Karam Chand Thapar and Bros. (C.S.) Ltd. Vs Asstt. Commissioner of Income Tax and Others

Court: Calcutta High Court

Date of Decision: May 17, 2007

Citation: (2008) 214 CTR 676 : (2007) 295 ITR 355

Hon'ble Judges: Pranab Kumar Deb, J; Ashim Kumar Banerjee, J

Bench: Division Bench

Judgement

Ashim Kumar Banerjee, J.
The subject of controversy relates to the 1 assessment year 1994-95. During the said period the

appellant/assessee purchased electric meters on different dates from the Gujarat Electricity Board and at the same time they let out those meters to

the State Electricity Board on lease and thereby earned the rental income. The assessee submitted its return, inter alia, claiming depreciation on the

value of the said meters estimated at Rs. 35.10 crores approximately. On May 19, 1997, the assessing officer passed an order disallowing the

depreciation as claimed by the assessee. According to the assessing officer, the subject transaction was nothing but a camouflage as it was nothing

but a financial agreement by which money was lent and advanced by the assessee to the State Electricity Board on the said electric meters.

Accordingly, the assessing officer disallowed assessment on the rental income. The assessing officer calculated the notional interest on the principal

sum as and by way of interest income and assessed tax on the said basis. The assessee preferred an appeal before the Commissioner (Appeals).

The appellate authority asked the assessing officer to determine the market value of the said electric meters and submit a report. Accordingly, the

assessing officer submitted his report. On the basis of the said report the appeal was allowed by allowing depreciation on Rs. 11.38 crores being

the book value of the said meters and not Rs. 35.10 crores as prayed for by the assessee. The assessee approached the Tribunal. The Tribunal by

an order dated 31-12-2001, set aside the order of the Commissioner (Appeals) as well as the order of the assessing officer and remanded the

matter back to the assessing officer for deciding the issue afresh on the basis of the materials so produced by the assessee not only on the

depreciation but also on the issue of foreign travel allowance claimed by Mrs. J. Thapper, director of the assessee-company. The said order was

duly served upon the assessing officer. At that time the assessing officer was also considering the issue of exemption as claimed by the assessee on

account of sales tax u/s 147 of the said Act.

2. The assessing officer after receipt of the order of the Tribunal issued a notice asking the assessee to furnish various details and information with

regard to the other two issues being depreciation and foreign travel allowance. The assessee duly replied to the said letter. While the said issues

were pending, the assessing officer passed an order on 12-2-2002, deciding the issue of sales tax. While doing so the concerned officer also took

into account the order of the Tribunal dated 31-12-2001, and allowed depreciation as claimed by the assessee to the extent of Rs. 35.10 crores.

Accordingly, a refund voucher was issued. The assessee was given appropriate refund in terms of the said order dated 12-2-2002.

3. On 15-5-2002, the assessing officer issued a further notice asking for details and information regarding the issue of depreciation and foreign

travel allowance.

4. Challenging the said notice the assessee approached the learned single judge by filing a writ petition. According to the assessee, once the issue

was concluded by order dated 12-2-2002, there was no occasion for the assessing officer to ask for further details in terms of the notice dated

15-5-2002. The assessee prayed for quashing of the said notice.

5. Initially the learned single judge passed an order of stay with regard to giving effect to the said notice dated 15-5-2002. Ultimately the learned

single judge by judgment and order dated 15-10-2004 Karan Chand Thapar and Brothers Vs. Assistant Commissioner of Income Tax and

Another, , dismissed the writ petition by holding that the assessing officer was within his power to issue such notice. The relevant finding of the

learned single judge is quoted below (at page 110):

