IN THE INCOME TAX APPELLATE TRIBUNAL, 'A' BENCH MUMBAI

BEFORE: SHRI B R BASKARAN, ACCOUNTANT MEMBER
&
SHRI AMIT SHUKLA, JUDICIAL MEMBER

MA No.167/MUM/2023
(Arising out of ITA No.1634/Mum/2021)
(**Assessment Year :2019-20**)

Dy. Commissioner of Income Tax CIR 15(1)(1) Mumbai Room No. 451, 4th Floor, M.K. Road, New Marine Lines, Churchgate, Mumbai - 400020	Vs.	ANI Integrated Services Ltd., 624, Lodha Supremus II, A Wing North Tower, Road No. 22, Wagle Estate, Thane West, Thane - 400604
PAN/GIR No.AAHCA1626J		
(Appellant)	..	**(Respondent)**

Assessee by	Shri. Dharan Gandhi
Revenue by	Shri. H.M. Bhatt
Date of Hearing	**03/05/2024**
Date of Pronouncement	**29/05/2024**

आदेश / O R D E R

PER AMIT SHUKLA (J.M):

The aforesaid Miscellaneous Application has been filed by the Revenue against order dated 28/04/2022 in ITA No.1634/Mum/2021 which was filed by the assessee for A.Y. 2019-20.

2. The Revenue seeks to recall of the order on the ground that the issue of claim of deduction of the amount deposited on account of employees' contribution to PF and ESIC after due dates specified in PF /ESIC Acts, but before the due date filing of return as prescribed in Section 139(1) of the Act is not allowable, in view of the subsequent judgment of the **Hon'ble Supreme Court in the case of Checkmate Services P Ltd. Vs CIT (143 Taxmann.com 178) (SC) vide judgment and order dated 12/10/2022** has decided the controversy in favour of the department after observing and holding as under:-

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

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

55. In the light of the above reasoning, this court is of the opinion that there is no infirmity in the approach of the impugned judgment. The decisions of the other High Courts, holding to the contrary, do not lay down the correct law"

3. It has been contented by the revenue that, the Hon'ble Supreme Court has noted that the scheme of the Act is such that Sections 28 to 38 deal with different kinds of deductions, whereas Sections 40 to 43B spell out special provisions, laying out the mechanism for assessments and expressly prescribing conditions for disallowances. It was noted that the essential character of an employees' contribution, i.e., that it is part of the employees' income, held in trust by the employer is underlined by the condition that it has to be deposited on or before the due

date. The court pointed out to the finer distinction between Section 43B and the non-obstante clause in that section by observing that the said clause could not be applied to the deemed income u/s 36(1)(va) which was basically a money held in trust. Accordingly, it has been prayed:

> *"In view of the above, it is humbly prayed that the Hon'ble ITAT, Mumbai "A" Bench, may recall its order dated 22.04.2022 in No. 1634/Mum/2021 for A.Y. 2019-20 for rectification of the apparent error and to decide the appeal on merit and modify its order accordingly."*

4. Thus, revenue has filed this application u/s 254(2) of the Act in light of the subsequent judgment of the Hon'ble Supreme Court, that the Tribunal order not only should be recalled but should be decided in line with the subsequent judgment of the Hon'ble Supreme Court and therefore, it is a mistake apparent from record which deserves to be rectified and recalled within the scope and ambit of section 254(2) of the Act.

5. The brief facts are that assessee has filed its return of income for A.Y.2019-20 u/s. 139(1) on 02/10/2019. The CPC while processing the return had made disallowance of Rs.1,74,09,948/- on account of delay in deposits of employee's contribution towards provident fund and ESIC, beyond the due date of the respective Acts. Against the disallowance made by the CPC u/s. 143(1), assessee had preferred appeal before the ld. CIT(A) on the following ground:-

> *"The appellant had received employees' contribution to Provident Fund (PF and ESI) and from the total contribution received a part of funds i.e. Rs. 1,74,09,948/-was deposited*

by the appellant after the due date of the respective act but before the due date of filling of return as per section 139(1) of the Income Tax Act, 1961. The appellant did not fail to pay the employees PF and ESI so deducted by it. It was a mere delay of depositing the PF and ESI payments. The CPC also failed to appreciate the fact of the judgments passed by the various appellate authorities viz. High Courts and Supreme Court in favour of the appellants allowing such payments even if paid after the due date of respective acts but before the due date of filing income tax return as specified under section 139(1) of the Income Tax Act 1961. We therefore, request your good self to allow these employee contributions of PF and ESIC paid by the appellant."

5.1 Before the ld. CIT (A) following facts were brought on record:-

"In the case of ANI Integrated Services, Ltd., the employees of the Company are located at various sites across India & the World. Hence, for salary processing an extensive procedure is followed by the Company for proper disbursement of the Salary.

There is a 3 step process followed by the Company whereby after receiving the Salary Working from the site along with the documentary evidence (after the month end), the HR department verifies the working after which it is forwarded to the Finance Department for their verification as well.

This process is time consuming because of decentralised data collection which causes in a delay in payment of not only the Employees Contribution towards PF/ESIC but also the salary and hence the salary processing gets completed after the due date mentioned in the respective Act. Sometimes, additional time is required due to Bank/National Holidays.

It is to be noted that, as per the working submitted to the A.O though the payment is made after the due date, the delay in most cases is not greater than a few days. Further, the employee's contribution in most of these cases are deposited well before the due date of filing of return under the Income Tax Act."

6. On the allowability of the claim of deduction, assessee had relied upon series of judgments of the Hon'ble Bombay (Jurisdictional) High Court, wherein it was specifically held that if employee's contribution to the PF and ESIC were made before the due date of filing of return of income u/s 139(1), the same is allowable. Some of these judgments cited are as under:-

"1. ***Geekay Security Services (P.) Ltd. v/s Deputy Commissioner of Income Tax, Circle-3(1)(2) (Bombay High Court) [2019] 101 taxmann.com 192****, it was held that since the Commissioner has not examined the merits of the assessee's case, the revision petition is placed back to the Commissioner for disposal on merits. It is noticed that all ayments towards employee's contribution to the PF were made before the due date of the filing of the return. If that be so, surely, the Commissioner would be guided by the decision of this Court on the relevant issue namely – CIT v. Ghatge Patil Transport Ltd.*

2. ***Commissioner of Income-tax, (Central), Pune v/s Ghatge Patil Transports Ltd. (Bombay High Court) [2015] 53 taxmann.com 141 (Bombay),*** *it was held that no distinction is to be made between employer & employee's contribution to PF & the business deduction can be allowed as per the provisions mentioned in Section 438 of the Act & can be allowed if payment is made before the due date of furnishing the return of income.*

3. High Court Of Bombay in the case of ***Commissioner of Income-tax4, Mumbai v. Hindustan Organics Chemicals Ltd [2014] 48 taxmann.com 421 (Bombay).*** *The matter was in Supreme Court and the SLP has been dismissed as the department has subsequently withdrawn the appeal due to low tax effect (Commissioner of Income Tax v. Hindustan Organics Chemicals Ltd. [2020] 122 taxmann.com 171 (SC)) Hence, the Bombay High court decision still holds the ground.*

4. In the case of ***Pr. Commissioner of Income Tax -2 v. Pranav Agro Industries Ltd., Official Liquidator, High Court, Mumbai (INCOME TAX APPEAL 333 OF 2017) Order Dated – July 8****, 2019, the Honourable Bombay High Court has reiterated its earlier decision passed in the case of Commissioner of Income tax (Central), Pune v/s Ghatge Patil Transports Ltd."*

7. Apart from that assessee also quoted and relied upon more than 30 judgments of different Hon'ble High Courts across the Country wherein similar views were taken. However, the ld. CIT (A) taking note of the amendment brought by the Finance Act, 2021 by insertion of Explanation 5 to Section 43B to clarify the provision of Section in relying upon the provisions of Section, dismissed the assessee's appeal.

8. In the appeal filed by the Revenue before the Tribunal against the said appellate order, the Tribunal vide order dated 28/04/2022 following the co-ordinate Bench decision in the case of Kalpesh Synthetics Pvt. Ltd. in ITA No.2587/Mum/2021, wherein the Tribunal has discussed the scope of primafacie adjustment admissible u/s.143(1)(a) and after following various decisions of Hon'ble Jurisdictional High Court, allowed the claim of the assessee holding that, once the payment towards employees' contribution in PF & ESIC has been made before the due date of return of income, the same is allowable, at least adjustment cannot be made in intimation u/s 143(1)(a) for making the disallowance. It is important to note here that, this decision of the Tribunal had attained finality and there was no appeal filed against the said order. Thereafter, the Hon'ble Supreme Court in the case of **Checkmate Services P Ltd**

(supra) vide subsequent judgment dated 12/10/2022, held that essential condition for deduction of such payments is that, same should be deposited on or before the due date prescribed under the PF and ESIC Acts. Based on this subsequent judgment of Hon'ble Supreme Court, the Revenue now contends that order of the Tribunal should be recalled which otherwise had attained finality qua the parties and there was no *lis* pending in the case of the assessee.

9. Now, the issue which has been raised and argued by the ld. Counsel for the assessee that once the matter has attained finality, then based on subsequent judgment of a Higher Court, cannot be the ground to recall or to review the order within the scope and ambit of Section 254(2).

10. Subsection 2 to Section 254 reads as under:-

"254. (1) The Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit",

(1A)[[***]

(2) The Appellate Tribunal may, at any time within [six months from the end of the month in which the order was passed], 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 "[Assessing] Officer:

Provided that an amendment which has the effect of enhancing an assessment or reducing a refund or otherwise increasing the liability of the assessee, shall not be made under this sub-section unless the Appellate Tribunal has given notice to the assessee of its intention to do so and has allowed the assessee a reasonable opportunity of being heard:

11. Thus, the scope is of rectifying the mistake which is apparent from the record on the date of passing the order. On the scope of section 254(2) of the Act, it would be relevant to refer to the judgment of the Hon'ble Supreme Court in the case of **CIT vs. Reliance Telecom Ltd, reported in (2022) 440 ITR 1 (SC)** wherein Hon'ble Court has defined the scope of powers u/s.254(2). The Hon'ble Supreme Court held that the powers u/s.254(2) of the Act are akin to **Order XLVII Rule 1 CPC** and while considering the application u/s.254(2) of the Act, the Appellate Tribunal is not required to re-visit its earlier order and to go into details on merits. The powers u/s. 254(2) are that they are only to rectify or correct any mistake apparent from the record. The relevant Observation of the Court reads as under:-

"3.2 Having gone through both the orders passed by the ITAT, we are of the opinion that the order passed by the ITAT dated 18-11-2016 recalling its earlier order dated 6-9-2013 is beyond the scope and ambit of the powers under section 254(2) of the Act. While allowing the application under section 254(2) of the Act and recalling its earlier order dated 6-9-2013, it appears that the ITAT has re-heard the entire appeal on merits as if the ITAT was deciding the appeal against the order passed by the C.I.T. 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."***

12. At this point it is relevant to quote the provisions of **Order XLVII Rule 1 CPC.**

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 applies for the review.

[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.]

13. Ergo, the *Explanation* clearly envisages that the decision on a question of law on which judgment of the Court is based has been reversed or modified by the subsequent decision of a

superior Court in any of the case shall not be the ground for review of said judgment. Thus, there is a clear prohibition to review or revive the order simply based on the subsequent decision of a superior Court. This dictum has to be followed especially in the cases where *lis* has attained finality and qua both the parties the matter has been settled by the Court.

