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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1247 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE A.R.DAVE
and
Hon'ble MR.JUSTICE D.A.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

ASSISTANT COMMISSIONER OF INCOME TAX

Versus

SAURASHTRA KUTH STOCK EXCHANGE LTD.

Appearance:
MR PRANAV G DESAI for Petitioner No. 1
MR SN SOPARKAR FOR MRS SWATI SOPARKAR
for Respondent No. 1

CORAM : MR.JUSTICE A.R.DAVE
and
MR.JUSTICE D.A.MEHTA

Date of decision:31/03/2003

CAV. JUDGEMENT

(Per : MR.JUSTICE D.A.MEHTA)

1. This is a petition filed under Articles 226 and 227 of the Constitution of India against the order dated 05/09/2001 passed by the Income Tax Appellate Tribunal, Ahmedabad Bench 'C', Ahmedabad (Tribunal) in Misc. Application No.31/Rajkot/2000 under Section 254(2) of the Income Tax Act,1961 (hereinafter referred to as 'the Act'). The petitioner is the Assistant Commissioner of Income Tax, Circle I, Rajkot having jurisdiction to assess the respondent assessee i.e. Saurashtra Kutch Stock Exchange Limited.

2. The assessee returned Nil income on 29.10.1996 for assessment year 1996-97 seeking exemption under section 11 of the Act. Before the assessment was finalized on 3/2/1999 under section 143(3) of the Act, the assessee was granted certificate of registration dated 20/02/1998 under section 12A of the Act by the Commissioner of Income Tax, Rajkot. The assessing officer vide assessment order dated 03/02/1999 rejected the claim for exemption under section 11 of the Act.

3. The assessee went in appeal before the Commissioner of Income Tax (Appeal) I, Rajkot. However, on 28/02/2000 the C.I.T.(Appeal) confirmed the order of the assessing officer denying exemption under section 11 of the Act. The assessee preferred Second Appeal before the Income Tax Appellate Tribunal, Rajkot Bench, Rajkot which came to be registered as ITA No.69/Rajkot/2000. The Tribunal for the reasons stated in its order dated 27/10/2000 confirmed the orders of the assessing officer and C.I.T. (Appeal).

4. The assessee filed a Misc. Application dated 13/11/2000 seeking rectification of the aforesaid order dated 27.10.2000. In the said Misc.Application various mistakes of facts and law were pointed out. One of the principal contention raised in the Misc.Application was that the applicant assessee had relied upon a decision of this Court in the case of Hiralal Bhagwati Vs. C.I.T., copy whereof had been placed at page nos.268 to 278 in Paper Book No.3 submitted before the Tribunal during the course of hearing and the said decision of jurisdictional High Court, though binding on the Tribunal, had not been considered or even referred to by the Tribunal. Another factual error raised in the Misc.Application pertained to the aspect of prohibition as to declaration of dividend provided by the articles of the assessee/stock exchange, despite which according to the assessee, the Tribunal had held that it was permissible to the assessee to distribute whole or part of its income by way of dividend

amongst member shareholders. The assessee therefore prayed that the order dated 27/10/2000 required rectification and for this purpose said order may be recalled and the Tribunal restore the appeal for fresh disposal after hearing both the sides.

5. It is pertinent to note that by the time aforesaid Misc. Application dated 13/11/2000 was filed, the Members constituting Rajkot Bench of the Tribunal stood transferred and hence at Rajkot no Bench of the Tribunal was functioning. Misc. Application was fixed on 20/12/2000 at Rajkot when the assessee sought adjournment. Next hearing was fixed on 28/02/2001 at Ahmedabad when the petitioner sought adjournment. This fixation at Ahmedabad took place because in absence of Bench being available at Rajkot the Vice President of the Tribunal had transferred the said Misc.Application from Rajkot Bench to Ahmedabad Bench. Thereafter, the said Misc.Application was posted for hearing on 30/03/2001 but due to non availability of the Bench at Ahmedabad the matter stood adjourned. Ultimately the said Misc. Application was posted for hearing on 25/05/2001 and the same was fully heard by the Bench to which the said Misc. Application was assigned.

