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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.3650 OF 2014

Coca-Cola India Private Limited ..Petitioner

-Versus-

The Assistant Registrar representing
The Income Tax Appellate Tribunal
& Ors. ..Respondents

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Mr. S. E. Dastur, Senior Counsel, with Mr. R. Murlidhar, Arun S. i/b. Amarchand & Mangaldas & S. A. Shroff & Co. for the Petitioner.
Mr. Vimal Gupta, Senior Counsel, with Mr.Sham Walwe with Ms. Padma Divakar for the Respondents.

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CORAM: S.C. DHARMADHIKARI
AND
B.P. COLABAWALLA, JJ.

DATE :- 14th August, 2014

P.C.:

1] Rule.

2] The respondents waive service. By consent, Rule made returnable forthwith.

3] This Writ Petition under Article 226 of the Constitution of India is directed against the order passed by Income Tax Appellate Tribunal, Bench at Pune, on 6th December, 2013 in a Misc. Application styled as M.A.

No.150/PN/2010 arising out of Income Tax Appeal Nos.1258/PN/2003, 182 & 610/PN/2004, 256 and 144/PN/2007, 1103/PN/2005 and 896/PN/2008. The assessment years in question are 1998-99 to 2004-05.

4] The few facts which are referred for the purpose of this Writ Petition are that the petitioner before us is a company incorporated under the Companies Act, 1956. It has its registered office at the address mentioned in the cause title of this Writ Petition. The petitioner had approached the Tribunal against the order passed by the Commissioner of Income Tax (Appeals). The assessment years in question were as noted above. The case of the petitioners is in relation to allowance of service charges including travelling expenses. The factual position regarding this claim for the assessment years noted above is on the record of the Commissioner of Income Tax (Appeals) during the course of a challenge by the petitioner-assessee to an order passed by the Assessing Officer on 30th March, 2001. The grievance was that the Assessing Officer had erroneously refused to grant the claim of the assessee. Before the Commissioner of Income Tax (Appeals), initially the documents in relation to service charges were filed but the Commissioner remanded the matter to the Assessing Officer and called for a report. The report after remand was received by the Commissioner of Income Tax (Appeals). He, therefore,

proceeded to decide the matter and passed an order on 14th August, 2003. He, in that order, has held that the disallowance on account of service charges including traveling expenses needs to be enhanced to 25%. The petitioner-assessee's appeal and particularly ground No.2 therein was decided against it and with the enhancement as made.

5] Aggrieved and dissatisfied with such an order of the Commissioner of Income Tax (Appeals), the petitioner approached the Income Tax Appellate Tribunal. The petitioner was aggrieved, inter alia, by the enhancement in the disallowance to the extent made by the Commissioner of Income Tax (Appeals).

6] The petitioner's grievance is that during the course of proceedings in appeal, it relied on the record before the Commissioner of Income Tax (Appeals). Since the Commissioner of Income Tax (Appeals) had before him the necessary factual materials including a report from the Assessing Officer on remand, that the petitioner deemed it fit to argue the appeal on the basis that the Commissioner's order is erroneous in law. The disallowance could not have been enhanced and in any event the claim towards service charges including traveling expenses should have been granted in full.

7] The revenue argued to the contrary and pointed out that the factual foundation was not laid by the petitioner-assessee before the Assessing Officer. The revenue also argued that the findings in relation to prior assessment years cannot be of any assistance to the petitioner-assessee and this claim is, therefore, required to be decided without making any reference leave alone following the earlier findings.

