CHECKMATED.THE BANDWAGON EFFECT

(An essay into the rectification petitions to give effect to PF ruling retrospectively.)

Executive summary:

The present essay is on the issue of rectifying alleged ‘’mistakes apparent from record’’ u/s 254(2) and u/s 154 in wake of Checkmate ruling on s 36(1)(va) primarily in Tribunals across the country.The process and the result are misapplication of law and the orders are tumbling ,one riding on top of the other, unmindful of gross travesty of justice, by misreading jurisprudential aspects of the same.The endeavour is to give a coherent picture and suggest parameters on which such ‘recalls’and ‘rectifications’can be successfully challenged before HCs and SC.Its time to stop the gravy train.

I.THE PRESENT SCENARIO:

1.The decision in CHECKMATE SERVICES P. LTD. [2022] 448 ITR 518 (SC)passed on October 12, 2022.has created an extraordinary flurry of activity.In an uncharacteristic alacrity,the IT department has filed a cache of MAs before ITATs to recall the orders passed where assessees got relief in regard to deposit of employee’s contribution to PF.Also ,the AOs have unleashed suo motu 154s to rectify relief given ,esp in cases processed u/s 143(1) and not subject to scrutiny.

II.RULING IN CHECKMATE:

2.The ruling:

*‘’**53.** The distinction between an employer's contribution which is its primary liability under law - in terms of section 36(1)(iv), and its liability to deposit amounts received by it or deducted by it (Section 36(1)(va)) is, thus crucial. The former forms part of the employers' income, and the later retains its character as an income (albeit deemed), by virtue of section 2(24)(x) - unless the conditions spelt by Explanation to section 36(1)(va) are satisfied i.e., depositing such amount received or deducted from the employee on or before the due date. In other words, there is a marked distinction between the nature and character of the two amounts - the employer's liability is to be paid out of its income whereas the second is deemed an income, by definition, since it is the deduction from the employees' income and held in trust by the employer. This marked distinction has to be borne while interpreting the obligation of every assessee under section 43B.*

***54.** In the opinion of this Court, the reasoning in the impugned judgment that the non-obstante clause would not in any manner dilute or override the employer's obligation to deposit the amounts retained by it or deducted by it from the employee's income, unless the condition that it is deposited on or before the due date, is correct and justified. The non-obstante clause has to be understood in the context of the entire provision of Section 43B which is to ensure timely payment before the returns are filed, of certain liabilities which are to be borne by the assessee in the form of tax, interest payment and other statutory liability. In the case of these liabilities, what constitutes the due date is defined by the statute. Nevertheless, the assessees are given some leeway in that as long as deposits are made beyond the due date, but*

before the date of filing the return, the deduction is allowed. That, however, cannot apply in the case of amounts which are held in trust, as it is in the case of employees' contributions- which are deducted from their income. They are not part of the assessee employer's income, nor are they heads of deduction per se in the form of statutory pay out. They are others' income, monies, only deemed to be income, with the object of ensuring that they are paid within the due date specified in the particular law. They have to be deposited in terms of such welfare enactments. It is upon deposit, in terms of those enactments and on or before the due dates mandated by such concerned law, that the amount which is otherwise retained, and deemed an income, is treated as a deduction. Thus, it is an essential condition for the deduction that such amounts are deposited on or before the due date. If such interpretation were to be adopted, the non-obstante clause under section 43B or anything contained in that provision would not absolve the assessee from its liability to deposit the employee's contribution on or before the due date as a condition for deduction.

55. *In the light of the above reasoning, this court is of the opinion that there is no infirmity in the approach of the impugned judgment.* ***The decisions of the other High Courts, holding to the contrary, do not lay down the correct law.*** *For these reasons, this court does not find any reason to interfere with the impugned judgment. The appeals are accordingly dismissed.''*

2.1 THE BACKGROUND AS NOTED BY THE COURT:

''2. *In the years under consideration,* ***the Assessing Officers*** *(hereinafter, "AO") had ruled that the appellants had belatedly deposited their employees'*

contribution towards the EPF and ESI, considering the due dates under the relevant acts and regulations. Consequently, the AO ruled that by virtue of section 36(1)(va) read with Section 2(24)(x) of the IT Act, such sums received by the appellants constituted "income". Those amounts could not have been allowed as deductions under section 36(1)(va) of the IT Act when the payment was made beyond the relevant due date under the respective acts…..''

So,these are **scrutiny assessments** wherein ab initio the AO denied the claim of the assessee.**This is vital** and needs to be remembered.

3.CHECKMATE ruled ,riding on s 2(24) ,the memorandum,notes on clauses and strict interpretation rule that payment towards employee's contribution to provident fund after the due date prescribed under the relevant statute is not allowable as deduction under section 36(1)(va) of the Act.

3.1 So far so good.How does this impact the doctrine of finality in respect of concluded and unagitated matters by the department?How does it impact the matters concluded by ITAT? More significantly ,does it become a cause of action u/s 254(2) and 154?

3.2 **Unjust enrichment theory** of holding back deposit till ROI date is unexceptional.But the MAs and the surprising knee jerk reactions of Tribunals in recalling their orders create some disturbing and legally unsound precedents which deserve challenge in HCs and SC.

4.The cases impacted fall under four broad categories:

1. DISALLOWANCE made u/s 143(1) by CPC ,relief provided by ITAT.No further contest by department.
2. Disallowance made u/s 143(3) by AO,relief provided by ITAT.No further contest by department.
3. Rarely,allowance made by AO.[154 initiated later ,impelled by Checkmate or Audit].
4. Matter under contest and pending before various appellate fora.

5. A small minority of cases would be under Gujarat and Kerala HCs (the minority decisions favouring revenue) where the ruling went in favour of revenue and assessee is/is not contesting further.

III.WHAT AGITATES A PERSON INSTRUCTED IN LAW?

6.

ISSUE 1: A ruling needs reading ,not only in context of the facts of the case but also the provisions of law considered.A subsequent ruling ,in conformity, is possible only under same provision of law-can it be artificially extended to action under provision of law widely divergent in scope and intent?Simply put,can a 143(1) be rectified under 154 on a highly debatable issue with majority of HCs steering in favour of assessee and huge interpretational cleavages exist just because SC has settled the issue subsequently?Would a 143(3) matter decided , supersede and expand the scope of s 154 or 254(2) because the former stands settled by SC on a point of law ?

ISSUE 2 : Is the issue amenable to action u/s 154 or 254(2)?

ISSUE 3: In the garb of complying with the decision of SC, can ITAT **recall** its own order in exercise of powers u/s 254(2)?

ISSUE 4: If ITATs start taking divergent views on the scope of 154 or 254(2)[as has actually opened] ,will the matters again travel to hon'ble SC ,vexing the assessee,not once,not twice but thrice?

ISSUE 5 : Does the **principle of Stare Decisis** have no application to the issue under question?More perversely,is the principle redundant in the context?For ,if tomorrow a 5 judge bench were to either overrule this decision or were to hold that it cannot extend the scope of 154 or 254(2) ,would these recalls and amendments be rectifiable again?

ISSUE 6: Can this retrospectivity be read even where the Legislature,in order to cure the supposed mischief,made it clear ,in inserting Explanation 2 to s 36(1)(va) memorandum that it would apply from AY 2021-22 onwards?

ISSUE 7 : Would this application of unsettling old decisions not amount to **retrospective penalisation** ,subject to so much judicial deprecation?An assessee would **find his state of financial affairs retrospectively upset** while bonafidely acting on an interpretation of law settled in most part.

ISSUE 8: Can a judicial decision,even of hon'ble SC, be read and applied **retrospectively(Blackstonian principle**) to the extent of upsetting settled judicial orders whether or not under consideration of SC?

ISSUE 9: What is the implication of phrase ''***The decisions of the other High Courts, holding to the contrary, do not lay down the correct law.''?***

ISSUE 10: Is judicially benedicted **Doctrine of Prospective Overruling** needs explicit mention in the order for it to operate prospectively ,without which it is a still born principle? Is there any relevance of Explanation to Order 47 Rule 1 of CPC 1908?

6.1 These issues involve a dynamic interplay amongst themselves, so within my humble and limited understanding, I shall attempt a synergised analysis.

IV.ANALYSIS:

7.In a plethora of MAs ,[one argued by me also before Mumbai ITAT(SCNS PVT LTD in ITA number 2170/Mum/2020 AY 2019-20 ,heard on21.4.23) decision dated 27.6.23] the question was raised that ITAT relief ,though given on a date earlier than Checkmate(which was dated 12.10.2022)was based on an interpretation of law or following of HC rulings held as no longer valid by hon'ble SC.

7.1 Among the most comprehensive orders,one dealt with by me ,in a separate but related article is **THE DCIT, CIRCLE-1 (1) , BHILAI (C.G)**

AND OTHERS VERSUS N.R WIRES PRIVATE LIMITED AND OTHERS Dated: - 29-5-2023. Reported in 2023 (6) TMI 516 - ITAT RAIPUR in MA Nos. 04/RPR/2023 05/RPR/2023 (Arising out of ITA Nos.8 & 9/RPR/2022), 06/RPR/2023 ,07/RPR/2023 (Arising out of ITA No.58 & 62/RPR/2021) This can be taken as lead one combining multiple MAs-instances where revenue has been successful in getting orders recalled by ITAT .

8.**The position prior to Checkmate and even subsequent to Finance Act 2021 amendment:**

a. Controversy in past

There was debate on whether the provision of section 43B(*b*) would apply only to employer's contribution to specified fund or it also applies in case of employee's contribution to such funds.

High Courts in few judgments, as follows, had taken a view that provision of section 43B overrides other provisions of the Act including section 36(1)(*va*); **therefore, payment of employee's contribution to the specified fund is allowable as deduction if it is paid beyond the due date specified under relevant applicable provision but before the due date of filing of return.**

(*i*) *CIT* v. *State Bank of Bikaner and Jaipur* [2014] 43 taxmann.com 411/225 Taxman 6 (Mag.)/363 ITR 70 (Raj.);

(*ii*) *CIT* v. *Udaipur Dugdh Utpadak Sahakari Sangh Ltd.* [2013] 35 taxmann.com 616/217 Taxman 64 (Mag.)/[2014] 366 ITR 163 (Raj.);

(*iii*) *CIT* v. *Rajasthan State Ganganagar Sugar Mills Ltd.* [2017] 88 taxmann.com 522/393 ITR 421(Raj.);

(*iv*) *Bihar State Warehousing Corporation Ltd.* v. *CIT* [2016] 71 taxmann.com 247/242 Taxman 142/386 ITR 410 (Patna);

(*v*) *CIT* v. *Ghatge Patil Transports Ltd.* [2015] 53 taxmann.com 141/228 Taxman 340/[2014] 368 ITR 749 (Bom.);

(*vi*) *CIT* v. *Hemla Embroidery Mills Pvt. Ltd.* [2013] 37 taxmann.com 160/217 Taxman 207 (Mag.)/[2014] 366 ITR 167 (Punj. & Har.);

(*vii*) *CIT* v. *Magus Customers Dialog Pvt. Ltd.* [2015] 57 taxmann.com 94/231 Taxman 379/371 ITR 242 (Kar.);

(*viii*) *Essae Teraoka Pvt. Ltd.* v. *Dy.CIT* [2014] 43 taxmann.com 33/222 Taxman 170 (Mag.)/366 ITR 408 (Kar.);

(*ix*) *CIT* v. *Hindustan Organics Chemicals Ltd.* [2014] 48 taxmann.com 421/366 ITR 1 (Bom.);

(*x*) *CIT* v. *Mark Auto Industries Ltd.* [2013] 40 taxmann.com 482/[2014] 220 Taxman 75 (Mag.)/[2013] 358 ITR 43 (Punj. & Har.);

(*xi*) *CIT* v. *Kichha Sugar Co. Ltd.* [2013] 35 taxmann.com 54/216 Taxman 90/ 356 ITR 351(Uttarakhand)

(*xii*) *Principal CIT* v. *Hind Filter Ltd.* [2018] 90 taxmann.com 51 (Bom.).

Some decisions of Tribunals on the point ruling in favour of assessee are:

1. Harendra Nath Biswas, Kolkata vs Dcit, Cir. 29, Kolkata ITA No.186/Kol/2021 A.Y. 2019-20 on 16 .7. 2021

b.Mohan Ram Chaudhary,Jodhpur Vs. The ITO, Ward 3(2),Jodhpur ITA No. 51/Jodh/2021 Assessment Year : 2018-19 on 28.9.21 and other cases

3.M/S. The Continental Restaurant & Café Co BANGALOREvs Centralized Processing Center, ... ITA No.388/Bang/2021 : Asst.Year 2019-2020 on 11.10.2021

4.Shri. Gopalakrishna Aswini Kumar,Bengaluru Vs. The Assistant Director of Income Tax, CPC,Bengaluru. ITA No.359/Bang/2021 Assessment Year : 2019-20 on 13.10.2021

However, other High Courts had taken a different view that provision of section 43B does not apply in case of employee's contribution, in the decisions as under:

(*i*) *Unifac Management Services* (*India*) *Pvt. Ltd.* v. *Dy. CIT* [2018] 100 taxmann.com 244/[2019] 260 Taxman 60/[2018] 409 ITR 225 (Mad.);

(*ii*) *Popular Vehicles and Services Pvt. Ltd.* v. *CIT* [2018] 96 taxmann.com 13/257 Taxman 120/406 ITR 150 (Ker.);

(*iii*) *CIT* v. *Merchem Ltd.* [2015] 61 taxmann.com 119/235 Taxman 291/378 ITR 443 (Ker.)*;*

(*iv*) *CIT* v. *Gujarat State Road Transport Corporation* [2014] 41 taxmann.com 100/223 Taxman 398/366 ITR 170 (Guj.).

b.The amended provision;

Other deductions.

36. *(1) The deductions provided for in the following clauses shall be allowed in respect of the matters dealt with therein, in computing the income referred to in section 28—*

[(va) any sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 apply, if such sum is credited by the assessee to the employee's account in the relevant fund or funds on or before the due date.

[71a] *[Explanation 1].—For the purposes of this clause, "**due date**" **means** the date by which the assessee is required as an employer to credit an employee's contribution to the employee's account in the relevant fund under any Act, rule, order or notification issued thereunder or under any standing order, award, contract of service or otherwise.]*

[71b] ***[Explanation 2.—For the removal of doubts, it is hereby clarified that the provisions of section 43B shall not apply and shall be deemed never to have been applied for the purposes of determining the "due date" under this clause;]***

71a. Explanation renumbered as *Explanation 1* by the Finance Act, 2021.

71b. Inserted by the Finance Act, 2021.

c.The relevant part of the **MEMORANDUM** TO FINANCE BILL relied upon is as follows:

''Accordingly, in order to provide certainty, it is proposed to –(i) amend clause (va) of sub-section (1) of section 36 of the Act by inserting another explanation to the said clause to clarify that the provision of section 43B does not apply and deemed to never have been applied for the purposes of determining the —due datell under this clause; and (ii) amend section 43B of the Act by inserting Explanation 5 to the said section to clarify that the provisions of the said section do not apply and deemed to never have been applied to a sum received by the assessee from any of his employees to which provisions of sub-clause (x) of clause (24) of section 2 applies.**These amendments will take effect from 1stApril, 2021 and will accordingly apply to the assessment year 2021-22 and subsequent assessment years.[Clauses 8 and9] ''.**

d.Relying on the above memorandum and the date of effectiveness further reliefs were provided by various fora.To wit,

Dhabriya Polywood Ltd., Jaipur vs Acit-C-6, Jaipur ITA. No. 53/JP/2021 Assessment Years : 2019-20 on 15 September, 2021

''6. In the instant case, admittedly and undisputedly, the employees' contribution to ESI and PF collected by the assessee from its employees have been deposited well before the due date of filing of return of income u/s 139(1) of the Act. Further, it is noted that the ld CIT(A) has referred to the explanation to section 36(1)(va) and section 43B introduced by the Finance Act, 2021 and has also referred to the Dhabriya Polywood Limited vs. ADIT rationale of the amendment as explained by the Memorandum in the Finance bill, 2021, ***however, he has simply failed to consider the express wordings in the said memorandum which says "these amendments will take effect from 1st April, 2021 and will accordingly apply to assessment year 2021-22 and subsequent assessment years". The impugned assessment year is assessment year 2019-20 and therefore, the said amendment cannot be applied in the instant case.***

7. In light of the aforesaid discussions and in the entirety of facts and circumstances of the case and following the decision referred supra, the addition by way of adjustment while processing the return of income u/s 143(1) amounting to Rs 21,15,855/- so made by the CPC towards the deposit of the employees's contribution towards ESI and PF though paid before the due date of filing of return of income u/s 139(1) of the Act is hereby directed to be deleted."

9.NOTES ON CLAUSES:A VITAL GUIDE TO LEGISLATIVE INTENT:A DECISIVE ARGUMENT-

There is one peculiar feature in the present issue which was not present in other retrospectivity favouring interpretations,which is **the legislature making it clear that amendment stood applicable from a particular date**.Though the amendment was referred in Checkmate but no ruling exists that the same applies retrospectively.So we are in an anomalous situation where the letter of law says the amendment applies w.e.f. 1.4.2021 ,the subordinate fora ITAT ,riding on Checkmate **reads a judicial casus omissus** therein and says ,since noted by the hon'ble Court ,the issue stands considered and decided.**This point needs contest before Courts**.There cannot be an implied consideration.The hon'ble Court noting the amendment is one thing and making a ruling thereon ,or even making it a part of its ruling is another thing.Nothing of the sort has been done by hon'ble SC to the best of my humble understanding.We shall see that the manner in which Checkmate has been read and implemented. ignoring settled principles of reading judgements. imputing meanings and taking out implications where none exist. has been a gross travesty of justice. It is literally an instance of **being more loyal than the king**,if I may borrow a literary euphemism.

9.1 Did the SC ,respectfully,rule in the Checkmate judgement that though the amendment is made applicable by memorandum w.e.f. AY 21-22 has to be read as applicable from earlier years?If not ,then ,does the memorandum (an integral part of law)lose legislative force because it is **deemed read down or impliedly struck down or the presumed canon of Blackstonian principle read into,though never formalised,in a decision, overcomes the memorandum** ?Is a curative/review petition in order on this issue?

9.2 In fact this issue of content of memorandum is not a part of the judgement and arguably was never a part of pleadings even though the Explanation came on Statute on 1.4.2021 and the Checkmate decision happened on 12.10.2022.**Admittedly the amendment was referred in para 4 and 5 of the decision(without any comment or analysis)** ,but the allied aspect of memorandum was **never pleaded or brought to the attention of the hon'ble SC**.That the memorandum is an essential and vital tool to understand legislative intent is beyond a pale of doubt.

One may refer to **Allied Motors (P.) Ltd.*v.*CIT [1997] 224 ITR 677 (SC)** for appreciating how SC considered memorandum ,budget speech and explanatory circular as vital inputs in understanding/constructing a section.

9.3 One can also refer to the Constitution bench decision in VATIKA TOWNSHIP 271 CTR 1 SC which by itself must settle the issue conclusively.The debate was in regard to s 113 and in para 39 ,the Court held as under:

[quote]

''(d) There are some other circumstances which reflect the legislative intent. The problem which was highlighted in the Conference of Chief Commissioners on the rate of surcharge applicable is noted above. In view of the aforesaid difficulties pointed out by the Chief Commissioners in their Conference, it becomes clear that as per the provisions then enforced, levy of surcharge in the block assessment on the undisclosed income was a difficult proposition. It is for this reason retrospective amendment to Section 113 was suggested. Notwithstanding the same, the legislature chose not to do so, as is clear from the discussion hereinafter.

"Notes on Clauses" appended to Finance Bill, 2002 while proposing insertion of proviso categorically states that "this amendment will take effect from 1st June, 2002". These become epigraphic words, when seen in contradistinction to other amendments specifically stating those to be clarificatory or retrospectively depicting clear intention of the legislature. It can be seen from the same notes that few other amendments in the Income Tax Act were made by the same Finance Act specifically making those amendments retrospectively. For example, clause 40 seeks to amend S.92F. Clause iii (a) of S.92F is amended "so as to clarify that the activities mentioned in the said clause include the carrying out of any work in pursuance of a contract." This amendment takes effect retrospectively from 01.04.2002. Various other amendments also take place retrospectively. **The Notes on Clauses show that the legislature is fully aware of 3 concepts:**

(i) prospective amendment with effect from a fixed date;

(ii) retrospective amendment with effect from a fixed anterior date; and

(iii) clarificatory amendments which are retrospective in nature.

Thus, it was a conscious decision of the legislature, even when the legislature knew the implication thereof and took note of the reasons which led to the insertion of the proviso, that the amendment is to operate prospectively. Learned counsel appearing for the assessees sagaciously contrasted the aforesaid stipulation while effecting amendment in Section 113 of the Act, with various other provisions not only in the same Finance Act but Finance Acts pertaining to other years where the legislature specifically provided such amendment to be either retrospective or clarificatory. In so far as amendment to Section 113 is concerned, there is no such language used and on the contrary, specific stipulation is added making the provision effective from 1st June, 2002.

(e) **There is yet another very interesting piece of evidence that clarifies the provision beyond any pale of doubt, viz. understanding of CBDT itself regarding this provision. It is contained in CBDT circular No.8 of 2002 dated 27th August, 2002, with the subject "Finance Act, 2002 - Explanatory Notes on provision relating to Direct Taxes".** This circular has been issued

after the passing of the Finance Act, 2002, by which amendment to Section 113 was made. In this circular, various amendments to the Income Tax Act are discussed amply demonstrating as to which amendments are clarificatory/retrospective in operation and which amendments are prospective. For example, explanation to Section 158BB is stated to be clarificatory in nature. Likewise, it is mentioned that amendments in Section 145 whereby provisions of that section are made applicable to block assessments is made clarificatory and would take effect retrospectively from 1st day of July, 1995. When it comes to amendment to Section 113 of the Act, this very circular provides that the said amendment along with amendments in Section 158BE, would be prospective i.e. it will take effect from 1st June, 2002.

(f) Finance Act, 2003, again makes the position clear that surcharge in respect of block assessment of undisclosed income was made prospective. Such a stipulation is contained in second proviso to sub-section (3) of Section 2 of Finance Act, 2003. This proviso reads as under:

> "**Provided further** that the amount of income-tax computed in accordance with the provisions of section 113 shall be increased by a surcharge for purposes of the Union as provided in Paragraph A, B, C, D or E, as the case may be, of Part III of the First Schedule of the Finance Act of the year in which the search is initiated under section 132 or requisition is made under section 132A of the income-tax Act."

Addition of this proviso in the Finance Act, 2003 further makes it clear that such a provision was necessary to provide for surcharge in the cases of block assessments and thereby making it prospective in nature. The charge in respect of the surcharge, having been created for the first time by the insertion of the proviso to Section 113, is clearly a substantive provision and hence is to be construed prospective in operation. The amendment neither purports to be merely clarificatory nor is there any material to suggest that it was intended by Parliament. Furthermore, an amendment made to a taxing statute can be said to be intended to remove 'hardships' only of the assessee, not of the Department. On the contrary, imposing a retrospective levy on the assessee would have caused undue hardship and for that reason Parliament specifically chose to make the proviso effective from 1.6.2002.

40. The aforesaid discursive of ours also makes it obvious that the conclusion of the Division Bench in Suresh N. Gupta's case (supra) treating the proviso as clarificatory and giving it retrospective effect is **not a correct conclusion. Said judgment is accordingly overruled.''**

[unquote]

9.4 This decision was neither cited nor was before the hon'ble SC in Checkmate.We have a analogous situation here.A decision holds a proviso retrospective,matter goes to a larger bench,legislative intent is read from notes on clauses appended to Finance bill and Explanatory notes issued by CBDT and its held that legislature did not intend the amendment to be retrospective.

Ditto in our case here.

The memorandum clearly mentions the amendment to be prospective.But the issue ,is not brought out before the Court,presumably because the validity of the provision itself is in question.

9.5 What did the Notes on Clauses appended to Finance Bill 2021 say in case of s 36?

Clause 8 of the Bill seeks to amend section 36 of the Income-tax Act, relating to other deductions.

Sub-section (1) of the said section provides for allowing of deductions provided for in the clauses thereof for computing the income referred to in section 28 of the said Act. Clause (va) of the said sub-section provides for allowance of deduction for any sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 apply, if such sum is credited by the assessee to the employee's account in the relevant fund or funds on or before the due date. Explanation to the said clause provides that for the purposes of this clause, "due date" means the date by which the assessee

is required as an employer to credit an employee's contribution to the employee's account in the relevant fund under any Act, rule, order or notification issued thereunder or under any standing order, award, contract of service or otherwise.It is proposed to insert Explanation 2 to clause (va) of sub-section (1) of the said section so as to clarify that the provisions of section 43B shall not apply and shall be deemed never to have been applied for the purposes of determining the "due date" under the said clause.

This amendment will take effect from 1st April, 2021 and will, accordingly, apply in relation to the assessment year 2021-2022 and subsequent assessment years.[page 261]

9.6 Citing the parallel amendment ,what did Vatika say?;'' These become epigraphic words,''.What does ''epigraphic'' mean? ; it means ''**CAST IN STONE'',an ''inscription in metal'' so to say.Is any other evidence/debate even required now?**

Reading the above,the Memorandum(supra) and the ruling in Vatika,the matter should close here.[In fact ,Checkmate itself relies on Notes on Clauses in para 41 of its order.The Checkmate order is a GENERIC analysis of s 36 and 43B delightfully steering clear of quagmire of conflicting views and embarking on detailed and enlightening exposition of principles of interpretation of statutes.]

9.7 Admittedly part of Circular 495(dated 22.9.1987) was referred as to the nature of the section in para 9 of the decision(referred later here.)

But this is not the issue at all in the present controversy.

9.8 So ,if retrospectivity is to be read on the interpretation , is the decision itself and the legislative intent as exemplified by the inserted explanation

not colliding on interpretational aspect too ,as well as retrospectivity? Can the Vatika parallel(supra) be ignored?

An ambiguous provision is rid of the mischief it has created, by legislative act.The legislature thus agrees clearly there was mischief and ambiguity ,maybe created by 43B requirements, and it was the need for harmonious interpretation leading to the interpretation it led to ,in regard to s 36 ,which had to be cured, and 43B and 36 had to be put on different interpretational planes.

9.9 Surely the hon'ble SC could have held the amendment to be curative and hence retrospective, even though Legislature added the Explanation,acknowledging the ambiguity and the mischief and in the memorandum, and held it to be prospective.

9.10 If the law is amended, whether prospectively or retrospectively, such law has to be applied as presented .The legislative will reigns supreme as we shall see presently.

10.RETROSPECTIVE INTERPRETATION OF STATUTE IS NOT THE SAME AS RETROSPECTIVITY READ IN JUDGEMENTS

There is a rich judicial history on retrospectivity being read into provisions. A proviso added from 01-04-1988 to Section 43B of the Act from 01-04-1984 came up for consideration in Allied Motors Private Limited v. CIT (1997) 91 taxman 205(SC) before Hon'ble Supreme Court **and it was given retrospective effect from the inception of the section on the reasoning that the proviso was added to remedy unintended consequences and supply an obvious omission** so that the section may be given a reasonable interpretation and that in fact the amendment to

insert the proviso would not serve its object unless it is construed as retrospective **.** In **CIT v. Podar Cement Pvt. Limited (1997) 92 Taxman 541(SC)** , the Hon'ble Supreme Court held that amendment introduced by the Finance Act,1987 in so far the related to Section 27(iii) ,(iiia) and (iiib) which redefined the expression 'owner of house property', in respect of which there was a sharp divergence of opinion amongst the High Courts, was clarificatory and declaratory in nature and consequently retrospective. Similarly , in **Brij Mohan Das Laxman Das v. CIT (1997) 90 Taxman 41(SC)**, explanation 2 added to section 40 of the Act was held to be declaratory in nature and , therefore , retrospective. But then these are different aspects-a law being held as applicable retrospectively being curative or declaratory .Here an interpretation is being held as retrospective ,for a provision which was clarified,given same interpretation the Court gave,and laid it down to be prospective.**This is the point of challenge before the Courts.**

11.WHY INSERTED EXPLANATION 2 WAS NOT HELD RETROSPECTIVE?

