

(2001) 08 P&H CK 0171
In the Punjab And Haryana At Chandigarh
Case No : Income-tax Appeal No. 2 of 2000

Commissioner of Income Tax	Vs	APPELLANT
Aruna Luthra		RESPONDENT

Date of Decision : 31-08-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 47 Rule 1
Income Tax Act, 1922 — Section 35
Income Tax Act, 1961 — Section 143, 143(1), 144, 154

Citation : (2002) 1 ILR (P&H) 236 : (2001) 252 ITR 76

Hon'ble Judges : N.K. Sud, J;Jawahar Lal Gupta, J;Ashutosh Mohunta, J

Bench : Full Bench

Advocate : R.P. Sawhney and Rajesh Bindal, for the Appellant; Sanjay Bansal and A.K. Jain, for the Respondent

Judgement

Jawahar Lal Gupta, J.—Can proceedings for rectification of an order passed under the provisions of the Income Tax Act, 1961, be initiated on the basis of a judgment delivered by the jurisdictional or a superior court after the passing of the said order ? This is the short question that arises for consideration in this case. A few facts as relevant for the decision of this case may be noticed.

2. The respondent-assessee filed her return for the assessment year 1987-88. She declared an income of Rs. 44,380. While computing the profit from business, the assessee claimed a deduction of Rs. 74,205 on account of loss in chit fund. The Assessing Officer framed the assessment u/s 143(I)(a) of the Income Tax Act, 1961, Vide order dated March 30, 1988, the income as declared by the assessee was accepted. A copy of this order is at annexure P-4 with the appeal.

3. On April 4, 1989, a Division Bench of the Punjab and Haryana High Court decided the case of Soda Silicate and Chemical Works Vs. Commissioner of Income Tax, . It was, inter alia, held that the (headnote) : "contributions made to the chit fund could not be treated as revenue expenditure nor could the payment or receipt of any amount to and from the chit fund be treated as the

business activity of the assessee. The transactions involved did not give rise to any income assessable to Income Tax nor any revenue loss in respect of which any deduction could be claimed". Thus, the order of the Tribunal disallowing the assessee's claim for deduction on account of loss in the chit fund was upheld.

4. After the above decision, the Assessing Officer issued a notice u/s 154 of the Act to the assessee. She was asked to show cause as to why the deduction on account of loss in chit fund be not disallowed. Finally, vide order dated February 13, 1992, a copy of which has been produced as annexure P-3 with the petition, the order of assessment was rectified. The assessee's claim for deduction of Rs. 74,205 on account of loss in chit fund by debiting the amount to her profit and loss account was, thus, disallowed. As a consequence, the amount was added to the taxable income of the assessee.

5. Aggrieved by the order of the Assessing Officer, the assessee filed an appeal. It was dismissed by the Commissioner of Income Tax (Appeals), Faridabad, vide order dated September 17, 1992. A copy of this order has been produced as annexure P-2 with the appeal. The assessee challenged the order before the Income Tax Appellate Tribunal. Vide order dated July 5, 1999, the Tribunal took the view that the issue regarding the admissibility of the deduction was "debatable as ITAT, Delhi Bench, in the case ... after considering the decision of the Punjab and Haryana High Court in the case of Soda Silicate and Chemical Works Vs. Commissioner of Income Tax, had taken a different view and, thus, it goes out of the purview of the provisions of Section 154".

6. Aggrieved by the order of the Tribunal, the Revenue has filed the present appeal. It maintains that in view of the decision of the jurisdictional High Court, the Tribunal could not have held that the issue was debatable. The matter was placed before a Division Bench of this court. Keeping in view the conflict in judicial opinion as expressed by different High Courts, the case was referred to the Full Bench. Thus, we have heard it.

7. Mr. Sawhney, learned counsel for the Revenue, contended that in view of the decision in the case of Soda Silicate and Chemical Works Vs. Commissioner of Income Tax, , the contributions made by the assessee to the chit fund could not be treated as a revenue expenditure and no deduction could be claimed on account of the loss suffered on that account. Since the jurisdictional High Court had pronounced upon the matter, the order of the Assessing Officer suffered from an "error apparent from the record." Such an error could be rectified u/s 154 of the Act.

