

**HON'BLE THE ACTING CHIEF JUSTICE RAMESH RANGANATHAN
AND
HON'BLE SRI JUSTICE GUDISEVA SHYAM PRASAD**

R.C. No. 81 of 1993

Judgment: (Per the Hon'ble The Acting Chief Justice Ramesh Ranganathan)

The following questions of law have been referred for our opinion by the Income Tax Appellate Tribunal as having arisen from its order dated 18.12.1992. These questions are:

1. Whether on the facts and circumstances of the case, the Income Tax Appellate Tribunal is correct in holding that the remission of interests relating to the assessment years 1970-71 to 1974-75 was chargeable to tax under Section 41(1) of the Income Tax Act even though the losses for those years were not set off and had lapsed due to the passage of the prescribed time of eight assessment years ?
2. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in holding that the interest was allowed to be deducted and that the assessee had already derived the advantage ?

The facts, to the extent necessary, are that the assessee was carrying on business of fabricating machinery for sugar industries. It filed a return of loss on 30.8.1983 contending that it had sustained losses for the past several years; the business losses computed by the Income Tax Officer included interest payment made by it to certain financial institutions; these payments had been debited in its profit and loss account, and was allowed by the Income Tax Officer as a deduction; this resulted in a corresponding increase in the losses sustained by it; and these losses were also allowed to be carried forward.

During the accounting year, relevant to the assessment year 1983-84, the Income Tax Officer, on a scrutiny of the profit and loss account of the assessee, found that a sum of Rs.1,25,52,856/-, represented waiver of interest by ICICI Ltd (a financial institution), pursuant to an agreement with M/s. Navabharat Ferro Alloys Ltd with which the assessee was amalgamated. On receipt of the interest amount from the financial institutions, the assessee had credited it to its profit and loss account with the narration *“by interest and commitment charges waived by financial institutions as per agreement between M/s. Navabharat Ferro Alloys Ltd and the Industrial Credit & Investment Corporation of India Ltd, (ICICI)”*.

Before the Income Tax Officer, the assessee contended that this interest amount, received from ICICI, related to the years 1969 to 1981; the interest, relating to the years 1974 to 1981 for Rs. 92,87,944/-, could be set off against the losses which the assessee suffered during these years; however the interest received, relating to the years 1969 to 1973 for Rs.32,44,858/-, should not be included in their total income, as they were not entitled to set off the losses, which they had incurred during the years 1969-73, with this interest; by the time, the interest paid earlier was refunded in 1981, more than eight years had elapsed; and, consequently, the set off stipulated in Section 72 of the Income Tax Act, 1961 (for short “the Act”) was no longer available to them. The Income

Tax Officer, however treated the entire interest of Rs.1,25,52,856/- as the income of the assessee.

In appeal, the Commissioner of Income Tax (Appeals) observed that the provisions of Section 41(1) of the Act were independent of Section 72, which dealt with carry forward and set off of losses; while computing the losses of the assessee, for the earlier years, the interest paid by them had already been allowed as a deduction; and, therefore, Section 41(1) was attracted. On the assessee preferring an appeal thereagainst, the Tribunal observed that the interest, under consideration, had been debited by the assessee to their profit and loss account; it is only after allowing interest as a deduction, had the Income Tax Officer computed losses for the previous years; as interest was allowed as a deduction, the assessee had derived an advantage; consequently Section 41(1) was attracted; application of Section 41(1) was not dependent on the final set off of the loss computed for the previous years; Section 41(1) was independent of, and not related to, Section 72; it was not a condition precedent, for the application of Section 41(1), that the loss should be carried forward and set off under Section 72, before it can be considered as a benefit derived by the assessee; Section 41(1) could be invoked where an allowance or deduction had been made in the assessment year, for any year in respect of loss, expenditure or trading liability incurred by the assessee and subsequently, during a later previous year, the assessee had

obtained any amount in respect of such trading liability by way of remission or cessation thereof; while computation of income, during the relevant years, had resulted in a loss, such loss would have been as a result of various deductions allowed to the assessee; in the years 1969 to 1973, there must have been some positive income to the assessee from which certain liabilities were allowed as a result of which the assessment finally ended in a loss; it could not, therefore, be said that the deductions, other than the deduction of interest, were more than the income shown by the assessee on the credit side of the profit and loss account; and it was, therefore, difficult to say that a part of the interest was, in fact, not set off against the income declared by the assessee. The appeal preferred by the assessee was dismissed.

