

## **Commissioner Of Income Tax vs G.M. Mittal Stainless Steel (P) Ltd. on 10 December, 2002**

**Equivalent citations: (2003)179CTR(SC)553, [2003]263ITR255(SC), (2003)11SCC441, AIRONLINE 2002 SC 182, (2003) 173 TAXATION 363, 2003 (11) SCC 441, (2003) 263 ITR 255, (2003) 179 CUR TAX REP 553, (2005) 30 ALLINDCAS 296**

**Bench: Ruma Pal, B.N. Srikrishna**

### **ORDER**

1. The assessment years in question are 1985-86 and 1986-87. The AO had, by assessment orders dt. 22nd Dec., 1988, and 28th March, 1989, in respect of the respective assessment years, inter alia, allowed power subsidy to be treated as capital receipt instead of revenue. This was also the law as laid down by the jurisdictional High Court in the decision of CIT v. Dusad Industries (1986) 162 ITR 784 (MP).

The CIT in exercise of powers under Section 263 of the IT Act, 1961, sought to revise the assessment orders by two identical but separate orders dt. 25th March, 1991. In each of the orders the CIT has merely stated that the AO had erred while assessing the income of the assessee without setting out the reasons why the CIT was of the view that the AO had been erroneous in following the decision in Dusad Industries (supra). The assessee preferred an appeal to the Tribunal. The Tribunal found that the CIT had wrongly exercised his power under Section 263 of the IT Act on the ground that no reasons had been given by the CIT for his conclusion that the assessment order was erroneous and prejudicial to the interest of the Revenue and also on the ground that in view of the decision of the High Court in Dusad Industries (supra), the AO could not be said to be in error in making the assessment while following the judgment.

2. The High Court on a reference made under Section 256(2) of the IT Act answered the question framed, viz;

"Whether, on the facts and in the circumstances of the case, the Tribunal was justified in partly cancelling the order of CIT passed under Section 263?"

against the Revenue and in favour of the assessee

3. In the appeals been contended on behalf of the Revenue authorities that the decision of Dusad Industries (supra) had been subsequently set aside by this Court in Sahney Steel & Press Works Ltd. v. CIT in which this Court has clearly come to the conclusion that the power subsidy was not in nature of capital receipt but a revenue receipt. It is also pointed out to us that the decision of the Madhya Pradesh High Court in Dusad Industries (supra) had been held to be erroneous by this

Court. It is contended that, therefore, the CIT was correct in revising the decision of the AO and coming to the conclusion that the AO had erroneously treated the power subsidy as capital receipt. The appellant has also submitted that the declaration of law by this Court, in *Sahney Steel* (supra) could be deemed to have been the law which was at all times operative. In any event, according to the appellant, the Revenue, at least as far as the State of Andhra Pradesh was concerned, had not accepted the principle as enunciated in *Dusad Industries* (supra) and had challenged the decision of the Andhra Pradesh High Court rendered in 1985 in *Sahney Steel*. The issue was, therefore, according to the appellant, still open and the CIT could in the circumstances keep it alive by initiating proceedings under Section 263 of the Act. Reliance has been placed on the decision of the Madras High Court in *CIT v. Seshasayee Paper Boards Ltd.* and of the Calcutta High Court in *CIT v. Assam Oil Co. Ltd.* .

4. Although nobody appears on before us, it has behalf of the respondent despite service of notice of appeal, we are of the view that the High Court was entirely correct in deciding the question framed in favour of the assessee and against the Revenue. Section 263 of the IT Act requires that the CIT can call for and examine the record of any proceeding under the IT Act only on the basis of his being satisfied (1) that the AO was erroneous in passing the assessment orders, and (2) that the decision of the AO was prejudicial to the interest of the Revenue. Needless to say that the satisfaction must be one which is objectively justifiable and cannot be the mere ipse dixit of the CIT.

5. In this particular case, the CIT has not recorded any reason whatsoever for coming to the conclusion that the AO was erroneous in deciding that the power subsidy was capital receipt. Given the fact that the decision of the jurisdictional High Court was operative at the material time, the AO could not be said to have erred in law. The fact that this Court had subsequently reversed the decision of the High Court would not justify the CIT in treating the AO's decision as erroneous. The power of the CIT under Section 263 of the IT Act must be exercised on the basis of the material that was available to him when he exercised the power. At that time, there was no dispute that the issue whether the power subsidy should be treated as capital receipt had been concluded against the Revenue. The satisfaction of the CIT, therefore, was based on no material either legal or factual which would have given him the jurisdiction to take action under Section 263 of the IT Act.

6. The decisions of the High Courts relied upon by learned counsel appearing for the appellant do not, in our view, assist the Revenue. The Madras High Court in *CIT v. Seshasayee Paper Boards Ltd* (supra) considered a situation where the AO had relied upon a particular decision in framing the assessment order. The decision relied upon was itself the subject-matter of an appeal before the Supreme Court. In those circumstances, the High Court was of the view, and correctly so that the CIT could have initiated proceeding under Section 263. It is nobody's case that the decision in *Dusad Industries* (supra) was the subject-matter of any appeal before this Court. As far as the Revenue authorities in Madhya Pradesh were concerned the issue could not be said to be alive.

7. The Calcutta High Court decision, has in fact held contrary to what is being submitted on behalf of the appellant. In that case the AO had initiated reassessment proceedings on the basis of a decision of the Rajasthan High Court. The decision of the Rajasthan High Court was subsequently reversed by this Court. The Calcutta High Court held that despite such reversal, it could not be said that

reassessment proceedings were without jurisdiction on the basis of the law as it stood when the proceedings were initiated.

8. Apart from the language of Section 263 of the IT Act, if we were to accept the submission of the appellant that the Revenue authorities within the State could refuse to follow the jurisdictional High Court's decision on the ground that the decision of some other High Court was pending disposal by this Court, it would lead to an anarchic situation within the State. If at the time when the power under Section 263 was exercised the decision of the jurisdictional High Court had not been set aside by this Court or at least had not been appealed from, it would not be open to the GIT to have proceeded on the basis that the High Court was erroneous and that the AO who had acted in terms of the High Court's decision had acted erroneously.

The appeals are, therefore, dismissed without any order as to costs.