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**(1997) 01 P&H CK 0160**

**In the Punjab And Haryana At Chandigarh**

**Case No :** Income-tax Reference No. 41 of 1981

Commissioner of Income Tax

APPELLANT

Vs

Vardhman Spinning

RESPONDENT

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**Date of Decision :** 13-01-1997

**Acts Referred:**

Income Tax Act, 1961 — Section 154, 254, 254(1), 254(2), 80J

**Citation :** (1997) 139 CTR 322 : (1997) 226 ITR 296

**Hon'ble Judges :** N.K. Agrawal, J; Ashok Bhan, J

**Bench :** Division Bench

**Advocate :** R.P. Sawhney and Mahavir Ahlawat, for the Appellant; A.K. Mittal, for the Respondent

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**Judgement**

Ashok Bhan, J.—On a petition filed u/s 256(2) of the Income Tax Act, 1961 (hereinafter referred to as "the Act"), by the Commissioner of Income Tax, this court directed the Income Tax Appellate Tribunal, Chandigarh Bench, Chandigarh (hereinafter referred to as "the Tribunal"), to refer the following two questions of law, along with the statement of the case, for the opinion of this court :

"(1) Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in rectifying its appellate order u/s 254(2) of the Income Tax Act, 1961 ?

(2) Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in holding that there was no mistake apparent from the record, which could be rectified by the Income Tax Officer u/s 154 of the Income Tax Act, 1961, thus vacating his order dated June 21, 1973, as invalid ?"

2. The respondent-assessee is a limited company carrying on business in the manufacture of cotton staple yarn. The assessment for the year 1967-68, relevant to the accounting period ending December 31, 1966, was completed by the Income Tax Officer on March 17, 1972. At that time, the Income Tax Officer did not allow the assessee's claim u/s 84 (now equivalent to Section 80J) of the

Act for want of certain details and verification. Later on, the assessee moved an application u/s 154 of the Act along with charts of depreciation, development rebate and calculations u/s 84/80J of the Act. The Income Tax Officer considered the claim of the assessee and passed an order u/s 154 of the Act on March 30, 1972. While allowing the claim of the assessee u/s 84 of the Act, the Income Tax Officer computed the capital employed by the assessee in the industrial undertaking at Rs. 59,82,176 and on this amount, relief u/s 84 of the Act was worked out at Rs. 3,58,930. In working out the capital employed by the assessee, the Income Tax Officer did not deduct a sum of Rs. 18,43,287, being the average of the secured loans from the Punjab Financial Corporation, Chandigarh, against the mortgage of plant, machinery, land and building. The Income Tax Officer passed another order u/s 154 of the Act on June 21, 1973, whereby he deducted the average of the secured loans amounting to Rs. 18,43,287 in view of Rule 19(3) of the Income Tax Rules, 1962, as it existed at that time and computed the capital employed at a sum of Rs. 34,75,491. Accordingly, a relief of Rs. 2,08,529 was allowed instead of Rs. 3,58,930.

3. The assessee filed an appeal, which was partly allowed by the Appellate Assistant Commissioner. The Revenue accepted the order passed by the Appellate Assistant Commissioner but the assessee came in second appeal before the Tribunal, which was dismissed, vide order dated May 9, 1977, by observing as under :

" 5. After hearing the learned representatives of the parties and going through the records, we do not find any substance in this appeal. Rule 19(3) of the Income Tax Rules, 1962, clearly lays down that for the purposes of computing the capital employed in an undertaking u/s 84 of the Income Tax Act, 1961, any borrowed money and debt due by the person carrying on the business shall be deducted. Now, the loan obtained by the assessee from the Punjab Financial Corporation against the mortgage of the fixed assets of the company was clearly "borrowed money" utilised in the business and as per the provisions of Sub-rule (3) of Rule 19 of the Income Tax Rules, 1962, the said amount of capital was employed for working out relief u/s 84 of the Income Tax Act, 1961. While working out the capital employed u/s 84, the Income Tax Officer, in his order dated March 30, 1972, did not deduct the average of the loan secured from the Punjab Finance Corporation and hence there was a glaring mistake which was apparent from the record and was rectified by the Income Tax Officer by his subsequent order dated June 21, 1973. In our opinion, the Income Tax Officer had the jurisdiction to rectify the mistake in his order dated March 30, 1972, which was apparent from the record. The Appellate Assistant Commissioner was, therefore, justified in upholding the order u/s 154 dated June 21, 1973, passed by the Income Tax Officer."

4. The assessee then moved a miscellaneous application, u/s 254(2) of the Act before the Tribunal for rectification of its order on the ground that it failed to deal with the following ground taken by the assessee in its appeal :

" That the learned Income Tax Officer and learned Appellate Assistant Commissioner of Income Tax have misconstrued and misapplied the provisions of Section 84 of the Income Tax Act, 1961, and Rule 19(3) of the Income Tax Rules for purposes of computation of capital employed in industrial undertaking."

5. The Tribunal, vide its order dated January 10, 1978, passed u/s 254(2) of the Act accepted the miscellaneous application of the assessee and relying upon a decision of the Calcutta High Court in Century Enka Ltd. Vs. Income Tax Officer, "D" Ward and Others, , held that the question whether the amount of secured loans obtained by the assessee from the Punjab Financial Corporation, Chandigarh, was deductible or not while computing the capital employed as per the provisions of Rule 19 of the Income Tax Rules, is a debatable issue and, therefore, the provisions of Section 154 of the Act were not applicable to the facts of the present case and the successor Income Tax Officer who had passed the order dated June 21, 1973, had no jurisdiction to act u/s 154 of the Act, there being no mistake apparent from the record. As a result, the earlier order of the Income Tax Officer dated March 30, 1972, was allowed to stand. The Tribunal concluded that there was a mistake in the order of the Tribunal which required to be rectified. The contention of counsel for the Revenue that it amounted to review of the Tribunal's order dated May 9, 1977, was rejected. The Tribunal in its subsequent order dated January 10, 1978, held as under :

"After hearing both the sides and duly considering the issue, we are inclined to the view that there is an error in the order of the Tribunal inasmuch as the assessee's ground No. 2 and the assessee's arguments thereon have not been dealt with in it. The assessee had included a copy of the Calcutta High Court judgment dated 29th April, 1976, in the case of Century Enka Ltd. Vs. Income Tax Officer, "D" Ward and Others, , in its paper book filed before the Tribunal. The Calcutta High Court's decision clearly took the view after considering the case law that borrowed capital was to be included in the capital employed in an industrial undertaking referred to in Section 80J of the Income Tax Act. Section 80J is similar in terms to Section 84 and Rules 19A and 19 are also similar in nature. When we take note of the decision of the Calcutta High Court in Century Enka Ltd. Vs. Income Tax Officer, "D" Ward and Others, , it becomes clear that Rule 19 went beyond the power of the rule-making authority and, further, borrowed capital will form part of the capital employed in an industrial undertaking for the purpose of calculating the admissible relief u/s 84 of the Income Tax Act. The Calcutta High Court has referred to a Supreme Court decision in the case of Indore Malwa United Mills Ltd., Indore Vs. State of Madhya Bharat and Others, , If this decision was not lost sight of by the Tribunal, we feel confident that the assessee would have succeeded on the preliminary ground that the issue involved was a debatable one on which two opinions could be entertained and the Calcutta High Court had in fact taken a contrary view. We may point out that in paragraph 4 of the Tribunal's order, the assessee's counsel's argument is clearly noted that the question whether the amount of secured loan obtained by the assessee from Punjab Financial Corporation,

Chandigarh, was deductible or not while computing the capital employed as per the provisions of Rule 19 of the Income Tax Rules, 1962, is a debatable issue and hence, the provisions of Section 154 are not applicable to the facts of the present case and the assessee's counsel had relied on T.S. Balaram, Income Tax Officer, Company Circle IV, Bombay Vs. Volkart Brothers, Bombay, . In view of this, we are inclined to accept the assessee's submission that there is a mistake in the Tribunal's order as pointed out which requires to be rectified u/s 254(2) of the Income Tax Act by us. There was clearly a debatable issue involved and the successor Income Tax Officer who passed the order dated June 21, 1973, had no jurisdiction to act u/s 154 there being no mistake apparent from record as per the ratio of the Supreme Court decision in T.S. Balaram, Income Tax Officer, Company Circle IV, Bombay Vs. Volkart Brothers, Bombay, . As we find there is a mistake in the order of the Tribunal which we are bound to rectify, this is not a case of review of the Tribunal's earlier order by us.

