* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ I.T.A No.478 of 2005

% Judgment reserved on: September 27, 2006
Date of Decision : October 11, 2006

Commissioner of Income-tax,
Delhi-XVII, Mayur Bhawan, New Delhi .... Appellant

! Through Mr. R.D. Jolly, Advocate.

versus

$ M/s Hindustan Coca Cola Beverages (P) Ltd.
1/49, IInd Floor, Lalita Park, New Delhi ..... Respondent

^ Through Mr. Ajay Vohra with
Ms. Kavita Jha, Advocates

CORAM:

HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE DR. JUSTICE S. MURALIDHAR

1. Whether Reporters of local papers may be allowed to see the judgment? No

2. To be referred to the reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

: Dr. S. Muralidhar, J.

1. This appeal is directed against an order dated 13.9.2004 passed by the Income Tax Appellate Tribunal, New Delhi ('ITAT') recalling its earlier order dated 12.7.2002 for the limited purpose of adjudicating upon ground

2. The brief facts leading to the filing of the present appeal ma recited. By an order dated 30.3.2001 passed by the Assessing Officer (AO) under Ss. 201 (1) and 201 (1A) of the Income Tax Act, 1961 ('Act'), the assessee was held to be an 'assessee in default' for failure to deduct tax at source in respect of warehousing charges paid to M/s Pradeep Oil Corporation. The AO negatived the plea of the assessee that these were contractual payments warranting TDS in terms of Section 194-C of the Act at 2 per cent. The AO held that "the composite arrangement is in essence an arrangement for taking the premises on rent. Hence, the payment is covered under s.194 I and tax needs to be deducted from the payment thereof as per S.194 I." The AO determined the amount of short deduction of tax as well as interest payable thereon under S. 201 (1A). The appeal of the assessee on this aspect was partly allowed by the CIT (Appeals) on 15.1.2002 and its appeal before the ITAT was dismissed on 12.7.2002. The further appeal of the assessee was dismissed by this Court on 21.5.2004.

3. Thereafter nearly two years after the ITAT's order dated 12.7.2002, the respondent assessee filed an application under S.254 (2) of the Act for rectification of the order of the ITAT on the ground that an alternate plea raised by it in Ground 7 of the memo of appeal had not been considered by

the impugned order dated 13.9.2004 holding that:

> "This plea of the assessee appears to have been missed by the Tribunal while disposing of the appeal and hence, to that extent, there is a mistake apparent on record. Not adjudicating upon a particular ground, though raised in the appeal, constitutes a rectifiable mistake under section 254(2) of the Act and hence we recall the order of the tribunal dated 12.7.2002 for the limited purpose of adjudicating upon this particular ground i.e. ground No.7 raised in the Memo of Appeal."

4. Mr.R.D.Jolly, appearing for the appellant revenue submits that the ITAT erred in holding that while passing the earlier order the point in Ground 7 had been missed. He referred to several portions of the first order dated 12.7.2002 of the ITAT to contend that the point was definitely answered by the ITAT against the assessee. Relying on the judgments in ***Commissioner of Income Tax v. K.L. Bhatia*** [1990] 182 ITR 361 and ***Commissioner of Income Tax v. Income Tax Appellate Tribunal*** [2006] 155 Taxman 378 (Del) he urges that the ITAT was not justified in recalling its order dated 12.7.2002 in relation to ground No.7 and that this was beyond the scope of Section 254(2) of the Act.

5. In reply it is submitted by Mr. Ajay Vohra, learned counsel for the

submits that the alternate plea raised in Ground 7 of the memo of a before the ITAT, to the effect that the respondent was not liable to pay the short deduction of tax at all, was not dealt with by the ITAT. This, according to him, was a mistake apparent from the record warranting rectification under S.254 (2). He also placed reliance on a Circular dated 29.1.1997 issued by the CBDT in this regard. He has placed reliance upon the decisions of the Madhya Pradesh High Court in ***CIT v. ITAT*** 172 ITR 158, ***Sardar Machhisingh v. CIT*** [2005] 278 ITR 247 (MP), the Allahabad High Court in ***Laxmi Electronic Corporation Ltd. v. CIT*** [1991] 188 ITR 398 and this Court in ***CIT v. Escorts Farms P. Ltd.*** 180 ITR 280.

6. The central issue revolves around Ground 7 of the memo of appeal before the ITAT, which reads as under:

> "7. The CIT (A) has erred in ignoring the jurisdictional High Court judgment which has held that deduction of tax is subject to regular assessment of the payee. The CIT(A) has failed to consider the fact that in the absence of any tax liability of the payee, the differential TDS cannot be realised once again from the payer even though the appellants have submitted documents evidencing refund claims made by the service provider."

7. In its first order dated 2.7.2002 a Bench of the ITAT comprising its

noted the contentions of the counsel for the assessee. No specific conte appears to have been urged to the effect that even if the assessee was liable to pay penalty and interest it could not be asked to pay the tax short deducted. However, the following contention urged by the assessee was noted by the ITAT in its first order dated 12.7.2002:

> "That the recipient, namely, Shri J.P. Gupta the proprietor of M/s. Pradeep Oil Corporation had certified that during the relevant periods he had claimed a substantial amount of "refund" on account of TDS and the plea in this connection was that as far as the Govt. was concerned it had recovered its tax dues and it was immaterial whether these were in the form of TDS deducted by the assessee or these were in the form of payments by M/s. Pradeep Oil Corporation in its respective assessments."

8. In para 21 of its first Order dated 12.7.2002, the ITAT observed:

> "It must be appreciated that section 201(1) speaks of non-deduction of the whole or any part of the tax or after deduction there is a failure to pay the tax as required under the Act and on any of these eventualities taking place the assessee is deemed to be an assessee in default in respect of such tax Section 201(1A) then speaks of interest which is liable to be paid at a specified percentage on the amount of such tax from the date on which it was deductible and up to the date on which it is actually paid. **With such provisions it is not at all a convincing argument on the part of the assessee that the payee has settled his tax liabilities and has obtained a refund from the Department.** Reliance is placed on the judgment of the Hon'ble Madhya Pradesh High Court in the case reported in 137 ITR 230 (supra) and the decision of the same court in the case reported in 140 ITR 818 (supra). As rightly contended by the learned Departmental Representative section 192 pertains to payment of salary and an element of estimate crops in since salary includes various types of

already stated, TDS provisions are meant to ensure payment w earning the income and any postponement, delay or def stipulated by law would mean delay in a particular amount reaching Govt. coffers and that is why payment of interest has been provided under section 201(1A) and in so far as the shortfall is concerned, the assessee is treated to be in default vide section 201(1). The two decisions of the Hon'ble Madhya Pradesh High Court (supra), in our opinion, would not apply as these were situations where the assessments of the employees had already been completed and tax fully paid and no purpose would have been served in asking the employee to deposit the shortfall etc. for the TDS, since that would have only meant a further refund to the employees since TDS is always to be adjusted in the account of the earner of the income." (emphasis supplied)

Ultimately in para 29 the ITAT held as under:

"**The learned Departmental Representative has appropriately contended that what happens in the case of a recipient is not relevant since the duty to deduct tax is absolute unless the recipient filed the requisite declaration or certificate to show that its/his income is below the taxable limit.** This is supported by the judgment of the Hon'ble Madras High Court in the case of CIT Vs. Ramesh Enterprises (supra). This in fact was a judgment where the TDS pertained to payment of interest and which was a known and quantified amount. Another decision relied upon by the learned Departmental Representative was in the case of Income-tax Officer v. Sreenivasa Trading Co. & Another (2001) 252 ITR 133 (Mad.) where Their Lordships of the Hon'ble Madras High Court took the view that two excuses put forward by the assessee for not complying with the TDS provisions could not be treated as an excuse in the eyes of law to avoid the liability. These were:

(i) The firm had been incurring losses; &

(ii) The amount deducted had been refunded to the depositors."

appeal. The extracted paragraphs of the first order clearly indicate th ITAT did consider the plea of the assessee as contained in ground No.7 and gave a decision thereon. In particular, the portions highlighted in para 8 above show that the point of the assessee not being liable to pay the differential TDS since the payee itself was not liable to pay tax was in fact considered. The conclusion reached by the subsequent Bench of the ITAT, different from the one that passed the first order, to the effect that the Tribunal had failed to deal with this aspect is, in our view, based on an incorrect reading of the first order. Certainly, this cannot be characterised as a mistake, much less a mistake apparent from the record justifying a 'rectification' of the first order.

10. We may notice that in the present case the assessee filed an appeal against the order dated 12.7.2002 of the ITAT and the appeal was dismissed by this Court on 21.5.2004. The order dated 12.7.2002 of the ITAT thus became final. Mr.Vohra candidly stated that the point based on Ground No.7 was not taken up in the appeal in this Court. The reason for this, according to him, was that this Court would not have permitted the assessee to urge such ground in the absence of decision thereon by the ITAT. We do not agree with this understanding by the assessee of the scope of an appeal

has been specifically raised in the memo of appeal before the ITAT ha been considered by it, that can persuade this Court, if the circumstances so justify, to remand the case to the ITAT for consideration of that ground. What clearly appears to have happened here is that having failed to urge this ground in the appeal before this Court, the assessee took a chance by filing a rectification application on that very ground before the ITAT after the dismissal of the appeal by this Court and nearly two years after the ITAT's first order. This, to our mind, was an attempt at doing indirectly what could not be done directly, i.e. seeking a review of an order of the ITAT that had already attained finality.

11. Since on the facts of the present case we are of the view that there was no mistake apparent from the record in respect of its earlier order dated 12.7.2002 warranting the exercise by the ITAT of its power of rectification under S.254(2) of the Act, we do not consider it necessary to discuss in detail the cases cited by the counsel for the assessee. We may nevertheless refer to the decision rendered by us today in ***CIT v. Honda Siel Power Products Ltd.*** (Judgment dated 11.10.2006 in ITA No. 735/2004) where we have given detailed reasons explaining the narrow scope of the power of rectification under S.254(2). There we have discussed the decisions handed

395, *Commissioner of Income Tax v. Vichtra Construction (P.)* [2004] 269 ITR 371, *J.N. Sahni v. Income Tax Appellate Tribunal* [2002] 257 ITR 16 (Del) and *Commissioner of Income Tax v. Income Tax Appellate Tribunal* [2006] 155 Taxman 378 (Del) and taken the view that:

> "It is plain that the power to rectify a mistake is not equivalent to a power to review or recall the order sought to be rectified. Rectification is a species of the larger concept of review. Although it is possible that the pre-requisite for exercise of either power may be similar (a mistake apparent from the record), by its very nature the power to rectify a mistake cannot result in the recall and review of the order sought to be rectified. Otherwise, what cannot be done directly by seeking a review of an order can be achieved indirectly, by seeking a rectification of that order. This is even more significant in light of the fact that under the Act there is no express power given to the Tribunal to review its own orders."

We have also held in *Honda Siel Power Products* that:

> "It makes no difference whether the entire order is sought to be recalled or the order passed by the Tribunal on individual grounds is sought to be recalled in entirety. In other words, if the Tribunal has given its decision on say grounds 3 and 4 in a particular way in its first order while dealing with ten separate grounds and pursuant to a rectification application, it recalls its decision on grounds 3 and 4 and gives a completely different decision on the said grounds, then it would certainly amount to recall and review of its entire order in respect of those grounds."

In conclusion we have observed:

> "It must be remembered that this is not a power of review but is restricted to rectifying mistakes "apparent from the record." A liberal approach might constitute an invitation to parties to allow the period

fancy imagined 'mistake apparent from the record' at any time b the expiry of four years." .

The present case is an apt illustration of the above situation, which we reiterate must not be permitted to ensue in the garb of 'rectification'.

12. For these reasons, we are of the view that the impugned order of the Tribunal dated 13.9.2004 cannot be sustained in law and it is accordingly set aside. The appeal is allowed with no order as to costs.

(S. Muralidhar)
Judge

(Vikramajit Sen)
Judge

October 11, 2006
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