(1983) 07 MAD CK 0017

In the Madras High Court

Case No : T.C.P. No. 150 of 1983

M.V. Arunachalam APPELLANT

Vs

Commissioner of Income Tax RESPONDENT

Date of Decision : 26-07-1983

Acts Referred:
Income Tax Act, 1961 — Section 147, 256(2), 54

Citation : (1985) 152 ITR 512

Hon'ble Judges : Ratnam, J;Ramanujam, J

Bench : Division Bench

Advocate : K. Srinivasan, for the Appellant; J. Jayaraman and Nalini Chidambaram, for the Respondent

Judgement

Ramanujam, J.—The assessee seeks a direction in this reference petition to the Tribunal to refer the following question for a decision of this

court, as arising from the order of the Tribunal I

Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was justified in refusing to amend its order and cancel the

assessment made u/s 147(b) of the Act ?

2. The assessee claimed and obtained exemption from capital gains tax u/s 54 of the I.T. Act, for the assessment year 1972-73, in the Income Tax

assessment made u/s 143(3) of the said Act on July 23, 1974. Subsequently on the ground that there was information from the audit party that the

exemption was not available to a HUF, the assessment was reopened by ITO u/s 147(b). In the reassessment made on January 11, 1978, the ITO

took the view that the exemption granted u/s 54 in respect of the sale of the 20% share in the property known as ""Chamundeswari Bagh"" at No. 9,

Santhome High Road, has been wrongly allowed in the original assessment. He, therefore, withdrew the exemption granted in the original

assessment.

3. The assessee took the matter in appeal to the AAC, questioning both the jurisdiction of the ITO to make a reassessment u/s 147(b) of the Act

as well as on merits. The AAC by his order dated May 23, 1978, upheld the validity of, the reassessment proceedings, following the decision of

the Supreme Court in R.K. Malhotra, ITO, Group Circle II(1), Ahmedabad Vs. Kasturbhai Lalbhai (Huf), . On merits, however, he accepted the

petitioner''s contention and directed the ITO to grant the relief u/s 54 of the Act.

4. The Revenue took the matter in appeal to the Tribunal questioning the order of the AAC, on merits. The Tribunal dismissed the appeal filed by

the Revenue by its order dated July 31, 1979, holding that the exemption u/s 54 was available to a HUF also. Aggrieved by the order of the

Tribunal the Revenue has asked for a reference to this court.

5. In the meantime, the Supreme Court in the case of Indian and Eastern Newspaper Society, New Delhi Vs. Commissioner of Income Tax, New

Delhi, , held that any opinion expressed by the audit party on a question of law cannot be taken to be an information or material so as to enable the

ITO to reopen the assessment u/s 147(b) of the Act. Taking note of the subsequent decision of the Supreme Court, the assessee filed M.P. No.

21 of 1980, before the Tribunal requesting for rehearing of the appeal so that the Tribunal may also decide the issue as regards jurisdiction, which

issue has not been decided by the Tribunal at the time of the hearing of the appeal, as there was no cross-appeal or cross-objection by the

assessee. The Tribunal, in dealing with the said M.P. No. 21 of 1980, held that no case has been made out for invoking the power of the

rectification of a mistake apparent from the record, that the jurisdiction of the ITO to reopen the assessment u/s 147(b) was not the subject-matter

of the appeal filed by the Revenue against the order of the AAC, and that there is, therefore, no question of any rectification of a mistake arising.

According to the Tribunal, the question of rectification will arise only if the Tribunal gives a decision on the point as to the jurisdiction earlier in one

way and the Supreme Court deciding that question differently later. According to the Tribunal, as it has not decided the question of jurisdiction at

any point of time, the decision of the Supreme Court in Indian and Eastern

Newspaper Society, New Delhi Vs. Commissioner of Income Tax,

New Delhi, , cannot be used by the assessee as a ground for rectification of the order of the Tribunal on the ground that there was a mistake

apparent from the record. In this view, the Tribunal rejected the assessee''s petitions for rectification.

6. Aggrieved by the order of the Tribunal refusing to rectify its earlier order dated July 31, 1979, the assessee has sought a reference on the

question set out above.

7. It is no doubt true that the Supreme Court in Indian and Eastern Newspaper Society, New Delhi Vs. Commissioner of Income Tax, New Delhi,

, has taken the view that the opinion given by the audit party on a question of law cannot be used as the basis for invoking Section 147(b) of the

Act for reopening the assessment. If the Tribunal has given a decision on the question of jurisdiction of the ITO to reopen an assessment u/s 147(b)

of the Act and if the said decision of the Tribunal is contrary to the decision rendered by the Supreme Court in Indian and Eastern Newspaper

Society, New Delhi Vs. Commissioner of Income Tax, New Delhi, , then it is possible to say that there is a mistake apparent from the record of

the order of the Tribunal. But, as already stated, in this case, though the assessee in his appeal before the AAC questioned the validity of

reassessment proceedings both on the question of jurisdiction and also on merits, when the AAC upheld the jurisdiction of the ITO to reopen the

assessment, but decided the case on merits in favour of the petitioner, he did not agitate the question of jurisdiction further. As a matter of the fact,

he did not file an appeal against the view taken by the AAC on the question of jurisdiction before the Tribunal. Even in the appeal filed by the

Revenue against the decision of the AAC on merits, he did not raise any cross-objection questioning the jurisdiction of the ITO to reopen the

assessment u/s 147(b) of the Act, on the basis of the audit report. Therefore, there was no occasion for the Tribunal to go into the question of

jurisdiction. When the Tribunal has not given a decision on the point, we do not see how a mistake apparent from the record could arise from the

order of the Tribunal on the question of jurisdiction, merely from the fact that subsequently a decision has been rendered by the Supreme Court on

the question of jurisdiction.

8. The learned counsel for the assessee contends that the assessee did not question the jurisdiction issue before the Tribunal either by filing an

independent appeal or by filing a cross-objection in the appeal filed by the Revenue, in view of the fact that the decision of the Supreme Court in

R.K. Malhotra, ITO, Group Circle II(1), Ahmedabad Vs. Kasturbhai Lalbhai (Huf), , held the field and the decision of the Supreme Court in

Indian and Eastern Newspaper Society, New Delhi Vs. Commissioner of Income Tax, New Delhi, , was rendered long after the Tribunal disposed

of the appeal on merits. Whatever be the reason for the assessee for not raising the question of jurisdiction before the Tribunal, the fact remains

that the Tribunal has not given a decision on the question of jurisdiction in its order and, therefore, there is no mistake apparent from the record so

as to enable the assessee to invoke the power of the Tribunal to rectify its order.

9. We are of the view that the order passed by the Tribunal in this case is proper. We are not inclined to direct a reference in this case. Hence, this

petition is dismissed. No costs.

