* **IN THE HIGH COURT OF DELHI AT NEW DE**

\+ **Writ Petition (Civil) No. 2174/2011**

Commissioner of Income Tax (Ghaziabad) ....Petitioner
Through Ms. Rashmi Chopra, Advocate.

VERSUS

Krishna Gupta & Ors. .....Respondent
Through

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

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 ?

ORDER

% 31.03.2011

SANJIV KHANNA, J.

The Commissioner of Income Tax, Ghaziabad has filed the present writ petition for quashing of the order dated 7th December, 2007 passed by the Income Tax Appellate Tribunal, Delhi Bench "D" (Tribunal, for short), dismissing MA No. 144/D/2007 in ITA Nos. 145/D/1998 & 25/D/1998 titled ITO, Ward-30(2), New Delhi vs. Ms. Krishna Gupta.

2. The aforesaid M.A. was filed under Section 254(2) of the Income Tax Act, 1961 (Act, for short) for recall of the earlier order dated 12th February, 2004 disposing of ITA Nos. 145/D/98 titled Ms. Krishna Gupta vs. Asstt. Commissioner of Income Tax and ITA No. 25/D/1998, Asstt. Commissioner of Income Tax vs. Ms. Krishna Gupta.

3. The petitioner had earlier filed an appeal under Section 260A of the Act, being ITA No. 1102/2008 which was disposed of vide order dated 22nd September, 2010, inter-alia holding that in view of the Full Bench decision in ITA No. 724/2010 titled ***M/s Lachman Dass Bhatia Hingwala (P) Ltd. Vs. Assistant Commissioner of Income Tax***, the appeal was not maintainable against the order dated 7th December, 2007.

4. Learned counsel for the petitioner has submitted that the impugned order dated 7th December, 2007 dismissing the application under Section 254(2) of the Act, cannot be sustained in view of the above judgment.

5. The Tribunal has the power to recall its earlier order disposing of an appeal under Section 254(1) of the Act, but the said power has to be

exercised rarely and when a case for entire recall is made out. It cannot be exercised on every application moved under Section 254(2) of the Act. In WP© No. 6460/2010 titled ***M/s Lachman Dass Bhatia Hingwala(P) Ltd. Vs. Assistant Commissioner of Income Tax,*** a Full Bench of Delhi High Court while accepting that the power of total recall exists, has observed as under:-

> " (A) The decision rendered in ***Honda Siel Power Products Ltd.,*** (supra) by the Apex Court is an authority for the proposition that the Income-tax Appellate Tribunal under certain circumstances can recall its own order and there is no absolute prohibition.
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> (B) In view of the law laid down in ***Honda Siel Power Products Ltd.,*** (supra) by the Apex Court, the decisions rendered by this Court in ***K.L. Bhatia*** (supra), ***Deeksha Suri*** (supra), ***Karan and Co.*** (supra), ***J.N. Sahni*** (supra) and ***Smt. Baljeet Jolly*** (supra) which lay down the principle that the tribunal under no circumstances can recall its order in entirety do not lay down the correct statement of law.
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> © Any other decision or authority which has been rendered by pressing reliance on ***K.L. Bhatia*** (supra) and the said line of decisions are also to be treated as not laying down the correct proposition of law that the tribunal has no power to recall an order passed by it in exercise of power under Section 254(2) of the Act.
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> (D) The tribunal, while exercising the power of rectification under Section 254(2) of the Act, can recall its order in entirety if it is satisfied that prejudice has resulted to the party which is attributable to the tribunal's mistake, error or omission and which error is a manifest error and it has nothing to do with the doctrine or concept of inherent power of review.

(E) When the justification of an order passed by the tribunal recalling its own order is assailed in a writ petition, it is required to be tested on the anvil of law laid down by the Apex Court in ***Honda Siel Power Products Ltd.,*** (supra) and ***Saurashtra Kutch Stock Exchange Ltd***. (supra)."

