Taxes by the dealer and the only objection raised was

that it should not have assessed to tax the amounts collected by it by way of tax amounting to Rs, , 6, 57, 971"4-9. By his order dated 21-8-

1954, the Dy. Commissioner of Commercial Taxes dismissed the revision petition holding that the respondent was not entitled to raise the

contention for the first time. It was further held that even otherwise, the statute permitted the inclusion of tax in the taxable turnover of the dealer.

Thereafter, on 4-8-1958, the Board of Revenue issued a notice to the dealer stating that it proposed to revise the assessment made by the Dy.

Commercial Tax Officer, by including, in the net turnover a sum of Rs. 7,74,62,706-1-6 as the amount had been wrongly excluded by the''

assessing'' authority. The dealer objected to the proposed revision on the ground that the proceeding was barred by limitation. Moreover, there

was no wrong exclusion by the Dy. Commercial Tax Officer as alleged. The Board of Revenue, however, overruled both the objections and

revised the taxable turnover by including the said amount of Rs. 7.74,62,706-1-6.

Thereafter, the case went to the Madras High Court which held that the revision proceedings were barred by limitation. The State of Madras

thereafter appealed to the Supreme Court. The question of law that fell for determination in that case was: Whether the order of the Board of

Revenue dated 25-8-1958, was illegal because there was a contravention of the rule of limitation laid down by section 12 of the Madras General

Sales Tax Act inasmuch as the order of the Board of Revenue was made after a period of 4 years from the date on which the order of the Dy.

Commercial Tax Officer was communicated to the assessee.

10. On the basis of the principles laid down by the Supreme Court in the case of Amritlal Bhogilal & Co. (supra), it was contended on behalf of

the State of Madras that the order passed by the Dy. Commercial Tax Officer had merged in the appellate order of the Dy. Commissioner of

Commercial Taxes passed on 21-8-1954, which was the operative order. The Board of Revenue was competent to revise that order within the

period of four years of passing of that order. The Supreme Court rejected this contention in the following words in Madurai Mills Co. Ltd."s case

(supra):

... But the doctrine of merger is not a doctrine of rigid and universal application and it cannot be said that wherever there are two orders, one by

the inferior Tribunal and the other by a superior Tribunal, passed in an appeal or revision, there is a fusion or merger of the two orders irrespective

of the subject-matter of the appellate or revisional order and the scope of the appeal or revision contemplated by the particular statute. In our

opinion, the application of the doctrine depends on the nature of the appellate or revisional order in each case and the scope of the statutory

provisions conferring the appellate or revisional jurisdiction. For example, in Commissioner of Income Tax, Bombay Vs. Amritlal Bhogilal and Co.,

, it was observed by this Court that the order of registration made by the income tax Officer did not merge in the appellate order of the Appellate

Commissioner, because the order of registration was not the subject-matter of appeal before the appellate authority. It should be noticed that the

order of assessment made by the income tax Officer in that case was a composite order, viz., an order granting registration of the firm and making

an assessment on the basis of the registration. The appeal was taken by the assessee to the Appellate Commissioner against the composite order

of the income tax Officer. It was held by the High Court that the order of the income tax. Officer granting registration to the respondent must be

deemed to be merged in the appellate order and that the revisional power of the Commissioner of income tax cannot, therefore, be exercised in

respect of it. The view taken by the High Court was overruled by this Court for the reason that the order of the income tax Officer granting

registration cannot be deemed to have merged in the order of the Appellate Commissioner in an appeal taken against the composite order of

assessment... In the circumstances of the present case, it cannot be said that there was a merger of the order of assessment made by the Deputy

Commercial Tax Officer dated 28th November, 1952, with the order of the Dy. Commissioner of Commercial Taxes dated the 21st August,

1954, because the question of exemption of the value of yarn purchased from outside the State of Madras was not the subject-matter of revision

before the Deputy Commissioner of Commercial Taxes. The only point that was urged before the Deputy Commissioner was that the sum of Rs.

