

IN THE SUPREME COURT OF
BANGLADESH
HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

INCOME TAX REFERENCE
APPLICATION NO. 240 OF 2011.

Zinat Ara, J

Kazi Md. Ejarul
Haque Akondo, J

Judgment on
26.02.2018.

Grameen Danone Foods
Limited represented by its
Executive Director
Grameen Bank Bhaban
(13th Floor), Mirpur-2
Dhaka- 1216.

.....Applicant.

Vs

The Commissioner of
Taxes, Company Circle
No. 7, Taxes Zone-3
Dhaka.

.....Respondents.

For the
applicant.

Mr. Sarder Jinnat Ali with
Mr. Md. Forrukh Rabman,
Mr. Md. Delower Hossin,
Advocates

For the
Respondent.

Ms. Nurun Nahar, AAG

Terms, Issues and Phrases:

IT reference, Questions of fact- not to be decided in Reference jurisdiction, Remanding back the case for the Tribunal, Cash sale of yougurt- not to be compared with foreign company in assessment of a local company, Question on trading account- question of fact, Determination of sale as well as rate of gross profit- a question of fact.

Main Decision:

In the above context, the matter is sent back on remand to the Tribunal for deciding the appeal afresh in accordance

with law considering all the aspects of the appeal, after giving the assessee an opportunity to take additional grounds in appeal, to produce further documents, if so required.

The Tribunal is further directed to dispose of the appeal within ninety days from the date of receiving copy of the judgment.....(Paras 28 and 29).

The Registrar, Supreme Court of Bangladesh is directed to take necessary steps under section 161(2) of the Income Tax Ordinance, 1984.....(Para 32).

Income Tax Ordinance, 1984: Section 160:
Cash sale and Trading account: being question of facts cannot be decided in Reference jurisdiction:

We are also of the similar view that in case of cash sale of yogurt, etc., it was not necessary for the seller i.e. the assessee to bother about the names and addresses of the purchasers or preserve it. But the DCT rejected it for the said reason, which is affirmed by the appellate authorities unlawfully.

Moreover, it appears from the assessment order that the assessee is a Bangladeshi company, but the DCT, while estimating the sale as well as rate of gross profit, rejecting the assessee's claim, estimated those considering only the sale and rate of gross profit of a renowned multi-national company registered in Bangladesh, namely, New Zealand Dairy Products Bangladesh Limited, which is not proper.....(Paras 21-22).

Income Tax Ordinance, 1984: Section 160:
Determination of sale as well as rate of gross profit being a question of fact, cannot be determined in reference jurisdiction:

It is true that determination of sale as well as rate of gross profit is a question of fact and this question of fact has to be decided finally by the Tribunal.

In the instant case, it appears that the assessee raised question on trading account rejection before the Tribunal, but the Tribunal has not considered this aspect of this case, as it ought to have been done.

Be that as it may, in an income tax reference application, we are not going to discuss the detailed facts of the case, as this court is not sitting in an appellate jurisdiction.

However, it appears that the assessment order apparently shows some contradiction, etc. as discussed but both the appellate authorities, the Commissioner of Appeal and the Tribunal without considering those in a mechanical way rejected the appeals.....(Paras 23-26).

assessee has not produced travelling bills, vouchers, etc.

Similarly, in the expenses relating to mobile phone bills, the DCT observed that the assessee has not filed bill, vouchers and call register. But the learned Assistant Attorney General frankly concedes that in case of pre-paid mobile phone, no bill is sent to the subscribers and she has also failed to show us any law that maintenance of call register is necessary.....(Paras 16-17).

However, it appears that the assessment order apparently shows some contradiction, etc. as discussed but both the appellate authorities, the Commissioner of Appeal and the Tribunal without considering those in a mechanical way rejected the appeals.....(Para 26).

Cases cited and/or relied on:

R. B. Jessaram Fatehchand (Sugar Dept.) v. Commissioner of Income-Tax, Bombay City II ITR (Vol. 75) 33.

Income Tax Ordinance, 1984: Section 160:
Contradictions in findings by DCT in its assessment order is to be determined by the Tribunal:

Thus, it is crystal clear from the assessment order that the DCT made contradictory remarks in the assessment order itself relating to submission of bills, vouchers, etc. by the assessee. In one place, the DCT mentioned that the assessee's representative produced travelling bills, vouchers, but at the time of assessment, he mentioned that the

JUDGMENT

ZINAT ARA, J:

1. This Income Tax Reference Application (hereinafter stated as the reference application) under section 160 of the Income Tax Ordinance, 1984 (hereinafter referred to as the Ordinance) has arisen out of the order dated 30.01.2011 passed by the Taxes Appellate Tribunal, Division Bench-5, Dhaka in Income Tax Appeal No. 660 of 2010-2011. This is relating to the assessment year 2008-2009.

