(2002) 03 CAL CK 0036

Calcutta High Court

Case No: IT Ref. No. 66 of 1995 13 March 2002 A.Y. 1984-85

Commissioner of Income Tax		APPELLANT
	Vs	
Hindustan Coconut Oil Mill		RESPONDENT

Date of Decision: March 13, 2002

Acts Referred:

- Income Tax Act, 1961 - Section 263

Citation: (2002) 174 CTR 583

Hon'ble Judges: Maharaj Sinha, J; Ajoy Nath Ray, J

Bench: Full Bench

Judgement

By the court

The questions which have come up for answer by us in this reference are as follows :

1. "Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the assessing officer travelled beyond his jurisdiction in including sales-tax liability of Rs. 32,40,408 to the order of the Commissioner u/s 263, which according to the Tribunal, was on limited issue, that is, regarding recomputation of relief u/s 80HH, when, in facts the assessment was set aside as a whole by the Commissioner while passing order u/s 263 ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in dismissing the departmental appeal by accepting the cross-objection of the assessee without deciding the correctness of the finding of the Commissioner (Appeals) which was challenged by the department before the Tribunal ?

2. The brief facts of this case are as follows.

"On or about 25-3-1985, the assessment was made for the first time by the Income Tax Officer for the assessment year 1984-85. We are concerned only with that single

year. On the 7-1-1986, the Income Tax Officer purported to rectify and amend the original assessment order. The most significant point, and indeed the only point of this rectification for our purpose was that a sum upwards of Rs. 32,00,000 was sought to be added as sales-tax receipt by the assessee, which receipt had allegedly by not been made over by them to the sales-tax authorities."

Needless to mention the assessee was aggrieved by the order of rectification and it preferred due departmental appeals.

On the 17-2-1987, notice was issued from the office of the Commissioner, WB-XIV, proposing to pass orders in revision u/s 263 for three assessment years, the last of which was 1984-85. Points were raised there (in so far as the present assessment year is concerned) about (i) section 80HH deductions, and (ii) sales-tax realized from customers, and whether those have been shown as part of the assessee''s income.

It will be noted that by the time the notice for revision had been issued, the order for rectification had already been passed, and it was nearly 13 months old on that date. If the order in rectification is taken into account, the sales-tax point no longer remained in the region of any assessment which was prejudicial to the interest of the revenue.

Be that as it may the notice of revision did include the sales-tax matter. Why it did so include, whether the authority issuing the notice had not properly examined the files, these are matters into which we need not speculate although the Tribunal has done so in parts of its order.

The order in revision was passed within nine days of the issuance of the notice of revision. That order is dated 26-2-1987. In that order so far as the section 80HH part is concerned, specific mention is made and a direction is given to the effect that no deductions are to be allowed because there was no income from which the appropriate deduction could be made. There was no profit in the assessment year in question from which such deduction could appropriately be made.

As regards the sales-tax issue the order in revision was practically totally silent. This is what the Commissioner (Revision) said at the end of the order pertaining to the assessment year 1984-85 :

"Thus, on the basis of the facts of the case and after giving the assessee an opportunity of being heard on 24-2-1987, I hold that the order of the Income Tax Officer is prejudicial to the interest of revenue. I am, therefore, cancelling the same and directing the Income Tax Officer to pass a fresh assessment order after taking into consideration all the revenue-yielding aspects of the assessee.

The Income Tax Officer is so directed."

Some three months after the passing of the order in revision the departmental appeal filed by the assessee form the order of (section 154) rectification came up for

hearing. The Commissioner (Appeals) was of the view that the order passed in revision already had caused a removal of both the original assessment order as well as of the order under appeal i.e., the order passed in rectification.

On the ground that the order appealed from was no longer in existence the appeal was dismissed for statistical purposes.

The Commissioner (Appeals) said as follows :

"2. It is seen from the records that the Commissioner, West Bengal-XIV passed an order u/s 263 on 26-2-1987, cancelling the assessment order and directing the Income Tax Officer to pass a fresh assessment order after taking into consideration of the facts. As the original assessment order itself was set aside, the order u/s 154 does not survive.

3. The appeal has, therefore, became infructuous. It is treated as dismissed for statistical purposes".

The fresh assessment after the conclusion of the proceeding in revision and appeal was made on the 26-2-1988.

3. In the paper book before us neither the notice of revision dated 17-2-1987, is to be found, nor this fresh assessment dated 26-2-1988, copies of these were handed up by Mr. Poddar, appearing for the assessee, and those should be kept countersigned on record as part of the records of these proceedings.

4. From the fresh assessment order the appeal was heard and decided on the 30-10-1988, and then the Tribunal gave its decision on the 17-12-1993.

Broadly speaking, the Tribunal has opined that in the order passed in revision there being no specific mention of the sales-tax matter, it could form no part of the directions which were to be followed by the Income Tax Officer for the purpose of making alterations. Thus, the alterations sought to be made by the Income Tax Officer in the fresh assessment of 26-2-1988, in regard to sales-tax addition was without jurisdiction. It should be mentioned here that in the fresh assessment the Income Tax Officer practically verbatim repeated the order which had been passed by it in the rectification order dated 7-1-1986. The addition of Rs. 32,00,000 and odd was maintained in the fresh assessment order, and upon the same reasoning as was adopted in the order passed u/s 154.

5. We have received excellent assistance from both sides in this matter where the facts are slightly unusual; but the sustained efforts and expertise of Mr. Poddar certainly deserve special mention.

6. From the first part of the two compilations of cases given to us by Mr. Poddar, two Division Bench decisions of the reference court of our High Court, make it amply clear that, even if a superior departmental authority sets aside the entire assessment order and calls for the assessment to be made again, that does not

mean that the Income Tax Officer in his new exercise will treat the matter as if it is coming before it for the first time. Rather, the Income Tax Officer would have to examine the body of the order of the superior departmental authority and gather from it the points upon which the assessment has been directed to be made once again. Excepting for making changes in the new areas as indicated, the Income Tax Officer has no jurisdiction to touch on his own once again the matters which have already formed the subject of assessment before him, and which parts the superior departmental authority has left completely untouched.

The two cases mentioned above are the cases of Katihar Jute Mills (P.) Ltd. Vs. Commissioner of Income Tax (Central A), and Surrendra Overseas Ltd. Vs. Commissioner of Income Tax, .

Those were of course, both cases of Income Tax appeals and not of revision. In one of the cases an intervening Supreme Court decision was sought to be given effect to by the Income Tax Officer in regard to the value of loom hours which had been ruled to be receipts of a capital nature rather than of a revenue nature, the ruling being of the Supreme Court. It was held, however, that beyond the terms of the appellate authority''s direction the Income Tax Officer could not touch its own original order.

In the second case deductions were sought to be withdrawn from the head of development rebate because ships were sold within two years. This time the decision went in favour of the assessee; even though the ships had actually been sold, rebate could not be withdrawn because the appellant authority''s remand order did not permit the Income Tax Officer to reshape its assessment order on those issues.

7. After the amendments made in the year 2001, section 263, which deals with revision, and section 251, which deals with appeals, have marked differences in wording. But previously, section 251 contained words which allowed the appellate authority in appropriate circumstances to set aside the entire assessment and call for a fresh assessment to be made. These words are no longer expressly there in section 251. But so far as section 263 is concerned, the power of cancellation of assessments made to the prejudice of the revenue and of directions for fresh assessment were all along there and those are still there. Thus, the ratio given in the two above reference decisions of the Calcutta High Court would have to be followed by us, there being no material differences between the appellate provisions and the provisions for revision, at the relevant time. We respectfully opine that we are in full agreement with the reasoning of the two above cases, and we follow those cases here.

On this basis, we would no doubt have to opine that the Tribunal was quite right in forming the view that the Income Tax Officer had no authority to say anything new about the sales-tax addition; this is so, simply because the Commissioner in revision

did not permit, in the reasoning portion of his order, any change to be made in the section 43B matter of addition of the sales-tax amount received.

8. On behalf of the revenue the argument was that although sales-tax was not specifically mentioned, the Commissioner in revision was careful enough to state that the assessment was being cancelled and that a fresh assessment order would be passed by the Income Tax Officer ''after taking into consideration all the revenue-yielding aspects.....

9. Indeed, the Income Tax Officer was bound to make the repetition of all revenue-yielding, aspects in the same manner as it was bound to make repetition of the other facts, figures and findings of the original assessment, which parts had been left untouched by the Commissioner in revision. The Tribunal will, therefore, have to examine now on merits whether the assessee is bound in law to suffer an addition on the sales-tax receipts for the purpose of assessment of its profits and gains. But, and here lies the catch, in the whole fresh assessment, what is the nature and character of a section 154 order which is repeated in the order of reassessment passed on a direction from a Commissioner revision? The practical value of an answer to this question will be evident.

