IN THE SUPREME COURT OF INDIA

CIVIL APPEAL NOS.7662-7663 OF 2009

M/s MEPCO INDUSTRIES LTD

Vs

COMMISSIONER OF INCOME TAX & ANR

S H Kapadia, H L Dattu And Deepak Verma, JJ

Dated : November 19, 2009

Appellant Resp. by : Mr. Preetesh Kapur, Adv. Ms. Radha Rangaswamy, Adv.
Respondent Rep. by : Mr. B.V. Balaram Das, Adv.

Income tax - Sec 154 - Assessee is a manufacturer of potassium chlorates - receives power subsidy - declares it as revenue receipt for two AYs - Following the decision in the case of P.J.Chemicals (2002-TIOL-749-SC-IT), assessee files review petition u/s 264 and treats the subsidy as capital receipt - CIT allows the claim - Subsequently, Apex Court decides the case of Sahney Steel and Press Works Ltd (2002-TIOL-11-SC-IT) wherein power subsidy is held as revenue receipt taxable u/s 28 - CIT disallows assessee's claim by passing rectification order u/s 154 - whether Revenue is legally right in invoking powers u/s 154 and reversing its earlier decision

Assessee pleads CIT cannot pass rectification order u/s 154 to deny a benefit already held allowable - goes in Writ - HC holds that in view of the Apex Court decision in the case of Sahney Steel, Revenue can pass a rectification order to disallow a claim not admissible to the assessee - Decision affirmed by the Division Bench - On further appeal, held:

++ It is settled law that under Section 154 of the Act, rectification cannot be permissible on debatable issue.

++ The nature of the subsidies is very critical to decide whether an income is revenue receipt or not. There is no straight-jacket principle of distinguishing a capital receipt from a revenue receipt. It depends upon the circumstances of each case. In Sahney Steel and Press Works Limited & Ors, the Supreme Court has observed that the production incentive scheme is different from the Scheme giving subsidy for setting up industries in backward areas. In the circumstances, the present case is an example of change of opinion which is not permissible. Revenue has clearly erred in invoking Section 154 of the Act.

++ Rectifiable Mistake: It must be a patent mistake, which is obvious and whose discovery is not dependant on elaborate arguments. Decision on debatable point of law cannot be treated as "mistake apparent from the record".

Assessee's appeal allowed

JUDGEMENT

Per : Kapadia, J :

Heard learned counsel on both sides.

Leave granted.

The short question which arises in the facts and circumstances of these appeals is: whether it was open to the Commissioner of Income Tax to rectify its own order under Section 154 of the Income Tax Act, 1961, on the basis of the judgement of this Court [later judgement] in the case of Sahney Steel and Press Works Limited & Ors. vs. Commissioner of Income Tax, reported in [1997] 228 I.T.R.253 = (**2002-TIOL-11-SC-IT**). In short, in these appeals, we are concerned with the scope of Section 154 of the Act.

The appellant is engaged in the business of manufacture of Potassium Chlorates. Its factory is located in the Union Territory of Pondicherry. The appellant received power subsidy for two years, which it initially offered as revenue receipt in its Return of Income. In the petitions filed under Section 264 of the Income Tax Act, 1961 [for short, "the Act"], the assessee pleaded that the subsidy amount was a capital receipt, hence not liable to be taxed, and, accordingly, it sought revision of the assessment orders for Assessment Years 1993-1994 and 1994-1995. In the revision petitions, appellant had pleaded that the subsidy amount was a capital receipt and, for that purpose, it relied upon the judgement of this Court in the case of Commissioner of Income Tax vs. P.J. Chemicals Limited, reported in [1994] 210 I.T.R.830 = (**2002-TIOL-749-SC-IT**). The revision petitions filed by the appellant under Section 264 of the Act stood allowed by the Commissioner of Income Tax by order dated April 30, 1997. Subsequent to the said order, on 19th September, 1997, this Court in the case of Sahney Steel and Press Works Limited (supra) held that incentive subsidy admissible to Sahney Steel and Press Works Limited was a revenue receipt and, hence, it was liable to be taxed under Section 28 of the Act. This decision was based on a detailed examination of the Subsidy Scheme formulated by the Government of Andhra Pradesh. It stated that incentives would not be available unless and until production had commenced. In that matter, this Court found that

incentives were given by refund of sales tax and by subsidy on power consumed for production. In short, on the facts and circumstances of that case, this Court came to the conclusion that incentives were production incentives in the sense that the assessee was entitled to incentives only after entering into production. It was also clarified that the Scheme was not to make any payment directly or indirectly for setting up the industries.

Following the judgement of this Court in the case of Sahney Steel and Press Works Limited (supra), delivered on 19th September, 1997, the Commissioner of Income Tax passed an order of rectification dated 30th March, 1998. The only ground on which rectification was sought to be made by the Commissioner of Income Tax was that Power Tariff Subsidy given to the appellant herein was admissible only after commencement of production.

Consequently, according to the Commissioner of Income Tax, Power Tariff Subsidy constituted operational subsidies, they were not capital subsidies and, in the circumstances, applying the ratio of the judgement of this Court in the case of Sahney Steel and Press Works Limited (supra), the Commissioner of Income Tax sought to rectify its earlier order dated 30th April, 1997, by invoking Section 154 of the Act. Aggrieved by the said order, the appellant herein filed writ petitions before the Madras High Court, which took the view that, in view of the subsequent decision of this Court in the case of Sahney Steel and Press Works Limited (supra), the Department was entitled to invoke Section 154 of the Act and that the Commissioner was right in treating the receipt of subsidies as a revenue receipt. This decision of the learned Single Judge has been affirmed by the Division Bench of the Madras High Court. Hence, these appeals by special leave. At the outset, we may state that, in these appeals, we are concerned with Assessment Years 1993-1994 and 1994- 1995. The short point involved in these appeals is, whether there existed a `rectifiable mistake' enabling the Department to invoke Section 154 of the Act? If one examines the Scheme of the Income Tax Act, as it stood at the material time, one finds a clear dichotomy between Section 154 and Section 147 of the Act. Section 154 deals with rectification of mistake. Section 154(1), inter alia, states that, with a view to rectify any mistake apparent from the record, an Income Tax Authority may amend any order passed by it under the provisions of the Act, whereas Section 147, inter alia, states that if the Assessing Officer has reason to believe that any income charged to tax has escaped assessment for any assessment year, he may, subject to the provisions of Sections 148 to 153, assess or re-assess such income which has escaped assessment and which comes to the notice of the Assessing Officer subsequently in the course of proceedings under the said Section. In the present case, the Department did not invoke Section 147 of the Act even when the matter

was within the time limit prescribed. Be that as it may, in these appeals, we are concerned with the meaning of the words `rectifiable mistake'.

On the facts of the present case, we are of the view that the present case involves change of opinion. In this connection, it must be noted that Government grants different types of subsidies to the entrepreneurs. The subsidy in Sahney Steel and Press Works Limited (supra) was an incentive subsidy linked to production. In fact, in Sahney Steel and Press Works Limited (supra) [at page 257], this Court categorically stated that the Scheme in hand was an incentive Scheme and it was not a Scheme for setting up the industries. In the said case, the salient features of the Scheme were examined and it was noticed that the Scheme formulated by the Government of Andhra Pradesh was admissible only after the commencement of production. In Income Tax matters, one has to examine the nature of the item in question, which would depend on the facts of each case. In the present case, we are concerned with power subsidy whereas in the case of Commissioner of Income Tax vs. Ponni Sugars and Chemicals Limited, reported in [2008] 306 I.T.R.392 = (**2008-TIOL-174-SC-IT**), the subsidy given by the Government was for re-paying loans. Therefore, in each case, one as to examine the nature of subsidy. This exercise cannot be undertaken under Section 154 of the Act. There is one more reason why Section 154 in the present case was not invokable by the Department. Originally, the Commissioner of Income Tax, while passing orders under Section 264 of the Act on 30th April, 1997, had taken the view that the subsidy in question was a capital receipt not taxable under the Act. After the judgement of this Court in Sahney Steel and Press Works Limited (supra), the Commissioner of Income Tax has taken the view that the subsidy in question was a revenue receipt. Therefore, in our view, the present case is a classic illustration of change of opinion.

We may now deal with the judgement of the Calcutta High Court in the case of Jiyajeerao Cotton Mills Limited vs. Income Tax Officer, Calcutta & Ors., reported in [1981] 130 I.T.R. 710. In that case, the appellant- assessee derived profits from three industries, one of which qualified for special rebate under Part-I of Schedule-I to the Finance Act, 1965, for the Assessment Year 1966-1967. In granting this special rebate, the Income Tax Officer computed the profits attributable to that industry without deducting development rebate granted to the appellant. The Income Tax Officer sought to rectify the mistake under Section 154 of the Act by re- computing the profits by deducting the development rebate. The appellant filed a writ petition for setting aside the notice of rectification. It was held by the Calcutta High Court that since there was conflict of opinion on computation of profits of priority industry for granting tax relief which conflict was resolved by the Supreme Court later on for the subsequent Assessment Year 1967- 1968, such subsequent decision of the Supreme Court did not obliterate

the conflict of opinion prior to it. It was held that, under Section 154 of the Act, rectification was not permissible on debatable issue.

In Kil Kotagiri Tea and Coffee Estates Company Limited vs. Income Tax Appellate Tribunal & Ors., reported in [1988] 174 I.T.R.579, the facts were as follows: the assessee claimed interest on advance tax paid by it in excess but beyond the due dates. The Income Tax Officer disallowed the claim of the assessee. The Commissioner of Income Tax upheld the claim of the assessee. Following the decision of a learned Single Judge of the Kerala High Court in A. Sethumadhavan vs. Commissioner of Income Tax [1980] 122 I.T.R.587, the Tribunal held that belated payments were not to be taken into account as advance tax for the purpose of Section 214 of the Income Tax Act, and, therefore, interest was not admissible for such belated payments. However, subsequently, a Division Bench of the same High Court in Santha S. Shenoy vs. Union of India [1982] 135 I.T.R.39, reversed the decision of the learned Single Judge in A. Sethumadhavan (supra) and held that payment of tax made within the financial year, though not within specified dates, should be treated as advance tax and, consequently, the assessee was entitled to interest on excess tax paid. The assessee filed an application under Section 154 of the Act for rectification of the order of the Tribunal in view of the later decision in Santha S. Shenoy (supra). On the facts of that case, the Kerala High Court came to the conclusion that the rectification contemplated under Section 154 must be a `rectifiable mistake' which is a mistake in the light of the law in force at the time when the order sought to be rectified was passed. The Kerala High Court also examined the judgement of the Calcutta High Court in Jiyajeerao Cotton Mills Limited (supra) and held that the said decision was distinguishable. The High Court laid down a principle of law, which was applicable across the board, namely, payment of advance tax made within the financial year, though not within the specified dates, should be treated as advance tax and, therefore, the assessee was entitled to interest on excess tax paid. The judgement in Kil Kotagiri Tea and Coffee Estates Company Limited (supra) is not applicable to the facts of the present case, as stated above. Sahney Steel and Press Works Limited & Ors. (supra) was a case which dealt with production subsidy, Ponni Sugars and Chemicals Limited (supra) dealt with subsidy linked to loan re-payment whereas the present case deals with a subsidy for setting up an industry in the backward area. Therefore, in each case, one has to examine the nature of the subsidy. The judgement of this Court in Sahney Steel and Press Works Limited & Ors. (supra) was on its own facts; so also, the judgement of this Court in Ponni Sugars and Chemicals Limited (supra). The nature of the subsidies in each of the three cases is separate and distinct. There is no straight-jacket principle of distinguishing a capital receipt from a revenue receipt. It

depends upon the circumstances of each case. As stated above, in Sahney Steel and Press Works Limited & Ors. (supra), this Court has observed that the production incentive scheme is different from the Scheme giving subsidy for setting up industries in backward areas. In the circumstances, the present case is an example of change of opinion. Therefore, the Department has erred in invoking Section 154 of the Act.

Before concluding, we may state that in Deva Metal Powders (P) Limited vs. Commissioner, Trade Tax, Uttar Pradesh, reported in 2008 (2) S.C.C.439 = (**2007-TIOL-221-SC-IT**), a Division Bench of this Court held that a `rectifiable mistake' must exist and the same must be apparent from the record. It must be a patent mistake, which is obvious and whose discovery is not dependant on elaborate arguments.

To the same effect is the judgement of this Court in the case of Commissioner of Central Excise, Calcutta vs. A.S.C.U. Limited [2003] 151 E.L.T. 481 = (**2002-TIOL-408-SC-CX**), wherein it has been held that a `rectifiable mistake' is a mistake which is obvious and not something which has to be established by a long drawn process of reasoning or where two opinions are possible. Decision on debatable point of law cannot be treated as "mistake apparent from the record". For the afore-stated reasons, appellant-assessee succeeds, impugned judgement is set aside and, consequently, the appeals are allowed with no order as to costs.