

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****TAX APPEAL NO. 635 of 2012****With****TAX APPEAL NO. 740 of 2013****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR.JUSTICE AKIL KURESHI****and****HONOURABLE MR.JUSTICE A.J. SHASTRI**

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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COMMISSIONER OF INCOME TAX I....Appellant(s)

Versus

ATUL LTD....Opponent(s)

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Appearance:

MRS MAUNA M BHATT, ADVOCATE for the Appellant(s) No. 1

MR. S.N. SOPARKAR, LD. SENIOR ADVOCATE with MR B S SOPARKAR,  
ADVOCATE for the Opponent(s) No. 1

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**CORAM: HONOURABLE MR.JUSTICE AKIL KURESHI**  
**and**  
**HONOURABLE MR.JUSTICE A.J. SHASTRI**

Date : 01/08/2016

**COMMON ORAL JUDGMENT**

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

1. Since appeals involve the same assessee and similar issues, we may refer to facts arising in Tax Appeal No.635 of 2012. Revenue is in appeal against the order of the Income Tax Appellate Tribunal dated 11.05.2012. On 04.09.2013, the Court noticing that the issue arises out of the rectification application by the respondent assessee had issued notice for final disposal. For the purpose of this Tax Appeal, we frame following substantial question of law.

"Whether the Income Tax Appellate Tribunal was justified in recalling its judgment relying on the subsequent decision of this Court in case of **Gujarat Alkalies and Chemicals Ltd. v. Commissioner of Income-tax**, reported in [2013 350 ITR 94 (Guj)] on the ground that there was an error apparent on the face of the record committed by the Tribunal."

2. Respondent assessee is a company registered under the Companies Act. For the assessment year 2001-02, the assessee had filed return of income declaring 'nil' income. The Assessing Officer framed scrutiny assessment on 26.03.2004 assessing total income at

Rs.4.9 crores (rounded off). This included addition of Rs.15.68 crores made on account of disallowance of the assessee's claim under section 80IA of the Income Tax Act, 1961, on setting up of a new power generation plant.

3. The claim of the assessee was that during the year under consideration, the assessee had established a new power plant by expending a sum of Rs.14.56 crores. The assessee had claimed deduction under section 80IA of the Act in relation to the profit derived from such undertaking. The Assessing Officer examined such claim. He was of the opinion that generation of power would require boiler and turbine both since boiler would manufacture steam which would be a raw material for production of power with the aid of turbine. The assessee had merely installed a new turbine, claiming it to be a new industrial undertaking capable of generating electricity. The assessee pointed out that in the existing power plant, the assessee had excess steam production capacity which was utilised by the turbine, which was installed in the new plant. The assessee contended that even otherwise, the assessee could have purchased steam

from market and utilized for production of generation of electricity through the turbine installed in the new industry. The Assessing Officer did not agree with the contentions of the assessee that the turbine should be treated as an independent power generating unit and thereby disallowed the assessee's claim of deduction under section 80IA of the Act.

4. The assessee carried the matter in appeal. The CIT(A) held that no industrial undertaking came into existence within the meaning of the provisions contained in section 80IA of the Act by transferring the boiler or by installing new machinery for the purpose of generation of power. It was only an exercise to claim deduction to reduce taxable profits. The power plant was not capable of running independently and depended on the transfer of steam from the existing plant. He therefore rejected the assessee's appeal.

5. The assessee carried the matter further in appeal before the Tribunal.

6. The Tribunal by a judgment dated 16.05.2008 on this issue rejected the appeal of the assessee making

following observations:

