BOMBAY HIGH COURT

K. Subramanian

Vs

Siemens India Ltd

(Kotwal, C.J. M Pendse, J.)

16.11.1987

JUDGMENT

Pendse, J.

1. This is an appeal preferred by the Revenue against the judgment dated July 30, 1982, delivered by Mr. Justice Madon (as he then was) in Miscellaneous Petition No. 218 of 1975 *Siemens India Ltd. v. K. Subramanian, ITO*[1] The question which came up for consideration before the learned single judge was the ambit and the scope of the powers of the Income-tax Officer under section 7 of the Companies (Profits) Surtax Act, 1964 ("the 1964 Act"). The facts which gave rise to the filing of the petition are as follows :Siemens India Ltd. is a public limited company incorporated under the Companies Act, 1956, and is assessed to income-tax. The previous year of the company is the period of 12 months ending on September 30 in each calendar year. The controversy in the petition was in respect of the provisional assessment for the assessment year 1974-75 in respect of which the previous year would be the year ending on September 30, 1973. The company submitted their return of chargeable profits for the said previous year on September 30, 1974. In the said return, the company showed their chargeable profits at Rs. 1,53,41,602 and their capital at Rs. 12,64,19,560 and the statutory deduction at Rs. 1,26,41,956. According to the return, the excess of the chargeable profits over the statutory deduction was, therefore, Rs. 26,99,646 and the surtax on such excess chargeable profits at the applicable rate of 25 per cent. would be Rs. 6,74,912.Under section 4 of the 1964 Act, every company is liable to pay for every assessment year commencing on and from April 1, 1964, surtax in respect of so much of its chargeable profits of the previous year or years, as the case may be, as exceed the statutory deduction, at the rate specified in the Schedule to the Act. Section 7 confers upon the Income-tax Officer power to make a provisional assessment before proceeding to make a regular assessment under section 6 of the Act. Sections 6 and 7 read as under :

"6. Assessment.-(1) For the purposes of making an assessment under this Act, the

Income-tax Officer may serve on any person who has furnished a return under sub-section (1) of section 5 or upon whom a notice has been served under sub-section (2) of section 5 (whether a return has been furnished or not) a notice requiring him on a date therein to be specified, to produce or cause to be produced such accounts or documents or evidence as the Income-tax Officer may require for the purposes of this Act and may from time to time serve further notices requiring the production of such further accounts or documents or other evidence as he may require.

(2) The Income-tax Officer, after considering such accounts, documents, or evidence, if any, as he has obtained under sub-section (1) and after taking into account any relevant material which he has gathered, shall, by an order in writing, assess the chargeable profits and the amount of the surtax payable on the basis of such assessment.

7. Provisional assessment. - (1) The Income-tax Officer, before proceeding to make an assessment under section 6 (in this section referred to as the regular assessment) may, at any time after the expiry of the period allowed under sub-section (1) or sub-section (2) of section 5 for the furnishing of the return and whether the return has or has not been furnished, proceed to make in a summary manner a provisional assessment of the chargeable profits and the amount of the surtax payable thereon.

(2) Before making such provisional assessment, the Income-tax Officer shall give notice in the prescribed form to the person on whom the provisional assessment is to be made of his intention to do so, and shall with the notice forward a statement of the amount of the proposed assessment, and the said person shall be entitled to deliver to the Income-tax Officer at any time within fourteen days of the service of the said notice a statement of his objections, if any, to the amount of the proposed assessment.

(3) On expiry of the said fourteen days from the date of service of the notice referred to in sub-section (2), or earlier, if the assessee agrees to the proposed provisional assessment, the Income-tax Officer may, after taking into account the objections, if any, made under sub-section (2), make a provisional assessment, and shall furnish a copy of the order of the assessment to the assessee :

Provided that assent to the amount of the provisional assessment, or failure to make objection to it, shall in no way prejudice the assessee in relation to the regular assessment.

(4) There shall be no right of appeal against a provisional assessment made under this section.

(5) After a regular assessment has been made, any amount paid or deemed to have been

paid towards the provisional assessment made under this section shall be deemed to have been paid towards the regular assessment; and where the amount paid or deemed to have been paid towards the provisional assessment exceeds the amount payable under the regular assessment, the excess shall be refunded to the assessee."

