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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of decision: 25th February, 2014

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W.P.(C) 7037/2011

NATIONAL AGRICULTURAL COOPERATIVE
MARKETING FEDERATION OF INDIA LTD

..... Petitioner

Through Mr M S Syali, Sr. Adv. with Mr
Satyen Sethi, Mr Mayank Nagi and Mr Arta
Trana Panda, Advs.

versus

COMMISSIONER OF INCOME TAX AND ANR

..... Respondents

Through Mr Balbir Singh, sr. standing counsel
with Mr Abhishek Singh, Adv.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE R.V. EASWAR

R.V. EASWAR, J.

These proceedings taken under Article 226 of the Constitution of India impugn the order of the Income Tax Appellate Tribunal passed on 28th June, 2004 under section 254(2) of the Income Tax Act, 1961 in MA No.89/Del/1999 arising out of ITA No.s 6648 to 6656/Del/1996 for the assessment years 1986-87 to 1994-95. The petitioner also prays that respondent No.2 should be directed to complete the income tax



assessments of the petitioner for the aforesaid assessment years without regard to the impugned order.

2. The petitioner is an apex co-operative society, registered under the Multi State Cooperative Societies Act, 1984. Section 80P(2)(a)(iii) of the Income Tax Act, 1961, granted exemption to a cooperative society engaged in the marketing of agricultural produce of its members. The petitioner was held entitled to the deduction in respect of the assessment years 1968-69 and 1969-70 by a judgment of a Division Bench of this Court (*S. Ranganathan and Leila Seth, JJ*) delivered on 15th April, 1981 in ITR No.241/1975. The deduction, on the basis of judgment of this Court, was also allowed in the assessments made for the assessment years 1986-87 to 1994-95 which are the assessment years involved in the present writ petition. After the completion of the assessments for the aforesaid assessment years, notices were issued under section 148 of the Act seeking to reopen the assessments and withdraw the deduction already allowed. The basis for issuing the notices was the judgment of the Supreme Court in the case of *Assam Co-operative Apex Marketing Society V. CIT (Addl.)* (1993) 201 ITR 338, a judgment which was followed by the Kerala High Court in *Kerala State Cooperative Marketing Federation and Ors. V. CIT* (1994)



207 ITR 319. The Supreme Court in the aforesaid judgment took the view, contrary to the view taken by the judgment of this Court (supra) in the petitioner's own case, that in order to be eligible for the deduction, the society must be engaged in the marketing of the agricultural produce produced by its members. In the reassessment orders passed for the years now under consideration, the deduction earlier granted under section 80P(2)(a)(iii) was withdrawn. The assessee's appeals to the CIT(A) were unsuccessful and further appeals were taken to the Tribunal. While those appeals were pending before the Tribunal, on 13.5.1998, the Supreme Court in the judgment reported as *Kerala State Co-operative Marketing Federation Ltd. Vs. CIT* (1998) 231 ITR 814 reversed the judgment of the Kerala High Court (supra) as also its own view taken earlier in the case of *Assam Cooperative Apex Marketing Society* (supra). The result was that in order to be eligible for the deduction under section 80P(2)(a)(iii), it was not necessary that the cooperative society should be engaged in the marketing of the agricultural produce produced by its own members and that it was sufficient that the society marketed the produce grown by others.

3. Following the judgment of the Supreme Court in *Kerala State Cooperative Marketing Federation Ltd. and Ors.* (supra) rendered by



the Supreme Court on 13.5.1998, the Tribunal, before which the appeals of the petitioner for the assessment years 1986-87 to 1994 were pending, passed orders in favour of the assessee-petitioner and held that the petitioner was entitled to the deduction.

4. It is necessary at this juncture to advert to a crucial aspect of the appeals before the Tribunal since much of the arguments on behalf of the petitioner turned on this aspect. In the appeals before the Tribunal against the orders of the CIT (Appeals) confirming the reassessment, the petitioner had taken grounds questioning the jurisdiction of the assessing officer to reopen the assessments as also the withdrawal of the deduction granted under section 80P(2)(a)(iii) on merits. In its order dated 31.8.1998 by which it disposed of the appeals of the petitioner, the Tribunal allowed the appeals of the petitioner on merits on the basis of the judgment of the Supreme Court in *Kerala State Cooperative Marketing Federation Ltd. and Ors.* delivered on 13.5.1998 and held that the petitioner was entitled to the deduction. The grounds taken by the petitioner questioning the jurisdiction of the assessing officer to reopen the assessments were not decided by the Tribunal. The relevant portion of the order of the Tribunal is as under :



“7. We have considered the rival submissions and have gone through the relevant material and the case laws. In view of the latest decision of the Hon’ble Supreme Court in the case of the Kerala State Cooperative Marketing Federation Ltd. and Others Vs. CIT, we find that the apex court has reversed its own decision of Division Bench in the case of Assam Cooperative Apex Marketing Society Ltd., wherein it was held that agricultural produce produced by the members only is entitled for exemption. However, now the latest decision says that the marketing of agricultural produced of its members would mean not only such societies which deal with the produced raised by the members who are individuals or societies which are members thereof who may have purchased such goods from the agriculturists will be covered under section 80P(2)(a)(iii). Therefore, respectfully following the decision of apex court, we hold that assessee is entitled to deduction under section 80P(2)(a)(iii) of the Income Tax Act. We, therefore, set aside the order of the CIT(Appeals) on this issue and direct the ITO to allow deduction.

