

**(1996) 03 MP CK 0060**

**In the Madhya Pradesh High Court**

**Case No : Miscellaneous Civil Case No. 316 of 1992**

Commissioner of Income Tax

APPELLANT

Vs

Umeshchand K. Patel

RESPONDENT

**Date of Decision : 22-03-1996**

**Acts Referred:**

Income Tax Act, 1961 — Section 254, 256

**Citation : (1997) 225 ITR 1050**

**Hon'ble Judges : Nirmal Kumar Jain, J; Asha Ram Tiwari, J**

**Bench : Division Bench**

**Advocate : D.D. Vyas, for the Appellant; None, for the Respondent**

## **Judgement**

N.K. Jain, J.—By this application u/s 256(2) of the Income Tax Act, 1961, the applicant/Department seeks a direction to the Income Tax Appellate Tribunal, Indore, to state the case and refer the undernoted questions said to be of law for the opinion of this court, arising out of its common order dated November 30, 1990, passed in M. A. Nos. 50 and 51/Ind. of 1990, and its refusal to refer the case by order dated December 30, 1991, passed in R. A. Nos. 22, 23 and 24/Ind. of 1991 :

" 1. Whether, on the facts and in the circumstances of the case, the material contained in Income Tax Appellate Tribunal's order in M. A. Nos. 50 and 51/Ind. of 1995 dated November 20, 1990, justifies recalling its earlier order in ITA Nos. 842 and 843/Ind. of 1985, 691 and 692/Ind. of 1985, 584/Ind. of 1987 and 833/Ind. of 1985 dated September 4, 1990 ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal has power to review its own order ?

3. Whether the Tribunal was justified in invoking the provisions of Section 254(2) when there was no mistake apparent from the record ?

4. Whether, on the facts and in the circumstances of the case, the Tribunal's

order is apparently perverse ?"

2. The assessment year involved is 1977-78 for which the income of the non-applicant/assessee was returned at Rs. 1,130 and which was finally assessed at Rs. 74,484. Since the assessee committed a default as envisaged u/s 271(1)(c), the Assessing Officer initiated proceedings and imposed penalty of Rs. 3,320. The matter went up to the Tribunal which by its consolidated order dated September 4, 1990, passed in I. T. A. No. 841 and 842/Ind of 1985, 691 and 692/Ind. of 1985 for the assessment years 1975-76 and 1977-78, respectively, in the case of Tirupati Construction Co., Dewas, and in I. T. A. Nos. 458/Ind. of 1987 and 833/458/Ind. of 1987 ; 833/Ind. of 1985 for the assessment years 1971 to 1978 (sic) in the case of the present non-applicant/assessee, confirmed the aforesaid penalty.

3. Subsequently, the assessee moved the applications for rectification u/s 254(2) of the Act. The Tribunal by its common order dated November 30, 1990, passed in M. A. Nos. 50 and 51/Ind. of 1990, allowed the applications and recalled its aforesaid order dated September 4, 1990, and directed that the appeals be fixed for hearing afresh. The Tribunal while passing the order, inter alia, observed :

" For the present it is not necessary to consider what is pointed out as mistake in the order of the Tribunal by the assessee. What we find is that a factual mistake has crept in the order of the Tribunal in the case of the assessee, Tirupati Construction Co., proceeded on the assumption of the fact that it filed a return of income for the assessment year 1975-76 on February 26, 1981, in compliance with the notice u/s 148. In fact, the notice u/s 148 for the assessment year 1975-76 was issued and served on the assessee-firm on January 7, 1988. This wrong assumption of fact has vitiated the order. Since the order is a consolidated one, it is necessary to recall the entire order for fresh findings in the light of facts obtained in each case and the correct law applicable thereto."

4. Dissatisfied with the order of the Tribunal, the Department moved a reference application u/s 256(1) requiring the Tribunal to state the case and refer the abovenoted questions for the opinion of this court. The Tribunal by its order dated December 30, 1991, rejected the reference application holding that no referable question of law arises out of the order of the Tribunal. The Department has, therefore, come up before this court u/s 256(2).

5. We have heard Shri D.D. Vyas, learned counsel for the applicant/ Department. None has appeared for the non-applicant/assessee.

6. We are satisfied that the order of the Tribunal recalling its earlier order is based on appreciation of facts and, therefore, it does not give rise to any referable question of law. In fact, no adverse final order is passed against the Department inasmuch as the Tribunal by its order dated November 30, 1990, has merely directed for hearing the appeals afresh. The order of the Assessing Officer imposing penalty, therefore, still survives and the Department would be free to

support the order before the Tribunal. In case the Department suffers any adverse order it may take recourse to the appropriate provision of the Act and seek reference to this court. For the present no referable question of law arises out of the order of the Tribunal.

7. Consequently, the present application is dismissed but without any order as to costs, Counsel's fee Rs. 750 is allowed, if certified.