
(1980) 11 CAL CK 0006
In the Calcutta High Court

Case No : Civil Rule No's. 8744 (W) , 8745 (W) and 8746 (W) of 1976

Mozufferpore Electric Supply Co. Ltd.

APPELLANT

Vs

Income Tax Officer, "E"-Ward

RESPONDENT

Date of Decision : 12-11-1980

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 154, 155, 33(6)

Citation : (1982) 134 ITR 102 : (1981) 6 TAXMAN 366

Hon'ble Judges : T.K. Basu, J

Bench : Single Bench

Advocate : D. Pal and M. Seal, for the Appellant; Samar Banerjee and Ram Chandra Prosad, for the Respondent

Judgement

T.K. Basu, J.—In this application, the petitioner challenges a notice u/s 154/155 of the I.T. Act, 1961, issued by respondent No. 1. The notice relates to the assessment year 1970-71 where according to the notice there is a " mistake apparent from the record ". The nature of the mistake which is proposed to be rectified is set out in the notice itself and is in the following terms :

" Withdrawal of development rebate on meters installed at the residence and offices of the consumers by virtue of Section 33(6) of the Act. "

2. Dr. Debi Pal, appearing on behalf of the petitioner drew my attention to Section 33(6) of the I.T. Act, 1961 (hereinafter referred to as " the Act"), which provides as follows :

" Notwithstanding anything contained in the foregoing provisions of this section, no deduction by way of development rebate shall be allowed in respect of any machinery or plant installed after the 31st day of March, 1965, in any office premises or any residential accommodation, including any accommodation in the nature of a guest-house. Provided that the provisions of this sub-section shall not apply in the case of an assessee being an Indian company, in respect of any

machinery or plant installed by it in premises used by it as a hotel, where the hotel is for the time being approved in this behalf by the Central Government. "

3. Dr. Pal submitted that on a proper reading of the sub-section and in the context of the opening words of the section the expression " any office premises or any residential accommodation " should mean the premises or the accommodation of the assessee or in the assessee's occupation and it cannot extend to the office or accommodation of persons other than the assessee.

4. Dr, Pal, however, very fairly pointed out that in this application I may not be called upon to pronounce on the merits of this contention, namely, what is the correct interpretation of the expression " any " in that sub-section. This is because that if two views are possible or conceivable on the interpretation of any particular provision, there cannot be a mistake apparent on the face of the record which attracts the provisions of s, 154 of the Act.

5. In support of this contention, Dr. Pal relied on the well-known decision of the Supreme Court in the case of T.S. Balaram, Income Tax Officer, Company Circle IV, Bombay Vs. Volkart Brothers, Bombay, of the report, the following passage occurs:

" From what has been said above, it is clear that the question whether Section 17(1) of the Indian Income Tax Act, 1922, was applicable to the case of the first respondent is not free from doubt. Therefore, the Income Tax Officer was not justified in thinking that on that question there can be no two opinions. It was not open to the Income Tax Officer to go into the true scope of the relevant provisions of the Act in a proceeding u/s 154 of the Income Tax Act, 1961. 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... ..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"."

6. On the basis of the above decision of the Supreme Court Dr. Pal pointed out that in the instant case the fact that there can be two conceivable opinions on the interpretation of Section 33(6) of the Act is amply borne out by the fact that two Income Tax Appellate Tribunals of Calcutta and Bombay have taken a view which favours the assessee. I may mention that both these decisions related to

the identical question, namely, whether the meters which were supplied by the electricity company to their consumers were entitled to development rebate. The Tribunal at Calcutta in the case of Tinnevely-Tuticorin Tea & Investment Co. Ltd. v. ITO (I.T.A. Nos. 5580 and 5581 (Cal) of 1976-77) has come to the definite conclusion that the expression " any " used in Section 33(6) of the Act must be understood as applicable to the office premises or residential accommodation of the assessee and not that of any other person who has business dealings with the assessee. Similarly, the Tribunal at Bombay in the case of Thana Electric Supply Co. Ltd. v. ITO (I.T.A. No. 3081 (Bom) of 1976-77) has taken a similar view. In that view of the matter, Dr. Pal contends that without going into the merits of the interpretation of Section 33(6) of the Act and in view of the fact that the ITO in the instant case has come to a different view as mentioned in the impugned notice from that taken by the two Income Tax Appellate Tribunals of Calcutta and Bombay, it is sufficient to show that two views are definitely conceivable and in fact have been taken and thereby make the provisions of Section 154 inapplicable to the present case as there is no mistake apparent on the record.

7. Mr. Banerjee appearing on behalf of the respondents contended in the first place that the mistake is apparent on the record, because the word " any " must be given its natural meaning and should not be cut down in its amplitude particularly in view of the fact that s, 33(6) of the Act opens with the clause " notwithstanding anything contained in the foregoing provisions of this section ". According to Mr. Banerjee, this was a mandatory provision of law, an overlooking of which would amount to a mistake apparent on the face of the record. In support of this contention, Mr. Banerjee relied on a decision of the Allahabad High Court in the case of Addl. Commissioner of Income Tax Vs. District Co-operative Bank Ltd., , where it has been, inter alia, held that the overlooking of a mandatory provision of law which leaves no option or discretion with the taxing authority would amount to commission of a mistake apparent on the face of the record.

8. The next submission of Mr. Banerjee was that the application was premature at this stage because only a notice has been issued. According to Mr. Banerjee, the assessee should appear before the ITO and present the views of the Appellate Tribunals which are mentioned above. After this, if the assessee got an adverse decision, then he would be entitled to move this court under art. 226 of the Constitution. Mr. Banerjee pointed out, and correctly, that the Supreme Court decision in T.S. Balaram, Income Tax Officer, Company Circle IV, Bombay Vs. Volkart Brothers, Bombay, , which I have mentioned, was in a writ petition filed against the final order of the ITO u/s 154 of the Act.

9. Dr. Pal in reply to the question of prematurity of the application drew my attention to the decision of the Division Bench of this court in the case of Income Tax Officer, "G" Ward and Another Vs. India Foils Ltd., . In that case, the identical question, that since there was no finality in the notice and the assessee could

maintain an application only after the order is made, was raised. Dealing with this question P.B. Mukharji C.J. (as his Lordship then was), inter alia, observed as follows (p. 78):

" Here, Section 154 is quite clear that it must have to be a mistake apparent from the record and in the instant case a notice u/s 154 was issued. If the notice was not in fact justified by the circumstances of the case then the notice itself is bad and I do not see why the respondent should wait till the assessments are made pursuant to the notice before coming up to this court for a writ. The case for a writ is there if the Income Tax Officer is proceeding under the statute and the statutory provisions do not apply. It is not a case where the question of jurisdictional fact is involved. It is a case where obviously and plainly the issue of the notice under Sections 154/155 of the Income Tax Act was initially bad and, therefore, all proceedings thereafter are bound to be bad. In such circumstances one does not have to wait till the proceedings are completed."

10. In my view, the contention of Dr. Pal is sound and should be accepted as will be evident from what has been stated hereinbefore that the two Income Tax Appellate Tribunals of Calcutta and Bombay have taken the view on the interpretation of Section 33(6) of the Act which clearly favours the respective assesseees. The ITO, as will appear from the impugned notice, has taken a contrary view. This, in my opinion, is sufficient to show that not only are two different views conceivable but two different views in fact were taken by two competent authorities referred to above. That being so on the principle enunciated by the Supreme Court in T.S. Balaram, Income Tax Officer, Company Circle IV, Bombay Vs. Volkart Brothers, Bombay, , it must be held that Section 154 of the Act can have no manner of application to the facts of the present case. That being so, the initiation of the proceeding under a particular provision of law which has no application must be held to be without jurisdiction and bad. I also accept the contention of Dr. Pal that the petitioner does not have to wait till the final order is passed on the principle laid down by our Division Bench in the case mentioned above.

11. I make it clear that it is not necessary for me to pronounce on the merits of the rival contention as to the interpretation of Section 33(6) of the Act. I am not doing so. As already indicated, I am of the view that Section 154 of the Act has no application to the instant case and, therefore, the impugned notice is bad.

12. In the result, this application succeeds and the rule is made absolute. There will be a writ in the nature of mandamus directing the respondents to forthwith recall, cancel and withdraw the impugned notice dated 3rd April, 1976. There will also be a writ of certiorari quashing any proceeding that might have been held on the basis of the impugned notice. The respondents are also directed by a writ of mandamus to forbear from giving effect to the impugned notice or any proceeding held in pursuance thereof in any manner whatsoever.

13. There will be no order as to costs.

14. Re.: C. R. No. 8745(W) of 1976.--In view of my judgment in the case of Mozufferpore Electric Supply Co. Ltd. (C. R. No. 8744(W) of 1976) this rule is made absolute. There will be a writ in the nature of mandamus directing the respondents to forthwith recall, cancel and withdraw the impugned notice dated 3rd April, 1976. There will also be a writ in the nature of certiorari quashing any proceeding that might have been held on the basis of the impugned notice. The respondents are also directed by a writ of mandamus to forbear from giving effect to the impugned notice or any proceeding held in pursuance thereof in any manner whatsoever.

15. Re.: C, R. No. 8746(W) of 1976.--In view of my judgment in the case of Mozufferpore Electric Supply Co. Ltd. (C. R. No. 8744(W) of 1976) this rule is made absolute. There will be a writ in the nature of mandamus directing the respondents to forthwith recall, cancel and withdraw the impugned notice dated 10th July, 1976. There will also be a writ in the nature of certiorari quashing any proceeding that might have been held on the basis of the impugned notice. The respondents are also directed by a writ of mandamus to forbear from giving effect to the impugned notice or any proceeding held in pursuance thereof in any manner whatsoever.