6,57.971-4-9 collected by the respondent by way of tax should not be included in the taxable turnover. This was the only point raised before the

Deputy Commissioner and was rejected by him in the revision proceedings. On the contrary, the question before the Board of Revenue was

whether the Deputy Commercial Tax Officer, Madurai, was right in excluding from the net taxable turnover of the respondent the sum of Rs.

7,74,62,708-1-0 which was the value of cotton purchased by the respondent from outside the State of Madras. We are, therefore, of opinion that

the doctrine of merger cannot be invoked in the circumstances of the present case."" (p. 149)

11. If this principle is applied to the instant case, it will be seen that the subject-matter of appeal before the AAC or the Tribunal was not

concerned in any way with the question of exchange fluctuation. Whether the loss occasioned by exchange fluctuation was a capital loss or revenue

loss was a question that was not raised, gone into or decided by the AAC or the Tribunal.

12. Therefore, if the principle laid down by the Supreme Court in the case of Madurai Mills Co. Ltd. (supra) is applied, it will clearly appear that

the entire order of the ITO had not merged with the appellate order.

13. It has also to be borne in mind that under the Act, it is only the assessee who can prefer an appeal. The department has no right of appeal. If

an error is committed by the ITO it can be rectified u/s 154 of the Act by the ITO himself only if the error is apparent from the record. If the ITO

has made any erroneous mistake in the assessment order, then that mistake can only be corrected by exercise of revisional powers by the

Commissioner.

If the Commissioner did not have jurisdiction to revise an order of the ITO, there would be no scope for correcting mistakes committed by the

ITO which were prejudicial to the department. It cannot be readily assumed that merely because the assessee has preferred an appeal and sought

correction of errors committed by the ITO on some of the points, the Commissioner is robbed of his jurisdiction to correct errors which do not

form the subject-matter of the appeal.

14. This controversy directly came up for consideration before the Bombay High Court in the case of Commissioner of Income Tax, Bombay

City-II Vs. Sakseria Cotton Mills Ltd., . A Division Bench of the Bombay High Court applied the doctrine laid down by the Supreme Court in the

case of Madurai Mills Co. Ltd. (supra) and held that the doctrine of merger was not a doctrine which applied universally in all cases where the

orders of a subordinate authority were subjected to an appellate or revisional jurisdiction of higher authorities or the Tribunals. Whether an order of

a subordinate authority had merged partially or wholly with the orders of the superior appellate authority or revisional authority will have to be

decided with reference to the provisions dealing with the appellate jurisdiction or revisional jurisdiction of the superior authority under the relevant

enactment. It was further held by the Bombay High Court that if the AAC had not been called upon or had not actually dealt with any part of the

assessment order made by the ITO, there was no question of that part of the order merging or being superseded by the AAC. The effect of

section 31 of the Indian income tax Act, 1922, was that only that part of the order of the ITO merged or stood superseded by the order of the

AAC in respect of which the AAC had exercised his appellate jurisdiction. The remaining part of the order of assessment continued to be

unaffected by the decision of the AAC and had independent existence unaffected by the appellate order. It was concluded that the doctrine of

merger was not wholly applicable in the case of such orders made under the Act.

15. Similar view was taken by the Gujarat High. Court in the case of Karsandas Bhagwandas Patel Vs. G.V. Shah, Income Tax Officer, Rajkot

and Others, and also in the case of Poonjabhai Vanmalidas Vs. Wealth-tax Officer, Circle IV-A (Spl), Ahmedabad, .

16. In the case of Puthuthotam Estates (1943) Ltd. Vs. State of Tamil Nadu, , a Division Bench of the Madras High Court held that the doctrine of

merger would operate only on matters which had been decided by the Tribunal but could not apply to matters which had not been touched by the

Tribunal. Where a particular matter had not been placed before the Tribunal for its decision, the matter would be at large so as to be subject to the

exercise of the powers of revision by the Commissioner.

17. Strong reliance has been placed on behalf of the petitioner on a Division Bench judgment of this Court in the case of General Beopar Co. (P.)

Ltd. (supra). In that case, the assessee, a private limited company, was assessed to income tax for the assessment year 1973-74. Thereafter, the

assessee preferred an appeal against the assessment order to the AAC on the point of disallowance of deduction u/s 80M of the Act. The AAC

accepted the contention of the assessee and by his order dated 26-5-1975, directed the ITO to allow deduction u/s 80M as claimed. The AAC

also directed the ITO to rectify certain typo graphical mistakes in the assessment order. There was a rectification proceeding after the order was

passed by the AAC which culminated in an order passed by the ITO dated 1-10-1975.

On 11-11-1976, the ITO issued a notice u/s 148 of the Act for the reopening of the assessment for the assessment year 1973-74. While the

reopening proceeding was pending, the Commissioner issued a notice dated 13-12-1976, u/s 263, seeking to revise the original order of

assessment dated 13-11-1975, and also the order u/s 154 dated 1-10-1975, on the ground that the orders appeared to be erroneous and

prejudicial to the interests of the revenue inasmuch as business losses of the earlier years had been set off against income from other sources in the

said assessments. The jurisdiction of the Commissioner to revise the assessments u/s 263 was challenged by the assessee in appeal against the

revisional orders before the Tribunal. The contention of the assessee before the Tribunal, as recorded in the judgment, was:

... It was contended before the Tribunal on behalf of the assessee that during the pendency of the reassessment proceedings u/s 148 of the Act, the

Commissioner had no jurisdiction to revise the assessment u/s 263...."" (p. 90)

The Tribunal dismissed the appeal preferred by the assessee. The question referred to the High Court was:

''Whether, on the facts and in the circumstances of the case, the order of the Commissioner u/s 263 of the income tax Act, 1961, is valid in law?''

(p. 91)

After referring to a large number of cases, it was held:

In view of the observations of the Supreme Court on the effect of initiation of reassessment proceedings, we are unable to agree with the view

taken by the Delhi and Gujarat High Courts that during the pendency of reassessment proceedings, it would be open to the Commissioner to

exercise his revisional jurisdiction. We do not know on what grounds the assessment was sought to toe reopened in the instant case, tout there may

be cases where, by the exercise of his revisional jurisdiction by the Commissioner u/s 263 of the Act, only a part of the assessment order may be

modified or revised without setting aside the entire assessment order but the same may also have the effect of nullifying the pending reassessment

proceedings which might have been initiated on entirely different grounds. It remained open to the Commissioner to revise the order passed in

reassessment but by revising the order of assessment itself, the proceeding for reassessment may be made abortive.

Keeping the object of the proceedings of reassessment in view and the implications thereof, we prefer to take the view that once proceedings of

reassessment are initiated, the original order of assessment loses its finality and at this stage, it is no longer open for revision by the Commissioner.

(p. 100)

18. The issue before the Court in the above case was whether, after the ITO had reopened an assessment proceeding, the Commissioner could

exercise his revisional power during the pendency of the reopening proceeding? The effect of issue of a notice u/s 148 is to reopen the entire

assessment proceeding. The previous assessment is set aside and the whole assessment proceedings start afresh. The passage extracted above

appears to be the ratio of the decision in the case of General Beopar Co. (P.) Ltd. (supra). This principle of law was also enunciated by the

Supreme Court in the case of V. Jaganmohan Rao and Others Vs. Commissioner of Income Tax and Excess Profits Tax, Andhra Pradesh, .

19. It was really not necessary for the Court to examine the scope of the doctrine of merger in the context of the observations made which have

been set out here in above. In fact, the attention of this Court was not drawn to the judgment of the Supreme Court in the case of Madurai Mills

Co. Ltd. (supra). The principles laid down in that case set at rest the controversy about the doctrine of merger. The principles laid down in the

case of Madurai Mills Co. Ltd. (supra) have been applied by the Gujarat, Madhya Pradesh and Bombay High Courts in the cases of Karsandas

Bhagwandas Patel (supra); JAORA SUGAR MILLS LTD. Vs. UNION OF INDIA AND ANOTHER, ; ALOK PAPER INDUSTRIES Vs.

COMMISSIONER OF Income Tax M.P., and Sakseria Cotton Mills Ltd."s case (supra).

