

7 SCOB [2016] HCD 1

**High Court Division
(Special Original Jurisdiction)**

Mr. Md. Erfan Ullah, Adv.
...For the Assessee-applicant.

I.T. Ref: Application No. 90 of 2014
With
I.T. Ref: Application No. 82 of 2009
And
I.T. Ref: Application No. 81 of 2009

Ms. Nasrin Parvin, AAG with
Mr. Saikat Basu, AAG.
...For I.T. Department.

Ahmed Services Limited
....Assessee-Applicant.
Versus

Heard on: 19.11.2014 & 10.12.2014
And
Judgment on: The 14th December, 2014

The Commissioner of Taxes

Present:
Justice A.F.M. Abdur Rahman
And
Justice Md. Emdadul Haque Azad

Income Tax Ordinance, 1984

Section 35(4):

Since the DCT concern did not raise any dissatisfaction as to the method of accounting and did not pin point any of the defect in the accounts, the two lower appellate authorities were required to consider the said question and decide the appeals before them in its true perspective. But that has not been done by the two lower appellate authorities and as such the questions as have been formulated in the instant three Income Tax Reference Applications are required to be answered in negative and in favour of the Assessee-applicant. ... (Para-17)

Judgment

A.F.M. Abdur Rahman, J:

1. These 3 (three) Income Tax Reference Applications filed by the Assessee-applicant, Ahmed Services Limited, having involved the similar question of law on the identical factual aspects have been heard analogously and now disposed off by this single judgment.

2. Facts of the case in ITR No. 90 of 2014:

It has been asserted in Income Tax Reference Application No. 90 of 2014 that the Assessee-applicant Ahmed Services Limited is a private limited company and runs a Hotel business under the name and style Hotel Park International, having Hotel, Restaurant and Bar facilities. The Assessee-applicant is a regular income tax payer holding TIN. 002-200-5331, which maintained proper books of accounts as required under the provision of section 75(2)(d)(iii) of the Income Tax Ordinance 1984, following regular method of accounting which has been audited by a chartered accountant company which certified the account as true and correct. The Assessee-applicant in course of his business submitted its income tax return for the assessment year 1996-1997 showing net income of Tk. 87,190.00 and submitted the said chartered accountant certified books of account as required under the

provision of section 35(3) of the Income Tax Ordinance 1984. But the Deputy Commissioner of Taxes refused to accept the book version of the accounts and upon disallowing some of the expenditure without any material basis only on assumptions assessed net income of the assessee-applicant at an amount of Tk. 86,97,305.00, against which the Assessee-applicant preferred BuLi Bf̄mf̄æ ew-26/ᄁLj̄w-2/LxAx-2/1998-1999 before the 1st Appellate Authority which having been rejected by the First Appellate Authority, thereafter the applicant filed Appeal before the Taxes Appellate Tribunal, who remanded the case to the First Appellate Authority, which has been renumbered as BuLi Bf̄mf̄æ ew- 465/ᄁLj̄w-21/LxAx-7/2007-2008, which having been failed the Assessee-applicant further preferred an unsuccessful appeal, being ITA No. 4368 of 2007-2008 before the Taxes Appellate Tribunal and being failed now preferred the instant Income Tax Reference Application formulating the following question of law, seeking opinion from this court:

1. *Whether in the facts and on the circumstances of the case the learned Taxes Appellate Tribunal was legally justified under section 159(2)/35 of the Income Tax Ordinance 1984 in maintaining without any material basis but only on assumptions of higher sales and higher G.P. in the head of Room Account, Restaurant Account, Bar Account resulting enhancement of income without rejecting the audited statement of accounts the method of accounting regularly employed with the provision of section 35(3) of the Income Tax Ordinance 1984.*
2. *Whether the learned Taxes Appellate Tribunal was legally justified in confirming the higher sales and higher G.P. in the head of Room Account, Restaurant Account, Bar Account without any material basis but only on the assumption where the VAT authority accepted the disclosed sales shown in the accounts.*
3. *Whether the learned Taxes Appellate Tribunal was legally justified where the contents of the inspection report were not furnished to the assessee-petitioner to enable him to controvert the same whether it violates the principle of natural justice.*

3. Facts of the case in ITR No. 82 of 2009:

It has been asserted in Income Tax Reference Application No. 82 of 2009 that the Assessee-applicant in the same manner maintained its account and submitted its income tax return for the assessment year 2003-2004 showing net income at an amount of Tk. 8,351.00. But the Deputy Commissioner of Taxes upon discarding the book version of the accounts estimated the income of the Assessee-applicant without any material basis but only on assumptions at an amount of Tk. 1,59,13,145.00, against which the Assessee-applicant preferred BuLi Bf̄mf̄æ ew-1100/ᄁLj̄w-21/LxAx-7/2004-2005 before the 1st Appellate Authority, which having been failed in substance, the Assessee-applicant further preferred unsuccessful appeal before the Taxes Appellate Tribunal being ITA No. 1165 of 2005-2006 and being failed now preferred the instant Income Tax Reference Application formulating the following question of law in the supplementary-affidavit, seeking opinion from this court;

1. *Whether in the facts and on the circumstances of the case the learned Taxes Appellate Tribunal was legally justified under section 159(2)/35 of the Income Tax Ordinance 1984 in maintaining without any material basis but only on assumptions of higher sales and higher G.P. in the head of Room Account, Restaurant Account, Bar Account resulting enhancement of income without rejecting the audited statement of accounts the method of accounting regularly employed by the applicant having complied with the provision of section 35(3) of the Income Tax Ordinance 1984.*

2. *Whether the learned Taxes Appellate Tribunal was legally justified in confirming the higher sales and higher G.P. in the head of Room Account, Restaurant Account, Bar Account without any material basis but only on assumption where the VAT authority accepted the disclosed sales shown in the accounts.*

4. Facts of the case in ITR No. 81 of 2009:

It has been asserted in Income Tax Reference Application No. 81 of 2009 that the Assessee-applicant upon maintaining its accounts in the same manner, submitted its income tax return for the assessment year 2005-2006, showing net income at an amount of Tk. 6,07,561.00. But the Deputy Commissioner of Taxes discarded the book version of the accounts and estimated the net income of the Assessee-applicant at an amount of Tk. 74,73,551.00, against which the Assessee-applicant preferred BuLi Bfñmfæ ew-106/®Ljw-21/LxAx-7/2006-2007 before the 1st Appellate Authority which having been failed, the Assessee-applicant further preferred unsuccessful appeal before the Taxes Appellate Tribunal, being ITA No. 2568 of 2006-2007 and now preferred the instant Income Tax Reference Application formulating the following question in the supplementary-affidavit, seeking opinion from this court;

1. *Whether in the facts and on the circumstances of the case the learned Taxes Appellate Tribunal was legally justified under section 159(2)/35 of the Income Tax Ordinance 1984 in maintaining without any material basis but only on assumptions of higher sales and higher G.P. in the head of Room Account, Restaurant Account, Bar Account resulting enhancement of income without rejecting the audited statement of accounts the method of accounting regularly employed with the provision of section 35(3) of the Income Tax Ordinance 1984.*
2. *Whether the learned Taxes Appellate Tribunal was legally justified in confirming the higher sales and higher G.P. in the head of Room Account, Restaurant Account, Bar Account without any material basis but only on assumption where the VAT authority accepted the disclosed sales shown in the accounts.*

5. Claim of the Taxes Department:

Upon service of the notice, the Taxes Department appeared through the learned Assistant Attorney General Ms. Nasrin Parvin and Mr. Saikat Basu and filed affidavit-in-reply, wherein it has been categorically asserted that the Assessee-applicant having maintained its books of accounts under the mercantile system of accounting claimed exorbitant expenditure and shown less income and therefore the true and correct income of the Assessee-applicant could not be deduced from the books of accounts and as such the DCT concern invoked its power available under the provision of section 35(4) of the Income Tax Ordinance 1984 and accordingly the income of the Assessee-applicant for the assessment year 1996-1997, 2003-2004 and 2005-2006 were disposed off by discarding the book version of accounts and estimating the income of the Assessee-applicant in a correct and lawful manner. Therefore, the two lower appellate authorities lawfully did not entertain the objection as raised by the Assessee-applicant and accordingly the questions as have been formulated in these three Income Tax Reference Applications are not required to be answered in negative and in favour of the Assessee-applicant.

