* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ W.P.(C) No.14155/2004

Date of Decision: June 02, 2006

\# COMMISSIONER OF INCOME TAX DELHI ..... Petitioner
! Through: Ms.P.L. Bansal, Adv.

versus

$ THE INCOME TAX APPELLATE TRIBUNAL & ORS. ... Respondents
^ Through : Mr.V.K. Jain, Adv.

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CORAM:
HON'BLE MR. JUSTICE T.S. THAKUR
HON'BLE MR. JUSTICE SHIV NARAYAN DHINGRA

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

: T.S. THAKUR, J.

Issue rule. With consent, this writ petition has been heard for final disposal.

2. The petitioner has in this petition assailed the validity of an order passed by the Income Tax Appellate Tribunal under Section 254 of the Income Tax Act, 1961, whereby the Tribunal has recalled its order dated 7th August, 2003 passed in ITA No.151/Del/2000 and posted the said appeal for rehearing after notice to the parties. The controversy arises in the following circumstances:

3. Shri Ratti Ram Gotewala was along with his family

a partner in M/s. Rati Ram Ram Vinod and M/s Rati Ram Ram Vinod and Company, besides being a Director in M/s Rati Ram Saree Store Pvt. Ltd. He was also the proprietor of M/s R. Rakesh Behari & Co.

4. A search was conducted at the residential and business premises of the group concerns mentioned above and various incriminating material including certain hundies depicting various transactions seized. Since the Income Tax Department was of the view that the transactions evidenced by the said documents related to undisclosed income of the assessee, a notice under Section 158BC was issued and served up on the assessee on 17th April, 1998 and his group concerns. A return was, pursuant to the said notice, filed by the assessee culminating in a block assessment order passed by the DCIT (Investigation Circle) in September, 1999. Aggrieved by the said assessment, the assessee appealed to the Commissioner of Income Tax (Appeals) who partly allowed the same. The correctness of the said order was then assailed by the assessee before the Income Tax Appellate Tribunal, Delhi Bench, which was disposed by the Tribunal by order dated 7th August, 2003. The Tribunal after a detailed examination of various aspects, agitated before it by the parties granted only partial relief to the assessee. The assessee thereafter made an application under Section 254 of the Income Tax Act before the Tribunal invoking the powers of the Tribunal to rectify the order by withdrawing the same in toto and for re-hearing of the appeal *de novo*. This application has been allowed by the Tribunal in terms of

the order impugned in this writ petition.

5. We have heard learned counsel for the parties at some length and perused the order under challenge. The Tribunal has recalled the order passed by it earlier and directed re-hearing of the appeal on two distinct grounds. Firstly, the Tribunal has held that it had while disposing of the appeal failed to take note of a decision rendered by a three member Bench of the Tribunal at Allahabad in *Dr.A.K. Bansal Vs. ACIT*, holding that the Tribunal could examine the validity of a search in an appeal filed before it under the Income Tax Act. The second reason why the Tribunal recalled its order was that the issue whether an assessment under Section 158BC could be framed on the basis of estimation was debatable. Both these grounds were according to the petitioner, insufficient to justify an order of recall having regard to the language employed in Section 254(2) of the Income Tax Act, which simply permits rectification of any mistake apparent from the record in contradistinction to a review which is implicit in an order of recall in toto. There is, in our view, considerable merit in that submission. The Income Tax Appellate Tribunal does not enjoy the power of review of its orders. Section 254(2) of the Act, however, permits rectification of mistakes apparent from the record and reads as under:

> " 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

the Assessing Officer."

6. It is evident from the above that the power available to the Tribunal is not in the nature of a review as is understood in legal parlance. The power is limited to correction of mistakes apparent from the record. What is significant is that the section envisages amendment of the original order of the Tribunal and not a total substitution thereof. That position is fairly well settled by two decisions of this Court in *Deeksha Suri Vs. I.T.A.T.*, **(1998) 232 ITR 395** and *Karan and Co. Vs. I.T.AT.*, **(2002) 253 ITR 131**. This Court has in both these decisions held that the foundation for the exercise of the jurisdiction lies in the rectification of a mistake apparent from the record which object is ensued by amending the order passed by the Tribunal. The said power does not, however, contemplate a re-hearing of the appeal for a fresh disposal. Doing so would obliterate the distinction between the power to rectify mistakes and the power to review the order made by the Tribunal. The following passage from the decision of this Court in Karan & Co. (Supra) elucidates the difference between review and rectification of an order made by the Tribunal:

> "The scope and ambit of application of section 254(2) is very limited. The same is restricted to rectification of mistakes apparent from the record. We shall first deal with the question of the power of the Tribunal to recall an order in its entirety. Recalling the entire order obviously would mean passing of a fresh order. That does not appear to be the legislative intent. The order passed by the Tribunal under section 254(1) is the effective order so far as the appeal is concerned. Any order passed under section 254)(2) either allowing

> with the original order passed. The order as amended or remaining unamended is the effective order for all practical purposes. The same continues to be an order under section 254(1). That is the final order in the appeal. An order under section 254(2) does not have existence de hors the order under section 254(1). Recalling of the order is not permissible under section 254(2). Recalling of an order automatically necessitates rehearing and readjudication of the entire subject matter of appeal. The dispute no longer remains restricted to any mistake sought to be rectified. Power to recall an order is prescribed in terms of rule 24 of the Income-tax (Appellate Tribunal) Rules, 1963, and that too only in cases where the assessee shows that it had a reasonable cause for being absent at a time when the appeal was taken up and was decided ex parte. This position was highlighted by one of us (Justice Arijit Pasayat, Chief Justice) in CIT v. Income-tax Appellate Tribunal (1992) 196 ITR 640 (Orissa). Judged in the above background the order passed by the Tribunal is indefensible."

7. That being the legal position, the Tribunal was not in our opinion justified in recalling the order passed by it in toto and setting the matter down for a fresh hearing. Just because a pronouncement made on the subject either by the Tribunal or by any other Court was not noticed by the Tribunal while taking a particular view on the merits of the controversy may constitute an error that would call for correction in an appropriate appeal against the order. Any such error may however fall short of constituting a mistake apparent from the record within the meaning of Section 254(2) of the Act. More importantly just because a point is debatable (which is one of the reasons given by the Tribunal in the instant case) could hardly provide a justification for recalling the order and fixing the appeal for a *de novo* hearing. While doing so, the Tribunal has no doubt made certain observations in regard to the levy of interest under Section 158

BFA being statutory in nature with no power vested in any authority or Tribunal to condone the same, but the very fact that the Tribunal has made those observations would not render valid the order of recall passed by it. The net result of the order made by the Tribunal continues to remain the same viz., the appeal has to be heard again simply because one of the issues decided by the Tribunal is debatable or the Tribunal has not noticed an earlier decision rendered by another Bench. Both these reasons were insufficient to justify the order of recall made by the Tribunal.

8. In the result, this petition succeeds and is hereby allowed. The order of recall passed by the Tribunal is hereby quashed, leaving it open to the parties to seek such redress against the original order as is legally permissible. No costs.

T.S. THAKUR, J

SHIV NARARYAN DHINGRA, J

June 02, 2006
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