

Mohan MeakIn Ltd. Vs. Ito

Mohan MeakIn Ltd. Vs. Ito

SooperKanoon Citation : sooperkanoon.com/707557

Court : Delhi

Decided On : Dec-14-2003

Reported in : [2004]89ITD179(Delhi)

Appeal No. : Miscellaneous Application No. 142 (Delhi) of 2001, IT Appeal Nos. 322 and 732 (Delhi) of 1988 14 Dec

Appellant : Mohan MeakIn Ltd.

Respondent : ito

Advocate for Pet/Ap. : G.S. Aggarwal,;for the assessed; Amitabh Misra,;for the Revenu

Judgement :

ORDER

Per Sikander Khan, AM.

We have perused the miscellaneous application along with the Tribunal's order dated 31-1-2001 in the appeal and other relevant materials on the file. We have also heard the Ld. ARs of both the sides.

2. The learned authorised representative of the assessed submitted that he would press only the points raised in paras 3, 6, 7, 8, 9, 10 and 12 of the miscellaneous application. Other paras were not pressed.

3. In the above paras it is contended that there are mistakes apparent from record in the Tribunal's order relating to the provision of Rs. 4,75,458 for leave encashment of permanent employees debited in the Profit & Loss account (vide para 2 of the Tribunal's order), expenditure on advertisement, publicity, running and maintenance of motor car under section 37(3A) (vide para 14 of the Tribunal's order), excess collection of sales tax (vide paras 19 to 22 of the Tribunal's order), claim of excise duty (vide paras 23 to 26 of the Tribunal's order) and expenditure on spare parts (vide para 49 of the Tribunal's order).

4. After considering the rival submissions we are of the view that there is mistake apparent from record insofar as the Tribunal's finding with regard to provision of Rs. 4,75,458 for leave encashment of permanent employees was concerned. The claim was allowable as per the Supreme Court's decision in the case of *Bharat Earth Movers v. CIT* : [2000]245ITR428(SC) . The decision of the Supreme Court was directly on the issue and as such it was directly applicable to the claim in question. In view of the Supreme Court decision it was not correct to disallow the claim on the basis of the ITAT's order in earlier years. Accordingly, we modify the Tribunal's order dated 31-1-2001 in this regard and direct the assessing officer to allow the provision of Rs. 4,75,458.

5. As regards the other points raised in the miscellaneous application and pressed before us during the hearing as mentioned above, we hold that there was no mistake apparent from record and there is no case for action under section 254(2) of the Act. The assessed by raising these points in the miscellaneous application has in fact tried to obtain review of the order which is not permissible under section 254(2) of the Act. The contentions made in the misc. application are argumentative. The decision relied upon are not applicable because the facts are different.

6. In the result, the miscellaneous application is partly allowed.

Per Shri KC Singhal Judicial Member

7. After going through the proposed order under section 254(2) of my learned Brother and having discussion with him, I have not been able to persuade myself

to agree with that order on certain points for the reasons given hereafter.

8. One of the mistakes pointed out by Mr. Aggarwal, learned counsel for assessed relates to the finding/directions of the Tribunal in para 22 of the impugned order, which is reproduced as under :

'After hearing both the sides and considering the materials on the file we are of the view that in the interest of justice and fair play the matter should be set aside and restored to the assessing officer who should decide the matter afresh after giving reasonable opportunity to the assessed and after due verification of the accounting method followed by the assessed with regard to the aforesaid items.'

The counsel for assessed explains that assessed had claimed deduction of Rs. 30,56,565 on account of Sales-tax liabilities outstanding at the end of the year. The claim of assessed was disallowed by assessing officer and Commissioner under section 43B on the ground that the said amount was not paid during the previous year. According to him, it was argued before the Tribunal that such claim was allowable if such liability was discharged on or before the due date for filing of the income-tax return prescribed under section 139(1) in view of the Supreme Court judgment in the case of Allied Motors (P) Ltd. v. CIT : [1997]224ITR677(SC) wherein it has been held that proviso to section 43B invoked by Finance Act, 1987 was retrospective and would apply to earlier years also. Proceeding further, it was stated that by inadvertence, the Tribunal failed to consider the said judgment and issued the directions mentioned above. According to him, the directions regarding method of accounting are contrary to the provisions of section 43B as well as the judgment of Supreme Court (supra) since deduction has to be allowed irrespective of the method of accounting if such payments are made on or before due date of filing income-tax returns. Hence, according to him, an apparent mistake has been committed by the Tribunal while issuing the directions regarding verification of method of accounting. In my concerned opinion, there is substance in the submissions of learned counsel for the assessed. Initially, there was a dispute as to whether outstanding liabilities of sales-tax could be allowed as deduction in view of section 43B. In order to remove the hardship causing to the assessed, the legislature inserted the proviso to section 43B by Finance Act, 1987 which allowed

deduction if such liability was discharged on or before the due date of filing income-tax return. This proviso was held to be retrospective by the Hon'ble Supreme Court in the case of Allied Motors (A) Ltd. (supra). In view of this finding and declaration of law, the claim of assessed has to be allowed if sales-tax liability outstanding at the end of the year is discharged by assessed before the due date of filing of income-tax return irrespective of the method of accounting adopted by the assessed. This judgment of Supreme Court was cited before the Tribunal as is apparent from the noting made by the then members on the grounds of appeal filed by assessed. Perhaps, while dictating the order, this judgment slipped from their minds. Hence, in my considered opinion, an apparent mistake within the ambit of section 254(2) was committed by the Tribunal by directing the assessing officer to decide afresh keeping in mind the method of accounting adopted by assessed. thereforee, I would delete such directions and substitute para 22 of the impugned order of the Tribunal as under :

'22. After hearing both the sides and considering the materials on the file, we are of the view that in the interest of justice and fair play the matter should be set aside and restored to the assessing officer, who shall decide the matter afresh in accordance with the provisions of the proviso to section 43B.'

9. The other mistake pointed out by the assessed's counsel relates to the finding recorded in Para 26 of the impugned order of the Tribunal, which is reproduced as under :

'We have heard both the sides and considered the materials on the file. We are of the view that on the facts and in the circumstances of the case and for the reasons given in the impugned appellate, order, the learned Commissioner (Appeals) was justified in upholding the assessing officer's action. The assessed was not justified in changing its method of valuation of closing stock. The assessing officer was justified in making the impugned addition in line with the method of valuation of closing stock followed by the assessed in the past. We, thereforee, decline to interfere in the order of the learned Commissioner (Appeals) and dismiss the ground.'

The counsel for assessed explains that prior to assessment year 1984-85, the assessed used to charge the Profit and Loss account with the amount of excise duty paid in respect of goods cleared from bonded warehouse and include the relatable component of excise duty while valuing closing stock of such finished goods and charged the Profit and Loss account with the amount of excise duty which were sold. On the other hand excise duty paid in respect of goods cleared from the bonded warehouse but not sold, was directly taken to balance sheet. The amount which was not so included in the closing stock amounted to Rs. 79,99,706. This amount was claimed as deduction under section 43B as it could be allowed only in this year on account of actual payment. Such claim was disallowed by lower authorities as there was change in method of valuation of stock which was being adopted consistently in the past. On further appeal, it was submitted before the Tribunal that the issue was covered by the decision of Special Bench in the case of ITO v. Food Specialities Ltd. wherein such method was held to be in accordance with the provisions of section 43B and deduction under section 43B was accordingly allowable. The counsel further states that he wanted to explain the same with regard to the facts on record but the Bench observed that there was no need to argue further. However, the claim of assessed has been disallowed by upholding the order of the Commissioner (Appeals) vide Para 26 which has already been quoted. It has been pleaded before us that Tribunal, by inadvertence, failed to follow the said decision and, therefore the Tribunal committed a mistake apparent from the record.

10. In my considered view, there is substance in the pleadings of learned counsel for assessed. The perusal of appeal record shows that both the members of the Tribunal, who heard the assessed's appeal had noted citation of Special Bench decision against Ground No. 6. One of the members has also noted as 'covered'. So the fact which emerges from the record is that said decision of Special Bench was cited before and noted by the Bench. I have gone through the paper book filed by the assessed and facts recorded in the case before Special Bench. It is found that in both the cases, assessment year is same and facts regarding this issue are identical. In the present case, the auditors had a note No. 11 to their report which is identical with the note given by the auditors in the case before Special Bench. The Special Bench has quoted the same in para 3. For the benefit

of this order, both the notes are quoted below :

Note as per Para 3 of order of Special Bench in the case of Food Specialities Ltd.

Note No. 11 of auditors report in the case of assessed.

In past years, it has been the practice to charge the total expenses on Excise Duty to the Profit & Loss Account and include the amount relating to unsold Stocks in the closing stock valuation. The current year's liabilities for Excise Duty has been charged as an expense only in respect of goods cleared & sold and the balance amount of Rs. 81.61 lakhs relating to goods cleared from bonded warehouse & remaining unsold has been included under 'Loan and Advances' in Schedule H. Had the previous year's practice been followed charge to Excise Duty & the value of closing stock would have been higher by Rs. 81.61 lakhs. However, this change has no effect upon the profit before taxation for the year. In computing the provision for income-tax. The above referred sum of Rs. 81.61 lakhs has been considered as an allowable deduction under the provisions of section 43B of the Income Tax Act, 1961.

In past years, it has been the practice to charge the total expenses on excise duty to the Profit & Loss a/c and include the amount relating to unsold stock cleared from the bonded warehouses in the closing stock valuation. The current year's liabilities for excise duty have been charged as an expense only in respect of goods cleared and sold and the balance amount of Rs, 79,99,706 relating to goods cleared from bonded warehouse during the year and remaining unsold have been included under 'Loan & Advances' in Schedule No. 3. Had the previous year's practice been followed, the charge to excise duty and the value of closing stock would have been higher by Rs. 79,99,706. However this change has no effect upon the Profit before taxation for the year. In computing the provision for income-tax, the above referred sum of Rs. 79,99,706 has been considered as an allowable deduction under the provisions of section 43B of the Income Tax Act, 1961.

The perusal of the above notes shows that facts of both the cases were identical except the amount of excise duty not included in the closing stock. It appears that

while dictating the order in the present case, the learned member forgot to consider the said decision of Special Bench. According to judicial discipline, the cases of Special Bench is binding on all Benches unless contrary view is expressed by the jurisdictional High Court or Supreme Court. Till date, there is no contrary decision of jurisdictional High Court. thereforee, in my considered opinion, an apparent mistake within the ambit of section 254(2) has been committed by the Tribunal since the finding of the Tribunal is contrary to finding of Special Bench. Accordingly, the same has to be rectified. thereforee, following the Special Bench decision in the case of Food Specialities Ltd. (supra), I allow the claim of assessed and vacate the finding of Tribunal on this issue recorded in para 26.

11. Another mistake pointed out by learned counsel for the assessed is that Ground No. 6(b) relating to disallowance of Rs. 17,17,965 has not been adjudicated by the Tribunal though the same has been noted by the Tribunal in para 23. I find substance in the submission of assessed and hold that mistake was committed by not adjudicating such issue. Accordingly, the order of Tribunal on this issue is recalled for adjudication.

12. Except as stated above, I agree with the rest of the order proposed by my learned Brother.

Reference Under Section 255(4) of the Income Tax Act, 1961

Since there is a difference of opinion between the Members, the following questions are referred to the Hon'ble President of the Tribunal under section 255(4) of the Income Tax Act, 1961 :

'1. Whether on facts and in law, the Income Tax Appellate Tribunal committed an apparent mistake by including the following in the directions given by the Tribunal in para 22 of its order dated 31-1-2001 while deposing the issue under section 43B :

'. . . and after due verification of the accounting method followed by the assessed with regard to the aforesaid items.'

