

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**ORDINARY ORIGINAL CIVIL JURISDICTION**  
**WRIT PETITION NO. 2526 OF 2010**

Naresh K.Pahuja }  
Prop: M/s Maya Jewellers }  
596/597, Siru Chowk, }  
Ulhasnagar - 421 002. }  
PAN No.AALPP22768 } .. Petitioner

vs

1. The Income Tax Appellate Tribunal }  
Mumbai Bench 'J' }  
through the Assistant Registrar, }  
Income Tax Appellate Tribunal, }  
Mumbai, 4<sup>th</sup> Floor Old CGO Bldg }  
M.K.Road, Mumbai-400 020 }  
2. Dy.Commissioner of Income Tax }  
Central Circle-39 }  
Bandra Kurla Complex, Bandra (E) }  
Mumbai (Present Assessing Officer) }  
ITO Wd 2(2) Kalyan }  
Rani Mansion, Murbad Road, }  
Kalyan-421 301. }  
3. Union of India }  
through Ministry of Finance }  
Aayakar Bhavan, 2<sup>nd</sup> Floor, }  
M.K.Road Mumbai-400 020 } .. Respondents

Mr.Ajay R.Singh a/w Ms.Neelam C.Jadhav for Petitioner  
None for Respondents

**CORAM: M.S.SANKLECHA &**  
**G.S.KULKARNI, JJ**

**DATE: 7<sup>th</sup> JANUARY 2015**

**PC.**

1. By this petition under Article 226 of the Constitution of India the

challenge is to the order dated 20<sup>th</sup> August, 2010 passed by the Income Tax Appellate Tribunal (for short the 'Tribunal' ) under Section 254 (2) of the Income Tax Act, 1961 (for short the 'Act' ).

2. By the impugned order dated 20<sup>th</sup> August, 2010 the petitioner's Misc.Application for rectification of the order dated 10<sup>th</sup> July, 2007 passed by the Tribunal under Section 254 (1) of the Act in respect of the petitioner's quantum Appeal for A.Y.1995-96 was rejected.

3. On 10<sup>th</sup> July, 2010 the Tribunal dismissed the petitioner's Appeal for A.Y.1995-96 filed against order of the Commissioner of Income Tax (Appeals) upholding the order of the Assessing Officer inter alia holding that gifts of Rs.13.25 lacs received by the petitioner from one Kishan Punjabi (donor) were not genuine. On 3rd December, 2007 the petitioner filed an application for rectification under Section 254 (2) of the Act seeking to rectify the order dated 10th July, 2007 confirming the orders of the lower authorities for A.Y.1995-96. The basis of the Misc.Application was that the Tribunal in its order dated 10<sup>th</sup> July 2010 relied upon an order of the Supreme Court in **Commissioner of Income Tax vs P.Mohan**

**Kala (2007) 291 ITR 278 (SC)** in the order without having giving the petitioner any notice of the same and also on the ground that the statement of the donor gifting Rs.13.25 lacs was not considered.

4. On 11<sup>th</sup> July, 2008, the Tribunal dismissed the petitioner's Misc.Application on the ground that there was no mistake apparent on record warranting exercise of jurisdiction under section 254 (2) of the Act. Being aggrieved by the order dated 11<sup>th</sup> July, 2008 rejecting petitioner's rectification Application, the petitioner filed writ petition No.2515 of 2008 in this Court. On 19<sup>th</sup> January, 2009 this Court by order allowed the petition and restored the application of the Tribunal by inter alia holding :

*5. The petitioner carried an appeal to the Tribunal. By order dated 10.7.2007 the tribunal dismissed the petitioner's appeal. As the order of the tribunal suffered from various mistakes apparent on record the petitioner filed M.A.No.730/M/07 praying for rectification of mistakes. By the impugned order the said application was dismissed. The main grievance of the petitioner before the tribunal was that the tribunal relied upon certain judgments of which the petitioner had no notice. They were not cited by the departmental representative. The tribunal also did not indicate that it was relying on those judgments. The petitioner is particularly aggrieved by the reliance placed on the Supreme Court's judgment in CIT vs PMohankala (2007) 291 ITR 278 (SC). According to the petitioner, no opportunity was given to him to explain how the said judgment is not applicable to the facts of the case. The petitioner is also aggrieved by the fact that the statement of the donor Mr.Punjabi dated 9.8.1999 was not considered by the*

*tribunal.*

*6. Learned counsel for the petitioner reiterated the same grievance We find substance in his submission. In view of the fact that the impugned judgment is delivered without taking into consideration the donor's statement, we deem it proper to set aside the order and remand the application to the tribunal with direction to decide it afresh after hearing the parties in accordance with law. Order accordingly.”*

5. On 9<sup>th</sup> November, 2009 the Tribunal by an order dismissed the petitioner's application for rectification of the order dated 10<sup>th</sup> July, 2007 as restored by this Court. This on the ground that there was no mistake apparent on record in order dated 10<sup>th</sup> July, 2007 warranting its rectification.

6. Being aggrieved, the petitioners challenged the order dated 9<sup>th</sup> July, 2009 of the Tribunal before this Court by filing Writ Petition No.212 of 2010. This Court by order dated 22<sup>nd</sup> February, 2010 allowed the petition and restored the petitioner's Application for rectification once again before the Tribunal by directing as under :

*“ In these circumstances, there is merit in the submission which has been urged on behalf of the petitioner that despite the order of remand the tribunal has not complied with the directions contained in paragraphs 5 and 6 of the judgment of this Court dated 19<sup>th</sup> January*

*2009. In this view of the matter and particularly having regard to the limitations on the jurisdiction of this Court to inquire into questions of fact, we deem it appropriate to remand the proceedings back to the tribunal by setting aside the impugned order dated 9.11.2009. The tribunal shall upon remand, reconsider the application under section 254 (2) afresh having due regard to the observations contained in paragraphs 5 and 6 of the judgment of this court dated 19<sup>th</sup> January 2009 in writ petition No.2515 of 2008.”*

7. On the Misc.Application for rectification being restored, the Tribunal by the impugned order dated 20<sup>th</sup> August, 2010 after placing reliance upon paragraph 5 and 6 of the order dated 19<sup>th</sup> January, 2009 of this Court and paragraph 6 of the order dated 22<sup>nd</sup> February, 2010 held that the scope of examination in Rectification Application was confined only to consider the donor's statement and allowing an opportunity to the petitioner to meet/confront the reliance by the Tribunal on decision of the Supreme Court in **P.Mohan Kala (supra.)** The impugned order after considering the statement of the donor dated 9<sup>th</sup> August, 1999 and also submissions of the petitioners with regard to inapplicability of the decision of the apex Court in **P.Mohan Kala (supra)** concluded that they did not find any mistake apparent from the record warranting interference with order dated 10<sup>th</sup> July, 2007 passed by the Tribunal under section 254 (2) of the Act.

8. Mr.Singh learned counsel appearing for the Petitioner in support of the petition submits as under :

(A) The impugned order incorrectly interprets orders of this Court dated 19<sup>th</sup> January, 2009 and 22<sup>nd</sup> February, 2010 restoring the Misc.Application for consideration only to consider the donor's statement and allowing the petitioners an opportunity to meet reliance of the Tribunal on the decision of the Apex Court in **PMohan Kala (supra)** on which reliance is placed in its order dated 20thAugust, 2010. According to him, once the matter was restored to the Tribunal the entire Misc.Application was to be a subject matter of consideration by the Tribunal.

(B) While dealing with the application under Section 254 (2) of the Act, the Tribunal has to only decide whether or not there is a mistake apparent on record and if in the view of the Tribunal, it is so, then the appeal should be placed for hearing to consider the merits. In this case, the Tribunal has while disposing the Misc.Application for rectification has disposed of the petitioner's contentions on merits. This according to the petitioner causes prejudice to them as the petitioner's submissions would have to be considered in the context of other facts which are ignored when the application is disposed of on merits at the stage of Section 254 (2) of the Act;

(C) Without prejudice to the above, on merits it is submitted that the impugned order incorrectly records that the statement of the donor was not recorded during the course of assessment proceedings when in fact the statement was recorded on 9<sup>th</sup> August, 1999 and the proceedings had commenced on 9<sup>th</sup> July, 1999. Besides, the order incorrectly records that the donor was never produced by the petitioner during the proceedings before the Assessing Officer but, the assessment order itself records the donor had appeared before the Assessing Officer on the day fixed for hearing but, was to leave India on that very day and hence adjourned. It is also submitted that during the course of hearing before the Tribunal the donor was present and the petitioner's

Advocate had brought the same to the notice of the Tribunal. So far as reliance upon the decision of the Apex Court in **PMohan Kala (supra)** is concerned it is submitted that it would not have any application in the present facts as that decision was rendered in the context of facts completely different from that existing in the present case.

It was submitted that the impugned order be set aside and the appeal itself be restored before the Tribunal for final disposal.

9. None appears for the revenue.

10. The petitioner in their first petition being Writ petition No.2515 of 2008 had made a grievance with regard to reliance by the Tribunal upon the decision of **PMohan Kala (supra)** without giving notice of the same to the petitioner and also that the statement of the donor dated 9<sup>th</sup> August, 1999 being not considered by the Tribunal in its order dated 20<sup>th</sup> August, 2010. The Court was prima facie impressed by the grievance of the petitioners on the aforesaid two submissions and in the light of those submissions directed the Tribunal to consider afresh the petitioner's application for rectification of the order dated 10<sup>th</sup> July, 2007. Thereafter, when the Tribunal again by an order dated 9<sup>th</sup> November, 2009 dismissed

the Misc.Application for rectification, the petitioner's challenge was upheld by order dated 20<sup>th</sup> February 2010 of this Court in writ petition No.212 of 2010. The Application was restored to the Tribunal for considering the petitioner's contention as directed in paragraph nos. 5 and 6 of the earlier order dated 19<sup>th</sup> January, 2009. It is clear from the above orders dated 19<sup>th</sup> July 2005 and 20<sup>th</sup> February, 2010 that this Court only took a prima facie view that there appears to be an error in the order of the Tribunal dated 10<sup>th</sup> July, 2007. However, this Court did not give any conclusive finding with regard to there being any error apparent on record in the order dated 10<sup>th</sup> July, 2007 and restored Misc.Application for consideration by the Tribunal on the two issues of which grievance was made by the petitioner before the Court. Therefore, the Tribunal has correctly understood and interpreted orders of this Court that Misc.Application for rectification is restored to the Tribunal only in respect of two issues namely donor's statement and opportunity to meet the decision of the Apex Court in **P.Mohan Kala (supra)** Therefore, the Tribunal correctly limited the scope of adjudication of the rectification application only on the aforesaid two issues.

11. The next contention urged on behalf of the petitioner was that

under Section 254 (2) of the Act, the Tribunal ought not to have decided the issue on merits but, ought to have merely recalled its order dated 10<sup>th</sup> July, 2007 and thereafter considered the issues raised by the petitioner on merits. In support reliance was placed on the decision of this Court in **COMMISSIONER OF INCOME TAX VS. EARNEST EXPORTS LTD (2010) 323 ITR 577**, wherein it has been held that the power under section 254 (2) of the Act is confined to merely rectification of a mistake apparent on record. It does not empower the Tribunal at the stage of deciding the application under Section 254 (2) of the Act to substitute its view for the view taken in the order sought to be rectified. The Court further held that the scope of Section 254 (2) is only to correct the mistake and errors apparent on the face of the record and it does not contemplate giving a fresh decision on merits by substituting the earlier view. The aforesaid decision in **EARNEST EXPORTS (supra)** was rendered in the context of the Tribunal allowing application under section 254 (2) of the Act seeking to rectify its earlier order and in fact substituted the findings of the earlier order by reversing the same. In the present case, the impugned order does not substitute the view taken by the Tribunal in the first instance as recorded in its order dated 19<sup>th</sup> July, 2007. It is while considering the

