

HIGH COURT OF JUDICATURE OF ALLAHABAD

CIVIL MISC. WRIT PETITION NO.889 OF 2002

M/s Siraj Advertising Company, Allahabad.Applicant

Versus

The Income Tax Appellate Tribunal, Allahabad. .Respondent

Hon'ble Rajesh Kumar, J.

By means of the present writ petition under Article 226 of the Constitution of India, petitioner has prayed for quashing of the order dated 28.06.2001 passed by Income Tax Appellate Tribunal.

Brief facts of the case are that the petitioner was assessed in the status of Unregistered Firm (hereinafter referred as "URF") for the assessment year 1990-91 by the Assistant Commissioner of Income Tax, Circle-II, Allahabad vide order dated 06.03.1991. It appears that a sum of Rs.1,95,020/- had been added in the income of the petitioner as an unexplained investment, which were the deposits in the books of account of the petitioner in various names. Being aggrieved by the order of the Assistant Commissioner of Income Tax, Circle-II, Allahabad, petitioner filed appeal before the Commissioner of Income Tax (Appeals), Allahabad. Commissioner of Income Tax (Appeals) vide order dated 30.08.1991 allowed the appeal in part. Appellate authority accepted the explanation of the petitioner in respect of some of the deposits but has not accepted the explanation in respect of some of the deposits and confirmed the addition. While confirming the addition, appellate authority observed that assessment has been framed in the status of URF and in this background the ratio of the decision of this Court in the case of C.I.T. Vs. Jaiswal Motor Finance, reported in (1983) 141 ITR, 706 does not apply. Appellate authority further observed that the assessee formed an AOP did not carry on any business in accounting year and the assessment has been framed in the status of URF. Under these circumstances, the onus to prove the nature and source of credit appearing in the books of account of the individual members of the AOP squarely lies upon the assessee.

Being aggrieved by the order of the Commissioner of Income Tax (Appeals), Allahabad petitioner filed second appeal before the Income Tax Appellate Tribunal, Allahabad. Assistant Commissioner of Income Tax has also filed appeal before the Tribunal. Tribunal vide order dated 09.07.1998 dismissed the appeal filed by the department and partly allowed the appeal of the assessee. Tribunal accepted the explanation of some of the deposits and confirmed some of the deposits. It appears that before the Tribunal, addition towards unexplained investment relating to the deposits in the various names have been challenged and reliance had been placed on the decision of this Court in the case of Commissioner of Income-Tax, Allahabad Vs. Jaiswal Motor Finance, (Supra). Tribunal while dealing with the decision of this Court in the case of Commissioner of Income Tax, Allahabad Vs. Jaiswal Motor Finance, (Supra) observed as follows:

"The finding which is based on the facts narrated here-in-before that the status of the assessee was that as an AOP has not at all been challenged before us in these circumstances we have no hesitation in saying that the law propounded by the Hon'ble High Court of Allahabad in Jaiswal Motors was not applicable to the facts of the present case. Instead, the law laid down by the High Court of Calcutta in the case of Shanker Industries, (Supra) is more relevant wherein it was held that it was necessary for an assessee to prove, prime facts, the transaction which results in a cash credit in his books of accounts. Such proofs are proof of quantity of the creditor, the capacity of such creditor to advance the money and genuineness of the transaction."

With the view, that there was a patent mistake in the order of the Tribunal, petitioner filed Misc. application for the rectification of the order. The main plea raised in the application was that the petitioner was assessed to tax in the status of URF while Tribunal has held that the status of the firm as an AOP and as such the decision of this Court in the case of Commissioner of Income-Tax, Allahabad Vs. Jaiswal Motor Finance, (Supra), is not applicable to the present case.

Tribunal vide order dated 31.10.2000 allowed the application in part. Tribunal has recalled the order dated 09.07.1998 in ITA No.2438 and 2367(A) of 1991 for fresh consideration and adjudication of the issues involved in the appeal relating to the applicability of the ratio of the decision of this Court in the case of Commissioner of Income-Tax, Allahabad Vs. Jaiswal Motor Finance, (Supra) along with the other issues relating to the applicability of section 68 of Income Tax Act with reference to the deposits. Tribunal was of the view that by mistake the status of the assessee was taken as an AOP and, therefore, the decision of this Court in the case of Commissioner of Income-Tax, Allahabad Vs. Jaiswal Motor Finance, (Supra) was held not applicable was factually incorrect and apparent on the face of the record.

