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

% *Date of decision: 13.02.2023*

\+ **ITA 78/2023**
ITA 79/2023

PR. COMMISSIONER OF INCOME TAX (CENTRAL)-2
..... Appellant
Through: Mr Sanjay Kumar, Sr. Standing Counsel.

versus

GREEN MARK INFRA LTD. ..... Respondent
Through: None.

CORAM:
HON'BLE MR JUSTICE RAJIV SHAKDHER
HON'BLE MS JUSTICE TARA VITASTA GANJU

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J.: (ORAL)

CM APPL. 6764/2023 in ITA 78/2023
CM APPL. 6766/2023 in ITA 79/2023

1. Allowed, subject to just exceptions.

CM APPL. 6763/2023 in ITA 78/2023
CM APPL. 6765/2023 in ITA 79/2023 ***[Applications filed on behalf of the appellant seeking condonation of delay of 100 days in re-filing the appeal]***

2. These are applications filed on behalf of the appellant/revenue seeking condonation of delay in re-filling the appeals.

3. According to the appellant/revenue, there is delay of 100 days.

4. For the reasons given in the applications, the delay in re-filling the

appeals is condoned.

5. The applications are disposed of in the aforesaid terms.

ITA 78/2023
ITA 79/2023

6. These appeals are directed against order dated 01.04.2022 passed by the Income Tax Appellate Tribunal [in short, "Tribunal"] concerning MA No. 756 preferred in ITA 6208/Del/2015 and MA No. 755 preferred in ITA 6207/Del/2015.

6.1. ITA 78/2023 concerns Assessment Year (AY) 2009-10, while ITA 79/2023 concerns AY 2008-09.

7. The appellant/revenue is aggrieved by the fact that *via* the aforementioned order the Tribunal has recalled its order dated 26.10.2018 which was passed on merits.

8. Mr Sanjay Kumar, learned senior standing counsel, who appears on behalf of the appellant/revenue, says that since the above-referred applications were filed by the respondent/assessee under Section 254(2) of the Income Tax Act, 1961 [in short, "Act"], the Tribunal could not have recalled the order dated 26.10.2018, as the same was rendered on merits.

9. A careful perusal of the record would show that the Tribunal, while noting the appearances of the representatives of the parties, had noted the following:

Assessee by:	Shri S.S. Rana, CIT DR
Revenue by:	None

9.1. This was, clearly, a mistake made while noting the appearances of the parties.

10. Insofar as the impugned order is concerned, the Tribunal was persuaded to recall the order dated 26.10.2018, as the respondent/assessee had asserted that it had not received notice of the date when the concerned appeals were fixed for hearing.

10.1. In support of this plea, [as recorded in paragraph 2 of the impugned order], an affidavit of the Director of the respondent/assessee was filed. This aspect [as recorded by the Tribunal in paragraph 3 of the impugned order], was not controverted by the appellant/revenue.

10.2. Given this position, the Tribunal observed in paragraph 4 the impugned order that the appellant/revenue had placed no material before it which would suggest that the reasons given by the respondent/assessee for non-appearance, on the date fixed for hearing, were false.

11. Having regard to the aforesaid position, the Tribunal went on to hold that it was a well-settled principle of law that opportunity of hearing should be accorded to the disputants and that no disputant should be condemned unheard. Accordingly, the Tribunal, in the interest of justice, recalled its *ex parte* order [i.e., order dated 26.10.2018] which had been passed on merits.

12. As noted hereinabove, there was certainly a mistake in recording the appearances in the matter.

12.1. Besides this, even if, for the moment, we were to agree with Mr Kumar that the order could not have been recalled by the Tribunal by taking recourse to Section 254(2) of the Act, we are, certainly, of the view that this was an incidental and ancillary power available to the Tribunal. [See ***Income Tax Officer, Cannanore v M.K. Mohammed Kunhi*** AIR 1969 SC 430.]

12.2. That said, under Section 254(2) of the Act, the Tribunal has the

power to rectify an error which emanated from a mistake committed by it. The mistake can arise from an act of omission or commission. In this case, the Tribunal failed to notice that the respondent/assessee did not have information concerning the date fixed for hearing in the appeal.

12.3. Given this position, contrary to what Mr Sanjay Kumar has contended, the Tribunal could have corrected its mistake, to do right by the party who was inadvertently wronged. [See ***Honda Siel Power Products Ltd. v Commissioner of Income Tax, Delhi*** (2007) 12 SCC 596[1]]

12.4. Furthermore, any which way the Tribunal, in our opinion, has power conferred upon it under Rule 25 of the Income Tax Appellate Tribunal

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[1] ***"12.*** *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 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 10-9-2003 allowing the rectification application has given a finding that Samtel Color Ltd. 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 43-A. 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.*

13. ....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."

Rules, 1963 [in short, "1963 Rules"] to recall its orders in such situations. The said rule reads as follows:

> *"**25. Hearing of appeal ex parte for default by the respondent.** Where, on the day fixed for hearing or any other day to which the hearing may be adjourned, the appellant appears and the respondent does not appear in person or through an authorized representative when the appeal is called on for hearing, the Tribunal may dispose of the appeal on merits after hearing the appellant.*
>
> *Provided that where an appeal has been disposed of as provided above and **the respondent appears afterwards and satisfies the Tribunal that there was sufficient cause for his non-appearance when the appeal was called on for hearing, the Tribunal shall make an order setting aside the ex parte order and restore the appeal**."*
>
> [Emphasis is ours]

13. As is evident from the discussion above, sufficient cause having been provided, the Tribunal felt impelled to recall its order dated 26.10.2018. It is more than well-established that even if a judicial or a quasi-judicial authority does not refer to the source of its power in support of its action, as long as the power is otherwise available, no fault can be found with the exercise of the power. This is one such instance.

14. We find no merit in the above-captioned appeals. The appeals are, accordingly, dismissed.

RAJIV SHAKDHER, J

TARA VITASTA GANJU, J

FEBRUARY 13, 2023 / tr

Click here to check corrigendum, if any