# CHECKMATED II: THE GRAVY TRAIN OF NR WIRES

## EXECUTIVE SUMMARY

**The decision in CHECKMATE SERVICES P. LTD. [2022] 448 ITR 518 (SC)**passed on October 12, 2022 held 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.The IT department filed a cache of MAs before ITATs to recall the orders passed prior to Checkmate where assessees got relief .

In the MAs filed by IT Department ,[one argued by me also before Mumbai ITAT(SCNS PVT LTD in ITA number 2170/Mum/2020 AY 2019-20 ,heard on 21.4.23 ) decision dated 27.6.23 wherein order was recalled.] the issue under determination was that ITAT relief ,though given on a date earlier than Checkmate was based on an interpretation of law or following of HC rulings held as no longer valid by hon'ble SC.

Among the most comprehensive orders,one dealt with by me in this essay ,is in **THE DCIT, CIRCLE-1 (1) , BHILAI (C.G) AND OTHERS VERSUS N.R WIRES PRIVATE LIMITED AND OTHERS Dated: - 29-5-2023. Reported as 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 .

[ From the order: MA 01/RPR/2023 (Arising out of ITA No.67/RPR/2019) AY 2013-14 DATED 29.5.2023

( a/w 38 OTHER MAs)]

This can be read as part two of my first essay on this issue(published in **ITATONLINE.ORG**:the interested reader may refer the following link: **https://itatonline.org/digest/articles/checkmated-the-bandwagon-effect/)** Some points in both essays are common ,but vital to mention here ,hence there may be part repetition.But since they were organically connected to the ruling,their mention was unavoidable.

## I.MA as encapsulated by ITAT:

**1.**

**[quote]**

2. On a perusal of the miscellaneous application filed by the department in MA No.01/RPR/2023, we find that the revenue applicant under sub-section (2) of Section 254 of the Act has **sought for recalling of the order** passed by the Tribunal while disposing off the appeal in ITA No.67/RPR/2019, stating as under (relevant extract) :

"7. However, recently, the Hon'ble Apex Court has passed an order in the case of Checkmate Services Pvt Ltd Vs. CIT-1 in Appeal No. 2833 of 2016 dated October 12th, 2022 in which they have held that the deduction shall be admissible only if the amount is paid within the due date as prescribed under those Acts and not before filing of ITR. As such, the entire scenario has now undergone a change and

the litigation with respect to this issue has achieved a finality. The order of the Apex Court is the law of the land. Therefore, any order passed not in consonance with the Apex Court's order **can be said to be erroneous** to that extent and therefore, a cause for filing a Miscellaneous Application to correct that error can be said to have arisen.

8.However, in view of the decision of the Hon'ble Supreme Court in Civil Appeal No. 2833 of 2016 in the case of Checkmate Services (P) Ltd Vs. Commissioner of Income Tax-1 pronounced on October 12,2022, the Hon'ble Supreme Court has upheld the order of the Hon'ble Gujarat High Court. In the case of Gujarat State Road Transport Corporation, Hon'ble Gujarat High Court has held that w.r.t. the sum received by the assessee from any of his employees to which provision of sub-clause (x) of clause (24) of section (2) applies, the assessee shall be entitled to deduction in computing the income referred to in section 28 w.r.t. such sum credited by the assessee to the employee's account in the relevant fund or funds on or before the due date mentioned in explanation to section 36(1)(va) of the Income Tax Act, 1961.

9.Considering the above facts, Miscellaneous Application u/s. 254(2) of the Income Tax Act, 1961 before the Hon'ble ITAT, Raipur is required to be filed as the Hon'ble FAT was not justified in directing the AO to vacate the disallowance of Rs.49,188/- made u/s 36(1)(va) of the Income Tax Act, 1961 on account of delayed deposit of the employees share of contribution."

**[unquote]**

## II. ARGUMENTS BY RESPONDENTS AND DISPOSAL THEREOF BY TRIBUNAL: BIRD'S EYE VIEW

**3.**

| S.NO. | ISSUE RAISED by RESPONDENT | DECISION OF ITAT |
|---|---|---|
| 1. | Not mistake apparent.Relied MEPCO IND 319 ITR 208 SC | Facts completely different.Deptt.only seeking rectification. MEPCO involved ''change Of opinion''. |

| | | |
|---|---|---|
| 2. | Order 47 Rule 1 CPC 1908 Expn.relied.Also cited Reliance 440 ITR 1(SC) | Context of Reliance different.It concerned rehearing of appeal on merit |

In Tribunal's words:'' *In our considered view, the reference by the Hon'ble Apex Court to Order XLVII, Rule 1 of CPC, 1908 was for the purpose of making it clear that the Tribunal in exercise of powers vested u/s.254(2) cannot revisit its earlier order and go into the details on merits. The Ld. ARs interpretation, if accepted, would mean that the Tribunal in exercise of Section 254(2) can review an order.''*

Ashok Textiles Ltd. (1961) 41 ITR 732 (SC) was also relied by bench in this context holding that Ld. ARs have *'tried to read the restriction placed on review of an order by a court as provided in the "Explanation" to order XLVII, Rule 1 into the scope of power of the Tribunal''*

**ACIT Vs. Saurashtra Kutch Stock Exchange Ltd. (2008) 305 ITR 227 (SC) and S.A.L Narayana Row, CIT Vs. Model Mills Nagpur Ltd. (1967) 64 ITR 67 (SC) squarely covers the issue at hand per ITAT.**

| | | |
|---|---|---|
| 3. | M/s. Malabar Regional Co-operative Milk Producers Union Ltd. Vs. The Commissioner of Central Exercise, C.E Appeal No.10 of 2019 dated RELIED | covered by 2 SC decisions (supra) |

| | | |
|---|---|---|
| 4. | Claim of revenue time barred since 6 months lapsed | Time limit applies only to suo motu |

| | |
|---|---|
| | rectifications.<br>305 ITR 227 SC says so.<br>Shree Ayannar 301 ITR 434 SC similar. |
| 5. Amendments are only w.e.f. 1.4.2021 | Amendments were on statute on date of SC decision. |
| 6. Deptt could approach HC | No bar in approaching ITAT u/s 254(2) |
| 7. Debatable issue hence not covered u/s 143(1) | Issue beyond scope of 254(2) |
| 8. Allow u/s 37 | Issue beyond scope |
| 9.Simplex decision 358 ITR 129 SC RELIED | Distinguishable decision was on 147 |
| 10.PT Manuel Kerala decision relied | was on ITAT revising own order on basis of another ITAT order |
| 11.Jiyajeerao 130 ITR 710 relied | Issue covered by SC |

[**IMPORTANT NOTE: POINT NUMBER 5(date of amendment) is of supreme vitality** and in my view the strongest issue favouring assessees ,but has been dealt with by me ,in great detail in part I of this article.Hence not being dealt with here again.]

**12.Learned ITAT further relied upon the following for same propositions:**

1.**Kil Kotagiri** Tea and Coffee Estates Co. Ltd. v. ITAT [1988] 174 ITR 579 (Ker.)(discussed as under).

