
(2004) 10 MP CK 0034

In the Madhya Pradesh High Court

Case No : IT Ref. No. 81 of 1999 & IT Ref. No. 81 of 1999 4 October 2004

Commissioner of Income Tax

APPELLANT

Vs

Mahavir Drilling Co.

RESPONDENT

Date of Decision : 04-10-2004

Acts Referred:

Income Tax Act, 1961 — Section 154

Citation : (2005) 273 ITR 201

Hon'ble Judges : Ashok Kumar Tiwari, J; A.M. Sapre, J

Bench : Division Bench

Advocate : R.L. Jain, for the Appellant; S.K. Jain, for the Respondent

Judgement

A.M. Sapre, J.—This is a reference made u/s 256(1) of the IT Act at the instance of Revenue (CIT) to answer following questions of law which arise out of ITA No. 1107/1108/Ind/1993 :

"1. Whether, on the facts and in the circumstances of the case, the Hon''ble Tribunal was justified in law in confirming the order of the learned Dy. CIT(A) cancelling the AO''s order u/s 154 withdrawing investment allowance in respect of drilling machines even though the AO''s action in rejecting such claim of investment allowance was in conformity with the ratio of the decision of the Hon''ble Supreme Court in the case of Commissioner of Income Tax, Orissa and Others Vs. N.C. Budharaja and Company and Others,

2. Whether, on the facts and in the circumstances of the case, the Hon''ble Tribunal was justified in upholding cancellation of the rectification order passed by the AO on 19th Oct., 1992, despite the decision of the Hon''ble Supreme Court in the case of N.C. Budharaja & Co. (supra) on the ground that the aforesaid order of the Supreme Court was passed on 7th Sept., 1993 and hence, it would not be applicable to the order dt. 19th Oct., 1992 of the AO u/s 154 in the case ?"

2. Facts as mentioned in statement of case drawn by the Tribunal need to be

taken note of infra.

3. The respondent, an assessee, is a firm engaged in the business of drilling tube-well. In the asst. yr. 1987-88, the assessee claimed investment allowance of Rs. 2,99,175 on drilling rig machine which the AO allowed it to be set off against the income of asst. yrs. 1988-89 and 1989-90 by his order passed on 31st March, 1989.

4. The AO later realised that the investment allowance could not have been claimed by assessee on the drilling machine or in other words, it was noticed that the same was wrongly granted. A notice for rectification u/s 154 of the Act was issued to assessee to show cause as to why the relief of investment allowance be not withdrawn. The assessee contested the issue. However by order dt. 19th Oct., 1992 (Annex.-A) the AO withdrew the benefit of investment allowance by taking recourse to provisions of rectification namely, Section 154 *ibid*. In the opinion of AO, it being a mistake apparent on its face, a case for rectification is made out. The assessee felt aggrieved, filed an appeal to Dy. CIT(A). The Dy. CIT(A) by order dt. 3rd Sept., 1993 (Annex.-B) allowed the appeal and set aside the order passed by AO. The Revenue then filed appeal to Tribunal. By order dt. 6th Nov., 1997 (Annex.-C), the Tribunal dismissed the appeal filed by Revenue. However, on a reference"prayed by the Revenue, the Tribunal acceded to the prayer made by Revenue and made the reference to this Court for answering the two questions framed *supra*. This is how the matter has come to this Court to answer the aforementioned two questions of law.

5. Heard Shri R.L. Jain, learned counsel for the applicant, and Shri S.K. Jain, learned counsel for non-applicant.

6. Learned counsel for the Revenue has contended that in the light of law laid down by Supreme Court in the case of Commissioner of Income Tax, Orissa and Others Vs. N.C. Budharaja and Company and Others, the issue in relation to claiming of investment allowance in the activity of drilling stands decided in favour of Revenue. It is on this basis, learned counsel contended that once the issue is decided by the Supreme Court against an assessee, the action on the part of AO in invoking Section 154 of the Act rectifying the mistake in wrongly granting the benefit to assessee in the original assessment order could always be withdrawn. In reply, learned counsel for assessee placing reliance on the decisions reported in *Geo Miller & Co. Ltd. v. Dy. CTT*, (2004) 134 Taxman 552 (Cal), *CIT v. K. Venkateswara Rao*, (1988) 169 ITR 330 Commissioner of Income Tax Vs. Jabalpur Transport Development Co., ; Commissioner of Income Tax Vs. Agya Wanti and Others, contended that in this case AO had no jurisdiction to invoke powers u/s 154 of the Act. According to learned counsel, the law laid down by Supreme Court in the case of Budharaja (*supra*) being much subsequent to the order passed by AO in assessment and hence, the same cannot be made basis to seek rectification u/s 154 *ibid*. In other words, the submission was that the law laid down in Budharaja (*supra*) being prospective in nature, the same will not apply to this case because on the date when AO

granted relief to assessee, the issue in relation to claiming of investment allowance on drilling activity was a debatable one. In substance, therefore, the submission of learned counsel for the assessee was that both Dy. CIT(A) and Tribunal were justified in holding that Section 154 of the Act could not have been resorted to in this case.

7. Having heard learned counsel for the parties and having perused record of the case, we are inclined to answer the reference against the Revenue and in favour of assessee.

8. As taken note of supra, the AO passed an assessment order on 31st March, 1989, granting benefit of investment allowance to an assessee. This benefit was withdrawn by taking recourse to the provisions of Section 154 on 19th Oct., 1992".

9. Admittedly, either on the date of granting benefit, i.e., on 31st March, 1989, or on the date when the same was withdrawn by taking recourse to Section 154 i.e., 19th Oct., 1992, the decision of Supreme Court in the case of N.C. Budharaja (supra) had not been delivered. It was delivered on 7th Sept., 1993. Obviously, therefore, the AO had not relied upon nor he could have relied upon the decision of Budharaja (supra) for invoking the powers u/s 154 of the Act seeking rectification. In other words, on the date when the rectification was done (19th Oct., 1992) by AO, decision of Budhamja (supra) was not made basis nor it could have been made. It is for the simple reason that it had not been rendered till that date.

10. It is not in dispute that on the date when the assessee claimed the benefit of investment allowance i.e., on 31st March, 1989 the issue in regard to its claim was a debatable one. In other words, on that date, there was cleavage of judicial opinion between the several High Courts. Some had taken a view in favour of assessee and some in favour of Revenue. It is in this state of judicial environment, the AO decided to grant benefit to assessee rather than to Revenue. In a case where the issue is debatable, one cannot claim rectification on the ground of an error being apparent on the face of the record. In this view of the matter, the AO had no jurisdiction to invoke Section 154 ibid and rectify the order of assessment thereby withdrawing the benefit granted to assessee. In other words, there did not arise any cause of action as on 19th Oct., 1992, to seek rectification of the order and the issue being debatable on the date of claiming benefit, the assessee could claim and AO could either grant or decline.

11. In our view, the decision relied on by learned counsel for the assessee does support the stand taken by an assessee. Indeed, in some cases, i.e, (2004) 134 Taxman 552 (Cal) the AO made Budhamja (supra) decision as basis to seek rectification in assessment order, yet the Calcutta High Court held that law laid down by Supreme Court being prospective in nature, the same cannot be made basis for seeking rectification of an assessment order. The learned Judge placing reliance on an Explanation appended to Order 47, Rule 1 of CPC held, and in our

opinion rightly, that the legislative intent contained in enacting Explanation added to Order 47, Rule 1 can always be taken into consideration while construing Section 154 of the Act. It was held that when decision on a question of law on which the impugned judgment of the Court is based has been reversed or modified by the subsequent decision of a superior Court in other case cannot be made a ground for review under Order 47, Rule 1 of CPC then it necessarily follows that the same cannot be made basis for claiming rectification u/s 154 of IT Act. In the case in hand, the decision of Budharaja (supra) was not even delivered on the date when the order for rectification was passed. It was rendered much thereafter. We, therefore, respectfully concur with the view taken by Calcutta High Court in the case of Geo Miller Co. Ltd. v. Dy. CIT (supra) as in our opinion, the decision lays down correct principle of law insofar as the interpretation of Section 154 *ibid* is concerned.

12. Accordingly, and in view of aforesaid discussion, we answer both the questions, i.e., question Nos. 1 and 2, against the Revenue and in favour of assessee. In other words, we answer the questions by holding that Tribunal was right in holding that AO had no jurisdiction to invoke the powers u/s 154 of the Act and hence, the order dt. 19th Oct., 1992 passed by AO u/s 154 of the Act is without jurisdiction and was thus rightly set aside by the Tribunal by upholding the order of Dy. CIT(A). No costs.