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

RESERVED ON: 26.07.2012
PRONOUNCED ON: 04.09.2012

\+ **W.P.(C) 106/2012**

COMMISSIONER OF INCOME TAX-II ..... Petitioner
Through: Sh. N.P. Sahni, Advocate.

versus

M/S. MARUTI INSURANCE DISTRIBUTION SERVICES LTD.
..... Respondent
Through: Sh. Ajay Vohra and Sh. Somnath Shukla, Advocates.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V. EASWAR

MR. JUSTICE S.RAVINDRA BHAT

%1. This writ petition by the revenue (Commissioner of Income Tax) seeks quashing of an order of the Income Tax appellate Tribunal dated 14.1.2011 in Misc. App. No. 75 (Del)/2010 (in ITA No. 2866 (Del)/2009) whereby it rectified its previous order dated 30.11.2009 in ITA 2866/Del/2009.

2. The brief facts necessary to decide the case are that the assessee is engaged, *inter alia*, in the business of corporate insurance agency; it conducts business through extensive Maruti dealers' networks consisting of over 300 sales outlets and 400 dealer workshops spread throughout the country. It is a 100% owned subsidiary of Maruti Suzuki India Ltd, and has

a business arrangement with National Insurance Co. Ltd as its licensed corporate insurance agent. It filed a return for AY 2006-07 declaring an income of Rs. 2,66,26,206/-. The AO issued notice under Section 143 (2) and the assessee filed its reply. The AO held that the assessee had debited Rs. 8,99,89,136/- as commission paid to Maruti dealers, on a total sum of Rs. 6,29,92,392/-. This amounted to 70% of the total receipts of insurance commission. For the preceding years, (A) 2005-06,2004-05 and 2003-04) the payments made to Maruti dealers were 70%, 79% and 93.66%. The AO restricted the commission to 60% and thus disallowed Rs. 89,98,913/-. The assessee's appeal challenging this addition succeeded. The revenue preferred an appeal. The ITAT in its order dated 30-11-2009 (in ITA 2866/Del/09) allowed the appeal, reasoning that the revenue's argument that since commission payable during the initial years after setting up of business might have been warranted, whereas for the AY 2006-07 a decline in such commission could be justified. The matter was remitted for reconsideration to the AO to decide the matter afresh.

3. After the above order was made, the assessee preferred an application under Section 254 (2) contending that a rectification of the previous order (dated 30-11-2009) was called for. In this appeal, the assesee relied on a development which had not been taken into consideration by the ITAT (for the reason that it was not before it, when it passed the order on 30-11-2009), i.e that on 9-10-2009, it had dismissed the revenue's appeal for AY 2005-06. It was contended in the application (for rectification) that there were no change of facts, warranting a differential approach as to the nature of allowance for commission, for two succeeding assessment years, i.e 2005-06

and 2006-07 necessitating a drastic disallowance to the extent of 10%. The number of dealerships was the same, and that the Tribunal misled itself by observing that the setting up of outlets during earlier years justified payment of higher commission, and that for 2006-07 such commission payment should have reduced.

4. The Tribunal, in its order (impugned in this case) dated 14-1-2011 accepted the assessee's contention. It reasoned that the mistake in holding that the dealership commission should have reduced was unwarranted. On a reappreciation of the record, it concluded that the number of dealerships and workshops remained constant and that by its order for 2005-06 (in ITA 1590 and 1924(Del)/09 dated 9-10-2009) it had upheld the commission expenditure to an extent of 70%. Consequently, it allowed the rectification application, and reversed its previous order. The result was that the rectification order amounted to dismissal of the revenue's appeal (to the Tribunal).

5. The revenue contends, through this writ petition, that the Tribunal exceeded its limited jurisdiction to rectify its orders, and in effect re-examined the merits. It was argued that if indeed the previous order, allowing the revenue's appeal was based on faulty reasoning or appreciation of the law, the subsequent action, in allowing a rectification was utterly unjustified. Mr. Sahni, learned counsel for the revenue argued that the Tribunal cannot launch into a quasi appeallate enquiry, invoking the rectification route prescribed under Section 254 (2). If an error or mistake was apparent, facially from the record, the exercise of jurisdiction would be justified. On the other hand, if that error is discernible on the basis of

reasoning and argument, it is not capable of rectification; the remedy is an appeal. It was lastly argued that the passing of an order dated 9-10-2009 for a previous year (which could have been shown at the time of original disposal of the revenue's appeal on 30-11-2009) did not in any way constitute a rectifiable error. Counsel stressed on the fact that the Tribunal could not have rectified its order, and substituted the previous order resulting in an entirely different direction.

6. The assessee filed its counter affidavit, and has relied upon it, and the contents of its recrification. Mr. Ajay Vohra, its learned counsel, argued that the ITAT's order, impugned in this case, cannot be faulted for procedural impropriety or jurisdictional excess. It was contended that the Tribunal was appraised of the fact that there was no justification on the record for it to assume that the commission expenses would have reduced over the years. Counsel emphasized that the number of Maruti dealerships and workshops remained the same; the CIT (A) had in the previous year dealt with an identical situation, and directed the deletion of disallowance. He again followed the same path for the assessment year in question, i.e 2006-07. However, the Tribunal had affirmed the appellate commissioner's order for 2005-06 and for the later year, without any factual basis, directed a different approach. This inconsistency was rectifiable under Section 254 (2).

Analysis and findings

7. Section 254(2) of the Act makes it amply clear that a *'mistake apparent from the record'* is rectifiable. To attract the jurisdiction under Section 254(2), a mistake should exist and must be *apparent* from the record. The power to rectify the mistake, however, does not cover cases

where a revision or review of the order is intended. "Mistake" means to understand wrongly or inaccurately; it is an error; a fault, a misunderstanding, a misconception. "Apparent" implies something that can be seen, or is visible; obvious; plain. A mistake which can be rectified under Section 254(2) is one which is patent, obvious and whose discovery is not dependent on argument. The language used in Section 254(2) is permissible where it is brought to the notice of the Tribunal that there is any mistake apparent from the record. The amendment of an order therefore, does not mean obliteration of the order originally passed and its substitution by a new order which is not permissible, under the provisions of Section 254(2). Further, where an error is far from self-evident, it ceases to be an "apparent" error. Undoubtedly, a mistake capable of rectification under Section 254(2) is not confined to clerical or arithmetical mistakes. At the same time, it does not cover any mistake which may be discovered by a complicated process of investigation, argument or proof. As observed by the Supreme Court in *Master Construction Co. (P) Ltd. v. State of Orissa* (1966) 17 STC 360, an error which is apparent on the face of the record should be one which is not an error which depends for its discovery on elaborate arguments on questions of fact or law. A similar view was also expressed in *Satyanarayan Laxminarayan Hegde v. Mallikarjun Bhavanappa Tirumale AIR* 1960 SC 137.

8. Significantly, the language used in Order 47, Rule 1 of the CPC, 1908, is different from the language used in Section 254(2) of the Act. Power is conferred upon various authorities to rectify any *"mistake apparent from the record"*. Though the expression "mistake" is of indefinite content and has a

large subjective area of operation, yet, to attract the jurisdiction to rectify (an order) under Section 254(2), it is not sufficient if there is merely a mistake in the orders sought to be rectified. The mistake to be rectified must be one apparent from the record. A decision on the debatable point of law or undisputed question of fact, is not a mistake apparent from the record.

9. The contours of the jurisdiction under Section 254 (2) were examined repeatedly by Division Benches of this Court. In *Commissioner of Income Tax v. Income Tax Appellate Tribunal* (2005) 204 CTR Del 349, it was held that:

> *"6. It is evident from the above that the power available to the Tribunal is not in the nature of a review as is understood in legal parlance. The power is limited to correction of mistakes apparent from the record. What is significant is that the section envisages amendment of the original order of the Tribunal and not a total substitution thereof. That position is fairly well-settled by two decisions of this Court in Ms. Deeksha Suri v. ITAT and Karan and Co. v. ITAT [2002] 253 ITR 131. This Court has in both these decisions held that the foundation for the exercise of the jurisdiction lies in the rectification of a mistake apparent from the record which object is ensued by amending the order passed by the Tribunal. The said power does not however, contemplate a re-hearing of the appeal for a fresh disposal. Doing so would obliterate the distinction between the power to rectify mistakes and the power to review the order made by the Tribunal. The following passage from the decision of this Court in Karan and Co.'s case (supra) elucidates the difference between review and rectification of an order made by the Tribunal:*
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> > *"The scope and ambit of 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 the 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 re-hearing and readjudication 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 or Rule 24 of the Income Tax (Appellate Tribunal) Rules, 1963, and that too only in cases where the assessed 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. ITAT . Judged in the above background the order passed by the Tribunal is indefensible."

7. That being the legal position, the Tribunal was not in our opinion justified in recalling the order passed by it in toto and setting the matter down for a fresh hearing. Just because a pronouncement made on the subject either by the Tribunal or by any other Court was not noticed by the Tribunal while taking a particular view on the merits of the controversy may constitute an error that would call for correction in an appropriate appeal against the order. Any such error may however fall short of constituting a mistake apparent from the record within the meaning of Section 254(2) of the Act. More

importantly just because a point is debatable (which is one of the reasons given by the Tribunal in the instant case) would hardly provide a justification for recalling the order and fixing the appeal for a de novo hearing. While doing so, the Tribunal has no doubt made certain observations in regard to the levy of interest under Section 158BFA being statutory in nature with no power vested in any authority or Tribunal to condone the same, but the very fact that the Tribunal has made those observations would not render valid the order of recall passed by it. The net result of the order made by the Tribunal continues to remain the same viz, the appeal has to be heard again simply because one of the issues decided by the Tribunal is debatable or the Tribunal has not noticed an earlier decision rendered by another Bench. Both these reasons were insufficient to justify the order of recall made by the Tribunal."

In *Commissioner of Income Tax v Honda Siel Power Products* (2007) 293 ITR 132 (Del) the Court held that:

"It makes no difference whether the entire order is sought to be recalled or the order passed by the Tribunal on individual grounds is sought to be recalled in entirety. In other words, if the Tribunal has given its decision on say grounds 3 and 4 in a particular way in its first order while dealing with ten separate grounds and pursuant to a rectification application, it recalls its decision on grounds 3 and 4 and gives a completely different decision on the said grounds, then it would certainly amount to recall and review of its entire order in respect of those grounds."

The Court also noticed and held that:

"It must be remembered that this is not a power of review but is restricted to rectifying mistakes "apparent from the record." A liberal approach might constitute an invitation to parties to allow the period for filing an appeal to expire, anticipate a change of coram of the bench that heard the appeal in the first instance, and then at their own sweet will "take a chance" by

filing a rectification application on any fancy imagined 'mistake apparent from the record' at any time before the expiry of four years."

The Supreme Court also, in *T.S. Balaram, Income Tax Officer, Company Circle IV, Bombay v. Volkart Brothers, Bombay* [1971] 82 ITR 50 (SC) placed similar interpretation on the expression "with a view to rectifying any mistake apparent from the record" - an expression common in section 254(2) and section 154 of the Act, holding:

> From what has been said above, it is clear that the question whether Section 17(1) of the Indian Income-tax Act, 1922 was applicable to the case of the first respondent is not free from doubt. Therefore the Income-tax Officer was not justified in thinking that on that question there can be no two opinions. It was not open to the Income-tax Officer to go into the true scope of the relevant provisions of the Act in a proceeding under Section 154 of the Income-tax Act, 1961. A mistake apparent on the record must be an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may conceivably be two opinions. As seen earlier, the High Court of Bombay opined that the original assessments were in accordance with law though in our opinion the High Court was not justified in going into that question. In Satyanarayan Laxminarayan Hegde and Ors. v. Millikarjun Bhavanappa Tirumale [1960]1SCR890 this Court while spelling out the scope of the power of a High Court under Article 226 of the Constitution ruled that an error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions cannot be said to be an error apparent on the face of the record. A decision on a debatable point of law is not a mistake apparent from the record-see Sidhramappa v. Commissioner of Income-tax, Bombay [1952]21ITR333(Bom) . The power of the officers mentioned in Section 154 of the Income-tax Act, 1961 to correct "any mistake apparent from the record" is undoubtedly

> not more than that of the High Court to entertain a writ petition on the basis of an "error apparent on the face of the record".

10. It can be seen from the preceding discussion that the power to rectify an order, under Section 254 (2) is extremely limited. It does not extend to correcting errors of law, or re-appreciating factual findings. Those, properly fall within appellate review of an order of court of first instance. What legitimately falls for consideration are errors (mistakes) apparent from the record. Here, whether the dealer commissions remained constant throughout the previous years, or had to dwindle, according to the Tribunal's understanding in its previous order of 30-11-2009, were matters that had to be gone into and were directed to be gone into by the Assessing officer. However, in the order by which previous order was rectified, the entire basis of its previous reasoning was substituted, and a wholly new result ensued. This court is clear that such re-appreciation did not amount to rectification of a mistake, but re-appreciation of a process of reasoning, which falls legitimately in the sphere of the appellate forum. The Tribunal – as is evident from a reading of its impugned order- took note of its order dated 9-10-2009 in respect of the AY 2005-06, and was to quite an extent influenced by it. This court also notices that the correctness of that order is under appeal before this court (in ITA 1476/2010) and a question of law has been framed. Furthermore, the Tribunal could, in view of clear decisions of this court, have not entirely substituted and re-written its previous order.

11. In view of the above discussion, it is held that the impugned order of the Tribunal dated 14-1-2011 in Misc. App. No. 75 (Del)/2010 (in ITA No. 2866 (Del)/2009) cannot be sustained. It is hereby quashed; the main order

disposing of the matter on 30-11-2009 is hereby restored. If the assessee feels aggrieved by that order, it is open to it to seek its appellate remedies, if so advised, in accordance with law. The writ petition is allowed in the above terms; no costs.

S. RAVINDRA BHAT
(JUDGE)

R.V. EASWAR
(JUDGE)

SEPTEMBER 4, 2012