

(2003) 12 KL CK 0012

In the High Court Of Kerala

Case No : IT Appeal No. 244 of 2001 17 December 2003

Asstt. Commissioner of Income Tax

APPELLANT

Vs

C.N. Ananthram

RESPONDENT

Date of Decision : 17-12-2003

Acts Referred:

Income Tax Act, 1961 — Section 254, 260A, 54, 54F

Citation : (2004) 135 TAXMAN 477

Hon'ble Judges : P. Vishwanatha Shetty, J;Ajit J. Gunjal, J;Ajit Gunjal, J

Bench : Full Bench

Advocate : E.R. Indrakumar, for the Revenue E.S. Kiresur, for the Assessee, for the Appellant;

Judgement

P. Vishwanatha Shetty, J.

This appeal is by the revenue. In this appeal, filed u/s 260A of the Income Tax Act, 1961 (hereinafter referred to as the Act), the appellant has called in question the correctness of the order dated 29-3-2001 passed by the Income Tax Appellate Tribunal, Bangalore (hereinafter referred to as Tribunal) in Misc. Petition No. 88/Bang./1999 in ITA No. 774/Bang./1998.

2. The facts of the case in brief which are relevant for the purpose of disposal of this appeal may be stated as follows :

The assessee was the owner of a residential site No. 4 (old No. 71), 4th main, Sripuram Extension, Seshadripuram, Bangalore having acquired the same as a result of family settlement. The assessee started putting up construction of ground floor, first floor and second floor on the site in question. The construction was completed in the year 1994-95 at a total cost of Rs. 17.40 lakhs, the break up as under:

Rs.

Ground floor

8.40 lakhs;

First floor

4,25 lakhs;

Second floor

4.75 lakhs;

Total

17.40 lakhs.

The assessee during the relevant assessment year 1996-97 transferred and sold the first and second floors of the said building together with undivided share in the land for a consideration of Rs. 9.60 lakhs to two different purchasers. Since the building was not held for a period of exceeding 36 months, the assessee offered the difference for taxation in respect of the sale proceeds received on account of transfer of building under the "short-term capital gains". But however insofar as the undivided portion of the land, according to the assessee, it being held for a period of more than 36 months, the income from sale of the said land was offered under the head "Long-term capital gains" and claimed exemption.

3. The assessing officer did not allow the assessee's claim on the ground that the income offered under the head "Long-term capital gains" is in respect of land portion only and concluded that he was not entitled for exemption. The said order of the assessing officer was challenged before the Commissioner (Appeals)-II, Bangalore. The Commissioner (Appeals) by order dated 31-8-1998, a copy of which is produced as Annexure-B, dismissed the appeal on the ground that for the purpose of computing the capital gains, the assessee could not have considered the land separate from the building and computed the long-term capital gains and short-term capital gains separately while in the context of claiming exemption u/s 54 of the Act. The Appellate Authority further found that the income from the land in respect of which long-term capital gains income has been computed by the assessee is not chargeable under the head "Income from house property". He confirmed the order of the assessing officer and held that the claim for exemption u/s 54 of the Act was rightly rejected. The said order of the assessing officer as well as the Appellate Authority was carried in appeal before the Tribunal. The Tribunal at the first instance by its order dated 28-1-1999, a copy of which is produced as Annexure-C dismissed the appeal holding that insofar as the benefit u/s 54 of the Act is concerned, the deduction is available only when out of the sale proceeds, the assessee makes an investment in the construction of a residential building. Since the case of the assessee was not that he had constructed a residential building after the sale and by utilizing the sale proceeds, the benefit of section 54 was not available to the assessee. Insofar as the benefit u/s 54F is concerned, the Tribunal held that the assessee did not satisfy the conditions as the assessee owns several residential properties including the ground floor of the building in which the first and second

floors were constructed. Consequently, dismissed the appeal as one devoid of merits. The assessee filed an application for rectification and for amendment of the order u/s 254(2) of the Act. The said application was treated as a Miscellaneous Petition which was numbered as Misc. Petition No. 88/Bang./99. The Tribunal accepted the said miscellaneous petition on the ground that on a careful examination of the assessment order, the order of the Appellate Authority and the earlier order of the Tribunal passed on 28-1-1999 it is found that certain vital documents necessary for adjudicating the grounds of appeal were not brought out in the order dated 28-1-1999 and felt that it requires further clarification and directed that the entire matter be heard afresh. The said order of accepting the miscellaneous petition is challenged in the above appeal u/s 260A of the Act.

4. Sri Indrakumar, learned counsel for the appellant has raised the following questions of law for our consideration :

" 1. Whether, on the facts and in the circumstances of the case, the Tribunal is correct in law in recalling its earlier order dated 28-1-1999 which was passed after due consideration of all the issues thereto?

2. Whether, on the facts and in the circumstances of the case, the Tribunal is correct in law in recalling its earlier order and directing the matter to be heard afresh when the Tribunal had passed its earlier order and such order was not obtained by fraud etc. ?"

5. Sri Indrakumar, learned counsel appearing for the appellant challenging the correctness of the order passed by the Tribunal, made two submissions. Firstly he submitted that since there is no finding recorded in the order impugned that the earlier order dated 28-1-1999, a copy of which has been produced as Annexure-C, suffers from mistake apparent on the record, it was not permissible for the Tribunal to pass the impugned order. Secondly, he submitted that the procedure adopted by the Tribunal while passing the impugned order is totally illegal. According to the learned counsel section 254(2) of the Act does not contemplate passing of two orders. According to him, if the Tribunal is satisfied that the earlier order passed by it suffers from mistake apparent on the record, it could record such a finding and amend the earlier order. Therefore, he submits that the order impugned is liable to be set aside solely on the ground that the same came to be passed in total disregard to section 254(2) of the Act. In support of his contentions, he referred to us the decisions in the cases of Commissioner of Income Tax and Another Vs. Income Tax Appellate Tribunal and Another, and Commissioner of Income Tax Vs. Income Tax Appellate Tribunal and Another, .

5A. However, Sri Kiresur, learned counsel appearing for the respondent submitted that since the Tribunal has found that the earlier order dated 28-1-1999 passed by it suffers from mistake apparent from the record and directed that the matter should be heard afresh on merits, there is absolutely no justification for this

court to interfere with the said order while exercising powers u/s 260A of the Act. According to the learned counsel the order passed by the Tribunal does not suffer from any substantial error of law. He further pointed out that since the Tribunal has found that certain vital facts which are necessary for adjudicating the grounds of appeal were not brought on record in order dated 28-1-1999 passed by the Tribunal and the matter required further rectification, the impugned order was passed, the said conclusion reached by the Tribunal must be held to be a mistake apparent on the record. In support of his submission he referred to us the decisions in the cases of Commissioner of Income Tax Vs. Ramesh Chand Modi, ; Commissioner of Income Tax Vs. Dr. T.K. Jairaj, and Commissioner of Income Tax Vs. U.P. Shoe Industries, .

6. In the light of the rival contentions, the only question that would arise for consideration in this appeal is as to whether the order impugned is liable to be interfered by us in exercise of the power conferred u/s 260A of the Act ?

7. We are of the view that the order impugned is liable to be set aside on both the grounds urged by Sri Indrakumar, learned counsel for the appellant. As rightly pointed out by Sri Indrakumar, the Tribunal except pointing out in the impugned order that certain vital facts which are necessary for adjudicating the grounds of appeal were not brought out in the order dated 28-1-1999 and therefore the matter requires clarification, the Tribunal has not given a finding in the impugned order that the order dated 28-1-1999 passed by it suffers from mistake apparent from the record. Sub-section (2) of section 254 empowers the Tribunal to amend the earlier order passed by it provided the Tribunal is satisfied that the earlier order passed by it suffers from mistake apparent from the record. Therefore, before an order is made by the Tribunal amending the earlier order, it must be satisfied that the earlier order suffers from mistake apparent from the record. As noticed by us earlier, the Tribunal in its entire order has not adverted to this aspect of the matter. The language used in section 254(2) makes it abundantly clear that the Tribunal is conferred with power to amend the order passed u/s 254(1) of the Act, if the Tribunal is satisfied that the order made u/s 254(1) of the Act suffers from a mistake apparent from record. It is necessary to point out that the object of the power conferred u/s 254(2) of the Act is to rectify the mistake apparent on the record. Therefore, the Tribunal before it exercise the power conferred on it u/s 254(2) of the Act must refer to the materials on record which were not considered or misread which led to passing of a patently wrong order u/s 254(1) of the Act. There is no application of mind by the Tribunal on this aspect of the matter. Amendment of an order does not mean wiping out the order earlier passed and substitution by a new order. Therefore, as rightly pointed out by Sri Indrakumar, the order impugned is liable to be set aside on the short ground that there is no application of mind by the Tribunal with regard to its power to rectify/ amend the earlier order passed by it. Further, no doubt the decision relied on by Sri Kiresur in the cases stated supra supports his contention that it is permissible for the Tribunal first to recall the earlier order and proceed to hear the parties afresh and pass a fresh order amending the

earlier order passed by it. But in the said decisions, there is no discussion with regard to the question as to whether the Tribunal is required to make only one order on an application filed u/s 254(2) of the Act or whether it should pass two orders. However, the decisions in the cases of Commissioner of Income Tax and Another Vs. Income Tax Appellate Tribunal and Another, and U.P. Shoe Industries (supra) relied on by Sri Indrakumar, it is clearly stated that the Tribunal should pass only one order amending the earlier order if it is satisfied that the earlier order suffers from mistake apparent from the record. In this connection, it is useful to refer to the observations of the Delhi High Court in the case of Karan & Co. (supra) the judgment which reads as follows :

"The scope and ambit of application of section 254(2) is very limited. The same is restricted to rectification of mistakes apparent from the record. We shall first deal with the question of the power of the Tribunal to recall an order in its entirety. Recalling the entire order obviously would mean passing of a fresh order. That does not appear to be the legislative intent. The order passed by the Tribunal u/s 254(1) is the effective order so far as the appeal is concerned. Any order passed u/s 254(2) either allowing the amendment or refusing to amend gets merged with the original order passed. The order as amended or remaining unamended is the effective order for all practical purposes. The same continues to be an order u/s 254(1). That is the final order in the appeal. An order u/s 254(2) does not have existence de hors the order u/s 254(1). Recalling of the order is not permissible u/s 254(2). Recalling of an order automatically necessitates rehearing and readjudication of the entire subject-matter of appeal. The dispute no longer remains restricted to any mistake sought to be rectified. Power to recall an order is prescribed in terms of rule 24 of the Income Tax (Appellate Tribunal) Rules, 1963, and that too only in cases where the assessee shows that it had a reasonable cause for being absent at a time when the appeal was taken up and was decided ex parte. This position was highlighted by one of us Commissioner of Income Tax and Another Vs. Income Tax Appellate Tribunal and Another, . Judged in the above background the order passed by the Tribunal is indefensible." (p. 136)

We are in respectful agreement with the view taken by the Delhi High Court in the case of Karan & Co. (supra) and the Orissa High Court in the case of ITAT (supra). Therefore, on this ground also the impugned order is liable to be set aside.

8. In the light of the discussion made above, the order dated 29-3-2001 made in Misc. Petition No. 88/Bang./99 is hereby set aside and the matter is remitted to the Tribunal to reconsider the miscellaneous petition filed by the respondent u/s 254(2) of the Act on merits and in accordance with law in the light of the observations made above. The Tribunal is directed to take a fresh decision in the matter as directed by us, within four months from the date of receipt of a copy of this order. All contentions on merits are left open to be urged before the Tribunal.

In terms stated above, the appeal is allowed and disposed of. The questions of

law raised by the appellant is answered in favour of the revenue and against the assessee. No order is made as to costs.