

INCOME TAX : ITAT has no powers u/s 254(2) to recall its earlier order

- The powers of ITAT under Section 254(2) of the Act are only to rectify/correct any mistake apparent from the record.
- If the order passed by the ITAT was erroneous on merits, the remedy available to the Assessee was to prefer an appeal before the High Court.
- Therefore, as such, the order passed by the ITAT recalling its earlier order is beyond the scope and ambit of the powers of the Appellate Tribunal conferred under Section 254 (2) of the Act.
- Merely because the Revenue might have in detail gone into the merits of the case before the ITAT and merely because the parties might have filed detailed submissions, it does not confer jurisdiction upon the ITAT to pass the order *de hors* Section 254(2) of the Act.
- Considering the fact that the Assessee had earlier preferred appeal/s before the High Court challenging the original order passed by the ITAT dated 6-9-2013, which the Assessee withdrew in view of the subsequent order passed by the ITAT dated 18-11-2016 recalling its earlier order dated 6-9-2013, we observe that if the Assessee/s prefers/prefer appeal/s before the High Court against the original order dated 6-9-2013 within a period of six weeks from today, the same may be decided and disposed of in accordance with law and on its/their own merits and without raising any objection with respect to limitation.

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[2021] 133 taxmann.com 41 (SC)

SUPREME COURT OF INDIA

Commissioner of Income-tax (IT-4), Mumbai

v.

Reliance Telecom Ltd.

**M.R. SHAH AND B.V. NAGARATHNA, JJ.
CIVIL APPEAL NOS. 7110 AND 7111 OF 2021
DECEMBER 3, 2021**

JUDGMENT

M.R. Shah, J. - Feeling aggrieved and dissatisfied with the impugned common judgment and order dated 8-8-2017 passed by the High Court of Judicature at Bombay in Writ Petition No. 1432/2017 and Writ Petition No. 1406/2017, by which the High Court has dismissed the aforesaid writ petitions preferred by the Commissioner of Income-tax (IT-4), Mumbai (hereinafter referred to as the 'Revenue') and has confirmed the order passed by the Income-tax Appellate Tribunal, Bench at Mumbai (hereinafter referred to as the 'ITAT') dated 18-11-2016 passed in Miscellaneous Application Nos. 261/M/2014 and 419/M/2013, by which the ITAT in exercise of powers under section 254(2) of the Income-tax Act (hereinafter referred to as the 'Act') has recalled its earlier order dated 6-9-2013 passed in ITA No. 5096/Mum/2008 and ITA No. 837/Mum/2007, the Revenue has preferred the present appeals.

2. The facts leading to the present appeals in a nutshell are as under. For the sake of convenience, the facts in Civil Appeal No. 7110 of 2021 arising from Special Leave Petition (Civil) No. 13963/2018 in the case of M/s Reliance Telecom Limited (hereinafter referred to as the 'Assessee') are narrated. The facts in another appeal are similar except that the assessee is different, but with respect to same group of companies.

2.1 That the Assessee entered into Supply Contract dated 15-6-2004 with Ericsson A.B. Assessee filed an application under section 195(2) of the Act before the Assessing Officer, to make payment to the non-resident company for purchase of software without TDS. It was contended by the Assessee that it was for the purchase of software and Ericsson A.B. had no permanent establishment in India and in terms of the DTAA between India and Sweden & USA, the amount paid is not taxable in India.

2.2 The Assessing Officer passed an order dated 12-3-2007 rejecting the Assessee's application holding that the consideration for software licensing constituted under section 9(1)(vi) of the Act and under Article 12(3) of the DTAA is liable to be taxed in India and accordingly directed the assessee to deduct tax at the rate of 10% as royalty.

2.3 The Assessee after deducting the tax appealed before the Commissioner of Income-tax (Appeals). CIT *vide* order dated 27-5-2008 held in favour of the Assessee. Revenue appealed before the ITAT and by a detailed judgment and order dated 6-9-2013, the ITAT allowed the Revenue's appeal by relying upon the judgments/decisions of the Karnataka High Court and held that payments made for purchase of software are in the nature of royalty. Against the detailed judgment and order dated 6-9-2013 passed by the ITAT, the Assessee filed miscellaneous application for rectification under section 254(2) of the Act. Simultaneously, the Assessee also filed the appeal before the High Court against the ITAT order dated 6-9-2013.

2.4 That *vide* common order dated 18-11-2016, the ITAT allowed the Assessee's miscellaneous application filed under section 254(2) of the Act and recalled its original order dated 6-9-2013. Immediately, on passing the order dated 18-11-2016 by the ITAT recalling its earlier order dated 6-9-2013, the Assessee withdrew the appeal preferred before the High court, which was against the original order dated 6-9-2013.

2.5 Feeling aggrieved and dissatisfied with the order passed by the ITAT allowing the miscellaneous application under section 254(2) of the Act and recalling its earlier order dated 6-9-2013, the Revenue preferred writ petition before the High Court. By the impugned common judgment and order, the High Court has dismissed the said writ petition/s. Hence, the Revenue is before this Court by way of present appeal/s.

