HIGH COURT OF ALLAHABAD

Commissioner of Income-tax

v.

Raza Hussain Contractor*

SUNIL AMBWANI AND ADITYA NATH MITTAL, JJ.
IT APPEAL NO. 189 OF 2009†
OCTOBER 3, 2012

ORDER

1. We have heard Shri Bharat Ji Agarwal, Senior Advocate assisted by Shri Dhananjai Awasthi for the revenue. Shri Ashish Bansal appears for the respondent-assessee.

2. This Income Tax Appeal under Section 260-A of the Income Tax Act, 1961 arises out of an order passed by the Income Tax Appellate Tribunal, Lucknow Bench, Lucknow dated 13.2.2009 in M.A. No. 85 (Luc)/2008 arising out of Income Tax Appeal No. 175 (Luc)/2008 for the assessment year 2003-04.

3. The Income Tax Appellate Tribunal allowed the misc. application and recalled its order dated 30.5.2008. In the opening paragraph of the order dated 30.5.2008, it was stated that the appeal has been filed by the assessee against the order of CIT (A) dated 12.10.2007 for the assessment year 2003-04, in which the assessee has raised 14 grounds disputing the assessment of income and also various additions made by the Assessing Officer. The assessee had also filed an application under Section 253 (5) of the Act for condonation of delay of 29 days in filing the appeal.

4. After condoning the delay the Tribunal decided the matter on merits. After narrating the facts of the case it observed in paragraph-10, that the AO completed the assessment on a total income of Rs. 16,41,800/- by making addition on account of wrong and excessive claim of labour expenses of Rs.11,13,009/- and secret commission of Rs.4,18,434/-. He added these amounts under Section 69C of the Act as unexplained expenditure. In paragraph-12 the Tribunal observed that the assessee is in appeal before it. Learned counsel for the assessee made submissions as they were made before the authorities. With regard to expenditures incurred on labourers, the Tribunal interfered with the findings recorded by the AO and CIT (A), on total expenses of labour for installation of 343 hand pumps as Rs. 7,40,880/-. After recalculating the amount spent on labour, the assessee was given relief of Rs. 2,62,892/-. Thereafter in paragraph-16 it considered the issue regarding expenses of Rs. 4,18,438/- towards secret commission disallowed by the AO and confirmed by the CIT (A). The Tribunal thereafter in paragraph-17 relied upon *Dy. CIT* v. *Super Tannery (India) Ltd.* [2005] 274 ITR 338 (All.) and in para-18 recorded the findings that disallowance was made in part and in the case before the Tribunal, there was no part disallowance and genuineness of the expenditure was not said to be proved; thus it cannot be said that the decision is identical to the facts of the case. In para-19 the Tribunal confirmed the disallowance towards secret commission of Rs.4,18,438/-. The appeal was allowed in part.

5. The assessee filed a miscellaneous application to recall the order of the Tribunal dated 30.5.2008 under Section 254 (2) of the Act alleging that the Tribunal did not consider and decide ground nos. 7, 8 and 9 taken by the assessee. By these grounds the assessee had primarily objected that the ITO could not have determined the income of the assessee to his best judgment unless he had first rejected the books of account.

6. The Tribunal thereafter proceeded to allow the recall application to the limited extent of considering ground no.2 as follows:—

'3. After hearing the ld. D.R and considering the material on record, we find that the contention of the assessee is partly correct. The Tribunal has not disposed of the ground no.2, which reads as under:

"2. That the assessee has received a total payment of Rs. 2367949/- out of this amount the ITO has assessed and fixed the income of appellant at Rs. 16,48,000, 69.33% of the gross receipts without rejecting the account books u/s 145 (3) when there is no cash credit in account books without considering all the facts and laws cited by assessee. On appeal ld. CIT (A) has fixed total income of Rs. 1372337 (57.95%) against the total receipts of Rs. 23,67,949 in this connection it is humbly submitted that both the decisions of lower authorities are unlawful and arbitrary."

After going through the order of the Tribunal, we find that this ground has not been inadvertently adjudicated. Hence to adjudicate on this ground, we recall the order of the Appellate Tribunal dated 30.5.2008 to that limited extent. The Registry is directed to fix the appeal in due course for fresh hearing.

4. In the result, Miscellaneous Application is partly allowed.

The order pronounced in the open Court on 13.2.2009.'

7. The department has filed this appeal on the following substantial questions of law:—

"(1) Whether on the facts and in the circumstances of the case, the Tribunal is justified in law in going beyond the scope of its powers in adjudicating on an issue which was neither pleaded nor raised before it in the grounds filed by the assessee in its Misc. Application?

(2) Whether the Tribunal while giving a finding in respect of Ground No. 2 has completely lost sight of the fact that non-adjudication of Ground No. 2 was not the grievance of the assessee when it moved the Misc. Application."

8. Shri Bharat Ji Agarwal, appearing for the revenue submits that the recall application was not maintainable to decide the matter all over again. It was not a case of mistake apparent from the record to recall the entire order. The Tribunal was not required to consider each and every ground taken in the appeal unless the appellant specifically pressed such ground/s. From the entire order of the Tribunal, it does not appear that the assessee had pressed any of the ground nos. 7, 8 and 9 or even ground no. 2, which goes to the very jurisdiction of the ITO. Shri Bharat Ji Agarwal submits that even if an application for rectification of mistake apparent from the record is to be entertained, which was not the case in the application, the Tribunal could amend any order passed by it, if such mistake was brought to its notice by the assessee to the Assessing Officer. The Tribunal has no power to recall the order and to decide the matter afresh. Shri Agarwal has relied upon judgments in *Commissioner of Trade Tax* v. *Upper Doab Sugar Mills Ltd*. [2000] 3 SCC 676 ; *CIT* v. *Ralson Industries Ltd*. [2007] 288 ITR 322/158 Taxman 160 (SC) and *Asstt. CTO* v. *Makkad Plastic Agencies VSTI* 2011 (10) 3265 in support of his submission.

9. Shri Ashish Bansal, replying to the argument of Shri Bharat Ji Agarwal, submits that the Tribunal did not consider in its judgment either the ground nos. 7, 8 and 9 or ground no.2, which is the substance of ground nos. 7, 8 and 9. The Tribunal failed to consider that the AO could not have proceeded to make the additions by way of best judgment assessment unless the books of accounts were rejected. The ITO had assessed and fixed income of assessee at Rs. 16,41,800/- i.e. 69.33% of gross receipts without rejecting the account books u/s 145 (3) when there was no cash credit in account books, without considering all the facts and laws cited by assessee. On appeal the CIT (A) fixed total income at Rs. 13,72,337/- (57.95%) against the total receipts of Rs. 23,67,949/-and thus both the decisions of lower

authorities are unlawful and arbitrary.

10. Shri Ashish Bansal submits that ground nos. 7, 8 and 9 were in fact consolidated in ground no.2 and thus the Tribunal did not commit any mistake in finding that since ground no.2 has not been adjudicated. The Tribunal recalled the order to the limited extent.

11. The powers of review, rectification and recall are clearly understood in legal term. The power of review may be exercised, where there is an error apparent on the fact of record to be considered and decided by the judicial or quasi judicial authority. The power of rectifying the mistake is different in nature. If the mistake has crept in the order by way of inadvertence or for any reason whatsoever, the judicial or quasi judicial authority can amend any order passed by it, but that such power cannot be used to review the judgment and to consider the grounds, which were not considered by it.

12. In contradistinction to the powers of review or rectification of mistake the powers for recalling the order can be exercised in the circumstances, where the authority has made a wrong order or that the order is violative of principle of natural justice inasmuch as any of the affected parties was not heard. The order may also be recalled where any of the affected party had died, and no representative was brought on record. The power to recall is ordinarily exercised in cases where the affected party was not heard or that there are circumstances in which the authority could not have made an order or judgment. The power of recall cannot be exercised in substitution to the powers of review or rectification of mistake.

13. It is not necessary to any judicial or quasi judicial authority to meet each and every grounds, which has been taken by the applicant-appellant in the application or appeal. The judicial or quasi judicial authority is required to consider and decide only those grounds, which were pressed before it. It is always advisable to say at the end of the judgment/order, whether any other ground was pressed. The absence of such recital, however, has to be understood in the sense that no other ground was pressed.

14. In the present case, we find that there is no indication in the order dated 30.5.2008 that any ground, other than the grounds considered by the Tribunal, was pressed. The reference to ground nos. 7, 8 and 9 or ground no.2, which is substance of ground nos. 7, 8 and 9, the applicant virtually wanted the rehearing of the appeal by the Tribunal. The Tribunal committed gross error of law in recalling its order and also stating that recall is only to the limited extent.

15. On the aforesaid discussions, we find that the Tribunal erred in law in recalling its order on the pretext of rectifying the mistake, and permitting itself to rehear the matter as if it was exercising the power of appeal over its own judgment.

16. For the aforesaid reasons, both the substantial questions of law are decided in favour of the revenue and against the respondent assessee. The Income Tax Appeal is allowed. The order dated 13.2.2009 is set aside. By way of caution, we may mention that no other point was pressed.

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*In favour of revenue.

†Arising out of order of ITAT in M.A. No. 85 of 2008, dated 13-2-2009.