A

INCOME-TAX OFFICER, LUCKNOW

v.

M/S. S. B. SINGHAR SINGH & SONS & ANR.

August 17, 1976

[H. R. KHANNA, R. S. SARKARIA AND JASWANT SINGH, JJ.]

B

Constitution of India, 1950—Art. 226—High Court—if could interfere with the appellate orders of Income Tax Appellate Tribunal under Art. 226.

Since the assessee had not maintained complete and regular accounts for the purpose of Excess Profits tax, the Excess Profits Tax Officer assessed tax on the basis of accounts of certain previous years chosen by the assessee as his "standard period", pointing out that because of this position it was not possible C to make any adjustment for variations in average capital. The Assistant Appellate Commissioner upheld the assessment order. In appeal to the Appellate Tribunal one of the specific grounds taken by the assessee was that the Excess Profits Tax Officer and the Assistant Appellate Commissioner had erred in not allowing proper standard profits in accordance with the standard period subject to the adjustment on account of increase and decrease of capital in the relevant chargeable accounting period and that they were *prepared* to file computation of average capital. Without discussing the ground relating to the standard profits the Tribunal disposed of the appeals. The assessee's second application D alleging that the ground relating to the standard profits was not disposed of by it was rejected by the Tribunal. In an application under s. 66(2) of the Income Tax Act before the High Court, the assessee did not ask for a reference on this ground. But during proceedings for preparation of statement of case, the assessee's application requesting the Tribunal to refer this ground to the High Court was rejected by it. The assessee's petition for a writ of Mandamus requiring the Tribunal to consider the ground relating to standard profits was allowed by the High Court.

E

Allowing the Department's appeal to this Court,

HELD : The High Court could not justifiably interfere, in the exercise of its extraordinary jurisdiction under Art. 226 of the Constitution, with the appellate orders of the Tribunal. The question as to whether the omission to record a finding on Ground No. 1 by the Tribunal was due to the failure of the appellant to urge that ground or due to a lapse on the part of the Tribunal, which deserved rectification, was a matter entirely for the authorities under F the statute to decide. [219 G]

Shivram Poddar v. *Income-tax Officer* (1964) 51, I.T.R. 823, 829 (S.C.) applied.

In the instant case the High Court had assumed jurisdiction on the assumption that a certain ground had been urged before the Tribunal which had arbitrarily refused to consider the same and record a finding thereon. This assumption, stood thoroughly discounted by the concomitant circumstances of the case in- G cluding the dilatory and questionable conduct of the assessee. This was not a fit case for the exercise by the High Court of its special jurisdiction under Art. 226. [220 C]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1539 of 1971.

(From the Judgment and Order dated 5-8-1969 of the Allahabad High Court in Special Appeal No. 58/65).

H

B. B. Ahuja and *R. N. Sachthey,* for the Appellant.

A. T. M. Sampath and *Ram Lal,* for Respondent No. 1.

The Judgment of the Court was delivered by

SARKARIA, J.—This appeal on certificate is directed against an appellate judgment, dated August 5, 1969, of a Bench of the High Court of Allahabad. It arises as follows :

M/s. S. B. Singar Singh and Sons (hereinafter called the assessee) were assessed to Excess Profits tax for the chargeable accounting periods, ending March 31, 1945 and March 31, 1946, under two assessment orders dated August 26, 1949. The previous years 1936-37 was chosen by the assessee as his standard period." The profits of that year were Rs. 38,703/-. After deducting the profits of the standard year, the Excess Profits Tax Officer, assessed the tax on the remaining amounts of profits. The Excess Profits Tax thus assessed for the accounting years, was to the tune of Rs. 1,06,181.5 and Rs. 48,978/-, respectively. In his orders, the assessing Officer said that "for reasons detailed in the earlier assessment orders no adjustments are made for capital variations in the standard period and the chargeable accounting period". These reasons as given in the earlier assessment order, dated October 30, 1947, pertaining to the chargeable accounting period ending March 31, 1944, were :

> "As complete and regular accounts are not maintained by the assessee, it is not possible to make any adjustment for variations in average capital which cannot be accurately ascertained".

Against the orders of assessment, the assessee preferred two appeals on September 24, 1949 to the Assistant Appellate Commissioner. By two separate applications dated October 24, 1949, the assessee took an additional ground of appeal—which obviously he had not taken in the original memorandum of appeal—that the Excess Profits Tax Officer had erred in not allowing adjustments on account of the increase and decrease of capital in the relevant chargeable accounting period. The assessee added that he "was always prepared to file his computations of average capital". Dismissing the appeals by his orders, dated November 24, 1949, the Assistant Appellate Commissioner negatived the assessee's contention, in these terms :

> "As in these years no regular accounts have been maintained and it is not possible to make any adjustment for variations in average capital which cannot be exactly ascertained. No figures have been shown to me, nor has any exact working been furnished at this stage. The accounts are left in the same manner as for the earlier years. Profits in the major accounts had to be worked out by the application of a rate to the turnover. I am, thus, unable to allow this contention."

Aggrieved, the assessee carried appeals to the Income-tax Appellate Tribunal. In the memoranda of appeals, one of the specific grounds taken was, that "the Excess Profits Tax Officer and the Assistant Appellate Commissioner had erred in not allowing to the assessee proper standard profits in accordance with the standard period subject to the adjustment on account of the increase and decrease of capital in the relevant chargeable accounting period." It was reiterated that "the

A appellant was always prepared to file his computation of average capital."

This ground relating to standard profits was not discussed by the Tribunal and no finding was recorded thereon. The Excess Profits Tax Appeals and other Income-tax appeals filed by the assessee were heard together by the Tribunal and disposed of by common orders dated February 24, 1951. In the Income-tax appeals, some relief B was granted, but in the Excess Profits appeals, no relief was granted due to the variation of the capital in the chargeable accounting period of 1945-46 and 1946-47.

The assessee on July 27, 1951, made an application under s. 35 of the Income-tax Act, 1922 for rectification of its order to the Tribunal on grounds *other than the one* regarding variation in the standard C profits due to increase and decrease of the capital. This application was dismissed on August 27, 1951 by the Tribunal on the ground that there was no mistake apparent on the record. No grievance was made in this application that the Tribunal did not consider and decide the ground relating to adjustment of standard profits according to variation in capital during the relevant period.

On March 11, 1954, the assessee made a representation to the D Central Board of Revenue praying for reopening of the assessments. In this representation, also, he did not take up Ground No. 1. Subsequently however on May 24, 1954 he wrote a letter to the Income-tax Officer saying that he was sorry to omit 'one important point' *i.e.*, Ground No. 1, from his representation to the Board, and that the Income-tax Officer should "supplement the same while making (his) report to the higher authorities.' His representation dated March 11, E 1954 and the petition dated May 24, 1954, both were rejected and the Commissioner communicated those rejections to the assessee by a letter dated May 25, 1955, saying that he did not see any justification for re-opening the assessments which had become final and closed.

Thereafter on April 2, 1956, the assessee made a second application to the Tribunal (which in substance was one for review of its F orders, dated February 24, 1951), contending that Ground No. 1 raised in his two appeals, relating to the standard profits of the two chargeable accounting periods and pointing out the failure of lower authorities to make necessary adjustments in such profits according to s. 6 of the Excess Profits Tax Act (hereinafter referred to as Ground No. 1) was not disposed of by the Tribunal. It was prayed that the appeals relating to excess profits tax matters which should G be deemed to be still pending owing to the non-decision of Ground No. 1 be disposed of after hearing the assessee. The Tribunal rejected this contention with the remark that the appeals were decided as early as 24th February, 1951 and it is now futile to contend that the matter was pending when the Tribunal had already passed orders and the orders were served on the assessee." The Tribunal further observed that the absence of a reference "to the contention of the assessee re- H garding the standard profits and the necessary adjustments would not render the Tribunal's order a nullity, nor would it mean that the Tribunal had partially disposed of the appeals and some residue is pending". In the alternative, it held that even on the assumption that

Ground No. 1 was argued and was not disposed of by the Tribunal, the proper remedy for the assessee was either to apply for rectification under s. 35 or to move an application under s. 66. The Tribunal refused to treat this application as one for rectification because, in its opinion, such an application would be much too time-barred. In the result, the Tribunal dismissed that application by an order dated June 9, 1956.

The assessee had filed a reference application, also under s. 66(1) of the Income-tax Act in these cases. That application was dismissed by the Tribunal on August 28, 1951. The assessee then made applications under s. 66(2) of the Income-tax Act before the High Court requesting for reference on certain question of law arising out of the order, dated February 24, 1951, of the Tribunal. In these applications, also, he did not ask for reference on a question relating to Ground No. 1 (regarding adjustment of standard profits). These applications were allowed by the High Court by an order, dated April 12, 1956, whereby the Tribunal was directed to state a case and refer for decision certain questions of law to the High Court.

Thereafter, during the proceedings before the Tribunal for preparation of the statement of the case, the assessee moved an application, dated July 23, 1957, requesting it to refer the question of adjustment of standard profits on account of increase and decrease in the capital in the relevant periods to the High Court, in addition to the questions of law directed by the High Court to be referred to it. This application was rejected for the reason that the question had not been raised in the reference application, nor did it arise out of the appellate orders of the Tribunal.

On July 24, 1957, the Tribunal stated the case and made a reference on the other question to the High Court in compliance with that Court's order, dated April 12, 1956.

On November 4, 1968, the assessee filed a writ petition in the High Court praying for a writ of Mandamus requiring the Tribunal to consider his Ground No. 1 mentioned in the Excess Profits Tax Appeals Nos. 651 and 660 of 1949 and 1950 and his subsequent application dated April 2, 1956.

The writ petition was heard by a learned single Judge of the High Court who held that while disposing of the appeals, it was the duty of the Tribunal to record a finding on Ground No. 1 which had been specifically raised in the memoranda of appeals before it, that the Tribunal therefore, could and should have reviewed its orders and rectified its mistake in the exercise of its inherent powers when that mistake was brought to its notice by the assessee by his application dated April 2, 1956; that s. 35 of the Income-tax Act which provides a period of four years' limitation for seeking rectification of mistakes in assessment orders, was not applicable to assessment orders made by the Tribunal under the Excess Profits Act; that consequently, the Tribunal was in error in refusing to treat the assessee's application, dated April 2, 1956, as one for rectification of a mistake of the Tribunal on

A the ground of limitation. In the result, the learned Judge set aside the Tribunal's order, dated June 9, 1956, and directed the Tribunal to dispose of the assessee's application dated April, 2, 1956, afresh in accordance with law.

The Revenue filed a Special Appeal against the order of the learned single Judge before the Appellate Bench of the High Court. The Bench B dismissed the appeal and affirmed the findings and orders of the learned single Judge.

Hence this appeal.

Mr. Ahuja, appearing for the appellant, contends that the writ petition of the assessee should have been thrown out by the High C Court on the preliminary ground that he had not come with clean hands. In this connection Counsel has pointed out several circumstances which according to him, belie the main plea of the assessee that the Tribunal had not considered his Ground No. 1 although the same was urged before it at the hearing of the appeals. It is stressed that Ground No. 1 was not originally taken by him in the grounds of appeal filed before the Assistant Appellate Commissioner, although D subsequently in the Additional grounds filed about one month after the institution of the appeals, he, as an after-thought, did introduce "Ground No. 1"; that he did not make any grievance whatever on the score of Ground No. 1 in his application for rectification of the Tribunal's orders, filed on July 27, 1951; that for more than 5 years after the announcement of the appellate orders of the Tribunal, he made no application to the Tribunal for review and rectification of its appellate E orders in relation to Ground No. 1; that the assessee delayed the making of the application, dated April 2, 1956 presumably with a view to ensure that at the time of its presentation, none of the members of the Tribunal who had originally decided the assessee's appeals, was there to hear the application; that even in this inordinately delayed application, review and rectification was not asked for in a straight forward manner but it was disguised as an application for decision of F the appeals which on account of non-decision of Ground No. 1 were alleged to be still pending; that the writ petition was filed after an abnormal delay of ten years; that a perusal of the assessment orders made by the Excess Profits Tax Officer and the Assistant Appellate Commissioner, and even the memoranda of appeals filed before the Tribunal shows that at no stage the assessee furnished complete accounts or even a statement showing variation in the capital during G the relevant periods. It is emphasised that all that the assessee said in the memoranda of appeals was that he was *"prepared"* to furnish a statement of such computation and accounts. It is further pointed out that no certificate of Shri Surinderjit Singh, Advocate who is supposed to have argued the appeals before the Tribunal, was filed. It is maintained that the only reasonable inference from these circumstances was that Ground No. 1 was not pressed or argued at all by Shri H Surinderjit Singh before the Tribunal who consequently, did not think it necessary to deal with it.

