THE HON'BLE THE CHIEF JUSTICE UJJAL BHUYAN

AND

THE HON'BLE SRI JUSTICE C.V.BHASKAR REDDY

+ **I.T.T.A. No.103 of 2001**

% Date: 07.09.2022

The State Bank of India

… Appellant

v.

$ Deputy Commissioner of Income Tax,
Circle 3(2), Signature Towers,
Kondapur, Hyderabad – 500 084.

… Respondent

! Counsel for the appellant : Mr. Karthik Ramana Puttam Reddy

^ Counsel for respondent : Ms. K.Mamata Chowdary
(Standing Counsel for Income Tax Department)

< GIST:

➢ HEAD NOTE**:**

? CASES REFERRED:

1. (1986) 158 ITR 102
2. (1994) 210 ITR 129
3. (1999) 237 ITR 889
4. (2008) 305 ITR 227 (SC)
5. MANU/DE/2551/2012
6. (1994) 210 ITR 633 (AP)
7. (2005) 272 ITR 397 (Bombay)

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I.T.T.A. No.103 of 2001

JUDGMENT: *(Per the Hon'ble the Chief Justice Ujjal Bhuyan)*

Heard Mr. Karthik Ramana Puttam Reddy, learned counsel for the appellant and Ms. K.Mamata Chowdary, learned Standing Counsel for Income Tax Department appearing for the respondent.

2. This appeal has been preferred by the assessee as the appellant under Section 260A of the Income Tax Act, 1961 (briefly, 'the Act' hereinafter) against the order dated 23.02.2001 passed by the Income Tax Appellate Tribunal, Hyderabad Bench 'B', Hyderabad (Tribunal) in M.P.No.2/Hyd/2001 in Interest Tax Appeal No.9/Hyd/1992 for the assessment year 1985-86.

3. The appeal was admitted on 20.09.2001 on the following substantial questions of law:

> "1) Whether on the facts and in the circumstances of the case and having regard to the provisions of Section

254(2) of the Income Tax Act, the Tribunal was correct in holding that on the basis of subsequent Supreme Court Judgment the Tribunal cannot rectify its earlier appellate order as a mistake apparent from record?

2) Whether the amendment of earlier order passed by the Tribunal to bring it in conformity with the law propounded by the Supreme Court subsequently amounts to review and not rectification apparent from the record under the provisions of Section 254(2) of the Income Tax Act and Section 27 of the Interest Tax Act?"

4. Before adverting to the substantial questions of law so framed, it would be apposite to briefly dilate on the material facts. In the assessment proceeding for the aforesaid assessment year, appellant (assessee) did not declare any interest on the balance in the "protested bill account". Therefore, assessing officer added a sum of Rs.2,65,51,147.00 as chargeable interest for the said assessment year.

5. Against the aforesaid order of assessment, assessee preferred an appeal before the Commissioner of Income Tax (Appeals). Taking the view that Section 43D of the Act, though introduced with effect from 01.04.1991, was

retroactive in nature, appellate authority held that on that basis no interest could have been levied. Therefore, addition made by the assessing officer was deleted. This order of the Commissioner of Income Tax (Appeals) came to be challenged by the revenue before the Tribunal in further appeal.

6. Tribunal, following two decisions of the Supreme Court in **State Bank of Travancore v. CIT**[1] and **Kerala Financial Corporation v. CIT**[2]**,** reversed the decision of the Commissioner of Income Tax (Appeals) and restored the matter to the file of the assessing officer for quantification of the interest to be chargeable vide the order dated 22.10.1997.

7. After the aforesaid decision was rendered by the Tribunal on 22.10.1997, assessee filed a miscellaneous petition before the Tribunal stating that the above two decisions of the Supreme Court in **State Bank of Travancore** (supra) and **Kerala Financial Corporation**

[1] (1986) 158 ITR 102
[2] (1994) 210 ITR 129

(supra) have since been overruled by the Supreme Court in the case of **UCO Bank v. CIT[3].** Therefore, Tribunal was requested to rectify the order dated 22.10.1997 under Section 254(2) of the Act.

8. By the order dated 23.02.2001, Tribunal held that decision rendered by the Supreme Court in **UCO Bank** (supra) was subsequent to the order of the Tribunal dated 22.10.1997. The said decision was not available at the time of decision rendered by the Tribunal. Therefore, there is no mistake apparent from the record in the order of the Tribunal, scope of rectification being very limited. If the prayer for rectification was allowed, it would amount to review of the decision of the Tribunal which is impermissible. Therefore the miscellaneous petition for rectification was dismissed. Hence this appeal.

