
(2007) 05 GAU CK 0059
In the Gauhati High Court

India Carbon Ltd.

APPELLANT

Vs

Commissioner of Income Tax and Another

RESPONDENT

Date of Decision : 25-05-2007

Acts Referred:

Income Tax Act, 1961 — Section 256, 260A, 43B

Citation : (2007) 3 GLT 339

Hon'ble Judges : Ranjan Gogoi, J;B.P. Katakey, J

Bench : Division Bench

Judgement

Ranjan Gogoi, J.—The Petitioner, who was the Appellant in Income Tax Appeal No. 13/2000, seeks a review of the order dated 1.4.2004 passed in the said Appeal by which order this Court had refused to go into the questions framed by holding the same to be not necessary and accordingly disposed of the Appeal.

2. The facts, which will be necessary to be noticed for an effective adjudication of the questions arising in the Review Petition, may be stated at the outset:

The assessment of the petitioner to income tax for the assessment year 1993-94 was finalized on 10.1.1996. For the previous year ending on 31.3.1993, the petitioner had collected Central Sales Tax amounting to Rs. 53,82,059. Though collected, the said amount was not paid into the State Exchequer. The petitioner did not include the amount in its trading as well as in the profit and loss account. The Assessing Officer, in the said facts, treated the amount in question as a part of the trading receipt of the petitioner during the financial year in question. Thereafter, the Assessing Officer held that as the amount in question was not deposited, the petitioner would not be entitled to the benefit of deduction of the said amount u/s 43B of the Income Tax Act (hereinafter referred to as the Act). Accordingly, the amount in question was included in the income of the petitioner. The petitioner filed an appeal before the Commissioner of Income Tax (Appeals) contending that it had not claimed deduction of the amount in question u/s 43B of the Act. The Commissioner of Income Tax (Appeals) upheld the claim of the petitioner and ordered for deletion of the amount of Rs. 53,82,059/-. Aggrieved,

the Revenue filed a further appeal to the Appellate Tribunal. The learned Tribunal by its order dated 25.9.2000 took the view that the Assessing Officer had not made the addition by disallowing the Central Sales Tax collected u/s 43B of the Act but that the addition in question was made by treating the amount in question as a part of the trading receipt of the assessee for the relevant assessment year. Accordingly, the order of the Commissioner (Appeals) was reversed.

3. Aggrieved by the aforesaid order dated 25.9.2000, the petitioner filed the appeal in question before this Court u/s 260A of the Act. The following questions were framed by the Court by its order dated 19.5.2001 admitting the appeal.

(i) Whether the Income Tax Appellate Tribunal had not acted arbitrarily and illegally in not following the judgment and order of the jurisdictional High Court on the same issue in respect of the appellant company itself in respect of the preceding year whereby this Hon"ble Court deleted the additions made to the income of the assessee u/s 43B of the Act?

(ii) Whether the Income Tax Appellate Tribunal constituting the same bench was legally justified in passing two contrary orders in respect of two different assessment years of the appellant company on the same issue when all the appeals were heard together on the same day and the judgment was reserved thereon?

(iii) Whether the Income Tax Appellate Tribunal has not exceeded its jurisdiction in going into the issue not arising out of the order of the Commissioner of Income Tax (appeals) and which were not the subject matter of appeal before the Income Tax Appellate Tribunal?

4. By order dated 1.4.2004, this Court took the view that Central Sales Tax collected but not credited or debited in the profit and loss account would form a part of the trading receipt and further that though the assessee had not claimed any deduction u/s 43B of the Act, as the said amount formed part of the trading receipt of the petitioner, tax is leviable thereon. Accordingly, this Court by its order dated 1.4.2004 disposed of the appeal filed by the petitioner by holding that the questions framed therein did not require any answer.

5. Dr. A.K. Saraf, learned senior counsel for the Review Petitioner has vehemently contended that a similar position, as in the present case, had arisen in the case of the petitioner in respect of the assessment year 1984-85. In the proceedings arising in connection with the aforesaid assessment year, against a similar addition made by the Assessing Officer by invoking Section 43B of the Act, the petitioner had moved this Court by instituting a writ petition registered and numbered as Civil Rule No. 1073/1987. By judgment and order dated 22.9.1992 the writ petition was answered by holding that as the petitioner had not claimed any deduction u/s 43B of the Act, the said provision of the Act could not have been invoked by the Assessing Officer to add the amount of unpaid sales tax to the taxable income of the assessee. It was further held that the

question before the Court was with regard to the applicability of Section 43B and not whether sales tax collected but not paid formed a part of the business or trading receipt. Accordingly, this Court held that "what would be the effect of showing such sum as payable by way of tax on the liabilities side in the balance-sheet without actually paying the same is a different question", which question was not before the Court. Dr. Saraf has further submitted that the aforesaid order of this Court which has since been reported in *India Carbon Ltd. Vs. Inspecting Assistant Commissioner of Income Tax and Another*, was appealed against by the Revenue before the Apex Court. However, by an order dated 23.8.1990 special leave to appeal was declined by the Apex Court.