6. On 05/09/2001 the Tribunal passed the order on the Misc. Application holding that as there was a mistake apparent from the record the order of the Tribunal dated 27.10.2000 was recalled and the Registry was directed to refix the case for fresh disposal. It is this order which is under challenge in the present petition.

7. Mr.P.G.Desai, learned Counsel appearing on behalf of the petitioner contended that :

[a] The Tribunal had wrongly exercised jurisdiction under section 254 (2) of the Act;

[b] Section 254(2) of the Act only permitted amendment of an order with a view to rectifying a mistake apparent from the record, and the said provision did not permit review in the guise of rectification;

[c] The Tribunal was a creature of statute as could be seen from provision of section 252 of the Act and hence it could not go beyond the powers granted under the Act;

[d] Under section 254(4) of the Act the order passed by the Tribunal in appeal was final and by purported exercise under section 254(2) of the Act such finality could not be disturbed;

[e] There was no mistake in the order dated 27/10/2000, and alternatively there was no mistake apparent from record;

[f] The appeal was heard by the Rajkot Bench of the Tribunal while the Misc.Application was heard and disposed off by order dated 05/09/2001, by Ahmedabad Bench "C" despite the fact that Rajkot Bench had in the meantime started functioning from 28/05/2001;

[g] The Tribunal did not have power to recall its order as could be seen from the provisions of Rules 24 and 34A of the Income Tax Appellate Tribunal Rules,1963 (The Tribunal Rules);

[h] Though the assessee might have cited judgment of jurisdictional High Court at the time of hearing of the appeal, unless it was shown that the said judgment was applicable to the facts of the case, it could not be stated that it was binding precedent which would require the Tribunal to exercise power under section 254(2) of the Act;

[i] Under Section 254(2) of the Act the Tribunal cannot obliterate its earlier findings/reasonings/order and though the order may change i.e. outcome or conclusion may change, original order cannot be wiped out or substituted;

[j] The judgment in the case of Hiralal Bhagwati (supra) was not dealing with the controversy which was there before the Tribunal and the observations on which the assessee placed reliance were per in curiam and thus did not give jurisdiction to the Tribunal to exercise power of rectification;

[k] There was a contrary decision of this Court in the case of Shantagauri Ramniklal Trust and others Vs.CIT, reported in 239 ITR 528(Gujarat) and hence there were debatable questions of law;

[l] It was settled that once there were debatable issues there was no mistake apparent on the record.

8. Mr.S.N.Soparkar, learned Senior Counsel appearing on behalf of respondent assessee submitted that the position in law was well settled that the decision of jurisdictional High Court, if not taken into consideration by an authority, would constitute an apparent mistake and the Tribunal had rightly exercised power of rectification :-

[a] That there was no conflict between the decision in case of Hiralal Bhagwati (supra) and Shantagauri Ramniklal (supra);

[b] That once a mistake was shown to have occurred it would constitute a valid reason to recall the order, regardless of the fact that the mistake had been caused by a party;

[c] That the argument regarding hearing of the Misc.Application by Ahmedabad Bench and not by Rajkot Bench was not available to the petitioner as Vice President had, in his administrative capacity, as authorised by Rules passed the order transferring Misc. Application from Rajkot Bench to Ahmedabad Bench; that the petitioner had not only not raised any objection but had participated in the hearing of the Misc.Application before the Ahmedabad Bench;

[d] That Rule 34A of the Tribunal Rules itself provided for posting Rectification Application for hearing;

[e] That various judgments regarding review jurisdiction relied on by the petitioner were not applicable on the facts of the case;

[f] That whether an order was required to be recalled or not before rectification could be made would depend on the facts of the case and the issue involved;

[g] That the Tribunal in the impugned order dated 05/09/2001 had posted the appeal for rehearing and no prejudice had been caused to the petitioner by the said order and no vested right could be claimed by the petitioner.

9. The parties before us are at ad idem that the Tribunal has jurisdiction to rectify but it has no jurisdiction or power to review its own order. There is no dispute as regards the well settled proposition that power of review is not an inherent power and must be conferred by law, either specifically or by necessary implication. The only point wherein the parties joined the issue is whether there is a mistake apparent from record and if yes, what should be the procedure or modality to be adopted by the Tribunal for rectifying the said mistake.

