IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE THE ACTING CHIEF JUSTICE MR.ANTONY DOMINIC
&
THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

THURSDAY, THE 11TH DAY OF JANUARY 2018 / 21 ST POUSHA, 1939

ITA.No. 64 of 2015

AGAINST THE ORDER/JUDGMENT IN ITA 215/2014 of I.T.A.TRIBUNAL,COCHIN BENCH DATED 05-09-2014

APPELLANT/RESPONDENT:

THE COMMISSIONER OF INCOME TAX,
TRIVANDRUM.

BY ADVS.SRI.P.K.R.MENON,SR.COUNSEL,
GOI(TAXES)
SRI.JOSE JOSEPH, SC, FOR INCOME TAX

RESPONDENT/APPELLANT/APPELLANT/ASSESSEE:

YOUNUS KUNJU,
YOUNUS CASHEW INDUSTRIES, VADAKKEVILA, KOLLAM.

R1 BY ADV. SRI.S.ARUN RAJ
R1 BY ADV. SMT.C.T.SUJA

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 11-01-2018,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

IT APPEAL NO.64 OF 2015

APPENDIX

ANN.A TRUE COPY OF THE ORDER U/S 143(3) OF THE INCOME TAX ACT, 1961 OF THE ASSESSING OFFICER DTD 28.3.1988.

ANN.B TRUE COPY OF THE ORDER U/S 154 OF THE INCOME TAX ACT, 1961 OF THE DEPUTY COMMISSIONER OF INCOME TAX, C-1, KOLAM DTD.18.7.2006.

ANN.C TRUE COPY OF THE ORDER U/S 154 OF THE INCOME TAX ACT, 1961 OF THE DEPUTY COMMISSIONER OF INCOME TAX, C-1, KOLLAM DTD.27.9.2006.

ANN.D TRUE COPY OF THE ORDER CIT(A)-III, TRIVANDRUM IN ITA NO.122-Q/06-07/CIT(A)/TVM, DTD.8.12.2006.

ANN.E TRUE COPY OF ORDER OF INCOME TAX APPELLATE TRIBUNAL, COCHIN IN ITA NO.215/COCH/2007 DTD.26.12.2009.

ANN.F TRUE COPY OF ORDER OF THIS COURT IN ITA NO.302 OF 2010 DTD.3.12.2013.

ANN.G TRUE COPY OF ORDER OF THE INCOME TAX APPELLATE TRIBUNAL, COCHIN IN ITA NO.215/COCH/2007, FOR THE AY 1985-86 DTD.5.9.2014.

TRUE COPY

P.S.TO JUDGE

css/

Antony Dominic & Dama Seshadri Naidu, JJ.

I. T. Appeal No.64 of 2015

Dated this the 11th day of December 2017

JUDGMENT

Dama Seshadri Naidu, J

Facts:

Complex and convoluted are the facts. So we will set them out a little more elaborately, as pleaded by the assessee.

2. Younskunju of Youns Cashew Industries, Kollam, is an income tax assessee. For the assessment year 1985-86, he filed the Return of Income on 31.09.1986, declaring a total income of Rs.93,960/-. The Assessment Officer ("AO") completed the assessment on 28.03.1988 under section 143(3) of the Income Tax Act ("the Act"). He arrived at a total income of Rs.47,43,890/- and demanded, through Annexure A, tax of Rs.1,39,71595/-, which included interest, too.

3. On appeal, the Commissioner of Income Tax

("CIT(A)"), through his order dt.24.11.1988, set aside the Annexure A order. Under section 143(3), read with sections 250 & 144 A, the CIT(A) arrived at a total income of Rs.62,48,680/-. Meanwhile, on 28.08.1989, the assessee applied under section 245C of the Act before the Additional Bench of the Income Tax Settlement Commission, Chennai. On 29.06.1993 the Settlement Commission passed an order under section 245D (4) of the Act; it was given effect to by the AO through his proceedings, dated 23.08.1993. He redetermined the total income at Rs.15,52,220/-.

4. As the record reveals, the Settlement Commission issued another order under section 245D on 28.04.1994. The AO gave effect to this order, too. On 22.7.1994, again he revised the total income to be Rs.17,06,020/-. But, soon thereafter, the AO noticed what is said to be an error and rectified it.

5. The assessee, then, requested the AO to rectify the assessment for 1985-86 by allowing him to set off and to carry forward the loss relating to the firm, M/s. Hotel Shah & Co, for the assessment year 1983-84. Through an order, dt.23.05.1995, the AO rejected the assessee's plea because the loss relating to

the assessment year 1983-84 could not be set off: The firm's status was fixed as an unregistered firm (URF), and section 77 (2)(a) of the Act prohibits set off and adjustment of a partner's loss from a URF—Shah & Co.

6. Aggrieved, the assessee appealed to CIT (A)-I, Kochi. The CIT(A), through an order dated 12.11.2002 in ITA No. T003/95-96, allowed the appeal and directed the AO to modify the assessment for the AY 85-86: to set off the enhanced share of loss.

7. The AO, through his proceedings dated 27.02.2003, in turn, modified his order dated 21.06.1994. He allowed an amount of Rs.2,54,698/- as loss carried forward form M/s. Hotel Shah & Co for the AY 1983-84. The AO revised it on 14.08.2003, based on the assessee's request to include his wife's share of loss.

8. In the proceedings dated 14.08.2003, the AO omitted to charge interest under sections 220(2) and 245D (6A). To rectify that supposed mistake, the AO revised the order through proceedings in No.46-007-PZ-3152/Cir.1/KLM, dated

18.07.2006. He charged Rs.8,57,347/- and Rs.79,355/- as interest under sections 220 (2) and 245D (6A) of the Act respectively.

9. Once again, the AO, in his proceedings dated 18.07.2006, erroneously calculated interest from April 1988 to April 1991. Two months later, through Annexure C, he rectified the mistake and charged interest under section 220 (2) from April 1991 to June 1993: the interest was quantified at Rs.3,49,935/-.

10. Again aggrieved, the assessee appealed to the CIT(A), Trivandrum, against the AO's order, dated 18.07.2006. But the appeal yielded nothing, as it was dismissed through Annexure D order, dt.08.12.2006.

11. On the issues of charging interest under section 220 (2) and disallowing interest under section 244 (1A) of the Act, the assessee appealed before the Income Tax Appellate Tribunal ("Tribunal'). The Tribunal, through Annexure E order, dismissed the appeal as not maintainable. When Tribunal's order was challenged, this Court, through Annexure F judgment, set

aside the order and remanded the matter to the Tribunal, to be disposed of on merits.

12. On remand, through Annexure G order, the Tribunal allowed the assessee's appeal and cancelled the AO's rectification order under section 154 of the Act. This time, the Department came before us assailing the Tribunal's Annexure G order.

Submissions:

The Department's:

13. Sri P. K. Ravindranatha Menon, the learned Senior Counsel for the Revenue, has submitted that the Tribunal has erred in setting aside the AO's order as incorrect. According to him, the Tribunal misdirected itself by observing that 'the mistake apparent from record must be an obvious and patent mistake but not something which can be established by a long drawn process of reasoning. It negates section 154 of the Act. He has also contended that the Tribunal ought to have examined the issue in the light of Calcutta High Court's decision in

Hindustan Lever Ltd v. CIT.[1]

14. Sri Menon has also submitted that the rectification order has not involved a long-drawn process of reasoning on a point on which there may conceivably be two opinions. On the contrary, the rectification, he contended, resulted from the AO's correcting an arithmetical mistake in charging interest. In other words, Sri Menon asserted that the mistakes noticed by the AO were patent, and they relate to levy of interest under sections 220 (2) and 245D (6A), and also withdrawal of interest under section 244 (1A) of the Act.

The Assessee's:

15. Sri Arun Raj, the learned counsel for the assesse, has contended that once the Settlement Commission passes an order under section 245D (1) of the Act, the regular assessment under section 143(3) or 144 of the Act ceases to exist. He has contended that the very Department has admitted that the demand earlier raised by it was not valid.

16. According to Sri Arun Raj, any further levy of interest

1 (2006) 3 CAL L T 466 (HC)

under section 220(2) of the Act amounts to a double levy of interest because the Department has already levied interest under sections 245D (2C) and 245D (6A) of the Act. The learned counsel has also contended that the Settlement Commission already considered the assessee's incomes returned and disclosed. So, there is no room for any further assessment under section 143(3) of the Act. In other words, section 245D(4) of the Act is comprehensive, and there is no question of the assessment under section 245D (4) relating back to the date of regular assessment under section 143(3), 144, or 147 of the Act.

17. In the alternative, Sri Arun Raj has submitted that if at all interest under section 220 (2) has to be levied, it must be done only by the Settlement Commission, for it exercises exclusive jurisdiction once it admits a case under section 245-I of the Act. In other words, the AO is not empowered to levy interest u/s. 220(2) regarding a matter decided by the Settlement Commission.

18. Heard Sri P. K. Ravindranatha Menon, the learned Senior Counsel for the Revenue, and Sri Arun Raj, the learned

counsel for the respondent-assessee, besides perusing the record.

The Substantial Questions of Law:

1. Is the supposed mistake in calculating the interest apparent from the record, and can it be corrected under section 154 of the Income Tax Act?

2. Are the findings of the Tribunal, in the facts and circumstances, perverse, illogical, and beyond section 154 of IT Act, 1961?

3. Has the Tribunal justified itself in interfering with what is said to be an order of rectification?

Discussion:

19. The original assessment for the AY 1985-86 was completed in March 1988. On appeal, the CIT(A) set it aside in November 1988. The reassessment was completed in March 1991. But in the meanwhile, in August 1989, the assesse approached the Additional Bench of the Income Tax Settlement Commission, Chennai, invoking section 245C of the Act.

20. In June 1993, the Settlement Commission passed an order under section 245(4) of the Act; the AO gave effect to it through his proceedings on 26.06.1994. But he revised those

proceedings on 14-08-2003. It was to adopt the assessee's correct share of income from a partnership firm; it resulted in a refund of Rs.8,90,706/-.

21. But once again the AO found certain mistakes in the revised proceedings. So, on 09.06.2005, he issued notice under section 154 of the Act, to rectify those mistakes: (a) to charge interest under section 220 (2); to levy interest under section 245D (6A); (c) to withdraw interest earlier charged under section 244(1A) of the Act. Later, he did pass an order revising the tax.

22. On appeal, the CIT(A) justified the AO's action. Skipping the later incidental developments, we may straight come to the proceedings before the Income Tax Appellate Tribunal ("Tribunal"). First, the Tribunal dismissed the appeal as not maintainable; later, on remand from this Court, it decided on merits: it allowed the assessee's appeal.

Statutory Scheme:

23. The pivotal point that urges our attention and resolution is this: Has the AO been justified in invoking section

154 of the Act?

24. Before amendment by Act 23 of 2012, section 154 empowered an income tax authority "to rectifying any mistake apparent from the record." The authority can correct the mistake either on his own or on being pointed out by the assessee. If the intended correction is to result in increasing the assessee's liability, he should be put on notice and heard. If the correction reduces the assessee's burden, the authority should refund the reduced amount to the assessee. Subject to section 155 or sub-section (4) of section 186, the correction must be effected in four years from the financial year in which the original order was passed.

25. Analogous to section 154 of the Act is the terse section 37 of the Rajasthan Sales Tax Act: "With a view to rectifying any mistake apparent from the record, any officer appointed or any authority constituted under the Act may rectify *suo motu* or otherwise any order passed by him." Interpreting this provision, the Supreme Court in *CTO v. Makkad Plastic Agencies*[2] has held

2 (2011) 4 SCC 750 at page 754

that this power of correction is neither a power of review nor is a power of revision, but is only a power to rectify a mistake apparent on the face of the record. Rectification implies the correction of an error or a removal of defects or imperfections. It implies an error, mistake, or defect which after rectification is made right.

26. Quoting with approval its earlier decision in *Kalabharati Advertising v. Hemant Vimalnath Narichania*[3], the Supreme Court has further observed that review is a creature of the statute, and an order of review could be passed only when an express power of review is provided in the statute. In the absence of any statutory provision for review, "exercise of power of review under the garb of clarification/ modification/ correction is not permissible."

27. In fact, the very section 154 of the Act came to be interpreted by the Supreme Court in *CIT* v. *Ralson Industries Ltd.*[4] The Court observed that the powers of rectification under section 154 and section 263 of the Act are different. Section 154

3 (2010) 9 SCC 437
4 (2007) 2 SCC 326 at p. 330

is not a power of review. An error being apparent on the face of record, according to the Supreme Court, is *sine qua non*.

What is an error apparent on the face of record?

28. It needs no repetition that a judgmental error is not a reviewable error, nor can it be termed an error on the face of record. Error in reasoning or, for that matter, in applying law to facts is an appealable error. And that power of appeal is the creation of a statute. An error apparent on the face of record, on the other hand, an error that strikes one "on mere looking at the record and would not require any long-drawn process of reasoning on points where there may conceivably be two opinions."

