IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction (Income-Tax)
(Original Side)

Present:
The Hon'ble Mr. Justice Bhaskar Bhattacharya
And
The Hon'ble Mr. Justice Sambuddha Chakrabarti

I.T.A. No.60 of 2004

Faridabad Investment Company Limited
Versus
Commissioner of Income-Tax, West Bengal-XX

For the Appellant: Mr. J. P. Khaitan,
Mr. Agnibesh Sengupta.

For the Respondent: Md. Nizamuddin,
Mr. Aniket Mitra.

Heard on. 21.06.2011

Judgment on : 13th July, 2011.

Bhaskar Bhattacharya, J.:

This appeal under Section 260A of the Income-tax ("Act") is at the instance of an assessee and is directed against an order dated August 21, 2003 passed by the Income-tax Appellate Tribunal, "A" Bench, Kolkata, in Income-tax Appeal bearing ITA No.1375(Kol)/2002 for the Assessment Year 1995-96 dismissing the appeal preferred by the assessee.

The facts giving rise to filing of this appeal may be summed up thus:

a) The appellant before us is a public limited liability company within the meaning of the Companies Act, 1956 and is assessed to tax under the Income-tax Act. The present appeal arises out of the assessment under the Act for the Assessment Year 1995-96 for which the relevant previous year was the Financial Year ended March 31, 1995. The appellant derives income from purchase and sale of and investment in shares, interest income, dividend income and rental income. For the Assessment Year 1995-96, the appellant filed a return on October 31, 1995 disclosing a total income of Rs.35,09,420/-. The said return was processed under Section 143(1)(a) of the Act. Subsequently, notices under Sections 143(2) and 142(1) were issued. In support of the said return, the appellant submitted numerous details in course of the assessment proceedings which were duly verified and examined by the Assessing Officer. On May 21, 1997, the Assessing Officer passed an order under Section 143(3) determining the total income at Rs.35,79,410/-. In the said assessment, the Assessing Officer allowed deduction under Section 80M of the Act in respect of the dividend of Rs.60,88,864/- received by the appellant. The Assessing Officer took note of the fact that the appellant had paid dividend of Rs.61,10,000/- but the deduction under Section 80M was limited to the amount of dividend received.

b) On November 25, 1999, the Assessing Officer issued a notice under Section 154 of the Act proposing to rectify the said order of assessment. In the details of mistake appearing in the notice it was alleged that an error had been made in making allowance under Section 80M and the refund which was an apparent mistake. By a letter dated January 25, 2000, the appellant submitted its reply that deduction under section 80M was correctly allowed and there was no mistake to be rectified.

c) The Assessing Officer, however, by an order dated June 30, 2000 rectified the assessment order dated May 21, 1997. In the said order, the Assessing Officer held that allowance of deduction under Section 80M on dividend without deducting proportionate management expenses was a mistake apparent from the record. Such proportionate management expenses were notionally worked out in the annexure to the order as Rs.8,71,725/-. Accordingly, the deduction granted under Section 80M in the order dated May 21, 1997 was reduced by the said sum of Rs.8,71,725/-.

d) Being dissatisfied, the appellant preferred an appeal before the Commissioner of Income-tax (Appeals). The said appellate authority, by an order dated April 10, 2002, allowed the appeal by accepting the appellant's contention that the action taken by the Assessing Officer was not permissible under Section 154 of the Act.

e) Being dissatisfied, the Revenue preferred an appeal before the Income-tax Appellate Tribunal and by the order impugned in this appeal, the Tribunal held that the Assessing Officer was bound to follow the judgment of the Hon'ble Supreme Court in the case of CIT Vs. United General Trust Ltd., reported in (1993) 200 ITR 488 while making the rectification. According to the Tribunal, it could not be held that no expenses were incurred for earning the dividend and thus, set aside the order of the Commissioner of Income-tax (Appeals).

f) Being dissatisfied, the appellant has come up with the present appeal.

A Division Bench of this Court at the time of admission of this appeal formulated the following substantial questions of law:

"i) Whether the question as to whether any expenditure was incurred for earning dividend income and if so, the quantum thereof could be gone into and decided in proceedings under Section 154 of the Income Tax Act, 1961 and the Tribunal was justified in law in upholding the order dated June 30, 2000 passed by the Assessing Officer under Section 154.

