

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“SMC” BENCH, AHMEDABAD**

**BEFORE Ms. SUCHITRA RAGHUNATH KAMBLE, JUDICIAL MEMBER  
&  
SHRI NARENDRA PRASAD SINHA, ACCOUNTANT MEMBER**

MISCELLANEOUS APPLICATION No. 105/Ahd/2024  
(in I.T.A. No. 247/Ahd/2024)  
(निर्धारण वर्ष / Assessment Year : 2014-15)

<b>ITO</b> Wd.1(2)(2), Race Course Circle, Vadodara	<b>बनाम/ Vs.</b>	<b>Neetaben Snehalkumar Patel</b> B-5, Vrajdeep Apartment, Opp. Rokadnath, Race Course Circle, Vadodara
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : BWRPP7664K		
<b>(Respondent)</b>	..	<b>(Applicant)</b>

<b>Assessee by :</b>	Shri Sunil Talati, A.R.
<b>Revenue by :</b>	Shri Ramesh Kumar, Sr. D.R.

<b>Date of Hearing</b>	05/07/2024
<b>Date of Pronouncement</b>	10/07/2024

**ORDER**

**PER SHRI NARENDRA PRASAD SINHA, AM:**

The present Miscellaneous Application is filed by the assessee to modify the order passed by this Tribunal in ITA No. 247/Ahd/2024 dated 03.05.2024 for A.Y. 2014-15.

2. Shri Sunil Talati, Ld. Counsel for the assessee explained that there was mistake in the order dated 03.05.2024 on two counts:

(i) In Para 9 of the order, the Tribunal has observed that the objection of the assessee on the issue of low tax effect was not sustainable. He explained that the subject matter of the appeal was in connection with shares of Basukinath Real Estate Pvt. Ltd. which was subsequently merged with Unno Industries Ltd. According to the Ld. Counsel, neither Basukinath nor Unno Industries Ltd. was listed anywhere as penny stock and this fact was upheld by the Ld. ITAT, Delhi in the case of *Mohit Hora (HUF) in ITA No. 410/Del/2018* as well as by the Ld. CIT(A)-12, Ahmedabad in case of *Late Shri Mihir P. Panchal*. The Ld. AR contended that this fact was brought to the notice of the Ld. Tribunal in the course of hearing of the appeal. Since the shares of Basukinath or Unno Industries were not penny stock, there was a mistake in the order of the Tribunal in not acceding to the request of the assessee to dismiss the appeal on the ground of low tax effect. The Ld. Counsel submitted that following the judicial discipline it should have been held that no penny stock issue was involved in this case.

(ii) The second mistake was pointed out by the Ld. Counsel in respect of observation of the Tribunal in para 16 of the order, which was as under:

*The question as to why a broker based in Kolkata will sale the shares to a client resident in Vadodara on credit, with whom there was no previous transaction, and why the ownership of such shares sold on credit will be transferred without receipt of payment, has not been answered or explained.*

The Ld. AR submitted that the assessee had got a tip from the Kolkata based broker and, therefore, the transaction of purchase was carried out through him. He further explained that many brokers were providing credit facility of 4 to 5 months for buying shares because upon sale transactions, the money will be kept with him for longer time. It was for this reason that the shares were purchased from the Kolkata based broker on credit facility of 4 and ½ month.

3. In view of the above mistakes, the assessee has prayed that the order passed by the Tribunal on 03.05.2024 may be recalled and another opportunity be granted to the assessee to present its case before the Tribunal after re-fixing the appeal.

4. Per contra, Shri Ramesh Kumar, Sr. DR appearing for the department submitted that there was no mistake apparent from the record in the order dated 03.05.2024 of the Ld. ITAT and that the present Miscellaneous Application was mis-directed. He submitted that the AO had elaborately discussed in the assessment order that share as dealt in by the assessee was penny stock and that the CBDT Circular No. 5/2024 was squarely applicable to the facts of the present case. Therefore, the Ld. ITAT had rightly rejected the objection of the assessee on the issue of low tax effect after discussing the matter in Para 9 of the order. On the second objection of the assessee also, the Ld. DR submitted that there was no mistake in the order of the Ld. Tribunal.