3. We have heard Shri Balbir Singh, learned Additional Solicitor General of India appearing on behalf of the Revenue and Shri Anuj Berry, learned Advocate appearing on behalf of the Resolution Professional of the respondent-company. At this stage, it is required to be noted that the respondent-company/companies - respective assessee/s currently are undergoing corporate insolvency resolution process and the Resolution Professional is appointed. We have heard learned counsel for the Resolution Professional of the respondent-assessee.

3.1 We have considered the order dated 18-11-2016 passed by the ITAT allowing the miscellaneous application in exercise of powers under section 254(2) of the Act and recalling its earlier order dated 6-9-2013 as well as the original order passed by the ITAT dated 6-9-2013.

3.2 Having gone through both the orders passed by the ITAT, we are of the opinion that the order passed by the ITAT dated 18-11-2016 recalling its earlier order dated 6-9-2013 is beyond the scope and ambit of the powers under section 254(2) of the Act. While allowing the application under section 254(2) of

the Act and recalling its earlier order dated 6-9-2013, it appears that the ITAT has re-heard the entire appeal on merits as if the ITAT was deciding the appeal against the order passed by the C.I.T. In exercise of powers under section 254(2) of the Act, the Appellate Tribunal may amend any order passed by it under sub-section (1) of Section 254 of the Act with a view to rectifying any mistake apparent from the record only. Therefore, the powers under section 254(2) of the Act are akin to Order XLVII Rule 1 CPC. While considering the application under section 254(2) of the Act, the Appellate Tribunal is not required to re-visit its earlier order and to go into detail on merits. The powers under section 254(2) of the Act are only to rectify/correct any mistake apparent from the record.

4. In the present case, a detailed order was passed by the ITAT when it passed an order on 6-9-2013, by which the ITAT held in favour of the Revenue. Therefore, the said order could not have been recalled by the Appellate Tribunal in exercise of powers under section 254(2) of the Act. If the Assessee was of the opinion that the order passed by the ITAT was erroneous, either on facts or in law, in that case, the only remedy available to the Assessee was to prefer the appeal before the High Court, which as such was already filed by the Assessee before the High Court, which the Assessee withdrew after the order passed by the ITAT dated 18-11-2016 recalling its earlier order dated 6-9-2013. Therefore, as such, the order passed by the ITAT recalling its earlier order dated 6-9-2013 which has been passed in exercise of powers under section 254(2) of the Act is beyond the scope and ambit of the powers of the Appellate Tribunal conferred under section 254 (2) of the Act. Therefore, the order passed by the ITAT dated 18-11-2016 recalling its earlier order dated 6-9-2013 is unsustainable, which ought to have been *set aside* by the High Court.

5. From the impugned judgment and order passed by the High Court, it appears that the High Court has dismissed the writ petitions by observing that (i) the Revenue itself had in detail gone into merits of the case before the ITAT and the parties filed detailed submissions based on which the ITAT passed its order recalling its earlier order; (ii) the Revenue had not contended that the ITAT had become *functus officio* after delivering its original order and that if it had to relook/revisit the order, it must be for limited purpose as permitted by Section 254(2) of the Act; and (iii) that the merits might have been decided erroneously but ITAT had the jurisdiction and within its powers it may pass an erroneous order and that such objections had not been raised before ITAT.

6. None of the aforesaid grounds are tenable in law. Merely because the Revenue might have in detail gone into the merits of the case before the ITAT and merely because the parties might have filed detailed submissions, it does not confer jurisdiction upon the ITAT to pass the order *de hors* Section 254(2) of the Act. As observed hereinabove, the powers under section 254(2) of the Act are only to correct and/or rectify the mistake apparent from the record and not beyond that.

Even the observations that the merits might have been decided erroneously and the ITAT had jurisdiction and within its powers it may pass an order recalling its earlier order which is an erroneous order, cannot be accepted. As observed hereinabove, if the order passed by the ITAT was erroneous on merits, in that case, the remedy available to the Assessee was to prefer an appeal before the High Court, which in fact was filed by the Assessee before the High Court, but later on the Assessee withdrew the same in the instant case.

7. In view of the above and for the reasons stated above, the impugned common judgment and order passed by the High Court as well as the common order passed by the ITAT dated 18-11-2016 recalling its earlier order dated 6-9-2013 deserve to be quashed and *set aside* and are accordingly quashed and set aside. The original orders passed by the ITAT dated 6-9-2013 passed in the respective appeals preferred by the Revenue are hereby restored.

8. Considering the fact that the Assessee had earlier preferred appeal/s before the High Court challenging the original order passed by the ITAT dated 6-9-2013, which the Assessee withdrew in view

of the subsequent order passed by the ITAT dated 18-11-2016 recalling its earlier order dated 6-9-2013, we observe that if the Assessee/s prefers/prefer appeal/s before the High Court against the original order dated 6-9-2013 within a period of six weeks from today, the same may be decided and disposed of in accordance with law and on its/their own merits and without raising any objection with respect to limitation.

9. Both the appeals are accordingly allowed in the aforesaid terms. However, there shall be no order as to costs.

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