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

Reserved on : 14.02.2019

% ***Pronounced on : 25.02.2019***

\+ **W.P.(C) 10846/2016**

PR COMMISSIONER OF INCOME TAX-6 NEW DELHI ..... Petitioner

Through : Mr. Asheesh Jain, Sr. Standing Counsel with Mr. Sanjay Kumar, Jr. Standing Counsel along with Mr. Dushyant Sarna, Adv. for ITD.

versus

N.R. PORTFOLIO PVT. LTD. ..... Respondent

Through : Mr. Rakesh Gupta, Mr. Rohit Kumar Gupta and Ms. Monika Ghai, Advs.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE PRATEEK JALAN

S. RAVINDRA BHAT, J.

1. The Commissioner of Income tax (hereafter "the Revenue") challenges an order dated 20.5.2016 (in M.A No.340/Del/2015 in ITA No. 2177/Del/2010 passed by the Income Tax Appellate Tribunal, Delhi Bench New Delhi. By that order, ITAT rejected the Revenue's request to rectify its earlier order dated 26th March 2015 passed in M.A No. 205/Del/2014 in ITA No. 2177/Del/2010, whereby it had rectified its earlier Order dated 22.07.2011 (passed in ITA No.2177/Del/2010, (hereafter "the first ITAT order"). The first ITAT order had been set aside by this Court (in ITA No. 134/2012, decided by judgment dated 21.12.2012). The first ITAT order had rejected revenue's appeal. The first ITAT order had also rejected the

assessee/petitioner's cross objections, on the issue of legality of reassessment proceedings.

2. The brief facts are that the assessee/respondent's returns became the subject matter of a re-assessment, in the course of which the Assessing officer (AO) disallowed certain amounts, under Section 68. The AO rejected the assessee's contentions with respect to the validity of the reassessment notice, under Section 147/148 of the Income Tax Act (hereafter "the Act"). The assessee appealed; the Commissioner of Appeals [CIT(A)] allowed the assessee's contentions and deleted the amounts added back (by the AO); however, the appellate commissioner rejected the assessee's arguments regarding validity of the reassessment notice (under Section 148). The first ITAT order upheld this order on both aspects. The assessee did not appeal to this court under Section 260A of the Act; the revenue did so. The revenue's appeal was allowed by judgment and order dated 21.12.2012 [reported as (2013) 60 taxmann.com]. This court allowed the revenue's appeal, and added back the amounts brought to tax under Section 68. However, at that stage, the assessee did not challenge the rejection of its cross objection. It however, challenged this court's judgment, through special leave petition before the Supreme Court.

3. After this court's judgment, reversing the ITAT's first order, the assessee approached it (ITAT)- this time by filing an application for rectification (M.A No.205/Del/2014) in the appeal (preferred by the revenue, earlier before the ITAT, which was disposed of on 20-7-2011, rejecting it) contending that since the rejection of its cross objection about the validity of reassessment notice was not on merits, it ought to consider that ground and revive the cross objections. The ITAT, on 26.03.2015, allowed this application (MA 205/2104) and *inter alia*, held that:

> *"The said issue was not adjudicated by the IT AT for the reason that the issue on merit was decided in assessee's favour and the Cross Objection filed by the assessee was dismissed, treating the same as infructuous. Since the decision of the ITAT on merit has been reversed by the Hon'ble Jurisdictional High Court, therefore, the Cross Objection filed by the assessee is no longer infructuous and is required to be adjudicated. We, therefore, direct the Registry to fix the Cross Objection filed by the assessee in due course."*

4. The revenue attempted to get a rectification of this order (dated 26-03-2015) by filing MA 340/15; however, it was rejected on 20th May, 2016. The ITAT reasoned, *inter alia*, that :

> *"As the main appeal of the. department has been restored to the IT AT and the Cross Objection filed by the assessee is connected with the said appeal of the department. Therefore, vide order dated 26.03.2015 'in MA No. 205/Del/2014 filed by the assessee, the Cross-Objection No. 207 /Del/20 11 was also restored for adjudication which was earlier dismissed as infructuous for the reason that the appeal of the department was dismissed. In our opinion, there is no mistake in the order dated 26.03.2015 passed in MA No. 205/Del/2014. In that view of the matter, we do not see merit in this Miscellaneous Application of the department."*

5. It is argued by the revenue in its appeal that since it preferred an appeal against the first ITAT order (being ITA No.134/2012) which was allowed by this court by the judgment dated 21.12.2012, the first ITAT order was set aside. It is pointed out that the assessee chose not to file any Appeal or get any question framed in ITA No. 134/2012 against the rejection of its Cross Objections by the Ld. ITAT vide order dated 22.07.2011;therefore, the rejection of Cross Objections had attained finality. The revenue urges that it was after this court set aside the first ITAT order that the ITAT had allowed the assessee's Miscellaneous Application under Section 254(2) of the Act by order dated 26.03.2015 passed in M.A No. 205/Del/2014.

6. It is urged that the order dated 26.03.2015 passed in M.A No. 205/DeI/2014 in ITA No. 2177/Del/2010 is ex-facie beyond the jurisdiction of the ITAT, patently illegal and liable to be set aside. The revenue argues that the principle of merger, enunciated by the Supreme Court in several judgments applied clearly to the facts of this case, since the substratum of the assessee's grievance was with respect to additions made in the re-assessment proceedings; that issue was plainly the subject matter of the decision of this court, under Section 260A; consequently the ITAT's order merged with the judgment of this court. The order of the ITAT further attained finality. In the circumstances, the assessee could not have again approached the ITAT complaining that its order was erroneous in some respect.

7. Counsel cited and relied upon *Commissioner of Income-tax, Bombay V/s. M/s. Amritlal Bhogilal & Co*., AIR 1958 SC 868; *M/s. Gojer Brothers Pvt. Ltd. v. Shri Ratanlal,* AIR 1974 SC 1380 and *Kunhayammed and Others Vs. State of Kerala & Another* [(2000) 6 SCC 359]. He also urged that the assessee allowed the dismissal of its cross objection to attain finality and was not aggrieved; it never urged that such dismissal was erroneous, or sought any remedy before this court. In the circumstances, it could not be allowed to go back to the same forum with an imaginary grievance. Further, counsel submitted that the ITAT cannot exercise plenary powers under Section 254 since it is a *power to rectify* not to negate the judgements of appellate courts; he relied on *Honda Siel Power Products Ltd Vs. Commissioner of Income Tax Delhi*, 295 ITR 466

8. It is argued by Dr. Rakesh Gupta on behalf of the assessee that the ITAT, in the first order had rejected the revenue's appeal. No doubt, it also rejected the cross objection. However, points out counsel, that dismissal was not on merits, but because the ITAT felt that the issue was academic,

since the main dispute, i.e. the merits of the addition, was decided by it. The asssessee was content with this and chose not to appeal. That however, did not mean that the question with regard to correctness of the reassessment notice or its validity was tested by the ITAT. That the ITAT's order was reversed by this court, at the behest of the revenue, did not deflect from the fact that the order – with respect to merits of the addition merely operated in respect of what it decided and nothing more. Since the reversal of the ITAT's decision by this court, meant that the assessee's grievance *with regard to the reassessment notice* remained unadjudicated, it could well approach and seek rectification of the order (dismissing the appeal as infructuous) within the period provided by law.

9. Learned counsel relied on *State of Madras v Madurai Mills Co. Ltd*., AIR 1967 SC 681 to say that the doctrine of merger, relied on by the revenue has limited application; it can operate only as regards decisions on the matters covered by the judgment, and not with regard to matters not decided on merits. It was held, in that decision that the principle of merger had limited application and could not operate regardless of subject matter of the decision. It was held that *"the application of the doctrine depends on the nature of the appellate or revisional order in each case and the scope of the statutory provisions conferring the appellate or revisional jurisdiction."* Counsel submitted that even in *Kunhayammed*, the doctrine of merger was held to be limited in its application and not that appellate decisions were not determinative of subject matter or causes not decided by the higher courts (in appeals or revisions).

10. Learned counsel relied on the decision of this court in *Mitsubishi Corporation v Commissioner of Income Tax* 337, ITR 498 (Del) where it was stated that:

> *"13. Coming to the scope and ambit of Section 154 of the Act, this provision has been interpreted by the Apex Court in number of judgments. Principle of law which has been authoritatively embedded in various judgments including the judgments cited by the counsel for both the parties is that a glaring or an obvious mistake of law can be rectified under Section 154 of the Act. Insofar as factual mistake is concerned, it should be apparent on the record and exercise requiring investigation to find the mistake of fact, impermissible as when investigation is required to find mistake apparent on record. Likewise, the issue of law which can be rectified invoking the provisions of Section 154 of the Act should be an established principle of Law. If such an issue requires interpretation, it cannot be the subject-matter of Section 154 proceedings.*
>
> *14. We are therefore, of the opinion that doctrine of merger would not apply. As held by this Court in Eurasia Publishing House (P.) Ltd.'s case (supra) that the doctrine of merger is not a doctrine of rigid and universal application. Whether there is fusion or merger of the order of the inferior Tribunal into an order by a superior Tribunal shall have to be determined by finding out the subject-matter of the appellate or revisional order and the scope of the appeal or revision contemplated by the particular statute."*

11. Dr. Gupta also relied on *R.W. Promotions P. Ltd v Income Tax Appellate Tribunal* 2015 (376) ITR 0126 (Bom); *Sandvik Asia Ltd v Commissioner of Income Tax* 2004 (267) ITR 78; *Nirma Industries Ltd v Dy. Commissioner of Income Tax* 2006 (283) ITR 402; *Citizen Watch Co. Ltd v Inspecting Assistant Commissioner* 1984 (148) ITR 774 and *Shanmugavel Nadar v State of Tamil Nadu* 2003 (263) ITR 658.

Analysis and Conclusions

12. Before considering the rival contentions, it would be useful to consider the relevant provisions of the Income Tax Act, dealing with the powers of rectification. The power of rectification conferred upon the

Assessing Officer and *"any income tax authority"* is by Section 154, which is as follows:

> *"**154. Rectification of mistake**.—[(1) With a view to rectifying any mistake apparent from the record an income-tax authority referred to in section 116 may,—*
>
> *(a) amend any order passed by it under the provisions of this Act;*
> *(b) amend any intimation or deemed intimation under sub-section (1) of section 143;*
>
> *(c) amend any intimation under sub-section (1) of section 200A;]*
> *(d) amend any intimation under sub-section (1) of section 206CB.]*
>
> *(1A) Where any matter has been considered and decided in any proceeding by way of appeal or revision relating to an order referred to in sub-section (1), the authority passing such order may, notwithstanding anything contained in any law for the time being in force, amend the order under that sub-section in relation to any matter other than the matter which has been so considered and decided.*
>
> *(2) Subject to the other provisions of this section, the authority concerned-*
>
> *(a) may make an amendment under sub-section (1) of its own motion, and*
>
> *(b) shall make such amendment for rectifying any such mistake which has been brought to its notice by the assessee or by the deductor, or by the collector], and where the authority concerned is the Commissioner (Appeals) by the Assessing Officer also."*

13. The power of the *Income Tax Appellate Tribunal*, to entertain its appeal and the subject matter thereof is as follows:

> *"Section 253- Appeals to the Appellate Tribunal*

(1) Any assessee aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order –

(3) Every appeal under sub-section (1) or sub-section (2) shall be filed within sixty days of the date on which the order sought to be appealed against is communicated to the assessee or to the 18 [Principal Commissioner or Commissioner], as the case may be:

Provided that in respect of any appeal under clause (b) of sub-section (1), this sub-section shall have effect as if for the words "sixty days", the words "thirty days", had been substituted.

*** *** ***

(4) The Assessing Officer or the assessee, as the case may be, on receipt of notice that an appeal against the order of the Commissioner (Appeals), has been preferred under sub-section (1) or sub-section (2) by the other party, may, notwithstanding that he may not have appealed against such order or any part thereof, within thirty days of the receipt of the notice, file a memorandum of cross-objections, verified in the prescribed manner, against any part of the order of the Commissioner (Appeals), and such memorandum shall be disposed of by the Appellate Tribunal as if it were an appeal presented within the time specified in sub-section (3)."

14. The power of the ITAT to make and rectify its own order is contained in Section 254, which reads as follows:

"254. Orders of Appellate Tribunal

(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.

(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 [2] Assessing] Officer: Provided that an amendment which

has the effect of enhancing an assessment or reducing a refund or otherwise increasing the liability of the assessee, shall not be made under this. sub-section unless the Appellate Tribunal has given notice to the assessee of its intention to do so and has allowed the assessee a reasonable opportunity of being heard.

(3) The Appellate Tribunal shall send a copy of any orders passed under this section to the assessee and to the Commissioner."

15. The revenue urges that the ITAT could not have, in the circumstances of the case, since this court's judgment against its first order was allowed, gone back and sought recall, since the findings of the ITAT (which had confirmed the CIT's order regarding additions on merits, in favour of the assessee) were set aside and the issue attained finality. In that sense, the doctrine of merger applied to the facts of this case. The assessee however, naturally urges to the contrary, stating that the issue with respect to dismissal of its cross objection by the ITAT on the ground of its being rendered infructuous (since on the merits it had held in its favour- i.e. in favour of the assessee) was never tested by this court and that the order of the ITAT restoring its cross objections, in the light of this court's decision against the assessee (on merits of the addition) were proper and in due exercise of its power of rectification.

16. *Kunhayammed* (supra), a three judge decision of the Supreme Court, considered several previous rulings – including *Amritlala Bhogilal* (supra); *Gojer Brothers* (supra) and also *S.S. Rathore v. State of Madhya Pradesh*, AIR 1990 SC 10. *S.S. Rathore* was a seven judge decision, which had, in turn considered several rulings previously rendered [*State of Uttar Pradesh v. Mohammad Nooh*, (1958) SCR 595*; Batuk Nath v. Munni Devi*, AIR 1914 PC 65; *Jowad Hussain v. Gendan Singh*, 1926 (53 IA 197); *Madan Gopal Rungta v. Secretary to the Govt. of Orissa*, AIR 1962 1513; *Collector of*

Customs, Calcutta v. East India Commercial Co, Ltd., AIR 1962 SC 1124; *Raghubir Jha v. State of Bihar,* AIR 1986 SC 508; *Sita Ram Goel v. The Municipal Board, Kanpur,* AIR 1958 SC 1036; *Pierce Leslie & Co. Ltd. v. Violet Ouchterlong Wapshare and Ors.,* AIR 1969 SC 843; *Somnath Sahu v. The State of Orissa & Ors.,* 1969 (3) SCC 384 and *Amrit Lal Bhogilal* (supra)].

17. In one of the earliest decisions, i.e. *U.J.S. Chopra v. State of Bombay,* AIR 1955 SC 633, it was held that:

> *"A Judgement pronounced by a High Court in exercise of its appellate or revisional jurisdiction after issue of a notice and a full hearing in the presence of both the parties would replace the Judgement of the lower Court, thus constituting the Judgement of the High Court the only final Judgement to be executed in accordance with law by the Courts below."*

18. In *East India Commercial Co.* (supra) the Supreme Court held as follows:

> *"The question, therefore, turns on whether the order of the original authority becomes merged in the order of the appellate authority even where the appellate authority merely dismisses the appeal without any modification of the order of the original authority. It is obvious that when an appeal is made, the appellate authority can do one of three things, namely, (i) it may reverse the order under appeal, (ii) it may modify that order, and (iii) it may merely dismiss the appeal and thus confirm the order without any modification. It is not disputed that in the first two cases where the order of the original authority is either reversed or modified it is the order of the appellate authority which is the operative order and if the High Court has no jurisdiction to issue a writ to the appellate authority it cannot issue a writ to the original authority. The question therefore is whether there is any difference between these two cases and the third case where the appellate authority dismisses the appeal and thus confirms the order of the original authority. It seems to us that on principle it is difficult to draw a distinction between the first two kinds of orders passed by the appellate authority and the third kind of*

order passed by it. In all these three case after the appellate authority has disposed of the appeal, the operative order is the order of the appellate authority whether it has reversed the original order or modified it or confirmed it. In law, the appellate order of confirmation is quite as efficacious as an operative order as an appellate order of reversal or modification."

19. *Kunhayammed* (supra) – as stated earlier, considered various previous rulings and stated the principle as follows, before considering the effect of the doctrine on appeals to Supreme Court and the orders made thereon: whether after granting leave to appeal, or in the course of the order dismissing the petition, or merely disposing of the petition, *in limine*, as it were. It observed *inter alia*, as follows:

"12. Once the superior court has disposed of the lis before it either way - whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree or order of the superior court, tribunal or authority which is the final, binding and operative decree or order wherein merges the decree or order passed by the court, tribunal or the authority below. However, the doctrine is not of universal or unlimited application. The nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or which could have been laid shall have to be kept in view."

20. The said decision has been followed by this Court in a large number of decisions including *Union of India and Others v. West Coast Paper Mills Ltd. & Anr.*, [(2004) 2 SCC 747] etc.

21. What is discernible from the above discussion is that if an appeal is provided against an order passed by a tribunal, the decision of the appellate authority is the operative decision in law. If the appellate authority modifies or reverses the decision of the tribunal, it is obvious that it is the appellate decision that is effective and can be enforced. Undoubtedly, there are cases and causes where issues that were not the subject matter of appeals were

sought to be made the content of a later litigation before the lower court or tribunal. As emphasized in *Amritlal Bhogilal* and *Gojer Bros.* (supra) as to what was that issue or matter may at times be decisive to consider whether the previous binding order of the appellate or revisional authority prevailed over the lower court or authority's order.

22. The assessee sought to distinguish the decisions cited by the revenue, and relied upon several decisions. This court does not find any decision that has facts parallel to the present case. *Mitsubishi,* on which some arguments were addressed, was a case involving rectification by the AO, after the decision of the ITAT. The facts in that case were that while considering the issue of tax deduction, the AO computed said shortfall on account of tax and interest on part of the assessee; however the AO did not include tax payment by employer to exchequer on behalf of the employee as a part of salary for computing the value of rent free accommodation perquisite under the applicable Rule 3 of Income Tax Rules, 1962. The said order was contested by the assessee in appeal, which went up to the Tribunal. The Tribunal quashed the order of the AO for Financial Years 1995-96 to 1997-98 after grossing up income under Section 195A of the Act and directed the AO to re-compute the tax liability for the said financial years. An order giving effect to the Tribunal's direction was passed on 22.03.2004 in respect of Financial Years 1995-96 to 1997-98 (as well as in the original order), the value of perquisite for each employee in respect of rent free accommodation was computed *without including the element of tax perquisite in the gross salary*. A show cause notice was issued to the assessee requiring it to explain as to why the value of perquisite in respect of rent free accommodation should not be recomputed after including the tax element in gross salary and therefore, order be rectified under Section 154 of the Act. The assessee was asked to file its submission by 29.03.2004.

The assessee's objections to the re-opening were brushed aside by relying on a decision (*T.P.S. Scott and Ors. Vs. Commissioner of Income Tax* [232 ITR 475], which held that tax perquisite is the part of gross salary). The original order was thus rectified by re-computing perquisites for rent free accommodation by including tax element in the gross salary. The assessee appealed without success, to the CIT(A) and the ITAT stating that the original order of the AO had merged with the order of the Tribunal to which effect was given on 22.03.2004. This court held that the principle of merger did not apply, on the ground that the question of including the tax paid on the perquisite, while grossing up, was not considered.

23. It would be apparent on a careful reading of the discussion in that decision, that this court held that the doctrine of merger did not apply because the argument with respect to inclusion of the tax paid element was made only before the ITAT in the first round. The court held that the power of the ITAT was not concurrent and therefore, the derivative power of the CIT to make additions could be of no avail to the revenue, which had authority under Section 154 of the Act the rectify the previous order, even while giving effect to the ITAT's remand.

24. This court is of the opinion that in the present case, the issue sought to be urged by the assessee in the first ITAT order was in its cross objection, concerning the legality of reassessment. Undoubtedly, the validity of a reassessment notice can be a matter of substance. The merits of the additions made after considering the assessee's contentions were deleted by the CIT (A). He however upheld the reassessment proceeding. The assessee had two courses: either appeal or cross object against that part of the order, to the ITAT. It chose the latter, when the revenue appealed to the tribunal. The ITAT rejected the revenue's appeal and also dismissed the assessee's cross objections as infructuous. At that stage, the assessee could

have cross objected before this court, or filed independent appropriate proceedings to protect its interest. It however was sanguine about its case on the merits; unfortunately, it did not choose to appeal or question the dismissal of its cross objections. It sought to challenge the judgment of this court reversing the ITAT (on merits of the addition) by appeal through special leave to the Supreme Court. Although the judgment of this court was rendered on 21-12-2012, it chose to approach the ITAT in 2014; that rectification application was allowed on 26-03-2015.

25. To this court it appears that the assessee's claim for rectification is precluded by the doctrine of finality and not merely merger. Once the additions were upheld on merits, the second innings as it were before the tax authorities which have the effect of unsettling binding decisions of higher courts, cannot be countenanced. In that sense the issue of merger applies. In the facts of this case, this court is of opinion that the doctrine of finality applies as well. The assessee by conduct in not seeking remedy for the dismissal of its cross objection and speculatively waiting for the outcome of the revenue's appeal, cannot be heard to complain that its grievance with respect to reassessment remained unaddressed. The court is conscious that it is not dealing with an uninformed litigant; instead it is advised by counsel. Furthermore, the court notices that the first ITAT order was by two members (M/s C.L. Sethi and Shamim Yahya). The application made under Section 254 for rectification was heard and disposed by two others (M/s C.M. Garg and N.K. Saini).

26. This court further notices that there is a difference in the structure of the power of rectification conferred upon tax authorities, such as the AO and the CIT on the one hand, and the ITAT, on the other. The AO- as well as lower revenue authorities have an overriding power to rectify, in Section 154 (1A) which reads as follows:

> *"(1A) Where any matter has been considered and decided in any proceeding by way of appeal or revision relating to an order referred to in sub-section (1), the authority passing such order may, notwithstanding anything contained in any law for the time being in force, amend the order under that sub-section in relation to any matter other than the matter which has been so considered and decided."*

27. However, such overriding power is absent, in the case of the ITAT, whose authority to amend or rectify its order is confined by the language (of Section 254 (2)), i.e. *"to 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…"*

28. Furthermore, this court is of the opinion that the conduct of the assessee was speculative, to put it mildly. As observed earlier, it is not an uninformed litigant; it calculatedly chose not to question the rejection of its cross objection (on grounds of its having been rendered infructuous). Having waited more than a year *after* the decision of this court (which was rendered on 21-12-2012), it approached the ITAT in 2014. It offered no explanation why it did not seek the rectification earlier, during the pendency of the revenue's appeal- in that event, if the ITAT had rejected its application this court would have given suitable directions. Instead, waiting for the time till the two members who decided the first ITAT orders were not available and choosing to prefer the rectification application at a convenient time, the assessee no doubt technically was compliant, but stood exposed to the odium of forum shopping.

29. In the circumstances of this case, the court holds that the rectification application filed by the assessee (MA 250/2014) was barred by the principle of finality, and to an extent the doctrine of merger. The ITAT, in the

opinion of this court, entirely mis-appreciated its jurisdiction which, as held in *Honda Siel*, is to correct an apparent mistake. That its previous decision to dismiss the cross appeal as infructuous was a mistake in the *light of the subsequent reversal of its order on the merits of the addition*, is not in the considered view of this court, a mistake or error warranting rectification. This court deprecates in the strongest terms, the invocation of the power of rectification.

30. For the above reasons, the writ petition has to succeed; the order of the ITAT dated 26th March, 2015 is hereby quashed; the ITAT clearly erred in rejecting the revenue's request to rectify that order as well. The writ petition consequently is allowed; in the peculiar circumstances, the assessee shall bear the costs of the proceedings, quantified at ₹1.5 lakhs.

S. RAVINDRA BHAT
(JUDGE)

PRATEEK JALAN
(JUDGE)

FEBRUARY 25, 2019