6. The learned Advocate Mr. Md. Erfan Ullah, represented the Assessee-applicant, while the learned Assistant Attorney General Ms. Nasrin Parvin conducted hearing on behalf of the Taxes Department at the time of hearing of these three Income Tax Reference Applications.

7. Argument of the Parties:

The learned Advocate Mr. Md. Erfan Ullah, appearing on behalf of the Assessee-applicant at the very outset has drawn the attention of this court that the latitude of power available under the provision of section 35(4) of the Income Tax Ordinance 1984 to discard the book version of the account maintained regularly by the Assessee of income tax has already been decided in so many cases especially, in the case of Titas Gas (T&D) Limited-Vs-The Commissioner of Taxes reported in 53 DLR 209, the case of Mark Builders Limited-Vs-The Commissioner of Taxes reported in 59 DLR 463 and in the case of Eastern Hardware Store-Vs-The Commissioner of Taxes reported in 54 DLR 125 and therefore the DCT concern was required to observe the *ratio decidendi* of those decisions while discarding the book version of the accounts since the Assessee-applicant maintained regular method of accounting audited and certified by the Chartered Accountant and the DCT concern did not raise any objection as to the method of accounting, nor it has pin pointed the defects in the accounts, submitted by the Assessee-applicant. Therefore, the two lower appellate authorities were required to consider this aspect of the assessment but they having been failed, the question as have been formulated by the Assessee-applicant in these three Income Tax Reference Applications are required to be answered in negative and in favour of the Assessee-applicant.

8. The learned Advocate further argued that the VAT authority already accepted the disclosed sales shown in the account and without any material basis only on assumptions the DCT concern enhanced the net income which is not maintainable in the eye of law and equity.

9. On the other hand the learned Assistant Attorney General Ms. Nasrin Parvin, appearing on behalf of the Taxes Department strenuously argued that the facts as have been decided in the referred cases are quite different from the instant Income Tax Reference Applications. Ms. Parvin submits that the Assessee-applicant made an exorbitant claim of expenditure and also shown a lesser income in the book version of the accounts which is nothing but concealment of income by the Assessee-applicant. The DCT concern correctly and lawfully invoked its power available under the provision of section 35(4) of the Income Tax Ordinance 1984. Therefore, the *ratio decidendi* of the referred cases are not applicable in the instant Income Tax Reference Applications and therefore the questions as have been formulated by the Assessee-applicant in these three Income Tax Reference Applications are not required to be answered in negative and in favour of the Assessee-applicant.

10. We have heard the learned Advocates and perused the materials on record.

11. Deliberation of the Court:

It appears that the Assessee-applicant is a private limited company which upon complying the provision of section 75(2)(d)(III) of the Income Tax Ordinance 1984 maintained its account in mercantile system which has been audited regularly by chartered accountant firm and the Assessee-applicant upon complying the provision of section 35(3) of the Income Tax Ordinance 1984 submitted the said chartered accountant audited and certified accounts with the return of the assessment years. But the DCT concern did not accept the book version of the accounts, rather it has discarded the same on the ground of non-verifiability of different

head of expenditure and also the non-verifiability of the income as has been claimed by the Assessee-applicant.

12. But it appears that the DCT concern prior to that did not raise any dissatisfaction as to the method of accounting or did not pin point any of the defects in the accounts expressing that due to the same the correct and true income of the Assessee-applicant could not be deduced from the book version of the accounts.

