M/S HIND WIRE INDUSTRIES LTD. A

v.

THE COMMISSIONER OF INCOME TAX, WEST BENGAL-V

JANUARY 20, 1995

[P.B. SAWANT AND G.N. RAY, JJ.] B

Income Tax Act, 1961—Section 154(7) as it stood on 21st Sepember, 1979—Expression 'from the date of the order sought to be amended'—Interpretation of—Word 'order' would mean any order including amended or rectified order. C

The appellant assessee was assessed for income-tax originally under the assessment order dated 21st September, 1979. The assessee filed a petition for rectification of the assessment order u/s 154 of the Income Tax Act. The assessment order was rectified on 12th July, 1982. Thereafter, the assessee again applied for rectification of the fresh order on 4th July, 1986. The Income Tax Officer dismissed the assessee's claim on the ground that the application was beyond time. This order was confirmed by the Appellate Assistant Commissioner. On appeal, the Tribunal allowed the application holding that the application for rectification made on 4th July, 1986 was within 4 years of the fresh order of assessment made on 12th July, 1982 and hence within limitation. D E

On reference, the High Court reversed the order of the Tribunal holding that the period of 4 years was to be calculated from the initial order of assessment, viz., from 21st September, 1979. Hence this appeal. The question raised was regarding the interpretation of Section 154(7) of the Act. F

Allowing the appeal, this Court

HELD : The word 'order' in the expression 'from the date of the order sought to be amended' in sub-section (7) of Section 154 of the Income Tax Act as it stood at the time of the assessment order dated 21st September 1979, had not been qualified in any way and it did not necessarily mean the original order. It would mean even the rectified order. [527-F] G

International Cotton Corporation **v.** *C.T.O.,* **[1975] 2 SCR 345 and** H

A *Deputy Commissioner of Commercial Taxes* v. *H.R. Sri Ramulu,* **(1977) 39 STC 180, relied on.**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 1323-27 of 1995.

B From the Judgment and Order dated 24.3.93 of the Calcutta High Court in I.T.R. No. 51 of 1991.

Dr. Shankar Ghosh and R. Mukherjee for the Appellant.

G.V. Iyer, S.N. Terdol and R. Satish for the Respondent.

C

The following Order of the Court was delivered :

Special leave granted. Heard counsel on both sides.

What is challenged in these appeals is the decision of the Calcutta D High Court interpreting the provisions of Section 154(7) of the Income Tax Act (hereinafter referred to as the 'Act') as it stood at the time of the assessment order dated 21st Septmber, 1979.

Shortly stated, facts are that the appellant assessee was assessed for income tax originally under the assessment order dated 21st September, E 1979. The assessee filed a petition for rectification of the said order under Section 154 of the Act as it stood then on the ground that the Income Tax Officer had not taken into consideration the shift allowance available to the assessee. Consequent upon this application, the assessment order was rectified on 12th July, 1982. Thereafter, the assessee again applied for F rectification of the fresh order of 12th July, 1982 on 4th July, 1986 contending that while he was entitled to depreciation allowance on factory building at the rate of 10%, he was allowed the depreciation only at the rate of 5%. The Income Tax Officer dismissed the assessee's claim on the ground that the application was beyond time. This order was confirmed by the Appellate Assistant Commissioner. In the appeal, the Tribunal, however, allowed G the application holding that the application made on 4th July, 1986 was within 4 years of the fresh order of assessment made on 12th July, 1982 and hence within limitation. On reference, the High Court reversed the order of the Tribunal holding that the period of 4 years is to be calculated from the initial order of assessment, viz., from 21st September, 1979 and H not from the fresh order of assessment passed on 12th July, 1982.

There is no dispute that the assessee would be entitled to 10% depreciation allowance on the factory building and it has to be granted to him if it is held that this rectification application was within time.

Section 154 of the Act, as it stood at the relevant time, read as follows:

> "154. Rectification of mistake -
>
> (1) With a view to rectifying any mistake apparent from the record-
>
> (a) the Income-tax Officer may amend any order of assessment or of refund or any other order passed by him.
>
> xxxx xxxx xxxx
>
> (1A) Where any matter has been considered and decided in any proceeding by way of appeal or revision relating to an order referred to in sub-section (1), the authority passing such order may, notwithstanding anything contained in any law for the time being in force, amend the order under that sub-section in relation to any matter other than the matter which has been so considered and decided.
>
> xxxx xxxx xxxx
>
> (7) Save as otherwise in Section 155 or sub-section (4) of section 186 no amendment under this section shall be made after the expiry of four years from the date of the order sought to be amended."

What falls for consideration in the present case is the interpretation of the expression "from the date of the order sought to be amended" in sub-section (7) of Section 154 as it stood then. It is obvious that the word 'order' hs not been qualified in any way and it does not necessarily mean the original order. It can be any order including the amended or rectified order. A similar expression in Rule 38 of the Mysore Sales Tax Act fell for consideration in *Internation Cotton Corporation* v. *C.T.O.,* [1975] 2 SCR 345. Dealing with the point raised, this Court held as under :

> "The other attack that the rectification order is beyond the point of time provided in Rule 38 of the Mysore Sales Tax rules is also

A without substance. What was sought to be rectified was the assessment order rectified as a consequence of this Court's decision in *Yaddalam's* case. After such rectification the original assessment order was no longer in force and that was not the order sought to be rectified. It is admitted that all the rectification orders would be within time calculated from the original rectification order. Rule
B 38 itself speaks of "any order" and there is no doubt that the rectified order is also "any order" which can be rectified under Rule 38"

This decision was endoresed in *Deputy Commissioner of Commercial*
C *Taxes* v. *H.R. Sri Ramulu,* [1977] 39 STC 180 when this court observed there as follows :-

"The reason for that is that once an assessment is reopened, the initial order for assessment ceases to be operative. The effect of
D reopening the assessment is to vacate or set aside the initial order for assessment and to substitute in its place the order made on re-assessment. The initial order for re-assessment cannot be said to survive, even partially, although the justification for re-assessment arises because of turnover escaping assessment in a limited field or only with respect to a part of the matter covered by the
E initial assessment order. The result of reopening the assessment is that a fresh order for reassessment would have to be made including for those matters in respect of which there is no allegation of the turnover escaping assessment. As it is, we find that in the present case the assessment orders made under section 12A were
F comprehensive orders and were not confined merely to matters which had escaped assessment earlier. In the circumstances, the only orders which could be subject-matter of revision by the appellant were the orders made under Section 12A of the Act and not the initial assessment orders.

G In the case of *J. Jaganmohan Rao* v. *Commissioner of Income-tax and Excess Profits Tax, Andhra Pradesh,* (1970) 75 ITR 373 SC, this Court dealt with section 34 of the Indian Income-tax Act, 1922, which relates to reassessment in the case of income escaping assessment. It was held by this Court that once assessment is
H reopened, the previous under-assessment is set aside and the whole

proceedings start afresh. Ramaswamy, J., speaking for the Court observed:

> "Section 34 in terms states that once the Income- tax Officer decides to reopen the assessment he could do so within the period prescribed by serving on the person liable to pay tax a notice containing all or any of the requirements which may be included in a notice under section 22(2) and may proceed to assess or reassess such income, profits or gains. It is, therefore, manifest that once assessment is reopened by issuing a notice under sub-section (2) of section 22 the previous under- assessment is set aside and the whole assessment proceedings start afresh. When once valid proceedings are started under section 34(1)(b), the Income-tax Officer had not only the jurisdiction but it was his duty to levy tax on the entire income that had escaped assessment during that year."