10. Section 252 of the Act states that the Central Government shall constitute an Appellate Tribunal consisting of as many judicial and accountant members as it thinks fit to exercise the powers and discharge the functions conferred on the Appellate Tribunal by the Act. Section 254 of the Act is a provision relating to orders of Appellate Tribunal. Section 255 of the Act regulates procedure of the Tribunal. Sub-section (1) of Section 255 of the Act lays down that the powers and functions of the Tribunal be exercised and discharged by Benches constituted by the President of the Appellate Tribunal. A Bench of the Tribunal shall consist of a Judicial Member and Accountant Member, however, depending on the monetary limit stipulated in sub-section (3) of Section 255 of the Act, it would be open to the President of the Tribunal or any other member authorised in this behalf by the Central Government to sit singly and dispose of the case allotted to a Bench comprising of a Single Member. Section 255(5) of the Act provides that the Tribunal shall have power to regulate its own procedure and the procedure of Benches thereof in all matters arising out of the exercise of its powers or of the discharge of its functions, including the places at which the Benches shall hold their sittings.

11. In exercise of the powers conferred by

sub-section (5) of Section 255 of the Act, the Tribunal has framed the Income Tax (Appellate Tribunal) Rules,1963. Rule 3 and 4 pertain to the sittings of Bench and powers of Bench respectively. A Bench is required to hold its sitting at its Head quarter or at such other place or places as may be authorised by the President. While Rule 4 provides that a Bench shall hear and determine such appeal and application made under the Act as the President may by general or special order direct. Sub-rule (2) of Rule 4 empowers the President or in his absence Senior Vice President/Vice President of the concerned Zone to transfer an appeal or application from any one of such Benches to any other. Therefore, on a conjoint reading of provision of Section 255(5) of the Act and Rules 3 and 4 of the Tribunal Rules it is apparent that the Misc.Application which was filed before the Rajkot Bench stood transferred to Ahmedabad Bench under an administrative order taking into consideration the fact that Rajkot Bench was not available. Once the Misc. Application had been validly transferred under valid and legal order of transfer by way of an administrative exigency, unless a fresh order retransferring the matter from the Ahmedabad Bench to Rajkot Bench was made it would be the Ahmedabad Bench which would be seized of the jurisdiction to hear and determine the Misc.Application. The contention of the petitioner on this count cannot be countenanced and is devoid of any merit. The petitioner not only filed his written objections to the Misc. Application but was also heard through his representative. Thus no prejudice has been suffered by the petitioner on this count.

12 Section 254 of the Act as is material for the purpose reads as under :

"Orders of Appellate Tribunal.

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.

(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 [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".

(3) xxxx xxxx xxxx xxxx xxxx

(4) Save as provided in Section 256 [or section 260A] orders passed by the Appellate Tribunal on appeal shall be final."

13. The Tribunal after hearing both the parties to the appeal is empowered to pass such orders as it thinks fit. Sub-section (2) of Section 254 of the Act, on a close reading provides for two distinct situations. Firstly, the Tribunal at any time within four years from the date of the order, may amend any order passed under sub-section (1), with a view to rectify any mistake apparent from the record. Secondly, the Tribunal shall make such amendment if the mistake is brought to its notice by the assessee or the assessing officer. Therefore, it can be seen that, the Tribunal has a discretion to rectify any mistake apparent from the record suo motu, but it is bound to amend the mistake, as is evident from the latter portion of the provision, when the mistake is brought to its notice by either party to the appeal. In both situations it is necessary that there should exist a mistake apparent from the record and the order passed under sub-section (1) of Section 254 of the Act, shall be amended with a view to rectify such a mistake. Therefore, whether the Tribunal acts on its own motion or at the behest of any party to the appeal, there must be a mistake apparent from the record which would require that the order in appeal is amended. First Proviso reproduced hereinabove specifically provides that an amendment which directly creates prejudice to the assessee in the form of enhancing an assessment or reducing a refund or otherwise increasing the liability of the assessee, cannot be made unless the Tribunal gives a notice of its intention to do so and allows the assessee a reasonable opportunity of being heard. Sub-section (4) of Section 254 of the Act provides that the orders passed by the Tribunal on appeal shall be final save as provided in section 256 or section 260A of the Act. It may be noted that the language employed is orders passed by the Tribunal on appeal. The order passed on appeal can be an order passed under sub-section (1) of Section 254 of the Act or it could be an order passed under sub-section (1) as amended by an order under

sub-section (2) of Section 254 of the Act. In both the situations an order would none the less remain an order on appeal.

