In the High Court of Judicature for Rajasthan
Jaipur Bench
**
Civil Writ Petition No.5081/2008
Apex Metchem (P) Ltd ***Versus*** Income Tax
Appellate Tribunal Jaipur Bench & Ors.

Date of Order ::: 08/05/09

Hon'ble Mr. Justice Ajay Rastogi

Mr. Sanjay Jhanwar with
Mr. Prakul Khurana & Mr. Atul Saxena, for petitioner
Mr. Sameer Jain for respondent No.1 & 4 (ITAT)
Mr. Anurup Singhi for Mr. JK Singhi, for respondents No.2 & 3 (CIT)

While considering application U/Art.226 (3) of Constitution seeking vacation of interim orders dt.23/05/08, this Court vide order dt.16/01/09 observed to finally dispose of the petition at admission stage; hence instant petition was finally heard at joint request.

Instant petition is directed against order dt.31/03/2008 (Ann.4) in Misc.Appl.8/JP/2008, whereby Income Tax Appellate Tribunal, Jaipur Bench ("**ITAT, Jaipur**") in exercise of powers U/s 254(2) of Income Tax Act, 1961 ("**IT Act**") re-called its earlier order dt.29/03/2006 (Ann.1) and further directed both the appeals (ITSSA-105/JP/2004 & 35/JP/2005-Asstt.Year-Block Period 01/04/88 to 23/03/99) to be heard by ITAT Mumbai Bench, Mumbai in terms of order dt. 04/04/05 (Ann.3) of the President ITAT, Mumbai (respondent No.4).

Basic issue raised herein is as to

whether on the facts & in the circumstances of the case, the Tribunal has erred in law and in facts in re-calling its final order passed U/s 254(1) with a view to rectify the same in exercise of powers U/s 254(2) of the Act.

Shorn of all details, only relevant facts necessary for purposes of issue raised herein are summerised. It appears that on 21/01/99, the Revenue initially conducted a search operation U/s 132 of the Act at office and residential premises of one Shri Mayur M. Thakkar of Mumbai wherein certain cash & documents were seized and in course of search of his bank accounts, name of petitioner-Company (M/s Apex Metchem (P) Ltd, 193A Industrial Area Jhotwara Jaipur) was found having debit & credit statements. Proceedings for block period (01/04/88 to 23/03/99) were initiated against M.Thakkar U/s 158-BC at Mumbai while against petitioner Company U/s 158BD of the Act at Jaipur. Assessing Authority at Mumbai passed order of assessment in case of M.Thakkar U/s 158BC on 31/03/01 against which appeal was preferred before Commissioner of Income Tax (Appeals) Mumbai and decided on 30/04/03. Since petitioner-Company also appeared as intervenor in proceedings initiated against M.Thakkar, as such also preferred appeal against order of assessment

made U/s 158BC and order of CIT(A) Central VII Mumbai before Appellate Tribunal, Mumbai which was transferred by Appellate Tribunal Mumbai to Jaipur Bench and came to be registered as ITSSA -97/JP/04.

Since appeal arises from proceedings initiated against M.Thakkar U/s 158BC of the Act on its transfer to Jaipur Bench, application was filed by petitioner to consolidate appeal and on the said application, the President, ITAT Mumbai passed order dt.04/04/05 (Ann.3) directing appeal (IT(SS)A No.97/Jp/04 to be heard and determined by Mumbai Bench, Mumbai. As informed, hearing after transfer is pending before Mumbai Bench.

Since petitioner was assessed by assessing authority U/s 158BD of the Act vide order dt.13/07/04, against which appeal was preferred and came to be decided by CIT (Appeals) III, Jaipur on 14/12/2004, against which petitioner Company preferred appeal (IT(SS)A No. 105/JP/2004) on 27/02/05 before ITAT Jaipur and cross appeal (IT(SS)A No.35//JP/2005) was also filed by Revenue and both the appeals (supra) were decided by common order dt.29/03/06 (Ann.1) U/s 254(1) of the Act.

Against order dt.29/03/06 (Ann.1) of ITAT

Jaipur, the Revenue preferred appeals U/s 260A of the Act being D.B. Income Tax Appeal Nos.77/08 & 78/08) which as informed, were admitted by this Court and are pending adjudication.

At this stage, without there being any application filed by either of parties, vide order dt.15/12/2007 (Ann.2), the ITAT suo moto issued show cause notice to the parties as to why order dt.29/03/06 (Ann.1) be not re-called U/s 254(2) of the Act and to get the matters heard & decided by Mumbai Bench, Mumbai, as per orders of the President, ITAT, Mumbai dt.04/04/05 (Ann.3). After show cause notice (supra) was served, petitioner Company & the Revenue both appeared where petitioner raised several objections including authority of ITAT to question final order passed U/s 254(1) and also tried to clarify that reasons referred to in the show cause notice issued vide order dt.15/12/2007 (Ann.2) with respect to appeal being transferred from Jaipur to Mumbai Bench were not related to appeals having been decided by ITAT, Jaipur Bench vide final order dt.29/03/06 (Ann.1); as such reasons assigned in the notice (Ann.2) was not legally sustainable.

However, ITAT, Jaipur vide order impugned dt.31/03/08 (Ann.4) re-called its final order

dt.29/03/06 (Ann.1) passed U/s 254(1) of the Act, holding that it was a mistake apparent from the record and further directed to consolidate both the appeals to be heard alongwith appeal pending before ITAT, Mumbai Bench, being assailed herein.

Counsel for petitioner submits that the Tribunal committed an error of law & jurisdiction in exercise of powers U/s 254(2) while re-calling its final order (Ann.1) passed U/s 254(1) of the Act. Counsel further submits that the Tribunal does not hold any plenary & inherent powers under the Act; and once substantive order passed by Tribunal U/s 254(1) was assailed by Revenue by filing appeal U/s 260-A before this Court, powers U/s 254(2) of the Act were not required to be exercised pending adjudication before High Court. Counsel further submits that under limited scope of S.254(2) of the Act, learned Tribunal could have rectified mistake apparent from the record, but not hold competence of re-calling the order and to re-hear afresh, as such order impugned passed by ITAT Jaipur in exercise of powers U/s 254(2) of the Act is without jurisdiction and deserves to be set aside.

Respondents have filed separate reply through their respective counsel. In their reply, respondent Nos.1 & 4 raised preliminary objection

that writ petition is not maintainable in view of statutory remedy of appeal being available U/s 260-A of the Act; and that apart, it has been inter-alia averred that at one stage, request was made by petitioner-Company by clubbing its appeals and to be heard at Mumbai Bench, Mumbai pertaining to search conducted at premises of Mayur M.Thakkar; and despite order of consolidation dt.04/04/05 (Ann.3) passed on its application by President ITAT, Mumbai in exercise of powers U/r 4 of ITAT Rules, 1963 cancelled but was not brought to the notice of ITAT Jaipur Bench which was the mistake apparent from the record and thus the Tribunal has not committed any error in re-calling its final order dt.29/03/06 (Ann.1) passed in exercise of powers U/s 254(1) of the Act. It has also been averred that Counsel for petitioner was relative of one of members of ITAT Jaipur Bench, and the original order (Ann.1) was obtained by petitioner;and when it came to the notice of Mumbai Bench, Mumbai, petitioner made an attempt to withdraw the appeal which was transferred to ITAT Mumbai Bench vide order of the President ITAT Mumbai dt.04/04/05 (Ann.3).

At the same time, Assessing Authority (respondent Nos.2 & 3) have also filed their

separate reply raising self-same preliminary objection about availability of remedy of appeal U/s 260-A of the Act against order impugned but nothing substantial has been averred by them in their reply.

It is relevant to mention that after passing of the order impugned, recalling final order dt.29/03/06 (Ann.1) passed in exercise of powers U/s 254(2) of the Act, the President, ITAT, Mumbai has passed further order dt.20/08/08 in pursuance of R.4 of ITAT Rules, 1963 transferring petitioner's two appeals-IT(SS)A NO.97/Jp/04 & No.105/JP/04; and so also of assessing authority (ACIT Cir.3, Jaipur) (No.35/ Jp/05) for being heard by Mumbai Bench, Mumbai.

I have considered contentions of Counsel for both the parties and with their assistance, examined material on record. Under the Scheme of IT Act, in case of a search conducted U/s 132, proceedings of block assessment period against assessee are initiated U/s 158-BC; while at the same time, if assessing officer is satisfied with undisclosed income belongs to any other persons other than those with respect to whom search was made, can initiate proceedings against such other persons U/s 158-BD of the Act.

In instant case, search was conducted U/s

132 of the Act against Mayur M. Thakkar at Mumbai on 21/01/99 at his office and residential premises resulting into initiation of proceedings U/s 158-BC while at the same time, proceedings were also initiated against petitioner-Company as alleged U/s 158-BD for certain bank accounts in the name of petitioner-Company found in course of search conducted by assessing authority at Jaipur.

At the stage of pending assessment before assessing authority, cases under jurisdiction of different Director General, Chief Commissioner or Commissioner can be transferred obviously after affording reasonable opportunity of being heard to the assessee and after recording reasons for doing so in exercise of powers U/s 127 of the Act.

In instant case, the assessment was made of assessee (Mayur M. Thakkar) U/s 158-BC of the Act by assessing authority Mumbai against which he preferred appeal (CIT(A)C-VII/C-18/ROT-198/01/02) which was also decided on 30/04/03 preferred further appeal to ITAT, Mumbai; & the petitioner being intervenor preferred appeal before Mumbai Bench which was transferred to Jaipur Bench on 09/12/04 and this appeal was separately registered by Jaipur Bench as IT(SS)A No.97/

Jp/04, which on request made by petitioner for its consolidation was transferred to Mumbai Bench Mumbai vide orders dt.04/04/05 (Ann.3) passed by the President in exercise of powers U/r 4 of ITAT Rules, 1963.

At the same time, assessment order was passed by assessing authority in case of petitioner at Jaipur U/s 158-BD of the Act on 30/07/04 and the appeal preferred before CIT (Appeals) was decided on 14/12/04; and since both the parties were aggrieved, cross appeals (IT(SS) A-105/Jp/04 of petitioner Company & IT(SS) A No.35/Jp/05 of the Revenue) were filed before the ITAT Jaipur Bench and were decided vide common order dt.29/03/06 (Ann.1).

It is relevant to mention that order dt.04/04/05 (Ann.3) passed by the President in exercise of R.4 of ITAT Rules, 1963 transferring appeal of petitioner to Mumbai Bench was confined to appeal (IT(SS)A No.97/Jp/04) which indeed was transferred to Mumbai Bench; and consolidated to appeal (No.553/M/03) preferred by Mayur M.Thakkar and was pending before ITAT, Mumbai Bench; at the same time after cross appeals were decided by ITAT Jaipur Bench vide common order dt.29/03/06 (Ann.1), the Revenue preferred appeal (DB IT Appeal Nos.77/08 & 78/08) before High Court

Jaipur Bench U/s 260-A of the Act which were admitted and are pending adjudication.

In instant case, either of parties did not file any application but the Tribunal suo moto ordered on 15/12/07 to issue show cause notice (Ann.2) to the parties calling upon them to appear on 15/01/08; and reasons referred to in the notice was that order dt.04/04/05 of the President whereby appeals were consolidated and to be heard by Mumbai Bench was not brought to their notice, which according to the Tribunal, was a mistake apparent from the record; and that compelled the Tribunal Jaipur Bench vide order impugned (Ann.4) to re-call its final order (Ann.1)passed U/s 254(1)of the Act.

There cannot be any dispute that if there is a mistake apparent from the record, it can always be rectified or amended by the Tribunal obviously within the period of limitation U/s 254 (2) of the Act.

Before I examine the controversy further, it will be relevant to look into S.254(1) & (2) of the Act which runs ad infra:

> "**254.(1)** The Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit.
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> **(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."

Proviso to R.34A(3) & (4) of ITAT Rules (quoted below) provides procedure for dealing with applications submitted U/s 254(2) of the Act :

> **(3)** The Bench which heard the matter giving rsiet to the application (unless the President, the Senior Vice-President, the Vice President or the Senior Member present at the station otherwise directs) shall dispose it after giving both the parties to the application a reasonable opportunity of being heard:
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> "**Provided** that it shall not be necessary to post miscellaneous application for hearing if it prima facie appears to be a petition for review."
>
> **(4)** An order disposing of an application, under sub-rule(3), shall be in writing giving reasons in support of its decision."

In instant case, the Tribunal suo moto issued notice to the parties purporting in exercise of powers U/s 254(2) and re-called its final order passed U/s 254(1) of the Act on the premise that there was a mistake apparent from the record in order dt.29/03/06 (Ann.1).

Question arises as to whether on the facts, the Tribunal was justified vide order impugned dt.31/03/08 (Ann.4) to re-call its final order passed U/s 254(1) for re-consideration. In other words, question is as to whether the

Tribunal committed error of law in re-calling its final order, which was appealable U/s 260A of the Act, despite there being limited scope to rectify/amend the order only in case of mistake apparent from the record.

A bare perusal of S.254(2) of the Act shows that the section gives power to rectify any mistake apparent from the record; and to amend any order passed by it and to make such amendment if the mistake is brought to its notice by the assessing officer or the assessee.

On a conjoint reading of sub-sections (1) & (2) to S.254, it clearly emerges that final order (Ann.1) passed U/s 254(1) must hold the field and the apparent mistake can be rectified or amended in exercise of powers U/s 254(2) of the Act.

