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Court : Karnataka

Decided On : Mar-15-2004

Reported in : [2004]136TAXMAN716(Kar)

Appeal No. : WT Appeal No. 11 of 2003 15 March 2004

Appellant : Cit

Respondent : Mcdowell and Co. Ltd.

Advocate for Pet/Ap. : E.R. Indra Kumar, *for the Revenue* G. Sarangan and S. Parthasarathi, *for the Assessee*

Judgement :

R.V. Raveendran, J.

This appeal under section 27A of the Wealth Tax Act, 1957 (hereinafter referred to as Act), is filed against the order dated 28-4-2003 in Miscellaneous Petition No. 204/Bang./2002 arising out of the order dated 27-8-2002 in WTA No. 23/Bang./99 relating to assessment year 1993-94.

2. The Assistant Commissioner of Wealth Tax, Central Circle-11, Bangalore, passed an order dated 30-9-1996 under section 18(1)(c) read with sections 18(2) and 18(3) of the Act levying a penalty of Rs. 5,13,296 being 200 per cent of the amount of wealth tax said to have been evaded by the assessee-respondent. The

appeal filed by the assessee against the imposition of such penalty was dismissed by the Commissioner of Wealth Tax (Appeals)-I, Bangalore, by order dated 18-2-1999 in appeal No. WTA.25/C.II/Commissioner (Appeals)-I/96-97. The further appeal filed by the assessee in WTA. No.23/Bang/99 was partly allowed by the Income Tax Appellate Tribunal by order dated 27-8-2002 reducing the penalty to the minimum leviable under the Act which is equal to the amount of tax sought to be evaded.

3. Thereafter, the assessee filed an application (MP No. 204/Bang./2002) for rectification of the order dated 27-8-2002 under section 35 of the Act by recalling the said order and to pass appropriate orders after considering all the evidences and facts furnished by it. On hearing, the Tribunal was satisfied that it had not examined the issue from the angle as to whether the assets not disclosed in the return could be subjected to wealth tax or not and that it had also not considered the decision relied on by the assessee in CIT v. India Sea Foods : [1996]218ITR629(Ker) . Therefore, the Tribunal held that there was a mistake in its order and allowed the application for rectification and recalled the order dated 28-7-2002 passed in WTA. No. 23/Bang./1999. As a consequence WTA No. 23/Bang./1999 is to be heard afresh.

4. Feeling aggrieved, the revenue has filed this appeal. The revenue contends that the provisions of section 35 of the Act, do not empower or enable the Tribunal to recall its order, even if there was a mistake apparent from the record. It is submitted that even if there is a mistake apparent from the record, all that the Tribunal could do was to rectify such mistake by amending the order passed by it, but there is no power to recall the order and rehear the matter. It is submitted that recalling the order and rehearing the matter would amount to review and not rectification and the Tribunal did not have any power of review, having regard to the provisions of the Act. It is contended that the order of the Tribunal is contrary to a series of judgments of this court and several other High Courts, holding that while exercising the power of rectification, the original order cannot be recalled. Therefore, the following substantial question of the law arise for consideration : Whether, the Tribunal has the jurisdiction to recall its appellate order. while purporting to exercise the power of rectification under section 35 of the Wealth Tax

Act ?

5. Several decisions cited at the bar arose under sections 254(2) and 154(1) of the Income Tax Act, 1961, in pari materia with section 35 of the Wealth Tax Act. All these sections provide that with a view to rectifying any mistake apparent from the record, the Tribunal (or to Tax Authority) may amend any order passed by it.

5.1 The Delhi High Court in *Karan & Co. v. ITAT* (2002) 253 ITR 131 while considering section 254(2) of the Income Tax Act, 1961 held thus :

'The scope and ambit of application of section 254(2) is very limited. The same is restricted to rectification of mistake apparent from the record. We shall first deal with the question of the power of the Tribunal to recall an order in its entirety. Recalling the entire order obviously would mean passing of a fresh order. That does not appear to be the legislative intent. The order passed by the Tribunal under section 254(1) is the effective order so far as the appeal is concerned. Any order passed under section 254(2) either allowing the amendment or refusing to amend gets merged with the original order passed. The order as amended or remaining unamended is the effective order for all practical purposes. The same continues to be an order under section 254(1). That is the final order in the appeal. An order under section 254(2) does not have existence de hors the order under section 254(1). Recalling of the order is not permissible under section 254(2). Recalling of an order automatically necessitates rehearing and readjudication of the entire subject-matter of appeal. The dispute no longer remains restricted to any mistake sought to be rectified. Power to recall an order is prescribed in terms of rule 24 of the Income Tax (Appellate Tribunal) Rules, 1963, and that too only in cases where the assessee shows that it had a reasonable cause for being absent at a time when the appeal was taken up and was decided ex parte....' (p. 136)

5.2 Similar view was expressed by another Division Bench of the Delhi High Court in *J.N. Sahni v. ITAT* : [2002]257ITR161(Ker) :

'The Tribunal in the absence of any express power cannot be said to have a power of substantive review. The Tribunal has merely the power to amend its order. While exercising the said power it cannot recall its order. The expression

Amendment must be assigned its true meaning. While an order of amendment is passed, the order remains, but when an order is recalled it stands obliterated. It is well settled that what cannot be done directly, cannot be done indirectly. The review of its own order by the Tribunal is forbidden in law, it cannot be permitted to achieve the same object by exercising its power under sub-section (2) of section 254. The Income Tax Appellate Tribunal does not have an inherent power of review.' (p. 21)

5.3 The Division Bench of this court followed the decisions of the Delhi High Court in Karan & Cos. case (supra), and held that rectification cannot be by recalling the earlier order and hearing the parties afresh, but only by passing an order of amendment with reference to the original order-vide Asstt. CIT v. C.N. Ananthram (IT Appeal No. 244 of 2001, dated 17-12-2003).

5.4 Some view has been expressed by the Orissa High Court in CIT v. ITA T : [1992]196ITR640(Orissa) and Prajatantra Prachar Samity v. CIT : [2003]264ITR160(Orissa) the Andhra Pradesh High Court in CIT v. Ideal Engineers : [2001]251ITR743(AP) , the Calcutta High Court in Shaw Wallace & Co. Ltd. v. ITAT : [1999]240ITR579(Cal) , the Rajasthan High Court in ITO v. ITAT and the Allahabad High Court in CIT v. ITAT : [1997]227ITR443(All) . If the principle enunciated in the above decisions are followed, the question raised (vide para 4 above) will have to be answered in the negative.

6. However, learned counsel for the assessee submitted several other decisions have held that recalling of an order does not necessarily mean review of the order; and that even while passing an order on an application for rectification, the original order can be recalled if the original order related to only one issue and it was found that the basis on which the said issue has been decided was wholly erroneous. The decisions relied on by the assessee are Blue Star Engg. Co. (Bom) (P) Ltd. v. CIT : [1969]73ITR283(Bom) , CIT v. Shakuntala Rajeshwar : [1986]160ITR840(Delhi) , CWT v. Smt. Illa Dalmia : [1987]168ITR306(Delhi) , CIT v. Ramesh Chand Modi and CIT v. S.S. Gupta .

6.1 In Blue Star Engg. Co. (Bom) (P) Ltd.s case (supra) the Bombay High Court considered the question whether under section 154 of the Indian Income Tax Act

1961, rectification can go to the extent of cancelling the whole order. The Bombay High Court held thus :

'... The power intended to be given under section 154 is to rectify an error apparent on the face of the record. Amendment of the order is the consequence of the rectification and its purpose is to give effect to the rectification. If the rectification involves an amendment, which will affect the whole of the order, it cannot be said that simply because of the use of the word amend, which normally may not mean the cancellation of the whole order, the Income Tax Officer should be powerless to rectify the mistake or error which is apparent on the face of the order. The word amend with reference to legal documents means correct an error and the expression amend the order would mean correct the error in the order. Under section 154 power to rectify the error is to be exercised by correcting the error in the order and the correction must, therefore, extend to the elimination of the error. What the effect of the elimination of the error will be on the original order will depend upon each case. It may be that the elimination of the error may affect only a part of the order. It may also be that the error may be such as may go to the root of the order and its elimination may result in the whole order falling to the ground. In our opinion the Income Tax Officer will be able to amend or correct the order to the extent to which the correction is necessary for rectification of the error and such correction may extend either to the whole of the order or only to a part of it....' (p. 299)

6.2 In *Shakuntala Rajeshwars* case (supra) the assessee filed an application for rectification before the Tribunal, bringing to its notice that the concession made by her earlier was by mistake. The original order was recalled by the Tribunal and a fresh order was passed. The Delhi High Court held that the earlier order of the Tribunal was founded on a mistaken assumption on the part of all concerned including the Tribunal and thus there was a mistake apparent on the record and in such circumstances, the Tribunal was justified in invoking the jurisdiction under section 254(2) and recalling its earlier order and rehearing the matter. But, in that case, the point as to whether the original order can be recalled while exercising power under section 254(2) of Income Tax Act or whether only an order of amendment should be passed was not considered.

6.3 In Smt. Illa Dalmia case (supra) the Tribunal had disposed of an appeal of the assessee under section 24(5) of the Wealth Tax Act. Subsequently, the assessee filed an application stating that there was no service of notice of hearing. The Tribunal recalled its original order and passed a fresh order. The revenue contended that the Tribunal had no jurisdiction to recall the original order made ex parte and on merits and restore the appeal to file. The Delhi High Court held that having regard to the provisions of section 35 of the Wealth Tax Act enabling rectification, the order of the Tribunal recalling the original order on the ground that there was no notice of hearing was correct. This decision also is riot of much assistance. Appellant does not dispute that where an order is passed ex parte, and an application is filed to set aside the same, the ex parte order can be set aside.

6.4 In Ramesh Chand Modis case (supra), the Tribunal had recalled its order on the ground that it had failed to consider certain grounds urged by the assessee in its memorandum of appeal. The Rajasthan High Court held that if the mistake was on account of failure to decide an issue which was raised, the appropriate procedure is to recall the order under section 254(2) of Income Tax Act, and hear the matter afresh.

6.5 In S.S. Guptas case (supra), the Rajasthan High Court held, relying on the decision in Blue Star Engg. Co. (Bombay) (P) Ltd.s case (supra), held that where the Tribunal concludes that there is a mistake apparent on the face of the record, the Tribunal has power to rectify its order for eliminating its mistake by recalling the order and passing a fresh order.

7. The decisions relied on by the assessee no doubt laid down the principle that the Tribunal, while exercising the power under section 254(2) of the Income Tax Act or section 35 of the Wealth Tax Act, can recall the original order, if it is satisfied that there was a mistake apparent from the record. The decisions relied on by the assessee are cases where the order has been recalled either on the ground that the appeal had been heard ex parte or where the order related to only one issue and the decision on such issue was founded by a mistaken assumption or non-consideration of relevant grounds/documents relating to such issues.

8. The learned counsel for the assessee submitted that the principle laid down in the line of cases represented by *Karan & Co. (supra)* by the Delhi High Court and *C.N. Ananthram's case (supra)* by this court, state the general rule that the rectification can only by way of amendment of original order without setting aside the original order. He conceded that where the order of the Tribunal related to several issues and the rectification sought is with regard to finding on only one issue, the Tribunal can only pass an order of amendment to the original order in regard to the error, and the original order in entirety cannot be recalled; but on the other hand, where the order relates to only one issue and the finding on such single issue is found to be a mistake which is apparent from the record, then the order has to be recalled in entirety. It is pointed out that in a single issue case, if the decision on the single issue is found to be erroneous, nothing survives in the order and therefore in such cases, the proper remedy is to recall the order and pass a fresh order. It was submitted that the decisions cited by the assessee amply, demonstrated this exception to the general rule. The assessee pointed out that in this case, the matter related to levy of penalty and therefore related to a single issue and as the Tribunal found that certain contentions urged by the assessee and a decision cited by the assessee were not noticed and considered, it was justified in recalling the order, for rehearing the matter. It was submitted that the order recalling the original order is not in exercise of power of review, but only in exercise of the power of rectification.

9. We have given our anxious consideration to the issue. Section 35(1)(e) provides that with a view to rectifying any mistake apparent from the record, the Tribunal may amend any order passed by it under section 24. Sub-section (5) of section 35 provides that where an amendment is made under section 35, an order shall be passed in writing by the Tribunal. The power vested in the Tribunal, by section 35, is only to amend the order, to rectify any mistake apparent from the record and not to review its order. Section 35 also clearly states the mistake should be rectified by amending the original order. Therefore, rectification presupposes the continued existence of the original order. When an amendment is made to the original order, the amendment merges with the original order. The original order is read with the amendment thereto. If the power to rectify the original order by way of amendment to that order is to be interpreted as permitting recalling of the original order, then

the original order ceases to exist and a fresh original order is made. Recalling the original order involves rehearing of the matter which is not the purpose and intention of the provision for rectification. When the wording of the statutory provision are clear and unambiguous and can be given effect without any difficulty, it is not permissible to give an extending meaning to the provision. The words 'amended the original order to rectify any mistake apparent from the record' does not mean recall the original order, rehear the matter and replace the original order by a fresh order. The purpose can be achieved by continuing the original order and passing an amendment order stating whatever is necessary to rectify the mistake apparent from the record. Whether the issue involved is one or more makes no difference, as what is contemplated and provided for is an amendment to the original order and not an order in substitution of the original order.

10. It is true that when the original order is made without notice, or without hearing the order will be recalled and a fresh order is passed after rehearing. This is specifically provided for in rule 24 of the Income Tax (Appellate Tribunal) Rules. But, where power of rectification is used on the ground of mistake apparent from the record, the original order should remain and the mistake has to be corrected by means of an amendment order. It is useful to bear in mind the limited area where power of rectification can be used. This is stated in *Karan & Co.s* case (*supra*), thus :

' . . . In order to attract the application of section 254(2), a mistake Must exist and the same must be apparent from the record. The power to rectify the mistake, however, does not cover cases where a revision or review of the order is intended... A mistake which can be rectified under section 254(2) is one which is patent, which is obvious and whose discovery is not dependent on argument or elaboration. The language used in section 254(2) makes it clear that only amendment to the order passed under section 254(1) is permissible when it is brought to the notice of the Tribunal that there is a mistake apparent from the record. In our view, amendment of an order does not mean obliteration of the order originally passed and its substitution by a new order. Where an error is far from self-evident, it ceases to be an apparent error. It is no doubt true that a mistake capable of being rectified under section 254(2) is not confined to clerical

or arithmetical mistakes. On the other hand, it does not cover any mistake which may be discovered by a complicated process of investigation, argument or proof....' (p. 135)

11. We therefore respectfully disagree with the view expressed the Bombay High Court in Blue Star Engg. Co. (Bombay) (P) Ltd.s case (supra) and by the Rajasthan High Court in the Ramesh Chand Modis case (supra) and S.S. Guptas case (supra). Though the effect of passing an order of amendment would be virtually to replace the effect of the original order (in a single issue matter as contrasted from a multi issue matter), nevertheless the procedure as per law requires to be followed. The course that is in consonance with section 35 should be preferred to a course that deviates from it.

12. We, therefore, allow this appeal and set aside the order of the Tribunal dated 28-4-2003 and direct the Tribunal to rehear the application for rectification. If the Tribunal feels that there is mistake apparent from the record, requiring exercise of power of rectification under section 35 of Wealth Tax Act, it shall pass an order amending the original order, instead of recalling the original order.