IN THE HIGH COURT OF DELHI AT NEW DELHI

C.W.P. NO. 1105 OF 1979

Date of Hearing : 24th January, 2002

Date of Decision : 31st January, 2002

SHRI J.N.SAHNI ... ... PETITIONER
THROUGH : MR. ANOOP SHARMA,
MR. R.K.RAGHWAN,
MR.M.HUSAIN,
ADVOCATES

- VERSUS -

INCOME TAX APPELLATE TRIBUNAL & ORS. ... ... RESPONDENTS
THROUGH : MR.R.D.JOLLY,
MS.RASHMI CHOPRA,
ADVOCATES

CORAM :

THE HON'BLE MR. JUSTICE S.B. SINHA, CHIEF JUSTICE

THE HON'BLE MR. JUSTICE A.K. SIKRI

1. Whether reporters of local papers may be allowed to see the judgment?

2. To be referred to the reporter or not?

S.B. SINHA, C.J.

Whether the Income Tax Appellate Tribunal (in short 'ITAT') is empowered to recall its order passed on merit in purported exercise of its jurisdiction under Section 254 of the Income Tax Act is the question involved in this writ petition?

Two appeals came up for consideration before the ITAT at the instance of the petitioner herein in relation to two orders of assessment for assessment years 1973-74 and 1974-75, which were allowed.

The petitioner as also the department filed two miscellaneous applications. Before the learned Tribunal the parties purported to have brought to its notice the alleged mistake committed by them. It was held :

> "After hearing the parties we consider that there appears to be some misunderstanding of the factual position arising in the two cases, namely, of Shri Kohli, the other co-debtor, and Shri Sahni, the assessee before us. This seems to be a case of mistake of both of facts and law and this is a case in which the ratio of the decision of the Punjab High Court in 38 I.T.R. 1 (in the case of Mangat Ram Kuthiala) would directly apply. Both the sides have referred to mistakes as mistakes apparent from the record. In the interest of justice we consider that it would be fair and reasonable to recall our order dated 28th July, 1978 and re-fix the appeals for further hearing of both sides for ascertaining true and correct facts. We order accordingly. The order dated 28th July, 1978 stands recalled. The appeals shall be posted for further hearing at an early date."

Mr.Anoop Sharma, learned counsel appearing on behalf of the petitioner, would contend that the Tribunal has no power of review and while exercising its jurisdiction under Section 254 of the Income Tax Act it could not have recalled the order which was passed on merit. In support of the said contention, reliance has been placed on Ms.Deeksha Suri & Ors. vs. Income-Tax Appellate Tribunal and Ors., 1998 (232) ITR 395, Commissioner of Income-Tax vs. Ideal Engineers, 2001 (251) ITR 743, Commissioner of Income-Tax vs. K.L.Bhatia, 1990 (182) ITR 361 and Amrit Narain vs. Commissioner of Income-Tax, 1991 (190) ITR 644.

Mr.R.D.Jolly, learned counsel appearing on behalf of the revenue, would submit that this writ petition at the instance of the petitioner is not maintainable. He has also filed an application for rectification of the purported mistake committed by the Tribunal

in passing the said order dated 29.6.1979. The learned counsel would contend that although the jurisdiction of the Tribunal under Section 254 is limited, it cannot be said that it has no power to recall its order in any circumstances whatsoever. Strong reliance in this connection has been placed on the Division Bench decision of the Rajasthan High Court in Commissioner of Income Tax vs. Ramesh Chand Modi, 2000 (163) CTR (Raj.) 424.

Section 254 (2) of the Income-Tax Act reads thus:

> "(2) The Appellate Tribunal may, at any time within four years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it under sub-section (1), and shall make such amendment if the mistake is brought to the notice by the assessee or the Assessing Officer."

The power of the Tribunal to amend an order passed by it under sub-section (1) of Section 254 is limited. Such power of amendment is confined to rectification of mistake apparent from the record. The power of review, as is well known, must be conferred expressly or by necessary implication upon the statutory or quasi-judicial authorities. The Tribunal has no inherent power of review. It is thus axiomatic that while exercising its jurisdiction to amend its order on the ground of rectification of mistake it cannot recall its order passed on merit.

We must, however, at this juncture notice that whereas the Tribunal in absence of any express statutory provision may not have a substantial power of review but it has a procedural power of review.

In Grindlays Bank Ltd. vs. The Central Government Industrial Tribunal and others, AIR 1981 SC 606 the Apex Court noticed the aforementioned distinction and held:

> "We are of the opinion that the Tribunal had the

interest of justice. It is true that there is no express provision in the Act or the rules framed thereunder giving the Tribunal jurisdiction to do so. But it is a well-known rule of statutory construction that a Tribunal or body should be considered to be endowed with such ancillary or incidental powers as are necessary to discharge its functions effectively for the purpose of doing justice between the parties. In a case of this nature, we are of the view that the Tribunal should be considered as invested with such incidental or ancillary powers unless there is any indication in the state to the contrary. We do not find any such statutory prohibition. On the other hand, there are indications to the contrary."

Interpretation of Section 254(2) of the Act came up for consideration in various decisions. In K.L.Bhatia (Supra), Kirpal, J., as his Lordship then was, held:

"As we have already observed, the Tribunal is a creation of the statute. It is an admitted case, and it is now well-settled, that though the Tribunal has no inherent power of reviewing its order on merits, the Tribunal has incidental or ancillary powers which can be exercised by it. But such power cannot be invoked to rehear a case on merits. The Tribunal can, after disposing of the appeal under Section 254(1), rehear the matter on merits only within the purview of section 254(2). The Supreme Court has held in *Patel Narshi Thakershi vs. Pradyumansinghji Arjunsinghji*, AIR 1970 SC 1273, that the power to review is not an inherent power. It must be conferred by law either specifically or by necessary implication. It does not stand to reason that, if the power of review is not present with the Tribunal it, nevertheless, can exercise such power indirectly when it cannot do so directly. If the contention of learned counsel for the respondent is correct, then it could mean that, even on merits, the Tribunal can recall its earlier order and then hear the case afresh and pass a different order. If this is so, it would amount to the Tribunal exercising power of review when it does not have any such power. To give an example, under the provisions of Code of Civil Procedure, Order 47 provides the circumstances in which a judgment may be reviewed. If the contention of learned counsel for the respondent is correct, then applying the same analogy to a civil case, it would be open to a court to recall its judgment in a case where the provisions or Order 47 are not applicable, and then to rehear the case. With respect, we see no warrant for this in legal jurisprudence. The appellate court can hear a case and decide it on merits, once for all, and cannot keep on rehearing the same appeal over and over again. Full effect has to be given to the provisions of Section 254(4) which specifically provides that a decision of the Tribunal passed in appeal is final. This decision is final not only for the assessee but also final as far as the Tribunal itself is concerned."

In Ms. Deeksha Suri (Supra), Lahoti, J., as his Lordship then was, held that merely because the Tribunal overlooked an interim order of its own while deciding the appeal finally, it would not render the judgment void or null and, therefore, the said order cannot be recalled.

In Income Tax Officer vs. Income Tax Appellate Tribunal and Anr., 1987 (168) ITR 809, Mathur, J., as the learned Chief Justice then was, observed:

> "From a bare reading of sub-section (2) of section 254 of the Act, it appears that under the garb of rectification, the Income-Tax Appellate Tribunal cannot exercise the power of review and recall the order whole hog. There are conflicting judgments of various High Courts on this subject. Without going into the various authorities which have been cited before me, I only need say that a bare reading of sub-section (2) of section 254 shows that it does not empower the Tribunal to review its own order and recall its earlier order."

In the case of Ideal Engineer (Supra), a Division Bench of Andhra Pradesh High Court inter-alia observed that the Tribunal by recalling an order passed on merit has taken away a vested right, which could not be done.

Yet again in Commissioner of Income Tax vs. Prahlad Rai Todi, 2001 (251) ITR 833, a Division Bench of Gauhati High Court observed that the power of the Tribunal under Section 254(2) is wider than the power conferred upon a civil court under Section 152 of the Code of Civil Procedure but held that the said power is limited following the decision of this court in Commissioner of Income-Tax vs. K.L.Bhatia, 1990 (182) ITR 361.

In Smt. Baljeet Jolly vs. Commissioner of Income Tax, 2001 (113) Taxman 38, Pasayat CJ, as his Lordship then was, held :

> "A mistake which can be rectified under section 254(2) is one which is patent, which is obvious and whose discovery is not dependent on argument or elaboration. The language used in section 254(2) makes it clear that only amendment to the order passed under section 254(1) is permissible where it is brought to the notice of the Tribunal that there is any mistake apparent from the record. In our view amendment of an order does not mean obliteration of the order originally passed and its substitution by a new order. What the assessee intends to do in the present case is precisely the substitution of the order, which according to us, is not permissible under the provisions of section 254(2) and, therefore, the Tribunal was justified in holding that there was no mistake apparent on the face of the record. Where an error is far from self-evident, it ceases to be an apparent error. It is no doubt true that a mistake capable of being rectified under section 254(2) is not confined to clerical or arithmetical mistakes. On the other hand, it does not cover any mistake which may be discovered by a complicated process of investigation, argument or proof."

This aspect of the matter has recently been considered by a Division Bench of Calcutta High Court in Commissioner of Income Tax vs. Anamika Builders (P) Ltd., 2001 (165) Taxation 628, in the following terms:

> "After that the assessee filed the miscellaneous application and the Tribunal has just taken the reverse view and the rental income has been treated by the Tribunal as income from the business. Whether there was a scope for the Tribunal on the given material to reverse its earlier view, in our opinion, the Tribunal has committed error.
>
> Once the possible view has been taken on the basis of material on record, it cannot be said that there is apparent mistake, which can be corrected under section 254(2)."

While considering the said provision, the Division Bench of Andhra Pradesh High Court in Commissioner of Income-Tax vs. M/s. Praga Tolls Ltd., 2001 (165) Taxation 589 observed that the purported rectification made by the Appellate Assistant Commissioner disallowing the depreciation originally granted

The decision of the Rajasthan High Court in Ramesh Chand Modi (Supra) relied upon by Mr.Jolly, in our opinion, cannot be said to have any application. Therein the Division Bench held :

> "The contention of the counsel that there is no power to recall and substitute another order as a result of rectification because it amounts to review is not well founded. Once a mistake on the face of the record is established what order should follow to correct that mistake shall always depend on the facts and circumstances requiring to rectify the mistake. If the mistake is one which requires determination some undecided issue because it has not been decided though raised, the procedure that would follow the discovery of such mistakes is to recall the order, and decide the case afresh or to decide that issue after affording an opportunity of hearing to parties concerned and pass a fresh order in the light of finding on such issue. The order under section 254(2) is not confined to arithmetical or clerical mistake, nor only to correct substantive mistakes but also of procedural mistakes. While it is true that power of rectification of an order is far narrower than power to review generally, but the methodology of rectifying the order when mistake apparent from record is found, may to correct a mistake in substantive aspect of the order as well as mistake in procedural aspect of making order. Recalling of an order for correcting an apparent mistake in procedural aspect cannot be equated with review. For illustration purposes, if from the record it appears that one of the parties has not at all been heard and the order has been made in breach of principles of natural justice going to root of the matter, the only appropriate method of correcting such mistake is to recall the order and make a fresh order after affording an opportunity of hearing to such party. So also when an order is made ex parte when a party absents himself on any date of hearing. If the party shows sufficient cause for his absence the Court has power to make a fresh order after recalling the earlier order by affording a haring to such party. Similarly as in the present cases, where the Tribunal fails to decide some of the questions raised before it inadvertently or by oversight, adopting the similar course is the requirement of correcting such mistake."

With utmost respect we are unable to subscribe to the aforementioned view. The Tribunal in the absence of any express power cannot be said to have a power of substantive review. The Tribunal has merely the power to amend its order. While exercising the said power it cannot recall its order. The expression '*amendment*' must be assigned its true meaning. While an order of amendment is passed, the order remains but when an order is recalled it stands obliterated. It is well settled that what cannot be done directly, cannot be done indirectly. The review of its own order by the Tribunal is forbidden in law, it cannot be permitted to achieve the same object by exercising its power under section (2) of section 254. The Income Tax Appellate Tribunal does not have an inherent power of review.

In these circumstances, we are of the opinion, that the impugned order cannot be sustained. The petitioner himself has filed an application for amendment of the order. It did not file an application for review. Even assuming that the parties for all intent and purport, wanted to get review of the order of the Tribunal on merit, the same itself could not have conferred the Tribunal a jurisdiction therefor.

It is now well settled that jurisdiction cannot be conferred on a Tribunal even by consent. The Tribunal having no jurisdiction to review its own order, in our considered opinion, has acted without jurisdiction in passing the impugned order. The impugned order also suffers from misdirection in law.

For the reasons aforementioned the impugned order of the Tribunal cannot be sustained. It is accordingly set aside.

Before we part with the matter, we may record the statement made at bar that an application for reference to this court under Section 256(1) of the Act is pending before the Tribunal.

This writ petition is, therefore, allowed. Let a writ of certiorari issue. In the facts and circumstances of this case, however, there shall be no order as to costs.

CHIEF JUSTICE

A.K. SIKRI, JUDGE

January 31st, 2002
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