
(1996) 01 MP CK 0082

In the Madhya Pradesh High Court

Case No : Miscellaneous Civil Case No. 668 of 1991

Prakash Chand Mehta

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 17-01-1996

Acts Referred:

Income Tax Act, 1961 — Section 254(2), 69A

Citation : (1996) 135 CTR 203 : (1996) 220 ITR 277

Hon'ble Judges : A.K. Mathur, Acting C.J.; S.C. Pandey, J

Bench : Division Bench

Advocate : H.S. Shrivastava, for the Appellant; A. Adhikari, for the Respondent

Judgement

A.K. Mathur, Actg. C.J.

1. This is a reference u/s 256(1) of the Income Tax Act, 1961, at the instance of the assessee and the following two questions of law have been referred by the Tribunal for answer by this court :

" (1) Whether in view of the fact that Mohd. Rasid, Proprietor of Mohd. Mohammad Rasid and Co., Jabalpur, was not summoned in evidence by the Income Tax Officer, in spite of the request made by the applicant u/s 131, in this behalf there is justification in law to use the evidence recorded behind the back of the applicant without affording an opportunity to him to cross-examine the said Mohd. Rashid and drawing an adverse inference ?

(2) Whether the assessment is vitiated in law as the Inspecting Assistant Commissioner (Assessment) has not given reasonable opportunity of being heard and failed in summoning the witnesses as requested u/s 131 and his failure to consider the affidavit of Mohd. Rashid filed along with the written reply submitted on December 31, 1985 ?"

2. The assessee is an individual and carries on business of purchase and sale of silver ornaments in the name of Anil Kumar Sheetal Kumar Nahata. A search was

held by the Income Tax Department on the residential and business premises of the assessee from December 13, 1983, to December 17, 1983. During the search, silver ornaments and utensils were seized and were found to be in excess of the Stock as per books. After investigation in the assessment proceedings, silver ornaments amounting to 125.44 kgs. were held by the Income Tax Officer to remain unexplained and he made an addition of Rs. 3,49,225 representing the value of this property describing the addition to be made u/s 69A of the Income Tax Act, 1961. The assessee explained the said silver to have been purchased from one Rashid and Company of Jabalpur, The aforesaid explanation of the assessee was not accepted. The reason was that at the time of search, this silver was not found recorded in any books of account. The assessee in his examination u/s 132(4) of the Act did not offer any explanation about the source of acquisition and on an enquiry, Mohd. Rashid, the alleged proprietor, was found to be a man of very humble means and the assessee did not produce him for examination.

3. The Inspecting Assistant Commissioner having made an addition of Rs. 3,49,225 assessed the assessee and the assessee preferred an appeal before the Commissioner of Income Tax (Appeals) who by order dated May 16, 1986, affirmed the finding of the Inspecting Assistant Commissioner. Therefore, the assessee approached in appeal before the Tribunal and the Tribunal, after considering the matter in detail, affirmed the order of the Commissioner of Income Tax (Appeals). Thereafter, an application was made for rectifying the order of the Tribunal dated January 11, 1988. The Tribunal, after examining the matter, declined the rectification. Then an application was made to the Tribunal for referring the matter to this court. Hence, the aforesaid reference has been made by the Tribunal before this court.

4. Shri Shrivastava, learned counsel for the assessee, has submitted that the statement of Mohd. Rashid which was recorded behind the back of the assessee had been considered whereas the subsequent affidavit filed by Mohd. Rashid showing that he had sold this silver was not taken into consideration, and, therefore the Tribunal should have rectified this error. In support thereof, learned counsel invited our attention to the cases of Mehta Parikh and Co. v. CIT [1956] 30 ITR 181 ; C. Vasantlal and Co. Vs. Commissioner of Income Tax, Bombay City, and Dhakeswari Cotton Mills Ltd. v. CIT [1954] 26 ITR 775.

5. We have considered the submissions of counsel, and we do not agree with the contention raised by learned counsel for the simple reason that the scope of Section 254 of the Act is very limited and it is only the apparent error which can be rectified, but here the arguments of learned counsel for the assessee relates to merits that the Tribunal did not consider the affidavit filed by Mohd. Rashid and only the statement recorded by the Income Tax Officer of Mohd. Rashid was considered. Therefore, it is in breach of principles of natural justice. True, if statement of any person has been recorded without producing him in the witness box, the authority should not act upon that statement without affording the

assessee an opportunity to cross-examine the witness. But that is a matter not for rectification. It is a matter relating to the merits of the case as to whether the Tribunal has gone wrong in not considering the affidavit of Mohd. Rashid and has acted upon the statement of Mohd. Rashid which was recorded by the Income Tax Officer, without being permitted to cross-examine by the assessee. This is not a matter in which an apparent error is involved ; but is a matter more of merit and cannot be rectified within the scope of rectification. In the case of T.S. Balaram, Income Tax Officer, Company Circle IV, Bombay Vs. Volkart Brothers, Bombay, , their Lordships observed (headnote):

" 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 be conceivably two opinions. A decision on a debatable point of law is not a mistake apparent from the record."

6. In the present case, therefore, whether the Tribunal should have acted upon the statement of Mohd. Rashid or it should have acted upon the subsequent affidavit filed by Mohd. Rashid in favour of the assessee is not within the zone of apparent error on record but is a matter more of merits of the case and, therefore, beyond the scope of rectification.

7. Learned counsel for the assessee invited our attention to the case of Mehta Parikh and Co. v. CIT [1956] 30 ITR 181. In that case, an affidavit was filed by a party and that affidavit was not controverted by the Revenue and the Appellate Assistant Commissioner did not accept the affidavit and confirmed the order of the Income Tax Officer. The Tribunal accepted the explanation of the assessee in part. In that context, their Lordships observed that no attempt was, made by the Revenue to cross-examine the person who had sworn the affidavit. Therefore, their Lordships negatived the contention of the Revenue not to take the affidavit into consideration. Therefore, this case is of no avail to the assessee. Likewise, the other two cases cited by learned counsel are of no avail to the assessee in the peculiar circumstances of the case. Hence, this reference is answered against the assessee and in favour of the Revenue.