

**IN THE INCOME TAX APPELLATE TRIBUNAL “SMC” BENCH, MUMBAI**

**BEFORE SHRI SHAMIM YAHYA, AM**

M.A. Nos. 605 & 606/Mum/2018  
(Arising out of ITA Nos. 3275 & 3276/Mum/2015)  
(Assessment Years: 2003-04 & 2004-05)

ITO-8(1)(1) Room No. 662, 6 <sup>th</sup> Floor, Aayakar Bhavan, M. K. Road, Mumbai-400 020	Vs.	M/s. Rayoman Carriers Pvt. Ltd. B/12, Dhanraj Mahal, 3 <sup>rd</sup> Floor, Apollo Bunder Chatrapati Shivaji Marg, Colaba, Mumbai-400 001
PAN/GIR No. AAACR 1896 C		
<b>(Appellant)</b>	:	<b>(Respondent)</b>
<b>Appellant by</b>	:	Shri Abi Rama Karthikeyan
<b>Respondent by</b>	:	Shri Sashank Dundu
<b>Date of Hearing</b>	:	15.02.2019
<b>Date of Pronouncement</b>	:	22.02.2019

**ORDER**

Per Shamim Yahya, A. M.:

By way of these miscellaneous applications (M.A. for short) the Revenue seeks rectification of mistake apparent from the record in the order of the tribunal in ITA Nos.3275 & 3276/Mum/2015 vide order dated 23.08.2016 for Assessment Years (A.Y for short) 2003-04 and 2004-05.

2. In the MA's the Revenue has requested the following:

2. On a careful reading of the order, it is found that the appeal filed by the assessee has been allowed without considering the following:-

a. The present order under consideration is order dated 16.04.2018. It is, however, seen that earlier, vide order dated 23.08.2016, the SMC Bench of ITAT had actually held appeals filed by assessee as defective and therefore dismissed both the appeals of the assessee as un-admitted. The assessee was given liberty to file an application for recalling of orders after removal of defects.

b. The present order dated 16.4.2018 was again passed by the single member bench. This order appears to be oblivious of the first order dated 23.08.2016. It simply starts with the grounds of appeal and. discusses the facts of the case and pronounces the order.

With due respect it is submitted that the Hon'ble ITAT without recalling the first order dated 23.8.2016 which in itself is subject to removal of defects in the appeal by Assessee, cannot pass any fresh order.

c. Secondly, it is seen that the appeal of the Assessee has been allowed and assessment made u/s 143(3) r.w.s 147 was held to be invalid since the AO had originally issued notice u/s. 153C and after assessee had filed the return and also some details, the AO proceeded and made assessment u/s 143(3) r.w.s 147 without complying with the proceeding already initiated u/s153C.

The Hon'ble member had however, failed to notice that the assessee had vide letter dated 11.12.2007, protested about 153C proceedings stating them to be not applicable in its case as there were no documents, books of account, money, bullion, jewellery which were seized and belonging to the Assessee. It is evident that the objections raised were felt valid and the AO concluded that provisions of section 153C do not apply. The Hon'ble Bench should have also seen that proceedings u/s 148 were therefore appropriate and the assessee cannot be allowed to take contradictory stands as and when it suits and the bench should have dealt the case on merit and not on legal grounds of validity of 148 proceedings.

3. In the light of the above, this Miscellaneous Application is being filed with the Hon'ble ITAT with a request to recall order dated 16.04.2018 in the instant case and to pass a recall order subject to assessee removing defects therein and after recall, to consider and deal on merits. The grounds for filing Miscellaneous Application is annexed herewith.

3. I have heard both the counsel and perused the records. As regards the issues raised in 'a' and 'b', even at the cost of repetition, I reproduce the submissions of the Revenue as under:

a. The present order under consideration is order dated 16.04.2018. It is, however, seen that earlier, vide order dated 23.08.2016, the SMC Bench of ITAT had actually held appeals filed by assessee as defective and therefore dismissed both the appeals of the assessee as un-admitted. The assessee was given liberty to file an application for recalling of orders after removal of defects.

b. The present order dated 16.4.2018 was again passed by the single member bench. This order appears to be oblivious of the first order dated 23.08.2016. It simply starts with the grounds of appeal and. discusses the facts of the case and pronounces the order. With due respect it is submitted that the Hon'ble ITAT without recalling the first order dated 23.8.2016 which in itself is subject to removal of defects in the appeal by Assessee, cannot pass any fresh order.

4. I find that originally vide order dated 23/8/2016 the ITAT had dismissed the appeals for non-removal of defect in the appeal duly communicated to the assessee and also for non-prosecution. Subsequently vide order dated 31/3/2017 a Division bench of

this tribunal had recalled the said order in the interest of justice. The said recall order was duly dispatched to the department on 04.04.2017. Pursuant to the said recall, the matter was heard by the tribunal. The revenue was duly represented by Id. DR, whose argument about the reliance on an ITAT decision in support of revenues submissions was duly noted by the tribunal in the order.

In these circumstances, the Revenue has made an allegation that order was passed by the tribunal on 16/4/2018, being oblivious of the existence of the first order dated 23.08.2016. It has further been submitted that without recall of the first order, the ITAT cannot pass afresh order.

5. In this conspectus of the matter, when order dated 23/8/2016 was duly recalled, the said order was duly communicated to the department and the Revenue was duly represented in the hearing of the appeal and there was no whisper by the Id. DR in that hearing that earlier order had not been recalled, the insinuation that ITAT passes order in a state of oblivion to the facts and antecedents to the appeal, displays a totally irresponsible and cavalier approach on the part of Revenue on the cusp of contempt and deserving exemplary cost to purge the same. Furthermore, it is elementary knowledge that an appellate order has to be prefaced with the grounds or questions raised. Referring in a deriding manner that the ITAT started with the grounds of appeal, displays the naivette of revenue authority purporting to be critical examiner of ITAT verdict, which is uncalled for.

6. Be as it may, I express deep anguish at this approach of the department and hope that revenue will disband this cavalier and naïve approach while insinuating about the functioning of the ITAT, without verifying their record.

7. In these circumstances, the Id. DR was confronted with the facts. As regards the issue raised in 'a' and 'b', the Id. DR submitted that he shall not be pressing the same. As already noted the above is a misplaced and mischievous ground. The ITAT has passed the order after the earlier order was duly recalled.

8. As regards the issue in point 'c' above, it is noted that by this submission, the Revenue want us to sit in judgment over the tribunal's order on the issue of jurisdiction adjudicated in that order. As this will be a review of order not permissible u/s. 254(2) of the Act, this is not sustainable. It is settled law that review of the order of the tribunal u/s. 254(2) of the Act in the garb of the rectification of mistake is not permissible.

9. In the result, the miscellaneous applications filed by the Revenue stands dismissed. No order as to cost.

*Order pronounced in the open court on 22.02.2019*

Sd/-

(Shamim Yahya)  
Accountant Member

Mumbai; Dated :  
Roshani, Sr. PS

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT - concerned
5. DR, ITAT, Mumbai
6. Guard File

BY ORDER,

(Dy./Asstt. Registrar)  
ITAT, Mumbai