
(2001) 04 RAJ CK 0080

In the Rajasthan High Court

Case No : Income Tax Reference No. 74 of 1982

Commissioner of Income Tax

APPELLANT

Vs

B.L. Murarka

RESPONDENT

Date of Decision : 18-04-2001

Acts Referred:

Income Tax Act, 1922 — Section 33B, 35, 35(1)

Income Tax Act, 1961 — Section 11, 12, 13, 13(1), 154

Citation : (2001) 250 ITR 714 : (2001) 4 RLW 540 : (2002) 1 WLN 89

Hon'ble Judges : Sunil Kumar Garg, J;Rajesh Balia, J

Bench : Division Bench

Advocate : J.K. Singhi, for the Appellant; N.M. Ranka, for the Respondent

Judgement

Rajesh Balia, J.—Heard learned counsel for the parties.

2. This reference relates to the assessment year 1976-77. The assessee has claimed deduction u/s 80J of the Income Tax Act, 1961 (for short "the Act"). In the first instance, the return submitted by the assessee-respondent was not accompanied by the audit report as required by Subsection (6A) of Section 80J of the Act. However, before the assessment was made, the assessee-respondent submitted a revised return claiming greater benefit u/s 80J. The audit report was available with the respondent-assessee at the time when he filed the original return but it could not be filed along with the original return.

3. On the basis of the revised return, computation of deduction u/s 80J of the Act was made by the Assessing Officer by excluding the capital borrowed from the Rajasthan Finance Corporation and other scheduled banks amounting to Rs. 6,01,635 and deduction was computed accordingly.

4. Aggrieved by the lesser allowance of deduction than claimed u/s 80J of the Act, the assessee filed an appeal before the Appellate Assistant Commissioner of Income Tax, Range Kota, who, vide his order dated August 24, 1979, accepted the appeal filed by the assessee and directed the Assessing Officer to recompute

the deductions allowable u/s 80J of the Act by including the borrowed capital in the fixed capital investment. On that basis, the assessment was completed.

5. Thereafter, the Assessing Officer sought to recall the allowance u/s 80J by rectification of the assessment made in pursuance of the directions of the Appellate Assistant Commissioner relating to the allowance of deduction u/s 80J of the Act on the ground that the audit report was not submitted along with the return of income and thus deduction u/s 80J of the Act was not at all allowable. Against that, an appeal was filed before the Commissioner of Income Tax (Appeals).

6. In the appeal, two-fold points were raised by the assessee-respondent before the Commissioner of Income Tax (Appeals). Firstly, the matter relating to the allowance of deduction u/s 80J of the Act being the subject-matter of appeal before the Appellate Assistant Commissioner, the assessment order in regard to that matter merged with the order passed by the Appellate Assistant Commissioner and, therefore, the Income Tax Officer was not at all competent to make any rectification in that order so far as the matter of allowance of deductions u/s 80J was concerned. The second contention raised before the Commissioner of Income Tax (Appeals) was that in pursuance of the notice u/s 154 of the Act, the assessee-respondent had filed the audited accounts with the audit report. The provision regarding submission of the audit report along with the return being directory in nature, the mistake was not rectifiable. These contentions did not find favour with the Commissioner of Income Tax (Appeals) and the appeal filed by the assessee-respondent was dismissed.

7. However, on further appeal, the Income Tax Appellate Tribunal, Bench at Jaipur, accepted both these contentions raised on behalf of the respondent-assessee and held that the Income Tax Officer had no jurisdiction to invoke the provisions of Section 154 of the Act on the principle of merger of his order with the appellate order passed by the Appellate Assistant Commissioner. It was further held that on the issue regarding the requirement of filing the audit report being mandatory or directory, there exists a "difference of opinion between various High Courts and, therefore, considering this issue to be debatable it cannot be treated as a mistake apparent from the record and, hence, is not amenable to rectification proceedings on that ground also. On these findings, the Tribunal allowed the appeal filed by the respondent-assessee and set aside the order of rectification.

