
(1993) 03 CAL CK 0026

In the Calcutta High Court

Case No : Income-tax Reference No. 51 of 1991

Commissioner of Income Tax

APPELLANT

Vs

Hind Wire Industries Ltd.

RESPONDENT

Date of Decision : 24-03-1993

Acts Referred:

Income Tax Act, 1961 — Section 154, 154(1A), 154(7), 32
Limitation Act, 1963 — Section 5

Citation : (1993) 202 ITR 274

Hon'ble Judges : Shyamal Kumar Sen, J;Ajit K. Sengupta, J

Bench : Division Bench

Judgement

This Judgment has been overruled by : M/s. Hind Wire Industries Ltd. Vs. Commissioner of Income Tax, West Bengal-V., AIR 1995 SC 1133 : (1995) 124 CTR 219 : (1998) 99 ELT 25 : (1995) 212 ITR 639 : (1995) 2 JT 317 : (1995) 1 SCALE 475 : (1995) 3 SCC 136 : (1995) 1 SCR 519

Ajit K. Sengupta, J.—In this reference u/s 256(1) of the Income Tax Act, 1961, the Tribunal has referred the following question at the instance of the Revenue relevant to the assessment years 1976-77 to 1980-81 :

"On the facts and in the circumstances of the case whether the Tribunal is justified in holding that the mistake which the assessee seeks to get rectified has occurred in the set of rectification orders passed u/s 154 of the Income Tax Act, 1961, on July 12, 1982, and that date should be taken into account for purposes of computing the period of limitation ?"

2. As the question indicates there was a set of rectification orders in respect of the assessment years and a further mistake occurring in such rectification orders is sought to be rectified by the assessee which the Revenue contends against on the ground that for computing the period of limitation for rectification the date of the original order is relevant and not the date on which the rectification orders were passed.

3. The following table abstracts the various dates which have a bearing on the issue involved :

Assessment year	Date of initial assessment order	Date of order u/s 154	Date of order u/s 154	Date of order u/s 251
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(1)	(2)	(3)	(4)	(5)
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1976-77	21-9-1979	12-7-1982	1-9-1984	25-10-1984
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1977-78	21-9-1979	12-7-1982	1-9 1984	25-10-1984,
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4-9-1986				
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1978-79	12-8-1980	12-7-1982	1-9-1984	25-10-1984,
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4-9-1986				
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1979-80	25-5-1981	12-7-1982	1-9 1984	25-10-1984,
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4-9-1986				
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1980-81	8-1-1982	12-7-1982		25-10-1984
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4. The assessee's grievance had its genesis in the following circumstances. In the Income Tax returns filed by the assessee for the five assessment years under consideration, the assessee had claimed depreciation on factory buildings at five per cent. The assessments were completed, inter alia, on that basis. It is a matter of record that the assessee did not at any time prior to July, 1986, file any rectification application specifically claiming that the allowance of depreciation at five per cent. instead of ten per cent. on the factory buildings constituted a mistake apparent from the record. As pointed out earlier on July 12, 1982, the Income Tax Officer passed rectification orders dealing, inter alia, with the question of extra shift allowance. At that time also the assessee did not specifically raise the issue relating to factory buildings. The assessee had filed appeals before the Commissioner of Income Tax (Appeals) for the assessment years in question. Even at that stage the question of depreciation admissible on factory buildings was not raised.

5. On July 4, 1986, the assessee filed a rectification petition claiming, inter alia, that for the assessment years 1976-77 to 1983-84, depreciation on factory buildings was wrongly allowed at five per cent. instead of ten per cent. It would appear that in the course of the discussions that took place with the Income Tax Officer on this matter the assessee had contended that the rectification petition dated July 4, 1986, was not hit by the bar of limitation if July 12, 1982, the date on which the orders u/s 154 were passed by the Income Tax Officer for these years, was taken into account. The Income Tax Officer was not impressed by the assessee's argument in this regard. The Income Tax Officer, on his part, held that for the assessment years 1976-77 to 1980-81, the period of limitation ran from the respective dates on which the original assessment orders were passed for these years. On this basis, the Income Tax Officer negatived the assessee's

claim for the five years under examination. (As for the assessment years 1981-82 to 1985-84, the Income Tax Officer allowed the assessee's application).

