

Assistant Commissioner of Vs. Universal Cables Ltd.

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Court : Income Tax Appellate Tribunal ITAT Kolkata

Decided On : Mar-22-1993

Reported in : (1993)45ITD610(Kol.)

Judge : P Pradhan, R Easwar

Appellant : Assistant Commissioner of

Respondent : Universal Cables Ltd.

Judgement :

1. The appeals are by the department and the cross objections are by the assessee. Since they were heard together, they are consolidated and disposed of by this common order.

2. We are concerned with the assessment years 1980-81 and 1981-82. In the assessment made originally under Section 143(3) read with Section 144B, the ITO had allowed depreciation of Rs. 16,65,000 and Rs. 14,12,359 respectively in respect of certain non-factory buildings held by the assessee. Subsequently, the ITO invoked the provisions of Section 154 of the IT Act on the ground that the building which was purchased from Satna Cement Works for a consideration of Rs. 37 lakhs had not become the property of the assessee since no registered conveyance deed was executed in favour of the assessee. According to the ITO, under Section 32 of the IT Act, the assessee, in order to become entitled to depreciation in respect of the assets used in its business, should be the 'owner' of the assets. The ITO was of the view that though the assessee had paid the entire

purchase price and had also used the building for the purpose of the business and had also earned income therefrom which was charged to income-tax, was not eligible for depreciation in respect thereof in the absence of legal ownership. He also referred in this connection to the note made by the auditors in the printed accounts and balance-sheet which stated that the registration in respect of the buildings is yet to be executed. In coming to this conclusion the ITO relied on the decision of the Supreme Court in *Nawab Sir Mir Osman Ali Khan v. CWT* [1986] 162 ITR 888.

3. On appeal, the CIT(A) was of the view that the assessment orders passed under Section 143(3) read with Section 144B of the Act for the assessment years under appeal got merged with the appellate orders passed in appeal and, therefore, the ITO did not have jurisdiction to rectify the assessment orders. He further held and this was the main ground, that the issue whether the assessee is entitled to depreciation under Section 32 of the Act in respect of the buildings in the absence of a registered conveyance deed transferring the property in the building in its favour, was a debatable issue and was contrary to the view taken by the Andhra Pradesh High Court in the decision in *CIT v. Shahney Steel and Press Works (P.) Ltd.* [1987] 165 ITR 399 and in *CIT v. Sahney Steel and Press Works (P.) Ltd.* [1987] 168 ITR 811. Following the decision of the Supreme Court in *T.S. Balaram, ITO v. Volkart Bros.*

[971] 82 ITR 50, the CIT(A) held that a debatable question cannot be stated to be a mistake apparent from the record. He, therefore cancelled the orders passed by the ITO under Section 154 of the Act for both the years under appeal.

4. Mr. Lahiri, Ld. D.R. submitted that the CIT(A) was wrong in invoking the theory of merger since the issue of depreciation in respect of the buildings which is subject-matter of dispute was never taken in appeal, since the ITO had allowed the depreciation in the original assessments and the orders of the first Appellate authority touched different points and, therefore, there cannot be a merger of the appellate orders with the assessment order so as to hold that the ITO lacked jurisdiction to invoke the provisions of Section 154. As for the other ground on which the CIT(A) cancelled the orders passed by the ITO, he submitted that after

the decisions of the Supreme Court in CIT v. Bhurangya Coal Co. [1958] 34 ITR 802 and in Nawab Sir Mir Osman Ali Khan's case (supra) it was clear that a person cannot become the legal owner of an immovable property in the absence of registered conveyance deed executed in his favour. According to Mr. Lahiri, since there was no dispute in the present case that there was no registered conveyance deed in favour of the assessee in respect of the non-factory buildings purchased from Satna Cement Works, it followed as a natural consequence, that the assessee had been wrongly granted depreciation in respect of such buildings in the original assessments. Since the grant of depreciation was opposed to the law of the land laid down by the Supreme Court in the decisions cited above, the ITO had rightly clutched at jurisdiction under Section 154 to withdraw the depreciation on the ground that the allowance was a mistake apparent from the record.

5. On the other hand, Mr. Bajoria, Ld. counsel for the assessee supported the orders of the CIT(A). He pointed out that the question to be determined was whether it was the requirement of Section 32(1) of the Act that in order to be entitled to depreciation, the assessee should be the legal owner of the assets and such question was itself a debatable question. He pointed out that there was no direct decision of the Supreme Court on this point and the decisions cited by Mr. Lahiri were in connection with different statutory provisions. According to Mr. Bajoria, since the decisions relied upon by the ITO as well as Mr.

Lahiri were with reference to different provisions of law, the question whether the ratio or principle of such decisions would be applicable to the provisions of Section 32 of the IT Act would itself be a debatable question not amenable to the jurisdiction under Section 154 of the Act.

According to him, the word 'owner' must receive its meaning in accordance with the context in which it is used in the Income-tax Act and it is not as if the meaning ascribed to this word with reference to a particular provision in the statute can automatically be imported and applied to that expression appearing in a different context in the same or different statute. Mr. Bajoria further submitted that as against the fact that it would be a debatable question whether the decisions relied

on by the department were applicable to the interpretation of the word 'owner' appearing in Section 32 of the Act, there were at least three decisions of High Courts in favour of the view that for the purpose of Section 32 it was not necessary that the assessee should be a legal owner of the assets in respect of which depreciation is granted. He referred to the following three decisions: According to Mr. Bajoria these three decisions had dealt with Section 32 itself and held that it was not necessary for the purpose of that section that the assessee should be the legal owner of the assets and, therefore, the depreciation granted in the original assessments was rightly granted and such allowance was also in accordance with the preponderance of the judicial view of Section 32. As regards the applicability of the decision of the Supreme Court in Nawab Sir Mir Osman Ali Khan's case (supra) he submitted that there were observations in the judgment that the Supreme Court itself recognised that there may be cases where there can be legal ownership of immovable property without registration under the Registration Act and that the Supreme Court was not dealing with such cases. What Mr. Bajoria was in effect contending was that the decision of the Supreme Court cannot be read as authority for the proposition that in order to be eligible for depreciation under Section 32 of the Act it is necessary that the assessee should be the legal owner of the immovable property in respect of which depreciation is claimed. Mr. Bajoria also relied upon the decision of the Calcutta High Court in Jewanlal (1929) Ltd. v. ITO [1979] 118 ITR 946 for the purpose of showing that it was beyond the scope of Section 154 to enter into a debate and rectify a question on which two views were plausible.

6. On a consideration of the rival submissions, we are of the view that the orders of the CIT(A) cancelling the orders passed by the ITO under Section 154 of the Act have to be upheld. We may straightaway say that as far as the theory of merger is concerned, the view of the CIT(A) is not correct in view of the clear provisions of Sbu-section (1A) of Section 154 of the Act which was introduced with effect from 6-10-1964.

As far as rectification proceedings are concerned, an issue which has not been taken up in appeal by the assessee and which has, therefore, not been dealt with by the first appellate authority can be the subject-matter of rectification by the ITO.

That exactly is the purport of Sbu-section (1A). In view of this provision it is no longer open to apply the theory of merger in respect of orders passed under Section 154 of the Act. We are fortified in this view by the decision of the Madras High Court in CIT v. Indian Auto Stores [1981] 129 ITR 554 at page 558. Therefore, the CIT(A) was wrong in relying on the theory of merger for cancelling the orders passed by the ITO under Section 154 of the Act. However, as for the other ground on which the orders were cancelled, we have to accept the view taken by the CIT(A) and canvassed before us for acceptance by Mr. Bajoria. The question relates to the interpretation of the word 'owner' appearing in Section 32(1) of the Act. The question is whether it is the requirement of that section that in order to be entitled to depreciation in respect of an immovable property, the assessee should be the legal owner of the property. As pointed out by Mr. Bajoria, there is no authoritative pronouncement on this point by the highest court of the land. The decision of the Supreme Court in Bhurangua Coal Co.'s case (supra) was concerned with the question whether for the purpose of capital gains, the assessee can be stated to be liable for tax on capital gains in respect of immovable property only on the date on which the sale deed was executed. The Supreme Court ruled that the title to the immovable property passed to the transferee only when the sale deed was executed on 17-5-1946 and not when the agreement was concluded on 16-3-1946. The Supreme Court in this case was concerned with the provision of Section 12B of the Income-tax Act, 1922 and with the interpretation of the word 'transfer' appearing in that provision. This decision cannot be read as authority for the proposition that for the purpose of Section 32(1) of the Act the assessee should be the legal owner of the immovable property and will be entitled to the depreciation in respect thereof only if registered conveyance deed is executed in his favour. Similarly the decision of the Supreme Court in NawQb Sir Mir Osman Ali Khan's case (supra) is also not a direct authority on this point. As pointed out by Mr. Bajoria the Supreme Court itself in that decision recognised the fact that there can be cases where without any registered conveyance deed in favour of a person, he can be considered to be the owner of an immovable property. Observations to this effect appear at page 899 of the Report. It must be remembered that the Supreme Court was concerned with the provisions of Section 2(m) of the Wealth-tax Act. A person is liable to pay

wealth-tax in respect of assets 'belonging' to him. The Supreme Court was concerned with the interpretation to be placed on the word 'belonging' appearing in Section 2(m) of the Wealth-tax Act. The assessee in that case the Nizam of Hyderabad, had received full consideration for certain immovable properties from the purchasers but he had not executed any registered sale deeds in favour of the purchasers. The assessee contended that he was not liable to pay wealth-tax in respect of those properties since he had parted with possession of the properties, that the purchasers were in enjoyment of the properties and what remained with him was only the husk of title in the properties. The Supreme Court, relying on its earlier decision in CWT v. Bishwanath Chatterjee [1976] 103 ITR 536, ruled that so long as the assessee was the legal owner of a property, the property must be taken to 'belong' to him and the fact that he was not in possession of the property but had parted with the the same cannot stand in the way of treating the property as belonging to him. In so holding, the Supreme Court had considered the various decisions of different High Courts wherein it had been held that it was not always necessary in order that a person may be treated as the owner of an immovable property that a registered conveyance deed should be executed in his favour. The Supreme Court in fact accepted the position that such a view is plausible and that there can be circumstances where a person, even without a registered conveyance deed in his favour, can be treated as owner of an immovable property. Far from being in support of the rectification proceedings initiated in the present case the decision of the Supreme Court actually goes in favour of the assessee, as will be clear from the observations appearing at page 899 of the Report. This decision of the Supreme Court has been considered by the Andhra Pradesh High Court in Sahney Steel & Press Works (P.) Ltd.'s case 168 ITR 811 [supra]. In Shahney Steel & Press Works (P.) Ltd.'s case 165 ITR 399 (supra) the assessee was held by the High Court to be the owner of building for the purpose of Section 32 of the Income-tax Act even though no sale deed had been registered in its favour. After the decision of the Supreme Court, referred to above, the department contended before the Andhra Pradesh High Court that there was a case for reconsideration of the earlier decision in Shahney Steel & Press Works (P.) Ltd.'s case (supra). The Andhra Pradesh High Court expressly rejected this contention. At page 814, the Andhra Pradesh High Court pointed out that the

Supreme Court was not concerned with the controversy as to whether for the purpose of Section 32 of the Income-tax Act it was necessary that a registered conveyance deed conveying the immovable property to the assessee should have been executed in favour of the purchaser. The Andhra Pradesh High Court thereafter proceeded to follow its own earlier decision in Shahney Steel & Press Works (P.) Ltd.'s case (supra) and upheld the assessee's claim for depreciation.

7. The Calcutta High Court had occasion to consider the provisions of Section 32 of the Act in Steelcrete (P.) Ltd's case (supra). Applying the decision of the Supreme Court in R.B. Jodha Mal Kuthiala v. CIT [1971] 82 ITR 570, it was held that the expression 'owner' has different meanings in different contexts and that the owner need not always have the complete user of the rights of full ownership at all times. The observation at page 57 of the Report shows that the High Court also attached importance to the facts that the machinery in question in that case was exhibited by the assessee in its balance-sheet and that the corresponding liability in respect of the purchase price was shown in the liability side of the balance-sheet.

The High Court noticed that the assessee had treated the machinery as its own, as can be seen from the balance-sheet and that the department had not objected on the ground that the balance-sheet was not correct or that it did not contain the correct state of affairs. In the present case also the assessee, admittedly, has disclosed the building in its balance-sheet and the department has not raised any objection that the balance-sheet is not a correct balance-sheet. It will be clear from this decision of the jurisdictional High Court which was rendered in the context of Section 32 of the Act that the word 'owner' appearing in Section 32 can be so interpreted as to include a person who has paid the purchase price and who is in possession of the property and has also made appropriate entries in its accounts to show that he is the owner of it.

8. The above discussion would show that the question whether for the purpose of depreciation on an immovable property under Section 32 of the Act the assessee should be the legal owner of the property is a debatable question. We have seen that the decisions relied on by the department are not directly applicable or helpful

in solving the debate. On the contrary there is at least one direct decision, that of the Andhra Pradesh High Court in Sahney Steel & Press Works (P.) Ltd.'s case (supra), which directly supports the assessee's claim. The Madras High Court has taken the view that it is the requirement of Section 32 that the assessee should be the legal owner of the property and that a formal deed of conveyance duly registered should have been executed in his favour (see 163 ITR 61). It cannot, therefore, be stated that the matter is not debatable and is concluded one way or the other. In V.R.Sonti v. CIT [1979] 117 ITR 838, the Calcutta High Court has held that in ascertaining whether there is a divergence of judicial opinion on a particular issue, the ITO is not to confine himself to the decisions rendered by the jurisdictional High Court only and that he is to look into the various decisions of different High Courts and take them into account. In Jeewanlal (1929) Ltd.'s case (supra) at page 951 the Calcutta High Court while defining the scope of rectification proceedings under Section 154 of the Act has held following the decision of the Supreme Court in Volkart Bros.' case (supra) that the mistake proposed to be rectified must be patent or apparent or obvious and one on which there cannot conceivably be two points of view. A mistake which is to be established by a process of reasoning or on an examination of the question of law on which there may be two plausible views is not a mistake which can come within the purview of Section 154 of the Act. The application of this principle to the facts of the present case clearly rules out any rectification of the assessments on the ground that the depreciation in respect of the buildings was wrongly granted. We accept the contentions of Mr. Bajoria in support of the order of the CIT(A) and dismiss the deptl. appeals.

9. In the cross-objection, the only ground is that the CIT(A) ought to have upheld the claim of the assessee to depreciation even on merits.

Since we have upheld the order of the CIT(A) cancelling the orders under Section 154 on the ground that he had no jurisdiction to do so, we are not going into the question whether the assessee's claim is to be upheld on merits or not. The cross-objections are dismissed.

10. In the result, both the depatl. appeals and the cross-objections filed by the assessee are dismissed.

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