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IN THE HIGH COURT AT CALCUTTA  
SPECIAL JURISDICTION (INCOME TAX)  
ORIGINAL SIDE

ITA/161/2018  
RAJEEV BISWAS  
VS.  
UNION OF INDIA & ORS.

BEFORE :  
THE HON'BLE JUSTICE T.S. SIVAGNANAM  
And  
THE HON'BLE JUSTICE SUPRATIM BHATTACHARYA  
Date : SEPTEMBER 22, 2022.

Appearance:  
*Mr. Sukumar Bhattacharyya, Adv.*  
*Ms. Sayani Bhattacharya, Adv.*  
*Ms. Swaralipi Sarkar, Adv.*  
*...for appellant*  
*Mr. Tilak Mitra, Adv.*  
*...for respondent*

The Court :- This appeal filed by the assessee under Section 260A of the Income Tax Act, 1961 (the Act) is directed against the order dated 5.1.2018 passed by the Income Tax Appellate Tribunal "A" Bench, Kolkata in Miscellaneous Application No. 205/Kol/2017 affirming the order dated 27<sup>th</sup> September, 2017 passed in Income Tax Appeal No. 1176/Kol/2017 by which the order passed by the Commissioner of Income Tax (Appeals) -22 Kolkata, [CIT(A)] dated 15<sup>th</sup> March, 2017 was affirmed, which order of the [CIT(A)] arose out of an order passed by the assessing officer namely Deputy Commissioner of Income Tax (International Taxation), Circle - 2 (1), Kolkata dated 28<sup>th</sup> January, 2016 for the assessment year 2012-13. The appeal was admitted on 3<sup>rd</sup> December, 2018 to decide the following substantial questions of law:-

- "i. Whether the subject income could be taken to have accrued in India only for the reason that it was shown in the balance sheet of the assessee ?

- ii. Whether the learned tribunal ought to have allowed the rectification application of the appellant for the assessment year 2012-13 based on the CBDT circular no.13 of 2017 ?”

We have heard Mr. Sukumar Bhattacharyya for the revenue and Mr. Tilak Mitra, learned Advocate for respondent.

The legal issue involved in the instant case is whether the income of the assessee could have been taken to have accrued in India only because it was mistakenly shown by the assessee to have accrued in India while filing the return of income on 11<sup>th</sup> January, 2013. Even in the said return the name of the employer of the assessee was shown as M/s. MSC Ship Management Hongkong Limited. Therefore, admittedly the assessee was employed outside the Indian Territory. The return was processed and an intimation under Section 143(1) dated 2<sup>nd</sup> March, 2013 was issued computing the tax liability at Rs.4,40,070/-. Thereafter, the assessee filed the application for rectification under Section 154 of the Act. The same was rejected by the assessing officer by communication dated 23<sup>rd</sup> July, 2014 on the ground that tax has been correctly computed on the income return by the assessee and a fresh claim of change of income is not liable under Section 154 as the same is not a mistake apparent from the record. Thereafter the assessee filed another petition before the Deputy Commissioner of Income Tax (International Taxation) Circle 2(1). On 27.7.2015 this petition was filed by the Chartered Accountant of the assessee stating that on perusal of the client's record it was found that the assessee was an NRI during the period as he had to stay outside the Country due to his employment and he was outside the country for totally 210 days during the previous year relating to the assessment year 2012-13 and the income has been assessed without considering the assessee's NRI status. Therefore, it was requested that necessary rectification be made under section 154 of the Act. This

request was rejected by the Deputy Commissioner of Income Tax (International Taxation) by order dated 28<sup>th</sup> January, 2016 on the ground that there is no mistake which is apparent from the records that can be rectified.

Aggrieved by the same, the assessee preferred appeal before the [CIT(A)] contending that the assessing officer has erred in ignoring the revised return filed by the assessee on 15<sup>th</sup> July, 2014 which was duly acknowledged where the income earned by the assessee under the head 'salary claimed' was exempted under section 10(6)(viii) of the Act. Further, it was contended that the assessing officer has overlooked the response sheet wherein acknowledgement has been given for filing the revised return. The said appeal was dismissed by the order dated 15<sup>th</sup> March, 2017 and on perusal of the said order it shows that the [CIT(A)] devoted much attention to the scope of interference in an application filed under section 154 of the Act. We find that the merits of the matter has not been touched upon by the [CIT(A)]. Aggrieved by the same, the assessee filed an appeal before the tribunal which was heard by a single Member Bench. Contentions which were raised earlier both on the scope of section 154 of the Act and more particularly on the merits of the matter were also canvassed. The learned tribunal by an order dated 27<sup>th</sup> September, 2017 extracted the finding of the assessing officer in its entirety and rejected the appeal on the ground that the issue pertaining to the assessee's claim for exemption on account of salary income stated to be earned outside India is a debatable issue and, therefore, the CIT(A) was right in rejecting the appeal. Thereafter, the assessee preferred another application for rectification under Section 154 of the Act before the learned Tribunal which was dismissed by order dated 5<sup>th</sup> January, 2018. Thus, challenging the main order passed by the Tribunal as well as the order passed in Miscellaneous Appeal, the present appeal has been filed. After we have elaborately heard the learned advocates for the parties, we are of the considered view that the decision