14. As already seen hereinbefore, the Tribunal has power to rectify the mistake apparent from the record in two situations. One is on its motion and the other is on an application being made by a party before it. It cannot be contended that if a Tribunal is given power to rectify its own mistake on its own motion, that power excludes the power to rectify the same mistake at the instance of a party or when the attention of the Tribunal is drawn to the said mistake by a party to the appeal. The power to rectify on its own motion is a larger power than the power to rectify on the application of a party. When the statute confers a power on Tribunal to make an order on the application of a party it is limited to rectification of the mistakes pointed out in the application made by the party. But when the Tribunal exercises power to rectify without an application at the behest of a party it is doing something which it can do on its own motion viz. it exercises wider power, larger power of rectifying a mistake suo motu. Once the Tribunal's attention is invited to a mistake apparent from the record by a party, it would be open to the Tribunal to also exercise its power to rectify suo motu, which may be in relation to the same mistake or another mistake.

15. The contention of the petitioner to the effect that the order made under sub-section (1) of Section 254 of the Act has to be treated as final and cannot be disturbed under section 254(2) of the Act in light of provision of Section 254(4) of the Act is therefore misconceived. There is no dispute that an order on appeal attains finality unless and until disturbed or modified as provided by the statute. However, an order on appeal would take within its sweep an order made under sub-section (1) as well as an order made under sub-section (1) as rectified under sub-section (2) of Section 254 of the Act.

16. It has to be borne in mind that the Act is a statute providing for levy and collection of tax. In case a party before the Tribunal invites attention of the Tribunal that a point or a contention which is material for determining the amount of tax payable (which may be NIL in a given case) has not been considered by the Tribunal, it would certainly constitute a mistake apparent from the record within the meaning of Section 254(2) of the Act. The term 'record' in the provision

takes within its sweep the entire record before the Tribunal. The provisions of section 254(2) could not be construed in a manner which would produce an anomaly or otherwise produce an irrational or illogical result. It is one of the basic principles and a legal policy that when there is a provision for rectification of a mistake apparent from the record, that power should be allowed to be exercised for correcting mistake and/or error from the record and if the Tribunal feels that the Tribunal has committed an error of law, it would be against the concept of justice and fair play and also against the principle of legal policy not to allow the Tribunal to exercise such power.

17. The proposition that a contention raised but not dealt with by the Tribunal should be held to have been negatived is correct only upto a stage. Once a party brings to the notice of the Tribunal that an important point or contention raised by the party has not been dealt with it would be within jurisdiction and powers of the Tribunal to decide whether the same constitutes a mistake apparent from the record and thereafter, if necessary, reopen the appeal. Such a power is inherent in the Tribunal, as a party has suffered prejudice due to a lapse on part of the Tribunal and not an account of any fault of such a party. An act of the Tribunal should not prejudice a party so as to force the party into unwarranted litigation.

18. The principle which forms the basis for undertaking review of an order or judgment would be equally applicable in cases of exercise of powers of rectification. The principle is :

> "18. Justice is a virtue which transcends all barriers. Neither the rules of procedure nor technicalities of law can stand in its way. The order of the Court should not be prejudicial to anyone. Rule of stare decisis is adhered for consistency but it is not as inflexible in Administrative Law as in Public Law. Even the law bends before justice. Entire concept of writ jurisdiction exercised by the higher courts is founded on equity and fairness. If the Court finds that the order was passed under a mistake and it would not have exercised the jurisdiction but for the erroneous assumption which in fact did not exist and its perpetration shall result in miscarriage of justice then it cannot on any principle be precluded from rectifying the error. Mistake is accepted as valid reason to recall an order. Difference lies in the nature of mistake

and scope of rectification, depending on if it is of fact or law. But the root from which the power flows is the anxiety to avoid injustice. It is either statutory or inherent. The latter is available where the mistake is of the Court. In Administrative Law the scope is still wider. Technicalities apart if the Court is satisfied of the injustice then it is its constitutional and legal obligation to set it right by recalling its order. Here as explained, the Bench of which one of us (Sahai, J.) was a member did commit an error in placing all the stipendiary graduates in the scale of First Division Assistants due to State's failure to bring correct facts on record. But that obviously cannot stand in the way of the Court correcting its mistake. Such inequitable consequences as have surfaced now due to vague affidavit filed by the State cannot be permitted to continue".

xxx xxx xxx xxx

"Rectification of an order thus stems from the fundamental principle that justice is above all. It is exercised to remove the error and not for disturbing finality."