2.**Mysore Cements** Ltd. v. Deputy Commissioner of Commercial [1994] 93 STC 464{discussed as under}

3.**B.V.K. Seshavataram** Vs. CIT [1994] 210 ITR 633 (AP)(based on SAL N ROW.Concerns 154)

4.**M. K. Kuppuraj** Vs. ITO [1995] 211 ITR 853 (Mad.)[followed Mettur Chemical and Industrial Corporation Ltd. v. CIT [1977] 110 ITR 822 (Mad).On 154]

5.**Lakshmi Sugar Mills** Co Ltd. Vs. CIT (2012) 22 taxmann.com 300 (Delhi)[Followed Saurashtra Kutch but said time limit sanctity remains]

6.**Smt. Aruna L**uthra (2001) 252 ITR 76 (P & H) para 13 to 33 reproduced by ITAT.[held as in NR Wires on point of law ,but refused to overturn ITAT order in favour of assessee.NR wires order omits this fact]

**13.Order of the learned bench:**

*''33. In our considered view,* ***the aforesaid issue can safely be resolved by referring to the judgment of the Hon'ble Supreme Court in the case of ACIT Vs. Saurashtra Kutch Stock Exchange Ltd. (2008) 305 ITR 227 (SC).*** *The Hon'ble Apex Court by referring to the order of the Hon'ble High Court of Gujarat in the case of Suhrid Geigy Ltd. Vs. CIT (1999) 237 ITR 834 (Guj), had observed, that if a point is covered by the decision of the Hon'ble Jurisdictional High Court rendered prior to or even subsequent to the order proposed to be rectified, then it could be said to be a mistake apparent from record u/s. 254(2) of the Act and could be corrected by the Tribunal. The Hon'ble Apex Court drawing support from Blackstonian theory, had observed that it is not the function of the court to pronounce a "new rule" but to maintain and expound the old one. The Hon'ble Apex Court had observed that if a subsequent decision altered the earlier one, then the later decision does not lay down any new law but only discovers the correct principle of law which had to be applied retrospectively. It was further observed by the Hon'ble Apex Court that even where an earlier decision of the court operated for quite some time, the decision rendered later on would have retrospective effect clarifying the legal position which was earlier not correctly understood. Referring to its historical decision in the case of I.C Golaknath Vs. State of Punjab & ors, 1967 SCR (2) 762, it was further observed by the Hon'ble Supreme Court that though the Court in the said judgment had accepted the doctrine of "prospective overruling", however, the same was an exception to the*

*general rule of the doctrine of precedent. For the sake of clarity, the relevant observations of the Hon'ble Apex Court in the case of ACIT Vs. Saurashtra Kutch Stock Exchange Ltd. (supra) are culled out as under:*

*"*

[para 40- 45 of Saurashtra Kutch quoted.not reproduced.]

*Also, we find support from the judgment of the Hon'ble Supreme Court in the case of S.A.L. Narayana Row, CIT v. Model Mills Nagpur Ltd. [1967] 64 ITR 67 (SC), wherein the levy of additional tax on excess dividend was declared by the High Court of Bombay as illegal……..*
*[para 13- 33 Aruna Luthra,252 ITR 76 cited verbatim .not reproduced]…….*

*''34. On the basis of our aforesaid deliberations read along with the settled position of law as had been laid down by the Hon'ble Courts, we are of the considered view that as a subsequent decision of the Hon'ble Supreme Court do not enact the law but declare the law as it always was, therefore, an order can be rectified on the basis of a subsequent judgment of the Hon'ble Supreme Court or that of the Hon'ble Jurisdictional High Court. Our aforesaid view is further fortified by Article 141 of the Constitution of India, which reads as under:*

*"A law declared by the Hon'ble Supreme Court is binding on the Courts within the territory of India".''*

**14.Prospectivity** has to be specifically declared **M/s New Noble Educational Society** Vs. The Chief Commissioner of Income Tax, (2023) 290 Taxman 206 (SC) relied.

**4..** This about covers the determination planks of the Ld.Tribunal.

The approach in such MAs has become so mechanical that **in case of Reuters India P ltd, an exparte order** has been passed on similar ,though less comprehensive lines, ,reported in 153 taxmann.com 391 ,by Mumbai ITAT dated 15.6.2023, without even referring to rule 25 of Appellate Tribunal Rules,1963.

## III.. CBDT CIRCULAR NO 68 OF 1971

**5.In context of 154 ,a CBDT instruction exists as well ,which would support the stated reasoning of subsequent decision creating a mistake apparent from record further**.It reads as follows:

**CIRCULAR NO. 68 [F.NO. 245/17/71-A&PAC], DATED 17-11-1971**

1. The Board are advised that **a mistake arising as a result of a subsequent interpretation of law by the Supreme Court** would constitute "a mistake apparent from the records" and rectificatory action under section 35/154 of the 1922 Act/ the 1961 Act would be in order. It has, therefore, been decided that ***where an assessee moves an application under section 154*** **pointing out that in the light of a later decision of the Supreme Court** pronouncing the correct legal position, a mistake has occurred in any of the completed assessments in his case, **the application shall be acted upon, provided the same has been filed within time and is otherwise in order.** Where any such applications have already been rejected and the assessee files fresh applications **within the statutory time limit,** the same may also be treated on par with the applications which may either be pending or received after the issue of this circular.

2. The Board desire that any appeals or references pending on the point at issue may please be withdrawn.

## 6. A BRIEF ANALYSIS:

6.1 Interestingly, **the circular is purely for benefit of assessee and no authority is given to department to rectify order in case subsequent decision of SC favours revenue**.Further ,**interestingly,integrity of limitation** in 154 has been maintained.ITAT (supra) has given even that a go by ,splitting 254 in two parts and holding that the time limit applies only to suo motu rectifications, initiated by itself basing its view apparently on a SC decision which warrants no such conclusion .We shall see this too in detail.

6.2 Section 154 as it stood in 1971 is almost identically worded,only difference is that **limitation** is separately mentioned in subsec 7 whereas **enabling part** is in subsec 2.To wit,

*(2) Subject to the other provisions of this section, the authority concerned—*

*(a) may make an amendment under sub-section (1) of its own motion, and*

*(b)* ***shall make such amendment*** *for rectifying any such mistake which has been brought to its notice by the assessee, and where the authority concerned is the Appellate Assistant Commissioner, by the Income-tax Officer also.*

*……*

*(7) Save as otherwise provided in section 155 or sub-section (4) of section 186* ***no amendment under this section shall be made after the expiry of four years*** *from the date of the order sought to be amended.*

**6.1 We may contrast this with s 254(2) as it stood then:**

*(2) The Appellate Tribunal **may**, at any time within four years from the date of the order, with a view to rectifying any mistake apparent from the record, **amend** any order passed by it under sub-section (1), **and** shall make such amendment if the mistake is brought to its notice by the assessee or the Income-tax Officer :*

This is virtually the same as of now,only the time limit gets reduced to six months.

## IV. THE MYSORE CEMENT DECISION:

7. Let us bolster the retrospectivity aspect further. The hon'ble **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.

**It held as follows;**

"Therefore, in the final analysis, **what is a 'mistake apparent from the record', capable of being rectified**? A mistake, either of fact or of law, **glaring and obvious from the record itself, capable of identification, without a detailed investigation or enquiry or elaborate arguments, in regard to which there could reasonably be no two opinions** is a 'mistake apparent from the record'. If it relates to a fact, it should be possible to say 'this is obviously a mistake'. **A decision on a debatable point of law will not, however, be a mistake apparent from the record**. A point on which there is no decision of the Supreme Court or of the concerned High Court. and in regard to which two or more views are possible, is a debatable point of law. A point of law on which there are divergent views

of other High Courts, is a debatable point of law. Hence, there cannot be a rectificatian of an order, merely on the ground that a contrary decision was rendered on the point involved by a High Caurt other than the High Court of the concerned State. **It is needless to paint out that when a point is covered by a decision of the Supreme Court or concerned High Court, either rendered prior to or subsequent to the order proposed to be rectified, then the point ceases to be a debatable point, it also ceases to be a point requiring elaborate arguments or detailed investigation/enquiry. To encapsulate, the following will be 'mistakes apparent from the record' relating to a question of law .'**

**(a)An order made, ignoring or overlooking :**

(i) a binding decision of the Supreme Court or the concerned High Court rendered prior to the date of such order, and/or

(ii) a relevant provision of existing law,

**(b)An order, found to be erroneous .**

(i) by applying a subsequent enactment given retrospective effect; and/or

(ii) **by applying a subsequent decision of the Supreme Court or concerned High Court.**

**7.1 The above decision of the Hon'ble High Court was rendered in the context of a rectification order passed by the assessing authority under**

**Section 25-A of the Karnataka Sales Tax Act, 1957,** wherein the assessing authority held that the assessment orders holding that packing charges are to be deducted from the taxable turnover was a 'mistake apparent from the record' having regard to the decision of the Supreme Court in Ramco Cement Distribution Co Pvt Ltd vs State of Tamil Nadu.This also is in support of retrospectivity as well as the assertion that retrospectivity of a decision of jurisdictional HC or SC covers mistake apparent from record.

7.2 What is the **''order''** referred in b(ii)(supra)-an order that has attained finality inter partes or an order under contest? If it be former,the view is under serious contest from other HCs as we shall see.

## V.ANALYSIS OF ITAT ORDER IN NR WIRES MA:

### 8. INTRODUCTORY:

The Tribunal's order,respectfully, suffers from fatal mistakes of jurisprudence ,interpretation of statutes,interpretation of judgements among other things.**The first cardinal error** which vitiates the order is manner of interpretation and application of decisions suiting its conclusion and the **second is** non application of same yardstick to decisions favouring respondents.**The third is** ,citing suo motu decisions not apparently pleaded by revenue but failing to consider binding SC decisions favouring respondents not pleaded by them.**Fourth is** summary dismissal of most of the decisions cited at the bar.I shall refer all presently.

## 9. INTERPRETING AND APPLYING JUDGEMENTS:HARYANA OIL MILLS AIR 2002 SC 834:

9.1 There is one decision on interpretation of judgements which runs totally contrary to the manner of interpretation of relied decisions,most specifically the key cornerstone decision ,Saurashtra Kutch Exchange by Tribunal .

9.2 The decision I refer to is **Haryana Financial Corporation & Anr. vs M/S Jagdamba Oil Mills & Anr. AIR 2002 SC 834**

[CASE NO.:Appeal (civil) 607 of 2002.Decided on: 28 January, 2002 Bench: B.N. Kirpal, K.G. Balakrishnan, Arijit Pasayat:3 judge bench].The hon'ble SC held as follows:

[QUOTE]

**"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. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statues, they do not interpret judgments. They interpret words of statutes, their words are not to be interpreted as statutes. In London Graving Dock Co. Ltd. v. Horton (1951 AC 737 at P. 761), Lord Mac Dermot observed:**

"The matter cannot, of course, be settled merely by treating the ipsissima vertra of Willes, J. as though they were part of an Act of Parliament and

applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished judge."

**In Home Office v. Dorset Yacht Co. (1970 (2) All ER 294) Lord Reid said,** "Lord Atkin's speech..is not to be treated as if it was a statute definition. It will require qualification in new circumstances." Megarry, J. in (1971) 1 WLR 1062 observed: "One must not, of course, construe even a reserved judgment of even Russell L.J. as if it were an Act of Parliament." **And, in Herrington v. British Railways Board, (1972) 2 WLR 537 Lord Morris said:** "There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances made in the setting of the facts of a particular case."

**Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases**. Disposal of cases by blindly placing reliance on a decision is not proper.

The following words of Lord Denning in the matter of applying precedents have become locus classicus:

"Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive."

xxx xxx xxx "Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it."

[UNQUOTE.Emphasis supplied.]

9.3 Identical principles appear in a Constitution bench decision in **Padmausundara Rao (Dead) &Ors vs State Of T.N. & Ors (2002),3SCC 533.[ Appeal (civil) 2226 of 1997 DATE OF JUDGMENT:13/03/2002].**

**10. ITAT ORDER IS IN THE TEETH OF OTHER JURISPRUDENTIAL DECISIONS AS WELL:**

**10.1.**We must bear in mind the apt and instructive words of the hon'ble Supreme Court spelling out the approach to be adopted and the caution to be observed in appreciating the law declared by a decision of the Supreme Court. In the case of ***CIT* v. *Sun Engg. Works (P.) Ltd.* [1992] 198 ITR 227,** the principle was succinctly stated thus:

". . .The judgment must be read as a whole and **the observations from the judgment have to be considered in the light of the questions which were before this Court**. A decision of this Court takes its colour from the questions involved in the case in which it was rendered and, while applying the decision to a later case**, 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. . . ." (p. 320)

That is how the ratio of a judgment has to be ascertained and applied.

## 10.2 .UNION OF INDIA & ORS.Vs.DHANWANTI DEVI & ORS.(1996) 6 SCC 44.

3 judge bench

[QUOTE]

*''It is not everything said by a Judge who giving judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi.* ***According to the well settled theory of precedents, every decision contain three basic postulates*** *–*

*[i] findings of material facts, is the inference which the Judge draws from the direct, or perceptible facts;*

*[ii] statements of the principles of law applicable to the legal problems disclosed by the facts; and*

*[iii] judgment based on the combined effect of the above.*

*A decision is only an authority for what it actually decides. What is of the essence in decision is its ratio and not every observation found therein not what logically follows from the various observations made in the judgment. Every judgment must*

*be read as applicable to the particular facts proved, since the generality of the expressions which may be found there is not intended to be exposition of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. It would, therefore, be not profitable to extract a sentence here and there from the judgment and to build upon it because the essence of the decision is its ratio and not every observation found therein. The enunciation of the reason or principle on which a question before a court has been decided* ***is alone binding between the parties to it****, but it, is the abstract ratio decidendi,* ***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 what it was, is binding.* ***It is only the principle laid down in the judgment that is binding law under Article 141 of the Constitution.*** *A deliberate judicial decision arrived at after hearing an argument on a question which arises in the case or is put in issue may constitute a precedent, no matter for what reason,* ***and the precedent by long recognition may mature into rule of stare decisis.*** *It is the* ***rule deductible from the application of law to the facts and circumstances of the case*** *which constitutes its ratio decidendi.*

*Therefore, in order to understand and appreciate the binding force of a decision is always necessary to see what were the facts in the case in which the decision was given and* ***what was the point which had to be decided****. No judgment can be read as if it is a statute. A word or a clause or a sentence in the judgment cannot be*

*regarded as a full exposition of law. Law cannot afford to be static and therefore, Judges are to employ an intelligent in the use of precedents.''*

[UNQUOTE]

**10.3 SAURASHTRA KUTCH:THE TIPPING POINT**

Let us see how this understanding translates into understanding Saurashtra Kutch decision,the fulcrum on which NR Wires revolves.WHAT WAS THE ISSUE BEFORE THE COURT?-that is THE key aspect.

**In Saurashtra Kutch[305 ITR 227 ,SC]** ,the point which was to be decided may be seen in Court's own words:

''**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.''

10.3.1 The reader may decide for himself now as to what would be the ratio under SC guidelines outlined earlier.[Further discussion on Saurashtra Kutch follows later.]

10.3.2 The interpretative process adopted by the learned Tribunal is in the teeth of this settled law and it vitiates the entire order on this count alone.

Armed with the above understanding we shall see how learned ITAT went about dismantling the respondents'well reasoned arguments, summarily.

**11.PRECEDENTS AND FACTS:**

Astonishing summary brushing aside of some decisions has been done in NR Wires on the fantastic ground of ''distinguishable on facts''ignoring **the very basic jurisprudential principle that there cannot be a judicial precedent on a question of fact**. It is only the legal principle laid down on the basis of fact and the law that becomes judicial precedent. It is also clear that the precedent is binding for what it explicitly decides and no more. The following observations of Earl of Halsbury in the case of ***Qumin vs. Leathem ( 1901) AC 495 (HL) in Blue Star Ltd. vs. CIT (1996) 217 ITR 514 520 are instructive:***

*"Every judgment must be read as applicable to the particular facts proved or assumed to be proved,* ***since the generality of the expressions which may be found there, are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case*** *in which such expressions are found and a case is only an authority for what it actually decides.*

**12.MISREADING OF ARTICLE 141:**

**Does Article 141 say anything clearly about retrospectivity of its decisions?Or it speaks only of its binding nature on all ,throughout the country?**

**In Rajeshwar Prasad Mishra v. The State of West, Bengal and Anr. reported in AIR 1965 SC 1887**, it was held:

"Article 141 empowers the Supreme Court to declare the law and enact it. Hence **the observation of the Supreme Court should not be read as statutory enactments**."

In terms of Article 141 of the Constitution of India, **judgments of the Supreme Court are nothing but law and binding without demur on all courts and authorities in India.This is what Art 141 means.**

12.1 **Blackstonian theory** is such a decision is **''always understood from the inception of the provision''**.This is a jurisprudential implication at best,no doubt sanctified by some judgements where prospectivity of its operation was specifically mentioned.This is neither a judicial canon ,nor a universally accepted principle. English jurists such as Bentham and Austin criticized the

Blackstonian view that was followed in England. We have other landmark rulings{ followed from the landmark Golaknath case} like **Harsha Dhingra v. State of Haryana and Somaiya Organics (India) Ltd. v. State of U.P among others.**But rather than get into the slugfest ,let us concerns ourselves here with retrospectivity only to the extent that, even granted retrospectivity ,does the ruling create a statement of law elevated to not only it being from the inception of that provision ,but also to the extent that all decisions reaching finality based on what was good law at that point of time but now in contravention due to change of opinion, need to be disturbed and refinalised as ''mistakes apparent from record''.

12.2The interpretation put on article 141 by the Ld. Tribunal bench runs afoul of the exposition of the same in Rajeshwar Prasad and Dhanwanti Devi.Blackstonian theory is not embodied in the same and the Ld. Tribunal has erred materially in holding otherwise.

**13.CPC 1908: ORDER 47 RULE 1 EXPLANATION;RULING IN 440 ITR 1 (SC)**

13.1 An aspect related to this reading of retrospectivity is embedded in this provision ,which reads as follows:

## ''1. Application for review of judgment.—

(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes,

**and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment** to the Court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order **may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant** and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applied for the review.

**1 [Explanation.—The fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior Court in any other case, shall not be a ground for the review of such judgment.]**

1. Ins. by Act 104 of 1976, s. 92 (w.e.f. 1-2-1977). 203 ‘’

[**A preliminary note:** this explanation has been understood in NR Wires to mean that pleading ARs have *'tried to read the restriction placed on review of an order by a court as provided in the "Explanation" to order XLVII, Rule 1 into the scope of power of the Tribunal''*.

This is gross misunderstanding.There is no telescoping of ITAT's powers into Explanation above to imply it has power of review.In fact that argument would be fatal to cases of the aggrieved.Because ,once power of review is pleaded,read and accepted into s 254,the whole argument would end.The argument is that a previous decision of a Court cannot be revisited on the ground that a superior court has reversed its ruling on a point of law subsequently.

13.2 This was pleaded before the Tribunal .Reliance Telecom 440ITR 1 SC too was cited before them.**How did the ITAT read this ?**

*In our considered view, the reference by the Hon'ble Apex Court to Order XLVII, Rule 1 of CPC, 1908 was for the purpose of making it clear that the Tribunal in exercise of powers vested u/s.254(2)* ***cannot revisit its earlier order and go into the details on merits****. The Ld. ARs interpretation, if accepted, would mean that the Tribunal in exercise of Section 254(2) can review an order.''*

To support this reasoning ,Ashok Textiles Ltd. (1961) 41 ITR 732 (SC) was relied by bench and they held that Ld. ARs have *'tried to read the restriction placed on review of an order by a court as provided in the "Explanation" to order XLVII, Rule 1* ***into the scope of power of the Tribunal''***

**13.2 Here is the perversity.**

In Reliance the hon'ble SC was faced with this fact situation: **ITAT allowed the Revenue's appeal by relying upon the judgments/decisions of the Karnataka High Court** and held that payments made for purchase of software are in the nature of royalty. . Against the detailed judgment and **order dated 6-9-2013** passed by the ITAT, **the Assessee filed miscellaneous application for rectification under section 254(2)** of the Act. Simultaneously, the Assessee also filed the appeal before the High Court against the ITAT order dated 6-9-2013. That vide **common order dated 18-11-2016, the ITAT allowed** the Assessee's miscellaneous application filed under section 254(2) of the Act and recalled its original order dated 6-9-2013.Threafter assessee withdrew its appeal before HC.

**This was the context.**

**In para 3.2 the hon'ble SC held that recall of the order was not permissible u/s 254(2).It was held that "** In exercise of powers under section 254(2) of the Act, the Appellate Tribunal may amend any order passed by it under sub-section (1) of Section 254 of the Act **with a view to rectifying any mistake apparent from the record only.** Therefore, **the powers under section 254(2) of the Act are akin to Order XLVII Rule 1 CPC**. While considering the application under section 254(2) of the Act, the Appellate Tribunal is **not required to re-visit its earlier order and to go into detail on merits.** The powers under section 254(2) of the Act are **only to rectify/correct any mistake apparent from the record."**

"**4.** In the present case, a detailed order was passed by the ITAT when it passed an order on 6-9-2013, by which the ITAT held in favour of the Revenue. Therefore, the said order could not have been recalled by the Appellate Tribunal in exercise of powers under section 254(2) of the Act. **If the Assessee was of the opinion that the order passed by the ITAT was erroneous, either on facts or in law, in that case, the only remedy available to the Assessee was to prefer the *appeal before the High Court,*** *which as such was already filed……"*

13.2.1 The last line **also support the pleader's argument** that the proper recourse was to go before a higher forum i.e.JURISDICTIONAL H.C.It would be instructive to know as to what the Pr.CIT wrote on the file regarding going to HC when the original adverse ruling came? Did he accept it? And a ''change of opinion'',so deprecated by ITAT in NR Wires happened after Checkmate ruling came?Also ,why were appeals not filed ,as it seems ,against ITA orders giving relief to appellants?The attitude of running with the hare and hunting with the hound can be easily exposed ,if the files of Pr.CIT and CCIT are examined under the RTI Act or following s 138 as to what was the exact noting on adverse rulings on the issue then.The duplicity can expose the contrary views taken ,once Checkmate came out.Did the MAs happen because time to appeal against 254(1) orders had run out and the orders of Tribunals stood accepted?

14.What happened in **SCNS(supra)?**There was a clear recall.What happened in NR Wires? There was a refixing of appeal(akin to recall).In mere amending,an amendment order is needed to be passed and refixing of appeal

is not required.What the hon'ble SC said is that REHEARING(for whatever purposes) via REFIXING original appeal is not permissible.Only AMENDMENT of order is possible.

The hon'ble Court goes on to say:

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

*Even the observations that the merits might have been decided erroneously and the ITAT had jurisdiction* ***and within its powers it may pass an order recalling*** *its earlier order which is an erroneous order, cannot be accepted. As observed hereinabove,* ***if the order passed by the ITAT was erroneous on merits, in that case, the remedy available to the Assessee was to prefer an appeal before the High Court****, which in fact was filed by the Assessee before the High Court, but later on the Assessee withdrew the same in the instant case.''*

15.The order in NR Wires,SCNS and multiple such recalls is in the teeth of the SC order and the recalls are in gross violation thereof.In fact in present

recalls there is clear reference of the situation as envisaged in the Explanation OF O 47 R 1 and cases are on stronger footing.

15.1 **Ashok Textiles Ltd. (1961) 41 ITR 732 (SC)** which was relied on by ITAT was **rendered on 13.12.1960** in regard to s 35 of IT Act 1922.The context was POWER OF REVIEW.**Because there was no Explanation to O 47 R 1 on statute on the said date.It was inserted w.e.f 1.2.1977.**Where is the parallel and the applicability?This is where it is seen that Sun Engineering,Dhanwanti devi and Jagdamba (supra) ,all stand violated.

**16.ISSUE NOW COVERED BY HON'BLE SC ITSELF** IN THE CASE OF **M/S SARASWATI AGRO CHEMICALS PVT. LTD.SPECIAL LEAVE PETITION (CIVIL) Diary No(s). 18051/2023 ON 04-07-2023 by hon'ble SC itself.To wit,**

*''Secondly, by ignoring the Explanation to Order XLVII Rule 1 of the CPC and the principle that emerges from the same,* ***what is sought to be contended by learned ASG is that if a judgment is overruled by this Court by a subsequent judgment, then the overruled judgment will have to be reopened and on reopening the said judgment will have to be brought in line with the subsequent judgment which had overruled it. This is not permissible*** *in law for two reasons: firstly,* ***there has to be finality in litigation*** *and that is in the interest of State. Secondly,* ***a person cannot be vexed twice****.*

*This is epitomized by the following maxims:*

*(i) Nemo debet bis vexari pro una et eadem causa (No man should be vexed twice for the same cause);*

*(ii)Interest reipublicae ut sit finis litium (It is in the interest of the State that there should be an end to a litigation); and*

*(iii)Res judicata pro veritate occipitur (A judicial decision must be accepted as correct).*

*These maxims would indicate that there must be an end to litigation otherwise the rights of persons would be in an endless confusion and fluid and justice would suffer. That is why the explanation to Order XLVII Rule 1 which is a wholesome provision has been inserted to the Code of Civil Procedure. It states that once there is a subsequent judgment overruling an earlier judgment on a point of law, the earlier judgment cannot be reopened or reviewed on the basis of a subsequent judgment.*

16.1 By parity of reasoning ,**the prescriptive ratio** which emerges is that concluded matters cannot be reopened on basis of subsequent judgement of SC.

16.2 Mind you ,**this is not to say that the decision operates prospectively**.Far from it.This line of reasoning is exactly in pari materia with Golaknath judgement{**1967 AIR 1643}** ,which remains the law of the land in regard to prospective overruling and stare decisis having been rendered by a 11 judge bench.

16.3 The decision in **Geo Miller & Co. Ltd. v. DCIT[2003] 262 ITR 237 (Cal.)** on s 154 being in pari materia with Explanation to O 47 R 1 is fully in consonance with Saraswati Agro(SC)(supra).To wit,

**''7. This Court is unable to accept the proposition that Parliament intended that mistake on the face of the record for the purpose of review under order 47 cannot be based on a subsequent exposition of law by the apex court while mistake apparent on the record for the purpose of reopening an assessment under section 154 can be based on a subsequent exposition of law by the apex court. This is something which is contrary to the common sense and does not commend itself to reason. This court is of the view that the *Explanation* added to rule 1 of order 47 of the Code of Civil Procedure in order to define an error or mistake apparent on the face of the record is equally applicable to section 154 of the Income-tax Act, 1961. In construing section 154 of the Income-tax Act, 1961, the court is justified in taking into consideration other enactments where identical provision has been defined by the same Legislature.''**

16.4 In the same decision , in para 6, **KIL KOTAGIRI**,relied by ITAT in NR Wires **,has been held to be per incuriam** ,for its failure to consider the Explanation.

Geo Miller has also referred to another decision of SC in **Jiyajeerao Cotton(see below)in support of its conclusion.**

## 17.An illustration of application of Explanation not considered by rectification orders:

EXPLANATION TO O 47 R 1 CPC APPLIED following Jiyajeerao Cotton Mills Ltd. v. ITO [1981] 130 ITR 710 (Cal.) (para 8) .

There were two conflicting prior decisions of SC under issue here.The case in question is **CIT *v.* Peerless General Finance & Investment Co. Ltd.** [2015] 232 Taxman 615 (Cal.) which held that :

*"8. In any event, the fact that the decision on a question of law on which the judgement is based has been reversed or modified by any subsequent decision of a superior court cannot be a ground for exercise of power under section 154 of the Income Tax Act. Reference in this regard may be made to a Division Bench judgement of this Court in the case of Jiyajeerao Cotton Mills Ltd. v. ITO [1981] 130 ITR 710 wherein the following views were taken :*

> *"...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 interpretation 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."*

*9.* ***There is still another way of looking at it. Under Order 47 Rule 1 of the Code of Civil Procedure*** *there is a provision for review. But the power of Court to review contains the following restriction.*

***"..Explanation:—*** *The fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior Court in any other case, shall not be a ground for the review of such judgment".*

*10. We are, as such, of the opinion that the learned Tribunal was justified in reversing the order passed in exercise of section 154 by the Assessing Officer.*

*11. In that view of the matter the first question is answered in the affirmative. The second question need not be answered for the purpose of disposal of the appeal.*

*12. Thus, the appeal is disposed of."*

## 18.SUMMARY BRUSHING ASIDE OF MEPCO{319ITR208 SC} {3 JUDGE BENCH} RULING:

The aspect of ignoring prescriptive ratio under the veneer of saying facts were completely different comes in front of us regarding MEPCO.Let us see the issue before the Court and its ruling.

**Issue** as framed by the hon'ble Court:

**''3. The short question which arises** in the facts and circumstances of these appeals is: **whether it was open to the Commissioner of Income-tax to rectify its own order under section 154 of the Income-tax Act, 1961, on the basis of the judgment of this Court [later judgment] in the case of *Sahney Steel* & *Press Works Ltd.* v. *CIT* [1997] 228 ITR 253 In short, in these appeals, we are concerned with the scope of section 154 of the Act.''**

**154 is in pari materia with 254(2)-this is beyond a pale of doubt.**

**Facts:** Appellant preferred revision petitions.In the revision petitions, appellant had pleaded that the subsidy amount was a capital receipt and, for that purpose, it relied upon the judgment of SC in the case of *CIT* v. *P.J. Chemicals Ltd.* [1994] 210 ITR 830. The revision petitions filed by the appellant under section 264 of the Act stood allowed by the Commissioner of Income-tax by order dated 30-4-1997.

**Decision:**

*5. Following the judgment of this Court in the case of Sahney Steel & Press Works Ltd. (supra), delivered on 19-9-1997, the Commissioner of Income-tax passed an order of rectification dated 30-3-1998. ……applying the ratio of the judgment of*

*this Court in the case of Sahney Steel & Press Works Ltd. (supra), the Commissioner of Income-tax sought to rectify its earlier order dated 30-4-1997, by invoking section 154 of the Act. ……..*

*6. At the outset, we may state that, in these appeals, we are concerned with assessments years 1993-94 and 1994-95. The short point involved in these appeals is, whether there existed a 'rectifiable mistake' enabling the Department to invoke section 154 of the Act? ……. In the present case, the Department did not invoke section 147 of the Act even when the matter was within the time-limit prescribed. Be that as it may, in these appeals, we are concerned with the meaning of the words 'rectifiable mistake'.*

*7. On the facts of the present case, we are of the view that* ***the present case involves change of opinion****. ……. After the judgment of this Court in Sahney Steel & Press Works Ltd.'s case (supra), the Commissioner of Income-tax has taken the view that the subsidy in question was a revenue receipt. Therefore, in our view, the present case is a classic illustration of change of opinion.*

*8. We may now deal with the judgment of the Calcutta High Court in the case of* ***Jiyajeerao Cotton Mills Ltd. v. ITO [1981] 130 ITR 710. ……..It was held by the Calcutta High Court that since there was conflict of opinion on computation of profits of priority industry for granting tax relief which conflict was resolved by the Supreme Court later on for the subsequent assessment year 1967-68, such subsequent decision of the Supreme Court did not obliterate the conflict of***

***opinion prior to it.*** *It was held that, under section 154 of the Act, rectification was not permissible on debatable issue.*

*10. Before concluding, we may state that in Deva Metal Powders (P.) Ltd. v. Commissioner, Trade Tax, UP [2008] 2 SCC 439, a Division Bench of this Court held that a 'rectifiable mistake' must exist and the same must be apparent from the record. It must be a patent mistake, which is obvious and whose discovery is not dependent on elaborate arguments.*

*11. To the same effect is the judgment of this Court in the case of CCE v. A.S.C.U. Ltd. 2003 (151) ELT 481, wherein it has been held that a 'rectifiable mistake' is a mistake which is obvious and not something which has to be established by a long drawn process of reasoning or where two opinions are possible. Decision on debatable point of law cannot be treated as "mistake apparent from the record".*

*12. For the afore-stated reasons, appellant-assessee succeeds, impugned judgment is set aside and, consequently, the appeals are allowed with no order as to costs.*

**[emphasis-supplied]**

Jiyajeerao stands clearly approved by the hon'ble SC since its ratio is interwoven into the facts of the case and constitutes one of the material bases on which the ruling came. This decision of Jiyajeerao came under consideration of hon'ble SC separately as well. Their Lordships of the Supreme Court were pleased to dismiss SLP (c) Nos. 8791-8793 of 1980 .

**19.SIMPLEX CONCRETE-NOT APPLICABLE?**

**Simplex Concrete Piles (India) Ltd.[2013] 358 ITR 129 (SC)** was brushed aside by Ld.ITAT stating that it was in context of s 147.

An elementary lesson in law is that there is a descriptive ratio and a **prescriptive ratio** to be read in every decision.The Ld. Tribunal probably lost sight of that.Let us look at the ratio of Simplex:

***''3……. ….In any event, at the relevant time, when the assessment order got completed, the law as declared by the jurisdictional High Court, was that the civil construction work carried out by the assessee would be entitled to the benefit of Section 80HH of the Act, which view was squarely reversed in the case of CIT v. N.C. Budharaja & Co. [1993] 204 ITR 412/ 70 Taxman 312 (SC). The subsequent reversal of the legal position by the judgment of the Supreme Court does not authorise the Department to re-open the assessment, which stood closed on the basis of the law, as it stood at the relevant time.''***

19.1 What does the concluding line mean?The ratio is in pari materia with the ITAT recalling/revisiting their orders and refixing them for hearing.In 147 the department is revisiting their order and re fixing them for hearing.Both are meant to correct perceived wrongs.Both,AO and ITAT are quasi judicial authorities.To use the veneer of difference in sections used is unsustainable.Simplex clearly applies ,that's the crux of the matter.

And importantly,MEPCO is a 3 JUDGE BENCH JUDGEMENT.

19.2 **REVERSAL OF INTERPRETATION OF A PROVISION OF STATUTE BY APEX COURT DOES NOT AUTHORISE CORRECTIVE ACTION IN SETTLED MATTERS VIA MISTAKE APPARENT ROUTE-be it 154 or 254(2):**that's the

sum and substance and the prescriptive ratio.If it is anything,at best its an **appealable error,but not a mistake apparent**-as Saurashtra Kutch itself says while defining mistake apparent from record.(see para 37 thereof ,cited supra).

## 20.KRISHENA KUMAR AND ANR. ETC. ETC. Vs.UNION OF INDIA AND ORS. 1990 AIR 1782

**This decision was lost sight off by the Ld.ITAT ,or not brought to the knowledge of the esteemed members which CLARIFIED THEORY OF PRECEDENT,RATIO DECIDENDI ARTICLE 141 AND STARE DECISIS:SC CONSTITUTION BENCH}.**

**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."*

*[EMPHASIS:SUPPLIED]*

**In *CIT vs. Balkrishna Malhotra 81 ITR 759* the hon'ble 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.**

**[Pointer:perhaps a ground for a review/curative petition of Checkmate?]**

## 21.FUNDAMENTALS IGNORED IN RECTIFYING ORDER(S)

The fundamentals have been ignored in NR Wires and other orders in the haste to knock off the relief given to the assessees.Lets have a look.

### 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 the alleged ''mistake'',in our case, visible /capable of being seen on the date the original relief giving 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?

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 decided 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.So the four year time limit is part of ''record''.

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, namely, the commission of an apparent error which is the provocation for the exercise of the rectificatory power."***

**22.Malabar Regional, PT Manuel, Jiyajeerao per Tribunal,ARE ALL COVERED BY SAL N ROW AND SAURASHTRA KUTCH:**

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 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.''***

***[emphasis:supplied]***

## 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.**

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

**23.1 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 of the case. 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.''

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 in Saurashtra Kutch .This para has been misread to mean that SC approved of subsequent decisions also creating a mistake apparent.Far from it.

In fact if we read para 33 of the NR Wire order ,it suggests that Suhrid decision was referred earlier and THEREAFTER ,the hon'ble SC gave its decision in Saurashtra Kutch, which may give legitimacy of some implied approval of Suhrid ratio.BUT IT WAS NOT SO.The decision and ratio came first ,in Saurashtra [see para 40 cited(supra)].Paras 41-46 ,where the hon'ble SC discusses retrospectivity ,is in context of the case-whether their ruling would impact the non application of Gujrat HC DECISION WHICH existed at the time ITAT DECISION WAS RENDERED.It is not in context of Suhrid which was a mention after the conclusion was reached.

Even taking an ultra liberal interpretation of paras 41-46 as meaning to be in context of Suhrid,what is meant is the decision shall apply even to (matters sub judice) though pertaining to a prior period.**It says nowhere that matters attaining finality shall be disturbed and those too as 'mistakes apparent from record'. I** draw force for this conclusion from the Saurashtra decision itself in para 43 ,where Salmond IS cited and it is quoted that '' ***The***

***overruling is retrospective, except as regards matters* that are *res judicataor accounts that have been settled in the meantime.*"**

**"EXCEPT AS REGARDS MATTERS THAT ARE RES JUDICATAOR ACCOUNTS THAT HAVE BEEN SETTLED IN THE MEANTIME"** –this is the key part in the quote.

What does it mean?

## g. **Suhrid Geigy Ltd.*v.* Commissioner of Surtax [1999] 237 ITR 834 (Gujarat) misapplied by Ld.ITAT:**

Further,and most respectfully to the para cited in Saurashtra Kutch ,but with reference to ITAT relying thereon,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."***

Respectfully I miss the part where SC decision rendered subsequently aspect is written as part of ratio of the decision.Citations referred may 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 in Checkmate.

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.

Other decisions cited in II.12(supra) need no further elaboration as the above discussion covers them.

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

**a.Predates EXPN O 47 RULE 1 OF CPC 1908.**

**b.APPLICATION under s 35 of 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.

*c.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.

d.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)]

**24.RECTIFICATION INITIATED SUO MOTU ONLY HAS A SIX MONTH LIMITATION:**

24.1 A point was raised in NR WIRES that even if rectification is possible on basis of subsequent SC decision ,the statute determined time limit of 6 months cannot be exceeded.The Tribunal disposed off the matter thus:

*''19.On a perusal of the aforesaid observations of the Hon'ble Apex Court, it is established beyond doubt that in case a mistake in the order passed by the Tribunal while disposing off the appeal is brought to its notice either by the assessee or by the department, then the Tribunal is obligated to exercise the powers vested with it under sub- section (2) of Section 254 of the Act* ***without being subjected to the restriction of the time limit of six months (earlier***

***four years), which is applicable only in a case where it seeks to rectify any mistake apparent from record on a suo-motto basis."***

This is legislating without authority ,a case of gross overreach by a quasi judicial authority,an interpretation which renders limitation law of 254(2) semi otiose,principle of harmonious construction goes for a toss, and makes a mockery of the statute.

## 24.2 What were these observations of hon'ble SC?

For the sake of clarity, the relevant observations of the Hon'ble Apex Court in the case of Saurashtra Kutch Exchange Ltd. (supra) are culled out as under:

".....orders passed by the Appellate Tribunal on appeal shall be final". Sub-section (2) enacts that the Tribunal may at any time within four years from the date of the order rectify any mistake apparent from the record suo motu. The Tribunal shall rectify such mistake if it is brought to notice of the Tribunal by the assessee or the Assessing Officer.

Sub-section (2) thus covers two distinct situations;

(i) It enables the Tribunal at any time within four years from the date of the order to amend any order passed under sub-section (1) with a view to rectify any mistake apparent from the record; and

(ii) It requires the Tribunal to make such amendment if the mistake is brought to its notice by the assessee or the Assessing Officer.

**22.** It was submitted that so far as the first part is concerned, it is in the discretion of the Tribunal to rectify the mistake which is clear from the use of the expression `may' by the

> Legislature. **The second part, however, enjoins the Tribunal to exercise the power if such mistake is brought to the notice of the Tribunal either by the assessee or by the Assessing Officer. The use of the word `shall' directs the Tribunal to exercise such power."**

24.3 Also a similar view was earlier taken by the Hon'ble Apex Court in the case of Sree Ayyanar Spinning & Weaving Mills Ltd Vs. CIT (2008) 301 ITR 434 (SC) per ITAT.

The Hon'ble Apex Court in its aforesaid order had held as under:

"Analyzing the above provisions, we are of the view that Section 254(2) is in two parts. Under the first part, the Appellate Tribunal may, at any time, within four years from the date of the order, rectify any mistake apparent from the record and amend any order passed by it under sub-section (1). Under the second part of Section 254(2) reference is to the amendment of the order passed by the Tribunal under sub-section (1) when the mistake is brought to its notice by the assessee or the Assessing Officer. Therefore, in short, the first part of Section 254(2) refers to suo motu exercise of the power of rectification by the Tribunal whereas the second part refers to rectification and amendment on an application being made by the Assessing Officer or the assessee pointing out the mistake apparent from the record. **In this case we are concerned with the second part of Section 254(2). As stated above, application for rectification was made within four years. Application was well within four years. It is the Tribunal which took its own time to dispose of the application. Therefore, in the circumstances, the High Court had erred in holding that the application could not have been entertained by the Tribunal beyond four years."**

24.4This is gross misreading of the statute and the two cited decisions.If we go by the Tribunal decision ,it means the assessee and the revenue have a carte blanche to submit a rectification application AT ANY FUTURE POINT OF TIME .None of the two cited parts say so at all.Para 22 ofSaurashtra ,so grossly misread ,merely says the Tribunal SHALL rectify the error brought to its knowledge whereas ,suo motu it may(or may not).**Where is 4 YEARS READ INTO IT?**

**24.5 Ayyanar interpretation** is even more perverse.For there, the application is within four years.If anything,it supports the cause of appellants because 4 years is juxtaposed with part 2 of the segregation which as per ITAT is in perpetuity.It puts paid to doctrine of finality,renders time limit semi otiose and in short gives common sense jurisprudence a complete goodbye.Jagdamba Oil Mills decision warned against exactly this type of segregated reading.And to say the interpretation is flowing from the two SC decsions is beyond all imagination.

See the anomalous absurdities which may result.The same mistake,discovered by ITAT after,say,7 months ,cannot be rectified by them suo motu,because it is time barred , ,but if revenue or the assessee ,bring the very same mistake to its notice,after ,say ,7 YEARS,the ITAT SHALL have to rectify it! Fantastic.

24.6 **''AND''**

The juxtapositioning of 'and' seems to have created a semantics issue and thereaftera legal one.The Ld Tribunal seems to have taken the understanding

that ‘and ‘creates a disjunctive position and hence 4 years(now 6 months)limit applies to it only.This seems prompted by the reading relied upon.The Euclid Theory parallel was never truer than this interpretation.Let us now examine what ‘’and’’ does in a sentence construction.

24.6.1 **‘And’ is a ‘’coordinating conjunction’’.** We use ‘and’ to connect two words, phrases, clauses or prefixes together. It is used as a function word to indicate connection or addition especially of items within the same class or type.

‘And’ is **a logical operator that requires both of two inputs to be present or two conditions to be met for an output to be made or a statement to be executed.**It signifies two forms or two words to be read together.

24.6.2 Any fundamental understanding of English grammar shall tell us what this means.What hon’ble SC meant in Saurashtra Kutch was that within 4 years Tribunal MAY amend the mistake apparent suo motu **and** ‘’ It requires the Tribunal to make such amendment if the mistake is brought to its notice…..’’The ‘’shall’’ is thereafter explained as ‘’mandatory’’ on ITAT.It says nowhere that the shall ,shall make the limitation evaporate.This is made clear by the phrase ‘’make such amendment’’.What is such amendment ?-a mistake apparent,in same genus as the suo motu rectifiable mistake .The 1971 structure was probably more legislatively sound.But principle of harmonious construction is to our aid here and needs adoption, for sanity to prevail.

**25.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.***"

## 26.CONTRARY ITAT DECISIONS SUBSEQUENT TO CHECKMATE RULING IN FAVOUR OF ASSESEE AND AGAINST NR WIRES

**26.1 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.''*

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

## 27.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.

27.1 Then we had clarificatory and implied overrulings like 285 ITR 158 ALLD being 'clarified'by 304 ITR 30 ALLD [Court said:***'' 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 ?None.

So how come this pick and choose?

Or maybe,since only 18 odd years have passed and the time limit does not apply,a few hundred assessee favouring orders can still be corrected by MAs brought in by Revenue!Let the gravy train run again .

## VI.CONCLUSION:

**28.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

29.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.

30.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.** ....."

Unfortunately the order of the Tribunal in NR Wire fails spectacularly on these touchstones of finest interpretative principles.

**31.KEY POINT** IS NOT RETROSPECTIVITY PER SE **Key point is ,even if retrospectivity be granted,can it be applied on a point debatable in law,having conflicting HC views,via the mistake apparent route? A decision of SC may operate retrospectively.It may only be clarifying the law as it stood right from the inception of the statute.It may apply to all the matters under agitation before various appellate fora.Blackstonian principle may be applicable in the Indian legal context.**Even if all these issues can be arguably conceded ,it still does not follow that automatically it upsets the settled decisions and that too ,to the extent that they become mistake apparent from record? They may at best be errors of judgement.But amenable only to appeal before higher courts.This reconciliation saves both-the retrospectivity theory ,as well as the settled principles of mistake apparent from record.**The judgments of the Supreme Court always operate retrospectively in nature unless explicitly stated so, for the reason that the judgments do not make law, but merely interpret a law or discover a**

**principle of the law.** This is what **Saurashtra Kutch Stock Exchange says.**In this context it has to be said that **Mepco** has not been given its pride of place inspite of it being an SC decision and right on the button.It is also a 3 judge bench **and it has been rendered SUBSEQUENT TO Saurashtra Kutch.**

**32.**Ultimately a decision is an opinion of a judge-a view of law.To circumscribe it by limiting the term ''opinion'' as opinion de hors the law is circumscribing both-the law as well as the concept of opinion.It would be appropriate here to briefly mention **what is ópinion' as defined by SC** itself,to expose the shortcoming in the reasoning of ITAT in NR Wires.:

To wit,

***''Opinion** means something more than more retailing of gossip or of hearsay; **it means judgment or belief, that is, a belief or a conviction resulting from what one thinks on a particular question**. Now, the " belief " or conviction may manifest itself in conduct or behaviour which indicates the existence of the belief or opinion''*[DOLGOBINDA PARICHA Vs. NIMAI CHARAN MISRA & OTHERS AIR 1959 SC 914/ 1959 SCR Supl. (2) 814 ,3 judge bench]

33.This is amply clear in the following discussion ,backed by Kerala HC decision.The decision of the hon'ble Supreme Court in the Mepco Industries case was relied upon by the **Kerala High Court in the case of Malabar Regional Co-op Milk Producers Union Ltd vs CCE, Cochin [2020 (372) ELT 708 (Ker)]** where the question agitated was whether a subsequent

declaration of law through decision of the Apex Court can be considered as a mistake apparent on the face of the record, enabling a rectification by the Tribunal under Section 35(2) of the Central Excise Act. In the case before the Kerala High Court, the Tribunal has passed an order (referred to as Annexure A order) setting aside the imposition of penalty under Section 11 AC of the Central Excise Act since duty was paid before issue of SCN. The Tribunal had observed that the Apex Court had set aside the penalty on similar grounds in the case of Rashtriyalspat Nigam Ltd vs Commissioner of C.Ex, Visakhapatnam [2004 (163) ELT 113 (Tri)]. However, in view of the later decision of the Supreme Court in the case of UOI vs Dharamendra Textile Processors and Others [2008 (231) ELT 3 (SC)] wherein it was held that there is no scope for any discretion with respect to imposition of penalty and that levy of penalty is mandatory under Section I1AC, the Tribunal proceeded to reopen the decided appeal as a 'rectification of mistake' and went on to decide that the appellant was liable to pay penalty equal to the duty evaded. In view of the finding of the Tribunal, the Hon'ble Kerala High Court examined the substantial question of law as follows-

*" Whether the Tribunal was* right *in reopening a concluded appeal under the guise of* r€0ti *cation* ***of a mistake apparent on*** *the face* ***of record,*** *based on a subsequent decision of the Hon'ble* ***Supreme Court, by treating that the subsequent declaration*** *of law is a reasonable ground to reverse* its *earlier decision in the appeal and* ***to decide*** *the matter afresh against the applicant?"*

33.1 The **Hon'ble Kerala High Court** made the following observation:

"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."**

33.2 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.***

34.This then is the crux of the matter.The gravy train of MAs by revenue and respectfully,the trigger happy recalls of Tribunals have to stop, to honour the unquestioned principles of jurisprudence and settled case laws binding on ITAT have to be given their due place.Golak Nath deserves its place in the sun ,long since denied.Doctrine of finality and stare decisis must now have their moment of glory.We need to borrow some wisdom from American jurisprudence on implications of overrulings.It is again ,however likely to be the Apex court's burden to decide once and for all , the aspect of mistake apparent from record.The prospect seems irresisitibly disturbing and compelling in equal measure.

***Anadi Varma***