arrived at by the learned Tribunal and the CIT(A) was absolutely perverse. On the date when the learned Tribunal rendered the initial decision dismissing the appeal, i.e., on 27<sup>th</sup> September, 2017, there was a binding decision of this Court in the case of *Utanka Roy Vs. Director of Income Tax, International Taxation Transfer Pricing, Kolkata & Ors.* in W.P. No. 369 of 2014. The learned Tribunal could not have ignored the said decision and the same having been ignored that would be error which is apparent on the face of the record and the Tribunal ought to have exercised his power when an application was filed by the assessee under Section 154 and erroneously rejected the same by order dated 5<sup>th</sup> January, 2018. Therefore, the said order dated 5<sup>th</sup> January, 2018 also suffers from perversity. Unfortunately, the assessee has been very harshly dealt with by the Department, the Assessing Officer failed to note that the assessee was an individual and the return of income was filed by the Chartered Accountant and the Chartered Accountant going through the facts found the mistake which had been committed and immediately filed the revised return which has been duly acknowledged by the Department. Thereafter, the rectification application was filed which was dealt with by DCIT, International Taxation which was also rejected. In our considered view the Department could have taken a more reasonable stand, more particularly when the law on the subject is in favour of the assessee. That apart, there are circulars issued by the CBDT/ by the Assessing Officer, the CIT(A) as well as the Tribunal. In this regard we note the Circular No. 13/2017 New Delhi dated 11<sup>th</sup> April, 2017 wherein it has been clearly stated that salary approved to a non-resident seafarer for service rendered decision on a foreign ship shall not be included in the total income merely because the same salary has been credited in the NRE account maintained with an Indian Bank by the seafarer. There have been other clarifications as well including the pre-statement given by the Hon'ble Minister for Finance, Government of India. We also take note of

another circular issued by the CBDT in Circular No. 14 (XL-35) dated 11<sup>th</sup> April, 1995 wherein the CBDT had directed the Officers of the Department not to take advantage of ignorance of an assessee as to his rights and they pointed out that it is a duty of the Officers of the Department to assist the taxpayer in every reasonable way, particularly in the matter of claiming and securing reliefs and in this regard the Officers should take the initiative in guiding a taxpayer where proceedings and other particulars before them indicate that some refund or relief is due to him. In Commissioner of Income Tax, Delhi Vs. Mahalaxmi Sugar Mills Co. Ltd. reported in 1986 (160) ITR 920, the Hon'ble Supreme Court held that there is a duty cast upon the Income Tax Officer to apply the relevant provisions of the Income Tax Act for the purpose of determining the true figure of the assessee's taxable income and consequential tax liability and in the event the assessee fails to claim benefit or set off, it cannot relieve the Income Tax Officer of his duty to apply the benefits of an appropriate case. The Assessing Officer of CIT(A) as well as the learned Tribunal has lost sight of the directions issued by the Hon'ble Supreme Court in Mahalaxmi Sugar Mills Co. Ltd. and the Assessing Officer and the CIT(A) have ignored the circular issued by the Board dated 11<sup>th</sup> April, 1995 and perversity is in the face of the order passed by the Assessing Officer as well as the DCIT. The decision of the Hon'ble Division Bench of this Court in the case of Smt. Sumana Bandyopadhyay & Anr. Vs. The Deputy Director of Income Tax, (International Taxation) 3(1) in ITAT 374 of 2016 dated 13<sup>th</sup> July, 2017 will squarely apply to the facts of the present case and in favour of the assessee. Identical issue was the substantial question of law which was decided in the appeal. It would be beneficial to refer to the operative portion of the said decision:-

*“3. We had admitted the appeal on 11<sup>th</sup> July, 2017 on the following question:-*

*“Whether on the facts and in the circumstances of the case and in law, income by way of salary which became due and has accrued to the*

*assessee, a non-resident, for services rendered outside India and which is not chargeable to tax in India on the “due” or “accrual” basis, can be said to be chargeable to tax on the “receipt” basis merely because the foreign employers, on the instructions of the assessee, have remitted a part of amount of salary to the assessee’s NRE bank account in India?”*

Learned Advocate appearing for the appellant pointed out as to the scope of the appeal filed before this Court under Section 260A of the Act. It is the submission that the provision is akin to Section 100 of the Civil Procedure Code under which second appeals are entertained before this Court by placing reliance on the decision of the Hon’ble Supreme Court in *Ishwar Dass Jain Vs. Sohan Lal* reported in (2000) 1 Supreme Court Cases 434. It is submitted that under Section 100 CPC, after the 1976 Amendment, it is essential for the High Court to formulate a substantial question of law and it is not permissible to reverse the judgement of the First Appellate Court without doing so. It was further pointed out that there are two situations in which interference with the findings of fact is permissible. The first one is when material or relevant evidence is not considered which, if considered, would have led to an opposite conclusion. The second situation in which interference with findings of fact is permissible is where a finding has been arrived at by the Appellate Court by placing reliance on inadmissible evidence which is it was omitted, an opposite conclusion was possible. In either of the above situations, a substantial question of law can arise.

Applying the ratio laid down in the above decision we have no hesitation to hold that substantial questions of law arise for consideration in this case, more particularly when the orders impugned suffer from utter perversity.

As pointed out earlier on the date when the Miscellaneous Application was heard and decided by the learned Tribunal, there was a binding decision of the Hon’ble

Division Bench of this Court in the case of Smt. Sumana Bandyopadhyay & Anr. That apart, the order passed by the Single Bench of this Court in the case of Utanka Roy was also available as it was dated December 15, 2016. If such was the situation, could the Tribunal have refused to entertain the application filed for rectification under Section 154 of the Act. This issue has been decided by the Hon'ble Supreme Court in the case of ACIT vs. Sourashtra Kutch Stock Exchange reported in 2008 (305) ITR 227 wherein the Hon'ble Supreme Court has held that an application for rectification was maintainable in such factual situation. The relevant paragraphs are quoted hereinbelow:-

*“40. The core issue, therefore, is whether non-consideration of a decision of jurisdictional court (in this case a decision of the High Court of Gujarat) or of the Supreme Court can be said to be a “mistake apparent from the record”? In our opinion, both – the Tribunal and the High Court – were right in holding that such a mistake can be said to be a “mistake apparent from the record” which could be rectified under section 254(2).*

*41. A similar question came up for consideration before the High Court of Gujarat in Suhrid Geigy Ltd. v. Commissioner of Surtax [1999] 237 ITR 834. It was held by the Division Bench of the High Court that if the point is covered by a decision of the jurisdictional court rendered prior or even subsequent to the order of rectification, it could be said to be a “mistake apparent from the record” under section 254(2) of the Act and could be corrected by the Tribunal.*

*42. In our judgement, it is also well-settled that a judicial decision acts retrospectively. According to Blackstonian theory, it is not the function of the court to pronounce a “new rule” but to maintain and expound the “old one”. In other words, judges do not make law, they only discover or find the correct law. The law has always been the same. If a subsequent decision alters the earlier one, it (the later decision) does not make new law. It only discovers the correct principle of law which has to be applied retrospectively. To put it differently, even where an earlier decision of the court operated for quite some time, the decision rendered later on would have retrospective effect clarifying the legal position which was earlier not correctly understood.”*

For all the above reasons, the appeal filed by the assessee is allowed. The order passed by the learned Tribunal dated 15<sup>th</sup> March, 2017 and the order passed in the Miscellaneous Application dated 5<sup>th</sup> January, 2018, the order passed by the CIT(A)

dated 28<sup>th</sup> January, 2016, the order passed by the DCIT (International Taxation) dated 28<sup>th</sup> January, 2016 and the order of rejection of the application under Section 154 as per the communicated dated 23.7.2014 issued by the Centralised Processing Centre (CPC), Bangalore are quashed. Consequently, the order passed by the Assessing Officer computed the tax liability as per the intimation under Section 143 (1) of the Act dated 23.3.2013 and the assessment stands restored to the file of the Assessing Officer who shall review the assessment in terms of the observation made in the preceding paragraphs and also the law on the subject including the circular issued by the CBDT and grant the relief to the assessee by excluding the foreign income received by the assessee excluding the foreign income under Section 10(6)(viii) of the Act and such order shall be passed by the Assessing Officer within six weeks from the date of receipt of the server copy of this order.

(T.S. SIVAGNANAM, J.)

(SUPRATIM BHATTACHARYA, J.)