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Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : Feb-11-2005

Reported in : (2005)93ITD514(Delhi)

Judge : K Singhal, G Pannu

Appellant : Shri Pradeep Singh

Respondent : Dcit

Judgement :

1. This is a direct appeal to the Tribunal against the order of the AO Under Section 154 dated 09.11.2000 rectifying the original order Under Section 158BC dated 28.11.1997.

2. At the outset of the hearing, the Id. Sr. DR Shri Sanjay Kumar has strongly objected to the maintainability of the appeal on the ground that no direct appeal to the Tribunal has been provided by the Statute Under Section 253(1) against the order of the AO Under Section 154 where the search has taken place prior to the first day of January, 1997. He drew our attention to Clause (b) of Sub-section (1) of Section 253, which provides a direct appeal to the Tribunal against the only order of the A.O. passed under Clause (c) of Section 158BC and no appeal has been provided against any other order of the A.O. It has been contended by him that right of appeal, being a statutory right, cannot be availed by any person unless such right has been conferred upon him by the Statute. Accordingly, it was pleaded that in the absence of any provision Under Section 253(1), no appeal lies

directly to the Tribunal against an order of the A.O. Under Section 154 rectifying the original order Under Section 158BC.3. On the other hand, the Id. counsel for the assessee has submitted that once an order Under Section 154 is passed, the original order stands rectified and what remains in existence is not the order of rectification but the rectified order. Accordingly, it is pleaded that order Under Section 154 should be treated as an order Under Section 158BC. It was also submitted by him that when Chapter XIV-B was introduced by the Legislature by way of special provisions to compute the undisclosed income, only 60% tax was payable by the assessee in respect of undisclosed income and there was no provision for interest and penalty. Considering this scheme, the Legislature provided only one appeal against an order passed by the A.O. Under Section 158BC since no other order was required to be passed. He also pleaded that one should not be too technical in interpreting the appeal provisions. In view of the same, it was pleaded by him that appeal be held to be maintainable.

4. Rival submissions of the parties have been considered carefully. It is the settled legal position that there is no inherent right of appeal to any assessee and the right of appeal is only a statutory one.

Therefore, unless the statute provides specifically for filing of an appeal against a particular order, no right of appeal can be said to be conferred upon an assessee. No doubt, the right of appeal if conferred on the assessee has to be construed liberally. Reference can be made to the Supreme Court judgment in the case of CIT v. Ashoka Engineering Co.

194 ITR 645.

5. Let us now look into the scheme of the Act. Section 246 and Section 246A confer right of appeal on the assessee against various orders of the A.O. to the DCIT(Appeal)/CIT(Appeal) as the case may be. The orders against which appeal can be filed have been enumerated the Legislature in these sections which, inter alia, include order of assessment Under Section 143 and rectification order Under Section 154. Appeal to the Appellate Tribunal has been provided Under Section 253. Sub-section 1(a) provides appeal against the orders of DCIT(A) or the CIT(A) as the case may be mentioned therein which inter alia, include their orders Under

Section 154. Sub-section (1)(c) provides appeal against the orders of CIT/Chief CIT/Director General of I.T./Director of I.T. as the case may be mentioned therein which, inter alia, include order Under Section 154 rectifying the order Under Section 263. Sub-section (1)(h) provides direct appeal against the order of A.O. passed Under Section 158 BC where search took place before 01.01.1997. The perusal of the scheme shows that the Act does not confer unconditional general right of appeal against any order of the A.O./CIT(A)/DCIT(A). Specific orders have been mentioned by the statute in these sections against which appeal lies to the Appellate Authority. Though rectification proceedings Under Section 154 are part of the assessment proceedings, yet the Legislature has provided separate appeals in respect of order of assessment Under Section 143(3), order of re-assessment Under Section 147 and order Under Section 154 passed by the A.O. Similarly, separate appeals have been provided in respect of orders of CIT(A)/DCIT(A) passed Under Section 250 as well as Section 154 rectifying such appellate order. Similarly separate appeals have been provided against an order of Commissioner Under Section 263 and Section 154 rectifying order Under Section 263. However, while providing an appeal directly to the Tribunal against an order of A.O. Under Section 158BC, the Legislature has not provided a separate appeal against an order of A.O. Under Section 154 rectifying his order Under Section 158BC. Accordingly, in our opinion, there is deliberate omission by the Legislature in not providing an appeal directly to the Tribunal against the order of A.O. under Section 154 rectifying the order Under Section 158BC.6. It is the contention of the Id. Counsel for the assessee that once an order of rectification is passed, the assessment itself is modified and what remains thereafter is not the order of rectification but the assessment as rectified. Though no reference has been made to any decision by the Id. Counsel for the assessee yet this proposition finds support from the judgment of the Madras High Court in the case of Vedantham Raghaviah 49 ITR 314. According to this proposition, the order of rectification Under Section 154 has no legs to stand. If this is the legal position then question of filing any appeal against the order Under Section 154 would not arise.

7. The above contention of the assessee was raised in the identical situation before the Hon'ble Gujarat High Court in the case of Mandal Ginning & Pressing Co. Ltd. 90 ITR 332 wherein the question before the Court was: "whether an

appeal lies against an order of rectification made by the ITO Under Section 35(1) of the Indian Income Tax Act, 1922?".

8. Section 35(1) of 1922 Act is analogous to Section 154 of 1961 Act.

Under the 1922 Act, no appeal was provided Under Section 30 against the order of rectification Under Section 35(1). The contentions on behalf of assessee before the High Court was two folds as is apparent from page 335 of the report and the same is being reproduced for the benefit of this order: - The assessee relied upon two clauses of Sub-section (1) of Section 30 in support of his contention that, when an assessment under Section 23 is rectified by an order of rectification made under Section 35, Sub-section (1), the assessee is entitled to appeal against the order of rectification to the Appellate Assistant Commissioner. The first clause was "any assessee objecting to the amount of income assessed under Section 23 or the amount of tax determined under Section 23" and the second clause was "any assessee denying his liability to be assessed under this Act". The main argument of the assessee was based on the former clause and reliance was placed on the latter clause only in the alternative".

9. The Hon'ble Gujarat High Court after considering various judgments rejected the said contentions of the assessee and held that no appeal lies against the order of A.O. Under Section 35(1). Their Lordships observed at page 335-336 as under: - "It is clear, on a plain reading of Section 30, Sub-section (1), that a right of appeal is given by that sub-section against various orders and each of the orders against which a right of appeal is conferred is described by reference to the source of the power under which it is made. The clause on which reliance has been placed on behalf of the assessee is in the same strain. It confers a right of appeal against the amount of income assessed or the amount of tax determined under Section 23. It is obvious that the legislature did not intend to confer a right of appeal against the amount of income assessed or the amount of tax determined without reference to the section under which the assessment or determination may have been made. If the legislature wanted to give a right of appeal against every assessment of income or determination of tax, there is no reason why the legislature should have added the words "under Section 23" and specifically enacted the source of the

power under which the assessment of income or the determination of tax should have taken place in order that the assessee should be entitled to appeal against it. The words "under Section 23" must, therefore, be given due effect in interpreting this clause. These words in the context in which they occur can mean by virtue of or "in exercise of the power conferred under Section 23." If assessment of income or determination of tax has taken place under any other provision of the Act, it would not attract the right of appeal, unless of course it falls within any other clause of Section 30, Sub-section (1).

Having said so much on the interpretation of the words used in the clause, we may now proceed to consider what is the nature of a proceeding for rectification and what happens when an order of rectification is made rectifying an assessment under Section 23." 10. The perusal of the above judgment clearly shows that unless separate appeal is provided against the order of rectification, no appeal would lie against such order though such order rectifies the order of assessment.

11. This judgment clearly covers the issue before us. Similar view has been taken by the Hon'ble Madras High Court in the case of CIT, Madras v. Vellingiri Gounder And Brothers 24 ITR 166 and in the case of Adaikkappa Chettiar v. CIT 78 ITR 285 and also by Calcutta High Court in the case of Raj Nagar Tea Company Ltd. 87 ITR 669. This view is also fortified by the decision of Hon'ble Delhi High Court in the case of Mahabir Prasad & Sons 125 ITR 165 wherein it has been held that charging of interest is an integral process of assessment except where the ITO chooses to determine the liability for interest by an independent order and therefore, appeal would lie against the charging of interest if such appeal has been filed against the assessment order Under Section 143. However, it has been further held that no appeal would lie against separate order levying interest and nothing more.

This legal finding is based on the principle that right of appeal is a creature of statute and there can be no right of appeal unless it is conferred by the statute. Since no right of appeal was conferred on the assessee against an independent order of the A.O. charging interest, it was held that no appeal lies against such order.

12. In view of the above discussion, we are of the view that appeal is not maintainable against the order of the A.O. Under Section 154 rectifying the original order Under Section 158BC directly to the Tribunal since no right of appeal has been conferred upon the assessee against such order Under Section 253(1) of the Act. The appeal would lie only before the CIT(A) Under Section 246A. The assessee may file an appeal before the CIT(A) with a request for condonation of delay if so advised.

13. In the result, the appeal of the assessee is dismissed as non-maintainable.

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