Income Tax Appellate Tribunal - Mumbai
Harsha Achyut Bhogle vs Income Tax Officer on 11 October, 2007
Equivalent citations: (2008) 114 TTJ Mum 266
Bench: G Gupta, D Srivastava
ORDER D.K. Srivastava, A.M.

1. The present bunch of appeals has been filed by the assessee against the order passed by the CIT(A) for asst. yrs. 1996-97, 1998-99, 1999-2000 and 2001-02. Major issues involved in all the appeals are common. We therefore find it convenient to dispose of the present bunch of appeals by a consolidated order.

Ground Nos. 1 to 3 taken in the appeals for asst. yrs. 1996-97 and 1998-99 are identical except for the difference in figures. In other two appeals, namely appeals for asst. yrs. 1999-2000 and 2001-02, identical issue has been raised in first two grounds of appeal. Ground Nos. 1 to 3 taken by the assessee in his appeal for asst. yrs. 1996-97 read as under:

1. On the facts and in the circumstances of the case, the learned ITO erred in concluding that the appellant is not an actor within the meaning of Section 80RR of the IT Act and hence not entitled to deduction claimed under Section 80RR of Rs. 6,87,198 by the appellant and learned CIT(A) erred in confirming the same.

2. The learned ITO has erred in not considering the claim of the appellant at least if not as an actor but as an artist without appreciating the facts of the case and learned CIT(A) erred in confirming the same.

3. The learned ITO has erred in computation of deduction (without prejudice) even if allowed at Rs. 6,87,198 on net income as against the claim of Rs. 4,35,006 made by the appellant without giving any opportunity of hearing and without appreciating the language of Section 80RR of the IT Act and learned CIT(A) erred in confirming the same.

3. Briefly stated, the facts of the case are that the assessee, a well-known presenter, commentator and programme compere of various sports, live and recorded, telecast on television, received a sum of Rs. 9,16,264 in asst. yr. 1996-97, Rs. 14,84,012 in asst. yr. 1998-99, Rs. 24,76,176 in asst. yr. 1999-2000 and Rs. 2,14,814 in asst. yr. 2001-02 for performing as a presenter, commentator and programme compere on television. The said sums were received from non-residents in India and were brought in India in convertible foreign exchange within six months. The assessee claimed deduction under Section 80RR of the IT Act on the ground that he was an "artist" and therefore covered by the aforesaid provision. Learned CIT(A) decided the issue against the assessee following the order of this Tribunal in the assessee's own appeal for asst. yr. 1997-98. Relevant observations in this behalf are contained in para (2a) of the common appellate order passed by the learned CIT(A) on 26th Aug.. 2003 for asst. yrs. 1996-97, 1999-2000 and 2001-02 which read as under:

(2a) I have considered the submission of the appellant counsel and assessment order of the AO. After going through the assessment order, it is found that no fresh facts/evidence have been brought

either by the assessee or by the AO in these years. The AO after reproducing the portion of the finding/observation from Tribunal order in the appellant's own case for asst. yr. 1997-98 has disallowed the claim made under Section 80RR of the IT Act, 1961. Since the facts in all these- years, is identical to the fact in asst. yr. 1997-98, therefore, respectively following Tribunal decision in appellant's own case in the asst. yr. 1997-98, on the same reasoning, I hold that the appellant is not an actor or artist. Thus, the AO has rightly disallowed the claim of the appellant under Section 80RR of the IT Act, 1961.

4. Assessee's appeal for asst. yr. 1998-99 was also dismissed by the CIT(A) following the aforesaid order of the Tribunal in the assessee's case.

5. Aggrieved by the aforesaid order of the CIT(A), the assessee is now in appeal before this Tribunal. At the outset, the learned Counsel for the assessee fairly submitted that the issue under appeal stood covered against the assessee by the decision of this Tribunal in the assessee's own appeal for asst. yr. 1997-98 and that the said order of the Tribunal was already under appeal by the assessee before the Hon'ble jurisdictional High Court. He however, submitted that the aforesaid order should not be followed by us in view of the recent order of this Tribunal in Amitabh Dachchan v. Dy. CIT (2007) 106 TTJ (Mumbai) 925. He has submitted a detailed compilation to show as to how the facts in the case of the assessee are similar with those in Amitabh Bachchan (supra). In view of the similarity of facts stated by him, he submitted that the decision taken by this Tribunal in Amitabh Bachchan should be followed in the case of the assessee also to avoid discrimination between two similarly placed persons. He has given a long list of judicial authorities to support the order of this Tribunal in Amitabh Bachchan and also to support his submission that the said order in Amitabh Bachchan should be followed in the case of the assessee notwithstanding the decision of the Tribunal in the assessee's own case for asst. yr. 1997-98. His alternative submission was that the matter should be referred to a Special Bench for resolving the conflict in the views taken by Division Benches of this Tribunal in assessee's own case and in the case of Amitabh Bachchan.

6. In reply, the learned Departmental Representative vehemently opposed the submissions made on behalf of the assessee. She has filed her written submissions in this behalf, which read as under:

In these appeals, CIT(A) has confirmed the stand taken by the AO that the assessee is not eligible to claim deduction under Section 80RR. Your Honour, similar issue was involved in appeal for asst. yr. 1997-98 in assessee's own case which was also challenged by the assessee before Hon'ble Tribunal and it was held vide order No. ITA No. 5373/Mum/2000 dt. 24th April, 2002, that assessee is not entitled to claim deduction under Section 80RR. In short, this issue was decided against him by the Mumbai Tribunal in assessee's own case. A copy of this order is already filed before the Bench. It was, therefore, requested that the issue is covered in favour of Department and against assessee in assessee's own case and hence these appeals are covered matter.

However, assessee has now raised the issue stating decision in the case of Amitabh Bachchan is to be followed.

In connection with this argument, I would like to rely on the Hon'ble Bombay High Court judgment (which is a jurisdictional Court) in the case of CAT v. Goodlas Nerolac Paints Ltd. in which the Hon'ble Bombay High Court has held as under:

A subsequent Bench of Tribunal should not come to a contrary conclusion in respect of same facts and, if so desires, it should refer the matter to President for constituting a Larger Bench.

In view of the above, it is clear that subsequent Bench has to reach the same conclusion as reached by earlier Bench and if it has to reach contradictory, then issue is to be referred to the President for constituting Larger Bench.

Your Honour, the assessee has not accepted the Hon'ble Tribunal's decision for asst. yr. 1997-98 and challenged it before the Bombay High Court and the appeal is pending there.

On this background, reliance is being placed on President, Tribunal's order in the case of Star Ltd., Hongkong (copy enclosed). In this order, it was held that "the Tribunal as a body subordinate to the Hon'ble High Court cannot venture to decide the same issue when it is already pending before Hon'ble High Court".

The Hon'ble President has also said that Tribunal must stay its hands when the Hon'ble High Court is seized of the same matter.

On the backdrop of this policy decision of Hon'ble President of Tribunal, it is clear that even Larger Bench cannot be constituted since issue is already before Hon'ble High Court.

7. The learned Departmental Representative has taken us through the order of the Tribunal in Amitabh Bachchan (supra). She submits that the Tribunal has recorded a categorical finding in Amitabh Bachchan's case that the facts in the case of the assessee are clearly distinguishable with those in the case of Amitabh Bachchan (supra) and therefore it is not open to us, according to her, to take a diametrically opposite view now and hold that the facts in the case of the assessee are identical with those in Amitabh Bachchan. She submits that the Tribunal has not overruled or superceded the order of this Tribunal in the case of the assessee while passing the order in Amitabh Bachchan and therefore we are bound, according to her, to follow the order passed by this Tribunal in the assessee's own case.

8. We have heard the parties and considered their submissions including the judicial authorities referred to by them. There is no dispute that a Co-ordinate Bench of this Tribunal has rejected the claim of the assessee in his own appeal for asst. yr. 1997-98. The said order is reported as Harsha Bhogle v. AO (2004) 87 TTJ (Mumbai) 892 : (2003) 86 ITD 714 (Mumbai). In the said order, the Tribunal has examined all the relevant aspects of the case and decided the issue against the assessee. The said order is under appeal before the Hon'ble jurisdictional High Court. The rule of consistency and judicial discipline require us to follow the aforesaid order to maintain uniformity and consistency in the decisionmaking at our level. We therefore see no valid reason to take a view contrary to the one taken by this Tribunal in the assessee's own case for asst. yr. 1997-98.

9. While following the order of this Tribunal in the assessee's case for asst. yr. 1997-98, we do wish to record our respectful agreement with the view taken by this Tribunal in the aforesaid matter. Benefit of Section 80RR is available to an individual resident in India being an author, playwright, artist, musician, actor or sportsman (including an athlete) fulfilling the conditions laid down therein. The aforesaid categorization of persons eligible for deduction under Section 80RR falls under three distinct limbs; (i) author and playwright being producers of literary work; (ii) artist being producer of artistic work; and (iii) performers/artistes being musicians, actors and sportsmen. Thus, the benefit of Section 80RR has been extended to the persons producing (1) literary works, i.e., author and playwright; (2) artistic works, i.e., artist; and (3) performers or artistes, i.e., musicians, actors or sportspersons. Since persons producing literary works and performers/artistes have been treated as a separate class in Section 80RR, it is not possible to give widest possible meaning to the term "artist". The meaning of the term "artist" will therefore necessarily exclude performers or artistes or those producing literary work. Quite obviously, an "artist" would be one who produces artistic works. The term "artist" has been defined at p. 147 in P. Ramanatha Aiyar's Law Lexicon (1997 Edition) to mean "one who professes or practices an art in which conception and execution are governed by imagination and taste; one whose vocation involves drawing, painting, designing or layout work". The aforesaid meaning appropriately fits into and circumscribes the meaning of the term "artist" as used in Section 80RR. The term "artistic work" has been defined in the Copyright Act, 1957 as including works of painting, drawing, sculpture and artistic craftsmanship and architectural works of art and engravings and photographs. As a noun, the term "artist" would always denote a person who produces paintings or drawings or sculpture as a profession. It cannot include performers such as singers, actors, poets etc. or authors and playwright as they are separately covered by Section 80RR. The term "artist" has again to be distinguished from the term "artiste". The term "artiste", as a noun, refers to a professional entertainer, specially a singer or dancer including cabaret artistes. Singers, dancers including cabaret artistes arc known as "artistes" and not as "artists". It is for these reasons that we are in respectful agreement with the decision of this Tribunal in the assessee's own case. Be whatever it may, the fact remains that we are bound to follow the decision taken by this Tribunal in the assessee's own case and therefore we follow the same.

10. The learned Counsel for the assessee has vehemently contended that we should follow the decision of this Tribunal in Amitabh Bachchan (supra). We are unable to do so in view of the categorical finding recorded by this Tribunal in Amitabh Bachchan's case that the facts in the assessee's case are clearly distinguishable to those in Amitabh Bachchan. It is therefore not open to us to take a contrary view and hold that the facts in the case under appeal are identical with those in Amitabh Bachchan (supra). The aforesaid finding of fact recorded by this Tribunal in Amitabh Bachchan is binding on us. We shall therefore follow the same.

11. However, assuming for a while, that the facts in the assessee's case are identical with those in Amitabh Bachchan, it is still not open to us to take a view contrary to the one taken by this Tribunal in the assessee's case for the reasons explained by this Tribunal in Mehratex India Ltd. v. Dy. CIT (2005) 3 SOT 539 (Mumbai) as under:

9. It is thus beyond dispute that a decision which is per incuriam is not a binding judicial precedent. It is also well-settled that when it is not open to a High Court Bench to differ from the decision of a Bench of equal strength, it cannot also be open to a Bench of this Tribunal to differ from the view taken by a Co-ordinate Bench of equal strength. The only option in case one doubts the correctness of such a decision is to refer the matter for constitution of a Larger Bench. A decision ignoring this rule of precedent, which is duly approved by the Hon'ble Courts from time to time, cannot but be viewed as per incuriam. Therefore, following the Hon'ble Andhra Pradesh High Court Full Bench decision in the case of B.R. Constructions (supra), such a decision of the Co-ordinate Bench was of predence value.

12. The learned Counsel for the assessee submitted as a last resort that the matter should be referred to the Hon'ble President of this Tribunal for constitution of a Special Bench to resolve the controversy following the two diametrically opposite views taken by the Division Benches in the assessee's case and in the case of Amitabh Bachchan (supra). The learned Departmental Representative has very appropriately opposed the prayer made by the learned Counsel for the assessee. According to her, the Tribunal itself has recorded a finding in Amitabh Bachchan's case (supra) that the facts in that case are different from those in the assessee's case and therefore there is no question of two different Benches of this Tribunal taking divergent views in the matter on the same set of facts. Her second submission was that the constitution of Special Bench could not be resorted to when the High Court is already seized of the matter. In this connection, she has invited our attention to the order passed by the Hon'ble President of this Tribunal on 22nd Nov., 2006 withdrawing the order constituting a Special Bench in the case of Star Ltd. Hong Kong and in particular to the following observations made therein:

In my opinion, the assessee was not justified in asking the undersigned to constitute a Special Bench to consider the question which the Hon'ble High Court has already framed for consideration. In fact, information in respect of proceedings before the Hon'ble High Court was totally withheld. After the Hon'ble High Court had agreed to frame substantial question and decide them, application dt. 11th Aug., 2006 to constitute a Special Bench was moved before the undersigned in Delhi. Above facts as now placed before me by the Revenue, were important and relevant, should have been placed before me in the application to constitute the Special Bench. If situation like above is brought to the notice of the President, it is certain that President (unless there are strong reasons to do otherwise) would not constitute the Special Bench. The Tribunal as a body subordinate to the Hon'ble High Court has to take light and guidance and follow the directions of Hon'ble High Court under Section 260A of the IT Act r/w Article 226/227 of the Constitution. It cannot venture to decide the same issue when the Hon'ble High Court has already taken steps to decide it.... The Tribunal must stay its hands when the Hon'ble High Court is already seized of the same matter....

13. Respectfully following the order of the Hon'ble President, we reject the prayer of the assessee for constitution of a Special Bench to consider the issues already decided by the Tribunal in the assessee's own appeal as the appeal against the said decision of the Tribunal is pending before the Hon'ble jurisdictional High Court. Two forums, i.e., Special Bench of this Tribunal and the Hon'ble jurisdictional High Court cannot simultaneously be invited by the assessee to pronounce their judgments on identical issues in the same case. As held by the Hon'ble President, when the superior

forum is seized of the matter, the subordinate forum must keep itself away.

14. In view of the foregoing, we dismiss ground Nos. 1 to 3 taken by the assessee in his appeals for asst. yrs. 1996-97 and 1998-99 and ground Nos. 1 and 2 taken by him in his appeals for asst. yrs. 1999-2000 and 2001-02 and also reject the prayer of the assessee for constitution of a Special Bench of this Tribunal.

15. Ground No. 4 taken by the assessee in his appeal for asst. yr. 1996-97 is similar to ground No. 4 taken by the assessee in his appeal for asst. yr. 1998-99 and ground No. 3 taken by him in his appeal for asst. yr. 1999-2000. It reads as under:

The learned ITO erred in charging interest under Sections 234B and 234C of the IT Act, 1961. The learned ITO has failed to appreciate that levy of interest under the aforesaid section has to be specific and clear that application of mind as confirmed by the Supreme Court in the case of CIT v. Ranchi Club Ltd. . The appellant prays that imposition of interest being not in accordance with law it should be deleted and learned CIT(A) erred in confirming the same.

16. We have heard the parties. The assessee has filed a copy of the order passed by this Tribunal in assessee's own appeal for asst. yr. 1997-98. It is seen that additional ground of appeal was taken in the said appeal against levy of interest under Sections 234B and 234C on the ground that interest under both the aforesaid sections could not be charged unless there was a specific order to that effect by the AO. In the present ground of appeal also, the assessee has placed reliance on the decision in Ranchi Club Ltd. (supra) stating that the AO should not have charged the interest in the absence of a specific and clear direction in the assessment order. It is further stated by the learned Counsel for the assessee that the availability of deduction under Section 80RR is quite debatable and controversial and therefore the assessee could not have foreseen and thereby estimated his current income in terms of Section 209(1) of the IT Act. According to him, his estimation of current income for the purpose of payment of advance tax was bona fide and therefore the AO ought not to have charged interest under Sections 234B and 234C of the IT Act.

17. The estimation of current income envisaged by Section 209(1) of the IT Act must be a bona fide estimate. In case of doubt, the assessee must be cautious and careful. The assessee cannot presume that he would automatically get the deduction under Section 80RR without fulfilling the requisite conditions. His plea in this behalf is therefore rejected. Levy of interest is mandatory and automatic upon the assessment. Interest is levied to compensate the exchequer for delay in or non-payment of taxes. There is no doubt that the assessee has withheld the payment of tax. He must therefore compensate the exchequer for use of that money which legitimately belongs to the public exchequer. As mentioned earlier, identical issue has been considered by this Tribunal and decided against the assessee in asst. yr. 1997-98. We see no reason to take a view different from the one taken by this Tribunal in the assessee's own appeal for asst. yr. 1997-98. Ground No. 4 taken by the assessee in his appeal for asst. yrs. 1996-97, 1998-99 and ground No. 3 in asst. yr. 1999-2000 are consequently dismissed.

18. Ground No. 5 taken by the assessee in his appeal for asst. yr. 1996-97, asst. yr. 1998-99 and ground No. 4 in asst. yr. 1999-2000 are similar and identically worded. Ground No. 5 reads as under:

The learned ITO has erred in reopening the proceedings under Section 147 of the IT Act, 1961.

19. We have heard the parties. The learned CIT(A) has decided the issue against the assessee with the following observations in para 6a of his appellate order for asst. yrs. 1996-97 and 1999-2000:

(6a) I have considered the submission of the appellant counsel and the order of the AO. On perusal of the assessment order for both the years, it is found that initially the return filed by the appellant were accepted of under Section 143(1) of the IT Act, 1961 and thereafter, it was reopened under Section 147 of the IT Act, 1961. Since the original return filed by the appellant for both the years were accepted under Section 143(1) of the IT Act, 1961, there is no question of application of mind of the AO at the time of processing of return under Section 143(1) arises and thus, there is no question of change of opinion arise at the time of proceedings under Section 147 as argued by Mr. Gandhi. Therefore, this ground of appeal for both the years are dismissed.

20. We have heard the parties. In our view, the learned CIT(A) has correctly decided the issue against the assessce. His order is covered by the judgment of Hon'ble Supreme Court in Asstt. CIT v. Rajesh Jhaveri Stock Brokers (P) Ltd. (2007) 210 CTR (SC) 30 : (2007) 201 ITR 500 (SC). In this view of the matter, ground No. 5 taken in his appeal for asst. yrs. 1996-97, 1998-99 and ground No. 4 in asst. yr. 1999-2000 is dismissed.

All the appeals filed by the assessee are dismissed.