Mr. Sampath, appearing for the assessee-respondent has not been able to deny the existence of the circumstances pointed out by Mr.

Ahuja. His argument is that in the affidavit accompanying the writ petition, the deponent had sworn that Ground No. 1 was, in fact, argued before the Tribunal and that this sworn statement had been believed by the High Court. This being the case, it is argued, this Court should not re-open the question as to whether Ground No. 1 was, in fact, argued or not before the Tribunal. According to Mr. Sampath, over 5 years' delay in making the application dated April 2, 1956, partly stood explained by the circumstance that he had made a representation to the Board supplemented by the assessee's letter of May 24, 1954 to the Income-tax Officer, seeking relief on the basis of Ground No. 1.

We find a good deal of force in the submissions made by Mr. Ahuja. The sheet-anchor of the assessee's case in the writ petition was that at the hearing of the appeals, his Counsel had argued Ground No. 1 set out in the memoranda of appeals, but the Tribunal did not consider it at all. The question whether or not this Ground had been argued, was one of fact. The tell-tale circumstances enumerated by Mr. Ahuja, unerringly lead to the conclusion that, in all probability, Ground No. 1 was not argued by the Counsel, possibly because he was aware that in the absence of a complete statement of accounts showing variations in the capital during the relevant periods, a contention founded on Ground No. 1 would be an exercise in futility. It is noteworthy that at no stage before the Revenue authorities or the Tribunal, did the assessee categorically say that he had actually produced a complete statement of accounts and computation of the increase and decrease in capital. All that he said in his Additional Grounds of appeal before the Assistant Appellate Commissioner and the Appellate Tribunal in Ground No. 1, was that he was *prepared* to file such a statement. Shri Surinderjit Singh, Counsel who argued the appeals, has not thought it fit to certify that Ground No. 1 was actually argued, and not abandoned, by him. The affidavit of another person who could not be the best informed person on this point, was of little value and could hardly displace the irresistible inference arising from the surrounding circumstances and the conduct of the assessee, namely, that his Counsel had not argued on Ground No. 1, at all and had thus given it up.

In the light of what has been observed above, we are of opinion that the High Court could not justifiably interfere in the exercise of its extraordinary jurisdiction under Article 226 of the Constitution with the appellate orders of the Tribunal. In any case, the question as to whether the omission to record a finding on Ground No. 1 by the Tribunal was due to the failure of the appellant to urge that ground or due to a lapse on the part of the Tribunal, which deserved rectification, was a matter entirely for the authorities under those Taxation statutes. It will be well to recall once more what this Court speaking through J. C. Shah J. (as he then was,) had stressed in *Shivram Poddar* v. *Income-tax Officer*(1).

> "Resort to the High Court in exercise of its extraordinary jurisdiction conferred or recognised by the Constitution in

(1) [1964] 51 I.T.R. 823, 829 (S.C.).

A matters relating to assessment, levy and collection of income-tax may be permitted only when questions of infringement of fundamental rights arise, or where on undisputed facts the taxing authorities are shown to have assumed jurisdiction which they do not possess. In attempting to bypass the provisions of the Income-tax Act by inviting the High Court to decide questions which are primarily within the jurisdiction B of the revenue authorities, the party approaching the court has often to ask the Court to make assumptions of facts which remain to be investigated by the revenue authorities."

In the instant case, the High Court had assumed jurisdiction on the assumption that a certain ground had been urged before the Income-tax Appellate Tribunal which had arbitrarily refused to consider the same C and record a finding thereon. This assumption, in our opinion, stood thoroughly discounted by the concomitant circumstances of the case, including the dilatory and questionable conduct of the assessee. This was therefore not a fit case for the exercise of its special jurisdiction under Article 226 by the High Court.

Accordingly, on this short ground we allow the appeal and dismiss D the writ petition. As the appeal succeeds on a preliminary ground, we do not feel it necessary to express any opinion on the question as to whether or not the Appellate Tribunal under the Excess Profits Tax Act has statutory or inherent power to review and rectify mistakes in its orders. The assessee shall pay one set of the costs of the appellant.

P.B.R. *Appeal allowed.*