8. It is in the aforesaid facts and circumstances of this case, on an application being moved u/s 256(1) of the Act by the Commissioner of Income Tax, the following questions of law have been referred to this court for its opinion by the Income Tax Appellate Tribunal :

"(1) Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that as a result of the order of the Appellate Assistant Commissioner, the original assessment order is supposed to have merged in the

appellate order and, therefore, the Income Tax Officer could not have started rectification proceedings u/s 154 of the Income Tax Act, 1961 ?"

(2) Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the Income Tax Officer passed the order u/s 154 due to change of opinion and that there was no mistake apparent from the record within the meaning of Section 154 of the Income Tax Act, 1961 ?"

9. We have heard Mr. J. K. Singhi, learned counsel appearing for the Revenue, and N. M. Ranka and J. K. Ranka, for the respondent-assessee.

10. It has been contended by learned counsel appearing for the Revenue that the Tribunal has erred in not properly appreciating the principle relating to doctrine of merger particularly keeping in view the provisions of Section 154(1A) of the Act. The doctrine of merger which inhibits the jurisdiction of an authority to rectify its own order on finding it to be suffering from a mistake apparent from the record is only confined to the subject-matter of appeal and not in its entirety irrespective of the fact whether the appeal is restricted to a limited question or to an order in its entirety. In support of this contention, he has placed reliance on a decision of the Gujarat High Court in Karsandas Bhagwandas Patel Vs. G.V. Shah, Income Tax Officer, Rajkot and Others,

11. Mr. N. M. Ranka, learned counsel for the assessee-respondent, urged that the subject-matter of appeal in the present case being the claim for deductions u/s 80J of the Act, all aspects of allowability of deductions u/s 80J of the Act became the subject-matter of appeal and, therefore, merely because one aspect of the matter has not been considered or argued, it could not give jurisdiction to the lower authority to rectify that order by bypassing the appellate order on the ground that points were not raised and decided.

12. Section 154 of the Act, to the extent it is relevant for the present purpose, reads as under :

"154. Rectification of mistake.--(1) With a view to rectifying any mistake apparent from the record, an Income Tax authority referred to in Section 116 may,-

(a) amend any order passed by it under the provisions of this Act;

(b) amend any intimation or deemed intimation under Sub-section (1) of Section 143.

(1A) Where any matter has been considered and decided in any proceeding by way of appeal or revision relating to an order referred to in Sub-section (1), the authority passing such order may, notwithstanding anything contained in any law for the time being in force, amend the order under that sub-section in relation to any matter other than the matter which has been so considered and decided."

13. Sub-section (1A) was inserted in Section 154 of the Act, vide amendment Act No. 31 of 1964, and it was given effect to with effect from October 6, 1964. This

insertion was made with a view to resolve the existing controversy regarding the scope and ambit of the authority who has passed the order to rectify his order on conditions enumerated in Section 154 of the Act being fulfilled, where such an order has been subjected to an appeal whether partly or in its entirety. One view has been that once an order has been subjected to appeal in its entirety, the order merges in the appellate order and the authority making the order loses its jurisdiction to rectify the mistake apparent from his order even if such part of the order has not been made the subject-matter of the appeal. Another view which has found favour with some of the courts was that the doctrine of merger applies only with respect to the subject-matter of controversy that has been made subject to an appeal. Thus, Sub-section (1A) gives statutory recognition to the principle that the doctrine of merger so far as the question of rectification is concerned, operates only on the field of the subject-matter of appeal and not beyond that.

14. The question then arises what is meant by the expression "in relation to any matter other than the matter which has been so considered and decided". On a plain reading of the statute, we find that it conveys that the subject matter of appeal in all its aspects which can call for consideration on the dispute raised and that will always depend upon the nature of the dispute raised before the appellate authority and the answer cannot be found in the abstract.