petitioner's application for rectification that the submissions of the petitioner were considered to reach a conclusion that there was no error apparent on record. The Tribunal while considering the application for rectification would necessarily have to consider the submissions of a party to the effect that there is an error apparent on record. It is in that context that the tribunal has made observations to reach a conclusion that there is no error apparent on record. It is only in cases where the Tribunal reaches a conclusion that there is an error apparent on record on the facts of a case warranting a recall of an order then the Tribunal would place the matter for fresh hearing after recalling the earlier order. In view of the above, the above submissions made on behalf of the petitioner has no merits.

12. The petitioner next submitted that the impugned order dated 20<sup>th</sup> August, 2010 has incorrectly recorded the fact that the statement of the donor were recorded prior to assessment proceedings and also that the donor was not produced before the Assessing Officer, both are factually incorrect as seen from the assessment order. We find that the Tribunal after making the above observations did not decide the application on the

above issues but, proceeded to consider the application in terms of the directions of the Court in order dated 19<sup>th</sup> January, 2009 as reiterated in order dated 22<sup>nd</sup> February, 2010. Thus the above two statement even if accepted to be incorrectly recorded, were not the basis of disposing of the application.

13. This Court in the above order has directed the Tribunal only to consider statement of the donor dated 9<sup>th</sup> August, 1999 as according to the petitioner the same had not been considered in order dated 10<sup>th</sup> July 2007 passed by the Tribunal and the petitioner's submissions on the reliance on the decision of the Apex Court in **P.Mohan Kala (supra)** by the Tribunal in the impugned order considered the donor's statement and on appreciation of facts came to the conclusion that there is no mistake apparent on record in the order dated 10<sup>th</sup> July, 2007. The consideration of the statement of the donor in the rectification application was in accordance with directions of this Court. The Court itself had not reached a final conclusion that there was an error apparent on record in view of the statement of the donor not being considered. It has not been shown to us that the findings reached by the Tribunal on examination of the statement of the donor is in any manner perverse and/or arbitrary. So

far as reliance in the order dated 10<sup>th</sup> July, 2007 on the decision of the Supreme Court in **PMohan Kala (supra)** is concerned, it was pointed in the impugned order that it merely records the fact that a gift from abroad does not become genuine merely because it is routed through a banking channel. The Tribunal in its order dated 10<sup>th</sup> July, 2007 after recording the conclusion of the Supreme Court tested the order of the Commissioner of Income Tax (Appeals) keeping in view that mere receipt of gifts from a foreign party through banking channel would not make it genuine. In fact, it was one of the submissions of the petitioner before the Tribunal that the gift received from the donor who was a foreign national through established banking channel makes it a genuine gift. The petitioner attempted to point out that there are distinguishing features in the decision of **PMohan Kala (supra)** and in present case. However to our mind, facts of the case would not be material for the present purpose as the conclusions of the Supreme Court being relied upon is that in law mere routing of a gift through a banking channel would not by itself establish that the gift is genuine. This finding of the Supreme Court is applicable irrespective of the facts. The genuineness or non-genuineness of the gift would have to be established by other evidence. The Tribunal was

thus justified in coming to the conclusion that there has been no error apparent on record in order dated 20<sup>th</sup> July, 2007.

14. For all the aforesaid reasons, we do not find merit in the petition and the same is accordingly dismissed.

(G.S.KULKARNI, J)

(M.S.SANKLECHA, J)



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