$~2 [2021]

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

% *Date of decision: 22.10.2021*

\+ **W.P.(C) 11330/2021**

FEDERAL MOGUL GOETZE (INDIA) LIMITED THROUGH A.R. ..... Petitioner

Through: Mr. Vivek Sarin and Mr. Dibya Prashant Singh, Advocates

versus

ASSISTANT COMMISSIONER OF INCOME TAX CIRCLE-9(1), NEW DELHI ..... Respondent

Through: Mr. Kunal Sharma, Advocate.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER
HON'BLE MR. JUSTICE TALWANT SINGH
[Physical Court hearing]

RAJIV SHAKDHER, J. (ORAL)

1. On the previous date i.e., 11.10.2021, we had passed the following order, whereby the controversy obtaining in the matter had been crystallized:

"2. This writ petition is directed against the order dated 23.09.2020, passed by the Income Tax Appellate Tribunal (in short „the Tribunal"), whereby the Miscellaneous Application i.e., M.A. No.555/Del/2019 was dismissed.

2.1. The aforementioned M.A. was filed by the assessee/petitioner seeking adjudication qua additional grounds i.e., Ground Nos. 6 and 7, which formed part of its appeal i.e., ITA No.1909/Del/2016. For the sake of convenience, the said grounds are extracted hereafter:

> *"**Ground No. 6***
> *The Ld. AO, on facts and in law, has erred in disallowing the advances written off amounting to INR 52,53,000 under the provisions of Section 36(2) of the Act. In doing so, the Ld. AO has failed to appreciate that such advances were given during the normal course of business and their subsequent non-*

recovery and consequent write-off in the books of accounts by the Appellant constituted a valid business expenditure to be allowed to the Appellant.

Ground No. 7

7.1 The Ld. AO has erred, on the facts and circumstances of the case and in law, in not allowing additional MAT credit (amounting to INR 1,36,75,898) as claimed by the Appellant during the course of assessment proceedings. In doing so, the Ld. AO has failed to appreciate that the aforesaid claim was a revision of an existing claim already claimed in the return of income, on account of an inadvertent error and not a fresh claim on account of omission on the part of the Appellant.

7.2 Further, the Hon'ble DRP has grossly omitted in addressing the objection raised by the appellant on the aforesaid action of the Ld. AO while issuing directions to the Ld. AO."

3. The record shows that, the assessee/petitioner withdrew its appeal, as the issue pertaining to transfer pricing adjustment, concerning the assessment year (AY) in issue i.e., AY 2011-2012 stood resolved. 3.1 The resolution took place as the assessee/petitioner had entered into an Advance Pricing Agreement with the respondent/revenue. 4. Mr. Vivek Sarin, who appears on behalf of the assessee/petitioner, in support of his plea, says that, the Tribunal could have exercised its power under Section 254(2) of the Income Tax Act, 1961.

4. Mr. Vivek Sarin, who appears on behalf of the assessee/petitioner, in support of his plea, says that, the Tribunal could have exercised its power under Section 254(2) of the Income Tax Act, 1961.

4.1. Inter alia, in this context, Mr. Sarin has placed reliance upon a full bench judgement of this Court, rendered in ***Lachman Dass Bhatia Hingwala (P.) Ltd. v. Assistant Commissioner of Income Tax,*** *2010 SCC OnLine Del 4617. In particular, reliance is placed on paragraph 27 of the said judgement. For the sake of convenience, the same is extracted hereafter:*

"27. *In this context, we may refer with profit to the decision in Assistant Commissioner of Income-Tax v. Saurashtra Kutch Stock Exchange Ltd., [2003] 262 ITR 146 wherein a Division Bench of the Gujarat High Court was dealing with a writ petition preferred under Articles 226 and 227 of the Constitution of India. In the said case, the assail was to the order dated 5.9.2001 passed by the tribunal whereby the tribunal had recalled the earlier order dated 27.10.2000. The Division Bench dealt with the contention canvassed by the revenue that the tribunal cannot obliterate its earlier findings/reasonings/order and the original order cannot be wiped out and came to hold as follows:*

> *"(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."

On the basis of the said conclusions, the writ court affirmed the order of recall passed by the tribunal. The aforesaid decision was challenged by the revenue before the Apex Court and their Lordships in ACIT v. Saurashtra Kutch Stock Exchange Ltd., [2008] 305 ITR 227 (SC) 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)."

[Emphasis supplied]

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.

In S. Nagaraj v. State of Karnataka1993 Supp (4) SCC 595, 618, Sahai, J. stated:

"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."

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."

4.2. Mr. Kunal Sharma, who appears on advance notice on behalf of the respondent/revenue, seeks time to examine the aforementioned judgement, cited by the counsel for the assessee/petitioner.

5. Since we are standing over the matter, we are inclined to issue a formal notice in the matter. It is ordered accordingly.
5.1. Mr. Sharma accepts notice on behalf of the respondent/revenue. In case instructions are received to resist the writ petition, a counter-affidavit will be filed before the next date of hearing.
6. List the matter on 22.10.2021."

2. The aforementioned extract shows that Mr. Kunal Sharma, learned counsel for the respondent/revenue, was to revert with instructions today.

2.1. Furthermore, as would be evident from the order dated 11.10.2021, Mr. Sharma was also given leave to file a counter-affidavit, in case he were to receive instructions, to resist the petition.

2.2. Concededly, counter-affidavit has not been filed.

2.3. Mr. Sharma, however, does not dispute the fact [as he cannot in view of the fact that no counter affidavit has been filed] that, no decision could be rendered on the issues raised before the Income Tax Appellate Tribunal (in short "the Tribunal") by way of additional ground nos. 6 and 7, in view of the fact that the appeal had been withdrawn by the petitioner.

2.4. Mr. Sharma also cannot but accept the position that, the Tribunal has the power to amend its order to rectify mistakes, which are apparent on the face of the record, in exercise of its power under sub-section (2) of Section 254 of the Income Tax Act, 1961 (in short "the Act").

3. It is our view that, the power available to the Tribunal under sub-section (2) of Section 254 of the Act is not limited to a mistake committed by the Tribunal. The amendment to the order of the Tribunal can also be made, if it is triggered on account of a mistake of the counsel for the parties.

3.1. In other words, once a mistake/error is brought to the notice of the Tribunal, which is apparent on face of record, either by the assessee or the

assessing officer, the Tribunal would have the necessary power to rectify/amend its order. This power will also extend to a situation, such as the one obtaining in the present case, where the petitioner's counsel withdrew the appeal, for the reason that, the issue concerning transfer pricing adjustment in respect of the assessment year (AY) in issue i.e., AY 2011-12, stood resolved.

3.2. The petitioner's counsel, inadvertently, failed to bring to the notice of the Tribunal, that the issues raised in ground nos. 6 and 7 of the appeal were outstanding, and that they needed to be adjudicated upon.

4. Thus, having regard to the aforesaid, we are of the view that the impugned order dated 23.09.2020, passed by the Tribunal in the miscellaneous application i.e., MA No.555/Del/2019 deserves to be set aside.

4.1 It is ordered accordingly.

5. The Tribunal is requested to take up the petitioner's appeal, insofar as the issues pertaining to grounds 6 and 7 are concerned, and adjudicate upon the same, after hearing the concerned parties and/or their authorized representative.

6. The writ petition is disposed of in the aforesaid terms.

RAJIV SHAKDHER, J

TALWANT SINGH, J

OCTOBER 22, 2021/pmc

Click here to check corrigendum, if any