

(2010) 08 KAR CK 0113
In the Karnataka High Court
Case No : IT Appeal No. 3235 of 2005

Commissioner of Income Tax

APPELLANT

Vs

Festo Control (P.) Ltd.

RESPONDENT

Date of Decision : 10-08-2010

Acts Referred:

Income Tax Act, 1961 — Section 154, 44 AB, 80 HHC

Citation : (2011) 196 TAXMAN 239

Hon'ble Judges : N. Kumar, J; H.S. Kempanna, J

Bench : Division Bench

Advocate : M.V. Seshachala, for the Appellant; A. Shankar, for the Respondent

Final Decision : Dismissed

Judgement

N. Kumar, J.—This appeal is by the revenue challenging the order passed by the Tribunal, which, while confirming the order of the appellate authority has held that, the profit of business at the point of time of calculating deduction u/s 80HHC is not to be reduced by brought forward losses.

2. The Assessee in respect of the assessment year 1993-94 had filed returns of income on 2-12-1983 declaring a total income of Rs. 38,51,040. This return was accompanied by tax audit report as contemplated u/s 44AB of the Act. A regular order of assessment came to be passed on 10-1-1986. The Assessing Officer thereafter initiated proceedings u/s 154 of the income tax Act, 1961 (for short, hereinafter referred to as, "the Act") for rectification of the order dated 10-1-1996. After hearing the Assessee, he rectified the order by passing a considered order dated 8-3-1999 holding that the profit of business has to be arrived at after setting of these brought forward losses before proceeding to grant deduction u/s 80HHC of the Act. Aggrieved by the said order, the Assessee preferred an appeal before the Commissioner of income tax (Appeals). The Appellate Commissioner held, Section 80HHC deduction should be granted in favour of the Assessee without excluding from the profit and loss in the business carried forward from the earlier assessment years. In coming to the said

conclusion, he relied on the judgment of Andhra Pradesh in the case of Commissioner of Income Tax Vs. Gogineni Tobacco Limited, . The said order of the Appellate Commissioner was challenged by the revenue before the appellate Tribunal. The Tribunal agreeing with the findings recorded by the Appellate Commissioner dismissed the appeal. Aggrieved by the same, the revenue is in appeal before this Court.

3. The learned Counsel for the revenue assailing the impugned orders contended that, in view of the law declared by the Apex Court in the case of Commissioner of Income Tax, Pune Vs. Shirke Construction Equipment Ltd., , it is clear that the brought forward losses of the previous years have to be deducted before arriving at the profits of business and therefore, he submits, the orders passed by the two appellate authorities is erroneous and requires to be set aside.

Per contra, the learned Counsel appearing for the Assessee contended that, the judgment of the Apex Court in Shirke Construction Equipment Ltd.'s case (supra) was delivered on 17-5-2007. Till such time, the various High Courts in the Country has taken view that, these business losses of the previous years should not be taken into consideration in arriving at the business profits u/s 80HHC. At any rate, it was a debatable issue. The Assessing Officer has passed an order u/s 143(3) of the Act after disallowing some deductions claimed by the Assessee, but accepting the aforesaid position that the business losses are not to be deducted while computing the business profit u/s 80HHC. The said order has attained finality inasmuch as it was not set aside in revision by the revisional authority on the ground that it is prejudicial to the interest of the revenue. On the date the said order was passed, that was the view, which was prevailing as is clear from the various judgments of the High Courts. Therefore, in those circumstances, the Assessing Officer could not have invoked his jurisdiction u/s 154 of the Act to rectify the order passed, on the ground that there was an error apparent from the record.

In support of his contention, he relied on a judgment of the Bombay High Court - Royal Cushion Vinyl v. CIT [2009] 180 Taxman 208, which has held in almost identical situation that the question involved was a debatable issue and that could not be sorted out in the proceedings u/s 154 of the Act.

He also brought to our notice the subsequent judgment of the Apex Court in the case of Commissioner, Income Tax, Thiruvananthapuram Vs. K. Ravindranathan Nair, wherein the Apex Court has held that, while calculating "business profits" the same had to be done in terms of Section 28 and Section 44D of the income tax Act alone. Other provisions like Sections 70 and 71 of the income tax Act were excluded. Therefore, he contends that the order passed by the appellate authorities are strictly in accordance with law and do not call for any interference.

4. In the light of the aforesaid contentions and from the material on record, before deciding the substantial question of law, which is framed in this appeal at the time of admission, it is necessary for the Court to go into the question

whether the said question could have been the subject-matter of the proceedings u/s 154 of the Act, Section 154 of the Act reads as under :

154. Rectification of mistake.--(1) With a view to rectifying any mistake apparent from the record and 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.

A perusal of the aforesaid provision makes it very clear that the assessing authority can invoke the power under the aforesaid provision only with a view to rectify any mistake apparent from the record. Under the guise of the said proceedings, he cannot go into either debatable issue or complicated questions of law, once an assessment order is passed by him. If the said order is prejudicial to the interest of the revenue, the Act provides a remedy to the revenue by way of revisional powers conferred on the Commissioner subject to the case falling under the four corners of the revisional powers of the authority. Infact, the Bombay High Court has an occasion to consider almost identical issue in the case of Royal Cushion Vinyl (supra), wherein it held as under :

Issue regarding deduction of unabsorbed depreciation and unabsorbed losses from the profits and gains of business or profession while computing deduction u/s 80HHC was a debatable issue and therefore, Dy. CIT had no jurisdiction to pass the impugned order u/s 154 holding that the Assessee company is entitled to deduction u/s 80HHC at nil as there is no positive income after setting off the unabsorbed depreciation and unabsorbed business losses of the earlier years.

Before the proceedings were initiated by the Assessing Officer on 8-3-1989, the Andhra Pradesh High Court had considered the deductibility of the carry forward losses to the previous years in the case of CIT v. Gogineni Tobacco Ltd., (2002) 253 ITR 800 has held that, deduction u/s 80HHC has to be computed only after reducing brought forward losses. Therefore, the order passed by the Assessing Officer on the date it was passed was in conformity of the law as it stood on that date. Even otherwise, it was a debatable issue. Therefore, the Assessing Officer could not have passed a rectification order u/s 154 of the Act on the ground that there is an error apparent on the face of the record. Rightly, such an order has been set aside by the two appellate authorities relying on several pronouncements of the various High Courts, which agreed with the view taken by the Andhra Pradesh High Court. In fact, now reliance is placed on two Supreme Court judgments by both the parties, which seems to be in direct conflict with

each other or at any rate, the judgment on which the revenue relies on, has no application to the facts of this case. In these circumstances, we are of the view that the assessing authority committed an error of jurisdiction in passing the impugned rectification order u/s 154 in the facts of this case. Therefore, the appellate authorities were justified in setting aside the said order on merits. Therefore, we decline to answer the substantial question of law raised in this appeal. The justice of the case would be met by dismissing this appeal on the ground that the Assessing Officer has exceeded his jurisdiction in passing the impugned order.

Ordered accordingly.