Power to rectify mistake apparent from record vis-à-vis review u/s 254(2)

(A)Introduction

The Income Tax Act, 1961 statutorily empowers the tribunal to rectify its order passed within the extended meaning of section 254(1) provided the mistake is alleged to be apparent from record. The word apparent from record inherently weighs any possibility to extract mistake which is apparent from record and which in the understanding of the tribunal warrants rectification. Any information extracted outside the scope of proceedings will find foul of the entire power conferred upon the tribunal to rectify the so called order passed amenable to rectification process provided under section 254(2) of the Income Tax Act, 1961. The Hon'ble Supreme Court of India has over a considerable period of time extended varied dimensions to the parameters enlisted for stepping into the rectification process so as to rectify any mistake apparent from record which is in existence. Recently the **Hon'ble Supreme Court of India in *Commissioner of Income Tax vs. Reliance Telecom Limited, Civil Appeal No.7110 of 2021 dated 03rd December, 2021 reported as (2021) 323 CTR (SC) 873*** went a step ahead to curtail and prune the powers conferred upon the tribunal to rectify its mistake apparent from record itself. Factually whether the above said pronouncement has the impact of curtailing the power of the tribunal to rectify mistake on a comprehensive basis intend to stall the very operation of the statutory provision embedded in section 254(2) forms part of the present discussion as a whole.

(B)Repercussion of the pronouncement of the Hon'ble Supreme Court

The Hon'ble Supreme Court of India in ***Commissioner of Income Tax vs. Reliance Telecom Limited (supra)*** analyzed the scope of review vis-à-vis rectification of the order passed under section 254(2) of the Income Tax Act, 1961. The Hon'ble Supreme Court of India principally envisaged and observed that merely by passing a detailed order in respect of the issues encapsulated before it, its powers to step into the rectification process is completely worn out besides being torn apart. The above said reasoning of the Hon'ble Court however is observed in respect of peculiar circumstances of the case and practically might involve immersing within itself various school of

thoughts so as to enforce a lawful action of rectification per request made either by the department or by the assessee concerned. In order to have a better understanding as to what has since been explored and can be validly extracted out of the above said reasoning of the Hon'ble Court, it is of utmost importance to dive deep into the resultant facts of the case under reference.

(i)Facts

The assessee namely Reliance Telecom Limited entered into a contractual obligation for supply with another concern namely Ericsson A.B. dated 15th June, 2004. The assessee filed an application for remittance of the amount involved without adhering to the norms governing the deduction of TDS lawfully for purchase of software concerned. It was contended that since the company Ericsson A.B. did not had any permanent establishment in India, therefore in terms of the Double Taxation Avoidance Agreement between India and Sweden besides United States of America, the amount paid does not carry any element of Tax deducted at source as it is not taxable in India. The assessing officer post consideration of the application filed passed an order dated 12th March, 2007, whereby the said application of the assessee was rejected considering the impact of the consideration paid as royalty under section 9(1)(vi) of the Income Tax Act, 1961 apart from extending a thoughtful consideration to the terms of article 12(3) of the Double Taxation Avoidance Agreement and accordingly passed directions to levy Tax deducted at source @10%.

The assessee namely Reliance Telecom Limited post deduction of tax at source as per directions of the assessing officer filed a tax appeal before the Commissioner (Appeals). The Commissioner vide order dated 27th May, 2008 decided in favour of assessee to the extent that liability to deduct Tax at source does not arise. Contesting the findings of the worthy Commissioner (Appeals), revenue filed an appeal with the jurisdictional tribunal and the tribunal by a detailed pronouncement dated 06th September, 2013 allowed its appeal by placing reliance upon the judicial precedents of the Hon'ble Karnataka High Court and held that payment made for purchase of software is in nature of royalty therefore assessee was liable to deduct tax at source. The assessee simultaneously preferred miscellaneous application for rectification of the order passed under section 254(2) along with an appeal before the jurisdictional high court against the findings of the order passed by the tribunal dated 06th September, 2013.

