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

\+ W.P.(C) 4093/2021

AMBARNUJ FINANCE AND INVESTMENT PVT. LTD ..... Petitioner

Through : Ms.Suruchi Mittal, Advocate.

versus

DEPUTY COMMISSIONER OF INCOME TAX & ANR. ..... Respondents

Through: Mr.Abhishek Maratha, Senior Standing Counsel for Revenue.
Mr.Asheesh Jain, CGSC along with Mr.Keshav Mann and Mr.Gaurav Kumar, Advocates for R-2.

% Reserved on : 13th October, 2022
Date of Decision: 02nd November, 2022

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T

MANMEET PRITAM SINGH ARORA, J:

1. The present writ petition has been filed by the Petitioner, Assessee, seeking quashing of the rectification order dated 15th February, 2021, passed by the Respondent during the consideration of the Assessee's application for settlement of disputed tax under the Direct Tax Vivad Se Vishwas Act, 2020 ('Act of 2020').

2. The Assessee is also seeking a direction to the Respondent No. 1 to

reconsider its application for settlement of disputed tax under the Act of 2020, for the Assessment Year ('AY') 2017-18.

3. The Assessee filed its Return of Income ('ROI') on 2nd November, 2017, and thereafter, filed its revised return on 14th May, 2018, both times declaring an income of NIL, as there was business loss in the AY 2017-18.

4. The Assessing Officer ('AO') initiated scrutiny assessment proceedings under Section 143(3) of the Income Tax Act, 1961 ('the Act of 1961') for the said assessment year and passed assessment order dated 21st December, 2019. The AO disallowed the write off of the 'bad debt' and made an addition to income of Rs.30,00,152/-. The AO computed and raised a demand of Rs.5,53,839/-.

5. The Assessee filed an appeal against the aforesaid assessment order dated 21st December, 2019, which is pending before the Commissioner of Income Tax (Appeals).

6. In the meantime, the Act of 2020 was notified, which provided for resolution of disputed tax. The applications eligible for settlement under the Act of 2020 were the proceedings which were pending and filed upto 31st January, 2020. The benefit of the Direct Tax Vivad Se Vishwas Scheme ('DTVSV Scheme') could be availed by Assessee upon payment of tax amount and the Assessee would be benefitted by the waiver of interest and penalty. Further, the DTVSV Scheme offered the Assessee immunity from further proceeding qua the relevant disputed tax and was intended to put a quietus to the said disputes.

7. The Petitioner herein opted for the said scheme and on 28th December 2020 filed relevant forms and declarations stipulated under Section 4 of the Act of 2020. Thereafter, on 4th January, 2021, the Assessee received an e-

mail from the Respondent No. 1 stating that upon verification of Form-1 and Form-2, filed under the DTVSV Scheme, it was noticed that there was a computation mistake and therefore, the addition of Rs.30,00,152/- on account of 'bad debt written off', has been inadvertently taken as income chargeable to tax at special rates in lieu of business income and due to the alleged mistake, there was a short fall of Rs. 4,09,386/- approximately. It was further stated in the e-mail that the application of the Assessee under the DTVSV Scheme could not be entertained in the absence of correct tax liability.

8. The Assessee replied to the aforesaid email on 6th January, 2021, raising its objection that the enhanced demand now sought to be raised in the e-mail is not a mistake apparent on the record, but is a debatable issue and any rectification on the basis of a debatable issue is impermissible as it would amount to a case of change of opinion by the AO.

It was also stated that it is Assessee's right to set-off loss inter-head without any particular sequence since no guidelines have been given in the Act of 1961, for sequence of set-off of losses. It was stated that the AO's stance of changing sequence of set-off of business loss from one head to another head is nothing but change of opinion.

9. The Respondent No. 1, sent an email to the Assessee on 9th January, 2021, rejecting the objections raised by the Assessee and reiterated the earlier position communicated vide email dated 4th January, 2021.

10. The AO consequently passed the impugned rectification order dated 15th February, 2021, purportedly in exercise of his jurisdiction under Section 154 of the Act of 1961, modifying the original assessment demand dated 21st December, 2019, and raising a fresh enhanced demand of Rs. 9,27,047/-

along with the interest.

11. The Assessee aggrieved by the aforesaid order, filed an application under Section 154 of the Act of 1961 on 11th March, 2021, for rectification of order dated 15th February, 2021, raising its objection to the modified computation and stated that there was error apparent in the AO's treatment of disallowed bad debt by himself. The Assessee, therefore, requested AO to consider the application and rectify the mistake apparent from record since business income needs to be adjusted against business loss first and balance business loss is to be set-off against other heads of income.

12. Learned counsel for the Petitioner states that the present petition has been filed against the arbitrary action of the Respondent in modifying its original assessment order dated 21st December, 2019, which was pending in appeal, while considering the Assessee's application for resolution of the tax dispute of AY 2017-18 under the DTVSV Scheme. She states that the action of the AO is in excess of his jurisdiction under the Act of 2020, as it is contrary to the intent of the DTVSV Scheme and also violative of the rights of the Assessee to have the tax dispute settled under the Scheme. She states that the exercise of modification of tax demand undertaken by the AO, while considering the application filed by the Assessee under the DTVSV Scheme of 2020 is impermissible, in addition to being contrary of the object of the DTVSV Scheme. She submits that the Assessee has till date, not received any formal intimation rejecting its application under the DTVSV Scheme. However, on a random login on 'My Account' of the Assessee on the e-Filing portal, the Assessee learnt that the status of the application under the DTVSV Scheme was marked as 'rejected' and no separate order, in this regard, has been communicated to the Petitioner.

13. In the alternative, on merits, the learned counsel for the Petitioner states that the modification dated 15th February 2021 of the assessment order by the AO with respect to the accounting treatment of the bad debt disallowed was incorrect since the Act of 1961, does not prohibit the accounting treatment in the manner undertaken originally by the AO in the assessment order dated 21st December 2019. Notice was issued in this petition and a counter-affidavit has been filed and brought on record by the Respondent No. 1.

14. In the counter-affidavit, it is stated that the rectification on 15th February, 2021, has been carried-out in pursuance to an audit objection raised by the ITO-IAP (Central)-3, Delhi ('the Audit Party') wherein, it was stated that the tax liability in this case should have been Rs. 9,00,046/- + statutory interest, instead of the demand raised in the original assessment order dated 21st December, 2019. Consequently, the Audit Party made an intra-head adjustment of business loss of current year towards the income from capital gain first and income from other sources second. The Audit Party then calculated the tax at 30% of the balance income.

15. The Respondent states that the AO has only followed the audit objection raised by the Audit Party and consequently, he amended the original assessment order dated 21st December, 2019. It is further stated that the rejection of the application filed by the Assessee under the DTVSV Scheme was a consequence of the rectification order dated 15th February 2021.

16. We have considered the submissions of the parties.

17. The computation of the returned income made by the AO in the Assessment order dated 21st December, 2019, and as modified vide

rectification order dated 15th February, 2021, following the Audit objection are as under[1]: -

Computation as per the Assessment order dated 21st December, 2019

'TABLE A'

S. No.	Particulars	Amount (in Rs.)
1.	Income from Capital Gain – Rs. 36,58,439/- Income from other Sources – Rs. 34,79,649/- Business Loss – (Rs. 41,37,936) Business Loss – (Rs. 71,38,088) Add: bad debts disallowed – Rs. 30,00,152/-	30,00,152
2.	Total Taxable Income	30,00,152
3.	Tax @15% (Taxed at special rate being Short Term Capital Gain)	4,50,023
4.	Education Cess @3%	13,501
5.	Total Tax Payable	4,63,524

Computation modified as per rectification order dated 15th February, 2021

'TABLE B'

S. No.	Particulars	Amount (in Rs.)
1.	Return Income declared by the Assessee as under: Business Loss – (Rs. 71,38,088) Add: Capital gain as declared –	NIL

[1]Annexure P-11, Rectification Application dated 11th March 2021

	Rs.36,58,439/- Add: Income from other sources – Rs.34,79,649/-	
2.	Addition made by AO	30,00,152
3.	Total Taxable Income	30,00,152
4.	Tax @30%	9,00,046
5.	Education Cess @3%	27,001
6.	Total Tax Payable	9,27,047

18. It is not disputed by the Respondent in its Counter Affidavit and by the learned senior standing counsel for Revenue during the arguments that both the computations are equally permissible under the Act of 1961 and that the AO has modified the computation dated 21st December 2019 in his rectification order dated 15th February, 2021, solely on the basis of audit objection raised by the Audit Party. Further, from a perusal of the aforesaid computations, it can be seen that consequent to the modification, the returned income has remained the same but there is an increase in total tax payable, on account of change in rate at which payable tax is calculated.

19. Learned counsel for the Petitioner has drawn our attention to a Circular bearing No. 26 (LXXVI-3) dated 7th July, 1955, issued under the erstwhile Income Tax Act, 1922, which reads as under:

> *"There is nothing in Section 24(1) to indicate that a particular mode of set-off shall be followed. [**In the absence of any such indication, the general rule to be followed in all fiscal enactments is that where words used are neutral in import, a construction most beneficial to the assessee should be adopted**]. The words "he shall be entitled to have the amount of loss set-*

off" occurring in Section 24(1), would seem to be consistent with the conferment of a benefit on the assessee which he can claim as of right."

20. Section 24 (1) of the erstwhile Income Tax Act, 1922 corresponds to Section 71 (2) of the Act of 1961 and the audit objection has been raised under the said Section. She states that the audit objection raised by the Audit Party is in ignorance of the aforesaid Circular, which allows the Assessee to select a sequence of set-off, which is more beneficial to it.

21. No legal error in the method of computation made in the original assessment order dated 21st December, 2019 has been brought to our attention during the course of arguments. The amount of disallowed bad debt has been added as income and consequently the business loss of the Assessee stood reduced to Rs. 41,37,936/-. The said business loss has then been set-off first against 'income from other sources' and balance from 'short term capital gain'. The remaining short term gain of Rs. 30,00,152/- has been taxed at 15%. The said method of computation (TABLE A) of income is also permissible on a plain reading of section 71(2) of the Act of 1961.

22. In contrast, as per the computation in TABLE B, the AO acting upon the Audit Party's objection has set-off the business loss as claimed by the Assessee in its original return, *first* against the other heads of income and then taxed the amount of disallowed bad debt as a stand-alone addition to returned income. This is contrary to facts as the amount for the said disallowed bad debt has to be added to the business income of the assessee to arrive at the net income/net loss. It is not chargeable to tax as a separate head of income as is sought to be done in TABLE B.

23. Further, the objection raised by the Audit Party in this case was not to a mistake apparent from the record, which can be corrected under Section 154 of the Act of 1961, but it is an opinion in law on the manner in which set-off of business losses is to be permitted. It is also evident from the record that the legal opinion of the Audit Party is at variance with the opinion of the AO, who determined that it was permissible to add as income, the amount arising from disallowed bad debt resulting in reduction of the business loss, while passing the original assessment order. Therefore, there were two different legal opinions available on record with respect to the sequence of set-off giving rise to a debatable issue.

24. In this regard, it would be relevant to mention here that the Supreme Court in the case of ***T.S. Balaram, Income Tax Officer, Company Circle IV, Bombay v. M/s Volkart Brothers, Bombay, 1971 (2) SCC 526***, has held that for the purpose of Section 154 of the Act of 1961, a mistake apparent on the record must be obvious and not something which can be established by a long-drawn process of reasoning on points on which there may conceivably be two opinions.

25. We therefore find in the facts of this case that there was no mistake apparent in the computation of income in the assessment order dated 21st December, 2019, within the meaning of Section 154 of the Act, which could have been a subject matter of rectification.

26. We also find merit in the submission of the learned counsel for the Petitioner that the rectification order dated 15th February, 2021, effectively resulted in re-assessment of income and not rectification. She states that in the facts of this case, even a reassessment on the basis of the audit objection was not permissible.

27. Upon a perusal of the counter-affidavit, it is borne out that the objection raised by the Audit Party on the sequence of set-off of losses is an opinion on law and that the AO had passed the rectification order only on the basis of the direction of the Audit Officer. The AO himself was not of the independent opinion that the original assessment order passed by him on 21st December, 2019, was erroneous in law.

28. In this regard, it would be instructive to refer to the decision of the Supreme Court in ***M/s Indian & Eastern Newspaper Society, New Delhi v. Commissioner of Income Tax, New Delhi, (1979) 119 ITR 996 (SC),*** wherein, the Court held that an audit opinion by itself with respect to application or interpretation of law cannot be treated by the Income Tax Officer as 'information' for reopening the assessment. The relevant portion of the said judgment is reproduced hereinunder:

> *"…*
> *13. … In every case, the Income Tax Officer must determine for himself what is the effect and consequence of the law mentioned in the audit note and whether in consequence of the law which has now come to his notice he can reasonably believe that income has escaped assessment. The basis of his belief must be the law of which he has now become aware. The opinion rendered by the audit party in regard to the law cannot, for the purpose of such belief, add to or colour the significance of such law. In short, the true evaluation of the law in its bearing on the assessment must be made directly and solely by the Income Tax Officer.*
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> *xxx xxx xxx*
> *20. Therefore, whether considered on the basis that the nature and scope of the functions of the internal audit organisation of the Income Tax Department are co-extensive with that of Receipt Audit or on the basis of the provisions specifically detailing its functions in the Internal Audit Manual, we hold that the opinion of an internal audit party of the Income Tax Department on a point of law cannot*

be regarded as "information" within the meaning of Section 147(b) of the Income Tax Act, 1961.

(Emphasis Supplied)

29. Thus, since the objection of the Audit Party in this case was on a point of law, no reassessment proceedings could also have been permissible, inasmuch as the Supreme Court in ***M/s Indian & Eastern Newspaper Society*** (Supra) has clearly held that the opinion of an internal Audit Party of the Income Tax Department on a point of law cannot be regarded as 'information' and gives no cause to the AO to initiate reassessment proceedings. The Supreme Court while deciding the aforesaid issue, in reference to the provisions of Section 34(1)(b) of the erstwhile Income Tax Act, 1922, corresponding to S. 147 of the Act, has also held that discovery of an error by the Income Tax Officer, upon reconsideration of the same material, does not give him any power to reopen the assessment.

30. In the facts of the present case, there was no new or fresh material before the AO except the opinion of the Audit Party. Since, it is settled law that mere change of opinion cannot form the basis for initiating reassessment proceedings as per the decision of the Supreme Court in ***CIT Vs. Kelvinator of India Ltd.***, ***(2010) 2 SCC 723,*** no reassessment could also have been permissible in the facts of the present case. It is also not apparent from record if the AO agreed with the objection of the Audit Party. Infact, the contents of the counter affidavit evidences that the AO was satisfied with the initial computation and has acted only upon the direction of the Audit Party while passing the impugned order.

31. We are, therefore, of the considered view that since the objection raised by the Audit Party was in regard to the law, which objection in the

facts of the present case was debatable in light of the Circular bearing No. 26 (LXXVI-3) dated 7th July, 1955, and thus, it could not have formed the basis for passing a rectification order under Section 154 of the Act. We, therefore, set aside the impugned rectification order dated 15th January, 2015.

32. Lastly, as regards the objection of the counsel for the Petitioner that the impugned rectification order is barred under Section 5 of the Act of 2020, we find that the bar of the said provision is not attracted in the facts of his case. She contends that the provisions of the Act of 2020, have an over-riding effect on the provisions of the Act of 1961, insofar as the determination of the tax arrears under Section 5 of the Act of 2020, is to be made on the basis of the facts, as they existed on the date of the filing of the application and the Revenue was precluded from undertaking any rectification after receipt of the Forms 1 and 2.

33. The right of the Revenue to initiate any further proceedings with respect to the calculation of the disputed tax arrears are foreclosed after Form 3 has been issued by the Designated Authority under Section 5(1) of the Act of 2020, determining the full and final settlement of tax arrears. The Form 3 has admittedly not been issued in the present matter and therefore, the rigour of Section 5(3) of the Act of 2020 is not attracted in the facts of this case.

34. Further, in the facts of this case, as per record the rectification proceeding was initiated consequent to an audit objection dated 31st August, 2020, even though, the rectification order finally came to be passed on 15th February, 2021 and therefore, we are unable to agree with the contention of the Petitioner that the rectification proceedings were initiated only upon

receipt of the application of the assessee on 28th December, 2020 under the Act of 2020.

35. However, the aforesaid issue need not detain us, since we have held that the rectification order itself was incorrect and as held above, we have set aside the impugned rectification order dated 15th February, 2021. We also set aside the consequential order of the Respondent rejecting the Petitioner's application for settlement under the DTVSV Scheme, on the ground that the tax liability was not ascertained, and restore the application to the file of the AO as on 28th December, 2020. We direct the Respondent to determine the amount payable by the assessee in accordance with the provisions of the Act of 2020 and grant a Certificate to the assessee containing particulars of tax arrears and amount payable, in accordance with law, within a period of two weeks.

36. The writ petition stands disposed of with the above directions.

MANMEET PRITAM SINGH ARORA, J

MANMOHAN, J

NOVEMBER 02, 2022
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