

(2004) 09 CAL CK 0060

Calcutta High Court

Case No: Writ Petition No"s. 2254, 2286, 2287, and T/448 of 2003

Smriti Properties Pvt.
Ltd.

APPELLANT

Vs

Settlement Commission
(IT and WT) and Others

RESPONDENT

Date of Decision: Sept. 13, 2004

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 47 Rule 1, 114
- Income Tax Act, 1922 - Section 35
- Income Tax Act, 1961 - Section 116 , 154, 234A, 234B, 234C
- Income Tax Settlement Commission (Procedure) Rules, 1997 - Rule 12, 31A

Citation: (2005) 199 CTR 261 : (2005) 191 ELT 128 : (2005) 278 ITR 274 : (2005) 149 TAXMAN 386

Hon'ble Judges: Kalyan Jyoti Sengupta, J

Bench: Single Bench

Advocate: Dutt, for the Appellant; Kapoor, for the Respondent

Judgement

Kalyan Jyoti Sengupta, J.

All these matters were heard together as the points involved therein are identically the same. Therefore, the decision to be rendered will cover all these four matters.

2. The facts are more or less identical. On different dates the learned Settlement Commission of the Income Tax Department accepted the proposal of the assesseees for settlement of the cases and dues of the respective petitioners. In the case of Smriti Properties Private Ltd., the assessment years related to 1989-90 to 1994-95 and the orders were passed by the Settlement Commission by the Bench of three learned members on March 16, 1999. By the said order, interest which would ordinarily have been chargeable under the various provisions of the said Act was either partially or fully waived.

3. On March 10, 2003, the Income Tax authorities filed a miscellaneous petition before the Commission whereby it was contended on behalf of the Revenue that the said orders need rectification in view of the decision of the apex court rendered in the case of [Commissioner of Income Tax Vs. Hindustan Bulk Carriers](#). By this judgment the apex court reversing the earlier decision of the same court rendered in the case of [Swan Mills Ltd. Vs. Commissioner of Income Tax](#), held that the Settlement Commission has no jurisdiction to waive interest. Since it was a question of jurisdiction of the Settlement Commission the direction for waiver of interest either partially or fully needed to be reviewed. Therefore the earlier order of the Commission was mistaken, as it would appear from the records, so far as the interest portion is concerned.

4. This application for rectification was allowed by order dated March 27, 2003, which is impugned herein. Similarly on identical facts in three other matters on different dates the orders were passed whereby the order of waiver of interest were set aside by the Commission itself.

5. Mr. Dutt, learned Counsel appearing in support of all these three petitions, submits that all the impugned orders have been passed by the Settlement Commission consisting of two members, they have no jurisdiction to recall the earlier orders, for the earlier order dated March 16, 1999, was passed by a Bench consisting of three members.

6. He contends further that the Bench has to be formed by three members and the application for rectification if at all entertainable under the law, ought to have been placed before the same Bench whose order was sought to be rectified. He has drawn reference to Section 245BA (Sub-section (5)) of the aforesaid Act and also Section 245BD thereof. He submits further very fairly that it is not that the Bench cannot be constituted with two members at all, but it could be done under certain circumstances as mentioned in Sub-section (5) of Section 245BA of the said Act read with Rule 12 of the Income Tax Settlement Commission (Procedure) Rules, 1997, for which general or special order of the Chairman is required. Nothing has been shown and/or produced before this Court in this regard.

7. He contends further drawing my attention to Section 245F(1) of the said Act, that by virtue of the provision of Section 116 of the said Act the order of rectification could be passed by the authority of the Settlement Commission consisting of three members Bench and not by a smaller Bench of two members. In support of his contention he has relied on the decision of [M/s. Elpro International Ltd. Vs. Collector of Central Excise, Pune](#). Even the comity and courtesy followed in the quasi-judicial proceeding, demanded that the order of three members of the Bench ought not to have been dealt with by a two member-Bench.

8. He further submits assuming the said Bench has jurisdiction then application for rectification u/s 154 ought not to have been entertained as it is settled position of law that mistakes could be rectified when the same are found to be obvious and patent one and

no further elucidation and/or argument are required. In other words any mistake of fact or law committed previously cannot be rectified under the aforesaid section. The Settlement Commission has power to waive or reduce statutory interest. The order impugned did not suffer from any patent or obvious mistake on the face of it. The grounds on which the earlier order in effect has been reversed so far the waiver of interest portion is concerned, are not tenable under the law as the subsequent decision of the Supreme Court though has got the force of law, cannot be applied retrospectively. In support of his argument he has sought reliance on the judgments reported in [Commissioner of Income Tax, Mumbai Vs. Anjum M.H. Ghaswala and Others, ; Netai Chandra Rarhi and Co. and Others, Brindaban Chandra Das and Satya Narayan Das Vs. Income Tax Settlement Commission and Others, ; Jiyajeerao Cotton Mills Ltd. Vs. Income Tax Officer, "C" Ward and Others,](#)

9. He urges it is true that the petitioner participated in the hearing before the learned Bench but according to him if the Bench of two members is having no jurisdiction, or in other words the two-member Bench lacks inherent jurisdiction, with participation of the petitioner the Bench could not assume jurisdiction, nor the petitioner is legally rendered incapacitated itself from challenging the same as it is a question of inherent lack of jurisdiction. This argument has been advanced by Mr. Dutt on the strength of the decision of the hon"ble Supreme Court reported in [Municipal Board, Saharanpur Vs. Imperial Tobacco of India Ltd. and Another Etc., and Pioneer Traders and Others Vs. Chief Controller of Imports and Exports Pondicherry,](#) .

10. The learned Additional Solicitor General (Mr. Kapoor) while opposing all these three applications contends that the Bench under the provision of Section 245A of the said Act means a Bench of the Settlement Commission, and it is clear from careful reading of the same that the Bench could be formed either by two members or three members or more than three members. He submits that Section 245BA(2) of the said Act has to be read subject to the other provisions of this section. Therefore, in other words, the Legislature had in mind that the number of members for different Benches might be different, that is, either more or less than three members. It is however clear from Sub-section (5) of Section 245BA which enables two persons to function as a Bench. Therefore, a harmonious reading of the provisions of the Chapter will reveal that a Bench may be of two members, or three members. According to him it is not necessary that the order ought to be placed before the same Bench having the same number of members, this is clear from the Settlement Commission (Procedure) Rules, 1997, particularly Rule 12. He submits further that under the rules of business constitution of the Bench with the members of less than three is permissible. In the Income Tax Act there is no corresponding provision of review like the Civil Procedure Code. He further submits that rules of comity or norms of judicial courtesy are not applicable in the proceeding before the Settlement Commission. According to him by the impugned order the Settlement Commission has correctly rectified the earlier order relying on the Supreme Court judgment as no argument nor any elaboration of further fact or law was required. The Supreme Court while reversing the earlier judgment has held that the Settlement

Commission has no jurisdiction to waive interest under Income Tax Act, 1961, in the case of [Commissioner of Income Tax Vs. Hindustan Bulk Carriers](#). Therefore, in this case it is a question of jurisdiction and/or authority to waive interest. The Commission itself on the subsequent pronouncement of the law rectified the same. According to him the pronouncement of the Supreme Court which has the effect of law, can be given retrospective effect, and this should be given effect from the date when the law itself came into force, though the Supreme Court might have explained the scope and effect of the provision of law by the judgment at a later stage. This is the principle of law for applying the Supreme Court judgment. However, there is an exception in the case where the Supreme Court makes it clear expressly that the judgment shall operate prospectively. In support of his submission he has relied on the decision of various courts reported in [Walchand Nagar Industries Ltd. Vs. V.S. Gaitonde, Income Tax Officer, Companies Circle 1\(3\), Bombay and Another](#), [Commissioner of Income Tax Vs. Aruna Luthra](#), [NAV NIRMAN P. LTD. Vs. COMMISSIONER OF Income Tax.](#), [Lily Thomas, Vs. Union of India and Others](#), ; [Sarwan Kumar and Another Vs. Madan Lal Aggarwal](#), and [M.A. Murthy Vs. State of Karnataka and Others](#),

11. I have considered the rival contentions of learned Counsel and gone through the petition and the materials placed before this Court. No affidavit in opposition has been filed despite direction being given in all these four matters. Basically the following two points have been raised to assail the impugned orders passed by the subsequent Bench of respondent No. 1.

(1) Whether the subsequent Bench consisting of two members is competent or has jurisdiction to recall a previous order for withdrawal of partial or full waiver of interest of the Bench of three members u/s 234A of the Income Tax Act on an application u/s 245F read with Section 154 of the said Act or not ?

(2) Whether on the facts and circumstances of this case an application u/s 154 read with Section 245F of the said Act should have been entertained and allowed on the strength of the decision of the Supreme Court in the case of [Commissioner of Income Tax Vs. Hindustan Bulk Carriers](#), ?

12. Mr. Dutt, appearing for the petitioners, has submitted that the Sub-section 12 quent Bench of respondent No. 1 consisting of two members cannot do it as the provisions of Sub-section (2) of Section 245BA read with Sections 245BB and 245BD do not envisage for constitution of a Bench consisting of members less than three. His further contention is that the minimum number of members in a Bench must be three, however, a Bench consisting of less than three members is competent to decide any matter on certain situation and conditions as contemplated in Sub-section (5) of Section 245BA of the said Act. In order to appreciate this submission reproduction of Section 245BA is necessary and is hereby done as follows:

"245BA.(1) Subject to the other provisions of this Chapter, the jurisdiction, powers and authority of the Settlement Commission may be exercised by Benches thereof.

(2) Subject to the other provisions of this section, a Bench shall be presided over by the Chairman or a Vice-Chairman and shall consist of two other Members.

(3) The Bench for which the Chairman is the Presiding Officer shall be the principal Bench and the other Benches shall be known as additional Benches.

(4) Notwithstanding anything contained in Sub-sections (1) and (2), the Chairman may authorise the Vice-Chairman or other Member appointed to one Bench to discharge also the functions of the Vice-Chairman or, as the case may be, other Member of another Bench.

(5) Notwithstanding anything contained in the foregoing provisions of this section, and subject to any rules that may be made in this behalf, when one of the persons constituting a Bench (whether such person be the Presiding Officer or other Member of the Bench) is unable to discharge his functions owing to absence, illness or any other cause or in the event of the occurrence of any vacancy either in the office of the Presiding Officer or in the office of one or the other Members of the Bench, the remaining two persons may function as the Bench and if the Presiding Officer of the Bench is not one of the remaining two persons, the senior among the remaining persons shall act as the Presiding Officer of the Bench:

Provided that if at any stage of the hearing of any such case or matter, it appears to the Presiding Officer that the case or matter is of such a nature that it ought to be heard by a Bench consisting of three Members, the case or matter may be referred by the Presiding Officer of such Bench to the Chairman for transfer to such Bench as the Chairman may deem fit.

(5A) Notwithstanding anything contained in the foregoing provisions of this section, the Chairman may, for the disposal of any particular case, constitute a Special Bench consisting of more than three Members.

(6) Subject to the other provisions of this Chapter, the places at which the principal Bench and the additional Benches shall ordinarily sit shall be such as the Central Government may, by notification in the Official Gazette, specify and the Special Bench shall sit at a place to be fixed by the Chairman."

13. The learned Additional Solicitor-General contends that Sub-section (5) of the said section clearly postulates that decision can be rendered by the Bench of members less than three.

14. Upon a fair reading of Section 245BA of the said Act it appears to me that the constitution of the Bench must be with a presiding member and at least two other

members and this is apparent from the words and language used in Sub-section (2) of Section 245BA of the said Act, which speaks of the majority decision in ordinary circumstances. The concept of majority presupposes at least three members, obviously the question of majority does not and cannot arise in a Bench having one member or two members. But there is an exception to this provision of maintaining more than two members all the time. The exceptional circumstances are spelt in Sub-section (5) of Section 245BA of the said Act. The idea behind providing exception is that in case during pendency of a matter a member is not available for any reason, absence of one member at a later stage in the Bench does not vitiate its functioning nor its jurisdiction.

15. The Legislature keeping in view all possible difficulties, to my mind has provided the aforesaid measure. But can respondent No. 1 taking advantage of Sub-section (5) as submitted by Mr. Additional Solicitor General constitute the Bench of less than three members initially ? In my view the answer is in the negative, otherwise the mandatory nature of the provision of Sub-section (2) with regard to the formation of the Bench becomes otiose. It is true that Sub-section (5) starts with a non obstante clause "notwithstanding anything" but the applicability of this Sub-section depends upon certain situation mentioned therein. The circumstances and situations amongst others are absence, illness or any other cause or in the event of occurrence of any vacancy either in the office of the presiding officer or of one of other members.

16. So, I am unable to accept the contention of the learned Additional Solicitor General that the Bench can be constituted with two members. In my reading and understanding the reasonable interpretation would be while harmonising Sub-sections (1), (2) and (5) of Section 245BA read with Section 245BD that the Bench has to be formed with at least three members with the Chairman or the Vice-Chairman, as the case may, as a presiding officer and the case and/or the matter has to be placed before this body constituted as I have already observed. Anything short of these members, in my view, constitution of Bench is not lawful so also conferment of authority u/s 245BA of the said Act, meaning thereby such Bench will not have any jurisdiction. However, after formation of the Bench and after the matter being placed before it, while the same is being heard if any of those situation arises as mentioned in Sub-section (5) of Section 245BA of the said Act, the remaining two and/or more members are competent to conclude the hearing and to take a decision even with the shortage of one member.

17. It is settled position of the law while interpreting any portion of the statute the approach of the court would be to give meaningful, reasonable and acceptable interpretation, so that an Act itself can be made operative with the object and idea for which it was framed, avoiding absurdity.

18. In this case it was not a different matter that was entertained, heard and decided by a Bench of the Commission but a matter, decided earlier, was to be reconsidered. Admittedly, on the earlier occasion a Bench of three members passed the orders. The power of rectification u/s 154 read with Section 245F(1) has been exercised. Mr. Dutt

contends taking preliminary objection that this power ought to have been exercised by the same Bench consisting of the same members. I am unable to accept this portion of the argument of Mr. Dutt, as it is impossible for any one to get hold of the same personnels under all circumstances, particularly in a matter sought to be reconsidered u/s 154 almost after less than four years. Section 154 provides power for rectification of mistake, ordinarily in a judicial and quasi-judicial proceeding the persons who have committed mistake are expected to correct and/or rectify the same as far as practicable. Therefore, all endeavour should be made so that it is done by the same person.

19. In this case I find, admittedly two members were requested to constitute the Bench since the beginning to entertain an application for rectification of an order passed by the Bench of three members. No affidavit in opposition has been filed nor in the impugned order I get any idea as to why two members were asked to form the Bench. Mr. Dutt has rightly stated that two members would be competent to function as a Settlement Commission under the situation I have already observed above. I do not find any such situation existed either. I therefore, hold that the formation of the Bench consisting of two members to entertain the application for rectification and to pass the impugned order is de hors the provision of Sub-section (2). of Section 245BA. The object of formation of the Settlement Commission is no doubt for setting up of a quasi-judicial functionary. In support of my observation as above, I find a decision of the Supreme Court. reported in [M/s. Elpro International Ltd. Vs. Collector of Central Excise, Pune](#), cited by Mr. Dutt. This decision while dealing with a case under the provision of the Customs, Excise and Gold (Control) Appellate Tribunal (Procedures) Rules, in paragraph 8 observed that the same Bench, which passed the final order, should hear the application for rectification of mistakes. Due to subsequent events a situation may emerge when one or more of the members who pronounced the order must cease to hold office as a member of the Tribunal by retirement, death or otherwise. Though ordinarily, the rectification application should be heard by a Bench consisting of the members who heard the appeal giving rise to the application, the subsequent events or the change in situation or altered circumstances, may render it impossible. In such a situation it is certainly open to the President to direct that the application may be heard by a Bench consisting of member/members who did not originally hear the appeal and passed the order. In other words, the members, who constitute the Tribunal for hearing the rectification proceedings, may be different. To this extent, the President can direct otherwise. Normally, it will not enable the President to constitute entirely a new and different Bench, if one or more of the members who heard the appeal and rendered the order originally, are available. In view of the matter, Rule 31A will not clothe the President with jurisdiction to constitute a Bench consisting of lesser number of members than the original Bench which heard the appeal and render the final order. This view is in accordance with judicial decorum, discipline and fairness. Any other interpretation will not bring the fact of situation to clothe the President of the Tribunal with arbitrary powers. Such intention cannot be meted out in framing Rule 31A. In paragraph 9 of the said judgment it has been observed amongst others that (page 3332):

"The order passed under Rule 31A will have the impact of altering, amending or modifying the final order. We are of the view that a final order passed by a Bench of three Members cannot be modified or altered or amended by a Bench consisting of lesser Members. A Full Bench is superior to a Division Bench and a Division Bench to a single Member Bench. The object for constituting a Division Bench or Full Bench, is the fact that multi-Member tribunals create the opportunity for mature deliberation which improves and enhances individual decision making by adding perspectives and excluding or at least minimising faculty reasoning. Judicial propriety and fairness require, that so long as it is possible and feasible, the same number of Members should constitute the Bench to hear the rectification proceedings as well. It is also prudent and pragmatic and will avoid chaos. In the above perspective, we hold that the majority decision of the Customs, Excise and Gold (Control) Appellate Tribunal appealed against, is erroneous in law and so unsustainable."

20. It is true that the aforesaid judgment was rendered in the context of expressed provision of the rule regarding constitution of the Bench, but I think the principle enunciated therein will have application here also. I cannot persuade myself as suggested by Mr. Additional Solicitor. General, to ignore this judgment altogether. The fair reading of paragraphs 8 and 9 of the said judgment will make clear that rectification and/or correcting measure can be taken by the same Bench as far as practicable, not by a different Bench. At least an attempt should be made to place before the same personnels who constituted the earlier Bench to decide the case originally, if all the members not being available, then available member or members with other new members should be allowed to form the Bench. Even from the common sense point of view I do not find any justification as to why in these cases orders passed by three members could be placed before two members in the absence of excepted circumstances as contemplated under Sub-section (5) of that section. Collective deliberation by the more persons ensures reasonable and fair decision. Every human being has got his own limitation and/or horizon of his intellectual faculty, and logic, one may be deficient in one aspect and another may be brilliant to make good such deficiency in exercise of the mental faculty. The object is to achieve the fairest and most reasonable judgment and decision and that is why the idea of formation of a Bench with a number of members is evolved. Therefore, I think respondent No. 1 was not justified to place these applications for rectification before a Bench consisting of two members, that too different ones. As the Bench has not been constituted properly, I hold that the impugned order has been passed by incompetent authority, having no jurisdiction to decide the matter.

21. It is urged by the learned Additional Solicitor General, the petitioners having participated in this proceeding before respondent No. 1 in the hearing of this rectification application are estopped from challenging the impugned order. In my view this point has no force as it has been settled by a large number of decisions of the Supreme Court and various High Courts that the plea of jurisdiction can be taken at any stage when such plea is inherent lack of jurisdiction. In such a case mere participation in the hearing by the

parties does not cure such defect, consequently, the principle of estoppel does not apply. Moreover, I find from the records of the learned "Commission in the impugned order that at the first available opportunities the writ petitioners took the plea of jurisdiction. On this point Mr. Dutta has supplied a decision for assistance of the Supreme Court rendered in the case of [Pioneer Traders and Others Vs. Chief Controller of Imports and Exports Pondicherry](#), the Constitution Bench of the Supreme Court has observed in paragraph 31 amongst others as follows (page 745):

"These facts can however make no difference to the position in law that if in fact the importations were made on the basis of contracts concluded before November 1, 1954, the Sea Customs Act would not apply and the Collector or the Central Board of Revenue would have no jurisdiction to make any order of confiscation or penalty. Where an authority whether judicial or quasi-judicial, has in law no jurisdiction to make an order the omission by a party to raise before the authority the relevant facts for deciding that question cannot clothe it with jurisdiction."

22. Therefore I conclude that the impugned order on the ground of the jurisdiction is not sustainable and the same deserves to be set aside.

23. After concluding this I could have stopped here and sent the matter back to respondent No. 1 for deciding afresh by constituting an appropriate Bench consisting of at least 3 members, but having regard to the nature of the matter and the point involved, I think that the matter should be decided by this Court once for all.

24. Now the second issue is whether on the facts and circumstances of this case any rectification is called for.

25. To deal with this issue the relevant portion of Section 154 of the Income Tax Act under which rectification of mistake can be done is required to be quoted hereunder:

"154(1) With a view to rectifying any mistake apparent from the record an Income Tax authority referred to in Section 116 may,--

(a) amend any order passed by it under the provisions of this Act...."

26. The plain language of the section is very clear that the Income Tax authority (here the Settlement Commission) has jurisdiction to rectify any mistake apparent from the record. The learned Additional Solicitor General has drawn my attention to the judgment of the Full Bench of the Punjab and Haryana High Court rendered in the case of [Commissioner of Income Tax Vs. Aruna Luthra](#). In this case the word "records" has been held that record would include everything on the case file. The return, the evidence and the order are a part of the record. In the case here record relates to the order of the Settlement Commission nothing else. It appears from the aforesaid decision of the Punjab and Haryana High Court that subsequent exposition of law by the High Court was made a ground for rectification of an order passed previously. In that case the Assessing Officer

has allowed deduction of contribution made by the assessee to the fund, on account of revenue expenditure. Subsequently, the same High Court in another matter took a contrary view that, as the contribution to the fund would not be treated as revenue expenditure. In view of the aforesaid pronouncement the rectification was allowed.

27. The learned Solicitor General has laid much emphasis on this judgment as an authority to hold that within the scope of Section 154, rectification can be allowed on the strength of the subsequent proposition of law by the High Court or the Supreme Court. I have gone through the judgment of the Full Bench. With my effort I could not locate that the Full Bench has examined the scope in details as to whether the rectification of the kind as done here could be allowed. Factually relief was granted but I do not find any such ratio on the question of law as has been urged by Mr. Kapoor, has been laid down by the aforesaid judgment. On the other hand the Division Bench judgment of this Court rendered in the case of [Jiyajeerao Cotton Mills Ltd. Vs. Income Tax Officer, "C" Ward and Others](#), has taken the view on this point particularly that the judgment of the Supreme Court does not have any retrospective effect in the case of this nature. This decision was affirmed by their Lordships of the Supreme Court upon SLP (see [1983] 142 ITR 2) having been dismissed. In view of this situation with respect I am unable to apply above the Full Bench decision rather I follow the ratio laid down by the Division Bench of this Court rendered in the case of Swadeshi Cotton Mills Ltd.

28. The very basis for rectification is the Supreme Court pronouncement rendered in the case of [Commissioner of Income Tax, Mumbai Vs. Anjum M.H. Ghaswala and Others](#), and in the case of [Commissioner of Income Tax Vs. Hindustan Bulk Carriers](#), .

29. To my mind under the provision of Section 154 of the said Act the Income Tax officials cannot in the guise of rectification, review or recall the earlier order on the strength of the subsequent declaration of law by the Supreme Court. Mistake apparent from the records means which was in existence on the date of passing of the order and the same escaped notice of all concerned. Here this sort of mistake is not there undisputedly.

30. In order to invoke jurisdiction of the aforesaid section one has to see whether without any debate or argument of extraneous matter the correction is possible. The scope of Section 154 suggests that the officer concerned is to examine all the records including order, returns and accompanying documents forming assessment, and to find any apparent mistake or defect nor the correctness of the decision on law or fact. For example if it is found on the facts there is a mistake in calculation or misquoting of the relevant law and further ordering portion of the judgment is not the logical conclusion or does not conform to the decision and reasoning recorded in the order itself rectification u/s 154 is permissible. In my view even misapplication of the provision of law stated in the impugned order cannot be a ground for rectification.

31. The power under this section is not akin to the power of the CPC under Order 47 or Section 114 of the Civil Procedure Code. According to me the power of review in the CPC under its Order 47 and Section 114 is wider than the provisions of Section 154 of this Act. In exercising the power of review u/s 114 with Order 47, Rule 1 of the Code of Civil Procedure, the court can reverse the judgment and order in its entirety if the conditions as mentioned in Sub-rule (1) of Rule 1 of the CPC are satisfied. Of course a learned single judge of this Court in the case of [Geo Miller and Co. Ltd. Vs. Deputy Commissioner of Income Tax and Others](#), has held that the Explanation added to Rule 1 of Order 47 of the Code has been held to be applicable in Section 154 of the present Act, but the aforesaid pronouncement of the learned single judge of this Court with great respect is not the correct proposition of law firstly because the Supreme Court in the case of [The Income Tax Officer, Alwaye Vs. The Asok Textiles Ltd., Alwaye](#), held while examining the scope of Section 35 of the Income Tax Act 1922, (present is Section 154 of the present Act), that the High Court had fallen into an error in equating the scope of Section 35 of the Act (Indian Income Tax Act, 1922) with that of Order XLVII, Rule 1, of the Civil Procedure Code, secondly the Full Bench of the Punjab and Haryana High Court has held that the language of the section is different, because Section 35 of this Act empowered the Income Tax authorities to rectify any mistake apparent from the records within four years from the date of any assessment, whereas in the CPC the words in Order XLVII are "error apparent on the face of the record" and the two provisions do not mean the same language. Secondly, the Full Bench of the Punjab and Haryana High Court in [Commissioner of Income Tax Vs. Aruna Luthra](#), has also held that the language mentioned in Section 154 of this Act and that of in Order 47, Rule 1, are materially different. Therefore the Explanation in Order XLVII of the CPC is not at all applicable.

32. In the context of the aforesaid discussion the previous order of the Commission dated March 16, 1999, is to be examined to find out apparent mistake from the record. By the impugned order the waiver of interest, payable u/s 234B of the Act, has been withdrawn. Therefore, the probe is to be focused only on the question of justifiability of withdrawal. By the previous order the Commission has recorded its justification basing on the ratio of the decision of the Income Tax Settlement Commission in the case of Gulraj Engineering Construction Co., In re [Swan Mills Ltd. Vs. Commissioner of Income Tax](#), Therefore, it cannot be said on that date there was any mistake in the records. The latter Bench has observed that the previous Bench should have followed some other decision. In my view it is a debatable issue as to which decision should be followed or not, Wrong application of law is not a mistake apparent in the records. Consequently it cannot be a mistake within Section 154. A mistake could be defined if something unintended is done inadvertently on the existing facts and law. This type of mistake can be rectified under the provision of Section 154 but not the ones, which have been done consciously and on the basis of deliberation and/or on its own logic. The second category of mistake can be rectified in my view by the appropriate forum in appropriate proceedings. In this context the observation of the apex court in the case of [Commissioner of Income Tax \(CNTL\), Ludhiana Vs. Hero Cycles Pvt. Ltd., Ludhiana](#), is helpful to the extent as follows (see

[Commissioner of Income Tax Vs. Aruna Luthra,](#)

"However, the rectification can be made only when a glaring mistake of fact or law committed by the officer passing the order becomes apparent from the record. Rectification is not possible if the question is debatable."

