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IN THE HIGH COURT OF DELHI AT NEW DELHI

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W.P.(C) 3910/2015

PROMAIN LIMITED

..... Petitioner

Through: Mr Salil Aggarwal with Mr Ravi Pratap
Mall, Advocates.

versus

COMMISSIONER OF INCOME TAX

..... Respondent

Through: Mr Rahul Choudhary, Senior Standing
Counsel with Mr Raghvendra Singh, Junior
Standing Counsel and Mr Sharad Agarwal,
Advocates.

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE VIBHU BAKHRU

ORDER

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15.02.2016

Dr. S. Muralidhar, J:

1. This is a writ petition filed by the Petitioner challenging the order dated 19th December, 2014 passed by the Income Tax Appellate Tribunal (ITAT) in M.A. No. 06/Del/2013 in ITA No. 427/Del/2010 under Section 254(2) of the Income Tax Act, 1961 ('Act') for the Assessment Year ('AY') 2006-07.

2. The background facts are that the Petitioner is a public limited company incorporated under the Companies Act, 1956 and is carrying on the business of investment, finance and trading. From the details placed on record, it is seen that from the Assessment Year (AY) 1999-2000 onwards, the Assessee has been filing returns declaring its sources income as dividend income,

rental income, interest income and “*Vyaj Badla*”. In some AYs, the Petitioner earned income from “*Vyaj Badla*”. However, in all the AYs from AY 1999-2000 onwards up to AY 2012-13, the Petitioner earned interest income. The interest income earned by the Assessee, even in a particular AY when it did not earn any income from the *Vyaj Badla* business, has been treated as business income.

3. Aggrieved by the order of the Assessing Officer (AO) treating the interest income earned during the AY 2006-07 as income from other sources and not as business income, the Assessee filed an appeal before the Commissioner of Income Tax (Appeals) [CIT(A)]. In the order dated 26th November 2009 dismissing the appeal, the CIT(A) did not specifically deal with the issue of interest income being treated as business income.

4. Against the said order of the CIT(A), the Petitioner filed ITA No.427/Del/2010 before the ITAT. By the order dated 12th October 2012, the ITAT affirmed the order of the AO and the CIT(A). In para 6 of the said order it was noted by the ITAT that the counsel for the Assessee was unable to demonstrate “how the rental income, interest income or dividend income of the Assessee is to be assessed as a business income.” The ITAT also noted that the order for the AY 2008-09, which was relied upon by the Assessee “does not throw any light about the acceptance of business activity of the Assessee”.

5. The above order led the Assessee to file an application under Section 254(2) of the Act before the ITAT. It was urged by Mr Salil Aggarwal,

learned counsel appearing for the Petitioner, that before the ITAT in the rectification application the Petitioner urged the ground of applicability of the principle of consistency and contended that the Revenue had treated the interest income earned by the Petitioner as business income for the AYs earlier to AY 2006-07, as well as in the AYs subsequent thereto. In short, the Assessee case was that if in all the earlier AY as well as in subsequent AYs the Revenue had accepted the stand of the Assessee that the interest income earned by it should be treated as business income, there was no reason to make a departure only for AY 2006-07.

6. By the impugned order dated 19th December, 2014, the ITAT dismissed the application. In para 3.1 while rephrasing earlier order of the ITAT dated 12th October 2012, the ITAT observed that "admittedly, the rental income, dividend income, income from long terms/short term capital gain cannot be the business income. Now, only other interest was the interest income of Rs. 48,312/- which too was held by the Assessee by investment of own funds." Therefore, the question before the ITAT was "whether the earning of the interest was of Rs. 48,312/- by investing own funds can be said to carrying on the business and consequently, allowance of a business expenditure/business loss of Rs. 10,66,545/-." The ITAT then proceeded to record in the impugned order that "admittedly in this year the Assessee did not carry on the business of *Vyaj Badla*. Moreover, interest income was only Rs. 48,312/-." The ITAT then came to the conclusion that in the above facts it could not be said that there was any apparent mistake in the order dated 12th October, 2012.

7. One course open to the Petitioner, if it was aggrieved by the ITAT's order dated 12th October 2012, was to have filed an appeal before this Court under Section 260A of the Act. However, Mr Salil Aggarwal, learned counsel for the Petitioner states that in view of the enunciation of the law by the Supreme Court in ***Honda Siel Power Products Ltd. v CIT (2007) 295 ITR 466 (SC)***, the Assessee decided to file a rectification application since there was a fundamental legal error with the ITAT declining to apply the rule of consistency and failing to appreciate that for all earlier AYs and even the subsequent AYs, the Revenue itself had treated the interest income earned by the Assessee as business income.

