

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "I", MUMBAI**

BEFORE SHRI SHAMIM YAHYA (AM) AND SHRI RAM LAL NEGI (JM)

**M.A. No. 98/Mum/2018
(Arising out of ITA no. 5439/Mum./2016)
(Assessment Year : 2010-11)**

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| Shri Kaushik N. Tanna, 15-C/25, 3 rd Floor, Shankar Bari Lane, Chira Bazar, Mumbai - 400002 PAN: AAAPT7941B | Vs. | The Asst. Commissioner of Income Tax- 18 (2), Mumbai |
| (Appellant) | | (Respondent) |

Assessee by : Shri Bharat Kumar (AR)

Revenue by : Shri Chaudhary Arunkumar Singh
(DR)

Date of Hearing: 03/08/2018
Date of Pronouncement: 01/11/2018

ORDER

PER RAM LAL NEGI, JM

The assessee has filed the present miscellaneous application for rectification of mistake apparent *inter alia* on the ground that since the Bench has passed the order dated 09.11.2017 in assessee's appeal ITA No. 5439/Mum/2016, beyond 90 days after the final hearing of the appeal, the said order is bad in law in view of the ratio laid down by the Hon'ble Bombay High Court in the case of Otter Club vs. Director of Income Tax (Exemptions), Writ Petition No. 2889 of 2016.

2. The Ld. counsel for the assessee submitted that since the Bench has passed the order in the present case beyond 90 days, the same is required to be recalled for fresh hearing in terms of the decision of the Hon'ble Bombay

High Court in the case of Otters Club vs. Director of Income Tax (Exemptions), Mumbai referred above.

3. On the other hand, the Ld. Departmental Representative (DR) did not controvert the fact that the order has been pronounced beyond 90 days i.e. on 91st day from the date of conclusion of the hearing. However, the Ld. DR opposed the other grounds taken by the assessee/applicant that the VAT rate of assessee's business was only 4% and confirming 12.5% is against the factual position and the Bench ought to have confirmed only VAT amount involved in the alleged bogus purchases.

4. We have gone through the relevant record in the light of the rival submissions. In the present case, the order has been pronounced one day beyond 90 days prescribed under the ITAT Rules. The Hon'ble Bombay High Court in the case of Otter Club Vs. Director of Income Tax (Exemptions) (supra) has held that the impugned order rejecting rectification application has not been considered the rule 34(8) of the Tribunal Rules and the binding decision, therefore, the order is not sustainable. In the said case, the Tribunal had passed order u/s 254 (1) beyond the period of 90 days from the date of conclusions of its hearing. The assessee filed application for rectification of the order on the ground that the order was in breach of Rule 34(5)(c) of the Income Tax Appellate Tribunal Rules and the delay had resulted in prejudice to the assessee. The Hon'ble jurisdictional High Court set aside the order being not sustainable and restored the miscellaneous petition to the Tribunal for fresh consideration and dispose of in accordance with law.

5. Since, in the present case, the order has been pronounced one day beyond 90 days prescribed under the Rules, we respectfully following the order of the Hon'ble High Court discussed above, recall the order dated 09.11.2017 without going into the merits of the other grounds raised in the application, for fresh hearing. Accordingly, we direct the registry to fix the case for fresh hearing by the regular Bench in the ordinary course.

In the result, misc. application filed by the assessee is partly allowed.

Order pronounced in the open court on 1st November, 2018.

Sd/-

(SHAMIM YAHYA)

ACCOUNTANT MEMBER

Sd/-

(RAM LAL NEGI)

JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 01/11/2018

Alindra, PS

आदेश प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai