

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****R/SPECIAL CIVIL APPLICATION NO. 6337 of 2018**

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SHAMBHUBHAI MAHADEV AHIR

Versus

INCOME TAX APPELLATE TRIBUNAL

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Appearance:

MR R K PATEL AND MR DARSHAN R PATEL(8486) for the PETITIONER(s)  
No. 1

MR MANISH BHATT FOR MS MAUNA M BHATT(174) for the  
RESPONDENT(s) No. 4

NOTICE SERVED(4) for the RESPONDENT(s) No. 1,2,3

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CORAM: **HONOURABLE MR.JUSTICE AKIL KURESHI**

and

**HONOURABLE MR.JUSTICE B.N. KARIA**

**Date : 20/08/2018**

**ORAL ORDER**

**(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)**

1. The petitioner has challenged the decision of the Income Tax Appellate Tribunal recalling an earlier order in exercise of powers for rectification.
2. Brief facts are as under:

Petitioner is an individual. Petitioner was subjected to search on 11.10.2006 pursuant to which, the petitioner was required to file returns in response to notice under section 153A of the Income Tax Act. During the search, the Revenue authorities had found cash of Rs. 84.61 lacs (rounded off) in possession of the petitioner. In the returns filed by the petitioner for the

assessment years 2001-02 to 2006-07 under section 153A of the Act, the petitioner disclosed further income in addition to what the petitioner had disclosed in the original returns. The petitioner, however, contended that the additional income also arose out of his agriculture operations. The Assessing Officer however, framed assessment during such additionally disclosed income as income from undisclosed sources. The matter eventually went up to the Tribunal. The Tribunal, by an order dated 31.05.2010, accepted the assessee's contentions and confirmed the position that the additional income disclosed by the petitioner was also agriculture income. In such order, the Tribunal discussed at length, the evidence on record and held that the Assessing Officer committed an error in treating the difference of agriculture income between the original returns and the further returns. It was observed that there may arise a suspicion as to why the assessee did not disclose the agriculture income initially when such income was otherwise exempt from tax except for the purpose of deciding the slab. It was recorded that undisputably, no incriminating material was found or seized either during the course of search or post search inquiries with the aid of which the assessee's claim of the additional income having been derived from agriculture operations could be rejected.

3. The Revenue thereafter filed appeals against the decision of the Tribunal. Revenue's appeals are admitted by the High Court. Pending such appeals, the Revenue also applied to the

Tribunal for rectification of the order inter alia on the grounds that according to the assessee, such income included agriculture income of his son and daughter-in-law. The Tribunal could not have accepted such a position in law. On such applications of the Revenue, the Judicial member proposed rejection of the application. He recorded at length the original consideration before the Tribunal while dealing with the tax appeals as also the contentions of both sides in response to the Revenue's rectification application. He was of the opinion that when the High Court had already admitted the Revenue's appeals, it was no longer open for the Tribunal to exercise rectification powers. Additionally, he also formed an opinion that such powers cannot be used for recalling entire order to re-write it. Power of rectification cannot be equated with review. The same can be exercised only to rectify an error apparent on record. The Accountant Member however, could not accept such an opinion. He put his dissent note on 18.01.2013 in which, he made lengthy reference to the rival contentions as also to the general propositions in law regarding the Tribunal's power of rectification. Eventually, he rejected the assessee's contention that pendency of appeals before the High Court would prevent him from accepting the Revenue's petition. He opined that such Misc. Applications deserved to be allowed. We may notice that in the order, which runs into several pages, the Accountant Member has not recorded any independent reasons why he was persuaded to exercise rectification powers.

4. In view of difference of opinion between two members, the issue is referred to the third member, who sided with the view of the Accountant Member. Eventually, therefore, the third member's opinion prevailed and became the order of the Tribunal.
5. While issuing notice on 30.04.2018, we had recorded two legal contentions of the counsel for the petitioner and rejected them viz. mere pendency of the appeal in the High Court would preclude the Tribunal's power of rectification and secondly that, the very fact, that there was a difference of opinion between the two members, would, by itself, mean that the error sought to be rectified was not apparent on the record. Nevertheless, we had kept the question of de-merits of the exercise of powers of rectification open. Accordingly, we have heard learned advocates for parties at some length. We find that the Tribunal committed an error in recalling its earlier order. It was an order based on submissions made before the Tribunal and upon consideration of materials on record. The fundamental issue was whether the additional income disclosed by the assessee post search, was also agriculture income or whether the Assessing Officer was correct in discarding such a theory of the assessee and treating his income from other sources. The Tribunal had given its consideration, referred to evidence on record and held that the Assessing Officer had referred to the submissions of the sathi

and other evidence to come to a conclusion that the assessee's declaration of the source of income is also quite believable. The Tribunal also noted that no evidence was collected by the Revenue during the search or post search inquiry to hold that the additional income disclosed was not agriculture income.

6. Whatever be the correctness of these findings it cannot be stated that the Tribunal arrived at such findings without proper consideration of materials on record. Several issues were presented before the Tribunal and were examined before coming to such specific finding. The Tribunal could not have recalled the entire order under purported exercise of rectification powers. It is well settled through series of judgements of this Court and the Supreme Court that power of rectification are circumscribed with the condition that the same can be exercised for correcting error be of law or facts apparent on record. The jurisdiction to correct errors vested in the Tribunal is not akin to review powers. As noted, the Accountant Member, while showing inclination to exercise rectification powers, had not cited any reason in support of his opinion.
7. In the result, impugned order is set aside with all consequential effect. Petition is allowed and disposed of.

**(AKIL KURESHI, J)**

**(B.N. KARIA, J)**

JYOTI V. JANI