A simple solution in the appeal in Checkmate would have been to hold the inserted Explanation retrospective and thereafter the analysis would have followed the trail.This was not done.Does it tell us something?

It may also happen that the clarificatory or explanatory provision introduced later to depict the real intention of the legislature is not specifically made retrospective by the statute. Notwithstanding the fact that such amendment to the substantive provision has been given prospective effect, the judicial or quasi judicial authorities, on a challenge

made to it, can hold such amendment to be retrospective.Why was it not done?And if not done ,what then are its implications?

12.And if hon'ble SC had no occasion to consider this amendment (though referred)and memorandum(not even referred) then there is need to apply to interpretation of Checkmate ,the same principle Checkmate applied on Alom Extrusions.saying that *''**45.** A reading of the judgment in Alom Extrusions, would reveal that **this court, did not consider** sections 2(24)(x) and 36(1)(va). Furthermore, the separate provisions in section 36(1) for employers' contribution and employees' contribution, **too went unnoticed.''***

12.1 Likewise then ,the prospectivity of 2021 amendment as clarified in the memorandum remained to be considered by the hon'ble Court.Is it not then at least an ancillary argument to read prospectivity in the decision?

12.2 The allied question would be is whether Blackstonian principle is to be read into Article 141 of the Constitution,even in regard to fiscal laws?Or some vital decisions remained unconsidered by hon'ble SC ,of itself-since not brought to their Lordships knowledge?A fascinating trip to take ,which we shall do presently.Before that lets see the fundamental aspects of retrospectivity very briefly.

12.2 Article 141,Constitution of India

This is how the article reads:

141. Law declared by Supreme Court to be binding on all courts.—The law declared by the Supreme Court shall be binding on all courts within the territory of India.

Now ,as per several rulings and law pundits ,the presumption of retrospectivity(read Blackstonian principle) is built in because the Courts do not ''lay down law'' but merely ''interpret/declare'' it.[Surprising because in concluding para of Checkmate,para 55, the phrase ''lay down law'' is used.].

12.2.1 A recent decision too clearly lays it down.In **Manoj Parihar vs The State Of Jammu And Kashmir on 27 June, 2022** **SPECIAL LEAVE PETITION (C) NO. 11039 OF 2022,in para 26 it was held as under:**

''26. What was done in Bimlesh Tanwar (supra) was actually a declaration of law. Therefore, the same will have retrospective effect. ***In P.V. George v. State of Kerala, (2007) 3 SCC 557, this [22] Court held that "the law declared by a court will have retrospective effect, if not otherwise stated to be so specifically".***

12.3 This has very interesting ramifications,esp if we get into the PV George ruling,but it shall expand the scope of this article interminably.So that remains for another day.We take this,for our present purpose ,as authoritative.

12.4.A DISCLAIMER:

There is no contest as to the ratio laid down in Checkmate.Indeed there can't be,in terms of Article 141, it is the law of the land as on date ,to be deferentially accepted.

It applies to all matters pending on the date it was pronounced too is beyond pale of doubt.

But the interpretation being put on it by multiple Tribunals,of reversing settled matters ,and that too as a mistake apparent from record,as well as spate of 154s on concluded matters by AOs, is,respectfully ,not only

legally unsustainable but holds dangerous ramifications for revenue too, in future rulings and upsetting several earlier ones.

13.READING THE PAST AND PUTTING IT IN PERSPECTIVE:

13.1 In my humble view WHERE THE ASPECT OF ‘’DUE DATE’’ IN S 36 (1)(va) MEANING DATE OF THE PF ACT DERIVES LEGITIMACY FROM is the original **Finance Act, 1987 - Circular No. 495, Dated 22-9-1987-**

> **‘’Measures of penalising employers who misutilise contributions to the provident fund or any fund set up under the provisions of the Employees' State Insurance Act, 1948, or any other fund for welfare of employees**
>
> **12.1** The existing provisions provide for a deduction in respect of any payment by way of contribution to a provident fund or superannuation fund or any other fund for welfare of employees in the year in which the liability is actually discharged [section 43B]. The effect of the amendment brought about by the Finance Act, is that no deduction will be allowed in the assessment of the employer(s) unless such contribution is paid to the fund on or before the "due date". Due date means the date by which an employer is required to credit the "contribution" to the employee's account in the relevant fund under the provisions of any law or term of contract of service or otherwise.
>
> [Explanation to section 36(1)(va) of the Finance Act]
>
> **12.2** In addition, contribution of the employees to the various funds which are deducted by the employer from the salaries or wages of the employees will be taxed as income [insertion of new sub-clause (x) in clause (24) of section 2] of the employer, if such contribution is not credited by employer in the account of the employee in the relevant fund by the "due date". Where such income is not chargeable to tax under the head "Profits and gains of business or profession", it will be assessed under the head "Income from other sources".

12.3 Payment by way of tax on duty, liability for which has accrued in the previous year, will be allowed as a deduction if it is made by the due date of furnishing the return under section 139(1) in respect of the assessment year to which the aforementioned previous year relates.

12.4 These amendments will take effect from 1-4-1988 and will, accordingly, apply from the assessment year 1988-89 and subsequent years.

[Sections 3(b), 9, 10, 26 and 27 of the Finance Act]''

13.2 In this background **that part of the present Explanatory Memorandum, which never came out in any discussion/decision** [pages 39-40] needs consideration:

"Though section 43B of the Act covers only employer's contribution and does not cover employee contribution, some courts have applied the provision of section 43B on employee contribution as well. There is a distinction between employer contribution and employee's contribution towards welfare fund. It may be noted that employee's contribution towards welfare funds is **a mechanism to ensure the compliance by the employers of the labour welfare laws.** Hence, it needs to be stressed that the employer's contribution towards welfare funds such as ESI and PF needs to be clearly distinguished from the employee's contribution towards welfare funds**. Employee's contribution is employee own money and the employer deposits this contribution on behalf of the employee in fiduciary capacity. By late deposit of employee contribution, the employers get unjustly enriched by keeping the money belonging to the employees.** Clause (*va*) of sub-section (1) of Section 36 of the Act was inserted to the Act *vide* Finance Act, 1987 as a measures of **penalizing employers who mis-utilize employee's contributions**."

13.3 Legislative intent is thus clear. The subsequent rulings in favour of employers did exactly was sought to be prevented by the 1987 circular: **not penalising employers who misutilise contributions** and what the

present memorandum had to re-clarify viz., **unjust enrichment by misuse of fiduciary capacity in which funds stand entrusted to the employer ; because the waters got muddied by the 43B interpolated interpretations.Readers may note that 36(1)(va) came in statute w.e.f. 1.4.1988 .Section 43B came w.e.f. 1.4.1984 and its second proviso came vide s 9 of Finance Act 1989 as noted by hon'ble SC itself in Checkmate decision.S 21 of Finace Act 2003 deleted the said second proviso.**

13.4 Let us read the Explanation 2 inserted by FA 21:

> [49][*Explanation* 2.—**For the removal of doubts**, it is hereby clarified that the provisions of section 43B shall not apply and shall be deemed never to have been applied for the purposes of determining the "due date" under this clause;]

13.5 The hon'ble Supreme Court in a recent judgment in the case of **M.M.Aqua Technologies Limited v. CIT reported in (2021) 436 ITR 582 (SC) had held that retrospective provision in a taxing Act which is "for the removal of doubts" cannot be presumed to be retrospective, if it alters or changes the law as it earlier stood (page 597).**Let us consider this in detail:

It was held as follows in MM Aqua:

''22. Second, a retrospective provision in a tax Act which is "for the removal of doubts" cannot be presumed to be retrospective, even where such language is used, if it alters or changes the law as it earlier stood. This was

stated in ***Sedco Forex International Drill. Inc.* v. *CIT*** **[2005] 149 Taxman 352/279 ITR 310 (SC)** as follows:

> 17. As was affirmed by this Court in Goslino Mario [(2000) 10 SCC 165] a cardinal principle of the tax law is that the law to be applied is that which is in force in the relevant assessment year unless otherwise provided expressly or by necessary implication. (See also *Reliance Jute and Industries Ltd.* v. *CIT* [(1980) 1 SCC 139]). An *Explanation* to a statutory provision may fulfil the purpose of clearing up an ambiguity in the main provision or an *Explanation* can add to and widen the scope of the main section [See *Sonia Bhatia* v. *State of U.P.*, (1981) 2 SCC 585, 598] . **If it is in its nature clarificatory** then the *Explanation* must be read into the main provision with effect from the time that the main provision came into force [See *Shyam Sunder* v. *Ram Kumar*, (2001) 8 SCC 24 (para 44); *Brij Mohan Das Laxman Das* v. *CIT*, (1997) 1 SCC 352, 354; *CIT* v. *Podar Cement (P) Ltd.*, (1997) 5 SCC 482, 506]. **But if it changes the law it is not presumed to be retrospective, irrespective of the fact that the phrases used are "it is declared" or "for the removal of doubts".”**
>
> The decision of MM AQUA was referred in Checkmate in para 42 ,but only to clarify rationale of s 43B.The above quoted never arose for reference therein.

13.6 So we have a prospective law,sanctified by legislature ,not read down or struck off ,and we have a SC ruling on same issue.How is this to be resolved?Is there any judicial guidance available?.Let’s consider this:

ACIT *v.*Goldmine Shares and Finance (P.) Ltd. [2008] 113 ITD 209(AHD.)(SB)

[quote]

''54……..

Fourthly, a decision without noticing an existing provision of law governing the very issue in dispute cannot shut the doors of the Tribunal in considering and applying the provisions of law *de hors* the contrary decision of a High Court. This is because a statutory provision supersedes the contrary decision of any court including that of a High Court or even Supreme Court and has an ultimate force of law having greater force.

Fifthly, in the first case it was not an actual non-consideration of a provision but **as the Supreme Court itself says in the underlined portion by the intervener itself *'because they thought that "relevant provisions were not brought to the notice of the Court".'(unquote)***

13.6.1 Accordingly the drawn inference is, once a portion of a statute(read memorandum here), is not considered since it is not brought to the esteemed attention of the hon'ble Court, the attempt to interpolate, by a Tribunal,that the aspect stood considered, is a legally perverse interpretation.It may even be noted.But till it is considered and ruled upon, it cannot have a deemed interpretation. [See para 8b and 9.5(supra)].

14.RETROSPECTIVITY OF SC RULINGS AND FISCAL STATUTES

The ultimate issue boils down to thes 3 interrelated questions:-

1.WHAT IS THE NORM in interpreting SC judgements?:PROSPECTIVITY OR RETROSPECTIVITY?

2.IF RETROSPECTIVITY,DOES IT UPSET SETTLED MATTERS?

3.IF IT UPSETS SETTLED MATTERS,THEN ARE EARLIER DECISIONS,BASED ON GOOD LAW THEN,BECOME ‘’MISTAKES APPARENT FROM RECORD’’?That is,IF THEY BECOME MISTAKES APPARENT FROM RECORD CAN THEY SO BECOME BY VIRTUE OF A SUBSEQUENT DECISION OF SC,NOT IN EXISTENCE WHEN ORIGINAL DECISION WAS RENDERED?

14.1 Resisting temptation of a long essay on the subject,which must form part of a different dissertation,I shall very briefly make the point and proceed to the main part of my article,which is ‘’MISTAKE APPARENT FROM RECORD’’and SC RULING.

14.2 Retrospective penalisation:

The amended provisions impose a liability on the taxpayer and therefore cannot be construed as applicable with retrospective effect unless the legislature specifically says so. As was observed in the decision in ***L'Office Cherifien des Phosphates* v. *Yamashita-Shinnihon Steamship Co. Ltd*. [1994] 1 AC 486** legislations which modified accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect; unless the legislation is for purpose of supplying an obvious omission in a former legislation or to explain a former legislation. [This was favourably noted by the Constitution bench of SC itself in **CIT *v.*Vatika Township (P.) Ltd. [2014] 271 CTR 1 (SC)**.]

14.3 The ambiguity argument:

The earlier decisions were on the point of resolving an ambiguity prior to Checkmate.Did they not lay down good law then? **Any ambiguity in the language of *statute* shall be resolved in favour of the assessee is well settled. See *Cape Brandy Syndicate* (***Cape Brandy Syadicate*** v. *Inland Revenue Commissioner* [1921] (1) KB 64**) and as followed by judgment of hon'ble SC - See *Vodafone International Holdings BV* v. *Union of India* [2012] 341 ITR 1 (SC) at paras 60 to 70 per Kapadia, C.J. and para 333, 334 per Radhakrishnan, J.**

So,arguably,was a perfectly good law was not laid down at the time,as indicated and vindicated by Legislature itself in inserting the Explanation 2 w.e.f. 1.4.2021?

In Vatika Township(supra) it was held that " **Tax laws are clearly in derogation of personal rights and property interests and are, therefore, subject to strict construction, and any ambiguity must be resolved against imposition of the tax.** In Billings v. U.S. [1914] 232 U.S. 261, the Supreme Court clearly acknowledged this basic and long-standing rule of statutory construction:

> "Tax Statutes... should be strictly construed, and, if any ambiguity be found to exist, it must be resolved in favor of the citizen. Eidman v. Martinez, 184 U.S. 578, 583; United States v. Wigglesworth, 2 Story, 369, 374; Mutual Benefit Life Ins. Co. v. Herold, 198 F. 199, 201, aff'd 201 F. 918; Parkview Bldg. Assn. v. Herold, 203 F. 876, 880; Mutual Trust Co. v. Miller, 177 N.Y. 51, 57."

