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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Date of decision: 26th April, 2021***

\+ **W.P.(C) 3921/2021**

BHARAT BHUSHAN JINDAL ..... Petitioner

Through: Mr. Salil Kapoor with Ms. Soumya Singh, Mr. Sumit Lalchandani and Ms. Ananya Kapoor, Advocates.

versus

PRINCIPAL COMMISSIONER OF INCOME TAX-12 & ANR. ..... Respondents

Through: Mr. Zoheb Hossain, Sr. Standing Counsel for revenue

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER
HON'BLE MR. JUSTICE TALWANT SINGH

RAJIV SHAKDHER, J.: (ORAL)

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Preface:

1. *Via* this writ petition, the petitioner-assessee seeks to lay a challenge to the orders dated 27.01.2021 and 11.02.2021, whereby, Forms 1 and 2 filed by it under the Direct Tax *Vivad Se Vishwas* Act, 2020 (in short 'the 2020 Act') were rejected by the designated authority.

Background facts:

2. The impugned orders came to be passed in the background of the following board facts and circumstances:

2.1. The Assessing Officer [in short 'AO'] *vide* order dated 21.03.2014, concerning the assessment year ('AY') 2011-2012, pegged the petitioner-assessee's taxable income at Rs.2,19,50,020/-. as against the declared income of Rs.21,21,160/-.

2.2. In arriving at the assessed income, the AO, *inter alia*, added to the petitioner-assessee's declared income, agricultural income, amounting to Rs.7,06,145/- and also disallowed the deduction of Rs.1,91, 22,723 claimed by the petitioner-assessee under Section 80IC of Income Tax Act, 1961 (in short 'the Act').

2.3. Aggrieved, by the decision rendered by the AO, the petitioner-assessee preferred an appeal with the Commissioner of Income Tax (Appeals) [in short "CIT(A)"]. The CIT(A) allowed the petitioner's-assessee's appeal *vide* order dated 29.01.2016.

2.4. This time around, the revenue escalated the matter and preferred an appeal with the Income Tax Appellate Tribunal (in short 'the Tribunal'). The Tribunal dismissed the appeal of the revenue *vide* order dated 22.06.2018. While dismissing the appeal, in the operative part of its order, the Tribunal made the following observations:

"7. We have heard the Ld. DR and it is a matter of record that CIT(A) has proceeded on the footing that in A.Ys. 2008-09, 09-10 and 2010-11 identical issue was decided in favour of the assessee. The CIT (A) held as under:

> *"10.7 Facts of the case during the year are identical to AY 2008-09, 09-10 and 2010-11. Therefore, respectfully following the order of CIT (A) dated 16.09.2011 for AY 2008-09 and for AY 2009-10 and 2010-11, it is held that deduction u/s 80IC is allowable to the assessee of Rs.1,88,63,283/- on the net profit arising in 1st, 2nd and 3rd category and, therefore, addition to the extent of which made by the Assessing Officer is deleted and deduction u/s 80IC is not allowable on the profit on sale of ALP reagent kit, ALT reagent kit and AST reagent kit (4th Category) amounting to Rs. 2,60,117/- and addition made by the Assessing Officer is upheld to that extent."*

Thus, the Ld. DR could not controvert the findings given by the CIT(A) that the Tribunal in earlier assessment years dismissed the appeal of the Revenue. Therefore, the issue is squarely covered by the decision of the Tribunal and there is no need to interfere with the finding of the CIT(A). The Revenue's appeal is dismissed."

[Emphasis is ours]

2.5. The revenue, thereafter, moved a miscellaneous application [in short 'MA'], under Section 254(2) of the Act, seeking to bring to the notice of the Tribunal, the error, which, according to it, was apparent on the face of the record. The revenue pointed out, in its application, that, as a matter of fact, the Tribunal had reversed the view, taken by the CIT(A) in the earlier years, i.e., AYs 2008-2009, 2009-2010 and 2010-2011, contrary to what was noted in the Tribunal's order dated 22.06.2018.

2.6. It would be relevant to note that, when the Tribunal passed the order dated 22.06.2018, the petitioner-assessee was not represented.

2.7. The Tribunal, having realised, that a mistake [which was apparent on

the face of the record], had been made, exercised the power vested in it under Section 254(2) of the Act, and accordingly, allowed the MA filed by the revenue, vide order dated 11.05.2020 and went on to restore the revenue's appeal, with a direction that the appeal would be heard afresh. The appeal was fixed for hearing by the Tribunal on 06.07.2020.

2.8. Being crucial to the outcome in the matter, it would be appropriate, at this juncture, to record the observations made by the Tribunal in paragraphs 2, 3, and 4 of its order dated 11.05.2020.

> *"2. The Ld. DR submitted as under:-*
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> *"**The ITAT has dismissed the appeal of the Revenue relying on its own order for earlier years. The fact is that the order of the Ld. ITAT in earlier years (AY 20089-09 & 2009-10) was in favour of the Revenue. It has upheld the action of the AO and reversed the decision of the Ld. CIT(A). Relying on the order in previous years, the Ld. ITAT should have confirmed the action of the AO and allowed the appeal of the Revenue.** However, in the impugned order dated 22.06.2018 for A.Y.2011-12 while rejecting the appeal of revenue, on the basis of earlier orders of Ld. CIT(A) for A.Yrs 2008-09 and 2009-10. Ld ITAT ignored its own orders in the case of the assessee for A.Y.2008-09 & 2009-10 where it has upheld the action of the AO and reversed the order of the Ld. CIT(A) and had decided in favor of Revenue. Thus, a mistake has been crept into said order dated 22.06.2018 passed by the Ld. ITAT which requires rectification."*
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> *3. The Ld. AR agreed to the contentions of the Ld. DR and requested that the matter may be restored for hearing.*
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> *4. **We have heard both the parties and perused the material available on record. From the perusal of the order, the contentions taken by the Revenue appears to be correct. The Ld. AR also agrees with the same. Therefore, the Miscellaneous Application filed by the Revenue is allowed and the appeal is***

restored for fresh hearing before the Tribunal on 06.07.2020. *The registry is directed to place the ITA No. 1347/Del/2016 for hearing on 06.07.2020. Both the parties be informed accordingly. The Misc. Application is allowed."*

[Emphasis is ours]

3. We are informed that the appeal preferred by the revenue, which was restored by the Tribunal, is pending adjudication.

4. Given this scenario, the petitioner-assessee filed Forms 1 and 2 with the designated authority, under the 2020 Act, in the first instance, on 21.03.2020. This exercise was repeated by the petitioner-assessee, by filing revised Forms 1 and 2, on 27.01.2021, and thereafter, on 20.03.2021. [See Annexure P-12].

4.1. In the interregnum, the impugned orders came to be passed. *Via* the impugned orders, both sets of Forms 1 and 2, which were filed on 21.03.2020 and 27.01.2021, were rejected.

5. Thus, the question that arises for our consideration is: whether, in the given facts and circumstances, it could be said that the revenue's appeal was pending on the specified date (i.e., 31.01.2020) as noticed under the 2020 Act?

Submissions on behalf of the petitioner/assessee:

6. Mr. Salil Kapoor, who appears on behalf of the petitioner-assessee, says that the appeal was pending. He contends that the MA under Section 254(2) of the Act was filed by the revenue on 13.11.2018. This application, as noticed above, was allowed on 11.05.2020. Therefore, Mr. Kapoor submits that since the order dated 11.05.2020 passed by the Tribunal restored the revenue's appeal, which was dismissed on 22.06.2018, the

revenue cannot take the stand that the appeal was not pending on the specified date, i.e., 31.01.2020.

6.1. Furthermore, Mr. Kapoor says that a perusal of the order dated 22.06.2018, whereby the revenue's appeal was dismissed, shows that the dismissal was based on a mistake of fact, which was that, in its order for earlier AYs, where identical issues were involved, the Tribunal had ruled in the favour of the assessee and against the revenue. In other words, according to him, the dismissal of the Tribunal was "*in limine"* and not on merits as sought to be portrayed on behalf of the revenue.

Submissions on behalf of the revenue:

7. Mr. Zoheb Hossain, who appears on behalf of the revenue, on the other hand, says that there is no mention of an MA, in the 2020 Act. For this purpose, he has referred us, to the definition of the "appellant", as provided in Section 2(1)(a) of the 2020 Act.

7.1. Furthermore, it is also Mr. Hossain's contention, that the dismissal of the revenue's appeal, *via* order dated 22.06.2018, was not *in limine*, and that the said order has been passed, taking into account all the facts and circumstances of the case.

Analysis and Reasons:

8. We have heard the learned counsel for the parties and also perused the record. What emerges, and *qua* which there can be no dispute, is the following:

(i) The AO passed the assessment order on 21.03.2014 for the AY 2011-2012. *Via* this order, there was an appreciable enhancement, as noticed above, in the taxable income of the petitioner-assessee.

(ii) The petitioner-assessee preferred an appeal, for the said AY, before the CIT(A), which was allowed on 29.01.2016. The revenue filed an appeal on 10.03.2016 before the Tribunal. The appeal was, however, dismissed by the Tribunal on 22.06.2018, based on a mistake of fact. Revenue's appeal was dismissed by the Tribunal under the mistaken belief that in the earlier AYs, it had taken a view against the revenue and in the favour of the assessee.

(iii) This obvious mistake, once brought to the notice of the Tribunal, *via* a MA preferred by the revenue, was rectified *vide* order dated 11.05.2020.

(iv) The MA was filed before the specified date, i.e., 31.01.2020. As per the information available on the Tribunal's portal, the MA was filed on 13.11.2018.

(v) The Tribunal, realising the mistake that had been made, recalled its order dated 22.06.2018 and restored the revenue's appeal and directed that the appeal be heard afresh. As a matter of fact, the Tribunal fixed the date of hearing, via the very same order, in the appeal, on 06.07.2020.

(vi) The appeal preferred by the revenue is pending disposal.

9. Given these undisputed facts, the argument advanced by Mr. Hossain, that the order dated 22.06.2018 was an order on merits, does not find favour with us. The expression "*in limine"*, which is, very often used as a part of Court lingo by judges and lawyers, simply, means "preliminarily". [See: Black's Law Dictionary, 9th edition, Bryan A. Garner, page 85.]

9.1. A careful perusal of the order dated 22.06.2018 would show that the revenue's appeal was dismissed, at the threshold, based on a mistaken impression, perhaps, given by the departmental representative, that the Tribunal had taken a view against the revenue. As noticed hereinabove by

us, on 22.06.2018, on the date, the revenue's appeal was dismissed. the petitioner-assessee was not represented.

9.2. This obvious error, which was apparent from the record, was corrected by the Tribunal, on 11.05.2020. Therefore, if we were to apply the response given to FAQ no. 61, as contained in the revenue's Circular No. 21 of 2020, dated 04.12.2020, in our opinion, the petitioner-assessee should succeed. For the sake of convenience, FAQ 61 and the response given, *qua* the same is set forth hereafter:

> "*Q.No.61. Whether Miscellaneous Application (MA) pending as on 31 January 2020 will also be covered by the scheme?*
> *Answer:* ***If the MA pending on 31" Jan 2020 is in respect of an appeal which was dismissed in limine (before 31" Jan 2020), such MA is eligible.*** *Disputed tax will be computed with reference to the appeal which was dismissed."*
>
> [Emphasis is ours]

9.3. A plain reading of the response to FAQ no. 61 would show that it requires fulfilment of two prerequisites for an appeal to be construed as pending on the specified date [i.e., 31.01.2020] as per the provisions of the 2020 Act.

i. First, the MA should be pending on the specified date, i.e., 31.01.2020.

ii. Second, the said MA should relate to an appeal, which had been dismissed "*in limine*" before 31.01.2020.

9.4. Insofar as the first aspect is concerned, there is no dispute that the MA was filed, and was pending on the specified date, i.e., 31.01.2020. As regards the second aspect, in our view, the order of the Tribunal dated 22.06.2020 can only be construed as an order that dismissed the revenue's appeal *in limine*. In our opinion, the decision taken to dismiss the revenue's

appeal was based on a preliminary assessment of the facts, i.e., the outcome of the revenue's appeal preferred with the Tribunal *qua* the same issues in earlier AYs. There was no discussion on the merits of the case. Therefore, in our view, the petitioner-assessee should succeed on this ground alone.

9.5. Besides this, we are also of the view, that in the given facts and circumstances, the order dated 11.05.2020 would have to be construed, metaphorically, as one breathing life into a dead appeal, in the light of the doctrine of relation back[1] [See: ***Commissioner of Income-Tax vs. Haryana Sheet Glass Ltd.***, 2009 SCC OnLine Del 4226]. As alluded to above, the order dated 11.05.2020 rectified the Tribunal's earlier order dated 22.06.2018, as according to the Tribunal, a mistake, apparent on the face of the record, had occurred[2]. The Tribunal, in its operative directions, while

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[1] [See: Black's Law Dictionary, 9th edition, Bryan A. Garner]

"**relation back**, n. (18 c), **1.** The doctrine that an act done at a later time is, under certain circumstances, treated as though, it occurred at an earlier time. In federal civil procedure, an amended pleading may relate back, for purposes of the statute of limitations, to the time when the original pleading was filed. Fed.r.civ.p.15(c). [Cases Limitation of actions 127.] 2. A judicial application of that doctrine. – Also termed doctrine of relation back. Cf. NUNC PRO TUNC. – **relate back**, vb."

[2] See: ***Honda Siel Power Products Ltd. vs. Commissioner of Income-tax***, [2007] 165 TAXMAN 307 (SC).

> "13. "Rule of precedent" is an important aspect of legal certainty in rule of law. That principle is not obliterated by section 254(2) of the Income-tax Act, 1961. When prejudice results from an order attributable to the Tribunal's mistake, error or omission, then it is the duty of the Tribunal to set it right. Atonement to the wronged party by the Court or Tribunal for the wrong committed by it has nothing to do with the concept of inherent power to review. In the present case, the Tribunal was justified in exercising its powers under section 254(2) when it was pointed out to the Tribunal that the judgment of the co-ordinate Bench was placed before the Tribunal when the original order came to be passed but it had committed a mistake in not considering the material, which was already on record. The Tribunal has acknowledged its mistake; it has accordingly rectified its order. In our view, the High Court was not justified in interfering with the said order. We are not going by the doctrine or concept of inherent power. We are simply proceeding on the basis that if prejudice had resulted to the party, which

recalling the order dated 22.06.2018, not only restored the revenue's appeal but also posted it for a fresh hearing. Therefore, if the doctrine of "relation back" were to be applied, and given its logical application, it would have to be said that the revenue's appeal was pending on the specified date, i.e., 31.01.2020.

Conclusion: -

10. Given the foregoing, we are inclined to allow the prayer made in the writ petition. The impugned orders are set aside.

11. The revenue will accord due consideration to Form no. 1 and 2, filed by the petitioner-assessee, and thereafter take the next steps in the matter, as per the provisions of the 2020 Act, keeping in mind the timelines given therein.

RAJIV SHAKDHER, J.

TALWANT SINGH, J.

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prejudice is attributable to the Tribunal's mistake, error or omission and which error is a manifest error then the Tribunal would be justified in rectifying its mistake, which had been done in the present case."

Also see: ***Assistant Commissioner of Income-tax, Rajkot vs. Saurashtra Kutch Stock Exchange Ltd.***, [2008] 173 Taxman 322 (SC).