14 The **Constitution Bench of the Hon'ble Supreme Court in the case of Beghar Foundation vs. Justice K.S. Puttaswamy reported in (2021) 123 taxmann.com 344 (SC)** wherein the Hon'ble Supreme Court made following observations:-

"4. ***The present review petitions have been filed against the final judgment and order dated 26-9-2018. We have perused the review petitions as well as the grounds in support thereof. In our opinion, no case for review of judgment and order dated 26-9-2018 is made out. We hasten to add that change in the law or subsequent decision/judgment of a co-ordinate or larger Bench by itself cannot be regarded as a ground for review. The review petitions are accordingly dismissed****."*

15. Thus, when the Constitutional Bench of the Hon'ble Supreme Court has clearly opined that the change in law or subsequent decision / judgment of a Co-ordinate Bench or a larger Bench by itself cannot be regarded as a ground of review, then where is the scope of recalling the order within the power and ambit of Section 254(2). Admittedly, when the judgment of the Tribunal was passed, it was based on the law binding on the Tribunal and authorities below by series of judgments of the Hon'ble Jurisdictional High Court and other High Courts as

noted above. Thus the decision of the Tribunal was rendered, prior to the judgment of the Hon'ble Supreme Court in the case of Checkmate Services P Ltd (supra), and before this judgment, the law as was prevalent was that no *prima facie* disallowance can be made in case of payment towards employees' contribution to PF and ESIC if the same has been paid on or before the due date of filing of return of income. If the ld. AO or CPC has made the disallowance u/s. 143(1), contrary to the judgment of Jurisdictional High Court, then at that point of time such a disallowance was ostensibly unsustainable.

16. Be that as may be now that the Hon'ble Supreme Court has held that payment of employees' contribution of PF and ESIC should be made before the due date in respective Act for reduction, but that does not lead to an inference that where the matter had already attained finality and there is no appeal pending, then the subsequent judgment of the Hon'ble Supreme Court cannot be the ground for recalling of the matter as held by the Constitutional Bench of the Hon'ble Supreme Court. If the Revenue was aggrieved, then appeal should have been filed before the Hon'ble High Court. The judgment of the Hon'ble Supreme Court will apply in all the cases where the *lis* or cases are pending before any Court or forum. But once the issue in the appeal has attained finality following the earlier binding precedence of Jurisdictional High Court and there is no *lis* pending, and then based on subsequent judgment of a superior Court do not alter the finality of the judgment. If the Revenue's contention is to be accepted, then whenever a judgment is

reversed by a higher Court or by any Constitutional Court subsequently in some different case, then all the appeals and matters which have been decided following the earlier order of the Constitutional Courts / High Court or Supreme Court does not mean that all such orders should be recalled even when there is no *lis* pending and to disturb the finality.

17. This principle has been reiterated by the Hon'ble Supreme Court again in the case of **CIT vs. Gracemac Corporation reported in (2023) 456 ITR 135 vide order dated 03/07/2023,** wherein the Hon'ble Supreme Court had made the following observations:-

"5. *Apart from this, it has also been brought to our notice by the learned ASG that in CIT (International Taxation) v. Microsoft Corporation (MS Corp.) [2023] 151 taxmann.com 372/453 ITR 746 (SC) bearing SLP (C) Dy. No. 7076/2023, a coordinate Bench of this Court by an order dated 20-3-2023 dismissed the special leave petition and liberty has been reserved to reopen and/or revive the special leave petition in the event the review petition in Engineering Analysis Centre of Excellence (P.) Ltd. (supra) is allowed.*

6. *In our view, as on today, Engineering Analysis Centre of Excellence (P.) Ltd. (supra) is holding the field. In the event, the aforesaid decision is overruled, that cannot have a bearing on the present case, as it will have an impact only on the judgment passed in Engineering Analysis Centre of Excellence (P.) Ltd. (supra) and the cases to be decided thereafter.*

7. In other words, if once a judgment is passed by a Court following another judgment and subsequently the latter judgment is overruled on a question of law, it cannot have

an effect of reopening or reviving the former judgment passed following the over ruled judgment nor can the same be reviewed. This is having regard to the Explanation to Order XLVII Rule 1 of the Code of Civil Procedure, 1908 *(for short "CPC") which reads as under:*

"Order XLVII Rule 1 CPC. 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.

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."

8. The explanation is also in the nature of an exception. In other words, the Explanation being in the nature of a proviso is a qualifying or an exception to what is stated in Order XLVII Rule 1 CPC which states the grounds for seeking a review. Hence, the object and intendment of the Explanation must be given its full effect. The object and purpose of the Explanation can be related to the following three 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).”

(Emphasis added)

18. Again the **Hon’ble Supreme Court reiterated the same principle in the case of Commissioner of CGST and Central Excise (J And K) vs. Saraswati Agro Chemicals Pvt. Ltd in SLP (Civil) Diary No(s).18051/2023** and others, **vide judgment and order dated 04/07/2023** had made following observations:-

“……
……Thus, in substance, by filing the miscellaneous application the revenue was seeking a second review of the said judgment which is impermissible in law (Order XLVII Rule 9 CPC). 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."

(Emphasis added)

19. In a latest judgment, division Bench of three judges vide judgment and order dated 17/05/2024 in the case of **Govt. of NCT of Delhi vs. M/s. K.L. Rathi Steels Limited and Others in Miscellaneous Application No.414 of 2023 in Civil Appeal No.11857/2016** alongwith various other Miscellaneous Applications had elaborated this entire law and review based on subsequent judgment of the Hon'ble Supreme Court and interpreting Rule 1 of order XLVII of CPC specifically the scope of Explanation in Rule 1 as incorporated above.

***39.** Order XVLII does not end with the circumstances as section 114, CPC, the substantive provision, does. Review power under section 114 read with Order XLVII, CPC is available to be*

exercised, subject to fulfilment of the above conditions, on setting up by the review petitioner any of the following grounds:

***(i)** discovery of new and important matter or evidence; or*
***(ii)** mistake or error apparent on the face of the record; or*
***(iii)** any other sufficient reason.*

***40.** Insofar as **(i)** (supra) is concerned, the review petitioner has to show that such evidence (a) was actually available on the date the court made the order/decree, (b) with reasonable care and diligence, it could not be brought by him before the court at the time of the order/decree, (c) it was relevant and material for a decision, and (d) by reason of its absence, a miscarriage of justice has been caused in the sense that had it been produced and considered by the court, the ultimate decision would have been otherwise.*

***41.** Regarding **(ii)** (supra), the review petitioner has to satisfy the court that the mistake or error committed by it is self-evident and such mistake or error can be pointed out without any long-drawn process of reasoning; and, if such mistake or error is not corrected and is permitted to stand, the same will lead to a failure of justice. There cannot be a fit-in all definition of "mistake or error apparent on the face of the record" and it has been considered prudent by the courts to determine whether any mistake or error does exist considering the facts of each individual case coming before it.*

***42.** With regard to **(iii)** (supra), we can do no better than refer to the traditional view in **Chhajju Ram** (supra), a decision of a Bench of seven Law Lords of the Judicial Committee of the Privy Council. It was held there that the words "any other sufficient reason" means "a reason sufficient on grounds at least analogous to those specified immediately previously", meaning thereby **(i)** and **(ii)** (supra). Notably, **Chhajju Ram** (supra) has been consistently followed by this Court in a number of decisions starting with **Moran Mar Basselios Catholics v. Most Rev. Mar Poulose Athanasius**.*

***43.** There are recent decisions of this Court which have viewed 'mistake' as an independent ground to seek a review. Whether or*

not such decisions express the correct view need not detain us since the review here is basically prayed in view of the subsequent event.

