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IN THE SUPREME COURT OF BANGLADESH

Appellate Division

PRESENT

Mr. Justice Syed Mahmud Hossain

Mr. Justice Muhammad Imman Ali

Mr. Justice Mohammad Anwarul Haque

CIVIL APPEAL NO. 279 OF 2002

(From the judgment and order dated 25th of March, 2001 passed by the High Court Division in Reference Application No. 43 of 1997)

M/S Ali Garments Limited ... Appellant

= Versus =

The Commissioner of Taxes ... Respondent

For the Appellant :Mr. Rafique-ul-Huq, Senior Advocate, instructed by Mr. Mvi. Md. Wahidullah, Advocate-on-Record

For the Respondent :Mr. Mr. Mahfuza Begum. Assistant Attorney General, instructed by Mr. B Hossain, Advocate-on-Record

Date of hearing & judgement :The 5th of February, 2014

JUDGEMENT

MUHAMMAD IMMAN ALI, J:-

The Civil Appeal, by leave, is directed against the judgment and order dated 25.03.2001 passed by a Division Bench of the High Court Division in Reference Application No. 43 of 1997 rejecting the reference.

The facts of the case, in brief, are that the appellant filed return for the assessment year 1991-92 showing gross profit at the rate of 11.77%. Notice was served upon him, fixing date of hearing but he did not appear at the time of hearing and the Deputy Commissioner of Taxes took the matter for ex-parte hearing and held that the assessee intentionally avoided attending the case and made assessment under

section 84 of the Income Tax Ordinance, 1984. The Deputy Commissioner of Taxes considered the audit report submitted by the company but found that supporting papers including vouchers have not been filed and made the assessment fixing 64.70% as the rate of gross profit.

Against the said order the appellant filed an appeal being I.T. Appeal No. 56/coy-2/94-95 and the same was heard by the Commissioner of Taxes(Appeal) who by his order dated 30.10.1995 reduced the gross profit to 25% and also allowed deduction of Tk. 17,50,000/- but rejected the claim for rebate of 60% as a garments manufacturer and exporter.

Against the said order the assessee appellant filed I.T.A. No. 1831 of 1995-96 before the Taxes Appellate Tribunal. The Tribunal directed the revenue authority to accept the sale as disclosed by them and also reduced the rate of gross profit to 20% from 25% holding that the decision was taken by the appellate authority on comparison of records with parallel cases.

Against the said order the appellant filed an application under section 160 of the Income Tax Ordinance before the High Court Division stating that the Taxes Appellate Tribunal has illegally fixed gross profit at the rate of 20% instead of 11.77%. the question of law under reference was couched in the following terms:

"Whether in the facts and circumstances of the case the Taxes Appellate Tribunal was justified in

directing adoption of gross profit at 20% in view of the fact that the petitioner's accounts are audited and verifiable, contrary to Income Tax Law and Procedure."

By the impugned judgment and order, the High Court Division rejected the reference application.

Against the said judgement and order dated 25.03.2001 the appellant filed a civil petition for leave to appeal.

Leave was granted to consider the following grounds:

I. Whether the High Court Division acted illegally in holding that no question of law arose for their decision in considering the reference formulated and placed before them;

II. Whether the respondent having not filed any affidavit-in-opposition in the reference application disputing the question of law as formulated nor suggesting any new question of law, the High Court Division acted illegally in holding that no question of law arose out of the order of the Tribunal; as such the reference application was not maintainable; and

III. Whether the High Court Division could itself have formulated the question referred by way of reference.

Mr. Rafiq-ul-Huq, learned Senior Advocate appearing on behalf of the appellants made submissions

in line with the grounds upon which leave was granted. He submitted that the High Court Division acted illegally in not considering that the Tribunal applied GP at the rate of 20% without taking into consideration the evidence on record when the misreading and non-consideration of evidence are questions of law and as such the appeal is liable to be allowed. The learned Advocate further submitted that the audit report was supplied containing a certificate from a Chartered Accountant certifying the correctness of the true income of the assessee, and as such the Tribunal was bound by the evidence given by the Appellant under section 82 of the Income Tax Ordinance and as such the High Court Division acted illegally in holding that no question of law had arisen in the reference application for their decision. He also submitted that the High Court Division acted illegally in not formulating any question of law as prayed for by the appellant. The learned Advocate lastly submitted that the question of law as formulated in the Reference Application does arise from the order of the Tribunal and as such the High Court Division acted illegally in holding that question of law does not arise for their decision in the instant Reference Application and the impugned judgement is liable to be set aside and the appeal may be allowed.