2. The assessee-applicant-Grameen Danone Foods Limited (hereinafter stated as the assessee) is a company limited by shares and registered under the Companies Act, 1994. The assessee is engaged in the business of developing and dealing in food products, dairy products and beverage. The assessee-company is formed to carry out social business and so, its profit is not for financial benefit but for social benefits i.e. supplying nutrition to the poor people, particularly, to the children at cheap rate by selling milk based products like yogurt, etc.

3. The assessee filed its income tax return for the assessment year 2008-2009 showing its income at a loss of Tk. 1,68,63,036/- before the Deputy Commissioner of Taxes, Companies Circle-7, Taxes Zone-3, Dhaka (hereinafter referred to as the DCT). Whereupon the DCT illegally assessed the income of the assessee ex parte at Tk. 14,230/-

4. Being aggrieved by the assessment order, the assessee preferred an appeal being Aikor Appeal Patra-445/Coy-7/Ka: Au:-3/2009-10 before the Commissioner of Taxes (Appeals), Taxes Appeal Zone-3, Dhaka (the Commissioner of Appeal, in brief). The Commissioner of Appeal, upon hearing, rejected the appeal by order dated 24.06.2010 and thereby, affirmed the assessment order made by the DCT.

5. Being aggrieved, the assessee preferred a second appeal being Income Tax Appeal No. 660 of 2010-2011 (assessment year 2008-2009) before Taxes Appellate Tribunal, Division Bench-5, Dhaka (briefly, the Tribunal). The Tribunal, upon hearing, by order dated 30.01.2011, rejected the appeal and thereby, maintained the order passed by the Commissioner of Appeal.

6. In the above backdrop, the assessee has filed this reference application raising certain questions of law.

7. Subsequently, by filing a supplementary affidavit dated 29.10.2017, the assessee reformulated the original questions of law in the following manner:

- I. Whether, in the facts and on the circumstances of the case, the Tribunal under sections 159(2)/29, 130A, 183(2) of the Income Tax Ordinance, 1984 (the Ordinance) was justified in maintaining disallowances except statutory ones for reasons of non deduction of tax (where applicable) and for non verifiability of expenses while the applicant made proper deduction of taxes and produced 100% of the expenditure verifiable?
- II. Whether, in the facts and on the circumstances of the case, the Tribunal under section 159(2) of the Ordinance was justified in upholding inclusion of depreciation in computation of trading version, in so far the schedule of depreciation on plant and Machineries, had been presented in the audited accounts and further the Tribunal is justified holding such depreciation as a component for application of trading version and that the application is disentitled to depreciation allowance as per 3rd schedule of the Ordinance?

III. Whether, in the facts and on the circumstances of the case, the Tribunal under section 159(2) of the Ordinance was justified in estimating higher-sales and at the same time applying higher rate of gross profit, the notional trading version with reference to a separate entity in absence of reproduction of similarities and dissimilarities and other co-related factors, in as such 100% of purchase, sales related evidences are verifiable?

IV. Whether, in the facts and on the circumstances of the case, the Tribunal under sections 159(2)/35 of the Ordinance was justified in maintaining excess estimate of scrap sales over the sales disclosed by the applicant?

V. Whether, in the facts and on the circumstances of the case, the Tribunal under sections 159(2), 119(1) of the Ordinance was justified in upholding addition of the part of share money deposit Tk. 31,25,000/-(refunded) as income from other sources under section 19(1) of the Ordinance inasmuch as, the assessee-applicant received the share money deposit Tk. 56,25,000/- in anticipation of shares of full value but because of limitation in shares the applicant company issued shares worth TK. 25,00,000/- and refunded Tk. 31,25,000/- in the following year and as such being no abstract of balance it could not be reflected

in the balance sheet of Grameen Byabosha Bikash?"

8. The assessee filed a series of supplementary affidavits reiterating more or less the same facts and annexing some documents.

9. The Department-respondent i.e. the Commissioner of Taxes, contested the reference application by filing an affidavit-in-reply controverting the statements made in the reference application and supporting the orders of the DCT, the Commissioner of Appeal and the Tribunal.

