
(1991) 03 CAL CK 0049

Calcutta High Court

Case No: IT Reference No. 270 of 1983

Commissioner of
Income Tax

APPELLANT

Vs

Goodricke Group Ltd.

RESPONDENT

Date of Decision: March 28, 1991

Acts Referred:

- Income Tax Act, 1961 - Section 256, 263, 44C

Citation: (1993) 71 TAXMAN 30

Hon'ble Judges: Shyamal Kumar Sen, J; Ajit K. Sengupta, J

Bench: Division Bench

Advocate: ;Anil Roychowdhury, for the Respondent

Judgement

Ajit K. Sengupta, J.

In this reference u/s 256 of the income tax Act, 1961 ("the Act") for the assessment year 1977-78 the following question of law has been referred to this Court:

Whether, on the facts and in the circumstances of the case, and having regard to the fact that the grounds on which the assessment order was set aside u/s 263 of the income tax Act, 1961 were not the subject matter of appeal, the Tribunal was justified in holding that the Commissioner of income tax had no jurisdiction to invoke the provisions of section 263 of the Act and in that view, in cancelling the order u/s 263 passed by the Commissioner of income tax?

Shortly stated, the facts are that the Commissioner exercised his jurisdiction u/s 263 of the Act. in respect of the assessment year 1977-78 as, according to him, the order passed by the ITO was erroneous inasmuch as the ITO came to the conclusion that only 7/12th of the head office expenses should be taken into account for disallowing the expenses as provided u/s 44C of the Act. He also observed that the ITO erred in calculating the correct amount of disallowance. According to the Commissioner, the order

of the ITO was erroneous and prejudicial to the interest of the revenue. He initiated proceedings u/s 263. The assessee protested against the proceedings initiated by the Commissioner. Amongst other things a point was raised that the Commissioner (Appeals) heard the appeal filed by the assessee which was disposed of and, therefore, the Commissioner cannot exercise his jurisdiction u/s 263 in respect of the order of the ITO which was the subject matter of appeal before the Commissioner (Appeals).

The Commissioner in his order u/s 263 noted that the Commissioner (Appeals) upheld the order of the ITO. The point regarding the applicability of section 44C was the only point agitated by the assessee in the aforesaid appeal. The point whether the head office expenses for the entire year had been taken into account was not agitated by the assessee. Accordingly, he was of the view that the contention of the assessee that the Commissioner had no jurisdiction to take action u/s 263 cannot be upheld. The Commissioner further noted that as the ITO erred in applying a pro rata basis for head office expenses and as there were mistakes in the computation, the Commissioner set aside the assessment order and directed the ITO to redo the assessment after hearing the assessee.

2. The assessee preferred an appeal before the Tribunal raising various grounds. One of the main grounds related to the claim of the assessee that the Commissioner had no jurisdiction u/s 263 on the basis of audit objection and such action of the Commissioner was bad in law. It was further argued that the point regarding the applicability of section 44C was raised before the Commissioner (Appeals) who had disposed of the appeal filed by the assessee on 30-8-1980, and, therefore, the Commissioner had no jurisdiction u/s 263. It was further argued on behalf of the assessee that the Commissioner (Appeals) omitted to adjudicate on the ground taken by the assessee regarding section 44C, and on further appeal by the assessee, the Tribunal vide its order dated 12-11-1981 directed the Commissioner to dispose of the ground, and, therefore, the Commissioner had no jurisdiction to act u/s 263. It was also argued on behalf of the assessee that on the facts of the case, the order of the Commissioner u/s 263 cannot be upheld. Reliance was placed on the decision of the Tribunal in the case of Singlo (India) Tea Co. Ltd. [IT Appeal No. 2114 (Cal.) of 1980, dated 19-7-1982] and also on another decision in the case of Assam Co. (I) Ltd. [IT Appeal No. 228 (Cal.) of 1981, dated 30-4-1982].

3. The Tribunal heard the revenue. It was contended that the issue on which the Commissioner had acted u/s 263 was not the subject matter of appeal, and, therefore, the Commissioner had jurisdiction u/s 263 in the present case.

4. After hearing both the parties, the Tribunal perused the papers placed before it for consideration. It observed that in similar circumstances the Tribunal did not sustain the order of the Commissioner u/s 263. In the present case before it, the Tribunal noted that the applicability or otherwise of section 44C was considered by the Tribunal in IT Appeal No. 2040 (Cal.) of 1980 in the case of the assessee and by its order dated 12-11-1981 the Tribunal found that there was no discussion in the order of the Commissioner

(Appeals) regarding this ground. The Tribunal, therefore, sent back this point to the Commissioner (Appeals) for verifying the correctness of the claim. The Tribunal also referred to the decision of the Special Bench of the Tribunal, Bombay, in the case of Dwarkadas & Co. (P.) Ltd. v. ITO [1982] 13 TTJ 107 in which it was held that as a result of the appellate order there was a merger and under such situation the Commissioner had lost his jurisdiction u/s 263, and, therefore, the order of the ITO cannot be revised. Following the above decisions, the Tribunal was of the view that on the facts of the case, the Commissioner had no jurisdiction to revise the order u/s 263. Accordingly, the appeal of the assessee was accepted and the order u/s 263 of the Commissioner was quashed.

5. From the narration of facts it would appear that the question regarding the application of section 44C was directly in issue before the ITO. The matter also went to the Commissioner (Appeals). Thereafter it was taken up before the Tribunal. The Tribunal directed the Commissioner (Appeals) to reconsider the matter on the basis of the directions given in the appellate order of the Tribunal. In such a case it cannot be said that the issue was not considered by the ITO. This is a case where the order of the ITO merged with the order of the Commissioner (Appeals) as appeal was preferred and decided on the identical issue.

6. In any event, this question has become purely academic in view of the fact that on merits the assessee was entitled to succeed. Division Bench of this Court in [Rupenjuli Tea Co. Ltd. Vs. Commissioner Income Tax](#), held that section 44C had no application to the case of an assessee who does not carry on any business outside India. The facts and circumstances of this case are similar and, accordingly, section 44C had no application to the case of this assessee. For the reasons aforesaid we answer the question in this reference in the affirmative and in favour of the assessee.

There will be no order as to costs.

Sen, J. -

I agree