

B. I. C. Ltd. Vs. Deputy Commissioner of Income Tax.

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SooperKanoon Citation : sooperkanoon.com/488955

Court : Allahabad

Decided On : Mar-29-1996

Reported in : (1996)56TTJ(All)521

Appeal No. : ITA No. 1845/All/1994; Asst. yr. 1991-92, 29th March, 1996.

Appellant : B. I. C. Ltd.

Respondent : Deputy Commissioner of Income Tax.

Judgement :

ORDER

V. K. SINHA, A.M. :

This is an appeal filed by the assessee against an order of the CIT(A) upholding the rectification under s. 154 of an intimation under s. 143(1)(a) of the Act.

2. The facts of the case are given in chronological order briefly as under :

Sl. No.

Date

Event

1.

31-12-1991

Original return filed showing current loss of Rs. 23,65,68,711 and carried forward unabsorbed losses and allowances of Rs. 10,10,32,155. The total loss came to Rs. 124,68,20,270 (sic).

2.

4-2-1992

Notice under s. 143(2) issued and served on the assessee on 20th Feb., 1992.

3.

17-3-1992

Processing under s. 143(1)(a) done. Prima facie adjustment made reducing the loss by Rs. 91,61,254. This resulted in charging of additional tax under s. 143(1A) amounting to Rs. 9,48,189.

4.

5-5-1992

Revised return filed showing total loss at Rs. 123,81,80,860.

5.

25-5-1992

Notice under s. 142(1) issued for hearing on 1st June, 1992.

6.

27-8-1992

Application given by the assessee under s. 154 of the Act seeking deletion of additional tax under s. 143(1A) amounting to Rs. 9,48,189. Reliance placed on decision of the Allahabad High Court in the case of Indo Gulf Fertilisers vs . Union

of India : [1992]195ITR485(All) .

7.

31-8-1992

Order under s. 154 passed accepting the assessee's contention and cancelling additional tax under s. 143(1A).

8.

24-1-1994

Regular assessment completed under s. 143(3) of the Act computing a loss of Rs. 19,10,39,880 including unabsorbed depreciation allowance. Disallowances included, inter alia, provision for doubtful advances Rs. 2,59,76,755 under s. 36(1)(vii) of the Act and interest payable to financial institutions Rs. 16,85,833 under s. 43B of the Act.

9.

22-4-1994

Notice issued by the Assessing Officer (AO) under s. 154 of the Act seeking to revise intimation under s. 143(1)(a), dt. 17th March, 1992, and order under s. 154, dt. 31st Aug., 1992, for the following :

(a) Charging additional tax in view of the retrospective amendment of s. 143 w.e.f. 1st April, 1989;

(b) for reducing the loss on account of -

(i) unpaid interest to financial institutions amounting to Rs. 16,85,833 and

(ii) provision for doubtful advances amounting to Rs. 2,59,76,755.

10.

31-5-1994

Order under s. 154 passed as proposed in Sl. No. 9 above. This resulted in charging of additional tax under s. 143(1A) of the Act amounting to Rs. 33,87,793.

3. It is the order under s. 154 of the Act, dt. 31st May, 1994, which has resulted in the present dispute before us. The three items covered in it will now be discussed in a little greater detail.

4. As we have seen, the processing under s. 143(1)(a) on 17th March, 1992, resulted in additional tax under s. 143(1A) amounting to Rs. 9,48,189. Thereafter, the assessee moved an application under s. 154 on 27th Aug., 1992, claiming that additional tax could not be levied where losses continue after adjustment made under first proviso to cl. (a) of s. 143(1). Reliance was placed on decision of the jurisdictional High Court in the case of *Indo Gulf Fertilisers & Chemicals Corpn. Ltd. vs. Union of India & Anr.* (supra). This contention was accepted and the AO passed an order under s. 154 on 31st Aug., 1992, deleting the additional tax. Subsequently, there was an amendment of s. 143(1A) brought out by the Finance Act, 1993, with retrospective effect from 1st April, 1993, according to which additional tax could be charged even where the loss declared by the assessee in the return was reduced in the processing under s. 143(1)(a) of the Act. This led to a notice under s. 154 being issued by the AO to the assessee on 22nd April, 1994.

5. The assessee submitted before the AO that the above decision of the Allahabad High Court still holds good and the retrospective amendment of s. 143(1A) did not nullify it. This reply did not find favour with the AO and he rejected the contention relying on a decision of the Andhra Pradesh High Court in the case of *CIT vs. R. M. & Co.* : [1984]148ITR353(AP) . The following extract from the judgment was quoted by him :

'An order which is inconsistent with the provisions of a subsequent amendment of law with retrospective effect, must be deemed to suffer from a mistake apparent from record and is liable to be rectified under s. 154 of the Act.'

6. Thereafter, the additional tax was restored by him by an order under s. 154, dt. 31st May, 1994.

7. Regarding unpaid interest to financial institutions of Rs. 16,85,833 and provision for doubtful debts/advances of Rs. 2,59,76,755, the assessee submitted before the AO that revised computation of income as per letter dt. 16th Jan., 1994, already accepted the above disallowances, which was before the finalisation of the assessment. The AO did not accept this contention either. He observed that there was no dispute about the disallowability of these two items and the assessee had itself offered these disallowances in the revised computation dt. 16th Jan., 1994. As such, omission to make adjustments of the two sums while processing the return under s. 143(1)(a) on 17th March, 1992, constituted a glaring mistake of law apparent from the record. Accordingly, he made adjustments of these two amounts also in the order under s. 154, dt. 11th May, 1994.

8. A preliminary objection was raised before the CIT(A) saying that once the regular assessment was completed under s. 143(3) of the Act, the earlier intimation under s. 143(1)(a) ceased to exist legally. It was also stated that once the return had been taken up for scrutiny under s. 143(2), the processing under s. 143(1)(a) was a mere procedural formality. However, the CIT(A) did not accept the contention. She observed that processing of the return was a separate procedure and distinct from completing the assessment under s. 143(3). The only order of assessment was the order under s. 143(3) and what was done in terms of s. 143(1)(a) was a processing of the return only.

9. On merits, it was submitted before the CIT(A) that the matter was a debatable one and, therefore, outside the scope of s. 154 of the Act. The CIT(A) did not accept this contention either. Regarding charging of additional tax, in view of amendment of s. 143(1A) of the Act with retrospective effect from 1st April, 1989, she relied on a decision of the Supreme Court in *M. K. Venkatachalam, ITO & Anr. vs . Bombay Dyeing & .* : [1958]34ITR143(SC) and decision of Allahabad High Court in *Addl. CIT vs . District Co-operative Bank Ltd.* : [1979]119ITR142(All) . She held that in view of the amended provision, the AO was bound to take cognizance of the amended law and take necessary action under s. 154.

10. She further observed that unpaid interest was not eligible for deduction under s. 43B irrespective of the method of accounting being followed by the assessee.

Overlooking of a mandatory provision amounted to commission of a mistake apparent on the face of the record. Similarly, provision for doubtful debts/advances was only a provision and not a bad debt written off. It was, therefore, not admissible even in terms of the amended s. 36(1)(vii) of the Act and this was also a case of patent mistake of law. For these reasons, the assessee's appeal was dismissed. The assessee is now in appeal before us.

11. The learned counsel for the assessee again raised the preliminary objection before us. According to him, as soon as the regular assessment was completed under s. 143(3) of the Act, the order under s. 143(1)(a) merged with it and became non est. There was, therefore, nothing left to rectify thereafter and on this ground the order under s. 154, dt. 11th May, 1994, should be cancelled.

12. The learned counsel further submitted that once a notice under s. 143(2) had been issued, the provisions of s. 143(1)(a) could no longer be invoked to make prima facie adjustments. It followed that there could be no rectification under s. 154 either. For these propositions, he relied on the following decisions :

1. Kerala State Coir Corpn. Ltd. vs . Dy. CIT .

2. Modern Fibotex India Ltd. & Anr. vs . Dy. CIT : [1995]212ITR496(Cal) .

3. Monarch Foods Pvt. Ltd. vs. Asstt. CIT (1995) 52 TTJ (Ahd) 294 : (1995) 214 ITR 64 (AT).

13. The learned Departmental Representative, on the other hand, relied on the order of the CIT(A) and submitted that there was no merger of the processing under s. 143(1)(a) with the order under s. 143(3).

