
(2014) 06 AP CK 0077
In the Andhra Pradesh High Court
Case No : I.T.T.A. No. 64 of 2001

Prefab Gratings Ltd.

APPELLANT

Vs

The Assistant Commissioner of Income Tax

RESPONDENT

Date of Decision : 25-06-2014

Acts Referred:

Income Tax Act, 1961 — Section 10, 12, 146, 147, 154

Citation : (2014) 366 ITR 550

Hon'ble Judges : L.N. Reddy, J;Challa Kodanda Ram, J

Bench : Division Bench

Advocate : A.V. Krishna Kaundinya, Advocate for the Appellant; S.R. Ashok, Advocate for the Respondent

Judgement

L. Narasimha Reddy, J.—This appeal is preferred u/s 260A of the Income Tax Act, 1961 (for short the Act) by the assessee-appellant assailing the order, dated 04.05.2000, passed by the Hyderabad Bench A of the Income Tax Appellate Tribunal in I.T.A.No.21/Hyd/1996.

2. The brief facts, that gave rise to the filing of this appeal, are as under:

The appellant is a Company, involved in the activity of construction, particularly of Dams. During the assessment year 1983- 84, it claimed the investment allowance u/s 32A of the Act. The Income Tax Officer (ITO), the respondent herein, found the claim to be tenable, and permitted the investment allowance to be absorbed, to the extent possible in that assessment year. Since substantial portion thereof remained unabsorbed, it was carried forward and was partially absorbed for the assessment years 1983-84 to 1986-87. Still some portion thereof remained. It is stated that the appellant sustained losses during the assessment years 1986-87 to 1991-92. Hence, there was no occasion to absorb the balance of the investment allowance. It was only in the assessment year 1991-92 that the claim was made to permit it to set off unabsorbed portion of the investment allowance. Through an order, dated 03.05.1993, the ITO allowed such set off, to the extent of Rs.8,62,585/-.

3. However, proceedings were initiated u/s 154 of the Act and a notice was issued to the appellant, at a later stage by the ITO. It was mentioned that in view of the judgment of the Supreme Court in C.I.T. v. N.C.Budhiraja & Company, the investment allowance ought not to have been allowed. Stating that no reply was issued to the show cause notice, the ITO passed an order, dated 24.01.1994, disallowing the investment allowance, that was set off in the previous assessment year.

4. The appellant filed an appeal before the Commissioner of Income Tax (Appeals). The appeal was allowed through order, dated 04.10.1995. Challenging the same, the Department filed I.T.A.No.21/Hyd/1996. The Tribunal allowed the appeal and had set aside the order passed by the Commissioner. Hence, the present appeal.

5. While admitting the appeal, a Division Bench of this Court framed the following substantial questions of law:

(a) Whether on the facts and circumstances of the case, the order dated 24.01.1994 of the Assessing Officer passed u/s 154 of the Income Tax Act, 1961 withdrawing the unabsorbed investment allowance allowed to be set off in the assessment year 1991-92 is sustainable?

(b) Whether on the facts and circumstances of the case, the Assessing Officer could invoke jurisdiction u/s 154 and modify the assessment order for the year in which unabsorbed instalment allowance was allowed to be set off without modifying the order of the earlier years whether the allowance was determined to be allowed?

6. Sri A.V.Krishna Kaundinya, learned Senior Counsel, assisted by Sri Siva Karthikeya, learned counsel for the appellant, submits that the view taken by the respondent as well as the Tribunal is contrary to law. He contends that the question as to whether the benefit of investment allowance can be availed u/s 32A of the Act, was determined by the competent authority, way back in the year 1983-84, and, in fact, a substantial part thereof was set off over the period and it was not at all open to the respondent to invoke the jurisdiction u/s 154 of the Act. He submits that though in a given case the judgment of the competent Court of law can constitute the basis to initiate proceedings u/s 154 of the Act, it is always subject to certain conditions such as limitation under sub-section (7) thereof, and that the respondent ignored the specific provision. It is also urged that in the name of rectification of error, the respondent has, in fact, reviewed the order passed by his predecessor in the assessment year 1983-84, wherein not only the character of the amount claimed as investment allowance, but also the entitlement to claim set off, were determined. It is pleaded that even on merits, the Commissioner took the view that the judgment of the Supreme Court in N.C.Budhiraja & Company's case (1 supra), does not apply and the same was not properly dealt with by the Tribunal.

7. Sri S.R.Ashok, learned Senior Standing Counsel for Income Tax, submits that,

each assessment year being a unit by itself, it was always competent for the respondent to examine as to whether the investment allowance, which was carried forward, can be allowed for the subsequent years, particularly, when there is change of law. Placing reliance upon the judgment of the Supreme Court in *Instalment Supply (Private) Limited v. Union of India*, he submits that it is always competent for an Assessing Authority in a particular year, to adjudicate the matter in accordance with law and observations or orders passed, if any, in the previous assessment years, would not bind him. He has also placed reliance upon the judgment of the Supreme Court in *Commissioner of income tax v. Manmohan Das*, in support of his contention that each assessment year is a unit and the concept of *res judicata* is alien to the adjudication under the Act.

8. The principal controversy in the appeal is as to whether it was competent for the respondent to invoke Section 154 of the Act in the facts and circumstances of the case. This takes in its fold, the other subsidiary legal proposition, namely whether it is competent for an ITO to ignore the findings recorded in the assessments of the assessee for the preceding years.

9. The basic facts that gave rise to the filing of the appeal have already been stated. It was way back in the year 1983-84 that the appellant claimed the benefit u/s 32A of the Act in the form of investment allowance. After undertaking thorough scrutiny, the then ITO allowed the claim. Even after the corresponding deductions were made against profits, for the assessment years 1983-84 to 1985-86, there existed substantial amount in the investment allowance. The appellant sustained losses for about five years between 1986-87 and 1990-91. Therefore, no deductions were made in those years. It was only in the year 1999 that certain profits were made, and the deduction to the extent of Rs. 8,62,585/- from the carried forward unabsorbed investment allowance was made, through order, dated 03.05.1993. Few months thereafter, the respondent sought to reopen the proceedings and set at naught, the set off, permitted for the assessment year 1991-92. For this purpose, he invoked his power u/s 154 of the Act and issued a notice. There was no reply from the appellant and an order was passed on 24.01.1994. The basis for the proceedings indicated in para 2 of the order is as under:

In the light of recent Supreme Courts Judgment in *Commissioner of Income Tax, Orissa and Others Vs. N.C. Budharaja and Company and Others*, superseding all the earlier orders wherein the Supreme Court held that the construction work cannot be treated as a manufacturing activity, a notice u/s 154 was issued to the assessee company to withdraw the investment allowance. So far, to this date the assessee neither filed any explanations nor sought for adjournment. Therefore, I am compelled to complete the proceedings keeping in view the facts of the case and Supreme Courts judgment.

10. The conclusion of the respondent reads:

Therefore, in the instant case, since the assessee company is not engaged in

manufacture of articles or thing it cannot be treated as industry for the purpose of investment allowance u/s. 32A. As such, the assessee-company is not entitled to investment allowance in respect of Plant & Machinery used by it for construction activity of Dam etc. hence, the unabsorbed investment allowance allowed in the assessment year 1991-92 is withdrawn.

11. The matter was carried in appeal and the Commissioner observed that the order passed by the respondent cannot be sustained. He has also briefly explained, the purport of the judgment of the Supreme Court in N.C.Budhiraja & Company's case (1 supra) and took the view that neither the facts permit, nor the law allows the exercise undertaken by the respondent. The Tribunal, however, has struck a different note. According to it, the matter is covered by the judgment of the Supreme Court in N.C.Budhiraja & Company's case (1 supra). After referring to the facts of the case, the Tribunal concluded its discussion with this:

From the order of the Commissioner of income tax (Appeals), we find that the principles enunciated in the above judgment of the Supreme Court has not been properly understood. Hence, in the light of the said judgment of the Supreme Court, the order of the first appellate authority is set aside and the appeal filed by the Revenue is allowed thereby confirming the order of the assessing officer concerned.

12. Two questions arise for consideration. The first is as to whether it was competent for the respondent to invoke the jurisdiction u/s 154 of the Act, in the facts of the case. This, in fact, is the purport of the substantial questions of law framed by this Court. The second is as to whether the findings that have assumed finality with reference to a particular assessment year, can be reopened on the basis of the judgment of the Supreme Court, delivered at a later point of time. Extensive arguments are advanced on both the aspects.

13. There is hardly any ambiguity as to the nature of powers invoked by the respondent that resulted in the order, dated 24.01.1994. He specifically made a reference to the notice, issued u/s 154 of the Act and concluded that the deduction of the investment allowance to the tune of Rs.8,62,585/- for the previous assessment year was not permissible, and accordingly, withdrew it.

14. Apart from providing the avenues of appeals and revisions, the Act confers power on the assessing authority itself, to take certain steps, including those of review and reopening of assessments. Sections 146 and 147 of the Act confer power upon the ITO to reopen the assessment, if the income of the assessee is escaped from the assessment. Section 154 thereof empowers him to rectify the mistakes. This power can be exercised subject, however, to the restrictions. One such restriction is imposed under sub-section (4) thereof, is that the power shall not be exercised after expiry of four years from the end of the financial year, in which the order sought to be amended, was passed.

15. If one takes into account, the date of order, which the respondent intended

to rectify, the exercise can be said to be within the limitation stipulated under sub-section (7) of Section 154 of the Act. However, on a close analysis, it emerges that the respondent has in effect, revised and modified the determination made by his predecessor, in the assessment year 1983-84, as regards character of the investment allowance claimed by the appellant. That the character so decided has been acted upon, is evident from the fact that not only part of it was permitted to be adjusted during that very assessment year, but also substantial part of it was allowed to be carried forward and adjusted in the subsequent years. Though the respondent has chosen to brand the exercise undertaken by him as the one, to correct mistake, in effect it is nothing but one of revising the order passed by the ITO in the assessment year 1983-84. Unless, the very character of that amount or allowance is changed, the question of disallowing the same, does not arise.

