

(2000) 07 RAJ CK 0047
In the Rajasthan High Court
Case No : IT Appeal No. 9 of 2000 4 July 2000

COMMISSIONER OF INCOME TAX

APPELLANT

Vs

RAMESH CHAND MODI

RESPONDENT

Date of Decision : 04-07-2000

Acts Referred:

Income Tax Act, 1961 — Section 158BC, 254

Citation : (2000) 163 CTR 424

Hon'ble Judges : Rajesh Balia, J; Mohd. Yamin, J

Bench : Full Bench

Advocate : Sandeep Bhandawat, for the Appellant;

Judgement

Rajesh Balia, J.

Heard learned counsel for the appellant.

2. The appellant challenges the order passed by the Tribunal, dated 20-9-1999, in Misc. AppIn. No. 43/Jp/1998. The assessee -respondent preferred an appeal against the order passed by assessing officer u/s 158BC of the Income Tax Act, 1961. That appeal was decided by the Tribunal on 29-6-1998 and in respect of that order miscellaneous application was made by the assessee pointing out that grounds No. 31 to 42 of the appeal remain to be decided, this was a mistake apparent on the record and deserves to be corrected. The Tribunal agreeing with this contention that the grounds referred to in memo of appeal at Nos. 31 to 34 though taken by the assessee remain undecided in particular it quoted ground No. 34 and was of the view that this ground goes to the very basis of the order and though this ground taken by the assessee in his appeal could not be considered "due to oversight". On the aforesaid conclusion, the application was allowed and the order dated 29-6-1998 was recalled. The appeal was ordered to be heard afresh for deciding in accordance with law.

3. Learned counsel for the appellant urged that the Tribunal has no general power of review and the recalling of the earlier order amounts to reviewing the

earlier order that was beyond the scope of the authority of the Tribunal. It was further stated by the learned counsel that merely because the Tribunal failed to decide those grounds without comprehending the nature of the issues which did not amount to a mistake apparent on the record. We are unable to accept the contention of the learned counsel. The Tribunal has been empowered u/s 254(2) to rectify its own order in case there exists mistake apparent on the record. The power is akin to one of the grounds on which a civil court is permitted to rectify its own judgment under order 47, rule 1 which empowers a court to review its own order if on account of some mistake or error on the face of record an aggrieved party applies for such review. The expression "error apparent on the face of record" has received judicial interpretation concerning various mistakes which have been pointed in the facts of many cases. Relevant for the present purposes, we may notice the decision of the Supreme Court in *MMB. Gathohcos v. M.P. Anthanasius* AIR 1954 SC 526 wherein a review application filed by the aggrieved person before the Travancore and Cochin High Court was rejected. However, reversing the decision of the Travancore and Cochin High Court, the court said:

"The majority judgments of the Full Bench were defective on the face of them in that they did not effectively deal with and, determine an important issue in the case on which depended the title of the plaintiffs and the maintainability of the suit. This was mainly an error apparent on the face of the record. "

This is what the Tribunal has said in the present case that it failed to consider the four grounds taken in the memo of appeal and has referred ground No. 34 in its order. We, in the circumstances, are of the opinion that the Tribunal has exercised its jurisdiction u/s 254 in accordance with the settled principles for determining the "mistake apparent from the face of the record" and discovering the mistake on the face of the order has acted in furtherance of correcting the order.

4. Learned counsel has referred to two decisions. One is *Income Tax Officer Vs. Income Tax Appellate Tribunal* and Another, It was a case in which as a result of search conducted at the business as well as, the residence of the assessee in the ensuing proceedings an addition of Rs. 80,000 was made in his income for the assessment year 1978-79. The appeal of the assessee before the Income Tax Officer and the Commissioner (Appeals) failed. Thereafter, the assessee moved the Tribunal u/s 254(2) of the Act for rectification of the mistake. The mistake which was pointed out by the assessee was that the conclusions reached by the Tribunal were wrong on facts. It is in these circumstances, the court observed that it does not empower the Tribunal to review its own order and recall its earlier order. There is no doubt to the proposition that the Tribunal does not enjoy the powers of reviewing in general its order as are available with the civil court under order 47 on various grounds. The power to rectification is confined to the ground "mistake apparent on the face of record". The order of learned Single Judge does not reveal facts on which the order of recalling the Tribunal's order

was founded viz. whether there existed any mistake of omitting the decision on an important issue in the case or not. But obviously it was not a case in which the Tribunal has failed to decide an important issue by inadvertence as was the case before the Supreme Court referred to above.

