



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Date of decision: 30.03.2011

+ ITR No.292/1992

COMMISSIONER OF INCOME TAX, DELHI-IV ...APPELLANT

Through: Mr.Sanjeev Sabharwal Advocate

Versus

M/S HYDROCARBONS INDIA LTD. ...RESPONDENT

Through: Mr.M.S.Syali, Sr.Adv. with Mr.Mayank Nagi, Ms.Husnal Syali and Mr.Rahul Satija, Advocates

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE RAJIV SHAKDHER

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | No |
| 2. | To be referred to Reporter or not? | No |
| 3. | Whether the judgment should be reported in the Digest? | No |

RAJIV SHAKDHER, J. (ORAL)

1. At the outset, we would like to point out that the registration of the captioned reference represents a comedy of errors in the sense that even though both, the assessee and the revenue, have sought a reference of various



placed before us. This apart, as per the paperbook made available to us, the captioned reference is entitled as: M/s Hydro Carbons India Ltd. v. Commissioner of Income Tax, whereas the Cause List shows the title in the reverse i.e. C.I.T. v. Hydro Carbons Pvt. Ltd. (ONGC).

2. The reason we gave this preparatory note is to avoid any confusion being caused on reading of our order. We are, thus, called upon to deal with two references involving two (2) sets of questions involving five (5) questions each. The facts which are required to be noticed for disposal of the captioned references are briefly as follows:

2.1 The assessee/company at the relevant time was a wholly owned subsidiary of the Oil and Natural Gas Commission of India ('ONGC' for short). The assessee was incorporated with the main object of taking over the right and interest of the ONGC available to it under the 'Joint Structure Agreement' ('JSA' for short) dated 17.01.1965. There were four parties to the said JSA namely National Iranian Oil Company ('NIOC' for short); ACIP, SPA of Italy; Philips Petroleum Company, USA and ONGC of India. Under the JSA, the aforementioned four parties were required to carry on the business of drilling, extracting, producing and selling petroleum and other crude oil products in the Persian Gulf. It is not disputed that under the JSA it had been agreed that 50 per cent of the produce would be owned by NIOC while the balance would be shared among the



remaining three parties: ONGC, ACIP and Philips in equal proportion. After the incorporation of the assessee, as noticed above, the rights under the JSA which were available to the ONGC, were assigned to the assessee.

2.2 On account of the revolution in Iran in 1978, the then regime got overthrown. Resultantly, the assessee was unable to carry on its business beginning with period commencing from, the previous year relevant to assessment year 1980-1981. It is not disputed that the assessee entered into a Settlement with NIOC through the good offices of the Govt. of India. The settlement attempted to compensate the assessee towards “immobilization and sterilization” of its business assets.

2.3 The terms of the Settlement were incorporated in the Settlement Agreement dated 26.12.1993 (in short ‘the Settlement Agreement’). At this stage, it would be important to note two articles contained in the Settlement Agreement; these being:

“ ARTICLE 2

In consideration of a final settlement of all or any aventual claims, rights and interest HIL may claim to have in connection with or related to the execution, fulfillment and nullification of IMINOCO Agreements, NIOC shall pay to HIL within Thirty (30) days from the Effecting Date of this Agreement, and HIL shall accept, the sum of six million (6,000,000) U.S.Dollars. As of January 1, 1979 upto the Effective Date of this Settlement Agreement such sum shall bear a



ARTICLE 5

This Settlement Agreement is subject to the approval of the appropriate authorities of the Parties.

NIOC shall forthwith notify HIL of the obtainment of Approval of its appropriate authorities.

The date of such Approval shall be the Effective Date of this Settlement Agreement .

HIL shall notify NIOC of the obtainment of the approval of the Appropriate Authorities within fourteen (14) days from the date of signing this Settlement Agreement .”

