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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ ITA 498/2022

PRINCIPAL COMMISSIONER OF INCOME TAX DELHI 4 .....Appellant

Through: Mr. Anurag Ojha, SSC with Mr. V.K. Saksena, Ms. Hemlata Rawat, JSCs, Mr. Dipak Raj, Mr. Kuldeep Mishra, Mr. Vipul Kumar & Mr. Subham Kumar, Advs.

versus

M/S INDIABULLS ADVISORY SERVICES LTD .....Respondent

Through: Mr. Manish Yadav & Mr. Gautam Jain, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE HARISH VAIDYANATHANSHANKAR

<u>O R D E R</u>

% **27.02.2025**

1. The instant appeal has been preferred by the Principal Commissioner aggrieved by the order of the **Income Tax Appellate Tribunal**[1] dated 08 April 2021 and posits the following questions of law for our consideration:

> "A. Whether on facts and in the circumstances of the case and also on the prevailing law, Hon'ble ITAT is justified in view of CBDT's circular 4/2007 dated 15th of June 2007 which deals with the matter of distinction between shares held as stock in trade in shares held as investment?
>
> B. Whether on facts and in the circumstances of the case and also on the prevailing law, Hon'ble ITAT is justified in reversing its own order dated 23.08.2018 without recognising that no new evidence has been brought on record by the respondent and by means of its earlier decision in a detailed and considered manner, considered the income of Rs. 35,14,66,127 as business income?"

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[1] Tribunal

2. We, however, deem it appropriate to admit the appeal on the question which is set out hereinbelow:

A. Whether the Tribunal was justified and had the requisite jurisdiction to recall its earlier order dated 23 January 2017?

3. The appeal itself arises in the context of the order passed by the Tribunal on a **Miscellaneous Application**[2] moved by the respondent-assessee and in terms of which it was asserted that the principal order dated 23 January 2017 suffers from apparent mistakes of law. That MA came to be initially allowed on 16 January 2018 restoring the appeals and fixing the same for hearing afresh.

4. The Tribunal then proceeded to allow the Revenue's appeal on 23 August 2018, leading to the respondent-assessee filing another MA asserting that the said fresh order also suffered from apparent errors and mistakes. It is this submission that has ultimately came to be accepted by the Tribunal, and which has while allowing the said MA on 29 May 2020 held as follows:

> "7. We have considered the arguments advanced by both the sides and perused the relevant material available on record. A perusal of the order of the Tribunal vis-à-vis the submissions made by the assessee at the time of hearing of the appeal shows that the decision of the Tribunal in the case of Prema Jain (supra) which has been relied upon by the Bench while deciding the issue against the assesseee was neither cited by the Revenue nor confronted to the assessee at the time of hearing. Further, the submissions of the assessee that in the subsequent seven assessment years i.e., A.Y. 2009-10 to 2015-16, the AO has consistently held the gain or loss from sale of shares as long-term or short-term capital gain out of which six assessment years have been completed u/s 143(3) and only in A.Y. 2013-14 the assessment was completed u/s 143(1) was also completely ignored by the Tribunal while passing the order. Similarly, the various decisions relied on by the ld. Counsel to the proposition that period of holding of investment unless settled during

[2] MA

the day is investment, disclosure in balance sheet is deciding factor and that discretion is with the assessee even if the assessee is a dealer in shares were also completely ignored by the Tribunal while deciding the issue. In fact, the decisions of the Hon'ble Supreme Court and the jurisdictional High Court which are in favour of the assessee and which were relied upon by the ld. Counsel for the assessee at the time of hearing of the appeal were inadvertently escaped the notice of the Bench. We, therefore, are of the opinion that a mistake has crept in the order of the Tribunal which requires rectification."

5. As is manifest from the aforesaid extract, the Tribunal allowed the MA on 29 May 2020, thereby restoring the appeal to the board of the Tribunal. The appeal preferred by the Revenue thus stood revived and ultimately came to be dismissed by virtue of the impugned order dated 08 April 2021.

6. However, the Tribunal has essentially undertaken a "merit review" and thus reopened the appeal for consideration. What the Tribunal seeks to describe as a rectification was clearly a review and a reconsideration of the merits of the order which was pronounced. This was, therefore, not a case where the Tribunal could have been said to have invoked a power to recall or exercise the power of "procedural review" which alone is recognised as inhering in all courts and tribunals.

7. In the absence of any statutory empowerment enabling the Tribunal to undertake a review on the merits of a judgment rendered by it, we find ourselves unable to sustain the impugned order dated 08 April 2021.

8. We, accordingly, answer the question as framed in the negative and in favour of the appellant. In light of our conclusion rendered on the aforenoted question, the second issue which was sought to be canvassed would clearly not survive for consideration.

9. We consequently allow the appeal and set aside the impugned order dated 08 April 2021.

YASHWANT VARMA, J

HARISH VAIDYANATHAN SHANKAR, J

FEBRUARY 27, 2025/*neha*