Before us Sri A.V. Krishna Koundinya, learned Senior Counsel appearing on behalf of the assessee, would submit that, but for the fact that interest was received in 1981 far beyond the maximum time limit of eight years specified in Section 72, the assessee would have been entitled to set off the interest, received by them, against the losses they suffered during the said years; it is because they were entitled to set off a part of this income, for the relevant years 1974 to 1981, did the assessee concede that the interest received, to the extent of Rs.92,87,944/-, could be treated as their income; however, for the earlier years 1969 to 1973, since more than eight years had elapsed by the time the income

was received in the year 1981, treating the said interest amount as income, relatable to the years 1969 to 1973, would deny the assessee the benefit of set off of its income with the losses sustained during the years 1969 to 1973.

Learned Senior Counsel would further submit that, even otherwise, this Court has the power to reframe the questions referred to it by the Tribunal; the question whether the assessee (transferor) could be subjected to tax after its amalgamation with M/s. Navabharat Ferro Alloys Ltd., (transferee) is implicit in question No.1; as held by the Supreme Court, in **Saraswathi Industrial Syndicate Ltd., vs. Commissioner of Income Tax, Haryana**¹, the transferor ceases to exist consequent upon amalgamation; since any receipt, relatable to a period prior to amalgamation, cannot be treated as its income, neither the transferor nor the transferee can be subjected to tax under Section 41(1) of the Act, in the light of the law declared by the Supreme Court in **Salem Cooperative Central Bank Ltd., vs. Commissioner of Income Tax**² and the Division Bench of this Court in **Commissioner of Income Tax vs. V.K. Ferro Alloys Industries P. Ltd**³.

On the other hand, Smt. B. Rachna, learned Standing Counsel for Income Tax, would submit that Section 41(1) and Section 72 are two independent provisions; the mere

¹ [1990] 186 ITR 278 (SC)

² [1993] 201 ITR 697

³ [2008] 299 ITR 191

possibility of the assessee being unable to set off interest received by it in the year 1981, with the losses it allegedly suffered during 1969 to 1973, under Section 72 of the Act would not disable the Revenue from bringing this interest income to tax under Section 41(1) of the Act; and since the questions referred by the Tribunal to this Court is only on the question of set off, in the context of Section 41(1) of the Act, the contention urged before this Court that, since the assessee was amalgamated with M/s. Navabharat Ferro Alloys Ltd, the Revenue lacks jurisdiction, to assess either the transferor or the transferee to tax, is not a question which would arise from the questions referred for the opinion of this High Court; and as the jurisdiction which this Court exercises, under Section 256 of the Act, is confined to the question referred to it by the Tribunal, the question which has now been urged before this Court, for the first time on behalf of the assessee, cannot be examined in proceedings under Section 256 of the Act.

The questions referred for our opinion, as extracted hereinabove are, firstly, whether remission of interest, relating to the assessment year 1970-71 to 1974-75 (ie, in the previous years 1969-70 to 1973-74), can be charged to tax under Section 41(1) of the Act, even though the losses for those years were not set off, and eight years had elapsed; and whether the Tribunal was justified in holding that the

assessee had deducted interest, and had derived an advantage.

It is evident from the statement of case, and the order of the Tribunal, that the assessee had claimed deduction with respect to the interest paid by them to ICICI during the previous years 1969-70 to 1980-81. It is also not in dispute that the assessee received this amount from ICICI Ltd pursuant to the interest, (which they had earlier claimed as a deduction), having been waived by the latter. The claim of the assessee, before the assessing authority, the Commissioner of Appeals and the Tribunal, was that the interest received by them in 1981 was the interest liable to be paid to ICICI during the years 1969-70 to 1980-81; as they had suffered losses during these years, it is only for the previous years 1973-74 till 1980-81 which the assessee could set off the losses suffered by them during the relevant previous years with the income received by them, i.e., the amount representing waiver of interest by ICICI; and since they were not entitled to set off losses beyond a period of eight years, the interest income received by them in 1981, in so far as it related to the years 1969-1973, should not be treated as income under Section 41(1) of the Act.