"9. We have carefully considered the rival submissions and perused the material on record along with the order of the tax authorities below. The deduction u/s 80IA is available to an assessee where the gross total income of the assessee includes any profits and gains derived by an undertaking or enterprise from any eligible business as referred to in sub-section (4). The deduction shall be allowed an amount equal to 100% of the profits and gains derived from such business for ten consecutive years. As per section 80IA(4) this section applies to any undertaking which is set up in any part of India for the generation or generation and distribution of power if it begins to generate power at any time during the period beginning on the 1st day of April, 1993 and ending on the 31st day of March, 2010. Sub-section (3) of section 80IA requires that such undertaking must fulfill the conditions laid down therein. The first condition therein is that the undertaking should not be formed by splitting up, or the reconstruction, of a business already in existence. The second condition states that the undertaking is not formed by the transfer to a new business of machinery or plant previously used for any purpose. Explanation 2 to this sub-section states that where in the case of an undertaking, any machinery or plant or any part thereof previously used for any purpose is transferred to a new business and the total value of the machinery or plant or part so transferred does not exceed twenty per cent of the total value of the machinery or plant used in the business, then, for the purposes of clause (ii) of this sub-section, the condition special therein shall be deemed to have been complied with. This is an undisputed fact that in this case the assessee has not transferred the existing boiler to the new undertaking for generating the power but the contention of the assessee

is that the same very boiler is being used for supplying the steam to both the turbine which was already in existence and the new one established by the assessee. The claim of the assessee is that the new turbine established by him itself is a new undertaking engaged in the business of generating the power. New turbine itself cannot generate power until and unless the steam is provided to it through boiler. An undertaking which is eligible for deduction u/s 80IA, in our opinion, must itself be an independent undertaking and should be able to carry out the activities for which it has been established. The new turbine established by the assessee cannot itself generate the power. The undertaking so that it may generate the power will be complete only when both new turbine and the boiler are installed. The assessee has not installed boiler but it is part of existing undertaking generating the power. This, in our opinion, is merely an expansion of the existing undertaking. If the existing boiler is carved out from the new turbine installed by the assessee, the new turbine claimed to be eligible undertaking itself cannot generate the power. No material or evidence was brought to our knowledge which may prove that the new turbine installed by the assessee can independently generate the power. The assessee is already having the undertaking engaged in the business of generating the power. The assessee in this case has merely added a new turbine to the existing undertaking by which his capacity to generate the power has increased. This, in our opinion, is merely an expansion of the existing undertaking. The new undertaking as is eligible u/s. 80IA, in our opinion, must be independent and integrated unit which should be able to carry on the activities or to carry on the business as has been stipulated u/s. 80IA independently. It is not the case of the assessee that the new unit established by the assessee has taken

*the boiler from the existing unit for its exclusive use and generation of power. It is only in the existing unit the assessee has added new turbine which, in our opinion, cannot be regarded to be establishing the new undertaking qualifying for deduction u/s 80IA. We, therefore, do not find any illegality or infirmity in the order of the CIT(A) in denying deduction to the assessee u/s 80IA. Thus, ground Nos.3 and 4 stand dismissed."*

7. The assessee thereafter filed an application for rectification before the Tribunal and contended that after the said judgment was delivered by the Tribunal, the High Court in case of **Gujarat Alkalies and Chemicals Ltd. v. Commissioner of Income-tax**, reported in [2013] 350 ITR 94 (Guj) has delivered a judgment which would have a bearing on the issues decided by the Tribunal. The assessee pressed the ratio of the High Court in case of **Gujarat Alkalies and Chemicals Ltd.** (supra) to contend that the Tribunal had committed an error apparent on the face of the record which required rectification. This application was strongly opposed by the Revenue contending that the judgment of the Tribunal did not suffer from any error apparent on the record and the same therefore did not require any rectification. The Tribunal by the impugned order dated 11.05.2012,

allowed the application for rectification, recalled its earlier judgment dated 16.05.2008, revived the assessee's appeal and ordered it to be posted for further hearing. This order of the Tribunal has given rise to the present Tax Appeal at the hands of the Revenue.

8. Learned counsel Shri Bhatt for the Revenue submitted that the Tribunal by the judgment dated 16.05.2008 had considered all issues on the available materials on record. The Tribunal had come to the conclusion that the assessee had not set up a new industry for power generation. This view was not opposed to the decision of the Gujarat High Court in case of **Gujarat Alkalies and Chemicals Ltd.** (supra), the judgment did not lay down a ratio which could be automatically applied to the case of the assessee. Such decision therefore could not have been a ground for recalling the order of the Tribunal by way of rectification. In this context, counsel relied on the judgment of the Supreme Court in case of **T.S. Balram, Income-Tax Officer, Company Circle IV, Bombay v. Volkart Brothers and others**, reported in **82 ITR 50**, in which it was observed that mistake apparent on the

record must be obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may be conceivably two opinions. Counsel also relied on the judgment in case of **[Assistant Commissioner of Income-Tax v. Saurashtra Kutch Stock Exchange Ltd., reported in [2008] 305 ITR 227 (SC),** in which the issue of error apparent on face of the record came up for consideration.

