IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

REVIEW PETITION NO. 9 OF 2013
IN
INCOME TAX APPEAL NO. 6073 OF 2010
ALONG WITH
REVIEW PETITION NO. 10 OF 2013
IN
INCOME TAX APPEAL NO. 6072 OF 2010

Commissioner of Income Tax-II, Mumbai …Petitioner in both petitions

v/s

Sri Adhikari Bros. … Respondent in both petitions.

Mr. P.C. Chhotaray along with N.A. Kazi for the petitioner.

Mr.Madhur Agarwal i/by Mint & Confreres for the respondent.

CORAM: M.S. SANKLECHA & N.M. JAMDAR, JJ.
DATED : 31ST JULY, 2015

P.C.:

Both these review petitions are directed against the common order dated 15 June 2012 passed by this Court in respect of two appeals filed by the revenue. Both the appeals were filed against the common order dated 21 May 2010 passed by the Income Tax Appellate Tribunal (the Tribunal) in respect of Assessment Year 2000-01 and 2001-02.

2 The basic question which arose for consideration before this Court in the two appeals filed by the revenue was: whether the Commissioner of Income Tax (Appeals) and the Tribunal were justified in holding that the issue in respect of claim for deduction under Section 35D of the Act allowed in respect of expenses incurred in connection with private placement of equity shares is amenable to rectification by the Assessing Officer under Section 154 of the Income Tax Act, 1961 (the Act) in the facts of the case.

3 Learned counsel for the revenue Mr.Chhotaray, in support of the review petitions submits that the present review has been taken out on the following grounds:

(a) The order dated 15 June 2012 holds that deduction under Section 35D(2))(c)(iv) of the Act in the present facts is a matter of opinion depending upon the notice of issue and even otherwise debatable, thus outside the scope of Section 154 of the Act. This according to him is an error apparent on record as the expenditure was incurred for private placement of shares and not for public issue. Therefore this Court ought to have held that rectification under Section 154 of the Act by the Assessing Officer is perimssible.

(b) The order dated 15 June 2012 has held that this very issue of allowing of deduction under Section 35D of the Act was a subject matter of consideration in revision and appellate proceedings. Therefore hit by Section 154(1A) of the Act. This, according to him, is an error apparent on record as this issue was not a subject matter of review or appellate proceeding. Therefore, this Court ought to have held that Section 154(1A) of the Act is no bar to rectification by the Assessing Officer under Section 154 of the Act.

4 So far as the first issue is concerned, we find that this very issue was agitated by the revenue at the hearing of the appeal. In fact, the revenue's submission that the assessee is not entitled to the benefit of Section 35D(2)(c)(iv) of the Act on the ground that the same is available only where expenditure is incurred in connection with public issue and this is a private placement is recorded in paragraph No.3 of the order dated 15 June 2012. The above submission was considered in paragraph No.7 of the above order holding that it was a matter of opinion depending upon the exact nature of the issue. Moreover the issue was also debatable. Therefore outside the scope of rectification.

5 So far as the second issue is concerned, we find that the review application filed is contrary to the appeal memo filed by the revenue. In the memo of appeal filed by the revenue, in paragraph 4 thereof, verified to the personal knowledge of the person declaring the petition is as under :

> *“Since deduction under Section 35D is available only with respect to share issue expenses incurred in connection with*

public issue of shares. Thereafter remedial action under Section 263 was proposed by Commissioner of Income Tax. After considering the assessee's contention, the Commissioner of Income Tax dropped the proposed proceedings under Section 263 of the Act dated 29.3.2005........ Thereafter the assessment was reopened under Section 147 of the Act by issue of notice dated 31.3.2005. The reassessment was completed on 30.1.2006 by making addition on .... inadmissible claim under Section 35D of the Act. The C.I.T. (Appeals) under order dated 15.6.2006 held that reopening of assessment is bad in law and cancelled the assessment........".

6 Therefore, it is obvious that the second ground urged by Mr.Chhotaray and the basis of the review runs contrary to the appeal memo filed by the Commissioner of Income Tax duly verified challenging the order dated 21 May 2010.

7 In view of the above, we find that this application made by the revenue is completely misconceived. A review is an exception to the general rule that once a Court passes an order it becomes *functus officio*. The review is generally permissible when new and important evidence not available when the matter was first heard or in case there is some glaring error/mistake apparent on the face of the record. In this case, it is neither. In fact almost one hour was taken in an attempt to show us that it was an error apparent

on record. In fact, the contentions taken before us in support of the review as pointed out above are in direct conflict/opposed to the statement of facts mentioned by the Commissioner of Income Tax in the appeal memo filed against the order dated 21 May 2010 of the Tribunal which led to the order dated 15 June 2012 of this Court. We find that the review application seems to have been filed in a most casual manner without having examined the case of the revenue in its memo of appeal which incidentally is the case they came to the Court in respect of the second issue. So far as the first issue is concerned, the grievance now raised in the review petition was a subject matter of consideration on which we took a view in order dated 15 June 2012. If according to the revenue it is not a correct view/opinion, then the remedy is an appeal and not review.

8 In fact, the approach of the revenue in these review petitions is not understood. First, the appeal was originally argued by some other advocate and for the review petition the revenue decided to engage Mr.Chhotaray. Thereafter when the review petition was being argued for undue time, we pointed out that this is a review and re-arguing the appeal is not permissible. The counsel insisted on making submissions for further 45 minutes in support of the review, oblivious of the large number of appeals filed by revenue themselves, involving far more important questions, awaiting disposal. It was long time ago in ***Sou. Chandra Kante v/s S.K.Habib,*** reported in ***1975 (1) SCC 674***, that the Apex Court observed while dealing with review petitions that, "*It is neither*

fairness to the Court which decided nor awareness of the public time lost, what with a huge backlog of dockets waiting in the queue for disposal, for counsel to issue easy certificates for entertainment of review and fight over the same battle which has been fought and lost. The Bench and the Bar, we are sure are jointly concerned in the conservation of judicial time for maximum use.....".

9 It is in the above back ground, that while dismissing both the review petitions, we are constrained to impose cost of Rs.5,000/- on the Commissioner of Income Tax who has authorized filing of these review petitions to ensure that proper case is taken in filing review petitions by the officers of revenue. The same should be paid to the Legal Services Authority, Mumbai, within four weeks from the copy of this order being available. Both the review petitions are dismissed.

(N. M. JAMDAR, J.) ***(M.S. SANKLECHA, J.)***