That vide order dated 18th November, 2016, the tribunal allowed miscellaneous application filed by the assessee company and recalled its original order passed dated 06th September, 2013. Post recalling of the original order by the tribunal, the assessee

withdrew appeal filed before the High Court against the findings contained in the original order passed by the tribunal dated 06th September, 2013. The revenue being dissatisfied with the order passed by the tribunal allowing miscellaneous application filed under section 254(2) of the Income Tax Act, 1961 carried the matter in writ before the High court. The High court dismissed the contention raised by the revenue in the instant matter and further aggrieved, the revenue carried the matter by way of an appeal before the Hon'ble Supreme Court of India.

(ii)Observations of the Hon'ble Supreme Court of India in *Reliance Telecom's case*

The Hon'ble Supreme Court observed that the order passed by the tribunal dated 18th November, 2016 recalling its earlier order dated 06th September, 2013 is beyond the scope of powers conferred within the meaning of section 254(2). It was further observed that the tribunal recalled its earlier order by observing as if it was hearing the matter a fresh in exercise of the powers conferred upon it, therefore the rectification was indeed falling within the purview of review which is not maintainable. The Hon'ble Supreme Court further observed that if the assessee was of the opinion that the order passed by the tribunal was erroneous either on the basis of facts or law, only remedy available was to prefer an appeal before the jurisdictional high court and none else. The Hon'ble Supreme Court observed in Para No.4, 5 and 6 of the pronouncement settled as under:-

> ***4.*** *In the present case, a detailed order was passed by the ITAT when it passed an order on 6-9-2013, by which the ITAT held in favour of the Revenue. Therefore, the said order could not have been recalled by the Appellate Tribunal in exercise of powers under section 254(2) of the Act. If the Assessee was of the opinion that the order passed by the ITAT was erroneous, either on facts or in law, in that case, the only remedy available to the Assessee was to prefer the appeal before the High Court, which as such was already filed by the Assessee before the High Court, which the Assessee withdrew after the order passed by the ITAT dated 18-11-2016 recalling its earlier order dated 6-9-2013. Therefore, as such, the order passed by the ITAT recalling its earlier order dated 6-9-2013 which has been passed in exercise of powers under section 254(2) of the Act is beyond the scope and ambit of the powers of the Appellate Tribunal conferred under section 254 (2) of the Act. Therefore, the order passed by the ITAT dated 18-11-2016 recalling its earlier order dated 6-9-2013 is unsustainable, which ought to have been set aside by the High Court.*
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> ***5.*** *From the impugned judgment and order passed by the High Court, it appears that the High Court has dismissed the writ petitions by observing that (i) the Revenue itself had in detail gone into merits of the case before the ITAT and the parties filed detailed submissions based on which the ITAT passed its order recalling its earlier order; (ii) the Revenue had not contended that the ITAT had become functus officio after delivering its original order and that if it had to relook/revisit the order, it must be for limited purpose as permitted by Section 254(2) of the Act; and (iii) that the merits might have been decided erroneously but ITAT had the jurisdiction and within its powers it may pass an erroneous order and that such objections had not been raised before ITAT.*

> ***6.*** *None of the aforesaid grounds are tenable in law. Merely because the Revenue might have in detail gone into the merits of the case before the ITAT and merely because the parties might have filed detailed submissions, it does not confer jurisdiction upon the ITAT to pass the order de hors Section 254(2) of the Act. As observed hereinabove, the powers under section 254(2) of the Act are only to correct and/or rectify the mistake apparent from the record and not beyond that.*

The Hon'ble Supreme Court based its conclusion by taking strong inference of a detailed order passed vis-à-vis issue under consideration to hold that rectification was not maintainable in the instant case thereby relegating the assessee to the remedy of appeal before the jurisdictional high court.

(C)Impact of earlier pronouncement vs. subsequent pronouncement

The Hon'ble Supreme Court was categorical to the extent in *Reliance Telecom's case (supra)* that if detailed order was passed, the next legal remedy available to the assessee is to challenge the same by way of an appeal before the jurisdictional high court and none else. It is to be taken into consideration that while adjudicating the appeal in *Reliance Telecom's case (supra),* the earlier pronouncement of the Hon'ble Supreme Court of India was neither understood to have been cited nor the Hon'ble Court took note of the same while considering the consequences ensued while deciding the matter in *Reliance Telecom's case (supra).* Hon'ble Supreme Court of India in ***Assistant Commissioner of Income Tax vs. Saurashtra Kutch Stock Exchange Limited (2008) 219 CTR (SC) 90*** settled long ago that non-consideration of the decision of the jurisdictional high court/Supreme Court constitutes mistake apparent from record and is rectifiable within the meaning of section 254(2) of the Income Tax Act, 1961. By respectfully adhering to the *ratio decidendi* of the Hon'ble Supreme Court decision in *Reliance Telecom's case,* undernoted points can still be of paramount importance when practically put to test in order to conclude that rectification petition under section 254(2) will be maintainable and sustainable even in the undernoted circumstances irrespective of the fact that detailed order is passed by the tribunal wherein:-

a)The submissions filed by the either party i.e. either the assessee or the revenue have since been considered in narrow perspective by the Hon'ble Tribunal without thoughtfully paying heed to what has since been argued,

b)Non-consideration of the detailed written submissions filed by the adverse party to the case likewise by placing heavy reliance upon the documents, corroborative evidence which is material and decisive in determination of question of fact besides question of law or a mixed question of fact and law other than a substantial question of law falling within the competence of the Hon'ble High Court,

c)Non-consideration of the decisions of the constitutional/writ court touching upon the issue under consideration and ignored by the Hon'ble tribunal while adjudicating the matter in dispute,

d)Non-consideration of the decision of the co-ordinate bench of the tribunal wherein dispute of identical nature has been adjudicated and relied upon by the assessees/revenue,

e)Non-consideration of the decision of the Third member bench having force equivalent to that of a special bench or Special Bench decision with respect to identical matter already stood decided by the respective forum,

f)Non-consideration of the decisions of the co-ordinate benches which have since met the fate of being approved by the writ courts/constitutional courts in appeal or in writ proceedings,

g)Wherein the submissions are considered in part and order so alleged to be detailed have since been encapsulated on the basis of such submissions tendered or argued during the course of hearing,

h)Non-adjudication of all grounds wherever exist and duly pressed for while arguing the matter in appeal before the tribunal in due adjudication of the original round of proceedings.

i)Partial consideration of the grounds argued by way of written submissions despite the fact that a detailed order have since been extracted out of the same by the Hon'ble Tribunal,

j)Incorrect application and appreciation of facts, law point involved besides adopting an adversarial approach to the facts of the case without providing ample and reasonable opportunity to express the issue at length,

k)By not-confronting the adversarial pronouncements relied upon by the bench on its own motion and pitted against the interest of the either party to the proceedings,

l)By relying upon a pronouncement not in existence at the time of conclusion of the hearing in original round of proceedings even in case of an alleged detailed order,

m)By placing reliance upon an unreported pronouncement of a court which has failed to meet the ratio already settled by the jurisdictional High court or Supreme Court even in case of alleged detailed order,

n)By thoughtfully considering the impact of a sound and reasoned decision making process while adjudicating all grounds of appeal specially touching upon the jurisdiction/preliminary issues etc. even in case of a detailed order passed,

o)By cherry-picking or ignoring the phrase/expression called evidence, documents, paper book filed in due adjudication of the matter under reference by either party to the proceedings even in case of a detailed order passed,

p)Non-consideration of the subsequent amendment introduced to the law either on a prospective basis or retrospective basis even in the face of a detailed order passed,

q)For want of extending proper opportunity of hearing as alleged by either of the party concerned to the proceedings even in case of a detailed order passed,

r)Non-consideration of the benevolent doctrine of *Stare-Decisis* or by not adhering /following the settled precedents/dictums with the intent to be an adversary party to the proceedings even in case of a detailed order passed,

s)By placing reliance upon the pronouncements on its own motion which have since been overturned even in case of a detailed order being passed,

t)By ignoring the spirit of the affidavits filed/statements examined on oath by either party to the proceedings below even on the face of a detailed judgement or pronouncement by the Hon'ble tribunal,

u)By placing reliance upon the pronouncement not relied upon by either party to the proceedings even in case of a detailed order being passed etc. can suitably and reasonably offer due assistance to either of the party praying for rectification of proceedings within the scope of section 254(2) and such a petition would be maintainable without any second thought.

The Hon'ble Supreme Court of India in ***Saurashtra Kutch Stock Exchange Limited (supra)*** settled and observed in context of section 254(2) of the Income Tax Act, 1961 as under:-

> ***40.*** *The core issue, therefore, is whether non-consideration of a decision of Jurisdictional Court (in this case a decision of the High Court of Gujarat) or of the Supreme Court can be said to be a "mistake apparent from the record"? In our opinion, both - the Tribunal and the High Court - were right in holding that such a mistake can be said to be a "mistake apparent from the record" which could be rectified under section 254(2)……*
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> ***46.*** *In S. Nagaraj v. State of Karnataka 1993 Supp. (4) SCC 595, Sahai, J. stated ::-*
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> > *"15. Justice is a virtue which transcends all barriers. Neither the rules of procedure nor technicalities of law can stand in its way. The order of the Court*

should not be prejudicial to anyone. Rule of stare decisis is adhered for consistency but it is not as inflexible in Administrative Law as in Public Law. Even the law bends before justice. Entire concept of writ jurisdiction exercised by the higher courts is founded on equity and fairness. If the Court finds that the order was passed under a mistake and it would not have exercised the jurisdiction but for the erroneous assumption which in fact did not exist and its perpetration shall result in miscarriage of justice then it cannot on any principle be precluded from rectifying the error. Mistake is accepted as valid reason to recall an order. Difference lies in the nature of mistake and scope of rectification, depending on if it is of fact or law. But the root from which the power flows is the anxiety to avoid injustice. It is either statutory or inherent. The latter is available where the mistake is of the Court. In Administrative Law, the scope is still wider. Technicalities apart if the Court is satisfied of the injustice then it is its constitutional and legal obligation to set it right by recalling its order...." (p. 618)

***47.** In the present case, according to the assessee, the Tribunal decided the matter on October 27, 2000. Hiralal Bhagwati was decided few months prior to that decision, but it was not brought to the attention of the Tribunal. In our opinion, in the circumstances, the Tribunal has not committed any error of law or of jurisdiction in exercising power under sub-section (2) of section 254 of the Act and in rectifying "mistake apparent from the record". Since no error was committed by the Tribunal in rectifying the mistake, the High Court was not wrong in confirming the said order. Both the orders, therefore, in our opinion, are strictly in consonance with law and no interference is called for.*

d)Conclusion

Respectfully by following the theory of detailed judgement passed and relied upon by the Hon'ble Apex Court, it can be examined from a limited scope when it is to be tested on the anvil of being capable for rectification within the purview of section 254(2). It can also be safely vouched that rectification filed with the intent to seek re-hearing of the matter in absence of any latent or patent mistake apparent from the record is not however permissible as it will better be understood as a review. Extending due regard to the pronouncement of the Hon'ble Supreme Court of India in ***Reliance Telecom's case (supra)*** wherein the impact of the pronouncement in ***Saurashtra Kutch Stock Exchange Limited's case (supra)*** was not considered**.** Reluctance to rectify an order merely because a detailed judgement has been passed without considering the impact of the parameters enlisted above can suitably cause gross injustice, infringement besides disservice to the cherished goal of extending justice to the parties concerned as a whole. Respectfully an end to the litigation process is somehow desired so that it can attain and achieve finality certainly not at the cost of justice, parity, equity and fair-play. By being an adversary party to the proceedings or by simply leaning down in favour of one party by promoting its interest as a whole can cause severe dent in the adjudication process which can further be resolved to a greater extent by enforcing faceless era of tribunalization as a whole. Adjudication or decision making process divorced from the concept of equity, fair-play, equality of opportunity, knowledge, inclined mindset towards a particular issue, non-adherence to the judicial precedents set in motion, discarding of pronouncement on the pretext of being an old law without thoughtfully examining the facts or the law involved, extending opportunity of hearing to selected counsel by

discarding the intellect/standing of the other consultant can cause a greater damage to the reputation of the institution which came out to be better acknowledged as a final fact finding authority under the direct tax laws with the motto `**Nishpaksh Sulabh Satvar Nyay** which means impartial, easy and speedy justice.

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