

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE ANTONY DOMINIC
&
THE HONOURABLE MR. JUSTICE SHAJI P. CHALY

WEDNESDAY, THE 12TH DAY OF AUGUST 2015/21ST SRAVANA, 1937

ITA.No. 85 of 2014 ()

AGAINST THE ORDER IN ITA 342/coch/2011 of I.T.A. TRIBUNAL, COCHIN BENCH
DATED 28-02-2013

APPELLANT(S)/APPELLANT:

M/S. ASIANET SATELLITE COMMUNICATIONS LTD.
3RD FLOOR, KARIMPANAL ARCADE
EAST FORT, THIRUVANANTHAPURAM.

BY ADVS. SRI.M.PATHROSE MATTHAI (SR.)
SMT.MARIAM MATHAI
SRI.SAJI VARGHESE

RESPONDENT(S):

THE COMMISSIONER OF INCOME TAX
THIRUVANANTHAPURAM.

R. BY ADV. SRI.P.K.R.MENON, SR.COUNSEL, GOI(TAXES)
R. BY ADV. SRI.JOSE JOSEPH, SC, FOR INCOME TAX

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 12-08-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX IN ITA.85/14

APPELLANT'S EXHIBITS:

ANNEXURE A: A TRUE COPY OF THE ASSESSMENT ORDER DATED 19.12.2008 U/S 143 (3) OF THE ACT.

ANNEXURE B: TRUE COPY OF ORDER OF THE COMMISSIONER OF INCOME TAX TRIVANDRUM DATED 7.2.2011 U/S 263 OF THE ACT.

ANNEXURE C: TRUE COPY OF THE CONSEQUENTIAL ORDER PASSED BY THE ASSESSING AUTHORITY ON 28.12.2011 PURSUANT TO THE ORDER OF THE COMMISSIONER OF INCOME TAX U/S 263 OF THE ACT.

ANNEXURE D: CERTIFIED COPY OF THE ORDER OF THE TRIBUNAL DATED 28.2.2013.

/TRUE COPY/

PS TO JUDGE

ANTONY DOMINIC & SHAJI P. CHALY, JJ.

I.T.A.No.85 of 2014

Dated this the 12th day of August, 2015

JUDGMENT

Antony Dominic, J.

1.This appeal is filed by the assessee, impugning the order passed by the Income Tax Appellate Tribunal, Cochin Bench in ITA.No.342/Coch/2011.

2.Briefly stated facts of the case are as follows:
Assessment for the year 2006-07 was completed under section 143(3) of the Income Tax Act by Annexure A order, accepting loss of ₹2,68,03,915/- returned by the assessee and allowing the loss to be carried forward. Subsequently, in exercise of the powers under section 263, the Commissioner of Income Tax initiated proceedings and passed Annexure B order dated 7.2.2011, by which, the assessment order was set aside for detailed examination of the issues involved. Accordingly, fresh assessment was completed by Annexure C order, where the total income was assessed to be 'nil'. By the impugned order, appeal filed against Annexure B order as ITA.342/11 was dismissed by the Tribunal. We are told that the

appeal filed by the assessee against Annexure C order of assessment is pending consideration of the appellate authority.

3. In this appeal filed under section 260A of the IT Act, the main question of law framed is whether, on the facts and circumstances of the case, the decision of the Tribunal holding that the order of the Commissioner of Income Tax under section 263 of the Act satisfies the precondition of prejudice to the revenue is proper and correct.

4. We heard learned senior counsel for the appellant and the learned senior standing counsel for the Revenue.

5. Relying on the judgment of the Apex Court in Malabar Industrial Co. Ltd. v. Commissioner of Income Tax [(2000) 243 ITR 83], senior counsel for the appellant contended that to invoke the power under section 263 of the IT Act, the twin conditions, that the order of the Assessing Officer being erroneous and prejudicial to the interests of the Revenue, should be established. According to the learned counsel, in

this case, this statutory requirement was not satisfied and therefore, the order passed by the Commissioner, as confirmed by the Tribunal, calls for interference.

6. On the other hand, learned senior standing counsel for the Revenue invited our attention to Annexure B order passed by the Commissioner and also the principles laid down, not only in the decision in Malabar Industrial Co. Ltd. (supra) but also in Toyota Motor Corporation v. Commissioner of Income Tax [(2008) 306 ITR 52(SC)] and Appollo Tyres Ltd. v. Deputy Commissioner of Income Tax [(2014) 360 ITR 36 (Ker)] and contended that this is a case where the Commissioner has correctly concluded that the order of assessment was erroneous and prejudicial to the interests of the Revenue. Therefore, according to him, the order of the Commissioner as confirmed by the Tribunal did not merit interference.

7. We have considered the submissions made by both sides. Section 263(1) reads thus:

"The Principal Commissioner or Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment."

