
(1990) 02 DEL CK 0029

In the Delhi High Court

Case No : Civil Writ Petition No. 735 of 1989

Smart P. Ltd.

APPELLANT

Vs

Income Tax Appellate Tribunal

RESPONDENT

Date of Decision : 16-02-1990

Acts Referred:

Citation : (1990) 82 CTR 34 : (1990) 41 DLT 407 : (1990) 182 ITR 384 : (1990) 49 TAXMAN 43

Hon'ble Judges : S.B. Wad, J; M.K. Chawla, J; B.N. Kirpal, J

Bench : Full Bench

Advocate : S.C. Manchanda, for the Appellant; Rajendra, B. Gupta, for the Respondent

Judgement

Kirpal J.

1. The question which has been referred for consideration to this larger Bench is whether an applicant has a right of being heard by the Income Tax Appellate Tribunal when an application u/s 254(2) of the Income Tax Act, 1961, is filed rectifying any mistake apparent from record.

2. Briefly stated, the facts are that the petitioner had filed two appeals before the Income Tax Appellate Tribunal in respect of the assessment year 1982-83 and 1983-84. The main ground in the appeal related to the claim of assessability of income from sub-letting of property, amounting to Rs. 1,21,000. The case of the petitioner was that the income from sub-letting was not liable to tax at all and, secondly, such income should not be considered as income covered by any other head of income mentioned in section 14. In the alternative, it was also submitted that such income, if at all, could be brought to assessment only under the head "Business".

3. By order dated August, 22, 1988, the Income Tax Appellate Tribunal partly allowed the petitioner's appeal.

4. The petitioner thereafter filed a miscellaneous application u/s 254(2) before the Income Tax Tribunal, inter alia, contending that the first two contentions which had been raised by it had not been decided by the Tribunal. It was averred that the order dated August 22, 1988, contains a mistake apparent from the record and that, Therefore, the said order should be recalled and the appeal be adjudicated upon to novo. Lastly, it was submitted that a hearing on the petition may be granted.

5. The petitioner then received a communication dated December 6, 1988, from the Assistant Registrar of the Tribunal. In this latter, it was stated that after due consideration of the petitioner's application, the Bench had passed the following order :

"See (S.C.) and gone through the order under reference. There is no mistake apparent from record. All arguments were duly considered and dealt with in the order. The application is not maintainable. Rejected summarily, in liming. "

6. The petitioner then filed another application on February, 8, 1989, also u/s 254(2), in which it was stated that, by order dated December 6, 1988, the Tribunal had dismissed the petitioner's earlier application u/s 254(2) in liming but without granting any hearing. It was also submitted by the petitioner that the order dated September 30, 1988, should be recalled and the application of the petitioner be decided after granting a hearing.

7. By a letter dated February 21, 1989, the petitioner received a communication from the Assistant Registrar of the Tribunal to the effect that the Bench had passed the following order on the petitioner's application :

"The miscellaneous application has already been rejected by a speaking order. No. question of recalling the order arises. Rejected. "

8. In the present writ petition, the challenge is to the aforesaid order dated February 21, 1989. The petition was heard by a Division Bench of this court which, vide order dated July 27, 1989, observed as follows :

"Counsel for the petitioner has referred to the decision of this court in C.W. No. 1079 of 1988 in support of his submission that while proceeding u/s 254(2) of the Income Tax Act, the petitioner has a right of being heard. We have gone through the said judgment of this court and we find that the proviso to sub-section (2) of section 254 has not been adverted to or argued before the said Division Bench. The question raised is of some importance. If sub-section (2) is read without the proviso, it can be said that the principle of natural justice should be read in the laid sub-section and an opportunity should be given. But, the Legislature makes its intention clear in the proviso that, except in the three cases mentioned in the proviso, the assessed is not entitled, as of right, to be heard. "

9. In view of the above, the Division Bench directed that the case be referred to a Full Bench. That is how the matter has come up for our consideration.

10 .The contention on behalf of the petitioner is that, before an application u/s 254 is decided, the applicant should be heard and, secondly, that such an application should be decided by a speaking order. While counsel for the Commissioner of Income Tax supported the contention the petitioner, Shri B. Gupta, appearing on behalf of the Income Tax Tribunal, sought to contend that, on a correct interpretation of section 254(2), no hearing is contemplated and that, Therefore, the Tribunal was right in passing the impugned order.

11. In order to appreciate the aforesaid controversy, it is necessary to refer to some of the provisions of the Act relating to the hearing of appeals by the Income Tax Appellate Tribunal. The Tribunal is constituted u/s 252 of the Act. Section 253 enables the assessed as well as the Income Tax Officer to file a second appeal to the Tribunal. Thereafter, section 254 provides for orders being passed by the Tribunal. The said section reads as follows :

"254. Orders of Appellate Tribunal. - (1) The Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such order thereon, as it thinks fit.

(2) The Appellate Tribunal may, at any time within four years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it under sub-section (1), and shall make such amendment if the mistake is brought to its notice by the assessed or the Assessing Officer :

12. Provided that an amendment which has the effect of enhancing an assessment or reducing a refund or otherwise increasing the liability of the assessed, shall not be made under this sub-section unless the Appellate Tribunal has given notice to the assessed of its intention to do so and has allowed the assessed a reasonable opportunity of being heard.

(3) The Appellate Tribunal shall send a copy of any orders passed under this section to the assessed and to the Chief Commissioner or Commissioner.

(4) Save as provided in section 256, orders passed by the Appellate Tribunal on appeal shall be final.

13. Section 254(1) specifically provides that an appeal which is being filed before the Tribunal shall be decided by it after an opportunity of hearing has been provided to both the parties. This sub-section does not contemplate dismissal of any appeal in liming without hearing the appellant. Every appeal which is filed before it has to be heard after opportunity has been accorded to both the parties to appear. If such an opportunity is granted, but any of the parties does not avail of the same, the Tribunal is free to dispose of the appeal in the absence of such a party.

14. Sub-section (2) of section 254 deals with the Tribunal passing orders with a view to rectify any mistake apparent from the record. It is this provision which requires our detailed examination and consideration in the present case.

15. In order to understand the full import and effect of section 254(2), it has first to be seen at whose instance an order u/s 254(2) can be passed. In the absence of any such specific mention, the said provision should be so construed as to make it meaningful and effective. There are three entities or parties who are directly involved in or concerned with the passing of an appellate order. They are the Tribunal itself and the appellate and the respondent before it. This being so, it is possible that the Tribunal may, suo motu from the opinion that there is a mistake apparent from the record which requires an order passed by it u/s 254(1) to be rectified or amended. In addition thereto, the existence of any mistake apparent from the record can be brought to the notice of the Income Tax Appellate Tribunal by either of the parties to the appeal, namely, the assessed or the Income Tax Officer. The power u/s 254(2) can thus be exercised by the Tribunal either suo motu or at the instance of either of the parties before it.

16. In the present case, we are not concerned with the circumstances under which an order u/s 254(2) can be passed. No arguments have been addressed on the question as to what is the meaning of the words "rectifying any mistake apparent from the record" occurring in section 254(2) and, Therefore, we do not propose to go into this question. All that we have to consider is whether the proviso to section 254(2) limits the hearing to be provided only to a case which has the effect of enhancing an assessment or reducing a refund or increasing the liability of the assessed.

17. An assessed or an Income Tax Officer can require the Tribunal to pass orders u/s 254(2). Ordinarily, this would be done when either of the parties, or in a particular case, even both of them, move applications before the Tribunal. When an application is filed by an assessed for rectification of a mistake, the said application may either be dismissed or allowed. If the application is dismissed, it would mean no modification is made by the Tribunal in its order passed u/s 254(1). On the other hand, when an application filed by an assessed is allowed, it may have the effect of reducing its tax liability.

18. An application filed by the Income Tax Officer may, likewise, be either dismissed or allowed. If such an application is allowed, there will be a possibility, as contemplated by the proviso to section 254(2), whereby the tax liability of the assessed is adversely affected.

19. The proviso to section 254(2), construed literally, provides only for a hearing to be granted to an assessed. It does not provide for the Tribunal giving any opportunity to the Income Tax Officer to be heard. Moreover, the opportunity to the assessed is to be granted only if the amendment has the effect of enhancing an assessment or reducing a refund or otherwise increasing the liability of the assessed.

20. If hearing, on an application being moved u/s 254(2), is to be confined only to those cases which are covered by the proviso to the said provision, the effect would be that, on an application for rectification filed by the assessed, no hearing

will be granted to the Department because the proviso does not specifically provide for such a hearing to be given. If an application filed by the assessed u/s 254(2) is allowed, then there may be reduction in the tax liability or an increase in the refund or reduction in the assessment. Any such order passed would, in effect, be prejudicial to the interests of the Revenue. When section 254(1) specifically contemplates hearing being given to the Revenue, on an appeal filed by the assessed, which appeal, if allowed, may have the effect of reducing the assessment or the tax liability or increasing the refund, it cannot possibly stand to reason that a hearing to the Department is not contemplated when the success of an application u/s 254(2) by an assessed may have the same effect as if the assessed's appeal u/s 254(1) has been allowed. It is now well-settled that, even where hearing is not specifically provided, principles of natural justice have to be complied with before any order adverse to any party is passed especially by a judicial or a quasi-judicial authority. This principle would be negated if section 254(2) is to be given a narrow construction, as sought to be placed by Shri. B. Gupta, and the hearing is limited only in the cases as contemplated by the proviso thereto.

21. Just as an application filed by the assessed, if allowed, may adversely affect the interests of the Revenue, similarly, the Tribunal, may also, suo motu, without any application by the assessed or the Revenue, rectify its order passed u/s 254(1) which may also be to the prejudice of the Revenue. The principles of natural justice would, in our opinion, require an opportunity to be granted to the Revenue before any such suo motu action is taken by the Tribunal.

22. Another situation may arise where the Department moves an application u/s 254(2) which may be partly allowed by the Tribunal. It would not stand to reason that, by applying the proviso to section 254(2), an opportunity to be heard is granted to the assessed, because, by partly allowing the Department's application, the tax liability of the assessed may be adversely affected, but the applicant himself, namely, the Income Tax Officer, is not heard.

23. In our opinion, principles of natural justice have to be read into the provisions of section 254(2). Any order which is passed u/s 254(2) especially when it has the effect of varying the tax liability should be passed only after affording an opportunity, to both the sides, of being heard. The proviso to section 254(2) does not detract from the principles of natural justice which are enshrined in sub-section (2) of section 254. The proviso may be regarded as having been inserted by way of abundant caution but we cannot interpret the proviso in such a way so as to take away or abridge the right of an aggrieved party of being heard when the Tribunal passes an order u/s 254(2). The proviso may be regarded as a reminder to the Tribunal not to pass any order adversely affecting the rights of an assessed without giving it a notice in this behalf but the said proviso cannot be regarded as limiting the power or jurisdiction of the Tribunal to hear the parties to an application u/s 254(2), which may adversely affect their rights.

24. It has been submitted before us that whenever an application u/s 254(2) is filed, principles of natural justice would demand that the applicant must be heard even if the Tribunal is inclined to dismiss the application. In other words, even though an order dealing with an application u/s 254(2) may not result in rectification, amendment or modification of the order passed u/s 254(1), nevertheless the applicant, filing such an application u/s 254(2), should be heard.

25. As we have already noticed and observed, the proviso cannot be so construed as to provide an opportunity only to the assessed to be heard under certain circumstances when the Tribunal deals with an application u/s 254(2). The right to be heard, as per the principles of natural justice, is enshrined in section 254(2) itself. Even though it is not specifically provided that, while dismissing an application u/s 254(2), the applicant should be heard, in our jurisprudence, whenever a judicial Tribunal deals with an application requiring a judicial decision, then the applicant, at the first instance, has to be heard. After hearing, the Tribunal may either dismiss the application, without notice to the opposite party or, if it is of the opinion that an order u/s 254(1) may require amendment or modification, then it should issue notice to the opposite party and, thereafter, hear both the parties before disposing of such an application. In other words, no order varying an order u/s 254(1) can be passed by the Tribunal without hearing both the parties but an order refusing to exercise powers u/s 254(2) can be passed by the Tribunal by hearing only the applicant. Similarly, when the Tribunal wants to suo motu rectify any mistake, it must, in consonance with the principles of natural justice, hear both the parties before passing an order u/s 254(2).

26. Whenever any application is filed u/s 254(2) either by an assessed or by an Income Tax Officer, it requires the Tribunal to apply its mind and pass a judicial order. An application filed u/s 254(2) would, ordinarily, contain the grounds on which the review is sought. In consonance with the principles of natural justice, the Tribunal should, in our opinion, decide the application by a speaking order. It may not be necessary for the Tribunal to give a detailed judgment but, while deciding the application, it should at least briefly indicate the reasons for the decision it arrives at. Even if the application is dismissed, without issuing notice to the respondent the Tribunal, which exercises its power u/s 254(2) of the Income Tax Act, ought to indicate the grounds while rejection an application. Similarly, cogent reasons have to be given, if an application for rectification is allowed, wholly or in part.

27. In view of the aforesaid discussion, it must follow that, inasmuch as the impugned order dated December 6, 1988, was passed without giving the applicant, namely, the petitioner, any opportunity of being heard, the same is liable to be quashed. We, accordingly, issue a writ of certiorari quashing the said decision and direct the Tribunal to decide the application u/s 254(2) filed by the petitioner in accordance with law keeping in view the observations made herein. There will be no order as to costs.