29. The Courts have considered on numerous occasions what an error apparent on the face of record is. In *Satyanarayan Laxminarayan Hegde v. Malikarjun Bhavanappa Tirumule*[5] the Supreme Court has held thus:

> "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

5 AIR 1960 SC 137

> 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."

30. No error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires an examination or argument to establish it. But there might be cases in which it may not work because an error of law might be considered by one Judge as apparent, patent, and self- evident; but might not be so considered by another Judge. Therefore, we ought to conclude that the legal contours of an error apparent on the face of the record cannot be exactly identified. In other words, an element of indefiniteness is inherent in its very nature and must be left to be determined judicially on the facts of each case.[6]

Addition and Deletion of Interest

31. Section 220 of the Act concerns the situations when tax is payable and when the assessee is deemed to be in default. Sub Section (1) mandates that “any amount, otherwise than by way of advance tax, specified as payable in a notice of demand

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6 Hari Vishnu Kamath v. Syed Ahmad Ishaque, (1955) 1 SCR 1104

under Section 156 shall be paid within thirty days of the service of the notice at the place and to the person mentioned in the notice." Sub-Section (2), which matters now, reads thus:

> Section 220 (2). If the amount specified in any notice of demand under section 156 is not paid within the period limited under sub-section (1), the assessee shall be liable to pay simple interest at one and one- half per cent for every month or part of a month comprised in the period commencing from the day immediately following the end of the period mentioned in sub- section (1) and ending with the day on which the amount is paid:
>
> Provided that, where as a result of an order under section 154, or section 155, or section 250, or section 254, or section 260, or section 262, or section 264 or an order of the Settlement Commission under sub- section (4) of section 245D], the amount on which interest was payable under this section had been reduced, the interest shall be reduced accordingly and the excess interest paid, if any, shall be refunded:
>
> . . .

32. As seen from the proviso to sub-section (2) of Section 220, evidently, there can be variation in charging interest, and such variation can be effected through correction under Section 154 of the Act. Therefore, we fail to countenance the assessee's contention that Section 154 of the Act is unavailable for rectifying the mistakes committed under Section 220 of the Act.

33. Even otherwise, miscalculation of interest is, at best, an arithmetical error and it needs no elaborate cogitation or

adjudication, long drawn or otherwise, to hold that there was an error committed.

34. Section 244 deals with interest on refund where no claim is needed. The provision to the extent necessary reads thus:

> (1) Where a refund is due to the assessee in pursuance of an order referred to in section 240 and the Assessing Officer does not grant the refund within a period of three months from the end of the month in which such order is passed, the Central Government shall pay to the assessee simple interest at fifteen per cent per annum on the amount of refund due from the date immediately following the expiry of the period of three months aforesaid to the date on which the refund is granted.
> (1A) Where the whole or any part of the refund referred to in sub-section (1) is due to the assessee, as a result of any amount having been paid by him after the 31st day of March, 1975, in pursuance of any order of assessment or penalty and such amount or any part thereof having been found in appeal or other proceeding under this Act to be in excess of the amount which such assessee is liable to pay as tax or penalty, as the case may be, under this Act, the Central Government shall pay to such assessee simple interest at the rate specified in sub-section (1) on the amount so found to be in excess from the date on which such amount was paid to the date on which the refund is granted :
>
> Provided that where the amount so found to be in excess was paid in instalments, such interest shall be payable on the amount of each such instalment or any part of such instalment, which was in excess, from the date on which such instalment was paid to the date on which the refund is granted:
>
> Provided further that no interest under this sub-section shall be payable for a period of one month from the date of the passing of the order in appeal or other proceeding:
>
> Provided also that where any interest is payable to an assessee under this sub-section, no interest under sub-section (1) shall be

payable to him in respect of the amount so found to be in excess.

35. As to correcting a mistake committed by an authority in calculating interest on refund, it is always open for the authorities to rectify that mistake. Again, in our reckoning, the reasons assigned to our interpretation of Section 220 apply here, too.

36. Under these circumstances, the order impugned cannot be sustained.

We, therefore, answer the substantial questions of law in revenue's favour, set aside the impugned order dated 8.12.2006, and restore the CIT (A)'s order, dated 5.9.2014.

SD/- ANTONY DOMINIC
ACTING CHIEF JUSTICE

SD/- DAMA SESHADRI NAIDU
JUDGE

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P.S.TO JUDGE