44. *As noted above, the Explanation in Rule 1 Order XLVII was inserted in 1976. It reads: "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."*
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I. PRECEDENTS CONSIDERING THE EXPLANATION

48. *There are a few decisions of this Court where the Explanation to Rule 1 of Order XLVII, CPC has since been considered.*

49. *The earliest decision is* ***Shanti Devi v. State of Haryana****29 where the Court rejected the review petition by holding that the contention that the judgment sought to be reviewed was overruled in another case subsequently is no*
ground for reviewing the said decision. Explanation to Order XLVII Rule 1 of the Code of Civil Procedure clearly rules out such type of review proceedings.

50. *Reference may next be made to the decision in* ***Union of India v. Mohd Nayyar Khalil****30. There, the impugned order had followed a three-Judge Bench judgment of this Court. Such judgment was admittedly pending consideration before a Constitution Bench. Taking note of such facts, it was*
held that:

> ***"2. *** Even if the question regarding the legality of the said three-Judge Bench decision is pending scrutiny before the Constitution Bench the same is not relevant for deciding the review petition for two obvious reasons — firstly, this was not pointed out to the Bench which decided the civil appeal; and secondly, by the time the impugned order was***

> ***passed the three-Judge Bench judgment had not been upset and even in future if the Constitution Bench takes a contrary view it would be a subsequent event which cannot be a ground for review as is clear from the explanation to Order 47 Rule 1(2) of the Code of Civil Procedure ***".***
>
> ***(emphasis supplied)***

The principle, thus, laid down is that a decision being upset in the future would be a subsequent event which could not be a ground to seek review.

51. *In* ***Nand Kishore Ahirwar v. Haridas Parsedia****, a Bench of three Hon'ble Judges, while dismissing the review petitions before it, made pertinent observations reaching out to the very core of the said Explanation. This Court observed that simply because there has been a Constitution Bench decision, passed in the aftermath of the judgment impugned, would be no ground for a review of the said judgment. It also went on to observe that a reference to a Constitution Bench would stand on a still weaker footing.*

52. *The question arising for decision in* ***State of West Bengal v. Kamal Sengupta****32 was whether a tribunal established under section 4 of the Administrative Tribunals Act, 1985 can review its decision on the basis of a subsequent order/decision/judgment rendered by a coordinate or larger Bench or any superior court or on the basis of subsequent event/development. It was contended on behalf of the State that any subsequent decision on an identical or similar point by a coordinate or larger Bench or even change of law cannot be made the basis for recording a finding that the order sought to be reviewed suffers from an error apparent on the face of the record. After considering a host of decisions with a finetooth comb, the Court went on to cull out the principles of review in paragraph 35 of the decision which is extracted hereunder:*

> ***"35. The principles which can be culled out from the above noted judgments are:***

(i) The power of the Tribunal to review its order/decision under Section 22(3)(f) of the Act is akin/analogous to the power of a civil court under Section 114 read with Order 47 Rule 1 CPC.
(ii) The Tribunal can review its decision on either of the grounds enumerated in Order 47 Rule 1 and not otherwise.
(iii) The expression 'any other sufficient reason' appearing in Order 47 Rule 1 has to be interpreted in the light of other specified grounds.
(iv) An error which is not self-evident and which can be discovered by a long process of reasoning, cannot be treated as an error apparent on the face of record justifying exercise of power under Section 22(3)(f).
(v) An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
(vi) A decision/order cannot be reviewed under Section 22(3)(f) on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.
(vii) While considering an application for review, the tribunal must confine its adjudication with reference to material which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.
(viii) Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier."

(emphasis supplied)

53. *This Court, in* ***Subramanian Swamy v. State of Tamil Nadu****33, has read the Explanation as follows:*

> *"52. *** The Explanation to Order XLVII, Rule 1 of Code of Civil Procedure 1908 provides that if the decision on a question of law on which the judgment of the court is based, is reversed or modified by the subsequent decision of a superior court in any other case, it shall not be a ground for the review of such judgment. Thus, even an erroneous decision cannot be a ground for the court to undertake review, as the first and foremost requirement of entertaining a review petition is that the order, review of which is sought, suffers from any error apparent on the face of the order and in absence of any such error, finality attached to the judgment/order cannot be disturbed."*

