
(2003) 02 CAL CK 0024

In the Calcutta High Court

Case No : Income-tax Reference No. 2 of 1998

Commissioner of Income Tax

APPELLANT

Vs

Bhagwati Developers (P.) Ltd.

RESPONDENT

Date of Decision : 14-02-2003

Acts Referred:

Income Tax Act, 1961 — Section 254(2), 69C

Citation : (2003) 182 CTR 619 : (2003) 261 ITR 658

Hon'ble Judges : R.N. Sinha, J;D.K. Seth, J

Bench : Division Bench

Advocate : P.K. Mallick and Sunil Mukherjee, for the Appellant;

Judgement

D. K. seth J.

1. There was a search and seizure in the premises of the assessee. From the documents scrutinised, some expenditure was noticed to have been incurred by the assessee. But this expenditure does not find recorded in the books of account produced. Neither this amount was shown in the category of receipts. The Assessing Officer and the appellate authority had added the amount u/s 69C on account of failure of the assessee to satisfactorily explain the said expenditure. The learned Tribunal concurred with the finding of the appellate authority to the extent that no addition can be made if the same is negated by payment. But it is to be examined, since the amount has not been shown in the regular books of account, in the context of the construction work as to whether this amount was reasonably spent or not. Therefore, the matter was remanded for reassessment to the Assessing Officer. An application for review or rectification u/s 254(2) was filed on behalf of the assessee. This was allowed and the order of remand was recalled. In the circumstances, the Department had sought for the reference on the question, which is as follows :

"Whether, on the facts and in the circumstances of the case, the learned Tribunal, Calcutta, was justified in allowing the miscellaneous petition and partially

recalling the order of the Tribunal for the assessment years 1987-88 and 1988-89 ?"

2. u/s 254(2), the Appellate Tribunal is clothed with the power to amend with a view to rectify any mistake apparent from the record either on its own motion or on an application by the assessee or the Assessing Officer concerned. The law by now is well settled. Section 254(2) does not confer a power on the Tribunal to review its earlier order in *Niranjan and Co. Ltd. Vs. Income Tax Appellate Tribunal and Others*, . It is only a mistake apparent from the record in its appellate order which can only be rectified in *Commissioner of Income Tax Vs. Kelvin Jute Co. Ltd.*, . Under the garb of rectification, it is not possible to seek something other than rectification. The mistake, as expressed in *Master Construction Co. (P) Ltd. Vs. State of Orissa and Another*, , means a mistake apparent from the record but not a mistake that depends for its discovery on elaborate argument on questions of fact and law. We may note the distinction between the provision of Section 254(2) of the Income Tax Act, and Order 47, rule 1 of the Code of Civil Procedure. In the former, rectification is of a mistake "apparent from the record", whereas in the latter, of an error "apparent on the face of the record". While the Income Tax Act uses the phrase "from the record", the CPC uses the phrase "on the face of the record". Therefore, the scope of Section 254(2) of the Income Tax Act is much more limited than the width of Order 47 of the Code of Civil Procedure. This distinction was noted by the apex court in *The Income Tax Officer, Alwaye Vs. The Asok Textiles Ltd., Alwaye*, referring to *Maharana Mills (Private) Ltd. Vs. Income Tax Officer, Porbandar*,) . Mere complexity of the problem or necessity of genuine argument for discovery of mistake, by itself is not a sufficient reason to oust the jurisdiction of the Tribunal to rectify the mistake. If it could be discerned with some precision after a fair probe into the record and reasonable and probable conclusion can be arrived at and that the court's conscience has been shaken, then it would be an error from the record subject to rectification. But if two views are possible or detailed argument would be necessary for understanding the question, then that would not be a mistake within the meaning of this section. It is not sufficient that there is merely a mistake, it must be one apparent from the record in *The Commercial Tax Officer, Bangalore, Vs. Sri Venkateswara Oil Mills and Another*, etc. etc., . A mistake apparent from the record must be an obvious and patent mistake and not something, which could be established by a long drawn process of reasoning on points on which there may be conceivably two opinions. A decision on a debatable point of law is not a mistake apparent from the record in *Satyanarayan Laxminarayan Hegde and Others Vs. Millikarjun Bhavanappa Tirumale, T.S. Balaram, Income Tax Officer, Company Circle IV, Bombay Vs. Volkart Brothers, Bombay*, . A mistake apparent from the record is one to point out for which no elaborate argument is required. It must be glaring, obvious or self-evidenced mistake. If it is a mistake, which requires to be established by complicated process of investigation, argument or proof, it cannot be regarded as mistake apparent from the record. A debatable issue does not come within the scope of

this provision in Nita Taneja (Smt) Vs. Asstt. Controller and Another,

3. The question is very simple in the present case. Whether having regard to the finding of the learned Tribunal, it could be said that the finding recorded is a mistake apparent from the record or not. In order to appreciate the situation and understand the order in the context it is passed, we are to refer to Section 69A read with Section 69C of the Income Tax Act, 1961. Section 69A deals with unexplained money if found at the hands of the assessee unless satisfactorily explained is deemed to be an income at the hands of the assessee for such financial year when it was seized. Section 69A deals with receipt of income on the basis of existence of assets mentioned therein. Whereas Section 69C deals with unexplained, source of expenditure. If from documents it appears that there was an expenditure, unless its source is satisfactorily explained, the same would also be deemed to be the income of the assessee for such financial year. The question of addition depends on the satisfactory explanation of the source. It cannot be negated simply because the expenditure was actually incurred. On the failure to explain the source of the expenditure, it is liable to be added. While considering the same, the learned Tribunal in its order had observed that no addition can be made if negated by payment, as we find from page 161. In order to appreciate the situation, we may quote the relevant portion from the text of the order of the learned Tribunal as hereafter :

"We have considered the rival submissions, facts and material on record. It is not disputed that the assessee was doing the business of construction and those expenses were incurred in the issue which was being constructed not as an investor and as the contractor. In these circumstances, even the expenses recorded in the seized papers are not debited in the books of account. No addition can be called for because the addition will be negated by the payments. This view had been taken by the Patna Bench of the Income Tax Appellate Tribunal in the case of Nishant Housing Development (P.) Ltd. v. Asst. CIT [1995] 52 ITD 103. However, it is to be seen whether the expenses claimed by the assessee in the regular books of account and expenses recorded in these seized papers are reasonable in the context of the construction work done by the assessee. This matter is, therefore, restored back to the file of the Assessing Officer to re-decide the matter."

4. A plain reading of the above text of the order indicates that the learned Tribunal had come to a finding that this expenditure was not debited in the books of account. The observation that no addition can be called for because the addition will be negated by the payments, a view taken by the Patna Bench in Nishant Housing Development (P.) Ltd. v. Asst. CIT [1995] 52 ITD 103, is an observation with regard to the said decision that no addition can be called for if negated by payment. Such a view is possible when the amount is treated u/s 69A as an asset and treated as an income, then it would be negated by the expenditure if shown. In this case, the addition could not be made u/s 69A since no receipt of the amount was explained or shown or disclosed. On the other

hand, the expenditure has not been debited in the books of account. Failure to explain the source of the expenditure would result in a legal fiction under which the expenditure would be deemed to be an income and liable to be added. Section 69C, in no uncertain terms, provides that if the explanation for the source of the expenditure incurred offered by the assessee is not satisfactory, then it is to be deemed to be an income of the assessee. Admittedly, the explanation has not been found to be satisfactory. Therefore, the learned Tribunal had observed that it was to be seen whether the said expenditure was reasonable in the context of the construction done by the assessee. Such a finding can, at best, be a finding, which may be erroneous, but the alleged contradiction cannot be said to be a mistake apparent from the record. In order to be a mistake apparent from the record, the mistake must be free from doubt and incapable of different interpretation. Here in this case, the earlier part cannot be interpreted to be a clear finding and/or conclusion arrived at by the learned Tribunal. On the other hand, it was a general observation that no addition can be called for if negated by payments, as was observed by the Patna Bench in *Nishant Housing Development (P.) Ltd. v. Asst. CIT* [1995] 52 ITD 103. But in this case, in the absence of satisfactory explanation about the source of the expenditure, there is no scope for adjustment of the expenditure and avoidance of addition. This addition has not been sought to be made u/s 69A. The addition is to be made u/s 69C under which an expenditure, the source whereof by fiction of law is a deemed income and as such liable to be added. But this has to be seen in the context of the facts and circumstances of the case, as was rightly held by the learned Tribunal in its original order since been reviewed subsequently. The question of negation by payment can arise only when the source of the expenditure is satisfactorily explained, which is yet to be examined on remand. It is not the reasonableness of the expenditure that requires satisfactory explanation. It is the source of such expenditure, which needs to be satisfactorily explained. Therefore, in the context of the order and the law, the word "reasonableness" used in the order does not seem to be a mistake. It can at best be an erroneous expression. However, it can be presumed to have been used to connote reasonableness of the explanation about the source of the expenditure. Such a view is quite possible. Thus, it does not seem to be a mistake obvious or patent about which no two views are possible.

5. In that view of the matter, the said part of the order could not be subjected to Section 254(2) of the Act for being rectified as a mistake apparent from the record since it does not seem to be a mistake nor it is so obvious, clear or patent to hold that it is apparent from the record.

6. Mr. Mallick had pointed out that the three judgments, which were relied on by the learned Tribunal in allowing the miscellaneous application for review are, in fact, wholly irrelevant and have no manner of application in the facts and circumstances of the case. The decision in *ASSAM CO-OPERATIVE APEX BANK LTD. Vs. COMMISSIONER OF Income Tax, ASSAM.*, , does not seem to be of any relevance for our present purpose. The decision in *Niranjan and Co. Ltd. Vs.*

Income Tax Appellate Tribunal and Others, , provides that u/s 254(2) an order can be rectified only when there is a mistake apparent from the record. In the said decision, it was held that in order to find out the mistake, the learned Tribunal had entered into the merits of the case, which the learned Tribunal could not do. This decision, however, helps the contention of Mr. Mallick. Here also the learned Tribunal had attempted to weigh the materials as was held by the learned Tribunal earlier. The decision in Controller of Estate Duty Vs. Satish Chandra, , also does not seem to be of any assistance in the present case.

7. In the circumstances, we answer the question in the negative in favour of the Revenue.

8. The reference is, thus, disposed of.

9. No costs.

10. All parties are to act on a signed xerox copy of this dictated order on the usual undertaking.

R. N. sinha J.

11. I agree.