IN THE INCOME TAX APPELLATE TRIBUNAL,
AGRA BENCH, AGRA

BEFORE : SHRI BHAVNESH SAINI, JUDICIAL MEMBER AND
SHRI A.L. GEHLOT, ACCOUNTANT MEMBER

M.A. Mo. 04/Agra/2012
(Arising out of M.A. No. 02/Agra/2011 & ITA No. 468/Agra/2004)
Asstt. Year : 2001-02

Income-tax Officer, 2(4), Agra. (Applicant)	vs.	Shri Bhagwan Agarwal, D-31, Pratap Nagar, Agra. (PAN: ADMPA 9968 J). (Respondent)

Applicant/Deptt. by	:	Shri Waseem Arshad, Sr. D.R.
Assessee by	:	Shri Nitesh Agarwal, Advocate

Date of hearing	:	03.07.2013
Date of pronouncement of order	:	12.07.2013

ORDER

Per Bhavnesh Saini, J.M.:

This order shall dispose of miscellaneous application filed by the Revenue through Shri S.K. Verma, ITO 2(4), Agra u/s. 254(2) of IT Act against the ITAT order passed u/s. 254(1) of IT Act allowing the appeal of assessee by canceling penalty u/s. 271(1)(c) of the IT Act.

2. We have heard the ld. representatives of both the parties at length and perused the orders and the material on record.

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3. Briefly, the facts of the case are that the assessee alleged to have purchased 4000 shares of M/s. Pernami Habitat Developers Ltd., Gurgaon at the rate of Rs.5.88 per share for a sum of Rs. 23,630/-. These shares were allegedly purchased on 09.06.1999 and 15.06.1999 through the share broker, M/s. Rakesh Nagar & Co., New Delhi. The shares were claimed to have been sold for a sum of Rs.5,03,772/- through the same broker, M/s. Rakesh Nagar & Co. The amount of Rs.5,03,772/- was deposited in the capital gain account for utilization in the construction of house and accordingly, the assessee claimed deduction u/s. 54F of the IT Act. The AO observed that the assessee had in fact taken benefit of bogus entries through these transactions with the sole motive of converting the black money into white money. The AO during the course of assessment proceedings discussed the matter with the assessee and his representatives in the presence of Addl. CIT, Range-2 Agra. The assessee was informed that the share broker, M/s. Rakesh Nagar & Co. in their statement had stated that no transaction of purchase and sale of 4000 shares of M/s. Pernami Habitat Developers Ltd, Gurgaon on behalf of the assessee were made through him. The assessee thereafter filed detailed reply and offered the amount of capital gain for taxation. The assessee filed revised computation of income on 28.03.2003 and revised return of income on 01.10.2003. In view of these facts, the AO observed that the surrender of income made by the assessee was not voluntary, but it was made after detection

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under compulsion. The AO accordingly initiated the penalty proceedings u/s. 271(1)(c) of the IT Act. The assessee at the penalty stage informed that he was not aware of the fraud in respect of purchase and sale of shares committed by the share broker. Therefore, the assessee has surrendered the amount in question for taxation. The AO was not satisfied with the reply of assessee and levied minimum penalty u/s. 271(1)(c) of the IT Act. The ld. CIT(A) confirmed the penalty and the matter reached before ITAT, Agra Bench in appeal filed by assessee in ITA No. 468/Agr./2004 for the assessment year 2001-02, which was dismissed by the Tribunal vide order dated 27.04.2007. The Tribunal while dismissing the appeal of the assessee held that the filing of revised return subsequently cannot be taken as voluntary disclosure on behalf of the assessee and Explanation-1 to section 271(1)(c) would apply against the assessee. The explanation of the assessee is false.

4. The assessee thereafter filed appeal before the Hon'ble Allahabad High Court against the order of the Tribunal dated 27.04.2007 dismissing the appeal of the assessee in Income-tax Appeal No. 477 of 2007 and the Hon'ble Allahabad High Court vide order dated 17.08.2010 held that the finding of Tribunal is finding of fact and no substantial question of law arises from the order of the Tribunal. The appeal of the assessee was accordingly dismissed.

