IN THE INCOME TAX APPELLATE TRIBUNAL,
AHMEDABAD "C" BENCH, AHMEDABAD

[Coram: Pramod Kumar (Vice President)
and Mahavir Prasad (Judicial Member)]

MA No. 166/Ahd/18
Arising out of ITA No. 210/Ahd/15
Assessment year: 2010-11

Income Tax Officer
Ward 11(4), Ahmedabad …….. Applicant

Vs

Devendra J Kothari ……..…..Respondent
37, C201 Shree Ghantakaran Mahavir Market
Sarangpur, Ahmedabad 380 002 [PAN: ACFPK2973H]

Appearances by
S K Dev *for the applicant*
S N Soparkar, *along with* **Parin Shah,** *for the respondent*

Date of concluding the hearing : January 4, 2019
Date of pronouncement : April 3, 2019

O R D E R

Per Pramod Kumar, VP:

1. This rectification application, seeking modification in our order dated 22nd September 2017, raises very interesting questions for our adjudication and must be dealt with in some detail.

2. It is, at the outset, necessary to understand the factual backdrop, as discernible from the material on record, in which the present rectification petition is moved. The assessee in this case is an individual. During the course of scrutiny assessment proceedings, and as a result of AIR inputs available with the income tax department, it was found that the assessee has deposited the sums of money aggregating to Rs 43,72,650 in his savings bank account with ICICI Bank Limited. When he was confronted with this fact, he had, vide letter dated 7th January 2013, *inter alia* stated that, "I was doing business of used clothes on small scale basis with retail lariwalas and hawkers since last several years *(,that)* I have invested about Rs 18 lakhs as my past profit, capital savings and capital received from my father on his death in the said business in the earlier years *(,that)* the profit margin in the said business is very low at 3 to 4% after deducting various expenses…….*(,and that)* "I have also done business in F&O in the share market and there was a huge loss in my said business". In the absence of further details to substantiate these contentions, the Assessing Officer held entire

deposit of Rs 43,72,650 as his unexplained investment and brought the same to tax under section 69. The matter did not rest at that. The Assessing Officer also imposed the concealment penalty under section 271(1)(c) by treating the entire amount of Rs 43,72,650 as income that the assessee concealed and in respect of which reasonable explanation of the assessee was not available. The explanation given by the assessee was rejected by the Assessing Officer who, inter alia, observed as follows:

> **However, the same** *(explanation)* **is not acceptable as the assessee has not filed any justification of cash deposited in bank account. The same story is repeated as submission filed by the assessee at the time of assessment proceedings. As such, I have reasons to believe that the assessee has nothing** *(worthwhile)* **to say about the penalty proceedings under section 271(1)(c) of the Income Tax Act, 1961. Further, the assessee has not filed appeal against the order passed under section 143(3) before the CIT(A).**

3. The assessee was thus imposed a penalty of Rs 13,00,990 being equivalent to 100% of the tax sought to be evaded. In appeal, learned CIT(A) extensively reproduced from Hon'ble Supreme Court's judgment in the case **MAK Data Limited Vs CIT [(2013) 358 ITR 593 (SC)],** confirmed the said penalty and also observed that **"In the present case, the AO had clearly recorded his satisfaction that the assessee concealed particulars of income and also furnished inaccurate particulars of income. The facts of the case are also that the appellant had not only offered no explanation for the cash deposits in his bank account and has also reiterated all through that he is unable to do so and has no explanation for the same"** and concluded that **"Under the circumstances, and in view of the decision of the Hon'ble Supreme Court** *(MAK Data Limited, supra)* **which is squarely applicable on the facts of the appellant's case, penalty of Rs 13,00,990 levied under section 271(1)(c) for concealment of income is confirmed"**. However, when an appeal against the stand so taken by the Commissioner (Appeals) came up before us, the Tribunal accepted the explanation to the extent of Rs 39,35,385 and declined the same in respect of the remaining amount, i.e. Rs 4,37,265. The reasoning adopted was that when admittedly the assessee was engaged in business in earlier years, and assessed on that basis, one could possibly proceed on the basis that these deposits represent the business receipts but then the assessee did not pay any tax on the profits of the said business was either, and, to that extent, that concealment of income has no explanation at all. Thus, the Tribunal restricted the penalty to 100% of tax sought to be evaded in respect of Rs 4,37,265. The operative portion of the order passed by the Tribunal was as follows:

> *"4. We find, as evident from undisputed past history of this case, that the assessee was stated to be engaged in some business and his bank account was being used in respect of the same. Learned Departmental Representative has also very fairly not disputed this possibility. We have, however, also noted that even if the explanation of the assessee is to be accepted, the assessee does not have any explanation for not disclosing the reasonable profits and on the business which he stated to have carried out. As a matter of fact, his return only shows interest income and salary income.*

> *When we put it to the assessee as to why he did not disclose, going by his version, any business income, the assessee has nothing to say. In these circumstances, in our considered view, the penalty deserves to be confirmed at least to the extent of reasonable profit on turnover of the assessee reflecting by cash deposits. Thus, as against an addition of Rs.43,72,650/- penalty to the extent relatable to addition of Rs.4,37,265/- will certainly be justified. Learned counsel for the assessee does not also dispute this position. As regards the balance quantum addition, we find that similar deposits have been treated as deposits in the course of business, in past, and, to that extent, explanation deserves to be accepted at least for penalty purposes. Accordingly, in our considered view, accepting assessee's explanation, though not proved to the hilt, that the deposits represent dealings in connection with business, we confirm the impugned penalty to the extent relatable to the addition of Rs.4,37,265/-. The balance amount of penalty stands deleted."*

4. Rather than challenging this relief in appeal before Hon'ble High Court, which was not permissible anyway in the light of applicable monetary limits for filing of appeals, the Principal Commissioner of Income Tax concerned filed a writ petition before Hon'ble Gujarat High Court on the ground that the Tribunal reduced penalty under section 271(1)(c) to "**10% of the tax sought to be evaded which was wholly impermissible**". Hon'ble High Court declined to entertain the said writ petition and observed as follows:

> It may be possible for the Revenue to argue that the monetary limits set out by the CBDT are for filing appeals before various foras, including the High Court and the Supreme Court. **These limitations imposed under the circular cannot be applied to a writ petition that may be filed by the Revenue**. However, when we recognize the philosophy behind issuance of the said circular, which happens to be to reduce litigation, such **liberty to file writ petition, even if available, cannot be lightly granted. In a rare and exceptional case, we may entertain a writ petition filed by the Revenue ignoring the monetary limit set out by the CBDT for filing the appeal particularly when we find that the judgment of the Tribunal is likely to have long term or cascading effect or would result into gross miscarriage of justice or such like**. Under the *(present)* circumstances, we are not inclined to entertain this petition.
>
> [Emphasis, by underling, supplied by us now]

5. What essentially follows from the observations so made by Their Lordships, in our humble understanding, is as follows:

1. The monetary limits set out by the CBDT for filing of appeals before the Hon'ble High Court and Hon'ble Supreme Court do not apply to the writ petitions filed before the Hon'ble Courts. In other words, even though an order may not be appealable before the Hon'ble Courts above, in view of the monetary limits for filing of appeals prescribed by the Central Board of Direct Taxes,in appropriate cases, such an order can nevertheless be challenged by way of writ petition.

2. Even though the option of filing the writ petitions, and thus challenging the orders of the authorities below, including this Tribunal, granting relief below the specified monetary limits, is legally available to the Revenue, Hon'ble Courts cannot lightly grant such a liberty to entertain the writ petitions as a matter of routine. It is only in a "rare and exceptional" case that such writ petitions can be entertained by the Hon'ble Courts above.

3. The "rare and exceptional cases" in which the writ remedy can be availed by the Revenue authorities are the cases in which decisions of this Tribunal can have (a) long term or cascading effect; (b) gross miscarriage of justice; or (c) such other undesirable and serious consequences.

4. The present case does not fall in any of the above categories of "rare and exceptional cases", and, for this reason, Hon'ble jurisdictional High Court did not entertain the writ petition challenging the order passed by the Tribunal.

5. Hon'ble jurisdictional High Court has thus allowed the order passed by the Tribunal, which was challenged in the writ petition, to achieve finality.

6. Their Lordships, however, did not stop at that. Their Lordships had a message of caution and of disapproval of the course adopted by this Tribunal as well, and this message was so glaring in the closing observation as reproduced below:

> **Before closing, however, we may record our disapproval of the approach adopted by the Tribunal while reducing the penalty. In plain terms, statutory provisions contained in section 271 envisage penalty which would be 100% of the tax sought to be evaded and which may go upto 300% thereof. The Tribunal, however, found a way to bypass this minimum limit by suggesting that the profit element embedded in the cash deposits could be subjected to penalty. When the proceedings of assessment in which the additions in the hands of the assessee were made, the Tribunal could not have ignored such final conclusions by simply adopting the difference mode or yardstick to judge the amount of tax sought to be evaded by the assessee.**

7. Revenue's efforts were not thus completely in vain. While Their Lordships did not entertain the writ petition filed by the Principal Commissioner of Income Tax, Their Lordships did, in the above observations, disapproved the approach adopted by the Tribunal. These observations about disapproval of the stand of the Tribunal are being treated by the Assessing Officer as ammunition to keep his grievance alive and once again approach the Tribunal for taking a second look at its judgement. Armed with these observations, the Assessing Officer is before us seeking rectification of mistake in the impugned order passed by the Tribunal, and urging us to bring this order in parity and consonance with the legally valid approach on how to compute the minimum penalty. The Assessing Officer, in this factual backdrop, has moved the present rectification petition. The operative portion of this rectification petition is as follows:

"1. In this case assessment order was passed u/s. 143(3) of the Act dtd 21.01.2013 determining total income at Rs. 45,30,320/- after making addition of Rs. 43,72,650/- on account of unexplained cash deposits u/s. 69 of the Act in bank account and penalty u/s. 271(1)(c) of the Act was also initiated for the addition made u/s. 69 of the Act.

2.1 The assessee has not filed appeal against the assessment order. Thus the assessment made and the addition of Rs. 43,72,650/- made u/s. 69 of the Act became final, penalty of Rs. 13,00,990/- on the concealed income of Rs. 43,72,650/- was levied u/s. 271 (1) (c) of the Act vide order dtd. 29/07/2013

2.2 Being aggrieved with penalty order assessee filed an appeal before Ld. CIT(A). The Ld. CIT(A) vide order No. CIT(A)-XVI/ITO/Wd.II(4)/1245/13-14 dtd 08.10.2014 had dismissed the appeal.

2.3 Being aggrieved assessee filed further appeal before Hon'ble ITAT. The Hon'ble ITAT vide order No. ITA No.210/Ahd/2015 dtd 22.09.2017 reduced the penalty on the ground that profit element and hence the concealment in the addition of Rs.43,72,650/- was only 10% thereof. Since the quantum of addition made and consequently concealment of income in this case became final, it was not open to Hon'ble ITAT to adjudicate the same and determine the concealed income a fresh in an appeal against penalty order.

2.4 The petitioner humbly submits that the quantum addition of Rs. 43,72,650/- on account of unexplained cash deposit in account of assessee has attained finality. Thus, the concealed income is Rs.43,72,650/- and this has attained finality. The tax on the said addition is also calculated and thus, the tax sought to be evaded works out to Rs.13,00,990/- as is evident from the penalty order dt. 29.07.2013.

2.5 As per law, therefore, minimum penalty leviable in this case is Rs. 13,00,990/-. However, the Hon'ble ITAT has upheld the penalty levied only of tax sought to be evaded, which is in gross violation of law u/s 271(1)(c) of the Act.

