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% 30.09.2011

Present: Ms. Rashmi Chopra, Sr. Standing Counsel for the Revenue.
Mr. Ajay Vohra with Ms. Kavita Jha and Mr. Somnath Shukla, Advocates for the assessee.

+W.P.(C) No.2044/2011
*

Against the order passed by the Tribunal under Section 254 (2) of the Income Tax Act, the Revenue had filed appeal being ITA No.88/2011 which was dismissed by this Court stating that the remedy against that order of the Income Tax Appellate Tribunal was to file the writ petition. However, it transpires that the appeal preferred by the Revenue was maintainable as vide impugned order, the ITAT has followed the earlier order passed in the appeal and such an order can be assailed by filing the appeal as per Para 23 (iii) of the Full Bench Judgment dated 06.8.2010 in the case of ***Lachman Dass Bhatia Vs. Assistant Commissioner of Income Tax*** (ITA No.724/2010). This position is conceded by both the parties.

In view thereof, this writ petition is allowed to be withdrawn with liberty to the petitioner to seek revival of ITA No.88/2011.

Dismissed as withdrawn.

A.K. SIKRI, J.

M.L. MEHTA, J.

SEPTEMBER 30, 2011/pmc

* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ ITA No.724/2010

LACHMAN DASS BHATIA ..... Appellant
Through Mr. R.M. Mehta, Adv.
versus

ASSISTANT COMMISSIONER OF INCOME TAX ..... Respondent
Through Mr. Deepak Chopra, Adv.

AND

ITA No.725/2010

LACHMAN DASS BHATIA ..... Appellant
Through Mr. R.M. Mehta, Adv.
versus

ASSISTANT COMMISSIONER OF INCOME TAX ..... Respondent
Through Mr. Deepak Chopra, Adv.

AND

ITA No.726/2010

LACHMAN DASS BHATIA ..... Appellant
Through Mr. R.M. Mehta, Adv.
versus

ASSISTANT COMMISSIONER OF INCOME TAX ..... Respondent
Through Mr. Deepak Chopra, Adv.

AND

ITA No.727/2010

LACHMAN DASS BHATIA ..... Appellant
Through Mr. R.M. Mehta, Adv.
versus

ASSISTANT COMMISSIONER OF INCOME TAX ..... Respondent
Through Mr. Deepak Chopra, Adv.

AND

ITA No.728/2010

LACHMAN DASS BHATIA ..... Appellant
Through Mr. R.M. Mehta, Adv.

versus

ASSISTANT COMMISSIONER OF INCOME TAX ..... Respondent
Through Mr. Deepak Chopra, Adv.

AND

ITA No.729/2010

LACHMAN DASS BHATIA ..... Appellant
Through Mr. R.M. Mehta, Adv.

versus

ASSISTANT COMMISSIONER OF INCOME TAX ..... Respondent
Through Mr. Deepak Chopra, Adv.

AND

ITA No.869/2010

THE COMMISSIONER OF INCOME TAX DELHI-X ..... Appellant
Through Ms. Sonia Mathur, Mrs. Prem Lata Bansal, Advs.

versus

M/S BAHADUR SINGH & ORS. ..... Respondents
Through None.

AND

ITA No.871/2010

THE COMMISSIONER OF INCOME TAX DELHI-X ..... Appellant
Through Ms. Sonia Mathur, Mrs. Prem Lata Bansal, Advs.

versus

M/S VIRENDER SINGH & ORS. ..... Respondents
Through None.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE MANMOHAN

1. Whether reporters of the local papers 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?

ORDER
06.08.2010

DIPAK MISRA, CJ

Regard being had to the similitude of the question of law involved for consideration in this batch of appeals, they were heard analogously for the

purpose of consideration of the limited issue referred by the Division Bench and, accordingly, the reference is answered by a singular order.

2. It is apposite to state that when a batch of appeals, namely, ITA Nos.724/2010 to 729/2010 were listed before the Division Bench, a preliminary objection was raised by the revenue with regard to the maintainability of the appeal preferred under Section 260A of the Income Tax Act, 1961 (for brevity 'the Act') where the legal substantiality of an order passed under Section 254(2) of the Income Tax Act, 1961 is called in question on the foundation that the order would not come within the ambit and sweep of 'every order as engrafted under the provision meant for appeal'. At that juncture, the learned counsel for the revenue had commended to the decisions in ***Visvas Promoters (P) Ltd. v. Income Tax Appellate Tribunal & Anr.*** (2009) 226 CTR (Madras) 638, ***Chem Amit v. Assistant Commissioner of Income Tax*** (2005) 272 ITR 397 (Bombay) and ***Shaw Wallace & Co. Ltd. v. Income Tax Appellate Tribunal & Others,*** [1999] 240 ITR 579 (Calcutta).

