

**(1989) 08 DEL CK 0066**

**In the Delhi High Court**

**Case No : Income Tax C. No. 134 of 1987**

Commissioner of Income Tax

APPELLANT

Vs

K.L. Bhatia

RESPONDENT

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**Date of Decision : 03-08-1989**

**Acts Referred:**

**Citation : (1989) 25 ECR 283 : (1990) 182 ITR 361 : (1990) 51 TAXMAN 436**

**Hon'ble Judges : C.L. Choudhary, J;B.N. Kirpal, J**

**Bench : Division Bench**

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## **Judgement**

Kirpal, J.—This order will dispose of a petition u/s 256(2) of the Income Tax Act wherein it is prayed that the Tribunal should state the case and refer the following questions of law to this court :

" (1) Whether the Income Tax Appellate Tribunal was correct in law and on facts in holding that the material facts pointed out by the assessed in his miscellaneous application were not considered by the Tribunal, especially when all the facts pointed out by the Income Tax Appellate Tribunal in para 5 of their order were before the Income Tax Appellate Tribunal and have been considered by them in their order dated June 27, 1985 ?

(2) Whether the Income Tax Appellate Tribunal was correct in law and on facts in holding that there is a mistake in the Tribunal's order dated June 27, 1985, when there is no such mistake apparent from the record and all the facts mentioned by the Tribunal were considered by them in passing their order dated June 27, 1985 ?

(3) Whether the Income Tax Appellate Tribunal was correct in law and on facts in holding that the Tribunal inadvertently failed to consider the material facts regarding :

(i) repayment of loan by Smt. Prem Lata Bhatia;

(ii) failure to consider the Income Tax and wealth-tax returns filed by Smt. Prem

Lata Bhatia, especially when the Tribunal itself have given a finding on both these facts in their order dated June 27, 1985 ?

(4) Whether the Income Tax Appellate Tribunal was correct in law and on facts in recalling their order dated June 27, 1985, in I.T.A. No. 917/Del. of 1983 especially when there is no mistake apparent from the record as envisaged in section 254(2) of the Income Tax Act, 1961 ?

(5) Whether the Income Tax Appellate tribunal was correct in law and on facts in having recourse to section 254(2) of the Income Tax Act, 1961, in recalling their own order dated June 27, 1985, in I.T.A. No. 917/Del. of 1983 ? "

2. Briefly stated, the facts of the case are that, in respect of the assessment year 1976-77, the Income Tax Officer framed the assessment. Against that, in respect of property No. E-73, Kalkaji, New Delhi, the assessed filed an appeal to the Commissioner of Income Tax (Appeals), New Delhi. The contention of the respondent was that the said property belonged to his wife and not to him. The Commissioner of Income Tax accepted this contention. The Income Tax Officer then filed a second appeal to the Income Tax Appellate Tribunal. The Income Tax Appellate Tribunal, by a speaking order dated June 27, 1985, came to the conclusion that the wife of the respondent was only a benamidar and that the property, in fact, belonged to the respondent.

3. The petitioner then filed an application purported to be one u/s 254(2) of the Income Tax Act, in which it was stated that a mistake had been committed by the Tribunal and that it should recall its earlier order dated June 27, 1985. In the said application, submissions were made on merits to show that some material facts were not correctly noted by the Tribunal in its earlier order and that some facts had not been taken into consideration.

4. On January 30, 1986, the Tribunal accepted this application. The Tribunal noted that this was an application u/s 254(2) of the Act and, after dealing with the merits of the application, it came to the conclusion that there was a mistake in the Tribunal's order and, as such, it required to be recalled.

5. Being aggrieved, the petitioner herein filed an application u/s 256(1) of the Act requiring the Tribunal to state the case and refer the aforesaid questions of law to this court.

6. By order dated September 17, 1986, the Tribunal came to the conclusion that no question of law arose from its order because the said questions were only questions of fact.

7. Thereafter, the present petition u/s 256(2) has been filed.

8. At the outset, a preliminary objection has been raised by Shri G. C. Sharma. Learned counsel submits that the order dated January 30, 1986, of the Tribunal, from which the present reference is sought, is not an order passed under the provisions of the Act and, Therefore, an application u/s 256 is not maintainable.

The submission of learned counsel is that the said order is not passed u/s 254 and, Therefore, a reference application was not maintainable. Learned counsel submits that, in exercise of its inherent powers, the Tribunal can, de hors the Act, recall its earlier order if there are sufficient grounds for doing so.

9. In our opinion, there is no force in the contention of learned counsel for the respondent. Firstly, we find that the Tribunal has purported to exercise its jurisdiction u/s 254 of the Act. As has already been stated hereinabove, the respondent itself, in its application, stated that the said application was being filed u/s 254 of the Act. The Tribunal also, while dealing with the application, came to the conclusion that there was a mistake in its order and that, Therefore, the order had to be recalled. In addition thereto, the Tribunal noted that the application which had been filed was u/s 254(2) of the Act.

10. What is of greatest importance, however, is the fact that the application u/s 256(1) was dismissed by the Tribunal on merits. If the order dated January 30, 1986, had not been passed in the purported exercise of its powers u/s 254 of the Act, the Tribunal would not have entertained the application u/s 256(1). It is well-settled that a reference petition u/s 256 can be filed only against an order passed u/s 254 of the Act. It is also pertinent to note that the respondent did not raise such an objection before the Tribunal, when the Tribunal was dealing with the application of the petitioner u/s 256(1) of the Act. If such an objection had been raised, the Tribunal would itself have possibly clarified though, in our opinion, no clarification was required, stating that the order had been passed by it in exercise of its powers u/s 254 of the Act.

11. Secondly, we are also of the opinion that the Income Tax Appellate Tribunal can have no power to pass any order on merits, in exercise of its alleged inherent powers, if such orders are not contemplated to be passed under the provisions of the Income Tax Act.

12. The Income Tax Act is a self-contained code. The Income Tax Appellate Tribunal is a creation of the statute and its powers are circumscribed by the provisions of the Act. Appeals are filed before it u/s 253 of the Act. Section 254(1) contemplates disposal of the said appeal after giving an opportunity to both the parties of being heard. Sub-section (2) of section 254 enables the Tribunal to rectify any mistake apparent from the record. Sub-section (4) of section 254 specifies that save as provided in section 256, under passed by the Appellate Tribunal on appeal are final.

13. A reading of section 254 shows that the orders which are passed u/s 254 are final except under two circumstances : (1) if a rectification is called for, then such an order can be passed u/s 254(2), and (2) a reference can be made on questions of law arising out of this order under the provisions of section 256. As far as the Tribunal is concerned, section 254(4) provides that the orders passed by it on appeal are final.

14. Learned counsel for the respondent however, has drawn our attention to

certain decisions such as V. Venkataraman Vs. Controller of Estate Duty, Madras, , Commissioner of Income Tax, Madras Vs. Mtt. Ar. S. Ar. Arunachalam Chettiar, , Murlidhar Surda Vs. Income Tax Appellate Tribunal and Others, , Commissioner of Income Tax Vs. Dr. (Mrs.) Krishna Rana, , Commissioner of Wealth Tax Vs. Smt. Illa Dalmia, , Income Tax Officer Vs. S.B. Singar Singh and Sons and Another, and Income Tax Officer Vs. M.K. Mohammed Kunhi, , in an effort to show that, in exercise of its inherent powers, the tribunal can pass an order recalling its earlier order.

15. In V. Venkataraman Vs. Controller of Estate Duty, Madras, , the circumstances under which the question arose was that an appeal to the Tribunal had been dismissed in default of appearance of the assessed's representative. An application was filed for review of this order. The Tribunal held that it had no power to review its order passed in appeal. Petition under article 226 of the Constitution was filed and the Punjab High Court held that, in exceptional circumstances and in rare cases, the Tribunal can recall and quash its own order where it is shown that it was obtained by fraud or by a palpable mistake or was made in utter ignorance of a statutory provision and the like. In our opinion, the said decision is no authority for the proposition which is now sought to be raised before us. In that case, the Tribunal was called upon to recall its order not on merits but for the reason that there was a procedural irregularity, as proper opportunity had not been granted to the assessed to argue its appeal. The power which was sought to be exercised by the Tribunal was incidental or ancillary to the exercise of its appellate power. Incidental or ancillary power can, in our opinion, be exercised by a Tribunal for the furtherance of the exercise of statutory power which is conferred upon it. For example, in Mohd. Kunhi's case [1969] 71 ITR 815, the Supreme Court observed that the Tribunal had inherent power to grant stay of realisation of tax. Incidental or ancillary power is exercised not with respect to the merits of the appeal or the case but is primarily concerned with the procedural aspect or realisation of tax. Similarly in Murlidhar Surda's case [1973] 92 ITR 189, the Calcutta High Court held that, in exercise of its incidental or ancillary power, the Tribunal had the power to cancel an earlier order where the appeal had been decided without hearing the assessed. This is also in consonance with the provisions of section 254(1) which require the Tribunal to decide a case after giving both the parties to the appeal an opportunity of being heard. If, Therefore, the Tribunal is of the opinion that proper opportunity has not been granted, then the provisions of section 254(1) would not be regarded as having been complied with and the Tribunal would have been justified in exercise of its inherent powers, which would be ancillary or incidental in nature, to recall an earlier order and give an opportunity to any of the two parties to argue before the Tribunal. Arunachalam Chettiar's case [1953] 23 ITR 180, was one where the Supreme Court decided that, if an application had not been decided under the provisions of section 33(4) of the Income Tax Act, then a reference u/s 66(1) of the Indian Income Tax Act, 1922, was not maintainable. The Supreme Court did not, in that case, hold whether the

miscellaneous application had been filed and decided under the provisions of section 35 of the Indian Income Tax Act, 1922, or not. The reason for that was that from an order passed u/s 35 of the 1922 Act, no reference application could be filed u/s 66 of the 1922 Act. The position in law has now changed with the enactment of the 1961 Act where even from an order of rectification, a reference application u/s 256 can be filed.

16. The decision in *Illa Dalmia's* case, [1987] 168 ITR 306 (Delhi), in our opinion, goes against the contention that has been urged by Shri Sharma. In that case, the Tribunal had disposed of the appeals of the assessed in her absence. An application was then filed and it was contended that there has been no valid service which had been effected on her of the notice of hearing of the appeal. The Tribunal recalled its earlier order and heard the appeal afresh. The question which arose was that from the order recalling the appellate decision, whether a reference could be filed u/s 27 of the Wealth-tax Act. This court held that the Tribunal had the inherent power to restore the appeal which had been disposed of without Realizing that the notice of hearing had not been properly served. It was observed that the order of the Tribunal was maintainable u/s 35 of the Wealth-tax Act, which section provides for rectification of orders and is analogous to section 256(2) of the Income Tax Act, 1961. It was stated that (at page 307) "When the assessed brought to the notice of the Tribunal that valid service had not been effected on her and the Tribunal came to realise that the appellant had not been served, it was entitled to rectification u/s 35(1)(d) of the Wealth-tax Act and passed appropriate orders for amending the position". As no reference can be filed against a decision u/s 35 of the Act, the application of the Commissioner in that case was dismissed. In *Illa Dalmia's* case [1987] 168 ITR 306, this court also observed that even if one accepted the contention that the application was not traceable to section 35 of the Act, even then a reference application could not be filed because of *Commissioner of Income Tax, Madras Vs. Mtt. Ar. S. Ar. Arunachalam Chettiar*, . But the said observation of this court cannot, under any stretch of imagination, be regarded as a finding that the decision of the Tribunal, in that case, on the miscellaneous application amounted to a decision which was de hors the provisions of section 35 of the Wealth-tax Act. As we have already noted, the High Court came to a definite conclusion that the decision of the Tribunal, on a miscellaneous application having been filed, had been arrived at under the provision of section 35(1)(d) of the Wealth-tax Act.

17. In *Krishna Rana's* case [1987] 167 ITR 652, the Patna High Court was concerned with a situation where rehearing was ordered in the appeal because the assessed had not been heard when the appeal had, in the first instance, been disposed of. The High Court came to the conclusion that the order which was passed for rehearing did not come within the periphery of section 253. The High Court purporting to apply the ratio of *Commissioner of Income Tax, Madras Vs. Mtt. Ar. S. Ar. Arunachalam Chettiar*, held that no reference arose. It is however, pertinent to note that the Patna high Court did not refer to the provisions of section 254(2) of the Act nor was the decision of *Illa Dalmia's* case [1987] 168

ITR 306 (Delhi), brought to its notice. Had the attention of the court been drawn to section 254(2) or to the decision in Illa Dalmia's case [1987] 168 ITR 306 of this court, we have no doubt that the Patna high Court would have come to the conclusion that the order passed by the Tribunal, in that case, for rehearing of the case should be regarded as an order passed u/s 254(2) of the Act.

18. In S. B. Singar Singh's case [1970] 75 ITR 646, the Allahabad High Court held that even when express power to review its order is not conferred by a statute, a court or a Tribunal has inherent jurisdiction to rectify a wrong committed by itself when that wrong causes prejudice to a party for which that party is not responsible. We are, with respect, unable to subscribe to the said proposition.

19. As we have already observed, the Tribunal is a creation of the statute. It is an admitted case, and it is now well-settled, that though the Tribunal has no inherent power of reviewing its order on merits, the Tribunal has incidental or ancillary powers which can be exercised by it. But such power cannot be invoked to rehear a case on merits. The Tribunal can, after disposing of the appeal u/s 254(1), rehear the matter on merits only within the purview of section 254(2). The Supreme Court has held in Patel Narshi Thakershi and Others Vs. Shri Pradyumansinghji Arjunsinghji, , that the power to review is not an inherent power. It must be conferred by law either specifically or by necessary implication. It does not stand to reason that, if the power of review is not present with the Tribunal, it, nevertheless, can exercise such power indirectly when it can not do so directly. If the contention of learned counsel for the respondent is correct, then it could mean that, even on merit, the Tribunal can recall its earlier order and the hear the case afresh and pass a different order. If this is so, it would amount to the Tribunal exercising power of review when it does not have any such power. To give an example, under the provisions of the Code of Civil Procedure, Order 47 provides the circumstances in which a judgment may be reviewed. If the contention of learned counsel for the respondent is correct, then, applying the same analogy to a civil case, it would be open to a court to recall its judgment in a case where the provisions of Order 47 are not applicable, and then to rehear the case. With respect, we see no warrant for this in legal jurisprudence. The appellate court can hear a case and decide it on merits, once for all, and cannot keep on rehearing the same appeal over and over again. Full effect has to be given to the provisions of sections 254(4) which specifically provides that a decision of the Tribunal passed in appeal is final. This decision is final not only for the assessed but also final as far as the Tribunal itself is concerned.

20. We have, Therefore, no hesitation in coming to the conclusion that the Tribunal can only exercise its jurisdiction u/s 254 of the Act in the manner indicated above and, de hors the provisions in the Act, it has no jurisdiction to recall its order on merits.

21. Coming to the facts of the present case, in our opinion, the following

questions of law do arise from the Tribunal's order and we direct the Tribunal to state the case and refer the following questions of law :

" (1) Whether the Income Tax Appellate Tribunal was correct in law and on facts in holding that there was a mistake in the Tribunal's order dated June 27, 1985 ? "

(2) Whether the Income Tax Appellate Tribunal was correct in law and on facts in having recourse to section 254(2) of the Income Tax Act, 1961, in recalling their own order dated June 27, 1985 ? "

22. The petition is disposed of. There will be no order as to costs.