6. The assessee took up the matter in appeal before the Commissioner of Income Tax (Appeals). On an examination of the facts and circumstances of the case as also the legal position, the Commissioner of Income Tax (Appeals) dismissed the assessee's appeals.

7. Thereupon, the assessee approached the Tribunal. On an examination of the facts and circumstances of the case and following the decision of the Patna High Court in the case of Bihar State Road Transport Corporation Vs. Commissioner of Income Tax, , the Tribunal held that the assessee was entitled to succeed. It may here be highlighted that the Tribunal distinguished the decision of the Calcutta High Court in the case of Bengal Assam Steamship Co. Ltd. Vs. Commissioner of Income Tax, .

8. Learned counsel for the parties reiterated before us their respective submissions before the Tribunal. Learned counsel for the assessee submitted that the period of limitation in the facts of the case should start running from July 12, 1982, the date on which the Income Tax Officer had passed the rectification orders u/s 154. According to him, the original assessment order got merged with the rectification orders of the said later date, viz., July 12, 1982. Further, depreciation itself was one of the matters that fell for consideration in the orders u/s 154 passed on that date, and it is immaterial that in such rectification the consideration was in regard to the allowance of extra shift depreciation and not the correct rate of depreciation for the factory building. According to him, consequent upon the original assessment orders getting fused with the rectification orders passed on July 12, 1982, the apparent mistake of allowing depreciation at a lower rate on factory buildings stood embedded in the said rectification orders of July 12, 1982. Therefore, the limitation is computable with reference to July 12, 1982, and not the dates of passing the initial assessment orders. The second limb of the argument advanced on behalf of the assessee is that assessment is one integrated process having as its object the correct determination of the tax liability. Therefore, rectificatory process is also part of the assessment and each stage of such determination cannot be treated as a water-tight compartment. Viewed from that angle, no exception can be taken to the computation of the period of limitation with reference to July 12, 1982.

9. Learned counsel finally relied upon the decision of the Patna High Court in Bihar State Road Transport Corporation Vs. Commissioner of Income Tax,

10. Learned counsel for the Revenue, however, relied upon the decision of this High Court in Bengal Assam Steamship Co. Ltd. Vs. Commissioner of Income Tax, . In this case, this court has held that no rectification order can be passed after the expiry of four years from the date of the order sought to be rectified. Thus the date of the original order is the commencing point of limitation. In the course of these four years, the assessment order may be subjected to a

rectification of a later date, still the commencing point of limitation remains the same date of the original order and not the later date of its subsequent rectification. The Revenue's case was sought to be further reinforced by reliance on the decision of other High Courts : For example, Ahmedabad Sarangpur Mills Company Ltd. Vs. A.S. Manohar, Income Tax Officer, Circle IV, Ward-a (Companies), Ahmedabad, , Karsandas Bhagwandas Patel Vs. G.V. Shah, Income Tax Officer, Rajkot and Others, , Kothari (Madras) Ltd. Vs. Agricultural Income Tax Officer, . It was also pointed out that the Gujarat and Madras High Courts have held that even where an appellate order has been passed in appeal against the original order that will not affect the computability of the limitation period from the date of the original order unless the rectification arises from the appellate order. It is of course patent that this rule does not hold good where the rectification sought for is in respect of a mistake arising from the appellate order or from the rectification order itself but in the present case obviously it is not that the assessee seeks to have rectified a mistake which the Assessing Officer committed while passing the rectification order. According to the Revenue, it is only in such contingency the period of limitation shall commence from the date of the rectification order or the appeal order, as the case may be.

11. Learned counsel for the assessee, however, sought to distinguish the Gujarat decision in Ahmedabad Sarangpur Mills Company Ltd. Vs. A.S. Manohar, Income Tax Officer, Circle IV, Ward-a (Companies), Ahmedabad, pointing out that the High Court was concerned with the provisions of Section 35 of the old Act, materially different from the provisions of Section 154 of the new Act. Section 35 of the repealed Act empowered the Income Tax Officer to rectify only an assessment order and not any other order. Therefore, the Gujarat High Court reasonably held that it was not permissible to enlarge the import of the expression "from the date of any assessment order "so as to encompass orders other than an assessment order. It is pointed out that the present provision for rectification, i.e., Section 154 of the new Act, instead uses the expression "any other order" and thus the jurisdiction to rectify has been so enlarged as to empower rectification of any order by the Assessing Officer. With regard to the decision of this court in Bengal Assam Steamship Co. Ltd. Vs. Commissioner of Income Tax, it is submitted that in the Calcutta case what the assessee sought to rectify was the original order itself and the request was made at a point of time beyond the period of limitation. In that case also there was a prior order u/s 154 but the assessee did not seek rectification of the mistake on the ground of merger as has been canvassed in the present case, it was submitted on behalf of the assessee.