It is necessary that there must exist a mistake apparent from the record and the order passed U/s 254(1) shall be made to be the basis with a view to rectify such a mistake. Therefore, whether the Tribunal acts on its own motion or at the behest of parties, it is imperative that there must be a mistake apparent from the record which would require the order in appeal to be amended.

That apart, S.254(4) of the Act provides

that the orders passed by the Tribunal on appeal U/s 254(1) shall be final save as provided subject to appeal U/s 260-A of the Act. The language employed in S.254 is crystal that the order passed on appeal can be an order passed U/s 254(1) or it could be an amended order passed U/s 254(2) of the Act and in both the situations, an order would nonetheless remain an order subject to appeal U/s 260A to the High Court.

Contention advance by Counsel for petitioner that such powers U/s 254(2) could not be exercise suo moto is not of any substance. On a bare reading of provisions of S.254 of the Act it depicts that the Tribunal has powers to rectify mistake apparent from record in two situations; - (1) on its own motion & (2) on application being moved by either party before it. It cannot be contended that power can be exercise only on the application. If the Tribunal is vested with power to rectify a mistake apparent from the record, it can certainly do so on its own motion or on application being filed by either party.

A Division Bench of Delhi High Court had an occasion to examine scope of S.254(2) of the Act in **CIT Vs. KL Bhatia (1990(182) ITR 361**) and observed ad infra:

"As we have already observed, the Tribunal is a creation of the statute. It is an admitted case, and it is now well settled, that though the Tribunal has no inherent power of reviewing its order on merits, the Tribunal has incidental or ancillary powers which can be exercised by it. Bu such power cannot be invoked to rehear a case on merits. The Tribunal can, after disposing of the appeal under section 254(1), rehear the matter on merits only within the purview of section 254(2). The Supreme Court has held in **Patel Narshi Thakershi v. Pradyuman singhji Arjunsinghji, AIR 1970 SC 1273**, that the power to review is not an inherent power. It must be conferred by law either specifically or by necessary implication. It does not stand to reason that, if the power of review is not present with the Tribunal, it, nevertheless, can exercise such power indirectly when it cannot do so directly. If the contention of learned counsel for the respondent is correct, then it could mean that, even on merits, the Tribunal can recall its earlier and then hear the case afresh and pass a different order. If this is so, it would amount to the Tribunal exercising power of review when it does not have any such power. To give an example, under the provisions of

> the Code of Civil Procedure, Order 27 provides the circumstances in which a judgment may be reviewed. If the contention of learned counsel for the respondent is correct, then, applying the same analogy to a civil case, it would be open to a court to recall its judgment in a case where the provisions of Order 47 are not applicable, and then to rehear the case. With respect, we see no warrant for this in legal jurisprudence. The appellate court can hear a case and decide it on merits, once for all, and cannot keep on rehearing the same appeal over and over again. Full effect has to be given to the provisions of section 254(4) which specifically provides that a decision of the Tribunal passed in appeal is final. This decision is final not only for the assessee but also final as far as the Tribunal, itself, is concerned."

In Asstt. **CIT Vs. Saurashtra Kutch Stock Exchange Ltd (2008 (173) Taxman 322 (SC)**), Apex Court observed ad infra:

> **37**. In our judgment, therefore, a patent, manifest and self-evident error which does not require elaborate discussion of evidence or argument to establish it, can be said to be an error apparent on the face of the record and can be corrected while exercising certiorari

> jurisdiction. An error cannot be said to be apparent on the face of the record if one has to travel beyond the record to see whether the judgment is correct or not. An error apparent on the face of the record means an error which strikes on mere looking and does not need long-drawn-out process of reasoning on points where there may conceivably be two opinions. Such error should not require any extraneous matter to show its incorrectness. To put it differently, it should be so manifest and clear that no Court would permit it to remain on record. If the view accepted by the Court in the original judgment is one of the possible views, the case cannot be said to be covered by an error apparent on the face of the record."

In **Honda Siel Power Prodcuts Ltd Vs. CIT (2007 (12) SCC 596),** Apex Court observed ad infra:

> **"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. (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**.
>
> **(emphasis added)**

From the judgments cited (supra), it is clear that the Tribunal is vested with powers to rectify mistake apparent from the record suo motu or at the behest of either party to dispute; and if there is a mistake apparent from the record, the Tribunal is bound to carry out the amendment in the original order to correct particular mistake as is evident from a latter portion of proviso, as per which there should exist mistake apparent from the record which would require the

order in appeal to be amended. Scope & ambit of application of S.254(2) of the Act is very limited. It is restricted to rectification of mistakes apparent from the record. But to re-view or re-call the order is not permissible U/s 254 (2) if necessitating rehearing & re-adjudication of entire subject matter of appeal and the dispute after being put for re-hearing no longer remains restricted to any mistake sought to be rectified. Power to re-call an order is provided U/Rr.24 & 25 of ITAT Rules, 1963; that too only in cases where appellant/ respondent shows reasonable cause for being absent at a time when the appeal was taken up and decided ex parte.

However, in instant case, mistake apparent from the record which was made by Tribunal to be the basis to re-call final order passed U/s 254(1) of the Act was in fact an order dt.04/04/05 (Ann.3) being passed by President ITAT, Mumbai in exercise of powers U/r 4 of ITAT Rules, 1963 – a bare perusal whereof depicts that Appeal (ITSSA No.97/Jp/04-block period 01/04/88 to 23/03/99) filed by appellant (petitioner Company herein) was transferred from Jaipur to Mumbai Bench and its copy was also forwarded to Asstt. Registrar, ITAT, Mumbai to hear appeal preferred by petitioner (ITSS A No.97/Jp04)

together with IT SS A No.375/04 filed by Mayur M. Thakkar.

But there was no order available on record being passed of consolidating appeals (ITSS A No.105/Jp2004 & cross appeal No.IT(SS) 35/Jp/2005) for being heard at Mumbai Bench in the absence whereof, there cannot be said to be any mistake apparent from the record being committed by the tribunal Jaipur Bench in hearing such appeals and decided finally U/s 254(1) of the Act vide order dt.26/03/2006 (Ann.1). Hence very plea of mistake apparent from the record having been taken to be the basis by Tribunal while re-calling its final order passed U/s 254 (1) of the Act on the facts of instant case is otherwise not legally sustainable.

However, it is relevant to mention that after impugned order was passed by Tribunal (Ann.4), the President ITAT, Mumbai also issued an order dt.20/08/08 in pursuance of R.4 of ITAT Rules, 1963 transferring both the appeals (supra) which were decided by Tribunal Jaipur Bench, to be consolidated and heard by Mumbai Bench. Since there was no prior order of consolidation of two appeals being passed by President U/r 4 of ITAT Rules, certainly there cannot be said to be any mistake apparent from the record while deciding

two appeals vide order (Ann.1) in exercise of powers U/s 254(1) of the Act.

Objection raised by respondents that petitioners have an alternative remedy of appeal U/s 260-A of the Act in the facts of instant case is of no substance for the reason that the appeal lies against order passed U/s 254(1) of the Act and any amendment made later on by Tribunal U/s 254(2) certainly merged into final order passed which is certainly appealable U/s 260-A. If final order U/s 254(1) of the Act is re-called and matter is to be re-heard afresh, there cannot be said to be an order U/s 254(1) allegedly appealable U/s 260-A of the Act and that apart, if the order is without jurisdiction, that can certainly be assailed under writ jurisdiction of this Court U/Art.226 of the Constitution.

Before parting with judgment, this Court would like to observe that in their separate reply, respondent Nos.1 & 4 have inter-alia averred about procedure adopted by Tribunal while passing final order dt.29/03/06 (Ann.1) and further imputed allegation against one of members of the Tribunal which passed final order U/s 254 (1), taking note of Vakalatnama filed by some of his relatives and also made averment that the order was passed in collusion. It is pertinent to

mention that such a reply imputing allegations against a member of the Tribunal is supported by affidavit of Registrar of the Tribunal, who has no personal knowledge and the record does not depicts so.

This Court has not examined the validity of final order passed U/s 254(1) of the Act and what has been averred by respondent Nos.1 & 4 in their reply imputing allegations, are not relevant factors for being considered or influenced thereby for the issue under consideration herein. However, this Court likes to observe that what has been raised by respondents in their reply imputing allegations, the respondent NO.4 being at the helm of affairs, it is for him to keep its office in order. Remedy lies within and not elsewhere but needs no comments from this Court which refrains from probing into further and expressing any opinion in this regard.

Consequently, writ petition succeeds and is hereby allowed. Order dt.31/03/08 (Ann.4) passed in exercise of powers U/s 254(2) of the Act & consequential order dt.20/08/08 (Ann.AR.1) of President ITAT for transferring appeals (ITSSA No.105/JP/04 & 35/JP/05) to Mumbai Bench are hereby quashed & set aside. No costs.

(**Ajay Rastogi), J.**