Dr. Saraf has further submitted that for a subsequent assessment year, i.e., 1989-90 in respect of a similar view of the Assessing Officer, as in the present case, the very same question was answered by the learned Appellate Tribunal by its order dated 25.8.2000 by following the judgment of this Court reported in *India Carbon Ltd. Vs. Inspecting Assistant Commissioner of Income Tax and Another*, . Against the said order dated 25.8.2000 of the learned Appellate Tribunal, the Review filed I.T.A. No. 13/ 2001. The said appeal was dismissed by this Court by its order dated 22.5.2003 again following the earlier decision in *India Carbon Ltd. (supra)*. The said decision dated 22.5.2003 of the Court has been reported in *Commissioner of Income Tax Vs. India Carbon Ltd.*, Dr. Saraf has further argued that in respect of the assessment year involved in the present proceedings, i.e., 1993-94, the question before the Court was with regard to the correctness of the addition to the income of the petitioner by rejection of the deduction u/s 43B of the Act. No such deduction was, however, claimed by the petitioner. Dr. Saraf has, therefore, contended that in such circumstances the question of the amount being a trading receipt and on that basis being liable to tax was not an issue before the Court. In these circumstances, according to Dr. Saraf, the order dated 1.4.2004 passed in ITA 13/2000 suffers from patent errors which are liable to be corrected by a recall of the said order dated 1.4.2004.

6. Controverting the submissions advanced on behalf of the review petitioner, Sri U. Bhuyan, learned Counsel for the Revenue has submitted that even if no deduction was claimed by the petitioner u/s 43B of the Act, the amount being a part of the trading receipt of the petitioner is liable to tax under the Act and, therefore, no infirmity, as such, is disclosed in the order dated 1.4.2004 passed by this Court. Sri Bhuyan has further submitted that the power of review has not been conferred on this Court by any of the provisions of the Act. In this regard, by referring to the provision contained in Section 260A(7) of the Act, Sri Bhuyan has submitted that the provisions of the CPC relating to appeals to the High Court have been made applicable to appeals filed u/s 260A of the Act. As only the provisions of the CPC with regard to appeals to the High Court have been made applicable by Section 260A(7), according to learned Counsel, it is clear that the legislative intent is against conferment of any power of review under Order 47 CPC in respect of orders passed in the exercise of the appellate jurisdiction u/s 260A of the Act. Referring to a decision of the Apex Court in the

case of Patel Narshi Thakershi and Others Vs. Shri Pradyumansinghji Arjunsinghji, as well as two others decisions of the Apex Court in the case of Indian National Congress (I) Vs. Institute of Social Welfare and Others, and Lily Thomas, Vs. Union of India and Others, , Sri Bhuyan has submitted that the power of review of an order passed under the Act has to be specifically conferred, in the absence of which it must be understood that the said power will not be available. Sri Bhuyan has, however, conceded that this Court after passing an order u/s 260A of the Act will not become functus officio and there will always be an inherent power in the Court to make corrections in the order passed even in the absence of an expressed conferment of such inherent power. Yet, according to Sri Bhuyan, the exercise of such inherent power of the Court must not be equated with the power of review.

7. In reply, Dr. Saraf, learned senior counsel for the review petitioner has submitted that while it is correct that no power of review has been conferred on this Court by the provisions of the Act to review orders passed in exercise of jurisdiction u/s 260A of the Act, it has been held by the Apex Court in the case of Jaipur Mineral Development Syndicate, Jaipur Vs. The Commissioner of Income Tax, New Delhi, that the inherent power of the Court will be available to recall an earlier order refusing to hear a reference u/s 256 (as existing then) of the Act. The Apex Court also took the view that the High Court does not become functus officio after passing of the initial order. Reliance has also been placed by Dr. Saraf on a judgment of the Karnataka High Court in Pierce Leslie India Ltd. Vs. Commissioner of Income Tax, where the principle laid down in Jaipur Mineral Development Syndicate (supra) had been some what extended to permit a prima facie examination of the merits of the order in exercise of the inherent power. A judgment of this Court in the case of Controller of Estate Duty Vs. Murarilal Sovasaria, has also been relied upon by, Dr. Saraf to contend that in the exercise of inherent power, an earlier order passed u/s 256 (as it then existed) of the Act had been corrected on the ground that the said order is in direct conflict with the views expressed by the Apex Court. As such correction was made in the exercise of the inherent power, Dr. Saraf has argued that in the present case also the order dated 1.4.2004 is in direct conflict with the decision of the Apex Court to grant special leave to appeal against the judgment of this Court in India Carbon Ltd. (supra).

8. The provisions of the Act have not vested in the High Court any power to review its own orders as conferred by Order 47 of the Code of Civil Procedure. An order passed u/s 260A of the Act, therefore, cannot be corrected by us even if it discloses an error apparent on the face of the order itself or if such an order has been passed in ignorance of relevant facts which could not be placed before the Court by either of the parties, notwithstanding the exercise of due diligence and reasonable care. At the same time it has been acknowledged that recall/ correction of such an earlier order can be made in the exercise of inherent power. The moot question, therefore, will be the dimensions of the said inherent power.

9. Inherent power inheres in every Court by virtue of the fact that it is the Court whose primary duty is to do justice between the parties in the given facts of a case. It is an inbuilt reserve power and not a matter of expressed conferment. Inherent power has also been understood to be in the nature of a power to do *ex debi to justitiae*. The Court, while exercising its inherent power, naturally, cannot extend the same to cover other areas of corrective jurisdiction e.g. appeal, revision, review etc. Inherent power which this Court or for that matter any other Court possesses also cannot be exercised to correct mere apparent errors as that would amount to exercise of the review jurisdiction. It is, therefore, a power more circumscribed than the review power. An order, in addition to being apparently erroneous must also be contrary to some fundamental principle of law or jurisprudential value in order to be amenable to correction in exercise of the inherent power. Likewise, an order passed in inadvertent departure from a core judicial procedure would also be amendable to a similar correction. Failure of justice cannot be the sole touchstone for its exercise because every judicial order is capable of being so perceived by an aggrieved party. An exhaustive determination of the situations where resort to inherent power will be permissible is neither possible nor desirable. In the last resort it is a discretion that must be left to the Court, the exercise of which has to be guided by proper judicial balance and wisdom. However, if an attempt is required to be made to visualize the ambit of the said power, the position could be summed up by conceptualizing a self evident erroneous order passed contrary to a fundamental judicial principle thereby occasioning a failure of justice. Such an order undoubtedly can be corrected in exercise of the inherent power.

10. In the present case, the point at issue before the Court in ITA 13/2000 was covered by two earlier decisions of this Court in *India Carbon (supra)* reported in *India Carbon Ltd. Vs. Inspecting Assistant Commissioner of Income Tax and Another*, and *Commissioner of Income Tax Vs. India Carbon Ltd.*, respectively. The later decision was of a coordinate bench. The earlier decision, as already noticed, had, in a way, been approved by the Apex Court by refusing to grant special leave to appeal. Though on a reading of the order dated 1.4.2004 it is evident that the aforesaid earlier decisions were not placed before the Court, what cannot be ignored is that, in any event, the order dated 1.4.2004 has the effect of overlooking two earlier orders of the Court on the same issue. It is a fundamental principle of judicial discipline that the previous order passed by a Coordinate Bench if cannot be agreed to, resolution must be made by a larger bench. Not only that, while passing the order dated 1.4.2004, the Court had proceeded to dispose of the appeal on a question that was not before it, i.e., whether unpaid Sales Tax collected or received was liable to tax by treating the same as a trading receipt.

11. This Bench must not be understood to have expressed any opinion on the correctness of the order dated 1.4.2004; what is being attempted to be emphasized is that had the earlier decisions of the Court been placed and what was not before the Court had been excluded, the decision that may have been

rendered, would have been more in conformity with acknowledged judicial norms.

12. In view of the above, we are inclined to take the view that in the facts and circumstances of the case the order dated 1.4.2004 should not be allowed to remain on record. We, therefore, deem it appropriate to exercise our inherent power to recall the said order dated 1.4.2004.

13. Consequently, this review application is allowed. The order dated 1.4.2004 passed in ITA No. 13/2000 is recalled. The aforesaid appeal will now be required to be re-heard for which purpose the Registry will list the same.