



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

% Judgment delivered on : 30.05.2012

+ **W.P.(C) 470/2011**

LAKSHMI SUGAR MILLS CO. LTD. AND ORS. ... Petitioners

Versus

COMMISSIONER OF INCOME TAX & ANR. ... Respondents

**Advocates who appeared in this case:**

For the Petitioners : Mr S.N.Kumar with Mr K.B.Soni

For the Respondents : Mr N.P.Sahni

**CORAM:**

**HON'BLE MR. JUSTICE BADAR DURREZ AHMED**

**HON'BLE MR. JUSTICE V.K.JAIN**

**JUDGMENT**

**BADAR DURREZ AHMED, J. (ORAL)**

1. This writ petition is directed against the order dated 06.02.2009 passed by the Income Tax Appellate Tribunal, Delhi Bench-D, Delhi, in M.A. No. 512(Del)/2008 which, in turn, arose out of ITA Nos. 3584 to 3586 (Del)/2007 pertaining to the Assessment Years 1993-1994, 1996-1997 and 1997-1998.

2. The facts giving rise to the present writ petition and which are necessary for a decision in this writ petition are very few. By virtue of an order dated 31.03.2008, the



Income Tax Appellate Tribunal disposed of the said ITA Nos. 3584 to 3586 (Del)/2007 by following the decision of the Supreme Court in the case of *Virtual Soft Systems Ltd. vs. Commissioner of Income Tax, Delhi-I* : (2007) 289 ITR 83, wherein the Supreme Court held that no penalty for concealment can be imposed under Section 271(1)(c) of the Income Tax Act, 1961 (hereinafter referred to as 'the said Act') if there is no tax payable by the assessee on account of the assessments being made in respect of a loss return. The Tribunal was of the view that since the decision of the Commissioner of Income Tax (Appeals), which had cancelled the penalties imposed on the assessee, was in line with the decision of the Supreme Court in the case of *Virtual Soft Systems Ltd. (supra)*, the decision of the Commissioner Income Tax (Appeals) was liable to be upheld. Consequently, the appeals filed by the revenue before the Tribunal were dismissed.

3. The matter rested there insofar as the present assessee is concerned. The revenue did not file any appeal under Section 260A of the said Act before this Court. As noted in the order dated 23.05.2012, the appeals, perhaps, were not filed on account of the fact that the tax effect was less than the minimum amount prescribed by the Central Board of Direct Taxes for appeals to the High Court.

4. Be that as it may, a larger Bench of the Supreme Court considered the decision in the case of *Virtual Soft Systems Ltd. (supra)* and overruled the same by virtue of its decision in the case of *Commissioner of Income Tax vs. Gold Coin Health Food Pvt. Ltd.* : (2008) 304 ITR 308 (SC). After the said decision in *Virtual Soft Systems Ltd.*



(*supra*) had been overruled by the Supreme Court by virtue of the subsequent decision in ***Gold Coin*** (*supra*), the revenue moved an application being M.A. No. 512(Del)/2008 on 21.10.2008 before the Income Tax Appellate Tribunal, under Section 254(2) of the said Act, seeking recall of the order dated 31.03.2008 by way of rectification. The plea taken by the revenue was that since the decision of the Tribunal dated 31.03.2008 had been based entirely on the decision of the Supreme Court in ***Virtual Soft Systems Ltd.*** (*supra*) and the latter decision had been subsequently overruled by a larger Bench of the Supreme Court in ***Gold Coin*** (*supra*), there was a mistake apparent on the face of the record and, therefore, the order dated 31.03.2008 needed to be rectified. We may point out that the application for rectification under Section 254(2) was filed within four years from the date of the order, i.e. 31.03.2008. As such, there is no issue with regard to limitation insofar as the application is concerned.

5. The Tribunal passed the order dated 06.02.2009 which is impugned before us.

The order reads as under:-

“1. In this case, the Tribunal had passed the order on 31.3.2008, in which the appeals of the revenue were dismissed on the ground that the returned and assessed income resulted into loss. The revenue filed a Misc. Application on 21.10.2008 requesting for the recall of the order on the ground that the decision in the case of *Virtual Soft Systems Ltd.* was reversed by the apex court in the case of *CIT vs. Goldcoin Health Food Ltd.* in Civil Appeal No. 5065 of 2008 dated 18.8.2008.

2. While none appeared on behalf of the assessee for hearing on 6.2.2009 in response to the notice issued on 7.1.2009, the learned DR pointed out that the



decision of apex court in the case of Goldcoin Health Food Ltd. (*supra*) was a binding precedence on all Tribunals and Courts throughout India and, therefore, constituted a sufficient ground for recalling the order with a view to decide the appeals on merit. We concur with the learned DR in this matter. Accordingly, the order is recalled with a view to decide the appeal of the revenue on merits. The Registry shall fix the cases for hearing in due course.

3. In the result, the application is allowed.

4. The order was pronounced in the open court on 6.2.2009 soon after completion of the hearing of the application.”

6. As a result, the order dated 31.03.2008 has been recalled in its entirety and the appeals of the revenue are to be decided on merits.

7. The learned counsel for the petitioners submitted that as the decision of the Supreme Court in *Gold Coin (supra)* rendered after the order passed by the Tribunal, the Tribunal's order cannot be regarded as one which had a mistake apparent on the record inasmuch as on 31.03.2008, the date on which the order was passed by the Tribunal, it was the decision of the Supreme Court in *Virtual Soft Systems Ltd. (supra)* which held the field. The Tribunal did not commit any mistake by following the said decision in *Virtual Soft Systems Ltd. (supra)*, which was the law as declared by the Supreme Court on that date. He submitted that a subsequent view taken by the Supreme Court by a larger Bench in the case of *Gold Coin (supra)*, would not make the decision of the Tribunal rendered on 31.03.2008 being regarded as a mistake, because, at



that point of time, the decision of the Supreme Court in *Gold Coin (supra)* was not there. It was also submitted by the learned counsel for the petitioners that on the date on which the decision of the Supreme Court was rendered in the case of *Gold Coin (supra)*, there was no proceeding pending before the Tribunal or any Court and, therefore, the order dated 31.03.2008 had attained finality and the same ought not to be disturbed.

8. On the other hand, Mr Sahni appearing on behalf of the revenue placed reliance on a decision of the Gujarat High Court in the case of *Assistant Commissioner of Income Tax vs. Saurashtra Kutch Stock Exchange Ltd. : 262 ITR 146 (Guj.)* as also on the decision of the Supreme Court in the case of *Assistant Commissioner of Income Tax vs. Saurashtra Kutch Stock Exchange Ltd. : 305 ITR 227(SC)*. In the decision of the Gujarat High Court, it was specifically observed that 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”. The Supreme Court in the very same matter, when it was carried by way of an appeal before it, made the following observations :-

“41. A similar question came up for consideration before the High Court of Gujarat in *Suhrad Geigy Limited vs. Commissioner of Surtax*, (1999) 237 ITR 834. It was held by the Division Bench of the High Court that if the point is covered by a decision of the Jurisdictional Court rendered prior or even subsequent to the order of rectification, it could be said to be a "mistake apparent from the record" under Section 254(2) of the Act and could be corrected by the Tribunal.



42. In our judgment, it is also well-settled that a judicial decision acts retrospectively. According to *Blackstonian* theory, it is not the function of the Court to pronounce a 'new rule' but to maintain and expound the 'old one'. In other words, Judges do not make law, they only discover or find the correct law. The law has always been the same. If a subsequent decision alters the earlier one, it (the later decision) does not make new law. It only discovers the correct principle of law which has to be applied retrospectively. To put it differently, even where an earlier decision of the Court operated for quite some time, the decision rendered later on would have retrospective effect clarifying the legal position which was earlier not correctly understood.

43. *Salmond* in his well-known work states;

“...the theory of case law is that a judge does not make law; he merely declares it; and the overruling of a previous decision is a declaration that the supposed rule never was law. Hence any intermediate transactions made on the strength of the supposed rule are governed by the law established in the overruling decision. ***The overruling is retrospective, except as regards matters that are res judicatae or accounts that have been settled in the meantime***”.

(emphasis supplied)

44. It is no doubt true that after the historic decision in *L.C. Golak Nath v. Union of India* (1967) 2 SCR 762, this Court has accepted the doctrine of “prospective overruling”. It is based on the philosophy : “The past cannot always be erased by a new judicial declaration.”

It may, however, be stated that this is an exception to the general rule of the doctrine of precedent.

45. 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.”

(underlining added)

9. The argument advanced by the learned counsel for the petitioners seems attractive at first blush. How can a decision of the Tribunal be said to be a mistake when, at the point of time it was delivered, the Tribunal had followed a decision of the Supreme



Court? And, how can the fact that the Supreme Court decision was subsequently overruled by a larger Bench of the Supreme Court, render the said decision of the Tribunal to be regarded as a ‘mistake apparent from the record’? But, these questions, raised by the learned counsel for the petitioners, have been fully answered by the Supreme Court in its decision in *Saurashtra Kutch Stock Exchange* (*supra*). The Supreme Court held that a judicial decision acts retrospectively. Judges do not make law they only discover or find the law. Thus, where a decision of the Supreme Court overrules an earlier decision, the views expressed in the later decision would have to be regarded as having always been the law.

10. The overruling is, therefore, retrospective. If that be the case, the decision of the Tribunal which merely followed the earlier decision of the Supreme Court in *Virtual Soft* (*supra*), which has been overruled in *Gold Coin* (*supra*), would be contrary to the law declared by the Supreme Court. Now, the question is whether, in the context of a matter which has attained ‘finality’, it would entail re-opening of those cases. Clearly, where there is no pending proceeding and the matter has ‘truly’ attained finality, re-opening is not contemplated. Therefore, the question of retrospective overruling would have to be considered in the light of the fact as to where a matter has or has not attained finality.

11. For this purpose, it would be necessary to examine the provisions of Section 254(2) of the said Act, which reads as under:-



“254. **Orders of Appellate Tribunal**

(1) XXXX XXXX XXXX XXXX

(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 1<sup>st</sup> day of October, 1998, shall be accompanied by a fee of fifty rupees.

XXXX XXXX XXXX XXXX”

12. Clearly, a time limit of four years from the date of the order has been prescribed in respect of the exercise of the power of rectification of a mistake apparent from the record. There is absolutely no doubt that had an appeal or other proceeding been pending in respect of the order of the Tribunal in this case, when the decision in *Gold Coin* (*supra*) was rendered, that decision would have to be followed. But, as it happens, no appeal or other proceeding was pending. However, the period of four years stipulated in Section 254(2) had not elapsed. Thus, in our view, once we recognize the fact that the Supreme



Court decision in *Gold Coin* (*supra*) operates retrospectively and therefore it has to be regarded as the law as it existed when the order was passed by Tribunal, there is a clear mistake apparent from the record. That mistake cannot be allowed to remain. The only limitation for correcting the mistake is that imposed by the provisions of Section 254(2) itself and that is only with respect to time. The application for rectification having been made in time, the order of the Tribunal recalling its earlier order cannot be faulted.

13. Consequently, this writ petition has no merit. It is dismissed but, with no order as to costs.

**BADAR DURREZ AHMED, J**

**V.K.JAIN, J**

**MAY 30, 2012**  
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