- 2.4 A perusal of Article 2 shows that the assessee under the Settlement Agreement was to receive a sum of USD 6 million in consideration of final settlement of all claims, rights and interests in connection with or in relation to the execution, fulfillment and nullification of the earlier agreement i.e. the JSA.
- 2.5 Apart from the aforementioned payment, Article 2 of the Settlement Agreement also provided that for the period commencing from 01.01.1979 up to the *“Effective Date”* of the settlement, a further amount towards ‘delayed payment charge’ at LIBOR one year base, would also be paid to the assessee.
- 2.6 Article 5 of the Settlement Agreement, however, made the agreement subject to the approval of the appropriate authority of the parties who were signatories to the Settlement Agreement.



2.7 It is not disputed that the approval was received by the parties on 01.01.1984. The Effective Date of the Settlement Agreement thus, as per the provisions referred to above was 01.01.1984.

2.8 In the background of these facts, the Assessing Officer framed an assessment order dated 20.03.1987. As per the aforesaid assessment order, the Assessing Officer made the following additions:

“Profit u/s 41(2)	Rs.17,40,43,120/-
Profit on sale of exploration store stock and Development store stock.	Rs.47,77,375/-
Profit on sale of crude oil stock.	Rs.27,37,525/-
Amount of sold oil.	Rs.6,01,693/-
Expenditure on a/c.of rentals taxable u/s.41(1).	Rs.15,38,072/-
Interest(Delayed payment charge)	Rs.5,41,92,736/-“

2.9 Being aggrieved, the assessee filed an appeal before the Commissioner of Income Tax (Appeals) {‘CIT(A)’ for short}. The CIT (A) vide order dated 04.11.1987 partially allowed the appeal of the assessee.

3. This resulted in a situation whereby both the assessee as well as the revenue preferred an appeal to the Income Tax Appellate Tribunal (‘Tribunal’ for short).



- 3.1 The Tribunal by the impugned judgment dated 31.10.1991 partly allowed the assessee's appeal while dismissing the revenue's cross appeal.
- 3.2 Aggrieved by the order of the Tribunal, as indicated hereinabove, a reference was sought by both the assessee as well as the revenue to this court. The revenue had sought reference of five (5) questions and similarly the assessee had sought reference of five (5) questions. The Tribunal vide order dated 02.09.1992 referred both the assessee as well as revenue's questions of laws contained in their respective references for adjudication to this Court.
- 3.3 What is important for our purposes is that one of the questions referred to this Court at the behest of the assessee, in our opinion, would have had impact on the disposal of the appeals before the Tribunal, had the assessee been allowed to urge it as an additional ground; this question being:

“Whether on the facts and circumstances of the case, the Hon'ble Tribunal was justified in rejecting additional ground of appeals having accepted the fact that Settlement Agreement dated 26-12-1983 was effective from 01.01.1984 and not relevant for consideration in asstt.Year 1984-85 on the basis of accounting year of the assessee being 31.12.1983.”

- 3.4 It is not disputed that the aforementioned question which



raised by the assessee for the first time before the Tribunal. The Tribunal rejected the assessee's plea to adjudicate the additional ground for the following reasons, which are set out in para 8 of its judgment dated 31.10.1991:

“8. We have considered the rival submissions on the admission of new ground. On the point of admission of new ground, we are of the opinion that the decision of the supreme Court in the case of Jute Corporation of India Ltd. (Supra) is latest authority where the Hon'ble Supreme Court has held that the power to raise additional ground is there but there should be sufficient reasons and bona fide on the part of the assessee to show that the ground could not have been raised earlier for good reasons. In the present case, we find that in the application, the assessee has not given any good reason for not raising this ground earlier. Therefore, applying the ratio of the above cited decision of the Hon'ble Supreme Court, this ground could not be raised. Otherwise also, we find that no doubt the previous year is the calendar year i.e.31.12.1983 for the business of the assessee but for different source of income, there can be different previous years. Therefore, for the income for year under consideration if previous year is adopted as financial year ending on 31.03.1984, then date of January, 1984 falls in assessment year 1984-85. So the year of assessment adopted by the tax authorities having not been objected at any stage and there is no evidence of that on record. Therefore, this additional ground cannot be admitted. Further, it will necessitate investigation of facts. In view of this, the additional ground is rejected.”
(emphasis supplied)

3.5 A reading of the reasoning supplied by the Tribunal

would show that while the Tribunal does not dispute that



the previous year of the assessee was the calendar year which ended on 31.12.1983, it chose to bring it within the ambit of the assessment year 1984-85 by supplying what according to us is a specious reasoning that the assessee could have adopted different previous years for different sources of income. There is no doubt that, under the then prevalent provision of Section 3 of the Income Tax Act, 1961 (in short the 'I.T. Act'), the assessee could have adopted different previous years for different sources of income, the point here was whether the assessee had actually exercised that choice. We also find on a reading of paragraph 10 of the very same judgment of the Tribunal that it has returned a finding of fact that the Effective Date of the Settlement Agreement was 01.01.1984. If that is so, then it perhaps, can be argued with equal force that the assessee's previous year would end on 31.12.1984 and hence, the receipt if at all had to be taxed in the assessment year 1985-86 and not 1984-85. This was a ground which the Tribunal ought to have examined. The Tribunal chose not to examine the ground based on the reasoning that: the application moved by the assessee before the Tribunal, did not set out any good reason why the ground had not been taken earlier; the ground raised was not bona fide; and lastly, further investigation into facts was necessitated.



4. We had put the last part of the Tribunal's reasoning to Mr.Syali who appears for the assessee. Mr.Syali has accepted before us that he does not wish to rely upon any additional material apart from that which is already on record. Even otherwise, the Tribunal has given no clue as to what are these additional facts which require investigation.

4.1 That leaves us with the first two limbs of the reasoning. According to us, the other two aspects do not impress us, for the reason that, ultimately the Tribunal, in our view, is the final fact-finding authority and is thus vested with a full panoply of powers which are conferred on the authorities subordinate to it.

5. The Tribunal in rejecting the application of the assessee has relied upon the judgment of the Supreme Court in the case of Jute Corporation of India Ltd. Vs. Commissioner of Income Tax (1991) 187 ITR 688. In our opinion, the Tribunal has misconstrued the ratio of the judgment.

Briefly, the facts obtaining in the said case were as follows :-

5.1 The assessment order was framed qua the assessee in respect of the assessment year 1974-1975. Being aggrieved, the assessee preferred an appeal before the Appellate Assistant Commissioner (in short, 'AAC').

During the course of the appeal, the assessee raised an



additional ground whereby, it sought deduction of Rs.11,54,995/- on account of liability towards purchase tax. The deduction was claimed by the assessee on the basis of the decision of that very court (i.e., Supreme Court) in the case of Kedarnath Jute Manufacturing Co. Ltd. Vs. CIT (1971) 82 ITR 363. The AAC permitted the assessee to agitate the additional ground raised by it, and after hearing the Income Tax Officer (in short, 'ITO') accepted the assessee's claim and allowed the deduction claimed.

5.2 Being aggrieved, the revenue carried the matter in appeal to the Income Tax Appellate Tribunal (in short, the 'Tribunal'). The Tribunal came to the conclusion that the AAC had no jurisdiction to entertain an additional ground or to grant relief to the assessee based on a ground which had not been raised before the I.T.O. Consequently, the Tribunal set aside the order of the AAC. In coming to this conclusion, the Tribunal placed reliance on another judgment of the Supreme Court in the case of CIT (Addl.) Vs. Gurjargravures P. Ltd. (1978) 111 ITR 1 (SC). The assessee's attempt at seeking reference to the High Court, under the provisions of Section 256(1) of the I.T. Act failed, as the Tribunal was of the view that the question of law in respect of which reference was sought, was covered by the decision in a case of Gurjargravures P. Ltd. (supra). The assessee's



attempt to seek reference from the High Court met with the same fate.

