

BOMBAY HIGH COURT

Commissioner of Income-Tax

Vs

Devidayal Metal Industries Pvt

(Kotwal, C.J. V Desai, J.)

26.09.1967

JUDGMENT

Kotwal, C.J.

1. Since counsel of the assessee, at whose instance questions Nos. 2 and 3 have been referred for decision to this courts, has not pressed those questions, it is unnecessary to consider them. That leaves for our decision only question No. 1, which is as follows :

"Whether, in the facts and circumstances so the case, the Tribunal was justified in restricting the powers conferred on the Income-tax Officer in making assessment under section 31(3) (b) of the Income-tax Act ?"

2. This question arises upon the following facts. We need not in stating the facts refer to any of the several facts to be found in the statement of the case which do not impinge upon this question. The two years with which we are concerned are the assessment years 1955-56 and 1956-57, corresponding to the accounting years January 1, 1954, to December, 31, 1954, and January 1, 1955, to December 31, 1955. In the those years the assessee, who is a dealer in and manufacturer of vessels out of stainless steel, copper and copper alloys and stainless steel scrap, had claimed business losses as under :

1955-56	1956-57
Rs.	Rs.
4,05,905.	1,70,213.

3. The Income-tax officer, however, computed the loss for 1955-56 at Rs. 1,30,889 and the income for 1956-57, at Rs. 5,60,078. In the same years, the assessee had claimed that he had

incurred speculation loss in respect of transactions entered into by way of speculation as a set-off against possible trading losses due to fluctuations in the market price of the metals which he had purchased. The Income-tax Officer disallowed these speculation losses as follows :

1955-56	1956-57
Rs.	Rs.
4,05,905	1,70,213.

4. It will be noticed that these speculation losses which the assessee had claimed corresponded exactly to the figures of speculation loss in business. The Income-tax Officer, in disallowing these losses, had merely treated them as speculation losses and held that, "As this is a speculation loss, this will be carried forward separately to be set off against future speculation profits."

5. The assessee, however, went up in appeal to the Appellate Assistant Commissioner and before the Appellate Assistant Commissioner it was contended that the speculation losses were from a speculation business embarked upon in the shape of hedging transactions, that is to say, transactions entered into by assessee as a safeguard against similar transactions of purchase of metals which he had entered into for the purpose of business. If due to fluctuation in price, the price of the metal had gone down and the assessee had incurred losses, to that extent the assessee would be compensated by contrary transactions entered into as hedging transaction. When this plea was raised before the Appellate Assistant Commissioner, he accepted the assessee's contention and passed an order, the operative part of which was as follows :

"While dealing with the appeal for the assessment year 1955-56, counsel of the appellant alleged that the entire loss of Rs. 4,05,905 which has been treated as speculation loss under proviso 2 to section 24(1) of the Indian Income-tax Act is actually the ready loss, because it is the loss in respect of hedging transactions to guard against the loss from future price fluctuations in respect of their stock. The appellant has filed a big chart to prove his case. You (the Income-tax Officer) are requested to go through the chart and list prepared by the appellant to state if the contention of the appellant is correct. Remand report in duplicate should be submitted within one month from the receipt hereof."

6. This order was passed on the 31st July, 1959, but no steps were taken to comply with it within a month as directed, because in the meanwhile not only the case itself but the appeal pending before the Appellate Assistant Commissioner came to be transferred. This order of transfer was the subject of the other two questions referred to us which counsel for the assessee said that he was not pressing.

7. Pursuant to the transfer order, the Income-tax Officer, Section IV (Central), Bombay, to whom the case was transferred, submitted a report in compliance with the Appellate Assistant Commissioner's order dated 31st July, 1959, and it must be said that he did not in terms comply with the Appellate Assistant Commissioner's order. On the other hand, in paragraph 10 of his report he invited the Appellate Assistant Commissioner, Central Range, Bombay, to pass a further order. The Income-tax Officer stated :

"I had sent a letter to the assessee asking to explain the position and the assessee's reply is on record. The reply, however, is not satisfactory and it would be necessary for me to go into great details in the trading account in order to determine whether there are actually any profits in the trading account due to the price fluctuation which would balance the alleged hedging loss."

8. When the matter was once again taken up on transfer by the Appellate Assistant Commissioner, Central Range, the Appellate Assistant Commissioner virtually accepted the request of the Income-tax Officer to set aside the assessments. In doing so, he observed that the hedging losses which the assessee claimed should have been allowed, were all incurred through a sister firm Messrs. Devidayal (Sales) Private Ltd., and that, therefore, the books of this allied concern required to be examined. He also observed that the bulk of the loss to him in the year 1954, was incurred in the months of October and November, that is to say, towards the close of the year, "when the results in ready trading could be more or less estimated with reasonable precision".

9. For these reasons, the Appellate Assistant Commissioner passed the following order :

"In the circumstances it is necessary that the Income-tax Officer should go into the question of the forward transactions in the assessment years 1955-56 and 1956-57, fully examining the relevant contracts and also the souda books maintained by all the connected parties to find out how far the various transactions are genuine. Only after the genuineness of the losses claimed is established the question of treating them as speculation loss or otherwise will have to be considered."

10. Now so far, the assessee makes no grievance against the order of the Appellate Assistant Commissioner. He had claimed that the hedging losses should be allowed to him and in order that they should be allowed to him, it was necessary to scrutinise the accounts and determine the genuineness of those losses, but the Appellate Assistant Commissioner did not stop at that. It is the further order that he passed which gave rise to the appeal before the Tribunal and to this reference and that order was, "As this has not been done, I set aside the assessment and direct the Income-tax Officer to verify the forward transactions in metals and also check up the correctness

of the results disclosed in the manufacturing and trading accounts of the appellant". It was urged before the Tribunal that, although the assessment may be set aside, it was necessary that the ambit of the enquiry to be undertaken by the Income-tax Officer in the course of the reassessment proceedings must be limited to the specific points that arose in the appeal. But the Appellate Assistant Commissioner in terms did not accept that contention and ordered that "the assessment for the year 1955-56 is, therefore, set aside and the Income-tax Officer is directed to re-do it according to law".

11. The order necessarily affected the assessee in so far as the assessment was wholly set aside and the computation of his trading losses was also re-opened. It was on this specific question, inter alia, that the assessee went up in appeal. We are not here concerned with the other questions which arose before the Tribunal for they form the subject-matter of the questions which have not been pressed.

12. Now before the Tribunal it was contended on behalf of the department that the order passed by the Appellate Assistant Commissioner, Central Range, was an order passed with jurisdiction and ought not to be interfered with by the Tribunal. Counsel for the assessee, before the Tribunal, accepted the suggestion that the Appellate Assistant Commissioner may have acted with jurisdiction, but what he urged and principally urged was that in the circumstances it was not a proper order which the Appellate Assistant Commissioner had passed. This latter contention on behalf of the assessee was accepted by the Tribunal who gave the following finding :

"Therefore we consider that in the facts and circumstances of this case, while undoubtedly the Appellate Assistant Commissioner had the power to set aside the assessment and direct the Income-tax Officer to make such investigation as he may direct, that power should be judiciously exercised in the facts and circumstances of each case. At no time genuineness of the trading accounts having been disputed, the Income-tax Officer at the original stage having scrutinized, considered and accepted the same, it is unnecessary to rip open the trading accounts. Even in the remand he has not discovered any serious laches. The Appellate Assistant Commissioner's order setting aside the assessment will have no doubt to stand, as it has not been passed without jurisdiction but in our opinion purely from grounds of expediency, it is just and reasonable to restrict the scope of the enquiry of the Income-tax Officer in the reassessment proceedings to only the speculation losses and to no other point."

13. It is against this specific finding of the Tribunal that the question No. 1 is directed.

14. Now the principal contention on the part of counsel for the department has been that the order of the Appellate Assistant Commissioner was an order passed with jurisdiction and so long as he

has acted within his jurisdiction, the Tribunal ought not to have interfered with his decision. He relied in this respect upon a decision of this court in *Narrondas Manordass v. Commissioner of Income-tax*. In that case, in an assessment made against the assessee against the assessment of his profits in a Native State at the figure of Rs. 1,17,643, the Appellate Assistant Commissioner had disagreed with the Income-tax Officer. In his view, the profits should have been ascertained on a proportionate basis and he directed that he should ascertain the actual profits for the relevant period earned by the assessee in the Native State and he remanded the matter to the Income-tax Officer. The question was whether such an order could be passed by the Appellate Assistant Commissioner in a case where the assessee appealed against the computation of his profits in the Native State and considering the provisions of section 31(3) this court held that it was within the ambit of the powers of the Appellate Assistant Commissioner.

