(2008) 07 DEL CK 0189

Delhi High Court

Case No: None

Dalmia Dairy Industries Ltd.	APPELLANT
Vs	
Commissioner of Income Tax	RESPONDENT

Date of Decision: July 30, 2008

Acts Referred:

- Income Tax Act, 1961 - Section 215, 217, 246A, 251, 254

Citation: (2009) 176 TAXMAN 169

Hon'ble Judges: Rajiv Shakdher, J; Badar Durrez Ahmed, J

Bench: Division Bench

Judgement

Badar Durrez Ahmed, J.

We propose to dispose of these three references u/s 256(1) of the Income Tax Act, 1961, all relating to the assessment year 1978-79. One reference (IT Ref. No. 299 of 1988) is at the instance of the assessee and arises out of the assessee''s appeal (ITA No. 2907/Del/1982) before the Tribunal. The other two references (IT Ref. No. 300/1988 and IT Ref. No. 301/1988) are at the instance of the revenue and arise out of the assessee''s appeal (ITA No. 2907/Del/1982) and revenue''s appeal (ITA No. 3018/Del/1982) before the Tribunal.

IT Ref. No. 299/1988

2. In this reference, the question that has been referred to us is:

Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in confirming the disallowance of the expenditure amounting to Rs. 10,03,627 being legal, court and other expenses in connection with the litigation against the National Bank of Pakistan?

3. According to the learned Counsel for assessee, this question has to be decided against the assessee and in favour of the revenue in view of the decision of this Court in its own case in respect of the assessment years 1967-68 to 1972-73 in the

case entitled Dalmia Dairy Industries Ltd. v. CIT. This Court, in that case, had noted that the litigation expenses incurred for recovering the sale proceeds from Pakistan were of a capital nature and were not allowable as an expenditure. Consequently, following this Court''s decision in Dalmia Dairy Industries Ltd. v. CIT (supra), the question raised in this reference (IT Ref. No. 299/1988} is decided in favour of the revenue and against the assessee.

IT Ref. No. 300/1988

4. As mentioned above, this reference is at the instance of the revenue. The questions referred are as under:

Whether the Tribunal, is correct in law and on facts in holding that:

(i) there is no mandate in Rule 40 that in order to exercise discretion of waiving or reducing interest u/s 217, first assessment must be completed and interest charged ?

(ii) the use of word ''waive'' against ''cancel'' signifies that exercise of discretion should be before the assessment is completed and not after the said event ?

(iii) the Commissioner (Appeals) erred in holding that assessee''s contention against levy of interest u/s 217 could not be entertained at all as it was beyond its power to adjudicate whether the facts of the case warranted levy of interest, its waiver or reduction ?

(iv) the Income Tax Officer must exercise his discretion to waive interest, if he has gone through the exercise and if he has processed the matter, the Commissioner (Appeals) should entertain the appeal on the question and adjudicate whether discretion under Rule 40 has been properly exercised or not ?

Although this question is divided into four parts, it is essentially one question relating to the issue of waiver of interest u/s 217 of the Income Tax Act, 1961.

5. The facts necessary for deciding these questions are as follows. The assessee had not filed any estimate of advance tax for the assessment year under consideration. The assessee also did not pay any advance tax during the financial year immediately preceding the assessment year under consideration. The assessed tax came to Rs. 54,24,216 and 75 per cent of this worked out to Rs. 40,68,162. Consequently, it is an admitted position that the provisions of Section 217 were attracted to the assessee''s case. The Income Tax Officer, as the assessing officer was then known, has charged interest from the assessee on the aforesaid basis.

6. The assessee challenged the same before the Commissioner (Appeals) and contended that interest ought to have been waived or reduced in view of the provisions of Rule 40 of the Income Tax Rules, 1962. The plea of the assessee was rejected by Commissioner (Appeals), inter alia; on the following ground:

(c) The assessee''s grievance is that the Income Tax Officer should have waived the interest u/s 215(4) of the Act read with Rule 40 of the Income Tax Rules, 1962 (hereinafter called the Rules). A perusal of the said Rule 40 would show that the discretion vested with the Income Tax Officer to reduce or waive the interest could be exercised only after the assessment has been made. In other words the exercise of that discretion does not form part of the assessment order and therefore, in my opinion, cannot be challenged in an appeal against the assessment order.

7. The Commissioner (Appeals) also rejected the assessee''s plea for the following reason:

(d) The assessee filed petitions u/s 215(4) of the Act read with Rule 40 of the Rules before the Income Tax Officer. The same were rejected by the Income Tax Officer. No appeals have been filed against the said orders therefore cannot be challenged in the present appeals.

7. The Tribunal after considering Rule 40 of the said Rules concluded that there is no mandate in the said rule that in order to exercise the discretion for waiving or reducing interest, the assessment must first have been completed and interest charged. The Tribunal noted that as discretion has been given to waive interest, it must follow that it should be before the assessment is completed and not after the said event. Consequently, the Tribunal rejected the Commissioner (Appeals)''s finding and conclusion that the discretion vested under Rule 40 to reduce or waive interest could be exercised only after the assessment had been made. The aforesaid questions have been referred to us in this background.

8. Rule 40(1) of the Income Tax Rules reads as:

40. The Income Tax Officer may reduce or waive the interest payable u/s 215 or Section 217, in the cases and under the circumstances mentioned below, namely:

(1) When the relevant assessment is completed more than one year after the submission of the return, the delay in assessment not being attributable to the assessee.

A reading of the rule clearly indicates that the Income Tax Officer has discretion to reduce or waive interest payable u/s 215 or 217 in the cases and under the circumstances mentioned therein which include the circumstance mentioned in the Sub-rule (1). The circumstance being that the assessment is completed more than one year after the submission of the return and that the delay in such completion of such assessment is not attributable to the assessee. In the present case the undisputed facts are that the return was filed on 29-6-1978, and the assessment was completed on 28-8-1981, well beyond three years. It is also not disputed that the delay in assessment was not attributable to the assessee. The assessee''s plea was that the circumstance indicated in Sub-rule (1) of Rule 40 was triggered in the assessee''s case and therefore, the Income Tax Officer ought to have exercised his

discretion to reduce or waive the interest u/s 217 of the said Act. The Commissioner (Appeals) had not looked into this aspect of the matter on the understanding that the question of waiver or reduction of interest could only be gone into after passing of the assessment order. And, because of this, the Income Tax Officer was not required to exercise discretion with regard to waiver in the course of assessment proceedings and, therefore, since the appeal was only against the assessment order, the question of exercise or non-exercise of discretion of waiver was not a part of the order appealed against. Consequently, the question of exercise of discretion to waive or reduce interest did not form subject-matter of the appeal.

9. In our view, the interpretation given by the Commissioner (Appeals) is erroneous. There is nothing in Rule 40(1) which stipulates or requires the Income Tax Officer to exercise his discretion to reduce or waive interest payable u/s 215 or 217 only after an assessment is completed. The view expressed by the Tribunal in this regard is the correct view in law.

10. Consequently, the question (including its four parts) is answered in favour of the assessee and against the revenue.

IT Ref. No. 301/1988

11. In this reference, three questions have been referred to us for our decision:

1. Whether the Tribunal is correct in law in holding that sales-tax liability of Rs. 7,00,057 is an allowable deduction during the year under consideration ?

2. Whether the Tribunal is correct in law and on facts in holding that since litigation expenses have been disallowed, cost and litigation charges of Rs. 29,53,197 are not taxable as revenue receipts ?

3. Whether, on the facts and in the circumstances, the Tribunal is correct in law and on facts in declining the department''s request in the form of additional ground of appeal?

12. Question No. 1 need not detain us in as much as counsel are agreed that it is covered in the assessee''s favour in view of this Court''s decision in the assessee''s case itself reported in Commissioner of Income Tax Vs. Dalmia Dairy Industries Ltd., It would be relevant to note that the same issue arose in the assessee''s case for the assessment year 1979-80. The revenue sought to move an application for reference u/s 256(1) of the said Act before the Tribunal. That application was rejected. Thereafter, the revenue sought to invoke the provisions of Section 256(2) of the Income Tax Act, 1961, and this Court rejected the revenue''s application by virtue of the said judgment in CIT v. Dalmia Dairy Industries Ltd. (supra) while relying on orders in respect of earlier assessment years. Consequently, question No. 1 stands answered in the assessee''s favour and against the revenue.

13. Insofar as question No. 2 is concerned, it is to be held in favour of the assessee in view of the decision of this Court in respect of the question referred to in the first reference i.e., IT Ref. No. 299/1988. It is answered accordingly.

14. This leaves us with question No. 3. The additional ground that was sought to be raised by the revenue before the Tribunal was as under:

In view of para 18 of Tribunal order dated 14-1-1986 in ITA No. 5718/Del/1984, C.O. No. 108/Del/1985 and ITA No. 2614/Del/1985, the Tribunal be pleased to restore to the file of Income Tax Officer or the Commissioner (Appeals) the point regarding assessability of Rs. 1,45,60,141 in the assessment years 1978-79 and 1979-80, as the case may be.

This relates to the issue of interest. Earlier the assessee was claiming taxability of interest on receipt basis and the department was insisting that interest be taxed on accrual basis year to year. Ultimately, the revenue''s view was accepted by the assessee. According to the learned Counsel for the assessee, the assessee has been paying tax on accrual basis year to year. By proposing the additional ground, what the revenue is wanting to do is to seek enhancement in an indirect manner by introducing a new source of income. According to the learned Counsel for assessee, the Tribunal does not have any powers to enhance what is not part of the assessment order. Therefore, the additional ground was couched in such a manner requiring the Tribunal to restore to the file of Income Tax Officer or the Commissioner(Appeals) the point regarding assessability of Rs. 1,45,60,141, for the assessment years 1978-79 and 1979-80, as the case may be. The learned Counsel also submitted that the revenue itself was not clear as to in which year the said amount was to be regarded as being taxable.

15. While considering the question of permitting the revenue to raise this additional ground, the Tribunal came to the conclusion that the revenue cannot be so permitted. First of all, it took the view that it was an accepted position that the issue of taxability of the interest was not part of the subject-matter of the assessment order or of the order of the first appellate authority for the assessment year under appeal and, that being the case, there can be no question of the setting of the process of assessment and action by the authorities below for the first time. Consequently the Tribunal, following the Supreme Court decision in the case of Commissioner of Income Tax, Calcutta Vs. Rai Bahadur Hardutroy Motilal Chamaria,) came to the conclusion that the appellate authority had no jurisdiction to assess the source of income which was not disclosed either in the return or processed in the assessment order. The Tribunal obviously was of the view that if the additional ground was permitted to be taken and it was ultimately allowed it would amount to introducing a new source of income which was not there in the assessment proceedings. Apart from this, the Tribunal also independently considered the question regarding the taxability of interest. Considering all these factors, the Tribunal declined the revenue''s request to restore the issue regarding taxability of

interest income which had not been processed or assessed by the assessing officer or dealt with by the first appellate authority on these three counts, independent of each other.

16. Mr. Jolly, who appeared on behalf of revenue, referred to National Thermal Power Co. Ltd. Vs. Commissioner of Income Tax, wherein the Supreme Court observed as under:

Under Section 254 of the Income Tax Act, the Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit. The power of the Tribunal in dealing with appeals is thus expressed in the widest possible terms. The purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. If, for example, as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that a non-taxable item is taxed or a permissible deduction is defied, we do not see any reason why the assessee should be prevented from raising that question before the Tribunal for the first time, so long as the relevant facts are on record in respect of that item. We do not see any reason to restrict the power of the Tribunal u/s 254 only to decide the grounds which arise from the order of the Commissioner (Appeals). Both the assessee as well as the department have a right to file an appeal/cross-objections before the Tribunal. We fail to see why the Tribunal should be prevented from considering questions of law arising in assessment proceedings although not raised earlier. In the case of Jute of Corporation of India Ltd. Vs. Commissioner of Income Tax and another, this Court, while dealing with the powers of the Appellate Assistant Commissioner observed that an appellate authority has all the powers which the original authority may have in deciding the question before it subject to the restrictions or limitations, if any, prescribed by the statutory provisions. In the absence of any statutory provision, the appellate authority is vested with all the plenary powers which the subordinate authority may have in the matter. There is no good reason to justify curtailment of the power of the Appellate Assistant Commissioner in entertaining an additional ground raised by the assessee in seeking modification of the order of assessment passed by the Income Tax Officer. This Court further observed that there may be several factors justifying the raising of a new plea in an appeal and each case has to be considered on its own facts. The Appellate Assistant Commissioner must be satisfied that the ground raised was bona fide and that the same could not have been raised earlier for good reasons. The Appellate Assistant Commissioner should exercise his discretion in permitting or not permitting the assessee to raise an additional ground in accordance with law and reason. The same observations would apply to appeals before the Tribunal also. The view that the Tribunal is confined only to issues arising out of the appeal before the Commissioner (Appeals) takes too narrow a view of the powers of the Tribunal (vide, e.g., Commissioner of Income Tax, Delhi-I Vs. Anand Prasad and others, Commissioner of Income Tax, Gujarat I Vs. Karamchand Premchand Private Ltd.,

and Commissioner of Income Tax, Gujarat-I Vs. Cellulose Products of India Ltd., . Undoubtedly, the Tribunal will have the discretion to allow or not allow a new ground to be raised. But where the Tribunal is only required to consider a question of law arising from the facts which are on record in the assessment proceedings we fail to see why such a question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of an assessee.

17. In response to this, Mr. Gupta, the learned Counsel appearing on behalf of assessee submitted that the Income Tax Act has a specific scheme. Referring to Section 246A he submitted that it is only the assessee who can file an appeal and not the revenue. With reference to Section 251, learned Counsel pointed out that though the Commissioner (Appeals) has the power to enhance, the same is limited to what is recorded in the assessment order. Similarly, he submitted with reference to Section 254 that the Tribunal can only pass orders in respect of the order appealed against and must confine itself to the subject-matter of the appeal itself. The Tribunal cannot enhance the assessment on the basis of the material which does not form part of the original assessment order or the appellate order. The learned Counsel placed reliance on the decision of Gujarat High Court in the case of Saheli Synthetsics Pvt. Ltd. Vs. Commissioner of Income Tax, That decision was also rendered in the background of the Supreme Court decision in CIT v. Rai Bahadur Hardutroy Motilal Chamaria (supra) wherein the Supreme Court categorically observed and noted that it is not open to the Appellate Assistant Commissioner, appellate authority to travel outside the record, that is, the return made by the assessee or the assessment order of the Income Tax Officer with a view to point out a new source of income and the power of enhancement u/s 31(3) (under the old Act of 1922, which is in pari materia to Section 251 of the 1961 Act) is restricted to the sources of income which have been the subject-matter of consideration by the Income Tax Officer from the point of view of taxability.

18. Agreeing with the submissions made by the learned Counsel for the assessee and the view clearly expressed by the Supreme Court in CIT v. Rai Bahadur Hardutroy Motilal Chamaria (supra), we feel that the Tribunal was right in rejecting the revenue''s application for raising the additional ground as that would have amounted to introduction of a new source of income. The decision in National Thermal Power Corporation (supra) also does not come to the aid of the revenue in this case. A new ground can be permitted in appeal so long as the relevant facts are on record and the ground sought to be raised could not have been raised earlier for good reasons. As noted in National Thermal Power Corporation (supra), the Tribunal has the discretion to allow or not to allow a new ground to be raised. A new ground may be allowed to be raised only when it arises from the facts which are on record. This is not the case here. Consequently, this question is decided in favour of the assessee and against the revenue.

19. The three references stand answered and are disposed of accordingly.