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

WRIT PETITION NO.1241 OF 2021
WITH
INCOME TAX APPEAL (L) NO. 4270 OF 2020
WITH
INTERIM APPLICATION (L) NO.4271 OF 2020 (NOB)

VISHAL SUBHASH PAREKAR

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Mithalal B. Jain ...Petitioner
vs.
Income Tax Officer,
Ward 19(2)(3), Mumbai and Others ...Respondents

Mr. D.H. Jain a/w. Ms. Radha Halbe, for the Petitioner.
Mr. Sham Walve, for the Respondent-Revenue.

CORAM : K.R. SHRIRAM &
N. J. JAMADAR, JJ.

DATE : FEBRUARY 08, 2022

P.C.:

. Certain additions were made to Petitioner's income based on re-opening under section 147 read with 148 of the Income Tax Act, 1961 for A.Y. 2010-2011. Petitioner filed an Appeal before the Commissioner of Income Tax (Appeals) and the CIT (A) held in favour of the Department.

2. Petitioner challenged that order before the Income Tax Appellate Tribunal (ITAT) which came to be dismissed by an order pronounced on 5th October, 2018. Petitioner raised a grievance before ITAT that CIT(A) has erred in sustaining 12.5% disallowance

on account of bogus purchases and also in upholding the validity of re-opening. In the Appeal before ITAT various grounds were raised including the challenge to re-opening itself. According to Petitioner there was no tangible material. Moreover Petitioner also alleged that reliance has been placed upon information received by Revenue from Maharashtra Sales Tax Authority that Assessee was beneficiary of Hawala accommodation entries from entry provider by way of bogus purchase. It is also alleged that accommodation entry provider has deposed and admitted before Maharashtra Sales Tax Authority vide statement/affidavit that they were engaged in providing bogus accommodation entries wherein bogus sales bills were issued without delivery of goods, in consideration for commission. It is stated that Assessee was one of the beneficiaries of this bogus entries of sale of material from Hawala entry providers. These accommodation entry providers on receipt of cheques from parties against bogus bills for sale of material, later on withdrew cash from their bank accounts which were returned to beneficiaries of bogus bills after deduction of their agreed commission.

3. It is Petitioner's case that these details/information like admission of accommodation entry provider before Maharashtra

Sales Tax Authority implicating Petitioner has not been provided to Petitioner despite repeated requests. As could be seen from the ITAT's order pronounced on 5th October, 2018, this ground has been raised before ITAT. We do not find anything in the ITAT's order as to why this information was not provided to Petitioner to enable to Petitioner to effectively deal with the same.

4. Subsequently Petitioner filed Misc. Application on 14th May, 2019 submitted on 23rd May, 2019 before ITAT pointing out mistake apparent from record. Petitioner has raised these grounds as well as additional ground that there has been a subsequent judgment of Bombay High Court which held that addition should be restricted to differences between the gross profit rate on alleged bogus purchases and the undisputed purchases. This Misc. Application came to be dismissed by an order pronounced on 11th October, 2019.

5. As regards the Petitioner’s grievance that the evidences /statements collected from the accommodation entry provider has not been provided, ITAT has not even dealt with that objection. As regards Bombay High Court’s judgment relied upon, ITAT says that it was a subsequent order and therefore it could not be stated that there was an error apparent from record.

6. The Apex Court in the case of **Assistant Commissioner of Income Tax, Rajkot vs. Saurashtra Kutch Stock Exchange Limited**[1] in paragraphs 42 to 46 states as under:

> 42. In our judgment, it is also well- settled that a judicial decision acts retrospectively. According to Blackstonian theory, it is not the function of the Court to pronounce a `new rule' but to maintain and expound the 'old one'. In other words, Judges do not make law, they only discover or find the correct law. The law has always been the same. If a subsequent decision alters the earlier one, it (the later decision) does not make new law. It only discovers the correct principle of law which has to be applied retrospectively. To put it differently, even where an earlier decision of the Court operated for quite some time, the decision rendered later on would have retrospective effect clarifying the legal position which was earlier not correctly understood.
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> 43. Salmond in his well-known work states;
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> > "......(T) he theory of case law is that a judge does not make law; he merely declares it; and the overruling of a previous decision is a declaration that the supposed rule never was law. Hence any intermediate transactions made on the strength of the supposed rule are governed by the law established in the overruling decision. The overruling is retrospective, except as regards matters that are res judicatae or accounts that have been settled in the meantime". (emphasis supplied)
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> 44. It is no doubt true that after a historic decision in Golak Nath v. State of Punjab AIR 1967 SC 1643 this Court has accepted the doctrine of 'prospective overruling'. It is based on the philosophy: "The past cannot always be erased by a new judicial declaration". It may, however, be stated that this is an exception to the general rule of the doctrine of precedent.
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> 45. 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.

1 [2008] 173 Taxman 322 (SC)

> 46. In S. Nagaraj & Ors. v. State of Karnataka, 1993 Supp (4) SCC 595, Sahai, J. stated:
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> > "15. Justice is a virtue which transcends all barriers. Neither the rules of procedure nor technicalities of law can stand in its way. The order of the Court should not be prejudicial to anyone. Rule of stare decisis is adhered for consistency but it is not as inflexible in Administrative Law as in Public Law. Even the law bends before justice. Entire concept of writ jurisdiction exercised by the higher courts is founded on equity and fairness. If the Court finds that the order was passed under a mistake and it would not have exercised the jurisdiction but for the erroneous assumption which in fact did not exist and its perpetration shall result in miscarriage of justice then it cannot on any principle be precluded from rectifying the error. Mistake is accepted as valid reason to recall an order. Difference lies in the nature of mistake and scope of rectification, depending on if it is of fact or law. But the root from which the power flows is the anxiety to avoid injustice. It is either statutory or inherent. The latter is available where the mistake is of the Court. In Administrative Law, the scope is still wider. Technicalities apart if the Court is satisfied of the injustice then it is its constitutional and legal obligation to set it right by recalling its order"..... (p.618)".

7. Therefore, we set aside the order dated 11th October, 2019 impugned in this Petition and remand the matter *de novo* and direct the ITAT to give its findings on the grounds raised in the Misc. Application including consider the judgment of the Bombay High Court in **PCIT vs. Mohommad Haji Adam & Co.**[2] In this order the ITAT has to also give a finding on the effect of not providing the documents/ affidavits/ declarations by the accommodation entry

2 ITA No. 1004 of 2016 dated 11/02/2019.

provider to Petitioner and explain how it meets with the principles of natural justice if they do not find anything wrong in not providing these information/ affidavit/ declarations.

8. Petition accordingly disposed.

9. We clarify that we have not made any observations on the merits of the case.

10. In view of above, Mr. Jain, seeks leave to withdraw the Income Tax Appeal (L) No. 4270 of 2020 with liberty to file a fresh Appeal if the original order is not modified.

11. Appeal dismissed as withdrawn with liberty as prayed for.

12. Accordingly Interim Application (L) No. 4271 of 2020 also stands disposed.

(N. J. JAMADAR, J.) **(K. R. SHRIRAM, J.)**