Santosh

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

WRIT PETITION NO. 2322 OF 2021

Hapag Lloyd India Pvt. Ltd. ...Petitioner

Versus

Principal Commissioner of Income-Tax,
Mumbai – 5 & anr. ...Respondents

Mr. Nishant Thakkar, a/w Mr. Hiten Chande, i/b PDS Legal, for the Petitioner.
Mr. Sham Walve, for Respondents – Revenue.

CORAM: K. R. SHRIRAM & N. J. JAMADAR, JJ

DATED: 9th FEBRUARY, 2022
(Video Conferencing)

JUDGMENT: (PER : N. J. JAMADAR, J.)

1. Rule. Rule made returnable forthwith, and with the consent of the Counsels for the parties, heard finally.

2. The challenge in this petition is to an order dated 31st March, 2021, passed by the Principal Commissioner, Income Tax, ("PCIT"), Mumbai, respondent no.1, in Revision Application No.PCIT, Mumbai-5/Revision-264/100000104019/2021, under Section 264 of the Income Tax Act, 1961 ("the Act, 1961"), whereby respondent no.1 was persuaded to reject the revision application on the ground that it was not maintainable under Section 264 of the Act, 1961.

3. The facts necessary for the determination of this petition are as under:

(a) The petitioner is a private limited company. It is successor of United Arab Shipping Agency India Company Pvt. Limited ("UASAC"), which amalgamated with the petitioner with effect from 1st April, 2019, pursuant an order by National Company Law Tribunal. The UASAC, the predecessor company, had distributed dividend of Rs.10,16,75,641/- to its holding company, United Arab Shipping Company Limited, a company incorporated under the laws of Kuwait. The UASAC paid Dividend Distributed Tax ("DDT") at the rate of 16.91% (including surcharge and cess) aggregating to Rs.2,06,99,127/-. A return of income for Assessment Year 2016 – 2017 was filed by UASAC on 30th November, 2016. A revised return of income was filed on 23rd December, 2016.

(b) In the original as well as revised return, the benefit of Article 10 of India – Kuwait DTAA was, however, not claimed. Under the said article, the dividend distributed during the Financial Year 2015 – 2016, was taxable at the rate of 10%. The petitioner was, thus, entitled to refund of Rs.84,61,650/- being the excess tax paid. The petitioner thus preferred an application under Section 264 of the Act before respondent no.1.

(c) By the impugned order respondent no.1 was persuaded to reject the application as untenable primarily on the ground that the UASAC had not made a claim of return of excess DDT at the time of filing original return of income as well as the revised return of income. Consequently, the assessment order under Section 143(3) of the Act, 1961 was passed on 18th December, 2018. Thus, there was no apparent error on the record in the said Assessment Order which warranted exercise of jurisdiction under Section 264 of the Act, 1961.

4. The petitioner has invoked the writ jurisdiction on the ground that respondent no.1 has completely misconstrued the scope of jurisdiction under Section 264 of the Act, 1961. This incorrect approach of respondent no.1 has resulted in unjustified refusal to exercise the jurisdiction vested in him by Section 264 of the Act, 1961. Thus, the impugned order be set aside and the matter be remitted back to respondent no.1 for determination on merits.

5. An affidavit-in-reply is filed on behalf of respondent no.1, wherein an endeavour has been made to support the impugned order. It is, *inter alia,* contended that the Assessment Order passed by the Assessing Officer under Section 143(3) of the Act, 1961, cannot be said to be against the interest of the assessee and, therefore, respondent no.1 was justified in declining to exercise the jurisdiction under Section 264 of the Act, 1961.

6. In the backdrop of the limited nature of the controversy, which revolves around the scope of jurisdiction under Section 264 of the Act, 1961, as construed by respondent no.1, we have heard Mr. Thakkar, the learned Counsel for the petitioner and Mr. Walve, the learned Counsel for respondent no.1.

7. Mr. Thakkar, the learned Counsel for the petitioner submitted that respondent no.1 committed a grave error in law in holding that an application under Section 264 of the Act, 1961 was not maintainable when the assessee had not made a claim for refund of excess tax paid, in the original return. Mr. Thakkar would urge that the view of respondent no.1 that, for exercise of jurisdiction under Section 264 of the Act, 1961, the order impugned ought to be apparently erroneous, is completely misconceived. Under Section 264 of the Act, 1961, the Commssioner is empowered to call for the record of any proceeding and make inquiry or cause an inquiry to be made and thereafter pass such order, as he thinks fit, but not being the one prejudicial to assessee. The scope is thus not restricted to correction of error apparent on the face of record, urged Mr. Thakkar.

8. In opposition to this, Mr. Walve sought to justify the impugned order on the premise that the refund was not claimed in the original as well as revised return and thus the order passed under Section 143(3) by the Assessing Officer, which was sought to be revised cannot be said to be prejudicial to assessee and, therefore, respondent no.1 was well within his rights in refusing to exercise the revisional jurisdiction.

9. In order to properly appreciate the aforesaid submissions, it may be apposite to extract the relevant part of the reasons ascribed by respondent no.1 in the impugned order. Paragraph 6 reads as under:

> "**6**. I have perused the relevant material available on record. I find that the assessee had not made the said claim of refund of excess DDT at the time of filing of return of income i.e. on 30.11.2016. If the assessee company had realized that the said claim of refund of excess DDT remained to be claimed, this claim should have been made while filing revised return of income on 23.12.2016. The assessee company has failed to claim the said claim of refund of excess DDT during the course of assessment proceedings also. Subsequently, the assessment order u/s 143(3) was passed on 18.12.2018 accepting the returned income of the assessee. <u>As such there is no mistake in the order u/s 143(3) of the act. The section 264 has been devised to review the order which is erroneous on the admitted facts of the case. Therefore, as discussed in foregoing paragraphs, in my view the revision for the assessment year under consideration is not maintainable and I do not consider it a fit case for invoking the powers under section 264 of the Income-tax Act, 1961.</u> Thus, in view of the facts of the case, the reasons mentioned above, on the application under section 264 of the Income-tax Act, 1961. Thus, in view of the facts of the case, the reasons mentioned above, on the application under section 264 of the Income-tax Act, 1961 filed by the assessee company, I

> **DECLINE TO INVOKE THE PROVISIONS OF SECTION 264** of the Income-tax Act, 1961 for the A.Y. 2016-2017. Thus, the application filed by the assessee u/s 264 of the IT Act, 1961 is hereby rejected."
>
> (emphasis supplied)

10. From the perusal of the aforesaid reasons, it becomes evident that two factors weighed with respondent no.1. First, the assessee had not claimed refund in the original and revised return and, thus, there was no error in the assessment order passed under Section 143(3) on 18th December, 2018. Second, respondent no.1 was of the view that the jurisdiction under Section 264 was confined to correct the order which is found to be apparently erroneous.

11. Respondent no.1 was justified in recording that the assessee had not claimed refund of excess tax paid by it in the original and revised return. However, respondent no.1 committed an error in constricting the scope of revisional jurisdiction, in the backdrop of the said undisputed factual position. In fact, the very foundation of the application under Section 264 of the Act, 1961 was that the assessee had inadvertently failed to claim the benefit of Article 10 of the India – Kuwait DTAA, under which the dividend distribution was taxed at a lower rate. We are of the view that the approach of respondent no.1 in refusing to exercise the jurisdiction under

Section 264 of the Act, 1961 on the premise that it can be lawfully exercised only where such a refund was claimed and considered by the Assessing Officer is neither borne out by the text of Section 264 of the Act, 1961 nor the construction put thereon by the precedents.

12. The aforesaid reasoning indicates that respondent no.1 failed to appreciate the distinction between revisional and review jurisdiction. The principles which govern the exercise of review were sought to be unjustifiably imported to the exercise of power under Section 264 of the Act, 1961 and thereby imposing limitations which do not exist on exercise of such power. Undoubtedly, revisional jurisdiction is not as wide as an appellate jurisdiction. At the same time, revisional jurisdiction cannot be confused with the power of review, which by its very nature is limited.

13. Mr. Thakkar was justified in placing reliance on a Division Bench Judgment of this Court in the case of ***Geekay Security Services (P) Ltd. vs. Deputy Commissioner of Income Tax, Circle-3(1)(2)***[1] wherein the Division Bench considered an identical question as to whether the revisional authority was justified in rejecting the revision application solely on the ground that the applicant had not claimed the benefit in the original return.

1 [2019} 101 taxmann.com 192 (Bombay).

After adverting to the previous pronouncements of various High Courts, this concurred with the view that Section 264 does not limit the power to correct errors committed by the sub-ordinate authorities and could even be exercised where errors are committed by the assessee and there is nothing in Section 264 which places any restriction on the Commissioner's revisional power to give relief to the assessee in a case where assessee detects mistakes after the assessment is completed.

14. The aforesaid pronouncement is on all four with the facts of the case at hand.

15. We are, therefore, inclined to interfere with the impugned order. Since respondent no.1 has not considered the revision application on merits, it would be in the fitness of things to remit the application back to respondent no.1 for *de novo* consideration on merits. Needless to add that respondent no.1 shall give an effective opportunity of hearing to the petitioner/assessee with adequate advance notice.

16. Hence the following order:

: O r d e r :

(i) The petition stands allowed.

(ii) The impugned order dated 31st March, 2021 stands quashed and set aside.

(iii) The revision application stands restored to the file of respondent no.1 and remitted back for *de novo* consideration.

(iv) Respondent no.1 shall provide an effective opportunity of hearing to the petitioner/assessee with an adequate advance notice and decide the revision application in accordance with law as expeditiously as possible and, preferably, within a period of 12 weeks from the communication of this order.

(v) By way of abundant caution, we clarify that we have not entered into the merits of the matter and all questions are expressly kept open for consideration by respondent no.1, except the question of tenability of the revision application.

(vi) All concerned to act on an authenticated copy of this order.

Rule made absolute.

No costs.

[N. J. JAMADAR, J.] **[K. R. SHRIRAM, J.]**