IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI SPECIAL BENCH 'E' : NEW DELHI

BEFORE SHRI G.E.VEERABHADRAPPA, VICE PRESIDENT,
SHRI I.P.BANSAL, JUDICIAL MEMBER AND
SHRI A.K.GARODIA, ACCOUNTANT MEMBER

MISCELLANEOUS APPLICATION NO.57/Del/2010
(In M.A.No.402/Del/2009)
(In M.A.No.05/Del/2008)
(In ITA No.2964/Del/2002)
Assessment Year : 1995-96

Shri Padam Prakash (HUF), **21, Shivaji Road,** **Meerut.** (Appellant)	**Vs.**	**Income Tax Officer,** **Ward-2(1),** **Meerut.** (Respondent)

Appellant by : Shri Sanjay Malik, Advocate.
Respondent by : Shri Jayant Misra, CIT-DR.

ORDER

PER I.P.BANSAL, JM :

Vide miscellaneous application filed as above, the assessee has sought recall of the order passed by this Tribunal dated 27.11.2009 passed in Miscellaneous Application Nos.402/Del/2009 and 05/Del/2008 in ITA No.2964/Del/2002 for AY 1995-96.

2. The said order had disposed of the miscellaneous application filed by the Revenue contending therein that a mistake had crept in the order of the Tribunal dated 26.9.2008 passed in Miscellaneous Application No.05/Del/2008 arising in ITA No.2964/Del/2002. To better understand the contention of the assessee raised in the present miscellaneous application, the sequence of dates is to be mentioned which is as under:-

(i) 29.9.2006 - Order was passed by the Special Bench u/s 254(1) wherein it was held that enhanced compensation received by the assessee from the acquisition authorities in respect of its land was

to be assessed on receipt basis. The Tribunal also passed some directions relating to interest payable on compensation/enhanced compensation.

(ii) 3.1.2008 - Miscellaneous application filed by the assessee numbered as M.A.No.05/Del/2008.

(iii) The aforementioned miscellaneous application No.05/Del/2008 was disposed of by this Tribunal vide order dated 26.9.2008 when the application filed by the assessee was dismissed on the ground that the order of Special Bench was challenged in appeal u/s 260A before Hon'ble High Court and Hon'ble High Court as per their decision dated 25.2.2008 has held that the order of Special Bench is not sustainable. It was therefore opined that order of the Tribunal had merged with the order of Hon'ble High Court and therefore, there was no question of rectification of any mistake.

(iv) 21.4.2009 - The Revenue submitted miscellaneous application dated 15.7.2009 against the order passed by the Special Bench in M.A.No.05/Del/2008 (order dated 26.9.2008) contending therein that the merger if any was with the order of Hon'ble Punjab & Haryana High Court whereas the assessee in the present case was resident of Uttar Pradesh and jurisdiction did not vest with Hon'ble Punjab & Haryana High Court.

(v) 27.11.2009 - The Tribunal disposed of aforementioned miscellaneous application filed by the Revenue by taking note of the fact that subsequent to all the orders passed by the Tribunal, Hon'ble Supreme Court vide decision dated 16.7.2009 in Civil Appeal No.4401/2009 in case of CIT Vs. Ghanshyam, HUF, the decision rendered by Hon'ble Punjab & Haryana High Court was no more a good law. Hence, it was observed that Revenue may suitably modify its

miscellaneous application having regard to the final decision of the Hon'ble Supreme Court and taking note of the fact that Revenue did not opt for filing such miscellaneous application as the Special Bench was sitting for the third time, the miscellaneous application filed by the Revenue was disposed of and it was noted that the observations contained in the order dated 26.9.2008 i.e. in respect of miscellaneous application filed by the assessee (M.A.No.05/Del/2008) were not sustainable under the law and constitute mistake apparent from record. It was also observed that the said order would lead to unnecessary confusion when the matter was clarified by the Hon'ble Supreme Court. Accordingly, order dated 26.9.2008 was rectified and was withdrawn and it was observed that what was stated in the said order shall not affect the rights of the parties and miscellaneous application filed by the Revenue was allowed.

3. It is against order dated 27.11.2009 the assessee has filed the aforementioned miscellaneous application.

4. The first contention of the assessee while assailing the aforementioned order dated 27.11.2009 is that what is permissible u/s 254(2) is only an order passed under sub-section (1) of Section 254. Making reference to provisions contained in Section 254(2), it is the case of the assessee that order passed by the Tribunal in M.A.No.402/Del/2009 could not be validly passed as the same was passed against the earlier order passed in M.A.No.05/Del/2008 which was an order passed u/s 254(2).

5. It is further the case of the assessee that vide miscellaneous application filed by the Revenue dated 15.7.2009, a clarification was sought as to whether the order merged with that of Hon'ble Punjab & Haryana High Court only to the extent of resident of Punjab & Haryana state and not in the case of the assessee who is a resident of Uttar

Pradesh and the said application of the Revenue was adjudicated without affording opportunity of hearing to the assessee and the findings recorded against that application are not based on the issue raised in the petition u/s 254(2) and therefore, the withdrawal of order dated 26.9.2008 was not based on the issue raised either by the assessee or by the department in the petition u/s 254(2). Therefore, it is against the principles of natural justice.

6. Lastly, it is the case of the assessee that the said order was passed by the Tribunal without affording the assessee reasonable opportunity of hearing. The counsel of the assessee had sought adjournment on the ground of indisposition of the counsel which constitute reasonable cause and reference is made to the decision of Hon'ble Madhya Pradesh High Court in the case of Mahavir Prasad Jain Vs. CIT – 172 ITR 331 to contend that the applicant who has engaged a counsel will be justified in presuming that counsel would attend to the case and the applicant cannot be made to suffer for the negligence of the counsel. In view of all these submissions, it has been prayed in the application that the order passed by the Tribunal on 27.11.2009 should be set aside as provided in Rule 25 of the Income Tax Appellate Tribunal Rules.

7. The submissions made in the rectification application have been reiterated in the written submissions filed before us and learned counsel for the assessee argued the aforementioned application on the basis of these written submissions which are placed on record.

8. On the other hand, learned DR submitted that the aforementioned order of the Tribunal dated 27.11.2009 is nothing but is stating that in view of subsequent order of Hon'ble Supreme Court in the case of CIT Vs. Ghanshyam (HUF) (supra), the order passed on 26.9.2008 could not stand and it is therefore the said order was

withdrawn. It is submitted that no mistake has been committed by the Tribunal by passing such order and application filed by the assessee should be dismissed.

9. We have carefully considered the rival submissions in the light of material placed before us. It is true that sub-section (2) of Section 254 can be invoked only in a situation if there is a mistake in the order passed by the Tribunal under sub-section (1) of Section 254. The impugned miscellaneous application filed by the assessee is against the order passed on 27.11.2009 which is an order passed u/s 254(2). Therefore, principally, the application filed by the assessee has to be rejected on this ground alone and for this purpose, reliance can be placed on the following decisions:-

(i) CIT Vs. President, Income Tax Appellate Tribunal – 196 ITR 838 (Orissa) wherein it has been held that to attract applicability of Section 254(2), a mistake which is sought to be rectified must be apparent from record and the same must be in any order passed under sub-section (1) of Section 254. The order referred to in Section 254(1) is one relating to an appeal filed either by the assessee or by the Revenue. The “appeal” referred to in the provision is one filed u/s 253. Therefore, the order which can be rectified must be one which has been passed by the Tribunal in an appeal filed u/s 253. An order rejecting an application for rectification u/s 254(2) cannot be rectified u/s 254(2). The same may relate to an appeal but is not an order passed by the Tribunal under sub-section (1) of Section 254 and thus, it was held that subsequent application filed by the assessee was rightly rejected by the Tribunal.

(ii) In the case of Mentha & Allied Products Co.Ltd. Vs. ITAT – 244 ITR 470 (Del), after referring to the provisions of Section 254(1) and (2), it was held as under:-

> "7. The relevant provisions of s. 254 read as under:
> "254. Orders of Appellate Tribunal. – (1) The Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit.
>
> (2) The 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-s. (1) and shall make such amendment if the mistake is brought to its notice by the assessee or the AO;……."
>
> The aforenoted provisions of law are clear and unambiguous. A bare reading whereof leaves no doubt in our mind that the Tribunal is competent to rectify a mistake apparent from the record and amend any order which has been passed under sub-s.(1). Admittedly, by the impugned order, the Tribunal has sought to rectify the order passed by it under s. 256(1) of the Act and not an order passed under s. 254(1). We have no hesitation in holding that the Tribunal is not clothed with an inherent power to rectify/recall an order passed under s. 256(1) of the Act by taking recourse to s. 254(2) of the Act and, therefore, the impugned order is illegal and invalid. The view taken by us finds support from a decision of this Court in CIT vs. Kabir Das Investment Ltd. (1995) 124 CTR (Del) 259 : (1994) 210 ITR 898 (Del) : TC 55R.777."

10. In the case of CIT Vs. Aiswarya Trading Co. – 196 Taxman 385 (Ker.), it was held that the Tribunal was justified in refusing to entertain an application filed by the Revenue under Section 254(2) to rectify the order issued by the Tribunal in an earlier rectification application filed by the assessee, as the second application on the very same issue is not maintainable before the Tribunal.

11. In the case of Dr.S.Panneerselvam Vs. ACIT – 319 ITR 135, it was held that the Tribunal having allowed first rectification petition, second petition was not maintainable; remedy by way of appeal was the only course open.

12. If the application filed by the assessee is viewed in the light of aforementioned judicial pronouncements, then it will become clear that the relief which is being sought by the assessee by way of impugned rectification application is not legally tenable for the reason that the Tribunal has no power to adjudicate upon subsequent application filed u/s 254(2). Here, it may be the case of the assessee that earlier order against which impugned rectification application is filed is also an order passed on subsequent application, then the only course permissible to the assessee is to file an appeal against that order and not to approach the Tribunal to contend that the said order was an invalid order, therefore it should be recalled.

13. Moreover, what has been done by the Tribunal by the order dated 27.11.2009 is that by keeping in view the latest decision of Hon'ble Supreme Court, it was observed that the observations made by it in earlier order dated 26.9.2008 are not more relevant and therefore, those observations have been withdrawn. According to the well established law, the order of the Tribunal has to brought in conformity with the decision of the Apex Court, even if the said decision is rendered subsequently to the pronouncement of the order and reference in this regard can be made to the decision of Hon'ble Supreme Court in the case of ACIT Vs. Saurashtra Kutch Stock Exchange Ltd. – 305 ITR 227 (SC).

14. So far as it relates to the contention of the assessee that indisposition of the counsel constitute reasonable cause for non-appearance on the fixed date of hearing, we may observe that in para

5 of the order dated 27.11.2009, it has been recorded by the Tribunal that there is no cooperation from the assessee's side who has also sought an adjournment. Therefore, this ground cannot constitute any cause to recall of the said order as what was done in that order was to bring the earlier order in conformity with the decision of the Hon'ble Apex Court rendered subsequently.

15. In view of the above discussion, we find no force in the miscellaneous application filed by the assessee which is rejected and dismissed.

Decision pronounced in the open Court on 7th January, 2011.

Sd/-	Sd/-	Sd/-
(A.K.GARODIA)	(G.E.VEERABHADRAPPA)	(I.P.BANSAL)
ACCOUNTANT MEMBER	VICE PRESIDENT	JUDICIAL MEMBER

Dated : 07.01.2011.
VK.

Copy forwarded to: -

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

Assistant Registrar