

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL NO. 109 OF 2016

Pr. Commissioner of Income-Tax-2

Mumbai

..Appellant

Vs.

M/s. Kochi Refineries

(now merged with M/s.Bharat

Petroleum Corporation Ltd)

..Respondent

Mr. Suresh Kumar, for the Appellant.

Mr. Atul K. Jasani, for the Respondent.

CORAM:-S. C. DHARMADHIKARI &

B. P. COLABAWALLA, JJ.

DATE :- AUGUST 21, 2018.

P. C.:

An order under Section 263 of the Income Tax Act, 1961 (for short I. T. Act) was passed by the Commissioner of Income Tax. That order was passed on 28th March, 2007.

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Tushar
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2 Aggrieved by that order, the Assessee preferred Appeal to the Income Tax Appellate Tribunal bench at Mumbai.

The two Appeals for two Assessment Years 1997-1998 and 1998-1999 had resulted in the Commissioner's exercise under Section 263 of the I. T. Act being reversed and the Assessee's Appeal allowed. Two contentions are raised before us by Mr. Suresh Kumar while emphasising that the present Appeal raises substantial questions of law. He would submit that the Tribunal's understanding on limitation for the exercise of powers under Section 263, is wholly contrary to the statutory provision.

3 Alternatively and without prejudice, Mr Suresh Kumar would submit that even on merits, the Tribunal was not right in holding that the order under Section 263 goes beyond the parameters prescribed by that provision and therefore the Commissioner committed an error. Thus, Mr. Suresh Kumar would submit that on both counts the order under Appeal deserves to be set aside.

4 Section 263 of the I. T. Act enables the Commissioner to exercise revisional powers. Those Powers have to be exercised only when preconditions for exercise of that power as prescribed in sub-section (1) of Section 263, are satisfied. " Revision of orders prejudicial to revenue" is the heading of this Section.

There- under by sub-section (1), a power is conferred to call for and examine the record of any proceeding under I. T. Act and if the revisional authority considers that any order passed by the Assessing Officer is erroneous insofar as it is prejudicial to the interests of the Revenue, he has to then comply with the requirement of hearing the Assessee, independent enquiry to be made as is necessary and then passing an order. The order could be as the circumstances of the case justify, including an order enhancing or modifying the assessment or cancelling the assessment and directing a fresh assessment. Then, there is an Explanation and then by sub-section (2), a period within which this exercise has to be carried out, is mentioned.

5 While it may be true that the Tribunal has rendered a conclusion in the passing, without advertng to sub-section (2) of Section 263, on the point of limitation, we made it clear to Mr.Suresh Kumar that we are not endorsing or upholding that finding of the Tribunal. However, beyond that as well, this Appeal does not raise any substantial question of law.

6 The Tribunal has faulted the exercise of power under Section 263 by the Commissioner on the ground that the

Commissioner has exercised this power so as to disable the Assessing Officer to give effect to the binding order and direction of the Tribunal. In that the Tribunal after referring to the order under Section 263 of the I. T. Act held that the claim of deduction under Section 80-I of the I. T. Act in respect of captive power plant was allowed by the Tribunal. The Commissioner proceeds on the footing that the claim of the deduction is allowed but not the computation as made in respect of this deduction. Thus, it was open for the Assessing Officer to dispute the computation of this deduction made by the Assessee and that he was empowered to do as the Tribunal directed the grant of deduction in accordance with law. However, in that garb, the Commissioner has far exceeded his jurisdiction under Section 263. The portion of his order dated 28th March, 2007 noted by us and particularly the observations from internal pages 2 to 4 of his order would reveal that the Commissioner has attempted to demonstrate that the deduction under Section 80-I itself could not have been claimed by the Assessee. He did not say that the computation alone is deficient for if that is what is the understanding of the Commissioner, possibly the Tribunal would not have interfered. The Commissioner observed that the computation of the profit in the ratio of the

assets is not at all a correct method. The Assessee purchased 253,42,000 units of electricity from the Karnataka State Electricity Board for Rs. 6,32,14,000/- during the year. The average cost per unit thus comes to Rs.2.49/-. The quantity of electricity generated in the captive power plant during the year was 14,22,92,000 units. The power generated and the power purchased was used for Assessee's business. Had there been no generation of power in captive power plant, it would have been necessary to purchase this much units of power from the Karnataka State Electricity Board incurring an expenditure of Rs. 35,43,07,080/-. The profit derived from the generation of power in captive power plant can therefore be found out by deducting the expenses incurred in relation to captive power plant unit and then the methodology is laid down in the revisional order of the Commissioner. The Commissioner goes beyond this as well and then comes to the conclusion that the adoption of allocating profit in the ratio of assets will make the operation of sub-section (6) of Section 80-I of the I. T. Act ineffective.

7 To our mind, this is the exercise which the Assessing Officer could never have carried out while giving effect to the order of the Tribunal. How subsection (6) of Section 80-I is rendered

ineffective by the exercise carried out by the Assessee ought to have been pointed out to the Tribunal itself. If the Revenue was aggrieved, it could have carried the matter to a higher Court challenging the Tribunal's order. However, in the garb of revisional jurisdiction, the Tribunal's order could not be rendered ineffective and that is the anxiety of the Tribunal in refusing to uphold the Commissioner's exercise of the powers. The reason assigned in Paragraph 14 of the order under challenge therefore cannot be faulted. That has to be seen and noticed in the backdrop of the facts peculiar to the Assessee's case in which the Tribunal issued the direction. All that the Tribunal expected him to make is the computation in terms of the legal provision and for that limited exercise the matter was sent to the Assessing Officer. It was not to enable the Assessing Officer to reopen the claim of deduction under Section 80-I.

8 It is in these circumstances that the Tribunal holds that the issue of claim of deduction under Section 80-I including determination of ratio of captive power plant stands merged with the earlier order of the Tribunal. It is in these circumstances that a simple computation exercise would not have enabled the Assessing Officer to give a go-bye or by-pass the binding order of

the Tribunal. It is in these circumstances that it has refused to uphold the revisional exercise.

9 Looked at from this angle, we do not see how the Revenue can submit before us that the present Appeal raises substantial question of law. A mixed issue and whether the exercise of power under Section 263 was warranted in the light of the limited direction of the Tribunal has alone been considered in the impugned order. Such an exercise carried out by the Tribunal is a mixed one. The jurisdiction under Section 263 of the I. T. Act was not available to be invoked in the given facts and circumstances. That is how, the Tribunal interfered with it and refused to uphold it. Such an order of the Tribunal is neither perverse nor vitiated by any error of law apparent on the face of the record.

10 Hence, we are not in agreement with Mr. Suresh Kumar that this Appeal raises substantial question of law.

11 While we dismiss it, we clarify that the finding of the Tribunal in the impugned order on the point of limitation is not endorsed by us and if that point arises in any other case, we will

look at it independently. Our present order shall not mean approval of the Tribunal's view on the point of limitation.

(B. P. COLABAWALLA, J.) (S. C. DHARMADHIKARI, J.)