5. We have considered the contentions of the assessee in the Miscellaneous Application and the rival submissions. As regarding objection of the assessee on the issue of low tax effect, a specific finding was given in Para 9 of the order dated 03.05.2024 as under:

*“9. We have carefully considered the submissions of both the parties. At the outset, the objection of ld. AR on the issue of low tax effect is not found sustainable. The CBDT vide circular 5/2024 dated 15<sup>th</sup> March, 2024 has clarified that the monetary limit for filing of appeal will not be applicable to certain exceptions as mentioned in the said circular. It is found that the cases involved in organized tax evasion including the case of bogus capital gain/loss through penny stock and case of accommodation entries is one of the exception listed in the circular. In such cases, the appeal is required to be filed without regard to the tax effect involved and the monetary limit prescribed. It is found that the issue involved in this case is bogus capital gain through penny stock and, therefore, this case is found to be covered under the exception of the said circular. Therefore, the objection of the Ld. AR for dismissing the appeal due to low tax effect is rejected.”*

7. The contention of the assessee is that the stock of Basukinath or Unno Industries was not a penny stock and, therefore, the said circular was not applicable. The AO had relied upon on the investigation report of the Directorate of Investigation, Kolkata in the assessment order and the extract of the said report were also reproduced therein. It is found there-from that the Directorate of Investigation had verified the BSE listed penny stocks which were used for generating bogus LTCG and that M/s. Unno Industries Ltd. was one such BSE listed penny stock company. Thus, the entire investigation and the addition in this case was based on the fact that it was a case of organized tax evasion of bogus capital gain through penny stock. In view of this fact, it was rightly held in the order dated 03.05.2024 that the

case was squarely covered by the CBDT Circular No. 5/2024. As per Clause (h) of Para 3.1 of the said Circular, it was stipulated that the monetary limit will not apply in the “*Cases involving organized tax evasion including cases of bogus capital gain/loss through penny stocks and cases of accommodation entries.*”

8. The assessee has relied upon the decision of ITAT, Delhi in the case of *Mohit Hora (HUF)*(*supra*) in support of the contention that the shares of Unno Industries was not a penny stock. It is found no such finding was anywhere given in the said order. The finding as recorded by the Tribunal in the said order is reproduced below:

*7. I have heard both the parties and perused the relevant records available with me, especially the orders of the revenue authorities and the case law cited by the assessee's counsel on the issue in dispute. I find that the assessment in this case was completed w/s. 143(3) of the Act vide order dated 19.12.2016 determining an income of Rs. 36,25,365/-. The AO has alleged that the assessee has claimed bogus long term capital gain of Rs. 33,63,365/- and has added the same treating it as unexplained cash credit found in the books of the assessee w/s. 68 of the Ac. I further note that AO has placed reliance on the information provided by the Investigation Wing and the statement recorded on oath of various persons. I further find that in support of claim of LTCG, the assessee has provided all the documents relating to sale and purchase which have taken place only through banking channel and are supported by contract note from HDFC Securities and the shares of Unno Industries Ltd. being listed shares on stock-exchange were filed by the assessee before the AO. I note that the shares of assessee were sold through HDFC Securities Ltd. at Bombay Stock Exchange and assessee received sale consideration from HDFC Securities Ltd. after payment of STT and brokerage. However, the AO has not brought on record any material to support its finding that there has been collusion/ connivance between the broker and the assessee for the introduction of assessee's own unaccounted money. In view of the above, I am of the considered view that*

*the LTCG claimed by the assessee is resulting from purchases made directly from the seller through a/c payee cheque based on actual delivery of shares, the transaction for sale is through registered broker on the floor of the stock exchange. Consequently, the LTCG of Rs. 33,63,368/- is fully supported by evidence, which in my considered opinion needs to be allowed. Keeping in view of the facts and circumstances of the case as explained above, the assessee has justified the LTCG as a genuine and bonafide transaction the cost of Rs. 1,14,686/- shall also be allowed as a deduction from the sale consideration. Hence, the enhanced addition in dispute amounting to Rs. 34,78,051/- is hereby deleted.*

It can be seen from the above that the issue was decided in the case of *Mohit Hora (HUF)* on the basis of appreciation of facts of the case and no finding was recorded anywhere that the share of Unno Industries was not a penny stock.

9. In our considered view whether a share is penny stock or not can't be decided by the Tribunal. This decision is taken by the BSE or the Investigation agencies after analyzing the trend of trading of such stocks. The Investigation Directorate, Kolkata had carried out a detailed study and analysis of such penny stock companies. The Hon'ble Kolkata High Court in the case of *PCIT Vs. Swati Bajaj, (139 taxmann.com 352)* has upheld the report of the Directorate of Investigation, Kolkata in respect of penny stock companies. The transaction in the case of the assessee was in respect of shares included in the report of the Investigation Directorate, Kolkata, wherein the share of Unno Industries Ltd. was reported as a BSE listed penny stock. In view of these facts, we do not find any merit in the objection of the assessee and there is no mistake in our finding as given in the order dated 03.05.2024.

10. Regarding objection of the assessee to the observations as made in Para 16 of the order, the assessee has quoted only a part of the observation. It was also mentioned in the said Para that *“It is found from the contract memo that no brokerage was charged by M/s. Jwalaji Suppliers Pvt. Ltd., Kolkata for sale of the shares to the assessee. The broker in Calcutta was after all doing a business and not running a charity.”* It is, thus, apparent that finding as given by the Tribunal was not only on the basis of the portion of the order to which the assessee has raised objection. The finding as recorded by the Tribunal is not disputed as incorrect and no mistake in the findings has been pointed out. By raising objection in respect of this finding, the assessee has precisely requested to recall the order and to allow another opportunity of being heard. The provision of Section 254(2) of the Act is intended to only rectify the mistake apparent from the records and we don't find any such mistake apparent in the order. The power of Section 254(2) of the Act cannot be utilized to recall and review the order on its merit. The *Hon'ble Supreme Court* in the case of *CIT vs. Reliance Telecom Limited (2021) 133 taxmann.com 41 (SC)* has categorically held as under:

*“3.2 Having gone through both the orders passed by the ITAT, we are of the opinion that the order passed by the ITAT dated 18.11.2016 recalling its earlier order dated 06.09.2013 is beyond the scope and ambit of the powers under Section 254(2) of the Act. While allowing the application under Section 254(2) of the Act and recalling its earlier order dated 06.09.2013, it appears that the ITAT has re-heard the entire appeal on merits as if the ITAT was deciding the appeal against the order passed by the C.I.T. In exercise of powers under Section 254(2) of the Act, the Appellate Tribunal may amend any order passed by it under sub-section (1) of Section 254 of the Act with a view to rectifying any mistake apparent from the record only. Therefore, the powers under Section 254(2) of the Act are akin to Order XLVII Rule 1 CPC. While considering the application under Section 254(2) of the Act, the Appellate Tribunal is not required to re-visit its earlier order and*

*to go into detail on merits. The powers under Section 254(2) of the Act are only to rectify/correct any mistake apparent from the record.*

*4. In the present case, a detailed order was passed by the ITAT when it passed an order on 06.09.2013, by which the ITAT held in favour of the Revenue. Therefore, the said order could not have been recalled by the Appellate Tribunal in exercise of powers under Section 254(2) of the Act. If the Assessee was of the opinion that the order passed by the ITAT was erroneous, either on facts or in law, in that case, the only remedy available to the Assessee was to prefer the appeal before the High Court, which as such was already filed by the Assessee before the High Court, which the Assessee withdrew after the order passed by the ITAT dated 18.11.2016 recalling its earlier order dated 06.09.2013. Therefore, as such, the order passed by the ITAT recalling its earlier order dated 06.09.2013 which has been passed in exercise of powers under Section 254(2) of the Act is beyond the scope and ambit of the powers of the Appellate Tribunal conferred under Section 254 (2) of the Act. Therefore, the order passed by the ITAT dated 18.11.2016 recalling its earlier order dated 06.09.2013 is unsustainable, which ought to have been set aside by the High Court.*

11. Considering the totality of the facts, the M.A. filed by the assessee is required to be dismissed for the reasons as discussed above and also on account of judicial discipline following the decision of the Hon'ble Supreme Court in the case of *Reliance Telecom Ltd., (supra)*.

12. Accordingly, the miscellaneous application filed by the assessee is dismissed.

**This Order pronounced in open court on 10/07/2024**

Sd/-  
(SUCHITRA RAGHUNATH KAMBLE)

**JUDICIAL MEMBER**

Ahmedabad; Dated 10/07/2024  
S. K. SINHA

Sd/-  
(NARENDRA PRASAD SINHA)

**ACCOUNTANT MEMBER**

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**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाइल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)  
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad