IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 17175 OF 2024
WITH
WRIT PETITION NO. 17176 OF 2024
WITH
WRIT PETITION NO. 17177 OF 2024

Infantry Security and Facilities … Petitioner
through, proprietor Tukaram M. Surayawanshi

Versus

The Income Tax Officer, Ward 4(5) …Respondent

Ms. Madhavi M. Tavanandi, for the petitioner.
Mr. Vikas T. Khanchandani, for the respondent.

CORAM: G. S. KULKARNI &
ADVAIT M. SETHNA, JJ.

DATED: 3 DECEMBER 2024

ORAL JUDGMENT: [Per G. S. Kulkarni, J.]

1. Rule, returnable forthwith. By consent of parties heard finally.

2. These are three writ petitions filed under Article 226 of the Constitution of India assailing a common order dated 20 October 2023 passed by the Income Tax Appellate Tribunal (*"Tribunal"* for short) Bench at Pune, whereby the Miscellaneous Applications filed by the respondent-Revenue against the order dated 26 July 2022, passed by the Tribunal, have been allowed. One of the factors which could have weighed in favour of the petitioner/assessee and against the Revenue is the view taken by the Tribunal is

that the decision of the Supreme Court in the case of ***Checkmate Services Private Limited vs. Commissioner of Income Tax***[1] being rendered subsequent to the original decision of the Tribunal, hence the same would not be relevant for setting aside the order passed by the Tribunal.

3. The facts are not in dispute. The Assessment Years in question are 2017-2018, 2018-2019 and 2019-2020. For these Assessment Years, the petitioner had filed its returns of income. The assessing officer in carrying out the assessment certain amounts in regard to the payment of the statutory dues like the Provident Fund and Employees State Insurance Corporation amounts were not allowed as expenses under Section 36(1)(va) of the Income Tax Act, 1961 (*"IT Act*" for short), for the reason that such payments were made beyond the due date under the relevant legislations.

4. The petitioner, being aggrieved by the assessing officer not allowing such expenditure under the said heads, approached the Commissioner of Income Tax (Appeals) ("*CIT(A)*" for short). The CIT(A) partly allowed the appeals. Against the orders passed by the CIT(A), the petitioner approached the Tribunal. The Tribunal by judgment and order dated 26 July 2022 was pleased to allow the appeals of the petitioner and delete the additions made by the assessing officer.

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1. 2022 (448) ITR 518 (SC).

5. Being aggrieved by the said order passed by the Tribunal, the Revenue, however, invoked the provisions of Section 254 of the IT Act and approached the Tribunal by filing Miscellaneous Application Nos. 111, 112 and 113 of 2023, praying that the original orders dated 26 July 2022 passed by the Tribunal, allowing the petitioner's appeal, be set aside on the ground that the view taken by the Tribunal qua setting aside of the additions as made by the assessing officer, cannot be accepted to be a correct view, in view of the decision of the Supreme Court in Checkmate Services Private Limited (Supra) which was rendered subsequent to the orders passed by the Tribunal. It was contended that in such decision the Supreme Court has held that deduction of employees share can be allowed under Section 36(1)(va), only if, it is deposited before the time limit under the respective statute and not before the due date under Section 139(1) of the IT Act. In this view of the matter, it was urged by the Revenue in the Miscellaneous Applications that due to such change in law, the basis of the order dated 26 July 2022 passed by the Tribunal has vanished and accordingly the same will be required to be set aside, by allowing the Miscellaneous Applications filed under Section 254(2) of the IT Act.

6. The petitioner in assailing the impugned order passed by the Tribunal, has urged two basic contentions: **Firstly**, it is submitted that the jurisdiction of the Tribunal under Section 254(2) is akin to the jurisdiction of the Civil Court of a review in terms of Order XLVII, Rule 1 read with Section

114 of the Code of Civil Procedure, 1908 ("*CPC*" for short) and hence it is only when there is an error apparent on the face of the order, it can be corrected by the Tribunal in exercise of its jurisdiction under Section 254(2); **secondly**, it is submitted that this is not a case where the existing position in law was not noticed by the Tribunal in rendering its decision on the petitioner's appeals in passing order dated 26 July 2022, as the decision of the Supreme Court as relied by the Revenue in the case of Checkmate Services Private Limited (Supra), was rendered subsequent to the decision of the Tribunal i.e. on 12 October 2022. In this view of the matter, it is submitted that the subsequent judgment being rendered by the Supreme Court, cannot be a ground to invoke the provisions of Section 254(2) of the IT Act, as in this event, the only remedy for the Revenue would be to assail the orders passed by the Tribunal in an appeal to be filed before this Court under Section 260A of the IT Act.

7. It is next submitted that in any event, the locus to file Miscellaneous Application in terms of Section 254(2), was available provided such Miscellaneous Application was to be filed within a period of six months from the end of the month in which the order was passed by the Tribunal. It is submitted that the limitation of six months is prescribed and/or available by virtue of a statutory provision of sub-Section (2) of Section 254 of the IT Act. In the present case, clearly the Miscellaneous Applications were filed with a

delay of 92 days. It is, therefore, the petitioner's submission that in terms of Section 254(2), the Miscellaneous Application was *per se* barred by limitation. It is submitted that this aspect is also not taken into consideration by the Tribunal. It is submitted that the impugned order passed by the Tribunal is contrary to the provisions of Section 254(2) hence the same would be required to be held invalid and illegal.

8. In support of such contentions, Ms. Madhavi Tavanandi, learned counsel for the petitioner has placed reliance on the decision of this Court in the case of **Commissioner of Income Tax (IT-4) vs. Income Tax Appellate Tribunal**[2], **Deputy Commissioner of Income Tax vs. ANI Integrated Services Ltd**[3], as also the decision of the Constitution Bench of the Supreme Court in **Beghar Foundation vs. Justice K. S. Puttaswamy**[4].

9. On the other hand, learned counsel for the Revenue has supported the impugned order. He would fairly submit that now the parameters of the jurisdiction of the Tribunal under Section 254(2) of the IT Act are well settled, while not disputing the principles of law as held in the decision cited on behalf of the petitioner. He would also submit that the decision in the case of Checkmate Services Private Limited (Supra), was rendered subsequent to the decision of the Tribunal allowing the petitioner's

2. [2017] 85 taxmann.com 42 (Bombay).

3. [2024] 162 taxmann.com 899 (Mumbai- Tribunal).

4. [2021] 123 taxmann.com 344/278 Taxman 1.

appeal vide order dated 26 July 2022 and hence, such decision certainly was not available when the Tribunal disposed of the petitioner's appeal subject matter of the Miscellaneous Applications filed by the Revenue.

10. Having heard the learned counsel for the parties and having perused the record, we find that there is much substance in the contentions as urged on behalf of the petitioner. At the outset, we may observe that the jurisdiction of the Tribunal as invoked by the Revenue, was the jurisdiction as conferred on the Tribunal under Section 254(2) of the IT Act provides, which is in relation to the orders passed by the Tribunal. Section 254, is required to be noted, which reads thus:

> "254. Orders of Appellate Tribunal
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> (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.
>
> (1A) [***]
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> **(2) The Appellate Tribunal may, at any time within six months from the end of the month in which the order was passed, with a view to rectifying any mistake apparent from the record, amend any order passed by it under sub-section (1), and shall make such amendment if the mistake is brought to its notice by the assessee or the Assessing Officer :**
>
> 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:
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> Provided further that any application filed by the assessee in this sub-section on or after the 1st day of October, 1998, shall be accompanied by a fee of fifty rupees.

(2A) In every appeal, the Appellate Tribunal, where it is possible, may hear and decide such appeal within a period of four years from the end of the financial year in which such appeal is filed under sub-section (1) or sub-section (2) of section 253:

Provided that the Appellate Tribunal may, after considering the merits of the application made by the assessee, pass an order of stay in any proceedings relating to an appeal filed under sub-section (1) of section 253, for a period not exceeding one hundred and eighty days from the date of such order subject to the condition that the assessee deposits not less than twenty per cent of the amount of tax, interest, fee, penalty, or any other sum payable under the provisions of this Act, or furnishes security of equal amount in respect thereof and the Appellate Tribunal shall dispose of the appeal within the said period of stay specified in that order:

Provided further that no extension of stay shall be granted by the Appellate Tribunal, where such appeal is not so disposed of within the said period of stay as specified in the order of stay, unless the assessee makes an application and has complied with the condition referred to in the first proviso and the Appellate Tribunal is satisfied that the delay in disposing of the appeal is not attributable to the assessee, so however, that the aggregate of the period of stay originally allowed and the period of stay so extended shall not exceed three hundred and sixty-five days and the Appellate Tribunal shall dispose of the appeal within the period or periods of stay so extended or allowed:

Provided also that if such appeal is not so disposed of within the period allowed under the first proviso or the period or periods extended or allowed under the second proviso, which shall not, in any case, exceed three hundred and sixty-five days, the order of stay shall stand vacated after the expiry of such period or periods, even if the delay in disposing of the appeal is not attributable to the assessee.

(2B) The cost of any appeal to the Appellate Tribunal shall be at the discretion of that Tribunal.

(3) The Appellate Tribunal shall send a copy of any orders passed under this section to the assessee and to the Principal Commissioner or Commissioner.

(4) Save as provided in section 256 or section 260A, orders passed by the Appellate Tribunal on appeal shall be final."

(emphasis supplied)

11. A perusal of Sub-section (2) of Section 254 of the IT Act, clearly indicates that the Tribunal at any time within six months from the end of month in which the order was passed by the Tribunal, with a view to rectify any "mistake apparent from the record", amend any order passed by under sub-Section (1) and shall make such amendment, if the mistake is brought to the notice by the assessee or the assessing officer by following the procedure as set out in the said provision. What is significant is that such jurisdiction on the Tribunal is conferred with a view to "rectify any mistake apparent from the record" and accordingly amend any order, that too on the applicant satisfying the conditions, that such mistake is brought to the notice of the Tribunal by the assessee or the assessing officer "within six months" from the end of the month, when the order was passed.

12. Thus, from the plain language of sub-Section (2) of Section 254, it is clear that the jurisdiction of the Tribunal as conferred under sub-Section (2) of Section 254 is akin to the review jurisdiction of the Civil Court, that is to be rectify any mistake apparent from the record.

13. The question in the present case is whether there was any mistake apparent on the face of the record and/or whether a decision which was rendered by the Supreme Court subsequent to the Tribunal's decision of which rectification is sought, could be relevant to come to a conclusion on the ground

that there was a mistake apparent on the face of the order, the Tribunal could substitute its original order.

14. In our clear opinion, the question would be required to be answered against the Revenue and in favour of the assessee. The reasons for which we discuss hereunder. In such context, at the outset, we may observe that the petitioner had succeeded before the Tribunal on the basis of the position in law as it prevailed on the day the decision was rendered on the petitioner's appeal on 26 July 2022. Subsequent to the said orders passed by the Tribunal, on 12 October 2022, the Supreme Court rendered its decision in "Checkmate Services Private Limited" (Supra), whereby the Supreme Court held that the deduction of the employees' share can be allowed under Section 36(1)(va) of the IT Act, only if such share was deposited before the time limit under the respective statutes and not before the due date under Section 139(1) of the IT Act. In the fact situation, certainly it cannot be said that the Tribunal has overlooked the existing position in law, as laid down by the Supreme Court or the High Court, so as to bring about a situation that the law declared by the Supreme Court was not followed by the Tribunal and/or the decision of the Tribunal is contrary to the law as laid down by the Supreme Court. Such decision of the Supreme Court which never existed when the Tribunal passed the original order could never have been applied by the Tribunal, and hence it cannot be said that there was any mistake on the face of the record, so as to

confer jurisdiction on the Tribunal to exercise its jurisdiction under Section 254(2) of the IT Act.

15. There is also much substance in the contention as urged on behalf of the petitioner, when it is contended that the Miscellaneous Application was filed by the Revenue beyond the prescribed limitation of six months as provided for in Sub-section (2) of Section 254 of IT Act, from the end of the month in which the order was passed. The Miscellaneous Applications were filed by the Revenue with a delay of 92 days. Considering the clear provisions of Sub-section (2) of Section 254, it is clear that it prescribes a limitation to file an application in invoking such provision. The Revenue could not make good, that in these circumstances there was any power with the Tribunal to condone delay if the Miscellaneous Application was to be filed beyond a period of six months. In any event, there was no application on the part of the Revenue in this regard. Thus, the impugned order would also be required to be faulted on such count that the same was passed beyond the limitation as prescribed under Sub-section (2) of Section 254 of the IT Act.

16. In so far as the petitioner's contention on the jurisdiction of the Tribunal to entertain the Miscellaneous Application is concerned, it appears that the position in law is well settled. The jurisdiction as conferred under sub-Section(2) of Section 254 is akin to the jurisdiction conferred on the Civil

Court under the provisions of Order XLVII, Rule 1 of the CPC *inter alia* to correct mistakes apparent on the face of the record. However, on a comparative reading of sub-Section (2) of Section 254 of the IT Act, and Rule 1 of Order XLVII of CPC, it appears that such jurisdiction conferred on the Tribunal is more restricted.

17. In **Beghar Foundation (Supra)**, the Supreme Court was considering a review petition, filed against the final judgment and order dated 26 September 2018, passed on the main proceedings. In rejecting the review petition, the Supreme Court observed that no case for review of such judgment was made out, and most importantly on the ground that change in law or subsequent decision/judgment of coordinate or larger bench by itself cannot be regarded as a ground for review. Such principles of law are squarely applicable in the facts of the present case.

18. In **Sanjay Kumar Agrawal vs. State Tax Officer (1) and Another**[5], the Supreme Court following the decision in the Constitution Bench in Beghar Foundation (Supra), made the following observations:

> "15. It is very pertinent to note that recently the Constitution Bench in Beghar Foundation v. K. S. Puttaswamy (Aadhaar Review – 5 J.), held that even the change in law or subsequent decision/judgment of coordinate Bench or larger Bench by itself cannot be regard as a ground for review."

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5. (2024) 2 Supreme Court Cases 362.

19. We may observe that recently a bench of the Tribunal in the case of ANI Integrated Services Ltd (Supra), had the occasion to consider the very issue as raised by the Revenue in light of the decision rendered by the Supreme Court in Checkmate Services Private Limited (Supra). In such case similar applications were filed by the Revenue praying that the Tribunal set aside its orders in relation to Employees State Insurance Corporation ("***ESIC***" for short) (for the Assessment Year 2019-20) considering the changed position in law in "Checkmate Services Private Limited" (Supra). The Tribunal by its decision dated 29 May 2024 [ANI Integrated Services Limited (Supra)] did not accept the contentions as urged on behalf of the Revenue and rejected the Miscellaneous Applications filed by the Revenue, also considering the decision in Beghar Foundation (Supra) and the scope of its limited jurisdiction under Section 254(2) of the IT Act. We are in complete agreement with the view taken by the Tribunal in ANI Integrated Services Ltd (Supra) and which is on the very issue as urged by the petitioner .

20. In view of the aforesaid discussion, we are of the clear opinion that the Tribunal was in a patent error in exercising jurisdiction under Section 254(2) in passing the impugned order. The petitions accordingly need to succeed. The petitions are allowed in terms of prayer clause (a) of each of these petitions.

21. Rule is made absolute in these terms. No costs.

(ADVAIT M. SETHNA, J.) (G. S. KULKARNI , J.)

Ganesh Lokhande, PA