Again, in United States v. Merriam [1923] 263 U.S. 179, the Supreme Court clearly stated at pp. 187-88:

> "On behalf of the Government it is urged that taxation is a practical matter and concerns itself with the substance of the thing upon which

> the tax is imposed rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer. Gould v. Gould, 245 U.S. 151, 153"

The least this quote can do is ,in wake of acknowledged and wide spread cleavage of opinion,not apply it on settled matters.

14.4 THE CONTRARIANS:

Contrary view ,upholding Blackstonian principle is pretty much settled,save some voices of judicial dissent.

Julius Stone in 'Social Dimensions of Law and Justice' () Ist Indian Reprint 1999 (Chapter (XIV) while dealing with the subject of 'Judge and Administrator in Legal Ordering', observes as under:—

"If, then, a main impulse underlying the stare decisis doctrine is that justice should respect reasonable reliance of affected parties based on the law as it seemed when they acted, this impulse still has force when reliance is frustrated by an overruling. Despite this, it has long been assumed that a newly emergent rule is to be applied not only to future facts, and to the necessarily past facts of the very case in which it emerges, but to all cases thereafter litigated, ***even if these involved conduct, which occurred before the establishment of the new rule****. This has proceeded ostensibly on the conceptual basis, clearly formulated since Blackstone, that the new holding does not create but merely declares, law. So that any prior putative law under which the parties acted is to be regarded as simply not law".*

(Emphasis supplied.)

The above observations support the VIEW that the court merely declares law. An earlier decision as declared by the court is “simply no law”.

In the case of *Sarwan Kumar* v. *Madan Lal Aggarwal* [2003] 4 SCC 147 the apex court held that the court declares the law as it stood right from the beginning. The interpretation of a provision relates back to the date of law itself and cannot be prospective of the judgment. The apex court further held that the doctrine of "prospective overruling" was initially made applicable to the matters arising under the Constitution but the same has since been made applicable to the matters arising under the statutes as well.

The **Karnataka High Court in Mysore Cement Ltd vs Deputy Commissioner of Commercial Taxes [1994 (93) STC 464 (Kar)] has also** held that the effect of the judgment is to operate retrospectively from the date when the law came into effect.

M.A. Murthy *v.* State of Karnataka[2003] 264 ITR 1 (SC) too clearly holds that prospectivity has to be specified. **M/s New Noble Educational Society Vs. The Chief Commissioner of Income Tax, (2023) 290 Taxman 206 (SC)** says so as well.

Plethora of other decisions exist on the issue.This apparently settles the issue.Or does it?

14.5 I just refer to the contrary voices and leave it at that:

In the case **of Jiyajeerao Cotton Mills Ltd. v. Income Tax Officer (1981) 130 ITR 710** a Division Bench of the Calcutta High Court had categorically taken the view that the judgment of the Supreme Court does not have retrospective effect. **This decision was affirmed by their Lordships of the Supreme Court as SLP (c) Nos. 8791-8793 of 1980 were dismissed**.

Also the decision of the **Andhra Pradesh High Court in Pingle Madhusudan Reddy v. Controller of Estate Duty 1985 156 ITR 45 AP** says that the judgment of the court does not operate retrospectively.

The Madras High Court has taken a view in favour of the assessee in **State of Tamil Nadu v. K.S.M.G Meenambal and Co., (1984) 56 STC 82.[**These decisions are referred in greater detail in my related second article concerning NR Wires.]

''The basic principle is the certainty of law. Even though considerations of justice, equity and fair-play sometimes compel courts to deviate from a view expressed in an earlier case, yet the common law principle of stare decisis has been followed with the avowed object of ensuring that the litigant must be able to act on the view expressed by a court. Law can't move with the wind. It is not a weather cock. The citizen is entitled to act on the basis of the law declared by the court. Once he acts, he should not be told that this summer is very hot. Thus, the law has changed even though the legislature has not intervened. The gnawing uncertainty has certainly to be avoided''.

[**cited in** Aruna Luthra 252 ITR 76 (P & H),while ruling in favour of rerospectivity]

14.5.1 Law declared today cannot apply to the events of the past. If we do something today, **we do it keeping in view the law of today and in force and not tomorrow's backward adjustment of it.** Our belief in the nature of the law is founded on the bedrock that **every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset.** This principle of law is known as ***lex prospicit non respicit*** : **law looks forward not**

backward. A substantive legislation brought with clear intent to deal with future acts as is clear from the Memorandum in our case ought not to change the character of past transactions carried on upon the faith of the then existing law.I find inspiration in stating this from Vatika decision(supra).

14.5.2 Why and where should prospective overruling apply,conceding it's the prerogative of the Apex court? **in the case of Harsh Dhingra v. State of Haryana (2001) 9 SCC 550,it was held that it can be resorted to ''in larger public interest'' and that it is '' *not only a part of constitutional policy but also an extended facet of stare decisis and not judicial legislation."***

In other words, actions taken contrary to the law declared prior to the date of declaration are validated in larger public interest. The law as declared applies to future cases. (see Ashok Kumar Gupta v. State of U. P. [1997] 5 SCC 201 and Baburam v. C. C. Jacob [1999] 3 SCC 362).

14.5.3 DCIT v. Surat Electricity Co. Ltd.* [2015] 376 ITR 121 (Gujarat) in fact

goes on to hold that

''5. We may record that there is no express finding by the Tribunal on the aspect of retrospective operation of the decision of the apex court in the case of Associated Power Co. Ltd. (supra) and, however, as the question has been framed, we need to answer. In our view, the question should not detain us further since **it is settled legal position that any judgment of the apex court interpreting a particular provision would have its applicability for the prospective effect unless it is expressly made retrospective in the said decision. The reference may be made to the decision of the apex court in case of Ashok Kumar Gupta v. State of**

U.P. [1997] 5 SCC 201, more particularly, observations made by the apex court in paragraph 54 as under :

"54. It is settled principle right from I.C. Golak Nath v. State of Punjab [1967] 2 SCR 762 ; [1967] AIR 1967 SC 1644 ratio that ***prospective overruling is a part of the principles of constitutional canon of interpretation****. Though Golak Nath ratio of unamendability of fundamental rights under article 368 of the Constitution was overruled in Kesavananda Bharati v. State of Kerala [1973] 4 SCC 225* ***the doctrine of prospective overruling was upheld and followed in several decisions.*** *This court negatived the contention in Golak Nath case that prospective overruling amounts to judicial legislation.* ***Explaining the Blackstonian theory of law****, i.e.,* ***judge discovers law*** *and does not make law,* ***and the efficacy of prospective overruling*** *at page 808 placitum D to H, this court by a Bench of eleven judges had held that the doctrine of prospective overruling is a modern doctrine and is suitable for a fast-moving society.* ***It does not do away with doctrine of stare decisis but confines it to past transactions. While in strict theory, it may be said that the doctrine involves the making of law, what a court really does is to declare the law but refuses to give retrospectivity to it. It is really a pragmatic solution reconciling the two conflicting doctrines, namely, that a court finds law and that it does make the law.*** *It finds the law but restricts its operation to the future. It enables the courts to bring about a smooth transition by correcting the errors without disturbing the impact of those errors on past transactions..."*

14.5.4 Baburam v. C.C. Jacob [1999] 3 SCC 362, more particularly, the observations made in **paragraph 5 thereof support this.**

14.5.5 The **key issue** is:

Is Retrospectivity the norm and Prospectivity has to be spelt out ,or is Prospectivity the norm and Retrospectivity has to be spelt out?Numerous SC and other decisions say former is the settled issue.

I am not so sure,humbly.I can do no better than to cite **MANAGING DIRECTOR ECIL HYDERABAD ETC. ETC.v B. KARUNAKAR ETC. ETC. AIR 1994 SC 1074** / 1993 4 SCC 727 Constitution bench of SC:

[Note; Paras 7 & 8 thereof capture the controversy in great detail and thereafter hold that in view of unsettled law on the issue under question and multiplicity of conflicting decisions ,the impugned SC order had to be given PROSPECTIVE EFFECT.Same is the question here,only SC has not so spelt it out because that was not at all the issue before it.**This is the point of review ,which can be raised.**]

Justice Ramaswamy,writing separately,but as part of the Bench made the interpretation unequivocal and carried the issue to its logical end(para 9 onwards):

‘’ **29. When judicial discretion has been exercised to establish a new norm, the question emerges whether it would be applied retrospectively to the past transactions or prospectively to the transactions in future only. This process is limited not only to common law traditions, but exists in all the jurisdictions. Though Lord Denning is the vocal proponent of judicial law making and the House of Lords consistently overruled him, judicial law making found its eloquent acceptance even from the House of Lords and buried the remnants of the Blackstone's doctrine in the language of Prof.**

Friedmann, "has long been little more than a ghost". In Candler v. Crane Christmas and Co., (1951) 2 K.B. 164, the dissenting opinion of Denning, L.J. as he then was, has now received approval and Candler was overruled by the House of Lords in Hedley Byrne and Co. Ltd. v.Heller and Partners Ltd., 1964 A. C. 465 interpreting whether a banker has a special relationship of duty of care in making careless misrepresentations, Lord Devlin held that the duty of care arises where the responsibility is voluntarily accepted or undertaken either generally, where a general relationship is created, or specifically in relation to a particular transaction, the law hitherto was existing. But, per majority held that the banker, though honest misrepresentation, spoken or written, was negligent, and it may give rise to an action for damages for financial loss caused thereby, any contract or fiduciary relationship apart, since "law will imply a duty of care when a party seeking information from a party possessed of a special skill trusts him to exercise due care, and that party knew or ought to have known that reliance was being placed on his skill and judgment". Without holding prospective operation of Hadley ratio, the House of Lords while setting aside the previous precedents laid new liability impliedly applicable to future contracts. Prof. Robert Stevens of Yale University commenting on Yedley Bryne ratio said that common law embodying the policy that 'sticks and stones may break my bones but words will never harm me" has been seriously eroded (vide 27 M.L.R. p. 5 (1964)).

30. Similarly, in Rookes v. Barnard, 1964 A.C. 1129, the House of Lords revived an all but forgotten tort of intimidation, and resurrected the

tort of conspiracy for economic disputes which had been all but buried in Crofter Hand Woven Harris Tweed Co. v. Veitch, 1942 A.C. 435 establishing a legal responsibility for damages in the case of a typical union action instigated by a union organiser and two fellow employees designed to coerce the employer into certain behaviour. Similarly in Miliangos v. George Frank (Textiles) Ltd., 1976 A. C. 443, the House of Lords overruled the previous decision of its own. Accordingly the rule that on a claim for a liquidated damages payable in foreign currency, debt has to be given for the appropriate amount of English currency as on the date when the payment was due was overruled prospectively from the date of the judgment without disturbing past transactions.

31. Prospective overruling, therefore, limits to future situations and excludes application to situations which have arisen before the decision was evolved. Supreme Court of United States of America in interpretation of the Constitution, statutes or any common law rights, consistently held that the Constitution neither prohibits nor requires retrospective effect. It is, therefore, for the court to decide, on a balance of all relevant considerations, whether a decision overruling a previous principle should be applied retrospectively or not. In Great Northern Railway Company v. Sunburst Oil and Refining Co. ((1932) 287 U.S. 358, "77 L. Ed. 360). Justice Cardozo speaking for the unanimous Supreme Court of U.S.A. for the first time applied prospective operation of the decision from the date of the judgment. The Supreme Court of Montana overruled a previous decision granting shippers, certain rights to recover excess payment regulated

by Rail-Road Commission of intrastate freight rate. The Montona Court held that the statute did not create such a right. While approving the above rule it was held that it would not apply to past contracts or carriages entered into in reliance upon earlier decision. The Court held that "we have no occasion to consider whether this division in time of the effects of a decision as a sound or an unsound application of a doctrine of stare decisis as known to the common law. Sound or unsound, there involved in it no denial of a right protected by the Federal constitution. This is not a case where a court in overruling an earlier decision has given to a new ruling a retroactive bearing, and thereby has made invalid what was valid in the doing.... The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature. We review not the wisdom of their philosophies, but the legality of their acts." In Dollree Mapp v. Ohio, (1961) 367 U.S. 643 : 6 Law Ed. 2nd 1081, it was held that evidence seized in a search and seizure violates the Fourth Amendment. Whether the ratio in Mapp's case could be applied retrospectively had come up in Victor Linkletter v. Victor G. Walker, (1965) 381 US 618 :14 L.Ed. 2nd 601. Per majority it was held that though the evidence collected in illegal search and seizure violated Fourth Amendment, the ratio in Mapp would apply prospectively. The Court further laid down that in determining whether to give its decision a prospective or retrospective operation, the court must weigh the merits and demerits in each case by looking to the previous history of the rule in question, its purpose and effect, and whether retrospective operation will accelerate or retard its

operation; this approach is particularly correct with reference to the fourth amendment's prohibitions as to unreasonable search and seizures. In Ernesto A. Miranda v. State of Arizona, (1966) 384 US 436, 16 Law Ed. 2nd 694, the court dealt with the admissibility of the confessional statement obtained from the accused during custodial interrogation without warnings or counsel being present. While holding that such evidence was inadmissible, the court per majority set aside the conviction and sentence. Similar was the case in Danny Escobedo v. Illinois, (1964) 378 U.S. 478:12 Law Ed. 2nd, 977. In Sylvester Johnson v. State of New Jersey, (1966) 384 U.S. 719:16 Law Ed. 2nd 882, the question arose whether retrospectivity would be given to constitutional guarantee laid in Miranda's case. Johnson was convicted and was sentenced to death and that became final. When certiorari was sought placing reliance on Escobedo and Miranda ratio, the court per majority held that even in criminal litigation court would make a new judicial rule prospective where the exigencies of the situation require such an application. The court held that even though it involved constitutional right of accused it would look into the purpose of the newly, evolved rule, the reliance placed on the former rule and the effect on the administration of justice of a retrospective operation of the new rule have to be considered. The retroactivity or non-retroactivity of a new judicial rule involving a constitutional dictate is not automatically determined by the provision of the constitution on which the dictate is based. The Court must determine in each case, by looking to the peculiar traits of the specific rule in question even if the new rule has already been applied

