vai

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.419 OF 2011

Dynavent Air Systems Pvt. Ltd. ...Petitioner
V/s.
Income Tax Appellate Tribunal, Mumbai & Ors. ...Respondents

Mr.Vipul B. Joshi with Mr.Abhishek Tilak i/b Mr.Sameer Dalal for the Petitioner.

Mr.Suresh Kumar for the Respondents.

CORAM : M.S. SANKLECHA &
G.S. KULKARNI , JJ.
DATE : 9TH JANUARY, 2015.

P.C. :-

1. This writ petition under Article 226 of the Constitution of India takes exception to the order dated 13.08.2010, passed by the Income Tax Appellate Tribunal (Tribunal). By the impugned order dated 13.08.2010, the application of the Revenue for rectification under section 35(1)(e) of the Wealth Tax Act, 1957 ("the Act"), of an order dated 28.05.2008 passed by the Tribunal in respect of the assessment year 2004-2005 was allowed.

2. The petitioner owns an office premises situated in Neena Co-operative Housing Society at Mumbai. The petitioner used half of

its office premises for its own purpose and the other half of the office premises was let out to its sister concern on rent.

3. On 20.07.2006, the petitioner without prejudice filed its Return of Wealth Tax. In its return of wealth tax, the petitioner computed 50% of the office property which was let out to its sister concern on rent, as property chargeable to the wealth tax. This on determining the value of the property on the basis of valuation report at Rs.52.52 lakhs. Consequently the petitioner paid self-assessment wealth tax of Rs.45,000/-.

4. During the assessment proceedings, the Assessing Officer determined the value of the 50% of the office property on the basis of the interest capitalization method. As a result, the value of the property for wealth tax purpose was enhanced from Rs.52.52 lakhs to Rs.2.50 crores a demand was accordingly raised.

5. The petitioner being aggrieved, preferred an appeal to the CIT (Appeals). By an order dated 26.09.2007, the CIT (Appeals) allowed the petitioner's appeal holding that as the petitioners premises were being used for commercial purposes, they are exempted from the wealth tax by virtue of sub-clause (5) of section 2 (ea)(i) of the Act.

6. Being aggrieved by the order dated 26.09.2007 of the CIT (Appeals), the Revenue challenged the order in appeal to the

Tribunal. The Tribunal by an order dated 28.05.2008 upheld the finding of the CIT (Appeals). In the order, the Tribunal recorded a finding of fact that no finding has been given by the Assessing Officer that any part of the subject premises was used for the residential purposes and consequently no question of including any part of its value in the net wealth of the petitioner could arise.

7. The Revenue challenged the order dated 28.05.2008 of the Tribunal in an appeal before this Court. However, the same was withdrawn on 13.02.2009, as the tax effect was less than of Rs.4.00 lakhs.

8. On 16.11.2009, the Revenue filed a rectification application under section 35(1)(e) of the Act with the Tribunal. The basis of the rectification application was that the office premises would fall under sub-clause 3 of section 2(ea)(i) of the Act and not under sub-clause (5) of section 2 (ea)(i) of the Act, as held by the Tribunal in its order dated 28.05.2008. Further reliance was also placed upon the petitioner having admitted 50% of its property had been let out and had paid the wealth tax thereon. Consequently according to the Revenue, there was a ex-*facie* mistake which would requires rectification.

9. On 13.08.2010, the Tribunal passed an impugned order allowing the rectification application filed by the Revenue. The basis

of allowing the application was that the Tribunal in its order dated 28.05.2008 had not dealt with the issue whether the office premises stand covered by sub-clause (3) of section 2 (ea)(i) of the Act. This according to the impugned order would depend on the fact whether the building in which the office premises is situated is in a building which is commercial or not, which again would depend upon the sanction granted by the local authority. Thus the impugned order recalled the order of the Tribunal dated 28.05.2008.

10. In support of the petitioner's submission, Mr.Joshi, learned counsel appearing for the petitioner submits that the impugned order passed by the Tribunal is completely without jurisdiction, as the entire issue of the applicability of sub-clause (3) or sub-clause (5) of section 2(ea)(i) of the Act in the facts of the present case is a debatable issue. This is particularly so as on identical facts, the Gujarat High Court in *Commissioner of Wealth Tax vs. Vasumatiben C. Virani* (Tax Appeal No.932 of 2012) dated 11.01.2013 has on similar facts held that sub-clause (3) of section 2(ea)(i) of the Act will have no application. Further the impugned order does not rectify any error apparent from the record as it relies upon the status of the building with the the local authority. Thus the impugned order is outside the scope of a rectification jurisdiction. Besides, reliance was placed upon a decision of the Apex Court in *Assistant Commissioner*

of Income Tax vs. Saurashtra Kutch Stock Exchange Limited, (2008) 305, ITR 227. In support of the proposition that an error has to be apparent on record and not one where one has to travel beyond record to examine whether there is error or not.

11. As against the above, Mr.Suresh Kumar, learned counsel for the Revenue supports the impugned order. It is further submitted that the question of the applicability of sub-clause (3) or sub-clause (5) of section 2(ea)(i) of the Act was not considered by the Tribunal at the stage of hearing the appeal even though the same was a ground of appeal taken by the Revenue. The issue whether or not sub-clause (3) of section 2 (ea)(i) of the Act applies will be considered at the fresh hearing of the appeal. The error apparent on record is non-consideration of the above submission. In the circumstances, no interference is warranted by this Court.

12. We have considered the rival submissions. It is a settled position in law that the power of the Tribunal to rectify mistakes is only to correct an error apparent on record and not to correct an error which is to be established by a long drawn out process of reasoning or where there could be two possible views. Although one of the grounds in the appeal before the Tribunal did relate to application of sub-clause (3) of section 2(ea)(i) of the Act, the same was not urged before the Tribunal during the hearing. This is evident from the fact

that the Rectification Application also does not state that the above issue was urged at the hearing. Therefore, the decision was taken by the Tribunal in its order dated 28.05.2008 on the basis of the submissions made before it on merits. This application as allowed by impugned order is in fact review the order dated 28.01.2008. Moreover the impugned order has while allowing the application held whether the office premises is in a commercial building or not would have to be determined by the sanction granted by the local authority. These are matters which would require further investigation and are not a part of the records of the proceedings leading to the order dated 28.05.2008 of the Tribunal.

13. In view of the above, we are of the view that in the present facts, the Tribunal could not have exercised jurisdiction to rectify the order dated 28.05.2008, as it seeks to refer, and rely upon the sanction granted by the local authority, which was clearly not a part of the record. Therefore, we set aside the order dated 13.08.2010 passed by the Tribunal.

14. Accordingly, the petition is allowed.

(G.S. KULKARNI, J.) ***(M.S. SANKLECHA, J.)***