8. Since we have held that assessee is entitled to deduction under section 80P, we feel that the other issues will be sent back to the file of the ITO. If at all there is taxable income after allowing the deduction, then he can decide all these issues after giving fresh opportunity of being heard to the assessee. We do not deal with other issues raised by the assessee.

9. Appeals of the assessee are partly allowed.”

It may be seen from the last line of paragraph 8 of the order of the Tribunal that all other issues, which included the issue relating to the



jurisdiction of the assessing officer to reopen the assessments, were not dealt with by the Tribunal.

5. The provisions of section 80P(2)(a)(iii) were substituted by the Income Tax (Second Amendment) Act, 1998 with retrospective effect from 1.4.1968. Prior to the amendment, the sub-clause referred to a cooperative society engaged in “*the marketing of the agricultural produce of its members*”. After the retrospective amendment, the sub-clause referred to a cooperative society engaged in “*the marketing of agricultural produce grown by its member*”. By virtue of the retrospective amendment, the petitioner would not be entitled to the deduction in respect of the assessment years now under consideration. The petitioner however challenged the retrospective operation of the amendment by a writ petition, but it was dismissed with the clarification that the amendment would not apply to completed assessments.

6. Pursuant to the retrospective amendment, the second respondent moved MA No.89/Del/1999 before the Tribunal under section 254(2) of the Act and sought rectification of the order of the Tribunal passed on 31.8.1998 on the ground that the decision of the Tribunal that the petitioner was entitled to the deduction was a mistake apparent from the record within the meaning of Section 254(2), requiring rectification of



its order by withdrawing the deduction allowed to the assessee. It was on this application that the Tribunal passed the impugned order on 28.6.2004, observing as under :

“18. Having considered the issue at length the irresistible (sic) conclusion is that when the law is amended with retrospective effect, the fiction is that all must proceed on the basis of law at the relevant time when the law was amended subsequently. That being so, the legal fiction is apparently capable of being carried forward to hold that when the earlier order of the Tribunal was passed on 31st August, 1998, it was passed in contravention of the amended law, which by fiction is deemed to be in force at that time. This clearly is an error apparent on the face of record. It is, therefore, our bounden duty to correct such a mistake and uphold the decision of the assessing officer for denying deduction of profit from marketing of agricultural produce of its members which is not grown by them as per provisions of Section 80P(2)(iii) of the Act and the order dated 31st August, 1998 of the Tribunal stands modified accordingly.

19. In the result, miscellaneous application of revenue stands allowed.”

7. It is the aforesaid order of the Tribunal that is called in question in the present writ petition.

8. It is a well-settled proposition in income tax law, adumbrated by the Supreme Court in *M.K. Venkatachalam, ITO. v. Bombay Dyeing and Manufacturing Co. Ltd.* (1958) 34 ITR 143 (SC) = 1959 SCR 703, that a



glaring and obvious mistake of law can be rectified as much as a mistake of fact borne from the record. That case was concerned with a retrospective enactment, to amending Section 18A(5) of the Indian Income Tax Act, 1922. The amendment Act was passed in 1953, but took retrospective effect from 1.4.1952. The effect of the amendment was that an assessee who had paid advance tax in the relevant financial year, was not entitled to interest on the whole of the advance tax paid, but was entitled to interest only on the difference between the advance tax and the amount of the tax determined on regular assessment. The income tax authorities, acting on the basis of the retrospective amendment, reduced the interest to which the assessee in that case was entitled and this was done by exercise of the power of the income tax officer under section 35 of the Indian Income Tax Act, 1922 which permitted rectification of a mistake apparent from the record. The assessee challenged the rectification successfully before the Bombay High Court, *Chagla, C.J. and Tendulkar, J* holding that section 35 had no application to the facts of the case because the mistake apparent from the record contemplated by that section was not a mistake which is the result of the amendment of the law even though the amending law may be retrospective in operation. In other words, in the opinion of the High



Court, the mistake mentioned by section 35 had to be apparent on the face of the order and it can only be judged in the light of the law as it stood on the day when the order was passed.