to the parties before the court in the case in which the rule was announced, its impact on the administration of justice be taken into account, the extent to which safeguards other than that involved in the new rule are available to protect the integrity of the truth determining process at trial. Such an application of new rule does not foreclose the possibility of applying the decision only prospectively and with respect to other parties. Accordingly due process in Miranda and Escobedo ratio was denied to Johnson. In T. A. Jenkins v. State of Delaware, (1969) 395 US 213 : 23 Law Ed. 2nd, 253, the Miranda ratio was not applied retrospectively to the pending appeals in Jenkins case. It was held that Miranda rule did not have to be applied to post Miranda trial of a case originally tried prior to the Miranda decision. It was further held that there is a large measure of judicial discretion involved in deciding the time from which that new principle is to be deemed controlling. In P. B. Rodrigue v. Aetna Casualty Co., (1969) 395 US 352 : 23 Law Ed. 2nd 360, at an action brought in United States Dist. Court in Lusiana for damages for death of the workman while in service, the Dist. Court on the basis of the Outer Continental Shelf Lands Act, held that damages claimed were not available. The suit was dismissed. On appeal it was confirmed. On certiorari, the Supreme Court of United States reversed the decision and held that the constitutional right gives them the remedy for damages. In Chevron Oil Co. v. Gaines Ted Huson, (1971) 404 US 97: 30 Law Ed. 2nd 296 a Civil action was laid in the United States Dist. Court for the Eastern Dist. of Lusiana to recover for personal injury prospectively two years earlier to the date of filing the suit. While the action was pending in

view of Rodrigue interpretation, the Dist. Court held that one year limitation prescribed under Lusiana Act bars the action for damage for personal injuries. On appeal reversed the decree and remanded the matter holding that Lusiana statute of limitation being prospective and the remedy though barred, right to recover is not extinguished, the Supreme Court of U.S.A. held on certiorari, that the limitation as interpreted in Rodrigue's case being prospective, the remedy was not extinguished and the claim was not barred as the action was controlled by Federal Law. It was further held that the question of non-retroactivity application of judicial issue is not limited to the area of criminal process but also pertains to decisions outside a criminal area, in both constitutional and non- constitutional cases. Where a decision of the court could produce substantial inequitable results, if applied retrospectively, there is ample basis for avoiding injustice or hardship by a holding of non- retrospectivity. Accordingly the Court held that the suit was within limitation and remanded the matter for trial according to law. In Northern Pipeline Construction Co. v. Marathon Pipeline Co. (1982) 458 US 50 : 73 Law Ed. 2nd 598, the question was whether the Bankruptcy Act 1978 and bankruptcy courts applied to Federal Dist. established earlier and the appointments of the tenure judges by 1978 Act were contrary to Art. III protection. While declaring, per majority, that the appointment of tenure judges was violative of Art. III protection offending independence of judiciary, the court applied the law prospectively while giving relief to the plaintiff therein, stayed its operation until a further date affording opportunity to the Congress to amend the Law to

reconstitute bankruptcy courts or to adopt other valid means of adjudication without impairing the interim administration of the bankruptcy laws.

32. In U. S. v. James Robert Peltier, (1975) 422 U.S. 531 :4SLaw Edn 2nd 374,the respondent was convicted for Federal narcotics offence. The Border Patrol Agent conducted a search at 70 air miles from the Mexican border and seized the contraband for which he was convicted. While the appeal was pending in the Court of Appeal, the Supreme Court of the United States of America in Almeida-Sanchez v. U.S. (1973) 413 U.S. 266:37 Law Ed. 2nd 596 held that warrantless automobile search conducted about 25 air miles from the Mexican border by the Border Patrol Agent was without probable cause offending Fourth Amendment of the Constitution. Therefore, the search was declared unconstitutional and the conviction was set aside. On concession by the State, the court of appeal set aside petitioner's conviction giving him the benefit of the Almeida-Sanchez rule. On appeal, the Supreme Court of the United States of America, per majority, held that Almeida-Sanchez's ratio would not be applied retrospectively if search was conducted prior to the date of the decision, since Border Patrol Agents had acted pursuant to the statutory and regulatory authority to conduct warrantless searches of the vehicles within 100 air miles from the border, existing law was that it was permissible. The same ratio was reiterated in Bowen v. U. S. (1975) 422 U. S. 916: 45 Law Ed. 2nd 641. In this case the ratio in Almeida-Sanchez was laid while his petition for certiorari was pending consideration in the Supreme Court of the United States of

America. The matter was remitted to the Appellate Court to consider in the light of Almeida-Sanchez ratio. The Court of Appeal again affirmed the appellant's conviction holding that the search was conducted at traffic check point according to the law then prevailing and, therefore, Almeida-Sanchez ratio was not applicable to the search conducted prior to the date of the decision. The Supreme Court of U.S.A. affirmed the decision by majority holding that Almeida-Sanchez ratio was not applicable retrospectively reiterating Peltier's ratio.

33. In United States v. Raymond Eugene Johnson (1982) 457 US 537 :73 Law Ed. 2nd 202, applying the ratio in Payton v. New York, (1980)445 US 573 :63 Law Ed. 2nd 639 it was held that warrantless arrest on suspicion at his home and suppression of his oral or written statements obtained on account of unlawful arrest offend Fourth Amendment constitutional right. The respondent was convicted by the District Court. The appeal was dismissed, but an application for rehearing was pending before the Appellate Court, before Payton's case was decided. Thereon it was contended that the respondent will be entitled to the benefit of the ratio in Payton. The state argued that the ratio in Payton should not be applied retrospectively to an arrest that had occurred before Payton was decided. The Court of appeal did not agree and held that Payton ratio did apply retrospectively. On appeal the Supreme Court of the United States of America per majority held that the rule announced in Payton's case would apply retrospectively to pending direct appeal since Fourth Amendment immunization was extended and the conviction was set aside.

34. In Golak Nath v, State of Punjab (1967) 2 SCR 762 : (AIR 1967 SC 1643), this Court while declaring that Shankari Prasad Singh Deo v. Union of India, 1952 SCR 89: (AIR 1951 SC 458) and Sajjan Singh v. State of Rajasthan (1965) 1 SCR 933 : (AIR 1965 SC 845) were wrongly decided, held that the constitutional amendments offend the fundamental rights and the Parliament has no power to amend fundamental rights exercising the power under Art. 368, applied Golak Nath rule prospectively and upheld the pre- existing law as valid, Mohd. Ramzan Khan tread on the same path.

35. It would, thus, be clear that the Supreme Court of the United States of America has consistently, while overruling previous law or laying a new principle, made its operation prospective and given the relief to the party succeeding and in some cases given retrospectively and denied the relief in other cases. As a matter of constitutional law, retrospective operation of an overruling decision is neither required nor prohibited by the Constitution but is one of judicial attitude depending on the facts and circumstances in each case, the nature and purpose of the particular overruling decision seeks to serve. The court would look into the justifiable reliance on the overruled case by the administration; ability to effectuate the new rule adopted in the overruling case without doing injustice; the likelihood of its operation whether substantially burdens the administration of justice or retard the purpose. All these factors are to be taken into account while overruling the earlier decision or laying down a new principle. The benefit of the decision must be given to the parties before the Court even though applied to future cases from that date prospectively

would not be extended to the parties whose adjudication either had become final or matters are pending trial or in appeal. The crucial cut off date for giving prospective operation is the date of the judgment and not the date of the cause of action of a particular litigation given rise to the principle culminated in the overruling decision. There is no distinction between civil and criminal litigation. Equally no distinction could be made between claims involving constitutional right, statutory right or common law right. It also emerges that the new rule would not be applied to ex post facto laws nor acceded to plea of denial of equality. This Court would adopt retroactive or non-retroactive effect of a decision not as a matter of constitutional compulsion but a matter of judicial policy determined in each case after evaluating the merits and demerits of the particular case by looking to the prior history of the rule in question, its purpose and effect and whether retroactive operation will accelerate or retard its operation. The reliance on the old rule and the cost of the burden of the administration are equally germane and be taken into account in deciding to give effect to prospective or retrospective operation.

36. The ratio of the Supreme Court of U. S. A. consistently given the benefit of overruling decision to the successful party received commendation from the academic lawyers. In 'Introduction to Jurisprudence, 4th Ed., Lord Lloyd of Hampstead at p. 858 stated that a strong argument against the Sunburst approach is that potential litigants faced with outmoded doctrine are given no incentive to litigate. If they win, their case is governed by the old doctrine and new rule would apply only to disputes subsequently arising. Litigants who

provide the courts with opportunities to rid the normative order of outmoded doctrine are performing a social service, and deserve some reward for their exertions. Andrew G. L. Nicol in his 'Prospective Overruling a Text for English Courts, (39 MLR 542 at 546) also stated that 'excepting the parties to the overruling decision from the denial of retroactivity, the courts which use this variation talk in terms of reward for the party who has persuaded them to see the error of their ways. They argued that unless the party to the instant case is given the benefit of new decision, there will be no incentive for him to raise the correctness of the old decision. Finally they say that if the new rule is not applied in the instant case, the overruling will be obiter only. Cross and Harris in their 'Precedent in English Law, have also argued on the same lines to give benefit to the party in the overruling case. P. S. Atiyah and R. S. Summers in their Form and Substance in Anglo-American Law, at page 146 also stated that: 'if litigants who persuade the court to overrule a bad precedent are not themselves accorded the benefit of the new law would they have sufficient incentive to litigate such cases so that bad law is not perpetuated". It is, therefore, argued to extend the benefit to the successful party in the case.

37. Mohd. Ramzan Khan's ratio giving the benefit to him and companion appellants was valid in law and not, therefore, per inquarium and was legally given the reliefs. The contention of the counsel for the employees/Govt. Servants that the denial of Ramzan Khan's ratio to the pending matters offend Art. 14 is devoid of substance. It is seen that placing reliance on the existing law till date of Ramzan Khan, the employers treated that under law they, had no obligation to supply a copy of

the enquiry report before imposing the penalty. Reversing the orders and directing to proceed from that stage would be a needless heavy burden on the administration and at times encourage the delinquent to abuse the office till final orders are passed. **Accordingly I hold that the ratio in Mohd. Ramzan Khan's case (AIR 1991 SC 471) would apply prospectively from the date of the judgment** only to the cases in which decisions are taken and orders made from that date and does not apply to all the matters which either have become final or are pending decision at the appellate forum or in the High Court or the Tribunal or in this Court.''

14.5.6 THE FINAL POINT:Does Retrospectivity upset settled matters and makes them ''mistakes apparent from record''?

Assuming naysayers are granted the retrospectivity,and conceding the spelt out law would apply to all pending matters,to what extent would this go?The interpretation put on Saurashtra Kutch by Tribunals in cases like NR Wires would mean precisely this.

15.CLARIFYING THEORY OF PRECEDENT,RATIO DECIDENDI, ARTICLE 141 AND STARE DECISIS:SC CONSTITUTION BENCH: KRISHENA KUMAR AND ANR. ETC. ETC. Vs.UNION OF INDIA AND ORS.

1990 AIR 1782

A. THEORY OF PRECEDENT & RATIO DECIDENDI:

The basic question of law that has to be decided, therefore, is what was the ratio decidendi in Nakara's case and how far that would be applicable to the case of the P.F. retirees. The doctrine of precedent, that is being bound by a previous decision, is

limited to the decision itself and as to what is necessarily involved in it. It does not mean that this Court is bound by the various reasons given in support of it, especially when they contain "propositions wider than the case itself required." This was what Lord Selborne said in Caledonian Railway Co. v. Walker's Trustees and Lord Halsbury in Quinn v. Leathem, [1981] A.C. 495, (502). Sir Frederick Pollock has also said: "Judicial authority belongs not to the exact words used in this or that judgment, nor even to all the reasons given, but only to the principles accepted and applied as necessary grounds of the decision."

In other words, the enunciation of the reason or principle upon which a question before a court has been decided is alone binding as a precedent. The ratio decidendi is the underlying principle, namely, the general reasons or the general grounds upon which the decision is based on the test or abstract from the specific peculiarities of the particular case which gives rise to the decision. The ratio decidendi has to be ascertained by an analysis of the facts of the case and the process of reasoning involving the major premise consisting of a pre-existing rule of law, either statutory or judge-made, and a minor premise consisting of the material facts of the case under immediate consideration. If it is not clear, it is not the duty of the court to spell it out with difficulty in order to be bound by it. In the words of Halsbury, 4th Edn., Vol. 26, para 573: "The concrete decision alone is binding between the parties to it but it is the abstract ratio decidendi, as ascertained on a consideration of the judgment in relation to the subject matter of the decision, which alone has the force of law and which when it is clear ***it is not part of a tribunal's duty to spell out with difficulty a ratio decidendi in order to bound by it, and it is always dangerous to take one or two observations out of a long judgment and treat them as if they gave the ratio decidendi of the case.*** *If more reasons than one are given by a tribunal for its judgment, all are taken as forming the ratio decidendi."*

Thereafter,the honble Court held as under on [ART 141.STARE DECISIS:]

*"**Stare decisis et non guieta movere**. To adhere to precedent and not to unsettle things which are settled. But it applies to litigated facts and necessarily decided questions. Apart from Art. 141 of the Constitution of India, the policy of courts is to stand by precedent and not to disturb settled point. When court has once laid down a principle of law as applicable to certain state of facts, it will adhere to that principle, and apply it to all future cases where facts are substantially the same. A deliberate and solemn decision of court made after argument on question of law fairly arising in the case, and necessary to its determination, is an authority, or binding precedent in the same court, or in other courts of equal or lower rank in subse- quent cases where the very point is again in controversy unless there are occasions when departure is rendered necessary to vindicate plain, obvious principles of law and remedy continued injustice. It should be invariably applied and should not ordinarily be departed from where decision is of long standing and rights have been acquired under it, unless considerations of public policy demand it."*

In *CIT vs. Balkrishna Malhotra 81 ITR 759* the Supreme Court held that if a decision has held the field for long and citizens as well as tax department have acted upon it, the Court will not disturb the law so laid down even if it comes to the conclusion that another view is reasonably possible.

