
(2003) 09 RAJ CK 0040

In the Rajasthan High Court

Case No : IT Ref. No. 41 of 1999 and Civil Writ Petition No. 1880 of 1999

Commissioner of Income Tax

APPELLANT

Vs

Devilal Soni

RESPONDENT

Date of Decision : 16-09-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 47 Rule 1
Income Tax Act, 1961 — Section 254(1), 254(2), 256(2)

Citation : (2003) 185 CTR 180 : (2004) 271 ITR 566 : (2004) 1 WLC 377

Hon'ble Judges : O.P. Bishnoi, J;N.N. Mathur, J

Bench : Division Bench

Advocate : K.K. Bissa, for the Appellant; Suresh Ojha, for the Respondent

Final Decision : Dismissed

Judgement

N.N. Mathur, J.—By way of instant application u/s 256(2) of the IT Act, 1961, the CIT, Bikaner seeks reference on the following question of law for the opinion of this Court :

"Whether the Tribunal was legally empowered to "review" its earlier order passed on 3rd Feb., 1997, by taking a different view on the same set of facts of the case ?"

2. On the same facts, the CIT, Bikaner has also filed a writ petition under Article 226 of the Constitution of India seeking direction to set aside the order dt. 25th Nov., 1997, The tax reference as well as the writ petition are heard and disposed of by a common order as both of them pertain to the asst. yr. 1989-90 of the same assessee i.e., Devilal Soni.

3. The facts which lead to filing of reference application and the writ petition are as follows :

4. The respondent-assessee is an individual, engaged in the job of gold smith. A search operation was carried out at the residential premises of the respondent-

assessee on 28/29th Sept., 1988. The AQ in the assessment order for the asst. yr. 1989-90 by order dated 27th March, 1992 made an addition of Rs. 4,24,250. The respondent-assessee preferred as appeal. The CIT(A) accepted the contention of the respondent-assessee that alleged surrender was not voluntary as it was under the threat of search party. The appellate authority observed thus :

"Thus, the statement of surrender are also invalid on the basis of the above facts. Besides that there are affidavits of the appellant Shri Devi Lal and the witness Shri Asha Ram on record which clearly alleged undue influence during the course of search, and the recording of the statement of the appellant. These affidavits have not been controverted by the AO while completing the assessment. All these facts clearly indicate that all was not well with the statements of surrender recorded u/s 332(4) of the IT Act on 29th Sept., 1988. After carefully perusing the above statements and all the above referred facts and circumstances of the case, I have no hesitation in concluding that the above referred alleged statements of surrender given by the appellant on 29th Sept., 1988, were not voluntary. Thus it would be quite unfair to make additions" on the basis of such statements. Therefore, the additions, if any are required to be made on account of unexplained gold ornaments or other moveable and immovable assets, the same should be made on merits after examining the relevant details and incriminating material e.g. if the acquisition of residential house and plots, etc. are not explained then the action for taxing the escaped income can be taken only in the relevant previous year and the same cannot be added for the assessment year under reference. These issues therefore, required fresh consideration after allowing adequate opportunity to the appellant. The above additions of Rs. 1,72,000 and Rs. 2,00,000 are, therefore, restored to the file of the AO with the directions that the case should be examined on merits and additions should be made only on the basis of some material after giving one opportunity to the appellant without placing any reliance on the so called statement of surrender of the appellant recorded on 29th Sept., 1988."

5. The AO assessed the income at Rs. 2,49,968. The matter was again carried in appeal before the CIT(A). He gave relief of Rs. 50,000 and the addition of Rs. 1,64,720 was sustained. The Tribunal granted a further relief of Rs. 80,696 to the respondent-assessee and the appeal, filed by the Department was dismissed.

6. The respondent-assessee filed a miscellaneous application u/s 254(2) of the IT Act. The Tribunal recorded the satisfaction that the details which were filed by the authorised representative before the Tribunal could not be considered due to oversight, thus, by order dt. 25th Nov., 1996, posted the case for rehearing. The Tribunal by order dt. 21st April, 1998, rectified the error in order dt. 3rd Feb., 1997, and allowed the appeal of the respondent-assessee. The Department filed a reference application u/s 256(1) of the IT Act, 1961, which was rejected by the order dt. 31st Aug., 1998.

7. Mr. Bissa, learned counsel appearing for the Department has vehemently argued that Tribunal has exceeded the jurisdiction in reviewing its own order and

recalling the same under the garb of rectification. The learned counsel has strongly placed reliance on the decision of apex Court in Patel Narshi Thakershi and Others Vs. Shri Pradyumansinghji Arjunsinghji, wherein it is held that the power to review is not an inherent power and it must be conferred by law. It is submitted that since the power of review has not been granted to the Tribunal, the impugned order is not sustainable in the eye of law. It is further submitted that the Tribunal has committed error in not following the decision of the jurisdictional High Court rendered in Income Tax Officer Vs. Income Tax Appellate Tribunal and Another, On the other hand, it is submitted by Mr. Ojha, learned counsel appearing for the respondent-assessee that so far as the case of ITO v. ITAT and Ors. (supra) is concerned, it is a judgment of learned Single Judge and it does not hold a good law in view of the Division Bench judgment of this Court in Commissioner of Income Tax Vs. Ramesh Chand Modi, It is further submitted that same view has been followed by another Division Bench of this Court in Rajasthan State Electricity Board (2002) 259 ITR 341.

8. We have considered the rival contentions. In order to appreciate the contention, it would be convenient to extract the relevant clauses of Section 254 of the IT Act as follows :

"Section 254. order of Appellate Tribunal--(1) The Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit.

(2) The Tribunal may, at any time within four years from the date of the order, with a view to rectifying any mistake apparent from the record, amend an y order passed by it under Sub-section (1), and shall make such amendment if the mistake is brought to its notice by the assessee of the AO :

Provided that an amendment which has the effect of enhancing an assessment or reducing a refund or otherwise increasing the liability of the assessee, shall not be made under this sub-section unless the Tribunal has given notice to the assessee, of its intention to do so and has allowed the assessee a reasonable opportunity of being heard :

Provided further that any application filed by the assessee in this sub-section on or after the 1st Oct., 1998, shall be accompanied by a free of fifty rupees.

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9. Section 254(2) of the Act empowers the Tribunal to amend at any time within four years from the date of the order, any order passed by it u/s 254(1) with a view to rectify any mistake apparent from the record either suo motu or on an application. There is no dispute to the proposition that power to review is not an inherent power. It must be conferred by law either specifically or by necessary implication. The Tribunal does not possess the power to review its own order. The Tribunal can not recall its previous order in an attempt to rewrite the order.

However, it has a power of rectification conferred by Section 254(2). Thus, the provision authorises the Tribunal to rectify any "mistake apparent from the record". The said expression has a wider content than the expression "error apparent on the face of record" occurring in Order 47, Rule 1, CPC. We are in complete agreement with the said view taken by the Kerala High Court in KIL KOTAGIRI TEA AND COFFEE ESTATES CO. LTD. Vs. Income Tax APPELLATE TRIBUNAL AND OTHERS., . The Allahabad High Court in Laxmi Electronic Corporation Ltd. Vs. Commissioner of Income Tax, has observed as follows :

"It is well settled proposition that an act of Court (which, in the context, means and includes a Tribunal of the nature of the Tribunal) should not prejudice a party. In such a case, it would not be just to drive the party to a reference u/s 256. It must be left to the Tribunal to reopen the appeal if it finds that it has omitted to deal with an important ground urged by the party. It is not correct to say that the expression "record" in the phrase "mistake apparent from the record" in Section 254(2) means only the judgment. The record means the record before the Tribunal."

10. In CIT v. Ramesh Chand Modi (supra) this Court has held that once a mistake on the face of record is established what order should follow to correct that mistake shall always depend on the facts and circumstances required to rectify the mistake. The Court observed :

"If the mistake is one which requires determination of some undecided issue because it has not been decided though raised, the procedure that would follow the discovery of such mistakes is to recall the order and decide the case afresh or to decide that issue after affording an opportunity to the parties concerned and pass a fresh order in the light of finding on such issue. The order u/s 254(2) of the IT Act, 1961, is not confined to arithmetical or clerical mistakes, nor only to correct substantive mistakes, but also procedural mistakes."

11. In the instant case by miscellaneous application u/s 254(2) the respondent-assessee asked the Tribunal to rectify the mathematical error in the order dt. 3rd Feb., 1997, inasmuch as, 704, gms. of ornaments were recovered and the Tribunal has wrongly proceeded on the basis of a figure 996.500 gms. It was pointed out that a per Panchanama prepared at the time of search, ornaments weighing 711.500 gms. only were recovered from the respondent-assessee but by mistake the Tribunal has treated whole ornaments weighing 995.500 gms. recovered from different relatives as if recovered from the respondent-assessee. The Tribunal having found apparent mistake has rightly invoked the jurisdiction of rectifying the mistake.

12. We have also gone through the order dt. 21st April, 1990. The Tribunal has recorded the finding based on the evidence of record. In view of the aforesaid to referable question of law arises, as such the reference application stands rejected.

13. We do not find any merit in the writ petition. For the reasons stated above, the writ petition stands dismissed.