13. In this respect various cases of this court and the apex court has decided the question as to the latitude of power available to the DCT concern while invoking the provision of section 35(4) of the Income Tax Ordinance 1984. The provision of section 35(4) of the Income Tax Ordinance 1984 reads as follows;

Income Tax Ordinance 1984

Section 35(4): Method of accounting—

(1)-(3).....

(4) Where—

(a) no method of accounting has been regularly employed, or if the method employed is such that, in the opinion of the Deputy Commissioner of Taxes, the income of the Assessee cannot be properly deduced therefrom; or

(b) in any case to which sub-Section (2) applies, the Assessee fails to maintain accounts, make payments or record transactions in the manner directed under that sub-Section; or

(c) a company has not complied with the requirements of sub-Section (3); the income of the Assessee shall be computed on such basis and in such manner as the Deputy Commissioner of Taxes may think fit.

14. The aforesaid provision was taken for consideration in the case of Titas Gas (T&D) Ltd.–Vs-The Commissioner of Taxes reported in 53 DLR 209, wherein their Lordship in this Bench, differently constituted, held as under;

The legal position is that in the computation of income profit and gains of company the DCT is entitled to reject the books of accounts if he is of the opinion that no method of accounting has been regularly employed by the assessee or if the method employed is such that the income of the assessee cannot be properly deduced therefrom or that a company has not complied with the requirement of sub-section (3) of section 35 of the Ordinance.

15. Similarly in the case of Mark Builders Ltd.–Vs-The Commissioner of Taxes reported in 59 DLR 463 their Lordship in this Bench, differently constituted, further held as follows;

The latitude available to the Deputy Commissioner of Taxes under section 35 is no doubt very wide but cannot be thought to be without any restraint in the process of assessment of the total income of an assessee under sub-section (2) of section 83 of the Ordinance. Discretion of statutory authority in the exercise of statutory power, particularly in taxation matter if though to be unlimited then exercise of such discretion may result in arbitrariness and selectivity.

After close examination of the power of the Deputy Commissioner of Taxes under section 83 of the Ordinance to assess the total income of an assessee, we find that after submission of a return or revised return by the assessee, if the Deputy Commissioner of Taxes is not satisfied with the return, he shall serve a notice under sub-section (1), requiring the assessee to appear either in person or through a representative or produce the evidence that the return is correct and complete. After hearing the person or his representative and/or considering the evidence produced pursuant to the notice, he may under sub-section (2) require further evidence on specified points before he could complete the assessment. That could only be done by asking again in writing the assessee to produce evidence upon such points as he should specify, the Deputy Commissioner of Taxes appears to be acquainted with.

16. In the case of Eastern Hardware Store Ltd.–Vs–The Commissioner of Taxes reported in 54 DLR (2002) 125 their Lordship in this Bench on the provision of section 35(4) of the Income Tax Ordinance 1984 held as under;

As the Appellate Additional Commissioner of Taxes did not find any defect either with the method of accounting or in the accounts neither of them can resort to estimation under section 35(4) of the Ordinance and thereby both of them acted illegally and that illegal order has been mechanically affirmed by the Appellate Tribunal which cannot be sustained in law.

17. From the aforesaid decisions it appears that the questions which have been raised in these three instant Income Tax Reference applications have already been decided in the above mentioned referred cases. In the instant cases since the DCT concern did not raise any dissatisfaction as to the method of accounting and did not pin point any of the defect in the accounts, the two lower appellate authorities were required to consider the said question and decide the appeals before them in its true perspective. But that has not been done by the two lower appellate authorities and as such the questions as have been formulated in the instant three Income Tax Reference Applications are required to be answered in negative and in favour of the Assessee-applicant.

18. Result of the cases:

In the result, these three Income Tax Reference Applications are allowed.

19. The questions as have been formulated by the Assessee-applicant are hereby answered in negative and in favour of the Assessee-applicant.

20. However, there shall be no order as to cost.