2.6. I humbly and with full respect submit that the Appellate Tribunal has exceeded its jurisdiction in penalty proceedings in restricting the penalty to 10% of tax payable on concealed income despite the fact that the addition u/s 69 of the Act has attained finality as the same has not been challenged by the Assessee. It is this order dated 22.09.2017 passed by the Appellate Tribunal in ITA No.210/Ahd/2015 which the petitioner seeks to rectify by way of filing this present Misc. Application as the same is contrary to the bare provisions contained in section 271(1)(c) of the Act.

2.7 Since the order of Hon'ble ITAT was found arbitrary, a Writ/Special Civil Application No. 7872 of 2018, (application No. 0/13171/2018) was filed in the Hon'ble High Court of Gujarat, Ahmedabad on 24.04.2018 by the Revenue. The Hon'ble High Court of Gujarat, Ahmedabad vide its order No. SCA No. 7872/2018 application No. 0/13171 /2018 dtd 11/05/2018 had though declined to entertain the

Writ petition, for the reasons recorded therein, but in para 5 of the order Hon'ble High Court has observed that....

> *"5. Before closing however we may record our disapproval of the approach adopted by the Tribunal while reducing the penalty. In plain terms, statutory provisions contained in section 271(1)(c) envisage penalty which would be 100% of the tax sought to be evaded and which may go up to 300% thereof. The Tribunal, however, found a way to bypass this minimum limit by suggesting that the profit element embedded in the cash deposits could be subject to penalty. When the proceedings of assessment in which the additions in the hands of the assessee were made, the Tribunal could not have ignored such final conclusions by simply adopting the different mode or yardstick to judge the amount of tax sought to be evaded by the assessee."*

3. In view of the submissions made and considering the observation made by the Hon'ble High Court and the provisions of section 271 (1)(c) of the I.T. Act,1961 it is evident that an error is apparent from records in the impugned order of Hon'ble ITAT wherein minimum penalty leviable u/s. 271(1)(c) of the Act has been reduced from 100% to 10% , the order passed by the Hon'ble ITAT-'C' Bench ITA No.210/Ahd/2015 dtd 22.09.2017 needs to be rectified accordingly.

Prayer of the Department: -
It is therefore, humbly prayed that:-
The Hon'ble ITAT may kindly rectify the error apparent from record in the order passed on 22/09/2017 and correct the same on the basis of the facts mentioned herein above and as per law and amend the order as per law accordingly."

8. We have heard Shri Dev, learned Departmental Representative, and Shri Soparkar, learned Senior Advocate representing the assessee. We have also carefully perused the material on record and duly considered facts of the case in the light of the applicable legal position.

9. We must, at the outset, humbly bow to the observations made by Hon'ble jurisdictional High Court and state, with all humility and in all sincerity, that we have taken a careful note of what Their Lordship consider the right course of action, and we will bear in mind these observations, in letter and in spirit, in the discharge of our judicial duties. As we go along, we may have to explain what the approach of the Tribunal was but that is not from the point of view of a debate on merits but simply from the limited point of view of whether our decision can be rectified under the limited scope of section 254(2) and there is absolutely no, and there cannot be any, question about reservations on what Their Lordships hold to be correct approach. As was said by Hon'ble Supreme Court in the case of **Assistant Collector of Central Excise vs Dunlop India Ltd. [1985] 154 ITR 172**, where the Hon'ble Court has itself quoted from the decision of House of Lords, "…..as was said in *Cassell & Co. Ltd.* v. *Broome* [1972] AC 1027 (HL), we hope it will never be necessary for us to say so

again that "**in the hierarchical system of courts" which exists in our country, "it is necessary for each lower tier", including the High Court, "to accept loyally the decision of the higher tiers". "It is inevitable in hierarchical system of courts that there are decisions of the Supreme appellate Tribunal which do not attract the unanimous approval of all members of the judiciary... But the judicial system only works if some one is allowed to have the last word, and that last word, once spoken, is loyally accepted.". . . The better wisdom of the Court below must yield to the higher wisdom of the Court above. That is the strength of the hierarchical judicial system**." *(Emphasis, by underlining, supplied by us).* There is no escape from the fact that our understanding of what is correct and what is legally permissible was indeed at variance with Their Lordships' take on the same, and we must now stand corrected in our approach.

