(2006) 03 CAL CK 0038

Calcutta High Court

Case No: Writ Petition No. 614 of 2000

Hindustan Lever Ltd.		APPELLANT
	Vs	
Joint Commissioner of Income Tax and Others		RESPONDENT

Date of Decision: March 31, 2006

Acts Referred:

- Income Tax Act, 1961 - Section 116, 154, 154(1), 155, 32

Citation: (2006) 3 CALLT 466

Hon'ble Judges: Kalyan Jyoti Sengupta, J

Bench: Single Bench

Advocate: Pal, for the Appellant;

Judgement

Kalyan Jyoti Sengupta, J.

By this writ application the petitioner has basically challenged the action of the Joint Commissioner of Income Tax, Special Range-2 (respondent Learned Counsel 1), purported to be u/s 154/155 of the Income Tax Act, 1961. After having heard Dr. Pal and learned Counsel for the respondent it appears to me that the scope of the enquiry in the writ petition is restricted to whether the way action taken by respondent No. 1 is permissible within the scope and purview of Section 154 of the said Act or not.

2. The notice issued under the aforesaid section is based on the following grounds as indicated in the impugned notice :

In this case the ''a'' Co., claimed depreciation allowance of Rs. 38.09 lakhs for the period from January 1, 1993 to March 31, 1993, for the fixed assets of Messrs. Tea Estates of India Limited and the same was allowed. Moreover, Messrs. Tea Estates of India Limited claimed depreciation of Rs. 2,30,90,740 for April 1, 1992 to December 31, 1992 and the same was allowed. As per Explanation 2 to Section 43(6) this allowance to Messrs. Brooke Bond Lipton India Limited is irregular. Hence, there

was excess allowance of depreciation allowance to the ''a'' Co.

3. The short facts of the case are required to be stated to understand the controversy between the parties in a better way. One M/s. Tea Estate Limited was amalgamated with M/s. Brooke Bond India Limited under a scheme of amalgamation sanctioned by the hon''ble High Court at Calcutta and the hon''ble High Court at Madras on January 1, 1993. Thereafter on January 7, 1994, M/s. Lipton India Limited amalgamated with M/s. Brooke Bond India Limited (B.B.I) and then the amalgamated company changed its name to Brooke Bond Lipton India Limited. M/s. Brooke Bond India Limited thereafter on January 1, 1996, was amalgamated with the writ petitioner under the scheme of amalgamation sanctioned by this hon''ble court and the hon''ble High Court at Bombay. On March 23, 1996, the Assessing Officer by his assessment order for the assessment year 1993-94 allowed the claim of depreciation on the assets, made by Brooke Bond India Limited subsequent to amalgamation for the period from January 1, 1993 to March 31, 1993, which had hitherto been owned by Tea Estate India Limited and was transferred to Brooke Bond India Limited under the scheme of amalgamation. Tea Estate India in its own assessment has been allowed depreciation on those assets for the period from April 1, 1992 to March 31, 1992 (prior to the date of amalgamation). As the said assets vested in Brooke Bond India Limited with effect from January 1, 1993, and the same was used by Brooke Bond India Limited during the relevant period which was less than 180 days, 50 per cent. of the normal rate of depreciation had been claimed by Brooke Bond India Limited and allowed by the Assessing Officer.

4. Thereafter on November 18, 1998, the impugned notice was issued. Dr. Pal appearing for the petitioner submits that the Assessing Officer allowed depreciation applying the correct position of law then prevailing during the relevant previous year corresponding to the assessment years as mentioned in the impugned notice in favour of Tea Estate India Limited as well as Brooke Bond India Limited. He submits the subsequently, of course, there has been a change of law relating to the allowance of the depreciation on the block assets. The Explanation referred to by the Assessing Officer was introduced much later and the same had no manner of application.

5. He submits that thus it will appear from the language mentioned in the impugned notice that there are disputes and debatable issues relating to the law. According to him, in the name of the exercise of power of rectification this debatable issue cannot be resolved by respondent No. 1 by the proceedings initiated by the impugned notice. If there is any error in application of law the same can be set right by appropriate proceedings or in a manner as provided in the law not u/s 154 of the said Act. The alleged errors which is purported to be shown are not apparent on the face of the records to enable respondent No. 1 to exercise his power for rectification u/s 154 as he has sought to do. In support of his contention he has relied on a large number of decisions of this Court as well as the Supreme Court, viz., (Vijay Mallya

Vs. Assistant Commissioner of Income Tax, ; T.S. Balaram, Income Tax Officer, Company Circle IV, Bombay Vs. Volkart Brothers, Bombay, ; Poothundu Plantations Pvt. Ltd. Vs. Agricultural Income Tax Officer, Chittoor, Kerala State and Others, ; Commissioner of Income Tax Vs. South India Bank Ltd., ; Bata India Ltd. Vs. Inspecting Assistant Commissioner of Income Tax and Others, and Income Tax Officer, "G" Ward and Another Vs. India Foils Ltd.,).

6. Learned Counsel for the Revenue contends that the notice has been issued rightly and lawfully and in proper exercise of jurisdiction. The writ petitioner in response to the said impugned notice has made representation and thus it has been submitted to the jurisdiction of the said authority. Whether the authority concerned has jurisdiction or not can be and indeed has been decided by respondent No. 1. The contention of the writ petitioner has not been accepted by respondent No. 1 and the appropriate order has been passed. This Court, therefore, should not interfere with the notice nor the order passed pursuant thereto u/s 154 of the said Act. The order passed by respondent No. 1 can be challenged by appropriate proceedings as provided under the statute itself. After the final order has been passed the challenge against the notice has lost its force.

7. It will appear from the impugned assessment order that the Assessing Officer earlier has patently applied the wrong law and allowed depreciation unjustly and illegally. A huge amount of revenue has been lost because of the misapplication of law. He contends further that the Assessing Officer has absolutely ignored the provision of Explanation 2 to Section 43(6). The definition of written down value has been specifically provided in the case of amalgamation under the aforesaid Explanation and the same has not been applied. As such the action taken by respondent No. 1 squarely comes within the purview of Section 154 of the said Act.

8. I have considered the respective contentions of learned Counsel. Dr. Pal strenuously calls upon me to decide that the Assessing Officer has previously correctly allowed the depreciation applying the correct law on the date of the assessment having regard to the position of the law prevailing at the time of the previous year in connection with the relevant assessment year. I think while excising power of judicial review I will not exceed my limitation. My endeavour would be to examine whether the impugned notice could be issued on the basis of the statement of facts as narrated therein or not meaning thereby whether he has exercised jurisdiction lawfully on the given statement of facts. Sub-section (1) of Section 154 is very clear to understand under what circumstances the rectification can be made. It is apposite to set out the language of Sub-section (1) of Section 154 which is as follows :

with a view to rectifying any mistake apparent from the record an Income Tax authority referred to Section 116 may,--

9. Therefore, the mistake must be apparent from the records, meaning thereby no external help either on fact or in law is required to detect such mistake. The mistake shall be so obvious that can easily be corrected, to wit arithmetical mistake, wrong quotation of section, etc. A large number of decisions have been cited and in fact it has been time and again explained with some extent of repetition by the judicial authorities. In the case of T.S. Balaram, Income Tax Officer, Company Circle IV, Bombay Vs. Volkart Brothers, Bombay, the scope of Section 154 was explained and interpreted as follows (headnote) :

A mistake apparent on the record must be an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may be conceivably two opinions. A decision on a debatable point of law is not a mistake apparent from the record.

10. Thereafter a large number of decisions as quoted above by me has followed the same principle and accepted the same interpretation of the said section. In order to avoid prolixity I do not wish to repeat the ratio laid down by all the decisions.

11. Each and every set of facts of the case stands on its own merits. Whether the aforesaid principle of law is applicable in this case or not is to be examined. Here factually the Assessing Officer has applied Section 32, Sub-section (1), third proviso. Whether the aforesaid provision has been correctly applied or not is a debatable issue. From the language of the impugned order as quoted above it is clear that respondent No. 1 has found that allowance of the depreciation to M/s. Brooke Bond Lipton India Limited is irregular in view of Explanation 2 to Section 43(6) of the said Act. Therefore, it is clear that respondent No. 1 thinks that Explanation 2 to Section 43(6) of the said Act should have been applied and, sequelly Sub-section (1), Section 32, was wrongly applied. It is further clear from the affi-davit-in-opposition affirmed by one Smt. Anuradha Mukherjee being respondent No. 1 in paragraphs 6A and 6B where it is stated that both the interpretations of the Act drawn by the petitioner company are patently wrong. In sub-paragraph B of paragraph 6 of the said affidavit it has been stated specifically that the petitioner has been given depreciation allowance by misinterpreting the law.

12. Thus, it is clear that on the basis of the opinion of respondent No. 1 the decision of the Assessing Officer is wrong in the eye of law as such the same is sought to be rectified. Whether interpretation of the provision of law is right or wrong is per se a debatable issue. This issue cannot be resolved by the official having co-ordinate jurisdiction u/s 154 of the said Act as the same cannot be termed to be apparent from the record.

13. Going by the aforesaid narration of facts and discussion I think respondent No. 1 has invoked the power illegally on the given facts. Respondent No. 2 ought not to have exercised such power, simply she has no jurisdiction unless the mistake appears to be apparent and obvious and for which further argument and debate are

not required.

14. I, therefore, hold that the impugned notice is ultra vires the provision of Section 154 of the said Act.

15. Now the question is as to whether the final order pursuant to the said impugned notice should be allowed to be sustained or not. In the decision of this Court reported in Income Tax Officer, "G" Ward and Another Vs. India Foils Ltd., it is made clear that if the decision is rendered pursuant to an invalid notice the subsequent action cannot stand. As such the order passed pursuant to the impugned notice is not sustainable in law and the same is set aside and quashed and I also set aside the notice. I however, make it clear that if there is a wrong decision of law or misapplication of law then the same can be set right in an appropriate manner otherwise than by the provision of Section 154 of the said Act.

16. There will be no order as to costs.

17. All parties are to act on a signed copy of the operative portion of this judgment and order.