
(1978) 08 CAL CK 0013

In the Calcutta High Court

Case No : Income-tax Reference No. 107 of 1977

V.R. Sonti

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 29-08-1978

Acts Referred:

Income Tax Act, 1961 — Section 154, 254(2), 45

Citation : (1979) 117 ITR 838

Hon'ble Judges : Sudhindra Mohan Guha, J;S.C. Deb, J

Bench : Division Bench

Advocate : N.K. Poddar and R.N. Saha, for the Appellant;Ajit Sengupta, for the Respondent

Judgement

Deb, J.—The following question is involved in this reference u/s 256(1) of the I.T. Act, 1961:

" Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that there was no mistake apparent from the record in its" order dated 25th August, 1973, which could be rectified u/s 254(2) of the Income Tax Act, 1961 ?"

2. The statement of the case relates to the assessment year 1965-66. The assessee is an individual. He was the owner of a business and sold it to a company in the relevant previous year. He also sold the goodwill of the said business to that company for Rs. 60,000. The ITO brought Rs. 60,000 to tax under the head "capital gains".

3. The appeals filed by the assessee were dismissed by both the appellate authorities. The assessee then made an application before the Tribunal u/s 254(2) of the I.T. Act, 1961, without asking for setting aside of the appellate order of the Tribunal.

4. It may be now noted here that two grounds were taken before the Tribunal in that application but only one ground has been argued before us which was

argued before the Tribunal on behalf of the assessee. It was in substance argued before the Tribunal that the goodwill of a business is not a capital asset as held in Commissioner of Income Tax, W.B. III Vs. Chunilal Prabhudas and Co. (Defunct Firm), , by a Division Bench of this court, and the Tribunal should, therefore, rectify its mistake.

5. The departmental representative, on the other hand, cited several decisions including a judgment of the Supreme Court in the case of Devidas Vithaldas and Co. Vs. Commissioner of Income Tax , Bombay, , in support of the contention that goodwill of a business is a capital asset.

6. The Tribunal rejected the contention of the assessee and dismissed the said application. Thereafter, at the instance of the assessee, the Tribunal referred the above question to this court.

7. Mr. N. K. Poddar, learned advocate for the assessee argues before us that by following the case of Commissioner of Income Tax, W.B. III Vs. Chunilal Prabhudas and Co. (Defunct Firm), , we should hold that the goodwill of a business is not a capital asset and, therefore, there is a mistake apparent from the record in the appellate order of the Tribunal which should have been rectified by the Tribunal u/s 254(2) of the Act. He also argues that the goodwill of a business which is built up in the course of carrying on the business cannot be regarded as a capital asset for the purposes of capital gains because there cannot be any cost of acquisition of such a goodwill.

8. Mr. Ajit Sengupta, learned counsel for the revenue, disputes the above contentions and cites two subsequent decisions of this court in support of his contentions that the goodwill of the business is a capital asset and any profit or gain arising from its sale is taxable under the head "Capital gains". Mr. Sengupta also argues that in any event two conceivable opinions being possible as to whether the goodwill of the business is a capital asset for the purposes of capital gains, it cannot be said that there is any mistake apparent from the record in the order of the Tribunal and, therefore, it was not a rectifiable mistake u/s 254(2) of the Act.

9. Before dealing with the aforesaid arguments we would like to dispose of the two cases cited by Mr. Poddar in support of his another argument that the Tribunal should have followed the case of Commissioner of Income Tax, W.B. III Vs. Chunilal Prabhudas and Co. (Defunct Firm), .

10. In Commissioner of Income Tax, Gujarat-I Vs. Ramjibhai Hirjibhai and Sons, , at the time of original assessment the ITO did not charge any interest u/s 139 of the 1961 Act for late filing of the return of income by the assessee. He thereafter charged interest by acting u/s 154 of the Act. The appeal filed by the assessee from the rectification order was allowed by the AAC who held that the ITO having already exercised his discretion in not levying any interest was no longer competent to charge it u/s 154 of the Act. The department then filed an appeal. The Tribunal held that the ITO was wrong in acting u/s 154 of the Act, as there

was a divergence of judicial opinion on the question as to whether any interest was leviable in those circumstances. On a reference, the Gujarat High Court held that, so far as that court was concerned, the point being well settled, the Tribunal was not right in its aforesaid conclusion although the other High Courts had taken a different view on the said question.

11. The other case cited by Mr. Poddar is *Mettur Chemical and Industrial Corporation Ltd. Vs. Commissioner of Income Tax*, . In that case the income from the business was assessed after deducting the wealth-tax paid by the assessee. Subsequently, the ITO, acting u/s 154 of the I.T. Act, 1961, deducted the wealth-tax paid by the assessee from the computation of its income from the business. The AAC dismissed the appeal filed by the assessee. The Tribunal, however, held that there was no mistake apparent from the record which could be rectified by the ITO u/s 154 of the Act. The Madras High Court, on a reference, disagreed with the Tribunal in view of a decision of that court in which it was held that the wealth-tax paid by a company was not an allowable expenditure and at page 825 of the report observed as follows :

"We are not referring to the subsequent decisions on this question and the retrospective amendment of the law in this behalf because at the time when the Income Tax Officer took proceedings u/s 154 this was the only binding decision in existence and, therefore, it was not merely the right but the duty of the Income Tax Officer to give effect to the law as declared by this court in the decision referred to above by correcting the mistake which he had already committed."

12. But in *T.S. Balaram, Income Tax Officer, Company Circle IV, Bombay Vs. Volkart Brothers, Bombay*, of the report, the Supreme Court says thus :

"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 conceivably be two opinions. As seen earlier, the High Court of Bombay opined that the original assessments were in accordance with law though, in our opinion, the High Court was not justified in going into that question. In *Satyanarayan Laxminarayan Hegde and Others Vs. Millikarjun Bhavanappa Tirumale*, this court while spelling out the scope of the power of a High Court under Article 226 of the Constitution ruled that an error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions cannot be said to be an error apparent on the face of the record. A decision on a debatable point of law is not a mistake apparent from the record--See *Sidhramappa Andannappa Manvi Vs. Commissioner of Income Tax, Bombay*, ."

13. Hence, if there is a divergence of judicial opinion on a question of law or two conceivable views are possible on it, proceedings u/s 154 or u/s 254(2) of the I. T. Act, 1961, cannot be taken at all. It is also not the law that the ITO or the appellate authorities under the I. T. Act for the purposes of a rectification application should only look at the decisions of a particular High Court under

whose advisory jurisdiction it acts in order to find out whether that High Court has taken different views on the question of law involved before it. They must consider the decisions of all the High Courts and if there is a divergence of judicial opinion on the question of law or two conceivable opinions are possible on it, they must hold that the mistake is not apparent from the records. The contention of Mr. Poddar is, therefore, rejected.

14. Now, as to the main argument of Mr. Poddar, namely, that we should follow the case of Commissioner of Income Tax, W.B. III Vs. Chunilal Prabhudas and Co. (Defunct Firm), . In the case of Devidas Vithaldas and Co. Vs. Commissioner of Income Tax , Bombay, of the report, the Supreme Court says thus :

"Acquisition of the goodwill of the business is, without doubt, acquisition of a capital asset, and, therefore, its purchase price would be capital expenditure."

15. Therefore, the case of Commissioner of Income Tax, W.B. III Vs. Chunilal Prabhudas and Co. (Defunct Firm), can no longer be regarded as good law. Further, a later Division Bench of this court in the case of K.N. Daftary Vs. Commissioner of Income Tax, has held that the goodwill of a business is undoubtedly a capital asset for the purposes of Section 45 of the I. T. Act, 1961, although the case of Commissioner of Income Tax, W.B. III Vs. Chunilal Prabhudas and Co. (Defunct Firm), was cited in the same as it was cited in Commissioner of Income Tax, Central Vs. Bird and Co. (P.) Ltd., and none the less it was held by a Division Bench of this court that the goodwill of a business is both a fixed and a capital asset. Accordingly, we reject his main argument.

16. There is also no merit in his other argument. Even if no cost is incurred in building up the goodwill of a business it is still a capital asset for the purposes of capital gains and the cost of acquisition being "nil" amount, the entire sale proceeds relating to the goodwill must be brought to tax under the head "capital gains ".

17. It being now well settled that the goodwill of a. business is a capital asset, vide the decision of the Supreme Court in the case of Devidas Vithaldas and Co. Vs. Commissioner of Income Tax , Bombay, , we answer the question in the affirmative and against the assessee. There will be no order as to costs.

Sudhindra Mohan Guha, J.

18. I agree.