

HIGH COURT OF MADHYA PRADESH AT JABALPUR
WRIT PETITION NO.9494/2017

PETITIONER : **GURMEET SINGH VILKHU**

Vs.

RESPONDENTS : **THE PRINCIPAL COMMISSIONER
OF INCOME TAX
AND ANOTHER.**

**Present : Hon'ble Shri Justice R.S. Jha,
Hon'ble Shri Justice Sanjay Dwivedi, JJ.**

Petitioner : Shri Gurmeet Singh Vilkhlu in person.

For the respondents : Shri Sanjay Lal, Advocate.

 Whether approved for reporting:

Law Laid down :

Significant para nos. :

ORDER
 (14/02/2019)

Per R. S. Jha, J.

This petition has been filed by the petitioner against the notice dated 9.5.2017 issued to him by the respondents under section 154/155 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act'), seeking rectification of the mistake in the order dated 5.12.2014 passed by the Income Tax Officer, Ward-1(1), Jabalpur.

2. It is submitted by the petitioner that the petitioner was an employee of the Punjab and Sind Bank and while in service a departmental enquiry was initiated against

him on 29.2.1996 and he was placed under suspension. The petitioner was ultimately terminated by the Bank in the departmental enquiry against which the petitioner had taken up proceedings before this Court. It is submitted that ultimately, after disposal of the petitioner's writ appeal whereby the order passed by the learned Single Judge, setting aside the termination and remanding the matter, was set aside, this Court in M.C.C No.960/2007 dated 4.7.2008 held that the petitioner should be treated as an employee under suspension from 1.3.1996 to 16.4.2007 and be paid subsistence allowance for the said period. As the amount of subsistence allowance was not paid to the petitioner, he filed a Contempt Petition which was registered as C.P No.1003/2008 and was ultimately disposed of on 18.2.2010 on a statement being made by the Bank that the subsistence allowance had been paid to the petitioner, at the same time granting liberty to the petitioner to assail the deduction made by the Bank towards income tax by filing a writ petition or by approaching the income tax authorities for refund. The subsistence allowance was Rs.20,90,354.96 for the aforesaid period which had been paid to the petitioner by

the Bank on 23.3.2009 after deducting a sum of Rs.5,25,000/- towards income tax.

3. Pursuant to the order passed by this Court, the petitioner approached the Income Tax authorities for refund of the Tax deducted from the subsistence allowance. The petitioner filed an application on 4.6.2010 before the authority concerned for refund of the tax deducted by the authorities on the ground that the amount paid to the petitioner was a debt accruing on account of the judgment of the Court and was not taxable, but the application was rejected by the authorities as it was stated that the petitioner had not filed any return and, accordingly, the petitioner was advised to do so by the income tax authorities.

4. On the advise of the income tax authorities, the petitioner filed a return on 27.10.2010. The prayer for refunding the amount deducted by treating it as non-taxable on the ground that it was a judgment debt, was not accepted by the authorities and an order of assessment against the petitioner under section 143(1) of the Act, was passed on 31.3.2011. The petitioner thereafter filed an application under section 154 of the Act, for rectification of the mistake before the authorities

on 29.4.2011 which was dismissed by the Income Tax Officer, Ward 1(1), Jabalpur on 30.8.2011, however while dismissing the application the following observations were made by the Income Tax Officer in para-21:-

“21. Further Section 192 of the Income Tax Act also attracts which state that “Any person responsible for paying any income chargeable under the head ‘Salary’ shall at the time of payment deduct income-tax on the amount payable at the average rate of income-tax computed on the basis of the rates in force for the financial year in which the payment is made.” However since the pay and allowance paid to the assessee pertains to the period 1.03.1996 to 16.4.2007 relief u/s 89(1) is allowable. The assessee can file revised application u/s 154 along with revised computation treating the subsistence allowance as income and claiming relief u/s 89(1).” (underlined by us)