5.3 Consequently, the assessee carried the matter to the Supreme Court by way of a Special Leave Petition. In this context, the Supreme Court applying the principle enunciated in the case of CIT Vs. Kanpur Coal Syndicate Ltd. (1964) 53 ITR 225 made the following observations :-

“The declaration of law is clear that the power of the Appellate Assistant Commissioner is conterminous with that of the Income-tax Officer, if that be so, there appears to be no reason as to why the appellate authority cannot modify the assessment order on an additional ground even if not raised before the Income-tax Officer. No exception could be taken to this view as the Act does not place any restriction or limitation on the exercise of appellate power. Even otherwise an Appellate Authority while hearing appeal against the order of a subordinate authority has all the powers which the original authority may have in deciding the question before it subject to the restrictions or limitations if any prescribed by the statutory provisions. In the absence of any statutory provision the Appellate Authority is vested with all the plenary powers which the subordinate authority may have in the matter. There appears to be no good reason and none was placed before us to justify curtailment of the power of the Appellate Assistant Commissioner in entertaining an additional ground raised by the assessee in seeking modification of the order of assessment passed by the Income-tax Officer.”

(emphasis supplied)

5.4 The Supreme Court further observed in the said case that the view taken in Gurjargravures case (supra) by a two-Judge Bench appeared to be in conflict with a view taken



Syndicate Ltd.(supra). Despite the said observation, the Supreme Court did not expressly overrule the view taken in Gurjargravures P.Ltd. case (supra) for the reason that the observations of the court in the said case which seem to suggest that there were certain special facts which perhaps persuaded the bench to make the observations which it did. These observations briefly being: that the exemption in any case was not allowable to the assessee.

5.5 The Supreme Court in Jute Corporation case went on to make the following observations in addition to what is extracted hereinabove by us :-

“The above observations do not rule out a case for raising an additional ground before the Appellate Assistant Commissioner if the ground so raised could not have been raised at that particular stage when the return was filed or when the assessment order was made, or that the ground became available on account of change of circumstances or law. There may be several factors justifying raising of such a new plea in appeal, and each case has to be considered on its own facts. If the Appellate Assistant Commissioner is satisfied he would be acting within his jurisdiction in considering the question so raised in all its aspects. Of course, while permitting the assessee to raise an additional ground, the Appellate Assistant Commissioner should exercise his discretion in accordance with law and reason. He must be satisfied that the ground raised was bona fide and that the same could not have been raised earlier for good reasons. The satisfaction of the Appellate Assistant Commissioner depends upon the facts and circumstances of each case and no rigid principles or any hard and fast rule can be laid down for this purpose.

8. In *Rai Kumar Srimal v. Commr. of Income-tax, West Bengal III* [1976]102 ITR 525(Cal) a Division Bench of Calcutta High Court presided



was held that the Appellate Assistant Commissioner was entitled to admit new ground or evidence either suo motu or at the invitation of the parties. If he is acting on being invited by the assessee, then there must be some ground for admitting new evidence in the sense that there must be some explanation to show that the failure to adduce earlier the evidence sought to be adduced before the Appellate Assistant Commissioner was not wilful and not unreasonable. This view is reasonable and it finds favour with us.”

5.6 The Tribunal, in the instant case seems to have picked up, out of context, some of these observations, to deny the relief sought by the assessee in the instant case for adjudicating upon the additional ground raised before it. A close scrutiny of the ratio of the judgment of the Supreme Court in **Jute Corporation** case would show that the Supreme Court has held that the appellate authority, in that case the AAC, is invested with all the **“plenary powers”** which a subordinate authority may have in the matter. There may be several factors which may justify raising of a new plea in the appeal and that each case had to be considered on its own facts and that the appellate authority should exercise its discretion in accordance with **“law”** and **“reason”**. The fact that the ground raised is bonafide and that while raising the ground the applicant should be able to demonstrate good reasons as to why the ground was not raised earlier, will not by itself be a disabling factor since, the appellate



authority is required to take into account the entire gamut of facts and circumstances obtaining in case.

5.7 In the *Jute Corporation* case (supra), the additional ground related to claim for deduction based on the judgment of the Supreme Court which was rendered prior to the assessment being framed. Despite this circumstance, the Supreme Court neither doubted the bonafides of the applicant / assessee nor felt that the reasons supplied were not good enough, for the Tribunal to have entertained the additional ground. The Supreme Court in the said case, as a matter of fact, remitted the case to the Tribunal for a fresh consideration.

6. The situation is no different in the present case. The Tribunal having found in favour of the assessee that the settlement agreement was operable from 01.01.1984, it ought to have taken this fact into account and entertained the plea of the assessee to agitate the additional ground of appeal.

6.1 As a matter of fact, the decision of the Supreme Court in the case of ***Jute Corporation*** has been considered in a latter decision rendered by it in the matter of: ***National Thermal Power Co. Ltd. Vs. CIT (1998) 229 ITR 383.*** The observations of the Supreme Court in this context, in the case of ***National Thermal Power Co. Ltd.***, being pertinent are extracted hereinbelow :-



the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit. The power of the Tribunal in dealing with appeals is thus expressed in the widest possible terms. The purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. If, for example, as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that a non-taxable item is taxed or a permissible deduction is denied, we do not see any reason why the assessee should be prevented from raising that question before the tribunal for the first time, so long as the relevant facts are on record in respect of that item. We do not see any reason to restrict the power of the Tribunal under Section 254 only to decide the grounds which arise from the order of the Commissioner of Income-tax (Appeals). Both the assessee as well as the Department have a right to file an appeal/cross-objections before the Tribunal. We fail to see why the Tribunal should be prevented from considering questions of law arising in assessment proceedings although not raised earlier.

6. In the case of Jute Corporation of India Ltd. v. CIT [1991]187 ITR 688(SC). this Court, while dealing with the powers of the Appellate Assistant Commissioner observed that an appellate authority has all the powers which the original authority may have in deciding the question before it subject to the restrictions or limitations, if any, prescribed by the statutory provisions. In the absence of any statutory provision, the appellate authority is vested with all the plenary powers which the subordinate authority may have in the matter. There is no good reason to justify curtailment of the power of the Appellate Assistant Commissioner in entertaining an additional ground raised by the assessee in seeking modification of the order of assessment passed by the Income-tax Officer. This Court further observed that there may be several factors justifying the raising of a new plea in an appeal and each case has to be considered on its own facts. The Appellate Assistant Commissioner must be satisfied that the ground raised was bona fide and that the same could not have been raised earlier for



Commissioner should exercise his discretion in permitting or not permitting the assessee to raise an additional ground in accordance with law and reason. The same observations would apply to appeals before the Tribunal also.

7. The view that the Tribunal is confined only to issues arising out of the appeal before the Commissioner of Income-tax (Appeals) takes too narrow a view of the powers of the Appellate Tribunal [vide, e.g., C.I.T. v. Anand Prasad [1981] 128 ITR 388(Delhi), C.I.T. v. Karamchand Premchand P. Ltd. [1969] 74 ITR 254(Guj) and C.I.T. v. Cellulose Products of India Ltd. [1985] 151 ITR 499(Guj). Undoubtedly, the Tribunal will have the discretion to allow or not allow a new ground to be raised. But where the Tribunal is only required to consider a question of law arising from the facts which are on record in the assessment proceedings we fail to see why such a question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of an assessee."

7. Therefore, according to us, if the facts and material available with the Tribunal give rise to a pure question of law, then the Tribunal ought not have any difficulty in entertaining the additional ground. We are, at this stage, not expressing a view either way as to whether the ground is sustainable or not. We propose to remand the matter to the Tribunal to consider the additional ground that ought to have been considered by it, in the first instance. The only caveat being, that the assessee shall not be allowed to move any application to rely upon material other than that which is already on record before the Tribunal.



- 7.1 Needless to say that this would also not entitle the assessee to seek indulgence of the Tribunal for further investigation, by which we mean gathering material apart from that which is already on record. Insofar as the material which is already on record is concerned, the Tribunal will most certainly consider the same in deciding the additional ground.
8. In these circumstances, we are, therefore, of the opinion that the matter ought to be remanded to the Tribunal.
9. We accordingly set aside the impugned judgment dated 31.10.1991 and remand the matter to the Tribunal for a *de-novo* hearing. We have, therefore, consciously refrained from expressing our view on the merits of the matters. Both references are thus disposed of in the aforesaid terms.

SANJAY KISHAN KAUL, J.

MARCH 30, 2011

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RAJIV SHAKDHER, J.