Having heard the respective contentions of learned Counsel in this matter, I think the issue is whether the assessing officer is justified in issuing the

impugned notice in the context of the order dated 12-2-2002. Mr. Murarka says that the aforesaid order is a final one, as the question of

depreciation has been taken care of and after considering every thing a refund order has been passed, so it reaches its finality. I have examined the

order carefully and I hold Mr. Ghosh is right in saying the order does not relate to any decision on the issue of depreciation or the expenditure on

account of the foreign tour of Mrs. J. Thapar. I have already quoted the direction of the Tribunal upon the assessing officer. It is clear that the

assessing officer is to decide upon fresh hearing on these two issues. Therefore, the contention of Mr. Murarka that this order being a final one and

on fresh decision of the aforesaid two issues is not correct. From the order dated 12-2-2002, it does not appear the assessing officer has heard

the assessee/petitioner or touched the issue not to speak of deciding the same. So, I hold that irrespective of the effect and implication of the order

dated February 15, 2002, the assessing officer has to decide afresh, pursuant to the direction of the Tribunal and this cannot be left outstanding in

any manner whatsoever. According to him if it is not done the same tantamount to gross breach of discipline in the quasi-judicial proceedings. It is

a settled position of law that the principle of maintaining hierarchical discipline is equally and vigorously applicable in the quasi-judicial proceedings.

This Court is duty bound to see such discipline is followed in the strict sense.

The decisions cited by Mr. Murarka, namely, Debi Prasad Malviya Vs. Commr. of Income Tax, United Provinces, Lucknow, ; M.M.A.K.

Mohiddin Thamby and Co., Eluru Vs. Commissioner of Income Tax, Hyderabad, ; T. Manavedan Tirumalpad and Another Vs. Commissioner of

Income Tax, Madras, , were rendered on the established principle of law that the assessment has to be in complete sense except in the case of

escapement of assessment. The scheme of the old Act as well as the new Act in the matter of assessment is that the revenue authorities will try as

far as practicable to complete the assessment in one go not in piecemeal manner. But some times for some reason or other, this may not be

possible. In the case of escapement of assessment for various reasons to safeguard against evasion and dodging of payment of revenue the

Legislature in its wisdom for the welfare of the country, has provided for reassessment on given conditions and situations with pre-conditions for

exercise of jurisdiction in the case of reassessment. Here the notice impugned was sought to be issued not in relation to any reassessment, but to

implement the direction of the Tribunal, and the same stands on a different footing. I agree with the contention of Mr. Ghosh that the order dated

12-2-2002, has nothing to do in relation to the aforesaid two issues of the computation of income and the reference to deduction on account of

depreciation is in consonance with the direction of the Tribunal as a first step to rehear the matter on these two issues.

I do not think, therefore, that the assessing officer has exceeded his jurisdiction or has improperly exercised jurisdiction. The order dated 12-2-

2002, substantially relates to the reassessment u/s 147 of the said Act in relation to the payment of sales tax. Therefore, I dispose of the writ

petition having found no merit in the contention upon deep and close scrutiny.

I direct the assessing officer to complete the rehearing pursuant to the direction of the Tribunal as early as possible and the same shall be done

within two months from the date of receipt of this order.

6. Being aggrieved by and/or dissatisfied with the judgment and order of the learned single judge the assessee preferred the instant appeal. The

Division Bench while admitting the appeal permitted the revenue to proceed with the assessment in terms of the order of the Tribunal so directed

by the learned single judge. Accordingly, the assessing officer passed an order on August 3, 2005, allowing depreciation to the extent of Rs. 11.38

crores and thereby disallowing Rs. 23.71 crores. The assessing officer also disallowed the claim on account of foreign travel expenses to the extent

of Rs. 2,00,746. The said order was, however, not officially communicated to tine assessee in view of pendency of this appeal.

7. The above appeal was heard by us on the abovementioned dates.

8. Mr. R. Murarka, learned Counsel appearing for the assessee contended as follows:

(i) When the Tribunal directed the assessing officer to adjudicate the issue afresh on account of depreciation and foreign travel allowance the

assessing officer was duty bound to complete the assessment along with the issue of sales tax pending before him. Hence, the order dated 12-2-

2002, was a composite order passed by the assessing officer, inter alia, u/s 254 of the Income Tax Act, 1961. Hence, the assessing officer had no

authority to issue the subsequent letter dated May 15, 2002.

(ii) Once the controversy stood resolved by the said order dated 12-2-2002, the assessing officer was not within his power to issue such notice in

the absence of any specific provision being made in the said Act of 1961.

(iii) The order dated 12-2-2002, could not be said to be a piecemeal assessment as piecemeal assessment was not permitted to be done under the

said Act of 1961 as decided by the precedents.

9. In support of his contention Mr. Murarka relied upon the following 9 decisions:

(i) Debi Prasad Malviya Vs. Commr. of Income Tax, United Provinces, Lucknow, ;

(ii) T. Manavedan Tirumalpad and Another Vs. Commissioner of Income Tax, Madras, ;

(iii) M. O. THOMAKUTTY Vs. COMMISSIONER OF Income Tax, KERALA., ; and

(iv) C. Commissioner of Income Tax, Gujarat II Vs. Himatlal Bhagubhai, .

Mr. Dipak Kumar Shome, learned Counsel appearing for the revenue ,

10. contended as follows:

(i) The order passed on 12-2-2002, was on the issue of sales tax and the assessing officer did not consider the issue afresh on account of

depreciation and foreign travel so directed by the Tribunal. Hence, he was within his power to complete such assessment in terms of the order of

the Tribunal by asking for further particulars as contained in the letter dated 15-5-2002.

(ii) Assuming that the notice dated 15-5-2002, could not be said to be a notice u/s 148 or u/s 154, could be termed as a notice u/s 142(1) of the

said Act of 1961

(iii) The Tribunal remanded the matter back to the assessing officer for a detailed consideration afresh upon giving appropriate opportunity of

hearing to the parties on the issue of depreciation and foreign travel. On a perusal of the order dated February 15, 2002, it would clearly appear

that the assessing officer did not venture to do the same and the said order would at best be said to be the resolution of the controversy with

regard to the sales tax only.

(iv) The learned single judge rightly held that the authority was within its power to call upon the assessee to produce necessary details as permitted

by the Tribunal. Hence, the said notice could not be quashed and the learned single judge rightly dismissed the writ petition by finding the same not

maintainable.

11. To appreciate the controversy let us first examine the appropriate pro- 11 visions of the Act of 1961.

12. Section 142 empowers the assessing officer to ask for further details after a return is submitted u/s 139. Such act was permissible before the

original assessment u/s 143.

13. u/s 143, an assessment: was to be made by the assessing officer on the basis of the return so submitted u/s 139 and/or the particulars so

submitted by the assessee u/s 142(1).

14. Section 147 empowers the assessing officer to reopen an assessment if he is of the opinion that there has been an escapement of assessment of

income which escaped the attention of the assessing officer at the time of passing order u/s 143 in view of concealment by the assessee which

comes to the notice of the assessing officer subsequently to the passing of the order u/s 143.

15. Section 148 gives power to the assessing officer to issue notice for reopening of the assessment u/s 147.

16. Section 154 empowers the assessing officer to correct his own mistake as crept in while passing an order u/s 143.

17. Section 254 empowers the Appellate Tribunal to pass appropriate order as it thinks fit after giving hearing to both the parties to the appeal.

Under Sub-section (2), the Tribunal within four years from the date of passing of its order is entitled to rectify its mistake. Hence, the Tribunal is

within its power to remand the matter back to the assessing officer if it thinks fit.

18. In the instant case, the assessee filed a return u/s 139. Assessment was done u/s 143 disallowing the depreciation. The matter went up to the

Commissioner (Appeals) and ultimately up to the Tribunal. The Tribunal remanded the entire matter back to the assessing officer after setting aside

the order of the original order of assessment passed u/s 143 so merged in the order of the Commissioner (Appeals). Hence, the assessing officer

got jurisdiction to reopen the assessment in terms of an order passed u/s 254 of the said Act of 1961 by the Tribunal. Hence, the assessing officer

was duty bound to give hearing to both the parties and consider the documents so directed by the Tribunal u/s 254.

19. In our view the Tribunal before passing the order dated 12-2-2002, should have resolved the controversy once and for all by taking into

account not only the issue of sales tax but also the issue of depreciation and foreign travel so remanded to him in terms of the order dated 31-12-

2001. The assessing officer, in our view, committed a grave error by passing the order dated 12-2-2002, keeping those two issues unresolved.

20. The Tribunal while passing the said order observed, ""pending the set aside assessment the demand is vacated"". The assessing officer should not

have said so after recording in the first paragraph of the order to the effect, ""proceeding u/s 148 initiated on October 9, 2000, as well as effect to

the Income Tax Appellate Tribunal order No. 1138"/Calcutta/2000 dated 31-12-2001, is given in a consolidated manner in this order"".

21. The assessing officer thereby committed grave error by misconstruing the relevant provisions of the Act as well as the order of the Tribunal. It

was repeatedly held that piecemeal assessment was not permissible. While the issue was pending on account of sales tax, before him, he could

have concluded the controversy on sales tax, had the Tribunal order being made not known to him. Once the said order was brought to his notice

he was not authorized to keep those issues pending by resolving the controversy with regard to the sales tax only.

22. Now, comes the question as to what was the right procedure to be adopted to rectify such mistake. In our considered view, the notice

impugned in the writ petition should be considered as a notice u/s 154 read with Section 254. Mr. Shome argued that it was a notice u/s 142(1).

Such argument was in desperation, in our view. The learned single judge held that it was a case of escapement of assessment of income meaning

thereby a situation contemplated u/s 147. We are not in a position to accept such view.

23. In a case u/s 147 there might be imposition of interest and penalty on the assessee as such escapement of assessment of income might be due

to omission on the part of the assessee to produce appropriate materials before the assessing officer. In a case u/s 147 the assessing officer might

come to a finding that such escapement was due to the fault on the part of the assessee. u/s 154 no fault could be attributed to the assessee as this

power was given to the assessing officer, to rectify his own mistake apparent on the face of the record. Such mistake could not be attributed

towards the assessee. Hence, an order u/s 154 may not attract any penalty. In the instant case, the Tribunal directed the assessing officer to

consider materials subsequently disclosed before the Tribunal. Hence, the officer got jurisdiction u/s 254 to consider the same. He should have

done so while passing the order on 12-2-2002. It was his mistake. Hence, he was within his jurisdiction to rectify his own mistake u/s 154 read

with Section 254. The assessing officer did not specifically mention under what section the impugned notice was issued. However from the tenor of

the said notice it appears that the blame was put on the assessee as if it was a notice u/s 148. Such power was not with the assessing officer while

considering an issue on remand u/s 254. His order stood merged ultimately in the order of the Tribunal. Hence, there could not have been any

situation contemplated u/s 147 for which he could issue a notice u/s 148.

24. The assessing officer, upon perusal of the documents so disclosed before the Tribunal, could ask for further particulars from the assessee for

further clarification as was done on 4-2-2002. The notice dated 15-5-2002, was a continuation of the earlier notice as he, by mistake, did not

resolve the controversy earlier. We are of the view that neither the said notice dated 4-2-2002, nor the notice dated 15-5-2002, could be called

as a notice u/s 142(1). Such notice could only be given at the time of original assessment. Hence, the said two notices could only be termed as

notice for clarification and/or further information in respect of a proceeding on remand u/s 254.

25. In such view of the matter, although we could not subscribe to the same view as was taken by the learned single judge we are in ad idem with

the final conclusion whereby his Lordship dismissed the writ petition.

26. On a perusal of the order passed by the assessing officer on remand u/s 254 pursuant to the interim order passed by the Division Bench, it

appears that no hearing was given to the assessee prior to the passing of the said order. Hence, we are not in a position to allow the revenue to

give effect to the said order dated August 3, 2005, copy of which has been handed over to the court. The said order dated August 3, 2005, is

quashed and set aside. We make it clear that we have not gone into the merits of the matter. The assessing officer is directed to give opportunity of

hearing to the parties and pass appropriate order on remand u/s 254 so directed by the Tribunal. While doing so the assessing officer would also

permit the assessee to give reply to the impugned notice dated May 15, 2002, within a period of three weeks from the date of communication of

this order.

27. The appeal is disposed of accordingly.

28. There will be no order as to costs.

29. Urgent xerox certified copy would be given to the parties, if applied for.

Pranab Kumar Deb, J.

30. I agree.