8] The petitioner submitted before the Tribunal that the issue should be decided on the basis of this available material and the submissions recorded in the Tribunal's order. However, when the petitioner received the final order of the Tribunal, it noticed that the Tribunal has erroneously observed that there was no record and factual data before the Assessing Officer. Therefore, without making any reference to the record before the Commissioner of Income Tax (Appeals), the Tribunal remanded the matter to the file of the Assessing Officer and that was with the following direction:-

> *"We find the reasons given by the learned DR not to follow the decision of the Tribunal order for the assessment year 1997-98 are not at all convincing in view of the point wise counter reply given by the learned counsel for the assessee to prove that those objections given by the learned DR to deviate from the decision of*

the Tribunal for the assessment year 1997-98 have been replied *by the learned senior counsel for the assessee which are already mentioned at paragraphs 50 to 71 of this order and these need not be incorporated here to avoid repetition. Considering the totality of the facts of the case and respectfully following the decision of the Tribunal in assessee's own case for the immediately preceding assessment year, we are of the opinion that the marketing expenses claimed by the assessee has to be allowed. However, as regards service charges, undoubtedly the assessee has not furnished the details before the Assessing Officer except the copy of the service agreement and the debit notes. It is the settled proposition of law that for claiming any expenditure, the onus is always on the assessee to satisfy the Assessing Officer with documentary evidence regarding the genuineness of the expenditure. The assessee in the instant case has failed to discharge the onus. Further the learned Commissioner of Income Tax (Appeals) has given a finding at para 8.1 of his order that the claim of the assessee in various submissions that all expenses as incurred by CCI Inc. would have to be incurred by assessee company in running the business is not entirely correct as has been separately brought out at different places of the appeal orders. We, therefore, in the interest of justice, deem it proper to restore the issue relating to "service charges" to the file of the Assessing Officer with a direction to decide the issue afresh after giving an opportunity to the assessee to substantiate the claim with evidence. We hold and direct accordingly. The ground raised by the assessee on marketing expenses are accordingly allowed whereas and the ground relating to service*

charges is allow for statistical purposes."

9] The petitioner, therefore, made an application styled as the above Misc. Application and requesting that the mistake which is apparent on the face of the record be corrected and the original order passed by the Tribunal be recalled to that extent.

10] The specific case of the petitioner in the Misc. Application was that the issue of service charges including traveling expenses should have been decided by the Tribunal on the available material and there was no warrant for remanding the case. The finding that the assessee has not furnished full details before the Assessing Officer except the copy of the service agreement and the debit notes cannot be a ground for remanding the matter for assessment year 1999-2000 to 2004-05 back to him. The petitioners case was that the dispute before the Tribunal was only as to whether expenditure on service charges which leads to incidental benefit to third parties such as the bottlers and TCC can be said to be "whole and exclusively" incurred for the business purpose of the petitioner-assessee. This issue was thoroughly considered by the Tribunal in assessment year 1997-98 and it was decided in favour of the assessee. There were clear findings recorded for the assessment years 1997-98 and 1998-99. Therefore,

it was an apparent mistake and to hold that firstly there were lack of details in full before the Assessing Officer. To that the finding was given in para 8.1 of the order of the Commissioner of Income Tax (Appeals) but the finding that were rendered by him on the basis of the record before him were not complete so as to enable the Tribunal to deal with the legal issue. The petitioner pointed out that this observation and conclusion of the Tribunal was vitiated by an apparent mistake inasmuch as the Tribunal failed to note that the facts were same. There was evidence before the Commissioner and from 1999 onwards even the evidence was before the Assessing Officer. There was a direction to the Assessing Officer by the Commissioner to scrutinize and verify the documents and make a report. Once that remand report was received by the Commissioner and he duly considered it, for the purposes of enhancing the disallowance, then, the direction that the issue relating to service charges including traveling expenses needs to be restored to the file of the Assessing Officer is nothing but an apparent mistake and the Tribunal has full powers to correct it.

11] The Tribunal was also informed that it committed the same mistake in relation to assessment years 1997-98 but refused to go into the aspect of service charges and render any finding thereon. Instead it issued a similar direction of restoring the matter to the file of the Assessing Officer.

A Misc. Application to correct this mistake was filed which was rejected. All this led to the petitioner-assessee filing a Writ Petition in this Court being Writ Petition No.7459/2006 which was decided by this Court on 12th February, 2007. That order of this Court is reported in (2007) 290 ITR 464. Therefore, the Tribunal should not repeat such a mistake and force the parties like the petitioner to resort to further legal proceedings.

12] It is that application which has been rejected by the impugned order and to the extent of the rejection of the claim/disallowance of service charges including traveling expenses that this Writ Petition has been filed questioning the order of the Tribunal.