8. On the other hand, Mr. Sanjay Bansal, learned counsel for the respondent-assessee, contended that a decision delivered by a court subsequent to the passing of the order cannot constitute an error apparent from the record so as to entitle the authority to proceed u/s 154.

9. The provision entitles the competent authority to rectify a mistake. The error should be apparent from the record. It can do so either suo motu or on an

application. In cases where the liability of the assessee is likely to be enhanced, the authority can pass the order only after giving notice. By virtue of Sub-section (7), no amendment in the order passed by the authority can be made "after the expiry of four years from the end of the financial year in which the order sought to be amended was passed."

10. The power given to the authority is wide. It can correct "any mistake" provided it is "apparent from the record". The first question that arises for consideration is--when a mistake can be said to be apparent from the record ?

11. The plain language of the provision suggests that the mistake should be apparent. It must be patent. It must appear ex facie from the record. It must not be a mere possible view. The issue should not be debatable.

12. Mr. Sawhney contended that when the view taken by an authority is ex facie contrary to the decision of the jurisdictional High Court or a superior court, the case would fall within the mischief of Section 154. However, Mr. Bansal submitted that while deciding a matter, an authority cannot anticipate the view that may be taken by the High Court or the Supreme Court on a subsequent date. If at the time of the passing of the order, the authority takes a particular view, which is not contrary to the existing interpretation of law, the provision of Section 154 cannot be invoked.

13. Apparently, the argument of Mr. Bansal appears to be attractive. If the issue of error in the order is to be examined only with reference to the date on which it was passed, it may be possible to legitimately contend that it was legal on the date on which it was passed. The subsequent decision has only rendered it erroneous or illegal. However, there was no error much less an apparent error on the date of its passing. Thus, the provision of Section 154 is not applicable. However, such a view shall be possible only if the provision were to provide that the error has to be seen in the order with reference to the date on which it was passed. Such words are not there in the statute. Resultantly, such a restriction cannot be introduced by the court. Thus, the contention raised by counsel for the assessee cannot be accepted.

14. There is another aspect of the matter. In a given case, on an interpretation of a provision, an authority can take a view in favour of one of the parties. Subsequent to the order, the jurisdictional High Court or their Lordships of the Supreme Court interpret the same provision and take a contrary view. The apparent effect of the judgment interpreting the provision is that the view taken by the authority is rendered erroneous. It is not in conformity with the provision of the statute. Thus, there is a mistake. Should it still be perpetuated ? If the contention raised on behalf of the assessee were accepted, the result would be that even though the order of the authority is contrary to the law declared by the highest court in the State or the country, still the mistake could not be rectified for the reason that the decision is subsequent to the date of the order.

15. Only the dead make no mistake. Exemption from error is not the privilege of

mortals. It would be a folly not to correct it. Section 154 appears to have been enacted to enable the authority to rectify the mistake. The legislative intent is not to allow it to continue. This purpose has to be promoted. The Legislature's will has to be carried out. By placing a narrow construction, the object of the legislation shall be defeated. Such a consequence should not be countenanced.

16. Still further, it deserves mention that Parliament has prescribed a period of four years for correction of the mistake. While an assessment u/s 143 or 144 has to be normally made within a period of one or two years, the mistake can be rectified at any time during the period of four years. The obvious intention of the Legislature is that if the mistake has come to the notice of the authority within the prescribed time, it should not be allowed to continue. It should be rectified. Regardless of the fact that the limitation for passing an order of assessment or filing an appeal has elapsed.

17. Still further, the provision has inbuilt safeguards. It provides for the issue of notice. It ensures the grant of an opportunity. It limits the jurisdiction of the authority. The action can benefit the assessee as well as the Revenue. In this situation, there appears to be no ground for placing an unduly restricted interpretation on the provision.

18. Mr. Bansal contended that a judgment of a court operates only prospectively and not retrospectively. Thus, a decided cause cannot be redecided. Is it so ?

19. A court decides a dispute between the parties. The cause can involve decision on facts. It can also involve a decision on a point of law. Both may have bearing on the ultimate result of the case. When a court interprets a provision, it decides as to what is the meaning and effect of the words used by the Legislature. It is a declaration regarding the statute. In other words, the judgment declares as to what the Legislature had said at the time of the promulgation of the law. The declaration is-This was the law. This is the law. This is how the provision shall be construed.