"ii) Whether in the facts and circumstances of this case the findings of the learned Tribunal rejecting the appellant's contention that no expenditure was incurred for earning

> dividend income could be sustained on the mere presumption that there were certain expenditure and therefore a proportionate amount is to be allotted for the purpose of earning the dividend income which on facts appears to have been earned out of investment made long before and thus the finding is arbitrary, unreasonable and perverse."

Mr. Khaitan, the learned Senior Advocate appearing on behalf of the appellant, has strenuously contended before us that the learned Tribunal below committed substantial error of law in reversing the order passed by the CIT(A) by not considering the scope of Section 154 of the Act. According to Mr. Khaitan, there was no scope of rectifying of the order by deducting the expenses under Section 80M of the Act on the basis of materials on record inasmuch as the Assessing Officer assessed the expenses on the basis of proportionate expenditure which is impermissible. According to Mr. Khaitan, even according to the law of the land, the deduction of expenditure under Section 80M of the Act must be the actual expenditure and not a proportionate one as done by the Assessing Officer. In support of his contention, Mr. Khaitan relies upon a Division Bench decision of this Court in the case of Commissioner of Income-tax Vs. United Collieries Ltd., reported in 2003 ITR 857 (CAL) whereby it was specifically held that the special deduction under Section 80M of the Act is allowable only on the net dividend which is arrived at after taking into account the expenditure, if any, incurred for the purpose of earning such dividend. It was

further pointed out that only the actual expenditure incurred by the assessee in earning the dividend income should be deducted from the dividend income and there is no scope for any estimate of expenditure being made and no notional expenditure could be allocated for the purpose of earing income.

By relying upon such decision, Mr. Khaitan contends that there was no mistake apparent on the face of record within the meaning of Section 154 of the Act inasmuch as the actual expenditure incurred by the appellant was not available on record and at the same time, the deduction of proportionate expenditure on notional basis was also illegal. Mr. Khaitan, therefore, prays for setting aside the order passed by the Tribunal below.

Mr. Nizamuddin, the learned Advocate appearing on behalf of the Revenue, on the other hand, supported the order passed by the Tribunal below and has contended that this Court within the narrow scope of Section 260A should not interfere with the discretion exercised by the Assessing Officer and affirmed by the Tribunal below. Mr. Nizamuddin, thus, prays for dismissal of the appeal.

Therefore, the only question that falls for determination in this appeal is whether the Tribunal below was justified in approving the order of rectification of the assessment notwithstanding the fact that no materials was available to indicate the actual expenditure of the appellant in getting the net dividend and

the consequent benefit of deduction under Section 80 M of the Act and the order of rectification was not based on actual expenditure.

After hearing the learned counsel for the parties and after going through the materials on record we find that in the original return filed by the appellant there was no mention of any expenditure in getting the dividend. It was stated that the interim dividend to the extent of Rs.47,00,000/- was paid on November 21, 1994 and the final dividend to the extent of Rs.14,10,000/- was paid on January 9, 1995 but the appellant claimed Rs.60,88,864/- as deduction under Section 80M of the Act. In the original assessment order, the following observations have been made regarding the benefit of Section 80M of the Act:

> *"The Assessee has paid dividend of Rs.61,10,000/- but entitled for deduction limited to dividend earned i.e. Rs.60,88,864/-."*

In the notice under Section 154 of the Act, the following details of mistake have been indicated:

> *"It is seen from the records while computing total income of the assessee, the error had been made making allowance u/s 80M and refund. Since, this apparent mistake and rectification u/s 154 is required."*

Ultimately, the Assessing Officer by relying upon the decision of the Supreme Court in the case of CIT Vs. United General Trust (P) Ltd (200 ITR 488) held that proportionate management expenses should be deducted from the

dividend for calculation of the amount of deduction under Section 80M of the Act.

The calculation of the proportionate deduction done by the Assessing Officer is quoted below:

AS PER P/L ACCOUNT

Opening Stock of Share	: Rs.83,84,786	
Add: Purchase during the year	: Rs.12,00,089	
	Rs.95,84,875	
Less : Closing Stock	: Rs.10,64,550	
		Rs.85,20,325
Sale During the year	: Rs.96,50,095	
Less : Total Stock	: Rs.85,20,325	
Profit from Share		Rs.11,29,770/-
Profit from Share	: Rs. 11,29,770	
Dividend to the receipts	: Rs.1,00,75,032	
		Rs.1,12,04,802/-

Expenditure on finance to the Service Charges : Rs.16,04,288

Proportionate Expenses on Dividend $\frac{16,04,288 \times 60,88,864}{1,12,04,802}$ =8,71,725

Allowable deduction u/s 80M Rs.60,88,864 – 8,71,725 = 52,17,069/-
Charge Intt. if applicable

Sd/-
(C.MERWAR)
ADDL. C.I.T. S.R. – 6, CALCUTTA"

In the case of CIT Vs. United General Trust Ltd, (supra) the Supreme Court did not lay down any proposition of law but on the basis of the agreement between the counsel for the parties held that question sought to be raised by the Revenue but not permitted to be raised by the High Court was concluded against the assessee and in favour of the Revenue in the case of Distributors (Baroda) P Ltd. Vs. Union of India reported in (1985)155 ITR 120 and the same principles should apply to the said case.

In the case of Distributors (Baroda) P. Ltd. (supra), the five-judge-bench of the Supreme Court laid down the following proposition for computing the deduction under Section 80M of the Act:

> *"Now when in computing the total income of the assessee, a deduction has to be made from "such income by way of dividends", it is elementary that "such income by way of dividends" from which deduction has to be made must be part of gross total income. It is difficult to see how the language of this part of sub-sec. (1) of S. 80M can possibly fit in if "such income by way of dividends" were interpreted to mean the full amount of dividend received by the assessee.* ***The full amount of dividend received by the assessee would not be included in the gross total income: what would be included would only be-the amount of dividend as computed in accordance with the provisions of the Act. If that be so it is difficult to appreciate how for the purpose of computing the total income from the gross total income any deduction should be required to be made from the full amount of the dividend. The deduction required to be made for computing the total income from the gross total income can only be from the***

> ***amount of dividend computed in accordance with the provisions of the Act which would be forming part of the gross total income.*** *It is therefore clear that whatever might have been the interpretation placed on Cl. (iv) of sub-sec. (1) of S. 99 and S. 85A, the correctness of which is not in issue before us, so far as sub-sec. (1) of S. 80M is concerned the deduction required to be allowed under that provision is liable to be calculated with reference to the amount of dividend computed in accordance with the provisions of the Act and forming part of the gross total income and not with reference to the full amount of dividend received by the assessee."*
>
> (Emphasis supplied by us).

Thus, in view of the above decision of the Supreme Court the amount of expenditure, if any, made in receiving the dividend is to be deducted for the purpose of calculating the deduction under Section 80M of the Act and not the whole amount of dividend. Thus, the actual expenditure made should be deducted and not a notional one based on average calculation. In a given situation, the expenditure may be less, in some cases it may be more and even in some cases, there may not be any expenditure. A Division Bench of this court in the case of CIT Vs. United Collieries Ltd., reported in (1993) 203 ITR 857 had taken the same view that actual expenditure must be deducted and not the notional one.

In the case before us, there was no material available on record to assess the actual expenditure made by the assessee and in the notice under Section 154 of the Act there is no particular of expenditure indicated which allegedly escaped

the notice of the Assessing Officer. Even in his order of rectification quoted above, the expenditure is assessed not on actual basis but on notional one which is contrary to the law laid down by the Division Bench of this Court.

Thus, even without going into the question whether it was permissible to the Assessing Officer to invoke Section 154 of the Act, we find that the order under Section 154 of the Act is contrary to the Division Bench decision of this Court in the case of CIT Vs. United Collieries (supra).

The next question is whether Section 154 of the Act authorizes the Assessing Officer to issue notice in the facts of the present case.

In a recent case of Deva Metal Powder (P) Ltd Vs. Commissioner Trade Tax, Uttar Pradesh, the Supreme Court had occasion to deal with the scope of Section 22 of the U. P. Trade Tax Act, 1948 conferring similar power of rectification as indicated in Section 154 of the Act. The said provision of Section 22 is quoted below:

> *"22. Rectification of mistakes.—(1) Any officer or authority, or the Tribunal or the High Court may, on its own motion or on the application of the dealer or any other interested person rectify any mistake in any order passed by him or it under this Act apparent on the record within three years from the date of the order sought to be rectified:*

Provided that where an application under this sub-section has been made within such period of three years, it may be disposed of even beyond such period:

Provided further that no such rectification as has the effect of enhancing the assessment, penalty, fees or other dues shall be made unless reasonable opportunity of being heard has been given to the dealer or other person likely to be affected by such enhancement.