14. We have considered the rival submissions carefully. In order to arrive at a proper decision, we will first take up the three cases relied upon by the learned counsel for the assessee. In the case of Kerala State Coir Corpn. Ltd. vs. Dy. CIT (supra), it was held, inter alia, that validly initiated assessment proceedings under s. 143(2) should prevail and supersede provisions of s. 143(1)(a). The relevant facts were that the assessee filed its return showing loss. The AO accepted the figure of loss shown in the return as such in what was purported to be an

intimation under s. 143(1)(a) sent to the assessee. Subsequently, the AO issued a notice under s. 143(2) of the Act. Meanwhile, the AO also passed an order under s. 154 withdrawing excess depreciation in the intimation, sent earlier and levied additional tax. The CIT(A) confirmed charging of additional tax under s. 143(1A) of the Act. The Tribunal observed that from a comprehensive reading of s. 143, it was clear that once notice under s. 143(2) is issued, the regular proceeding gets started and thereafter the AO is not empowered to have or continue to have the preliminary proceedings under s. 143(1)(a). In the instant case, there was no valid intimation existing in terms of s. 143(1)(a) r/w the provisos thereto, since there was neither any demand nor any refund. A regular assessment was completed under s. 143(3) and thereafter an order under s. 154 purporting to rectify certain mistakes in the non-existing intimation was without any legal basis.

15. The facts of the present case are distinguishable. In the present case, processing under s. 143(1)(a) was completed on 17th March, 1992, in which additional tax was charged, whereas in the case noted above, there was no additional tax in the processing under s. 143(1)(a). If this intimation could not be rectified, then the rectification order dt. 31st Aug., 1992, could not have been passed according to the assessee's own argument. However, this has not been challenged. If it was possible to pass one rectification order, it was possible to pass second one also. Secondly, the processing under s. 143(1)(a) in the present case was after prima facie adjustment and was, therefore, an 'intimation', whereas there was no valid intimation in the case noted above. For these reasons, the case relied upon does not help the assessee.

16. In the case of *Modern Fibotex India Ltd. & Anr. vs. Dy. CIT & Ors.* (supra), it was held that intimation under s. 143(1)(a) cannot be issued after notice was given under s. 143(2) of the Act. However, the appeal in the present case is not against processing under s. 143(1)(a) at all. The above issue is not before us. What is challenged is rectification under s. 154 of an intimation under s. 143(1)(a), which is to be treated as valid as far as this case is concerned. Thus, the above case also does not help the assessee.

17. In the case of *Monarch Foods P. Ltd. vs. Asstt. CIT (supra)*, reliance was placed on the decision of the Bombay High Court in *CIT vs. Smt. Godavaridevi Saraf* : [1978]113ITR589(Bom) , where it was observed that an authority like the Tribunal, acting anywhere in the country, has to respect the law laid down by the High Court in the country, though of a different State, so long as there is no contrary decision of any other High Court on that question. This decision was relied upon by the learned counsel for the assessee before us in support of his contention that the decision of the Calcutta High Court in the case of *Modern Fibotex India Ltd. (supra)* should be applied here also. However, as we have noted above, the facts in the present case are distinguishable. The decision, therefore, does not help the assessee here either.

18. We will now take up the question whether processing under s. 143(1)(a) gets merged with an assessment order under s. 143(3) of the Act. For this purpose, it will be first examined whether processing under s. 143(1)(a) is an 'order'.

11. Processing under s. 143(1)(a) of the Act was introduced by the Direct Tax Laws (Amendment) Act, 1987, w.e.f. 1st April, 1989. Prior to that s. 143(1)(a) of the Act authorised the AO in certain circumstances to 'make an assessment of the total income or loss'. However, w.e.f. 1st April, 1989, no 'assessment' is done in the processing under s. 143(1)(a). This word is significantly absent. Not only is the word 'assessment' absent but also the word 'order' is absent. It would follow that the processing and sending of intimation does not constitute an order.

12. This view is fortified by the Explanation below s. 143(5) of the Act according to which an intimation sent to the assessee under s. 143(1) 'shall be deemed to be an order for the purposes of ss. 246 and 264'. It was necessary to make this deeming provision only because on its own the intimation under s. 143(1) is not an order. The deeming provision is limited to ss. 246 and 264 and does not extend to s. 143(3) of the Act.

13. The view is further fortified by s. 154(1) of the Act relating to rectification of mistakes. Prior to 1st April, 1989, an IT authority was authorised to 'amend any order passed by it under the provision of this Act' in cases where there were mistakes apparent from record. However, the Direct Tax Laws (Amendment) Act,

1987, introduced cl. (b) in s. 154(1) of the Act w.e.f. 1st April, 1989. Under this clause, an IT authority is also authorised to amend any intimation sent by it under s. 143(1) of the Act. This specific provision became necessary only because the intimation under s. 143(1) was not an order on its own.