54. *The final one is a decision of the Constitution Bench in* ***Beghar Foundation v. K.S. Puttaswamy****34. The majority was of the following view:*

> *"2. The present review petitions have been filed against the final judgment and order dated 26-9-2018. We have perused the review petitions as well as the grounds in support thereof. In our opinion, no case for review of judgment and order dated 26-9-2018 is made out. We hasten to add that change in the law or subsequent decision/judgment of a coordinate or larger Bench by itself cannot be regarded as a ground for review. The review petitions are accordingly*
> *dismissed."*

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89. *The relevant principles deducible from the precedents on the Explanation to Rule 1 that we have considered, for the purpose of deciding the present reference, are as follows:*

a) in case of discovery of a new or important matter or evidence, such matter or evidence has to be one which existed at the time when the decree or order under review was passed or made; and
b) Order XLVII would not authorize the review of a decree or order which was right when it was made on the ground of some subsequent event.
What follows is that Order XLVII of the CPC does not authorize a review of a decree, which was right, on the happening of some subsequent event.

90. *With the introduction of the Explanation, there seems to be little room for any serious debate on the point under consideration. Parliament, in its wisdom, has accepted what the Law Commission recommended. Resultantly, what the statute prohibits, cannot be permitted by the Court. If permitted, the Court would be acting contrary to law. What the Parliament has done, the Court cannot undo unless the law enacted by the Parliament is declared ultra vires. The vires of the Explanation not being under challenge during more than four decades of its existence, it is not for the Court to ignore the Explanation.*

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104. We, thus, hold that no review is available upon a change or reversal of a proposition of law by a superior court or by a larger Bench of this Court overruling its earlier exposition of law whereon the judgment/order under review was based. We also hold that notwithstanding the fact that Pune Municipal Corporation (supra) has since been wiped out of existence, the said decision being the law of the land when the Civil Appeals/Special Leave Petitions were finally decided, the subsequent overruling of such decision and even its recall, for that matter, would not afford a ground for review within the parameters of Order XLVII of the CPC.

(Emphasis added)

The aforesaid judgment of the Hon'ble Supreme Court had elaborately dealt the issue of power to rectify error and power to review and after referring to catena of decisions of the Hon'ble Supreme Court categorically held that, if the judgment has been passed by the Court following another judgment and subsequently by later judgment, the decision has been overruled or reversed, cannot have the effect of reopening or reviewing the former judgment based on following overruled judgment nor can the same be reviewed. The aforesaid judgment clearly clinches the issue that the subsequent judgment of the Hon'ble Supreme Court in the case of Checkmate Services P Ltd. Vs CIT reported in 143 Taxmann.com 178, the earlier judgment passed by the Tribunal based on the binding precedents cannot be recalled or reviewed. Once this is the law of the land, then we are unable to appreciate the contention of the Revenue that the judgment of the Tribunal should be recalled which has been passed following catena of judgment of the Hon'ble Jurisdictional High Court and other High Courts prevalent at that time in light of the subsequent judgment of the Hon'ble Supreme Court this would be against the principle of law laid down by the Hon'ble Supreme Court in the aforesaid cases specially once this law has been upheld by the Hon'ble Supreme Court in various judgments which we are bound to follow.

20. We are aware that many of the Co-ordinate Benches have recalled the order of the Tribunal on this issue on the principle of the Hon'ble Supreme Court in the case of **ACIT vs. Saurashtra Kutch Stock Exchange Ltd. reported in (2008) 305 ITR 227**.

In the aforesaid case the issue was that the Tribunal has passed an order on 27/10/2000 upholding the decision of CIT that assessee was not entitled for exemption u/s.11. Thereafter, the Miscellaneous Application was filed u/s. 254(2) to rectify the error committed by the Tribunal in the decision rendered by any appeal as it has not followed the judgment of the Hon'ble Jurisdictional High Court in the case of Hiralal Bhagwati vs. CIT reported in [2000] 246 ITR 188; Suhrid Geigy Ltd vs. Commissioner of Surtax reported in (1999) 237 ITR 834 which was already available on the date of the order. Thus, non-consideration of binding decision of the Jurisdictional High Court which was not followed by the Tribunal, rather it was not brought to the notice of the Tribunal therefore, Miscellaneous Application was filed and Tribunal had then recalled the order. Against this recalling of the order, Revenue had filed the writ petition which was dismissed by the Hon'ble High Court. Thus, before the Hon'ble Supreme Court one of the question was, whether the ITAT was right in exercising the powers under sub-section (2) of Section 254 on the ground that there was a mistake apparent from record committed by the Tribunal while deciding the appeal and whether it could have recalled the earlier order of the Tribunal on that ground. Thus, the core issue was, whether non-consideration of a decision of the Jurisdictional High Court or of the Hon'ble Supreme Court which was already existing at that time when the judgment was rendered by the Tribunal can be stated to be mistake apparent from the record. The Hon'ble Supreme Court upheld that the Tribunal was right in holding that it was a mistake which can be said to be mistake apparent

from the record which could be rectified u/s.254(2). There was no such principle which has been laid down that if after passing of the order of the Tribunal which has attained finality between the parties and in subsequent judgment is rendered by the superior Court, the same should also be recalled within the scope of Section 254(2). Though the Hon'ble Supreme Court had referred to a decision of Gujarat High Court in the case of Suhrid Geigy Ltd vs. Commissioner of Surtax reported in (1999) 237 ITR 834 that if the point is covered by the decision of the Hon'ble Jurisdictional High Court rendered prior or even subsequent to the order of rectification, it could be a mistake apparent from the record u/s. 254(2) and could be corrected by the Tribunal. However, the Hon'ble Supreme Court has referred this judgment and only held that if a judgment is being rendered by any High Court or Supreme Court that means the law was always being the same and if a subsequent decision alters the earlier one, the later decision does not make a new law. This observation of the Court does not lead to any inference to draw that any rectification order u/s. 254(2) can be based on subsequent judgment which comes later on. On the contrary, all the aforesaid judgments of Hon'ble Supreme Court which we have quoted above *extenso* have clearly held that there would be no review or recall of the order based on the subsequent judgment. Finally, the Hon'ble Supreme Court in the case of Saurashtra Kutch Stock Exchange Ltd. on the fact of the case has concluded as under:-

"In the present case, according to the assessee, the Tribunal decided the 47 matter on October 27, 2000. Hiralal Bhagwati was

decided a 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 junsdiction in exercising power under sub-section (2) of section 254 of the Act and in rectifying the "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."

21. The sequitor of the aforesaid decision of the Hon'ble Supreme Court is that, if already existing judgment of Jurisdictional High Court is not brought to the notice or attention of the Tribunal, then the Tribunal can recall the order while exercising the powers u/s.254(2).

22. Even otherwise also once in the latest decision in the case of **CIT vs. Reliance Telecom Ltd**. (supra) the Hon'ble Supreme Court have clearly held that the powers u/s. 254(2) of the Income Tax are akin to Order XLVII Rule 1 CPC, then it cannot be held that scope of power u/s.254(2) is beyond and much larger than scope of review as given in the Order XLVII Rule 1 of CPC. In fact, the scope of Section 254(2) is much limited and the scope of review is much wider. Accordingly, in view of the law laid down by the Hon'ble Constitutional Bench of the Hon'ble Supreme Court and several other judgments of Hon'ble Supreme Court cited supra, we hold that order of the Tribunal cannot be recalled based on the subsequent judgment of the Hon'ble Supreme Court when the order of the Tribunal had attained finality between the parties. Consequently, the Miscellaneous Application filed by the department is dismissed.

23. In the result, Miscellaneous Application of the Revenue is dismissed.

Order pronounced on 29th May, 2024.

Sd/-	**Sd/-**
(BR BASKARAN)	**(AMIT SHUKLA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai; Dated 29/05/2024
KARUNA, *sr.ps*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai