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CUSTOMS. EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
SINGLE MEMBER APPEAL BRANCH

Appeal No. E/1130/2007 – SM[BR] Date 05/01/2009

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S MAHALAKSHMI CABLE INDUSTRIES
3, TILAK NAGAR INDL. AREA, NEW DELHI.

M/S MAHALAKSHMI CABLE INDUSTRIES Appellant

Vs

C.C.E. DELHI II Respondent

I am directed to transmit herewith a certified copy of **Final order No**. 1641 / 2008 - **SM[BR]** dated 28.11.2008

passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(SM Appeal Branch)

Copy to :
1. Respondent
   C.C.E. DELHI II
   C.R. BUILDING, I.P. ESTATE, NEW DELHI 110002
2. Adv. / Consult
   MR.R.K.PHILIPS
   M/S SIRMACS CONSULTANCY SERVICES, UG-3,PRAGATI TOWER, 26, RAJENDRA PLACE, N.DELHI.
3. S.D.R
4. ~~I.C.D.R~~.
5. Bar association, CESTAT, New Delhi
6. M/s. Deeparchi Publications, M-93, Marg. 46, Saket, New Delhi 110017
7. M/s Centax Publictions (P) Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New - 3
8. Excise & Customs cases, B-37, Sector -1, NOIDA - 201301 Gautam Budh Nagar, (U.P.)
9. Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10. Nidheshak publications, I.P.Estate, new Delhi
11. Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
12. Commercial Laws of India Pvt Ltd Post Bag No. 1033, No.70(Old No. 88), Thyagaraya Road, T. Nagar,Chennai
13. Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
14. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,Ahmedabad-1
15. Office Copy
16. Guard file

Assistant Registrar
(SM Appeal Branch)

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, R.K. PURAM, W.B. NO.2, PRINCIPAL BENCH NEW DELHI, COURT NO.I

Excise Appeal No. 1130 of 2007-SM
[Arising out of Order-in-Appeal No. 04-CE/DLH/2007 dated 07.02.2007 passed by the Commissioner (Appeals), Central Excise, New Delhi]

Date of Hearing/Decision: 28.11.2008

For approval and signature:

Hon'ble Ms. Jyoti Balasundaram, Vice President

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982.	No
2	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	No
3	Whether Their Lordships wish to see the fair copy of the Order?	Seen
4	Whether Order is to be circulated to the Departmental authorities?	Yes

M/s Mahalakshmi Cable Industries — Appellant

Vs.

CCE, Delhi-II — Respondent

Appearance:

Mr. R.K. Philips, Advocate for the appellant
Mr. R.K. Saini, DR for the respondent

CORAM: Ms. Jyoti Balasundaram, Vice President

Final Order No. 1641/08-SM(BR)

Per Jyoti Balasundaram:

Claim for refund of Rs. 4,12,590/- of the appellants herein has been rejected by the lower appellate authority on the ground that duty was paid during the period 22.2.1999 upto 28.8.99 while the refund claim was filed on 08.09.2005 after period of one year and was therefore barred by limitation.

2. I have heard both sides.

3. Learned Counsel for the appellants seeks to rely upon para 69 of the Apex Court judgement in Mafatlal Industries Limited vs. Union of India – 1997 (89) ELT 247 (SC) to support his contention that the amount was paid during investigation and the amount is to be treated as deposit and not duty, therefore, the provision for period of limitation for filing refund claim are not attracted against the assessee.

4. However, I do not find any merit~~s~~ in this plea for the reason that all refund claims have been held to be governed by the provisions of Section 11B of the Central Excise Act by the Apex Court itself and therefore the claim for refund is required to be filed within the statutory period of limitation. Since the claim for refund was filed beyond 1 year, it has rightly been rejected on the ground of limitation. I uphold the impugned order and reject the appeal.

[Dictated and pronounced in the open Court]

[Jyoti Balasundaram]
Vice President

[Pant]

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

(Principal Bench)

West Block No.2, R.K. Puram, New Delhi-110066

SINGLE MEMBER APPEAL BRANCH

Date : 11/08/2010

MISC Order No. 209 / 2010 -SM[BR]

Application E / ROM / 13 / 2009 -SM[BR] IN

Appeal No. E/1130/2007 - SM[BR]

1. Appellant

   M/S MAHALAKSHMI CABLE INDUSTRIES

   3, TILAK NAGAR INDL. AREA, NEW DELHI.

2. Respondent

   C.C.E. DELHI II

   C.R. BUILDING, I.P. ESTATE, NEW DELHI
   110002

3. Adv / Consult :
   MR.R.K.PHILIPS

   M/S SIRMACS CONSULTANCY SERVICES,
   UG-3,PRAGATI TOWER, 26, RAJENDRA
   PLACE, N.DELHI.

4. C.D.R
5. Bar Association, CESTAT, New Delhi.
6. Director Publications, Customs, Excise. I.P. Estate, New Delhi
7. M/s Centax Publications Pvt Ltd., 1512-B, Bhishm Pitamah Marg, Opp. ICICI Bank of Defence Colony, New Delhi - 110003
8. Company Law Institute of India Pvt Ltd, No.2 (OLD No.36),Vaithyaram Street, T. Nagar, Chennai 600017
9. Deeparchie Publications, M-93, Marg. 43, Saket, New Delhi - 110017.
10. Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi -110005
11. Easy Service Tax Online Dot Com Pvt. Ltd. 407A, Iscon Mall, Above Star India Bazar, Satellite Road, Ahmedabad - 15
12. LAWCRUX Advisors (P) Ltd, Law House,1-8,Sector - 10, Faridabad 121003 (Haryana)
13. TaxIndiaOnline.com Pvt Ltd, Unit No. 1, 2nd Floor, Vasant Arcade Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
14. Office Copy
15. Guard File

Assistant Registrar
(SM Branch)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST BLOCK NO.II, R.K. PURAM, NEW DELHI-110066.
BENCH-SM

Excise ROM No. E/ROM/13/09-SM in
Excise Appeal No.E/1130/07-SM

[Arising out of Order-in-Appeal No.04-CE/DLH/2007 dated 07.02.2007 passed by the Commissioner (Appeals0 Central Excise, New Delhi].

M/s. Mahalakshmi Cable Industries ...Appellant

Vs.

CCE, Delhi-II ... Respondent

Present for the Appellant :Shri.R.K.Phillips, Advocate
Present for the Respondent:Shri.I. Baig, SDR

Date of Hearing : 10.05.2010
Date of Pronouncement: 04.08.2010

Coram: HON'BLE MR.DN.PANDA, JUDICIAL MEMBER

Misc **ORDER NO.** 209/2010-SM (Br) **DATED:**______

PER: D.N.PANDA

Through this application registered as ROM/13/09 under section 35 C (2) of the Central Excise Act 1944 (hereinafter referred to "the Act") the Appellant stating that there is a mistake apparent from final order No. 1641/08-SM (Br.) passed on 28.11.2008 in Excise Appeal No.E/1130 of 2007-SM by Tribunal prays for the rectification of the same. The appeal before Tribunal arose out of order in Appeal No. 04-CE/DLH/2007 passed by ld. Commissioner (Appeals) Central Excise, New Delhi.

2. The MA (ROM) further states that when the Order-in-Original No. 42/04-05 dated 23.06.04 was quashed, refund arose, for which application was filed by the appellant and that was allowed by Order-in-Original No.100/04-05 dated 3.12.2005. But such order granting refund was challenged by Revenue on the ground that refund application was barred by limitation under section 11B of the Central Excise Act, 1944 (hereinafter referred to as "the Act") and the appellant had not followed the procedure of payment of duty under protest in terms of Rule 233B of erstwhile Central Excise Rules 1944. But the appellant's grievance was that the amount of Rs.4,12,590/- deposited by it became due to be refunded when show cause notice No. CE-20/Mahalaxmi/SCN/R-23/MOD V/01/Pt/611 dated 27.09.01 was struck down in terms of Order-in-Original No.42/04-05 dated 23.06.2004. Accordingly, refund application dated 08.09.2005 made was well within one year from the date of Order in Original as required under section 11B of the Act.

3. When the matter stood as above, against the order of rejection of refund the appellant came in appeal before Tribunal and such appeal was registered as appeal case No.E/1130/2007. While disposing such appeal, Tribunal recorded the fact that rejection of the claim was done by the learned Appellate Authority on the ground that duty was paid during the period 22nd February, 1999 to 28th August, 1999, while the refund claim was filed on 8.9.2005 which was after a period of one year for which that was barred by limitation.

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Plea of the appellant that the amount in question was paid during investigation and that was to be treated as deposit but not a duty for which the limitation provision do not apply in such case. He relied upon para 69 of Apex Court judgement in Mafatlal Industries vs. Union of India reported in 1197 (89) ELT 247 (S.C.) for his submission. The ground on which rejection was ordered by Tribunal was that all refund claims are governed by provisions of Section 11B of the Act and application for refund is to be filed within the statutory period of limitation. It was also observed that the claim was made beyond one year for which that was rightly rejected by the lower appellate authority.

4. Ld. Counsel appearing on behalf of the appellant submitted that following the law laid down in the case of Mafatlal Industries (supra), refund of the deposit that was made during investigation is not governed by section 11B of the Act. Holding contrary by the Tribunal by order dated 28.11.2008 is an apparent mistake. According to him a question of law having arisen from the order of the Tribunal that is a mistake apparent and rectifiable. He relied on the decision of Deva Metal Powders Pvt. Ltd. vs. Commissioner, Trade Tax, U.P. reported in 2008 (221) ELT 16 (SC) to argue that the mistake of the nature committed by Tribunal is an apparent mistake from record and rectifiable. If any error of law is committed that shall be a case of apparent mistake.

Sulank.

5. Ld. Counsel also relied on the decision of Asstt. Commr., Income-Tax, Rajkot vs. Saurashtra Kutch Stock Exchange Ltd. reported on 2008 (230) ELT 385 (SC) to submit that non-consideration of the decision of the Apex Court in Mafatlal Industries' case (supra) is a mistake apparent from record. Again he relied upon decision in the case of Honda Siel Power Products Ltd. vs. Commissioner of Income-tax, Delhi reported in 2008 (221) ELT 11 (S.C.) to submit that Tribunal should justifiably exercise its power for rectification of mistake in view of wrong done to the assessee without proper appreciation of principles of law laid down in Mafatlal Industries judgement.

6. He also relied on the decision in the case of Commissioner of Central Excise, Mumbai vs. Bharat Bijlee Ltd. reported in 2006 (198) ELT 489 (SC) to argue that non-consideration of the factual aspect of the refund is an apparent mistake and rectifiable. He further placed reliance on the decision of Tata Engg. & Locomotive Co. Ltd. vs. Commr. Of C. Ex., Jamshedpur reported in 2007 (218) ELT 644 (SC) to submit that there is no finding against the appellant that the amount was paid towards duty for which the wrong conception of Tribunal about refund of duty should not make the appellant to suffer.

7. Ld. Counsel further relied on the decision of Hindustan Lever Ltd. vs. Commissioner of C. Ex., Mumbai-I reported in 2006 (202) ELT 177 (Tri.-LB) and submitted that when the law

was pronounced in Mafatlal Industries' case (supra) wrong consideration of the same shall be rectifiable mistake. He also submitted that taking into consideration the judgement of Hon'ble High Court of Bombay in the case Stanlek Engineering Pvt. Ltd. vs. Commissioner of C. Ex., Mumbai-II reported in 2008 (229) ELT 61 (Bom.), it may be held that non-consideration of the citation gives rise to rectifiable mistake. It was further relied upon by the ld. Counsel on the decision of the Tribunal in the case of Tide Water Oil Co. (India) Ltd. vs. Commissioner of Central Excise, Kolkata – II reported in 2007 (216) ELT 732 (Tri- Kolkata) to argue that no litigant should suffer for mistake of Court. Ld. Counsel also drew attention to para 11.5 of the first appeal Order to support his case submitting that deposit of the amount in question was not duty. Therefore denial of refund is not desirable.

8. Per-contra Revenue's submission is that upon consideration of the material facts coming out of first appeal order, Tribunal decided the appeal in E-1130/07-SM on 28.11.2008 holding that the refund application has to go through route of section 11B of the Act. This was done recording the fact at the beginning part of the order. Also it was held that the claim was made beyond one year for which rejection of the claim of refund on the ground of limitation was appropriate. Under such circumstance, if the decision taken by Tribunal to reject appeal of appellant is interfered in rectification proceeding that shall amount to review for which Tribunal has no power to do so. To submit so, ld. DR

appearing on behalf of Revenue relied on the judgement of the Apex Court in the case of Commissioner of Central Excise, Calcutta vs. A.S.C.U. Ltd. reported in 2003 (151) E.L.T. 481 (S.C.) and submitted that the review asked by the application through ROM Application is meaning to recall the entire order of the Tribunal that was passed on 28.11.2008 and to replace the same by a new judgement. Such a replacement shall amount to review since there is no mistake at all committed by Tribunal which is not apparent from the order itself. According to learned DR, a mistake to be rectified must be glaring but nothing by discovery made by a detailed exercise of argument and extensive examination of record. It should be patent. According to learned DR, the appellant relying on para 69 of Mafatlal Industries' judgment intends Tribunal to make an enquiry into the entire facts of the case again and come to a conclusion disturbing its earlier decision dated 28.11.08 for which the application is liable to be rejected.

9. Heard both sides and perused the records.

10. The order passed on 28.11.2008 by Tribunal was on the basis of the argument made on 28.11.2008 before the Single Bench. Fact found by the learned Appellate Authority below was recorded in para – 2. In para 3 of the order, it has been recorded that the appellant relied on para 69 of the Apex Court judgement in Mafatlal Industries' case – 1997 (89) ELT 247

for which the refund application is not barred by limitation. There was no elaborate argument made by appellant how its case is covered by the ratio of Apex Court judgment in Mafatlal case. Nothing is apparent to have been argued or submitted by the appellant to bring to the notice of the Bench about the law laid down by para 69 of the judgement in Mafatlal case and the manner how case of the appellant was covered by the same.

11. Judgement in Mafatlal's case (supra) being on the constitutionality of the levy, It has been held that a levy if found unconstitutional is not leviable and any collection of tax made under a wrong notion or conception of law declared unconstitutional, becomes refundable. But the case of the appellant is that a suo-moto deposit was made by it towards duty without any formal protest to get rid of the adjudication apprehended by him. It is common knowledge that no one shall prefer to make deposit with department since a deposit entails loss of purchasing power depriving the depositor from alternative use of its money. There is also no provision to invite deposit by Department without authority of law. When a deposit of duty is made under law, such deposit is appropriated against adjudication demand and if such deposit of duty is found unwarranted or excess over the demand, law permits refund thereof subject to provisions of law relating to refund. When the appellant preferred to deposit the amount in question with the department claiming not as duty and deposit not being solicited by law, the appellant has no right of redressal through a rectification petition for getting the refund

without undergoing due process of scrutiny of law on limitation and unjust enrichment u/s 11B of the Act.

12. For convenience of reading the para 69 of Mafatlal's judgment is reproduced as under:-

> ***69.****There is, however, one exception to the above proposition, i.e., where a provision of the Act whereunder the duty has been levied is found to be unconstitutional for violation of any of the constitutional limitations. This is a situation not contemplated by the Act. The Act does not contemplate any of its provisions being declared unconstitutional and therefore it does not provide for its consequences. Rule 11/Section 11B are premised upon the supposition that the provisions of the Act are good and valid. But where any provision under which duty is levied is found to be unconstitutional, Article 265 steps in. In other words, the person who paid the tax is entitled to claim refund and such a claim cannot be governed by the provisions in Rule 11/Section 11B. The very collection and/or retention of tax without the authority of law entitles the person, from whom it is collected, to claim its refund. A corresponding obligation upon the State to refund it can also be said to flow from it. This can be called the right to refund arising under and by virtue of the Constitutional provisions, viz., Article 265. But, it does not follow from this that refund follows automatically. Article 265 cannot be read in isolation. It must be read in the light of the concepts of economic and social justice envisaged in the Preamble and the guiding principles of State Policy adumbrated in Articles 38 and 39 - an aspect dealt with at some length at a later stage. The very concept of economic justice means and demands that unless the claimant (for refund) establishes that he has not passed on the burden of the duty/tax to others, he has no just claim for refund. It would be a parody of economic justice to refund the duty to a claimant who has already collected*

the said amount from his buyers. The refund should really be made to the persons who have actually borne its burden - that would be economic justice. Conferring an unwarranted and unmerited monetary benefit upon an individual is the very anti-thesis of the concept of economic justice and the principles underlying Articles 38 and 39. Now, the right to refund arising as a result of declaration of unconstitutionality of a provision of the enactment can also be looked at as a statutory right of restitution. It can be said in such a case that the tax paid has been paid under a mistake of law which mistake of law was discovered by the manufacturer/assessee on the declaration of invalidity of the provision by the court. Section 72 of the Contract Act may be attracted to such a case and a claim for refund of tax on this score can be maintained with reference to Section 72. This too, however, does not mean that the taxes paid under an unconstitutional provision of law are automatically refundable under Section 72. Section 72 contains a rule of equity and once it is a rule of equity, it necessarily follows that equitable considerations are relevant in applying the said rule - an aspect which we shall deal with a little later. Thus, whether the right to refund of taxes paid under an unconstitutional provision of law is treated as a constitutional right flowing from Article 265 or as a statutory right/equitable right affirmed by Section 72 of the Contract Act, the result is the same - there is no automatic or unconditional right to refund. [emphasis supplied]

13. Perusal of para 69 of Mafatlal Industries' judgment guides that the said para deals with the cases of refund arising out of declaration of certain provisions of a statute un-constitutional or violation of any of the constitutional limitations. Accordingly, tax paid under mistake of law which mistake of law is discovered by the manufacturer/assessees on the declaration of invalidity of the provision by the Court,

Section 72 of the Contract Act is held to be attracted for claim of refund of tax paid under such mistake. Hon'ble Court has also held that right to refund arising as a result of declaration of unconstitutionality of provision of enactment can be looked at as the statutory right of restitution. It has also been held that taxes paid under unconstitutional provision of law does not mean automatic refund under section 72 of the Contract Act. When section 72 of the Contract Act contains rule of equity and once it is a rule of equity, that follows equitable considerations.

14. There appears no provision under the Central Excise Act 1944 for inviting deposit by Department of any amount other than duty, penalty or interest. Duties may be deposited by an assessee in the course of investigation in advance for appropriation thereof against ultimate duty liability in adjudication. The order sought to be amended by present ROM does not disclose whether the appellant has made any formal protest with the department in respect of deposit made by it prior to adjudication. No evidence in this regard is available on record. Para 11.1 of the first appeal order which was subject matter of appeal before the Tribunal in Appeal case No. 1130/07 categorically shows that an amount of Rs.4,12,590/ was deposited by the appellant voluntarily towards duty of excise consequent to the audit objections. There was no averment by Appellant justifying claim of refund in the course of appeal hearing since nothing comes out from the order sought to be amended. Appellate order was passed

indicating reason in para 4 thereof which has been summarised herein before. All these aspects come to surface only when a detailed exercise as aforesaid is carried out.