15. We are unable to see how this decision can assist the department. We are not here concerned with the jurisdiction of the Appellate Assistant Commissioner at all. On the contrary, even counsel for the assessee accepted before the Tribunal that the order of the Appellate Assistant Commissioner may be assumed to have been passed with jurisdiction but what counsel had urged before the Tribunal was that even assuming that the Appellate Assistant Commissioner had jurisdiction he did not exercise that jurisdiction properly in the circumstances of the case. The contention was clear that the existence of jurisdiction was not disputed but the manner of its exercise was. We do not think therefore that this case can in any way assist the department.

16. Apart from that so far as the order of the Tribunal is concerned, there can be no doubt that the Tribunal had the jurisdiction to pass the order which it did. The power is conferred upon the Tribunal in the widest possible terms by section 33(4) by the words "pass such orders thereon as it thinks fit". We cannot conceive of words of wider amplitude than these words and indeed the Supreme Court has, in a recent decision in *Hukumchand Mills Ltd. v. Commissioner of Income-tax*, said so in terms. They have held that "the powers of the Appellate Tribunal in dealing with appeals are expressed in section 33(4) of the Income-tax Act in the widest possible terms. The word 'therein' in section 33(4) restricts the jurisdiction of the Tribunal to the subject-matter of the appeal. The words 'pass such order as the Tribunal thinks fit' include all the powers (except possibly the power of enhancement) which are conferred on the Appellate Assistant Commissioner by section 31. Consequently, the Tribunal has authority under section 33 to direct the Appellate Assistant Commissioner or the Income-tax Officer to hold a further enquiry and dispose of the case on the basis of such enquiry."

17. Now what is it that the Tribunal has done in the present case? The Tribunal found that the Appellate Assistant Commissioner passed the order setting aside the assessment with jurisdiction, but in the passage which we have quoted had observed that power ought to have

been judiciously exercised in the facts and circumstances of the case. In order to show why it was not judiciously exercised, it gave five grounds as follows : (1) That at no time was the genuineness of the trading account disputed; (2) that the Income-tax Officer had at the original stage scrutinised, considered and accepted the same; (3) that it was in the circumstances unnecessary "to rip open the trading accounts"; (4) that even in the remand the Income-tax Officer had not discovered "any serious laches" and (5) that it was just and reasonable to restrict the scope of the enquiry of the Income-tax Officer to only the speculation losses and no other. Upon the reasons given, we have no doubt that the order of the Tribunal was amply justified. The Income-tax Officer who made the original assessment had carefully gone into all the accounts of the assessee and in terms has said so and had come to a finding that there was a trading loss and had ascertained that figure of loss. That figure was at no time in dispute, except that it was claimed that the hedging losses should be set off against that figure. Because the assessee claimed hedging losses before the Appellate Assistant Commissioner, advantage was taken to reopen the entire assessment in the guise of ascertaining the hedging losses. Even after the remand was made, it has not been found that there has been any incorrectness in the assessment of the trading losses, but what the Income-tax Officer asked for pursuant to the remand order was that he should be allowed to go into the entire accounts of the assessee both of his trading and of his speculation business or of his hedging transactions. We cannot see therefore how the ascertained profit or losses in the business could be responded and the accounts gone into fresh to ascertain those figures.

18. So far as looking into those accounts is concerned, Mr. Kolah on behalf of the assessee stated that the assessee would have no objection even now to the Income-tax Officer looking into all the accounts, but what he urged was that the direction given by the Appellate Assistant Commissioner that the assessment is set aside and his permitting the checking up of the correctness of the results disclosed in the manufacturing and trading accounts of the appellant, was incorrect. For the reasons which the Tribunal gave, it set aside that particular direction.

19. We have no doubt that the issue as to what was the trading loss could not be reopened in the circumstances of the case, though the accounts as a whole may be looked into in order to determine the quantum of the hedging losses.

20. We uphold the order of the Tribunal and answer the question referred in the affirmative. The Commissioner shall pay the costs of the assessee.

21. Question answered in the affirmative.



