
(2001) 03 CAL CK 0039
In the Calcutta High Court
Case No : C.R. No. 5671 (W) of 1977

I.T.C. Ltd.

APPELLANT

Vs

Inspecting Assistant Commissioner and Others

RESPONDENT

Date of Decision : 08-03-2001

Acts Referred:

Income Tax Act, 1961 — Section 154, 155, 263

Citation : (2001) 249 ITR 104 : (2001) 119 TAXMAN 1000

Hon'ble Judges : Ashim Kumar Banerjee, J

Bench : Single Bench

Advocate : Debi Prasad Pal, Pranab Kumar Pal and Manisha Seal, for the Appellant; Ram Chandra Prasad, for the Respondent

Judgement

Ashim Kumar Banerjee, J.—The income of the petitioner for the assessment year 1964-65, was assessed by the Assessing Officer by his order dated March 20, 1969, allowing a rebate at 20 per cent, by considering the assessee as a limited company without having substantial interest of the public at large. Such order of assessment was taken on appeal and the appellate authority reversed the order of the Assessing Officer and held the petitioner as a company having substantial interest of the public at large and thereby directed rebate of 30 per cent, instead of 20 per cent. allowed initially by the Assessing Officer.

2. In terms of the direction of the appellate authority the Assessing Officer by his order dated April 19, 1972, revised his own order by granting rebate at 30 per cent, instead of 20 per cent. The order of the appellate authority was impugned by the Revenue before the Tribunal wherein the Tribunal upheld the order of the appellate authority by its order dated September 21, 1973. The reference application made by the Revenue on the said score was also dismissed for non-prosecution as the Department did not wish to proceed any further in the matter.

3. After the said issue having been resolved by the ultimate order of the Tribunal the Assessing Officer issued a notice for correction of some mistakes which was accepted by the petitioner and accordingly the order was revised.

4. On October 17, 1977, the Inspecting Assistant Commissioner, Special Range-I, issued a notice u/s 154/155 of the Income Tax Act, 1961, for correction of a mistake for calculation of tax amount for the self-same assessment year and asked the views of the assessee in the said regard. The assessee asked for clarification of the said notice indicating as to the nature of mistakes wherein the Revenue by its letter dated November 15, 1977, appearing at page No. 60 of the writ petition indicated that the mistake is in respect of withdrawal of rebate of super tax under the provisions of the Finance Act, 1964. The said notice has been impugned before me by the assessee in this writ petition.

5. Mr. Pranab Kumar Pal led by Dr. Debi Prasad Pal appearing for the assessee has submitted that the nature of mistake indicated in the said notice cannot be termed as a "mistake" u/s 154 of the said Act, 1961.

6. According to Mr. Pal the issue of granting rebate and the rate had been decided finally by the Tribunal and the order of the Tribunal had been accepted by the parties.

7. Mr. Pal contended that the applicability of the Finance Act is a question of law which is deemed to have been decided ultimately by the Tribunal. The Assessing Officer by issuing the said notice wanted to rectify the alleged mistake in calculation in the revised order of assessment which was corrected in terms of the order of the appellate authority which had reached its finality before the Tribunal by the order of the Tribunal dated September 21, 1973. According to Mr. Pal the revised order was passed by the Assessing Officer on the basis of the direction given by the appellate authority. Hence, it is presumed that the question of payment of rebate and the rate of rebate had been decided by the ultimate authority once for all by taking into consideration all aspects of the matter including the legal aspects.

8. Applying the doctrine of merger Mr. Pal has contended that the rectification of mistake in effect amounts to rectification of the order of the appellate authority which had merged in the order of the Tribunal and as such the same cannot be done at the Assessing Officer's end.

9. In support of his contention, Mr. Pal has cited three decisions which are as follows :

(i) T.S. Balaram, Income Tax Officer, Company Circle IV, Bombay Vs. Volkart Brothers, Bombay, ;

(ii) Oil India Ltd v. CIT [1982] 138 ITR 856 ; and

(iii) Commissioner of Income Tax, West Bengal-II, W.B. Vs. M/s. Method Trading and Investment Ltd., .

10. Mr. Ram Chandra Prasad, appearing for the Revenue, has submitted that the writ petition is not maintainable as merely a show-cause notice has been given by the Revenue authority and the assessee is given an opportunity to oppose

such attempt and would be entitled to make its submission before the authority and this court should not interfere at this stage.

11. With regard to the scope of rectification Mr. Prasad has submitted that even if it is a mistake of law it can be rectified relying on the decisions reported in *Zdzizlaw Skakuz Vs. Commissioner of Income Tax*, ; *Sirsa Industries Vs. Commissioner of Income Tax and Another*, and *SAIT NAGJEE PURUSHOTHAM AND CO. (P.) LTD. Vs. THIRD ADDITIONAL Income Tax OFFICER, CALICUT*, .

12. Mr. Prasad has also cited various decisions which show that if there are mistakes apparent on the face of the record the Revenue authority is entitled to correct such mistake. Since this proposition is not in dispute, I do not intend to discuss in detail about those decisions.

13. Let me now discuss about the cases cited by the parties to find out the applicability of those in the facts and circumstances of this case.

14. *SAIT NAGJEE PURUSHOTHAM AND CO. (P.) LTD. Vs. THIRD ADDITIONAL Income Tax OFFICER, CALICUT*, : In this case a single judge of the Kerala High Court decided an issue with regard to rectification on the basis of a provision of law which was later on repealed. The point in issue before the Kerala High Court was whether the assessment done prior to repeal of the said provision can be modified even after repeal following the old provision. In my view, this case has no application in the facts and circumstances of this case.

15. *T.S. Balaram, Income Tax Officer, Company Circle IV, Bombay Vs. Volkart Brothers, Bombay*, : This case has been cited by both the parties. Here the apex court held that 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 the reasoning on points on which there may be conceivably two opinions. A decision on a debatable point of law is not a mistake apparent on the face of the record.

16. This case squarely supports the assessee. The applicability of the Finance Act is a question of law. The interpretation of the same requires a long drawn process of reasoning on points and might result in two opinions hence it cannot be said to be a mistake that can be rectified u/s 154 of the said Act, 1961.

17. *Oil India Ltd. Vs. Commissioner of Income Tax, Central-II*, .: In the instant case, the Division Bench held that where an appeal is preferred before the Appellate Assistant Commissioner and a subject is particularly raised, the Commissioner cannot revise such an order taking into account an aspect not dealt with by the Appellate Assistant Commissioner.

18. It has been held in the said case that as the quantum of depreciation was the subject-matter of appeal, the Commissioner had no jurisdiction u/s 263 to revise the order with reference to this aspect. This case also supports the contention of the assessee. The subject of rebate was an issue decided ultimately by the Tribunal. The rate has also been fixed by the appellate authority and affirmed by

the Tribunal. Hence, by way of rectification such rebate cannot be decreased or increased by way of rectification.

19. *Sirsa Industries Vs. Commissioner of Income Tax and Another*, : A single judge of the Punjab and Haryana High Court held that if a mistake of fact is apparent on the record of the assessment the same could be rectified u/s 154. Similarly, a mistake of law which was glaring and obvious could also be similarly rectified. In this case the Income Tax Officer initially did not include the sales tax payable to the Government in the total income of the assessee, later on he has issued notice under Sections 154 and 155 for rectification of mistake. This case also has no application in the instant case as the Assessing Officer himself upon realising the fact that he had committed an error in not including the amounts reserved for sales tax on the basis of the mercantile system of the accounting and rectified his own mistake by application of Section 154/155. The facts are not at all similar to the present facts and hence it has no application.

20. *Zdzizlaw Skakuz Vs. Commissioner of Income Tax*, : This case has also dealt with a situation similar as of *Sirsa Industries Vs. Commissioner of Income Tax and Another*, and the Assessing Officer rectified his own mistake which was held to be justified by the Division Bench of the Andhra Pradesh High Court. Hence, this case has no application in the present facts.

21. *Commissioner of Income Tax, West Bengal-II, W.B. Vs. M/s. Method Trading and Investment Ltd.*, : Here the Division Bench of this court held that the subject-matter or issue which was before the Commissioner (Appeals) could not be made the subject-matter of revision u/s 263 relying on the doctrine of merger. In this case the Tribunal held that there was no merger of the order of the Income Tax Officer in the order of the Income Tax Commissioner (Appeals) and rejected the contention on that point. The Division Bench held that such view of the Tribunal was not correct.

22. Applying the aforesaid decisions in the instant case it appears to me that since the question of payment of rebate and the rate of rebate had once been decided and reached its finality before the Tribunal it is not open for the Assessing Officer to revise his order which he has passed in compliance with the direction of the appellate authority affirmed by the Tribunal. I also feel that even if such issue can be reopened such can only be reopened by the Tribunal and none else. The Revenue accepted the order of the Tribunal, did not proceed with the reference application and allowed the same to be dismissed for non-prosecution. Having done so, the order of assessment passed by the Assessing Officer in compliance with the direction of the appellate authority has been accepted by the Revenue and the same cannot be reopened at this stage in the manner it has been attempted.

23. In the result, the writ petition succeeds. Notice bearing No. PA(II)-000-CY-6086/CAL/C-III/I.S.C. relating to the assessment year 1964-65 appearing at page 57 of the writ petition is quashed and set aside. This order of setting aside

and/or cancellation of the said impugned notice would not in any way preclude the Revenue authority from taking any other step if they are so entitled to in law.

24. The writ petition is thus disposed of. Rule is accordingly made absolute. There would be no order as to costs in the instant case.