

Sec. 254 can't be invoked to recall entire order as otherwise it would be a review and not rectification

Summary – The Hyderabad ITAT in a recent case of Vertex Homes (P.) Ltd., (the Assessee) held that Power to rectify a mistake under section 254(2) cannot be used for recalling entire order as it would amount to review of order which is not permissible under Act.

Facts

- The assessee filed instant application submitting that the Tribunal had wrongly remitted the issue back to the file of the Assessing Officer though the development agreement was available on record which clearly demonstrated that the housing project was being developed by the assessee at its own risk and cost and, therefore, the assessee was undoubtedly a developer and not a work contractor and was entitled for deduction under section 80-IB(10).
- The revenue on the other hand submitted that there was no mistake apparent in the order of the Tribunal which needed to be rectified and consideration of the plea of the assessee would amount to reviewing of its own order by Tribunal which was not permissible under the law.

Held

- The finding of the Tribunal is a conscious decision and if the assessee has any grievance with the findings of the Tribunal, the remedy lies elsewhere. Consideration of argument of the assessee at this stage will amount to review of its own order by the Tribunal. The order of the Tribunal should be read as a whole and not in a piecemeal manner. The Tribunal had considered the cumulative effect of all the facts and circumstances of the case and given the findings that the Assessing Officer would re-examine the issue after bringing all materials on record and he should also see the development agreement.
- It is well-settled that the Tribunal is the final fact-finding body. The findings of the Tribunal are not liable to be interfered with unless the Tribunal has taken into consideration any relevant material or has failed to take into consideration any relevant material or the conclusion arrived at by the Tribunal is perverse in the sense that no reasonable person, on the basis of the facts before the Tribunal, could have come to the conclusion to which it has come.
- Further, it is well settled that statutory authority cannot exercise power of review unless such power is expressly conferred. There is no express power of review conferred on this Tribunal. Even otherwise, the scope of review does not extend to re-hearing of the case on merit.
- 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. It is necessary to 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 un-amended is the effective order for all practical purposes.
- 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 re-adjudication 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 ITAT Rules, 1963, and that too only in case 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. Judged in the above background the order passed by the Tribunal is indefensible.
- The words used in section 254(2) are 'shall make such amendment, if the mistake is brought to its notice'. 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 Act.
- 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 Act. Thus, what it could not do directly could not be allowed to be done indirectly.
- The scope and ambit of application under section 254(2) is as follows:
 - a. Firstly, the scope and ambit of application of section 254(2) is restricted to rectification of the mistakes apparent from the record.
 - b. Secondly, that no party appearing before the Tribunal should suffer on account of any mistake committed by the Tribunal and if the prejudice has resulted to the party, which prejudice is attributable to the Tribunal's mistake/error or omission, and which an error is a manifest error, then the Tribunal would be justified in rectifying its mistake. The 'rule of precedent' is an important aspect of legal certainty in the rule of law and that principle is not obliterated by section 254(2) and non-consideration of precedent by the Tribunal causes a prejudice to the assessee.
 - c. Thirdly, power to rectify a mistake is not equivalent to a power to review or recall the order sought to be rectified.
 - d. Fourthly, under section 254(2) an oversight of a fact cannot constitute an apparent mistake rectifiable under the section.
 - e. Fifthly, failure on the part of the Tribunal to consider an argument advanced by either party for arriving at a conclusion is not an error apparent on record, although it may be an error of judgment.

- f. Sixthly, even if on the basis of a wrong conclusion the Tribunal has not allowed a claim of the party it will not be a ground for moving an application under section 254(2).
- g. Lastly, in the grab of an application for rectification under section 254(2) the assessee cannot be permitted to reopen and reargue the whole matter as the same is beyond the scope of section 254(2).
- Keeping in mind the above parameters, the miscellaneous application filed by the assessee is dismissed.