33. By the impugned order it is observed held that the ratio laid down in the case of [Swan Mills Ltd. Vs. Commissioner of Income Tax](#), has been upset by necessary implication by the Supreme Court judgment rendered in the case of [Commissioner of Income Tax, Mumbai Vs. Anjum M.H. Ghaswala and Others](#), and also by the subsequent decision of the Supreme Court expressly in the case of [Commissioner of Income Tax Vs. Hindustan Bulk Carriers](#). It is an admitted position that the aforesaid two decisions were not rendered when the previous order was passed. Now the question is whether the Supreme Court pronouncement can be applicable retrospectively in the cases, which have been decided already. The Full Bench decision of the Punjab and Haryana High Court quoted above, has granted relief to the Revenue, giving retrospective operation to the aforesaid decision of the jurisdictional High Court (Punjab and Haryana High Court) in a case disposed of u/s 154 of the said Act within one year from the date of passing order.

34. In my view the Division Bench judgment of this Court reported in [Jiyajeerao Cotton Mills Ltd. Vs. Income Tax Officer, "C" Ward and Others](#), is still helpful on this subject as, though the Punjab and Haryana High Court noted this judgment it did not deal with the same. The Full Bench has further taken a view different from that taken by the Kerala and Karnataka High Courts. So I respectfully follow the ratio decided by the Division Bench of our court to the extent of its relevancy. The Division Bench at page 731 of its judgment in [Jiyajeerao Cotton Mills Ltd. Vs. Income Tax Officer, "C" Ward and Others](#), has taken the view as follows:

"The law is laid down or a provision in a statute is interpreted by the Supreme Court only when there is a debate or doubt on the interpretation of any provision of a statute requiring interpretation by the Supreme Court or when there is a conflict of judicial opinion on a provision of a statute between the different High Courts of India which is required to be resolved and settled by the Supreme Court. The law laid down by the Supreme Court, in our opinion, cannot be said to have retrospective operation in the sense that although a debate or doubt or a conflict of judicial opinion is resolved and settled by the Supreme Court, yet still that does not obliterate the existence of such debate or doubt or conflict that existed prior to the decision of the Supreme Court setting at rest such debate or doubt or conflict."

35. According to me retrospective operation of the Supreme Court pronouncement on the interpretation of law can be made applicable only in the cases which have not been decided finally and the same is pending for adjudication. This will be clear from the judgment of the Supreme Court in the case of [M.A. Murthy Vs. State of Karnataka and Others](#). The observation of the court in paragraph 8 is very relevant for this purpose. It is

observed in paragraph 8 (page 520) amongst other (page 3 of [2003] 264 ITR):

"Normally, the decision of this Court enunciating a principle of law is applicable to all cases irrespective of its stage of pendency because it is assumed that what is enunciated by the Supreme Court is, in fact, the law from inception."

36. I think one cannot take advantage of the subsequent pronouncement of a superior court in a closed and settled matter particularly in the matter decided and settled four years back, in the guise of rectification. I find in neither of the judgments rendered in [Commissioner of Income Tax Vs. Hindustan Bulk Carriers](#), and in [Swan Mills Ltd. Vs. Commissioner of Income Tax](#), the Supreme Court did have any occasion to examine the power of waiver of the Commission in view of the Board's notification issued u/s 119(2)(a) dated May 23, 1996. The Board has power to issue necessary notification under the aforesaid section in relaxation of the provision of Sections 234A, 234B and 234C of the said Act. The Supreme Court has not said as yet that the Board had no power to grant relaxation. I hold there was no ground nor does it warrant for exercising jurisdiction u/s 154 of the said Act. Thus, the impugned order is not sustainable on this ground also and the same is accordingly set aside.

37. However, there will be no order as to costs.

38. Prayer for stay of operation of this judgment and order is considered and I grant stay for a period of three weeks from date.

39. Xerox certified copy of the judgment and order shall be made available to the parties, if applied for.