15. Reliance has been placed on a decision of the Gujarat High Court in *Karsandas Bhagwandas Patel Vs. G.V. Shah, Income Tax Officer, Rajkot and Others*, It was a case which related to disallowance of certain depreciation already allowed by the Assessing Officer in respect of the claims made regarding specific business assets but withdrawn later on by taking recourse to the rectification proceedings. The part of the disallowance cannot deprive the claims relating to other items and other expenses and they were made the subject-matter of appeal and those appeals were allowed by the appellate authority. Subsequently, the order accepting the claim for depreciation in respect of motor car and motor cycle was sought to be rectified by the Assessing Officer. It was in the aforesaid circumstances, that the question of merger was raised for contending that the Income Tax Officer had no jurisdiction to invoke the powers u/s 35 of the Indian Income Tax Act, 1922 (which has been replaced by the Income Tax Act, 1961). It was in connection with that controversy, the Gujarat High Court concluded its opinion (page 267) :

"It would thus be seen that for the purpose of determining the applicability of the principle of merger in a case like the present, the test which has to be applied is whether the decision of the Income Tax Officer on a particular point is the subject-matter of appeal before the Appellate Assistant Commissioner. It may not be the subject-matter of appeal for two reasons, either because the Appellate Assistant Commissioner has no jurisdiction to consider that subject-matter as in the case before the Supreme Court or because the Appellate Assistant Commissioner though having jurisdiction to examine that subject-matter does

not do so. In either case there being no decision of the Appellate Assistant Commissioner on the point, the decision of the Income Tax Officer remains untouched and it is open to the Commissioner in exercise of power u/s 33B to revise it or to the Income Tax Officer in exercise of power u/s 35, Subsection (1), to rectify it if there is a mistake apparent from the record of the assessment."

16. Thereafter, considering the controversy before it as noticed by us above, the court further held (page 272) :

"Now, in the present case, additional depreciation on motor-car and motor-cycle was allowed by the Income Tax Officer in the original order of assessment. This being an allowance in favour of the assessee, it was obviously not complained of in the appeal preferred by the assessee before the Appellate Assistant Commissioner. It was not included in the four items in respect of which the appeal was preferred. The Appellate Assistant Commissioner also did not suo motu consider and decide whether the allowance was rightly given by the Income Tax Officer. The decision of the Income Tax Officer allowing additional depreciation on motor-car and motor-cycle did not, therefore, merge in the order of the Appellate Assistant Commissioner and if the allowance of such additional depreciation was patently erroneous, the Income Tax Officer was entitled to rectify the mistake u/s 35, Sub-section (1), by adding back the amount of such additional depreciation."

17. It may be recalled here that, in the aforesaid case, the principle of merger was applied keeping in view the facts and circumstances of that case before the court.

18. In this connection, we may refer to a recent decision of this court in Commissioner of Income Tax Vs. Eklingji Trust, D. B. Income Tax Reference No. 16 of 1987, decided at Jodhpur vide order dated February 23, 2001. In that case, the assessee was a public religious and charitable trust. The claim made by it was in respect of the income derived from different sources to be exempted from Income Tax under sections 11 and 12 of the Act of 1961. The Assessing Officer, while invoking the provisions of Section 13 of the Act, held that part of the income from the property of the trust during the previous year was applied directly or indirectly for the benefit of the one of the trustees inasmuch as some of the investments were made in a company in which the managing trustee had substantial interest. This raised the issue of applicability of Section 13 of the Act in that case. In that connection, the Income Tax Officer had disallowed the claim of the assessee by invoking the provisions of Section 13 of the Act and brought to tax the income from such investments. Aggrieved with the disallowance of exemption invoking the provisions of Section 13 of the Act, the assessee appealed before the Appellate Assistant Commissioner. The Appellate Assistant Commissioner also rejected the claim of the assessee and held that the investment in question was such to which Section 13 applies and the income which has been added could not be allowed. Thereafter, the Assessing Officer sought to invoke the jurisdiction u/s 154 of the Act by intending to disallow