16.FUNDAMENTALS IGNORED IN RECTIFYING ORDER(S)

A.WHAT IS 'MISTAKE'?

Smt. Baljeet Jolly *v.* CIT [2000] 113 Taxman 38 (Delhi)

'Mistake' means to take or understand wrongly or inaccurately; to make an error in interpreting; it is an error; a fault, a misunderstanding, a misconception. ***'Apparent' means visible; capable of being seen; easily seen; obviously; plain.***

Was it visible /capable of being seen on the date order was passed?Or it became capable of being seen in hindsight ,given the spectacles of Checkmate ruling?

B.WHAT IS 'APPARENT'?

Karan & Co. *v.* ITAT [2001] 118 Taxman 473 (Delhi)

The plain reading of the word 'apparent' is that it must be something which appears to be so ex facie and it is incapable of argument or debate. It, therefore, follows that a decision on a debatable point of law or fact or failure to apply the law to a set of facts which remains to be investigated cannot be corrected by way of rectification.

C.WHAT IS 'AMENDMENT'? DOES IT PERMIT /INCLUDE 'RECALL?

J.N. Sahni *v.* ITAT [2002] 123 Taxman 569/257 ITR 16 (Delhi)

Under section 254(2) the Tribunal has merely the power to amend its order. **While exercising the said power it cannot recall its order. The expression 'amendment' must be assigned its true meaning. While an order of amendment is passed, the order remains but when an order is recalled, it stands obliterated. It is well-settled that what cannot be done directly cannot be done indirectly.** The review of its own order by the Tribunal is forbidden in law; it cannot be permitted to achieve the same object by exercising its power under sub-section (2) of section 254. The Tribunal does not have an inherent power of review. It is now well-settled that jurisdiction cannot be conferred on a Tribunal even by consent.

In NR Wires the ITAT concludes as under:

39.In the combined result, all the miscellaneous applications filed by the department are allowed in terms of our aforesaid observations. **The registry is directed to fix the respective appeals for hearing**…….

In SCNS ltd(supra)MA,argued by me in person, ITAT concludes as under:

"10. We find that there is a mistake apparent in the order of Tribunal dated 18/05/2022 that warrants rectification in light of the decision rendered in the case of Checkmate Services Pvt. Ltd. (supra). **Consequently, the Tribunal order dated 18/05/2022 is recalled and appeal is restored** to its original number.
The Registry is directed to fix the appeal for hearing in due course after notice to both sides."

Permissible?

Mere error of procedure? In substance and effect ,no violation of law? Only irregularity? The original order remains?

OR

Judicial overreach? Illegality? Original order obliterated?

Can a quasi judicial body,under its supposed interpretation of what is a mistake apparent from record ,misread the law ,under the garb of drawing it from a decision of SC itself ,and recall its orders? Can it?

Take your pick.

D.WHAT IS ' RECTIFICATION'?

The State Of Tamil Nadu vs Everest Trading Co. 1987 67 STC 148 Mad

''11. "Rectification" implies the correctness of an error or removal of defects or imperfections. It implies prior existence of error, mistake or defect, which after rectification is made right, and corrected by removal of the flaws.''

E.. **WHAT IS 'RECORD'?**

The term ''record'' has been argued to mean not just the record at the time of conclusion of appeal but any relevant document/judgement etc which may become available within the time limit for rectification or even thereafter,going by NR Wires.So the four year time limit,or indefinitely is part of ''record'',never mind the latter rendering the concept of limitation otiose as NR Wires does adeptly.

16.1 This is again grossly specious.A similar question arose in context of section 55 of the Tamil Nadu General Sales Tax Act,1959 in the case of **THE STATE OF TAMIL NADU V. K.S.M.G MEENAMBAL AND CO. (1984) 56 STC 82 (MADRAS)**

.The section is in pari materia with s 154 and 254(2) of IT Act 1961.It reads as follows:

Section 55 of the Tamil Nadu General Sales Tax Act (1 of 1959), reads as follows :

"55. Power to rectify any error apparent on the face of the record. –

(1) An assessing authority or an appellate or revising authority (including the Appellate Tribunal) may, at any time within three years from the date of any order passed by it, rectify any error apparent on the face of the record :

Provided that no such rectification which has the effect of enhancing an assessment or any penalty shall be made unless such authority has given notice to the dealer and has allowed him a reasonable opportunity of being heard.

(2) Where such rectification has the effect of reducing an assessment or penalty, the assessing authority shall make any refund which may be due to the dealer.

(3) Where any such rectification has the effect of enhancing an assessment or penalty, the assessing authority shall give the dealer a revised notice of assessment or penalty and thereupon the provisions of this Act and the Rules made thereunder shall apply as it such notice had been given in the first instance.

(4) The provisions of this Act relating to appeal and revision shall apply to an order of rectification made under this section as they apply to the order in respect of which such order of rectification has been made."

On the issue ,it was ruled as under:

''8.The learned counsel for the assessees sub1nitted that on the wording of section 55, for an error to be apparent fro1n the face of the record it is not correct to say that the error could have been avoided even at the ti1ne when it had been co1nmitted. ***The learned counsel pointed out that section 55 carries a three year period of time to rectify the error, and this shows that an error can become apparent at any ti1ne within that period, which means that it could beco1ne apparent subsequent to the co1nrnission of the error.*** ***This argument is misconceived.*** *Section 55* ***contains two things: one is the commission of apparent error; the other is its rectification.*** ***The period of limitation prescribed by the section relates to the aspect of rectification. The learned counsel's contention is based on a transference of the limitation period of three years prescribed for rectification to the very basic requirement, narnely, the***

commission of an apparent error which is the provocation for the exercise of the rectificatory power.”

16.2.Malabar Regional, PT Manuel, Jiyajeerao ARE ALL COVERED BY SAL N ROW AND SAURASHTRA KUTCH per Tribunals:

The Tribunal’s case in,summary,rests exclusively on two latter SC decisions,and in their wake ,nothing cited at the bar or otherwise is of no consequence.Let us see the three former decisions in question first:

i.MALABAR REGIONAL, C.E.Appeal No.10 of 2019, 6.12.2019 (KERALA HC)

Issue: Central Excise Appeal filed under Section 35G of the Central Excise Act, 1944 Department (Revenue) had filed application seeking 'rectification of mistake', under Section 35C(2) of the Central Excise Act. The application for rectification of mistake was filed on the ground that, the position of law on the point has been declared through a subsequent decision of the Honourable Supreme Court in Union of India and Others v.Dharmendra Textile Processors and Others [2008 (231) ELT 3 (S.C)].

Therefore the Tribunal found that the final order passed in the appeal need to be recalled and the appeal need to be re-heard and decided. Accordingly

the appeal was restored and heard again and decided through the order passed on 26.7.2018

PER COURT: Section 35C(2) provides that the Appellate Tribunal may at any time within six months from the date of the order, with a view to rectify any mistake apparent from the record, amend any order passed by it under sub-section (1) and shall make such amendments if the mistake is brought to its notice by the Principal Commissioner of Central Excise or Commissioner ofCentral Excise or the other party to the appeal. Question to be examined is as to whether any subsequent decision of the Hon'ble Supreme Court on any legal point which was already decided in an appeal, which is having the effect of reversing the decision, can be considered as a mistake apparent from the record.

ASOK TEXTILES 41 ITR 372(SC) considerd.SAURASHTRA KUTCH 305 ITR 227(SC) considered.SUHRID GEIGY 237 ITR 834(GUJ) considered.KIL KOTAGIRI 174 ITR 579 considered.

Held:

"12.It is always a sound principle that the courts while pronouncing a judgment is not creating a new Rule. Nor it does not make law; but only declare the correct position of law. ***In that respect it has to be accepted that a judicial decision acts on retrospective basis. But the question mooted for decision is whether a subsequent judicial decision settling the correct interpretation of law, which unsettles the earlier precedents, can***

be considered as a mistake apparent on the face of record, which enables rectification of an earlier decision which had attained finality between parties inter se. In other words, whether a change of opinion declared in a subsequent judicial decision can be treated as a mistake apparent on the face of record to unsettle a decision which had attained finality. *Further, it is a question as to whether such subsequent change of opinion will enable the authority to reopen the settled proceedings and to decide it afresh.*

13.In this regard ***learned counsel for the appellant had cited a decision of the hon'ble Supreme Court in Commissioner of Central Excise, Calcutta v. ASCU Ltd., Calcutta[2003 (151) ELT 481(SC)].*** *After referring various precedents it was held that a mistake apparent on the face of the record must be an obvious and patent mistake and cannot be some thing which would have to be established by long drawn process of reasoning on points which there may conceivably be two opinions. A decision on a debatable point of law cannot be a "mistake apparent from the record".* ***As such it is held that, the scope of correction which can be made by the Tribunal under Section 35C(2) is limited.*** *Undoubtedly, if a decision is based solely on material which is irregular or which could not have been used, then possibly it could be said that there is a mistake apparent from the record.* ***However, if a decision is based on more than one material, then merely because in the process of arriving at the final decision reliance was placed on some material which could not have been used, it can never be said that, in the final decision there is a mistake apparent from the record, because the final***

opinion could also have been based on the other material which was relevant and which could have been used.

*14.**In Mepco Industries** Ltd. v. Commissioner of Income Tax[2009(248) ELT 3(SC)], the hon'ble Supreme Court had occasion to consider the scope of Section 154 of the Income Tax Act, 1961 which is in pari materia with Section 35C(2) of the Central Excise Act, 1944. Question considered was whether it was open to the Commissioner of Income Tax to rectify its own order under Section 154, on the basis of the judgment of the Supreme Court(later judgment). The apex court analyzed as to whether there existed a 'rectifiable mistake' enabling the Department to invoke Section 154 of the Act. It was found that, there is a clear dichotomy between Section 154 and 147 of the Income Tax Act. Section 154 deals with rectification of mistake which inter alia states that, with a view to rectify any mistake apparent from the record, an Income Tax Authority may amend any order passed by it. Whereas Section 147 inter alia, states that, if the Assessing Officer has reason to believe that any income charged to tax had escaped assessment for any assessment year, he may, subject to other provisions contained in the Act, assess or re-assess such income which had escaped the assessment. On the facts of the said case, on the basis of a subsequent decision of the hon'ble Supreme Court the Commissioner of Income Tax took a view that the subsidy in question was a revenue receipt. The hon'ble Supreme Court found that, it is a classic illustration of change of opinion, and it is not a mistake apparent on records.*

*15.**Decision of the Calcutta High Court which was impugned in the above referred case of the hon'ble Supreme Court, finding was that the***

subsequent decision of the Supreme Court will not obliterate the conflict of opinion prior to it. Under such circumstances, a rectification was not permissible on a debatable issue under Section 154 of the Act, was the finding. In Kil Kotagiri Tea and Coffee Estates *Company Ltd. v. Income Tax Appellate Tribunal & others(1988) 174 ITR 579, it is held that the rectification contemplated under Section 154 must be a "rectifiable mistake". It should be a mistake in the light of law in force at the time when the order sought to be rectified was passed. Therefore in Napco Industries Ltd. (supra) it was held by the apex court that, when there is a change of opinion, the department will be erred in invoking Section 154 of the Act.*

*16.**In another decision of the apex court in Commissioner of Sales Tax, U.P. v. Bharat Bone Mill(2007) 210 ELT 6 (SC), after referring to the decision in Income Tax Officer, Alwaye v. The Asok Textiles Ltd. Alwaye[(1961) SCR 236] it was held that,*** *provision for rectification of mistake apparent on the record, cannot be equated with the power of a civil court to review its own order as envisaged under Order XLVII Rule 1 of the Code of Civil Procedure.* ***In the decision of the High Court of Calcutta in Smriti Properties Pvt. Ltd. v. Settlement Commission[(2005) 191 ELT 128(Cal)] it was held that, retrospective operation of the Supreme Court pronouncements on the interpretation of law can be made applicable only in cases which had not been decided finally and the same is pending for adjudication. Finding in this respect was made with reference to another Supreme Court decision in M.A. Murthy v. State of Karnataka[(2003) 7 SCC 517].*** *One cannot take advantage of the subsequent*

pronouncement of superior court in a closed and settled matter, particularly in matter decided and settled four years back, is the finding therein.

*17.**In a more recent decision of the apex court in Deva Metal Powders Pvt. Ltd. v. Commissioner, Trade Tax, UP[2008(221) ELT 16(SC)],** it was found that "apparent" means visible; capable of being seen, obvious, plain. It means open to view, visible, evident, appears, appearing as real and true, conspicuous, manifest, obvious, seeming. **It was found that, rectification of an order does not mean obliteration of the order originally passed and its substitution by a new order. Where the error is far from self-evident, it ceases to be an apparent error.** An error which is apparent from record should be one which is not an error which depends for its discovery on elaborate arguments on questions of fact or law.*

*18.**Principle underlying in the above quoted decisions, when analyzed based on the facts of the case at hand, it is evident that, when the appeal was decided by the Tribunal through Annexure A order, the decision was taken based on the law as it stood then. In a subsequent decision of the hon'ble Supreme Court the law was declared as otherwise, based on a change of opinion. Such a change of opinion of law cannot be taken as a 'mistake apparent on the face of the record' which could be rectified by invoking Section 35C(2) of the Central Excise Act. Further, such material cannot be used for unsettling the settled position attained through disposal of the appeal, alleging that there occurred any mistake apparent from the face of the record. It cannot be utilized for reopening***

a concluded decision, which had attained finality between parties inter se. Therefore we are of the opinion that the above appeal has to succeed.