13] Mr. Dastur, learned Senior Counsel, appearing in support of this Writ Petition submitted that the Tribunal's order is vitiated by an error of law apparent on the face of the record. It has completely misdirected itself in issuing the direction and which is to be found at page 76 of the order of the Income Tax Appellate Tribunal. Mr. Dastur submitted that it was pointed out in detail to the Tribunal while arguing the Misc. Application that in the original order dated 31st March, 2010 the Tribunal issued a direction which could not have been issued by it when the vouchers and other evidence produced by the appellant has been enquired into by the

Commissioner of Income Tax (Appeals) to enhance the deduction. Mr. Dastur submits that if that was the basis on which the Commissioner passed the order, then, the correctness of the order passed by the Commissioner and relying on that record, was the issue in Question. Once the Tribunal had before it the necessary and requisite material to deal with the issue of service charges including traveling expenses, the direction in para-76 of the order dated 31st March, 2010 was an obvious mistake. The mistake was so apparent and for which no elaborate exercise of going behind the order in entirety or to consider any claim or submission by going through the entire record was necessary. In fact, in para-76, the Tribunal observed that as regards service charges undoubtedly the assessee has not furnished the full details before the Assessing Officer except the copy of the service agreement and the debit notes. This finding was erroneous and apparently because there was voluminous record before the Commissioner and which included a report of the remand by the Commissioner to the Assessing Officer. If the Assessing Officer had to submit a report after such remand and for scrutiny of the relevant documents, then, definitely the finding of the Tribunal that the Assessing Officer did not have the full details is incorrect. Alternatively and without prejudice, even if, there were not full details before the Assessing Officer they were definitely available before the

Commissioner of Income Tax (Appeals). Those were enough for decision on the disallowance of service charges including traveling expenses and the issue in relation thereto. For all these reasons, this was not a case where the Tribunal could have rejected the application for rectification of the mistake. For these reasons, the impugned order deserves to be set aside.

14] Mr. Dastur has invited our attention to the contents of the Misc. Application and equally the order of the Tribunal on the same. He submits that the order passed by the Tribunal on this Misc. Application and to the extent challenged before us is totally perverse inasmuch as in para 17.1 it had noted the submission of the petitioner's counsel that the assessee filed various vouchers in 10 box files. It has also referred to the finding of the Commissioner of Income Tax (Appeals) that there are expenses which have been claimed by one CCI Inc. If that was the factual position, then, the Tribunal was not required to correct anything in its original order. That it proceeded to correct something, is apparent from para 17 of the impugned order, wherein it made a correction. The finding was that the Assessing Officer is required to examine and scrutinize whether the claim of the petitioner-assessee is genuine or not. In other words, the “genuineness” of the expenditure was required to be proved.

Now the Tribunal in para 17 holds that inadvertently the word "genuine" has crept in the original order. The word needs to be substituted with another word called "allowability". Mr. Dastur submits that if this was the correction required in the original order, then, the further correction as desired by the petitioner could have always been made, more so, when the Tribunal was requesting and emphasizing is that there must be a decision on the issue. The Tribunal must decide the matter or claim itself and not sent it back and restore it to the Assessing Officer. This has unduly prolonged the proceedings.

15] Mr. Vimal Gupta, on the other hand, would submit that the petitioner desired to correct a mistake which was not apparent on the face of the record. If there was a mistake or error in the original order and which required the original order to be corrected to such an extent so as to verify and scrutinize the original record, then, the remedy of the petitioner was to file an appeal and not a Misc. Application. The remedy chosen was misconceived. That it is misconceived, is clear from the fact that the Tribunal is required to pass another order assigning further reasons. In these circumstances, the ploy of the petitioner-assessee is to some how derive benefit from the conclusion reached by the Tribunal pertaining to the same claim for the assessment year 1997-98. However,

the position has undergone a change and, therefore, the petitioner-assessee cannot derive any benefit from these earlier findings and conclusions. This being the position, the petitioner-assessee cannot prevail upon the Tribunal to modify its original order and force it to follow the findings and conclusions for prior assessment years. This attempt of the petitioner-assessee is apparent and, therefore, this Writ Petition should not be entertained but dismissed.

16] We have with the assistance of the learned counsel appearing for parties, perused the relevant part of the original order, the Misc. Application to the extent it raises the claim/disallowability of service charges including traveling expenses and the order on Misc. Application in this behalf.

17] We have also perused the order passed by this Court in the case of the very petitioner for the prior assessment year and a copy of which is at page 61 of the paper book. It is clear that the said order was passed in a Writ Petition by the petitioner-assessee. That Writ Petition challenged the order passed on Misc. Application filed by the petitioner-assessee for rectification of the mistakes in the order of the Tribunal for assessment years 1997-98. After a detailed scrutiny of the record pertaining to that

assessment year, this Court concluded that the petitioner was right in the complaint that it made. Even on that occasion, the Tribunal had chosen to restore the claim/disallowance in relation to service charges to the file of the Assessing Officer for a decision afresh and in accordance with law. The petitioner pointed out that the foundation or basis on which the Tribunal proceeded earlier was erroneous inasmuch as there was adequate and enough material on record to deal with and decide the petitioner's claim in relation to service charges. Therefore, the apparent mistake was required to be corrected by the Tribunal itself. This Court held that the Tribunal ought to have adjudicated upon the issues and decide any specific issues if they were found to be necessary. The Tribunal has not considered the specific issues raised in the appeal and had passed an order of remand to the Assessing Officer without adverting to any of the materials that were already before it. Such an order of remand was difficult to be sustained and hence this Court set aside the same. Thereafter, the matter was restored to the file of the Tribunal and for a decision in accordance with law.

18] It may be that the Tribunal has allowed the claim of the assessee on such restoration by this Court and for assessment year 1997-98. However, that issue came up again and for the assessment year which we have

noted hereinabove. The matter was before the Assessing Officer and he took a particular view on the claim/allowances. He disallowed the expenses to the extent of 10%. Aggrieved and dissatisfied with this exercise of the Assessing Officer, the petitioner-assessee carried the matter in appeal before the Commissioner of Income Tax (Appeals). During the course of the arguments before him, factual and legal issues were raised. The Commissioner noted that further elaboration is required in relation to certain materials. Therefore, he remanded the issue to the Assessing Officer and called for a report from him after such remand. After the report was received from the Assessing Officer the Commissioner dealt with the claim/allowance and in a detailed order concluded that not only the disallowance was justified but it could not have been restricted only to 10% and deserves to be enhanced to 25%. He adverted to the entire material in the form of not just oral submissions of parties but documents which were placed by the assessee, inter alia, all vouchers and available in about 19 box files. With such elaborate material before him, he enhanced the disallowance. If the petitioner is aggrieved by such an exercise of the Commissioner and preferred the further appeal to the Tribunal, then, the least that was expected of the Tribunal was to decide the issue. It noted the rival contentions but failed to decide the issue one way or the other as is apparent from the reasons that it assigned in para-76 of its original

order. We find that once the Tribunal concluded that considering the totality of the facts of the case and following the decision of the Tribunal in assessee's own case for the immediately preceding assessment year, the claim in relation to marketing expenses raised by the assessee needs to be allowed, however, on the same material and on totality of the facts as far as service charge is concerned, the Tribunal holds that the assessee has failed to furnish full details before the Assessing Officer except the copy of the service agreement and the debit notes. There is no reference at all made by the Tribunal to the adequacy or sufficiency or otherwise of the materials before Commissioner of Income Tax (Appeals) and the Respondent No.2. It has failed to take note of the report submitted to the Commissioner by the Assessing Officer after remand of the case to him. In fact, the petitioner's case was that there was enough material on record enabling the Tribunal to decide the issues raised. For the assessment year 1998-99, the evidence was filed before the Commissioner of Income Tax (Appeals) and in relation to assessment year 1999-2000 to 2004-05, the evidence was filed in several box files before the Deputy Commissioner of Income Tax (Respondent No.2). In such circumstances, we are of the opinion that the Tribunal should have corrected this obvious mistake and error and recalled the order and direction in para-76 to this limited extent. It should not have refused to consider and decide the issue relating to

service charges, more so, when an identical view taken by it earlier has not found favour of this Court. This Court repeatedly reminded the Tribunal of its duty as a last fact finding authority of dealing with all factual and legal issues. The Tribunal failed to take any note of the caution which has been administered by this Court and particularly of not remanding cases unnecessarily and without any proper direction. A blanket remand causes serious prejudice to parties. None benefits by non-adjudication or non-consideration of an issue of fact and law by an Appellate Authority and by wholesale remand of the case back to the original authority. This is a clear failure of duty which has to be performed by the Appellate Authority in law. Once the Appellate Authority fails to perform such duty and is corrected on one occasion by this Court, and in relation to the same assessee, then, the least that was expected from the Tribunal was to follow the order and direction of this Court and abide by it even for this later assessment year. If the same claim and which was dealt with by the Court earlier and for which the note of caution was issued, then, the Tribunal was bound in law to take due note of the same and follow the course for the later assessment years. We are of the view that the refusal of the Tribunal to follow the order of this Court and equally to correct its obvious and apparent mistake is vitiated as above. It is vitiated by a serious error of law apparent on the

face of the record. We find much substance in the contention of Shri Dastur that the Tribunal has misdirected itself completely and in law in refusing to decide and consider the claim in relation to service charges.

19] We are also aware of the apprehension that Mr. Vimal Gupta voiced and namely that if the matter goes back to the Tribunal and that too for the purpose of abiding by this Court's order and direction including in the earlier Writ Petition that would mean that the Tribunal is obliged to follow its view taken for the prior assessment year 1997-98 and apply it in the later assessment years. We have taken note of this apprehension but we are of the opinion that once Mr. Dastur appearing for the petitioner has not pitched or placed the case of the petitioner so high or to such an extent that we must direct the Tribunal to follow a particular course in law, then, this apprehension of Mr. Gupta has no basis. Once the Tribunal is directed to decide and consider the claim in relation to service charges, then, it is equally obliged to consider and decide it by taking into account the contentions and case of both sides. It cannot render any finding and conclusion without a complete and proper hearing. It must also take note of the submissions of the revenue that the position has undergone a drastic change after the assessment year 1997-98 and in relation to the same claim. Therefore, we have no doubt that when the Tribunal

considers the matter again it will also deal with revenue's contentions that the finding and conclusion on this issue of service charges for prior assessment year will not bind the Tribunal for the later years.

20] Once we have taken note of the apprehension of the revenue and clarified the matter as above, then, the only thing that remains is to pass a final order and direction and not just allow the Writ Petition. We, therefore, pass the following order:-

(A) The order passed by the Tribunal on the Misc. Application dated 6th December, 2013 is quashed and set aside.

(B) The Misc. Application filed by the petitioner seeking recall of the original order to the extent of the claim of service charges including traveling expenses and restoring that claim to the file of the Tribunal and the appeal filed by it, is, therefore, allowed.

(C) The original order passed by the Tribunal dated 31st March, 2010 is recalled to the extent of the claim of service charges including traveling expenses.

(D) The appeal filed by the petitioner-assessee before the Tribunal namely Income Tax Appeal No.1258/PN/2003 is restored to the file of the Income Tax Appellate Tribunal, Pune Bench, for a decision afresh on merits and in accordance with

law on the claim of service charges including traveling expenses and which it should decide as expeditiously as possible. All contentions of both sides in relation to this claim are kept open including the contention of the petitioner-assessee that the position, factual and legal, remains the same and, therefore, the Tribunal is bound by the findings and conclusions rendered by it in relation to the earlier assessment year 1997-98 which also stands approved in the light of the order passed by this Court.

(E) The Tribunal should decide the claim without in any manner being influenced by any observation in the original order as also in the order passed on the rectification application both of which do not survive in the light of our direction.

(F) The Rule is made absolute in above terms with no orders as to costs.

(B.P.COLABAWALLA, J.) (**S.C. DHARMADHIKARI, J.**)

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