

(2004) 02 DEL CK 0002

In the Delhi High Court

Case No : Income Tax A. No. 73 of 2003

Commissioner of Income Tax

APPELLANT

Vs

Vichtra Construction (P.) Ltd.

RESPONDENT

Date of Decision : 23-02-2004

Acts Referred:

Income Tax Act, 1961 — Section 254, 254(2)

Citation : (2004) 191 CTR 423 : (2004) 269 ITR 371 : (2005) 144 TAXMAN 456

Hon'ble Judges : B.C. Patel, C.J.; Badar Durrez Ahmed, J

Bench : Division Bench

Advocate : Prem Lata Bansal, for the Appellant; Krishan Mahajan, for the Respondent

Judgement

1. Admit.

2. At the request of the parties, we are taking up this matter for final disposal.

3. The following question is required to be answered by the court;

"Whether, on the facts and circumstances of the case, the Income Tax Appellate Tribunal exceeded its jurisdiction by recalling the entire order on an application u/s 254(2) and in passing the impugned order?"

4. No detailed facts are required to be examined in this case as a short question is required to be decided as indicated earlier. It transpires that the Income Tax Appellate Tribunal heard the appeal which was filed at the instance of the assessed and decided it by order dated November 13, 2000. It appears that the assessed submitted an application u/s 254(2) of the Income Tax Act, 1961, for rectification of a mistake and the Tribunal made an order dated September 12, 2001, allowing the application. The Tribunal held :

"We agree that the mistake rectifiable u/s 254(2) has occurred while passing the order dated November 30, 2000. Having come to this conclusion, we consider it reasonable and justified to recall the order passed by the Tribunal . . .".

5. Thereafter, the Tribunal reheard the entire appeal and passed a fresh order dated May 21, 2002.

6. The provisions of Section 254 are not similar to those of a review under the Civil Procedure Code. Section 254(2) reads as under :

"254. (2) The Appellate Tribunal may, at any time within four years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it under Sub-section (1), and shall make such amendment if the mistake is brought to its notice by the assessed or the Assessing Officer."

7. Thus while making an order under this provision, there-must be some mistake in the original appellate order which is required to be corrected. The words used are "... shall make such amendment if the mistake is brought to its notice . . ."

8. Clearly, if there is a mistake then an amendment is required to be carried out in the original order to correct that particular mistake. The provision does not indicate that the Tribunal can recall the entire order and pass a fresh decision. That would amount to a review of the entire order and that is not permissible under the Income Tax Act. In this context, we may refer to a decision of this court in the case of Ms. Deeksha Suri and Others Vs. Income Tax Appellate Tribunal, , the court pointed out as under ;

"Could any relief have been allowed to the petitioners in exercise of jurisdiction conferred by Section 254(2) of the Act amending the order passed by the Tribunal with a view to rectify any mistake apparent from the record ? The language of the provisions is clear. The foundation for exercising the jurisdiction is "with a view to rectify any mistake apparent on the record" and the object is achieved by "amending any order passed by it". The power so conferred does not contemplate a rehearing which would have the effect of re-writing an order affecting the merits of the case. Else there would be no distinction between a power to review and a power to rectify a mistake. What is not permitted to be done by the statute having deliberately omitted to confer review jurisdiction on the Tribunal, cannot be indirectly achieved by recourse to Section 254(2) of the Act."

9. Again in the case of Karan and Co. Vs. ITAT, , a Division Bench of this court pointed out the scope and ambit of an application u/s 254(2) as follows :

"The scope and ambit of application of Section 254(2) is very limited. The same is restricted to rectification of mistakes apparent from the record. We shall first deal with the question of the power of the Tribunal to recall an order in its entirety. Recalling the entire order obviously would mean passing of a fresh order. That does not appear to be the legislative intent. The order passed by the Tribunal u/s 254(1) is the effective so far as the appeal is concerned. Any order passed u/s 254(2) either allowing the amendment or refusing to amend gets merged with the original order passed. The order as amended or remaining

unamended is the effective order for all practical purposes. The same continues to be an order u/s 254(1). That is the final order in the appeal. An order u/s 254(2) does not have existence de hors the order u/s 254(1). Recalling of the order is not permissible u/s 254(2). Recalling of an order automatically necessitates rehearing and readjudication of the entire subject-matter of appeal. The dispute no longer remains restricted to any mistake sought to be rectified. Power to recall an order is prescribed in terms of Rule 24 of the Income Tax (Appellate Tribunal) Rules, 1963, and that too only in cases where the assessed shows that it had a reasonable cause for being absent at a time when the appeal was taken up and was decided ex parte. This position was highlighted by one of us (Justice Arijit Pasayat, Chief Justice) in Commissioner of Income Tax and Another Vs. Income Tax Appellate Tribunal and Another, . Judged in the above background the order passed by the Tribunal is indefensible."

10. The court specifically provided that recalling the entire order would mean passing of a fresh order. That does not appear to be the legislative intent. Counsel for the respondent cited a decision of this court in Seth Madan Lal Modi v. CIT [2003] 261 ITR 49. In that case, the order of rectification was upheld. It may be noted that the court considered various decisions including Ms. Deeksha Suri and Others Vs. Income Tax Appellate Tribunal, and Karan and Co. Vs. ITAT, . The court has not indicated any contrary view than what is expressed in the earlier decisions. On the facts, the court decided the matter.

11. In view of the provisions and judicial pronouncement indicated hereinabove, we are of the view that the power to rectify a mistake u/s 254(2) cannot be used for recalling the entire order. No power of review has been given to the Tribunal under the Income Tax Act. Thus, what it cannot do directly, cannot be allowed to be done indirectly. If the assessed was aggrieved, it was open for him to approach the appropriate forum but the Tribunal could not have reviewed the entire judgment delivered by it earlier in the garb of exercising its power u/s 254(2). Accordingly, the answer is required to be given in favor of the Revenue and against the assessed.

12. Counsel for the respondent submitted that he may be given liberty to prefer an appeal challenging the order of the Tribunal dated November 13, 2000. It goes without saying that after the answer which we have given hereinabove the subsequent order passed by the Tribunal will have no effect and it will be open for the assessed to prefer an appeal in accordance with law.