8. This provision came up for the consideration by the Apex Court in *Malabar Industrial Co. Ltd.* (supra) where the requirements of the section were explained thus:

"A bare reading of this provision makes it clear that the prerequisite to the exercise of jurisdiction by the Commissioner suo motu under it, is that the order of the Income-Tax Officer is erroneous in so far as it is prejudicial to the interests of the Revenue. The Commissioner has to be satisfied of twin conditions, namely, (i) the order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. If one of them is absent- if the order of the Income-Tax Officer is

erroneous but is not prejudicial to the Revenue or if it is not erroneous but is prejudicial to the Revenue-recourse cannot be had to section 263(1) of the Act.

There can be no doubt that the provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer, it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind.

The phrase "prejudicial to the interests of the Revenue" is not an expression of art and is not defined in the Act. Understood in its ordinary meaning it is of wide import and is not confined to loss of tax. The High Court of Calcutta in *Dawjee Dadabhoy and Co. v. P.Jain* [1957] 31 ITR 872, the High Court of Karnataka in *CIT v. T.Narayana Pai* [1975] 98 ITR 422, the High Court of Bombay in *CIT v. Gabriel India Ltd* [1993] 203 ITR 108 and the High Court of Gujharat in *CIT v. Smt.Minalben S. Parikh* [1995] 215 ITR 81 treated loss of tax as prejudicial to the interests of the Revenue.

Mr.Abraham relied on the judgment of the Division Bench of the High Court of Madras in *Venkatakrisna Rice Company v. CIT* [1987] 163 ITR 129 interpreting "prejudicial to the interests of the Revenue." The High Court held (page 138): "In this context, it must be regarded as involving a

conception of acts or orders which are subversive of the administration of revenue. There must be some grievous error in the order passed by the Income-tax Officer, which might set a bad trend or pattern for similar assessments, which on a broad reckoning, the Commissioner might think to be prejudicial to the interests of Revenue administration." In our view, this interpretation is too narrow to merit acceptance. The scheme of the Act is to levy and collect tax in accordance with the provisions of the Act and this task is entrusted to the Revenue. If due to an erroneous order of the Income-tax Officer, the Revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to the interests of the Revenue.

The phrase "prejudicial to the interests of the Revenue" has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the Revenue. For example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of Revenue; or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue, unless the view taken by the Income-tax Officer is unsustainable in law. It has been held by this court that where a sum not earned by a person is

assessed as income in his hands on his so offering, the order passed by the Assessing Officer accepting the same as such will be erroneous and prejudicial to the interests of the Revenue. Rampyari Devi Saraogi v. CIT [1968] 67 ITR 84 (SC) and in Smt.Tara Devi Aggarwal v. CIT [1973] 88 ITR 323 (SC).

In the instant case, the Commissioner noted that the Income-tax Officer passed the order of nil assessment without application of mind. Indeed, the High Court recorded the finding that the Income-tax Officer failed to apply his mind to the case in all perspective and the order passed by him was erroneous. It appears that the resolution passed by the board of the appellant-company was not placed before the Assessing Officer. Thus, there was no material to support the claim of the appellant that the said amount represented compensation for loss of agricultural income. He accepted the entry in the statement of the account filed by the appellant in the absence of any supporting material and without making any inquiry. On these facts the conclusion that the order of the Income-tax Officer was erroneous is irresistible. We are, therefore, of the opinion that the High court has rightly held that the exercise of the jurisdiction by the Commissioner under section 263(1) was justified."

9.This judgment was followed by this Court in the judgment in Appollo Tyres Ltd. (supra). Bearing in

mind the principles laid down by the Apex Court and by this Court in the judgments referred to above, we shall now turn to Annexure B order passed by the Commissioner. In this order, the Commissioner has noticed thus:

"Later examination of records showed that the assessee had debited Rs.710.19 lakhs as extra ordinary items being the Pole Rental Charges payable to KSEB for the period from 2002-03 to 31.3.2005. This was allowed by the assessing officer while determining the loss. Further it was noticed that Bandwidth charges of Rs.404.09 lakhs was debited in the Profit & Loss account in which Rs.86.76 lakhs were hire charges paid in foreign currency to M/s.Singtel, Singapore. No tax has been deducted as required under the relevant provisions and hence liable to be added u/s 40(a)(ia). It was further observed that the assessing officer had not applied his mind in accepting these items as details of expenditure did not call for and verified so as to satisfy their allowability under the statute. Clearly this is an error which would cause prejudice to the interest of revenue in as much as high quantum of loss require to be carried forward."

10.Relying on the above, the Commissioner held that the Assessing Officer has passed Annexure A order without

any application of mind and without conducting any enquiry and also without even calling for or verifying the records. The Commissioner has also found that hire charges were paid but no tax has been deducted. Admittedly, the assessment order does not reflect any reason for the conclusions of the Assessing Officer. These findings of the Commissioner fully justified his conclusion that Annexure A order was erroneous in as much as it is prejudicial to the Revenue. In our view, the findings of the Commissioner satisfies the requirements of section 263 of the IT Act and therefore, the order of the Tribunal confirming Annexure A order of the Commissioner passed under section 263 does not merit interference.

In the aforesaid circumstances, answering the question of law raised in favour of the Revenue, this appeal is dismissed.

Sd/-
ANTONY DOMINIC, Judge.

Sd/-
SHAJI P. CHALY, Judge.

k kb.