After the return was filed by the company under the 1964 Act, the Income-tax Officer served a notice dated December 20, 1974, under section 7(2) declaring his intention to make a provisional assessment. The statement attached to the notice sets out that the Income-tax Officer proposed to take the chargeable profits of the company at Rs. 1,53,41,602 as per the figure of chargeable profits shown by the company in the said return. The computation of capital was proposed to be taken by the Income-tax Officer at Rs. 10,38,22,259 and the statutory deduction at Rs. 1,03,82,226 as against the capital of Rs. 12,64,19,560 and the statutory deduction at Rs. 1,26,41,956 computed by the company. The company submitted objections to the proposed provisional assessment on December 27, 1974, which was a Friday, and on the next Monday, i.e., December 30, 1974, the Income-tax Officer rejected the contention raised by the company and made an order of provisional assessment in accordance with the statement annexed to the notice. The company filed a writ petition under article 226 of the Constitution of India to challenge the legality of the order and the notice of demand which followed and the petition was presented on February 14, 1975. It is required to be stated at this juncture that the statement annexed to the notice issued by the Income-tax Officer does not disclose why the Income-tax Officer desired to reduce the capital computation made by the company in the return.

By the impugned order of provisional assessment, the Income-tax Officer included (excluded ?) five items in the computation of capital and those items were :

(a) doubtful debts reserve,

(b) provisional doubtful debts,

(c) excess provision for taxation,

(d) deduction of a sum of Rs. 43,20,000 from the balance of the general reserve, and

(e) deduction of a sum of Rs. 1,26,29,182, being the amount of deductions to be made under Chapter VI-A of the Income-tax Act, 1961 ("the 1961 Act"), in computing the total income to which, according to the company, they were entitled under rule 4 of the Second Schedule to the Companies (Profits) Surtax Act.

2. The principal contention urged before the learned single judge was that the provisional assessment under section 7 of the 1964 Act must be made only on the basis of the return and it was not permissible for the Income-tax Officer to examine disputed questions either of law or of fact. The submission was accepted by the learned single judge and it was held that section 7(2), being a summary procedure, was not intended for determination of complicated questions either of law or fact. The learned single judge also held that, while passing an order of provisional assessment under section 7, the powers of the Income-tax Officer were not different from those exercised by the Income-tax Officer while passing a provisional assessment under section 141 of the 1961 Act. The learned single judge then examined as to whether the deductions made by the Income-tax Officer in the order of provisional assessment were justified, and concluded that in respect of each and every exclusion, the Income-tax Officer was in error, as the view taken was in conflict with the law as then existing and which was binding on the Income-tax Officer. It was also held that the Income-tax Officer should not have entered into examination of disputed questions of fact while passing an order of provisional assessment. The learned single judge, on the strength of this finding. set aside the order of provisional assessment and the consequent notice of demand and directed the Revenue to pay the costs of Rs. 1,000 to the company. The judgment delivered by the learned single judge is under challenge in this appeal.

3. Mr. Bhatia, learned counsel appearing on behalf of the Revenue, submitted that the learned single judge was in error in entertaining the petition by exercising writ jurisdiction under article 226 of the Constitution of India when there was an alternate efficacious remedy available to the company. Learned counsel did not dispute that in accordance with sub-section (4) of section 7 of the 1964 Act, an appeal is not provided against the order of provisional assessment, but he urged that section 17 of the 1964 Act enables the Commissioner to exercise revisional powers. It was urged that the Commissioner can exercise the powers in revision by calling for the records of any proceedings under the 1964 Act and examine the order passed by the Income-tax Officer under the 1964 Act and this power can be exercised either suo motu or on an application of the assessee. Mr. Bhatia submits that it was open to the company to approach the Commissioner and that being an alternate efficacious remedy, the writ petition should not have been filed. We are afraid we cannot accede to the submission for more than one reason. In the first instance, no such contention was raised before the learned single judge and the Revenue went for hearing before the learned single judge on the merits of the claim. Secondly, such contention was not also raised in the grounds of appeal which were filed to challenge the judgment of the learned single judge. Apart from this consideration, the submission that section 17 which confers power of revision on the Commissioner is an alternate efficacious remedy is not correct. It is well-settled that the power conferred on the Commissioner to call for records of any proceedings and examine the correctness of the order does not confer a substantive right upon the assessee to challenge that

order. The exercise of revisional powers under section 17 is purely discretionary in nature and by no stretch of imagination can it be termed as an alternate efficacious remedy for the assessee. The statutory right of appeal cannot be confused with the power of the Commissioner to revise orders passed by the subordinates. In our judgment, the Revenue very rightly did not raise any such contention before the learned single judge and it is not possible to hold that the learned single judge was in error in entertaining the writ petition. Mr. Bhatia invited our attention to the decision of a learned single judge of the Karnataka High Court in the case of Eskayef Ltd. v. ITO [1986] 160 ITR 164, but we are unable to appreciate how this decision would in any manner advance the submission of learned counsel that the writ petition should not have been entertained by the learned single judge. Indeed, the question which came up for consideration before the learned single judge of the Karnataka High Court was totally different from the one which was decided by the learned single judge by the impugned judgment.