(emphasis supplied)

6. A Division Bench of Gujarat High Court in ***Assistant Commissioner of Income-Tax vs. Saurashtra Stock Exchange Ltd., [2003] 262 ITR 146***, held as under:-

"(a) The Tribunal has power to rectify a mistake apparent from the record on its own motion or on an application by a party under section 254(2) of the Act;

(b) An order on appeal would consist of an order made under section 254(1) of the Act or it could be an order made under sub-section (1) as amended by an order under sub-section (2) of section 254 of the Act;

(c) The power of rectification is to be exercised to remove an error or correct a mistake and not for disturbing finality, the fundamental principle being, that power of rectification is for justice and fair play;

(d) That power of rectification can be exercised even if a mistake is committed by the Tribunal or even if a mistake has occurred at the instance of party to the appeal;

(e) A mistake apparent from record should be self-evident, should not be a debatable issue, but this test might break down, because judicial opinions differ, and what is a mistake apparent from the record cannot be defined precisely and must be left to be determined judicially on the facts of each case;

(f) Non-consideration of a judgment of the jurisdictional High Court would always constitute a mistake apparent from the record, regardless of the judgment being rendered prior to or subsequent to the order proposed to be rectified;

> (g) After the mistake is corrected, consequential order must follow, and the Tribunal has power to pass all necessary consequential orders."

7. The aforesaid decision of the Gujarat High Court was challenged in appeal in Supreme Court, in ***ACIT v. Saurashtra Kutch Stock Exchange Ltd.***, [2008] 305 ITR 227 (SC), wherein the Supreme Court came to hold as follows:

> "The core issue, therefore, is whether non-consideration of a decision of jurisdictional court (in this case a decision of the High Court of Gujarat) or of the Supreme Court can be said to be a "mistake apparent from the record"? In our opinion, both – the Tribunal and the High Court – were right in holding that such a mistake can be said to be a "mistake apparent from the record" which could be rectified under section 254(2)."
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> [Emphasis supplied]

7A. Thereafter, their Lordships proceeded to state as follows:

> "Rectification of an order stems from the fundamental principle that justice is above all. It is exercised to remove the error and to disturb the finality.
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> In *S. Nagaraj v. State of Karnataka* [1993] Supp 4 SCC 595, 618, Sahai J. stated:
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> > "Justice is a virtue which transcends all barriers. Neither the rules of procedure nor technicalities of law can stand in its way. The order of the court should not be prejudicial to anyone. Rule of stare decisis is adhered for consistency but it is not as inflexible in Administrative Law as in Public Law. Even the law bends before justice. Entire concept of writ jurisdiction exercised by the higher courts is founded on equity and fairness. If the court finds that the order was passed

> under a mistake and it would not have exercised the jurisdiction but for the erroneous assumption which in fact did not exist and its perpetration shall result in miscarriage of justice then it cannot on any principle be precluded from rectifying the error. Mistake is accepted as valid reason to recall an order. Difference lies in the nature of mistake and scope of rectification, depending on if it is of fact or law. But the root from which the power flows is the anxiety to avoid injustice. It is either statutory or inherent. The latter is available where the mistake is of the court. In Administrative Law, the scope is still wider. Technicalities apart if the court is satisfied of the injustice then it is its constitutional and legal obligation to set it right by recalling its order."
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> In the present case, according to the assessee, the Tribunal decided the matter on October 27, 2000. Hiralal Bhagwati, [2000] 246 ITR 188 (Guj) was decided a few months prior to that decision, but it was not brought to the attention of the Tribunal. In our opinion, in the circumstances, the Tribunal has not committed any error of law or of jurisdiction in exercising power under sub-section (2) of section 254 of the Act and in rectifying the "mistake apparent from the record". Since no error was committed by the Tribunal in rectifying the mistake, the High Court was not wrong in confirming the said order. Both the orders, therefore, in our opinion, are strictly in consonance with law and no interference is called for."
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> [emphasis supplied]

8. The Supreme Court in ***Honda Siel Power Products Ltd. V. Commissioner of Income-Tax, [2007] 295 ITR 466 (SC),*** has held as under:-

> "As stated above, in this case we are concerned with the application under section 254(2) of the 1961 Act. As stated above, the expression "rectification of mistake from the record" occurs in section 154. It also finds place in section 254(2). The purpose behind the enactment of section

254(2) is based on the fundamental principle that no party appearing before the Tribunal, be it an assessee or the Department, should suffer on account of any mistake committed by the Tribunal. This fundamental principle has nothing to do with the inherent powers of the Tribunal. In the present case, the Tribunal in its Order dated September 10, 2003 allowing the rectification application has given a finding that *Samtel Color Ltd.* (supra) was cited before it by the assessee but through oversight it had missed out the said judgment while dismissing the appeal filed by the assessee on the question of admissibility/allowability of the claim of the assessee for enhanced depreciation under section 43A. One of the important reasons for giving the power of rectification to the Tribunal is to see that no prejudice is caused to either of the parties appearing before it by its decision based on a mistake apparent from the record.

"Rule of precedent" is an important aspect of legal certainty in rule of law. That principle is not obliterated by section 254(2) of the Income-tax Act, 1961. When prejudice results from an order attributable to the Tribunal's mistake, error or omission, then it is the duty of the Tribunal to set it right. Atonement to the wronged party by the court or Tribunal for the wrong committed by it has nothing to do with the concept of inherent power to review. In the present case, the Tribunal was justified in exercising its powers under section 254(2) when it was pointed out to the Tribunal that the judgment of the coordinate bench was placed before the Tribunal when the original order came to be passed but it had committed a mistake in not considering the material which was already on record. The Tribunal has acknowledged its mistake, it has accordingly rectified its order. In our view, the High Court was not justified in interfering with the said order. We are not going by the doctrine or concept of inherent power. We are simply proceeding on the basis that if prejudice had resulted to the party, which prejudice is attributable to the Tribunal's mistake, error or omission and which error is a manifest error then the Tribunal would be justified in rectifying its mistake, which had been done in the present case."

[Emphasis supplied]

9. In the present case, the appeals filed by the Revenue and the assessee were disposed of by the Tribunal vide order dated 12th February, 2004. The best judgment assessment made for the year 1992-93 was upheld but the Tribunal upheld the decision of the Commissioner of Income Tax (Appeal) holding that gross profits should be calculated at the gross profit rate at 5% instead of 10% on the total quantum of sales. The Assessing Officer has applied gross profit rate of 10% on the total quantum of sales. The assessee had applied and had made a prayer that gross profit was 1.5% of the total sales, which was not accepted by the Tribunal.

10. In the application under Section 254(2) of the Act, it was contended that the Assessing Officer has rightly applied gross profit rate at 10% and the said estimate was justified and well reasoned. It was contended that Commissioner of Income Tax (Appeals) and the Tribunal had wrongly reduced the gross profit rate to 5%. The aforesaid contentions of the petitioner does not justify and make out a case for total recall of the earlier order of the Tribunal dated 12th February, 2004, disposing of the appeals. As noticed above, Tribunal has power

to recall their earlier order but in exceptional cases and not [illegible] asking. The reasons and grounds given in the application for recall of the order dated 12th February, 2004 do not justify exercise of power of making total recall. In fact what the petitioner wanted was re-hearing of the appeal on merits. The application under Section 254(2) of the Act is for rectification or modification of the order of the Tribunal when there is a mistake is apparent from the record. The Tribunal in the garb of mistake cannot give fresh hearing and re-examine the merits as an appellate court.

11. We do not find any merit in the present writ petition and the same is accordingly dismissed in limine.

SANJIV KHANNA, J.

CHIEF JUSTICE

March 31, 2011
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