

Energy Infrastructure (India) Vs. Dcit

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Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : Jan-11-2008

Judge : I Bansal, R Singh

Appellant : Energy Infrastructure (India)

Respondent : Dcit

Judgement :

1. These appeals, filed by the assessee are directed against two separate orders of CIT (A) dated 28.12.2004 for assessment years 2001-02 and 2002-03. As common issue is involved, these appeals are being disposed off by a single consolidated order for the sake of convenience. The main grievance of the assessee in these appeals is non-acceptance of an application filed Under Section 154 contending therein that income earned by the assessee by way of interest on lien money kept for the purpose of bank guarantee during the period of pre-commencement of business which was wrongly shown as income should be reduced from returned and assessed income. The amount of relief claimed in this regard is Rs. 6,01,270/- for Assessment year 2001-02 and Rs. 16,07,188/- for Assessment year 2002-03. Alternatively, it has also been claimed that in case the interest is not reduced from the returned/assessed income, then it should be set off or adjusted against the interest expenditure of Rs. 62,35,207/- and Rs. 34,62,611/- for assessment years 2001-02 and 2002-03 respectively.

2. The facts of the case are as follows. The assessee company, during the years under consideration, was in the process of setting up liquidated petroleum gas

(LPG) terminal at Okhla. Pending the commencement of commercial operation, expenses were treated as pre-operative expenses in the books of account which were to be capitalized on commencement of commercial operation. Interest as mentioned above was earned on money kept in fixed deposit on lien with the bank against the bank guarantee issued by the banker. The said interest was offered by the assessee to tax under the head "income from other sources" in the returns of income, which was accepted as such under the provisions of Section 143(1). The assessee, later on, realizing the mistake that the said income was wrongly offered to tax, filed an application Under Section 154 before the A.O. contending therein that there was a mistake in offering the interest income for tax. The assessee submitted that it had kept the deposit with the bank for issuance of bank guarantee by the banker and thus interest earned on such money was inextricably linked with the process of setting up of assessee's business. Such interest receipts should have been reduced from the cost of fixed assets or pre-operative expenses and such treatment is in accordance with the principle of law laid down in the decision of Hon'ble Supreme Court in the case of CIT v. Karnal Co-operative Sugar Mills Ltd. (243 ITR 2). According to the assessee, this decision is directly applicable to the assessee's case. In the said case, it has been held that any interest income earned on deposits kept for opening letter of credit for purchase of machinery was incidental to the acquisition of assets for setting up of plant and machinery. Therefore, such interest was of the nature of capital receipt, which would go to reduce the cost of assets. Reference was also made to the decision of the Hon'ble Supreme Court in the case of Bokaro Steel Ltd., (236 ITR 315) wherein it was held that the receipts inextricably linked with the process of setting up of plant and machinery shall go to reduce the cost of assets. The assessee also referred to the circular No. 68 dated 17.11.1971 and the decision of Kerala High Court in the case of Kil Kotagiri Tea and Coffee Estates Co. Ltd. v. ITAT and Ors. 174 ITR 579 as per which a mistake arising out of interpretation of law by the Hon'ble Supreme Court is a mistake apparent from record within the meaning of Section 154 of the Act and, therefore, requested that necessary relief be granted to the assessee under the provisions of Section 154 of the I.T. Act, 1961. The A.O. was however not satisfied. He observed that there were no mistakes apparent from the record as the returned income had been accepted under the provisions of Section 143(1)

and accordingly rejected both the applications.

3.1 In appeal, the assessee reiterated submissions made earlier before CIT(A). However, the latter rejected the arguments of the assessee on the ground that the assessee company itself had shown the interest receipts as income from other sources. It was observed by him that whether the interest earned had to be taxed under the head 'other sources' or was to be adjusted against the expenses incurred required going into the details in depth and, therefore, it could not be said that the issue was covered under the provisions of Section 154 of the I.T. Act. Regarding CBDT Circular, he observed that it related to the applicability of Supreme Court decision rendered subsequently. In this case, the judgement in the case of CIT v. Karnal Co-operative Sugar Mills Ltd. (supra) was rendered on 23.4.1999 which was much before the date when the returns were filed by the assessee and therefore the circular of CBDT was not applicable. The CIT(A) accordingly upheld the order of the A.O. rejecting the applications of the assessee filed Under Section 154. He also rejected the alternate contention of the assessee, based on the same reasoning, that interest income should be adjusted against the interest expenditure, as the said issue was not covered by the provisions of Section 154 of the Act. Aggrieved by the decision of CIT(A), the assessee is in appeal before the tribunal.

