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

WRIT PETITION NO. 1340 OF 2018

M/s. Universal Education
Foundation, Mumbai ...Petitioner

V/s.
The Income-Tax Appellate
Tribunal, Mumbai, Bench 'F"
and Ors. ….Respondents

Dr. K. Shivram, Senior Counsel i/b Rahul Hakani & Neelam Jadhav for the petitioner
Mr. Sham Walve for respondent no.2

CORAM :- M.S. SANKLECHA, &
SANDEEP K. SHINDE, JJ.
DATE :- 28th JUNE, 2018.

P.C. :-

1. At the request of the parties, the petition is disposed of finally at the stage of admission.

2. The challenge in this petition is to the order dated 16th January, 2018 of the Tribunal rejecting the petitioner's application for rectification of its order dated 25th May, 2017. The application was made under Section 254(2) of the Income-Tax Act, 1961.

3. The primary grievance of the petitioner in its rectification application to the Tribunal is that the order passed on 25th May, 2017

after recording the petitioner's submission that the provisions of Section 11(1) Explanation-2 of the Act would warrant its appeal being allowed was not considered and its appeal was dismissed. This led to the filing of the Rectification Application under Section 254(2) of the Act.

4. On 16th January, 2018 the impugned order was passed dismissing the Rectification Application. The impugned order while not disputing the submission of the petitioner leading to the order dated 25th May, 2017 did not consider the claim of the petitioner under Section 11(1) Explanation-2 of the Act to hold on merits that it is not entitled to the benefit of Section 11(1) of the Act. This according to the petitioner is clearly contrary to and in defiance of the decisions of this Court in **Safari Mercantile (P) Ltd. Vs. ITAT, 386 ITR 4** and **Gyan Constructions V/s. Income-Tax Appellate Tribunal, [2015] 55 Taxmen.com 479.**

5. Mr. Walve, the learned Counsel for the respondent submits to the order of this Court.

6. We find that the issue is no longer *res judicata* as it stands concluded by the decision of this Court in Safari Mercantile

(supra) and Gyan Constructions (supra) that while dealing with the application for rectification, the Tribunal where it finds there is an error apparent on record, then it should recall the original order and place the Appeal for consideration of the issue on merits before the Regular Court. It is not appropriate to dispose of the controversy on merits of the submission while disposing of the Rectification Application.

7. In the above view, the impugned order dated 16th January, 2018 is quashed and set aside. The Rectification Application filed by the petitioner is restored to the Tribunal for fresh disposal in accordance with the decision of this Court in Safari Mercantile Pvt. Ltd. (supra) and Gyan Constructions (supra).

8. The petition is disposed of in the above terms.

(SANDEEP K. SHINDE, J) (M.S. SANKLECHA, J)