

HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

ITA No.05/2017, MP No.01/2017

Date of order:18.04.2018

Ajay Kapoor vs Commissioner of Income Tax

Coram:

Hon'ble Mr. Justice Ramalingam Sudhakar, Chief Justice(Acting)

Hon'ble Mr. Justice Sanjeev Kumar, Judge

Appearing counsel:

For Appellant (s) : Mr Sheikh Najeeb, Advocate vice
Mr S.S.Ahmed Advocate.

For Respondent(s) : Mrs Aruna Thakur, Advocate.

Whether to be reported in
Press/Media : Yes/No.

Whether to be reported in
Digest/Journal/Net : Yes.

Sanjeev Kumar-J:

1 This appeal is directed against the order dated 30.09.2016 passed by the Income Tax Appellate Tribunal, Amritsar Bench (hereinafter to be referred to as the 'Tribunal') in MA No.13(Asr)/2016 arising out of ITA No.595(Asr)/2013 whereby the miscellaneous application filed by the appellant in terms of Section 254(2) of the Income Tax Act, 1961 (hereinafter to be referred to as the 'Act') against the order dated 14.02.2014 passed in ITA No.595 (Asr)/ 2013, has been dismissed.

2 This appeal was admitted by this Court vide order dated 07.12.2017 on the following substantial question of law:

'whether the Tribunal erred in dismissing the miscellaneous application filed for recalling or rectification of the final order,

ITA No.595 (Asr)/2013 dated 14th February, 2014, on a mis reading of the provisions under Section 254(2) of the Income Tax Act.'

3 The facts giving rise to the filing of this appeal, briefly stated, are that for the assessment year 2010-11, the Assessing Authority made the best judgment assessment in terms of Section 144 of Act against the appellant on 26.03.2013 by applying the net rate of 10% on the gross receipts. A sum of Rs.22.00 lac was also added to the income of the appellant under Section 68-A of the Act.

4 Aggrieved, the appellant challenged the order of the Assessing Authority by filing an appeal before the Commissioner of Income Tax (Appeals) (hereinafter to be referred to as 'CIT(A)'). The said appeal was filed primarily on the ground that the application of net profit rate of 10% on the gross receipts was totally unjustified and on a very higher side having regard to the nature of business and the area of operation. The appellant placed reliance on the judgment of ITAT Bench Amritsar rendered in the case of **Mohan Singh Contractor vs Income Tax Officer, in ITA No.59/Asr/2012**.

5 The CIT (A) disposed of the appeal vide order dated 10.07.2013 and reduced the net profit rate applied by the Assessing Authority from 10% to 6% on the gross receipts. The CIT (A) also set aside the addition of Rs.22.00 lac made on account of unexplained cash credits. The Revenue, however, felt aggrieved of the aforesaid order of the CIT(A) and assailed the same in an appeal before the Tribunal. The Tribunal allowed the appeal preferred by the Revenue, set aside the order of the CIT(A) and restored the order of the assessment made by the Assessing Authority. In short, the application of 10% net profit rate on the gross receipts made by the Assessing Authority was upheld. However, with regard to the addition made by the Assessing Authority under Section 68 of the Act, the matter was remanded to the Assessing Authority with a direction to decide the same afresh by providing adequate

opportunity of being heard to the appellant. The appellant, who had partly succeeded before the Tribunal, instead of challenging the order of the Tribunal by way of further appeal, chose to file an application before the Tribunal itself in terms of Section 254(2) of the Act for recalling the order dated 14.02.2014 passed in ITA No. 595/Asr/2013. The said application was filed, primarily on the ground that the order dated 14.02.2014 was vitiated by mistakes which were apparent from record. The said application was considered by the Tribunal and vide order impugned, the same was rejected. It is against this order, the appellant has filed this appeal.

6 Having heard learned counsel for the parties and perused the record, it is necessary to first set out the provisions of Section 254(1&2) of the Act which are as follows:

‘254. Orders of Appellate Tribunal

(1) The Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit.

(2) The Appellate Tribunal may, at any time within four years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it under sub- section (1), and shall make such amendment if the mistake is brought to its notice by the assessee or the² Assessing] Officer:

Provided that an amendment which has the effect of enhancing an assessment or reducing a refund or otherwise increasing the liability of the assessee, shall not be made under this. sub- section unless the Appellate Tribunal has given notice to the assessee of its intention to do so and has allowed the assessee a reasonable opportunity of being heard.

7 From a bare reading of sub-Section 2 of Section 254 of the Act reproduced above, it is clear that the Tribunal can amend its order passed under Section 254(1) of the Act reproduced above for rectifying any mistake

apparent from the record. This power of rectification is exercisable by the Tribunal *Suo Motu* or when the mistake is brought to its notice by the Assessee or the Assessing Officer. It is, thus, beyond any pale of doubt that this power vested in the Tribunal for rectification of its order is to be exercised only for the purposes of correcting the errors which are apparent from the record.

8 The plea of the appellant before the Tribunal for seeking rectification of its order was that the judgment cited by him before it rendered by the ITAT Amritstar Bench in the case of Mohan Singh Contractor (supra) where the learned Tribunal had held the net profit rate of 5% to be a reasonable rate was not considered by the Tribunal. It is, thus, submitted that the failure to consider a binding precedent on the question of law involved in the matter amounts to an error apparent on the face of record. The Tribunal, after considering the rival contentions, concluded that it had passed order sought to be rectified after going through the entire facts and had not passed the order merely in ignorance of the judgment relied upon by the Assessee before the CIT(A). Referring to the case law on the subject, the Tribunal did not rightly find any merit in the application and the same was dismissed.

9 On careful perusal of the order dated 14.02.2014 passed in ITA No. 595/Asr/2013, we find that the judgment rendered by the Tribunal in the case of Mohan Singh Contractor(supra) as well as in the case of M/s Pooja Construction Coompany vs Commissioner of Income Tax in ITA No.750(Asr)1992 was duly taken note of. It is only after considering the case law cited by the parties before the Tribunal, the Tribunal, on overall view of the matter in the light of facts and circumstances of the case, upheld the order of assessment whereby net profit rate of 10% on the gross receipts had been applied by the Assessing Officer. The best judgment assessment, to be made by the Assessing Authority in terms of Section 144 of the Act, is required to be made by the Assessing Authority

after taking into account all the relevant material. The Judicial precedents on the similar issue undoubtedly constitute relevant material.

10 Whether, in the facts and circumstances of the case, the judgment rendered by the ITAT Amritsat Bench in the case of Mohan Singh Contractor (Supra) or the one rendered by the same Bench in the case of M/S Pooja Construction Company (supra) was nearer to the facts of this case and, thus, applicable, is a matter required to be determined by the Adjudicating Authority.

11 The Tribunal in its wisdom and by taking overall view of the entire facts and circumstances of the case thought it just to follow the judgment rendered in the case of Pooja Construction Company (supra). This judicial discretion exercised by the Tribunal cannot be construed to be an error on the face of record which could be rectified by resorting to Section 254(2) of the Act.

The order of the Tribunal impugned in this appeal is well reasoned order and supported by judicial precedents and therefore does not call for any interference by this Court.

12 Placing reliance on the judgment of Hon'ble the Supreme Court rendered in the case of ***Honda Siel Power Products vs Commissioner of Income Tax, 2007 (12) SCC 596***, learned counsel for the appellant lastly contended that the order passed in ignorance of the judgment of the Coordinate Bench suffers from an error apparent on the face of record and, therefore, could be rectified in term of Section 254(2) of the Act. The judgment aforesaid relied upon by the appellant does not, in any manner, support the case of the appellant. The judgment passed by the ITAT Amritsar Bench in the case of Mohan Singh Contractor (supra) has been passed in the facts and circumstances of the said case. The profit margin of an assessee (Contractor) may depend upon several factors viz. the area of operation where the work is executed, nature of work, the quantum of work and several other factors. That being the position, it would not be appropriate to compare the two cases for the purposes of applying the net

profit rate on the gross receipts while framing the best judgment assessment. The Judgment of ITAT Amritsar rendered in the case of Mohan Singh Contractor (supra) does not have universal application and, therefore, does not serve as a binding precedent to be followed in all the cases irrespective of fact situations involved in such cases.

13. For the reasons stated above, we do not find any merit in this appeal and the same is, accordingly, dismissed.

(Sanjeev Kumar)
Judge

(Ramalingam Sudhakar)
Chief Justice(Acting)

Jammu
18.04.2018
Sanjeev