9. On the other hand, learned counsel Shri Soparkar for the assessee opposed the appeal contending that the judgment of the Tribunal dated 16.05.2008 was not in consonance with the view of the case of the decision of the High Court given in case of **Gujarat Alkalies and Chemicals Ltd.** (supra). Merely because new industry depended on the existing industry, would not be a ground to deny deduction under section 80IA of the Act. Since the Tribunal had proceeded only on this basis, it had recalled its judgment and posted the appeal for further hearing. Counsel relied on the decision of the Supreme Court in case of **Honda SIEL Power Products Ltd. v. Commissioner of Income-Tax**

reported in [2007] 295 ITR 466 (SC) in which, in the context of scope of power of rectification, it was observed as under:

*"12. As stated above, in this case we are concerned with the application under section 254(2) of the 1961 Act. As stated above, the expression "rectification of mistake from the record" occurs in section 154. It also finds place in section 254(2). The purpose behind enactment of section 254(2) is based on the fundamental principle that no party appearing before the Tribunal, be it an assessee or the Department, should suffer on account of any mistake committed by the Tribunal. This fundamental principle has nothing to do with the inherent powers of the Tribunal. In the present case, the Tribunal in its Order dated 10.9.2003 allowing the Rectification Application has given a finding that Samtel Color Ltd. (supra) was cited before it by the assessee but through oversight it had missed out the said judgment while dismissing the appeal filed by the assessee on the question of admissibility/allowability of the claim of the assessee for enhanced depreciation under section 43A. One of the important reasons for giving the power of rectification to the Tribunal is to see that no prejudice is caused to either of the parties appearing before it by its decision based on a mistake apparent from the record."*

10. From the facts on record, it emerges that the Tribunal in its original judgment dated 16.05.2008 had held that the assessee had not established a new power plant so as to qualify for deduction under section 80IA of the Act. The Tribunal recalled this order in

exercise of powers of rectification on the ground that this view is not in consonance with in case of **Gujarat Alkalies and Chemicals Ltd.** (supra). It is undisputed that under section 254(2) of the Act, the Tribunal enjoys the power to rectify any mistake apparent on the face of the record at any time within four years from the date of the order. In view of the judgment of this Court in case of **Assistant Commissioner of Income-Tax v. Saurashtra Kutch Stock Exchange Limited**, reported in **262 ITR 146**, the decision of the jurisdictional High Court even if rendered subsequently, would constitute a mistake apparent on record, investing the Tribunal with jurisdiction to rectify the mistake. It was therefore not even the argument of the Revenue that merely because the judgment of the Gujarat High Court in case of **Gujarat Alkalies and Chemicals Ltd.** (supra) was delivered subsequent to the judgment of the Tribunal, the same would not form a ground to hold that the Tribunal's judgment suffered from an apparent mistake. However, the Revenue argued that the said judgment did not clinch the issue and at any rate, it was debatable whether by virtue of the judgment of Gujarat High

Court, the Tribunal's view would be rendered incorrect and in that view of the matter, power of rectification could have been exercised.

11. As noted, the Supreme Court in case of **T.S. Balram** (supra) held that a mistake apparent on record must be obvious and patent mistake and not something which can be established on a long drawn process of reasoning where two opinions are possible.

12. In case of **Honda SIEL Power Products Ltd.** (supra), the Supreme Court highlighted that the purpose behind enactment of section 254(2) is based on the fundamental principle and no party appearing before the Tribunal should suffered on account of the mistake committed by the Tribunal and that power of rectification of the Tribunal is granted to see that no prejudice is caused to either of the parties by the decision of the Tribunal based on the mistake apparent from the record. Section 254 (2) itself refers to a mistake apparent on record, which can be rectified. The concept of mistake apparent on record was not diluted by the Supreme Court in case of **Honda SIEL Power Products Ltd.** (supra) also.