4. Mr. Bhatia then submitted that the learned single judge was in error in holding that while passing an order of provisional assessment under section 7 of the 1964 Act, it is not permissible for the Income-tax Officer to determine complicated questions either of law or of fact. Learned counsel submits that the learned single judge was in error in importing the provisions of section 141 of the 1961 Act while considering the ambit and scope of the section 7 of the 1964 Act. It is not possible to accept the submission of learned counsel. Section 141 of the 1961 Act confers power on the Income-tax Officer after the receipt of the return filed under section 139 to make a provisional assessment of the tax payable on the basis of the return and the accounts and documents accompanying the return. The power of provisional assessment under section 141(1) is exercised in a summary manner and the ambit of this power came up for consideration before this court in the case of *Burmah Shell Refineries Ltd. v. G. B. Chand, ITO*[2] This court pointed out the distinction between a provisional assessment and a regular assessment. A provisional assessment is made ex parte and without giving an opportunity to the assessee of being heard and the right of appeal is not provided against an order of provisional assessment. An order of provisional assessment is to be made under section 141 on the basis of the return filed by the assessee. This court held that a provisional assessment has to be made on the factual position admitted by the assessee except in those cases where the claim was clearly unsustainable. It was further held that where the position was not so clear and the determination of the claim would involve an inquiry into questions of fact, it was not open to the Income-tax Officer to proceed to adjudicate upon the claim while passing an order of provisional assessment. The question of the nature of exercise of powers under section 141(1) came up for consideration before the Supreme Court in the case of *Jaipur Udyog Ltd. v. CIT*[3] and the Supreme Court observed that the clearest implication of section 141 bars any enquiry at the stage of making a provisional assessment into disputed questions of law and fact. The Supreme Court observed that it was a matter of no

moment that the dispute raised was complicated or easy of solution. Mr. Bhatia is right in his submission that the language used in section 141 of the 1961 Act differs from that used in section 7 of the 1964 Act and the difference is principally in respect of two facts. Section 141 expressly provides that a provisional assessment is to be made on the basis of the assessee's return and the accounts and documents annexed thereto, while under section 7, such a qualification is absent. Secondly, section 141 does not require the Income-tax Officer to serve any notice upon the assessee before making an order of provisional assessment, while such is the requirement under section 7. The question which falls for our determination is whether this departure in section 7 from the language used in section 141 conferred a power upon the Income-tax Officer to make a provisional assessment by rejecting in whole or in part the return filed by the assessee. In our judgment, the object underlying both the sections is identical and not different, the object being to accelerate and expedite the collection of taxes without holding it up until a regular assessment is made. The object of a regular assessment is to determine the liability to tax on any assessee and to quantify that liability. The object being identical in both the cases, the mere fact that a notice is issued to the assessee under section 7 and the provisional order of assessment is passed after considering its objection would not lead to the conclusion that while passing an order of provisional assessment, it is permissible for the Income-tax Officer to ignore the contents of the return and determine disputed questions either of law or fact. In our judgment, the procedure given under section 7 for passing an order of provisional assessment being a summary one, it is not permissible for the Income-tax Officer to determine the disputed questions either of law or fact. The view taken by the learned single judge on this aspect of the matter is correct and is not required to be disturbed in this appeal.

5. Mr. Bhatia then contended that the conclusion recorded by the learned single judge that the Income-tax Officer was in error in excluding certain items while passing the order of provisional assessment is not correct. The submission is not accurate. The first two items excluded by the Income-tax Officer from the computation of capital were the doubtful debts reserve and the provision for doubtful debts. The learned single judge points out that the claim made by the company that the amounts stood in their books for several years and were not meant to be utilised for writing off bad or doubtful debts and that such debts were invariably debited to the profit and loss account and not to the reserve account was factually correct and not disputed. The learned single judge further pointed out that the contention of the company on the aspect was upheld by several decisions recorded by the Tribunals and the High Courts and, therefore, it was not open to the Income-tax Officer to disallow the above two items and in doing so, the Income-tax officer exceeded his jurisdiction. We are in entire agreement with the view taken by the learned single judge. The Income-tax Officer, even while passing an order of provisional assessment is bound by the decisions recorded by this court or any other High Court and it is not