The principles enunciated by the Supreme Court in the case of Madurai Mills Co. Ltd. (supra) leave no room for doubt that what merges in the

order of the appellate or revisional authority is not the entire appealable order of the lower authority but only that part of the order of the lower

authority which was under consideration of the higher authority in revision or in appeal. It is also to be noted from the judgment of the Supreme

Court that for the purpose of application of the doctrine of merger, no distinction can be made between an order passed in revision and an order

passed in appeal.

20. In the case of Shankar Ramchandra Abhyankar Vs. Krishnaji Dattatreya Bapat, , the Supreme Court pointed out that the principle of merger

of orders of inferior Courts would not become affected or inapplicable by making any distinction between a petition for revision and an appeal.

21. Therefore, the judgment of the Supreme Court in the case of Madurai Mills Co. Ltd. (supra) cannot be distinguished on the ground that the

question that arose in that case was application of the doctrine of merger in a case where the lower Court"s decision had been modified in exercise

of revisional jurisdiction.

22. The scheme of the Act has also to be seen. If the doctrine of merger is rigorously applied, then the ITO will not be able to reopen a case u/s

147 of the Act after the assessment order has been affirmed or modified by the appellate authority. In fact, under the scheme of the Act, a lower

authority cannot possibly reopen an order of a higher authority. If the assessment order is treated as having lost its identity in its entirety and

completely merged in the order of the appellate authority, then the power of reopening of an assessment u/s 147 will have to be confined only to

such orders against which no appeals have been preferred. The effect of a notice u/s 148 is to reopen the entire assessment. After a valid notice u/s

148 has been issued, the entire assessment proceedings will have to start afresh from the stage of a notice u/s 139. This aspect of the matter was

explained by the Supreme Court in the case of V. Jaganmohan Rao (supra). Ramaswamy, J. observed:

... once valid proceedings are started u/s 34 the income tax Officer had not only the jurisdiction but it was his duty to levy tax on the entire income

that had escaped assessment during that year."" (p. 380)

There is also another aspect of the case. Whenever an order of the ITO is modified by the order of an appellate authority, the ITO has to give

effect to the order of the appellate authority by passing a fresh order in. accordance with the decision given by the appellate authority. Therefore, it

is ultimately the order of the ITO which has to be revised u/s 263 or reopened u/s 148, as the case may be. It has been held that the order passed

by the ITO to give effect to an appellate order is also an order of assessment and is also appealable u/s 246 of the Act--Kooka Sidhwa and Co.,

Calcutta Vs. The Commissioner of Income Tax, W.B., .

23. Therefore, in my view, having regard to the scheme of the Act, I it cannot be said that the issues decided in the assessment order which were

left untouched by the appellate authority have merged in the order of the appellate authority irrespective of the grounds of appeal and the points

canvassed before the appellate authority.

24. The question of merger was examined in extenso by the Supreme Court in the case of Gojer Bros. (Pvt.) Ltd. Vs. Shri Ratan Lal Singh, . In

that case, the Supreme Court, after referring to its earlier decision in the case ofMadurai Mills Co. Ltd. (supra) observed:

These observations cannot justify the view that in the instant case there can be no merger of the decree passed by the trial court in the decree of

the High Court. The Court, in fact, relied on Commissioner of Income Tax, Bombay Vs. Amritlal Bhogilal and Co., ; while pointing out that if the

subject- matter of the two proceedings is not identical, there can be no merger. Just as in Amritlal Bhogilal"s case, "he question of registration of

the assessee-firm was not before the appellate authority and, therefore, there could be no merger of the order of the income tax Officer in the

appellate order, so in the case of State of Madras Vs. Madurai Mills Co., Ltd., ; there could be no merger of the assessment order in the revisional

order as the question regarding exclusion of the value of yarn purchased from outside the State was not the subject-matter of revision before the

Deputy Commissioner of Commercial Taxes.

32. In the instant case, the subject-matter of the suit and the subject- matter of the appeal were identical. The entire decree of the trial court was

taken in appeal to the first appellate court and then to the High Court....

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33. We are, accordingly, of the opinion that the decree of the trial court dated November 24, 1958, merged in the decree of the High Court dated

January 8, 1969...."" (pp. 1388-1389)

The aforesaid observation makes it clear that unless the subject-matter of the suit and the subject-matter of the appeal were identical, there could

not be any merger of the decree of the trial court in the decree of the appeal Court entirely.

As has been stated earlier in the judgment, the scheme of the Act also cannot justify the conclusion that the entire order of the ITO has merged in

the order of the AAC or the Tribunal even though only some specific points decided in the assessment order were taken up in appeal and all other

points were left untouched by the appeal Courts.

25. This aspect of the matter was also emphasised by Sabyasachi Mukharji, J. in the case of Premchand Sitanath Roy Vs. Addl. Commissioner of

Income Tax and Others, where the question of right of the Commissioner to interfere in revision with an assessment order after an appellate order

had been passed was considered. It was observed in that case, after referring to the decision of the Supreme Court in the case of Madurai Mills

Co. Ltd. (supra):

... The question whether the interest that was liable to be charged had been properly waived or not, is a question which was not the subject-matter

of appeal before, the Appellate Assistant Commissioner. Therefore, there cannot be any question of merger of the order of the income tax Officer

on this aspect of the matter and on the theory of merger it cannot be said that the Commissioner lost his jurisdiction in this case after the order of

the Appellate Assistant Commissioner. In the aforesaid view of the matter I am unable to accept the first contention urged in support of this

application."" (p. 758)

26. The Supreme Court in the case of Central Provinces Manganese Ore Co. Ltd. Vs. Commissioner of Income Tax, , held that levy of interest

was part of the process of assessment. Although sections 143 and 144 of the Act did not specifically provide for the levy of interest and the levy

was, in fact, attributable to section 139 or section 215 of the Act, it was nevertheless a part of the process of assessing the tax liability of the

assessee. Inasmuch as the levy of interest was a part of the process of assessment, it was open to an assessee to dispute the levy in appeal

provided he limited himself to the ground that he was not liable to the levy at all. The judgment of this Court in the case of Premchand Sitanath Roy

(supra) was specifically approved.

Lastly, I was referred to a judgment of the Bombay High Court in the case of P. Muncherji & Co. (supra) in which a view contrary to the view

earlier taken by that Court in the case of Sakseria Cotton Mills Ltd. (supra) was adopted. It was observed after referring to the case of Madurai

Mills Co. Ltd. (supra), that superficially looked at, this decision might appear to support the stand of the department that when appeal was not

preferred on all the questions decided by the ITO, the entire assessment order could not be said to have merged in the appellate order and in such,

circumstances, the Commissioner was not robbed of his jurisdiction to revise the assessment. It was emphasised that in the Madras High Court''s

case, the Dy. Commissioner had exercised powers of revision under clause (2) of section 12 of the Madras General Sales Tax Act, 1939. In that

context, the Supreme Court made its observations regarding merger. It was observed that it was difficult to accept that the Supreme Court in the

case of Madurai Mills Co. Ltd. (supra) had expressed a view different from its decision in the case of Amritlal Bhogilal & Co. (supra).

In my judgment, the decision of the Supreme Court in the case of Madurai Mills Co. Ltd. (supra) cannot be distinguished on the ground that it was

only a case of revision under clause (2) of section 12. Section 12(2) as it stood at that time, was as under:

12(2) The Deputy Commissioner may--

(i) suo motu, or

(ii) in respect of any order passed or proceeding recorded by the Commercial Tax Officer under sub-section (1) or any other provision of this Act

and against which no appeal has been preferred to the Appellate Tribunal u/s 12A, on application, call for and examine the record or any order

passed or proceeding recorded under the provisions of this Act by any Officer subordinate to him, for the purpose of satisfying himself as to the

legality or propriety of such order, or as to the regularity of such proceeding, and may pass such order with respect thereto as he thinks fit."" (p.

148)

27. Therefore, it was open to the Dy. Commissioner to call for records and examine the order passed by the Commercial Tax Officer and ''pass

such order with respect thereto as he thinks fit''. The Dy. Commissioner could exercise the power u/s 12(2) suo motu or on the basis of an

application. But the power was not confined or limited to any part of the assessment order. The entire assessment order could be revised by the

Dy. Commissioner in exercise of this power of revision. It does not appear that the power of revision of the Dy. Commissioner under the Madras

General Sales Tax Act, is in any way less extensive than the power of the AAC under the Act.

