IN THE INCOME TAX APPELLATE TRIBUNAL "L", BENCH MUMBAI

BEFORE SHRI D.T. GARASIA, JM
&
SHRI R.C.SHARMA, AM

MA No.411/Mum/2016 to 414/Mum/2016
(Arising out of ITA No.7001/Mum/2010)
(**Assessment Year :2003-04**)

M/s. Lucent Technologies GRL LLC, (Since merged with Alcatel Lucent USA Inc) Alcatel Lucent India Limited 14th Floor, Tower C, DLF Cyber Green DLF City, Phase-III, Gurgaon – 122002	Vs.	The Additional Director of Income Tax (International Taxation), Range – 4 Mumbai
PAN/GIR No. AABCL3902G		
Appellant)	..	**Respondent**)

Assessee by	Shri Madhur Agarwal
Revenue by	Shri Parag Vyas
Date of Hearing	**06/10/2017**
Date of Pronouncement	**09/10/2017**

आदेश / O R D E R

***PER R.C.SHARMA (A.M)*:**

These Miscellaneous Applications are filed by the assessee seeking rectification of mistake apparent on the record in the order dated 06/09/2013 passed by the Tribunal while disposing of bunch of appeals filed by the department.

2. It was argued by learned AR that similar miscellaneous application filed by M/s. Reliance Communication Ltd., have been allowed by the Tribunal vide its order dated 18/11/2016. It was also brought to our notice that

assessee was also party in the order passed by the Tribunal dated 06/09/2013 alongwith M/s. Reliance Communication Ltd.,

3. Learned DR fairly agreed that issue is covered by the order of the Tribunal dated 18/11/2016, however, he contended that ITAT has no power under the Act to consider miscellaneous application in so far as Section 254(2) of Income Tax Act was amended w.e.f. 01/06/2010 whereby power of ITAT to consider mistake apparent from record was restricted to six months from the end of month in which the order was passed. As per learned DR the order in respect of which miscellaneous applications are preferred were passed on 06/09/2013 whereas these miscellaneous applications have been preferred in December 2016 i.e., after amendment, hence ITAT has no power under the Act to consider the miscellaneous applications. Learned DR placed on record the decision of the ITAT Mumbai Bench dated 25/04/2017 in the case of Lavanya Land Private Ltd., wherein Tribunal have considered as to whether amendment applies only to the orders passed on or after 01/06/2016 or would apply to all the orders whether passed before or after 01/06/2016. As per learned DR since the amendment is fairly applicable from 01/06/2016, the power of ITAT to consider rectifications from that date stands modified.

4. Learned DR further contended that since these miscellaneous applications were not pending as on 01/06/2016, it cannot be said that assessee had any vested right.

5. On the other hand learned AR vehemently argued that to determine the period of limitation u/s. 254(2) the law as it stood at the time when the

impugned Order of the ITAT was passed has to be seen. At the relevant time, section 254(2) provided a period of 4 years from the date of the impugned order for passing the rectification order by the ITAT. Reliance was placed on the decision of Hon'ble Supreme Court in Honda Siel Power Products Ltd. v/s. CIT (2007) 295 ITR 466 wherein it was held that if the application has been filed within a period of 4 years, the same is maintainable and the ITAT can even pass the Order beyond the period of 4 years.

6. Learned AR also placed on record the order of ITAT, Pune Bench in case of Praj Industries Ltd., in ITA No.1027/PN/2014 dated 21/12/2016 wherein exactly similar issue of limitation period was considered in the light of amended provisions and Tribunal held that miscellaneous application can be filed within a period of four years in respect of the orders passed prior to the date of amendment.

7. It was further contended by learned AR that that the amendment by the Finance Act, 2016 with effect from 01 June 2016 reducing the time limit prescribed u/s. 254(2) to 6 months from the end of the month in which the Order sought to be rectified is passed is not applicable in the instant case for the following reasons:

> *1. Right to appeal or file a rectification application as in the present case is a substantive right and not a procedural right,and therefore the same has to be applied prospectively and not retrospectively. The Apex Court has consistently taken this view and which view has now been reiterated in the latest decision of the Apex Court in the case of K. Raveendranathan Nair v/s. CIT (in Civil Appeal No. 3131 of 2006). The relevant portion is extracted hereunder for ready reference: .*

We may mention at the outset that after referring to the judgments noted above even the High Court in the impugned judgment has accepted that right of appeal is not a matter of procedure and that it is a substantive right. It is ^ also recognized that this right gets vested in the litigants at the commencement of the Us and, therefore, such a vested right cannot be taken away or cannot be impaired or imperilled or made more stringent or onerous by any subsequent legislation unless the subsequent legislation said so either expressly or by necessary intendment. An intention to interfere with or impair or imperil a vested right cannot be presumed unless such intention be clearly manifested by express words or by necessary implication. Ho wever, the High Court has still dismissed the writ petition as it was of the opinion that the vested right of appeal conferred under Section 260A of the IT Act, insofar as payment of court fee is concerned, is taken away by necessary implication. In other words, the provisions of Section 52A of the 1959 Act inserted by the Amendment Act of 2003, in that sense, have retrospective operation thereby effecting the earlier assessment also. This proposition is advanced with the logic that before prior to introduction of Section 260A in the IT Act with effect from October 01,1998, there was no right of appeal.