3. Mr. Mehta, the learned counsel for the assessee-appellant, had drawn inspiration from ***L. Sohanraj and Others v. Deputy Commissioner of Income Tax and Anr. (Kar.) (No.1)*** [2003] 260 ITR 147 (Karnataka), ***Deputy Commissioner of Income Tax v. H.V. Shantharam*** [2003] 260 ITR 156 (Karnataka) and ***Jagdish Chandra and Sons v. ITAT & Another,***

[2005] 266 ITR 165 (Allahabad).

4. The Division Bench scanned the anatomy of Section 254 as well as Section 260A and referred to the decisions of various High Courts, took note of the fact that this Court had entertained appeals in ***CIT v. Hindustan Coca Cola Beverages Pvt. Ltd.*** [2007] 293 ITR 163, ***CIT v. ITAT*** [2007] 293 ITR 118 (Delhi), ***CIT v. Honda Siel Power Products Ltd.*** [2007] 293 ITR 132 and ***Perfetti Van Melle India P. Ltd. v. CIT*** (Delhi) 296 ITR 595, and thought it condign to refer to a larger Bench for an authoritative pronouncement on the issue in question. In this backdrop, the matter has been placed before us.

5. We have heard Mr. Chopra, learned counsel for the revenue, and Mr.Mehta, learned counsel for the assessee. We may also note with profit that Mrs. Sonia Mathur and Mrs. Prem Lata Bansal, learned counsel for the revenue, have also assisted us.

6. Mr. Chopra, learned counsel for the revenue, pyramiding the submission with regard to the maintainability of the appeal, has raised the following submissions:

(a) If the language of Section 260A is appositely and purposefully read, it would be clear as crystal that an order passed by the appellate tribunal in appeal can only be assailed under Section 260A and, as the order passed under Section 254(2) is not an order in appeal, no appeal would lie.

(b) The sub-sections (1) and (2) of Section 260A of the Act are to be read

in conjunction as they are conceptually inextricably connected and when read in juxtaposition, it would be clear as day that the order has to be passed in appeal and would not include any other kind of order.

(c) Section 254(2) which empowers the tribunal to rectify a mistake would not confer the tribunal with the power of recall and even if it is recalled, the same cannot be the subject matter of attack in appeal under Section 260A inasmuch as the order passed in the main appeal becomes extinct and order of the appellate authority rises like a phoenix.

To buttress the aforesaid submissions, the learned counsel for the revenue has commended us to the decisions in ***Apex Metchem (P) Ltd. v. Income Tax Appellate Tribunal***, 318 ITR 48 (Rajasthan), ***R. Renganayaki v. Commissioner of Income Tax*** 38 ITR 20 (Madras), ***Radhy Shyam Subedar Mal v. Commissioner of Income Tax***, 146 ITR 374 (Allahabad), ***Rani Paliwal v. Commissioner of Income Tax***, 190 CTR 566 (P&H) and ***Commissioner of Wealth Tax v. Rani Krishna Devi***, 84 ITR 94 (Allahabad) and ***Dr. S. Paneerselvam v. Assistant Commissioner of Income Tax***, 319 ITR 135 (Madras) apart from the decisions which were cited before the Division Bench.

7. Mr. Mehta, learned counsel for the assessee, has referred us to the Objects and Reasons to highlight why Section 260A was incorporated in the Statute book. Quite apart from the same, the learned counsel has drawn inspiration from a Division Bench decision of this Court in ***Rahulijee and Company P. Ltd. v. ITAT & Ors.***, 323 ITR 327 and the authorities in ***L.***

Sohanraj (supra), *H.V. Shantharam* (supra) and *Jagdish Chandra* (supra).

8. Mrs. Prem Lata Bansal, learned counsel for the revenue, submitted that sub-section (4) of Section 260A has to be taken into consideration while interpreting the provision of Section 260A in entirety so that it will be quite clear that an appeal would lie. Be it noted, such a submission has been canvassed by Mrs. Prem Lata Bansal as she thought it apposite to assist the Court to put the controversy to rest.

9. To appreciate the rivalised submissions raised at the Bar, it is seemly to refer to Section 260A of the Act which reads as follows:

> **"Appeal to High Court**
>
> 260A (1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal, before the date of establishment of the National Tax Tribunal, if the High Court is satisfied that the case involves a substantial question of law.
>
> (2) The Chief Commissioner or the Commissioner or an assessee aggrieved by any order passed by the Appellate Tribunal may file an appeal to the High Court and such appeal under this sub-section shall be -
>
> (a) filed within one hundred and twenty days from the date on which the order appealed against is received by the assessee or the Chief Commissioner or Commissioner.
>
> (b) omitted.
>
> (c) in the form of a memorandum of appeal precisely stating therein the substantial question of law involved.
>
> (2A) The High Court may admit an appeal after the expiry of the period of one hundred and twenty days referred to in clause (a) of sub-section (2), if it is satisfied that there was sufficient cause for not filing the same within that period.
>
> (3) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate

that question.

(4) The appeal shall be heard only on the question so formulated, and the respondents shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question.

(5) The High Court shall decide the question of law so formulated and deliver such judgment thereon containing the grounds on which such decision is founded and may award such cost as it deems fit.

(6) The High Court may determine any issue which -

(a) has not been determined by the Appellate Tribunal; or

(b) has been wrongly determined by the Appellate Tribunal, by reason of a decision on such question of law as is referred to in sub-section (1).

(7) Save as otherwise provided in this Act, the provisions of the Code of Civil Procedure, 1908 (5 of 1908) relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under this section."

Section 254 which deals with 'orders of appellate tribunal' reads as under:

"ORDERS OF APPELLATE TRIBUNAL

254 (1) The Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit.

(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 its notice by the assessee or the Assessing Officer:

Provided that an amendment which has the effect of enhancing an assessment or reducing a refund or

otherwise increasing the liability of the assessee, shall not be made under this sub-section unless the Appellate Tribunal has given notice to the assessee of its intention to do so and has allowed the assessee a reasonable opportunity of being heard:

Provided further that any application filed by the assessee in this sub-section on or after the 1st day of October, 1998, shall be accompanied by a fee of fifty rupees.

(2A) In every appeal, the Appellate Tribunal, where it is possible, may hear and decide such appeal within a period of four years from the end of the financial year in which such appeal is filed under sub-section (1) of section 253 or sub-section (2) of section 253:

Provided that the Appellate Tribunal may, after considering the merits of the application made by the assessee, pass an order of stay in any proceedings relating to an appeal filed under sub-section (1) of section 253, for a period not exceeding one hundred and eighty days from the date of such order and the Appellate Tribunal shall dispose of the appeal within the said period of stay specified in that order:

Provided further that where such appeal is not so disposed of within the said period of stay as specified in the order of stay, the Appellate Tribunal may, on an application made in this behalf by the assessee and on being satisfied that the delay in disposing of the appeal is not attributable to the assessee, extend the period of stay, or pass an order of stay for a further period or periods as it thinks fit; so, however, that the aggregate of the period originally allowed and the period or periods so extended or allowed shall not, in any case, exceed three hundred and sixty-five days and the Appellate Tribunal shall dispose of the appeal within the period or periods of stay so extended or allowed:

Provided also that if such appeal is not so disposed of within the period allowed under the first proviso or the period or periods extended or allowed under the second proviso, which shall not, in any case, exceed three hundred and sixty-five days, the order of stay shall stand vacated after the expiry of such period or periods, even if the delay in disposing of the appeal is not attributable to the assessee.

(2B) The cost of any appeal to the Appellate Tribunal shall be at the discretion of that Tribunal.

(3) The Appellate Tribunal shall send a copy of any orders passed under this section to the assessee and to the Commissioner.

(4) Save as provided in section 256 or section 260A, orders passed by the Appellate Tribunal on appeal shall be final."

10. The question that falls for consideration is whether all orders passed under Section 254(2) can be the subject matter of appeal. There can be no scintilla of doubt that an order passed under Section 254(1) is assailable in appeal. Section 254(2) has a different contour altogether. Before we advert to the microscopic and inherent facet of Section 254(2), we would like to notice the decisions in the field. In ***Chem Amit*** (supra), the High Court of Bombay distinguished the decision rendered in ***CIT v. Durga Engineering and Foundry Works***, (2000) 162 CTR (SC) 257 and expressed the view as follows:

"6. In Durga Engineering and Foundry Works (supra), the Supreme Court held that the reference under s.256 of the IT Act, 1961, could be made from the order of the Appellate Tribunal passed on the application for rectification under Section 254(2). That was so held by the Supreme Court in the light of the language of s.256 which empowered the assessee and the Revenue to "require the Tribunal to refer to the High Court any question of law arising out of an order passed under s.254". Sec.254 comprises two sub-sections. Sub-S.(1) of s.254 provides that the Tribunal may pass such order on an appeal as it thinks fit after giving both the parties to the appeal an opportunity of being heard. Sub-s.(2) of s.254 permits the Tribunal to rectify any mistake apparent from the record and amend any order passed under sub-s.(1) within four years from the date of the order. The expression employed in s.260A that provides for an appeal to the High Court is materially different from the expression used in s.256 that empowers the assessee and the Revenue to require the Tribunal to refer to the High Court any question of law. As already noticed

above, in s.256 the expression used is. "require the Tribunal to refer to the High Court any question of law arising out of an order passed under s.254". However, in s.260A, the Legislature has not provided an appeal to the High Court from every order passed under s.254 but has confined it to the order passed in appeal by the Tribunal. This is made clear by the use of the expression, "an appeal shall lie to the High Court from every order passed in appeal by the Tribunal". If the Legislature intended to provide an appeal to the High Court from the order passed by the Tribunal on the application for rectification under s.254(2), the Legislature would not have used the expression in s.260A that an appeal shall lie to the High Court from every order passed in appeal by the Tribunal, but instead used the expression as is used in s.256 that an appeal shall lie to the High Court from every order passed under s.254. The expression, "an appeal shall lie to the High Court from every order passed in appeal by the Tribunal" in s.260A cannot be equated with the expression, "an appeal shall lie to the High Court from every order passed under s.254". In Durga Engineering and Foundry Works (supra) also, the Supreme Court observed that "s.256 contemplates the reference of the question of law arising out of an order passed under s.254; that is to say, an order passed both under s.254(4) and s.254(2)". We have already highlighted the departure of the language in s.260A from the language occurring in s.256.

7. In a given case where as the consequence of an order passed on the rectification application under s.254(2), the amendment in the order passed in appeal under s.254(1) takes place, such amended order in appeal as a consequence of the order passed in the rectification application, however, shall be amenable to appeal under s.260A. Insofar as the present case is concerned, the assessee has only challenged the order of the Tribunal rejecting the application of rectification, the appeal under s.260A is not maintainable."

[Emphasis added]

11. In ***Shaw Wallace case*** (supra), the High Court of Calcutta was dealing with the provision whether the tribunal has power under Section 254(2) to recall the order and obliterate the original order. It is worth noting that a

writ petition was filed challenging the order of the tribunal on behalf of the revenue. An objection was raised that the writ petition was not maintainable as an alternative remedy was available under Section 260A of the Act. The learned Single Judge, while addressing with regard to the maintainability of the appeal under Section 260A of the Act, opined that if an order under Section 254 takes the shape of modifying the main order by way of amendment or rectification, the original order to some extent and then both the orders can jointly be appealable but an order of recall is clearly not appealable.

12. In ***Visvas Promoters (P) Ltd.*** (supra), a learned Single Judge of the Madras High Court, after referring to the decision in ***Chem Amit*** (supra), has held thus:

> "Therefore, the term, 'every order' referred to in s.260A, apart from being qualified as one involving substantial question of law, would mean an order which finally disposes of the rights of the parties in controversy. In cases where an application for rectification is made and an order passed under s.254(2) of the Act by merely rejecting such application, it does not decide the substantial issue involved between the parties, since the issue has already been decided under s.254(1) of the Act by the Tribunal and if the application is filed subsequently under s.254(2) by way of miscellaneous petition for rectification of mistake within the period of limitation, viz., 4 years and the same is rejected, it would only make the original order passed by the Tribunal final and if at all there is any substantial question of law that may arise or any right of the parties is finally decided by the Tribunal, the same can be only under the orders passed as per S.254(1) of the Act. Therefore, such order cannot be construed as, 'any order' referred to under s.260A of the Act to enable the aggrieved party to file appeal before the High Court."

13. In ***Apex Metchem (P) Ltd.*** (supra), the High Court of Rajasthan has

opined that when an order is amended under Section 254(2), the same merges into the final order which is passed under Section 254(1) and, therefore, the same is appealable under Section 260A but, when the order is recalled in exercise of the power under Section 254(2), the matter is to be reheard afresh and, hence, it cannot be said that such an order is appealable under Section 260A of the Act. The Bench opined that if the order is without jurisdiction, the same can be assailed under Article 226 of the Constitution of India.

14. The Punjab and Haryana High Court in ***Rani Paliwal*** (supra), while dealing with the maintainability of the appeal from an order of recall, opined that such an order is not appealable.

15. The learned counsel for the revenue has also drawn inspiration from the decision rendered in ***Radhey Shyam Subedar Mal*** (supra) wherein it has been held that an appeal in ordinary sense means taking the order to the higher authority for examination of its correctness and where an appeal is barred by limitation, the same would tantamount to an order passed in appeal as the order is still the subject matter of appeal in a different sense. It is urged by the learned counsel for the revenue that when an appeal is dismissed on the ground of limitation, it has the status of a decree and, therefore, a further appeal would lie but when the order is totally recalled, the same cannot be equated with the order passed by the tribunal giving the stamp of approval to the order of CIT(A), the first appellate authority, since the tribunal is still in seisin of the matter.

16. In the decision that has been placed reliance upon by Mr. Mehta in ***Karan & Co. v. ITAT*** [2002] 253 ITR 131, a Division Bench of this Court was dealing with a writ petition preferred by the assessee and in that context was dealing with the scope and ambit of an application under Section 254(2). We think it fruitful to reproduce the passage dealing with the same:

> "The scope and ambit of an 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 amendment or refusing to amend gets merged 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 re-adjudication 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."

17. On a reading of the aforesaid passage, we are of the considered opinion that the said decision did not deal with the issue with regard to the maintainability of the appeal preferred under Section 260A of the Act but

dwelled upon the power conferred on the tribunal under Section 254(2) of the Act. Hence, the decision cited by Mr. Mehta, we are disposed to think, is distinguishable.

18. As far as Section 254(1) and (2) are concerned, we have no scintilla of doubt that both the provisions are to be read in conjunction. In Section 260A, the words 'every order passed in appeal' have their own signification and Section 2 which came by way of amendment by Finance Act of 1999 (27 of 1999) only provides who can prefer the appeal. The language used in Section 260A 'every order passed in appeal' and the language used in Section 260A(2) 'any order passed by the appellate tribunal', in our considered opinion are to be read in conjunction and, therefore, the inspiration sought to be drawn by Mr. Mehta from the decisions cited has to be repelled because the language used by the legislature in both the Sections has to be appositely understood as the intention of the Legislature is that the order passed by the appellate tribunal in appeal is subject to appeal under Section 260A. It is worth noting sub-section (2) of Section 260A is only an enabling provision as to who can prefer an appeal. Ergo, we are constrained to repel the submission of Mr.Mehta, and we so do.

19. In this context, we may refer with profit to the decision in ***Parmeshwar Lal v. Gokhula Nandan Prasad***, AIR 1984 Patna 344, wherein it has been held thus:

> "It is importance to notice that a decree is the conclusive determination of the rights of the parties with regard to all or, any of the matters in controversy in the suit and may be either preliminary or final; but it is a formal expression of an adjudication by the Court. Any

alteration in this formal expression shall undoubtedly be a decree; but in the case of a clerical correction, this formal expression of an adjudication of the conclusive determination of the rights of the parties is not at all varied, and there is no modification and/or alteration of the decree as expressed by the Court...."

20. A Full Bench of Orissa High Court in ***Dinamani Debi v. Paramananda Choudhury & Anr.***, AIR 1980 Orissa 177 opined as follows:

"11. An order of remand under Section 151, C.P.C. is appealable only when it amounts to a decree. Where the order of remand merely sets aside the decree of the trial Court and does not itself decide any of the points raised for determination and does not determine the rights of the parties with regard to any of the matters in controversy in the suit, it cannot amount to a decree and must be treated as an order. The mere fact that the order reverses the decree of the trial Court and deprives a party of the valuable right it had acquired thereunder would not make an order of remand a "decree", unless that order itself determines any of the points arising for determination in regard to the matters in controversy in the suit.

12. Now the question arises whether a decision such as the impugned one is a decree or not. The definition of "decree" indicates that it must be a formal expression of an adjudication conclusively determining the rights of the parties with regard to all or any of the matters in controversy in the suit. There may be cases where the appellate Court itself decides finally certain aspects in dispute and thus passes a decree but in regard to certain other matters it directs the trial Court to reach final determination. In such cases the decision of the appellate Court amounting to a decree may be appealable. That, however, is not the case here. The impugned order clearly indicates that it is not a decree. The appellate Court, in passing the order of remand, did not conclusively determine anything on the merits of any of the disputes between the parties and left the entire matter for decision to the trial Court. The mere fact that the decree of the trial Court has been set aside would not thus make the order of remand a decree and appealable as such. To state otherwise, there is no final adjudication by the appellate Court of the rights of the parties by the order of remand. Therefore, it cannot be treated as a decree. The order indicates that pursuant to the remand,

> the trial Court must proceed to determine the suit. Thus, the determination of the suit is yet to come and that depends upon the adjudication by the trial Court. Such adjudication consequent on the remand would result in the decree. In such circumstances, a Second Appeal could not lie to this Court. The only remedy which was open to the petitioner was to approach this Court by a revisional application...."

21. We have referred to the aforesaid decisions only to highlight that when there is no final adjudication by the appellate court of the rights of the parties, no appeal would lie. When the order passed on earlier occasion is recalled in toto in exercise of power under Section 254(2) of the Act, there is no adjudication of the appeal on merits. On the contrary, there is no order in appeal. What survives is the order of the first appellate authority and not that of the tribunal. Therefore, on this analogy, no appeal under Section 260A would lie.

22. In view of our aforesaid premised reasons, we are inclined to agree with the view expressed by the High Court of Bombay, Calcutta, Punjab & Haryana, Allahabad and Madras that when an order under Section 254(2) is amended, both the main order as well as the amended order would be amenable to appeal. As far as the view taken by the Karnataka High Court is concerned, it is noticeable that a plea of alternative remedy was raised and that was not accepted and the Division Bench of the Karnataka High Court concurred with the view taken by the learned Single Judge. Therefore, with utmost reasons, we are unable to agree with the view expressed by the Karnataka High Court.

23. In view of our foregoing analysis, we proceed to record our

conclusions in seriatim:

(i) An order passed under Section 254(2) recalling an order in entirety would not be amenable to appeal under Section 260A of the Act.

(ii) An order rejecting the application under Section 254(2) is not appealable.

(iii) If an order is passed under Section 254(2) amending the order passed in appeal, the same can be assailed in further appeal on substantial question of law.

24. At this juncture, Mr. Mehta submitted that if the assessee is not in a position to prefer an appeal, he will be left remediless. The said submission deserves to be dealt with. When the appeal is not maintainable, in our considered opinion, the same can be challenged by way of writ petition under Articles 226 and 227 of the Constitution of India. Mr. Mehta further submitted that if this Court is of the view that writ would lie, permission should be granted to convert the appeal to the writ petition. In this context, we may refer with profit to the decision rendered in ***Col. Anil Kak (Retd.) v. Municipal Corporation, Indore & Ors.***, AIR 2007 SC 1130 wherein the Apex Court has expressed thus:

> "All that the High Court has done is to treat the petition filed before it under Section 115 of the Code as a proceeding initiated under Article 227 of the Constitution of India. The respondents had filed the revision originally and during the pendency of that revision the High Court appears to have taken a view that an order in an appeal arising from a proceeding under Order 39, Rules 1 and 2 of the Code, could not be challenged under Section 115 of the Code since the order was in the nature of an interlocutory order. In such a situation, in our view, the High Court rightly decided to permit the revision petitioners before it, to convert the same as a proceeding

under Article 227 of the Constitution of India...."

25. In ***Nawab Shaqafath Ali Khan v. Nawab Imad Jah Bahadur***, 2009 AIR SCW 2289, their Lordships have held thus:

> "....If the High Court had the jurisdiction to entertain either an appeal or a revision application or a writ petition under Articles 226 and 227 of the Constitution of India, in a given case it, subject to fulfillment of other conditions, could even convert a revision application or a writ petition into an appeal or vice-versa in exercise of its inherent power."

26. As the appeals in the present case are not maintainable, we are disposed to think, the same can be converted by filing proper application for conversion and by further complying with the necessary formalities as required under the rules to prefer the writ petition. The reference is answered accordingly.

27. Matter be placed before the Division Bench for further adjudication.

CHIEF JUSTICE

SANJIV KHANNA, J.

MANMOHAN,J.

AUGUST 06, 2010
Pk