IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

ITA No. 209 of 2003
Date of decision: 24.01.2012

The Commissioner of Income Tax-III, Ludhiana
-----Appellant

Vs.

M/s Varindra Construction Company, Baghapurana, District Moga

----Respondent

CORAM:- HON'BLE MR JUSTICE M.M.KUMAR
HON'BLE MR. JUSTICE AJAY KUMAR MITTAL

1. To be referred to the Reporters or not?
2. Whether the judgment should be reported in the Digest?

Present:- Mr. Rajesh Katoch, Advocate for the appellant.

Mr. Ravish Sood, Advocate for the respondent.

Ajay Kumar Mittal,J.

1. This order shall dispose of Income Tax Appeal Nos. 209 and 210 of 2003 relating to the assessment years 1992-93 and 1993-94 respectively, as according to learned counsel for the parties, common questions of law and facts are involved therein. For brevity, the facts are being taken from ITA No.209 of 2003 relevant to the assessment year 1992-93.

2. The revenue has preferred this appeal under Section 260A of the Income Tax Act, 1961 (in short, "the Act") against the order dated 9.4.2003 passed by the Income Tax Appellate Tribunal, Amritsar Bench, Amritsar (hereinafter referred to as "the Tribunal") in ITA No.222 (ASR) 1999 for the assessment year 1992-93, claiming following substantial questions of law:-

"i) Whether on the facts and in the circumstances of the case,

the Hon'ble ITAT was justified in law in setting aside the order under section 154 of the Income Tax Act, 1961 passed by the AO and upheld by the CIT(A), wherein the mistake in the application of rate of depreciation on Trucks was rectified?

ii) Whether on the facts and in the circumstances of the case, the Hon'ble ITAT was justified in law in holding that the order in question rectifying the mistake in application of rate of depreciation on assessee's own trucks used by the assessee for its own business tantamounts to review of the assessment order?"

3. The respondent-assessee filed its return of income for the assessment year 1992-93 on 29.3.1994 declaring net income of Rs.51,290/-. The assessment was framed by the Assessing officer under section 143(3) of the Act on 23.2.1995, Annexure A-1 at a total income of Rs.1,97,217/-. It was noticed by the Assessing Officer that as per Appendix I to Rule 5 of the Income Tax Rules, 1962 (for brevity, "the Rules"), the rate of depreciation applicable on the trucks not plied on hire was 25% and not 40% as claimed and allowed in the assessment order. Accordingly, the Assessing officer rectified the assessment by invoking the provisions of Section 154 of the Act and held that the rate of depreciation claimed by the assessee on trucks at 40% was wrongly allowed as the assessee was not plying trucks owned by it on hire but was utilizing the trucks for its own purposes and hence rate of depreciation applicable was 25%. Vide order dated 16.12.1998, Annexure A-2, assessment framed under section 143(3) of the Act was rectified under section 154 of the Act and income was assessed at Rs.6,74,312/-. Feeling aggrieved, the assessee filed an appeal before the Commissioner of Income Tax (Appeals), (CIT(A)), which was dismissed vide order dated 25.3.1999, Annexure A-3. The assessee then filed an appeal before the Tribunal. Vide order dated 9.4.2003, Annexure A-4, the Tribunal set aside the order passed by the CIT(A) and allowed the assessee's appeal. Hence these appeals by the revenue.

4. The revenue has assailed the findings of the Tribunal wherein it had held that the Assessing Officer had no jurisdiction to rectify the original assessment under section 154 of the Act as it was change of opinion and the review of order passed by his predecessor was not permissible under law.

5. Learned counsel for the revenue submitted that under section 154 of the Act, any error which is apparent on the face of the record can be rectified by the revenue. He referred to Section 154(1) of the Act which reads thus:-

> "154(1) With a view to rectifying any mistake apparent from the record an income tax authority referred to in section 116 may –
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> a) amend any order passed by it under the provisions of this Act;
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> b) amend any intimation or deemed intimation under sub-section (1) of section 143."

6. In view of Full Bench judgment of this Court in **CIT v. Smt.Aruna Luthra,** (2001) 252 ITR 76, it was submitted that the Assessing Officer was within his jurisdiction to rectify the order as the assessee had claimed 40% depreciation on the trucks which were being used by it as private carrier. According to him, under Sub-Item (1) of Item III of Appendix I to the Rules, the assessee was entitled to 25% rate of depreciation on trucks which were being used for its own business of transportation of goods. However, 40% was admissible in those cases where the trucks had been used for public carrier transport. Reliance was placed on the decisions of the Karnataka High Court in [**A] Veeneer Mills v. CIT,** (1993) 201 ITR 764 and Rajasthan High Court in **CIT v. Sardar Stones,** (1995) 215 ITR 350 in support of his submissions.

7. Controverting the aforesaid submissions, learned counsel for the assessee submitted that the assessment was framed under Section 143 (3) of the Act and recourse to rectification under Section 154 of the Act was in the nature of review which was not permissible. On the strength of judgments in **Jaipur Udyog Limited v. ITO**, (1985) 156 ITR 377 (Raj.), **Harbans Lal Malhotra and Sons**

(P) Limited v. ITO, (1972) 83 ITR 848 (Cal.), **T.S.Balaram v. Volkart Brothers and others**, (1971) 82 ITR 50 (S.C.), it was contended that the rectification order passed by the Assessing Officer under Section 154 of the Act was beyond jurisdiction as there was no mistake apparent on the record. Reliance was placed on Circular No.652 dated 14.6.1993 to urge that the Board itself had clarified with regard to the rate of depreciation on motor buses, motor lorries and motor taxis used in the business of transportation of goods. According to him, under the aforesaid circumstances, in view of judgment of Bombay High Court in **CIT v. S.C.Thakur and Brothers** (2010) 322 ITR 463, the higher depreciation will be admissible on motor lorries used in the transportation of goods on hire. The higher rate of depreciation, however,` will not apply if the motor buses, motor lorries etc. are used in some other non-hiring business of the assessee.

8. After giving thoughtful consideration to the rival submissions, we find merit in the submissions of learned counsel for the revenue. Full Bench of this Court in **Smt. Aruna Luthra,**'s case (supra) considered the scope of Section 154 of the Act in the following terms:-

> "The power given to the authority is wide. It can correct "any mistake" provided it is "apparent from the record". The first question that arises for consideration is – when a mistake can be said to be apparent from the record?
>
> The plain language of the provision suggests that the mistake should be apparent. It must be patent. It must appear ex facie from the record. It must not be a mere possible view. The issue should not be debatable.
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> xx xx xx xx xx
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> Only the dead make no mistake. Exemption from error is not the privilege of mortals. It would be a folly not to correct it. Section 154 appears to have been enacted to enable the authority to rectify the mistake. The legislative intent is not to allow it to continue. This purpose has to be promoted. The Legislature's will has to be carried out. By placing a narrow construction, the object of the legislation shall be

defeated. Such a consequence should not be countenanced."

9. It would be expedient to refer to the relevant entries in Appendix I of the Rules. Sub Item 1 of Item III of Appendix I provides for depreciation on machinery and plant whereas Sub Item 2(ii) of Item III of Appendix I deals with higher rate of depreciation on motor buses, motor lorries and motor taxis used in a business of running them on hire. They read thus :-

Appendix I

"III. Machinery and Plant	Dep.allowance As % age of WDV
1) Machinery and Plant other than those covered by Sub item (1A) (2) and (3) below.	25%
1A)Motor Cars, other than those used in a business of running them on hire, acquired or put to use on or after the Ist day of April 1990.	20%
2) (i) xxxxxxx	
ii) Motor buses, motor lorries and Motor taxis used in a business of running them on hire."	40%

10. A plain reading of the aforesaid clearly shows that wherever motor buses, motor lorries and motor taxis are used for public carrier, rate of depreciation admissible is 40%. However, in the case of private carrier, the same is restricted to 25%.

11. In order to appreciate the controversy in right perspective, it would be essential to refer to discussion made by Assessing Officer in the original assessment order framed under Section 143(3) of the Act, which reads thus:-

"The details of depreciation claim reveal that the assessee has claimed depreciation on trucks @ 40% as admissible in the

case of Public Carrier Trucks. The assessee was asked to explain as to why it should not be restricted to 25% because the trucks were used by the assessee for its own business. The assessee submitted its detailed explanation in support of its claim vide para 13 of the written reply filed on 19.12.94, which is reproduced as under:-

> "In regard to the depreciation on trucks, it is submitted that our trucks are public carriers, not private carriers. We use our trucks for the carriage of crashers, Bajris and sands and other goods meant for use in the execution of construction work of the assessee firm. These trucks of the firm carried these materials during the year 1991-92 nearly five lacs cubic feets of crashers, bajris and sand which costs nearly amounting to Rs.18,80,000/- the average rate of these goods approximately comes to Rs.3.75 per cubic feet to us.
>
> If we purchase these materials like crasher, bajri, sand and other goods from the market and loaded in trucks taken from the Trucks unions, the same quantities of material costs us nearly amounting to Rs.37,60,000/- which come to us nearly amounting to Rs.7.50 per cubic feet, which doubles the costs of materials.
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> It means we save half of the higher charges from the materials loaded by our firms Public Carriers trucks than the trucks taken from the Truck Unions. These savings of higher charges is as like as carriage charges earned by our public carrier trucks.
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> If we purchase goods from the local market, we have to spend more money for the purpose of the goods. Therefore, we purchase and carry goods from out stations on our Public Carrier trucks on cheaper rates than the local markets, which is in the interest of the revenue.
>
> Moreover, the private trucks can only carry the goods manufactured in their own factories. The private

carriers are unable to bring goods from the different places to the site as the truck unions do not permit the private carriers to load the same from different stations. Therefore, the assessee is compelled to use the public carriers for their business.

Public Carriers Trucks are to pay the token tax and goods tax, whereas the private trucks are to pay more token tax. The private trucks do not pay tax because they are not permitted to load the goods from the outside on hire basis.

The Public Carrier Trucks pay much more insurance premium than the private carrier trucks. Public Carrier Trucks operate in far away places, cover more distances, and are prone to more risks.

It is clear from the above facts that if our public trucks carry goods of our assessee firm they save much more hire charges and result in increased income of the assessee firm which is in the interest of revenue and therefore public carriers owned by the assessee are entitled to claim the depreciation at the rate of 40% which is prescribed in the Income Tax Act and Rules. Therefore, the claim of depreciation at the rate of 40% by the assessee firm is genuine."

The claim of the assessee firm has been considered in the light of the above said submissions. The cost of transportation of the materials like crasher, bajri and other goods from the market to the site of the assessee's business is double if these materials are brought in trucks taken from the truck unions. In this way the assessee is able to save huge amount of hire charges which are like carriage charges earned by Public Carrier Trucks. Further if the goods are purchased from the local market the cost is higher. Keeping in view these facts and other points as reproduced above the claim of depreciation appears to be in order. Hence depreciation as claimed is allowed to the assessee."

12. Learned counsel for the assessee was unable to demonstrate with

reference to any material that the respondent-assessee was using the vehicles in a business of transportation of goods and the trucks owned by the respondent-assessee were being used for public carrier. Further, he was unable to substantiate that the assessing officer while framing assessment under section 143(3) of the Act had recorded any finding that the respondent-assessee was using the vehicles in a business of running them on hire and the trucks on which depreciation had been claimed @ 40% were being used for public carrier. In such a situation, it cannot be held that the issue was debatable. If that was so, exercise of jurisdiction under section 154 of the Act was validly exercised. The judgments relied upon by learned counsel for the respondent, therefore, do not advance his case.

13. Adverting to the circular relied upon by learned counsel for the assessee, it would be advantageous to reproduce the same which reads thus:-

> "Under sub item 2(ii) of Item III of Appendix I to the IT Rules, 1962, higher rate of depreciation is admissible on motor buses, motor lorries and motor taxis used in a business of running them on hire. A question has been raised as to whether, for deriving the benefit of higher depreciation, motor lorries must be hired out to some other person or whether the user of the same in the assesee's business of transportation of goods on hire would suffice.
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> 2. In Board's Circular No.609, dated 29th July 1991, it was clarified that where a tour operator or travel agent uses motor buses or motor taxis owned by him in providing transportation services to tourists, higher rate of depreciation would be allowed on such vehicles. It is further clarified that higher depreciation will also be admissible on motor lorries used in the assessee's business of transportation of goods on hire. The higher rate of depreciation, however will not apply if the motor buses, motor lorries, etc. are used in some other non-hiring business of the assessee."

14. A bare perusal of the above circular clearly shows that this is applicable in respect of motor buses and motor lorries used in a business of

running them on hire whereas the assessee is utilizing the vehicles for its own business and is not carrying on business of hiring of motor vehicles. The Bombay High Court in **S.C.Thakur and Bros.'s case** (supra) was dealing with a case where the business of the assessee was running of motor vehicles on hire and the assessee had utilized the motor lorry in his own business of transportation of goods on hire. Such being not the position here, neither the circular nor the judgment support the case of the assessee. The Tribunal was, thus, not justified in holding that the assessing officer had erroneously exercised jurisdiction under Section 154 of the Act. The substantial questions of law claimed above are, therefore, answered in favour of the revenue and against the assessee.

15. Accordingly, both the appeals are allowed.

16. A photo copy of this order be placed on the file of the connected case.

(Ajay Kumar Mittal)
Judge

January 24, 2012 (M.M.Kumar)
'gs' Judge