

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**ITA No.63 of 2015 (O&M)
Date of decision: 18.1.2016**

Satbir Nijjer

.....Appellant

Vs.

**Commissioner of Income Tax (Appeals), Aayakar Bhawan, Maqbool
Road, Amritsar.**

.....Respondent

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not? **YES**
3. Whether the judgment should be reported in the Digest?

**CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL
HON'BLE MRS. JUSTICE RAJ RAHUL GARG**

Present: Mr. B.B.Bagga, Advocate for the appellant-assessee.

Mr. Denesh Goyal, Advocate for the respondent-revenue.

Ajay Kumar Mittal,J.

1. This appeal has been preferred by the appellant-assessee under Section 260A of the Income Tax Act, 1961 (in short, "the Act") against the order dated 23.5.2014, Annexure A.14 passed by the Income Tax Appellate Tribunal, Amritsar Bench, Amritsar (in short, "the Tribunal") in ITA No.579/(Asr)/2011 for the assessment year 2008-09, claiming following substantial questions of law:-

"i) Whether the income clearly exempted from ambit of Income Tax Act can constitute basis for claim of tax, interest, penalty, only on the ground that factum of non taxability of the sale

proceeds, being outside the purview of capital gain as per notification of Central Government was not known to the assessee at the stage of filing return under section 139 of Income Tax Act?

ii) Whether the facts and documents of the present case justify the impugned orders?

iii) Whether the learned Commissioner of Income Tax (Appeals) has not grossly erred in failing to judiciously consider the material question of non taxability of the sale proceeds as capital gain by also declining to remand back the matter to the Assessing Officer in exercise of the jurisdiction vested in the authorities below under section 250(4) of Income Tax Act and whether resultantly the impugned order being made by material irregularity in exercise of jurisdiction vested in the said authority under section 250(4) of Income Tax Act is sustainable in the eyes of law?

iv) Whether the learned Appellate Tribunal has not grossly erred in failing to judiciously consider the material question of non taxability of the sale proceeds as capital gain by again declining to remand back the matter to the Assessing Officer in exercise of the jurisdiction vested in the authorities below under Rule 28 of Appellate Tribunal Rules, 1963 of Income Tax and whether the consequently impugned order being made by material irregularity in exercise of jurisdiction vested in the said authority under Rule 28 of the Appellate Tribunal Rules, 1963 of Income Tax is sustainable in the eyes of law?

2. A few facts relevant for the decision of the controversy involved as narrated in the appeal may be noticed. The appellant filed his income tax return for the financial year 2007-08 relating to assessment year 2008-09 through his Chartered Accountant declaring gross income of ₹ 2,24,44,720/- on 26.3.2009 though the due date was 31.7.2008 on account

of the reasons beyond his control. Further, due to inadvertent error in the office of the Chartered Accountant of the appellant, the self assessed tax liability as reflected in the return was mentioned to the tune of ₹ 63,71,260/- and qua the payment of tax again there was erroneous declaration as “paid” while it was not paid in the said income tax return. During the course of summary assessment under Section 143(1) of the Act, the Assessing Officer raised a demand of ₹ 67,31,828/- vide notice dated 20.10.2009, Annexure A.2. The land of the appellant measuring 24 kanals 7 marlas in Village Meharbanpur, Tehsil Amritsar, District Amritsar which was falling outside the notified 6 kilometers range from the municipal limits was sold for a total consideration of ₹ 2.50 crores vide sale deed dated 25.3.2008, Annexure A.3. According to the appellant, this land being outside 6 kilometers of municipal limits is not capital asset as per section 2(14) of the Act as applicable to the relevant date and proceeds of the sale in respect of the said land are not subject to capital gain tax. The Assessing Officer treated the error committed by the appellant as wrong verification in the return vide impugned notice dated 20.10.2009, Annexure A.2. The appellant was called upon to deposit a sum of ₹ 67,31,828/-. The Deputy Commissioner of Income Tax (DCIT) issued order of penalty under section 221(1) of the Act dated 30.12.2009, Annexure A.6. The appellant complied with the impugned order. Due to paucity of funds, there was also delay in filing appeal by the appellant. The order of the DCIT against penalty of ₹ 50 lacs was assailed by the appellant before the Commissioner of Income Tax (Appeals) [CIT(A)]. Subsequently, as per the notification regarding exemption of the capital gain in respect of land of the appellant being 6

kilometers of the municipal limits, it was noticed that no liability could be fastened on the appellant. An application was moved by the appellant in the pending appeal. The CIT(A) dismissed the appeal of the appellant and passed impugned order dated 7.10.2011 under Section 250(6) of the Act, Annexure A.7 confirming the penalty of ₹ 50 lacs levied under section 221 (1) of the Act vide penalty order dated 30.12.2009, Annexure A.6. The said order was challenged by the appellant before the Tribunal under Rule 47(1) of the Income Tax Rules, 1962 (in short, “the Rules”). During the pendency of the appeal before the Tribunal, an application for rectification of the order of the Assessing Officer under Section 154 of the Act was also filed on 3.2.2012, Annexure A.8 by the appellant before the Assessing Officer which was dismissed vide order dated 16.2.2012, Annexure A.9. The appellant filed appeal against the said order before CIT(A) under Section 250(6) of the Act. Vide order dated 15.1.2014, Annexure A.11, the appeal was dismissed by the CIT(A). Still not satisfied, the appellant filed appeal before the Tribunal. An application for amendment of the grounds of appeal was also filed before the Tribunal. Vide order dated 23.5.2014, Annexure A.14, the Tribunal dismissed both the appeal and the application filed by the appellant. Hence the instant appeal by the appellant-assessee.

3. We have heard learned counsel for the parties.

4. From the perusal of the impugned order passed by the Tribunal, we find that it has been rightly recorded by the Tribunal that if the return had been filed wrongly or any claim had been made wrongly or the assessee after filing the return under section 139(1) of the Act discovered any omission or any wrong statement therein, he could have furnished a revised

return at any time before the expiry of one year from the end of the relevant assessment year or before completion of assessment whichever was earlier under section 139(5) of the Act. Alternatively, under Section 264 of the Act, the assessee could file a petition for revision within one year from the date on which the order in question was communicated to him or the date on which he otherwise came to know of it whichever was earlier. The assessee chose not to adopt any of the options for getting the revision of the claim. The Tribunal concurred with the findings recorded by the CIT(A) and the Assessing Officer in rejecting the assessee's rectification application because the mistake sought to be amended was not prima facie mistake. Secondly the assessee was submitting corroborating evidence with the rectification application which required investigation and verification and thus the same was outside the purview of the provisions of Section 154 of the Act. The relevant findings recorded by the Tribunal read thus:-

“We have heard the rival contentions and perused the facts of the case. As regards the additional ground raised by the assessee at this juncture with regard to the mistake on the legal advice of the counsel for the assessee who stated to have included wrongly the capital gains, infact this is not proper forum to revise the claim by taking the shelter of additional ground. If the return had been filed wrongly and claim had been made wrongly and the assessee after filing the return under section 139(1) discovers any omission or any wrong statement therein, he may furnish a revised return at any time before expiry of one year from the end of the relevant assessment year or before completion of assessment, whichever is earlier under section 139(5) of the Act. Alternatively, under Section 264 of the Act, the assessee could file a petition for revision within one year from the date on which the order in question was

communicated to him or date on which he otherwise came to know of it, whichever is earlier. But the assessee just chose not to adopt any of the courses for getting the revision of the claims. Therefore, the additional ground raised by the assessee cannot be admitted and therefore rejected.

9.1 As regards other grounds, the order passed under section 143(1) by the AO created a demand of ₹ 67,31,830/- against the assessee, as the assessee did not deposit tax under section 140A of the Act. The return of income in the present case was filed on 26.3.2009 which was a belated return. The assessee had claimed as per column No.9(c) regarding tax paid i.e. self assessment tax of ₹ 63,31,260/- has been paid and tax payable as per column No.10 at page 2 of the return of income has been declared as nil. The case was processed under section 143(1) of the Act on 20.10.2009 creating a demand of ₹ 67,31,828/- as the claim of the assessee regarding payment of self assessment tax of ₹ 63,31,260/- was found to be wrong since no taxes have been paid and wrong verification in the return of income was made. The intimation for the wrong and incorrect claim made by the assessee was given on 21.10.2009 to the assessee. Infact, the assessee submitted that the amount given to M/s Nijjer Agro Foods, a family concern unless is received back, no taxes and interest can be paid by him. Such an explanation by the assessee cannot go to prove a good and sufficient cause for not paying taxes under section 140 of the Act. After even selling agricultural land in the year 2008, as mentioned herein above, the assessee preferred to investment in his own concern M/s Nijjer Agro Foods, instead of making payment of taxes to income tax department which infact is a preferred liability. Therefore, again such account of the assessee cannot go prove good and sufficient cause for not levying penalty under section 221(1) of the Act. As per Explanation 221(1), the assessee shall not cease to be liable to any penalty merely by reason of the fact that before the levy of penalty he has paid to the tax. Infact, in

the present case, the penalty under section 221(1) of the Act was levied on 30.12.2009 on which date, the assessee was enjoying the money by investing the same in his sister concern in which he is stated to have incurred losses and by placing balance sheet of such company cannot help the assessee to prove good and sufficient cause and such action of investing money in the said concern M/s Nijjar Agro Foods appears to be quite intentional for avoiding preferred liability of income tax. Therefore, there cannot be any good and sufficient cause established before any of the authorities below or even before us for not levying penalty.

9.2. In the facts and circumstances of the case, we find no infirmity in the order of the learned CIT(A) who has actually confirmed the levy of penalty under section 221(1) of the Act. Thus, grounds 1 to 3 of the assessee are confirmed and the appeal is dismissed.

10. Now we take up appeal of the assessee in ITA No.187(Asr)/2014. The brief facts of the case are that the assessee filed an application under Section 154 of the Act dated 3.2.2012 alongwith copy of letter dated 1.2.2012 with the report of the Tehsildar I, Amritsar. The AO rebutted the case laws relied upon on the plea that some case laws are not applicable being quite distinguishable from the facts of the present case, whereas in all the stated case laws rectification was sought against order under section 143(1) of the Act. The AO after placing reliance on the following case laws, rejected the application under section 154 being maintainable:

- 1) **CIT vs. Keshri Metal P. Limited**, (1999) 237 ITR 165 (SC)
- 2) **Gammon India Limited vs. CIT** (1995) 214 ITR 50 (Bom.)
- 3) **T.S. Balaram ITO vs. Volkar Bros** (1971) 82 ITR 50 (SC)
- 4) **CIT vs. Hero Cycles P. Limited**, 228 ITR 463 (SC)

10.1 The AO further held that rectification is not possible if the question is debatable. Mistake apparent from record must be obvious and patent mistake and not something which

can be established by a long drawn process of reasons on points on which there may conceivably be two opinions. Moreover, the documents outside the records and the law is impermissible when applying the provisions of section 154 of the Act.

11. The learned CIT(A) confirmed the order of the Assessing Officer.

12. We have heard the rival contentions and perused the facts of the case. The brief facts in the present case are that the assessee has suo moto filed his return dated 26.3.2009 for assessment year 2008-09 declaring total income of ₹ 2,24,44,720/- comprising of salary of ₹ 9 lacs, LTC gain of ₹ 2,15,44,386/-, income from other sources at ₹ 335/- and agricultural income for rate purposes at ₹ 11,46,465/-. The above LTC gain has been reflected on the transfer of his agricultural holdings situated in village Meharbanpura, Tehsil Amritsar I, which later on claimed to be an agricultural land situated beyond 6 kilometers from Amritsar Municipal corporation limits and as such does not fall as a capital asset under section 2(14) of the Act but has suo moto determined his self assessment tax liability of ₹ 50 lacs. This return was processed under section 143(1) on 20.10.2009 creating a demand of ₹ 67,31,830/-. Later on the assessee sought reversal of his returned income claiming exempt LTC gain which has been erroneously shown by him. However, the AO has rejected the rectification application being not maintainable on the plea that the mistake sought to be amended is not a mistake apparent from record and the matter is outside the purview of rectification on points of debatable nature on which more than two opinions are likely to be drawn, thereby deriving support from various case laws cited in support thereto.

12.1 We concur with the view of the learned CIT(A) that the AO is quite justified in rejecting the assessee's rectification

application because the mistake sought to be amended is not a prima facie mistake. Secondly, the assessee is submitting corroborating evidence with the rectification application which requires investigations and verification and as such the same is outside the purview of provisions of section 154 of the Act. However, the correct course would have been by seeking remedy by moving revision application under section 264 before the CIT II Amritsar soliciting for revision of order passed under section 143(1) of the Act or by filing revised return.

12.2 As regards to the various Tribunal's decisions cited by the learned counsel in support of his contention, the same are of little help as the issue in question is quite debatable on which more than two opinions could be drawn and secondly the additional evidence filed alongwith the rectification application requires long drawn investigations and verification. Accordingly, the matter is quite outside the purview of provisions of section 154 of the Act being not a prima facie mistake apparent from record.

12.3 Accordingly, in view of our findings in ITA No.579/(Astr)/2011 herein above in assessee's own case and our findings herein above, we find no infirmity in the order of the learned CIT(A) who has rightly confirmed the action of the AO. Thus, all the grounds of the assessee are dismissed.”

Incidentally, it may be noticed that learned counsel for the appellant-assessee had relied upon judgments reported in ***Sanchit Software and Solutions P. Limited vs. Commissioner of Income Tax and others***, (2012) 349 ITR 404 (Bom.), ***Commissioner of Income Tax vs. Mitesh Impex***, Tax Appeal No.2562 of 2009 decided on 2.4.2014 (Ahmedabad), ***Jute Corporation of India Limited vs. Commissioner of Income Tax and another***, AIR 1991 SC 241 and ***The Commissioner of Income Tax UP***,

Lucknow vs. The Kanpur Coal Syndicate, Kanpur, AIR 1965 SC 325.

Suffice it to observe that the proposition of law expounded thereunder is unexceptionable but the said pronouncements were based on the factual matrix involved therein which is different from the present case. Thus, no advantage can be derived by him therefrom.

5. The concurrent findings recorded by the authorities below have not been shown to be illegal or perverse in any manner warranting interference by this Court. Consequently, no substantial question of law arises. The appeal stands dismissed.

(Ajay Kumar Mittal)
Judge

January 18, 2016
'gs'

(Raj Rahul Garg)
Judge