10. Mr. Sarder Jinnat Au, the learned Advocate for the assessee-applicant, appearing with the learned Advocates Mr. Md. Forrukh Rahman and Mr. Md. Delower Hossain, takes us through the reference application, the series of supplementary affidavits, the annexures thereof and put forward the following arguments before us:

(i) the assessee-applicant received Tk. 56,25,000/- from Grameen Byabsha Bikash and the assessee issued twenty five lac shares of Tk. 100/- each only and the remaining balance of Tk. 31,25,000/- was refunded in the next year. Therefore, no subsistence of balance was entered in the balance-sheet in Grameen Byabsha Bikash. Thus, the Tribunal is not legally justified in maintaining addition of the aforesaid amount under section 91 of the Ordinance;

(ii) upon receiving notices, the assessee's representative appeared before the DCT and

submitted salary statements, documents relating to repairing and maintenance expenses, copies of electricity bills, gas bills, fire service expenses, security service expenses, bills vouchers relating to hire of transportation, bills vouchers relating to travelling, bills relating to telephone, FAX, Email, Bank statements, permanent assets, etc., which is also apparent from the assessment order;

(iii) the DCT, upon receiving all the aforesaid documents in support of the assessee's claim, has not served any notice or further informed the assessee under section 82(2) of the Ordinance for producing any further documents. Had the assessee been asked for producing any other relevant documents, the assessee would have produced the said documents in support of its claim;

(iv) the assessee is a Bangladeshi company engaged in production of dairy products. But, from the assessment order, it appears that though the assessee showed its income as a loss, the DCT rejected the sale mentioning that all expenses were not supported by bills and vouchers and estimated the sale of the assessee at Tk. 80,00,000/- and determined gross profit @ Tk. 23.05% on the basis of a renowned foreign multi-national company being New Zealand

Dairy Products Bangladesh Limited;

(v) the Commissioner of Appeal and the Tribunal have not also considered that the profit of the assessee, a Bangladeshi small company, cannot be compared and estimated on the basis of a renowned foreign based multinational company. The relevant authorities ought to have estimated the income and the profit of the assessee comparing with the income of other local dairy products companies like Milk Vita, Arong, etc. But, without doing so, the profit of the assessee company as well as rate of gross profit was estimated by the DCT illegally and the said illegal order was affirmed by the Commissioner of Appeal as well as the Tribunal unlawfully;

(vi) the assessment order is self contradictory, as it is evident from the first page and second page of the assessment order about submission of documents relating to travel expenditure, etc.

(vii) it is true that all the grounds were not properly taken by the concerned lawyer before the Tribunal. But general grounds were taken before the Tribunal and the Tribunal as an appellate and final fact finding authority ought to have decided the matter considering all the facts and circumstances of the case. But the Tribunal, without doing so, in a mechanical way affirmed the

order of the Commissioner of Appeal and rejected the appeal preferred by the assessee unlawfully;

(viii) in the above facts and circumstances, the matter ought to be remanded to the Tribunal for deciding the matter afresh after giving an opportunity to the assessee-applicant to submit necessary documents before the Tribunal.

11. In reply, Ms. Nurun Nahar, the learned Assistant Attorney General appearing on behalf of the respondent, contends that the questions re-formulated in the reference application have neither been raised nor decided by the Tribunal and therefore, there is no scope to decide the aforesaid questions as re-formulated in the reference application. She next contends that it is a settled principle of law that the question relating to estimate of sale as well as gross profit is a question of fact, which cannot be decided in an income tax reference application. She further contends that the assessee failed to supply all necessary documents, bills and vouchers in support of its claim and, as such, the DCT lawfully rejected some of the claim of the assessee. Therefore, the said order was legally affirmed firstly, by the Commissioner of Appeal and secondly, by the Tribunal. She finally contends that in the facts and circumstances, answers are not necessary to the questions as reformulated in the reference application and the reference application is liable to be rejected.

12. We have gone through the reference application and the connected materials on record Viz. the assessment order made by the DCT (Annexure-B to the reference application), the first appellate order passed by

the Commissioner of Appeal (Annexure-C to the reference application) and the second appellate order passed by the Tribunal (Annexure-A to the reference application).

13. We have also gone through the series of supplementary affidavits filed by the assessee and the affidavit-in-reply filed by the department-respondent.

14. From the assessment order (Annexure-B to the reference application), it appears that the DCT observed therein as under:

“শুনানীর দিনে করদাতা কোম্পানীর মনোনীত জনাব শতদল দাস, এসিএ, শুনানীতে হাজির হইয়া আয়কর রিটার্ন ব্যাখ্যা করেন। প্রতিনিধি জানান যে, বিবেচ্য বর্ষে করদাতা কোম্পানী দুধজাত দ্রব্যাদি তৈরি ও বিক্রয় ব্যবসা হইতে আয় প্রাপ্ত হইয়াছে। তিনি দাখিলকৃত নিরীক্ষিত হিসাব বিবরণীর সমর্থনে বেতন বিবরণী, মেরামত ও রক্ষনা-বেক্ষণ খরচের প্রমানাদি, বিদ্যুৎ বিলের কপি, গ্যাস বিলের কপি, ফায়ার ফাইটিং সার্ভিসের প্রমানাদি, সিকিউরিটি সার্ভিসের প্রমানাদি, হায়ার অব ট্রান্সপোর্টেশনের বিল ভাউচার, ট্রাভেলিং বিল ভাউচারের প্রমানাদি, টেলিফোন, ফ্যাক্স ও ইমেইলের প্রমানাদি, ব্যাংক হিসাব বিবরণী এবং স্থায়ী সম্পদ সংযোজনের প্রমানাদি দাখিল/উপস্থাপন করেন যাহা পরীক্ষা করা হইল।.....”