20. Julius Stone in Social Dimensions of Law and Justice (First Indian Reprint 1999) (Chapter XIV), while dealing with the subject of Judge and Administrator in Legal Ordering, observes as under :

"If, then, a main impulse underlying the stare decisis doctrine is that justice should respect reasonable reliance of affected parties based on the law as it seemed when they acted, this impulse still has force when reliance is frustrated by an overruling. Despite this, it has long been assumed that a newly emergent rule is to be applied not only to future facts, and to the necessarily past facts of the very case in which it emerges, but to all cases thereafter litigated, even if these involved conduct, which occurred before the establishment of the new rule. This has proceeded ostensibly on the conceptual basis, clearly formulated since Blackstone, that the new holding does not create, but merely declares, law. So that any prior putative law under which the parties acted is to be regarded as simply not law".

21. The above observations clearly support the principle that the court merely declares law. An earlier decision as declared by the court is "simply no law".

22. Notwithstanding the above observations, the issue of judge-made law being prospective or retroactive is not free from difficulty. However, the system as followed in Indian courts ensures a "suitable legal order". It promotes "dignity and good repute of judicial institutions". It is only equitable and fair that similar cases lead to identical results.

23. Mr. Sanjay Bansal contended that the judicial principle of retroactive operation of judge-made law has now been negated by Parliament by introducing the Explanation in Order 47, Rule 1. A subsequent decision is no longer a good ground for review. Thus, counsel contended that the same principle should be followed while construing the provisions of the Income Tax Act.

24. This contention cannot be accepted. Firstly, because a similar provision has not been made in Section 154. The plain language is materially different. Still further, we have the authoritative pronouncement of their Lordships of the Supreme Court in *The Income Tax Officer, Alwaye Vs. The Asok Textiles Ltd., Alwaye*, . It was held that the High Court had (page 735): "fallen into an error in equating the language and the scope of Section 35 of the Act (Indian Income Tax Act, 1922), with that of Order 47, Rule 1 of the Civil Procedure Code. The language of the two is different because according to Section 35 of the Act which provides for rectification of mistakes the power is given to the various Income Tax authorities within four years from the date of any assessment passed by them to rectify any mistake "apparent from the record" and in the CPC the words are "an error apparent on the face of the record and the two provisions do not mean the same thing". As such, the contention raised by learned counsel cannot be accepted.

25. Mr. Bansal also pointed out that in the case of *Jiyajeerao Cotton Mills Ltd. Vs. Income Tax Officer, "C" Ward and Others*, , a Division Bench of the Calcutta High Court had categorically taken the view that the judgment of the Supreme Court does not have retrospective effect. This decision was affirmed by their Lordships of the Supreme Court as SLP(C) Nos. 8791-8793 of 1980 were dismissed. Mr. Bansal also referred to the decision of the Andhra Pradesh High Court in *Pingle Madhusudhan Reddy Vs. Controller of Estate Duty*, , to contend that the judgment of the court does not operate retrospectively.

26. It is undoubtedly true that the view taken by the Andhra and Calcutta High Courts supports the argument of the petitioner. Even the Madras High Court has taken a view in favour of the assessee in *State of Tamil Nadu v. KS. M.G. Meenambal and Co.* [1984] 56 STC 82. However, the view of the Kerala and Karnataka High Courts is to the contrary. In *Kil Kotagiri Tea and Coffee Estates Co. Ltd. v. ITAT* [19W] 174 ITR 579, the Kerala High Court relying upon the principle enunciated in *Salmond's Jurisprudence* had held in favour of the Revenue. Similar view was expressed by the Karnataka High Court in *Mysore*

Cements Ltd. v. Deputy Commissioner of Commercial Taxes [1994] 93 STC 464.

27. Learned counsel referred to the decision of a Bench of this court in Commissioner of Income Tax Vs. Haryana State Co-operative Supply and Marketing Federation Ltd., . In this case, it was, inter alia, observed that "once the matter has been decided by the High Court, it is not possible for the Department to carry out rectification on the solitary ground that in a later decision, the Supreme Court has impliedly overruled the decision". In Hero Cycles Ltd. v. State of Punjab [1995] 99 STC 611 (P & H) and Ram Dass Rice and General Mills v. State of Punjab [1996] 100 STC 211 (P & H), the opinion was in favour of the Revenue.

28. On an examination of the judgments cited by counsel for the assessee, it appears that the rectification was not sought on the basis of a binding decision of the jurisdictional High Court or the Supreme Court. There was no such judgment when the application u/s 154 had been filed. The pronouncement had come at a later stage when the prescribed period of four years had already expired. Thus, the decisions have been given in a different context. Thus, these are distinguishable from the facts of the case in hand.

29. The basic principle is the certainty of law. Even though considerations of justice, equity and fair-play sometimes compel courts to deviate from a view expressed in an earlier case, yet the common law principle of stare decisis has been followed with the avowed object of ensuring that the litigant must be able to act on the view expressed by a court. Law cannot move with the wind. It is not a weather cock. The citizen is entitled to act on the basis of the law declared by the court. Once he acts, he should not be told that this summer is very hot. Thus, the law has changed even though the Legislature has not intervened. The gnawing uncertainty has certainly to be avoided.

30. It was then contended that in a case where the Income Tax Officer intimates the assessee that the return has been accepted u/s 143(1), the provision of rectification cannot be invoked. Learned counsel placed reliance on the decision of their Lordships of the Supreme Court in Commissioner of Income Tax (CNTL), Ludhiana Vs. Hero Cycles Pvt. Ltd., Ludhiana, , in support of his contention.

31. On a perusal of Section 154, we find that the provision does not provide for rectification only when a mistake in the order is detected. The mistake has to be on the record of the case. The record would include everything on the case file. The return, the evidence and the order are a part of the record. The mistake can be detected from anything on the file. Thus, even in the case of an assessment u/s 143(1), it has not to be assumed that there can be no error apparent from the record. As for the decision in the case of Commissioner of Income Tax (CNTL), Ludhiana Vs. Hero Cycles Pvt. Ltd., Ludhiana, , the rule laid down by their Lordships is that the mistake can be of fact and law. However, the rectification can be made only when (headnote) : "a glaring mistake of fact or law committed by the officer passing the order becomes apparent from the record. Rectification

is not possible if the question is debatable". We cannot read this decision to mean that only the order has to be seen and not the record. Thus, the contention raised by counsel cannot be accepted.

32. It was also contended that the decision of an authority decides the rights of the parties. It vests a right in them. The vested right cannot be taken away except when specifically permitted by a retrospective law.

33. There is no quarrel with the proposition. However, what deserves notice is that the right, if any, is subject to the provisions of law. Section 154 clearly provides for the intervention of the authority within the specified time, subject to the condition that the mistake is apparent, and the issue is not debatable. Thus, any right under an order is subject to the provision of the statute. That being so, there is no vested right which can be said to have been taken away.

34. In view of the above, we hold that the power u/s 154 can be invoked even when an issue is decided by the jurisdictional High Court or a superior court after the order has been passed.

35. Coming to the merits of the case, it was contended by counsel for the assessee that even if the addition of Rs. 74,808 is made, the ultimate tax effect is trivial. In accordance with the circulars of the Board, in such cases, the appeals have normally not to be filed. Still further, there is no absolute rule that the assessee cannot claim the loss on account of investment in chit fund. In fact, according to the circulars of the Board, such a benefit can be claimed if it is shown that the income derived from chit fund was utilised for business by the assessee. On the facts, it was pointed out that the Tribunal has taken a view in favour of the assessee in various cases.

36. On a consideration of the matter, we find that the dispute relates to the assessment year 1987-88. The parties have been litigating for more than 13 years. The ultimate tax effect is limited. Thus, even though the decision on the question of law is in favour of the Revenue, we are not inclined to interfere with the order passed by the Tribunal.

37. Accordingly, the question as posed at the outset is answered in favour of the Revenue. It is held that the proceedings for rectification of an order can be initiated on the basis of an order passed by the jurisdictional High Court or the Supreme Court subsequent to the order passed by the authority under the Act. However, we decline to interfere with the order passed by the Income Tax Appellate Tribunal. No costs.