Accordingly, we accept the assessee's contention without going into the merits of the issue and hold that there was no mistake apparent from the record which could be rectified u/s 154 and the order of the Income Tax Officer u/s 154 dated June 21, 1973, is invalid and it is hereby vacated. As a result, the earlier order of the Income Tax Officer dated March 30, 1972, stands."

6. The first question referred to us is whether the Tribunal was right in law in rectifying its appellate order under section 254(2) of the Act.

7. u/s 254(1) of the Act, the Appellate Tribunal, after hearing the contesting parties can pass such orders as it deems fit. Section 254(2) of the Act specifically empowers the Appellate Tribunal, at any time within four years from the date of an order, to amend any order passed by it u/s 254(1) of the Act with a view to rectify any mistake apparent from the record, either suo motu or on an application made. Similar powers have been conferred u/s 154 of the Act on every Income Tax authority to rectify its mistakes which are apparent from the record. What can be rectified under these two Sections is a mistake which is apparent and patent, The mistake has to be such for which no elaborate reasons or inquiry is necessary. Where two opinions are possible, then, it cannot be said to be an error apparent on the basis of the record.

8. In T.S. Balaram, Income Tax Officer, Company Circle IV, Bombay Vs. Volkart Brothers, Bombay, , the apex court, while interpreting Section 154 of the Act, which empowers every Income Tax authority to rectify its mistakes which are apparent from the record, held as under (page 53) :

"A mistake apparent on the 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 conceivably be two opinions. As seen earlier, the High Court of Bombay opined that the original assessments, were in accordance with law though in our opinion the High Court was not justified in going into that question. In Satyanarayan Laxminarayan Hegde and Others Vs. Millikarjun

Bhavanappa Tirumale, , this court while spelling out the scope of the power of a High Court under article 226 of the Constitution ruled that an error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions cannot be said to be an error apparent on the face of the record. A decision on a debatable point of law is not a mistake apparent from the record--see Sidhramappa Andannappa Manvi Vs. Commissioner of Income Tax, Bombay, . The power of the officers mentioned in Section 154 of the Income Tax Act, 1961, to correct "any mistake apparent from the record" is undoubtedly not more than that of the High Court to entertain a writ petition on the basis of an "error apparent on the face of the record".

9. In the present case, the Tribunal after noticing the relevant provisions of the Act and the Rules formed an opinion that the loans obtained by the assessee from the Punjab Financial Corporation against the mortgage of six assets of the company were "borrowed money and debt due" and, therefore, liable to be deducted for the purposes of computing the capital employed in the undertaking u/s 84 of the Act. The point raised by the assessee was considered and the Tribunal arrived at its conclusions. The assessee sought to reargue the same point by saying that the Income Tax Officer and the Appellate Assistant Commissioner have misinterpreted and misapplied the provisions of section 84 of the Act and Rule 19(3) of the Rules for the purposes of computation of the capital employed in the undertaking. The Tribunal, while noticing the fact that the judgment of the Calcutta High Court in Century Enka Ltd. Vs. Income Tax Officer, "D" Ward and Others, (which was later on overruled by the Supreme Court in Lohia Machines Ltd. and Another Vs. Union of India (UOI) and Others, ) which had been placed on the paper book of the Tribunal, had not been taken note of while passing the original order u/s 254(1) of the Act, concluded that there was a mistake apparent from the record and proceeded to revise the orders passed earlier. The Tribunal clearly fell into an error. In fact, it reviewed its own order which it had no jurisdiction to do. The correctness of the conclusions arrived at in the judgment cannot be the subject-matter of an application for rectification where two views are possible. The same would not be sufficient to exercise the powers of rectification u/s 254(2) of the Act. The mistake, as observed earlier, has to be apparent and patent and not something which can be established by a long-drawn process of reasoning on which there may conceivably be two opinions. On an interpretation of Section 84 of the Act read with Rule 19A of the Rules, there could reasonably be two views out of which the Tribunal took one view. No doubt, at the relevant time only the Calcutta High Court had expressed its views in Century Enka Ltd. Vs. Income Tax Officer, "D" Ward and Others, , which ran counter to the view taken by the Tribunal, but this does not mean that two views were not possible. The judgment of the Calcutta High Court in Century Enka Ltd. Vs. Income Tax Officer, "D" Ward and Others, was not either by the apex court or by the jurisdictional High Court and, therefore, was not binding on the Tribunal. The view taken by the Calcutta High Court in Century Enka Ltd. Vs. Income Tax Officer, "D" Ward and Others, was entitled to all due respect, but the

Tribunal could take a different view and arrive at a different conclusion.

