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**(1990) 12 CAL CK 0027**

**Calcutta High Court**

**Case No:** IT Ref. No. 226 of 1984

COMMISSIONER OF INCOME TAX

APPELLANT

Vs

SALONAH TEA CO. LTD.

RESPONDENT

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**Date of Decision:** Dec. 11, 1990

**Citation:** (1992) 107 CTR 287

**Hon'ble Judges:** Suhas Chandra Sen, J; Bhagabati Prasad Banerjee, J

**Bench:** Full Bench

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### **Judgement**

BHAGABATI PRASAD BANERJEE, J. :

The following question of law has been referred to this Court by the Tribunal under s. 256(1) of the IT Act, 1961.

"Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the order of IAC to the extent of the mistake in calculating the amount disallowable under s. 44C of the IT Act should be deemed to have merged with the order of the CIT(A) and consequently the CIT had no jurisdiction to initiate proceeding under s. 263 of the IT Act and in that view in partly allowing the appeal of the assessee" ?

2. The assessment year involved in this reference in the asst. yr. 1977-78, for which the relevant period of account is the period ending on 31st December, 1976.

3. The point of controversy in this case is whether the subject-matter of refund was also under consideration before the appellate authority. In this case, the CIT sought to invoke the provisions of s. 263 of the IT Act in respect of the assessee's claim under s. 44C of the IT Act, 1961. The ITO, it appears, had made certain addition under s. 440. The assessee preferred an appeal before the appellate authority and the appellate authority had considered the scope and applicability of s. 44C extensively. When the matter brought before the Tribunal, the Tribunal also found that :

"In these circumstances, we get hold of the relevant part of the order from the file of the Department. Therein we noticed that the question of applicability of s. 44C was certainly in dispute before the CIT(A) because the assessee had challenged the applicability of this section altogether. The CIT(A) upheld the applicability but did not interfere in the amount disallowable because according to him, there was no dispute about the calculation of the amount. However, even if the CIT(A) has not considered this the fact remains that the question of applicability of s. 44C being disputed the CIT(A) could have considered correctness of calculation also and the ITO could have pointed out to him since the dispute was before him."

4. So it is clear that this question was considered by the AAC [Sic - CIT(A)] and as such on this point there was a question of merger.

5. This point has been considered in the judgment of this Court in the case of [Hindustan Aluminium Corporation Ltd. Vs. Commissioner of Income Tax \(Central\) and Others](#) . There this question was fully discussed and it was held that if the appellate authority did not take into consideration that part of the assessment order because that particular part of the order was not appealable or for any reason whatsoever it cannot be said that the assessment order has wholly merged. In this particular case, the question of applicability of s. 44C was before the appellate authority and as such there was a merger of the original order with the appellate order and consequently the CIT could not invoke the provisions of s. 263 of the IT Act for revising the order passed. In this particular case, the Tribunal specifically observed that though the question of applicability of s. 44C was an issue, neither of the parties has disputed the quantum in this regard. There is no dispute about the calculation of s. 44C but only the applicability of s. 44C was disputed. The Tribunal has decided this matter and, therefore, there has been merger of the assessment order with the order of the CIT(A). Therefore, the CIT had no jurisdiction to invoke the provisions of s. 263 of the IT Act, 1961.

Accordingly, the question of the law is answered in the affirmative and in favour of the assessee.

There will be no order as to costs.

SUHAS CHANDRA SEN, J. :

I agree.