2. Whether on facts and in law, the Tribunal committed an apparent mistake in upholding the addition of Rs. 79,99,706 in para 26 of the impugned order by ignoring the Special Bench decision in the case of Food Specialities, 49 ITD 21, though inadvertently, which was cited and relied upon by the assessed's counsel ?

3. Whether on facts and in law, the Tribunal committed an apparent mistake in not adjudicating upon the issue regarding the disallowance of Rs. 17,17,965 raised by the assessed in Ground No. 6(b)

Third Member Order

Per Shri R.M Mehta, Vice President

The following points of difference between the learned Members constituting the Division Bench were referred to me as Third Member by the Hon'ble President acting under section 255(4) of the Income Tax Act, 1961 :

'1. Whether on facts and in law, the Income Tax Appellate Tribunal committed an apparent mistake by including the following in the directions given by the Tribunal in para 22 of the order dated 31-1-2001 while disposing the issue under section 43B :

and after due verification of the accounting method followed by the assessed with regard to the aforesaid items.'

2. Whether on facts and in law, the Tribunal committed an apparent mistake in upholding the addition of Rs. 79,99,706 in para 26 of the impugned order by ignoring the Special Bench decision in the case of Food Specialities, 49 ITD 21, though inadvertently, which was cited and relied upon by the assessed's counsel ?

3. Whether on facts and in law, the Tribunal committed an apparent mistake in not adjudicating upon the issues regarding the disallowance of Rs. 17,17,965 raised by the assessed in Ground No. 6(b) ?'

2. Before the actual points of difference are considered, it may be mentioned that pursuant to the appeal being decided by the Division Bench, the assessed filed an M.A. running into 38 pages but at the time of hearing the counsel sought to press

only the points raised in some of the paras (see para 2 of the order of the learned AM on the M.A) withdrawing the rest. The learned Accountant Member vide para 3 of his order on the M.A. referred to a number of items which included the claim for deduction on account of provision for leave encashment amounting to Rs. 4,75,458 but in conclusion he directed the assessing officer to allow deduction for the said provision and thereafter in para 5, his observations were to the effect that there was no other mistakes apparent from the record within the meaning of section 254(2) and the assessed in fact had tried to obtain a review of the order and which was not permissible under section 254(2) of the Act.

3. The learned Judicial Member on the other hand passed a separate order considering some of the issues on which the learned AM had not given any decision. The subsequent view expressed by the learned JM was in the direction of rectifying certain mistake which according to him were those apparent from the record and therefore rectifiable under section 254(2). The first of these was the observation in para 22 of the order of the Division Bench whereby the matter pertaining to the applicability of section 43B had been restored back to the file of the assessing officer for deciding the same on merits but with the observation that the accounting method followed by the assessed be verified. As already observed by me the learned AM in deciding the M.A. did not make any observation on the aforesaid issue by the learned JM proceeded to discuss the relevant provisions of law and applying thereby the judgment of the Honble Supreme Court in the case of Allied Motors (P) Ltd. (supra) substituted the earlier directions of the Division Bench with the following directions :

'After hearing both the sides and considering the materials on the file, we are of the view that in the interest of justice and fair play the matter should be set aside and restored to the assessing officer, who shall decide the matter afresh in accordance with the provisions of the proviso to section 43B.'

4. The learned counsel for the appellant contended before me that vis-a-vis the relevant provisions of law, there was no necessity to examine the method of accounting adopted by the assessed and therefore, the return of the matter back to the file of the assessing officer to be decided afresh without any such

observations was the correct view to be taken as had been done by the learned Judicial Member. This according to the learned counsel was also in conformity with the judgment of the Hon'ble Supreme Court in Allied Motors (P) Ltd.'s case (supra). The learned Departmental Representative on the other hand supported the order passed by the learned AM.

5. After considering the rival submissions, I am of the view that the decision of the learned J. M. to substitute the earlier observations by a different set of observations was the correct view and approach to be taken and inasmuch as the earlier directions of the Division Bench were not in conformity with the legal position there was a mistake apparent from the record and which was rectifiable under section 254(2). I, therefore, agree with the view expressed by the learned JM and the first point of reference is therefore treated as disposed of.

6. As regards the second point of difference, the position is more or less identical since the learned AM did not say anything in detail vis-a-vis para 5 of his order whereas the learned JM took into account the facts of the case viz, the non-consideration by the Division Bench of the Special Bench decision in the case of Food Specialities Ltd. (supra). In para 10 of his order, the learned JM took due note of the fact that both the Members constituting the Division bench had noted the citation of the Special Bench decision and in fact one of them had also noted the term, 'covered'. The learned JM thereafter proceeded to consider the Special Bench decision and noted at pages 7 and 8 of his order that the facts of the assessed's case were absolutely identical to those considered by the Special Bench supra.

7. Further, according to the JM the non-consideration of a Special Bench decision constituted a mistake apparent from the record and he, therefore, proceeded to allow the claim of the assessed vacating in the process the finding of the Division Bench recorded in para 26 of its order.

8. The learned counsel for the assessed vehemently contended before me that the non-consideration of a judgment whether it be of the Special Bench of the Tribunal or the Division Bench of the Tribunal and the judgments of the Honble Supreme Court and High Court cited during the course of the hearing and not considered by

the Bench constituted a mistake apparent from the record and further, according to the learned counsel, since the learned JM in deciding the M.A. had examined the Special Bench decision at length and directed relief thereafter finding the assessed's case also to be in pari materia on facts, his decision was required to be upheld by the Third Member in contradistinction to the view expressed by the learned AM and such a view not containing any discussion or reasons or the case law cited. The learned Departmental Representative on the other hand supported the order passed by the learned AM.

9. After considering the rival submissions, I am of the view of the order passed by the learned JM is the correct one both on facts and in law. As rightly argued by the learned counsel the non-consideration of a judgment cited before the Tribunal constitutes a mistake apparent from the record within the meaning of section 254(2) and on being pointed out by any of the parties, the Tribunal is obliged to take into account the judgment so cited irrespective of the results that would follow. In the present case, the learned JM has very aptly compared the facts of the assessed's case with those prevailing in the case of Food Specialities Ltd. (supra) and thereafter directed requisite relief.

10. In conclusion, I agree with the view expressed by the learned JM vis-a-vis point No. 2 of the reference under section 255(4).

11. As regards the third point of difference, the matter need not detain me much since the non disposal of a ground by the Tribunal is definitely a mistake apparent from the record and all that the Tribunal is required to do is to direct the appeal to be fixed for hearing on the limited aspect of disposing of the said ground on merits. The learned AM in his order on the M.A. has not said anything on the said ground remaining to be disposed of whereas the learned JM vide para 11 of his order has directed the matter to be recalled for the limited purpose of adjudicating upon the said ground. I have no hesitation in straight away agreeing with the view expressed by the learned JM since his approach is the correct one both on facts and in law.

12. Before 1 part with this reference, I would like to mention that during the course of hearing, the learned counsel for the assessed placed reliance on two judgments

of the Hon'ble Delhi High Court and these being CIT v. G. Sagar Suri & Sons (1990) 185 ITR 484 and Seth Madan Lal Modi v. CIT : [2003]261ITR491(Mad) whereas the learned Departmental Representative appearing on behalf of the revenue placed reliance on two other judgments of the Hon'ble Delhi High Court and these being CWT v. Smt. Illa Dalmia : [1987]168ITR306(Delhi) and CIT v. K. L. Bhatia : [1990]182ITR361(Delhi) . These judgments cited by the parties have been taken into account by me in disposing of the present reference and I would only like to emphasize that the order of the learned JM on the M.A. does not tantamount to a review of the order passed by the Division Bench on the issues in question and his view is in conformity with the legal position as also the judgments of the Hon'ble Delhi High Court, which is the jurisdictional High Court in the present case.

13. The Registry is directed to place the matter before the Division Bench for passing an order in conformity with the majority view.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com