

VISVAS PROMOTERS (P) LTD. vs. INCOME TAX APPELLATE TRIBUNAL & ANR.

HIGH COURT OF MADRAS

P. Jyothimani, J.

Writ Petn. No. 3686 of 2009 & Misc. Petn. No. 1 of 2009

11th September, 2009

(2009) 77 CCH 0853 ChenHC

(2009) 226 CTR 0638 : (2009) 30 DTR 0065 : (2010) **323 ITR 0114** : (2009) 185 TAXMAN 0145

Legislation Referred to

Section 80-IB(10), 254(1), 254(2), 260A, Art. 226

Case pertains to

Asst. Year 2004-05

Decision in favour of:

Assessee, Revenue

Appeal (High Court)—Maintainability—Order of Tribunal under s. 254(2)—The term 'every order' referred to in s. 260A, apart from being qualified as one involving substantial question of law, would mean an order which finally disposes of the rights of the parties in controversy—In cases where an application for rectification is made and an order passed under s. 254(2) by merely rejecting such application, it does not decide the substantial issue involved between the parties—If at all there is any substantial question of law that may arise or any right of the parties is finally decided by the Tribunal, the same can be only under the orders passed as per s. 254(1)—Therefore, such order cannot be construed as 'any order' referred to under s. 260A to enable the aggrieved party to file appeal before the High Court—Writ petition against order under s. 254(2) cannot therefore be rejected on the ground of availability of alternative remedy

Held :

Only when a substantial question of law arises, which has been framed, an appeal lies to the High Court under s. 260A which would be possible only on a final judgment of the Tribunal to decide the issue in appeal on merits and not against the technical grounds or rectification of errors under s. 254(2). The term 'every order' referred to in s. 260A, apart from being qualified as one involving substantial question of law, would mean an order which finally disposes of the rights of the parties in controversy. In cases where an application for rectification is made and an order passed under s. 254(2) by merely rejecting such application, it does not decide the substantial issue involved between the parties, since the issue has already been decided under s. 254(1) by the Tribunal and if the application is filed subsequently under s. 254(2) by way of miscellaneous petition for

rectification of mistake within the period of limitation, viz., 4 years and the same is rejected, it would only make the original order passed by the Tribunal final and if at all there is any substantial question of law that may arise or any right of the parties is finally decided by the Tribunal, the same can be only under the orders passed as per s. 254(1). Therefore, such order cannot be construed as 'any order' referred to under s. 260A to enable the aggrieved party to file appeal before the High Court. The writ petition filed as against the impugned order of the Tribunal passed under s. 254(2) cannot therefore be rejected as not maintainable on the ground of availability of appellate remedy.—[Chem Amit vs. Asstt. CIT](#) (2005) 194 CTR (Bom) 141 : (2005) 272 **ITR** 397 (Bom) and [Shaw Wallace & Co. Ltd. vs. ITAT & Ors.](#) (1999) 155 CTR (Cal) 502 : (1999) 240 **ITR** 579 (Cal) **concluded with.**

(Paras 14, 15 & 18)

Conclusion :

Appeal under s. 260A is not maintainable against order of Tribunal under s. 254(2) and therefore writ petition against order under s. 254(2) cannot be rejected on the ground of availability of alternative remedy.

In favour of :

Assessee

Writ—Alternative remedy—Order of Tribunal under s. 254(2)—Appeal under s. 260A is not maintainable against order of Tribunal under s. 254(2) and therefore writ petition against order under s. 254(2) cannot be rejected on the ground of availability of alternative remedy

(Paras 14, 15 & 18)

Conclusion :

Appeal under s. 260A is not maintainable against order of Tribunal under s. 254(2) and therefore writ petition against order under s. 254(2) cannot be rejected on the ground of availability of alternative remedy.

In favour of :

Assessee

Appeal (Tribunal)—Rectification under s. 254(2)—Mistake apparent—After considering the relevant provisions of s. 80-IB(10) and Kolkatta Tribunal's decision, the Tribunal disallowed the assessee's claim for deduction on the ground that approval is accorded to the entire project and blocks of residential units are parts of a project and that the eligibility condition of 1,500 sq. ft. is applicable to entire project—In such circumstances, there is no question of rectifying any mistake stated to have crept in the original order of the Tribunal and therefore rectification under s. 254(2) was not called for

Held :

Deduction was claimed under s. 80-IB(10)(c) on the ground that the maximum built up area was less than 1,500 sq. ft., since the place involved is other than Delhi and Bombay. The Tribunal in its original order dt. 13th Oct., 2008, which is sought to be

rectified, has considered the said provision. Decision has been taken on the substantial issue raised by the petitioner on the basis of construction of relevant provisions of the IT Act, viz., s. 80-IB(10). In such circumstances, there is no question of rectifying any mistake stated to have crept in the original order of the Tribunal dt. 13th Oct., 2008. Even though it is true that in the said original order dt. 13th Oct., 2008, the Tribunal has not technically referred to the order of Co-ordinate Bench of Kolkatta Tribunal and the subsequent decision of the Calcutta High Court, the substance of the same has been discussed in detail against which certainly the petitioner has got a right of appeal and therefore, the filing of application for rectification under s. 254(2) after disposal of the appeal, is totally misconceived. In any event, in the impugned order, the Tribunal has explicitly taken note of the substance of the issue decided by the Kolkatta Tribunal wherein it was decided that the eligibility condition for deduction under s. 80-IB(10) is that the built-up area should not exceed 1,500 sq. ft. and the same is applicable to the entire project. The writ petition as such is misconceived and liable to be dismissed and accordingly, it is dismissed.

(Paras 20 to 22 & 24)

Conclusion :

After considering the relevant provisions of s. 80-IB(10) and Kolkatta Tribunal's decision, the Tribunal disallowed the assessee's claim for deduction, there was no mistake and the same could not be rectified under s. 254(2).

In favour of :

Revenue

Precedent—Binding nature—Decision of High Court of different jurisdiction—Is not binding on Tribunal—[CIT vs. Thana Electricity Supply Ltd.](#) (1993) 112 CTR (Bom) 356 : (1994) 206 **ITR** 727 (Bom) and [CIT vs. Vardhman Spinning](#) (1997) 139 CTR (P&H) 322 : (1997) 226 **ITR** 296 (P&H) concurred with

(Para 23)

Conclusion :

Decision of High Court of different jurisdiction is not binding on Tribunal.

Cases referred:

Bengal Ambuja Housing Developments Ltd. vs. CIT (ITA No. 1595/Kol/ 2005)

Britannia Industries Ltd. vs. CIT & Anr. (2005) 198 CTR (SC) 313 : (2005) 278 **ITR** 546 (SC)

CIT vs. Bengal Ambuja Housing Developments Ltd. (Decision of the Calcutta High Court dt. 5th Jan., 2007)

CIT vs. Havell's (P) Ltd. (2008) 165 Taxman 510 (Del)

CIT vs. Highway Construction Co. (P) Ltd. (1996) 131 CTR (Gau) 310 : (1996) 217 **ITR** 234 (Gau)

CIT vs. L.G. Ramamurthi & Ors. (1977) CTR (Mad) 416 : (1977) 110 **ITR** 453 (Mad)

CIT vs. Smt. Nirmalabai K. Darekar (1990) 186 **ITR** 242 (Bom)

Honda Siel Power Products Ltd. vs. CIT (2007) 213 CTR (SC) 425 : (2007) 295 **ITR** 466 (SC)

Lakshmi Vilas Bank Ltd. vs. CIT (2006) 202 CTR (Mad) 560 : (2006) 284 **ITR** 93 (Mad)

Nova Films & Paper Manufacturing Co. vs. ITO (2008) 296 **ITR** 340 (Mad)

Padmasundara Rao (Decd.) & Ors. vs. State of Tamil Nadu & Ors. (2002) 176 CTR (SC) 104 : (2002) 255 **ITR** 147 (SC)

Santosh Hazari vs. Purushottam Tiwari (Dead.) By LRs (2001) 170 CTR (SC) 160 : (2001) 251 **ITR** 84 (SC)

Counsel appeared:

R. Sivaraman, for the Petitioner : Mrs. Pushya Seetharaman, for the Respondents

P. JYOTHIMANI, J.

Order

This writ petition is directed against the order of the Tribunal, Chennai dt. 30th Jan., 2009 passed in Misc. Petn. No. 379/Mad/2008, rejecting the said petition filed by the assessee for cancellation of earlier order of the Tribunal dt. 13th Oct., 2008 in respect of asst. yr. 2004-05 by which the appeal filed by the Department was allowed and for restoration of the appeal and to pass further orders.

2. The petitioner is carrying on the business of real estate and during the asst. yr. 2004-05 the petitioner is said to have put up construction of four housing projects in Madurai city, viz. Agrini, Vajra, Porkudam Phase I and Phase II. In respect of two projects, viz., Agrini and Vajra, the construction of flats has been done and the size of the flats was more than 1,500 sq. ft. and in respect of some of the flats, the size was less than 1,500 sq. ft. area. In respect of flats which are measuring less than 1,500 sq. ft., the petitioner claimed deduction under s. 80-IB(10) of the IT Act.

2(a). The AO, by order dt. 26th Dec., 2006, held that the petitioner was not entitled for deduction in respect of those two projects since all the flats were not of specified size. As against the said order, the petitioner filed an appeal before the CIT(A), who allowed the appeal and granted deduction under s. 80-IB(10) of the IT Act (in short, "the Act") in respect of residential units which are less than 1,500 sq. ft. of size, based on the Division Bench order of the Tribunal in Bengal Ambuja Housing Developments Ltd. vs. CIT in ITA No. 1595/Kol/2005.

2(b). It was, as against the said order of the CIT(A), the respondent Department filed an appeal before the Tribunal, which came to be allowed on 13th Oct., 2008, thereby setting aside the order of the CIT(A) and rejecting the claim of deduction made by the petitioner under s. 80-IB(10) of the Act.

2(c). The case of the petitioner is that during the course of arguments before the first respondent Tribunal, when the appeal was filed as against the order of the CIT(A), it was brought to the notice of the first respondent, Tribunal, the decision of the Co-ordinate

Bench of the Kolkatta Bench Tribunal in Bengal Ambuja Housing Developments Ltd. vs. CIT (supra) and also the subsequent decision of Calcutta High Court in CIT vs. Bengal Ambuja Housing Developments Ltd., dt. 5th Jan., 2007, confirming the decision of the Tribunal and the first respondent, Tribunal without referring to the decision of Co-ordinate Bench of Kolkatta Tribunal and the decision of Calcutta High Court, has passed the final order allowing the appeal of the Department.

2(d). The petitioner, after the decision by the Tribunal, filed the above Misc. Petn. No. 379 of 2008 before the first respondent Tribunal as if a mistake has crept in the order of the Tribunal dt. 13th Oct., 2008, in not referring to the decision of the Co-ordinate Bench of Kolkatta Tribunal and also the judgment of the Calcutta High Court and to rectify the error by recalling the earlier order. That application came to be dismissed by the Tribunal on the basis that the entire issue has been dealt with in detail in the earlier order dt. 13th Oct., 2008 and by filing the said application the petitioner really wants to review the earlier order. The Tribunal held that there is no error apparent in the earlier order of the Tribunal. It is as against the order of the Tribunal, the present writ petition is filed.

3. The validity of the said order is challenged on the ground that it was the case of the petitioner that the first respondent Tribunal, while passing the original order dt. 13th Oct., 2008 has not taken note of the Co-ordinate Bench decision of Kolkatta Tribunal and the Calcutta High Court judgment, wherein in respect of residential units of less than 1,500 sq. ft. size deduction under s. 80-IB(10) of the IT Act was granted, which is binding on the first respondent, Tribunal and it was not intended that the first respondent should consider that aspect in the miscellaneous petition. The petitioner would rely upon the judgment of the Supreme Court in Honda Siel Power Products Ltd. vs. CIT (2007) 213 CTR (SC) 425 : (2007) 295 **ITR** 466 (SC), apart from the judgments of this Court in Lakshmi Vilas Bank Ltd. vs. CIT (2006) 202 CTR (Mad) 560 : (2006) 284 **ITR** 93 (Mad) and CIT vs. L.G. Ramamurthi & Ors. (1977) CTR (Mad) 416 : (1977) 110 **ITR** 453 (Mad).

4. It is the case of the petitioner that in all fairness, the first respondent having realised non-consideration of the Co-ordinate Bench decision of Kolkatta Tribunal and the judgment of the Calcutta High Court should have set aside its earlier order dt. 13th Oct., 2008 and passed even a similar order by considering the decision of Co-ordinate Bench of Kolkatta Tribunal and the judgment of the Calcutta High Court and differing with the stand taken in those judgments, on facts, since under s. 254(2) of the IT Act, no party should suffer on account of any mistake committed by the Tribunal. It is also stated that the Supreme Court has held that the Tribunal has to rectify its mistake, which is its inherent power.

5. In the counter-affidavit filed by the respondent Department, it is stated that as against the original order of the first respondent dt. 13th Oct., 2008, even if there was any mistake, the further course of action which was available to the petitioner was to file a tax case appeal before the Division Bench of this Court under s. 260A of the Act. By way of the claim of rectification of some mistake, in fact, the petitioner seeks an order from the first respondent to set aside its own order, which amounts to review. It is also stated that there is no Co-ordinate Bench and the ruling of a Bench at different place would not be binding upon the Tribunal at Chennai.

5(a). It is not the law that the decisions of Tribunals at other places are binding precedents. The respondent would rely upon the judgment of Bombay High Court in CIT vs. Thana Electricity Supply Ltd. (1993) 112 CTR (Bom) 356 : (1994) 206 **ITR** 727 (Bom) and submit that the decision of Kolkatta Tribunal or the Calcutta High Court is not binding upon the Tribunal at Chennai. The respondent would rely upon the judgment of Punjab & Haryana High Court in CIT vs. Vardhman Spinning (1997) 139 CTR (P&H) 322 : (1997) 226 **ITR** 296 (P&H) wherein it was held that rectification of mistake cannot be

done based on the decision of another jurisdiction. It is also stated that the decision of the Supreme Court in *Honda Siel Power Products Ltd. vs. CIT* (supra) relates to a decision taken by a different Bench of Delhi Tribunal and it does not relate to various branches of different Tribunals.

6. Mr. R. Sivaraman, learned counsel appearing for the petitioner would vehemently contend that non-consideration of the Calcutta High Court judgment by the first respondent Tribunal in its original order dt. 13th Oct., 2008 is a mistake on the face of record and that should have been rectified by the first respondent by allowing the miscellaneous petition filed by the petitioner. He would rely upon the judgment of the Delhi High Court in *CIT vs. Havell's (P) Ltd.* (2008) 165 Taxman 510 (Del) and submit that a tax case appeal can be filed before the High Court under s. 260A of the Act only against an order passed under s. 254(1) of the Act on the substantial merit of the case and an order passed under s. 254(2) of the Act is not an order which is appealable under s. 260A of the Act. He would rely upon the judgment of the Bombay High Court in *Chem Amit vs. Asstt. CIT* (2005) 194 CTR (Bom) 141 : (2005) 272 **ITR** 397 (Bom) to substantiate his contention that the decision of Co-ordinate Bench of other Tribunal is binding. His submission is that in the original order of the first respondent dt. 13th Oct., 2008, even there is no mention about the decision of the Co-ordinate Bench of Kolkatta Tribunal or the judgment of the Calcutta High Court and thus, a substantial mistake has been committed on the face of record and the same has to be rectified. He would also rely upon the judgments in *CIT vs. Highway Construction Co. (P.) Ltd.* (1996) 131 CTR (Gau) 310 : (1996) 217 **ITR** 234 (Gau) and *CIT vs. Smt. Nirmalabai K. Darekar* (1990) 186 **ITR** 242 (Bom).

7. On the other hand, it is the contention of the learned counsel for the respondent/Revenue that the High Courts of different jurisdiction and their judgments are not binding on the respondent Tribunal. It is his submission that every Tribunal is an independent entity and there is no question of binding precedent between the decisions of various Tribunals at various places in India. He would rely upon the judgment in *Nova Films & Paper Manufacturing Co. vs. ITO* (2008) 296 **ITR** 340 (Mad) to contend that the writ petition is not maintainable. He also placed reliance on the decisions in *CIT vs. Thana Electricity Supply Ltd.* (supra) and *CIT vs. Vardhman Spinning* (supra). It is his contention that in fact in the impugned order, the first respondent has considered the Bench decision of the Kolkatta Tribunal and there is no grievance to the petitioner.

8. I have heard learned counsel for the petitioner and the respondent and given my anxious thoughts to the issue involved in this case.

9. While the facts are not in dispute, it is relevant to note that as against the order of the CIT(A) dt. 7th May, 2007, by which the CIT(A) held that the petitioner was entitled for deduction under s. 80-IB(10) of the IT Act in respect of residential units which are less than 1,500 sq. ft. in size, a substantial appeal was filed before the first respondent under s. 253 of the Act.

10. The Tribunal is constituted as per s. 252 of the Act by the Central Government consisting of Judicial and Accountant Members and the Government also appoints one of the Senior Vice Presidents to be the President of the Tribunal and one or more of the Members of the Tribunal as Vice President or Vice Presidents and also appoints one of the Vice Presidents to be the Senior Vice President and the Senior Vice Presidents or Vice Presidents shall have all the powers and functions of the President as may be delegated to him by the President by general or special order in writing. Sec. 252 is as follows :

"Sec. 252. Appellate Tribunal—(1) The Central Government shall constitute an Appellate Tribunal consisting of as many Judicial and Accountant Members as it thinks fit to

exercise the powers and discharge the functions conferred on the Tribunal by this Act.

(2) A Judicial Member shall be a person who has for at least ten years held a judicial office in the territory of India or who has been a member of the Indian legal service and has held a post in Grade II of that service or any equivalent or higher post for at least three years or who has been an advocate for at least ten years.

Explanation : For the purposes of this sub-section,—

(i) in computing the period during which a person has held judicial office in the territory of India, there shall be included any period, after he has held any judicial office, during which the person has been an advocate or has held the office of a Member of a Tribunal or any post, under the Union or a State, requiring special knowledge of law;

(ii) in computing the period during which a person has been an advocate, there shall be included any period during which the person has held judicial office or the office of a Member of a Tribunal or any post, under the Union or a State, requiring special knowledge of law after he became an advocate.

(2A) An Accountant Member shall be a person who has for at least ten years been in the practice of accountancy as a chartered accountant under the Chartered Accountants Act, 1949 (38 of 1949), or as a registered accountant under any law formerly in force or partly as a registered accountant and partly as a chartered accountant, or who has been a member of the Indian Income-tax Service, Group A and has held the post of (Addl. CIT or any equivalent or higher post for at least three years).

(3) The Central Government shall appoint the Senior Vice President or one of Vice Presidents of the Appellate Tribunal to be the President thereof.

(4) The Central Government may appoint one or more Members of the Appellate Tribunal to be the Vice President or, as the case may be, Vice Presidents thereof.

(4A) The Central Government may appoint one of the Vice Presidents of the Appellate Tribunal to be the Senior Vice President thereof.

(5) The Senior Vice President or a Vice President shall exercise such of the powers and perform such of the functions of the President as may be delegated to him by the President by a general or special order in writing."

Therefore, there is no difficulty to conclude that there is only one President in the Tribunal and the powers of the President are delegated to various Vice Presidents in the Tribunals in various States.

11. The procedure to be followed by the Tribunal is contemplated under s. 255 of the Act, in which it is stated that Benches may be constituted by the President of the Tribunal from among its members. As against the orders of the Tribunal passed in appeal, a further appeal lies to the High Court, on the High Court being satisfied that the case involves a substantial question of law under s. 260A(1) of the Act which is stated as follows :

"Sec. 260A. Appeal to High Court—(1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal before the date of establishment of the National Tax Tribunal, if the High Court is satisfied that the case involves a substantial question of law."

Such appeal has to be heard by the High Court by not less than two Judges under s. 260B of the Act and thereafter an appeal is provided to the Supreme Court under s. 261 of the Act.

12. While passing the orders, the Tribunal has the powers to decide the issue in the main appeal by giving opportunity of being heard to both the parties as per s. 254(1) of the Act and in cases where the Tribunal has passed final orders under the abovesaid s. 254(1), within four years or thereafter, if there is a mistake apparent on record, the same can be rectified by way of making amendment to the order. Sec. 254(1) and s. 254(2) are as follows :

"Sec. 254. Orders of Appellate Tribunal—(1) The Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit.

(2) The Appellate Tribunal may, at any time within four years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it under sub-s. (1), and shall make such amendment if the mistake is brought to its notice by the assessee or the AO :

Provided that an amendment which has the effect of enhancing an assessment or reducing a refund or otherwise increasing the liability of the assessee, shall not be made under this sub-section unless the Appellate Tribunal has given notice to the assessee of its intention to do so and has allowed the assessee a reasonable opportunity of being heard :

Provided further that any application filed by the assessee in this sub-section on or after the 1st Oct., 1998, shall be accompanied by a fee of fifty rupees."

13. On the facts of the present case, the impugned order which is challenged in this writ petition, is admittedly passed in an application filed after the original appeal was disposed of and within four years under s. 254(2) of the Act. However, in the impugned order, the first respondent Tribunal has come to a conclusion that there is no mistake apparent on record to rectify and what is called by the petitioner is to review the decision of the Tribunal which is not permissible under the Act.

14. In *Chem Amit vs. Asstt. CIT (supra)*, a Division Bench of Bombay High Court has held that an order passed by the Tribunal under s. 254(2) of the Act rejecting an application for rectification cannot be said to be an order passed in an appeal by the Tribunal and therefore, a further appeal to the High Court under s. 260A against such order would not lie. The abovesaid decision of Division Bench of Bombay High Court, in my view, correctly shows that only when a substantial question of law arises, which has been framed, an appeal lies to the High Court under s. 260A of the Act which would be possible only on a final judgment of the Tribunal to decide the issue in appeal on merits and not against the technical grounds or rectification of errors under s. 254(2) of the Act. By referring to s. 256 which was omitted by the National Tax Tribunal Act, 2005 wherein there was a provision to make a reference to the High Court, it was held that the words contained in s. 256 viz., 'question of law' cannot be equated to the substantial question of law, as found in s. 260A of the Act. It was further held that if an application under s. 254(2) was allowed and mistake was rectified in the original order, that original order of the Tribunal may be deemed to be an order under s. 254(1), against which an appeal would lie to the High Court under s. 260A of the Act. The operative portion of the judgment is as follows :

"6. In *Durga Engineering & Foundry Works (supra)*, the Supreme Court held that the reference under s. 256 of the IT Act, 1961, could be made from the order of the Tribunal

passed on the application for rectification under s. 254(2). That was so held by the Supreme Court in the light of the language of s. 256 which empowered the assessee and the Revenue to 'require the Tribunal to refer to the High Court any question of law arising out of an order passed under s. 254'. Sec. 254 comprises two sub-sections. Sub-s. (1) of s. 254 provides that the Tribunal may pass such order on an appeal as it thinks fit after giving both the parties to the appeal an opportunity of being heard. Sub-s. (2) of s. 254 permits the Tribunal to rectify any mistake apparent from the record and amend any order passed under sub-s. (1) within four years from the date of the order. The expression employed in s. 260A that provides for an appeal to the High Court is materially different from the expression used in s. 256 that empowers the assessee and the Revenue to require the Tribunal to refer to the High Court any question of law. As already noticed above, in s. 256 the expression used is, 'require the Tribunal to refer to the High Court any question of law arising out of an order passed under s. 254'. However, in s. 260A, the legislature has not provided an appeal to the High Court from every order passed under s. 254 but has confined it to the order passed in appeal by the Tribunal. This is made clear by the use of expression, 'an appeal shall lie to the High Court from every order passed in appeal by the Tribunal'. If the legislature intended to provide an appeal to the High Court from the order passed by the Tribunal on the application for rectification under s. 254(2), the legislature would not have used the expression in s. 260A that an appeal shall lie to the High Court from every order passed in appeal by the Tribunal, but instead used the expression as is used in s. 256 that an appeal shall lie to the High Court from every order passed under s. 254. The expression, 'an appeal shall lie to the High Court from every order passed in appeal by the Tribunal' in s. 260A cannot be equated with the expression, 'an appeal shall lie to the High Court from every order passed under s. 254'. In *Durga Engineering & Foundry Works (supra)* also, the Supreme Court observed that 's. 256 contemplates the reference of the question of law arising out of an order passed under s. 254; that is to say, an order passed both under s. 254(4) and s. 254(2)'. We have already highlighted the departure of the language in s. 260A from the language occurring in s. 256.

7. In a given case whereas the consequence of an order passed on the rectification application under s. 254(2), the amendment in the order passed in appeal under s. 254(1) takes place, such amended order in appeal as a consequence of the order passed in the rectification application, however, shall be amenable to appeal under s. 260A. Insofar as the present case is concerned, the assessee has only challenged the order of the Tribunal rejecting the application of rectification, the appeal under s. 260A is not maintainable."

15. Therefore, the term, 'every order' referred to in s. 260A, apart from being qualified as one involving substantial question of law, would mean an order which finally disposes of the rights of the parties in controversy. In cases where an application for rectification is made and an order passed under s. 254(2) of the Act by merely rejecting such application, it does not decide the substantial issue involved between the parties, since the issue has already been decided under s. 254(1) of the Act by the Tribunal and if the application is filed subsequently under s. 254(2) by way of miscellaneous petition for rectification of mistake within the period of limitation, viz., 4 years and the same is rejected, it would only make the original order passed by the Tribunal final and if at all there is any substantial question of law that may arise or any right of the parties is finally decided by the Tribunal, the same can be only under the orders passed as per s. 254(1) of the Act. Therefore, such order cannot be construed as, 'any order' referred to under s. 260A of the Act to enable the aggrieved party to file appeal before the High Court.

16. That was also the view taken by the Calcutta High Court in *Shaw Wallace & Co. Ltd.*

vs. ITAT & Ors. (1999) 155 CTR (Cal) 502 : (1999) 240 **ITR** 579 (Cal), wherein it was held as follows :

"10. Regarding the point of s. 260A, in my opinion, an appeal would not be permissible from any and every order passed by the Tribunal under this section. If, say, an order of adjournment is passed, the assessee could not come in appeal to the High Court under s. 260A. There are many instances of provisions allowing appeals where words such as every order, any order, all orders, etc. have been interpreted to mean and include only those orders which are substantially final in some sense or the other, and which finally dispose of or affect the parties, rights in regard to some important point in controversy. In my opinion, the words every order in s. 260A means exactly this. Also to be appealable, the order of the Tribunal has to be passed in appeal. Here, the impugned order of the Tribunal was not passed in appeal, but in a miscellaneous application directed towards rectifying mistake apparent from the record. If the order under s. 254(2) had taken the shape of modifying by way of amendment or rectification, the original order to some extent, then both of those jointly might have been appealable under s. 260A; but an order of recall is clearly not appealable. Alternatively even if appealable, then impugned order being also without jurisdiction the writ application should be entertained in this case, as an exception, in the interest of expedition of the assessment proceedings."

17. The term, 'substantial question of law' as seen under s. 100 CPC in respect of filing of second appeal came to be explained by the Supreme Court in Santosh Hazari vs. Purushottam Tiwari (Dead) By LRs (2001) 170 CTR (SC) 160 : (2001) 251 **ITR** 84 (SC) and the relevant portion is as follows :

"The word 'substantial' as qualifying 'question of law', means having substance, essential, real, of sound worth, important or considerable. It is to be understood as something in contra-distinction with technical, of no substance or consequence, or academic merely. The expression 'substantial question of law' has not been suffixed by the words 'of general importance' as has been done in other provisions such as s. 109 of the CPC or Art. 133(1)(a) of the Constitution of India. The substantial question of law, on which a second appeal shall be heard, need not necessarily be a substantial question of law of general importance."

18. For the reasons stated above, I am of the considered view that the writ petition filed as against the impugned order of the first respondent Tribunal passed under s. 254(2) of the Act cannot be rejected as not maintainable on the ground of availability of appellate remedy.

19. The next point which has to be decided is as to the correctness of the impugned order passed by the first respondent under s. 254(2) of the Act. The deduction claimed by the petitioner before the first respondent Tribunal even prior to passing the order on 13th Oct., 2008 was under s. 80-IB(10) of the IT Act which is as follows :

"Sec. 80-IB. Deduction in respect of profits and gains from certain industrial undertakings other than infrastructure development undertakings. (1) to (9)...

(10) The amount of deduction in the case of an undertaking developing and building housing projects approved before the 31st day of March, 2007 by a local authority shall be hundred per cent of the profits derived in the previous year relevant to any assessment year from such housing project if,—

(a) such undertaking has commenced or commences development and construction of the housing project on or after the 1st Oct., 1998 and completes such construction,—

(i) in a case where a housing project has been approved by the local authority before the 1st day of April, 2004, on or before the 31st day of March, 2008;

(ii) in a case where a housing project has been, or, is approved by the local authority on or after the 1st day of April, 2004, within four years from the end of the financial year in which the housing project is approved by the local authority.

Explanation : for the purposes of this clause,—

(i) in a case where the approval in respect of the housing project is obtained more than once, such housing project shall be deemed to have been approved on the date on which the building plan of such housing project is first approved by the local authority;

(ii) the date of completion of construction of the housing project shall be taken to be the date on which the completion certificate in respect of such housing project is issued by the local authorities.

(b) the project is on the size of a plot of land which has a minimum area of one acre :

Provided that nothing contained in cl. (a) or cl. (b) shall apply to a housing project carried out in accordance with a scheme framed by the Central Government or a State Government for reconstruction or redevelopment of existing buildings in areas declared to be slum areas under any law for the time being in force and such scheme is notified by the Board in this behalf;

(c) the residential unit has a maximum built-up area of one thousand square feet where such residential unit is situated within the city of Delhi or Mumbai or within twenty-five kilometres from the municipal limits of those cities and one thousand and five hundred square feet at any other place; and

(d) the built-up area of the shops and other commercial establishments included in the housing project does not exceed five per cent of the aggregate built-up area of the housing project or two thousand square feet, whichever is less."

20. The deduction was claimed under s. 80-IB(10)(c) of the Act on the ground that the maximum built-up area was less than 1,500 sq. ft., since the place involved is other than Delhi and Bombay. The Tribunal in its original order dt. 13th Oct., 2008, which is sought to be rectified, has considered the said provision in the light of the judgment of the Supreme Court in Padmasundara Rao (Decd.) & Ors. vs. State of Tamil Nadu & Ors. (2002) 176 CTR (SC) 104 : (2002) 255 **ITR** 147 (SC) and also other judgments and ultimately held as follows :

".... A project cannot be approved in piecemeal. Approval is accorded to the entire project. Blocks of residential units are parts of a project and not project by itself. As such a block of residential unit cannot be construed to be a separate project. It is therefore evident that the assessee did not comply with the conditions precedent for availing the benefit of s. 80-IB(10). We, therefore, reverse the order of the CIT(A) and restore the order of the AO on this count.

In the result, appeal of the Revenue stands allowed."

21. That decision has been taken on the substantial issue raised by the petitioner on the basis of construction of relevant provisions of the IT Act, viz., s. 80-IB(10). In such circumstances, there is no question of rectifying any mistake stated to have crept in the original order of the first respondent Tribunal dt. 13th Oct., 2008. Even though it is true

that in the said original order dt. 13th Oct., 2008, the first respondent Tribunal has not technically referred to the order of Co-ordinate Bench of Kolkatta Tribunal and the subsequent decision of the Calcutta High Court, the substance of the same has been discussed in detail against which certainly the petitioner has got a right of appeal and therefore, the filing of application for rectification under s. 254(2) of the Act after disposal of the appeal, is in my considered view, totally misconceived.