(2) Where such rectification has the effect of enhancing the assessment, the assessing authority concerned shall serve on the dealer a revised notice of demand in the prescribed form and there from all the provisions of the Act and the Rules framed thereunder shall apply as if such notice had been served in the first instance."

While interpreting the aforesaid provision, the Supreme Court observed as follows:

"10. *This Court in Thungabhadra Industries Ltd. v. Govt. of A.P. held as follows: (AIR p. 1373)*

"There is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterised as vitiated by 'error apparent'. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. Where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out.

11. *"17. … an error apparent on the face of the record for acquiring jurisdiction to [effect rectification] must be such an error which may strike one on a mere looking at the record and would not require any long-*

drawn process of reasoning. The following observations in connection with an error apparent on the face of the record in Satyanarayan Laxminarayan Hegde v. Mallikarjun Bhavanappa Tirumale [need to be] noted: (AIR p. 137)

'An error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by a writ of certiorari according to the rule governing the powers of the superior court to issue such a writ.'

***"12.** A bare look at Section 22 of the Act makes it clear that a mistake apparent from the record is rectifiable. In order to attract the application of Section 22, the mistake must exist and the same must be apparent from the record. The power to rectify the mistake, however, does not cover cases where a revision or review of the order is intended. "Mistake" means to take or understand wrongly or inaccurately; to make an error in interpreting; it is an error, a fault, a misunderstanding, a misconception. "Apparent" means visible; capable of being seen; obvious; plain. It means "open to view, visible, evident, appears, appearing as real and true, conspicuous, manifest, obvious, seeming". A mistake which can be rectified under Section 22 is one which is patent, which is obvious and whose discovery is not dependent on argument or elaboration.*

***"13.** In our view rectification of an order does not mean obliteration of the order originally passed and its substitution by a new order. What the Revenue intends to do in the present case is precisely the substitution of the order which according to us is not permissible under the provisions of Section 22 and, therefore, the High Court was not justified in holding that there was mistake apparent on the face of the record. In order to bring an application under Section 22, the mistake must be "apparent" from the*

record. Section 22 does not enable an order to be reversed by revision or by review, but permits only some error which is apparent on the face of the record to be corrected. Where an error is far from self-evident, it ceases to be an apparent error. It is, no doubt, true that a mistake capable of being rectified under Section 22 is not confined to clerical or arithmetical mistake. On the other hand, it does not cover any mistake which may be discovered by a complicated process of investigation, argument or proof."

Applying the aforesaid tests to the facts of the present case, we are of the firm opinion that there was no scope of rectification in the case on the ground of error apparent on the face of the record as the Assessing Officer even in his rectified order could not find out the actual expenditure for obtaining the dividend and calculated the same on the notional basis which is not permissible. The position would have been different if from the materials on record, the actual expenditure of the assessee in obtaining the dividend was available. In such a situation, it would be permissible for the Assessing Officer to rectify the alleged mistake by deducting the actual expenditure available from the record. Thus, in the present case, the Assessing Officer exceeded his authority in invoking Section 154 of the Act and the Tribunal below committed substantial error of law in affirming the unauthorised act of the Assessing Officer.

The Full Bench decision in the case of CIT Vs. Sm. Aruna Luthra reported in 252 ITR 76 (PH), relied upon by Mr. Nizamuddin, the learned counsel for the Revenue dealt with the question whether on the basis of a subsequent decision of

the superior Court on a question of law, a proceeding under Section 154 of the Act can be initiated. In the case before us, such question is not involved and as such, we refrain from making any comment on such decision.

We, therefore, set aside the order of the Tribunal and the Assessing Officer by allowing the appeal. We answer both the questions formulated by the Division Bench against the Revenue, the first one in the negative and the second one in the affirmative.

In the facts and circumstances, there will be, however, no order as to costs.

(Bhaskar Bhattacharya, J.)

I agree.

(Sambuddha Chakrabarti, J.)