IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

MISC. CIVIL APPLICATION (OJ) NO. 1 of 2016
In R/TAX APPEAL NO. 607 of 2015

FOR APPROVAL AND SIGNATURE:

HONOURABLE MS.JUSTICE HARSHA DEVANI
and
HONOURABLE MR.JUSTICE A.G.URAIZEE

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1	Whether Reporters of Local Papers may be allowed to see the judgment?	**NO**
2	To be referred to the Reporter or not?	**NO**
3	Whether their Lordships wish to see the fair copy of the judgment?	**NO**
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder?	**NO**

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PRI.COMMISSIONER OF INCOME TAX-1
Versus
M/S KUNVARJI COMMODITIES BROKERS PVT.LTD.

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Appearance:
MRS MAUNA M BHATT for the PETITIONER(s) No.
MR B S SOPARKAR for the RESPONDENT(s) No.
RULE SERVED for the RESPONDENT(s) No.

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CORAM: **HONOURABLE MS.JUSTICE HARSHA DEVANI**
and
HONOURABLE MR.JUSTICE A.G.URAIZEE

Date : 12/03/2020

IA JUDGMENT
(PER : HONOURABLE MS.JUSTICE HARSHA DEVANI)

1. By this application, the applicant (original appellant) seeks recall of the order dated 02.11.2015 passed by this Court in Tax Appeal No. 607 of 2015 and seeks admission of the appeal on the proposed substantial questions of law.

2. The applicant, as appellant, preferred the captioned Tax Appeal against the order dated 19.03.2015 made by the Income Tax Appellate Tribunal, Ahmedabad Bench, 'A' (hereinafter referred to as "the Tribunal") in IT (SS) A No. 678/Ahd/2010 by proposing the following questions, stated to be the substantial questions of law:

> *"(A) Whether the Appellate Tribunal has substantially erred in law in deleting the addition without appreciating full facts of the case elaborately dealt with by the Assessing Officer and thereby the order of the Appellate Tribunal is perverse?*
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> *(B) Whether the Appellate Tribunal has substantially erred in law in not appreciating that the disclosure of undisclosed income u/s. 132(4) of the Act made voluntarily and without any element of coercion could not be retracted without cogent evidence?"*

3. By an order dated 02.11.2015, this Court had dismissed the appeal by placing reliance upon the order dated 06.10.2015 made in Tax Appeal No. 610 of 2015 in the case of *Principal Commissioner of Income Tax v. Kunvarji Finance Private Limited*.

4. It is the case of the applicant that as can be seen from the assessment order, the addition was proposed on the issue of client code modification. However, the addition with regard to client code modification was subsumed in the addition made on account of disclosure made under section 132(4) of the Income Tax Act, 1961 (hereinafter referred to as "the Act"). That the addition made pursuant to the disclosure under section 132(4) of the Act was on account of undisclosed income on the basis of client code modification conducted by the assessee.

5. Mr. M. R. Bhatt, Senior Advocate, learned counsel for the applicant submitted that this Court had admitted the appeal in the case of Kunvarji Finance Private Limited in Tax Appeal No. 610 of 2015 on the issue of client code modification and that, in this case also, the addition was proposed on the issue of client code modification. The learned counsel invited the attention of the Court to paragraph 6 of the assessment order, to submit that the amount of Rs.2 crore has been added as the amount of unaccounted income earned by the assessee by virtue of client code modification. It was submitted that proposed question (A) does not relate to question (B) inasmuch as question (B) relates to disclosure of undisclosed income under section 132(4) of the Act, whereas, question (A) relates to deletion of addition including addition made on account of client code modification. It was submitted that the addition made pursuant to the disclosure was on the basis of the client code modification conducted by the assessee. It was accordingly submitted that the issue of client code modification is duly covered by proposed question (A) and hence, the order dated 02.11.2015 passed in Tax Appeal No.

607 of 2015 be recalled and the appeal be admitted on the proposed substantial question of law.

6. Opposing the application, Mr. S. N. Soparkar, Senior Advocate, learned counsel for the respondent submitted that there is no error in the order dated 02.11.2015 passed by this Court as client code modification can never apply to the assessee as it is not a client but a broker. It was submitted that the allegation against the assessee is that it permitted its clients to have inter se adjustment, and hence, no addition can be made in its hands in the name of client code modification.

6.1 Next it was submitted that for the purpose of exercising powers of review, an error must be an error apparent on the record. Reliance was placed upon the decision of the Supreme Court in ***Parsion Devi v. Sumitri Devi, (1997) 8 SCC 715***, wherein, the Court held thus:

> *"7. It is well settled that review proceedings have to be strictly confined to the ambit and scope of Order 47, Rule 1, CPC. In Thungabhadra Industries Ltd. v. Govt. of A.P., AIR 1964 SC 1372, this Court opined:*
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> > "*What, however, we are now concerned with is whether the statement in the order of September, 1959 that the case did not involve any substantial question of law is an 'error apparent on the face of the record'. The fact that on the earlier occasion the Court held on an identical state of facts that a substantial question of law arose would not per se be conclusive, for the earlier order itself might be erroneous. Similarly, even if the statement was wrong, it would not follow that it was an 'error apparent on the face of the record', for 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*"

characterised 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 ."
(emphasis ours)

8. Again, in Meera Bhanja v. Nirmala Kumari Choudhury, (1995) 1 SCC 170, while quoting with approval a passage from Aribam Tuleshwar Sharma v. Aribam Pishak Sharma, (1979) 4 SCC 369, this Court once again held that review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 CPC.

9. Under Order 47 Rule 1 CPC a judgment may be open to review inter alia if there is a mistake or an error apparent on the face of the record. An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review under Order 47 Rule 1 CPC. In exercise of the jurisdiction under Order 47 Rule 1 CPC it is not permissible for an erroneous decision to be "reheard and corrected". A review petition, it must be remembered has a limited purpose and cannot be allowed to be "an appeal in disguise"."

6.2 It was submitted that the order dated 02.11.2015 passed by this Court in Tax Appeal No. 607 of 2015 being just, legal and proper, there is no warrant to review or recall the same. It was accordingly urged that the application being devoid of merits, deserves to be rejected.

7. The facts as appearing from the assessment order dated 23.12.2009 passed under section 153A(1)(b) read with section 143(3) of the Act are that the assessee is a broker and Kunvarji Finance Private Limited is a client of the assessee. Inquiries revealed that the assessee M/s. Kunvarji Commodities Brokers Private Limited had done client code modifications for an

unusually high number of times. According to the Assessing Officer, client code modifications have been made to hide the correct profit of a particular client. In the assessment order, the Assessing Officer has recorded that an analysis of the data captured in the computer hard disk seized from the head office of the respondent was made by the Investigation Wing. The profit/loss was recomputed without effecting the client code modification i.e. “without code modifications”. In other words, profit/loss has been worked out with reference to the “old clients” instead of “new clients”. The result of such re-computation revealed that different clients of Kunvarji Commodities Broker Private Limited (the assessee) including the group company Kunvarji Finance Private Limited had diverted their profits to other persons.

7.1 The fact regarding suppression of profits of its various clients along with relevant details came to be furnished to the assessee and it was asked as to why the said difference as furnished to the broker does not represent the unaccounted profits of its clients which have been derived by the methodology of repeated client ID modifications carried out through terminals of the broker.

7.2 Insofar as the assessee is concerned, the case of the Assessing Officer is that for providing such facility of broker, the assessee had earned unaccounted income. The Assessing Officer has attributed Rs.2 crore to the assessee based on the statement of Shri Nayan Thakkar who had accepted unaccounted income of Rs.12 crore in his statement recorded on 26.03.2008 and had stated that this unaccounted income pertains to the assessee, Kunvarji Finance Private Limited,

Kunvarji Finstock Private Limited, etc. Out of such amount, Rs.8 crore was disclosed in the hands of Kunvarji Finance Private Limited.

7.3 The Assessing Officer held that out of the balance Rs.4 crore, Rs.2 crore had been earned by the assessee for providing client code modification to its clients and group concerns. This unaccounted income was then attributed year-wise in the ratio of client code modification.

8. In the case of Principal Commissioner of Income Tax v. M/s. Kunvarji Finance Private Limited in Tax Appeal No. 610 of 2015, proposed question (A) reads thus:

> "*Whether the ITAT has erred in law and on facts in accepting the view of the assessee that the disclosure at the time of search had no basis even though the retraction was an afterthought*?"

8.1 This Court, in its order dated 06.10.2015 rendered in the above appeal, has in the context of proposed question (A), held thus:

> "*7. Thus, while it is true that on behalf of the assessee Mr. Nayan Thakkar had admitted unaccounted income of Rs.12,00,00,000/- which was subsequently reiterated by a letter dated 10.04.2008. However, the facts reveal that the statement had been recorded under circumstances which clearly disclose that the admission could not have been recorded voluntarily. The subsequent letter and the retraction which has been made much later have to be seen in the backdrop of the facts of the case, which clearly show that the relevant documents which were seized by the Department were not made available to the assessee for a long time. Moreover, the Commissioner (Appeals) and the Tribunal*

have recorded concurrent findings of fact that the additions have no reference to the seized material and that there is no material or evidence to support the additions made by the Assessing Officer. In other words, the addition is sought to be made solely on the basis of the statement recorded under section 132(4) of the Act which has been subsequently retracted, without such statement being corroborated by any material on record. In the decisions on which reliance has been placed upon by the learned counsel for the appellant, the statement of the assessee, though subsequently retracted, was corroborated by the material seized during the search, whereas in the present case the Tribunal has recorded a categorical finding to the effect that in the assessment order, the Assessing Officer has not pointed out any defect or discrepancy in any of the documents seized from the business premises of the assessee and that the addition has been made only on account of client modification code. Under the circumstances, the conclusion arrived at by the Tribunal that the disclosure at the time of the search had no basis being based upon findings of fact recorded after appreciation of the material on record, does not give rise to any question of law. The ground of appeal raised vide question [A] is, therefore, rejected."

9. From the facts noted hereinabove, it is apparent that the Assessing Officer had made addition in the hands of the assessee on the basis of disclosure made by Shri Nayan Thakkar by bifurcating the amount of Rs.12 crore into three parts, Rs.8 crore in the hands of Kunvarji Finance Private Limited, Rs.2 crore in the hands of Shri Nayan Thakkar and Rs.2 crore in the hands of the assessee as amount received for providing client code modification.

10. While it is true that the Assessing Officer has held that Rs.2 crore was received by the assessee for providing the client code modification and he has attributed this amount year-wise in the ratio of client code modifications, such

addition is not based on any material other than the disclosure made by Shri Nayan Thakkar. The Assessing Officer has merely held that an amount of Rs.2 crore out of the amount disclosed by Shri Nayan Thakkar has been received by the assessee from the clients by aiding them by suppressing their profits by way of diversion of profits through the methodology of client code modifications.

11. In the light of the above facts, this Court is of the view that the contention of the revenue that the addition with regard to client code modifications was subsumed in the addition made on account of non-disclosure made under section 132(4) of the Act, does not merit acceptance. This Court is of the view that both the questions proposed in the appeal stand covered by the findings recorded in paragraph 7 of the order dated 06.10.2015 passed in Tax Appeal No. 610 of 2015. Under the circumstances, no case is made out for recall of the order dated 02.11.2015 made in the captioned appeal.

12. The application, therefore, fails and is, accordingly, rejected.

[Harsha Devani, J.]

[A. G. Uraizee, J.]

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