It appears that at the instance of the order passed by the Tribunal, notice under section 254 (2) of the Income Tax Act was issued by the Assistant Registrar with the view that the Tribunal seems to have passed the order on Misc. application on mistaken facts, ignoring the correct facts on record, which is liable to be rectified by passing fresh order after recalling the order dated 31.8.2000. Thereafter, after giving the opportunity of hearing to the petitioner, Tribunal passed the impugned order dated 28.06.2001 as follows:

"After careful consideration of the rival submissions and the provisions of section 254(2) of the Act and discussion in para 5 above, we are of the opinion that though the provisions of section 254(2) are silent with regard to rectification of an order under section 254(2) of the Act, but in view of the settled position of law relating to the inherent powers of courts of plenary jurisdiction and the Tribunal, the Tribunal has inherent powers to rectify any mistake committed by it in any of its order - may that order be under section 254(1) or 254(2) of the Act and this conclusion of ours is fortified by the decisions of Hon'ble jurisdictional High Court of Allahabad (supra) and the decision of the ITAT, Lucknow Bench, Camp at Lucknow in the case of Dy.CIT Vs. M/s. U.P. Forest Corporation, Lucknow (supra).

Coming to the assessee's next objection that there being no application for

rectification either by the assessee or by the Revenue, the Tribunal of its own (suo moto) cannot rectify any of its order, let us consider the provisions of section 254(2) of the Act which are in the following terms:

"S.254(2). The Appellate Tribunal may, at any time within four years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it under sub-section (1), and shall make such amendment if the mistake is brought to its notice by the assessee or the Assessing Officer."

In view of the above analysis of the provisions of sub-section (2) of section 254, we are of the opinion that the Tribunal has clear powers to amend any order passed by it under sub-section (1) of section 254 of its own, i.e. suo moto. In support of our conclusion we once again derive support from the decisions of Hon'ble Jurisdictional Allahabad High Court (supra). The assessee's objection is, therefore, rejected and we hold that the Tribunal has power to rectify its order suo moto.

In view of the above facts and circumstances of the case, we are of the opinion that the Tribunal's finding that the assessee's status was that of URF has been arrived at on the mistaken facts i.e. on the basis of facts which are not on record and, therefore, the findings arrived at are as a result of mistake of facts. The findings in the order of the Tribunal dated 31.08.2000 in M.A. No.11 (Alld.)/2000 having been given on the basis of assumption contrary to the facts on record, the same are expunged and the order is recalled for fresh disposal of the assessee's Miscellaneous Application.

The assessee's plea that there being no appeal before CIT (A) on the point of status, he had no reasons to change the status from URF to AOP and that in case he had changed the same, his action was illegal, is also not sustainable because the assessee having not challenged the order of the CIT (A), wherein he had clearly changed the assessee's status from URF to AOP before the Tribunal - as is quite evident from the findings of the Tribunal in paragraph 9 of its order

dated 9th July, 1998 in assessee's I.T.A.No.2438 (Alld.)/1991. This objection of the assessee also stands rejected.

Having regard to the totality of the circumstances, decisions referred to in the foregoing part of this order we are of the opinion that a mistake had crept in the order of the Tribunal dated 31.8.2000- so far as question of changing of assessee's status from URF to AOP is concerned i.e. whether it was changed by the CIT (A) or the Tribunal simply assumed the status as that of URF; the mistake being of facts and apparent from the record is liable to be rectified by virtue of powers vested with the Tribunal by the provisions of section 254 (2) of the Act. We, therefore, with a view to expunge the findings of the Tribunal and recall the order of the Tribunal dated 31.08.2000. The Registry is to refix the assessee's M.A.No.11(Alld.)/2000 for fresh hearing on 24.8.2001."

Heard Sri R.S. Agrawal, learned counsel for the petitioner and Sri Govind Krishna, learned counsel for the respondent.

Learned counsel for both the parties have informed that in pursuance of the impugned order, no proceeding has been taken and no further order has been passed by the Tribunal.

Learned counsel for the petitioner made the following submissions:

- "Under section 254 (2), order passed under section 254 (1) can only be rectified and the order passed under section 254 (2) of the Income Tax Act cannot be rectified. Thus, Tribunal has erred in rectifying the order passed under section 254 (2) of the Income Tax Act dated 31.08.2000 passed in Misc. Application No.11 (Alld.)/2000. Thus, the impugned order is without jurisdiction.
- When the specific powers of the rectification is provided in the statute, inherent powers cannot be exercised.

· Inherent power is only available to the Court and not to the Tribunal. He submitted that the Tribunal is not a Court and, therefore, has no inherent power. In support of his contention he relied upon the decision of the Apex Court in the case of The Commissioner of Sales Tax, U.P., Lucknow Vs. M/S Parson Tools and Plants, Kanpur, reported in 1975 UPTC, 297, Damodaran Pillai and others Vs. South Indian Bank Ltd., reported in AIR 2005 SC, 3460, Welham Boy's School Society Vs. Central Board of Direct Taxes and Another, reported in (2006) 285 ITR, 74 (Uttaranchal), Dr.Shashi Kant Garg Vs. Commissioner of Income-Tax and others, reported in (2006) 285 ITR, 158 (All), Commissioner of Income-Tax Vs. Vardhman Spinning, reported in (1997) 226 ITR, 296, Commissioner of Income-Tax Vs. K.L.Bhatia, reported in (1990) 182 ITR, 361.

· Tribunal has erred in observing that the petitioner was assessed to tax in the status of URF and the Commissioner of Income Tax (Appeals) has taken the status as an AOP, therefore, there was no mistake in the order of the Tribunal in taking the status that of an AOP.

· He submitted that Commissioner of Income Tax (Appeals) has not changed the status from URF to AOP.

· He submitted that whether the Tribunal was justified in coming to the conclusion that the petitioner was assessed to tax in the status of URF and not in the status of AOP, which is apparent on record and in the appellate order, status has wrongly been taken as AOP by mistake is debatable issue, which requires adjudication.

· He submitted that from the perusal of the assessment order, it is apparent that the petitioner was assessed in the status of URF. Commissioner (Appeals) in its order has also not changed the status from URF to AOP. Commissioner (Appeals) has only observed that "the assessee formed an AOP did not carry on any business in accounting year and the assessment has been framed in the

status of URF. Thus, Tribunal by the impugned order has erred in observing that the Commissioner of Income-Tax (Appeals) has taken the status of AOP. Learned counsel for the respondent submitted that the Tribunal has inherent power to rectify the order under section 254 (2) of the Income Tax Act. In support of his contention he relied upon the decision in the case of Income-Tax Officer, Lucknow Vs. S.B.Singar Singh & Sons and another, reported in (1970) 75 ITR, 646, Central Manbhum Coal Co. (P) Ltd and another etc. Vs. Additional Collector, Dhanbad and others, reported in AIR, 1983 Calcutta, 95. (Para 27). He further submitted that by the impugned order Tribunal has directed to rehear the misc. application. Thus, misc. application is still open for consideration and, therefore, no interference is called for.

Having heard learned counsel for the parties, I have perused the order of the Tribunal and the authorities below.

I find substance in the argument of learned counsel for the petitioner. Perusal of the assessment order reveals that the petitioner was assessed to tax in the status of URF. On the very first page of the assessment order in the column of status URF is mentioned and before the computation of the income "After discussion, the income is computed as U.R.F." is clearly mentioned. Perusal of the order passed by Commissioner of Income Tax (Appeals) shows that the status has not been changed. The decision of this Court in the case of Commissioner of Income-Tax, Allahabad Vs. Jaiswal Motor Finance, (Supra) has been held not applicable taking the status of URF. The observation of the Commissioner of Income Tax (Appeals) that the assessee formed an AOP did not carry on any business in the accounting year and the assessment has been framed in the status of URF, can not be said that the Commissioner of Income Tax (Appeals) has taken the status as AOP. Tribunal in its order dated 09.07.1998 in paragraph 9 has observed "the findings which is based on the facts narrated here-in-before that the status of the assessee was that of an AOP has not at all been challenged before us. In these circumstances we have no hesitation in saying that the law propounded by the Hon'ble High Court in Jaiswal Motors was not applicable to the facts of the present case" appears to

be apparently incorrect. The status of the assessee was never taken as an AOP as observed above.

Having regard to the aforesaid factual position Tribunal by the order dated 31.08.2000 has recalled its order dated 09.07.1998 and directed for further hearing of the appeal.

Thus, on the facts of the case, the view of the Tribunal that Commissioner of Income Tax (Appeals) has changed the status to AOP is patently incorrect and erroneous.

Let us examine the legal position also. Section 254 (2) of the Income Tax Act read as follows:

"254(2) : The Appellate Tribunal may, at any time within four years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it under sub-section (1) and shall make such amendment if the mistake is brought to its notice by the assessee or the [Assessing] Officer :

Provided that an amendment which has the effect of enhancing an assessment or reducing a refund or otherwise increasing the liability of the assessee, shall not be made under this sub-section unless the Appellate Tribunal has given notice to the assessee of its intention to do so and has allowed the assessee a reasonable opportunity of being heard."

Section 254 (2) of Income Tax Act provides power to the Tribunal to rectify any mistake apparent from the record any order passed by it under sub-section (1). Under the Statute no power is provided to the Appellate Tribunal to rectify the mistake in the order passed under section 254 (2) of the Income Tax Act. When a specific power is given in the Statute to the Tribunal to rectify the order passed under section 254 (1) of the Income Tax Act only the power to rectify the order under section 254 (2) of the Income Tax Act cannot be assumed.

By the impugned order Tribunal has purported to review its earlier order dated 31.08.2000 passed under section 254(2) of the Act. Under the Income Tax Act no power is provided to the Tribunal to review its order. Apex Court in the case of Kapra Mazdoor Ekta Union Vs. Birla Cotton Spinning and Weaving Mills Ltd. and others, reported in 2005 AIR SCW, 1561 held that the Tribunal can not exercise power of review unless specifically provided.

In the case of The Commissioner of Sales Tax, U.P., Lucknow Vs. M/S Parson Tools and Plants, Kanpur, (Surpa) Apex Court held that the appellate authority and Judge (Revisions) Sales Tax exercising the jurisdiction under the Sales Tax are not the Court.

In the case of Damodaran Pillai and others Vs. South Indian Bank Ltd., (Supra), Apex Court held that the Court can not exercise the inherent power in condoning the delay in moving the restoration application inasmuch as under Order XXI application of section 5 of the Limitation Act is expressly excluded.

In the case of Welham Boy's School Society Vs. Central Board of Direct Taxes and another, (Supra), the Uttaranchal High Court held that the Commissioner being the statutory authority in the absence of any power in the statute to rescind the registration can not exercise such powers under the inherent power.

In the case of Commissioner of Income-tax Vs. Vardhman Spinning, (Supra), Punjab & Haryana High Court held that the appellate authority is creation of statute and it can exercise only those powers which have been conferred upon it. The only power conferred on the Tribunal under section 254(2) of the Act is to rectify any mistake apparent from the record. The jurisdiction to review or modify the orders passed by the authorities under the Act can not inferred on the basis of a supposed inherent right. The mistake, which can be rectify is apparent and patent. The mistake has to be such for which no elaborate reasons or inquiry is necessary. Where two opinions are possible, then it can not be said to be an error apparent on the basis of the record. In the case of Commissioner of Income-Tax Vs. K.L. Bhatia, (Supra), Division

Bench of Delhi High Court held that the Income-Tax Appellate Authority is a creature of the Income-Tax Act. Tribunal has no power, in exercise of its alleged inherent powers, to pass any order on merits, if such an order is not contemplated by the provisions of the Income-tax Act.

In the case of Patel Narshi Thakershi and others Vs. Pradyumansinghji Arjunsinghji, reported in AIR, 1970 SC, 1273, Apex Court held that the power to review is not an inherent power. It must be conferred by law either specifically or by necessary implication as to reason that if power of review is not present with the Tribunal, it nevertheless can not exercise such powers indirectly when it can not do so directly.

In the case of Central Manbhum Coal Co. (P.) Ltd. And another Vs. Additional Collector, Dhanbad and others, reported in AIR 1983, 95 (Cal.). Calcutta High Court held that the Tribunal can, even in the absence of specific powers, rectify its own mistakes in exercise of its inherent powers for the ends of justice or to prevent the abuse of its process. It is true of course that this power cannot and should not be exercised to reverse every wrong order made by it but should be exercised sparingly when the mistake is glaring and rectification of which is absolutely essential for the ends of justice.