2. Before us, the Ld. A.R. reiterated the submissions made before the lower authorities. It was further submitted that the fact that the interest income had been received in the pre commencement period on deposits made in connection with setting up of the business was apparent from the record. He referred to the notes No. I(c) and 6 in the Schedule 9 and the schedule 4 of the audited accounts, which were available at pages 20-23 of the paper book as per which, pending commencement of commercial operations, all expenses were treated in the books of accounts as pre operative expenses to be capitalized. Schedule 4 of the auditors also made it clear that fixed deposit with the bank was kept on lien with the bank for issue of bank guarantee. These notes of the auditors for Assessment year 2001-02 are reproduced below as an illustration. Similar notes had been recorded for the Assessment year 2002-03.

Pending commencement of commercial operations, all expenses directly or indirectly related to the project of the company are treated as preoperative expenses to be capitalized on commencement of commercial operations.

Note No. 6. As commercial operations of the company had not commenced up to March 31, 2001, no profit and loss account has been prepared.

Schedule 4. The fixed deposit of Rs. 60 lacs (Previous year 1 crores) are on the lien with bank against guarantee issued by it.

3.1 The Ld. A.R. further submitted that in view of the facts mentioned above, it was apparent that interest income could not be taxed under the head 'other sources' and the same had to be adjusted against the cost of the project in view of the judgements of Hon'ble Supreme Court in case of Karnal Cooperative Sugar Mills Ltd. (Supra) and Bokaro Steels Ltd. (supra). The mistake being apparent from record has to be rectified Under Section 154. He referred to the judgement of Hon'ble High Court of MP in case of K N Oil Industries (142 ITR 13) in which case the assessee had omitted to claim weighted deduction Under Section 35D and the Hon'ble High Court allowed the relief invoking provisions of Section 154. He also referred to the judgment of Hon'ble High Court of Mumbai in case of Walchandnagar Industries Ltd. as per which the rectification Under Section 154 can be made based on interpretation and application of law in the light of judicial pronouncements. Reference was also made to the circular No. 68 dated 17.11.1971 issued by CBDT vide F No. 245/17/71A in which it was clarified that subsequent interpretation of law by Supreme Court would constitute a mistake apparent from record.

3.2 The Ld. A.R. further argued that it was the duty of the A.O. to allow deductions, which are allowable under law even if no specific claim was made by the assessee. Reliance was placed on the judgement of Hon'ble High Court of Bombay in case of Archana R Dewante (136 ITR 355). The CBDT circular No. 14 dated 11.4.1995 was also quoted in which it was clarified that it was the duty of the A.O. to draw the attention of the assessee to any benefit or deduction to which the assessee was clearly entitled even if the same was omitted to be claimed in the return of income. It was thus argued that the A.O. was duty bound to compute the

total income correctly in accordance with law.

Alternatively, it was also submitted that the interest earned by the assessee should be set off against interest expenditure as held in the following decisions of the tribunal: i) 77 ITD 123 (Del.) in case of Honda Siel Power Products Ltd. v. DCIT It was thus pleaded that the rectification application filed by the assessee should have been accepted by the AO and his action in rejecting the same was against the facts and the above-mentioned principles of law enunciated in the decisions relied upon as above.

3.4 On the other hand, the Id. Sr. DR relying on the orders of AO and CIT(A) pleaded that as per assessee's own return, the assessment was framed by the AO under the provisions of Section 143(1) of the Act.

Therefore, there was no mistake, which could be said to be apparent from record. Further relying on the decision of the Hon'ble Supreme Court in the case of Goetze India Ltd. v. CIT 284 ITR 323, he pleaded that the claim made by the assessee by way of an application is inadmissible in the absence of a revised return. Thus he pleaded that applications had rightly been rejected by the AO and CIT (A) was right in upholding his order.

4. The appeal was subsequently refixed for clarification of an important aspect relating to power of the A.O. to make any adjustment to the returned income as per the amended provisions of Section 143(1) which had not been covered by the arguments of the either side. The Ld.

A.R. argued that there was an apparent mistake in the order Under Section 143(1) as the claim was allowable by the judgement of Hon'ble Supreme Court and therefore, the intimation issued Under Section 143(1) could be rectified. There was specific provision in Section 154(1)(b) for amendment of intimation or deemed intimation Under Section 143(1) in case of apparent mistake. The Ld. A.R. further submitted that the power to rectify an order had been conferred on authorities to ensure that there was no injustice to any of the parties and therefore, power had to be exercised to do justice. Reliance was placed on the judgement of Hon'ble Supreme Court in case of L Hriday Narain (78 ITR 26). It was also submitted that

the tribunal had wide powers Under Section 254 while dealing with appeal and it had power to consider the question of law arising from facts on record in the assessment proceedings even if the same was not raised before the lower authorities as held by Hon'ble Supreme Court in case of National Thermal Power Co. Ltd. (229 ITR 383).

4.1 As regards the judgement of Hon'ble Supreme Court in case of Goetz India Ltd. 284 ITR 323 relied upon by the Id DR, it was submitted that the said case was distinguishable as it related to the power of the A.O. to entertain a claim by the assessee made otherwise through a revised return. The Hon'ble Supreme Court had made it clear in that case that the judgement did not impinge upon the power of the tribunal to entertain the claim using the appellate powers. The attention of Ld.

A.R. was drawn to the decision of Ahmedabad Bench of the Tribunal in case of Choice Aqua Culture Pvt. Ltd. (100 ITD 143) in which the tribunal held that in view of amended provisions of Section 143(1) w.e.f. 1.6.1999, the A.O. was not empowered to make any prima facie adjustment to the returned income or to levy any additional income tax.

It was submitted by the Ld. A.R. that the said case related to additional claim of depreciation which could not be called a mistake apparent from record. He relied on the decision of the Amritsar Bench of the Tribunal in case of Satia Paper Mills Ltd. (100 TTJ 526) in which the rectification of assessment made Under Section 143(1) to charge interest Under Section 234B and 234C was upheld. It was therefore urged that the mistake being apparent from record should be rectified. The Id. Sr. DR on the other hand reiterated the submissions made earlier that there was no apparent mistake in the order of the A.O.. which was in tune with the statutory provision and therefore the rectification application had been rightly rejected.

4.2 We have perused the records and considered the rival contentions carefully. The issue raised in these appeals is regarding rectification of intimation issued by the A.O. Under Section 143(1) for Assessment years 2001-02 and 2002-03. The assessee during the relevant period was in the process of setting up a liquidated

petroleum gas (LPG) terminal at Okhla. The assessee had made the FDRs, which had been kept as lien money with the bank against the bank guarantee issued by the bank. From the said FDRs, the assessee had received interest income of Rs. 601270/- and Rs. 1607188/- respectively for the two years and had declared the interest income as income from other sources. The A.O. had processed the return for these two years Under Section 143(1) on 24.5.2002 and 15.2.2003 respectively accepting the returned income.

After adjusting the prepaid taxes, the A.O. had issued refund of Rs. 339/- for Assessment year 2001-02 and raised demand of Rs. 1724/- for the Assessment year 2002-03. Subsequently the assessee had filed petition Under Section 154 requesting to amend the intimation as the interest income was not chargeable to tax because the same had been received prior to the commencement of business and from deposits kept on lien with the bank in connection with the setting up of the project.

Reliance was placed on the judgement of Hon'ble Supreme Court in case of Bokaro Steels (236 ITR 315) in which it was held that receipts inextricably linked with the process of setting up of plant in the pre commencement period shall go to reduce the cost of the project and could not be taxed as revenue receipt. Subsequently in the case of Karnal Cooperative Sugar Mills Ltd. (243 ITR 01) Hon'ble Supreme Court reiterated the same position. In that case, the assessee had received interest income on deposits kept for opening letter of credit for purchase of machinery in connection with setting up of the plant and it was held that interest income was not taxable. In view of these judgements, the assessee requested that there was a mistake apparent from the record in the intimation as the interest income had been taxed contrary to the judgements of Hon'ble Supreme Court. The case of the assessee is that the facts available in auditor's report clearly showed that the interest had been received on lien money kept with the bank in connection with the setting up of the project and during the relevant period business had not commenced. Therefore, it was a case of apparent mistake, which could be rectified. The authorities below have rejected the application on the ground that there was no apparent mistake in the intimation issued by the A.O. as the same was based on the income returned by the

assessee.

4.3 The Ld. A.R. has argued before us that application of wrong provisions of the Act or erroneous application of the provisions will be a mistake apparent from record, which should be corrected to ensure justice. It has also been submitted that appellate authorities have wide powers to entertain even claim not made by the assessee in return as held by the Hon'ble Supreme Court in case of NTPC (supra). The Ld.

A.R. has also relied on the decision of the tribunal in case of Satia Paper Mills Ltd. (100 TTJ 526) in which rectification of intimation issued for Assessment year 2001-02 to include the charge of interest Under Section 234B and 234C was upheld.4.4 There is no dispute that mistake apparent from record has to be rectified Under Section 154 and that application of wrong provisions of the Act or erroneous application of law will be a mistake apparent from record. There is also no dispute on the proposition that a decision contrary to the judgement of Hon'ble Supreme Court will be a mistake apparent from record irrespective of the fact the judgement was rendered prior to or subsequent to the order proposed to be rectified as held by the Hon'ble High Court of Gujarat in case of Sourashtra Kutch Stock Exchange Ltd. (262 ITR 146). Further there is no dispute in this case that facts on record clearly show that the assessee had received the interest on FDRs kept on lien with the bank in connection with setting up of the project and the interest had been received in the pre commencement period which as per the judgments of the Hon'ble Supreme Court (supra) is a capital receipt and not taxable. But the main issue, which is required to be addressed, is whether the A.O. has acted contrary to the provisions of law or on incorrect application of law and whether the A.O. has powers to make any adjustment to the returned income under the provisions of Section 143(1) as amended w.e.f 1.6.1999.

4.5 The A.Os. under the provisions of Section 143(1), were earlier empowered to make prima facie adjustments to the income returned by the assessee. The said provisions are reproduced below as a ready reference: 143(1)(a): Where a return has been made under Section 139, or in response to notice under Sub-section (1) of Section 142,; (i) if any tax or interest is found due on the basis of such return,

after adjustment of any tax deducted at source, any advance tax paid and any amount paid otherwise by way of tax or interest, then without prejudice to the provisions of Sub-section (2), an intimation shall be sent to the assessee specifying the sum so payable, and such intimation shall be deemed to be a notice of demand issued under Section 156 and all the provisions of this Act shall apply accordingly; and (ii) if any refund is due on the basis of such return, it shall be granted to the assessee; Provided that in computing the tax or interest payable by, or refundable to, the assessee, the following adjustments shall be made in the income or loss declared in the return, namely: (i) any arithmetical errors in the return, accounts or documents accompanying it shall be rectified; (ii) any loss carried forward, deduction, allowance or relief, which, on the basis of the information available in such return, accounts or documents, is prima facie admissible but which is not claimed in the return, shall be allowed.

(iii) any loss carried forward, deduction, allowance or relief claimed in the return, which, on the basis of the information available in such return, accounts or documents, is prima facie inadmissible, shall be disallowed: Provided further that an intimation shall be sent to the assessee whether or not any adjustment has been made under the first proviso and notwithstanding that no tax or interest is due from him: 4.6 But w.e.f. 1.6.1999, provisions of Section 143(1) were amended and from the said date the A.O. is not empowered to make any adjustment to the income returned by the assessee. He is only empowered to compute the tax on the basis of income returned and to send intimation to the assessee about tax payable after adjusting prepaid taxes. In case there are no demands and tax is refundable on the basis of returned income, the A.O. is required to grant the refund and send intimation to the assessee to that effect. In all other cases, where there is neither demand nor refund, the acknowledgement of returned is deemed to be an intimation Under Section 143(1). The relevant provisions as amended from 1.6.1999 are reproduced below for the sake of clarity: 143(1): Where a return has been made under section 139, or in response to a notice under Sub-section (1) of Section 142, (i) if any tax or interest is found due on the basis of such return, after adjustment of any tax deducted at source, any advance tax paid, any tax paid on self-assessment and any amount paid otherwise by way of tax or interest, then, without prejudice to the provisions of Sub-section (2), an intimation shall be sent to

the assessee specifying the sum so payable, and such intimation shall be deemed to be a notice of demand issued under Section 156 and all the provisions of this Act shall apply accordingly; and (ii) If any refund is due on the basis of such return, it shall be granted to the assessee and an intimation to this effect shall be sent to the assessee: Provided further that except as otherwise provided in this sub-section, the acknowledgement of the return shall be deemed to be intimation under this sub-section where either no sum is payable by the assessee or no refund is due to him: Provided further that no intimation under this sub-section shall be sent after the expiry of one year from the end of the financial year in which the return is made.

Provided further that where the return made is in respect of the income first assessable in the assessment year commencing on the 1st day of April, 1999, such intimation may be sent at any time up to the 31st day of March, 2002.

4.6 It is thus clear that the A.O. under the amended provisions of Section 143(1) is not empowered to make any adjustment to the returned income. Even if a claim is apparently allowable, the A.O. is not empowered to modify returned income by allowing such claim. In this case, the A.O. had accepted the returned income and issued refund/raised demand on the basis of returned income. It cannot therefore be said that the A.O. had acted contrary to the provisions of the Act. We do not see any error in the order of the A.O. The A.O. can amend the intimation only if there is an apparent mistake in the intimation issued. This issue we find has also been examined by Ahmedabad Bench of Tribunal in detail in case of Choice Aqua Culture Pvt. Ltd. 100 ITD 143. In that case, the A.O. had sent the intimation Under Section 143(1) on the basis of returned income. Subsequently, the assessee filed a petition Under Section 154 requesting to allow higher depreciation on the basis of WDV of the assets determined in the preceding year. There is no dispute that depreciation has to be computed on the basis of WDV determined in the preceding Assessment year. But the tribunal rejected the claim and held that in view of the amended provisions w.e.f. 1.6.1999, no prima facie adjustment could be made to the returned income nor any additional income tax could be levied. The decision of the tribunal in case of Satiya Paper Mills Ltd. (100 TTJ 526) relied upon by the assessee is distinguishable as the same related to charge of interest Under

Section 234B and 234C and not to any adjustment to the returned income or levy of tax. The A.O. in that case rectified the intimation to charge interest Under Section 234B and 234C following the judgement of jurisdictional High Court in case of Upper India Steel Manufacturing and Engineering Co. Pvt. Ltd. (279 ITR 123) as per which charge of interest Under Section 234B and 234C where income was computed Under Section 115J was mandatory. The case is therefore distinguishable. No doubt the A.O. is empowered to rectify the intimation Under Section 154(1)(b) in case of apparent mistakes, but to exercise this power, there has to be an apparent mistake. There could be apparent mistakes in the intimation such as adopting income different from income declared in the return or wrong computation of tax or interest or mistake in adjustment of prepaid taxes but where the A.O. has made computation of tax/refund correctly on the basis of returned income, it cannot be said that there is a mistake apparent from record in the intimation issued Under Section 143(1).

4.7 We are unable to accept the argument of Ld. A.R. that appellate authorities have wide powers to entertain claim in proceedings for rectification Under Section 154. No doubt appellate authorities while dealing with appeal against the assessment orders have wide powers.

When appeal is filed against the assessment order, entire assessment is open before the first appellate authority i.e. CIT(A) who has powers coterminous with that of the A.O. He can do what the A.O. can do in relation to assessment and also can do what the A.O. had failed to do.

The powers of the tribunal while dealing with the appeal against the order of assessment are also wide. The tribunal, as held by the Hon'ble Supreme Court in case of NTPC (supra), can entertain any question of law having bearing on the tax liability of the assessee even if no such claim had been made before the lower authorities provided, the same could be adjudicated on the basis of facts found by the lower authorities. But such powers are only in relation to the appellate jurisdiction relating to the assessment. The case of NTPC (supra) related to appeal against the order of assessment made by the A.O. Under Section 143(3). The powers of appellate authorities in relation to rectification of mistake in the

assessment order, is however limited to the mistake pointed out in the assessment. In such cases, the only issue which can be looked into is whether there is any mistake of law or of facts which is apparent from records because only patent and obvious mistakes could be rectified under the provisions of Section 154. The case law relied upon by the assessee such as the judgement of Hon'ble High Court of MP in case of K.N. Oil Industries (supra), are distinguishable. In the case of K N Oil Industries (supra) the judgement was in connection with order passed Under Section 154 in relation to assessment made Under Section 143(3). In assessment Under Section 143(3), the A.O. has discretion to allow or not allow a particular claim and in case such decision is contrary to provisions of law, it will constitute a mistake apparent from record. The present case is in relation to intimation issued Under Section 143(1) in which the A.O. has no discretion to make any adjustment to the total income returned by the assessee in view of the amended provisions w.e.f.

1.6.1999. The A.O. in the present case has only accepted the income returned by the assessee under the provisions of Section 143(1) which is in accordance with the provisions of law and therefore, there is no mistake in the order of the A.O. which could be rectified. No judgement of any High Court on this specific issue of rectification in relation to intimation Under Section 143(1) as per amended provisions has been brought to our notice. The decision of the tribunal in case of Choice Aqua Culture Pvt. Ltd. (supra) is in favour of the revenue. We have no reason to make any deviation from the decision of the Coordinate Bench of the Tribunal, which supports the case of the revenue and is directly on the issue involved. We, therefore, see no infirmity in the order of CIT(A) rejecting the petition Under Section 154. The same is accordingly upheld.⁵ In the result, the appeals filed by the assessee are dismissed. This order was pronounced in the open court on 11.1.2008.

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