
(1988) 11 BOM CK 0034

In the Bombay High Court

Case No : Income-tax Reference No. 105 of 1976

Commissioner of Income Tax

APPELLANT

Vs

K. Subnani Construction Co.

RESPONDENT

Date of Decision : 22-11-1988

Acts Referred:

Income Tax Act, 1961 — Section 139(1), 154, 246

Citation : (1989) 75 CTR 93 : (1989) 177 ITR 219

Hon'ble Judges : T.D. Sugla, J;S.P. Bharucha, J

Bench : Division Bench

Judgement

Sugla, J.—This reference raises the following two questions of law at the instance of the Department. They read thus:

"1. Whether, on the facts and in the circumstances of the case, the Tribunal ought to have held that the levy of penal interest on the registered firm as if it were an unregistered firm was an error apparent on the face of the record and that the Income Tax Officer had jurisdiction to rectify the mistake u/s 154 of the Income Tax Act, 1961 ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal ought to have upheld the order of the Income Tax Officer and set aside the order of the Appellate Assistant Commissioner on the ground that the mistake was apparent on the face of the record ?"

2. The assessee is registered firm, its return of income for the assessment year 1966-67 was due on or before September 30, 1966. However, it was filed on July 23, 1968. While completing the assessment, the Income Tax Officer levied penal interest of Rs. 424 u/s 139(1) of the Income Tax Act, 1961. The levy was not disputed by the assessee.

3. Realising subsequently that the status of the assessee was that of a registered firm and that penal interest was chargeable by treating the assessee-firm as an unregistered firm in view of proviso (iii)(a) to section 139(1) of the Income Tax

Act, 1961, the Income Tax Officer, after allowing the assessee an opportunity of being heard, enhanced the penal interest to Rs. 8,000 by rectifying the order u/s 154 of the Act.

4. Two contentions were raised before the Appellate Assistant Commissioner. Once penal interest was levied, it was stated to be final and not subject to rectification. This argument was not accepted by the Appellate Assistant Commissioner who held that in view of the provisions in proviso (iii)(a) to section 139(1), the levy of interest treating the assessee as registered firm was an apparent mistake which could be rectified u/s 154 of the Act. The other contention was that the assessee had not made any application for extension was that the assessee had not made any application for extension of time for filing its return and that as held in the Andhra Pradesh High Court's decision in the case of Kishanlal Haricharan Vs. Income Tax Officer, A-Ward , it was not liable to penal interest at all. The Appellate Assistant Commissioner accepted the second contention and set aside the order passed by the Income Tax Officer u/s 154 of the Act.

5. The Department filed an appeal before the Tribunal and contended that the assessee having accepted the first order of levy of interest and in any event, the levy of interest being not appealable u/s 246. The Appellate Assistant Commissioner ought not to have entertained the appeal at all. The Tribunal, however, held that the appeal against the order u/s 154 was maintainable u/s 246. It further held that on the question of chargeability of penal interest, different opinions were expressed by different Benches of the Andhra Pradesh High Court and different High Courts, the point of levy of interest had, in the circumstances, become controversial and could not, therefore, be rectified u/s 154 of the Act. The Tribunal thus confirmed the order of the Appellate Assistant Commissioner.

6. The short question in this case is whether the mistake sought to be rectified by the Income Tax Officer u/s 154 is glaring and obvious so as to give him jurisdiction under that section. The settled legal position in this regard as laid down by the Supreme Court in T.S. Balaram, Income Tax Officer, Company Circle IV, Bombay Vs. Volkart Brothers, Bombay, , is that a mistake apparent from the record must be an obvious and patent mistake and not something which has to be established by a long drawn process on a point or 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. It is an admitted position that when the Income Tax Officer passed the impugned order u/s 154 on July 26, 1972, there was no decision of this court or of the Supreme Court on the issue of levy of interest under proviso (iii) to section 139(1) treating the registered firm as an unregistered firm when the application for extension of time for filing the return was not filed by the assessee. Admittedly, other High Courts had taken contrary and conflicting views. It cannot, therefore, be held that the levy of penal interest on the basis of registered firm was a mistake apparent, obvious and glaring so as

to give the Income Tax Officer jurisdiction u/s 154 to rectify the mistake.

7. The order of the Tribunal is confirmed and the questions are answered in the negative and in favour of the assessee. No order as to costs.