5. The another decision on which the reliance was placed is Commissioner of Income Tax Vs. Ramesh Electric and Trading Co., This decision, in our opinion, has not decided the issue which has been raised before us because it was not a case in which the Tribunal has failed to decide an important issue raised before it. It was only a case that while deciding a issue the Tribunal has not taken into consideration some of the arguments. That is to say that Tribunal has failed to consider one or some of the aspects of the issue decided by it. This case, in our opinion, is clearly not falling within the four corners of the controversy which we are considering wherein the Tribunal opining that it failed to decide the grounds raised by the assessee before it in memo of appeal by not properly considering what those grounds are, it has stated clearly that "by oversight it has failed to take notice of those grounds". In these circumstances, the case in hand clearly falls within the ratio laid by the Supreme Court and the two decisions cited by the learned counsel do not govern the facts of the case.

6. Once the conclusion is reached that the Tribunal had power to rectify mistakes on the face of record and that there existed mistakes on the face of record that the Tribunal has not dealt with the important issue arising in the case which goes to the root of the matter, the only consequential order of rectification that could be passed was to recall the earlier order and make a fresh order deciding the issue which left undecided after hearing the parties on that issue. That undecided issue could not have been decided in favour or against any party without hearing them in that regard. The contention of the learned counsel that there is no power to recall and substitute another order as a result of rectification because it amounts to review is not well founded. Once a mistake on the face of the record is established what order should follow to correct that mistake shall always depend on the facts and circumstances requiring to rectify the mistake. If the mistake is one which requires determination of some undecided issue because it is not been decided thoughraised, the procedure that would follow the discovery of such mistakes is to recall the order, and decide the case afresh or to decide that issue after affording an opportunity of hearing to parties concerned and pass a fresh order in the light of finding on such issue. The order u/s 254(2) is not confined to arithmetical or clerical mistake, nor only to correct substantive mistakes but also of procedural mistakes.

7. The whole contention of learned counsel for the appellant is found on the premises that recalling of the order for making a fresh order amounts to review and not rectification, While it is true that power of rectification of an order is far narrower than power to review generally, but the methodology of rectifying the order when mistake apparent from record is found, may be to correct a mistake in substantive aspect of the order as well as mistake in procedural aspect of

making order. Recalling of an order for correcting an apparent mistake in procedural aspect cannot be equated with review. For illustration purposes, if from the record it appears that one of the parties has not at all been heard and the order has been made in breach of principles of natural justice going to the root of the matter. The only appropriate method of correcting such mistake is to recall the order and make a fresh order after affording an opportunity of hearing to such party. So also when an order is made ex parte when a party absents himself on any date of hearing. If the party shows sufficient cause for his absence the court has power to make a fresh order after recalling the earlier order by affording a hearing to such party. Similarly, as in the present case, where the Tribunal fails to decide some of the questions raised before it inadvertently or by oversight, adopting the similar course is the requirement of correcting such mistake. In all such cases, ordinarily the court or the Tribunal acts ex debito justitiae to prevent abuse of process, even in the absence of specific provision.

8. It is apt to notice the following observation made by A.P. Sen J. in *Grindlays Bank Ltd. Vs. Central Government Industrial Tribunal and Others*, which repelling a contention that order setting aside an ex parte order amounts to review which cannot be exercised in the absence of express authorisation by law.

"The question that a party must be heard before it is proceeded against is one of procedure.....different consideration arise on review. The expression review is used in two distinct senses, namely (1) procedural review which is either inherent or implied in a court or a Tribunal to set aside a palpable erroneous order passed under a misapprehension by it, and (2) a review on merits when the error sought to be corrected is one of law and is apparent on the face of the record. It is in the latter sense that the court in *Narshi Thakershi*'s case held that no review lies on merit unless a statute specifically provides for it, obviously when a review is sought due to a procedural defect, the inadvertent error committed by the Tribunal must be corrected ex debito justitiae to prevent abuse of its process and such power inheres in every court or Tribunal."

9. Where a Tribunal fails to notice question raised before it inadvertently under any misapprehension, in correcting such error by recalling the order made without deciding such question which goes to root of the matter for deciding the same appropriately falls in such category of procedural mistakes which such Tribunal must correct ex debito justitiae, even in the absence of any power. The present case falls in that class.

Thus, in our opinion, no substantial question of law arises in this appeal. The appeal is, therefore, dismissed in limine.