10. The mere words of remorse- even if we express any, according to the learned Departmental Representative, will not suffice. He wants tangible results in terms of the relief granted to the assessee being vacated. Nothing less than our suitably amending our order, so as to bring it in conformity with the views expressed by the Hon'ble High Court, will satisfy the learned Departmental Representative. His prayer thus is that the relief granted by the Tribunal, in the impugned order, must be vacated by way of an order under section 254(2).

11. That's where learned senior counsel for the assessee, joins the issue with him. Learned senior counsel has three fold defence to the prayer of the applicant- first, that the application is time barred; second, that there is no mistake apparent on record in the order of the Tribunal, and; third, even if there be a mistake apparent on record in the order of the Tribunal that is not the kind of error which can be rectified within inherently limited scope of section 254(2). There are thus three aspects of the matter that we must address ourselves to:- (a) legal position with respect to admissibility of the present rectification petition- particularly with respect to the time limit under section 254; (b) the nature of mistake which is sought to be rectified; and (b) the scope of our powers under section 254(2) of the Act. Let us now take up these three aspects one by one.

12. So far as the limitation aspect is concerned, we find that Section 254(2), as it stands, provides, *inter alia*, that "the Tribunal may, at any time **within six months from the end of the month in which the order was passed**, 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". This time limit of six months from the end of the month in which the order has been passed is, as learned representatives fairly agree, judicially construed as application being filed within six months from the end of the month in which order is served on the aggrieved party and that is how the rectification petitions are being dealt with this Tribunal consistently. The delay is explained as on account of approaching the Hon'ble High Court and it is contended

that, for that reason, the delay was *bonafide* and the same deserves to be condoned. The impugned order was passed on 22nd September 2017 while the present rectification petition is filed on 31st May 2018. Clearly, the rectification petition is filed beyond the time limit set out in section 254(2). There is neither any petition seeking condonation of delay, nor, in response to our question, any powers are shown to have been conferred on us, by the statute- as in the case of powers in respect of delay in filing of appeals, for condoning such a delay in filing of rectification petitions. It is important to bear in mind the fact that while section 253(5) specifically provides that the Tribunal "**may admit an appeal or permit the filing of a memorandum of cross-objections after the expiry of the relevant period referred to in sub-section (3) or sub-section (4), if it is satisfied that there was sufficient cause for not presenting it within that period**", there is no such corresponding enabling provision, under the statute, for the rectification petitions under section 254(2). What is thus clear is that the Tribunal has no powers for condoning the delay in filing of applications under section 254(2), and that, in any event, there is not even a formal application on record seeking condonation of delay in filing of the present application under section 254(2). The present application is thus time barred and we are not in a position to deal with the same on merits.

13. That is not, however, the only reason for our inability to grant any relief in the matter.

14. There is no dispute that what can be rectified under section 254(2) is a mistake in the nature of "mistake apparent on record". The expression "mistake apparent on record" has limited connotations, and every mistake, appearing in an order, cannot be covered by the expression "mistake apparent on record". The connotations of expression "mistake apparent on record" have been judicially interpreted, in the landmark judgment of Hon'ble Supreme Court in the case of **ITO Vs Volkart Brothers [(1971) 82 ITR 50 (SC)],** as follows:

> **……. 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…..**

15. In this backdrop, let us look at the mistake committed by the Tribunal. The Tribunal was of the view that, so far as impugned addition of Rs. 43,72,650 was concerned, looking to the undisputed past history of the case and the stand of the Departmental Representative, these bank deposits, aggregating to Rs 43,72,650, could be treated as business receipts but then there was no explanation for the assessee not disclosing income element embedded therein to the extent of profits, which were taken @10% of turnover- as per past case history. In effect thus, explanation of the assessee was accepted to the extent of 90% of the quantum addition of Rs 43,72,650 and there was no explanation at all for the remaining amount of 10% of quantum addition i.e. Rs 4,37,265. The penalty to the extent relatable to Rs 4,37,265 was confirmed, and as regards the balance amount of Rs 39,35,385, the Tribunal observed that, "**we find that similar deposits have been treated as deposits in the course of business in the past, and, to that extent, explanation deserves to be accepted at least for**

penalty purposes". In effect thus, so far as the addition of Rs 43,72,650 was concerned, the Tribunal held that the explanation of addition to the extent of Rs 39,35,385 was acceptable inasmuch the additions in question were of the same nature which were treated as business receipts in past and only income embedded therein was brought to tax.

16. It is only elementary that penalty is not merely a consequence of quantum addition of income in the hands of the assessee. In the penalty proceedings, what is to be evaluated is the explanation, with respect to the related addition, offered by the assessee. Of course, the explanation of the assessee should be a reasonable explanation and it is not that the moment any explanation is offered, the penalty will not be leviable. In the landmark judgment in the case of **CIT v. Nathulal Agarwala & Sons [1985] 153 ITR 292**, a full bench of Hon'ble Patna High Court had inter alia observed as follows:

> **"As to the nature of the explanation to be rendered by the assessee, it seems plain on principle that it is not the law that the moment any fantastic or unacceptable explanation is given, the burden placed upon him would be discharged and the presumption rebutted. It is not the law and perhaps hardly can be that any and every explanation by the assessee must be accepted. In my view, the explanation of the assessee for the purpose of avoidance of penalty must be an acceptable explanation. He may not prove what he asserts to the hilt positively but as a matter of fact materials must be brought on the record to show that what he says is reasonably valid."**

17. The above views were approved by the Hon'ble Supreme Court in the case of **CIT v. Mussadilal Ram Bharose [1987] 165 ITR 142**. Referring to the judgment of Hon'ble Patna High Court, Their Lordships observed:

> **"The Patna High Court emphasised that as to the nature of the explanation to be rendered by the assessee, it was plain on principle that it was not the law that the moment any fantastic or unacceptable explanation was given, the burden placed upon him would be discharged and the presumption rebutted. We agree. We further agree that it is not the law that any and every explanation by the assessee must be accepted. It must be acceptable explanation, acceptable to a fact-finding body."**

18. It is, therefore, the acceptability of the explanation of the assessee which holds the key as to whether it is a fit case for imposition of penalty, or not. The explanation was found acceptable to the Tribunal, and, to that extent, the penalty was deleted. Hon'ble High Court, however, holds this exercise to be "**a way to bypass this minimum limit by suggesting that the profit element embedded in the cash deposits could be subjected to penalty"** and observes that **"When the proceedings of assessment in which the additions in the hands of the assessee were made, the Tribunal could not have ignored such final conclusions by simply adopting the difference mode or yardstick to judge the amount of tax sought to be evaded by the assessee".** With utmost respect, we humbly bow to the observations made by Their Lordships and accept, without entering into any debate or controversy, that it

was a mistake to accept explanation to the extent of a part of the amount added to the income of the assessee, on the basis of past case history, on the basis of stand of the Departmental Representation and on the basis of what we considered to be reasonable explanation, but what needs to be carefully examined today is whether mistake be said to be a mistake apparent on record. The conclusions arrived at by us were purely factual and somewhat subjective in the sense it was based on our perceptions of what is reasonable. The observations of Hon'ble High Court, disapproving the conclusions, are based on the proposition that the conclusion of the Tribunal was a way to bypass the minimum limit. That is, with respect, a wholly a highly subjective observation and all a matter of perception. The other way of looking at the conclusions of the Tribunal could possibly be, and that's how we looked at it, that the explanation of the assessee was partly accepted and, as regards the element of income on which explanation was not accepted, the penalty was still one hundred percent of tax sought to be evaded. It was stated to be accepted past history of the case, as pleaded before the Tribunal, that all the cash deposits were not of income nature but in the nature of business receipts and that only income embedded therein could be brought to tax. Wrongly though, as we have learnt the hard way, we were in error in following the same path for the purpose of evaluating explanation extended before the Tribunal during the hearing, but then this was not altogether devoid of any basis or rationale. The rationale or basis of our approach has turned out to be incorrect but it clearly did exist. In any event, it was not something which was incapable of two opinions. "Finding a way to bypass the minimum limit", as Their Lordships put it, is to decipher or discover the reason of why the Tribunal adopted a particular path but then, beyond any controversy, that's a highly subjective cerebral exercise and rectification of any mistake on the basis of such an exercise is inherently outside the limited scope of section 254. As regards the observation that "When the proceedings of assessment in which the additions in the hands of the assessee were made, the Tribunal could not have ignored such final conclusions by simply adopting the difference mode or yardstick to judge the amount of tax sought to be evaded by the assessee", we may mention that we were under the *bonafide*, but obviously incorrect impression, that the penalty proceedings are distinct and separate proceedings and merely based on the findings in the assessment proceedings, the penalty could not be levied. This approach, as we have learnt with the benefit of hindsight, is a legally unsustainable, and thus incorrect, approach in the present context but then it could not be said to be said to a glaring error which is incapable of two views being taken. We cannot join the issue on merits on what Their Lordships have held and any further analysis of legal position will inevitably take us there, and we humbly accept our mistake. We may, however, add that the school of thought that "**It is settled that the findings given in the assessment proceedings would be relevant and admissible materials in penalty proceedings, but those findings cannot operate as *res judicata* because the considerations that arise in penalty proceedings are different from those in the assessment proceedings**" has consistently found favour with several non jurisdictional High Courts, including in the case of **CIT Vs Ishitiaq Hussain [(1998) 232 ITR 673 (All)]**. The findings in the assessment proceedings have not thus be treated as final adjudication binding in the penalty proceedings. An approach adopted by the basis of the views expressed

by Hon'ble High Court, even if non jurisdictional, cannot be said to be a glaring error incapable of two views being taken.

19. In view of the above discussions, even if the rectification petition was to be treated as a petition filed well within the time limit, the rectification petition was to be dismissed on merits anyway- in the light of the nature of the mistake and the limited scope of powers under section 254(2). There would not have been any difference to the outcome of the exercise.

20. As we part with the matter, we must again reiterate, with all humility and all the emphasis at our command, that the dismissal of this rectification petition is on account of delay in filing of rectification petition as also on account of inherently limited powers vested in the Tribunal under section 254(2) of the Income Tax Act, 1961. That does not affect the fact that, in the light of the observations of Hon'ble jurisdictional High Court, this Tribunal was in error in granting the relief in the impugned order and we must gracefully acknowledge the same. There are, however, limitation to what we can do in the course of exercise of our powers under section 254(2) and as much as we must acknowledge our mistake, we must also acknowledge our limitations of rectifying the same. Just as Their Lordships, having noticed the mistake in the impugned order, declined to tinker with the same, for the larger causes of justice, and allow it to thus reach finality nevertheless, we must also refrain from revisiting the conclusions arrived at in the impugned order, in the garb of rectifying the mistake apparent on record, as, howsoever desirable be the ultimate objective, ends cannot justify the means; the legal remedies can only be provided within the framework of law.

21. In the result, the application is dismissed. Pronounced in the open court today on the 3rd day of April, 2019.

Sd/- Sd/-

Mahavir Prasad **Pramod Kumar**
(Judicial Member) (Vice President)

Ahmedabad, dated the 3rd day of April, 2019

Copies to: *(1)* *The Applicant* *(2)* *The respondent*
(3) *CIT* *(4)* *CIT(A)*
(5) *DR* *(6)* *Guard File*

By order

True Copy

Assistant Registrar
Income Tax Appellate Tribunal
Ahmedabad benches, Ahmedabad