9. Disapproving this view taken by the High Court, the Supreme Court observed as under: -

“It is in the light of this position that the extent of the Income-tax Officer's power under section 35 to rectify mistakes apparent from the record must be determined; and, in doing so, the scope and effect of the expression "mistake apparent from the record" has to be ascertained. At the time when the Income-tax Officer applied his mind to the question of rectifying the alleged mistake, there can be no doubt that he had to read the principal Act as containing the inserted proviso as from April 1, 1952. If that be the true position then the order which he made giving credit to the respondent for Rs. 50,603-15-0 is plainly and obviously inconsistent with a specific and clear provision of the statute and that must inevitable be treated as a mistake of law apparent from the record. If a mistake of fact apparent from the record of the assessment order can be treated as a mistake of law apparent from the record. Prima facie it may appear somewhat strange that an order which was good and valid when it was made should be treated as patently invalid and wrong by virtue of the retrospective operation of the Amendment Act. But such a result is necessarily involved in the legal fiction about the retrospective operation of the Amendment Act. If, as a result of the said fiction, we must read the subsequently inserted proviso as forming part of section 18A(5) of the principal Act as from April 1, 1952, the conclusion is inescapable that the order in question is inconsistent with the provisions of the said



proviso and must be deemed to suffer from a mistake apparent from the record. That is why we think that the Income-tax Officer was justified in the present case in exercising his power under section 35 and rectifying the said mistakes. Incidentally we may mention that in Meka Venkatappaiah v. Additional Income-tax Officer, Bapatla, the High Court of Andhra has taken the same view.”

10. After the judgment of the Supreme Court in *Bombay Dyeing and Manufacturing Co. Ltd.* (supra) it is unarguable that an assessment order or any other order passed by the income-tax authority can be rectified on the basis of a retrospective amendment of law. Section 254(2) speaks in the same language as section 35 of the Indian Income Tax Act, 1922 which was considered by the Supreme Court; it confers the Appellate Tribunal with the power to amend any order passed by it in the appeal “*with a view to rectifying any mistake apparent from the record*”. The principle laid down by the Supreme Court in the aforesaid judgment must therefore equally apply to the power of the Tribunal to rectify its order under section 254(2). The impugned order passed by the Tribunal cannot therefore be faulted, when it amended its appellate order on the basis of the retrospective amendment to section 80P(2)(a)(iii).

11. Counsel for the assessee fairly did not dispute the above legal position but submitted that the Tribunal should be directed to deal with



the grounds raised by the petitioner against the jurisdiction to reopen the assessments on liberty being given to the petitioner to file an application under section 254(2), lifting the bar of limitation prescribed by the sub-section. The sub-section permits the application for rectification to be moved within four years from the date on which the order was passed by the Tribunal. In this case, order was passed by the Tribunal on 31.8.1998 and the period of four years ended on 30.8.2002. The petitioner did not take any steps to have the order of the Tribunal rectified when the retrospective amendment nullified the Tribunal's order accepting the merits of the assessee's claim for deduction under section 80P(2)(a)(iii). It was open to the petitioner to move an application as soon as the Income Tax (Second Amendment) Act, 1998 came into force with retrospective effect from 1.4.1968. We are informed that the Amendment Act came into force from 8.1.1999. Even when the income tax department filed an application before the Tribunal in August, 1999 seeking rectification of the Tribunal's order, the petitioner did not get alerted or think it fit to pursue the remedy open to it under section 254(2) and ask the Tribunal to deal with the grounds of appeal against the jurisdiction to reopen the assessment. No steps were taken by the petitioner even thereafter when the Tribunal passed the



impugned order on 28.6.2004. Had any application been moved by the petitioner at that stage, there would have been much less delay. This Court rejected the appeal of the petitioner against the impugned order on 23.12.2010 and gave liberty to the petitioner to file a writ petition (i.e., the present petition); even at that time the petitioner did not approach the Tribunal with an application for rectification. Thus despite several opportunities and several occasions on which it was alerted, the petitioner did not choose to file an application for rectification before the Tribunal and in the meantime 12 years have passed after the period of limitation got over in 2002. The petitioner has now woken up from its slumber and wants this Court to grant it the opportunity of approaching the Tribunal under section 254(2), lifting the bar of limitation. In these proceedings under Article 226, the Court is no doubt required to consider the equities and exercise its discretion appropriately; that however does not mean that in a case like this where successive opportunities have been let go, for which there is no plausible explanation except a vague statement that the petitioner was not properly advised, a claim which rings hollow, this Court should rush to the help of the petitioner. We refuse to exercise the discretion in favour of the petitioner.



12. The result of the foregoing discussion is that the writ petition and all connected applications, if any, are dismissed with no order as to costs.

(R.V. EASWAR)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

FEBRUARY 25, 2014
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