(Underlined by us)

15. From the above quoted order, it appears that at the beginning of the assessment order, the DCT has clearly mentioned ভাউচার প্রমানাদি,.....দাখিল/উপস্থাপন করেন যাহা পরীক্ষা করা হইল” But in the second page of the assessment order, he observed and decided, - “ভ্রমণ ও যাতায়াত খরচ দাবী করা হইয়াছে ২,১৬,৩৯৫/- টাকা। খরচের স্বপক্ষে কোন বিবরণী বা কোন বিল ভাউচার দাখিল/উপস্থাপন করা হয় নাই। ফলে দাবীকৃত খরচ যাচাই করা গেল না। এমতাবস্থায় দাবীকৃত খরচ হইতে অগ্রাহ্য করা হইল টাকা ৭৫,০০০/”

(Underlined, emphasis supplied)

16. Thus, it is crystal clear from the assessment order that the DCT made contradictory remarks in the assessment order itself relating to submission of bills, vouchers, etc. by the assessee. In one place, the DCT mentioned that the assessee's representative produced travelling bills, vouchers, but at the time of assessment, he mentioned that the assessee has not produced travelling bills, vouchers, etc.

17. Similarly, in the expenses relating to mobile phone bills, the DCT observed that the assessee has not filed bill, vouchers and call register. But the learned Assistant Attorney General frankly concedes that in case of pre-paid mobile phone, no bill is sent to the subscribers and she has also failed to show us any law that maintenance of call register is necessary.

18. In an unreported judgment dated 24th January, 2017 passed by this Division in Income Tax Reference Application No. 80 of 2005 (in which one of us was a party), while deciding the question on maintenance of Telephone Call Register, the High Court Division observed and decided that maintenance of Telephone Call Register is not necessary.

19. It further appears from the assessment order that the DCT decided, যাচাই করা গেল না। ইহা ছাড়া কাহার নিকট কি হারে কি পরিমাণ মালামাল বিক্রয় করা হইয়াছে তাহার বিস্তারিত বিবরণ দাখিল করা হয় নাই”

20. In the case of *R. B. Jessaram Fatehchand (Sugar Dept.) v. Commissioner of Income-Tax, Bombay City II*, reported in ITR (Vol. 75) 33, it was decided in Indian jurisdiction as under:

“In the case of a cash transaction where delivery of goods is taken against cash payment, it is hardly necessary for the seller to bother about the name and address of the purchaser”

21. We are also of the similar view that in case of cash sale of yogurt, etc., it was not necessary for the seller i.e. the assessee to bother about the names and addresses of the purchasers or preserve it. But the DCT rejected it for the said reason, which is affirmed by the appellate authorities unlawfully.

22. Moreover, it appears from the assessment order that the assessee is a Bangladeshi company, but the DCT, while estimating the sale as well as rate of gross profit, rejecting the assessee's claim, estimated those considering only the sale and rate of gross profit of a renowned multinational company registered in Bangladesh, namely, New Zealand Dairy Products Bangladesh Limited, which is not proper.

23. It is true that determination of sale as well as rate of gross profit is a question of fact and this question of fact has to be decided finally by the Tribunal.

24. In the instant case, it appears that the assessee raised question on trading account rejection before the Tribunal, but the Tribunal has not considered this aspect of this case, as it ought to have been done.

25. Be that as it may, in an income tax reference application, we are not going to discuss the detailed facts of the case, as this court is not sitting in an appellate jurisdiction.

26. However, it appears that the assessment order apparently shows some

contradiction, etc. as discussed but both the appellate authorities, the Commissioner of Appeal and the Tribunal without considering those in a mechanical way rejected the appeals.

27. Considering the above facts and circumstances as discussed hereinbefore, we are of the view that without answering the questions re-formulated in this reference application the matter should be sent back on remand to the Tribunal for deciding the matter afresh.

28. In the above context, the matter is sent back on remand to the Tribunal for deciding the appeal afresh in accordance with law considering all the aspects of the appeal, after giving the assessee an opportunity to take additional grounds in appeal, to produce further documents, if so required.

29. The Tribunal is further directed to dispose of the appeal within ninety days from the date of receiving copy of the judgment.

30. With the above observations and directions, the reference application is disposed of without answering the questions reformulated by the assessee.

31. No costs.

32. The Registrar, Supreme Court of Bangladesh is directed to take necessary steps under section 161(2) of the Income Tax Ordinance, 1984.