9. At the threshold, we asked learned counsel for the appellant as to whether any appeal has been preferred assailing the order of the Tribunal dated 22.10.1997. He submitted that no such appeal has been preferred. The

[3] (1999) 237 ITR 889

present appeal is confined only to the legality and validity of the order dated 23.02.2001 rejecting rectification application of the assessee under Section 254(2) of the Act.

10. At this stage, we notice that an order was passed by this Court on 29.11.2017 that the question as to whether an order can be rectified under Section 254(2) of the Act based on a subsequent judgment is being considered by the Supreme Court in **Lakshmi Sugar Mills Co. Ltd. v. Commissioner of Income Tax** (Special Leave to Appeal (C) No.30062 of 2012). Therefore, the present appeal was adjourned *sine die* with liberty to the parties to move the Court on disposal of the aforementioned case by the Supreme Court.

11. We have been informed at the bar that **Lakshmi Sugar Mills Co. Ltd.** (supra) is still pending before the Supreme Court.

12. However, considering the fact that the present appeal is of the year 2001 and more than 21 years have gone by since institution of the appeal, we are of the view that the

same is required to be decided by this Court one way or the other.

13. Learned counsel for the appellant in support of his submissions has filed a compilation of judgments. He has placed reliance on a decision of the Supreme Court in **Assistant Commissioner, Income Tax, Rajkot v. Saurashtra Kutch Stock Exchange Ltd.**[4] and contends that overruling of a previous decision by a subsequent decision is retrospective. The subsequent decision lays down the correct interpretation of law which should be construed to be the law from day one. This decision of the Supreme Court was subsequently followed by the Delhi High Court in **Lakshmi Sugar Mills Co. Ltd. v. Commissioner of Income Tax**[5], wherein the principle that a judicial decision acts retrospectively was reiterated. Subsequent decision would be a good ground for rectification. He has further relied upon a decision of the then composite High Court of Andhra Pradesh in

[4] (2008) 305 ITR 227 (SC)
[5] MANU/DE/2551/2012

B.V.K.Seshavataram v. Commissioner of Income Tax[6] to contend that a subsequent decision can validly form the basis for rectifying an order of assessment under Section 154 of the Act. Elaborating on this aspect, he submits that while Section 154 of the Act applies to rectification by an assessing officer, similar principle is applicable to the Tribunal under Section 254(2) of the Act, provisions being *pari materia.*

14. Ms. K.Mamata Chowdary, learned counsel for the respondent has raised an objection that the appeal is not maintainable. She has referred to Section 260A of the Act, more particularly to sub-section (1) thereof, and submits that an appeal under Section 260A of the Act shall lie to the High Court from every order passed in "appeal". An order rejecting the application seeking rectification under Section 254(2) of the Act is not an order passed in appeal. Therefore, an appeal under Section 260A of the Act to the High Court against an order rejecting prayer for rectification would not be maintainable. In support of such

[6] (1994) 210 ITR 633 (AP)

contention, she has placed reliance on a decision of the High Court of Bombay in **Chem Amit v. Assistant Commissioner of Income Tax**[7]. Thereafter, she submits that the decision of the Supreme Court in **Saurashtra Kutch Stock Exchange Ltd.** (supra) was based on the fact that at the time of decision of the Tribunal, there was already an order of the jurisdictional High Court which the Tribunal failed to notice and consider. It was in that context that view was taken that non-consideration of the decision of the jurisdictional High Court was an error apparent on the face of the record. Insofar, the Delhi High Court decision in **Lakshmi Sugar Mills Co. Ltd.** (supra) is concerned, she submits that as a matter of fact, the appeal was dismissed by the Delhi High Court by holding that Tribunal had not committed any error of law or of jurisdiction in declining to exercise power under sub-section (2) of Section 254 of the Act as the judgment was rendered subsequently. She, therefore, submits that the appeal may be dismissed.

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[7] (2005) 272 ITR 397 (Bombay)

15. Submissions made by learned counsel for the parties have received the due consideration of the Court.

16. At the outset, we may consider the first objection raised by learned counsel for the respondent that an appeal under Section 260A of the Act is not maintainable against an order passed by the Tribunal rejecting the application seeking rectification under Section 254(2) of the Act.

17. In **Chem Amit**'s case (supra), Bombay High Court held that where as the consequence of an order passed on the rectification application under Section 254(2) of the Act, there is an amendment in the order passed in the appeal which is amenable to appeal, therefore the order passed in the rectification application, would be amenable to appeal under Section 260A of the Act. Noting that assessee had only challenged the order of the Tribunal rejecting the application for rectification, the appeal filed by the assessee was dismissed.

18. With utmost respect, we are unable to accept the view rendered by the Bombay High Court. The word "appeal" appearing in Section 260A of the Act is required to be given a wider interpretation; right of appeal being a substantive right. If a rectification application is allowed, in consequence, the original order of the Tribunal stands rectified. If this order allowing rectification is amenable to the appellate jurisdiction under Section 260A of the Act, it would be paradoxical to deny similar remedy to a party whose rectification application is rejected by the Tribunal. Therefore, an order passed under Section 254(2) of the Act either allowing rectification or not allowing rectification would be construed to be an order within the ambit of the expression "every order passed in appeal" appearing in sub-section (1) of Section 260A of the Act.

19. There is one more reason why we are unable to accept the submission made by learned counsel for the respondent. As we have already noticed above, the appeal was admitted way back on 20.09.2001. Twenty one years have gone by since then. After admission of the appeal and

after such long lapse of time, it would not at all be justified to dismiss the appeal on the point of maintainability.

20. At this stage, we may also refer to sub-section (4) of Section 260A of the Act which says that the appeal shall be heard only on the question so formulated and the respondent shall at the hearing of the appeal, be allowed to argue that the case does not involve such question. As per the proviso, nothing in sub-section (4) of Section 260A of the Act shall be deemed to take away or abridge the power of the Court to hear for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question. Therefore, it is open to the respondent to argue before the High Court that the substantial questions of law so formulated are not substantial questions of law. This cannot be stretched to say that respondent would be at liberty to argue that the appeal is not maintainable. There is a subtle, yet significant, distinction between the two which we have borne in mind.

21. The situation which is before us is that in the original order dated 22.10.1997, Tribunal had allowed the appeal of the respondent by following the two decisions of the Supreme Court in **State Bank of Travancore** (supra) and **Kerala Financial Corporation** (supra). These two decisions have since been overruled by the Supreme Court vide the subsequent decision in **UCO Bank** (supra), which is now the law of the land. On the face of the aforesaid binding judicial pronouncement, the very foundation of the decision rendered on 22.10.1997 no longer survives.

22. It is in the above backdrop that the order of the Tribunal dated 23.02.2001 refusing to rectify the previous order dated 22.10.1997 is required to be considered.

23. Let us now advert to Section 254 of the Act which deals with orders of Appellate Tribunal. Sub-section (2) of Section 254 of the Act says that the Appellate Tribunal may at any time within four years from the date of the order with a view to rectify 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 within four years. We may mention that the aforesaid period of four years has since been substituted by six months from the end of the month in which the order is passed by the Tribunal vide the Finance Act, 2016, with effect from 01.06.2016.

24. The expression "mistake apparent from the record" or its equivalent expression "error apparent from the record" has received considerable judicial attention. It is not necessary to burden this judgment with the large number of judicial pronouncements on this issue. Suffice it to say that a mistake apparent from the record or an error apparent from the record is a mistake or an error, discovery of which does not require any process of long drawn arguments/hearing. It must be discernible on the face of the record itself.

25. The issue which is staring at us is whether the subsequent decision of the Supreme Court which had overruled its earlier two decisions which formed the substratum of the decision of the Tribunal can be the basis

of rectification under sub-section (2) of Section 254 of the Act.

26. In **Saurashtra Kutch Stock Exchange Ltd.**'s case (supra) the facts before the Supreme Court were that while deciding the appeal by the Tribunal, the decision of the jurisdictional High Court i.e., High Court of Gujarat was not brought to the notice of the Tribunal. Assessee contended that there was thus a mistake apparent from the record which required rectification. Supreme Court considered as to whether non-consideration of the decision of the jurisdictional Court or of the Supreme Court could be said to be a mistake apparent from the record. Supreme Court answered the above issue in the affirmative holding that such a mistake can be said to be a mistake apparent from the record which can be rectified under Section 254(2) of the Act. Supreme Court thereafter analysed the situation from a jurisprudential perspective and thereafter held that if a subsequent decision alters an earlier one, it does not make any new law; it only discovers the correct principles of law which has to be applied

retrospectively. Overruling is retrospective except on matters where principles of *res judicata* apply. Thereafter, Supreme Court further held that rectification of an order stems from the fundamental principle that justice is above all. It is exercised to remove the error and to disturb the finality. In the facts of that case, Supreme Court noted that though the decision of the jurisdictional High Court was pronounced a few months prior to the decision of the Tribunal, the same was not brought to the notice of the Tribunal by the assessee. Therefore, no fault could be found with the Tribunal in passing the order.

27. Delhi High Court in **Lakshmi Sugar Mills Co. Ltd.** (supra) reiterated the proposition that overruling is retrospective. Once the law is settled by the Supreme Court which operates retrospectively, it has to be construed to be the law as it existed when the order was passed by the Tribunal. Therefore, there is clear mistake apparent from the record. The mistake cannot be allowed to remain. The only limitation for rectification is limitation.

28. A Division Bench of this Court in **B.V.K.Seshavataram**'s case was confronted with a similar situation. In that case, this Court was examining the provision of Section 154 of the Act. As submitted by learned counsel for the appellant, Section 154 of the Act provides for rectification of mistake by an income tax authority. As per sub-section (1) thereof, with a view to rectify any mistake apparent from the record, an income tax authority referred to in Section 116 of the Act may amend the order passed by it; amend any intimation or deemed intimation under Section 143(1) of the Act; amend any intimation under sub-section (1) of Section 200A of the Act; and amend any intimation under sub-section (1) of Section 206CB of the Act. In the facts of that case, this Court held that subsequent decision can validly form the basis for rectifying an order of assessment under Section 154 of the Act. It was held as follows:

> "8. There is no dispute that the decision of the Supreme Court in **Seth Banarsi Dass Gupta**'s case MANU/SC/0552/1987 : [1987] 166 ITR 783 (SC) was rendered after the original assessments were finalised giving the benefit of depreciation allowance to the

assessees. Based upon the said Supreme Court decision, rectification orders were passed by the successor assessing authority. Whether a subsequent decision can be the basis for "rectifying" an earlier order in exercise of the powers under section 154 of the Income-tax Act? Although the opening words of section 154(1) - "with a view to rectifying any mistake apparent from the record, the income-tax authority. . . . may give the impression that a judgment which came subsequently, not being part of the record at the time when the assessment was finalised, could not be the basis for rectification of any mistake under section 154, the legal position is no longer in doubt in view of the authoritative pronouncement of the Supreme Court in **S. A. L. Narayana Row, CIT v. Model Mills Nagpur Ltd.** MANU/SC/0168/1966 : [1967] 64 ITR 67 (SC). In that case, the assessing authority subjected excess dividends to income-tax. Subsequently, the Bombay High Court in **Khatau Makanji Spinning and Weaving Co. Ltd. v. CIT** MANU/MH/0348/1956 : [1956] 30 ITR 841 (Bom), held that levy of tax on excess dividends was illegal. On the basis of that decision, a claim for refund was made by the assessee requesting the assessing authority to rectify the earlier order mistakenly made. That plea was rejected by the assessing authority and also by the Commissioner of Income-tax when a revision application was filed before him. The High Court of Bombay allowed the writ petition filed by the assessee and directed the Income-tax Officer to revise the order of assessment and grant refund to the extent of the tax levied on the excess dividends. By the time the matter was carried to the Supreme Court, the decision of the

> Bombay High Court in **Khatau Makanji Spinning and Weaving Co. Ltd.**'s case MANU/MH/0348/1956 : [1956] 30 ITR 841 (Bom) was affirmed in **CIT v. Khatau Makanji Spinning and Weaving Co. Ltd.** MANU/SC/0188/1960 : [1960] 40 ITR 189 (SC). The Supreme Court affirmed the view taken by the Bombay High Court that the assessee was entitled to refund of the amount. This ruling is a clear authority for the proposition that a subsequent decision can validly form the basis for rectifying an order of assessment under section 154 of the Income-tax Act, 1961."

29. We respectfully agree with the reasonings given by a coordinate Bench of this Court in **B.V.K.Seshavataram** (supra); rather we are bound by it. If this position is applicable to Section 154 of the Act, we are of the view that it is equally applicable to Section 254(2) of the Act.

30. Summation of our above discussion is that the Tribunal was not justified in rejecting the rectification application of the appellant.

31. Consequently, we answer question No.1 so framed above in the negative and in favour of the assessee. Resultantly, we set aside the order dated 23.02.2001.

32. In view of our above order, answer to question No.2 so framed is not necessary.

33. The matter is remanded back to the Tribunal for a fresh hearing and decision in M.P.No.2/Hyd/2001 in Interest Tax Appeal No.9/Hyd/1992 for the assessment year 1985-86.

34. The appeal is accordingly allowed.

Miscellaneous applications pending, if any, shall stand closed. However, there shall be no order as to costs.

UJJAL BHUYAN, CJ

C.V.BHASKAR REDDY, J

07.09.2022

Note: LR copy to be marked.

B/o.

vs