IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.26 OF 2010

The Commissioner of Income Tax-9)
Aayakar Bhavan, M.K. Road,)
Mumbai - 400 020.)..Appellant.

V/s.

M/s. Earnest Exports Ltd.,)
D-603, Alica Nagar Bldg. No.10,)
Lokhandwala Township, Kandivli (E))
Mumbai 400 101.)..Respondent.

Mr. Suresh Kumar for appellant.

Mr. Vikas Singh with Sashi Tulsiyan, Ms. Amrita Narayan i/b. M/s. Sutapa Saha for respondent.

CORAM : DR. D.Y.CHANDRACHUD
AND J.P.DEVADHAR, JJ.

DATED : 25TH FEBRUARY, 2010

ORAL JUDGMENT (PER DR. D.Y.CHANDRACHUD, J.)

1) Admit.

2) In exercise of its power under Section 254 (2) of the Income Tax

Act, 1961, the ITAT has by its order dated 15th January, 2007 recalled its earlier order dated 31st August, 2006 and set aside an order passed by the CIT under Section 263. The substantial question of law which arises before the Court, in this appeal filed by the Revenue, is whether in the circumstances of the case, the impugned order falls within the parameters of the jurisdiction under Section 254(2) of the Act.

3) During the course of the assessment proceedings pertaining to assessment year 2000-01, the assessee made a claim of deduction under Section 80HHC. The Assessing Officer by an order dated 25th March, 2003 computed the gross total income of the assessee at Rs.32.19 crores, allowed a deduction under Section 80HHC in the amount of Rs.32.17 crores and computed the taxable income at Rs.1.25 lakhs. On 22nd March, 2005, the CIT exercised jurisdiction under Section 263 on the ground that the order passed by the Assessing Officer under Section 143(3) was erroneous in so far as it was prejudicial to the interests of the Revenue. The order under Section 263 basically refers to four items, namely: (i) Unrealised sundry debtors; (ii) Proceeds of sale of a DEPB licence; (iii) Direct costs of export sales; and (iv) Indirect costs attributable to trading goods exports. Since the issue to be considered in this proceeding is confined to the issue of the entitlement of the assessee to claim a deduction in respect of the sale proceeds of a DEPB licence under Section 80HHC, it would now be necessary to consider the reasons furnished by the CIT. The CIT observed that the DEPB licence in question had been granted to the assessee under the Foreign Trade (Development & Regulation) Act, 1992 and was not a

licence which was eligible, having regard to the provisions of Section 28 (iiia). Section 28 (iiia) inter alia deals with profits on sale of a licence granted under the Imports (Control) Order, 1955 made under the Imports and Exports (Control) Act, 1947 (18 of 1947). The CIT noted that sub-clause (iiia) was inserted in Section 28 by the Finance Act of 1990 with retrospective effect from 1st April, 1962. Since Parliament had confined the ambit of the provision to a licence granted under Imports (Control) Order, 1955 and had not made any further additions, a DEPB licence was not eligible for deduction under Section 80HHC as it did not fall under Section 28 (iiia). On this ground the order passed by the Assessing Officer was considered to be erroneous and to be prejudicial to the interest of the Revenue.

4) The assessee carried the decision of the CIT in appeal to the Income Tax Appellate Tribunal. The Tribunal, by its order dated 31st August, 2006, dismissed the appeal filed by the assessee. Before the Tribunal, it was urged on behalf of the assessee that in so far as the issue of a DEPB licence is concerned, decisions of the Tribunal were in favour of the assessee and it was on that basis the Assessing Officer had come to the conclusion that the DEPB licence would form part of the incentive, adding to profits of the assessee for the purpose of Section 80HHC. The Tribunal noted that the decision of its Ahmedabad Bench in the case of *Pratibha Syntex Ltd. V/s. JCIT (81 ITD 118)* was cited before it. For the reasons which the Tribunal indicated in its judgment, it came to the conclusion that the aforesaid decision which was relied upon by the assessee was not relevant and that it could not be held that the Assessing Officer could have come to a conclusion in favour

of the assessee on the basis of the decision. The Tribunal also held that the decision of the Mumbai Bench in the case of *Pink Star V/s. DCIT [27 ITD 137]* did not directly pertain to the issue in question involving a DEPB licence and was, therefore, not relevant.

5) The assessee thereupon filed a Miscellaneous Application under Section 254(2) for rectification. The Tribunal by its impugned order dated 15th January, 2007 allowed the application and recalled its earlier decision dated 31st August, 2006. While allowing the appeal filed by the assessee, the Tribunal set aside the revisional order passed by the CIT under Section 263. The Tribunal held that when the assessment order was passed, there was no dispute as to whether export incentives by way of a DEPB licence were eligible for deduction under Section 80HHC and that the issue had been considered by the Ahmedabad Bench in the case of *Pratibha Syntex Ltd.* and by the Mumbai Bench in *Pink Star (supra).* The Assessing Officer, according to the Tribunal, had thus followed the decisions of the Tribunal. The Tribunal held that there was also a decision in *Crown Frozen Foods [93 TTJ 485 (Mum)].* The Tribunal held that it had committed a mistake by dismissing the appeal only on a technical ground to the effect that the assessment order was not a speaking order.

6) Counsel appearing on behalf of the Revenue submitted that in the present case, the exercise of jurisdiction by the Tribunal cannot be relatable to the power conferred by Section 254(2). The Tribunal has while exercising its jurisdiction under Section 254(2) power to rectify a mistake

apparent from the record. The Tribunal had in its original order considered the judgment of the Ahmedabad Bench in *Pratibha Syntex Ltd.* and of the Mumbai Bench in *Pink Star.* The Tribunal has purported to exercise a power which is more in the nature of a review of its own decision or perhaps even a re-appreciation of the correctness of its earlier decision which is impermissible. Finally, it was submitted that the Tribunal had erroneously held in the subsequent order that in its earlier decision, the Tribunal had found fault with the order of the Assessing officer only on the ground that the assessment order was not a speaking order.

7) On the other hand, it is urged on behalf of the assessee, relying upon the judgment of the Supreme Court in **Honda Siel Power Products Ltd. V/s. Commissioner of Income Tax, Delhi**[1] that in a Miscellaneous Application under Section 254(2), the assessee was entitled to urge that the issue as to whether DEPB licences were eligible for deduction under Section 80HHC was concluded by the pronouncements of the Tribunal. In the present case, it was submitted that the assessee pointed out to the Tribunal in the application under Section 254(2) that the decisions in *Pratibha Syntex Ltd.*, *Pink Star* and *Crown Frozen Foods* (supra) had concluded the question. Counsel submitted that though the decision in *Crown Frozen Foods* had been cited before the Tribunal in the initial proceedings of the appeal against the order under Section 263, the decision was not dealt with and consequently, that could form the subject matter of an application under Section 254(2).

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8) Section 254(2) empowers the Tribunal to rectify a mistake apparent from the record and for that purpose to amend any order passed by it. The Supreme Court has held in its judgment in *Honda Siel Power Products Ltd. V/s. CIT (supra)* that the underlying purpose of Section 254(2) is based on the fundamental principle that a party appearing before the Tribunal should not suffer on account of a mistake committed by the Tribunal. When prejudice results from an order attributable to the Tribunal's mistake, error or omission, it is the duty of the Tribunal to set it right and it has nothing to do with the concept of the inherent power to review. The Supreme Court held that the Tribunal would be regarded as having committed a mistake in not considering the material which is already on record. In that case, a decision of the Tribunal which was cited before it, had by oversight been overlooked in the judgment dismissing the appeal filed by the assessee on the question of the admissibility of a claim for enhanced depreciation under Section 43-A. The Tribunal was held to be entitled to correct its error so as to deal with the decision which was cited.

9) In the present case, the Tribunal in its order dated 31st August, 2006 specifically dealt with the decisions of the Ahmedabad and Mumbai Benches of the Tribunal in *Pratibha Syntex and Pink Star (supra)*. The Tribunal held that the decision of *Pratibha Syntex* was not relevant to the issue involved and that the decision in *Pink Star* contained no direct discussion regarding the nature of a DEPB licence. At this stage, we are not concerned with the correctness of the determination made by the Tribunal in its evaluation of the two decisions in its original judgment. The point is that

both the decisions which were cited before the Tribunal were duly considered and distinguished. The Tribunal while dealing with the allowability of the other other claims for deduction under Section 80HHC observed that the total income as per the computation of the assessee was more than Rs.32 crores and the deduction was roughly of the same amount. In spite of that, the Assessing Officer dealt with the assessment in a two page order containing only nine perfunctory sentences. However, the dismissal of the appeal of the assessee was not based only on that ground since the Tribunal evaluated the issue on merits by dealing with the two decisions which were cited by the assessee. When the application under Section 254(2) was taken up by the Tribunal, once again reliance was sought to be placed on the decisions of the Mumbai Bench in *Pink Star* and of the Ahmedabad Bench in *Pratibha Syntex.* The Tribunal, while dealing with the application under Section 254(2) virtually reconsidered the entire matter and this time came to the conclusion that the Ahmedabad Bench held in *Pratibha Syntex* that a DEPB licence was eligible for deduction under Section 80HHC and that this view was reiterated by the Mumbai Bench in *Pink Star*. This amounted to a re-appreciation of the correctness of the earlier decision on merits. This was impermissible. Re-evaluating the correctness on merits of an earlier decision lies beyond the scope of the power conferred under Section 254(2).

10) The power under Section 254(2) is confined to a rectification of a mistake apparent on record. The Tribunal must confine itself within those parameters. Section 254(2) is not a carte blanche for the Tribunal to change its own view by substituting a view which it believes should have been taken

in the first instance. Section 254(2) is not a mandate to unsettle decisions taken after due reflection. The provision empowers the Tribunal to correct mistakes, errors and omissions apparent on the face. The Section is not an avenue to revive a proceeding by recourse to a disingenuous argument nor does it contemplate a fresh look at a decision recorded on merits, however appealing an alternate view may seem. Unless a sense of restraint is observed, judicial discipline would be the casualty. That is not what Parliament envisaged.

11) The Tribunal has also dealt with the decision of the Mumbai Bench in *Crown Frozen Foods (supra)* which does not materially place the matter beyond the earlier decision in *Pratibha Syntex*. In fact, the decision in *Crown Frozen Foods* records the submission of the assessee as having relied upon the decision of the Ahmedabad Bench in *Pratibha Syntex.* That apart, in *Crown Frozen Foods,* the Tribunal held that "on the given facts and circumstances of the case, it cannot be said that the order of the AO is erroneous and prejudicial to the interest of the Revenue". Obviously, therefore, that decision turned on its own facts and circumstances. Above all, as noted before, the specific argument in that case, of the assessee was that the order of the Assessing officer could not treated as erroneous because the action of the Assessing Officer in allowing a deduction under Section 80HHC in respect of the DEPB licence was in accordance with the view taken by the Tribunal in *Pratibha Syntex*. As we have observed earlier, in its original decision, the Tribunal had distinguished the decision in *Pratibha Syntex.*

12) For all these reasons, the exercise of jurisdiction by the Tribunal in the present case cannot be held to be relatable to the parameters of Section 254(2). This is not a case where the Tribunal had failed to consider a decision that was cited, as was the case before the Supreme Court in *Honda Siel Power Products Ltd.* The Tribunal had evaluated the facts and circumstances of the case when it originally dismissed the appeal of the assessee against the exercise of jurisdiction under Section 263 by the CIT. Whether the Tribunal was on merits correct or otherwise in dismissing the appeal, is not a matter which falls for determination in this proceeding. If the assessee is aggrieved by the merits of the determination by the Tribunal while dismissing the appeal, it is at liberty to pursue its remedy in accordance with law. The observations made by us in this judgment are, therefore, confined to our decision on the exercise of jurisdiction under Section 254(2), by the Tribunal.

13) In the circumstances, the appeal filed by the Revenue will have to be allowed and is accordingly allowed. The question of law as formulated shall stand answered in favour of the Revenue and against the assessee. The appeal is accordingly disposed of. There shall be no order as to costs.

(J.P.DEVADHAR, J.) (DR. D.Y.CHANDRACHUD, J.)