(S.Nagaraj and others Vs. State of Karnataka and Another, 1993 Supp.(4) SCC 595 at page 618-19)

19. As can be seen from a catena of judgments the relevant factors or conditions for assumption of jurisdiction to review or rectify are the same. In both, the respective language which has come up for interpretation is : for review - "error apparent on face of record", and for rectification - "mistake apparent from the record". The only distinguishing feature being the difference, if any, between the term "error" and "mistake". In the case of T.S. Balaram, Income Tax Officer Vs. Volkart Brothers and others, 82 ITR 50, the Apex Court has observed thus :

"The power of the officers in section 154 of the Income Tax Act, 1961, to correct 'any mistake apparent from the record' is undoubetedly not more than that of the High Court to entertain a writ petition on the basis of an 'error apparent on the face of the record'".

The provisions of Sections 154 and 254(2) of the

Act, Section 35 of The Indian Income-tax Act,1922, Section 35 of The Wealth-tax Act,1957 and Section 13 of The Companies (Profits) Surtax Act,1964 are pari materia.

20. Though the Supreme Court and various High Courts have sought to lay down precisely what is a mistake apparent from the record or an error apparent on face of the record it has been difficult to provide a definite comprehensive definition. Various factors like : mistake/error should be self-evident, should not be debatable, should not be arrived at after long drawn out process of reasoning, etc., are more easily stated. It is the applicability to the facts and circumstances of a case which raises difficulties. A question can thus be posed : In what circumstances or situation can a writ of certiorari issue ? This is what is laid down by a Constitutional Bench of the Supreme Court in the case of Hari Vishnu Kamath Vs. Ahmad Ishaque and others, reported in AIR 1955 SC 233:

"In 'AIR 1954 SC 440(C)', the law was thus stated:

An error in the decision or determination itself may also be amenable to a writ of 'certiorari' but it must be a 'manifest error apparent on the face of the proceedings', e.g., when it is based on clear ignorance or disregard of the provisions of law. In other words, it is a patent error which can be corrected by 'certiorari' but not a mere wrong decision."

"(23) It may therefore be taken as settled that a writ of 'certiorari' could be issued to correct an error of law. But it is essential that it should be something more than a mere error; it must be one which must be manifest on the face of the record. The real difficulty with reference to this matter, however, is not so much in the statement of the principle as in its application to the facts of a particular case. When does an error cease to be mere error, and become an error apparent on the face of the record? Learned Counsel on either side were unable to suggest any clear-cut rule by which the boundary between the two classes of errors could be demarcated.

Mr.Pathak for the first respondent contended on the strength of certain observations of Chagla, C.J. in - Batuk K.Vyas v. Surat Borough Municipality, AIR 1953 Bom 133 (R), that no error

could be said to be apparent on the face of the record if it was not self-evident & if it required an examination or argument to establish it. This test might afford a satisfactory basis for decision in the majority of cases. But there must be cases in which even this test might break down, because judicial opinions also differ, and an error that might be considered by one Judge as self-evident might not be so considered by another. The fact is that what is an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an 'element of indefiniteness' inherent in its very nature and it must be left to be determined judicially on the facts of each case."

21. Mr.Desai also contended that if the language of the provision was clear, the same had to be given effect to and resultant hardship cannot be a consideration for not applying the provision; when plain reading of the provision conveys meaning it was not open to add any words nor could interpretation not intended by legislature be adopted; that in taxing statute there is no intendment, no equity. There can be no dispute with these principles. However, those sections which impose the charge or levy should be strictly construed; but those which deal with the machinery of assessment and collection should not be subjected to a rigorous construction but should be construed in a manner which makes the machinery workable. Procedural provisions should be so construed as to subserve the course of justice and not to hinder it. Hearing of an appeal and passing an order thereon is a part of the machinery prescribed for collection and recovery of tax. The power to make an order encompasses within its fold the power to rectify.

22. Rule 24 of the Tribunal Rules provides for hearing of an appeal exparte for default by the appellant and by virtue of the Proviso under the said Rule it is laid down that where an appeal has been disposed of in absence of the appellant and the appellant appears afterwards and satisfies the Tribunal that there was sufficient cause for his non-appearance, when the appeal was called out for hearing, the Tribunal shall make an order setting aside the exparte order and restore the appeal. On the basis of this Rule it was contended on behalf of the petitioner that in no other situation can an appeal be restored to file and hence the impugned order dated 05/09/2001 was bad in law and deserved to be quashed and set aside. Rule 24 of the Tribunal Rules is

an enabling Rule of procedure and cannot be read to mean that in no other circumstance recalling of an order or restoration of appeal is not warranted. Even otherwise, the position in law is well settled that the Rules having been framed by exercise of power granted under the Act cannot limit the scope of the main provision under the Act nor can the Rule go beyond the main provision of the Act.

23. Rule 34A provides for procedure for dealing with an application under section 254(2) of the Act. The said rule is as under :

"34A. (1) An application under section 254(2) of the Act shall clearly and concisely state the mistake apparent from the record of which the rectification is sought.

(2) Every application made under sub-rule (1) shall be in triplicate and the procedure for filing of appeals in these rules will apply mutatis mutandis to such applications.

(3) The Bench which heard the matter giving rise to the application (unless the President, the Senior Vice- President, the Vice-President or the Senior Member present at the station otherwise directs) shall dispose it after giving both the parties to the application a reasonable opportunity of being heard :

Provided it shall not be necessary to post Miscellaneous Application for hearing if it prima facie appears to be a petition for review.

(4) An order disposing of an application, under sub-rule (3), shall be in writing giving reasons in support of its decision ".

24. Relying upon sub-rule (3) of Rule 34A of the Tribunal Rules it was submitted that Misc. Application seeking rectification of the original order should be heard and disposed of by the same Bench which heard the appeal. That Proviso under the said sub-rule (3) specifically lays down that Misc. Application shall not be posted for hearing if the same appears to be prima facie a petition for review. It was therefore submitted that the assessee having filed a Review Application the Tribunal ought to have exercised its power under the Proviso to sub-rule (3) of Rule 34A of the Tribunal Rules and rejected the said application filed by the assessee.

That the Tribunal having failed to do so, the impugned order dated 05/09/2001 is contrary to specific provision of the said Rule and hence requires to be quashed.

25. Rule 34A(3) of the Tribunal Rules states that the Bench which heard the matter giving rise to the application shall dispose it after hearing both the parties to the application, but an exception has been carved out by portion in the parenthesis whereby it is stipulated that unless the President, Senior Vice-President, Vice-President or the senior member present at the station otherwise directs. That means if any of the aforesaid authorities directs that the Misc. Application shall be heard by a Bench comprised of members other than the Bench which heard the appeal, such other Bench would hear and dispose of the Misc.Application. This rule does nothing else but provides for an administrative contingency. In case one or both members comprising the Bench which heard the appeal are transferred, or retired or for any other reason are not available to hear the Misc.Application (which should be filed within a period of four years from the date of the order in appeal), a situation cannot be permitted to come about whereby Misc.Application may not be proceeded with in absence of the original Bench being available. In fact, in the present case, this very situation came about and hence the order transferring Misc.Application from Rajkot Bench to Ahmedabad Bench. The appeal was heard by Bench constituted by Mr.Biharilal (Accountant Member) and Mr.S.K.Yadav (Judicial Member). By the time Misc. Application was filed Mr.Biharilal was transferred out of Gujarat while Mr.S.K.Yadav was transferred to Ahmedabad Bench and there was no Bench available at Rajkot. In these circumstances, the order transferring Misc.Application from Rajkot Bench to Ahmedabad Bench came to be made. It is pertinent to note that the Bench sitting at Ahmedabad which heard Misc.Application was constituted by Shri T.N.Chopra (Accountant Member) and Shri S.K.Yadav (Judicial Member). Thus, effectively administrative order ensured that atleast one Member from the Bench which heard the appeal was available to hear the Misc. Application seeking rectification of the appellate order to which the Judicial Member was a party. In these circumstances, Rule 34A(3) of the Tribunal Rules stands complied with in letter and spirit and the petitioner cannot be heard to make a grievance about the same.

26. Coming to the applicability of Proviso to sub-rule (3) of Rule 34A of the Tribunal Rules, it is apparent that on a plain reading the said Proviso

stipulates that Misc.Application shall not be posted for hearing if it is prima facie found to be a petition for review. Therefore, once the Bench has posted Misc. Application for hearing, consequence is that the Bench arrived at a prima facie decision that the application was not for review but was an application under section 254(2) of the Act, seeking rectification of a mistake apparent from the record. In other words, the Bench had arrived at a tentative decision that there was a mistake apparent from the record and for rectification of the same both the parties to the appeal were required to be heard. In these circumstances, the contention on behalf of the petitioner on this count is therefore ill founded.

27. Whether the judgment of jurisdictional Court would constitute a mistake apparent from the record or not is no longer res integra. In the case of Parshuram Pottery Works Co.Ltd. Vs. D.R.Trivedi, Wealth-Tax Officer, Morvi and Another, 100 ITR 651, (Guj) facts before the Court were that the petitioner company claimed deduction of certain amount in respect of the provision for taxation while computing its net wealth. The said claim was disallowed by the assessing officer as according to him the provision for tax liability did not constitute a 'debt owed' on the valuation date. Though the said assessment was not challenged by way of appeal, when the petitioner came to know subsequently about a decision of the Tribunal allowing such a claim in some other case, the petitioner applied to the assessing officer for rectifying the assessment order u/s.35 of the Wealth Tax Act,1957. The said application came to be rejected on the ground that there was no mistake apparent on the face of the record. The petitioner filed revision application before the Commissioner of Wealth Tax but did not succeed. Thereupon the petitioner applied to the High Court for exercising writ jurisdiction to quash the order and for direction to rectify the assessment order. The High Court after referring to earlier decision of this Court in the case of Commissioner of Wealth Tax vs. Raipur Manufacturing Company Limited, 52 ITR 482 and of the Supreme Court in the case of Kesoram Industries and Cotton Mills Ltd. Vs. Commissioner of Wealth Tax, 59 ITR 767 held that the provision of taxation was 'debt owed'and was deductible while computing the net wealth of the assessee. Therefore, the High Court held that there was clearly an error of law apparent on face of the record and the assessment order was erroneous. Repelling the contention of the revenue that the aforesaid judicial pronouncements were subsequent to the date of the assessment order it is laid down that the said decisions merely stated what the law had always been and must

always be understood to have been. The fact that the said decisions were not before the assessing officer when he made the assessment order had no material bearing on the question whether the said order discloses any mistake apparent from the record and was liable to be rectified under section 35 of the Wealth Tax Act,1957. It was further held that the decision in the case of Raipur Manufacturing Company (supra) had been brought to the attention of the Commissioner during the course of hearing of revision petition and as he failed to apply the said decision there was an error of law apparent on the face of the record. That non-preferring of appeal against the assessment could not disentitle the assessee to seek rectification once patent error of law appeared on face of the record.

28. The aforesaid principle has been reiterated by this Court in the case of Suhrid Geigy Ltd. Vs. Commissioner of Surtax,237 ITR 834, wherein one of us (Hon'ble Mr.Justice A.R.Dave) was a party to the decision. It is laid down in the said decision that :

"Section 13 of the Companies (Profits) Surtax Act,1964 provides for rectification of mistake apparent from the record. A point which is debatable cannot be termed a mistake. But when the 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 and it also ceases to be a point requiring elaborate arguments or detailed investigation/inquiry. The subsequent decisions of the jurisdictional High Court do not enact the law but declare the law as it always was".

29. Hence, it is well settled that a decision of the jurisdictional High Court, even if rendered subsequently, would constitute a mistake apparent from the record investing an authority with jurisdiction to rectify the mistake. The question that would then arise is :- What should be the consequential order i.e. how should the original order be rectified and in what form the amendment must be carried out. In the case of Sidhramappa Andannapa Manvi Vs. The Commissioner of Income Tax, Bombay, reported in AIR 1952 (Bom.) 287, almost a similar contention was raised before the Bombay High Court on behalf of the assessee as is raised on behalf of the revenue in the present petition. It is contended by Mr.Desai that in the guise of rectification it is not open to the Tribunal to pass an order which is

contrary to the order already passed. The Bombay High Court has dealt with the contention as follows:

> "[3] But the more substantial question raised by Mr.Kolah is as to the power of the Tribunal to rectify the mistake. Now the power is undoubtedly a limited power; it is not a power of revision or review, but it is limited to correcting only those mistakes which are apparent on the record. A mistake must be patent on the record; it must not be a mistake which can be discovered by a process of elucidation or argument, or debate. The mistake being patent on the record, rectification must be limited to correcting that mistake only without any further argument or debate. The rectification must follow as a necessary logical consequence of the mistake being found on the record. But Mr.Kolah contends that even though the Tribunal may rectify a mistake it cannot pass an order which is contrary to the order already passed. According to him in dismissing his appeal after having allowed it what the Tribunal was doing was not rectifying a mistake but was revising or reviewing its own decision. Now, it is obvious that the power of the Tribunal is not confined to mere rectification of a mistake which is patent on the record. After the mistake is corrected, the consequential order must follow, and the Tribunal has the power to pass all consequential orders. This is clear from the proviso itself, because the proviso contemplates that in correcting or rectifying the error and in passing the consequential orders prejudice may be caused to the assessee by his assessment being enhanced. In such cases, the law requires a notice to be served upon the assessee under S.35".

Thus, once the Tribunal finds a mistake, for rectifying the same all consequential orders as are necessary are a must and follow as a corollary

30. As many as 67 judicial authorities were cited before us by both the sides, and even if some of them might not have been specifically referred to and discussed in the judgment they have all been taken into consideration.

31. Though both the sides made elaborate submissions as regards merits of various contentions raised in support of their respective stands viz., that there is no

mistake or a mistake apparent on face of the record, and that there is a mistake apparent from the record, the merits of the matter are not being dealt with in light of the fact that the appeal is to be heard afresh by the Tribunal.

32. To sum up :

[a] The Tribunal has power to rectify a mistake apparent from the record on its own motion OR on an application by a party under section 254(2) of the Act;

[b] An order on appeal would consist of an order made under Section 254(1) of the Act or it could be an order made under sub-section (1) as amended by an order under sub-section (2) of Section 254 of the Act;

[c] The power of rectification is to be exercised to remove an error or correct a mistake and not for disturbing finality, the fundamental principle being, that power of rectification is for justice and fair play;

[d] That power of rectification can be exercised even if a mistake is committed by the Tribunal or even if a mistake has occurred at the instance of party to the appeal;

[e] A mistake apparent from record should be self evident, should not be a debatable issue, but this test might break down, because judicial opinions differ, and what is a mistake apparent from the record cannot be defined precisely and must be left to be determined judicially on the facts of each case;

[f] Non consideration of a judgment of the jurisdictional High Court would always constitute a mistake apparent from the record, regardless of the judgment being rendered prior to or subsequent to the order proposed to be rectified;

[g] After the mistake is corrected, consequential order must follow, and the Tribunal has power to pass all necessary consequential orders.

33 In light of what is stated hereinbefore, we hold that there is no infirmity or error in the order dated 5/9/2001 passed by the Tribunal in Misc.Application

No.31/Rajkot/2000 under Section 254(2) of the Act. The petition, therefore, deserves to be rejected and is accordingly rejected. Rule discharged. Ad-interim relief granted vide order dated 29.01.2002 stands vacated. There shall be no order as to costs.

At this stage Mr.P.G.Desai, learned Advocate for the petitioner, submits that the ad-interim relief granted earlier be continued for a period of eight weeks. The prayer is opposed by learned Senior Counsel appearing on behalf of the respondent.

Having heard both the sides, we do not find it a fit case to continue the ad-interim relief granted earlier. The prayer is accordingly rejected.

(A.R.Dave,J) (D.A.Mehta,J)

m.m.bhatt