

R.M. AMBERKAR
(Private Secretary)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

INCOME TAX APPEAL NO. 1359 OF 2016

The Commissioner of Income Tax (Exemption)
6th Floor, Piramal Chambers,
Lalbaug, Mumbai - 400 012.

.. Appellant

Versus

Slum Rehabilitation Authority
5th Floor, Griha Nirman Bhavan,
Kala Nagar, Bandra (E),
Mumbai - 400 051.

.. Respondent

-
- Mr. Suresh Kumar for the Appellant
 - Mr. S.E. Dastur, Senior Counsel a/w Mr. Nishant Thakkar and Ms. Jasmin Amalsadvala i/by Mint & Conferers for the Respondent
-

CORAM : AKIL KURESHI &
SARANG V. KOTWAL, JJ.

DATE : MARCH 26, 2019.

ORAL JUDGMENT (Per Akil Kureshi, J.)

1. This appeal is filed by the Revenue to challenge the judgment of the Income Tax Appellate Tribunal (“the Tribunal” for short). Following questions are presented for our consideration:-

- “(i) Whether on the facts and in the circumstances of the case and in law, the Tribunal was right in holding that order passed by DIT(E) is beyond the scope of Sec. 263 of the I.T. Act when the subject matter of revision is applicability

of proviso to Sec. 2(15) and not denial of exemption u/S. 11?

- (ii) Whether on the facts and in the circumstances of the case and in law, the Tribunal was right in holding that order sought to be revised is not prejudicial to the interest of the revenue, even though the order sought to be revised was passed without making verification which should have been made, deemed to be erroneous in so far as it is prejudicial to the interest of the revenue in view of the Explanation 2 to Sec. 263?"

2. Brief facts are as under:-

Respondent assessee, the Slum Rehabilitation Authority had filed return of income for the assessment year 2009-10 and claimed benefit under Section 11 of the Income Tax Act, 1961 ("the Act" for short) in relation to its income claiming itself to be engaged in charitable activity. The Assessing Officer passed an order of assessment under Section 143(3) of the Act on 22.12.2011 in which this claim was examined. He held that the assessee was not a Local Authority within the meaning of Section 10(20) of the Act. He further held that in view of the nature and activities carried out by the assessee and its legal status, the assessee's claim for exemption under Section 11 of the Act cannot be entertained.

3. The assessee carried the matter in appeal. The Appellate Commissioner allowed the appeal and granted the benefit of exemption. The Commissioner of Income Tax took the order of assessment in suo motu revision in exercise of powers under Section 263 of the Act on the ground that by virtue of Section 2(15) of the Act which defines the term “charitable purpose”, the activities of the assessee cannot be considered as charitable in nature. He passed order under Section 263 of the Act on 28.3.2014 holding that the order of assessment passed by the Assessing Officer was erroneous and prejudicial to the interest of the Revenue. He set aside the order and directed the assessment to be made afresh after considering the proviso to Section 2(15) of the Act.

4. The assessee challenged this revisional order of the Commissioner before the Tribunal. The Tribunal by the impugned order, allowed such appeal on the ground of merger as well as on the ground that the order of assessment cannot be stated to be prejudicial to the interest of the Revenue since in any case, the Assessing Officer had

rejected the assessee's claim of exemption under Section 11 of the Act, may not be with reference to Section 2(15) of the Act. This order, the Revenue has challenged in the present appeal.

5. Appearing for the Revenue, learned counsel Mr. Suresh Kumar contended that the assessee was hit by the proviso to Section 2(15) of the Act and therefore, its activities were not charitable in nature. Automatically, therefore, the assessee's claim for exemption under Section 11 of the Act would not survive. The Assessing Officer had not examined this important aspect and passed the order of assessment which was thus, erroneous and prejudicial to the interest of the Revenue. The Commissioner, therefore, correctly exercised his revisional powers under Section 263 of the Act. Learned counsel placed heavy reliance on clause (c) of explanation (1) below sub-section 1 to Section 263 of the Act to contend that since this issue was never the subject matter before the Appellate Commissioner in appeal filed by the assessee, the principle of merger would not be applicable.

6. On the other hand, learned counsel Mr. Dastur for the respondent assessee opposed the appeal raising following grounds:-

(i) _____

(a) The Commissioner (Appeals) had set aside the entire order of assessment. The order of Commissioner (Appeals) was confirmed by the Tribunal. When the Commissioner, therefore, exercised his revisional powers, the assessment order itself did not exist. There was no order which the Commissioner, therefore, could have taken in revision.

(b) Another facet of this argument was that the assessee's claim of exemption under Section 11 of the Act having been rejected by the Assessing Officer, was subject matter of appeal before the Appellate Commissioner. The Appellate Commissioner having allowed the appeal, on the principle of merger, it was thereafter no longer open for the Commissioner to exercise his jurisdictional powers. In this context learned counsel relied on following decisions:-

- (1) **CIT Vs. Smt. A.S. Narendrakumari**¹;
- (2) **CIT Vs. Nirma Chemicals Works P Ltd**²;
- (3) **Haryana Paper Distributors (P) Ltd Vs. Pr. CIT.**³

(ii) The Assessing Officer having rejected the entire claim of the assessee, the order of assessment cannot be said to be prejudicial to the interest of the revenue.

1 [1988] 176 ITR 515 (Bombay)

2 [2009] 309 ITR 67 (Guj)

3 [2018] 95 taxmann.com 152 (Gujarat)

- (iii) Learned counsel contended that the Commissioner had proceeded on factually erroneous grounds. Our attention was invited to the revisional order passed by the Commissioner to contend that the Commissioner erroneously records that the Assessing Officer had not examined the applicability of Section 2(15) of the Act. Learned counsel drew our attention to the documents on record before the Assessing Officer to point out that during the assessment proceedings, the Assessing Officer had raised queries with respect to the applicability of the proviso to Section 2(15) of the Act. The assessee had replied to such queries upon which the Assessing Officer did not invoke the said provision. Learned counsel contended that merely because in the order of assessment, the Assessing Officer did not give reasons for accepting the assessee's explanation, would not imply that no inquiry was carried out. The Commissioner, thus proceeded entirely on erroneous footing that the Assessing Officer had not examined the applicability of the proviso to Section 2(15) of the Act.

7. Section 2(15) of the Act as is well known defines the term "charitable purpose". This includes range of activities such as relief for poor, education, medical relief etc and "the advancement of any other object of general public utility". The proviso to Section 2(15) of the Act as it stood at the relevant time reads as under:-

Provided that the advancement of any other object of general public utility shall not be a charitable purpose, if it involves the carrying on of any activity in the nature of trade, commerce or business, or any activity of rendering any service in relation to any trade, commerce or business, for a cess or fee or any other consideration, irrespective of

the nature of use or application, or retention, of the income from such activity:

Provided further that the first proviso shall not apply if the aggregate value of the receipts from the activities referred to therein is twenty-five lakh rupees or less in the previous year"

8. According to the Revenue, since the receipts of the assessee from the activities referred to in the first proviso far exceeds 25 lakh Rupees in the previous year, by virtue of first proviso, the activities of the assessee would be excluded from the expression "charitable purpose". In the present appeal, we are not required to examine the correctness of this contention. We have referred to this proviso only in order to get better clarity on the issue at hand. The question to be decided by us is whether the Tribunal was correct in holding that the Commissioner committed an error in exercising his revisional powers. In this context, we may recall, the Assessing Officer had rejected the assessee's entire claim of exemption under Section 11 of the Act, not with the aid of the proviso to Section 2(15) of the Act but on entirely different ground. Be that as it may, the assessee's claim stood rejected upon which the assessee had filed appeal before the Appellate

Commissioner and the Appellate Commissioner allowed the appeal which was also confirmed by the Tribunal. Under these circumstances, in our opinion, the Tribunal was correct in drawing a conclusion that on the principle of merger, it was not open for the Commissioner to take the order of assessment in revision. Once the entire claim of the assessee for exemption under Section 11 of the Act was at large before the Appellate Commissioner, the Commissioner (Appeals) had wide powers and jurisdiction to examine all aspects of the such a claim. It is well settled that the Commissioner (Appeals) has even the power of enhancement of assessment once an appeal is filed by the assessee. The present case was not even one of the enhancement of assessment, it was a case where the claim of the assessee was rejected by the Assessing Officer on one ground. If the Revenue was of the opinion that such order could have been sustained not on the ground on which the Assessing Officer had rejected it, but on some other legal ground, it was open for the Revenue to argue the same before the Appellate Commissioner. Nothing prevented the Revenue from persuading the Appellate Commissioner to reject the claim of

the assessee on such legal ground. At any rate, the Commissioner in exercise of the revisional powers cannot initiate fresh inquiry about the same claim on the ground that one of the aspects of such a claim was not considered by the Assessing Officer.

9. This Court in case of Narendrakumari (supra) considered the principle of merger of the order of assessment into that of the order of the Appellate Commissioner. It was held that when the order of assessment merges with the order of the Appellate Commissioner in its entirety, the Commissioner would have no jurisdiction to revise such order of assessment. It was held that the order of Assessing Officer was no longer revisable.

10. In case of Nirma Chemicals Works P Ltd (supra), the Division Bench of Gujarat High Court dealt at some length on the principle of merger. It was a case in which the assessee had claimed deduction under Section 80I of the Act which the Assessing Officer allowed partially. The assessee filed an

appeal against the disallowance. The Commissioner (Appeals) allowed the appeal. Subsequently, the Commissioner in exercise of powers under Section 263 of the Act, disallowed the claim under Section 80I of the Act on the ground that the assets used by the assessee in new industrial undertaking had formed part of old plant and machinery and the new industrial undertaking was formed by reconstruction or restructuring or splitting up of the old business. In such background, the Court held that the requirement of fulfillment of the conditions stipulated under sub-section (2) of Section 80I of the Act were very much subject matter of the appeal in relation to the income which was disallowed by the Assessing Officer. On the ground of merger, the Court held that the Commissioner could not have exercised the revisional powers.

11. The Gujarat High Court in case of Haryana Paper Distributors P Ltd (supra) was concerned with a notice issued by the Commissioner for exercising revisional powers under Section 263 of the Act. It was a case in which the Assessing Officer had doubted the genuineness of the purchases shown

by the assessee. The assessee contended that the purchases were genuine and in any case if such purchases are not believed to be genuine, the profit from such dealing should be calculated at the rate of 4% of the turnover. The Assessing Officer accepted the assessee's later contention, made additions at 4% of the GP on the purchases and granted adjustment of the already offered GP @ 1.79% and made limited additions. The assessee had carried the matter in appeal before the Commissioner (Appeals) and argued that the entire addition should be deleted. When such appeal was pending, the Commissioner issued a notice for revision of the order of assessment on the ground that the Assessing Officer having held that the entire purchases were bogus, he erred in limiting the addition only to a small portion of the same on gross profit rate. When this show cause notice was pending, the Appellate Commissioner decided the assessee's appeal against the order of assessment and held that the Assessing Officer could not have made the addition of Rs. 9.57 lacs on GP basis. In such background, the assessee had challenged the notice of revision issued by the Commissioner of Income Tax. The

Court while quashing the notice observed as under:-

"12. Equally importantly, the issue itself had travelled before the Appellate Commissioner at the hands of the assessee. To the extent, the Assessing Officer rejected the assessee's request for making no additions, the assessee carried the matter in appeal. Appellate Commissioner deleted even the limited additions made by the Assessing Officer. The limited additions made by the Assessing Officer and the larger additions proposed by the Commissioner in the impugned notice are inextricably inter linked. The Commissioner argues that the entire purchases were bogus. The Assessing Officer accepted the purchases as genuine but added certain amount on the premise that the assessee's profit from such dealings would have been higher than disclosed. The entire issue was at large before the Appellate Commissioner. It is well known that the Commissioner (Appeals) while hearing the assessee's appeal has powers to even enhance the assessment. If he was of the opinion that not only limited additions made by the Assessing Officer but much larger additions were justified, he could have certainly exercised such powers, of course after putting the assessee to notice. In this context, we may refer to clause (c) of Explanation 1 to sub-section (1) of section 263 of the Act. As is well known sub-section (1) of section 263 of the Act empowers the Principal Commissioner or the Commissioner to call for and examine the record of any proceeding and revise the same if he considers that the order passed therein by the Assessing Officer was erroneous insofar as it is prejudicial to the interest of the Revenue. Clause (c) of Explanation 1 of sub-section (1) provides that for removal of doubts it is hereby declared that, for the purpose of the said sub-section,-

"(c) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal [filed on or before or after the 1st day of June, 1988], the powers of the [Principal Commissioner or] Commissioner

under this sub-section shall extend [and shall be deemed always to have extended] to such matters as had not been considered and decided in such appeal.]"

13. Clause (c) of Explanation 1 may be worded in a manner as suggesting the extent of the powers of the Commissioner for taking an order in revision, its effect is of circumscribing such powers in cases where the order passed by the Assessing Officer has been subject matter of any appeal and such subject matter has been considered and decided in such appeal. This provisions thus statutorily recognizes the principle of merger and avoids any conflict of opinion between two quasi judicial authorities of the same rank. This issue has been considered at length by Division Bench of this Court in case of CIT V. Nirma Chemicals Works (P) Ltd. [2009] 182 taxmann.com 183/309 ITR 67 (Guj). It was held as under:

"20. The stand of the revenue that the assessment order was silent as regards eligibility or otherwise of section 80-I of the Act cannot thus be accepted. As noted hereinbefore the entire section lays down a complete codified scheme in itself for deciding not only the eligibility but also for the computation of the relief to which the assessee is entitled. When the section talks of profits and gains derived from an industrial undertaking the requirement is in relation to the industrial undertaking to which the section applies and which fulfills all the conditions laid down in sub-section (2) of section 80-I of the Act. It is not possible to read the provisions in any other manner whatsoever. Hence, the contention that the eligibility or otherwise u/s.80-I of the Act was never the subject matter of Appeal requires to be rejected. The Tribunal thus committed an error in law in coming to the conclusion that the prohibition imposed by Explanation (c) to section 263 of the Act would not be applicable."

12. Under these circumstances, we do not find that the Tribunal has committed any error. In view of this conclusion, it is not necessary to examine the correctness of the remaining submissions of the learned counsel of the assessee. No question of law arises. The Income Tax Appeal is dismissed.

[SARANG V. KOTWAL, J.]

[AKIL KURESHI, J]