Mrs. Mahfuza Begum, learned Assistant Attorney General appearing on behalf of the respondent submitted that the High Court Division on perusal of

the materials on record has rightly held that no question of law has been raised before it because the determination of the rate of gross profit is not a question of law. In support of her contention she referred to the decision in the Case of ***Commissioner of Income Tax A-Range, Chittagong Vs. Harendra Kumar*** **Shil** reported in ***34 DLR (AD) 298,*** where it was held that:

> *"Determination of rate of gross profit for the particular year in respect of the particular business or trade, is purely a question of fact, and that being so it could not be made a ground for making reference under section 66(1) of the Income-tax Act."*

She further submitted that the question of fact does not require to be controverted by filing an affidavit-in-opposition. As there was no requirement to controvert the question of fact raised before the High Court Division, the Revenue Department did not file any affidavit-in-opposition and for non-filing of affidavit-in-opposition by the respondent, the appellant cannot be benefited in any manner. The learned A.A.G lastly submitted that the audit report was not accepted by the Deputy Commissioner of Taxes for want of supporting papers and the appellant having not furnished any supporting papers either before the Commissioner (Appeal) or the Tribunal, their claim for being assessed at the rate of 11.77% in respect of gross profit is not tenable and thus suggestion for

reformulating the alleged question of law as claimed by the appellant does not arise.

During the course of hearing Mr. Rafique-ul-Huq, learned Senior Counsel submitted that the appellant supplied accounts certified by Chartered Accountants which under section 82 of the Income Tax Ordinance, 1984 is sufficient to deem the return as correct.

On the other hand, Mrs. Mahfuza Begum, learned A.A.G. submitted that the provisions of section 82 is only applicable if the certificate of the Chartered Accountants is furnished on the prescribed form under Rule 64 A of the Income Tax Ordinance Rules, 1984.

We have considered the submissions of the learned advocates appearing for the parties concerned and perused the impugned judgement as well as other evidence and materials on record.

The relevant portions of section 160 of the Income Tax Ordinance provides as follows:

> *160* ***Reference to the High Court Division.****-(1) The assessee or the Commissioner may, within sixty days from the date of receipt of the order of the Appellate Tribunal communicated to him under section 159, by application in the prescribed form, accompanied, in the case of an applicaion by the assessee, by a fee of one hundred taka, refer to the High Court Division any question of law arising out of such order:*

ATTESTED
Superintendent
Appellate Division
Supreme Court of Bangladesh

Provided further that the Board may, on an application made in this behalf, modify or waive, in any case, the requirement of such payment.

[..............................]

(4) on receipt of the notice on the date of hearing of the application, the respondent shall, at least seven days before the date of hearing submit in writing a reply to the application; and he shall therein specifically admit or deny whether the question of law formulated by the applicant arises out of the order of the Appellate Tribunal.

(5) If the question formulated by the applicant is, in the opinion of the respondent, defective, the reply shall state in what particular the question is defective and what is the exact question of law, if any, which arises out of the said order; and the reply shall be in triplicate and be accompanied by any documents which are relevant to the question of law formulated in the application and which were produced before the Deputy Commissioner of Taxes, the Inspecting Joint Commissioner, the Appellate Joint Commissionr, the Commissioner (Apepals) or the Appellate Tribunal, as the case may be, in the course of any proceeings relating to any order referreed to in sub-section (2)(a) or (b).

The High Court Division observed that no audited accounts and papers relating to the applicant's accounts were either before the Commissioner of Taxes(Appeal) or before the Taxes Appelalte Tribunal.

Having examined the reference application as well as the order of the Taxes Appellate Tribunal the High Court Division held that no quesiton of law had arisen from the said order and the assessee-applicant had not been able to formulate any point of law. In this regard the learned A.A.G. has referred to the decision in the case of ***Cmmissioner of Income Tax A-Range, Chittagong Vs. Harendra Kumar Sil*** reportned in ***34 DLR (AD) 298,*** where it was specifically held that the determination of rate of gross profit is purley a question of fact and could not be made a ground for making reference. Since that was the only point of reference made by the appellant before the High Court Divison, we are constrained to agree with the submissions of the learned A.A.G that the respcndents were not required to controvert the same by filing an affidavit-in-opposition. We also note that under sub-section (4) the respondetns are required to specifically admit or deny whether the question of law formulated by the appelicant arises out of the order of the Appellate Tribunal. Since in view of the above mentioned decision of this Division, no question of law arose in the reference the respondents were not required to admit or deny the reference. Similarly the question of reformulating the qustion referred by the applicant would only arise if the reference was indeed on a question of law.

We are of the view that the High Court Division correctly found that no question of law had arisen.

With regard to the submission of learned Counsel for the appellant that the High Court Division itself could have formulated a point of law in the manner suggested, we are of the view that section 160 of the Ordinance does not provide for any such action. Clearly it is for the assessee to formulate any point of law and make the reference to the High Court Division in the prescribed form. Under section 161 (2) the High Court Division is required only to hear and decide the question of law raised and, therafter, deliver its judgement stating the grounds on which the decision is founded.

In the instant case the High Court Division found that no question of law had arisen, which is fully in accrodance with the decision reported in 34 DLR (AD) 298, mentioned above.

We do not find any illegality or infirmity in the impugned judgment and order of the High Court Division, accordingly, the appeal is dismissed without however any order as to costs.

Sd/- S. M. Hossain, J
Sd/- M. Imman Ali, J
Sd/- A. Haque, J

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