10. It might be, that the order passed in rectification is not an appropriate subject-matter of an order passed u/s 154 at all. If that is so, would such an order, which is originally not sustainable u/s 154, become sustainable when repeated in the fresh assessment pursuant to an order passed in revision? In our opinion this is not so. If the original order u/s 154 was not properly passed under that section, then and in that event, the order remains tarnished, and remains equally subject to challenge, even when it is repeated in the fresh assessment after an order is passed in revision. The principal reason why we say so is this.

Suppose in the original assessment the Income Tax Officer assessees profit at Rs. 1 lakh suppose a rectification order amends such assessment by adding Rs. 2 lakhs to the said sum of Rs. 1 lakh; suppose an order in revision thereafter finds that Rs. 5,000 was not properly left out and should have been added to the original assessment of Rs. 1 lakh. That order in revision directs a revision to be made by the making of the addition of Rs. 5,000. After making the fresh assessment, the profits are now assessed at Rs. 3,05,000. If the sum of Rs. 2 lakhs which is inserted in the fresh assessment becomes immune from attack, in spite of it being passed and assessed inappropriately u/s 154 in the first place, then and in that event each and every small amount of revision, even if undeniably necessary to stop prejudice to the interest of the revenue, would upset the whole process of assessment and the structure of rights available to the assessee and the revenue.

11. We do not wish to impute any wrong motive to any party, but theoretically, an eager Commissioner in revision might easily render an otherwise unsustainable section 154 order wholly valid by making a small revision of a few rupees in the

original assessment. This simply cannot be. All bona fide and genuine revisions are permitted, but such revision cannot take away from assessee the rights, if any, which are already available to it.

12. A point might arise, that in this case, the assessee had appealed from the section 154 order but the appeal had failed. Why should it be allowed to reagitate the issue now ? The answer to this question is too simple. That appeal had been dismissed for statistical purposes because according to that appellate authority there was no section 154 order in existence. If the section 154 order is not in existence, then the assessee is not unhappy, but if it comes back into existence in the garb of reassessment, the assessee has every right to be unhappy and call for a decision in law. Thus, when the matter goes back before the Tribunal, the revenue will no doubt be at pains to emphasize that the receipts of sales-tax, however, accounted for must form part of revenue-bearing receipts;; similarly, we can foresee the assessee being at equal pains to emphasize that such addition of sales-tax is a matter, subject not only to debate and dispute, but subject to a lot of debate and dispute, and those of the very bitterest nature. They will, therefore, argue that rectification u/s 154 was impermissible. These matters the Tribunal will have to enter into on merits, because the sales-tax addition in the reassessment has not lost its character as an order passed in rectification, u/s 154.

13. Before leaving the matter we have to say something about one outstanding point. The department might well ask that if the Commissioner in revision is faced with a situation like this, where the Income Tax Officer has made an assessment and has thereafter, perhaps made an unauthorized rectification u/s 154, involving a large amount, what is the Commissioner to do ? Must he leave the matter as absolutely hopeless ? Does he compulsorily have to accept that the wrong invocation of section 154 will ultimately be upset in appeal and the said large amount will never be assessed as profits and gains, of the assessee although it might have been so assessed had the Income Tax Officer made it a part of the original assessment order ?

14. We say that this is not so. If the Commissioner in revision realizes that section 154 has been invoked in a wrong way, he should make it plain and specific in the order in revision that the invocation is wrong. He should thereafter cancel the order passed on section 154 saying that it has been wrongly invoked and such wrong invocation is to the prejudice of the revenue. If thereafter he finds on merits, that the amount ought to be added, then he should himself pass a direction in that regard, by applying his own mind, and pass on an order which will be followed by the Income Tax Officer in the fresh assessment. If such direction is followed, the fresh assessment will not repeat the section 154 order, but on the other hand, follow the direction in revision, and since the section 154 order is not repeated, no portion of the fresh assessment will be subject to challenge as being a result of a wrong invocation of section 154.

We make this above clarification only to avoid future problems of Commissioners in revision who might well be faced with a situation in future like the one in the present case. In all such cases the Commissioner should be fully articulate and say that the section 154 matter is being considered by him, as it does not form part of the original assessment, and as it is not an appropriate matter to form the subject-matter of a rectification order u/s 154. As soon as he does that, problems like those which have arisen in the present case will be totally avoided.

The questions are, therefore, both answered in the negative with a direction to the Tribunal that it should hear the matter afresh on the matter of sales-tax addition and section 43B and decide whether on merits and in law, in the light of the exposition we have given above, such an addition should be maintained in favour of the revenue or deleted as claimed by the assessee.

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