In the result, the question of law framed is answered in favour of the appellant and against the Revenue……"

["**change of opinion**" comment above takes care of the superficial objection on the use of the same phrase to distinguish Simplex(supra)]

ii. P.T. Manuel & Sons v. CIT [2021] 434 ITR 416 (Kerala)

Saurashtra Kutch considered

14. We are of the view that the reasoning of the Tribunal is erroneous. A decision taken subsequently in another case is not part of the record of the case. A subsequent decision, subsequent change of law, and/or subsequent wisdom dawned upon the Tribunal, are not matters that will come within the scope of 'mistake apparent from the record' before the Tribunal. The different view taken by the very same Tribunal in another case, on a later date, could be relied on by either of the parties while challenging the earlier decision or the subsequent decision in an appeal or revisional forum, but the same is not a ground for rectification of the order passed by the Tribunal. It could at the most be a change in opinion based upon the facts in the subsequent case. The subsequent wisdom may render the earlier decision incorrect, but not so as to render the subsequent decision as a mistake apparent from the record calling for rectification under section 254 of the Act.

iii.JIYAJEE RAO 130 ITR 710 (CAL.)

SLP (c) Nos. 8791-8793 of 1980 DISMISSED IN THIS CASE

S.A.L. Narayan Row* v. *Ishwarlal Bhagwan Das [1965] 57 ITR 149 **(SC) considered.**

"We are, however, unable to accept the contention of Mr. Pal that the principle of retrospective legislation is applicable to the decisions of the Supreme Court declaring the law or interpreting a provision in a statute. The law is laid down or a provision in a statute is interpreted by the Supreme Court only when there is a debate or doubt on the interpretation of any provision of a statute requiring interpertation by the Supreme Court or when there is a conflict of judicial opinion on a provision of a statute between the different High Courts of India which is required to be resolved and settled by the Supreme Court. The law laid down by the Supreme Court, in our opinion, cannot be said to have retrospective operation in the sense that although a debate or doubt or a conflict of judicial opinion is resolved and settled by the Supreme Court, yet still that does not obliterate the existence of such debate or doubt or conflict that existed prior to the decision of the Supreme Court setting at rest such debate or doubt or conflict."

Note: This decision not considered in Saurashtra Kutch and post dates SAL N Row.

17.Now we see the two main planks of ITAT decision:

17.1 MISAPPLICATION and MISREADING OF SAURASHTRA KUTCH:

The decision of ITAT almost completely rests on ACIT *v.*Saurashtra Kutch Stock Exchange Ltd. [2008] 305 ITR 227 (SC).Let us see what was the issue before the Court and what was necessary for it to decide the matter as well as what was actually decided.

a.QUESTIONS BEFORE THE COURT:

''17. Having heard learned counsel for the parties, **two questions have been raised by the parties before us**. Firstly, whether the Income-tax Appellate Tribunal, Gujarat was right in exercising power under sub-section (2) of section 254 of the Act on the ground that there was a 'mistake apparent from the record' committed by the Tribunal while deciding the appeal and whether it could have recalled the earlier order on that ground. Secondly, whether on merits, the assessee is entitled to exemption as claimed.''

Question 2 was not challenged by assessee so Court deemed it fit not to decide it.(para 18 of the judgement).

b.VIEW OF COURT ON MISTAKE APPARENT:

''37. In our judgment, therefore, a patent, manifest and self-evident error which does not require elaborate discussion of evidence or argument to establish it, can be said to be an error apparent on the face of the record and can be corrected while exercising *certiorari* jurisdiction. **An error cannot be said to be apparent on the face of the record if one has to travel beyond the record to see whether the judgment is correct or not. An error apparent on the face of the record means an error which strikes on mere looking and does not need long-drawn-out process of reasoning on points where there may conceivably be two opinions. Such error should not require any extraneous matter to show its incorrectness.** To put it differently, it should be so manifest and clear that no Court would permit it to remain on record. If the view accepted by the Court in the original judgment is one of the possible views, the case cannot be said to be covered by an error apparent on the face of the record.''

c.FACTS ON WHICH THE CONCEPT WAS TO BE APPLIED AND COURT'S CONCLUSION:

''39. As stated earlier, the decision was rendered in appeal by the Income-tax Appellate Tribunal, Rajkot. **Miscellaneous Application came to be filed by the assessee under sub-section (2) of section 254 of the Act stating therein that a decision of the 'Jurisdictional Court', *i.e.,* the High Court of Gujarat in *Hiralal Bhagwati's* case (*supra*) was not brought to the notice of the Tribunal** and thus there was a "mistake apparent from record" which required rectification.

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).''……

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.The facts and issue on which decision was based were thus whether ignoring AN **EXISTING DECISION** OF JURISDICTIONAL HIGH COURT would constitute a mistake apparent from record.

e.Between paras 41 to 46 the general concept of Blackstonian principle was discussed which was not even a basis of determination of conclusion in Saurashtra Kutch.There must be a causal linkage between the holding of a case to the existence of a peculiar fact. Unless that very fact is predominantly present in the matter where the judgment has been cited, the holding is not applicable.

f.What was misread by the Tribunal was PARA 41 wherein ,the Court cited (without approving or disapproving) a decision of GUJRAT HC wherein the SUBSEQUENT DECISION aspect was raised:

''**41.** A similar question came up for consideration before the High Court of Gujarat in ***Suhrid Geigy Ltd.'s*** case (*supra*). It was held by the Division Bench of the High Court that if the point is covered by **a decision of the Jurisdictional Court** rendered prior or even subsequent to the order of rectification, it could be said to be "mistake apparent from the record" under section 254(2) of the Act and could be corrected by the Tribunal.''

17.1.1 The common part between SUHRID and Saurashtra,seen from above, is the PRIOR decision,not the SUBSEQUENT one-because the hon'ble SC was not seized of the issue of SUBSEQUENCY.This para has been misread to mean that SC approved of subsequent decisions also creating a mistake apparent.Far from it.

17.1.2 Further,and most respectfully to the para cited in Saurashtra Kutch ,what exactly was held in SUHRID?Multiple decisions were cited in para 15 thereof and then it was held that '' **15.** As noted above, the rectification orders were made under section 13 keeping in view the ratio of the decision of the Supreme Court in *Mysore Electrical Industries Ltd.'s* case (*supra*). The appellate orders against these orders made under section 11 by the Commissioner (Appeals) took note of the decision of the Tribunal in the assessee's own case for the earlier years in which the Tribunal had held against the assessee relying upon the decision of the Gujarat High Court in *Karamchand Premchand (P.) Ltd.'s* case (*supra*) decided on 13-12-1976. The case of *Karamchand Premchand (P.) Ltd.* (*supra*) was carried to the Supreme Court and the Supreme Court in their decision in *Karamchand Premchand (P.) Ltd.* v. *CIT* [1993] 200 ITR 268/ 67 Taxman 537 while construing the provisions of the said rule 1 and the *Explanation* to it, in terms, held that the appellate order passed by the Tribunal in a surtax case, without taking note of the *Explanation* to rule 1 of Schedule II, could be rectified by the Tribunal under section 13. It was held that the amounts set apart for proposed dividends, profit-

sharing, bonus, pension scheme, were not 'reserves' and could not be included in the computation of the capital of the assessee under the provisions of rule 1 in Schedule II. Thus, the fact that the Assessing Officer had rendered his orders of assessment without taking note of the aforesaid *Explanation* to rule 1 in Schedule II was undoubtedly a ground for rectification of the order under section 13 of the Act since it was a mistake apparent from the record. Even when the decision in *Karamchand Premchand's* case (*supra*) was rendered by the jurisdictional High Court, it was only a declaration of the law as it already existed....(various decisions cited.not reproduced)..... **The subsequent decisions of the jurisdictional High Court do not enact the law but declare the law as it always was and, therefore, there is a fallacy in the contention which was sought to be raised on behalf of the assessee initially**. **As noted hereinabove, there was no debatable point existing at the time when the assessment orders were initially made.** In fact, in our opinion, apart from the fact that rule 1 and its *Explanation* came to be considered later on by the jurisdictional High Court, **the fact remains that the *Explanation* to rule 1 was absolutely clear to indicate that the proposed dividend which was an item identified from the Form prescribed under the Companies Act under the heading 'Provisions' could never be regarded as a 'reserve'. Therefore, even on the reading of rule 1 and the *Explanation* itself, there was no scope for any doubt over the said proposition that the proposed dividend was not to be regarded as a reserve** for the purpose of rule 1 while computing the capital of the company on the first day of the previous year. **In our view, therefore, the Assessing Officer, by not at all deducting the provisional dividends which were required to be deducted from the general reserve of these two years, completely overlooked the *Explanation* to rule 1 and thereby committed a mistake apparent from the record which required to be rectified under section 13 of the said Act**."

17.1.3 Respectfully I miss the part where SC decision rendered subsequently aspect is written as part of ratio of the decision.Citations referred mention it ,but that does not become part of the ratio.The ratio was created on three points –one,the JURISDICTIONAL HC clarified what EXISTED IN THE STATUTE.And second THERE WERE NO DIVERGENT VIEWS OR DEBATE on the issue.This is not even remotely the matter here.THIRD,the mistake apparent pointed out by Court was not the clarification of HC rendered subsequently but FAILURE TO CONSIDER A STATUTE WHICH ADMITTED OF NO DEBATE.

18. **SAL N. ROW MISAPPLIED AND IN ANY CASE STANDS CONSIDERED:**

a.Predates EXPN O 47 RULE 1 OF CPC 1908.APPLICATION under 1922 Act.

The aspect of retrospectivity does not appear at all,at lest not by explicit statement.Issue was levy of tax on excess dividend declared illegal subsequently.

b.Issue raised was " no application for rectification under section 35 of the Income-tax Act was presented by the respondent-company, and, therefore, the company was not entitled to the relief claimed by it."

It was this which was decided by HC and considered by SC.Issue was not debatable and merely concerned levy of an additional tax on the excess dividend declared by the respondent-company.

c.The decision has also been considered in **The State Of Tamil Nadu vs Everest Trading Co. 1987 67 STC 148 Mad.in fact goes on to accept that SAL N ROW has nullified the proposition that ''*supervening judgments of courts, whether of the High Court or the Supreme Court, cannot by themselves form the foundation for the exercise of power to rectify an assessment order when the appropriate authority is asked to do so".But still goes on to explain and hold as follows:***

''12. In the instant case, what we are very much concerned is **whether section 55 of the Act gives such a wide power to the Tribunal to reverse its own order when an application is made under the provisions of the said section relying on a subsequent decision that had been rendered.** On a careful and anxious consideration of the facts involved in this case together with the decisions rendered on the point of rectification under the provisions of section 55 of the Act, we are of the definite opinion that the order under revision is necessarily to be set aside, since the law on the question has not been properly appreciated by the Tribunal. **Such a wide power of reversing of its own order is not contemplated under section 55(1) of the Act, on the pretext and guise of rectifying the error in the earlier order. The provision of section 55 does not in any way authorise an authority to disown its own earlier judgment on an interpretation of a subsequent decision that had been rendered by a higher forum. Under these circumstances, the revision is allowed with costs.''**

[S 55 referred is the same one as referred earlier in K.S.M.G MEENAMBAL) supra)]

19.We would be wisening ourselves if we were to heed to the golden rulings in

1. **Haryana Financial Corporation & Anr. vs M/S Jagdamba Oil Mills & Anr. AIR 2002 SC 834: ''Observations of Courts are not to be read as Euclid's theorems nor as provisions of the statute. These**

observations must be read in the context in which they appear. Judgments of courts are not to be construed as statutes."

And

2. **CIT v. Sun Engg. Works (P.) Ltd. [1992] 198 ITR 227 (SC):" the courts must carefully try to ascertain the true principle laid down by the decision of this Court and not to pick out words and sentences from the judgment, divorced from the context of the questions under consideration by this Court, to support their reasonings"**

20.RETROSPECTIVE OPERATION DOES NOT APPLY TO SETTLED MATTERS ,NOR IS IT A MISTAKE APPARENT:

In **THE STATE OF TAMIL NADU V. K.S.M.G MEENAMBAL AND CO. (1984) 56 STC 82** (supra),the other aspect of a SC decision ,rendered subsequently creation a retrospective mistake apparent from record was also dealt with. To wit,

4. ''This contention is well taken. ***The error which can be rectified under section 55 must be an error which is so apparent on the very face of the record that it is a wonder how it had "crept in", as the saying goes. It is the assumption of the section that if the Tribunal had not "nodded " as it were, they could have avoided the mistake, even in the first place. It is only error of this kind which is amenable to correction or rectification*** *under section 55.*

5. In the present case, with the fullest information on facts made available to the

Tribunal and with the 1nost up to date knowledge of the law, ***it would still be impossible for such a body to have anticipated what the Supreme Court's decision would have been a few months later.*** *It follows, therefore, that the error could not be said to be an apparent error within the meaning of section 55.*

6. ***The learned counsel for the assessees put forward the well-known doctrine of jurisprudence that whenever a court declares what the law is, it takes effect, not from the date of the judgment , but from the very date of the commencement of the law in question.*** ***This is a well-known fiction of our jurisprudence.*** *Cynics sometimes refer to this doctrine by describing court judgments as always being retrospective , 'in contrast to Acts of the legislature which are generally prospective and where occasional retrospectivity is the butt of high-faulting criticis1n fro1n legal purists and from the pulpit of the Bench. We quite agree with the learned counsel for the assessees that* ***retrospectivity is the very life-breath of court decisions generally. But this doctrine of jurisprudence cannot alter the realities of ti1ne or space.*** *At the time when the Tribunal rendered their decision in these cases, there was no Supreme Court decision at all. So it cannot be said that the Tribunal's decision could be regarded, ex facie as running counter to the Supreme Court's decision, and so ex facie erroneous. The Supreme Court have no doubt clarified what the law under the Tarnil Nadu General Sales Tax Act, 1959, was fro1n its very commencment , but their judgment has not the effect of rendering the orders of the Tribunal dated 31st January, 1973, and 25th April, 1978,* ***as mistakes apparent from***

the record.''

21.ITATs AGAIN RULE DIFFERENTLY POST CHECKMATE; NOT ENDORSING NR WIRES CATEGORY OF ORDERS

Three distinct ITATs have already ruled contrary to what NR wires says:

I.P. R. Packaging Service v. ACIT[2023] 148 taxmann.com 153 (Mumbai - Trib.)

7.12.2022

''10. In view of the detailed discussions above, we are of the considered view that the impugned adjustment in course of processing of return under section 143(1) is vitiated in law, and we delete the same. As we hold so, we make it clear that our observations remain confined to the peculiar facts before us, that our adjudication confined to the limited scope of adjustments which can be carried out under section 143(1) and that we see no need to deal with the question, which is rather academic in the present context, as to whether if such adjustment was to be permissible in the scheme of section 143(1), whether the insertion of Explanation 2 to section 36(l)(va), with effect from 1st April 2021, must mean that so far as the assessment years prior to this assessment year 2021-22 are concerned, the provisions of section 43B cannot be applied for determining the due date under Explanation (now Explanation 1) to section 36(l)(va). That question, in our humble understanding can be relevant, for example, when a call is required to be taken on merits in respect of an assessment under section 143(3) or under section 143(3) r.w.s. 147 of the Act, or when no findings were to be given on the scope of permissible adjustments undersection 143(l)(a)(iv). That is not the situation before us. We, therefore, see no need to deal with that aspect of the matter at this stage.11. In a result, this appeal is allowed"

5. We are conscious of the fact that the issue on merits is decided against the assessee by the recent decision of the Hon'ble Supreme Court in the case of

Checkmate Services (P.) Ltd. v.CIT [2022] 143 taxmann.com 178/[2023] 290 Taxman 19/[2022] 448 ITR 518. This decision was rendered in the context where assessment was framed under section 143(3) of the Act and not under section 143(1)(a).

6. Hence we direct the Ld. Assessing Officer to delete the addition made in respect of employees' contribution to Provident Fund, in the facts and circumstances of the instant case. Accordingly, grounds 1 to 3 raised by the assessee are allowed."

*II.**DCIT VS SUMAN SOLANKI(JAIPUR)***

Misc. Application No. 13/JP/2023
(Arising out of ITA No.124 /JP/2022)
AssessmentYear : 2018-19.
17 /07/2023

ON LIMITATION

''2.3 On the other hand, the ld. AR of the assessee objected to such delay of 76 days in filing the Misc. Application by the Department and submitted that the M.A. is filed on 15-02-2023 by the Department i.e. after the 2.5 months of order passed in assessee's case. It is further submitted that as per the provisions of Section 254(2) of the I.T. Act, the Hon'ble Bench may amend the order within a period of six months from the end of the month in which the order is passed and the time limit to file the M.A. expired on 30th Nov. 2022. Thus the M.A. filed by the department is time barred. 2.4 After hearing both the parties and perusing the materials available on record, the Bench noted that there is force in the submissions of the ld. AR of the assessee. Hence, the Bench does not find sufficient cause whereby the Department was prevented in late filing the Misc. Application. Thus the application for condonation of delay made by the Department is dismissed.''

ON MERIT:

''3.2 We have heard both the parties and perused the materials available on record including the judgement passed by Hon'ble Supreme Court dated 22-10-2022 in the case of M/s. Checkmate Services Pvt. Ltd. vs CIT-1 in Civil Appeal No. 2833/2016. The question arises as to whether there is an apparent mistake in the order of the Tribunal passed by it in the case of the assessee vide its order dated 12-05-2022. Section 254(2) empowers the Tribunal to rectify 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 notices by the assessee or the Assessing Officer. The Bench also noted that the Department has simply relied upon the Judgement of Hon'ble Supreme Court in Civil Appeal No. 2833/2016 in the case of M/s. Checkmate Services Pvt. Ltd. (supra) but it has not mentioned that there is apparent mistake in the order of the ITAT passed in the case of Shri Suman Solanki (ITA No. 124/JP/2022, A.Y. 2018-19) dated 12-05-2022 wherein some amendment/ rectification is required. The order was passed by the Bench in the case of the assessee on 12-05-2022 in accordance with that time, situation and prevailing interpretation of law by various Hon'ble High Courts [including binding judgment of jurisdictional High Court] and ITAT Benches across the country wherein the Bench does not find any infirmity or apparent mistake. In such a situation, the Bench feels hesitation to concur with the submission of the Department to amend its order. Hence, the Misc. Application filed by the Department is dismissed".'

III. Sanjay Kumar v.ITO[2023] 152 taxmann.com 594 (Delhi - Trib.)

JUNE 21, 2023

*"**3.** Facts in brief are in regard to **disallowance made on account of EPF and ESI amounting to Rs. 73,18,988/- by learned AO vide order dated 27-7-2020 u/s 154 of the Act the assessee had claimed before the learned CIT(A) that it was beyond the jurisdiction and powers under section 154 of the Act to make an addition for which expenditure was allowed in assessment u/s 143(1) of the Act.** It is claimed that the same cannot be considered to be an error apparent on record to exercise rectification powers u/s 154 of the Act, because **when such powers were exercised on 27-7-2020,** there were judgments both favouring the Revenue and the assessee and the Hon'ble Supreme Court judgment giving conclusive finding in favour of Revenue in Checkmate Services (P.) Ltd. v. CIT [2022] 143 taxmann.com 178/[2023] 290 Taxman 19/[2022] 448 ITR 518/[Civil Appeal No. 2833 of 2016, dated 12-10-2022], by which the disallowance of employees' contribution to EPF and ESI have been sustained, if the same are not deposited before the due date prescribed in the respective statutes.*

***4.** Learned AR has placed reliance on Instruction No. 1814 dated 4-4-1989 of the Board to submit that even the Board discourages adjustments u/s 143(1) of the Act where there are conflicting views of Hon'ble High Court or the Tribunal. Learned AR*

specifically relied on the judgment of the Hon'ble Madhya Pradesh High Court in the case of CIT v. Mahavir Drilling Co. [2005] 142 Taxman 663/273 ITR 201 to submit that Hon'ble M.P. High Court has held that any benefit granted cannot be withdrawn by taking recourse to Section 154.

5.** On the other hand, learned DR supported the orders of learned tax authorities below and submitted that **the learned CIT(Appeals) has duly taken note of the judgment of the Hon'ble Supreme Court in Checkmate Services (P.) Ltd. case (supra) to sustain the order u/s 154 of the Act.

6.** After giving thoughtful consideration to the material on record the Bench is of the considered opinion that **the issue involved in the appeal is not with regard to merits of addition but whether such addition could be made by learned AO by exercising powers u/s 154 of the Act**. The matter of fact is that learned AO had accepted the return filed u/s 139 of the Act vide intimation u/s 143(1) of the Act dated 24-11-2019. The same was based on the tax audit report in form no. 3CB and 3CD. **Thus, the question of delay in deposit of the employees' contribution was very much in the assessment records upon which the intimation u/s 143(1) was served upon the assessee.** As at relevant time there was law in favour of assessee allowing such expenditure so it has to be concluded that assessee was benefited by same and failure to follow a divergent view in favour of Revenue cannot be considered to be an error apparent on record and thus learned AO was not justified to substitute his opinion by invoking provision of section 154. The question of relying any judgment in favour of Revenue to invoke section 154 powers is not manifested from the order u/s 154 and thus **the learned CIT(Appeals) too erred to sustain the order on the basis of the judgment of the Hon'ble Supreme Court in Checkmate Services (P.) Ltd. case (supra).

***6.1** In the case of Mahavir Drilling Co. (supra), investment allowance claimed by the assessee on drilling machines was granted by the AO. The AO later realised that the investment allowance could not have been claimed by the assessee on the drilling machine or in other words, it was noticed that the same was wrongly granted.*

However by order dated 19-10-1992, the AO withdrew the benefit of investment allowance by taking recourse to the provisions of rectification. The revenue submitted that in the light of law laid down by Supreme Court in the case of CIT v. N. C. Budharaja & Co. [1993] 70 Taxman 312/204 ITR 412 the issue in relation to claiming of investment allowance in the activity of drilling stood decided in favour of revenue. ***It was contended that once the issue is decided by the Hon'ble Supreme Court against an assessee, the action on the part of AO in invoking section 154 of the Act rectifying the mistake in wrongly granting the benefit to assessee in the original assessment order could always be withdrawn.*** *The assessee submitted that the law laid down in N.C. Budharaja & Co. case (supra) was prospective in nature, therefore, the same would not apply to this case because, on the date when AO granted relief to assessee, the issue in relation to claiming of investment allowance on drilling activity was a debatable one.* ***The Tribunal allowed assessee's appeal on the ground that the Hon'ble Supreme Court's decision in N. C. Budharaja & Co. (supra) was not available on the date of rectification****, i.e., on 19-10-1992, therefore, the same could not be made a basis for withdrawing the investment allowance.* ***Hon'ble High Court held that as on the date, when the assessee claimed the benefit of investment allowance, i.e., on 31-3-1989, the issue in regard to its claim was debatable one as there was cleavage of judicial opinion between several High Courts. On the date of rectification i.e., on 19-10-1992, the decision in N. C. Budharaja & Co. (supra)*** *was not rendered by the Supreme Court, therefore, invocation of provisions of section 154 was not justified.*

7. *Thus in the case in hand also order of Ld. CIT(A) cannot be sustained. Ground no. 1 raised in the additional grounds, which goes to the root of erroneous exercise of jurisdiction, stands allowed in favour of appellant and remaining grounds are left academic. Thus, the appeal of the assessee is allowed.''*

The issue of conflicting decisions of Tribunal rear their head again.Is there any finality to such imbroglios?Will sanity and finality prevail?The overzealous interpretation of Checkmate has brought about a mindless race of using all available material on retrospectivity to uphold MAs of revenue by some Tribunals without understanding, appreciating the finer points of a very subtle and intricate legal issue.

22.PICK AND CHOOSE :TWO PAGES FROM HISTORY

Consider the following;

1.291 ITR 500 SC OVERRULED BY 306 ITR 277 SC

2.289 ITR 83 SC OVERRULED BY 304 ITR 308 SC

Both in favour of revenue.How many MAs were filed by revenue before multiple appellate fora? I cannot recall even one.

Then we had clarificatory and implied overrulings like 285 ITR 158 ALLD being 'clarified'by 304 ITR 30 ALLD [***'' the obiter observation in the underlined portion of the judgment extracted above was made apparently because of the confusion created by the complex language in which section 151(2) has been drafted.''***]

How many MAs were filed ?I do not recall seeing any.

So how come this pick and choose?

VI.CONCLUSION:

23.The following maxims in law are well established:

1. ***Nemo debet lis vexari pro eadem causa***– no man to be vexed twice for the same cause.(double jeopardy rule).Or:

Nemo debet bis vexari (pro una et eadem causa)- **'no one shall be harassed twice for the same cause' No person should be twice sued upon the same set of facts if there has been a final decision of a competent court. No-one should be tried twice (in respect to the same matter).**

2.Interest republicae ut sit finis litium– it is in the interest of the state that there should be end to litigation.

3.Re judicata pro veritate occipitur– a judicial decision should be accepted as correct or a point judicially decided is taken to be correct.j

24.Income-tax Tribunal is a Tribunal constituted under the Act. It is not a 'Court' having plenary powers, but a statutory Tribunal functioning under the Act of 1961. It, therefore, cannot act outside or *de hors* the Act nor can exercise powers not expressly and specifically conferred by law.

25.We must be alive to the words of guidance by **Hon'ble Supreme Court in Mumbai Kamgar Sabha vs. Abdulbahi Faizullbhai AIR 1976 SC 1455** wherein it was observed thus, **"It is trite, going by anglophonic principles that a ruling of a superior Court is binding law. It is not of scriptural sanctity but of ratio-wise luminosity within the edifice of facts where the judicial lamp plays the legal flame. Beyond those walls and de hors the milieu we cannot impart eternal vernal value to the decisions, exalting the precedents into a prison house of bigotry, regardless of the varying circumstances and myriad developments.**

Realism dictates that a judgment has to be read, subject to the facts directly presented for consideration and not affecting the matters which may lurk in the dark". **It is, therefore, indeed duty of every subordinate judicial forum to apply the ruling of the superior Courts in such a manner so as to enforce the true legal principles emerging from the same, by putting the words and expression used in the ruling in the right perspective and by taking a holistic legal view of the matter.** ....."

26.Hon'ble Kerala High Court in the case of Malabar Regional Co-op Milk Producers Union Ltd vs CCE, Cochin [2020 (372) ELT 708 (Ker)]must have pride of place in concluding the matter;

"12. It is always a sound principle that the Courts while pronouncing a judgment is not creating a new Rule. Nor it does not make law; but only declare the correct position of law**. In that respect it has to be accepted that a judicial decision acts on retrospective basis. But the question mooted for decision is whether a subsequent judicial decision settling the correct interpretation of law, which unsettles the earlier precedents, can be considered as a mistake apparent on the face of record, which enables rectification of an earlier decision which had attained finality between parties *inter se.* In other words, whether a change of opinion declared in a subsequent judicial decision can be treated as a mistake apparent on the face of record to unsettle a decision which had attained finality. Further, it is a question as to whether such subsequent change**

of opinion will enable the authority to reopen the settled proceedings and to decide it afresh."

26.1 After analysing several judicial decisions including the Supreme Court decision in the Mepco Industries case *supra,* the Hon'ble Kerala High Court held in favour of the assessee-appellant stating that ***'when the appeal was decided by the Tribunal through Annexure A order, the decision was taken based on the law as it stood then. In a subsequent decision of the Hon'ble Supreme Court, the law was declared as otherwise, based on a change of opinion.*** *Such change of opinion of law cannot be taken as 'mistake apparent on the face of record' which could be rectified by invoking* Section 35C(2) *of the Central Excise Act.* ***Further, such material such material cannot be used for unsettling the settled position attained through disposal of the appeal, alleging that there occurred any mistake apparent from the face of the record. It cannot be utilized for reopening a concluded decision, which had obtained finality between parties inter se. Therefore we are of the opinion that the above appeal has to succeed.***

REVERSAL OF INTERPRETATION OF A PROVISION OF STATUTE BY APEX COURT DOES NOT PER SE VALIDATE CORRECTIVE ACTION IN SETTLED MATTERS VIA MISTAKE APPARENT ROUTE -be it 154 or 254(2):this is how the matter must rest.

Anadi Varma