Even in view of the law laid down by the Calcutta High Court order of the Tribunal can not be held justified. There was no glaring mistake in the order sought to be reviewed. By the impugned order Tribunal sought to review the order and not to rectify the order, which is not permissible in law. This Court in the case of ITO Vs. Singar Singh (S.B.) And Sons (Supra) held that even when express power to review its orders is not conferred by a statute, a court or a Tribunal has inherent jurisdiction to rectify a wrong committed by itself when that wrong causes prejudice to a party for which that party is not responsible. The Division Bench of the Delhi High Court in the case of Commissioner of Income-Tax Vs. K.L. Bhatia (Supra) disagreed to the aforesaid view.

Further on the facts of the case, this is not applicable in the present case. In the said case Court has held that the Tribunal has inherent jurisdiction to rectify a wrong committed by itself when that wrong causes prejudice to a party for which that party is not responsible. This situation is not available in the present case.

The Appellate Tribunal has no inherent power of reviewing its order on merits. It cannot, in the purported exercise of its inherent powers, rehear a case on its merits. It is true that as an incidental or ancillary to the appellate power, for the furtherance of the statutory power which is conferred upon it, Tribunal can set aside the ex-parte order and can recall its earlier order or stay the realization of the tax in the absence of any specific provisions as held in various cases, namely, Mangat Ram Kuthiala Vs. CIT, reported in 38 ITR, 1 (Punjab), CIT Vs. Arunachalam Chettiar (Mst.Av.S.Ar.), reported in [1953] 23 ITR, 180 (SC), Murlidhar Surda Vs. ITAT, reported in [1973] 92 ITR, 189 (Cal.), CUT Vs. Krishna Rana (Dr.) (Mrs.) [1987] 167 ITR, 652 (Pat.), CWT Vs. Smt. Illa Dalmia, reported in [1987] 168 ITR, 306 (Delhi), ITO Vs. Singar Singh (S.B.) And Sons, reported in [1970] 75 ITR, 646 (Alld.) but there is no inherent power with the Tribunal to deal with the matter on merits to review or modify its earlier order.

Thus, in my opinion, impugned order of the Tribunal is not sustainable for the following reasons:

1) Commissioner of Income-Tax (Appeals) has not changed the status from URF to AOP. Assessing authority has taken the status as URF, which has not been disturbed by the Commissioner of Income-Tax (Appeals).

2) Tribunal has no power under the Income-Tax Act to review or rectify the order under section 254 (2) of the Act. It has only power to rectify the order passed under section 254(1) of the Act.

3) Tribunal has no power in the Act to review any order. The mistake which is

sought to be rectified by the impugned order is not apparent and patent error. Tribunal sought to review/modify its earlier order, which is not permissible in law.

The Appellate Tribunal has no inherent power of reviewing its order on merits. It cannot, in the purported exercise of its inherent powers, rehear a case on its merits. It is true that as an incidental or ancillary to the appellate power, for the furtherance of the statutory power which is conferred upon it, Tribunal can set aside the ex-parte order and can recall its earlier order or stay the realization of the tax in the absence of any specific provisions as held in various cases, namely, Mangat Ram Kuthiala Vs. CIT, reported in 38 ITR, 1 (Punjab), CIT Vs. Arunachalam Chettiar (Mst.Av.S.Ar.), reported in [1953] 23 ITR, 180 (SC), Murlidhar Surda Vs. ITAT, reported in [1973] 92 ITR, 189 (Cal.), CUT Vs. Krishna Rana (Dr.) (Mrs.) [1987] 167 ITR, 652 (Pat.), CWT Vs. Smt. Illa Dalmia, reported in [1987] 168 ITR, 306 (Delhi), ITO Vs. Singar Singh (S.B.) And Sons, reported in [1970] 75 ITR, 646 (Alld.) but there is no inherent power with the Tribunal to deal with the matter on merits to review or modify its earlier order.

In the result, writ petition is allowed. Impugned order of the Tribunal is quashed.

Dt.13.03.2007