

Deepak Chhabra Vs. Ito

Deepak Chhabra Vs. Ito

SooperKanoon Citation : sooperkanoon.com/75477

Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : Feb-28-2007

Judge : R Easwar, Vice, K Bansal

Appellant : Deepak Chhabra

Respondent : ito

Judgement :

1. This misc. application has been filed by the assessee under Section 254(2) of the Income Tax Act. It is submitted that there are mistakes in the order of the Tribunal which need rectification.

2. The appeal before the Tribunal was that of the Income-tax department. The relevant grounds taken by the department were against the order of the CIT (Appeals) deleting (a) the addition of Rs. 1,00,761 made on account of under-stated turnover; (b) the addition of Rs. 2,90,180 made on account of under-stated gross profit rate; and (c) reducing the addition of Rs. 13,81,852 made on account of discrepancy on account of closing stock to Rs. 5 lakhs. So far as the first two additions were concerned, the Tribunal deleted the same vide paragraph 10 of its order. As regards the addition of Rs. 13,81,852, the Tribunal restored the addition, reversing the order of the CIT (Appeals) reducing the addition to Rs. 5 lakhs. The present misc. application is directed against the order of the Tribunal restoring the addition of Rs. 13,81,342.

3. We have heard both the sides at length and we have also perused the record. The main contentions of the learned Counsel for the assessee are that the Tribunal overlooked certain vital factual aspects of the case and committed factual mistakes while dealing with the addition of Rs. 13,81,852 and further that certain cases cited on behalf of the assessee during the hearing of the appeal did not find a place in the order of the Tribunal. In particular, it was submitted that the assessee's contention that the rate was not mentioned in the stock inventory and despite repeated queries, the income-tax authorities did not furnish the basis of the rate adopted by them for making the stock addition, was not considered by the Tribunal. Our attention in this connection was drawn to page 3, 8th line from the bottom, where it was stated by the Tribunal that the stock inventory prepared by the survey authorities had mentioned also the rate. It is stated that this is a serious mistake committed by the Bench. Our attention is also drawn to page 7 of the Tribunal's order, 4th line from the bottom, where the Tribunal has stated that they did not see force in the argument of the learned Counsel for the assessee that the inventories gave particulars of quantity and rate but not of value. It was submitted in the course of the arguments that the assessee's case throughout was that the department had not mentioned the rate at which the stock was valued and despite repeated requests, the assessee was not given the basis of valuation of the stock and further that the items in stock were of such nature that they cannot be valued by the laymen and required technical expertise. It is submitted in support of the present application that all these have not been duly considered by the Tribunal and thus the order has given rise to serious factual errors which have a great bearing on the ultimate decision and, therefore, they have to be rectified.

4. The learned Counsel for the assessee further contended that during the arguments at the time of the hearing of the appeal, he had cited the following judgments /orders which have not found a place in the Tribunal's order *Bansal Strips Ltd. v. Assistant Commissioner* (2006) 99 ITD 177 (Delhi).

5. In support of the contention that factual errors committed by the Tribunal in its order can be rectified under Section 254(2), the learned Counsel for the assessee cited the following judgments: (vi) *Champa Lal Chopra v. State of Rajasthan* (2002) 257 ITR 741 (Raj.); 6. In support of the contention that not referring to the

decisions cited at the time of the hearing of the appeal amounts to mistake apparent from record, the learned Counsel for the assessee cited the following judgments: *Himachal Pradesh Financial Corpn. v. CIT* (ii) *Assistant Commissioner v. Saurashtra Kutch Stock Exchange Ltd.* .

7. On behalf of the department, the miscellaneous application was vehemently opposed and it was urged that having regard to the tenor of the observations made by the Tribunal at page 8 of its order there is no scope for any kind of rectification, let alone a rectification in the manner desired by the assessee. Strong reliance was placed on these observations to contend that they take care of the contentions of the assessee. It was submitted that the order of the Tribunal has to be read as a whole and if its found on such reading that the claims and contentions of the assessee have been dealt with in substance then there would be no scope to contend that some points were left out of consideration and therefore the order of the Tribunal requires rectification. It was pointed out that the Tribunal had observed that despite opportunities the assessee did not submit the rates of the inventorised items to the assessing officer and it was in such circumstances that the Tribunal was left with no option but to confirm the addition. It was pointed out that the points taken by the assessee in the miscellaneous application can at best give rise to some argument or show that the assessee has an arguable case, but on that ground the Tribunal's order cannot be rectified. It was further pointed out that the case was essentially one of valuation of the inventorised items for the purpose of making an addition, where there was no dispute about the includibility of the items in the inventory or about the justification for making the addition. Our attention was also drawn to the observations of the Tribunal to the effect that there was no documentary evidence adduced by the assessee in support of its plea that the value placed by the assessing officer on the inventory was arbitrary or excessive. It was thus strenuously contended that the application for rectification filed by the assessee was wholly beyond the scope of Section 254(2) of the Act.

8. On a careful consideration of the rival contentions, we are unable to accept the assessee's application for rectification. The scope of Section 254(2) is limited to rectifying mistakes apparent from record.

it does not extend to reviewing the decision of the Tribunal, nor can mistakes which can only be established by a long-drawn process of reasoning or argument be rectified under the provision. Points on which there can conceivably be more than one opinion and errors of judgment, if any, cannot be rectified under Section 254(2). In the present case, the arguments of the assessee before the Tribunal have been recorded in paragraph 8 of its order. The following arguments have been noted: (a) that the income-tax authorities adopted an ad hoc value for the purpose of preparing the inventory; (b) that it was not based on any purchase vouchers or other reliable basis; (c) that they did not take into consideration that the assessee dealt with both old and new parts; (a) that the income-tax authorities had not worked out the value based on the description of the goods, quantity and rate in the stock inventory supplied to the assessee; (e) that different machinery parts had different specifications and the price varied according to such specifications, as shown by the price list of Cummins India Sales and Service (India) Ltd. as on 1-6-2003; (h) that there were disputes between the assessee and the department and a criminal complaint had also been filed against the survey party which had been admitted by the Metropolitan Magistrate (the suggestion being that there could have been a motive in making the addition). After noticing these contentions, the Tribunal proceeded to dispose them of in paragraph 9 of its order. The findings of the Tribunal are : (a) that the addition was based on specific material gathered during the survey in the course of which stock inventory was prepared; (b) there is no force in the argument that the inventory gave only the particulars of quantity and rate but not the value because once the quantity and rate are given, the value is only a matter of calculation; (c) the inventory of stock was countersigned by the assessee and, therefore, it may be assumed that it was furnished to the assessee on the date of survey; (a) the department has acted on specific material but the assessee has not relied upon an iota of material to dispute the inference drawn, except criticizing the procedure; (e) the assessing officer is right in saying that it was incumbent upon the assessee to furnish his own valuation or to establish that the valuation of the assessing officer was not correct; (h) the assessee himself admitted during the survey that proper trading records were not admitted and the return was filed on ad hoc basis; (g) the assessee has not relied on any documentary evidence to dispute the calculations of the

department, which was his duty as he was in full knowledge and control of the facts and the evidence and material; (h) the assessee cannot take advantage of his own shortcomings; (z) there is no finding of the Metropolitan Magistrate against the survey proceedings; (1) there is no evidence of mix up of the stock of the assessee with that of the assessee's wife; and (k) though the assessee was dealing in old and new spare parts, no material was brought on record to show that the rate has not been correctly taken in the inventory. On the basis of these findings, the Tribunal reversed the decision of the CIT (Appeals) and restored the addition of Rs. 13,81,342.

9. A perusal of paragraphs 8 and 9 of the order of the Tribunal shows that all the major contentions of the assessee have been substantially dealt with by the Tribunal. The refrain in the operative paragraph of the Tribunal's order is that there was no evidence or material adduced by the assessee to challenge the value placed by the survey authorities on the stock. It may be that a few contentions or points raised on behalf of the assessee did not get mentioned in paragraph 8 of the Tribunal's order but it must be remembered that the burden of the Tribunal's decision was the total lack of evidence or material from the assessee's side to controvert the value placed in the stock inventory by the survey authorities. In the light of this, the contentions of the assessee to the effect that despite repeated demands, the assessing officer did not give the basis of the stock valuation or that the items being technical in nature cannot be valued properly by layman or that there was inordinate delay (nearly six years) in giving the basis of the valuation, have all not been considered by the Tribunal as of any consequence and the mere omission to say so in its order does not mean that the order suffers from mistakes which should be rectified. It may also be true that the assessee cited three judgments in support of its contention which did not find a place in the Tribunal's order but again that is because the Tribunal felt, in the light of the basic fact that there was no evidence or material brought on record by the assessee to question the valuation made by the survey authorities, that when the assessee's claim had no factual or evidentiary basis and was not supported by any material there was really no need to examine the case-law relied on by the assessee. The mere non-mention of the decisions does not give rise to any mistake apparent from record when the order of the Tribunal has proceeded on the factual basis. There may

even be an error of judgment in appreciating the impact of the points raised by the parties before the Tribunal which may make its order vulnerable in further appeal but that also does not give rise to a mistake apparent from the record. If on a fair and whole reading of the Tribunal's order, one can broadly say that the Tribunal has fairly and substantially dealt with the contentions raised by the parties before it or the issue in all its important aspects, the mere fact that there has been an omission of some incidental points or to refer to a decision or authority cited before it does not give rise to a mistake apparent from the record.

10. In CIT v. Honda Suel Power Products Ltd. (2007) 158 Taxman 56, the Hon'ble Delhi High Court, after a review of the authorities on the question, has held that the power to rectify a mistake under Section 254(2) is not equivalent to a power to review or recall the order sought to be rectified. In paragraph 13 of the judgment, the High Court referred to its earlier judgment in CIT v. ITAT (2006) 155 Taxman 378 (Delhi). In paragraph 7 of the judgment in ITAT's case (supra) the following observations occur: 7 That being the legal position, the Tribunal was not in our opinion justified in recalling the order passed by it in toto and setting the matter down for a fresh hearing. Just because a pronouncement made on the subject either by the Tribunal or by any other court was not noticed by the Tribunal while take a particular view on the merits of the controversy may constitute an error that would call for correction in an appropriate appeal against the order. Any such error may however fall short of constituting a mistake apparent from the record within the meaning of Section 254(2) of the Act. More importantly just because a point is debatable (which is one of the reasons given by the Tribunal in the instant case) would hardly provide a justification for recalling the order and fixing the appeal for a de novo hearing. While doing so, the Tribunal has no doubt made certain observations in regard to the levy of interest under Section 158BFA being statutory in nature with no power vested in any authority or Tribunal to condone the same, but the very fact that the Tribunal has made those observations would not render valid the order of recall passed by it. The net result of the order made by the Tribunal continues to remain the same, viz., the appeal has to be heard again simply because one of the issues decided by the Tribunal is debatable or the Tribunal has not noticed an earlier decision rendered by another Bench. Both these reasons were insufficient to justify the order of recall made by the Tribunal.

It will be clear from the above observations of the Hon'ble Delhi High Court that just because a pronouncement made on the subject was not noticed by the Tribunal it cannot be said that there is a mistake apparent from the record within the meaning of Section 254(2) of the Act, though the view taken by the Tribunal without noticing the pronouncement of the court may constitute an error that may call for correction in an appropriate appeal against the order. It will also be seen that it has been observed that a debatable point can hardly provide justification for recalling the order by resort to Section 254(2). In *CIT v. Hindustan Coca Cola Beverages (P.) Ltd.* (2007) 159 Taxman 122, again the Hon'ble Delhi High Court reiterated its judgment in *Honda Sael Power Products Ltd.'s case* (supra) and held that under Section 254(2) the decision of the Tribunal cannot be reviewed in the guise of a rectification.

12. A perusal of these two judgments of the Hon'ble jurisdictional High Court, apart from reiterating the well- established position in law that no review of the order is permissible under Section 254(2) also reveals another aspect of the matter. The provisions of Section 260A were introduced into the Income Tax Act with effect from 1-10-1998 by the Finance (No. 2) Act, 1998, providing for an appeal to the High Court from the order passed by the Tribunal if the case involves a substantial question of law. The provisions of Section 256 which contained the earlier procedure for reference of a question of law to the High Court were suitably amended. The High Court was, thus, constituted as an appellate court under Section 260A. Earlier under the advisory jurisdiction under Section 256, the view was that when a reference of a question of law is made to the High Court, the Tribunal does not lose seisin of the appeal which continues to remain pending with it and the appeal was finally disposed of by the Tribunal only when it passes an order under Section 260(l) in conformity with the opinion expressed by the High Court. During the pendency of the reference with the High Court, it was the Tribunal which had the power to grant stay because it was the Tribunal which was seized of the appeal. This was the position as laid down in the judgment of the Supreme Court in *CIT v. Bansi Dhar & Sons* . It was, therefore, generally thought that unless the order of the Tribunal sent along with the statement of the case sent under Section 256(l) to the High Court is amended or rectified to correct factual errors, it would be difficult to obtain a correct opinion under the advisory

jurisdiction where a stick view was taken that the factual findings of the Tribunal were, subject to very limited exceptions, is binding on the High Court. After the introduction of Section 260A and the introduction of the appellate jurisdiction, there is all the more reason for the Tribunal not to rectify its order under Section 254(2) of the Act when debatable questions arising out of its decision are sought to be rectified or where the parties feel that there has been an error of judgment on the part of the Tribunal or are of opinion that their contentions have either not been adverted to or have been wrongly appreciated or have not been appreciated in the manner in which they ought to have been. These are essentially matters which ought to be carried in appeal to the High Court under Section 260A while challenging the correctness of the order of the Tribunal. A review of the order of the Tribunal under similar circumstances cannot be made under Section 254(2) of the Act even before the introduction of Section 260A, all the more so, when the order of the Tribunal is now the subject of an appeal to the High Court and not merely a reference under the advisory jurisdiction of the High Court. This is one more reason that has persuaded us in the present proceedings not to accept the assessee's application which is essentially an application for a review of our order.

13. For the reasons given above, we are of the view that there is no mistake apparent from the record which requires rectification under Section 254(2) of the Act. All the contentions raised by the assessee before us, if accepted, would result in our order being reviewed by us, a thing which is not permitted in law. We are, therefore, unable to accept the assessee's application.

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