It has not even been contended before us by Sri A.V. Krishna Koundinya, Learned Senior Counsel, that the pre-condition, for invoking Section 41(1) of the Act, is the right of the assessee to claim set off under Section 72 of the Act. As

has been rightly held by the Tribunal, both Section 41 and Section 72 are two independent provisions, and neither of them are dependant on the other. It is only after the total income of the assessee is computed for the relevant previous year, would the question of the assessee claiming set off, under Section 72 of the Income Tax Act, arise. Section 41(1) is attracted only when the assessee has claimed deduction for certain expenditure in a previous year, which is either waived or remitted or received by them in a subsequent pervious year. In such cases, Section 41(1) requires the waived amount, remission or receipt to be treated as income in the subsequent year in which the benefit is extended or received.

In the present case the interest payable by them to ICICI Ltd, which the assessee had claimed as deduction from the years 1969 to 1981, was waived by ICICI Limited in the year 1981. Consequently, Section 41(1) was attracted, and the assessee was rightly subjected to tax. The mere fact that they were unable to set off this income, against the losses suffered by them during the previous years 1969-70 to 1973-74, as more than eight years had elapsed by the time interest was waived in 1981, is of no consequence. Since the Revenue was justified in subjecting the interest income, received by the assessee in the year 1981, to tax under Section 41(1) of the Act, question No.1 must be answered in the affirmative and in favour of the Revenue. Consequently question No.2, i.e., whether the assessee had, in fact, derived an advantage, and

had allowed interest to be deducted in those years, does not need to be answered.

What, however, remains to be considered is the submission of Sri A.V. Krishna Koundinya, learned Senior Counsel, that, as the statement of case itself records that the assessee had amalgamated with M/s. Navabharat Ferro Alloys Ltd, this Court should reframe the questions referred to it, and decide whether the assessee, which ceased to exist consequent on its amalgamation, can thereafter be subjected to tax under the Act. As reliance is placed by the learned Senior Counsel on the judgment of the Supreme Court in **Saraswathi Industrial Syndicate Ltd¹**, and on Circular No. 636 issued by the Central Board of Direct Taxes on 31.8.1992, it is necessary to refer both to the judgment, and to the Circular, in greater detail.

In **Saraswathi Industrial Syndicate Ltd¹**, the appellant -a limited company - had, pursuant to the order of the High Court, amalgamated itself with Indian Sugar Company Ltd on 28.9.1962, resulting in Indian Sugar Company Ltd losing its identity, as it did not carry on any business thereafter. Prior to the amalgamation, Indian Sugar Company Ltd was allowed an expenditure of Rs. 58,735/- on accrual basis in its earlier assessment. This amount was shown as a trading liability which, consequent upon amalgamation, was taken over by the appellant. After its amalgamation, the appellant claimed exemption of the said amount from income-tax for the

assessment year 1965-66 on the ground that the amalgamated company was not liable to pay tax under Section 41(1) of the Act. As the expenditure had been allowed as a deduction to the erstwhile Indian Sugar Company Ltd, which was a different entity from the amalgamated company, the Tribunal allowed the appeal holding that, after amalgamation of Indian Sugar Company Ltd with the assessee company, the identity of Indian Sugar Company Ltd was lost, and it was no longer in existence; and as the appellant was a different entity, it could not be subjected to tax with regards the trading liability taken over by it pursuant to the order of amalgamation.

The Punjab & Haryana High Court, however, answered the question in favour of the Revenue holding that the liability, claimed as exemption by the appellant, was chargeable to tax under Section 41(1) of the Act; on amalgamation of the two companies, neither of them ceased to exist; both the amalgamating and amalgamated companies continued their entities in a blended form; the amalgamated company was a successor-in-interest of the amalgamating company; as the assets of both the companies were merged and blended, to constitute a new company, the liabilities attached thereto must be on the amalgamated company; and the appellant was, therefore, liable to tax as the assets of Indian Sugar Company Ltd had come into its hands.

The Supreme Court, after referring to its earlier judgments in **General Radio and Appliances Co. Ltd, vs. M.A. Khader**⁴ and **CIT vs. Hukumchand Mohanlal**⁵, held that the High Court was in error in holding that, even after amalgamation of the two companies, the transferor company did not become non-existent, but continued its existence in a blended form; the High Court's view, that, on amalgamation, there was no complete destruction of the corporate personality of the transferor was not sustainable in law; the true effect and character of the amalgamation largely depended on the terms of the scheme of merger; when two companies amalgamate and merge into one, the transferor company loses its entity as it ceases to have its business; however their respective rights and liabilities are determined under the scheme of amalgamation; and the corporate entity of the transferor company ceases to exist with effect from the date the amalgamation is made effective. The Supreme Court agreed with the view of the Tribunal that the amalgamating company ceased to exist in the eye of law, and held that the appellant was therefore not liable to pay tax.

In Circular No. 636 dated 31.8.1992, the Central Board of Direct Taxes held that, under the provisions of sub-section (1) of Section 41, the amount or benefit referred to in Section 41(1) could be charged to tax only if the assessee, which received the amount or benefit, was the same person who was

⁴ [1986] 60 Company Cases 1013

⁵ [1971] 82 ITR 624

allowed the deduction earlier; and with a view to ensure that there was no loss of revenue and undue enrichment, Section 41(1) had been substituted by the Finance Act, 1992 so as to bring the amount or benefit to tax also in cases where the recipient is a successor in business, and is other than the person who was allowed the deduction earlier. The amended provision was to take effect from 1st April, 1993 and was applicable from the assessment year 1993-94 onwards.

In the present case, the assessment year is 1983-84, long prior to the substitution of Section 41(1) of the Act with effect from 1.4.1993. While the pre-amended Section 41(1) would alone be applicable, the question which necessitates consideration is whether this Court is entitled to examine this question, since it has not been specifically referred for its opinion by the Tribunal.

In **V.K. Ferro Alloys Industries P. Ltd³**, a Division Bench of this Court observed:-

“..... A statement of case is in the nature of pleadings wherein all the facts found are set out. It is the question of law referred to in it that calls for a decision and it is that that constitutes the pivotal point on which the jurisdiction of the High Court hinges. The statement of case is material only as furnishing the facts for the purpose of enabling the High Court to decide the question referred. The High Court acts purely in an advisory capacity on a reference which properly comes before it. It is of the essence of such a jurisdiction that the court can decide only questions which are referred to it and not any other question. A question of law which the applicant cannot require the Tribunal to refer, and which the Tribunal was

not competent to refer, cannot be entertained by the High Court (CIT v. Scindia Steam Navigation Co. Ltd. [1961] 42 ITR 589 (SC). The statement of case, submitted to the High Court by the Tribunal, would refer to the facts selected by the Tribunal from out of the material already on the record. The High Court, in dealing with a question of law arising from the order of the Tribunal, has to answer the said question in the light of the statement of case (Keshav Mills Co. Ltd. v. CIT [1965] 56 ITR 365 (SC).

