

(2001) 07 DEL CK 0174
In the Delhi High Court
Case No : CWP 3337 of 2001

M/S. Karan and Co.

APPELLANT

Vs

Income Tax Appellate Tribunal

RESPONDENT

Date of Decision : 20-07-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 47 Rule 1
Constitution of India, 1950 — Article 226, 227
Income Tax (Appellate Tribunal) Rules, 1963 — Rule 24
Income Tax Act, 1961 — Section 254(1), 254(2), 256(1)

Citation : (2001) 94 DLT 77 : (2002) 63 DRJ 170

Hon'ble Judges : Dr. Arijit Pasayat, C.J.; D.K. Jain, J

Bench : Division Bench

Advocate : Mr. P.N. Monga, Mr Manu Monga and Navneet Negi, for the Appellant; Mr R.C. Pandey and Ms Prem Lata Bansal, for the Respondent

Judgement

Arijit Pasayat, C.J.—By this petition under Article 226 and 227 of the Constitution of India, 1950 (in Short the Constitution), the petitioner, hereinafter referred to as the assessed, calls in question legality of order dated 31.1.2001 passed by the Bench on Income Tax Appellate Tribunal, New Delhi (in short the Tribunal) in purported exercise of powers u/s 254(2) of the Income Tax Act, 1961 (in short the Act).

2. Factual position which is almost undisputed is as follows:

The assessed had filed an appeal before the Tribunal primarily challenging the reopening of assessment u/s 147(a) for assessment year 1985-86. By order dated 24.11.1993, a Bench of the Tribunal consisting of the President Shri Ch.G. Krishnamurthy and Shri Vimal Gandhi, Member allowed the appeal. We are not very much concerned with various issues which were examined by the Tribunal for allowing the appeal in view of certain factual aspects with which we shall deal infra. Subsequently, the Revenue filed an application for reference u/s 256(1) of the Act praying for a reference to this Court which was numbered as RA 915/Del/

1996. An application for rectification u/s 254(2) was also filed on 20.10.1994. assessed filed an objection to the prayer made in the said application on the ground that the nature of relief sought for cannot be granted in an application u/s 254(2) of the Act. The application was numbered as MA 163-D/94 and was disposed of by a Bench consisting of Shri MA Bakshi and Miss. Moksh Mahajan by order dated 25.7.1995. The relevant portion of the order reads as follows:

"Thus on verification of records it is clear that the Court proceedings which were held to be vital information in para 33 of the order were not filed by the assessed before the Assessing Officer at the time when original assessment was framed. Therefore as the court proceedings were not there before the Assessing Officer while framing the original assessment proceedings the finding/observation of the ITAT giving the impression that court proceedings contrary to record and thus constitute a mistake apparent from the record. To this extent the order of the ITAT would stand rectified."

Revenue filed an application u/s 256(1) of the Act in respect of the said order passed in RA/915/Delhi/96. This was stated to be a modified reference application. assessed also filed an application for reference u/s 256(1) in respect of the order in misc. application 163/Del/94. Revenue again filed another application u/s 254(2) of the Act on 10.4.1997. Prayer, inter alia, was to recall/review the original order dated 24.11.1993 passed in ITA 1356/Del/63 in the light of the aforesaid quoted portion of the order in MA 163/Del/94 Same was originally heard by a Bench consisting of M/S. Nathu Ram and UBS. Bedi. Though a copy of the order passed is available on record, one of the member Mr Bedi did not sign the order and noted as follows: "There are certain reservations and other member had since retired, it may be fixed before a bench". File was released on 1.6.99. Therefore, the D.R. placed the matter before the Vice President to consider whether it was to be treated as de-heard and fixed for fresh hearing or to be treated as a case of difference of opinion between the two members. Vice President observed that the Accountant Member to whom the case was allotted had dictated the order and if the Judicial Member had a difference of opinion on any point, he was to express it judicially and in a proper manner. He further observed that the remarks of the Judicial Member cannot be said to be judicial order in terms of Section 255(4) and Therefore the case was not to be referred to President for disposal. The file was directed to be placed before Judicial Member for passing judicial order by him for taking necessary action. Finally the matter was heard by a bench consisting of M/s UBC Bedi and Sikander Khan and the impugned order was passed, by which the order passed in appeal has been recalled and registry has been directed to put up the appeal for fresh adjudication. Direction so far as relevant read as under :

"After considering the submissions made before us by both the sides, the materials on the file and various decisions cited by both the sides, we are of the view that there was mistake apparent from the record in both the order s dated 24.11.1993 in the appeal and order dated 25.7.95 in the first Misc. application

passed by the Tribunal. After making observations in the order dated 25.7.95 in the first misc. application accepting the revenue's plea that there was mistake apparent from record in so far as the Tribunal's order dated 24.11.1993 in the appeal was concerned Tribunal should have recalled the order dated 24.11.1993 for fresh adjudication:

"Therefore, as the court proceeding were not there before the AO while passing the original assessment proceedings the findings/observations of the ITAT giving the impression that court proceedings were filed in the original assessment proceedings are contrary to record and thus constituted a mistake apparent from record. To this extent the order of the ITAT would stand rectified."

In the above view of the matter we recall the Tribunal's order dated 24.11.1993 in ITA No. 1356/Del/1992 for the assessment year 1985-86 and direct the Registry to post the appeal for fresh hearing and fresh adjudication."

3. Mr P.N. Monga, learned counsel for the assessed submitted that the course adopted by the Tribunal in unknown. Order purported to have been passed u/s 254(2) is clearly misconceived in law, considering the limited scope of rectification permissible. It is submitted that there is no power to recall and review the order which the Tribunal has done. Shri. R.C. Pandey, learned counsel for Revenue, on the other hand, contended that the order is perfectly in order and this petition should not be entertained. According to him, order in MA/193/Delhi/94 was to be given effect and only possible course to be adopted was to recall the order and to have a fresh hearing so that the factual position could be duly taken note of and then an order could be passed in the appeal itself on merit.

4. A bare look to section 254(2) of the Act makes it clear that a "mistake apparent from the record", is rectifiable. In order to attract the application of Section 254(2); a mistake must exist and the same must be apparent from the record. The power to rectify the mistake, however, does not cover cases where a revision or review of the order is intended. "Mistake" means to take an understand wrongly or inaccurately; to make an error in interpreting; it is an error: a fault, a misunderstanding, a misconception. "Apparent" means visible, capable of being seen, easily seen, obvious, plain. A mistake which can be rectified u/s 254(2) is one which is patent, which is obvious and whose discovery is not dependent on argument or elaboration. The language used in Section 254(2) makes it clear that only amendment to the order passed u/s 254(1) is permissible when it is brought to the notice of the Tribunal that there is a mistake apparent from the record. In our view amendment of an order does not mean obliteration of the order originally passed and its substitution by a new order. Where an error is far from self-evident, it ceases to be unapparent error. It is no doubt true that a mistake capable of being rectified u/s 254(2) is not confined to clerical or arithmetical mistakes. On the other hand, it does not cover any mistake which may be discovered by a complicated process of investigation, argument or proof. As observed by the Apex Court in Master Construction Co (P)

Ltd. v. State of Orissa [1966] 17 STC 360 , an error which is apparent on the face of the record should be one which is not an error which depends for its discovery on elaborate arguments on question of fact of law A similar view was also expressed in Satyanarayan Laxminarayan Hegde and Others Vs. Millikarjun Bhavanappa Tirumale, . It is to be noted that the language used in Order 47 rule 1 of the Code of Civil Procedure, 1908 (in short, the CPC), is different from the language used in Section 254(2) of the Act. Power is given to various authorities to rectify any mistake "apparent from record". In the Civil Procedure Code, the words are "an error apparent on the face of the record". The two provisions do not mean the same thing. The power of the Tribunal in Section 254(2) to rectify "any mistake apparent from the record" is undoubtedly not more than that of the High Court entertain a writ petition on the basis of "an error apparent on the face of the record". (See. T.S. Balaram, Income Tax Officer, Company Circle IV, Bombay Vs. Volkart Brothers, Bombay,). Mistake is an ordinary word, but in taxation laws, it has a special significance. It is not an arithmetical or clerical error alone that comes within its purview. It comprehends errors which, after a judicious probe into the record from which it is supposed to emanate, are discerned. The word "mistake" is inherently indefinite in scope, as what may be a mistake for one may not be one for another. It is mostly subjective and the dividing line in border areas is thin and indiscernible. It is something which a duly and judiciously instructed mind can find out from the record. In order to attract the power to rectify u/s 254(2) it is not sufficient if there is merely a mistake in the orders sought to be rectified. The mistake to be rectified must be one apparent from the record. A decision on a debatable point of law or disputed question of fact is not a mistake apparent from the record. The plain meaning of the word "apparent" is that it must be something which appears to be so ex facie and it is incapable of argument or debate. It, Therefore, follows that a decision on a debatable point of law or fact or failure to apply the law to a set of facts which remains to be investigated cannot be corrected by way of rectification. This position was highlighted by us in SMT. BALJEET JOLLY Vs. COMMISSIONER OF INCOME TAX, .

5. The scope and ambit of an 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 order so far as the appeal is concerned. Any order passed u/s 254(2) either allowing 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 re-adjudication 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 {1992} 196 ITR 640. Judged in the above background the order passed by the Tribunal is indefensible.

6. We may take note of the preliminary objection raised by Mr Pandey, learned counsel for Revenue, about the maintainability of the writ petition in the presence of statutory remedy. Rule relating to exhaustion of statutory remedy is essentially a rule of prudence and not one of law. There are several exceptions to the salutary requirement of the exhaustion of statutory remedy. One of them is lack of jurisdiction of the authority who has passed the order impugned. As indicated above, Tribunal had no jurisdiction to pass the impugned order in the absence of any statutory prescription. We find no substance in the plea of Mr Pandey that the assessed should have availed of the statutory remedy.

7. In the result, the impugned order, Annexure A is quashed. Needless to say that the applications filed u/s 256(1) shall be dealt with and disposed of by the Tribunal in accordance with law.