**IT: Where Assessing Officer failed to apply binding precedent that blending of tea leaves was not manufacturing or production activity and had wrongly allowed deduction under section 80-I, same being an error apparent on face of record, assessment order was to be rectified**

**[2019] 104 taxmann.com 215 (Calcutta)**

**HIGH COURT OF CALCUTTA**

**Hindustan Lever Ltd.**

***v.***

**Joint Commissioner of Income-tax, Special Range-2, Calcutta***

DEBANGSU BASAK, J.
WRIT PETITION NO. 1096 OF 2000
JANUARY 29, 2019

**Section 80-IA, read with section 154, of the Income-tax Act, 1961 - Deductions - Profits and gains from industrial undertakings, etc., after certain dates (Manufacture/production) - Assessment years 1991-92 to 1993-94 - Assessee-company set up units at a tea garden for blending of tea leaves - Assessing Officer allowed assessee's claim of deduction under section 80-I failing to notice ratio laid down in Apeejay (P.) Ltd. v. CIT [1994] 77 Taxman 208/206 ITR 367 (Cal.), which stipulated that blending of tea leaves does not amount to manufacturing or production - Whether there were errors apparent on face of record in respect of assessment orders and thus, invoking section 154, notice was correctly issued to rectify same - Held, yes [Para 8] [In favour of revenue]**

## FACTS

- The assessee-company set up new units at a tea garden for blending of tea and claimed deduction under section 80HH and 80-I/80-IA.
- The Assessing Officer allowed the assessee's claim under section 80-HH and 80-I/80-IA and made the assessment order.
- The revenue authorities invoked the provisions of section 154 and issued show cause notices in respect of the relevant assessment years on the strength of the ratio laid down in *Apeejay (P.) Ltd.* v. *CIT* [1994] 77 Taxman 208/206 ITR 367 (Cal.) in which it was held that the blending of different kinds of tea does not constitute manufacture or production of articles or things within the meaning of section 80-J. Hence, the revenue authorities opined that there were errors apparent on the face of the record in respect of the assessment orders in question.
- The revenue authority issued notice under section 154 for rectification of the impugned assessment order.

## HELD

- In the instant case, the assessment orders were passed subsequent to the law being settled in *Apeejay (P.) Ltd.'s* case (*supra*). The assessment orders are not prior to

*Apeejay (P.) Ltd.'s* case (*supra*) so as to attract the ratio of *Geo Miller & Co. Ltd.* v. *Dy. CIT* [2003] 262 ITR 237/[2004] 134 Taxman 552 (Cal.). In *CIT* v. *Tara Agencies* [2007] 162 Taxman 337/292 ITR 444 (SC) it was held in *Apeejay (P.) Ltd.* (*supra*) that the processing of tea would fall short of either manufacturing or production.

- On the other hand, *CIT* v. *Purtabpore Co. Ltd.* [1986] 159 ITR 362/26 Taxman 386 (Cal.) has held that a rectification under section 154 is permissible in order to bring the order of assessment in terms of an authoritative pronouncement of the Court. The Income-tax authorities are preparing to bring the orders of assessment in time in accordance with the ratio of *Apeejay (P.) Ltd.* (*supra*) through the process initiated by the impugned show cause notices. They are entitled to do so. [Para 7]
- Section 154 can be invoked to correct an error apparent on the face of the record. An order of assessment must be in tune with the law laid down by a binding precedent. The subject orders of assessment not being in terms of the ratio of *Apeejay* (*P.*) *Ltd.'s* case (*supra*) contains errors. An error in an order not in consonance with a binding precedent is an error apparent on the face of the record. [Para 8]
- The writ petition is to be, accordingly, dismissed. [Para 9]

## CASE REVIEW

*Apeejay (P.) Ltd.* v. *CIT* [1994] 206 ITR 367/77 Taxman 208 (Cal.) (para 8) and *CIT* v. *Purtabpore Co. Ltd.* [1986] 159 ITR 362/26 Taxman 386 (Cal.) (para 7) *followed.*

## CASES REFERRED TO

*TATA Tea Ltd.* v. *Asstt. CIT* [2010] 189 Taxman 303/[2011] 338 ITR 285 (Ker.) (para 3), *Harbans Lal Malhotra & Sons (P.) Ltd.* v. *ITO* [1972] 83 ITR 848 (Cal.) (para 3), *Income Tax Settlement Commission* v. *Netai Chandra Rarhi & Co.* [2005] 142 Taxman 446 (Cal.) (para 3), *Md. Serajuddin & Bros.* v. *CIT* [2012] 24 taxmann.com 46/210 Taxman 84 (Cal.) (para 3), *Jiyajeerao Cotton Mills Ltd.* v. *ITO* [1981] 130 ITR 710 (Cal.) (para 3), *Geo Miller & Co. Ltd.* v. *Dy. CIT* [2004] 134 Taxman 552/[2003] 262 ITR 237 (Cal.) (para 3), *Appeejay (P.) Ltd.* v. *CIT* [1994] 77 Taxman 208/206 ITR 367 (Cal.) (para 3), *Brooke Bond Lipton India Ltd.* v. *State of Karnataka* [1998] 109 STC 265 (Kar.) (para 3), *CIT* v. *Purtabpore Co. Ltd.* [1986] 26 Taxman 386/159 ITR 362 (Cal.) (para 4), *Indo Asahi Glass Co. Ltd.* v. *ITO* [2002] 122 Taxman 123/254 ITR 210 (SC) (para 4), *CIT* v. *Tara Agencies* [2007] 162 Taxman 337/292 ITR 444 (SC) (para 4) and *CIT* v. *Hindustan Petroleum Corpn. Ltd.* [2017] 396 ITR 696/250 Taxman 1/84 taxmann.com 215 (SC) (para 4).

**J.P. Khaitan**, Sr. Adv. and **Somak Basu**, Adv. *for the Petitioner.* **Vipul Kundalia**, **Ms. Nabonita Karmakar**, **Ms. Hera Nafis** and **Yogesh Vat**, Advs. *for the Respondent.*

## ORDER

**1.** The petitioner has challenged 3 notices, all dated March 21, 2000, issued under Section 154 of the Income Tax Act, 1961 for the assessment years 1991-92, 1992-93 and 1993-94.

**2.** Learned senior advocate appearing for the petitioner has submitted that, the impugned notices are without jurisdiction. According to him, section 154 of the Income Tax Act, 1961 can be invoked only when there is an error apparent on the face of the record. According to him, the assessment orders, in respect of which the impugned notices have been issued, cannot be said to contain any error on the face of the record. In the present case, the assessment for the assessment year 1991-92 was made on March 31, 1994. The assessment for the assessment year 1992-1993 was made on March 31, 1995 and the

assessment in respect of the assessment year 1993-94 was made on March 29, 1996. The impugned notices were issued on March 21, 2000. The petitioner set up new units at the tea garden for the period from 1991 to 1994. The question as to whether blending of tea is production or manufacture is debatable. There are authorities on both sides of the divide. As there was a debate on such a point, it cannot be said that, there is an error apparent on the face of the record requiring invocation of Section 154 of the Act of 1961. He has drawn the attention of the Court to the fact that, the Tribunal has taken a view in its order dated November 30, 1992 that, the assessee was engaged in the manufacturing and production of tea and coffee. An appeal has since been admitted by the Hon'ble High Court at Calcutta. Appeal is admitted on a question of law. Such appeal is pending. Therefore, according to him, the issue still being at large, it does not permit invocation of Section 154 of the Act of 1961.

**3.** Relying upon *TATA Tea Ltd.* v. *Asstt. CIT* [2010] 189 Taxman 303/[2011] 338 ITR 285 (Ker.) learned senior advocate appearing for the petitioner has submitted that, there must be an error apparent on the face of the record for invocation of Section 154 of the Act of 1961. He has relied upon *Harbans Lal Malhotra & Sons (P.) Ltd.* v. *ITO* [1972] 83 ITR 848 (Cal.) and *Income Tax Settlement Commission* v. *Netai Chandra Rarhi Co.* [2005] 142 Taxman 446 (Cal.) and submitted that, Section 154 of the Act of 1961 cannot be invoked when there is a mixed question of law and fact involved. Moreover, when the issue is debatable, the same cannot be invoked. In support of such contention, he has relied upon *Md. Serajuddin & Bros.* v. *CIT* [2012] 24 taxmann.com 46/210 Taxman 84 (Cal.). He submitted that, a judgment of the Supreme Court does not obliterate a debate. In support of such contention, he has relied upon *Jiyajeerao Cotton Mills Ltd.* v. *ITO* [1981] 130 ITR 710 (Cal.). Subsequent exposition of law cannot form basis of a rectification proceedings and in support of such contention he has relied upon *Geo Miller & Co. Ltd.* v. *Dy. CIT* [2004] 134 Taxman 552/[2003] 262 ITR 237 (Cal.). He has submitted that, *Appeejay (P.) Ltd.* v. *CIT* [1994] 77 Taxman 208/206 ITR 367 (Cal.) cannot form the basis of the proceedings under section 154 of the Act of 1961. The judgment and order of *Appeejay (P.) Ltd.* (*supra*) was delivered on September 10, 1991 and the impugned notices were issued on March 21, 2000. In any event, the factual aspects as to whether or not, the petitioner installed new machineries at the units, is required to be looked into. In support of the contention that, blending is a manufacturing activity, learned senior advocate appearing for the petitioner has relied upon (*Brooke Bond Lipton India Ltd.* v. *State of Karnataka*) [1998] 109 STC 265 (Kar.). Relying upon *Geo Miller & Co. Ltd.'s* case (*supra*) learned senior advocate appearing for the petitioner has submitted that, a subsequent judgment does not make the order of assessment a mistake. Therefore, according to him, the impugned notices being without jurisdiction should be quashed.

**4.** Learned advocate appearing for the revenue has submitted that, the writ petition is directed against show cause notices. The show cause notices are dated March 21, 2000. The writ petition was filed on March 27, 2000. The date of hearing of the show cause notices was March 28, 2000. According to him, the petitioner could have replied to the show cause notices and participated in the proceedings emanating out of the show cause notices rather than coming to the writ Court. It cannot be said that, the impugned notices suffers from inherent lack of jurisdiction. *Brooke Bond Lipton India Ltd.* (*supra*) was rendered under a different statute. The judgment of the jurisdictional High Court is binding upon the authorities. The decision rendered by the Calcutta High Court is binding upon the authorities. Therefore there is no infirmity in the issuance of the show cause notices. According to him, there is no debate on any issue. As to what constitutes a debatable issue, he has relied upon *CIT* v. *Purtabpore Co. Ltd.* [1986] 26 Taxman 386 (Cal.). He has submitted that, the basis for invocation of section 154 of the Act of 1961 was *Apeejay (P.) Ltd.* (*supra*). *Apeejay (P.) Ltd.* (*supra*) was rendered on September 10, 1991. The orders of assessment were passed subsequent thereto. The decision of *Apeejay (P.) Ltd.* (*supra*) was binding upon the authorities. The authorities were required to invoke section 154 of the Act of 1961 to correct the error apparent on the face of the record in view of *Apeejay (P.) Ltd.* (*supra*). The orders of assessments should be in conformity with the ratio laid down in *Apeejay (P.) Ltd.* (*supra*). He has relied

upon *Indo Asahi Glass Co. Ltd.* v. *ITO* [2002] 122 Taxman 123/254 ITR 210 (SC) in support of the contention that, the petitioner is required to reply to the show cause notice as the authorities did not lack jurisdiction inherently in issuing the impugned show cause notices. He has relied upon *CIT* v. *Tara Agencies* [2007] 162 Taxman 337/292 ITR 444 (SC)*CIT* v. *Hindustan Petroleum Corpn. Ltd.* [2017] 396 ITR 696/250 Taxman 1/84 taxmann.com 215 (SC) in support of his contentions. He has submitted that, no interference is called for in the present writ petition.

**5.** As noted above, three show cause notices are under challenge in the present writ petition. Courts are slow to interfere with show cause notices. It has to be established that, the show cause notices are patently without jurisdiction or have been issued in abuse of the process of law or with a closed mind for a Court to interfere at the show cause notice stage. Interference by the Court at the show cause notice stage is an exception. If it is contended that, the legal premises upon which the show cause notices have been founded are without any basis, then the same would constitute a jurisdictional fact which should ideally be left to the authority to decide at the first stage. In *Indo Asahi Glass Co. Ltd.* (*supra*) the writ petition against the show cause notice was dismissed by the single judge on the ground that, alternative remedy was available. In appeal, the Division Bench held the same view. The Supreme Court held that, the High Court was right in coming to the conclusion that, it is appropriate for the writ petitioner to file a reply to the show cause notice and take whatever defence is open to it.

**6.** By the impugned show cause notices, the authorities have invoked provisions of section 154 of the Act of 1961 in respect of the relevant assessment years on the strength of the ratio laid down in *Apeejay (P.) Ltd.'s* case (*supra*). It has proposed to withdraw deductions allowed under Section 80 I of the Act of 1961 as the petitioner is not engaged in the manufacture or production of any article at its units. Mixing and blending of tea leaves cannot be considered to be a manufacture or production of any article entitling the petitioner to deduction under section 80 I of the Act of 1961. In the facts of the present case, the assessing officer had allowed claims under section 80 HH and 80 I/80 IA of the Act of 1961 in the relevant assessment orders. *Apeejay (P.) Ltd.'s* case (*supra*) has held that, the blending of different kinds of tea carried on by an assessee does not constitute manufacture or production of articles or things within the meaning of section 80 J of the Act of 1961. The Division Bench of the Calcutta High Court followed *Apeejay (P.) Ltd.'s* case (*supra*)in *Brooke Bond India Ltd.'s* case (*supra*)and held that, the assessee cannot be held to be a manufacturer or producer in the facts available. It had distinguished *Brooke Bond Lipton India Ltd.'s* case (*supra*). It has held that, the case in hand did not appear to involve all facts similar as were involved in the Karnataka case, and as such the judgment did not apply. The Supreme Court in *Hindustan Petroleum Corpn. Ltd.* (*supra*) has noticed that, the procedure of blending of different qualities of tea would amount to processing of tea, and it did not amount to manufacture or production of tea. *Apeejay (P.) Ltd.'s* case (*supra*)was rendered on September 10, 1991. It is a judgment and order of the Division Bench of the High Court. It is binding upon the authorities within the jurisdiction of the High Court. The assessment orders for the relevant assessment years therefore were wrong when they allowed the deductions. The assessment orders were passed subsequent to September 10, 1991. The assessment order for the assessment year 1991-92 was passed on March 31, 1994, the assessment order for the assessment year 1992-93 was passed on March 31, 1995 and the assessment order for the assessment year 1993-94 was passed on March 29, 1996. The assessing officer ought to have applied the ratio of *Apeejay (P.) Ltd.'s* case (*supra*)in the assessment orders. There are, therefore, errors apparent on the face of the record, in respect of the 3 assessment orders for the relevant assessment years. It cannot be said that, the impugned show cause notices have been issued patently without jurisdiction or in abuse of process of law or with a closed mind. The assessee may reply to the show cause notices and set up such just defences as are available to it in law.

**7.** It has been contended on behalf of the petitioner that, the issue sought to be addressed by the impugned show cause notices are debatable. According to the petitioner, the issue was not settled on the

date of issuance of the show cause notices. According to the petitioner whether blending, packing and export of tea packets would constitute manufacture or not is debatable. Reliance has been placed on *TATA Tea Ltd.'s* case (*supra*) in support of such contention.

*TATA Tea Ltd.* case (*supra*) has been rendered in the context of Section 10B of the Income Tax Act, 1961. It has been rendered in the context of considering exemption for industries in the export processing zones, free trade zones and to 100 percent export oriented units covered by Sections 10, 10A and 10B of the Act of 1961. It has held that, the assessee is entitled to exemption on the profit derived by its 100 per cent export oriented unit engaged in blending, packing and export of tea bags and tea packets. The fact scenario obtaining in the present case is different.

*Harbans Lal Malhotra & Sons (P.) Ltd.'s* case (*supra*) has interpreted the expression 'machinery' and 'plant'. It has held that, where interpretation of words are required to arrive at a finding then, it cannot be said that, there exists any mistake apparent on the face of the record allowing invocation of Section 154 of the Act of 1961. In the present case, no further interpretation is required in view of the settled position of law rendered by *Apeejay* (*supra*). *Md. Serajuddin & Bros.* (*supra*) has held that, where, the issue is debatable, the same cannot be made a ground for rectification under Section 154 of the Act of 1961. *Jiyajeerao Cotton Mills Ltd.* (*supra*)has held that, rectification is not permissible on a debatable issue. It has also held that, a decision by the Supreme Court does not obliterate the existence of conflict of opinion prior to it. In the present case, the mistake is sought to be rectified subsequent to the authoritative pronouncement of *Apeejay (P.) Ltd.'s* case (*supra*). *Nitai Chandra Rarhi & Co.* case (*supra*) has held that, waiver of interest under Sections 234A, 234B and 234C by the Settlement Commission is not an obvious mistake and cannot be cancelled in a proceedings under Section 154 of the Act of 1961. The fact scenario obtaining in the present case is different. *Geo Miller & Co. Ltd.'s* case (*supra*)has held that, a subsequent exposition of law by the Supreme Court does not render the assessment order, a mistake. In the facts of the present case, the assessment orders were passed subsequent to the law being settled in *Apeejay (P.) Ltd.'s* case (*supra*). The assessment orders are not prior to *Apeejay (P.) Ltd.'s* case (*supra*)so as to attract the ratio of *Geo Miller & Co. Ltd.* (*supra*). *Tara Agencies* (*supra*)has held that, processing of tea would fall short of either manufacturing or production. *Purtabpore Co. Ltd.* (*supra*)has held that, a rectification under Section 154 of the Act of 1961 is permissible in order to bring the order of assessment in terms of an authoritative pronouncement of the Court. The Income Tax authorities are preparing to bring the orders of assessment in time with the ratio of *Apeejay (P.) Ltd.'s* case (*supra*) through the process initiated by the impugned show cause notices. They are entitled to do so.

**8.** Section 154 can be invoked to correct an error apparent on the face of the record. An order of assessment must be in tune with the law laid down by a binding precedent. The subject orders of assessment not being in terms of the ratio of *Apeejay (P.) Ltd.'s* case (*supra*)contains errors. An error in an order not in consonance with a binding precedent is an error apparent on the face of the record.

**9.** In view of the above discussions above, I find no merit in the present writ petition.

**10.** W.P. No. 1096 of 2000 is dismissed. No order as to costs.

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*In favour of revenue.