

PUNJAB AND HARYANA HIGH COURT

R.B.L. Banarsi Dass & Co. (P) Ltd

Vs

Commissioner of Income Tax

(M.M.Kumar, J.)

12.03.2008

JUDGEMENT

M.M.Kumar, J.

(1.) THIS appeal filed by the assessee under s. 260A of the IT Act, 1961 (for brevity, 'the Act'), is directed against order dt 1281/Chd/1996, in respect of asst yr. 1989 -90. The assessee appellant has claimed that following questions of law would arise for consideration of this Court : (i) Whether under the facts and circumstances of the case, the Tribunal is justified in taxing amount received in pursuance of the insurance claim giving two divergent treatments as a capital receipt and as a revenue receipt ? (ii) Whether under the facts and circumstances of the case the Tribunal is justified in overlooking the doctrine of merger being the substance of the controversy on the interpretation of order in CWP No. 4637 of 1996 and ITA No. 122 of 2002 by this Court ? (iii) Whether the Tribunal is justified in applying the provisions of s. 45(1A) retrospectively, which were inserted in the (iv) Whether the Tribunal is justified in taking an adverse inference overlooking and ignoring that a mistake of fact and law cannot be an estoppel which is non est in eyes of law ? (v) Whether on the true and correct interpretation of the provisions of s. 50, a non obstante clause the scope stands fulfilled on the acquisition of the asset as distinct from the user of the same ?

(2.) BRIEF facts of the case necessary for disposal of the instant appeal are that the assessee appellant is a company, which was subsequently wound up somewhere in 1996. The assessment for the year 1989 -90 was completed on 27th that the AO committed serious error causing prejudice to the interests of the Revenue. He expressed the view that the AO failed to give proper treatment to the sale of scrap of machinery and directed the AO to complete the assessment afresh. Accordingly, the AO in the course of assessment under s. 143(3) of the Act took cognizance of the fact that there was a fire in the factory and the assessee had lodged a claim with the insurance company for the loss due to fire. The claim to the extent of Rs. 15,34,177 was received. The assessee had also sold scrap of the machinery for a sum of Rs. 13,04,995. The written down value (WDV) of the machinery was Rs. 1,42,042, which by adding the machinery

of previous year of Rs. 20,06,705. came to the total of Rs. 21,48,747. The short -term capital gain was calculated by the assessee at Rs. 6,90,425 after deducting the aforementioned amount from the insurance claim and scrap value received from the sale of the same, which was set aside by the CIT in exercise of power under s. 263 of the Act. vide order dt.

(3.) DURING the course of assessment proceedings under s. 143(3) of the Act, the submission made by the assessee that insurance claim was in lieu of damage/destruction by the fire, was rejected by the AO on the ground that insurance claim was to be considered as short -term capital gain in terms of provisions of s. 50 of the Act. Fresh assessment was assessing the short -term capital gain under s. 50 of the Act. The AO rejected the application on the ground that the claim of the assessee having been rejected under s. 143(3) of the Act. could not be considered afresh by invoking s. 154 1995. The assessee thereafter preferred an appeal before the CIT(A) against the order of rejection of application under s. 154 of the Act. The CIT(A) after conferring due consideration on the contention of the assessee that the scrap was dumped on the assessee by the insurance company at determined value and since such claim was settled in kind, the same constituted the capital receipt and accordingly the CIT(A) accepted the contention of the assessee and the a direction to the AO to examine the issue in the light of the provisions of s. 50 of the Act. The Revenue approached the Tribunal by raising the issue that the appeal before the CIT(A) was against the order under s. 154 of the Act and therefore, he had no power to set aside the assessment framed under s. 143(3) of the Act, as no appeal was filed by the assessee against that order. The Revenue raised various other issues. The assessee also raised the principal issue that the AO having ignored the legal provisions of s. 50 of the Act committed a mistake apparent on record, which is rectifiable under s. 154 of the Act and that s. 45(1A) of the Act was incorporated w.e.f. 1st specific claim during the course of assessment proceedings under s. 143(3) r/w s. 263 of the Act that the amount received from the insurance company was a capital receipt which was rejected by the AO by observing that the judgment of Hon'ble the Supreme Court in the case of *Vania Silk Mills (P) Ltd. vs. CIT*¹ did not apply to the facts of the present case. The AO had further held that the sale of scrap was liable to short -term capital gain in terms of provisions of s. 50 of the Act and that the assessee did not file any appeal against the decision of the AO. The assessee, however, filed an application under s. 154 of the Act which was rejected. The CIT(A) did not decide the issue whether the AO was justified in rejecting the application of the assessee under s. 154 of the Act on the ground that the same very issue had already been raised and decided by the AO under s. 143(3) r/w s. 263 of the Act and that the issue was highly debatable. The Tribunal further held that the CIT(A) did not pass any speaking order on the issue but has issued direction to the AO to consider the claim of the assessee under s. 50 of the Act afresh the Act. The Tribunal placed reliance on a judgment of Hon'ble the Supreme Court in the case of *T.S. Balaram, ITO vs. Volkart Brothers*² and went on to observe as under : ".....In our considered view, the powers of the AO under s. 154 are limited to rectification of mistake apparent from record. The mistake must be obvious and patent and not something which can be established by a long -drawn process of reasoning on points on which there may be conceivably two opinions as held by the Supreme Court in the case of *T.S. Balaram, ITO vs. Volkart Brors. & Ors*³. A

decision on a debatable point of law is not a mistake apparent from record. In the present case, whether the amount received from the insurance company including the sale of scrap was a capital receipt or not was highly debatable. Moreso, such claim was specifically rejected by the ITO at the time of completing the assessment under s. 143(3). In our considered view, the issue relating to the assessment of short -term capital gain in the light of provisions of s. 50 is highly debatable. The AO had expressed an opinion in the assessment order passed under s. 143(3)....." ;

Cases Referred.

1(1991) 98 CTR (SC) 153 : AIR 1991 SC 2104

2AIR 1971 SC 2204

3(1971) 82 ITR 50 (SC)