Delhi High Court
Commissioner Of Income-Tax vs Kailash Apartments P. Ltd. on 27 October, 1998
Equivalent citations: 2000 243 ITR 795 Delhi
Author: R Lahoti
Bench: R Lahoti, C Mahajan
JUDGMENT R.C. lahoti, J.

1. By this petition under Section 256(2) of the Income-tax Act, 1961, the Revenue seeks a mandamus to the Income-tax Appellate Tribunal for drawing up a statement of the case and referring the following questions of law (for the assessment year 1984-85) for the opinion of the High Court :

"1. Whether, on the facts and in the circumstances of the case, the Tribunal was correct in law in holding that there is only one line of business, namely, construction business with branch at Kuwait and that the management and control is undoubtedly common ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was correct in law in setting aside the order made under Section 263 of Income-tax Act ?"

2. The assessee is a limited company. It is carrying on business as contractors. 'The assessee has business in India as also in Kuwait For the assessment year 1984-85, the assessee filed a return declaring income of Rs. 10,97,626 and claiming brought forward losses to the tune of Rs. 8,61,53,374. The assessee had claimed expenditure of Rs. 6,69,216 by way of deduction which expenditure was incurred in relation to the assessee's business at Kuwait on various items like bank charges, commission to bank, air tickets for the directors and miscellaneous expenditure. The assessment was completed on January 28, 1987 allowing the said expenditure.

3. The Commissioner of Income-tax called for and examined the assessment records under Section 263 of the Act. Notice was issued to the asses-see wherein it was stated that during the relevant previous year the asses-see was not doing" any business, i.e., work in Kuwait. The assessee was called upon to explain why the expenses referable to the Kuwait branch be not disallowed in view of no business having been done in Kuwait.

4. In response to the notice, the assessee submitted that the business carried on by the assessee in India and in Kuwait was one being a composite business. The assessee claimed that all expenses were necessarily to be allowed though part of such expenses may have pertained to such construction which had already been completed. It was not necessary that the business in Kuwait should have continued during the relevant previous year. Finalisation of guarantees for the Kuwait contract was being sorted out and the expenses related to the post-construction responsibilities.

5. The learned Commissioner of Income-tax overruled the contention of the assessee for two reasons ; firstly, there was no business activity or any liability attributable to Kuwait ; secondly, no details or justification was furnished for the alleged expenses to the tune of Rs. 6,69,216 incurred in Kuwait. The Assessing Officer was directed to disallow the deduction.

6. The order of the Commissioner of Income-tax was challenged by the assessee in appeal before the Income-tax Appellate Tribunal which arrived at the following findings, inter alia :

"The assessee's case is that the business of construction carried on in India and in Kuwait is a composite business and the construction business has not been closed down. There may not be any construction activity at Kuwait yet the business of the assessee is a running business inasmuch as the construction business in India is continuing. In the case of B. R. Ltd. v. V.P. Gupta, CIT [19781113 ITR 647 (SC), referred to above, it has been held by the Supreme Court that for the purpose of ascertaining whether two lines of business constitute the same business the decisive test is unity of control and not the nature of the two lines of business and the fact that one business cannot conveniently be carried on after the closure of the other ; furnished a strong indication that the two business constitute the same business but no decisive inference can be drawn from the fact that after the closure of one business, another may or may not conveniently be carried on. The said observation was made by the Supreme Court in the context of set off of carried forward loss. The principle laid down by the Supreme Court in our view squarely applies to the case of the assessee. In the present case, there is only one line of business, namely, construction business with branch at Kuwait. The management and control is undoubtedly common.

In the present case, the business of the assessee is very much in existence as is evident from the copies of the profit and loss account placed at pages 34 to 42 of the paper book relating to the assessment years 1985-86 and 1986-87."

7. The Department moved an application under Section 256(1) of the Income-tax Act which has been rejected by the Tribunal forming an opinion that the appellate order of the Tribunal was based on findings of fact and no question of law arises out of the said order.

8. Learned senior standing counsel for the Revenue has submitted that to be entitled to deduction of an expenditure by reference to Section 37 of the Act the assessee must show amongst others that the business in respect of which expenses were claimed was continuing and the expenses of one business cannot be set off against the income of another business. Learned counsel for the assessee has submitted that the business was one and it was continuing ; merely because construction activity at one place had come to an end while it was continuing at another place, the business cannot be said to have come to an end.

9. The submission of learned counsel for the Revenue is based on an assumption that the business at Kuwait and the business at India were two separate businesses not connected with each other. This is a fallacy. In B. R. Ltd. v. V.P. Gupta, CIT [1978] 113 ITR 647, the Supreme Court has held that the test for deciding whether the business is one or two is common management and common control of the business. A similar view has been taken by a Division Bench of the Delhi High Court in Snam Progetti S. P. A. v. Addl. CIT [1981] 132 ITR 70.

10. The business activity carried on by the assessee at Kuwait and in India was the same, i.e., construction business. The management and control of the business was common. It is not the case of the Department that the expenditure is not referable to Section 37 of the Act. The Tribunal was,

therefore right in forming an opinion that the findings recorded by the Tribunal were those of fact and did not raise any question of law.

11. The questions suggested by the Department do not arise as questions of law from the order of the Tribunal. The petition is, therefore, rejected.