22. In any event, in the impugned order, the first respondent Tribunal has explicitly taken note of the substance of the issue decided by the Kolkatta Tribunal in Bengal Ambuja Housing Developments Ltd. vs. CIT (supra), wherein it was decided that the eligibility condition for deduction under s. 80-IB(10) of the Act is that the built-up area should not exceed 1,500 sq. ft. and the same is applicable to the entire project, by relying upon the judgments of the Supreme Court in Padmasundara Rao (Decd.) & Ors. vs. State of Tamil Nadu & Ors. (supra) and Britannia Industries Ltd. vs. CIT & Anr. (2005) 198 CTR (SC) 313 : (2005) 278 **ITR** 546 (SC).

23. In CIT vs. Vardhman Spinning (supra), a Division Bench of Punjab & Haryana High Court has held that a decision of High Court of different jurisdiction is not binding on the Tribunal and the rectification sought for on that basis under s. 254(2) of the Act is not valid. In that case, when a similar argument was raised, it was held as follows :

"Counsel for the assessee, relying upon a judgment of the Madhya Pradesh High Court in CIT vs. Mithalal Ashok Kumar (1985) 49 CTR (Mad) 372 : (1986) 158 **ITR** 755 (Mad), further argued that even if the Tribunal had no power to review its own order yet it can certainly correct its mistakes by rectifying the same in case it is brought to its notice that the material which was already on record before deciding the appeal on the merits was not considered by it; that the Tribunal had failed to consider the judgment in Century Enka Ltd. vs. ITO & Ors. (1976) CTR (Cal) 433 : (1977) 107 **ITR** 909 (Cal), which had been placed on record, while arriving at a conclusion contrary to the view expressed in Century Enka Ltd. vs. ITO & Ors. (supra).

There is no force in this submission as well. The decision of the Court would be taking a view on the interpretation of the provisions of the Act or conclusions arrived at on the given facts. It would not amount to non-consideration of a material fact which could amount to a mistake apparent on the record which could be rectified under s. 254(2) of the Act. The Tribunal in its original order, as observed earlier, had taken a view different from the view taken in Century Enka Ltd. vs. ITO & Ors. (supra), which view was also possible and it could not review the same and pass a different order subsequently simply on the ground that it had failed to take notice of the view expressed by the Calcutta High Court in Century Enka Ltd. vs. ITO & Ors. (supra) which was not of the jurisdictional High Court."

24. The principle of judicial precedents has been formulated in the form of proposition by a Division Bench of Bombay High Court in CIT vs. Thana Electricity Supply Ltd. (supra) which is as follows :

"(a) The law declared by the Supreme Court being binding on all Courts in India, the decisions of the Supreme Court are binding on all Courts, except, however, the Supreme Court itself which is free to review the same and depart from its earlier opinion if the situation so warrants. What is binding is, of course, the ratio of the decision and not every expression found therein.

(b) The decisions of the High Court are binding on the subordinate Courts and authorities or Tribunals under its superintendence throughout the territories in relation to which it exercises jurisdiction. It does not extend beyond its territorial jurisdiction.

(c) The position in regard to the binding nature of the decisions of a High Court on different Benches of the same Court may be summed up as follows :

(i) A single Judge of a High Court is bound by the decision of another single Judge or a Division Bench of the same High Court. It would be judicial impropriety to ignore that decision. Judicial comity demands that a binding decision to which his attention had been drawn should neither be ignored nor overlooked. If he does not find himself in agreement with the same, the proper procedure is to refer the binding decision and direct the papers to be placed before the Chief Justice to enable him to constitute a larger Bench to examine the question (see Food Corporation of India vs. Yadav Engineer & Contractor AIR 1982 SC 1302).

(ii) A Division Bench of a High Court should follow the decision of another Division Bench of equal strength or a Full Bench of the same High Court. If one Division Bench differs from another Division Bench of the same High Court, it should refer the case to a larger Bench.

(iii) Where there are conflicting decisions of Courts of co-ordinate jurisdiction, the later decision is to be preferred if reached after full consideration of the earlier decisions.

(d) The decision of one High Court is neither binding precedent for another High Court nor for Courts or Tribunals outside its own territorial jurisdiction. It is well-settled that the decision of a High Court will have the force of binding precedent only in the State or territories on which the Court has jurisdiction. In other States or outside the territorial jurisdiction of that High Court it may, at best, have only persuasive effect."

In such view of the matter, I am of the considered view that the writ petition as such is misconceived and liable to be dismissed and accordingly, it is dismissed. No costs. Connected miscellaneous petition is closed.
