Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 1569 OF 2007

PREMIER BREWERIES LTD.,
KARNATAKA ... APPELLANT (S)

VERSUS

COMMISSIONER OF INCOME TAX,
COCHIN ... RESPONDENT (S)

WITH

CIVIL APPEAL NO. 3214 OF 2011

WITH

SLP(C) No. 10080 of 2014

J U D G M E N T

PRAFULLA C. PANT, J.

1. Civil Appeal No. 1569 of 2007 is directed against the judgment and order dated 31.03.2005 of the High Court of Kerala by which in exercise of jurisdiction under Section

256(2) of the Income Tax Act, 1961 (as it then existed) (hereinafter for short 'the Act') the questions reframed by the High Court have been answered against the appellant-assessee and in favour of the revenue. The question decided by the High Court and relevant to the present appeal relates to the entitlement of the assessee to the benefit of disallowance of commission purportedly paid by the assessee to its commission agents for procurement of order for supply of liquor. Following the aforesaid judgment of the Kerala High Court, the Karnataka High Court had decided a similar question arising in Income Tax Appeal No. 12 of 1999 and Income Tax Appeal Nos. 42, 44, 46 and 47 of 2001, in a like manner i.e. against the assessee and in favour of the revenue. Aggrieved by the aforesaid orders of the High Court of Karnataka which pertains to different assessment years, Civil Appeal No. 3214 of 2011 and Special Leave Petition (C) No. 10080 of 2014 have been filed by the assessee. In view of the fact that the decision of the Karnataka High Court in I.T.A. No. 12 of 1999 had followed the decision of the Kerala High Court impugned in Civil

Appeal No. 1569 of 2007 and the decision of the Karnataka High Court in the subsequent appeals before it (impugned in Civil Appeal No. 3214 of 2011 and Special Leave Petition (C) No. 10080 of 2014) essentially follows the decision rendered in I.T.A. No. 12 of 1999, it will be necessary first to deal with the issues arising in Civil Appeal No. 1569 of 2007 and depending on the decision therein the remaining appeals will have to be accordingly answered.

2. Succinctly, the appellants are engaged in the manufacture and sale of beer and other alcoholic beverages. Certain States like Kerala and Tamil Nadu had established marketing corporations which were the exclusive wholesalers of alcoholic beverages for the concerned State whereby all manufacturers had to compulsorily sell their products to the State Corporations which, in turn, would sell the liquor so purchased, to the retailers. It is pleaded by the appellants that manufacturers of beverages containing alcohol have to engage services of agents who would co-ordinate with the retailers and State Corporations to ensure continuous flow/supply of goods to the ultimate consumers.

And on that ground they sought deduction under Section 37 of the Act.

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3. The claim made by the assessee in the facts noted above was disallowed by the Assessing Officer by order dated 29.01.1993. The said order of the Assessing Officer was confirmed by the Commissioner of Income Tax (Appeals) by order dated 29.10.1993. The assessee had moved the learned Income Tax Appellate Tribunal, Cochin Bench against the aforesaid orders. The learned Tribunal took the view that the assessee was entitled to claim for deduction. The said view of the learned Tribunal has been reversed by the High Court in the Reference made to it under Section 256 (2) of the Act.

4. We have noticed that in the Reference made to the High Court by the learned Tribunal under Section 256(2) as many as 12 different questions were framed and referred. The High Court reframed the questions in the following manner.

"(i) Whether, on the facts and in the circumstances of the case did the assessee discharge the burden of proof that lay on it in support of the claim for Rs. 7,75,602/-?

(ii) Whether, on the facts and in the circumstances of the case, did the assessee discharge the burden of proof that lay on it in support of the claim for Rs. 22,72,192/-?

(iii) Whether, on the facts and in the circumstances of the case, the Tribunal is right in law and fact in holding that the payment to Golden Enterprises was only for business purpose or and was in business interest?"