I do not find any conflict between the principles laid down in Amritlal Bhogilal & Co."s case (supra) and Madurai Mills Co. Ltd."s case (supra).

All these cases were considered by the Supreme Court in the case of Gojer Bros. (P.) Ltd. (supra), where it was emphasised that only if the

subject-matter of the two proceedings was identical, the merger of the order in the order of higher appellate authority could take place. It was

observed in Gojer Bros. (P.) Ltd."s case (supra), that in Amritlal Bhogilal & Co."s case (supra), the question of registration of the assessee-firm

was not before the appellate authority and, therefore, there could be no merger of the entire order of the ITO in the appellate order. In Madurai

Mills Co. Ltd."s case (supra), there could be no merger of the entire assessment order in the revisional order as the question regarding exclusion of

the value of yarn purchased from outside the State was not the subject-matter of revision before the Dy. Commissioner of Commercial Taxes.

28. In the case of B.S. Banwarilal (supra), a Full Bench of the Madhya Pradesh High Court held that the doctrine of merger applied to income- tax

proceedings; but the extent of its application depended on the scope and the subject-matter of the appeal and the decision rendered by the

appellate authority. Where an appeal had been preferred by the assessee to the AAO from an order of assessment made by the ITO in respect of

only some of the items covered by the ITO"s order and the remaining items, forming part of the ITO"s assessment order were not agitated by

either party, though it was open to the revenue to agitate them or the AAC to consider them suo motu and no decision of the AAC was, therefore,

made in respect of the remaining items, the ITO"s order merged with the appellate order only to the extent it was considered and decided by the

AAO. The ITO"s assessment order survived in respect of the matters which were not covered by the appellate order and were left untouched.

The revisional jurisdiction of the Commissioner u/s 263, could be exercised on those aspects of the assessment matters which were left untouched

by the AAC.

29. The Fall Bench agreed with the decision of the Gujarat High Court in the case of Karsandas Bhagwandas Patel (supra), wherein it was held

that merger of the order of the lower authority in the order of the higher authority took place when the order under appeal had been reversed,

modified or even confirmed by the appellate authority. But that principle had no application where the decision of an inferior authority did not come

in for consideration before the appellate authority and there was no decision of the appellate authority either by way of affirmance or by way of

reversal or modification on the points decided by the inferior authority. Therefore, the order of assessment made by the ITO merged in the order of

the AAC only insofar as it related to the items which were considered and decided by the AAC. It was not material that the AAC could suo motu

consider all the points involved in the assessment order or the revenue could agitate all the points before the AAC. The real test was whether any

such point was actually considered and decided by the AAC.

I respectfully agree with the test propounded in that case. If the AAC does not take into consideration any aspect of the assessment order because

that particular aspect of the order was not appealable or for any other reason, it cannot be said that the assessment order has wholly merged in the

appellate order irrespective of the subject-matter of the appeal or the scope of the appellate order.

The same principle has been reiterated by the Gujarat High Court in another case of Poonjabhai Vanrnalidas (supra).

The principles of law enunciated by the Supreme Court in the cases of Madurai Mills Co. Ltd. (supra), Gojer Bros. (P.) Ltd. (supra) and Amritlal

Bhogilal & Co. (supra), make it abundantly clear that the entire assessment order made by the ITO did not merge in the order of the AAC

irrespective of the issues raised by the parties or decided suo motu by the appellate authority. The scope and the subject-matter of the appellate

order cannot be ignored in deciding the question whether the assessment order had entirely merged in the appellate order. In Amritlal Bhogilal &

Co. "s case (supra) a part of the ITO"s order did not merge in the appellate order because that part of the order was not appealable. In the case

of Madurai Mills Co. Ltd. (supra), the assessment order made by the Dy. Commercial Tax Officer did not merge in the order of the Dy.

Commissioner of Commercial Taxes because the question of exemption of the value of yarn purchased from outside the State of Madras was not

the subject-matter of the revisional order. In the case of Gojer Bros. (P.) Ltd. (supra), there was a merger because, as pointed out by the Supreme

Court, "in the instant case, the subject-matter of the suit and the subject-matter of the appeal were identical."

The aforesaid three judgments of the Supreme Court leave no room for doubt that unless it can be established that the subject-matter of the appeal

and the subject-matter of the order by the Court of first instance are identical, the lower court"s order cannot be said to have merged entirely in the

order of the appeal court. If the appeal court could not have dealt with a part of the order of the lower court because it was non-appealable, then

the question of merger of the non-appealable part of the order in the appellate order cannot arise at all. But even if the entire order is appealable

but an appeal is preferred only on certain issues and the appellate order has not travelled beyond those issues which have actually been raised

before it, it cannot be said that even in such a case, the lower court"s order has entirely merged in the appeal court"s order and lost its identity.

In view of the aforesaid principles of law laid down by the Supreme Court and also having regard to the scheme of the Act, I am unable to uphold

the first contention advanced on behalf of the assessee in this case.

It was next argued that there has been no prejudice to the revenue in this case. Assuming that exchange fluctuation resulted in increase of liability on

the capital account and the ITO had erred in allowing the liability on the trading account, no prejudice has really been suffered by the revenue

because the increased liability on the capital account will have the result of enhancement of the cost of the capital assets. That means, there will be

higher depreciation and in the long run, there was no real loss of revenue.

But, in the instant case, the Commissioner is not concerned with the long-term view of the matter. Each assessment year is a self-contained unit. If

any loss or any depreciation is to be allowed or income is to be assessed in a particular year, it must be done so in that year. Therefore, if any

increased liability incurred on the capital account has been allowed to be deducted against business income, then it cannot be said that the revenue

has not been prejudiced by such an order.

30. The case was heard at length on 25-8-1987, 9-9-1987, 15-9-1987, 11-12-1987, and 15-1-1988, and when hearing was completed, the

matter was fixed for judgment on 22-1-1988. Dr. Pal sought to make further submissions when the matter was fixed for judgment on 22-1-1988,

and a further hearing took place on 26-2-1988. Thereafter, it has appeared for judgment today. It has now been stated on behalf of the petitioner

that it does not want to press this writ petition but the matter should be heard on merits before the Commissioner. I have decided to leave open all

questions on merits. But, in my view, the notice issued cannot be struck down on the ground for merger because of the reasons stated

hereinabove. Dr. Pal then drew my attention to the amendment proposed by the Finance Bill, 1988 (section 263) by which an Explanation is

sought to be substituted with effect from 1-6-1988. The Explanation is as follows:

44. Amendment of section 263. --In section 263 of the income tax Act, in sub-section (1), for the Explanation, the following Explanation shall be

substituted with effect from the 1st day of June, 1988, namely:--

''Explanation : For the removal of doubts, it is hereby declared that, for the purposes of this sub-section, --

(a) an order passed by the assessing officer shall include--

(i) an order of assessment made by the Assistant Commissioner or the income tax Officer on the basis of the directions issued by the Deputy

Commissioner u/s 144A;

(ii) an order made by the Deputy 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'' includes 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, the powers of

the Commissioner under this sub-section shall extend to such matters as had not been considered and decided in such appeal.-- Vijaya

Commercial Credit Ltd. Vs. Sixth Income Tax Officer, .

In the memorandum explaining the Finance Bill, the controversy which has led to the amendment has been noted. Therefore, it is argued by the

petitioner that this Finance Bill has really recognised the fact that no revision was possible before this amendment was made effective.

31. I am unable to uphold this contention. The proposed amendment will not have the effect of introducing something which was not already there

in the Act. Amendments, very often, are clarificatory. In my opinion, the proposed amendment has tried to make explicit what was already implicit

in the Act.

32. The writ petition is dismissed. All interim orders are vacated.

33. There will be no order as to costs. It is made clear that I have not expressed any opinion on the petitioner''s right to get depreciation. That

question is left open to be decided by the appropriate authority.