10. The Tribunal in its earlier order had not noticed the view expressed in *Century Enka Ltd. Vs. Income Tax Officer, "D" Ward and Others*, , but after putting its interpretation to the provisions of the Act and the Rules, it concluded that for the purposes of computing the capital employed in an undertaking u/s 84 of the Act, the borrowed money and the debt due by the person carrying on the business shall be deductible. The change in view by the Tribunal in the subsequent order amounted to review of its order. The power of review has not been conferred upon the Tribunal by the statute, and it is not open to the Tribunal to review its order as the Act did not confer on it any power to review orders made by it.

11. Counsel for the assessee, relying upon a judgment of the Allahabad High Court in *Income Tax Officer Vs. S.B. Singar Singh and Sons and Another*, , argued that the Tribunal has inherent powers to review its orders in order to correct a wrong done to a party.

12. The argument raised by counsel for the assessee has no force. The Tribunal is a creation of a statute and it can exercise only those powers which have been conferred upon it. The only power conferred on the Tribunal u/s 254(2) of the Act is to rectify any mistake apparent from the record. This court in *Rajeshwar Pershad Vs. Commissioner of Income Tax, E.P., Pepsu etc.*, , held that the jurisdiction to review or modify the orders passed by the authorities under the Act cannot be inferred on the basis of a supposed inherent right.

13. Counsel for the assessee, relying upon a judgment of the Madhya Pradesh High Court in *Commissioner of Income Tax Vs. Mithalal Ashok Kumar*, , further argued that even if the Tribunal had no power to review its own order yet it can certainly correct its mistakes by rectifying the same in case it is brought to its notice that the material which was already on record before deciding the appeal on the merits was not considered by it; that the Tribunal had failed to consider the judgment in *Century Enka Ltd. Vs. Income Tax Officer, "D" Ward and Others*, , which had been placed on record, while arriving at a conclusion contrary to the view expressed in *Century Enka Ltd. Vs. Income Tax Officer, "D" Ward and Others*, .

14. There is no force in this submission as well. The decision of the court would be taking a view on the interpretation of the provisions of the Act or conclusions arrived at on the given facts. It would not amount to non-consideration of a material fact which could amount to a mistake apparent on the record which could be rectified u/s 254(2) of the Act. The Tribunal in its original order, as observed earlier, had taken a view different from the view taken in *Century Enka Ltd. Vs. Income Tax Officer, "D" Ward and Others*, , which view was also possible and it could not review the same and pass a different order subsequently simply on the ground that it had failed to take notice of the view expressed by the Calcutta High Court in *Century Enka Ltd. Vs. Income Tax Officer, "D" Ward and*

Others, , which was not of the jurisdictional High Court.

15. Relying upon Income Tax OFFICER, A-WARD, DEHRA DUN, AND ANOTHER Vs. Income Tax APPELLATE TRIBUNAL, A-BENCH, DELHI, AND ANOTHER., , counsel for the assessee then argued that where in a judgment or order of the Appellate Tribunal, an error has crept in not as a result of any fault of the assessee, but attributable entirely to the Tribunal in having lost sight of a material fact at the time of writing of its order or judgment, which fact had been duly brought to its notice by the assessee, there would be an error apparent from the record which could be rectified u/s 254(2) of the Act.

16. As observed earlier, the decision of a court would be taking of the view and not of non-consideration of a material fact. We do not find any force in this submission as well. Even after referring to the view taken in Century Enka Ltd. Vs. Income Tax Officer, "D" Ward and Others, , the Tribunal could have taken a different view. It cannot be said that two views on the interpretation of Section 84 of the Act and Rule 19A(3) of the Rules were not possible especially when the judgment in Century Enka Ltd. Vs. Income Tax Officer, "D" Ward and Others, was not that of the apex court or of the jurisdictional High Court. The subsequent view taken by the Tribunal, under the circumstances, would amount to review and not correcting a mistake apparent from the record.

17. For the reasons stated above, question No. 1 is answered in the negative and it is held that the Tribunal was not right in law in rectifying its appellate order u/s 254(2) of the Act. Question No. 1 is, accordingly, answered in favour of the Revenue and against the assessee.

18. In view of the answer to question No. 1 given above, question No. 2 becomes redundant and is, therefore, returned unanswered.