M.B. ABDULLA

v.

COMMISSIONER OF INCOME-TAX, KERALA

MARCH 19, 1990

[SABYASACHI MUKHARJI, C.J. AND M.M. PUNCHHI, J.]

Income Tax Act, 1961: Section 256(1)—Reference—Question arising out of the order of the Tribunal—Value of gold worth Rs.20 Lakhs confiscated from the assessee added to the income—Application for treating the amount as business loss rejected—High Court dismissed the application for reference—Whether Rs.20 Lakhs could be treated as income of the assessee and whether that sum could be deducted as business loss—Principles.

On November 11, 1968 the Petitioner was apprehended carrying contraband gold in a Maruti Car driven by him. He was taken into custody and the seized gold was confiscated. For the assessment year 1960-70 the Petitioner had filed a return declaring total income of Rs.9,571. In finalising the assessment the Income Tax Officer added Rs.20 Lakhs being the price of the confiscated gold as income from undisclosed source. The Petitioner went in appeal before the Appellate Assistant Commissioner who reduced the income by that amount holding that the assessee was not the owner of the confiscated gold. On second appeal by the revenue the Tribunal restored the order of the I.T.O. The Petitioner then moved a Misc. Application under S. 254(1) for amendment for treating Rs.20 Lakhs as business loss which was rejected by the Tribunal. The Petitioner then moved a Petition u/s 256(1) of the Income Tax Act seeking reference to the High Court raising certain questions, which was turned down by the Tribunal holding that none of the questions sought to be raised was decided by the Tribunal and as such did-not arise from its order. The High Court also declined the application to direct the Tribunal to refer the questions and to state the case to it.

Hence this special leave petition directed against both the order of the Tribunal as well as the High Court. Dismissing the Special Leave Petition, the Court,

HELD: The real and substantial question posed and canvassed before the Tribunal in its appellate order and in the appeal was whether the sum of Rs.20 Lakhs be considered as part of the income of the

assessee and as such suffer taxation. The question sought to be raised is whether in view of the decision of the Court in *Piara Singh's* case this amount could be treated as legitimate business loss of the assessee. It is possible to take the view that this is substantially a different question, namely whether an amount is a business loss even assuming that it was the income. It is possible and conceivable to consider two different questions, namely whether a certain sum of money is the income of the assessee and secondly, whether even assuming that such was the income, was that income liable to be deducted in view of the provisions of the Act. Considerations which go into determination whether an amount should be treated as income and considerations which are relevant to determine whether even assuming that, that was the income the amount was deductible, are different. The question in this form was not canvassed before the Tribunal. The view taken by the Tribunal and the High Court is a possible view and they have borne in mind the principles of law laid down by the Court in *Scindia Steam Navigation's* case. [11B-E; 12E]

C.I.T., Patiala **v.** *Piara Singh,* **124 ITR 40 2 and** *C.I.T., Bombay* **v.** *Scindia Steam Navigation Co. Ltd.,* **[1961] 42 ITR 586, referred to.**

CIVIL APPELLATE JURISDICTION: Special Leave Petition (Civil) Nos. 4973/89 and 12763/89.

From the Judgment and Order dated 31.1.1989 of the Kerala High Court in O.P. No. 3218/88 and dated 25.3.82 of the Income Tax Appellate Tribunal, Cochin in I.T.A. No. 302/Coch/1977-78.

K.K. Venugopal and K.R. Nambiar for the Petitioner.

Soli J. Sorabjee, Attorney General, S. Ganesh and Ms. A. Subhashini for the Respondents.

The Judgment of the Court was delivered by

SABYASACHI MUKHARJI, CJ. This is a petition under article 136 of the Constitution for leave to appeal against the orders of the tribunal and the High Court. The High Court vide its order dated 31st January, 1989 had dismissed the application for reference. There is also an order of the tribunal refusing to make a reference under section 256(1) of the Income Tax Act, 1961 (hereinafter called 'the Act'). This petition also seeks leave to appeal directly from the said order of the tribunal.

However, in order to appreciate the controversy in this case the facts reiterated by the High Court of Kerala in its said judgment and order are important, it had observed as follows: A

