(2005) 07 GUJ CK 0033

In the Gujarat High Court

Case No : IT Ref. No. 237 of 1993

Commissioner of Income Tax APPELLANT

Vs

Gujarat State Export Corpn. Ltd. RESPONDENT

Date of Decision : 05-07-2005

Acts Referred:
Income Tax Act, 1961 — Section 143(3), 144B, 154, 256(2), 35B

Citation : (2005) 198 CTR 251 : (2005) 279 ITR 477

Hon'ble Judges : H.N. Devani, J;D.A. Mehta, J

Bench : Division Bench

Advocate : M.M. Bhatt, for the Appellant; Swati Soparkar, for the Respondent

Judgement

D.A. Mehta, J.—The Tribunal, Ahmedabad Bench ''B'' has referred the following question for the opinion of this Court u/s 256(2) of the IT Act, 1961 (the Act), at the instance of the CIT :

"Whether the Tribunal has not erred in law and on facts in holding that the order of rectification made by the ITO in respect of following items :

Rs. (1) Commission on sales to overseas distributors 8,25,922 (2) Stationery and printing (50 per cent of Rs. 1,60,743) 80,372 (3) E.C.G.C. promotion expenses 18,054 (4) Expenses for participation in International Trade Fair 1,74,053 (5) Salary (50 per cent of Rs. 1,99,350) 5,46,679 (6) Rent (50 per cent of Rs. 2,33,537) 1,16,769 16,61,849 is not sustainable in view of the Supreme Court judgment in the case of T.S. Balaram, Income Tax Officer, Company Circle IV, Bombay Vs. Volkart Brothers, Bombay,

2. The assessment year is 1979-80 and the relevant accounting period is the financial year ended on 31st March, 1979. The assessee, a limited company, in its return of income claimed weighted deduction u/s 35B of the Act on 17 items amounting to Rs. 28,01,738. The AO allowed the claim in respect of 15 items totalling to Rs. 22,80,051 vide assessment order dt. 2nd March, 1982, passed u/s 143(3) read with Section 144B of the Act.

3. Thereafter, the AO initiated rectification proceedings u/s 154 of the Act on the basis of the amendment carried out by Finance Act, 1978, to disallow weighted deduction in relation to the following items :

Rs. Commission on sales to overseas distributors 8,25,922 Stationery and printing (50 per cent of Rs. 1,60,743) 80,372 E.C.G.C. promotion expenses 18,054 Expenses for participation in International Trade Fair 1,74,053 Salary (50 per cent of Rs. 10,93,358) 5,46,679 Rent (50 per cent of Rs. 2,33,537) 1,16,769

He, accordingly, passed an order on 20th March, 1984.

4. The assessee carried the matter in appeal before CIT(A) who, for the reasons stated in his order dt. 10th Aug., 1984, dismissed the appeal. The assessee filed second appeal before the Tribunal and the Tribunal allowed the appeal vide order dt. 13th June, 1985. The principal ground, on which the appeal has been allowed by the Tribunal, is that the point at issue was highly debatable and, therefore, no action could be taken u/s 154 of the Act as held by the apex Court in the case of T.S. Balaram, Income Tax Officer, Company Circle IV, Bombay Vs. Volkart Brothers, Bombay,

5. Ms. M.M. Bhatt, learned standing counsel appearing on behalf of the applicant/ Revenue, submitted that the amendment was clear and unambiguous and any expenditure which is incurred after 1st April, 1978, and falling within Sub-clauses (i) and (iii) of Clause (b) of Sub-section (1) of Section 35B of the Act cannot be allowed. That is the exercise which the AO undertook while framing the rectification order. She, therefore, submitted that the Tribunal was wrong in holding that the issue was debatable. According to her, if on a plain reading of the provision the mistake was apparent on record, nothing further was required and the assessing authority was within its jurisdiction to exercise the powers of rectification of such a mistake. She, therefore, urged that the question referred be answered in favour of Revenue.

6. Ms. Soparkar, learned advocate appearing on behalf of the respondent-assessee, in support of the order of the Tribunal, submitted that on an issue which was highly debatable the AO was not entitled to exercise powers of rectification as laid down by the Hon''ble Supreme Court in case of T.S. Balaram, ITO v. Volkart Bros. and Ors. (supra). She also invited attention to the decision in the case of Commissioner of Income Tax Vs. Cadila Laboratories (P) Ltd., rendered by this Court to submit that payment of commission to its agents in foreign countries would certainly amount to expenditure incurred wholly and exclusively for the promotion of sales outside India and on maintenance of agency outside India.

7. The Tribunal has recorded that while framing assessment order u/s 143(3) read with Section 144B of the Act, the AO had nowhere mentioned various sub-clauses of Section 35B(1)(b) of the Act under which the respective items were allowed weighted deduction. That it was only while passing the order u/s 154 of the Act that the AO spelt out for the first time that weighted deduction on the

disputed items was allowed under Sub-clauses (i) and (iii) of Section 35B(1)(b). It is in this context that the Tribunal has come to the conclusion that the point at issue is highly debatable and, therefore, no action could be taken u/s 154 of the Act.

8. It is apparent from the assessment order as well as order of rectification that the AO has referred to Sub-clauses (i) and (iii) of Section 35B(1)(b) of the Act only during rectification proceedings. Therefore, it is not possible to state, one way or the other that, while granting deduction originally in the assessment order each of the disputed items had been allowed only under Sub-clauses (i) and (iii) of Section 35B(1)(b) of the Act. As can be seen from the first item which is disputed, viz., commission on sales to overseas distributors, whether or not it falls within Sub-clause (i) and/or Sub-clause (iii), it would yet require consideration whether the same would also fall or not under Sub-clause (viii) of Section 35B(1)(b) of the Act. Thus, if an item is prima facie capable of being governed by either of the sub-clauses, viz., Sub-clauses (i) and (iii) on one side and Sub-clauses (ii), (iv) to (ix) on the other side, it cannot be stated that merely because it falls either under Sub-clause (i) and/or Sub-clause (iii) it would be mistake apparent on record if the said item also conceivably could fall under any of the sub-clauses of the latter group. As laid down by the apex Court in the case of T.S. Balaram, ITO v. Volkart Bros. and Ors. (supra), it is not open to the AO to go into the true scope of the relevant provisions of the Act in a proceeding u/s 154 of the Act. A mistake apparent on 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.

9. Applying the aforesaid principles to the facts of the case, it is apparent that the Tribunal was justified in holding that the true scope of Section 35B of the Act could not be subject-matter of rectification proceedings as the issue was highly debatable and as to which item would fall under each of the sub-clauses was not within the scope of the powers that the AO could exercise u/s 154 of the Act.

10. It is necessary to take note of the fact that the Tribunal has stated that it agrees with the submission made on behalf of the assessee that the disputed items were allowed under Sub-clause (ii) of Section 35B(1)(b) of the Act. Considering the controversy which was brought before the Tribunal it was not necessary for the Tribunal to record such an opinion especially in light of the fact that the Tribunal itself has found, and rightly so, that in the original assessment order the AO had not mentioned any sub-clause under which the items were allowed weighted deduction. This finding of the Tribunal was, therefore, not called for in the facts and circumstances of the case.

11. The Tribunal was, therefore, right in holding that the order of rectification made by the AO in respect of the six items stated in the question was not sustainable in view of the Hon''ble Supreme Court judgment in case of T.S. Balaram, ITO v. Volkart Bros. and Ors. (supra). The question referred for the opinion of this Court is, therefore, answered in the affirmative i.e., in favour of

the assessee and against the Revenue.

12. The reference stands disposed of. There shall be no order as to costs.