8. Mr Rahul Choudhary, learned Senior Standing counsel for the Revenue, on the other hand submitted that by entertaining the present writ petition, the Court would be virtually giving the Assessee another round of appeal before the ITAT which would defeat the very object of Section 254(2) of the Act. He submitted that it would be recognising a power of review of the ITAT which clearly was not permissible within the scope of Section 254(2) of the Act. Having failed to avail the remedy of filing an appeal against the original order of the ITAT dated 12th October, 2012 the Petitioner could not be permitted to indirectly seek the same relief.

9. What the scope of powers of the ITAT under Section 254(2) of the Act is, was explained by this Court earlier in four decisions ***CIT v. K. L. Bhatia (1990) 182 ITR 361 (Del)***, ***Ms. Deeksha Suri v. ITAT (1998) 232 ITR 395(Del)***, ***J. N. Sahni v. ITAT (2002) 257 ITR 16 (Delhi)*** and ***Baljeet Jolly v. CIT (2001) 250 ITR 113 (Del)***. These were again explained in ***Honda***

Siel Power Products Ltd. v CIT (2007) 293 ITR 132 (Del). The last decision was taken in appeal before the Supreme Court in ***Honda Siel Power Products Ltd. v CIT (2007) 295 ITR 466 (SC).*** The following observations in the said decision at para 13 are relevant:

“13. “Rule of precedent” is an important aspect of legal certainty in rule of law. That principle is not obliterated by section 254(2) of the Income-tax Act, 1961. When prejudice results from an order attributable to the Tribunal’s mistake, error or omission, then it is the duty of the Tribunal to set it right. Atonement to the wronged party by the court or the Tribunal for the wrong committed by it has nothing to do with the concept of inherent power to review. In the present case, the Tribunal was justified in exercising its powers under section 254(2) when it was pointed out to the Tribunal that the judgment of the co-ordinate Bench was placed before the Tribunal when the original order came to be passed but it had committed a mistake in not considering the material which was already on record. The Tribunal has acknowledged its mistake, it has accordingly, rectified its order. In our view, the High Court was not justified in interfering with the said order. We are not going by the doctrine or concept of inherent power. We are simply proceedings on the basis that if prejudice had resulted to the party, which prejudice is attributable to the Tribunal’s mistake, error or omission and which error is a manifest error then the Tribunal would be justified in rectifying its mistake, which had been done in the present case.”

10. The above decision was followed by a Full Bench of this court in ***Laxman Das v. ACIT (2011) 330 ITR 243 (Del).*** While, paraphrasing the decision of the Supreme Court in ***Honda Siel Power Products Ltd. v CIT (2007) 295 ITR 466 (SC),*** the Full Bench of this Court in ***Laxman Das (supra)*** observed as under:

“28. It has also been pronounced that the decision is only an authority for what it actually decided and it is the duty to ascertain the real concrete or ratio decidendi which has the binding effect. While dealing with the principle of precedent, it is to be borne in mind that a judgment is neither to be read as Euclid’s theorem nor is to be read out of context. Mechanical application of a decision treating as a precedent without appreciating the underlying principle is not allowable. In *Honda Siel Power Products Ltd.*, (*supra*), the Division Bench of this court considered the stance of the counsel that the decision in *K.L. Bhatia [1990] 182 ITR 361 (Delhi)* and the other decisions that have followed it, forbids recall of the Tribunal’s entire decision on the basis that in the grab of rectification, the order cannot be recalled. When the matter travelled to the apex court, their Lordships as is evident from the paragraphs quoted hereinbefore, took note of the fact that the application for rectification was filed as the Tribunal had not taken note of a binding precedent though the same was cited before the Tribunal. In that factual background, their Lordships have held that the power of rectification has been conferred on the Tribunal to see that no prejudice is caused to either of the parties appearing before it by its decision based on a mistake apparent from the record. Their Lordships further opined that atonement to the wronged party by the court or the Tribunal for the wrong committed by it has nothing to do with the concept of inherent power to review. Their Lordships further took note of the fact that the Tribunal committed a mistake in not considering the material which was already on record and the Tribunal acknowledged its mistakes and accordingly rectified its order. It is wrong nothing that their Lordships have clearly stated that they are not going by the doctrine or concept of inherent power but on the basis that if prejudice has resulted to the party, which is attributable to the Tribunal’s mistake, error or omission and which error is a manifest error, then the Tribunal would be justified in rectifying its mistake, which had been done in the said case by recalling the original order. Applying the principles which we have enumerated hereinabove to understand the concept of

precedent, it can safely be stated that the apex court was dealing with a case which travelled from this court wherein it had been held that the Tribunal had no power of recall of its own order in entirety; that the court was not going by the doctrine or concept of inherent power; that the "rule of precedent" which is an important part of legal certainty in rule of law is not obliterated by section 254(2) of the Act; that if prejudice has resulted to the party due to the mistake, error or omission which is attributable to the Tribunal and it is manifest from the record, the mistake can be rectified. Thus understood, it is clear as crystal that their Lordships have held that the fundamental principle is that no party appearing before the Tribunal should suffer on account of any mistake committed by the Tribunal and no prejudice is caused to either of the parties before the Tribunal which is attributable to the Tribunal's mistake, omission or commission and if the same error is a manifest error, then the Tribunal would be justified to recall. The line of decisions which have been rendered by this court have proceeded on the basis of review, the limited power of recall as provided under rule 24 of the Income-tax (Appellate Tribunal) Rules, 1963 as regards the exercise of power which cannot be exercised directly or exercised indirectly and that even if there is any irregularity caused, that would not clothe the Tribunal with the power of review as it may ultimately result in rehearing of the appeal. Thus, the entire stream of decisions has gone by the concepts which are fundamentally founded on the power of review, rehearing and the limited concept of recall. But what has been stated by the apex court in *Honda Siel Power Products Ltd. [2007] 295 ITR 466 (SC)* is based on the doctrine of prejudice. Their Lordships have clarified that they were not proceeding on the doctrine or concept of inherent power. Analyzed from this perspective, there can be no trace or shadow of doubt that the said decision is an authority for the proposition that the Tribunal in certain circumstances can recall its own order and section 254(2) of the Act does not totally prohibit so."

11. Ultimately, the Full Bench of this Court in *Laxman Das (supra)* overruled the earlier decisions in *K. L. Bhatia (supra)*, *J. N. Sahni (supra)*, *Baljeet Jolly (supra)* and *Deeksha Suri (supra)* to be not laying down the correct law.

12. The result of the above discussion of the legal position is that, it will be open for the ITAT in application of Section 254(2) of the Act, to also examine whether the order sought to be rectified has an apparent error of law not limited to mistakes of fact apparent on the face of the record.

13. In the present case, the Court finds that the order dated 12th October, 2012 merely records that the Assessee did not carry on the business of *Vyaj Badla* during AY 2006-07. As pointed out by Mr Aggarwal, although in the AY in question the Assessee may not have carried out the business of *Vyaj Badla*, it was necessary for the ITAT to examine, in light of the stand of the Revenue in the earlier and later AYs, whether the interest income earned by the Petitioner should be treated as business income. That plainly the ITAT failed to do in the order dated 12th October, 2012. The impugned order in the rectification application also failed to deal with this aspect.

14. While, it is true that the Assessee could have challenged the order dated 12th October 2012 in an appeal before this Court, the Assessee cannot be faulted for approaching the ITAT under Section 254 (2) of the Act for rectification of the above order in view of the law explained by the Supreme Court in *Honda Siel Power Products Ltd. v CIT (supra)*.

15. In that view of the matter the impugned order dated 19th December, 2014 passed by the ITAT is set aside and the application for rectification filed by the Assessee before the ITAT under Section 254 (2) of the Act is treated as disposed of. However, this would require the restoration of the appeal ITA No.427/Del/2010 to the file of the ITAT to examine the grounds urged by the Assessee on the rule of consistency as far as treatment of the interest income earned by the Assessee.

16. Accordingly ITA No. 427/Del/2010 is directed to be listed before the ITAT peremptorily on 14th March, 2016 for a fresh decision on the limited ground of treatment of the interest income earned by the Petitioner during AY 2006-07.

17. The writ petition is disposed of in the above terms. Order *dasti*.

S.MURALIDHAR, J

VIBHU BAKHRU, J

FEBRUARY 15, 2016
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