15. In order to amend an order under the powers of rectification of mistake conferred on the Tribunal by law the mistake should be apparent from record and appreciable without a detailed exercise for discovery thereof. Depicting of the facts aforesaid clearly shows that detailed exercise is called for by the Appellant to appreciate the facts and circumstances of the case. Such exercise is permissible only if an appeal is decided or power of review is conferred on the Tribunal. But such a power is absent in the scheme of the law of Excise.

16. It is of course not easy to define or adequately describe what is a mistake apparent from record. But what that can be rectified is to be appreciable by a cursory glance to the order and should be apparent therefrom. Hon'ble Supreme Court has time and again held that the rectifiable mistake must be patent mistake and discovery thereof is not from elaborate argument. For such proposition of law reference may be made to the decision in M/s. Mapco Industries Ltd. vs. Commissioner of Income Tax & Anr. reported in 2009-TIOL-121-SC-IT-LB. While deciding the case of M/s. Mepco Industries Ltd. , Hon'ble Supreme Court has also reiterated the law laid down in the case of Deva Metal Powders Pvt. Ltd. vs. Commissioner, Trade Tax, U.P. – 2008 (221) ELT 16 (S.C.) where in it has been held

that "rectifiable mistake" must exist and the same must be apparent from record. It must be a patent mistake which is obvious and which discovery is not depending on elaborate arguments. To the same effect is the judgement of Apex Court in the case of Commissioner of Central Excise, Calcutta vs. ASCU Ltd. - 2003 (151) ELT 481 (S.C.) wherein it has been held that rectifiable mistake is a mistake which is obvious and not something which has to be established by long drawn process of reasoning or where two opinions are possible. It has also been held that decision on debatable point of law cannot be treated as "mistake apparent from record".

17. A bare look at Section 35C (2) of the Act makes it clear that a mistake apparent from the record is rectifiable. In order to attract the application of this section, the mistake must exist and the same must be apparent from the record. The power to rectify the mistake, however, does not cover cases where a revision or review of the order is intended. "Mistake" means to take or understand wrongly or inaccurately; to make an error in interpreting; it is an error, a fault, a misunderstanding, a misconception. "Mistake" is an ordinary word but in taxation laws, it has a special significance. It is not an arithmetical error which, after a judicious probe into the record from which it is supposed to emanate is discerned. The word "mistake" is inherently indefinite in scope, as to what may be a mistake for one may not be one for another. It is mostly subjective and the dividing line in border areas is thin and indiscernible. It is something which a duly and judiciously instructed mind can find out from the record. In order to attract the power to rectify under 35C (2) of the Act, it is not sufficient if there is merely a mistake in the order sought to be rectified. The mistake to be rectified must be one apparent from the record. A decision on a debatable point of law or a disputed question of fact is not a mistake apparent from the record.

18. "Apparent" means visible; capable of being seen, obvious; plain. It means "open to view, visible, evident, appears, appearing as real and true, conspicuous, manifest, obvious, seeming." The plain meaning of the word "apparent" is that it must be some thing which appears to be so *ex facie* and it is incapable of argument or debate. It, therefore, follows that a decision on a debatable point of law or fact or failure to apply the law to a set of facts which remains to be investigated cannot be corrected by way of rectifications. A mistake which can be rectified under Section 35C (2) of the Act is one which is patent, which is obvious and whose discovery is not dependent on argument or elaboration. Rectification of an order does not mean obliteration of the order originally passed and its substitution by a new order. What the Appellant intends to do in the present case is precisely the substitution of the order which according to law is not permissible under the provisions of Section 35C (2) of the Act.

19. In order to bring an application under Section 35C (2) of the Act, the mistake must be "apparent" from the record. Section 35C (2) of the Act does not enable an order to be reversed by revision or by review, but permits only some error which is apparent on the face of the record to be corrected.

Where an error is far from self-evident, it ceases to be an apparent error. It is, no doubt, true that a mistake capable of being rectified under 35C (2) of the Act is not confined to clerical or arithmetical mistake. On the other hand, it does not cover any mistake which may be discovered by a complicated process of investigation, argument or proof. As observed by Apex Court in *Master Construction Co. (P) Ltd.* v. *State of Orissa* [1966] 17 STC 360, an error which is apparent from record should be one which is not an error which depends for its discovery on elaborate arguments on questions of fact or law.

20. In para 7 of the judgment in the case of Commisioner of Central Excise, Calcutta V. A S C U Ltd – 2003 (151) ELT 481 (SC) it has been held that Section 154 is *pari materia* to Section 35C (2) of the Act. Apex Court has in two judgments viz. *T.S. Balaram, Income Tax Officer, Company Circle IV, Bombay* v. *M/s. Volkart Brothers, Bombay* [1971 (2) SCC 526] and *Commissioner of Income Tax (CNTL), Ludhiana* v. *Hero Cycles Pvt. Ltd., Ludhiana* [1997 (8) SCC 502] considered the extent to which power can be exercised under Section 154 of the Income Tax Act, 1961. In both these decisions, it has been held that a mistake apparent on the face of the record must be an obvious and patent mistake. It is held that "mistake apparent from the record" cannot be something which would have to be established by a long drawn process of reasoning on points on which there may conceivably be two opinions. It has been held that a decision on a debatable point of law cannot be a "mistake apparent from the record". In para 13 of the judgment in the case of A S C U Ltd (supra) it has been held that the scope of correction which can be made by the Tribunal under Section 35C (2) is limited. Undoubtedly if a decision is based solely on material which is irrelevant or which could not have been used, then possibly it could be said that there is a mistake apparent from the record. However, if a decision is based on more than one material, then merely because in the process of arriving at the final decision, reliance was placed on some material which could not have been used it can never be said that in the final decision there is a mistake apparent from the record. This is because the final opinion could also have been based on the other material which was relevant and which could be used.

21. In the case of Poothundu Plantation P. Ltd. V. Agricultural ITO, Chittoor - 2004 (178) E.L.T. 16 (S.C.) in Para 4 it has been held that it is well-settled that if Hon'ble Supreme Court has construed the meaning of a section, then any decision to the contrary given by any other authority must be held to be erroneous and such error must be treated as an error apparent on the record. In the case of Commissioner of Central Excise , Mumbai V. Bharat Bijlee Limited - 2006 (198) E.L.T. 489 (S.C.) it has ben held that failure to take into consideration the material evidence which was present on the record, would certainly amount to mistake apparent on the face of the record and the Tribunal under the circumstances would have the jurisdiction to correct the said mistake in exercise of its powers under Section 35C(2) of the Act. But in the present case neither attention of the Bench was drawn to any material evidence in the course of hearing of the appeal on 28.11.2008 to buttress the claim of the appellant nor the manner how the case of the appellant was covered by para 69 of the Mafatlal's case (supra) was explained. The matter was therefore decided stating the reasoning in para 4 of the orders sought to be amended by the present application.

22. In the case of Honda Siel Power Products Ltd. V. Commissioner of income Tax, Delhi - 2008 (221) E.L.T. 11 (S.C.) it has been held that the expression "rectification of mistake from the record" occurs in section 154. It also finds place in section 254(2). The purpose behind enactment of section 254(2) is based on the fundamental principle that no party appearing before the Tribunal, be it an assessee or the Department, should suffer on account of any mistake committed by the Tribunal. This fundamental principle has nothing to do with the inherent powers of the Tribunal. "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 Tribunal for the wrong committed by it has nothing to do with the concept of inherent power to review. One of the important reasons for giving the power of rectification to the Tribunal is 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. If prejudice results 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. In that case the Tribunal in its Order dated 10-9-2003 allowing the Rectification Application has given a finding that *Samtel Color Ltd.* (supra) was cited before it by the assessee but through oversight it had missed out the said judgment while dismissing the appeal filed by the assessee on the question of admissibility/allowability of the claim of the assessee for enhanced depreciation under section 43A. Therefore it was held that Tribunal was justified in exercising its powers under section 254(2) when it was pointed out to the Tribunal that the judgment of the coordinate 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. Accordingly it was held by the Apex Court that the High Court was not justified in interfering with the said order. But in the present case, Tribunal examining record and noticing material fact recorded by lower appellate authority and applying statutory provisions of section 11 B of the Act, came to the conclusion as recorded in para 4 of the order and while arriving at such decision, appellants' reliance on Mafatlal's case (supra) does not appear to have escaped notice of the Tribunal.

23. Following the ratio laid down by Hon'ble Supreme Court in Deva Metal Powders Pvt Ltd. V. Commissioner of Trade Tax, U.P it may be stated that an error apparent on the face of the record for acquiring jurisdiction to effect rectification must be such an error which may strike one on a mere looking at the record and would not require any long drawn process of reasoning. The following observations in connection with an error apparent on the face of the record in the case of *Satyanarayan Laxminarayan Hegde* v. *Mallikarjun Bhavanappa Tiruymale* [AIR 1960 SC 137] need to be noted :

> "An error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by a writ of certiorari according to the rule governing the powers of the superior Court to issue such a writ."

24. It has been held by the Hon'ble Supreme Court in the case of Commissioner of Income Tax, Mumbai V. Rasson Industries Ltd - 2007 (214) ELT 166 (SC) that power of review and/or rectification is not akin to an administrative power. An administrative function and judicial function operate in two different places. Whereas a judicial function must be exercised by the authority invested therewith in terms of the provisions of the statute and on the basis of the materials on record; an administrative order may although *inter alia* have to be passed by a statutory authority but the same must be confirmed within the four corners of the statute. There may, however, be an element of discretion. Order by a judicial functionary is subject to appeal or revision. An administrative order may or may not be.

25. The scope for review has been considered by Apex Court in several cases. In the case in *Haridas Das* v. *Usha Rani Banik (Smt.) and Ors.* - (2006 (4) SCC 78) in Para 13 it has been held that:

> "13. In order to appreciate the scope of a review, Section 114 of the CPC has to be read, but this section does not even adumbrate the ambit of interference expected of the Court since it merely states that it "may make such order thereon as it thinks fit." The parameters are prescribed in Order XLVII of the CPC and for the purposes of this lis, permit the defendant to press for a rehearing "on account of some mistake or error apparent on the face of the records or for any other sufficient reason". The former part of the rule deals with a situation attributable to the applicant, and the latter to a jural action which is manifestly incorrect or on which two conclusions are not possible. Neither of them postulate a rehearing of the dispute because a party had not highlighted all the aspects of the case or could perhaps have argued them more forcefully and/or cited binding precedents to the Court and thereby enjoyed a favourable verdict. This is amply evident from the explanation in Rule 1 of the Order XLVII which states that the fact that the decision on a

question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior Court in any other case, shall not be a ground for the review of such judgment. Where the order in question is appealable the aggrieved party has adequate and efficacious remedy and the Court should exercise the power to review its order with the greatest circumspection. This Court in *M/s. Thungabhadra Industries Ltd. (in all the Appeals)* v. *The Government of Andhra Pradesh represented by the Deputy Commissioner of Commercial Taxes, Anantapur* [AIR 1964 SC 1372] held as follows:

> "There is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterized as vitiated by "error apparent". A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. Where without any elaborate argument one could point to the error and say here is a substantial point of law which states one in the face and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be

made out."

26. Certainly mandatory provision of the statute cannot be given go bye following the principles of law laid down in Addl. CIT V. Ubdua Tin Industries (P.) Ltd. 166 ITR 454 (Karn) at page 465 holding that "to attract the provisions of section 154 of the Act, there must be mistake and it must be a mistake apparent from the record. Overlooking a mandatory provision of law which leaves no discretion to the taxing authorities like admission to tax, surcharge or interest is a mistake apparent from the record (Swadeshi Cotton Mills Co. Ltd. v. ITO [1966] **60 ITR 720** (All): M.K. Venkatachalam, ITO v. Bombay Dyeing and Manufacturing Co. Ltd. [1958] **34 ITR 143** (SC)." which calls for rectification of mistake. But present case is not so.

27. Similarly if no order is passed in accordance with and subject to the provisions of law, that defeats spirit of law and that gives rise to rectifiable mistake apparent from record following the principles of law laid down by the Hon'ble High Court of Madras in CIT V. M.R.M. Plantations (P.) Ltd. 240 ITR 660 (Mad). It has been held that "the requirement that the mistake in the record be "apparent" does not imply that no other relevant document should be looked into. If in the light of other legally valid orders it is found that the original order contains mistakes which are apparent, the rectification of such mistakes is not barred under section 154. The object of the provision is the rectification of mistakes in the record and that object is ill-served if the authorities are compelled to preserve such mistakes in the order by asking them to wear blinkers and not look into relevant unimpeachable material such as the

rectified order of assessment for the period preceding the assessment year in the light of which mistakes in the order sought to be rectified are apparent." It has been further held that: "it is neither necessary nor possible to set out exhaustively all the material that can possibly be regarded as forming part of the "record" for the purpose of examination under section 154(1) of the Act. On the facts of this case, the order of assessment for the immediately preceding year which was rectified was undoubtedly a part of the record which was available for examination by the Income-tax Officer for the purpose of deciding as to whether there was a mistake apparent on the face of the record in the order of assessment for the immediately succeeding year, namely, the assessment year 1974-75." It was also view of the Hon'ble Court that "the record for the purpose of section 154(1) is the record available to the authorities at the time of initiation of proceedings for rectification and not merely the record of the original proceeding sought to be rectified." But the appellant in the present case has failed to bring its case to the four of the judgment.

28. Justice demands that no mistake to perpetuate or persist on record and rectification thereof is sine qua non. To fulfil mandatory provisions of law to what extent an order shall undergo amendment is immaterial following the principles of law laid down by the Hon'ble High Court of Bombay in Blue State Co. (Bom) Pvt. Ltd. V. CIT 73 ITR 283 (Bom). The Hon'ble court at Page – 229 of the reported judgment held that "the power intended to be given under section 154 is to rectify

an error apparent on the face of the record. Amendment of the order is the consequence of the rectification and its purpose is to give effect to the rectification. If the rectification involves an amendment, which will affect the whole of the order, it cannot be said that simply because of the use of the word "amend", which normally may not mean the cancellation of the whole order, the Income-tax Officer should be powerless to rectify the mistake or error which is apparent on the face of the order. The word "amend " with reference to legal documents means correct an error and the expression " amend the order " would mean correct the error in the order. Under section 154 power to rectify the error is to be exercised by correcting the error in the order and the correction must, therefore, extend to the elimination of the error. What the effect of the elimination of the error will be on the original order will depend upon each case. It may be that the elimination of the error may affect only a part of the order. It may also be that the error may be such as may go to the root of the order and its elimination may result in the whole order falling to the ground. In our opinion the Income-tax Officer will be able to amend or correct the order to the extent to which the correction is necessary for rectification of the error and such correction may extend either to the whole of the order or only, to a part of it.". When law is that refunds need scrutiny in terms of section 11 B of the Act, the application for rectification is misconceived without demonstrating where the mistake lies and in which part of the order sought to be amended.