permissible for the Income-tax officer to ignore the position of law declared by the courts and pass an order adverse to the assessee. The next item excluded by the Income-tax Officer was excess provision for taxation and in respect of this item also, the learned single judge points out that there are several decisions which accept the claim made on behalf of the company. Mr. Bhatia urged that the decisions referred to by the learned single judge were given under the provisions of the Super Profits Tax Act, 1963, and not under the 1964 Act, i.e., the Companies (Profits) Surtax Act, 1964, and, therefore, no fault can be found with the Income-tax Officer. It is not possible to accept the submission of learned counsel because whether the Explanation to rule 1 of the Second Schedule to the 1964 Act made any difference to the decisions under the Super Profits Tax Act or not is a debatable question and it was not permissible for the Income-tax Officer to determine that question while passing the order of provisional assessment. As mentioned hereinabove, the Income-tax Officer should scrupulously avoid determining questions which are disputed both on law and on facts.

6. The next item is in respect of a provision for dividend and it was not disputed before the learned single judge that on the date of the impugned order of provisional assessment, the Tribunal has taken a view favourable to the assessee in several decisions. It was contended by Mr. Bhatia that the Supreme Court delivered the judgment on September 25, 1981, in the case of *Vazir Sultan Tobacco Co. Ltd. v. CIT*[4] setting aside the view taken by the Tribunal and, therefore, the provisional order of assessment on this count could not have been faulted. It is not possible to accept this submission because the decision of the Supreme Court was recorded only on September 25, 1981, and was not available to the Income-tax Officer when the impugned order of provisional assessment was passed and on that date the decisions recorded by the Tribunal were binding on the Income-tax Officer and it was not permissible for the Income-tax Officer to ignore these decisions and pass an order adverse to the assessee. One more item was in respect of the sum of Rs. 1,26,29,182, being the total amount of deductions claimed under Chapter VI-A of the 1961 Act, in computing the total income. The deductions to be made under Chapter VI-A are different from the types of income which are not includible in the total income under section 10. The learned single judge points out that the conclusion of the Income-tax Officer that the amount of deductions under Chapter VI-A is not includible in the total income of the company was not correct. In dealing with the order of provisional assessment, the Tribunal has taken the view which supported the claim of the assessee and ignoring the statutory provisions and the rulings of the Tribunal, the Income-tax Officer recorded a finding adverse to the assessee. The learned single judge very rightly points out that subsequently several High Courts accepted the view taken by the Tribunal. Not only that, but in the regular assessment of the company, the Income-tax Officer took the same view which he did at the time of making of the provisional assessment. In these circumstances, the learned single judge was perfectly right in concluding that while

passing the order of provisional assessment, the Income-tax Officer exceeded his jurisdiction and consequently the order suffers from a serious infirmity and requires to be struck down. In our judgment, the decision recorded by the learned single judge is in accordance with law and does not require to be disturbed in this appeal.

7. Mr. Dastur, learned counsel appearing on behalf of the respondent, invited our attention to the decision recorded by one of us (Pendse J.) *in Kapadia (M. T.) v. S. V. Naik*[5] where an identical view was taken while considering the provisions of section 57 of the Estate Duty Act, 1953. The view taken in that decision is in consonance with the view taken by the learned single judge and with which we are in agreement.

8. Mr. Bhatia finally submitted that the question argued before the learned single judge was not free from doubt and, therefore the learned single judge should not have saddled the Revenue with the costs of the petition determined at Rs. 1,000. The costs were fixed by the learned single judge by taking into consideration the time spent on the hearing and preparation required to be undertaken by counsel. Mr. Bhatia is right in his submission that the question was not free from doubt and there was no decision of any court on the issue decided by the learned judge. The proper order of costs would have been to direct each party to bear their costs. Mr. Dastur did not seriously press for retention of the order of costs and, in our judgment, it would be proper to set aside the order of costs, though we wish to make it clear that the order of costs is normally a discretionary order and we would not disturb the discretion exercised by the learned single judge as a matter of routine.

9. Accordingly, the appeal fails and is dismissed, but, in the circumstances of the case, the parties are directed to bear their respective costs throughout.

Cases Referred.

1[1983] 143 ITR 120
2[1966] 61 ITR 493 (Bom)
3[1969] 71 ITR 799
4[1981] 132 ITR 559
5[1985] 154 ITR 251 (Bom)