13) It is difficult to accept such a logic given by the High Court. No doubt, before October 01,1998, in the absence of any statutory right of appeal to the High Court, there was no such vested right. At the same time, the moment Section 260A was added to the statute, right to appeal was recognized statutorily. Therefore, as already pointed out, in respect of those proceedings where ossessment orders were passed after October 01, 1998. vested right of appeal in the High Court had accrued. Same was the position qua Department in respect of those cases where the demand raised by the Department stood negatived by the appellate authority after October 01,1998.

14) In the present case, as noted above, when Section 260A of the IT Act was introduced by way of amendment with effect from October 01, 1998, it contained provision in the form of clause (2) of sub-section (2) thereof relating to payment of court fee as well. As per that provision, fixed court fee of Rs. 2,000/- was provided. This provision was, however, omitted with effect from June 01,1999. The court fee became payable as per Section 52 of the 1959 Act. The amendment in question in the 1959 Act, i.e. Section 52A, was made effective from March 06,2003. This provision has not been made retrospective.

15) We, therefore, are not able to subscribe to the aforesaid view of the High Court and set aside the same. In fine, we hold as under:

(I) Wherever assessee is in appeal in the High Court which is filed under Section 260A of the IT Act, if the date of assessment is prior to March 06.2.003,Section 52Aof the 1959' Act shall not apply and the court fee payable shall be the one which was payable on the date of such assessment order

(ii) In those cases where the Department files appeal in the High Court under Section 260A of the IT Act, the date on which the appellate authority set aside the judgment of the Assessing Officer would be the relevant date for payment of court fee. if that happens to be before March 06, 2003, then the court fee shall not be payable as per Section 260A of the IT Act on such appeals.

In view of the above it was contended by learned AR that right to appeal which includes rights to file a rectification application arises at the time of the original order is passed and such right can only be taken away when there is a retrospective amendment. In the present case, admittedly is prospective and applicable from 01 June 2016. Here, it may be noted that the decision of the Apex Court was in the context of the amount of court fees to be payable for filing an appeal before the High Court under the Income-tax Act, 1961. The contention of the revenue was that the amount of court fee would be determined as per the law as it is stood at the time of filing of the appeal and not when the original order was passed. The Supreme Court rejected the contention of the revenue that that the right of appeal being a substantive right, the same gets crystallised when the original order was passed. The assessee submits that the decision of the Apex Court is fully applicable to the facts of the present case. We further submit that the contention of the department in the present case that the Apex Court was interpreting another statute is not correct as the issue for interpretation before the Supreme Court was with respect to the right to file an appeal under the Act.

8. We have considered rival contentions and carefully gone through the rectification applications, impugned orders of the tribunal sought to be recalled and the order of the Co-ordinate Bench filed by learned AR and DR. We have also deliberated on the judicial pronouncements referred by lower authorities in their respective orders as well as cited by learned AR

during the course of hearing before us. We found that Tribunal in the case of Lavanya Land Private Limited vide order dated 25/04/2017 have held that since miscellaneous application was filed beyond a period of six months from the date of the order of the Tribunal which was sought to be rectified, the miscellaneous application was barred by limitation. We observe that while rendering the decision, the Co-ordinate Bench has not considered the decision of Hon'ble Supreme Court in the case of K. Ravindranathan Nair (Supra) where Hon'ble Supreme Court observed that right to appeal is vested in the litigant at the commencement of Lis and therefore, such vested right cannot be taken away and cannot be impaired or made more stringent by any subsequent legislation unless the subsequent legislation said so either expressly or by necessary intendment. An intention in interfere or impair a vested right cannot be presumed unless such intention be clearly manifested by the express words or by necessary implication.

9. Applying the proposition of law laid down by Hon'ble Supreme Court, we can safely infer that right to appeal which includes right to file rectification application arises at the time of passing the original order and such right can only be taken away when there is a retrospective amendment. In the instant case before us, the amendment so brought in u/s.254(2) was prospective and applicable to the orders passed after 01/06/2016, and not the orders passed prior to 01/06/2016. Undisputedly in the instant case the order of Tribunal sought to be rectified was dated 06/09/2013 which is much prior to the date of amendment. Accordingly

amended provisions of Section 254(2) limiting the period of filing rectification application within a period of six months is not applicable to the instant case before us.

10. It is clear that the Co-ordinate Bench relied on by learned DR has not considered the decision of the Apex Court in the case of **K. Raveendranathan Nair v/s. CIT (in Civil Appeal No. 3131 of 2006**) holding that right to appeal being a substantive right gets crystalized at the time of passing of the original order unless the same is taken away by retrospective amendment. Respectfully following the proposition of law laid down by Hon'ble Supreme Court, we do not find any justification in declining the rectification application which was filed within the prescribed time limit prevailing prior to amendment brought in Section 254(2) of I.T. Act w.e.f. 01/06/2010.

11. On merits the miscellaneous applications have to be allowed in view of the decision of the ITAT in the case" of **Reliance Communication Ltd. and Others v/s. DCIT (in MA No. 143/M/2014 & Ors).** This Order of the ITAT has subsequently also been approved by the Bombay High Court in the case of **CIT v/s. ITAT & Ors (in** WP (L) No. **708 of** 2017).

12. In view of the above discussion, we recall the order passed by the Tribunal and Registry is directed to fix the appeals for hearing afresh by regular bench.

13. In the result, Miscellaneous Applications are allowed.

Order pronounced in the open court on this 09/10/2017

Sd/-	**Sd/-**
(D.T. GARASIA)	**(R.C.SHARMA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai; Dated 09/10/2017
Karuna Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

सत्यापित प्रति //True Copy//

(Asstt. Registrar)
ITAT, Mumbai