exemptions from tax in entirety on all its incomes. When this matter came up before this court, it was argued on behalf of the Revenue that since at the time of original assessment applicability of sections 13(l)(c) and 13(l)(a) were not taken into consideration and, therefore, applicability of such provision was not subject of appeal, therefore, the doctrine of merger could not apply. This court opined that the subject-matter of the appeal directly related to applicability of Section 13 of the Act to the assessee due to such investment and how much income is to lose its exemption was only a consequence and, therefore, the doctrine of merger in terms of Section 154(1A) of the Act applies to the facts of the case. In coming to this conclusion the court said (pages 707 and 712): "If the Assessing Officer is taken to have addressed himself to those questions explicitly or impliedly and decided the question of denial of exemption on account of investment in a concern in which the managing trustee had substantial interest, for an inadequate rate of return, then the claim to exemption in respect of the income of the assessee, as decided by the order of the Income Tax Officer, was subsequently subjected to appeal by the assessee. On a decision of the appeal, the order of the Income Tax Officer merged with the order of the Appellate Assistant Commissioner and, thereafter, the Income Tax Officer could not have exercised any jurisdiction to amend the order passed by the Appellate Assistant Commissioner in exercise of his power u/s 154 of the Act of 1961. In such an event splitting the question of applicability of Sections 13, 11 and 12 could not have been made which forms a component part of the whole scheme, to get over the binding nature of the appellate order on the Income Tax Officer."

"It may be pertinent to notice that it is only on the finding that the income part of the funds of the trust has continued to be lent to Lake Palace Hotels and Motels Pvt. Ltd. in which the managing trustee of the trust has substantial interest for a period of nine months during the previous year at inadequate interest on the finding that the reasonable rate of interest chargeable was 10 per cent, whereas money has been lent to the company for a period of nine months only at the rate of 5 per cent, merely because the provision has not been referred to. It cannot be said that the additions in the income have been made without reference to those provisions,"

19. Another decision which has been made brought to our notice in this connection is the decision of the Gauhati High Court in P. Das and Company Vs. Deputy Commissioner of Income Tax and Others, In that case, commenting on the scope and ambit of Section 154 of the Act, the court observed as under (page 54) :

"The powers of the Income Tax Officer u/s 154 of the Act flow from the provisions of that Section only. In the present case, the authorities have imposed penalty on the assessee and the assessee had gone in appeal before the appellate authority and the appellate authority has considered all the aspects of the matter or should he taken to have considered all the aspects of the matter and found penalty imposed was rightly and correctly imposed. According to me,

the appellate authority under the provisions of Section 251(l)(b), had the power to alter or amend or even to enhance or reduce the penalty and deal with other aspects of the same matter, i.e., the imposition of penalty as it would find it proper. The language of Section 154(l)(a) makes it abundantly clear that the matter which is considered or decided by the appellate authority cannot be reopened or rectified. I am of the view that matter means all facets of the matter which come within the scope of the appeal. If the appeal is filed relating to a matter and the same was considered and decided or be treated to have been considered or decided by the appellate authority, it is no longer open for the assessing authority to reopen or reagitate or rectify the said issue or matter."

20. It may be noticed that before the Gauhati High Court, the question which arose was that the levy of penalty itself was made the subject-matter of appeal that had been decided by the appellate authority and it was in the aforesaid circumstances, the Gauhati High Court held that the doctrine of merger cannot be avoided by merely stating that one aspect of the controversy has not been considered, which could have been raised and decided by the authority.

21. Coming to the facts of the present case, it is apparent that there was no dispute between the parties that the assessee is an industrial undertaking to which the provisions of Section 80J of the Act are attracted to the case of the petitioner. There was also no dispute between the parties either on the issue that he fulfils all the conditions to avail of the benefit u/s 80J or has not failed to fulfil any condition which could disentitle him to relief u/s 80J notwithstanding that it is an assessee to which Section 80J was attracted. Therefore, so far as the matter relating to the applicability of the provisions of Section 80J of the Act is concerned, was considered and found in favour of the assessee. Thus, the applicability of Section 80J was not at all the subject-matter of the appeal. The subject-matter of the appeal was limited to the extent that by application of the provisions of Section 80J of the Act for the availing of which no impediment was found, how much benefit is to be computed to which the assessee is entitled to deduction u/s 80J of the Act. That being the position, it cannot be said that the matter regarding the applicability of Section 80J of the Act or non-fulfilment of any condition by the assessee in any sense was the subject-matter of the appeal, which would result in denuding the Assessing Officer to invoke his jurisdiction u/s 154 of the Act if otherwise the case is made out that the order suffers from the mistake apparent on the face of the record on the matter regarding the applicability of Section 80J of the Act as such, or non-fulfilment of any condition for availing of its benefit by the eligible undertaking. In these spheres, if there exists any mistake apparent from the record, the Assessing Officer retains his jurisdiction to rectify his order to that extent u/s 154(1A) of the Act.

22. We, therefore, answer question No. 1 in favour of the Revenue and against the assessee by holding that the Tribunal was not justified in holding that as a result of the order of the Appellate Assistant Commissioner, the original order is supposed to have merged in the appellate order and, therefore, the Income Tax

Officer could not have started rectification proceedings u/s 154 of the Act, even in respect of eligibility of the assessee as an industrial undertaking or that the assessee became disentitled to avail of the benefit though eligible u/s 80J, as it failed to fulfil an essential condition is apparent from the record.

23. Question No. 2 would rest on our quest for an answer to enquiry whether, in the facts and circumstances of the case, it could be said that the original order suffered from any mistake apparent on (he face of the record in respect of which the Income Tax Officer could exercise his jurisdiction u/s 154 of the Act, on the ground which has weighed with him.

24. The principle is well settled that a mistake apparent from the face of the record must be an obvious and patent mistake and not something which can 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. Reference in this connection may be made to T.S. Balaram, Income Tax Officer, Company Circle IV, Bombay Vs. Volkart Brothers, Bombay, and Commissioner of Income Tax (CNTL), Ludhiana Vs. Hero Cycles Pvt. Ltd., Ludhiana,

25. In the present case, the question involved was with regard to the requirement of Sub-section (GA) of Section 80J of the Act, which provides that where the assessee is a person other than a company or a co-operative society the deduction under Sub-section (1) from profits and gains derived from an industrial undertaking shall not be admissible unless the accounts of the industrial undertaking for the previous year relevant to the assessment year for which the deduction is claimed have been audited by an accountant, as defined in the Explanation below Sub-section (2) of Section 288 and the assessee furnishes, along with his return of income, the report of such audit in the prescribed form duly signed and verified by such accountant. As stated above, in the instant case, while submitting the original return, the audit report was not filed.

26. However, it cannot be gainsaid that in view of the pronouncements made by various High Courts on the question whether the requirement of filing of the audit report is mandatory or directory and whether it can be cured at a later stage, there is division of opinion.

27. In CIT v. Jaideep Industries [1989] 180 ITR 81 , it has been held by the Punjab and Haryana High Court that the requirement of filing of the audit report under sub-section (6A) of Section 80J of the Act along with the return is mandatory in nature and filing of such audit report during the assessment proceedings would not satisfy the requirement of the aforesaid provision. However, on the other hand, the Gujarat, Madras, Bombay, Allahabad, Patna and Jammu and Kashmir High Courts have held that the requirement u/s 80J(6A) that the audit report should be filed along with the return of income is not a mandatory condition and, therefore, the filing of the audit report after the

submission of the return but before the completion of the assessment is sufficient compliance with the said condition. Reference in this connection may be made to Addl. Commissioner of Income Tax Vs. Murlidhar Mathura Prasad, ; Commissioner of Income Tax Vs. Sitaram Bhagwandas, ; Commissioner of Income Tax Vs. Gujarat Oil and Allied Industries, and Commissioner of Income Tax Vs. A.N. Arunachalam,

28. In a recent judgment of the Jammu and Kashmir High Court in Commissioner of Income Tax Vs. Trehan Enterprises, it has been held that even if the audit report is not furnished along with the return during the course of assessment proceedings before the Income Tax Officer but it is produced in the appeal, the Commissioner of Income Tax (Appeals) should have treated the requirements to have been met and then framed the assessment or remitted the case back to the Income Tax Officer to proceed in accordance with law. The same view has been expressed by the Madras High Court in Commissioner of Income Tax Vs. Jayant Patel,

29. In the aforesaid circumstances, the conclusion is not far to reach that the present alleged mistake cannot be said to be a mistake which can fall within the precincts of the mistake rectifiable u/s 154 of the Act.

30. Accordingly, we answer the second question in the affirmative, i.e., in favour of the assessee and against the Revenue.