

आयकर अपीलिय अधिकरण] पुणे न्यायपीठ "ए" पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE

BEFORE SHRI ANIL CHATURVEDI, AM
AND SHRI VIKAS AWASTHY, JM

M.A.No.97/PUN/2018 in ITA No.204/PUN/2012

निर्धारण वर्ष / Assessment Year : 2008-09

Shri Ratanlal C. Bafna,
Proprietor of R.C. Bafna Silva Palace,
96, Subhash Chowk,
Jalgaon – 425 001.

..... अपीलार्थी /
Appellant

PAN : AAMPB3939K.

बनाम v/s

Joint Commissioner of Income Tax,
Range – 1, Jalgaon.

..... प्रत्यर्थी /
Respondent

Assessee by : Shri Sunil Ganoo

Revenue by : Shri Ashok Babu.

सुनवाई की तारीख / Date of Hearing : 08.02.2019	घोषणा की तारीख / Date of Pronouncement: 15.03.2019
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आदेश / ORDER

PER ANIL CHATURVEDI, AM :

1. This Miscellaneous Application (M.A.) filed by the assessee u/s 254(2) of the I.T. Act is arising out of the consolidated order of Tribunal in ITA No.204/PUN/2012 for A.Y. 2008-09.
2. Before us, Ld AR submitted in ITA No.204/PUN/2012 for A.Y. 2008-09, assessee had raised ground No.12 which was with respect to denying the opportunity to cross-examine Mr. Devichand Chhoriya, author of the seized documents. Ld AR submitted that the Tribunal while deciding the captioned appeal did not adjudicate ground of appeal No.12 though the ground was never withdrawn by assessee. He submitted that non-adjudication of the ground in the

appeal by the Tribunal is a mistake apparent from record in the order of the Tribunal which needs to be corrected. Ld.A.R. further submitted that against the order of ITAT (in ITA No.204/PN/2015) assessee had previously filed M.A. bearing No.33/PUN/2015 which was dismissed by the Hon'ble Bench vide order dt.27.07.2018. He submitted that in the said M.A. the assessee had not raised the issue of non-adjudication of ground No.12 which is now raised in the present M.A which is the second M.A. He submitted that since the earlier M.A did not touch the issue of non adjudication of ground No 12 which is now raised in the present second M.A, the Bench has power and authority to hear and decide the issue in second M.A for passing the necessary rectification order.

3. A query was raised by the Bench to the Ld.A.R. as to whether the second M.A. is maintainable in view of the fact that first M.A. of the assessee for the same order has been dismissed by the Tribunal. Ld.A.R. submitted that the second M.A. is maintainable because it is on the issue which was not subject matter of first M.A. In support of his contention that the issue which has not been decided in the first M.A, assessee can raise the issue in second M.A, he placed reliance on the decision of Hon'ble Kerala High Court in the case of CIT Vs. Aiswarya Trading Company reported in (2011) 323 ITR 521, decision of Allahabad High Court in the case of Hiralal Suratwala Vs. CIT reported in 56 ITR Page 339 (All) and the decision of Hon'ble Gujarat High Court in the case of CIT Vs. Smt. Vasantben H. Sheth reported in (2015) 372 ITR 536 (Guj).

4. Thereafter a query was raised to the Learned AR as to whether assessee has preferred appeal against the order of Tribunal before Hon'ble High Court and if so then whether The Tribunal can decide the issue in 254(2) proceedings? In response to the query of the

Bench, Ld AR submitted that against the quantum order passed by the Tribunal, assessee has filed appeal before the Hon'ble Bombay High Court in ITA Nos.471/2016 and 475/2016. The Hon'ble High Court vide order dated 26.11.2018 has admitted the tax appeals for consideration. He also placed on record the copy of the aforesaid order. Ld.A.R. thereafter relying on the decision of Hon'ble Bombay High Court in the case of R.W. Promotions Pvt. Ltd. Vs. ITAT (W.P.No.2238/2014) decided on 08.04.2015 submitted that merely because an appeal has been filed before High Court, it would not prevent the Tribunal from dealing with an application u/s 254(2) of the Act. He therefore submitted that since the ground No 12 has not been adjudicated, the order of the Tribunal be recalled to decide the aforesaid ground.

5. Ld.D.R. on the other hand, submitted that there is no apparent mistake in the order of Tribunal and the Bench while deciding the appeal of the assessee has considered the submissions and has decided the grounds of appeal issue considering the issues in totality and the facts involved. He further submitted that through this M.A. assessee is seeking a review of the order which is not permissible under the Act.

6. We have heard the rival submissions and perused the material on record. Before us, in the present M.A, it is assessee's contention that ground No.12 which was raised by the assessee in the appeal was not disposed of by the Tribunal and hence, there is a mistake apparent on record. It is an undisputed fact that against the order of Tribunal dated 31.3.2015, assessee has preferred appeal before the Hon'ble Bombay High Court. The Hon'ble Bombay High Court vide order dt.26.11.2018 (in ITA No 471 and 475 of 2016) has admitted the appeals of the assessee for consideration of substantial question

of law. In support of assessee's contention that when even though against the order of Tribunal, assessee has filed appeal, still Tribunal can entertain an application u/s 254(2) of the Act seeking rectification of the order passed by Tribunal, Ld.A.R. has placed reliance on the decision of Hon'ble Bombay High Court in the case of M/s. R.W. Promotions Private Limited (supra).

7. We find that in the case of R.W. Promotions Pvt. Ltd. (supra), it was the case where against the order of Tribunal, assessee had filed an appeal u/s 260A of the Act before the Hon'ble High Court **but the appeal was yet to be admitted.** The Hon'ble High Court in the facts of the case held that the Tribunal has power to entertain an application u/s 254(2) of the Act for rectification of mistake. In the present case, however it is not a case where the assessee has merely filed an appeal before the Hon'ble High Court but it **is a case where the Hon'ble High Court has admitted the appeal for consideration after framing substantial question of law.** We thus find that the facts in the case of R.W. Promotions (supra) and the present case are distinguishable.

8. On the issue when a slightest change in the facts changes the factual scenario and makes one case distinguishable from the other, we find that the Kolkata Bench of Tribunal in the case of Subhlakshmi Vanijya (P.) Ltd.vs CIT reported in (2015) 60 taxmann.com 60 (Kolkata - Trib.) has noted as under:

“13.d It is a well settled legal position that every case depends on its own facts. Even a slightest change in the factual scenario alters the entire conspectus of the matter and makes one case distinguishable from another. The crux of the matter is that the ratio of any judgment cannot be seen divorced from its facts.”

Further, it is a settled law that the judgment must be read as a whole and the observations made in a judgment are to be read in the context in which they are made and for which reference is made to the decision in the case of Goa Carbon Ltd. Vs. CIT reported in (2011) 332 ITR 209 (Bom).

9. We find that the Hon'ble Gujarat High Court in the case of CIT Vs. Muni Seva Ashram reported in (2013) 38 Taxmann.Com 110 (Guj) has held that when appeal has been filed before the Hon'ble High Court, the appeal is admitted and substantial question of law has been framed in the said appeal, then the Tribunal cannot recall the order. The relevant portion of the order reads as under :

*“6. In view of the above stand taken by the learned counsel appearing on behalf of the respondent – assessee recorded hereinabove, **more particularly when against the impugned judgement and order dtd.11/7/2008 passed in ITA No.633/Ahd/2008, which has been recalled subsequently by the ITAT, Tax Appeal No.1231 of 2008, was already admitted on the substantial questions of law framed in the said appeal, impugned orders cannot be sustained.***

[Emphasis supplied]

10. Considering the totality of the facts involved in the present case and in view of the decisions cited hereinabove, we are of the view that in the present case since the appeal against the order of the Tribunal has already been admitted and a substantial question of law has been framed by the Hon'ble High Court, the Tribunal cannot proceed with the Miscellaneous Application u/s 254(2) of the Act.

11. In view of the aforesaid facts and following the decision cited above, the Miscellaneous Application u/s 254(2) of the Act seeking rectification in the order of Tribunal is hereby dismissed, being not maintainable.

12. In the result, the Miscellaneous Application of the Assessee is dismissed.

Order pronounced on 15th day of March, 2019.

Sd/-
(VIKAS AWASTHY)
न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-
(ANIL CHATURVEDI)
लेखा सदस्य / ACCOUNTANT MEMBER

पुणे Pune; दिनांक Dated : 15th March, 2019.
Yamini

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. CIT(Appeals) –2, Nashik.
4. CIT-II, Nashik.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "ए" / DR,
ITAT, "A" Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

// True Copy //

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune.