



Sr. No.	Date	Orders
		<p>* IN THE HIGH COURT OF DELHI AT NEW DELHI</p> <p>+ ITA 508/2005</p> <p>COMMISSIONER OF INCOME TAX DEL Petitioner Through: Mr.J.R. Goel with Mr.S.C. Sharma Advocates.</p> <p>versus</p> <p>M/S AERO CLUB Respondent Through: Mr.V.P. Gupta with Mr.Basant Ku and Mr.Anuj Bansal, Advocates.</p> <p>CORAM: HON'BLE MR. JUSTICE T.S. THAKUR HON'BLE MR. JUSTICE BADAR DURREZ AHMED</p> <p style="text-align: center;"><u>ORDER</u> 19.10.2005</p> <p>%</p> <p>The assessee's appeal filed before the Income Tax Appellate Tribunal, Delhi bench was disposed of by the Tribunal by order dated 4.10.2004 holding that since payments towards ESI, provident fund and sales tax had not been made by the assessee the same could not be allowed under Section 43B of the Income Tax Act. This position, as appears, was accepted even by learned counsel appearing for the assessee who had filed an application seeking an ad-interim stay but since the order on the issue that arose for consideration in the stay application and the appeal was whether the statutory payments had been made, the appeal itself was deemed to have been finally heard for disposal. Some time after</p> <p><u>ITA 508/2005</u></p>



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		<p>disposal of the appeal, the assessee appears to have made miscellaneous application No. 573 before the Tribunal seeking rectification of the order passed by the Tribunal. The application proceeded on the basis that on 4.10.2004 the Tribunal had heard arguments only on the stay application and not the appeal. An affidavit sworn by one Shri Avtar Singh, partner of the respondent-assessee testified that the appeal had not been argued by the assessee's counsel Mr. Pradeep Dinodia and that the arguments in the case were limited to the application for an ad-interim stay. It was further contended on behalf of the assessee that the provident fund and other statutory dues had been deposited by the assessee in time and that evidence regarding the said deposit had been furnished before the Assessing Officer. Copies of the said material were according to the application, filed even before the Tribunal which were gone unnoticed by the Tribunal.</p> <p>The Tribunal has by its order dated 13.1.2005 disposed of the above application for rectification but instead of rectifying the order to the extent prayed for, it has recalled the order itself. The present appeal filed by the revenue assails the correctness of the said recall.</p> <p>Appearing for the appellant, Mr. Goel strenuously argued that while the rectification application was maintainable, the Tribunal had no power</p>



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		<p>to review its order or to recall the order already made in its entirety. submitted that the Tribunal had specifically recorded the statement made by Mr.Pradeep Dinodia counsel for the respondent assessee that the appeal itself be taken as having been heard for final disposal. The statement was, according to Mr.Goel, never retracted by Mr.Dinodia. There was any affidavit sworn by the learned counsel filed in support of the application seeking rectification. He submitted that the order passed by the Tribunal was without jurisdiction no matter the Tribunal had made the observation that the disposal of the appeal was under some misconception.</p> <p>On behalf of the respondent, it was on the other hand argued by Mr.Gupta that the affidavit filed by Mr.Avtar Singh, the partner of the assessee, supported the assessee's case that the appeal was never argued for final disposal and that the order of the Tribunal dated 4.10.2005 disposed of the appeal under some misconception. He submitted that the Tribunal had by recalling the order corrected a mistake committed by the Tribunal in the interest of doing substantial justice between the parties and this Court need not interfere with the said order specially when all that the respondent implied was that the Tribunal would go into the question whether the additions under Section 43B could be made on account of statutory d</p>

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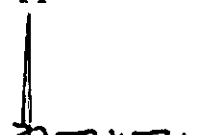



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		<p>shown as payable but not actually paid within the period allowed for same.</p> <p>The question of law that falls for consideration in the light of submissions made at the bar is whether the Tribunal could have in facts and circumstances of the case recalled its order dated 4.10.2004. is common ground that the Tribunal does not have the power to review orders. Any such power cannot be said to be inherent. It is exercised only if validly conferred by the statute. Independent of the power of review, there is no other power to which Mr.Gupta, counsel for respondent-assessee could draw our attention to justify the order of recall. The impugned order is, therefore, in excess of the powers available to the Tribunal.</p> <p>That apart, the appeal had been disposed of on the basis of a specific statement made on behalf of the assessee by its counsel Mr.Pradeep Dinodia that the appeal itself could be treated as having been heard for final disposal. That statement has been recorded by the Tribunal in its order dated 4.10.2004 and has not been withdrawn either before the Tribunal or before us by Shri Pradeep Dinodia by filing any affidavit to that effect. The affidavit of Sh.Avtar Singh, one of the partners of the assessee is of no help. It does not state that Shri Singh was present at</p>



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		<p>time of hearing of the appeal on 4.10.2004. The averments made in affidavit have been verified on the basis of "best of information and knowledge" of the deponent. That kind of verification is legally worthwhile. We are not, therefore, inclined to accept the version given by the assessee in the application that the appeal had not been heard for final disposal with the consent of Shri Pradeep Dinodia, its counsel. That being so, the very basis on which order dated 4.10.2004 has been recalled by the Tribunal gets knocked out.</p> <p>Learned counsel for the assessee, then submitted that the setting aside of the impugned order passed by the Tribunal should not take away the assessee's right to seek rectification of the order, if otherwise permissible under law. He submitted that he had produced evidence before the Assessing Officer as also before the Tribunal demonstrating that statutory payments had been made within the time stipulated for the same. The non-consideration of the said material would according to the learned counsel make out an excellent case for rectification. He submitted that the respondent-assessee be given liberty to file a fresh application for rectification of order dated 4.10.2004. Mr. Goel fairly conceded that setting aside of the impugned order cannot prevent the assessee from filing a fresh application for rectification of the order of the Tribunal.</p>



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		<p>dated 4.10.2004.</p> <p>In the circumstances, therefore, we allow this appeal set aside order dated 13.1.2005 passed by the Tribunal with the observation that assessee shall have the liberty to file a fresh application for rectification so advised. No costs.</p> <p style="text-align: right;"> T.S. THAKUR, J</p> <p style="text-align: right;"> BADAR DURREZ AHMED, J</p> <p>OCTOBER 19, 2005 ga</p> <p style="text-align: center;"><u>ITA 508/2005</u></p>