

(2001) 03 CAL CK 0010

Calcutta High Court

Case No: C.R. No. 5983 of 1979 28 March 2001 A.Y. 1974-75

Duncan Agro Industries Ltd.

APPELLANT

Vs

ITO and Others

RESPONDENT

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**Date of Decision:** March 28, 2001**Acts Referred:**

- Income Tax Act, 1961 - Section 263

**Citation:** (2001) 167 CTR 430**Hon'ble Judges:** Ashim Kumar Banerjee, J**Bench:** Division Bench**Advocate:** Dr Debi Prasad Pal, J.P. Khaitan, Ajoy Kumar Dey and S. Mukherjee, for the Assessee Rupendra Nath Mitra and Md. Nizamuddin, for the Revenue, for the Appellant;

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### Judgement

Ashim Kumar Banerjee, J.

Notice dated 22-6-1979, issued by the respondent-authority u/s 263 of the Income Tax Act served on the assessee, the petitioner above named, has been impugned before me in this writ petition. The said notice, dated 22-6-1979, has been annexed to the writ petition and is appearing at p. 54 therein. In the said notice the Commissioner (Central-II), Calcutta, asked the assessee to show-cause as to why the order passed by the assessing officer would not be revised u/s 263(1) of the Income Tax Act, 1961, for the assessment year 1974-75.

2. Appearing for the petitioner Dr. Debi Prasad Pal, learned senior counsel, submitted that the assessment order sought to be revised by the Commissioner has been passed u/s 143(3) read with section 144B of the said Act, 1961. u/s 144B if the return income exceeds Rs. 1,00,000 the matter should be referred by the assessing officer to the Inspecting Assistant Commissioner. In case, any objection is received on the draft assessment made by the assessing officer, upon hearing the parties the Inspecting Assistant Commissioner is empowered to pass order u/s 144B(4) of the said Act and such order and/or direction of the Inspecting Assistant Commissioner is

binding upon the Income Tax Officer by virtue of the provision of section 144B(5) of the said Act. Hence, Commissioner has no power to revise the order passed by the Income Tax Officer in compliance with the direction of Inspecting Assistant Commissioner u/s 144B(4) of the said Act. According to Dr. Pal the direction of Inspecting Assistant Commissioner in the said case is complied with by the Income Tax Officer by virtue of the provision of section 144B(5) of the said Act and Commissioner has no power to revise such order which has been passed in compliance with the direction of Inspecting Assistant Commissioner,

3. Dr. Pal further submitted that the revenue authority has issued the said show-cause notice on the basis of the "Explanation" incorporated by the Taxation Laws (Amending Act) 1984, which reads as follows :

"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 1-6-1988 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 authorized 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 1-6-1988, 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.

4. According to Dr. Pal since the said amendment has come into force with effect from 1-10-1984, the respondent-authority is not entitled to take its benefit retrospectively.

Replying on a decision CIT v. Tajmahal Hotel (1973) 82 ITR 44 , Dr. Pal submitted that expression "shall include" means that such amendment would have prospective effect.

Dr. Pal in this regard has also relied upon the case CIT v. Patel Brothers & Co. Ltd.& Ors. : [1995]215ITR165(SC) .

5. Mr. Rupendra Nath Mitra, learned advocate appearing for the revenue authority submitted that the "Explanation" incorporated u/s 263(1) of the said Act, 1961, is clarificatory and, therefore, the question of application of such "Explanation" prospectively does not arise. The revenue authority has relying on [COMMISSIONER OF Income Tax Vs. SHRI ARBUDA MILLS LTD.](#), and CIT v. Mulchand Bagri C.R. No. 5983 of 1979 206. Relying on the said decision it was contended on behalf of the revenue authority that the Commissioner was well within its power to issue such notice u/s 263(1) of the said Act, 1961, and the writ petition is misconceived and is liable to be dismissed.

6. To decide the issue let me first deal with the cases cited by the parties.

(i) (1973) 82 ITR 44 (supra) : I do not find any application of this judgment in the present case.

(ii) : [1995]215ITR165(SC) (supra) : "Explanation" inserted in section 37(2A) of the said Act, 1961, was called in question in the said judgment. Sub-section 2(A) being a non obstante clause provides that no allowance shall be made in the nature of entertainment expenditure expended before 30-9-1967. By incorporation of the said "Explanation" the entertainment expenditure provided in sub-section (2A) would include expenditure on provision of hospitality of every kind by the assessee to any outsider but would not include expenditure on food or beverages provided by the assessee to the employees.

The Apex Court while interpreting the said "Explanation" was of the view that sub-section 2(A) was inserted with effect from 1-10-1967, and "Explanation 2" inserted retrospectively with effect from 1-4-1976, while sub-section 2(B) was inserted with effect from 1-4-1970. According to Apex Court the meaning of "Explanation 2" is quite clear and it has enlarged the meaning to widen the tax net.

The Apex Court further held that the insertion of "Explanation 2" made retrospectively, but restricted in its application only with effect from 1-4-1976, is itself an indication that its application prior to 1-4-1976, is excluded. If "Explanation 2" was merely clarificatory of the ordinary meaning it was necessary to restrict its retrospective application in this manner only from 1-4-1976.

(iii) [COMMISSIONER OF Income Tax Vs. SHRI ARBUDA MILLS LTD.](#), : In the instant case the ""Explanation" to section 263(1) has been called in question. Here the Supreme Court held as follows :

"The consequence of the said amendment made with retrospective effect is that the powers u/s 263 of the Commissioner shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in an appeal. Accordingly, even in respect of the aforesaid three items, the powers of the

Commissioner u/s 263 shall extend and shall be deemed always to have extended to them because the same had not been considered and decided in the appeal filed by the assessee. This is sufficient to answer the question which has been referred. The question referred is, therefore, answered in the negative, in favour of the revenue and against the assessee. "

(iv) CIT v. Mulchand Bagri (supra) : The Division Bench of this court held that Commissioner is empowered to revise the order passed by the Income Tax Officer in accordance with the direction of Inspecting Assistant Commissioner and Commissioner is entitled to revise such an order u/s 263 of the said Act of 1961. The Division Bench of this court relied on the decision of Madhya Pradesh High Court in [Commissioner of Income Tax Vs. Vithal Textiles](#), wherein the subject "Explanation" has been held to be retrospective. Relying on the said Madhya Pradesh High Court decision the Division Bench of our court rejected the contention of the assessee that by the said "Explanation" the legislature intended to confer a new revisional jurisdiction upon the Commissioner.

7. By applying the provisions of law as laid down by the Apex Court and Division Bench of our court in the above decisions I feel that the purpose for which the "Explanation" inserted in section 37(2) and the "Explanation" inserted in section 263(1) are not similar and/or identical although both the said "Explanations" started by the word "for the removal of doubts". In the first case the intention of the legislature, as has been held by the Apex Court, was to make it retrospectively with effect from 1-4-1976. According to Apex Court by incorporating the words "with effect from 1-4-1976" it has excluded the period prior to 1-4-1976. In case of the Explanation incorporated in section 263(1) there is no such restriction imposed in the said "Explanation". Hence, the Apex Court in the case of CIT v. Shri Arbuda Mills Ltd. (supra) held such "Explanation" to have retrospective effect. However, the ambiguity, if any, was totally removed by 1988 amendment where it has included any order passed "on or before or after 1-6-1988".

Hence, relying on the proposition of law laid down in the case of Shri Arbuda Mills Ltd. and Mulchand Bagri (supra) I hold that the "Explanation" incorporated in section 263(1) of the Income Tax Act, 1961, has its retrospective effect and the impugned notice dated 22-6-1979, issued by the Commissioner is valid and binding upon the parties.

In the result the writ petition fails and is hereby dismissed. The rule nisi issued on 2-7-1979, is discharged. Interim orders passed earlier are vacated.

8. In the circumstances aforesaid, there would be no order as to costs.