(1986) 07 CAL CK 0030

Calcutta High Court

Case No: IT Reference No. 229 of 1976

Commissioner of Income Tax		APPELLANT
	Vs	
Turner Morrison and Co. Ltd.		RESPONDENT

Date of Decision: July 10, 1986

Acts Referred:

- Income Tax Act, 1922 - Section 23(3), 34
- Income Tax Act, 1961 - Section 154, 23A(1), 256(2), 297, 34

Citation: (1987) 166 ITR 57

Hon'ble Judges: Monjula Bose, J; Dipak Kumar Sen, J

Bench: Division Bench

Advocate: B.K. Bagchi and S.K. Chakraborty, for the Appellant;D. Pal and Miss M. Seal, for the Respondent

Judgement

Dipak Kumar Sen, J.

Turner Morrison & Co. Ltd., the assessee, was assessed to income tax in the assessment year 1951-52, the accounting year ending on 31-12-1950, the assessee''s total income was computed at Rs, 35,80,067. While computing the tax payable on the said total income, the ITO applied proviso (i) to paragraph B of Part I of the First Schedule to the Finance Act, 1951. The total income as reduced by 7 annas in the rupee exceeded the amount of the dividend declared and rebate at the rate of 1 anna per rupee was allowed on the amount of such excess. No order was made u/s 23A(1) of the Indian income tax Act, 1922 (''the 1922 Act''). A tax demand for Rs. 7,30,558 was raised and was set off against the tax paid in advance and deducted at source. An appeal was filed against the said assessment before the AAC who reduced the quantum of the total income by an order passed on 13-7-1957. A farther appeal was preferred by the assessee against the order of assessment before the Tribunal which by its order dated 22-2-1961 allowed further relief to the assessee and the total income of the asses see was reduced further.

2. When the appeal of the assessee before the AAC was pending the ITO started proceedings u/s 34 of the 1922 Act. On 20-4-1956, an order was passed by the ITO u/s 23(3), read with section 34. By the said order the ITO included in the total income of the assessee a sum of Rs. 8,49,959 as the notional dividend u/s 23A received by the assessee on 29-9-1950. The total income of the assessee was, therefore, enhanced to Rs. 44,30,026. The original total income as assessed remained at Rs. 35,80,067. In the said order rebate was not allowed under proviso (i) to paragraph B of Part I of the First Schedule to the Finance Act, 1951.

3. Being aggrieved, the assessee preferred an appeal before the AAC against the supplemental assessment which was dismissed on 11-11-1959. The assessee went up on further appeal before the Tribunal which allowed the appeal of the assessee and set aside the reassessment made u/s 34 on 14-11-1961.

4. In the meantime, the ITO gave effect to the order of the Tribunal passed on 22-2-1961 in the appeal from the original assessment and recomputed the total income at Rs. 43,446,639. While recomputing the said income the supplemental assessment was taken into account but relate under the Finance Act, 1951 was not allowed.

5. On 16-9-1964, the ITO passed an order giving effect to the order of the Tribunal dated 14-11-1961 setting aside the reassessment u/s 34. The ITO held that by reason of the order of the Tribunal setting aside the supplemental assessment the fresh demand of Rs. 1,99,373 was no longer valid and allowed the refund of the said amount. The said refund had been adjusted against a demand raised u/s 23A for the assessment year 1957-58.

6. The ITO thereafter came to hold the opinion that the order of refund passed on 16-9-1964 was prejudicial to the interests of the revenue in as much as the ITO had continued to treat the rebate on undistributed profits as withdrawn.

7. The ITO noticed that the withdrawal of the rebate on undistributed profits had been maintained in all the orders passed by the ITO but in 1964 when the predecessor ITO wanted to give effect to the Tribunal''s order he should not have revoked the withdrawal of the rebate.

8. The ITO, therefore, called upon the assessee to show cause why the order made on 16-9-1964 should not be rectified. The proposed rectification was further made clear by a subsequent letter of the ITO dated 11-1-1968 to the assessee where it was recorded that the withdrawal of the rebate on undistributed profits was made as a result of the order passed u/s 34 which was subsequently annulled by the Tribunal. It was recorded that revocation of such withdrawal of rebate on undistributed profits was erroneous.

9. The ITO ultimately passed an order u/s 154 of the Income- tax Act, 1961 (''the Act'') on 12-9-1968 and held that an excess refund to the extent of Rs. 42,663 had

been allowed to the assessee, by the order passed on 16-9-1964.

10. Being aggrieved, the assessee preferred an appeal against the order of rectification to the AAC. It was contended that there was no mistake in the order dated 16-9-1964 as the withdrawal of rebate had been effected by the ITO under the order passed u/s 34. As the said order u/s 34 had been set aside it was contended that the ITO was right in cancelling the entire reassessment u/s 34 and revoking the withdrawal of rebate. It was also contended that the rectification could be made only u/s 35 of the 1922 Act and not u/s 154 of the 1961 Act.

11. The AAC noted that in none of the earlier orders of assessment rebate had been withdrawn. He held that the withdrawal of the rebate could only have been effected by rectifying within the period of limitation calculated from the orders of assessment and not by amending the order passed by the ITO on 16-9-1964. He also held that the rectification should have been made under the 1922 Act. The appeal of the assessee was allowed.

12. Being aggrieved, the revenue preferred an appeal before the Tribunal. It was contended before the Tribunal on behalf of the revenue that the AAC had erred in holding that the order was illegal as it was passed u/s 154. It was further contended that the order should have been deemed to have been passed u/s 35. It was farther urged that the subject-matter of the rectification was not only the withdrawal of rebate on undistributed profits. It was contended that there were arithmetical mistakes in the order dated 16-9-1964 which had been rectified by the ITO.

13. It was contended on behalf of the assessee that even if the order of rectification was treated as having been made under the 1922 Act the appeal of the revenue was not maintainable. It was further contended that it was clear from records that the proposed rectification related to the withdrawal of rebate on undistributed profits. The contention of the revenue that subject-matter of rectification was something else then the actual subject-matter of the rectification was different from that in respect of which the assessee had been given notice. It was contended that principles of natural justice were thereby violated and accordingly the impugned order of rectification was invalid.

14. It was farther contended on behalf of the assessee that the entire order u/s 34 which resulted in the withdrawal of rebate had been annulled by the Tribunal. Therefore, the revocation of such with drawl was permissible and certainly the same was a controversial issue. The Tribunal held following a decision of the Madras High Court in the case of Vr. C. Rm. Adaikkappa Chettiar Vs. Commissioner of Income Tax, that the appeal filed by the revenue before the Tribunal was not maintainable though the AAC rightly or wrongly had entertained an appeal from the original order of rectification.

15. The Tribunal held further that the mistake which was sought to be rectified related to the withdrawal of the rebate and the ascertainment of excess quantum of

excess refund on this basis had to be determined by a complicated working. The Tribunal also held that the order u/s 34 having been annulled the reason for withdrawal of rebate made by the ITO consequent to the said order also disappeared. It was noted that while making the original assessment no order had been passed u/s 23A(1). On this ground also it was held that the attempt to be set aside the revocation of the withdrawal of the rebate by way of rectification raised controversy. The Tribunal held further that if the mistakes sought to be rectified were something other than relating to the withdrawal of rebate then the assessee was not put to notice about the exact nature of the mistake and the impugned order of rectification would be invalid on that ground also.

16. The appeal of the revenue was dismissed.

17. On an application of the revenue u/s 256(2) of the Act the Tribunal was directed to raise following questions as questions of law arising out of its order for the opinion of this Court:

1. Whether on the facts and in the circumstances of the case, the Tribunal erred in law in holding that the appeal by the department against the order of the Appellate Assistant Commissioner was not maintainable?

2. Whether, in the facts and in the circumstances of this case, the Tribunal was justified in holding that the Appellate Assistant Commissioner was right in cancelling the order u/s 154?

18. The controversy raised in the first question is covered by a decision of this Court in CIT v. Shell Petroleum Co. Ltd. [IT Reference No. 420 of 1975]. The judgment was delivered on 19-5-1986. It was held in that case following an earlier decision of this Court in Imperial Chemical Industries Ltd. Vs. Commissioner of Income Tax, that though an order of assessment had been made under the 1922 Act, when the subsequent 1961 Act came into force, the ITO had jurisdiction to rectify the order of assessment passed u/s 154. The facts in that case are similar to the facts before us. In the instant case, order of rectification was admittedly been made u/s 154. This is permitted by sub-section (2) of section 297 of the Act which provides that where a return of income had been filed before the commencement of the Act for any assessment year, proceedings for the assessment of that person for that year may be continued as if the Act had not been passed. The word used being ''may'' and not ''shall''. We bold following the above decisions that the ITO had jurisdiction also to proceed under the provisions of the Act.

19. We answer question No. 1 in the affirmative and in favour of the revenue.

20. So far as question No. 2 is concerned, the learned advocate for the revenue drew our attention to the various orders passed in making the assessment and submitted that as successive reliefs had been granted to the assessee in respect of the original assessment as also in respect of the supplemental assessment u/s 34 of the 1922

Act in computing the refund to be granted to the assessee implementing such reliefs, arithmetical mistakes had been committed. The learned advocate for the revenue sought to demonstrate the mistakes with calculations.

21. We are unable to entertain this contention on behalf of the revenue at this stage. The Tribunal has found that the rectification proceeding related to withdrawal of rebate granted under the Finance Act, 1951 and not in respect of any other mistake. This finding has not been challenged by the revenue. The Tribunal has found further that no notice had been given to the assessee in respect of any other mistake occurring in the order dated 16-9-1964 except in respect of withdrawal of the rebate and the assessee had no opportunity to make his representations in respect of rectification of any other mistake. Sub section (3) of section 154 makes it obligatory on the ITO to give notice to the assessee of the proposed amendment which has the effect of enhancing the assessment or reducing the refund and reasonable opportunity has to be granted to the assessee of being heard.

22. It was not contended on behalf of the revenue that rectification of the order dated 16-9-1964 so far it concerned the withdrawal of rebate the matter was free from controversy and could be lawfully made. In any event, the Tribunal has found that the rectification was made on the basis of the withdrawal of the rebate and the quantum of excess refund was worked out after complicated calculation. The Tribunal also found that the question of revocation of the withdrawal of rebate was a controversial matter. We see no reason to differ from the view taken by the Tribunal.

23. For the reason given above, we answer question No. 2 in the affirmative and in favour of the assessee. In the facts and circumstances, there will be no order as to costs.

Bose, J.

I agree.