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

WRIT PETITION NO.3028 OF 2018

M/s Sheetal Diamonds Ltd. … Petitioner

V/s.

Income Tax Appellate Tribunal and ors. … Respondents

Mr.V.Sridharan, Senior counsel with Mr.B.V.Jhaveri with Mr. Mayank Thosar for the Petitioner.
Mr.Akhileshwar Sharma for Respondent No.2.

CORAM : AKIL KURESHI AND
M.S.SANKLECHA, JJ.
DATE : JANUARY 03, 2019.

P.C.:-

1. Petitioner-assessee has challenged an order dated 5th September, 2018 passed by the Income Tax Appellate Tribunal ("the Tribunal" for short) by which the application of the revenue for rectification of the Tribunal's judgment dated 28th July, 2015 came to be allowed.

2. Brief facts are as under:-

Petitioner-assessee is a company. The petitioner had filed a return of income for the assessment year 2001-02 declaring loss of Rs.3.67 crores (rounded off). The Assessing Officer passed the order of assessment assessing the assessee's income for the said assessment year at Rs.34.63 lakhs (rounded off). This issue eventually reached the Tribunal. The Tribunal by an order dated 22nd August, 2008 reduced the assessee's income to Nil. In this order, the Tribunal confirmed the Assessing Officer's view of rejecting the book result, but did not find any basis for applying net profit rate of 10%. This judgment of the Tribunal has achieved finality.

3. The department instituted penalty proceeding. The Assessing Officer imposed penalty of Rs.13.69 lakhs on the basis of the escaped income of Rs.34.63 lakhs. The commissioner appeals, however, enhanced the penalty on the ground that the concealment can be stated to be of the difference between the stated loss and the assessed income. In further appeal the Tribunal passed an order and deleted the penalty making following observations:-

"4. We have heard the rival submissions and

> perused the material on record. We find that the AO had completed the assessment determining the income of the assessee at Rs.34.63 lacs, that the Tribunal had reduced the income for the year under appeal at Rs.NIL, that the company is now defunct and had suffered a loss of Rs.3.54 Crores in the immediate preceding AY, that the AO or the FAA did not have the benefit of the order of the Tribunal. As addition made by the AO have been deleted by the Tribunal in the quantum appeal, so, in our opinion the penalty imposed by the AO/enhanced by the FAA would not survive."

4. The revenue thereupon filed an application for rectification which came to be allowed by the impugned order of the Tribunal. The Tribunal referred to the decision of the Supreme Court in case of **Virtual Soft Systems Ltd. Vs. Commissioner of Income-Tax**[1] and observed that the said decision was not noticed when previous proceedings were disposed of. The Tribunal then referred to the decision of the Gujarat High Court in case of **Asst. CIT Vs. Saurashtra Kutch Stock Exchange Securities Ltd.**[2] and held that not noticing a binding judgment would give rise to a rectifiable mistake. The Tribunal eventually recalled its earlier order and posted the appeal for fresh hearing.

1 (2007) 289 ITR 83(SC)
2 (2013) 33 taxmann.com 118 (Gujarat)

5. We have heard learned counsel for the parties at considerable length. We are conscious of the decision of this court in case of **Chem Amit Vs. Assistant Commissioner of Income-tax**[1] holding that if the order of rectification results in a fresh order passed in appeal, the same would give rise to an appellate order. However, in the present case after allowing the revenue's rectification application, recalling its order, the Tribunal did not proceed further to pass a fresh order in the appeal. Under the circumstances, we have entertained this petition.

6. Coming to the merits of the petition, we may recall that while disposing of the assessee's appeal against the penalty order all that the Tribunal had by way of discussion on merits observed that the Tribunal had reduced the income of the assessee from Rs.34.63 lakhs as Assessing Officer to Nil. The Tribunal noted that the company was defunct and had suffered loss in earlier years. Primarily on such grounds the Tribunal was of the opinion that the penalty could not have been imposed.

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1 (2005) 272 ITR 397 (Bom)

7. While accepting the revenue's application for rectification the Tribunal recalled the order and posted the appeal for fresh hearing. We do not find that this order requires any interference. The previous order of the Tribunal on penalty appeal left much to be desired. It was not the disposal of the appeal on merits at all. The assessee's appeal was allowed and penalty as enhanced by the Commissioner was deleted on the grounds that the Tribunal had in quantum appeal reduced the income to Nil and that the assessee had suffered loss in earlier years. These grounds were not sufficient to delete the penalty without examination of relevant issues. It is true that the Tribunal referred to the decision of the Supreme Court in case of **Virtual Soft Systems (supra)** which counsel for the assessee would be correct in pointing out may not apply to facts of the case and by virtue of the decision of the three bench judge in case of **Commissioner of Income-Tax Vs. Gold Coin Health Food P. Ltd.**[1] the decision in case of **Virtual Soft Systems** has been overruled. The view of the larger bench of Supreme Court is that penalty can be imposed even in

1 (2008) 304 ITR 308 (SC)

the case of reduced loss.

8. In the present case, therefore, we are not inclined to interfere with the order of the Tribunal. The petitioner would have full opportunity to pursue the appeal before the Tribunal on all grounds. We make it clear that nothing stated in the order would prevent the petitioner from taking all defences as available in law to oppose the imposition of penalty. With these observations, petition is disposed of.

(M.S.SANKLECHA,J.) **(AKIL KURESHI,J.)**

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