
Simplex Concrete Piles (India) (P) Ltd. Vs Commissioner of Income Tax and Others

Writ Petition No. 1569 of 1987

Court: Calcutta High Court

Date of Decision: Dec. 23, 2005

Acts Referred:

Income Tax Act, 1961 " Section 2(7), 263, 263(1), 32A, 32A(2)

Citation: (2006) 206 CTR 219

Hon'ble Judges: Kalyan Jyoti Sengupta, J

Bench: Single Bench

Advocate: Debi Prosad Pal, Amar Nath Sen and Maloy Dhar, for the Appellant; Dipak Shome and Md. Nizamuddin, for the Respondent

Final Decision: Allowed

Judgement

Kalyan Jyoti Sengupta, J.

By this application the petitioner company has impugned a notice u/s 263 of the IT Act, 1961. By this notice the

CIT wanted to exercise his jurisdiction u/s 263 of the said Act suo motu having felt that the order of assessment particularly deduction for

investment allowance by the AO is prejudicial to the interest of the Revenue for the assessment years of 1980-81 to 1983-84. Ordinarily this sort

of notice cannot be interfered with by this Court in exercise of writ jurisdiction. At the ad interim stage, this Court did not grant stay of operation of

the aforesaid impugned notice and asked the CIT to complete hearing of the matter but effect to the final order was not (to) be given without the

leave of the Court.

2. On 23rd Aug., 2005, the matter was taken up for hearing. I passed an order directing the parties to supply information relating to the state of

affairs pursuant to the impugned notice. On the date of hearing it was informed that hearing was taken but no order has been passed. By my earlier

order I also directed to produce the final order passed, if any. The learned Counsel for the Revenue submits that he has received information that

final order has been passed but he is unable to produce the same.

At the ad interim stage there was no material, nor any explanation of the Revenue as to why such notice was issued, or it was not possible at that

stage to pass any order granting stay by simple reading of the notice and the petition itself.

As the final order has not been passed and now the Court has got all the materials, viz., the version of the Revenue as to why jurisdiction u/s 263

was exercised, therefore, the Court can decide it finally.

3. Dr. Pal, learned senior counsel for the petitioner, contends that exercise of jurisdiction u/s 263 of the said Act is pre-conditioned by two

eventualities, viz., (i) when it considers that any order passed by the AO is erroneous, and (ii) it is prejudicial to the interests of the Revenue.

According to him, on the date of passing orders by the ITO for the relevant assessment years basing on facts the investment allowance under the

Act was not erroneous either on facts or in law. At that point of time the law prevailing permitted such allowance to be granted. He has brought the

decisions of the Orissa High Court and the Bombay High Court reported in CIT v. N C. Budharaja and Co. (1980) 121 UR 212 and

Commissioner of Income Tax, Bombay City-II Vs. Pressure Pilling Co. (India) P. Ltd., respectively. At that point of time law laid down in those

decisions were governing the field of the above proposition.

He further submits that the ITOs have followed the earlier decisions of the Tribunal regarding allowing deduction for investment allowance u/s 32A

of the IT Act. Therefore, there cannot be error either on fact or in law. The ITO was obliged to accept and follow the decisions of the Tribunal

because of hierarchical position. In support of his submission he has relied on a decision of the Supreme Court reported in MALABAR

INDUSTRIAL CO. LTD. Vs. COMMISSIONER OF INCOME TAX, Moreover, he contends that when in a particular matter two views are

possible and the ITO adopts one of such views bona fide this act cannot be said to be erroneous, precisely when there has been a debate on a

particular point of law and the decision, in that debate following of one view is not error. He submits that in the petition it has been specifically

stated that the petitioner has been carrying on the business of manufacturing and/or processing of concrete piles. The said concrete piles are

manufactured by pouring into a steel cage the raw materials, viz., sand, gravels, stone chips and cement mixed mechanically in appropriate

proportion. Therefore, an independent movable article is brought into existence as a product of the same. The said product is an outcome of the

manufacturing process carried on by the petitioner which is the end of the piling process, and an independent entity which is normally described as

concrete piles. In the asst. yr. 1964-65 the ITO refused to accept that the petitioner was a company and had been carrying on manufacturing

activity and this matter thereafter had been taken successfully to the Tribunal and it was held that the petitioner was undoubtedly engaged in the

manufacturing of goods, as such the petitioner was entitled to get the benefit of reduction of rate of tax.

4. In view of the aforesaid factual position the definition of industrial company in the relevant Finance (No. 2) Act of 1980 is satisfied.

Consequently, investment allowance for the respective assessment years was allowed u/s 32A of the said Act. What is manufacturing process has

been explained in the decision of the Calcutta High Court reported in Russell Properties Pvt. Ltd. Vs. A. Chowdhury, Addl. Commissioner of

Income Tax and Others,

5. In the affidavit-in-opposition the aforesaid facts and circumstances have not been denied and disputed. No material far less new material has

been brought in the affidavit-in-opposition to justify the aforesaid action.

He contends further that all kinds of loss of revenue is not the requirement for exercise of jurisdiction but it has to be examined whether the

decision is erroneous or not and then whether it is prejudicial to the interests of the Revenue or not.

He further contends that following the decision of the Tribunal if the ITO has taken a decision such decision cannot be erroneous. He has referred

to a decision of this Court reported in Russell Properties (P) Ltd. v. A. Chowdhury, Addl. CIT (supra).

6. Learned Counsel for the Revenue, on the other hand, contends that upon examining the records it was found by the CIT that the petitioner-

company is a non-industrial company and it does not satisfy the definition of Section 2(7)(c) of the IT Act (relevant Finance Act). The company is

not engaged in the business of manufacturing and the nature of the business being carried on at that point of time by the petitioner was not of any

manufacturing business. Therefore, the investment allowance granted by the ITO during the relevant assessment years on the aforesaid factual

background is misapplication of law. Hence, the decision is erroneous on the face of it. Because of this allowance there has been a substantial loss

to the Revenue. Thus the conditions for application of that section for exercise of jurisdiction of the said Act are fulfilled and there is no illegality and

infirmary in the impugned notice. The Court should not interfere with this lawful function of the Revenue officer. He further contends that in a

revenue matter there cannot be any point of res judicata just because the Tribunal has decided at an earlier point of time on a particular point and

such decision cannot be made applicable for all the years to come. In support of his submission he has relied on a decision of the Gujarat High

Court reported in Commissioner of Income Tax Vs. M.M. Khambhatwala, and then a judgment of the Kerala High Court reported in

Bhagheeratha Engineering Ltd. Vs. Commissioner of Income Tax, . He further submits that when a particular point is a debatable, the CIT can

exercise his jurisdiction u/s 263 of the IT Act.

7. Having considered the respective contentions of learned Counsel for the parties the point herein involved is that as to whether on the basis of all

the facts and circumstances as stated in the petition as well as in the affidavit-in-opposition and the notice itself the CIT should have issued notice

u/s 263 of the IT Act or not. In order to understand the scope of the aforesaid section for the purpose of exercise of jurisdiction the same is set out

hereunder:

263. (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 insofar as it is prejudicial to the interest 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....

8. On a careful reading of the said section it is clear that this power can be exercised suo motu by the CIT and if he considers that any order

passed by the ITO (now AO) is erroneous and the same is prejudicial to the interests of the Revenue, he may, after giving the assessee an

opportunity of being heard and after making or causing such inquiry to be made 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. The aforesaid section has been very clearly explained by the Supreme Court in the case of Malabar Industrial Co. Ltd. v. CIT (supra).

It is explained that the CIT has to be satisfied with twin conditions, viz., (i) the order of AO sought to be revised is erroneous; and (ii) it is

prejudicial to the interests of the Revenue. If one of them is absent-if the order of the ITO is erroneous but is not prejudicial to the Revenue or if it

is not erroneous but prejudicial to the Revenue-recourse cannot be had to Section 263(1) of the Act. The provision cannot be invoked to correct

each and every type of mistake or error committed by the AO. It is only when an order is erroneous that the section will be attracted and an

incorrect assumption of the facts or an incorrect application of law will satisfy the requirement of the order being erroneous. If due to the erroneous

order of the ITO, the Revenue is losing tax lawfully it will certainly be prejudicial to the interest of the Revenue. The phrase ""prejudicial to the

interest of the Revenue"" has to be read in conjunction with an erroneous order passed by the AO. Every loss of revenue as a consequence of the

order of the AO cannot be treated as prejudicial to the interest of the Revenue.

9. In this case here the ITO during the relevant assessment years granted investment allowance, the amount invested in connection with the

business during the relevant assessment years. Had this amount not been excluded then the same would have been exigible to tax, equally-the

Department has certainly lost the revenue. Hence one of the conditions is fulfilled.

10. Now, it has to be examined whether the orders are erroneous or not, meaning thereby having regard to the facts and circumstances of this case

whether deduction for investment allowance is correctly granted by applying the law or not. From the records I find that the ITO did not disclose

any material on which action is sought to be taken. In the petition it has been stated and also in the notice that the petitioner-company has

undertaken manufacturing process of concrete piles. The said concrete piles are manufactured by pouring into a steel cage, raw materials, viz.,

sand, gravel, stone chips and cement mixed mechanically in appropriate proportion. This fact has not been denied and disputed in the affidavit-in-

opposition by the respondent. According to me, production and manufacturing process means inputting raw materials and mixing the same if a new

thing or material emerges then certainly it is a manufacturing process. The concrete piles are done with a process of mixing, and with the process a

third article emerges and it is by way of a chemical process as the finished product cannot be converted back to the inputs and this finished product

is used for other purposes. In this connection the decision of the Bombay High Court rendered in the case of CIT v. Pressure Piling Co. (India) (P)

Ltd. (supra) has supportive value. At p. 339 it is observed amongst others ""... The essence of the manufacturing process is the conversion of raw

material into an entirely new commodity or a new thing"". All types of investments are not allowed by way of deduction u/s 32A of the said Act.

Section 32A, Sub-section (2)(b)(iii), reads as follows:

in any other industrial undertaking for the purposes of business of construction, manufacture or production of any article or thing, not being an

article or thing specified in the list in the Eleventh Schedule.

11. The definition of ""industrial company"" in the Finance (No. 2) Act of 1980 for the relevant assessment years is as follows:

industrial company" means a company which is mainly engaged in the business of generation or distribution of electricity or any other form of

power or in the construction of ships or in the manufacture or processing of goods or in mining.

12. Going by the factual aspect as disclosed in the pleading it is clear that at that point of time the petitioner-company was an industrial company as

it was manufacturing or processing goods. The CIT has, in my view misread the provision of Section 32A, Sub-section (2), Clause (b), Sub-clause

(iii). It clearly provides for all kinds of industrial undertakings. The CIT has no basis nor any material to conclude that the petitioner-company was

a non-industrial company going by the definition of industrial company relevant for the year.

13. Moreover, I find as rightly contended by Dr. Pal that whether the petitioner-company is industrial undertaking or not or for its pattern of

manufacturing of concrete piles is manufacturing any article or thing has been adjudicated and decided by the Tribunal previously in respect of the

asst. yr. 1964-65. This fact finding of the Tribunal in the case of the same assessee is binding unless otherwise contrary is shown. It is settled

position of law that the findings and decisions of the Tribunal bind the subordinate officials of the IT Department. On this legal position a decision of

the learned single Judge in the case of Russell Properties (P) Ltd. v. A. Chowdhury, Addl. CIT (supra) may be appropriately referred to. At p.

245 of the said judgment it held "" ...As a matter of fact whenever there is a decision of the higher authority, the subordinate authorities are bound to

follow the said decision, if judicial discipline is to be maintained...."" The decisions cited and relied on by learned Counsel for the Revenue are not at

all helpful for the issues involved here.

14. Under those circumstances I think that there was no warrant to issue notice u/s 263 of the Act by the CIT as conditions mentioned therein are

not fulfilled in this case by reason of the fact there has been no error committed by the then ITO.

15. Therefore, this application is allowed. Accordingly, the notice is set aside and quashed, consequently any decision taken pursuant thereto

stands set aside and quashed. There has been no order as to costs.