COMMISSIONER OF INCOME TAX, JABALPUR

v.

M/S. DURGA ENGINEERING AND FOUNDRY WORKS

AUGUST 3, 2000

[S.P. BHARUCHA, U.C. BANERJEE AND N. SANTOSH HEGDE, JJ.]

Income Tax Act, 1961 :

Ss. 254(2) and 256—Income return filed by assessee firm—Assessing Officer making additions to the income treating certain amount as unexplained cash credits—Assessment upheld by Commissioner in appeal—Assessee's appeal allowed by Income Tax Appellate Tribunal and Assessing Officer directed to pass fresh order—Neither party sought any reference—Assessee filed before Tribunal an application seeking rectification of its order—Application allowed—Tribunal directed to delete the additions made by Assessing Officer—Revenue filed an application seeking reference on two questions—Tribunal declining to make reference—Revenue then filed an application u/s. 256(2) before the High Court, which dismissed the application on following its earlier judgment in which it had been held that a reference against an order of rectification under s.254(2) was not maintainable—Held, s.256 contemplates the reference of a question of law arising out of an order both under s.254(1) and s.254(2)—Having regard to the fact that the deletions of the additions that had been made by the assessing officer were made in rectification proceedings, the questions that were sought to be referred were questions of law and the High Court ought to have called upon the Tribunal to refer the same to it for its consideration—Tribunal shall refer to the High Court for its consideration the questions set out.

Popular Engineering Co. **v.** *Commissioner of Income Tax, M.P.,* **140 I.T.R. 398, overruled.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4089 of 1998.

From the Judgment and Order dated 11.11.97 of the Madhya Pradesh High Court in I.T.R. No. 13 of 1996.

Harish N. Salve, Solicitor General, B.B. Ahuja, N.K. Aggarwal, B.K. Prasad, D.S. Mehra, Ms. Sushma Suri and Prakash Shrivastava for the appearing parties.

A The following order of the Court was delivered :

The assessment years in question are 1987-88 and 1988-89. For these assessment years, the Income Tax Officer made additions to the income of the assessee, which is a partnership firm of sums which, in his view, represented the unexplained cash credits in the name of partners of the firm. The B assessments were upheld by the Commissioner in appeal. The Income Tax Appellate Tribunal, on 7th November, 1994, allowed the assessee's appeal and, setting aside the assessment orders, restored the matters to the file of the Assessing Officer, directing him to pass a fresh order after allowing the assessee the opportunity to support the documents that it had earlier filed C before him. Neither party sought to file any reference application there against but the assessee filed an application before the Tribunal under Section 254(2) of the Income Tax Act, 1961 seeking to rectify it on the basis that a contention that it had raised, had not been decided. On 4th January, 1995, the Tribunal allowed the rectification application. It noted that the assessee's objection was that the assessment on account of the credits should be made in the hands of D the partners of the assessee as they had made payments by cheque. The Tribunal observed that this issue had not been decided by it and that there was sufficient force in it. Accordingly, it rectified "the error by disposing of the preliminary issues raised by the assessee. We accordingly amend our order and direct that the additions made by the Assessing Officer amounting to Rs. E 5,00,851 and Rs. 85,700 be deleted from their income for assessment years 1987-88 and 1988-89. As observed, the Department may investigate the matter in the hands of the partners".

The Revenue filed an application before the Tribunal seeking reference of two questions that arose out of the order on the rectification application. F The questions read thus :

> "1. Whether on the facts and in the circumstances of the case, the Tribunal was justified in holding that the provisions of section 68 of the Income Tax Act, 1961 are not applicable to the facts of the present case?
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> 2. Whether on the facts and in the circumstances of the case, the Tribunal was justified in law in deleting the additions of Rs. 5,00,851 and Rs. 85,700 made by the A.O. u/s. 68 of the Income-tax Act, 1961, representing the unexplained cash credits in the accounts of the partners?
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The Tribunal declined to make the reference on the basis that these were questions of fact. The Revenue then made an application to the High Court under Section 256(2) of the Income Tax Act and, by the order under challenge, the same was dismissed. The order under challenge followed an earlier decision of the High Court, in the case of *Popular Engineering Co.* v. *Commissioner of Income Tax, M.P.*, (140 I.T.R. 398), in which it had been held that a reference against an order of rectification under Section 254(2) was not maintainable.

In the earlier Judgment, the High Court said :

"The language used in s.256(1) shows that the order contemplated under s.256(1) is the order passed under s.254 of the Act. Under s.254(1) the Appellate Tribunal passes an order on the appeal filed by the assessee or the Revenue. This order may be amended under s. 254 (2) of the Act with a view to rectifying any mistake apparent from the record. If, however, the application for rectification is dismissed, there is no amendment of the order passed under s.254(1) of the Act. Since no reference in the instant case was sought in respect of the appellate order passed under s.254(1), we are of the view that no reference from the order rejecting an application for rectification of any mistake is tenable under s.256(1) of the Act. The position obviously would have been different had the Appellate Tribunal amended its appellate order with a view to rectifying any mistake from the record. In that case the amended order could be a subject-matter of reference under s.256(1) of the Act. But if the order is not amended and the application for rectification is dismissed, the only order which stands is the order passed in appeal under s.254(1) of the Act and if no reference has been sought in respect of such order, the same becomes final in view of the language used in s.254(4) of the Act.

Section 256 read thus :

"256. (1) The assessee or the Commissioner may, within sixty days of the date upon which he is served with notice of an order passed before the 1st day of October, 1998 , under section 254, by application in the prescribed form, accompanied where the application is made by the assessee by a fee of two hundred rupees, require the Appellate Tribunal to refer to the High Court any question of law arising out of such order and, subject to the other provisions contained in this section, the Appellate Tribunal shall, within one hundred and twenty days of the receipt of such application, draw up a statement of the case

A and refer it to the High Court :

Provided that the Appellate Tribunal may, if it is satisfied that the applicant was prevented by sufficient cause from presenting the application within the period hereinbefore specified, allow it to be presented within a further period not exceeding thirty days.

B

(2) If, on an application made under sub-section (1), the Appellate Tribunal refuses to state the case on the ground that no question of law arises, the assessee or the Commissioner, as the case may be, may, within six months from the date on which he is served with notice of such refusal, apply to the High Court, and the High Court may, if it is not satisfied with the correctness C of the decision of the Appellate Tribunal, require the Appellate Tribunal to state the case and to refer it, and on receipt of any such requisition, the Appellate Tribunal shall state the case and refer it accordingly.

(3) Where in the exercise of its powers under sub-section (2), the D Appellate Tribunal refuses to state a case which it has been required by the assessee to state, the assessee may, within thirty days from the date on which he receives notice of such refusal, withdraw his application, and, if he does so, the fee paid shall be refunded.

Section 254, so far as it relevant, reads thus :

E 254. (1) The Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit.

(2) The Appellate Tribunal may, at any time within four years from the F date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it under sub-section (1), and shall make such amendment if the mistake is brought to its notice by the assessee or the Assessing Officer :

Provided that an amendment which has the effect of enhancing an G assessment or reducing a refund or otherwise increasing the liability of the assessee, shall not be made under this sub-section unless the Appellate Tribunal has given notice to the assessee of its intention to do so and has allowed the assessee a reasonable opportunity of being heard :

Provided further that any application filed by the assessee in this sub- H section on or after the 1st day of October, 1998, shall be accompanied by a

fee of fifty rupees. A

Section 256 empowers the assessee and the Revenue to "require the Appellate Tribunal to refer to the High court any question of law arising out of an order passed under Section 254." Section 254(1) states that the Appellate Tribunal may, after giving both parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit. It would appear that the High Court read Section 254(1) as referring only to orders passed by the Tribunal on an appeal. We do not think that that would be a correct way of reading Section 254(1). Section 254(1) empowers the Tribunal to pass orders not only on an appeal before it but also upon such applications as are made in the appeal and it specifies that, before doing so, it shall hear both parties to the appeal. Section 254(2) permits the Tribunal to rectify any mistake apparent from the record and amend any order passed by it under sub-section (1) within four years from the date of that order. The proviso requires it to give notice to the assessee before enhancing an assessment and allow him a reasonable opportunity of being heard. It will be seen, therefore, that the consequence of an order passed in rectification under Section 254(2) could have serious financial implications for the assessee and it is unthinkable that the assessee should be left without a remedy, by way of a reference to the High Court, if his assessment is erroneously increased in rectification proceedings. B C D

It is also to be noted that Section 256 contemplates the reference of a question of law arising out of an order passed "under Section 254": that is to say, an order both under Section 254(1) and Section 254(2). E

In our view, therefore, under the provisions of Section 256, a reference may be made to the High Court of a question of law that arises upon any order of the Tribunal. The view taken by the High Court in the earlier judgment in *Popular Engineering Co.* and followed by it in the order under challenge is erroneous. F

There is no doubt in our mind, particularly having regard to the fact that the deletions of the additions that had been made by the assessing officer were made in rectification proceedings, that the questions that were sought to be referred were questions of law and that the High Court ought to have called upon the Tribunal to refer the same to it for its consideration. G

Learned counsel for the assessee submitted that pursuant to the order of the Tribunal in the rectification proceedings, the amounts of the additions had H

A been assessed in the hands of the partners of the assessee and that, therefore, nothing survived for consideration insofar as the assessee was concerned. It is unclear whether the assessments in the hands of the partners were on a protective basis or otherwise. In any event, this is something that the High Court can go into in greater detail when it hears the reference.

B The civil appeal is allowed. The order under appeal is set aside. The Tribunal shall refer to the High Court for its consideration the questions set out above, having framed a statement of Case.

No order as to costs.

R.P. Appeal allowed.