

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

WRIT PETITION NO.2844 OF 2016

Ashish Gandhi Builders
& Developers P. Ltd.

.. Petitioner.

Vs.

Income Tax Appellate
Tribunal & Others

.. Respondents.

Mr. Firoze Andhyarujina, Senior Counsel with Mr.Manek
Andhyarujina i/b Sameer Dalal for the Petitioner.
Mr. Suresh Kumar for the Respondents.

**CORAM : M. S. SANKLECHA &
A.K. MENON , JJ.**

DATED : 12TH JANUARY, 2017

P.C. :

1. This petition under Article 226 of the Constitution of India challenges the order dated 28th September, 2016 passed by the Income Tax Appellate Tribunal. By the impugned order, the Tribunal dismissed the petitioner's Miscellaneous Application for rectification of its order dated 14th September, 2015 passed under Section 254(1) of the Income Tax Act, 1961 (the 'Act'). This issue relate to Assessment Year 2002-03.

2. The grievance of the petitioner before us is that during course of hearing leading to the order dated 14th September, 2015 under Section 254(1) of the Act, a legal paperbook was filed wherein a decision of the Gujarat High Court in *Commissioner of*

Income Tax Vs. Manilal Tarachand (2002) 120 Taxman Page 676 amongst other cases were relied upon. The Tribunal while passing the order dated 14th September, 2015 did not refer to it and/or deal with it. Thus, it was a mistake apparent on the face of record warranting rectification of the order dated 14th September, 2015.

3. In the above view it is submitted that the Tribunal should have exercised its jurisdiction vested in it by the Act by allowing the application. We note that the order of the Tribunal in respect of which rectification was sought was passed on 14th September, 2015 after having heard the parties on 9th September, 2015. The Miscellaneous Application for rectification was filed on 2nd May, 2016. In the rectification application as filed, after 7 months, the rectification sought was on various grounds such as under :

- (a) No specific finding with respect to inaccurate particulars/concealment of income;
- (b) Non consideration of the ruling of Gujarat High Court in the case of Manilal Tarachand (supra) cited during the course of hearing; and
- (c) Vague Notice under Section 274 read with Section 271(1)(c) of the Act.

4. However, before us and also before the Tribunal at the hearing of Miscellaneous Application, the only issue urged is

with regard to non consideration of the decision of Gujarat High Court in Manilal Tarachand (supra). According to the petitioner the above decision in Manilal Tarachand (supra) applies on all fours to the facts of the petitioner's case and is in its favour. However, the impugned order while dealing with petitioner's contention that the decision of Manilal Tarachand (supra) was relied upon during hearing of appeal on 9th September, 2015 leading to the order dated 14th September, 2015 is negated by the impugned order by inter alia recording as under :

“We have referred to Log book of 9th September, 2015 and find that all the cases referred by the assessee have been dealt with.”

5. It is settled position in law that statement of fact recorded in the order of the Court/Tribunal has to be accepted as correct and conclusive. It cannot be contradicted by affidavit or otherwise as held by the Supreme Court in State of Maharashtra vs. Ramdas S. Nayak 1982 (2) SCC 463, Central Bank of India vs. Vrajlal K. Gandhi 2003(6) SCC 573 and Jagvir Singh & Others vs. State (Delhi Admn.) 2007 (5) SCC 359. Thus, mere filing of the paperbook is no indication of the fact that the case law referred to in paperbook was relied upon and submissions made on it during course of hearing of the appeal. Moreover, in cases such as this where it is contended by a party that particular case was

not considered by the Court/Tribunal/Adjudicating Authority was cited during the course of hearing and is relevant to the issue, then a party would be expected to move the Tribunal as quickly as possible. This for the reason that the issues would be fresh in the mind of the Court/Tribunal/Adjudicating Authority. Once the Tribunal has recorded a finding that all cases referred to by the assessee during hearing have been dealt with by the Tribunal it must follow that the decision of the Gujarat High Court in Manilal Tarachand (supra) was not relied upon during hearing held on 9th September, 2015 leading to the order dated 14th September, 2015.

6. Mr. Andhyarujina, learned senior counsel appearing for the petitioner in support of his submissions placed reliance upon a decision of the Apex Court in Honda Siel Power Products Ltd. vs. Commissioner of Income Tax 295 ITR Page 466 and a unreported decision of the Gujarat High Court in Dattani and Co. vs. Income Tax Officer (Income Tax Appeal No.847 of 2013) decided on 21st October, 2013 in support of his submission that where the Tribunal has passed the order under Section 254(1) of the Act and committed a mistake in not having considered the decision which was relied upon during course of hearing before it, then the application has to be allowed. There can be no dispute with the above proposition of law on the basis of the facts therein. In both the above cases it was an accepted position that the Tribunal

omitted to consider a relevant decision in its order though cited and relied upon during the hearing. In this case, the Tribunal has categorically recorded in the impugned order, that the decision of Manilal Tarachand (supra) was not one of the decisions referred to during the course of hearing of 9th September, 2015 as it states cases referred to have been dealt with. Thus, the aforesaid case laws would not apply to the facts of the present case.

7. In the present facts, as pointed out hereinabove, the Tribunal has categorically recorded that all the decisions which were referred to and relied upon by the petitioner on the date of hearing on 9th September, 2015 have been dealt with.

8. However, before closing we must make it clear that in view of the above, we have not examined the other observations in the impugned order of the Tribunal relating to scope of a rectification application under Section 254(2) of the Act. In the present facts and in the context of the categorical finding of the Tribunal, the examination of other observation therein is academic.

9. In the above view we see no reason to interfere with the impugned order of the Tribunal. Therefore Petition dismissed. No order as to costs.

(A.K. MENON,J.)

(M. S. SANKLECHA,J.)