The questions reframed by the High Court were in respect of the payments made to M/s. R.J. Associates and one Golden Enterprises who, the assessee claimed, had rendered services as commission agents.

5. Though one item of claim for deduction pertained to the corporate management charges paid by the assessee to U.B. Limited and an issue pertaining to the said claim was one of the twelve questions initially framed in the Reference, in the questions reframed by the High Court, the said question does not find any mention. Be that as it may, the High Court on the reasons recorded in its order dated 31.03.2005

thought it proper to reverse the findings and conclusions recorded by the learned Tribunal. Eventually, in the ultimate paragraph of its order the High Court after recording the conclusion that the "*Tribunal has committed a grave error in not properly understanding the transaction entered into between the assessee and others*" set aside the order of the Tribunal and upheld the order of the Commissioner (Appeals) and answered the questions in favour of the revenue by holding that the assessee had not discharged the burden so as to entitle it to deduction under Section 37 of the Act. Aggrieved, this appeal has been filed by the assessee.

6. Three propositions have been advanced before us on behalf of the contesting parties. The first is whether the High Court could have reframed the questions after the conclusion of the arguments and that too without giving an opportunity to the assessee. The answer to the above question, according to the appellant, is to be found in ***M. Janardhana Rao vs. Joint Commissioner of Income Tax***[1] wherein this Court has held that questions of law arising in

[1] (2005) 2 SCC 324

an appeal under Section 260-A of the Act must be framed at the time of admission and should not be formulated after conclusion of the arguments. Though the decision in ***M. Janardhana Rao*** (supra) is in the context of Section 260-A of the Act, it is urged that the same principles would apply to the exercise of jurisdiction under Section 256 of the Act (as it then existed) particularly as the jurisdiction under Section 256 is more constricted than under Section 260-A of the Act.

7. The second issue raised is the jurisdiction of the High Court to set aside the order of the Tribunal in the exercise of its Reference Jurisdiction. The point is no longer *res integra* having been settled in ***C.P. Sarathy Mudaliar vs. Commissioner of Income Tax, Andhra Pradesh***[2] wherein this Court has taken the view that setting aside the order of the Tribunal in exercise of the Reference Jurisdiction of the High Court is inappropriate. This Court had observed that while hearing a Reference under the Income Tax Act, the High Court exercises advisory jurisdiction and does not sit in appeal over the judgment of the Tribunal. It has been further

[2] 1966 Vol. LXII ITR 576

held that the High Court has no power to set aside the order of the Tribunal even if it is of the view that the conclusion recorded by the Tribunal is not correct.

8. The third question that has been posed for an answer before us is with regard to the correctness of the manner of exercise of jurisdiction by the High Court in the present case. Learned counsel for the assessee has elaborately taken us through the judgment of the High Court to contend that the evidence on record has been re-appreciated with a view to ascertain if the conclusions recorded by the Tribunal are correct. The manner of exercise of jurisdiction, in the absence of any question of perversity of the findings of the learned Tribunal has been assailed before us. Reliance has been placed on para 16 of the judgment of this Court in the case of ***Sudarshan Silks & Sarees vs. Commissioner of Income Tax, Karnataka***[3] which is in the following terms.

> *"16. In the present case, the question of law referred to the High Court for its opinion was, as to whether the Tribunal was right in upholding the findings of the CIT (Appeals) in canceling the penalty levied under Section 271(1)(c). Question*

[3] (2008) 12 SCC 458

as to perversity of the findings recorded by the Tribunal on facts was neither raised nor referred to the High Court for its opinion. The Tribunal is the final court of fact. The decision of the Tribunal on the facts can be gone into by the High Court in the reference jurisdiction only if a question has been referred to it which says that the finding arrived at by the Tribunal on the facts is perverse, in the sense that no reasonable person could have taken such a view. In reference jurisdiction, the High Court can answer the question of law referred to it and it is only when a finding of fact recorded by the Tribunal is challenged on the ground of perversity, in the sense set out above, that a question of law can be said to arise. Since the frame of the question was not as to whether the findings recorded by the Tribunal on facts were perverse, the High Court was precluded from entering into any discussion regarding the perversity of the finding of fact recorded by the Tribunal."

9. In the present case, the High Court while hearing the Reference made under Section 256 (2) of the Act had set aside the order of the Tribunal. Undoubtedly, in the exercise of its Reference Jurisdiction the High Court was not right in setting aside the order of the Tribunal. However, reading the ultimate paragraph of the order of the High Court we find that the error is one of form and not of substance inasmuch

as the question arising in the Reference has been specifically answered in the following manner.

> "We therefore set aside the order of the Tribunal and uphold that of the Commissioner (Appeals) and answer the questions in favour of the Revenue by holding that the assessee had not discharged the burden that it is entitled to deductions under Section 37 of the Income Tax Act. Reference is answered accordingly."

The reliance placed on behalf of the appellant-assessee on ***Sudarshan Silks & Sarees*** (supra) therefore is of no effect.

10. The twelve questions referred to the High Court under Section 256(2) of the Act may now be set out below :

1) Whether, on the facts and in the circumstances of the case and also in view of the prohibition of outside service by KSBC, was the Tribunal right in law and fact in allowing the expenditure of RS. 7,75,602/- by/and/ deleting the addition of Rs. 7,75,602/-?
2) Whether, on the facts and in the circumstances of the case, did the Tribunal have any materials to show that the above expenditure of Rs. 7,75,602/-

was wholly and exclusively for the assessee's business?

3) Whether, on the facts and in the circumstances of the case, did the assessee discharge the burden of proof that lay on it in support of the claim for Rs.7,75,602/-?

4) Whether, on the facts and in the circumstances of the case, the Tribunal is right in law and fact in allowing the expenditure of Rs.22,72,192/- by/and/deleting the addition of Rs.22,72,192/-?

5) Whether, on the facts and in the circumstances of the case, did the Tribunal have any materials to show that the above expenditure of Rs. 22,72,192/- was wholly and exclusively for the assessee's business?

6) Whether, on the facts and in the circumstances of the case, did the assessee discharge the burden of proof that lay on it in support of claim for Rs. 22,72,192/-?

7) Whether, on the facts and in the circumstances of the case, the Tribunal is right in law and fact in holding that:

"the engagement of Golden Enterprises for carrying out certain support services was in the business interest" and is not the above finding also based on surmised and conjectures like "that two

sales officers of UB Group stationed at Madras did not do or at any rate could not have done any sub line service at the unit level" wrong, unreasonable and unsupported by materials?

8) Whether, on the facts and in the circumstances of the case is the increase in sales noted in paragraph 10 (page 18) of the order of the Tribunal based on the increase in the quantum or increases in price and if the increase in sales is based on an increase in price is not the same an irrelevant consideration and the order vitiated?

9) Whether, on the facts and in the circumstances of the case, should not the Tribunal have considered the contention of the Revenue that "ultimately Golden Enterprises has in turn appointed one Abhinava Agencies for doing such work and therefore Golden Enterprises did not have the necessary infrastructure to do the services" in its correct prospective without side treching the issue by observing "what happened between Golden Enterprises and Abhinava Agencies is not of the concern of the assessee...."and is not the above finding wrong and lacks prospective when the case behind entrustment with Golden Enterprises was for lack of infrastructure with the assessee?

10) Whether, on the facts and in the circumstances of the case and reason behind entrustment by the assessee with Golden Enterprises being for lack of infrastructure with the assessee, will such an assessee entrust the job to the one who lacks infrastructure and to the one who in turn entrust to another agency and are not the order and the findings, without adverting to the above aspects, wrong and hence vitiated?

11) Whether, on the facts and in the circumstances of the case, the Tribunal is right in law and fact in holding that "considering the need for such services and the opportunity cost of having a regular marketing force, the payment to Golden Enterprises was only for business purposes and was in business interest" and are not above findings wrong, unreasonable, unsupported by materials and based on surmise and conjectures?