13. In case of **Saurashtra Kutch Stock Exchange Ltd.** (supra) also, the Supreme Court observed that a patent manifest and self evident error which does not require elaborate discussion of evidence or arguments to establish it can be said to be an error apparent on the face of the record. In the said judgment, the Supreme Court approved the decision of Gujarat High Court in case of **Saurashtra Kutch Stock Exchange Ltd.** (supra).

14. In view of such settled legal position, we may examine the facts on hand. As noted, the assessee had installed a turbine for power generation, which relied on the excess steam production capacity of the plant. The assessee claimed that it had thus, set up a new power plant which qualify for deduction under section 80IA of the Act. The Tribunal by its original judgment, upheld the view of the Revenue authorities holding that turbine itself would not be sufficient to generate power and the plant therefore would not qualify as a new industry. On the basis of judgment of Supreme Court in case of **Gujarat Alkalies and Chemicals Ltd.** (supra), however, the Tribunal was persuaded to recall this judgment and post the appeal

for further hearing. In Gujarat Alkalies' case, the facts were that the assessee was in the business of manufacturing caustic soda and other chemicals, for which, it had installed a production plant. The assessee acquired a new industrial license and a new letter of intent for substantial expansion of the production capacity of the caustic soda, by which, its existing capacity was nearly doubled. The assessee had made sizable investment in acquiring new machinery and plant. The assessee therefore claimed that this was a new industrial undertaking and the profit in respect of which would qualify for deduction under section 80IA of the Act. The claim was rejected by the Revenue authorities and the Tribunal on the ground that this is a case of substantial expansion and not of installment of new industry. One of the grounds pressed in service was that, the assessee did not produce any evidence to prove that the new unit could independently produce the goods without taking assistance of the existing plant and machinery of the old unit. When the assessee approached the High Court, in this context, the High Court observed that there was no logic for the argument that the true test

would be whether a new industrial undertaking can function independently of the existing industrial undertaking. On the question of satisfying the test of a separate and distinct identity of the industrial unit set up, the Court was of the opinion that only because to a certain extent, the new undertaking is dependent on the existing unit, will not deprive the new undertaking status of a separate and distinct identity. It all depends on the nature of technicality and the mechanism of production.

15. Thus while discarding the theory of the test of separate and distinct identity failing merely because the new undertaking was dependent on the existing one, the Court opined that it all depends on the nature of technicality and the mechanism of production. In the later portion of the judgment, the Court observed that *"The true test is not whether the new industrial undertaking connotes expansion of the existing business of the assessee but whether it is a new identifiable endeavour where substantial investment of fresh capital is made to enable earning of profit attributable to that new capital."*

16. It can thus, be seen that the High Court in case of **Gujarat Alkalies and Chemicals Ltd.** (supra) while laying down certain broad propositions for ascertaining whether a new industrial undertaking in the given set of facts was established, did not lay down ratio which can be straightway applied to the facts of the present case. In the present case, the view adopted by the Revenue authorities which was upheld by the Tribunal was that by mere installation of turbines, the assessee did not install a new industry, since turbines themselves would not be sufficient for power generation, without generation of steam. When the High Court in case of **Gujarat Alkalies and Chemicals Ltd.** (supra) referred to the issue depending on the nature of technology and mechanism of production, it left this question open to be judged case specific. This was therefore not a case where by virtue of the judgment of the case of High Court in case of **Gujarat Alkalies and Chemicals Ltd.** (supra), it can be stated that the Tribunal had committed an error apparent on record which needed rectification. At best, the High Court propounded that mere dependence of a new industry on an existing

industry, would not disqualify itself from claiming deduction.

17. In the result, respective orders of the Tribunal dated 11.05.2012 and 22.03.2013 are set aside. Question answered in favour of the Revenue. Tax appeals disposed of accordingly.

(AKIL KURESHI, J.)

(A.J. SHASTRI, J.)

ANKIT