> "For the assessment year 1969-70 the petitioner filed a return declaring a total income of Rs.9,571. In completing the assessment the assessing authority proceeded on the basis that the assessee was the owner of the gold seized on 9.11.68 and confiscated by the Customs authorities worth Rs.20 lakhs and accordingly the Income-tax Officer treated the sum of Rs.20 lakhs as income from undisclosed source applying the provisions of Section 69-A of the Income-tax Act, 1961. On appeal, the Appellate Assistant Commissioner held that the assessee was not the owner of the contraband gold seized by the Central Excise Authority and therefore reduced the assessee's total income by Rs.20 lakhs. The Revenue filed a second appeal before the Appellate Tribunal, Cochin Bench. After going through the evidence the Tribunal came to the conclusion that the car belonged to the assessee and the special places of concealment had been provided by design in the car. Further the assessee himself was driving the car in which the gold was found. The assessee also has not attributed the ownership to anybody else. The assesee also has not established that the gold was given to him by any third party. In view of all these, the addition of Rs.20 lakhs made by the Income-tax Officer but deleted by the Appellate Asstt. Commissioner was restored. The additional ground raised by the Revenue that the appeal is not maintainable before the Appellate Asstt. Commissioner was rejected. The assessee thereafter filed a Miscellaneous Petition for rectification of the order of the Tribunal. The rectification sought to be made are:— B C D E F
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> (1) Business loss to the tune of Rs.20,00,000 incurred by the assessee due to investment in gold and the confiscation of the gold by the Customs authorities be allowed for the assessment year 1969-70, in view of the decision of the Supreme Court in *CIT* v. *Piara Singh,* decided on 8-5-1980 and reported in 124 ITR 40, G
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> (2) the income tax and special surcharge amounting to Rs. 16,19,395, Rs.20,00,000 and H

A (3) as the tax has already been collected from the amount of Rs.20,00,000 no interest was payable."

The High Court noted that the tribunal could not accede to the requests of the petitioner as these could not be considered as mistakes apparent from records. The points had not been raised by way of B cross-appeal or cross-objections. Thereafter, the assessee filed a petition u/s 256 of the Act seeking reference of the following questions of law:

"1. Whether the Tribunal is right in law in its view that the right to file an application under Section 254(2) of the C Income-tax Act, 1961 is open to be exercised only by the applicant and not by the respondent in the appeal before it?

2. Whether the Tribunal is right in law in rejecting the application under Section 254(2) on the ground that the D applicant was not the appellant before it and that he had also not filed any memo of Cross-objections in the appeal against him?

3. Whether on the facts and in the circumstances of the case the assessee was bound to raise before the Tribunal, at E the stage when he was only supporting the order appealed against him, of his case for deduction which he was legally entitled to claim in case of allowance of the appeal against him?

4. Whether on facts and circumstances of the case the F Tribunal was right in law in holding that the claim of loss on account of confiscation of the gold was not the subject matter of the appeal?"

The tribunal dismissed the petition holding that none of the questions sought to be raised was decided by the tribunal and as such G did not arise out of the order of the tribunal. Aggrieved by these two orders, one being refusal by the tribunal to refer the question as aforesaid u/s 256(1) and the other of the High Court directing the tribunal to refer the questions and state the case to the High Court, the petitioner has come up to this Court. We find that it can legitimately be argued in the facts and the circumstances of the case that the ques- H tion which essentially arose, which had to be borne in mind and which

was argued before the tribunal was, whether the sum of Rs.20 lakhs could be subject to taxation in the context as found by the tribunal as the income of the assessee. The assessee's further contention was that in view of the decision of this Court in *C.I.T. Patiala* v. *Piara Singh,* 125 ITR 40 even if Rs.20 lakhs could be treated as the income of the assessee inasmuch as this has been ordered to be confiscated, there was a business loss as held in the said decision of this Court. Therefore, this question should have been gone into which was sought to be raised by a Miscellaneous Application before the tribunal after disposal of the appeal by the tribunal.

The principle by which this should be determined has been fairly laid down by this Court in *C.I.T., Bombay* v. *Scindia Steam Navigation Co. Ltd.*, [1961] 42 ITR 589 wherein this Court at page 612 had observed as follows:

> "Section 56(I) speaks of a question of law that arises out of the order of the Tribunal. Now a question of law might be a simple one, having its impact at one point, or it may be a complex one, trenching over an area with approaches leading to different points therein. Such a question might involve more than one aspect, requiring to be tackled from different standpoints. All that section 66(I) requires is that the question of law which is referred to the court for decision and which the court is to decide must be the question which was in issue before the Tribunal. Where the question itself was under issue, there is no further limitation imposed by the section that the reference should be limited to those aspects of the question which had been argued before the Tribunal. It will be an over-refinement of the position to hold that each aspect of a question is itself a distinct question for the purpose of section 66(I) of the Act. That was the view taken by this Court in *Commissioner of Income-tax* v. *Ogale Glass Works Ltd.*, [1954] 25 ITR 529 and in *Zoraster & Co.* v. *Commissioner of Income-tax,* [1960] 40 ITR 552, and we agree with it. As the question on which the parties were at issue, which was referred to the court under section 66(I), and decided by it under section 66(5) is whether the sum of Rs.9,26,532 is liable to be included in the taxable income of the respondents, the ground on which the respondents contested their liability before the High Court was one which was within the scope of the question, and the High Court rightly entertained it.