12) Whether, on the facts and in the circumstances of the case,

    i) The assessee is entitled to claim any deduction under the head corporate and management charges?

    ii) Should not the Tribunal have disallowed the entire claim for Rs. 14,36,200/-

11. A reading of the questions initially framed and subsequently reframed show that what was done by the High Court is to retain three out of twelve questions, as initially framed, while discarding the rest. Some of the questions discarded by the High Court were actually more proximate to the question of perversity of the findings of fact recorded by the learned Tribunal, than the questions retained. From a reading of the Order of the High Court it is clear that the High Court examined the entitlement of the appellant assessee to deduction/disallowance by accepting the agreements executed by the assessee with the commission agents; the affidavits filed by C. Janakiraman and Shri A.N. Ramachandra Nayar, husbands of the two lady partners of RJ Associates and also the payments made by the assessee to RJ Associates as well as to Golden Enterprises. The question that was posed by the High Court was whether acceptance of the agreements, affidavits and proof of payment would debar the assessing authority to go into the question whether the expenses claimed would still be allowable under Section 37 of the Act. This is a question

which the High Court held was required to be answered in the facts of each case in the light of the decision of this Court in ***Swadeshi Cotton Mills Co. Ltd. Vs. Commissioner of Income Tax***[4] and ***Lachminarayan Madan Lal vs. Commissioner of Income Tax West Bengal***[5]***.*** In fact the High Court noted the following observations of this Court in ***Lachminarayan*** (supra) :

> "The mere existence of an agreement between the assessee and its selling agents or payment of certain amounts as commission, assuming there was such payment, does not bind the Income Tax Officer to hold that the payment was made exclusively and wholly for the purpose of the assessee's business. Although there might be such an agreement in existence and the payments might have been made. It is still open to the Income tax Officer to consider the relevant facts and determine for himself whether the commission said to have been paid to the selling agents or any part thereof is properly deductible under Section 37 of the Act."

12. There were certain Government Circulars which regulated, if not prohibited, liaisoning with the government corporations by the manufacturers for the purpose of obtaining supply orders. The true effect of the Government

[4] 1967 (63) ITR 57
[5] 1972 (86) ITR 439

Circulars along with the agreements between the assessee and the commission agents and the details of payments made by the assessee to the commission agents as well as the affidavits filed by the husbands of the partners of M/s. R.J. Associates were considered by the High Court. The statement of the Managing Director of Tamil Nadu State Marketing Corporation Ltd. (TASMAC Ltd.), to whom summons were issued under Section 131 of the Act, to the effect that M/s. Golden Enterprises had not done any liaisoning work with TASMAC Ltd. was also taken into account. The basis of the doubts regarding the very existence of R.J. Associates, as entertained by the Assessing Officer, was also weighed by the High Court to determine the entitlement of the assessee for deduction under Section 37 of the Act. In performing the said exercise the High Court did not disturb or reverse the primary facts as found by the learned Tribunal. Rather, the exercise performed is one of the correct legal inferences that should be drawn on the facts already recorded by the learned Tribunal. The questions reframed were to the said effect. The legal

inference that should be drawn from the primary facts, as consistently held by this Court, is eminently a question of law. No question of perversity was required to be framed or gone into to answer the issues arising. In fact, as already held by us, the questions relatable to perversity were consciously discarded by the High Court. We, therefore, cannot find any fault with the questions reframed by the High Court or the answers provided.

13. For the aforesaid reasons, Civil Appeal No. 1569 of 2007 has to fail and it is accordingly dismissed.

Civil Appeal No.3214 of 2011 and SLP(C) No.10080 of 2014

14. In the light of the above, Civil Appeal No.3214 of 2011 and SLP (C) No.10080 of 2014 are also dismissed.

.....J.
[RANJAN GOGOI]

.....J.
[PRAFULLA C. PANT]

NEW DELHI,

MARCH 10, 2015.