..... In some cases, the question of law referred to the High Court may have to be considered in several aspects some of which may not have been appreciated by the Tribunal. If a question of law is framed in general terms and, in dealing with it, several aspects fall to be considered, they have to be considered by the High Court even though the Tribunal may not have considered them (Keshav Mills Co. Ltd. v. CIT [1965] 56 ITR 365 (SC). The jurisdiction to reframe a question, in appropriate cases, is conferred on the High Court under Section 260(1) by necessary implication, although it does not specifically invest the High Court with such a power. The High Court is not confined to the questions which the Tribunal was directed to submit. The only condition is that the questions of law should arise from the reference. The High Court has not only the power but it is its duty to reframe the questions in such a way as to bring out the real dispute between the parties (Raja Rameshwara Rao Bahadur v. CIT [1957] 32 ITR 552 (A.P); Narain Swadeshi Weaving Mills v. CEPT [1954] 26 ITR 765 (SC); CIT v. G.M.Chennabasappa [1959] 35 ITR 261 (A.P), CIT v. Scindia Steam Navigation Co. Ltd. [1961] 42 ITR 589 (SC), CIT v. H.E.H Mir Osman Ali Khan Bahadur [1970] 76 ITR 383 (A.P). It is possible that the same question of law may involve different approaches for its solution, and the High Court may amplify the question to take in all the approaches. But the question must still be one which was before the Tribunal and was decided by it. It must not be an entirely different question which the Tribunal never considered. (Kusumben D. Mahadevia v. CIT [1960] 39 ITR 540 (SC)). If the question actually referred does not bring out clearly the real issue between the parties, the High Court may reframe the

question so that the matter actually agitated before the Tribunal may be raised before the High Court. (New Jehangir Vakil Mills Ltd. v. CIT [1959] 37 ITR 11 (SC)...”

It is clear from the judgment, in **V.K. Ferro Alloys Industries P. Ltd**³, that the statement of case is material only as furnishing the facts for the purpose of enabling the High Court to decide the question referred for its opinion; in the exercise of its advisory jurisdiction under Section 256, the High Court should decide only the questions referred to it, and not any other question; in dealing with the question of law, arising from the order of the Tribunal, the High Court has to answer the said question in the light of the statement of case; in certain cases, the question of law referred to the High Court may have to be considered in several aspects, some of which may not have been appreciated by the Tribunal; if a question of law is framed in general terms and, in dealing with it, several aspects fall to be considered, the High Court should consider them even though the Tribunal may not have considered them; the jurisdiction to reframe a question, in appropriate cases, is conferred on the High Court under Section 260(1) by necessary implication, although it does not specifically invest the High Court with such a power; and the only condition is that the questions of law should arise from the reference.

As held in **Keshav Mills Co. Ltd. v. CIT**⁶; the High Court, in dealing with a question of law arising from the order

⁶ (1965) 56 ITR 365 (SC)

of the Tribunal, should answer the said question in the light of the statement of case. All that is stated in the statement of case, by the Tribunal, is that the financial institution had waived the interest charged on the assessee earlier, as a result of an agreement between ICICI Ltd and M/s.Navabharat Ferro Alloys Ltd., with which the assessee was amalgamated. Except this bald statement, neither does the statement of case, nor the order of the Tribunal, contain details as to how and when the appellant was amalgamated with M/s. Navabharat Ferro Alloys Ltd; and whether such amalgamation was before or after the assessment year 1983-84. They also make no reference to the terms of the scheme of amalgamation. It is evident, from the statement of case, that the assessee had filed the return of income; and it is on scrutiny, of the assessee's books of accounts, that the interest received by them from ICICI Ltd was brought to tax under Section 41(1) of the Act.

While the law laid down by the Supreme Court, in **Salem Cooperative Central Bank Ltd²**, is that, consequent on amalgamation, the transferor company loses its identity and ceases to exist, and consequently the transferor company is no longer liable to tax under Section 41(1) of the Act, neither the statement of case nor the orders of the assessing authority, the Commissioner of Income Tax (Appeals) or the Tribunal contain any information regarding the manner, or the conditions, of amalgamation or as to when amalgamation

took place and if the assessee had already been amalgamated, and had ceased to exist, as to how the assessee had put forth its case thereafter before the assessing authority, later before the Commissioner of Income Tax (Appeals), and then before the Tribunal. It is also not known as to what was the effective date of amalgamation, for it is only from that date can the transferor company be held to have ceased to exist and thereafter not be held liable to tax under Section 41(1) of the Act.

The submission of Sri A.V. Krishna Koundinya, learned Senior Counsel, is that the question whether the assessee is liable to tax, consequent on its amalgamation with M/s.Navabharat Ferro Alloys Ltd., is implicit in question No.1, and this Court is therefore obligated to reframe the question and answer it. As noted hereinabove, question No.1 is only whether remission/waiver of interest in 1981, relating to the years 1969-70 to 1972-73, is chargeable to tax, under Section 41(1) of the Act, during the assessment year 1983-84, even though losses for those years could not be set off because eight years had elapsed in the interregnum.

What the learned Senior Counsel would asked us to do is to pause after the first limb of question No.1, and read it both independent of, and in conjunction, with the second limb; and, on reading the first limb of question No.1 independently, to frame the question whether the assessee (a company which he claims has ceased to exist consequent on

its amalgamation with M/s.Navabharat Ferro Alloys Ltd) could be subjected to tax under Section 41(1) of the Act. We must express our inability to agree. Question No.1, referred for our opinion, is simply this. It is whether inability of the assessee, to set off the interest income received by it in 1981 with the losses suffered by it during the years 1969-70 to 1972-73 under Section 72 of the Act, would disable the Revenue from bringing such income to tax under Section 41(1) of the Act. From neither of the two questions, referred for our opinion, can this question, which the learned Senior Counsel commends that we answer, be implied. Neither the facts referred to in the statement of case, nor the order of the Tribunal, contain any details for us to examine this question.

In **Salem Co-operative Central Bank Limited²**, the question referred for the opinion of the Madras High Court was whether the Tribunal was right in holding that the sum of Rs.19/-, being the interest received on the deposit made with the electricity company, was a business receipt necessitating deletion of the additional surcharge amount of Rs.81,920/- charged for the assessment year 1963-64. The Madras High Court had returned the reference unanswered, directing the Tribunal to consider the case on all points which required consideration of the question whether additional surcharge was attracted. In effect, the Madras High Court had directed the Tribunal to examine whether additional surcharge was attracted even if the income of Rs.19/- was

charged under the head “Profits and gains of business”. Before the Tribunal, while the Revenue had contended that the said receipt could not be treated as a business receipt as it was “income from other sources”, both the Revenue and the assessee had agreed that levy of additional surcharge on interest would depend upon classification of the head of income; if it fell under “income from business”, the appeal preferred by the Revenue was liable to be dismissed, and if it fell under “income from other sources”, the appeal should be allowed. Holding the income, as “income from business”, the Tribunal had dismissed the appeal preferred by the Revenue.

Before the High Court, the Revenue had contended that, irrespective of whether the said sum was “business income” or “income from other sources”, it attracted liability to additional surcharge. The assessee, on the other hand, had contended before the High Court that the Revenue could not be permitted to shift its stand, and urge a new contention. The Madras High Court held that the assumption of the Tribunal, that the liability to surcharge was not attracted in case the said sum represented “business income”, was not warranted; and, in such a situation, the High Court possessed the power to correct the error as long as the point arises out of the Tribunal’s order. This view of the Madras High Court was affirmed by the Supreme Court.

The law declared in **Salem Co-operative Central Bank Limited**² is only that the High Court has the power to correct

an error in the order of the Tribunal so long as the point arose out of the Tribunal's order. In the present case, the question, whether the assessee had amalgamated with M/s.Navabharat Ferro Alloys Ltd., before the interest income was received and whether it was therefore not liable to be subjected to tax under Section 41(1) of the Act as it ceased to exist, does not arise from the order of the Tribunal. It would be wholly inappropriate for us, in such circumstances, to examine this question which has neither been referred for our opinion nor does it arise from the order of the Tribunal.

We, therefore, answer the first question referred for our opinion in favour of the Revenue and against the assessee. In view of our opinion on question No.1, it is wholly unnecessary for us to express any opinion on question No.2.

The reference is answered accordingly.

RAMESH RANGANATHAN, ACJ

GUDISEVA SHYAM PRASAD, J

14th December, 2017.

Pnb/va

**HON'BLE THE ACTING CHIEF JUSTICE RAMESH RANGANATHAN
AND
HON'BLE SRI JUSTICE GUDISEVA SHYAM PRASAD**



14.12.2017