5. The petitioner, being aggrieved, filed an appeal against the order of the Income Tax Officer, Jabalpur, which was also dismissed on 1.10.2012 affirming the order passed by the Income Tax Officer. The petitioner thereafter, in view of the fact that the Income Tax Officer had held that the petitioner was entitled to the relief under section 89(1) of the Act, which was allowable for which he can file a revised application under section 154

of the Act, filed a revised application before the Income Tax Officer, Jabalpur on 24.2.2014. The said application was allowed by the Income Tax Officer, Jabalpur by order dated 5.12.2014 taking into consideration the observations and the opinion expressed by the Income Tax Officer in his order dated 30.8.2011 to the effect that the petitioner was entitled to relief under section 89(1) of the Act, which was allowable and which observation was affirmed by the Commissioner of Income Tax (Appeals).

6. In spite of the aforesaid order of 5.12.2014 holding that the petitioner was entitled to the benefit of Section 89(1) of the Act, on the salary income of Rs.20,90,355/- i.e., the subsistence allowance paid to the petitioner, as the amount was not paid to the petitioner, he approached the authorities by filing representations and gave a legal notice to them on 19.4.2017. The petitioner was thereafter served with the impugned notice under section 154/155 of the Act, dated 9.5.2017.

7. The particular mistakes proposed to be rectified, as mentioned in the impugned notice, is as under:-

“Particulars of the mistake proposed to be rectified:-

On verification of the record, it is found that you have not shown any income in your

return of income filed for A.Y. 2009010 and also not claimed any relief u/s 89(1) in your return of income, so it can not be allowed u/s 154, as there is no mistake apparent from the record. Thus, the order u/s 154 passed on 5.12.2014 needs to be rectified by withdrawing relief of Rs.2,81,797/- allowed u/s 89(1) and to revise the total income from Rs.20,87,090/- to Rs.NIL as shown by you in the original return of income.”

8. The petitioner, being aggrieved by the notice has filed the present petition and this Court by order dated 22.8.2017 directed the parties to maintain status quo.

9. It is pertinent to note that the counsel for the Revenue accepted notice on that date and sought time to seek instructions. The petition was thereafter listed on 11.9.2017 but no return was filed or submissions made by the respondents before this Court. Therefore, on 10.10.2017, the matter was again adjourned for two weeks for filing a return as prayed for by the learned counsel for the respondents, with an observation that in case the return is not filed, the Income Tax Officer, Ward-1 (1), Jabalpur, shall remain personally present before this Court on 6.11.2017.

10. A return was filed by the respondents on 1.11.2017, in which it is stated that pursuant to the proceedings under Section 154 of the Act, initiated against the petitioner, the respondent authorities had already passed an order under Section 154 of the Act, on 1.8.2017 rectifying the mistake in the order dated 5.12.2014. In paragraph 26 of the return the respondents have mentioned that the order under 154 proceedings was passed during the pendency of this petition on 1.8.2017 after issuing a show cause notice to the petitioner on 9.5.2017.

11. The petitioner submits that he was paid a sum of Rs.20,90,355/- pursuant to the order passed by this Court in MCC No.960/2007 holding that the petitioner was entitled to payment of subsistence allowance. It is submitted that though no tax on this amount was required to be deducted as the same was paid to the petitioner pursuant to the order passed by this Court, however, the authorities deliberately misconstrued the order and by treating the amount disbursed to the petitioner as payment of salary, refused to refund the income tax deducted from the payment of subsistence

allowance made to the petitioner and asked him to file a return.

12. It is submitted that the petitioner, who is a layman and is not conversant with the provisions of the Income Tax Act, filed a return on the instructions of the Income Tax authorities themselves but his claim for refund was again rejected. It is submitted that subsequently, when the petitioner again filed an application for rectification, the same was dismissed on 30.8.2011 but while doing so, it was held that the petitioner's claim under Section 89(1) of the Act. is allowable and after holding so, the petitioner was advised to file a revised application under Section 154 of the Act.

13. Though the petitioner assailed the aforesaid order before the CIT Appeals, the order dated 30.8.2011 was affirmed by the CIT Appeals by order dated 1.10.2012 affirming the findings recorded by the Income Tax Officer to the effect that the relief under Section 89(1) of the Act, was allowable for which the petitioner can file a revised application under Section 154 alongwith a revised computation. It is further submitted that when the petitioner filed such an application, he was asked to submit Form 10(E) giving details of his income and a

report in that regard was also called from the Bank authorities and thereafter the petitioner's claim under Section 89(1) of the Act, was allowed by order dated 5.12.2014.

14. It is submitted that in such circumstances, it is not in dispute that the petitioner is entitled to refund of Rs.2,81,797/- from the amount of Rs.5,25,000/- deducted by the Bank towards Income Tax from the total amount of subsistence allowance disbursed to the petitioner of Rs.20,90,355/-. It is submitted that in such circumstances, the impugned notice dated 9.5.2017 seeking to rectify some imaginary mistake in the order dated 5.12.2014 on the ground that he had not shown any income in his return for the year 2009-2010 and had initially not claimed relief under Section 89(1) of the Act, is itself misconceived as there is no mistake in the order dated 5.12.2014.

15. It is submitted that the petitioner was granted an interim relief by this Court on 22.8.2017 directing the parties to maintain status quo and in spite of the fact that the matter was listed twice, no information was given by the respondent authorities to this Court to the effect that orders on the impugned notice had already been passed

by the authorities. It is submitted that the return and additional return filed by the respondents make it abundantly clear that though orders in the 154 proceedings are said to have been passed on 1.8.2017 by the Income Tax Officer, Jabalpur, no notice or intimation of the same was ever given to the petitioner.

16. The petitioner has pointed out that the respondents themselves have filed the notice said to have been issued to the petitioner under Section 156 of the Income Tax Act, dated 2.8.2017 which is admittedly and undisputedly sent to the address of Mishra Transport Service, Sihora, Jabalpur. The petitioner has also filed a certificate issued by Shri Ajay Mishra, Advocate who is the counsel for Mishra Transport, indicating that a notice of the name of the petitioner was received by Mishra Transport Service, as the address in the notice was clearly mentioned as Mishra Transport Service.

17. It is submitted that no notice whatsoever was ever issued to the petitioner by the authorities before passing of the order under Section 154 of the Act. It is submitted that pursuant to the impugned notice issued by the respondents to the petitioner on 9.5.2017, the petitioner had immediately filed his response on 17.5.2017

(Annexure P/16) but the authorities, while passing the alleged order on 1.8.2017 under Section 154 of the Act, has not mentioned anything about the impugned notice dated 9.5.2017 or the response submitted by the petitioner on 17.5.2017 and has passed the order without considering the same in violation of the interim directions issued by this Court.

18. It is submitted that in the said order the authorities have also mentioned that another notice was issued to the petitioner on 30.6.2017 for hearing on 7.7.2017 but the petitioner did not appear and, therefore, the order was passed but no such notice has been placed on record. The petitioner submits that in view of the aforesaid facts and circumstances, it is apparent that the respondent authorities have deliberated passed the back dated order of 1.8.2017 to overcome the interim orders passed by this Court. In such circumstances, the petitioner submits that even if the order under Section 154 of the Act, has been passed by the authorities on 1.8.2017, the same is not binding on the petitioner as the same is in contravention to the interim orders passed by this Court and has been passed without giving any opportunity of hearing or notice to the petitioner.

19. The learned counsel for the respondents per contra submits that the petitioner had filed a return without claiming any relief under Section 89(1) of the Act., and the only prayer made therein was refund of the tax deducted. It is submitted that as no relief under section 89(1) of the Act, was ever claimed by the petitioner, therefore, the same could not have been allowed by the Income Tax Officer in proceedings under section 154 of the Act, by the impugned order dated 5.12.2014. It is submitted that when the aforesaid aspect came to the notice of the JCIT, Range-I, Jabalpur, he issued a letter on 9.1.2015 to the Income Tax Officer, Jabalpur, pointing out several aspects of the matter on the basis of which the impugned notice dated 9.5.2017 was issued to the petitioner.

20. It is submitted that though the petition was filed by the petitioner on 5.7.2017, interim order of status quo was passed thereafter on 22.8.2017, by which date the respondent authorities had already passed the order and decided the 154 proceedings initiated against the petitioner pursuant to the impugned show cause notice on 1.8.2017. It is submitted that this fact was brought to

the notice of this Court by the respondent authorities in the return, specifically para-26.

21. The learned counsel for the respondents further submits that notice of this order under section 154 of the Act, was also issued to the petitioner, however, the fact that it was sent on the address of Mishra Transport Service, Sihora, Jabalpur, has not been denied and has been admitted. It is submitted that in the absence of any claim for benefit of Section 89(1) of the Act, in the return filed by the petitioner, the authority concerned could not have granted any relief to the petitioner in the proceedings under section 154 of the Act, which is a glaring and apparent mistake requiring rectification and, therefore, notice under section 154 of the Act, was issued to the petitioner on 9.5.2017 and an order pursuant thereto has been passed withdrawing and correcting the mistake committed by the authorities in the order dated 5.12.2014.

22. The learned counsel for the respondents has further submitted that the claim made by the petitioner under section 89(1) of the Act, was beyond limitation and could not have been considered by the authority concerned in view of the provisions of Section 139(5) of the Act, and in

such circumstances the impugned order passed by the authorities on 5.12.2014 suffered from an apparent mistake of law which needed rectification and, therefore, the impugned notice has rightly been issued to the petitioner. The learned counsel for the respondents has relied upon the decisions rendered in the cases of **Goetze (India) Ltd. vs. Commissioner of Income Tax**, (2006) 284 ITR 0323; **Hind Wire Industries Ltd. vs. Commissioner of Income Tax**, (1995) 212 ITR 0639 and **Orissa Rural Housing Development Corporation Ltd. Assistant Commissioner of Income Tax**, (2012) 343 ITR 0316.

23. Having heard the petitioner and the learned counsel for the respondents, it is observed that the fact that the petitioner is entitled to the benefit under Section 89(1) of the Act is an undenied and undisputed fact. It is also clear from a perusal of the order dated 30.08.2011 passed by the Income Tax Officer in the previous application filed by the petitioner under Section 154 of the Act, that the Income Tax Officer in no uncertain terms has held that the relief under Section 89(1) of the Act is allowable to the petitioner for which he can file a revised application while rejecting the application filed by the petitioner under Section 154 of the Act.

24. It is also an admitted and undisputed fact that this order of the Income Tax Officer has been affirmed in appeal by the CITA by order dated 01.10.2012. It is apparent from a perusal of the aforesaid orders that the Income Tax Officer as well as the CITA while rejecting the applications filed by the petitioner under Section 154 of the Act on 30.08.2011 and 01.10.2012 respectively have categorically held that the relief under Section 89(1) of the Act is allowable to the petitioner and that these orders have neither been set aside or withdrawn and exists as they are and have attained finality. It is also apparent that the subsequent order dated 05.12.2014 has been passed on the revised application filed by the petitioner, by the authorities under Section 154 of the Act, on the basis of and relying on the aforesaid orders of the Income Tax Officer dated 30.08.2011 and the appellate order dated 01.10.2012 wherein it was held that the claim of the petitioner under section 89(1) was allowable and consequently allowed the claim of the petitioner under Section 89(1) of the Act.

25. It is also an undisputed fact that the only ground that has been mentioned in the impugned notice dated 09.05.2017 issued under Section 154 of the Act is that the

petitioner had not shown any income in his return for the year 2009 - 10 and had not claimed any relief under Section 89(1) of the Act in the return and therefore, no orders under Section 154 of the Act could have been passed by the Income Tax Officer granting relief under Section 89(1) of the Act. None of the other grounds raised and argued before this Court have been mentioned in the notice.

26. From the aforesaid, it is apparent that the authorities while issuing the impugned notice have totally ignored the orders passed by the Income Tax Officer dated 30.08.2011 and the CITA order dated 01.10.2012 wherein it has been held that relief under Section 89(1) of the Act is allowable to the petitioner for which he can file a revised application under Section 154 of the Act and that it was pursuant to the aforesaid observations of the Income Tax Officer and the CITA that the petitioner had filed the revised application under Section 154 of the Act. The respondents have also overlooked the fact that the petitioner's claim was allowed by order dated 05.12.2014 mainly in view of the previous orders dated 30.8.2011 and 1.10.2012.

27. The authorities have also not taken into consideration the fact that in the proceedings taken up by the authorities on the revised application under Section 154 of the Act, the authorities duly asked the petitioner to submit a form under Section 10-E of the Act and also sought for and received information from the Bank regarding the salary paid towards subsistence allowance pursuant to the orders passed by this Court and that it was on the basis of the aforesaid information and the document filed by the petitioner that benefit under Section 89(1) of the Act was given to the petitioner.

28. We are also constrained to observe that the submissions made by the learned counsel for the respondents to the effect that the relief under Section 89(1) of the Act was barred by limitation and, therefore, could not have been allowed by the Income Tax Officer, Jabalpur vide order dated 15.12.2014, does not find any mention in the particulars of the mistake that were proposed to be rectified in the notice dated 09.05.2017 and is apparently an afterthought.

29. Quite apart from the above, it is also an undisputed fact that the order of status quo was passed by this Court on 22.08.2017 and that the respondents authorities in the

return have filed order dated 01.08.2017 passed by the authorities under Section 154 of the Act pursuant to the notice issued to the petitioner on 09.05.2017, but the said order was sent on the address of the Mishra Transport Service, Sihora, Jabalpur and was never communicated to the petitioner and that the petitioner came to know about the same only when the return was filed by the respondents. It is also evident from a perusal of the order dated 01.08.2017 that the said order does not make any mention of the impugned notice dated 09.05.2017 and in fact the only notice mentioned therein is notice dated 30.06.2017 said to have been issued by the authorities concerned to the petitioner for hearing 07.07.2017, but no copies of the notice or documents in support of the said avertments made in the order dated 01.08.2017 have been placed before this Court.

30. A perusal of the observations made by the Income Tax Officer in the order dated 1.8.2017 makes it further clear that the order has been passed not on the basis of any law but on the basis of the detailed instructions issued by the Joint Commissioner of Income Tax, Range-I, Jabalpur, in its letter dated 25.5.2016 and, therefore, there is no independent application of mind by the

income tax authorities to the issues raised therein or involved in the case.

31. It is also apparent that the Income Tax authorities while passing the order dated 1.8.2017, Annexure R-6, has totally ignored and omitted to take note of the findings recorded by the Income Tax Officer in its order dated 30.8.2011 to the effect that the relief under section 89(1) of the Act, is allowable to the petitioner and for which purpose he could have filed a revised application under section 154 of the Act, which has been affirmed and confirmed by the CITA by order dated 1.10.2017. The authorities have simply taken note of the fact that the application under section 154 of the Act, was dismissed without taking note of the aforesaid finding and has revised the order.

32. In such circumstances, we are of the considered opinion that the proceedings sought to be initiated by the respondents against the petitioner vide the impugned order dated 9.5.2017 and decided against him by order dated 1.8.2017 are totally misplaced and misconceived and perverse, moreso as they have been passed totally ignoring the final and binding orders passed by the

Income Tax Officer dated 30.8.2011 and the CITA dated 1.10.2012 which had become final.

33. We are also of the opinion that the very initiation of the impugned Section 154 proceedings was misconceived and uncalled for as there was no mistake in the previous orders requiring rectification in view of the admitted and undisputed fact that the petitioner is entitled to claim benefit under Section 89(1) of the Act, and that his claim thereunder is allowable.

34. In the circumstances the petition filed by the petitioner is allowed, the impugned show cause notice dated 9.5.2017 and the subsequent order dated 1.8.2017 are quashed and it is directed that the petitioner is entitled to and shall be paid his dues mentioned in order dated 5.12.2014 by the Income Tax Department within two months with allowable interest.

35. The petition stands allowed. There shall be no order as to costs.

(R. S. JHA)
J U D G E

(SANJAY DWIVEDI)
J U D G E

mms/-