29. Hon'ble Allahabad High Court in the case Income Tax Officer V. ITAT - 58 ITR 634 (All) at page 641 of the reported judgment held that "in my judgment, where an error which has crept in, is not as a result of any fault of the assessee but is one attributable entirely to the Tribunal in having lost sight of a material fact at the time of writing its order or judgment, which fact was duly brought to its notice by the assessee, there would be an error apparent from the record which could be rectified under section 35 of the Act." The appellate order in the present case having noticed the material fact and recorded in para 2 of the appeal order, there is no scope for amendment in the present case.

30. In CIT V. VICHITRA CONSTRUCTIONS (P) LTD. 264 ITR 371 (Del), Hon'ble Court at Page 373 - 374 of the reported judgment it has been held that "clearly, if there is a mistake then an amendment is required to be carried out in the original order to correct that particular mistake. The provision does not indicate that the Tribunal can recall the entire order and pass a fresh decision. That would amount to a review of the entire order and that is not permissible under the Income-tax Act. Reference was made by Hon'ble court in the case of Ms. Deeksha Suri v. ITAT [1998] 232 ITR 395. At page 415, was made and the court pointed out as under:

"Could any relief have been allowed to the petitioners in exercise of jurisdiction conferred by section 254(2) of the Act amending the order passed by the Tribunal with a view to rectify any mistake apparent from the record? The language of the provisions is clear. The foundation for exercising the jurisdiction is 'with a view to rectify any mistake apparent on the record' and the object is achieved by 'amending any order passed by it'. The power so conferred does not contemplate a rehearing which would have the effect of re-writing an order affecting the merits of the case. Else there would be no distinction between a power to review and a power to rectify a mistake. What is not permitted to be done by the statute having deliberately omitted to confer review jurisdiction on the Tribunal, cannot be indirectly achieved by recourse to section 254(2) of the Act."

Again in the case of Karan and Co. v. ITAT [2002] **253 ITR 131**, a Division Bench of the Hon'ble court pointed out the scope and ambit of an application under section 254(2) as follows:

"The scope and ambit of application of section 254(2) is very limited. The same is restricted to rectification of mistakes apparent from the record. We shall first deal with the question of the power of the Tribunal to recall an order in its entirety. Recalling the entire order obviously would mean passing of a fresh order. That does not appear to be the legislative intent. The order passed by the Tribunal under section 254(1) is the effective order so far as the appeal is concerned. Any order passed under section 254(2) either allowing the amendment or refusing to amend gets merged with the original order passed. The order as amended or remaining unamended is the effective order for all practical purposes. The same continues to be an order under section 254(1). That is the final order in the appeal. An order under section 254(2) does not have existence de hors the order under section 254(1). Recalling of the order is not permissible under section 254(2). Recalling of an order automatically necessitates rehearing and readjudication of the entire subject-matter of appeal. The dispute no longer remains restricted to any mistake sought to be rectified. Power to recall an order is prescribed in terms of rule 24 of the Income-tax (Appellate Tribunal) Rules, 1963, and that too only in cases where the assessee shows that it had a reasonable cause for being absent at a time when the appeal was taken up and was decided ex parte. This position was highlighted by one of us (Justice Arijit Pasayat, Chief Justice) in CIT v. Income-tax Appellate Tribunal [1992] 196 ITR 640 (Orissa). Judged in the above background the order passed by the Tribunal is indefensible."

The court specifically held that recalling the entire order would mean passing of a fresh order. That does not appear to be the legislative intent.

In view of the provisions and judicial pronouncement indicated herein-above, Hon'ble Court held that the power to rectify a mistake under section 254(2) cannot be used for recalling the entire order. No power of review has been given to the Tribunal under the Income-tax Act. Thus, what it cannot do directly cannot be allowed to be done indirectly. If the assessee was aggrieved, it was open for him to approach the appropriate forum without asking the Tribunal review the entire judgment delivered by it earlier in present application of the applicant calling for review of the entire order to replace the earlier decision is a review exercise called for. Therefore that is liable to be dismissed.

31. For the reasons aforesaid and for the law laid down by Apex Court as stated herein before, present application for ROM is misconceived and being devoid of merit is dismissed.

[Pronounced in the open Court on 04.08.2010].

(D.N.PANDA) 04/08/2010
JUDICIAL MEMBER

Anita