A It is argued for the appellant that this view would have the effect of doing away with limitations which the Legislature has advisedly imposed on the right of a litigant to require references under section 66(I), as the question might be framed in such general manner as to admit of new questions not argued being raised. It is no doubt true that B sometimes the questions are framed in such general terms that, construed literally, they might take in questions which were never in issue. In such cases, the true scope of the reference will have to be ascertained and limited by what appears on the statement of the case. In this connection, it is necessary to emphasise that, in framing questions, the C Tribunal should be precise and indicate the grounds on which the questions of law are raised. Where, however, the question is sufficiently specific, we are unable to see any ground for holding that only those contentions can be argued in support of it which had been raised before the Tribunal. In our opinion, it is competent to the court in D such a case to allow a new contention to be advanced, provided it is within the framework of the question as referred."

Mr. Venugopal, appearing for the petitioner, drew our attention to the observations of Justice Shah, as the learned Chief Justice then E was, at p. 617 which are to the following effect:

"The source of the question must be the order of the Tribunal; but of the question it is not predicated that the Tribunal must have been asked to decide it at the hearing of the appeal. It may very well happen and frequently cases F arise in which the question of law arises for the first time out of the order of the Tribunal. The Tribunal may wrongly apply the law, may call in aid a statutory provision which has no application, may even misconceive the question to be decided, or ignore a statutory provision which expressly applies to the facts found. These are only illustrative case: G analogous cases may easily be multiplied. It would indeed be perpetrating gross injustice in such cases to restrict the assessee or the Commissioner to the questions which have been raised and argued before the Tribunal and to refuse to take cognisance of question which arise out of the order of the Tribunal, but which were not argued, because they could H not (in the absence of any indication as to what the

Tribunal was going to decide) be argued."

As mentioned hereinbefore, this is an application for leave to appeal from the decisions of the tribunal and the High Court under Article 136 of the Constitution. The real and substantial question posed and canvassed before the tribunal in its appellate order and in the appeal, as is manifest from the facts stated before, was, whether a sum of Rs.20 lakhs could in the facts and the circumstances be considered as part of the income of the assessee and as such suffer taxation. Now the question sought to be raised is, whether in view of the decision of this Court in *Piara Singh's* case (supra) the amount of Rs.20 lakhs could be treated as legitimate business loss of the assessee.

It is possible to take the view that this is substantially a different question, namely, whether an amount is a business loss even assuming that it was the income. It is possible and conceivable to consider two different questions, namely, whether a certain sum of money is the income of the assessee, and secondly, whether even assuming that such was the income, was that income liable to be deducted in view of the provisions of the Act. It is possible to take the view that these are substantially different questions and not merely different aspects of the same question. Considerations which go into determination of whether an amount should be treated as income and the considerations which are relevant to determine whether even assuming that, that was the income the amount was deductible, are different. The question in this form was not canvassed before the tribunal at any point of time in the alternative.

It may be reiterated that the Central Excise Officers at Valayar check-post seized gold weighing 16,000 gms. from Car No. MYX 9432, which was being driven by the petitioner along with the documents and took the petitioner into custody. The Collector of Central Excise, Madras had confiscated the gold in question and found that the petitioner was in possession of the gold. The assessment of the petitioner for the year in question was originally completed at a total income of Rs.1,571. Subsequent to the completion of the original assessment, the petitioner filed a return declaring a total income of Rs.9,571. The Income Tax Officer issued notice under section 148 of the Act.

The Tribunal ultimately had accepted the revenue's contention, restored the addition of Rs.20 lakhs made by the assessing authority, *inter alia,* holding that the onus was on the petitioner to prove that the

A gold was not owned by him which onus the petitioner had failed to discharge. The Tribunal had gone into and adjudicated the question substantially raised by the petitioner that the confiscated gold could not be treated as the income of the petitioner. The Tribunal rejected the application of the petitioner on the ground that the claim of loss on account of the confiscation of the gold was not the subject-matter of B the appeal. The principles of law have been discussed by this Court in *Scindia Steam Navigation Co. Ltd's* case (supra).

In the facts and the circumstances of the case, the Tribunal and the High Courts have taken the view that whether certain sum of money can be treated as the income of an assessee and whether that C sum of money could be deducted as loss are different question of law and not different aspects of the same question. The Tribunal and the High Court have taken a particular view. They have borne in mind the correct principles that are applicable in the light of the law laid down by this Court in *Scindia Steam Navigation's* case (supra).

D In the background of the facts and the circumstances of the case, as mentioned hereinbefore, if the aforesaid view of the Tribunal and the High Courts is a possible view, we are not inclined to interfere with that view under Article 136 of the Constitution in the light of the facts and the circumstances of this case. We are not prepared to say that injustice has been done to the petitioner. The view taken by the E Tribunal and the High Courts is a possible view. The Tribunal and the High Courts have borne in mind the principles of law laid down by this Court.

In the aforesaid view of the matter, in the facts and the circumstances of the case, this application is rejected and accordingly F dismissed.

R.N.J. Petition dismissed.