16. We find it difficult to treat such a far-reaching exercise as the one of mere correcting mistake. Another part of it is, that since the order of the respondent has the effect of altering the nature of the investment allowance, it dates back to the order passed for the assessment year 1983-84. Thus, viewed from that angle, it is barred by sub-section (7) of Section 154 of the Act.

17. Things would have been different altogether, had it been a case where the ITO has undertaken any independent exercise to determine the character of the allowance during the relevant assessment year i.e. 1991-92. He did nothing more than allowing deduction of the amount, which was carried forward from the previous assessment years. He fell in line with his predecessors, who dealt with that very allowance for the assessment years 1983-84 to 1986-87. Therefore, we are of the view that the exercise of powers u/s 154 of the Act, by the respondent to disallow the investment allowance to the appellant, is impermissible in law.

18. The second question is closely interlinked with the first one. However, it has a different dimension altogether. The determination of the character of investment allowance claimed by the appellant was not only accepted by the ITO in the year 1983-84, but also it has been honoured in the subsequent assessment years. In that view of the matter, it has assumed finality.

19. Learned Senior Counsel for the Department submits that even such a finding can be reversed in subsequent years and it is competent for an ITO to deal with the same independently. In support of his contention, he relied upon the judgment of the Supreme Court in Manmohan Dass case (3 supra). In a way, the case before the Supreme Court has arisen in a converse situation. For the assessment year, 1950-51, the ITO dealt with the business loss shown in the return of the assessee. It is not clear as to whether there was any factual necessity or foundation to allow that for the concerned assessment year. However, he made a specific observation in the assessment order to the effect that the assessee shall not be entitled to carry forward the same for the next assessment year. The assessee did not prefer any appeal against such an observation or the order. The occasion for him to claim the benefit of the

business loss arose on the next assessment year. When the claim was pressed, the ITO, who processed the return for the subsequent year, expressed his inability and treated the observation as final. The matter ultimately landed before the Supreme Court. The Hon'ble Supreme Court framed the following questions in this behalf :

1. Whether on a true interpretation of the deed of agreement dated 2nd January, 1931, appointing the assessee as treasurer of the Allahabad Bank Limited, income earned by the assessee from his activities as such treasurer fell to be computed u/s 10 of the Act or Section 7 or Section 12 of the income tax Act?

2. Whether the assessee could claim a set-off of the loss suffered by him in the preceding year 1950- 51 against his profits in the year under consideration, i.e., 1951-52, having failed to prefer an appeal against the refusal by the income tax Officer making the assessment for the year 1950-51 to allow the assessee to carry forward the loss u/s 24(2) of the Act?

20. Their Lordships took the view that it was not competent for the ITO, who processed the return for the assessment year 1950-51, to make an observation about the permissibility or otherwise of carrying forward the business loss for the subsequent assessment year. It was further held that it was competent for the ITO, who dealt with the matter in the assessment year 1951-52, to decide the admissibility of the claim, and proceed accordingly.

21. In the instant case, the situation is exactly the opposite. The successive ITOs from 1983 onwards did not express any reservation about the admissibility of the investment allowance claimed by the respondent. However, from the judgment of the Supreme Court, cited above, it is seen that the ITO, who dealt with the assessment of a subsequent year, can independently deal with the claim. Learned Senior Counsel submit that it was competent for the respondent to deal with the investment allowance for the assessment year 1991-92 independently, and was not bound by the view expressed by his predecessors, in the preceding assessment years.

22. If it were to be a case where no deduction whatever was permitted of the investment allowance, though claimed in the preceding assessment years, and the respondent addressed the question, the contention of the learned Senior Counsel for the Department can certainly be accepted. Where however, the determination as to the admissibility has already taken place and substantial part of it was enforced by permitting deduction, any permission accorded to the respondent to undo whatever has been done earlier, would run contrary to the very letter and spirit of Section 154 of the Act, or for that matter, the facility created u/s 32A of the Act. Notwithstanding the complexity of adjudication, provided for under the Act, the Parliament certainly intended, consistency to be the hallmark. The process of undoing any matter can be only through the known and prescribed procedure and not otherwise.

23. We, therefore, allow the appeal and set aside the order, 04.05.2000 passed

by the Hyderabad Bench A of the Income Tax Appellate Tribunal in I.T.A.No.21/Hyd/1996, in view of the substantial questions of law framed and answered by us in the preceding paragraphs. As a result, the order passed by the Commissioner shall become operational and the order, dated 24.01.1994 passed by the respondent shall stand set aside. There shall be no order as to costs.

24. The miscellaneous petition filed in this appeal shall also stand disposed of.