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AO couldn't pass rectification order of enhancing income without providing hearing opportunity to assessee

March 16, 2018 | [2018] 91 taxmann.com 184 (Agra - Trib.)

IT: Section 154 bars any enhancement being made sans prior notice and opportunity of hearing to assessee

IT: When assessee had pleaded before Assessing Officer that agricultural activity was carried out on a land but there was no proof brought on record to prove any such alleged agricultural activity, provisions of section 2(14) would not apply

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[2018] 91 taxmann.com 184 (Agra - Trib.)

IN THE ITAT AGRA BENCH 'SMC'

Gajendra Nath Chhoker

v.

Income Tax Officer, (Tech) Gwalior*

A. D. JAIN, JUDICIAL MEMBER
IT APPEAL NOS. 105 AND 125 (AGRA.) OF 2016
[ASSESSMENT YEAR 2007-08]
NOVEMBER 21, 2017

I. Section 154, read with section 45, of the Income-tax Act, 1961 - Rectification of mistakes - Apparent from record (Capital gains) - Assessment year 2007-08 - Whether section 154 bars any enhancement being made sans prior notice and opportunity of hearing to assessee - Held, yes - Assessee had filed an application under section 154, contending that assessment order contained some mistakes in calculation of capital gains - Assessing Officer found said mistakes to be correct - However, he noticed that in computation of capital gains, as done by him, there were further mistakes - He corrected those mistakes and enhanced income without allowing any opportunity of hearing to assessee - Whether said order was not sustainable in law - Held, yes [Para 13] [In favour of assessee]

II. Section 2(14) of the Income-tax Act, 1961 - Capital gains - Capital asset (Agricultural land) - Assessment year 2007-08 - Lands were sold by assessee, but no capital gains tax was paid - Assessing observed that though land had been described as agricultural in nature but no agricultural activity had been carried out thereat in last 3 to 4 years, and that lands were situated within 8 kilometers of municipal limits of Municipal Committee, Indore and he computed short term capital gains - No proof was brought on record to prove any such alleged agricultural activity - Further, there was no evidence on record regarding lands being situated beyond 8 kilometers from Municipal Committee, Indore and so, they were not exempt under section 2(14) - Whether, on facts, provisions of section 2(14) would not apply - Held, yes [Para 6] [In favour of revenue]

Interpretation of statute : Rule of audi alterem partem

FACTS - I

- The assessee had filed an application under section 154, contending that the assessment order passed contained certain mistakes in calculation of capital gains.
- The Assessing Officer found the said mistake to be correct. However, he noticed that in the computation of capital gains, as done by him, there were further mistakes. He corrected these mistakes and enhanced income.
- Before the Commissioner (Appeals), the assessee contended that the Assessing Officer had enhanced the income without allowing any opportunity to the assessee, which was not sustainable in law.
- The Commissioner (Appeals) observed that mistake as pointed out by assessee was such which required re-computation in entirety and if in the process of rectification being done as requested by the assessee, in ultimate analysis income got enhanced, he could not be heard to say that opportunity was not made available.
- On appeal:

HELD - I

- The above observations of the Commissioner (Appeals) are found to be clearly incorrect. The assessee cannot, through enhancement without notice, be reduced to a position worse than that he was in when he filed the application for rectification. [Para 16]
- Thus, section 154(3) provides, in very clear and unambiguous terms, that an amendment which has the effect of enhancing an assessment shall not be made under section 154, unless the Authority concerned has given notice to the assessee of its intention to do so and has allowed the assessee a reasonable opportunity of being heard. [Para 17]
- Once the provision itself is clearly worded, the Commissioner (Appeals) has evidently erred in going behind the same to seek the intention behind it. There is no scope for this in view of the unambiguous statutory mandate of the section. The section 154 bars any enhancement being made sans prior notice and opportunity of hearing to the assessee. The legislature chooses its words with utmost care. The direct words employed in the section permit no other intendment to be read into it. The use of the word 'shall' makes the compliance of the section statutorily mandatory. The Commissioner (Appeals) has erred in terming the assessee's legitimate grievance of non-compliance with the section to be a 'too far fetched' interpretation of the provision, which `does not appear to be logical'. As noted, the clear mandate of the section leaves no room for any logic to be supplemented. The provision is entirely in conformity with the natural justice principle of *audi alterem partem*, *i.e.,* opportunity of hearing must be provided to the affected/other party. [Para 18]
- The Commissioner (Appeals) states that the mistake pointed out by the assessee requires re-computation in its entirety and if in the process of the rectification requested by the assessee being done, the assessee's income would get enhanced, he cannot object that no opportunity was provided to him. This cannot be countenanced in law. [Para 19]
- As per the Commissioner (Appeals), the intention of law as mandated in section 154(3) is regarding a rectification being done by the Assessing Officer *suo motu* and not at the assessee's request. This observation, again, is without any basis. Section 154(3) contains no such differentiation. The operative expression as used, envisaged and dealt with therein is 'an amendment', without any discrimination whether it is carried out by the Assessing Officer of

his own accord, or on the asking of the assessee. The difference made out by the Commissioner (Appeals) is entirely imaginary, and as such, unsustainable. The principle of natural justice, has enshrined in section 154(3) cannot be flouted by any such non-existent, much less unintelligible classification. [Para 20]

- The Commissioner (Appeals) has also observed that the substance of the rectification application was that the capital gains had been erroneously computed. According to the Commissioner (Appeals), since this was agreed to by the Assessing Officer, the assessee cannot grudge that if ultimately the income would get enhanced, still he ought to be heard. This, once more, is without any reasoning. The assessee had filed the rectification application seeking relief. It was not a self-inculpatory application. The assessee was not inviting enhancement of his income thereby. Thus, if an enhancement was being contemplated by the Assessing Officer, obviously, that could not be done without notice, taking the assessee by surprise and causing prejudice to the assessee. [Para 21]
- In view of the above, the grievance of the assessee was found to be justified. The order of the Commissioner (Appeals) is reversed. [Para 22]

CASES REFERRED TO

CIT v. *Pankaj Gupta* [1991] 55 Taxman 341/188 ITR 184 (All.) (para 18), *M. Chockalingam & M. Meyyapan* v. *CIT* [1963] 48 ITR 34 (SC) (para 19), *Y. Narayana Chetty* v. *ITO* [1959] 35 ITR 388 (SC) (para 19), *Devendra Prakash* v. *ITO* [1963] 47 ITR 501 (All.) (para 19) and *CIT* v. *Gangaram Chapolia & Co*. [1990] 53 Taxman 183/[1991] 187 ITR 594 (Ori.) (para 19).

Rajendra Sharma, AR *for the Appellant.* **Waseem Arshad**, Sr. DR *for the Respondent.*

ORDER

I.T.A No. 105/Agra/2016

1. This is assessee's appeal for assessment year 2007-08, raising the following grounds:

'1. On the facts and in the circumstances of the case the learned CIT (Appeals) was not justified in not accepting the (additional evidence) regarding location of agricultural land beyond 8 km. as per certificate dated 08/06/2011 issued by Additional Tehsildar Indore and thereby treating the agricultural land as a capital asset and thereby upholding AO's order determining the short term capital gains of Rs.18,43,980/-. Addition on account of above capital gains may be deleted and appropriate relief allowed.

2. The learned CIT(A) further erred in law and on facts in not considering the alternative claim for exemption of capital gains u/s 54F of the Income Tax Act. Necessary direction may kindly be issued for entertain the alternative claim of exemption u/s 54F.

3. That the learned CIT(A) further erred in not considering and adjudication upon Ground No. 8 of the appeal filed u/s 246A of the IT Act which is reproduced below;—

"That in the alternatively, the assessing authority erred in making addition of Rs. 12,32,390/- under addition No.3 of the assessment over instead of Rs. 4,28,805/- as discussed in the assessment order. The assessing authority by error made addition of the purchase value of the land of Rs. 12,32,390/- instead of the gains of Rs. 4,28,805/- in the computation. The addition of Rs. 801585/- thus made by error made by the assessing authority in the computation is unwarranted and unjustified."'

2. Apropos Ground No. 1, the AO observed that lands were sold by the assessee, but no capital gains tax was paid; that though the land had been described as agricultural in nature, no agricultural activity had been carried out thereat in the last years 2005-06 to 2007-08; and that the

lands were situated within 8 kilometers of the municipal limits of Municipal Committee, Indore. The assessee stated that agricultural activities had been carried out on the lands by his caretaker, but since meager income had resulted, the same had not been shown; and that the lands were beyond 8 kilometers from the municipal limits of Municipal Committee, Indore. The AO held that there was no evidence of either agricultural activity, or the lands being situated within 8 kilometers of the Municipal Committee, Indore.

3. Before the Ld. CIT(A), the assessee produced Certificate dated 08.06.2011 from the Additional Tehsildar Indore, that the lands of the assessee were approximately 8.5 kilometers from Municipal Committee Indore. The Ld. CIT(A) rejected this Certificate, observing that the same had not been produced before the AO and no request for additional evidence had been made. The Ld. CIT(A) held that there was no evidence on record regarding the lands being situated beyond 8 kilometers from the Municipal Committee, Indore and so, they were not exempt u/s 2(14) of the IT Act. The Ld. CIT(A) held that the assessee had not even proved that the lands were agricultural lands.

4. The assessee now seeks admission of the aforesaid additional evidence. He states that it was due to inadvertence that it was not claimed as additional evidence before the Ld. CIT(A).

5. The Ld. DR has placed reliance on the impugned order.

6. I have heard the parties and have perused the material on record. For exemption u/s 2(15) of the IT Act, the land needs first to be agricultural land. The assessee has not proved his lands to be agricultural lands. The only plea taken before the AO was that agricultural activity was carried out, but since meager income resulted, it was not shown. There is no proof brought on record to prove any such alleged agricultural activity. So, it is not proved that the lands are agricultural in nature, even though they have been described as consisting in khasra numbers. Once the lands are not agricultural, the provisions of section 2(14) of the IT Act are not triggered and so, the issue of allowing additional evidence to show that they are situated beyond 8 kilometers from the Municipal Committee, Indore, is infructuous. Accordingly, the Ground No. 1 is rejected.

7. Ground No. 2 is stated as not pressed. Rejected as not pressed.

8. As per Ground No.3, the ld. CIT(A) has erred in not considering, much less adjudicating Ground No. 8 raised before me. This Ground No.8 raised before the ld. CIT(A) by the assessee reads as follows:

> "8. That in the alternatively, the assessing authority erred in making addition of Rs. 12,32,390/- under addition No.03 of the assessment over instead of 4,28,805/- as discussed in the Assessment order. The assessing authority by error made addition of the purchase value of the land of Rs. 12,32,390/- instead of the gains of Rs.4,28,805/- in the computation. The addition of Rs.8,03,585/- thus made by error made by the assessing authority in the computation is unwarranted and, unjustified."

9. A perusal of the impugned order shows that indeed, though this Ground was raised by the assessee before the ld. CIT(A), the same has not been decided. Accordingly, this issue is remitted to the file of the Ld. CIT(A), to be decided in accordance with law on affording adequate opportunity of hearing to the assessee. Ordered, accordingly.

I.T.A No. 125/Agra/2016

10. In this appeal for A.Y. 2007-08, which emanates from an order passed u/s 154 of the IT Act by the AO, the following grounds have been raised:

> '1. The CIT (A) has erred in law and in facts in confirming the order of assessing authority passed u/s 154 of the Act.
>
> 2. That the learned CIT (A) has erred in law and in facts in holding that no opportunity

was necessary as stipulated in section 154(3) of the Act.

3. Section 154(3) lays down. "An amendment which has the effect of enhancing an assessment or increasing the liability of the assessee ... shall be made under this section unless the authority concerned has given notice to the assessee of his intention so to do and has allowed the assessee a reasonable opportunity of being heard. " The order in the section without any notice or opportunity to the appellant, is therefore bad in law and is illegal.

4. In the alternative;

   That the order of assessing authority u/s 154 is not within the scope of section. Reopening the whole assessment, recompilation of the whole income, changing the method and basis of computation, is therefore illegal and bad in law.

5. Further-more, there is no basis of the figures a purchases and sales adopted by the assessing authority in recomputing the income.'

11. The Ld. Counsel for the assessee has contended, as in the Statement of Facts filed before me, that:

> "There was mistake in the computation of the income, the appellant filed application u/s 154 on 6/10/2010. The mistake was found to be correct by the assessing authority. The assessing authority, while correcting the mistake, reopened the whole assessment and recomputed the income, changing the whole process of computation, without affording any opportunity the appellant as mandated u/s 154(3). In appeal the CIT(A) confirmed the order of the assessing authority, holding that no opportunity as stipulated u/s 154(3) was necessary and confirmed the increase in computation of income and tax. "

12. The Ld. DR has placed strong reliance on the impugned order.

13. I have heard the parties and have perused the material on record. Against the assessment order dated 24.12.2009, the assessee had filed an application dated 06.01.2010 u/s 154 of the Act, contending that the assessment order so passed contained certain mistakes in calculation of capital gains. It was contended, *inter alia*, while computing income, as against the figure of capital gains of Rs.4,26,805/-, the figure of Rs. 12,32,390/- had erroneously been taken. The AO found the said mistake to be correct. However, the AO noticed that in the computation of capital gains, as done by him, there were further mistakes. In the order dated 07.01.2010, passed under section 143(3)/154 of the Act, the AO corrected these mistakes.

14. Before the Ld. CIT(A), the assessee contended that the AO had enhanced the income without allowing the any opportunity to the assessee, which was not sustainable in law.

15. In the impugned order, the Ld. CIT(A) has, *inter alia*, observed as follows:

> "The arguments of the appellant have been gone through carefully. Insofar as argument of the appellant that opportunity as provided u/s 154(3) was not made available to him is concerned, I am afraid whether it has any merits. As a matter of fact the mistake as pointed out by the appellant was such which required re-computation in entirety and if in the process of rectification being done requested by the appellant in ultimate analysis income gets enhanced, he cannot be heard to say that opportunity was not made available. Intention, of the law as mandated u/s 154(3) is in the context of the situation where the rectification is being carried out by the AO at his own motion and not in the context when rectification is being done on the motion of the appellant. Substance of the rectification application was that the capital gains had been erroneously computed which was agreed to by the AO and when it was so, the appellant cannot be heard to argue and submit that if in the ultimate results the income was getting enhanced then also he needed to be heard."

16. The above observations of the Ld. CIT(A) are found to be clearly incorrect. The assessee cannot, through enhancement without notice, be reduced to a position worse than that he was in when he filed the application for rectification. Section 154(3) of the Act reads as follows:

> "An amendment which has the effect of enhancing an assessment.... or increasing the liability of the assessee ... shall be made under this section unless the authority concerned has given notice to the assessee of his intention so to do and has allowed the assessee a reasonable opportunity of being heard. "

17. Thus, section 154(3) provides, in very clear and unambiguous terms, that an amendment which has the effect of enhancing an assessment shall not be made u/s 154 of the Act, unless the Authority concerned as given notice to the assessee of its intention to do so and has allowed the assessee a reasonable opportunity of being heard.

18. Once the provision itself is clearly worded, the ld. CIT(A) has evidently erred in going behind the same to seek the intention behind it. There is no scope for this in view of the unambiguous statutory mandate of the section. The section bars any enhancement being made sans prior notice and opportunity of hearing to the assessee. The legislature chooses its words with utmost care. The direct words employed in the section permit no other intendment to be read into it. The use of the word 'shall' makes the compliance of the section statutorily mandatory. The ld. CIT(A) has erred in terming the assessee's legitimate grievance of non-compliance with the section to be a 'too far fetched' interpretation of the provision, which 'does not appear to be logical'. As noted, the clear mandate of the section leaves no room for any logic to be supplemented. The provision is entirely in conformity with the natural justice principle of *audi alterem partem, i.e.*, opportunity of hearing needs must be provided to the affected/other party. *CIT* v. *Pankaj Gupta* [1991] 55 Taxman 341/188 ITR 184 (All.), handed down by the Hon'ble jurisdictional High Court holds so.

19. The CIT(A) states that the mistake pointed out by the assessee requires re-computation in its entirety and if in the process of the rectification requested by the assessee being done, the assessee's income would get enhanced, he cannot object that no opportunity was provided to him. This cannot be countenanced in law. As per *M. Chockalingam & M. Meyyappan* v. *CIT* [1963] 48 ITR 34 (SC), in case the proposed order of rectification is to prejudice the assessee, a notice must be sent to him, to give him a reasonable opportunity of being heard. As held in '*Y. Narayana Chetty* v. *ITO* [1959] 35 ITR 388 (SC), in such cases, the issue of notice for rectification is not merely a procedural requirement, but forms a foundation for the exercise of such jurisdiction. *M. Chockalingam & M. Meyyappan's* case (*supra*), amongst a plethora of other judgments, including '*Devendra Prakash* v. *ITO* [1963] 47 ITR 501 (All.), also holds, as is the clear stipulation of section 154(3), *inter alia*, that where a rectification order, passed without giving notice and opportunity to the assessee, enhances the total income, the order is bad, and that the first proviso to section 35(1) of the IT Act, 1922, corresponding to section 154(3) of the extant Act applies wherever the effect of the rectification order is to touch the pocket of the assessee *CIT* v. *Gangaram Chapolia & Co*. [1990] 53 Taxman 183/[1991] 187 ITR 594 (Ori.) holds that an order passed without following the principle of natural justice is a nullity.

20. As per the Ld. CIT(A), the intention of law as mandated in section 154(3) is regarding a rectification being done by the AO *suo motu* and not at the assessee's request. This observation, again, is without any basis. Section 154(3) contains no such differentiation. The operative expression as used, envisaged and dealt with therein is 'an amendment', without any discrimination whether it is carried out by the AO of his own accord, or on the asking of the assessee. The difference made out by the Ld. CIT(A) is entirely imaginary, and as such, unsustainable. The principle of natural justice, has enshrined in section 154(3) cannot be flouted by any such non-existent, much less unintelligible classification.

21. The Ld. CIT(A) has also observed that the substance of the rectification application was that the capital gains had been erroneously computed. According to the Ld. CIT(A), since this was agreed to by the AO, the assessee cannot grudge that if ultimately the income would get

enhanced, still he ought to be heard. This, once more, is without any reasoning. The assessee had filed the rectification application seeking relief. It was not a self-inculpatory application. The assessee was not inviting enhancement of his income thereby. Thus, if an enhancement was being contemplated by the AO, obviously, that could not be done without notice, taking the assessee by surprise and causing prejudice to the assessee.

22. In view of the above, the grievance of the assessee is found to be justified. It is accepted as such, the order of the Ld. CIT(A) is reversed. The order dated 7.01.2010 passed by the AO under section 143(3)/154 of the Act is quashed.

23. In the result, ITA No. 105/Agra/2016 is partly allowed and ITA No. 125/Agra/2016 is allowed.

pooja

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*Partly in favour of assessee.