In the case of *Commissioner of Sales Tax, Madhya Pradesh* v. *H.M. Esufali H.M. Abdulali,* [1973] 32 STC 77 SC=90 ITR 271 SC, this Court dealt with reassessment made under section 19 of the Madhya Pradesh General Sales Tax Act, 1958. It was held that when reassessment is made, the former assessment is completely reopened and in its place fresh assessment is made, Hegde, J., speaking for the Court, observed:

> "What is true of the assessment must also be true of reassessment because reassessment is nothing but a fresh assessment. When reassessment is made under section 19, the former assessment is completely reopened and in its place fresh assessment is made. While reassessing a dealer, the assessing authority does not merely assess him on the escaped turnover, but it assesses him on his total estimated turnover. While making reassessment under section 19, if the assessing authority has no power to make best judgment assessment, all that the assessee need do to escape reassessment is to refuse to file a return or refuse to produce his account books. If the contention taken on behalf of the assessee is correct, the assessee can escape his liability to be reassessed by

A adopting an obstructive attitude. It is difficult to conceive that such could be the position in law.".

What fell for consideration in this decision were Sections 12A, 21 and 21(2) and 21(3) of the Mysore Sales Tax Act. The relevant provisions of Section 12A are as under :

B

"(1) Where for any reason the whole or any part of the turnover of a dealer has escaped assessment to tax or licence fee or has been assessed at a lower rate than the rate at which it is assessable, the assessing authority may, subject to the provisions of sub-section C (2) at any time within a period of five years from the expiry of the year to which the tax or licence fee relates, assess to the best of its judgment, the tax or licence fee payable on the turnover referred to after issuing a notice to the dealer and after making such enquiry as it considers necessary."

D Section 21 of the said Act deals, *inter alia,* with revisional powers of the Deputy Commissioner. Sub-sections (2) and (3) of that section read as under :

(2) The Deputy Commissioner may of his own motion call for and E examine the record of any order passed or proceeding recorded under the provisions of the Act by a Commercial Tax Officer subordinate to him and against which no appeal has been preferred to him under section 20, for the purpose of satisfying himself as to the legality or propriety of such order or as to the regularity of F such proceeding and pass such order with respect thereto as he thinks fit.

(3) In relation to an order of assessment passed under this Act, the power under sub-sections (1) and (2) shall be exercisable only within a period of four years from the date on which the order was G passed."

While holding that the expression "the date on which the order was passed" in sub section (3) of Section 21, did not qualify the word 'order' and hence the period of four years has to be calculated from the date of H the rectified order, this Court referred to its earlier decision in *Internation-*

al Cotton case (supra) and also followed the decision of this Court in *H.M. Esufali H.M. Abdulali* case (1973) 90 ITR 271 at 280 as under : A

> "What is true of the assessment must also be true of re-assessment because re-assessment is nothing but a fresh assessment. When reassessment is made under section 19, the former assessment is B completely reopened and in its place fresh assessment is made. While reassessing a dealer, the assessing authority does not merely assess him on the escaped turnover but it assesses him on his total estimated turnover. While making reassessment under section 19, if the assessing authority has no power to make best judgment C assessment, all that the assessee need do to escape reassessment is to refuse to file a return or refuse to produce taken on behalf of the assessee is correct, the assessee can escape his liability to be reassessed by adopting an obstructive attitude. It is difficult to conceive that such could be the position in law."

D

The Court while dealing with the provisions of the M.P. General Sales Tax Act, 1958 quoted Section 19 and Rule 33(1) and (2) which read as under :

> "*19. Assessment of turnover escaping Assessment* – (1) Whereas an E assessment has been made under the Act repealed by Section 52 and if for any reasons any sale or purchase of goods chargeable to tax under this Act or any Act repealed by Section 52 during any period has been under-assessed or has escaped assessment or assessed at a lower rate or any deduction has been wrongly made F therefrom, the Commissioner may, at any time within five calendar years from the date of order of assessment, after giving the dealer a reasonable opportunity of being heard and after making such enquiry as he considers necessary, proceed in such manner as may be prescribed to reassess within a period of two calendar years G from the commencement of such proceedings, the tax payable by such dealer and the commissioner may, where the omission leading to such reassessment is attributable to the dealer, direct that the dealer shall pay, by way of penalty in addition to the amount of tax so assessed, a sum not exceeding that amount : H

A Provided that in the case of an assessment made under any Act repealed by section 52, the period for re-assessment, escapement or wrong deduction shall be provided in such Act notwithstanding the repeal thereof:

B Provided further that any reassessment proceedings pending on the date of commencement of the Madhya Pradesh General Sales Tax (Amendment) Act, 1978 (No. 25 of 1978) be completed in accordance with the provisions in force before the date of such commencement and within a period of two calendar years from the date of such commencement."

C

xxxx xxxx xxxx

"33. Manner of Assessment and re-assessment and imposition of penalty. – (1) Where -

D (a) a registered dealer has rendered himself liable to tax and penalty under sub-section (1) of Section 14-A, or

(a-i) a dealer has failed to comply with a notice issued under sub-section (1) of Section 17, or

E (b) a registered dealer has failed without sufficient cause to furnish prescribed returns for any period by the prescribed date as required by sub-section (1) of Section 17, or

(c) a registered dealer has rendered himself liable to best judgment F assessment under clauses (a) and (b) of sub-section (4) of Section 18, or

(d) a dealer has rendered himself liable to best judgment assessment under sub-section (6) or sub-section (7) of Section 18, or

G (e) a dealer being liable to pay tax, has wilfully failed to apply for registration, or

(f) the sale or purchase of goods by a dealer during any period has been under-assessed or has escaped assessment or has been H assessed at a lower rate or any deduction has been wrongly made

therefore within the meaning of sub-section (1) of Section 19, or A

(g) a dealer has deliberately concealed his turnover of sale or purchase in respect of any goods or has furnished a false return,

then in every such case, the assessing authority shall serve on the dealer a notice which shall as far as may be, be in Form XVI B specifying the default, escapement or concealment, as the case may be, and calling upon him to show cause by such date, ordinarily not less than 30 days from the date of service of the notice as may be fixed in that behalf, why he should not be assessed or reassessed to tax and/or penalty should not be imposed upon him and directing him to produce on the sale date his books or account and other C documents which the assessing authority may require and any evidence which he may wish to produce in support of his objection:

Provided that no such notice shall be necessary where the dealer, having appeared before the assessing authority, waives such notice. D

(2) On the date fixed in the notice issued under sub-rule (1) or in case the notice is waived on such date which may be fixed in this behalf the assessing authority shall after considering the objections raised by the dealer and examining such evidence as may be E produced by him and after taking such other evidence as may be available, assess or re-assess the dealer to tax and/or impose a penalty or pass any other suitable order".

In view of these authorities taking the view that the word 'any' in the expression "order sought to be amended" would mean even the rectified F order, we are satisfied that the High Court was wrong in setting aside the decision of the Tribunal. Shri G. Vishwanatha Iyer, learned senior counsel cited before us the decisions of the Calcutta, Gujarat, Madras and Orissa High Courts in *Bharat Taxtile Works & Ors.* v. *Income-tax Officer, Circle-IV, 3-A, (Company),* (1978) 114 ITR 28; *Ahmedabad Sarangpur Mills Co. Ltd.* v. *A.S. Manohar, Income-Tax Officer, Cirle IV, Ward-A, (Companies, Ahmedabad,* (1976) 102 ITR 712; *Kothari (Madras) Ltd.* v. *Agricultural Income Tax Officer,* (1989) 177 ITR 538 and *Commissioner of Income Tax* v. *Kalinga Tubes,* (1991) 187 ITR 595 respectively in support of his contention that the word 'order' used in the expression "order sought to be amended" would mean the original order of the assessment. As against this, Dr. H

A Shankar Ghose, learned senior counsel referred us to ther decisions of the Patna and Karnataka High Courts in *Bihar State Road Transport Corporation* v. *Commissioner of Income Tax,* (1986) ITR 162 114 at 130 and *Commissioner of Income-tax, Karnataka-II, Bangalore* v. *Mysore Iron & Steel Ltd.,* (1986) 157 ITR at 531 respectively which decisions have taken the contrary view. However, in view of the decisions of this Court referred to B above, we are of the opinion that the view taken by the Tribunal in the present case is the correct one. We, therefore, set sside the impugned order of the High Court and restore that of the Tribunal. The appeals are allowed accordingly with no order as to costs.

A.G. Appeals allowed.