Kesoram Industries Ltd. Vs Commissioner of Income Tax, West Bengal II, Calcutta

Court: Calcutta High Court

Date of Decision: July 13, 2004

Acts Referred: Income Tax Act, 1961 â€" Section 139, 139(8), 143, 143(3), 144(B)

Citation: (2005) 144 TAXMAN 192

Hon'ble Judges: Rajendra Nath Sinha, J; Dilip Kumar Seth, J

Bench: Division Bench

Final Decision: Allowed

Judgement

D.K. Seth, J.
The Appellant had submitted its return for the years 1981-82, 1982-83 which was assessed under Sections 143(3)/144B.

Subsequently, in respect of those two assessment years, the Assessee/Appellant submitted a return under the Amnesty Scheme and offered the

gratuity liability on the basis of actuarial certification for taxation. The assessments were completed under Sections 143(3)/231/147 and interest

was charged under Sections 139(8) and 215 of the Income Tax Act, 1961. This was subjected to certain proceedings and ultimately by an order

dated 17th March 1989, the CIT(A) held that no interest can be charged either u/s 139(8) or u/s 215 in a reassessment made u/s 147.

1.1. While giving effect to this order dated 17th March, 1989 instead of waiving interest since held not chargeable u/s 139(8) and u/s 215 by an

order dated 1st May, 1989 the Assessing Officer fully waived interest u/s 139(8) for the year 1981-82 and partially for the assessment year 1982-

83; and the interest u/s 215 was partially waived for both the years. Subsequently, by an order dated 22nd May, 1989, in terms of order dated

17th March, 1989 of the CIT(A), the AO had held that the interest u/s 139(8) for the assessment year 1981-82 was fully waived and the other

interest was partially waived, therefore no further step need be taken.

1.2. Against this order an appeal was preferred, CIT(A) by its order dated 14th June, 1991 directed the Assessee to file a rectification application

u/s 154 before the Assessing Officer. By an order dated 26th June, 1992 passed on the application for rectification so filed, the Assessing Officer

held that the interest had already been waived to the extent attributable to the income disclosed in the Amnesty returns and there was no scope for

further waiver.

1.3. On appeal the CIT(A) by an order dated 19th August, 1993 deleted the entire interest charged under Sections 139(8) and 215 for the

assessment years 1981-82 and 1982-83 in view of the earlier order dated 17th March, 1989 which had become final. On appeal by the Revenue,

the Learned Tribunal by its order dated 9th April, 1989 reversed the order of the CIT(A). It may be noted that ITAT in its order had also dealt

with the appeals for the years 1977-78, 1978-79 and 1979-80 but the two years 1981-82 and 1982-83 were omitted to be mentioned at the

penultimate paragraph of the decision.

1.4. On 16th June, 1999, an application for rectification of the order dated 9th April, 1999 was filed in respect of the assessment years 1981-

1982 and 1982-83 with regard to the omission to mention the said two assessment years in the decision and its omission to consider the question

regarding finality of the appellate order dated 17th March, 1989. By its order dated 30th March, 2000 the learned Tribunal incorporated the two

assessment year 1981-82 and 1982-83 in the order dated 9th April, 1989 but rejected the contention of the Assessee in respect of the other point

viz. the finality of the order dated 17th March, 1989. Against this order the present appeal has since been preferred.

Appellant"s contention:

2. Mr. J.P. Khaitan, learned Counsel for the Appellant, submitted that the scope of rectification is confined only to the error apparent on the face

of the record. It cannot stretch to the extent of review of the order sought to be rectified. According to him, the finality of the order dated 17th

March 1989 was completely overlooked and omitted to be considered. The finality of the order dated 17th March 1989 was staring on the face of

the Tribunal and on the strength of this finality the Tribunal could not have reopened the issue and decided the question sitting on appeal against the

order dated 17th March 1989. Therefore, this is amenable to rectification u/s 254(2) of the Income Tax Act, 1961.

2.1. In support of his contention, Mr. Khaitan had relied on the decision in Neeta S. Shah and others Vs. Commissioner of Income Tax, to

contend that when an earlier order of the Appellate Tribunal is founded on a mistaken assumption and the error is discovered, the power of

rectification u/s 254(2) of the Income Tax Act, 1961 can be invoked because the very basis of the earlier order requires rectification. He also

relied on a decision in Bata India Ltd. Vs. Deputy Commissioner of Income Tax and Others, to support his contention that when the breach

resulting from an order is attributable to the Tribunal''s mistake, error or omission, it is the bounden duty of the Tribunal to set it right.

2.2. Mr. Khaitan then relied upon a decision in Commissioner of Income Tax Vs. Ballabh Prasad Agarwalla, and contended that the Tribunal has

no inherent power to review neither it can re-examination or give a second view but Section 254(2) expressly confers power upon the Tribunal to

correct any mistake apparent from the record and power to amend any order passed under Sub-section (1) of Section 254. Elaborating, he

contended that it must be left to the Tribunal to reopen an appeal if it finds that it has omitted to deal with an important ground urged by the party.

Failure to deal with a preliminary objection amounts to a mistake apparent from the record. The primary aim of legal policy following from Section

254(2) is to do justice. The Parliament did not intend to do injustice or to allow a wrong thing to continue contrary to law or public policy.

Therefore, it has incorporated the provision for rectification of a mistake apparent on the record.

2.3. He then relied on the decision in Madura Coats Ltd. Vs. Union of India, to contend that once a decision has become final and the question of

the consequential order comes before the authority, the same cannot be challenged by the department since the order reaching finality is no longer

open to be interfered with. Reliance was placed by Mr. Khaitan in K. GOVINDAN and SONS Vs. COMMISSIONER OF INCOME TAX, to

contend the meaning of regular assessment defined in Section 2(40) which did not include an assessment u/s 147. In order to remove the anomaly

Explanation 2 was added to Sub-section (8) of Section 139 and Sub-section (6) added to Section 215 clarifying that the first assessment made u/s

147 is a regular assessment. In this case, the assessment u/s 147 was a reassessment since the first assessment was made under Sections 143(3)

/144(B) . Therefore, no interest was chargeable as was rightly held by the CIT(A) by its order dated 17th March 1989 against which no appeal

was taken by the department and the order had become final. This is supported from the ratio decided in K. Gobindan (supra) on the basis

whereof one other appeal involving similar question of chargeability of interest u/s 139(8) and Section 215 in respect of a reassessment in CIT v.

Keshoran Industries Ltd., ITR No. 184 of 1993 was disposed of on 7th April 2004 by Hon''ble Mr. Justice M.H.S. Ansari and Hon''ble Mr.

Justice Soumitra Pal holding inter alia that the said question is now concluded in view of the decision in K. Govindan (supra).

2.4. He distinguished the decision cited by Mr. Mullick and contended that this was a case fit for rectification. That the order dated 17th March

1989 has reached finality is not dependent on any long drawn argument nor any two opinions could be formed in respect of the finality of the said

decision. It is only the question whether this finality was overlooked or omitted to be considered or whether while dealing with the matter the

Tribunal had disturbed the finality and interfered with the matter, which has since attained finality. In case it had purported to interfere with an order

attaining finality, it is definitely an error apparent on the face of the record rectifiable u/s 254(2) . Therefore, the appeal should be allowed.

Respondent''s contention:

3. Mr. Mullick, learned Counsel for the department, on the other hand, contended drawing our attention to the respective orders and materials

available before us on record that the learned Tribunal had noted the fact with regard to the order dated 17th March 1989 and its impact and had

noted the contention on behalf of the Assessee. After having considered the question the Tribunal had given its decision. This decision may be

wrong but then it would be a wrong decision or wrong judgment, it cannot be an error apparent rectifiable u/s 254(2) . According to him, in order

to assert that there was an error apparent on the face of the record a long drawn argument is necessary and there is scope of forming two opinions

with regard thereto.

3.1. He relied on the decision in Commissioner of Income Tax Vs. Gokul Chand Agarwal, in support of his contention wherein it was held that it is

only a mistake which can be corrected, it cannot re-evaluate the total effect of the fact found by it nor can it review its order. He also relied upon a

decision in Commissioner of Income Tax Vs. Ramesh Electric and Trading Co., to contend that the Tribunal has no power to review its order. This

decision has considered the decision in Laxmi Electronic Corporation Ltd. Vs. Commissioner of Income Tax, wherein it was held by the Allahabad

High Court that if the Tribunal fails or omits to deal with an important contention affecting the maintainability or merits of an appeal, it must be

deemed to be a mistake apparent from the record which can be rectified by the Tribunal. But following the decision in the case of T.S. Balaram,

Income Tax Officer, Company Circle IV, Bombay Vs. Volkart Brothers, Bombay, , the Bombay High Court had taken a view that this decision

(Volkart Brothers) was not brought to the notice of the Allahabad High Court.

3.2. In Volkart Brothers (supra), it was held that the application u/s 254(2) can be exercised only when the mistake is obvious and a patent

mistake apparent from the record and not a mistake which requires to be established by argument and long drawn process of reasoning on points

on which there may conceivably be two opinions. Failure by the Tribunal to consider the argument advanced by either party for arriving at a

conclusion is not an error apparent on the record although it may be an error of judgment. He then relied on a decision in Vijay Mallya v. Assistant

Commissioner of Income Tax, 263 ITR 41 (Cal) to support his contention where all these decisions were considered and it was held that the

mistake contemplated must be a mistake apparent on the face of the record; it must be obvious, clear and patent; it must not be a mistake to

establish which a long and elaborate reasoning and argument is required on points on which there may conceivably be two opinions; it must not be

a debatable point of law.

Appellant"s reply:

4. Mr. Khaitan, in reply, however, pointed out that the decision of the Allahabad High Court in Laxmi Electronic Corporation Ltd. (supra) noted in

Ramesh Electric and Trading Co. (supra) by the Bombay High Court was considered in a decision by our High Court in Commissioner of Income

Tax Vs. Ballabh Prasad Agarwalla, and our High Court had preferred to follow the Allahabad view. Therefore, this High Court need not follow the

Bombay view.

Scope: Issues to be determined:

5. After having heard the learned Counsel for the parties, to us it appears that the question to be ascertained in this case is as to whether the finality

of the order dated 17th March 1989 though noted by the Tribunal and considered by it, yet it would come within the purview of Section 254(2)

for rectification as an error apparent on the face of the record?

Finality of order dated 17th March 1989:

6. From the facts disclosed, it appears that the order dated 17th March 1989 has since reached its finality. No appeal had since been preferred

against the same. As rightly ponted out by Mr. Khaitan the interest u/s 139(8) and Section 215 are chargeable in respect of regular assessment

which in Explanation 2 of Section 139(8) and Sub-section (6) of Section 215 respectively included the first time assessment u/s 147 as a regular

assessment. By converse analogy, it can be said that no interest can be charged u/s 139(8) and Section 215 when it is a case of reassessment u/s

147 as in the present case. The law is clear. Following this principle as was held in Volkart Brothers (supra) by the Apex Court, drawing the

converse analogy the principle seems to be settled, and it was so accepted by the CIT(A) in its order dated 17th March 1989.

6.1. The fact revealed that in the process of giving effect to this order which had waived the interest charged u/s 139(8) and Section 215 in respect

of two assessment years 1981-82 and 1982-83, the Assessing Officer had purported to waive interest u/s 139(8) fully in respect of the

assessment year 1981-82 and partially in respect of the assessment year 1982-83 and as well as partial in respect of other interests which was

repeated by the Assessing Officer in the second order dated 22nd May 1989. Against this order seeking to give effect of the order of CIT(A) an

appeal was preferred in which CIT(A) directed filing of an application for rectification before the Tribunal by its order dated June 14, 1991 before

the Assessing Officer.

6.2. On the application for rectification the Assessing Officer held that there was nothing to be rectified by its order dated June 26, 1992 against

which an appeal being preferred, the CIT(A) by its order dated 19th August 1993 waived the interest fully u/s 139(8) and Section 215 for the

assessment years 1981-82 and 1982-83 in view of its earlier order dated 17th March 1989 which had become final. It is against this order that an

appeal was preferred by the Revenue before the Tribunal. Now the Tribunal had reversed the order of the CIT(A).

6.3. True, the Tribunal had referred to the contention of the Assessee and referred to the fact of the order dated 17th March 1989. But, in our

view, such reference or consideration would not change the position in law which was staring on the face of the Tribunal that the order dated 17th

March 1989 passed by the CIT(A) had become final and the Tribunal was not sitting on appeal on the order dated 17th March 1989. It had no

jurisdiction to reopen the order dated 17th March 1989 nor it can interfere with the order dated 17th March 1989. Neither it had jurisdiction to

pass any order, which will render the order dated 17th March 1989 infructuous or redundant. No appeal against the order dated 17th March

1989 was preferred before the Tribunal. The Tribunal could not assume jurisdiction to deal with the merit of the said order, neither it could pass

any order contrary thereto and which could eclipse or could come in conflict with the said order. In order to establish that the order dated 17th

March 1989 has become final and it was no more open to interference by the Tribunal since the appeal that was preferred before the Tribunal was

not an appeal against the order dated 17th March 1989 and it was preferred against an order seeking to give effect to the order dated 17th March

1989, no argument is necessary, neither there could be two opinions with regard thereto. The jurisdiction of the Tribunal was confined within the

scope of looking into the question as to whether the Assessing Officer had rightly enforced or had given effect to the order dated 17th March

1989, which had fully waived the interest.

Whether there was any mistake amenable to Section 254(2):

7. Thus, even if the order dated 17th March 1989 was noted or even if the contention of the Assessee was noted even then non-consideration of

the fact or omission to note the fact of finality of the order dated 17th March 1989 staring on the face of the Tribunal outside the scope and

jurisdiction of the Tribunal''s interference within the scope of the appeal preferred before it, is a mistake which comes within the scope of the

Section 254(2) as an error apparent on the face of the record or a mistake. In the facts and circumstances of the case, it is a mistake on the part of

the Tribunal in its assumption of jurisdiction to interfere with the order dated 17th March 1989.

7.1. The law relating to scope of rectification u/s 254(2) is well settled. The decision in Gokul Chand Agarwal (supra) cited by Mr. Mullick is

distinguishable from the facts noted in the said decision at page 17 of the ITR as pointed by Mr. Khaitan is a distinguishing feature with regard to

the facts involved in the said decision vis-a-vis the case at hand. The principle laid down therein cannot be disputed. But the said principle would

not apply in the present case. The decision in Vijay Mallya (supra) has taken note of the decision in Volkart Brothers (supra) and other decisions

where the settled principles were enunciated. Having regard to the ratio laid down therein, in our view, the points made out by Mr. Khaitan, as

discussed by us above, clearly brings the mistake within the purview of the settled principles of law rectifiable u/s 254(2) within the ratio laid down

in Vjay Mallya (supra).

7.2. The decision in Ramesh Electric and Trading Co. (supra) cited by Mr. Mullick by the Bombay High Court though may run counter to the

proposition that omission to consider an argument is an error, yet in the present case whether the argument was omitted or not, we find that it was

a case of wrong assumption of jurisdiction and proceeding on that basis without looking into the finality of the order which was staring on the face

of the Tribunal, and oblivious of the fact that it was not sitting on appeal on the order dated 17th March 1989. Therefore, the decision of the

Bombay High Court does not help us in the present context. On the other hand, in Laxmi Electronic Corporation Ltd. (supra), the Allahabad High

Court and in Ballabh Prasad (supra) the Calcutta High Court had taken a view that failure to deal with a preliminary objection amounts to a

mistake apparent from the record and omission to deal with an important ground urged by the party is also a ground for rectification u/s 254(2) .

We would prefer to follow the ratio laid down by the Allahabad High Court and the Calcutta High Court in the said two decisions.

7.3. As already discussed, the order dated 17th March 1989 had reached finality even on the question of law being a reassessment within the ratio

decided in K. Govindan and Sons (supra) since followed in Keshoram Industries Ltd. (supra) involving identical question. Therefore, there is no

doubt about the justifiability of the order dated 17th March 1989 against which no appeal having been preferred, the order had attained finality.

Therefore, it was staring on the face of the Tribunal that this could not be interfered with in appeal against an order seeking to give effect to the

order dated 17th March 1989.

7.4. The decision in Neeta S. Shah (supra) by the Karnataka High Court had held that if the order is founded on a mistaken assumption and the

error is discovered, the Tribunal has power to invoke jurisdiction u/s 254(2) because the very basis of the earlier order sought to be rectified

requires rectification. We are in agreement with the said view of the Karnataka High Court having regard to the facts and circumstances of the case

where the very foundation of the orders of the learned Tribunal sought to be rectified herein was based on the misconceived notion that the learned

Tribunal was sitting on appeal in the order dated 17th March 1989 overlooking that the appeal was related to the giving effect to the other dated

17th March 1989 since attained finality.

7.5. The decision in Bata India Ltd. (supra) has held that when the prejudicial results from the order impugned is attributable to the Tribunal''s

mistake, error or omission, it is the bounden duty of the Tribunal to set it right. There is no doubt about the proposition laid down therein.

Following the said ratio, in the present case, we also find that the mistake sought to be corrected is attributable to the Tribunal''s misconception and

error or omission to note that the order dated 17th March 1989 has reached finality and was no more open to interference in an appeal preferred

against an order attempting to give effect to the order dated 17th March 1989 since attained finality. The decision in Food Specialities Ltd. (supra)

cited by Mr. Khaitan also supports the view we have taken inasmuch as it is no more open to the department to challenge the order dated 17th

March 1989 after it had attained finality and at the same time it was not at all a challenge to the said order before the Tribunal.

Conclusion:

8. For all these reasons, we are of the view that the omission to note or consider that the order dated 17th March 1989 had reached finality and it

was no more open to interference and the learned Tribunal could not have reopened the decision in an appeal against an order attempting to give

effect to the order dated 17th March 1989 which was staring at its face and its omission to consider that the Tribunal was not sitting on appeal

over the order dated 17th March 1989 is an error or omission or mistake which does not require any argument to establish the same nor any two

opinions could be formed with regard thereto and as such is amenable to rectification u/s 254(2) of the Income Tax Act.

Order:

9. In the result, the appeal succeeds. The impugned order dated 30th March 2000 passed on the application for rectification is hereby set aside

only to the extent it had rejected the prayer of the Assessee with regard to waiver of interest. Rest of the rectification incorporating the assessment

year 1981-82 and 1982-83 shall remain effective. The order dated April 9, 1999 is rectified to the extent with regard to the question of interest by

affirming the order dated 19th August 1993 passed by the CIT(A) in respect of the assessment years 1981-82 and 1982-83.

Xerox certified copy of this judgment be made available to the parties, if applied for, on usual terms.

R.N. Sinha, J.

10. I agree.