12. This line of argument was treated by the Tribunal in the following manner :

"As we see it, the points urged by Sri Ganguly, on behalf of the assessee, are well taken. As pointed out earlier, there should be a mistake apparent from the record and for purposes of rectifying the mistake, the Income Tax Officer is empowered to amend any order passed by him. The rectification order dated July

12, 1982, is an order passed by the Income Tax Officer and hence it is amenable to rectification u/s 154. It cannot be disputed that depreciation allowance was one of the matters that was dealt with by the Income Tax Officer in the said set of orders. It cannot also be disputed that the mistake relating to the granting of depreciation allowance on factory buildings at five per cent. instead of ten per cent. occurred in those orders also. True the mistake which had occurred in the original assessment orders was repeated or carried into the said set of rectification orders. Even so, the fact remains that the error is very much there in the said set of rectification orders.

The question then arises for consideration whether the Income Tax Officer was justified in reckoning the period of limitation not from July 12, 1982, being the date on which the rectification orders were passed, but from the dates on which the original assessment orders were passed. We are of the considered opinion that since the mistake which the assessee seeks to get rectified has occurred in the set of rectification orders passed on July 12, 1982, also, that date should be taken into account for purposes of computing the period of limitation.

As we see it, there is nothing in Section 154(7) to suggest that, in a case where the mistake that had earlier occurred in the assessment order gets repeated, either by accident or by design, in a subsequent rectification order, the mistake in question cannot be rectified by reckoning the period of limitation with reference to the date of the rectification order.

The position would of course have been different if a certain mistake arose in an assessment order and the subsequent rectification order dealt not with that aspect of the matter in which the mistake had occurred initially, but with some other matters. In such cases, the mistake having occurred in the original order, the period of limitation must be reckoned with reference to the date of the original order.

It hears repetition that, in this case, depreciation allowance was one of the items considered in the set of rectification orders passed on July 12, 1982. Under the Income Tax Act, 1961, allowance towards depreciation is a single item of allowance, even though the quantum of the allowance is calculated on different assets at different rates. It should, therefore, follow that, when in the set of rectification orders passed by the Income Tax Officer on July 12, 1982, with a view to recomputing the depreciation allowance admissible to the assessee, the mistake of allowing depreciation on factory buildings at five per cent. instead of ten per cent. got repeated, the mistake is capable of being rectified u/s 154 and the period of limitation will have to be computed with reference to July 12, 1982."

13. As will be seen from the Tribunal's observations on the issue, the Tribunal has assumed that since the present rectification petition of the assessee relates to depreciation, the previous rectification should be construed to contain the mistake sought to be rectified notwithstanding that it is a different mistake touching a different aspect of the depreciation allowance having genesis not in

the earlier rectification order but in the original assessment order. The Tribunal thinks that once the depreciation is rectified irrespective of the point of rectification, all points converging on depreciation shall have to be deemed to have been rectified in the earlier rectification order and, therefore, the limitation should be deemed to run from the date of the said rectification order.

14. This approach in our view is not correct. First, the assessment of income itself is a multi-faceted determination. Depreciation itself has many unrelated aspects depending on the nature of the assets, period of use of the assets, extra shift operation and so on. There may be one mistake in the treatment of one aspect of the issue or there may be different mistakes in different aspects of the allowance. If a mistake in the same aspect of depreciation occurs in a rectification with regard to the self-same point, it can be said that the subsequent mistake is a mistake in the rectification order itself. It is only in that case that the period of limitation can run from the date of the order of rectification.

15. As for the doctrine of merger, which has been urged before us, it is now well-settled that the doctrine of merger is not a doctrine of rigid and universal application and it cannot be said that wherever there are two orders, one by an inferior Tribunal and the other by a superior Tribunal passed in an appeal or revision, there is a fusion or merger of the two orders irrespective of the subject-matter of the appellate or revisional order and the scope of the appeal or revision contemplated by particular statute, vide *State of Madras Vs. Madurai Mills Co., Ltd.*, . The same can be also said of the effect of merger or fusion when the original order is rectified in any part. It can be equally said that the original order does not get completely merged or fused in the rectification order. The fusion or merger by virtue of the rectification order passed is only to the extent it relates to the matter considered and decided in the rectificatory order. The other part of the assessment order which relates to items forming the subject-matter of the original assessment order does not merge in the rectification order.

16. This holds good even after an appeal from an order of assessment is decided by the appellate authority. A mistake in that part of the assessment order which was not the subject-matter of review of the appellate authority and was left untouched by him does not merge and the order in such part remains open for rectification by the Assessing Officer u/s 154. On this there was some judicial controversy. See *Karsandas Bhagwandas Patel Vs. G.V. Shah, Income Tax Officer, Rajkot and Others*, , (which was dissented from in *J.K. Synthetics Ltd. Vs. Additional Commissioner of Income Tax and Another*, , *Jeewanlal (1929) Ltd. Vs. Additional Commissioner of Income Tax and Others*, , *Premchand Sitanath Roy Vs. Addl. Commissioner of Income Tax and Others*, . But the conflict of judicial opinion is now resolved as the principle of partial merger is now given statutory effect by Sub-section (1A) of Section 154 introduced by the Direct Taxes (Amendment) Act, 1964.

17. In the instant case, the question of the rate applicable to the factory building

was admittedly not the subject-matter of the earlier rectification. What was the matter for rectification in the earlier order u/s 154 was the question of admissibility of extra shift allowance. In fact, in the extra shift allowance, the depreciation for factory buildings cannot at all come in for consideration as no extra shift allowance is applicable to the factory buildings. Therefore, the Tribunal's view that depreciation as a whole in all its aspects was rectified earlier in the process of allowing extra shift allowance to plant and machinery, entitled to such allowance, is misconceived. Therefore, the omission to correct the mistake in the original order in allowing depreciation -to buildings at a lower rate than the rate applicable was not transmuted into a mistake incidental to the rectification order even though limited only to extra shift allowance. The Tribunal's view does not hold good in the light of the law as settled by the statute as well as judicial pronouncements. The allowance of a rate lower than that due for the factory building is a mistake that remains embedded in the original assessment and it cannot be said that the mistake in allowing the lower rate of depreciation was repeated while passing the rectification order specifically for allowing extra shift depreciation. The concept of such constructive mistake, despite its novelty, requires a fiction. But there is no fiction unless law creates one. If the mistake is not in the rectification order, it must be in the original one. Therefore, the limitation for rectification for that particular mistake shall run from the date of the initial order of assessment and not the subsequent rectificatory order.

18. It has also been argued before us that construction should be liberal where the mistake is, indisputable and deprives the assessee of his legitimate relief which the statute confers on him but such argument does not advance the assessee's case since the limitation under Sub-section (7) of Section 154 is rigid and there is no power vested in any authority to condone the delay. A rectification order must be passed within the period of limitation prescribed u/s 154(7). There is no provision like that in Section 5 of the Limitation Act, 1963, for condoning delay even if there is sufficient cause for such delay. This aspect of the matter has been dealt with by the Orissa High Court in *Commissioner of Income Tax Vs. Gangaram Chapolia and Co.*, . The court held that there is no help where the rectification is not made within the time. In the present case, it is the admitted position that four years long passed before the assessee sought for rectification in question. It is precisely for that reason that the assessee took the position that the limitation should commence not from the date of the original order of assessment but from the date of the rectification order that was passed on July 12, 1982. The view is urged because if computed from that date, the application is well within the time and there is no impediment to the rectification being carried out. But as we have observed, the contention is not correct. The Tribunal also fell into error in upholding the assessee's contention.

19. In the aforesaid premises, we answer the question in the negative, in favour of the Revenue and against the assessee.

20. There will be no order as to costs.

Shyamal Kumar Sen, J.

21. I agree.