***THE HON'BLE SRI JUSTICE SUJOY PAUL**

AND

***THE HON'BLE SRI JUSTICE N.TUKARAMJI**

+ WRIT PETITION No.8663 OF 2022

% 25-04-2024

M/s. BSCPL Infrastructure Ltd.

…Petitioner

vs.

$ Union of India and another.

… Respondents

!Counsel for the Petitioner: Sri A.V.A. Siva Kartikeya representing S. Vivek Chnadrasekhar.

^Counsel for Respondents: Sri Vijhay K Punna

<Gist :

>Head Note :

? Cases referred

1. (1956) 56 ITR 114 (Bom)
2. (2016) 386 ITR 643 (Del)
3. (2022) 444 ITR 310
4. (1976) 104 ITR 36
5. 2023 SCC OnLine SC 95

IN THE HIGH COURT FOR THE STATE OF TELANGANA

HYDERABAD

* * * *

WRIT PETITION No.8663 OF 2022

(Per Hon'ble Sri Justice Sujoy Paul)

Between:

M/s. BSCPL Infrastructure Ltd.

…Petitioner

vs.

Union of India and another.

… Respondents

JUDGMENT PRONOUNCED ON: 25.04.2024

THE HON'BLE SRI JUSTICE SUJOY PAUL
THE HON'BLE SRI JUSTICE N.TUKARAMJI

1. Whether Reporters of Local newspapers may be allowed to see the Judgments? :

2. Whether the copies of judgment may be Marked to Law Reporters/Journals? :

3. Whether His Lordship wishes to see the fair copy of the Judgment? :

SUJOY PAUL, J

N. TUKARAMJI, J

THE HON'BLE SRI JUSTICE SUJOY PAUL

AND

THE HON'BLE SRI JUSTICE N.TUKARAMJI

WRIT PETITION No.8663 of 2022

O R D E R: *(Per Hon'ble Sri Justice Sujoy Paul)*

1. This petition filed under Article 226 of the Constitution of India takes exception to the order dated 23.12.2021 in F.No.DCIT-1(1)/AAACB8316K/A.Y.2015-16/2021-22, whereby the application preferred by the petitioner under Section 154 of the Income Tax Act, 1961 (Act), was dismissed by assigning certain reasons.

2. The pivotal question before us is that when an assessee erroneously or as a mistake of law, admittedly paid tax on more than one occasion, and claims its refund under Section 154 of the Act, whether such application can be rejected by holding that such mistake does not fall within the ambit of 'error apparent on the face of record'.

Background facts:

3. The admitted facts between the parties are that the petitioner filed his returns for Assessment Year 2015-16. In the said return,

he has paid tax relating to ‘retention money’, which money was actually paid to him by the Government in the Assessment Years 2016-17, 2017-18 and 2018-19. The petitioner as an oversight again paid the tax on that ‘retention money’ in the Assessment Years 2016-17, 2017-18 and 2018-19. After having realised that he has paid tax twice, he preferred an application under Section 154 of the Act, for rectification of mistake before respondent No.2. The said application came to be dismissed by order dated 23.12.2021.

Contention of the petitioner:

4. Criticising the impugned order, the learned counsel for the petitioner submits that Article 265 of the Constitution of India, in no uncertain terms makes it clear that tax cannot be levied or collected beyond authority of law. The law permits levy of tax once on ‘retention money’, which has been admittedly collected in the year 2015-16. The subsequent payment of the tax for the years 2016-17, 2017-18 and 2018-19 was inconsonance with law because the income from retention money was relating to those years. The previous payment of tax in the year 2015-16 was by mistake and said amount should have been refunded by invoking power under Section 154 of the Act. Respondent No.2 committed an error in

rejecting the same. In support of this submission, he placed reliance on the judgments of Bombay High Court in the case of **National Rayon Corporation Ltd vs. G.R.Bahmani, Income Tax Officer, Companies Circle I (3), Bombay**[1] and Delhi High Court in the case of **Vijay Gupta vs. Commissioner of Income-Tax**[2]. It is argued that although, the judgment of the Delhi High Court deals with scope and ambit of Section 264 of the Act, it is based on the fundamental principle that a person cannot be subjected to double taxation or imposition of tax beyond authority of law. When the levy/deposit of tax is beyond authority of law, delay and technicalities etc., cannot strangulate the assessee and the excess amount so paid must be refunded.

Stand of Revenue:

5. Sri Vijhay K Punna, the learned counsel for the respondents opposed prayer of the petitioner and placed reliance on the judgment passed by Division Bench of this Court in the case of **MS Educational and Welfare Trust vs. Assistant Commissioner of Income Tax**[3]. He raised two fold submissions. The *first* is that the error pointed out by the petitioner does not fall within the ambit of

[1] (1965) 56 ITR 114 (Bom)
[2] (2016) 386 ITR 643 (Del)
[3] (2022) 444 ITR 310

Section 154 of the Act. *Secondly*, the petitioner has a statutory remedy of appeal, where he can raise all these points.

6. No other points were pressed by learned counsel for both the parties.

7. We have heard the parties at length and perused the record.

Findings:-

8. Before dealing with rival contentions, it is apt to refer to Article 265 of the Constitution of India, which reads as under:

> "**Article 265: Taxes not to be imposed save by authority of law:-** No tax shall be levied or collected except by authority of law.

9. During the course of hearing, the learned counsel for parties fairly submitted that the Bombay High Court in case of **National Rayon Corporation Ltd** (cited 1st supra) was dealing with Section 35 of the Income Tax Act, 1922, which is *pari materia* to Section 154 of the Act. For ready reference, relevant portions of both Sections are reproduced below:

Section 35 of Income Tax Act, 1922	Section 154 of Income Tax Act, 1961
35. Rectification of mistake.—	**154. Rectification of mistake.—**

(1) The Commissioner or Appellate Assistant Commissioner may, at any time within four years from the date of any order passed by him in appeal or, in the case of the Commissioner, in revision under section 33A and the Income-tax Officer may, at any time within four years from the date of any assessment order or refund order passed by him on his own motion **rectify any mistake apparent from the record of the appeal**, revision, assessment or refund as the case may be, and shall within the like period rectify any such mistake which has been brought to his notice by an assessee:	(1) With a view to **rectifying any mistake apparent from the record** an income-tax authority referred to in section 116 may,— (a) amend any order passed by it under the provisions of this Act; (b) amend any intimation or deemed intimation under sub-section (1) of section 143; (c) amend any intimation under sub-section (1) of section 200A; (d) amend any intimation under sub-section (1) of section 206CB.

10. The Madras High Court in the case of **Commissioner of Income-Tax, Madras-1 vs. Madhurai Knitting Company**[4], held that Section 35 of the Income Tax Act, 1922 and Section 154 of the Act are *pari materia.*

11. The Bombay High Court in **National Rayon Corporation Ltd** (cited 1st supra) at para No.8 opined as follows:

> "8. The *ratio decidendi* of these authorities, in our opinion, is that the jurisdiction of the Income-tax Officer to make an order of rectification under Section 35 of the Act depends upon the existence of a mistake apparent from the record. That mistake need not be a clerical or arithmetical mistake. **It may be a mistake of fact as well as a mistake of law**. A mistake becomes a mistake apparent from the record when it is a glaring,

[4] (1976) 104 ITR 36

> obvious or self-evident mistake. However, it is not possible to define precisely or exhaustively what is an error apparent from the record. But it can be said with certainty that a mistake which has to be discovered by a long drawn process of reasoning or examining arguments on points where there may conceivably be two opinions, it cannot be said to be a mistake or error which is apparent from the record. ..."

(Emphasis Supplied)

12. A plain reading of the above judgment makes it clear that there cannot be any precise or exhaustive definition of 'error apparent on the face of record'. However, it is clear that the errors of fact and errors of law both can form basis of 'error apparent on the face of record'. In no uncertain terms, it was made clear that no elaborate arguments should be required to establish an error apparent on the face of record.

13. In this backdrop, it is to be seen whether the error pointed out by the learned counsel for petitioner falls within the four corners of Section 154 of the Act and can be called as an error apparent on the face of record.

14. Interestingly, respondent No.2 has assigned the following reasons while rejecting application filed by the petitioner at para No. 3 of the impugned order dated 23.12.2021:

"3. The application filed by the assessee verified. The request for rectification u/s. 154 of the I.T.Act, 1961 filed by the assessee is not considered on the following grounds:

a) **From the records, it is seen that the assessee has offered excess retention money in A.Y.2015-16 which was offered in subsequent years also.** If such is the case, though the assessee has enough time to correct these omissions by way of filing revised return, the assessee has not availed this remedy.

b) The request made by the assessee for rectification is beyond the scope of passing modification order u/s. 154 of the Income Tax Act, 1961.

c) In year under consideration, only intimation u/s. 143(1) is passed by CPC. No order u/s. 143(3) is passed for the said year under consideration.

d) The assessee filed the return of income for A.Y.2015-16 on 30.11.2015. The Assessee had the scope for filing the return of income u/s. 139(4) of the Income Tax Act, 1961 and claimed the requisite reduction of income.

e) The request made by assessee for modification u/s.154 of the Act, is not mistake apparent from record. Hence, beyond the scope of Sec. 154 of the Income Tax Act, 1961.

f) Further, it is seen that the assessee had also not made any claim in this regard during the course of assessment proceedings before the Assessing Officer for A.Y. 2016-17 and 2017-18.

g) The request made by the assessee for rectification is not an arithmetic mistake."

(Emphasis Supplied)

15. The opening sentence of aforesaid Clause (a) reads *"From the records, it is seen that the assessee has offered excess retention money in A.Y.2015-16, which was offered in subsequent years also."*

This sentence makes it clear like noon day that (i) the authority has perused the record and (ii) on the basis of record, he gave a finding that assessee has offered tax on 'excess' retention money. Thus, no elaborate arguments are needed to establish the error as respondent No.2 himself found the same from the record about the payment of tax in excess on the 'retention money'.

16. The Delhi High Court in the case of **Vijay Gupta** was (cited 2nd supra), although dealing with ambit and scope of Section 264 of the Act, based its findings on the principle following from Article 265 of the Constitution of India and opined that when it is not in dispute that an amount of tax is recovered beyond the entitlement, technicalities cannot create a road block for the assessee. Thus, as rightly pointed out by the learned counsel for the petitioner, the fundamental reason for interference is founded upon Article 265 of the Constitution of India. If, it could be established with accuracy and precision that amount of tax is paid beyond permissible limit, it falls within the ambit of error apparent on the face of record. The only caveat, for that purpose is that no long drawn argument should be required to establish the error and such error should be clear, apparent and palpable.

17. We find support in our view from the judgments of Hon'ble Supreme Court and different High Courts. It is apposite to go through the legal journey:

a) The Apex Court examined the 'levy' and 'retention' of excise duty on the touchstone of Article 265 of Constitution and poignantly held in **Mafatlal Industries Limited vs. Union of India (1997) 5 SCC 536** as follows:

> "278. In conclusion, I hold that the Government is permitted to levy and retain only that much of excise duty which can be lawfully levied and collected under the Central Excise Act read with the Central Excise Tariff Act, 1985 and the Central Excise Rules and various notifications issued from time to time. Anything collected beyond this is unlawful and cannot be retained by the Government under any pretext. The illegal levy and collection of duty violates not only the Central Excise Act and the Rules but also offends Article 265 of the Constitution of India."

b) In the case of **CIT vs. Shelly Products [2003] 261 ITR 367 (SC)**, the Hon'ble Supreme Court ruled that if an assessee, due to error, inadvertence, or because of lack of awareness, includes an amount in their income which is exempt from income tax or not considered as income under the law, they may inform the Assessing Officer. If satisfied, the Assessing officer may provide necessary relief and refund any excess tax paid.

c) Similarly in **CIT vs. Bharat General Reinsurance Co. Ltd. (1971) 81 ITR 303 (Delhi)**, the Delhi High Court opined that mere inclusion of income in a tax return for a specific year erroneously, does not grant the tax department jurisdiction to tax that income for that year if it legally does not belong to it.

d) In **Balmukund Acharya vs. Deputy CIT (2009) 310 ITR 310 (Bom)** the Bombay High Court affirmed that tax collection must adhere strictly to the provisions of the law. If an assessee is over-assessed due to a mistake, misconception, or lack of proper guidance, authorities under the law are obligated to assist him and ensure that only due taxes are collected.

e) In **Nirmala L. Mehta vs. A. Balasubramaniam, CIT (2004) 269 ITR 1 (Bom)**, the Bombay High Court emphasized that no 'estoppel' can arise against the statute. Article 265 of the Constitution of India expressly lays down that taxes can only be levied or collected through the authority of law. Hence, 'acquiescence' cannot deprive a party of rightful relief when taxes are levied or collected without legal authority.

f) A similar issue was addressed by the Jammu & Kashmir High Court in **Smt. Sneh Lata Jain vs. CIT [2004] 192 CTR (J&K) 50**, wherein, a return of income was filed by an assessee without claiming exemption under Section 54F of the Act and the same was processed under Section 143(1) of the Act. Upon noticing the error, the assessee filed a revision petition under Section 264 of the Act. The Commissioner rejected the petition, contending that since a return filed under Section 139(1) of the Act was accepted, revisional powers couldn't be invoked for claims not made in the return. The assessee then filed a writ petition challenging the order of the Commissioner. It was thereby held by the High Court as under:

> " Though the assessing authority was not aware of the purchase of the property by the petitioner and proceeded on the basis of the admitted facts disclosed in the return. However, the revisional authority could not be oblivious of its duty to accept the contention of the assessee when the facts were brought to its notice about the capital gain being not chargeable to tax under law. What to say of its duty to advice the assessee the revisional authority rejected the contention of the petitioner only on technical grounds. When the substantive law confers a benefit on the assessee under a statute, it cannot be taken away by the adjudicatory authority on mere technicalities. It is settled proposition of law that no tax can be levied or recovered without authority of law. Article 265 of the Constitution of India and Section 114 of the State Constitution imposes an embargo on imposition and collection of tax if the same is without authority of law. Admittedly, on the basis of facts disclosed before the revisional authorities and this Court, the petitioner is not liable to tax on the capital gain. Once it is found that the petitioner has no tax liability, the respondents cannot be permitted to levy the tax and collect

> the same in contravention to Article 265 of the Constitution of India, which provides a constitutional safeguard on levy and collection of tax. It is true that this Court is not to act as Court of appeal while exercising the writ jurisdiction, but at the same time where the admitted facts disclosed non-exercise of jurisdiction by an adjudicatory authority and a citizen is subjected to tax not payable by him, interference by this Court is warranted. The respondent No. 2 is directed to reassess the taxable income of the petitioner, by taking into consideration the benefit available to her under Section 54F of the Income-tax Act and pass appropriate order."

(Emphasis Supplied)

18. So far, the question to relegate the petitioner to avail remedy of appeal is concerned, suffice it to note that in this case, there exists no disputed question of fact. The only question that needs determination relates to interpretation and scope of Section 154 of the Act. In this backdrop, no useful purpose would be served in relegating the petitioner to avail alternative remedy of appeal. In this regard, it is apt to refer to the decision of the Hon'ble Supreme Court in the case of **Godrej Sara Lee Ltd vs. Excise and Taxation Officer-cum-Assessing Authority**[5], wherein at para No.8, it is held as follows:

> "8. That apart, we may also usefully refer to the decisions of this Court reported in (1977) 2 SCC 724 (*State of Uttar Pradesh* v. *Indian Hume Pipe Co. Ltd.*) and (2000) 10 SCC 482 (*Union of India* v. *State of Haryana*). What appears on a plain reading of the former decision is that whether a certain item falls within an entry in a sales tax statute, raises a pure question of law and if investigation into facts is unnecessary, the high court

[5] 2023 SCC OnLine SC 95

> could entertain a writ petition in its discretion even though the alternative remedy was not availed of; and, unless exercise of discretion is shown to be unreasonable or perverse, this Court would not interfere. In the latter decision, this Court found the issue raised by the appellant to be pristinely legal requiring determination by the high court without putting the appellant through the mill of statutory appeals in the hierarchy. **What follows from the said decisions is that where the controversy is a purely legal one and it does not involve disputed questions of fact but only questions of law, then it should be decided by the high court instead of dismissing the writ petition on the ground of an alternative remedy being available."**

(Emphasis Supplied)

19. In the factual backdrop of present case, where singular necessary fact was admitted one, we do not see any reason to relgate the petitioner to prefer appeal.

20. In view of forgoing analysis, in our judgment, respondent No.2 has erred in holding that the error shown above does not fall within the ambit of 'error apparent on the face of record' and consequently, cannot be corrected under Section 154 of the Act. The view taken by the learned respondent No.2 is hyper technical in nature and runs contrary to the scheme flowing from Article 265 of the Constitution of India.

21. So far the judgment of Division Bench of this Court in the case of **MS Educational and Welfare Trust** (cited 3rd supra) is

concerned, it is noteworthy that this Court opined that the power of rectification of an order of assessment under Section 154 of the Act lies within a very narrow compass. It was clearly held that the order to be rectified must be an order which reflects 'error apparent on the face of record'. Since we have held that the error in the instant case is indeed of that character, the said judgment will not improve the case of the respondents.

22. Consequently, the Writ Petition stands **allowed** and the impugned order dated 23.12.2021 is set aside. Respondent No.2 is directed to undertake exercise of return of excess tax on 'retention money' and pass appropriate order and return the requisite tax money to the petitioner within a period of 60 days from the date of production of copy of this order.

There shall be no order as to costs. Miscellaneous applications, if any, pending shall stand closed.

SUJOY PAUL, J

N.TUKARAMJI, J

Date: 25.04.2024
GVR