14. Thus, looking to the language of s. 143(1)(a) and the scheme of the Act, we hold that an intimation under s. 143(1)(a) is not an 'order' for the purpose of s. 143(3) of the Act. If it is not an order, it follows that it cannot merge with an order under s. 143(3) of the Act. We hold accordingly. The preliminary objection of the assessee is, therefore, rejected.

15. We now come to the merits of the case. In the order under s. 154 passed by the AO on 31st May, 1994, it has first been directed that additional tax under s. 143(1A) should be charged despite the returned income and the income after prima facie adjustments being losses. This direction has been given in view of the retrospective amendment of s. 143(1A) brought about by the Finance Act, 1993, w.e.f. 1st April, 1989. The CIT(A) has held that such additional tax can be charged in view of the decision of the Supreme Court in *M. K Venkatachalam, ITO & Anr. vs. Bombay Dyeing & .* (supra), relevant extract from which is given below :

'..... If a mistake of fact apparent from the record of the assessment order can be rectified under s. 35, we see no reason why a mistake of law which is glaring and obvious cannot be similarly rectified. Prima facie, it may appear somewhat strange that an order which was good and valid when it was made should be treated as patently invalid and wrong by virtue of the retrospective operation of the Amendment Act. But such a result is necessarily involved in the operation of the Amendment Act....'

16. Both sides reiterated before us arguments given at earlier stages.

17. We find that the above decision is squarely applicable to the facts of the present case. We, therefore, uphold the decision of the CIT(A) that additional tax can be charged under s. 143(1A) of the Act in an order under s. 154 in the present case in principle. The quantum thereof will depend upon the quantum of prima facie adjustments upheld by us. We will deal with this matter now.

18. The first prima facie adjustment for depreciation amounting to Rs. 91,61,254 is no more in dispute before us. It is, therefore, upheld.

19. The second prima facie adjustment was made for interest to financial institutions under s. 43B of the Act amounting to Rs. 16,85,833. It was during the assessment proceedings that this question was raised and it was found that the amount of interest had not been paid by the assessee even within time allowed under s. 139(1) of the Act for filing of the return of income, and was, therefore, outside the purview of the first proviso below s. 43B of the Act. The assessee filed reply dt. 1st June, 1992, and 15th June, 1992, admitting the facts and consenting to the disallowance. However, the learned counsel for the assessee submitted before us that the assessee agreed to surrender the amount to avoid litigation and because deduction would be admissible in the year of payment in any case. The fact remained, according to him, that the issue was a debatable one. Reliance was placed on a decision of the Tribunal in the case of *Sir Shadi Lal Enterprises Ltd. vs . Dy. CIT* . The learned Departmental Representative, on the other hand, opposed the contention.

20. After careful consideration, we find that the case relied upon by the learned counsel for the assessee is distinguishable on facts. In that case, the assessee made payment of taxes before the due date for furnishing return under s. 139(1) of the Act, whereas in the present case payment of taxes was not made before the due date. This is a material distinction. The addition in that case was made because proof of making the payment was not attached with the return of income. Such is not the case here. The decision, therefore, does not help the assessee. We hold that in the circumstances, this prima facie adjustment has been rightly made and it is upheld.

21. The third prima facie adjustment was for provision for doubtful debts/advances of Rs. 2,59,76,755. According to the order under s. 154, there was absolutely no dispute about its disallowability. The learned counsel for the assessee, however, submitted that the dispute ended only on account of the enquiry at the time of regular assessment and the facts which emerged at that time were not available at the state of processing under s. 143(1)(a) of the Act. The learned Departmental

Representative opposed the contention.

22. The facts are that the assessee debited a sum of Rs. 2,59,76,755 as a provision for doubtful debts according to s. 36(1)(vii) of the Act, the assessee was entitled to deduction of an amount of 'any bad debt or part thereof, which is written off as irrecoverable in the accounts of the assessee for the previous year'. It was not patently clear from the return and accompanying accounts whether the bad debts had been written off as irrecoverable or otherwise and it was only when an enquiry was made during assessment proceedings that further facts came to light. We, therefore, hold that prima facie adjustment in regard to this amount was not justified and direct that the disallowance made should be deleted. The assessee's ground of appeal succeeds to this extent.

23. The additional tax under s. 143(1A) will be recomputed in accordance with our directions above.

24. In the result, the assessee's appeal is partly allowed.