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5. The assessee, instead of filing an appeal/SLP before the Hon'ble Supreme Court against the decision of Hon'ble Allahabad High Court, filed a miscellaneous application No. 02/Agra/2011 on 24.01.2011 u/s. 254(2) before the earlier ITAT, Agra Bench against its order dated 27.04.2007 and it was stated that the AO has nowhere pointed out under which offence penalty has been imposed – whether the assessee had concealed the particulars of income or had furnished inaccurate particulars of income. The assessee also relied upon certain decisions in support of contention. However, the assessee has not disclosed the important fact in the above miscellaneous application that his appeal has already been dismissed by Hon'ble Allahabad High Court vide order dated 17.08.2010 confirming the order of the Tribunal dated 27.04.2007 against which miscellaneous application has been preferred. The earlier ITAT, Agra Bench after detailed discussion allowed the Miscellaneous Application No. 02/2011 filed by the assessee and cancelled the penalty imposed u/s. 271(1)(c) of the IT Act. The appeal of the assessee was allowed and in the result, the miscellaneous application filed by the assessee was allowed by rectifying the order dated 27.04.2007 in the manner as stated in the order dated 28.07.2011. The order dated 28.07.2011 u/s. 254(2) merged with order dt. 27.04.2007 passed u/s. 254(1) of IT

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Act and appeal of assessee in ITA No. 468/2004 was thus allowed, which is contrary to judgment of Hon'ble Allahabad High Court dated 17.08.2010.

6. The Revenue has now filed M.A. No. 04/Agra/2012, in question, stating the same facts and prayed that after dismissal of appeal of the assessee by Hon'ble Allahabad High Court, the Tribunal cannot adjudicate the matter, which is already decided by the Superior Judicial Authority in the case of assessee. It appears that the assessee has not intentionally disclosed the fact of dismissal of appeal by the High Court before the ITAT, Agra Bench. Therefore, the miscellaneous application of the revenue may be allowed in the light of decision of Hon'ble Allahabad High Court dated 17.08.2010.

7. The notice of the present miscellaneous application was issued to the assessee who has appeared in person through his counsel and filed a written reply dated 12.07.2012 in which it was explained that the assessee under the legal advice made available to him by his counsel Shri K.G. Agarwal, C.A. did not disclose the dismissal of appeal by the Hon'ble Allahabad High Court in the miscellaneous application so filed. This fact was also confirmed by the assessee present in the court that as per advice of Shri K.G. Agarwal, C.A., he did not disclose the fact of dismissal of appeal by the Hon'ble High Court to the Tribunal

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when assessee's MA No. 02/2011 was filed. In view of the above reply of the assessee, the explanation of Shri K.G. Agarwal, C.A. who has represented the assessee in MA No. 02/2011 was called for. Shri K.G. Agarwal, C.A. filed his reply dated 03.12.2012 stating therein that the assessee made submissions in the miscellaneous application which were relevant only for the purpose of rectification of apparent mistakes in the said order and in no manner he intended to lower down the majesty of law or to conceal the facts knowingly. Otherwise also, no one can conceal a fact which is in the knowledge of the opposite party. He has also stated that nothing more was required to be disclosed in the miscellaneous application. Thus, the assessee or Shri K.G. Agarwal, C.A. did not dispute the fact that the order of the Hon'ble High Court dated 17.08.2010 dismissing the appeal of the assessee against the order of the Tribunal dated 27.04.2007 was not deliberately disclosed to the Tribunal while filing M.A. No. 02/2011.

8. The ld. DR contended that when Hon'ble Allahabad High Court dismissed the appeal of the assessee on 17.08.2010 confirming the levy of penalty by the Tribunal in their order dated 27.04.2007, it is a relevant and important fact and has bearing on miscellaneous application, therefore, the same judgment of High Court should have been disclosed by the assessee and their counsel while filing

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the miscellaneous application before the Tribunal. He has submitted that it is a solemn duty of the assessee to disclose all material facts before the Tribunal while filing the miscellaneous application. The order of the High Court is material fact which was deliberately concealed to get a favourable order from the Tribunal in miscellaneous application. He has submitted that the persons who have not come to the court with clean hands should not be heard on such matter and no relief should have been granted. It was also submitted that the decision of Hon'ble High Court dated 17.08.2010 was sent to the CIT-I, Agra vide letter dated 03.09.2010 by the AO, hence, High Court order was received in the office of ITO 2(4), Agra between 26.08.2010 & 03.09.2010. The ld. DR also referred to the reply of AO dated 26.07.2012 and submitted that prosecution is pending against the assessee on the same matter in issue, which was launched on 29.03.06. The ld. DR submitted that decision of Hon'ble Allahabad High Court is a finding of fact confirming the order of the Tribunal dated 27.04.2007 which was subsequently wholly reviewed by the earlier Members of Tribunal in miscellaneous application vide order dated 28.07.2011. The assessee should not have moved miscellaneous application No. 02/2011 before the Tribunal after dismissal of their appeal by the Hon'ble Allahabad High Court. Even in case the assessee filed MA against the order of the Tribunal dt. 27.04.2007, he should have disclosed the important fact of dismissal of appeal by the Allahabad High

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Court. If the assessee was at all aggrieved against the decision of Hon'ble Allahabad High Court, he should have moved SLP before the Hon'ble Supreme Court of India. The assessee and their counsel have deliberately, intentionally and consciously in disregard to the order of the Tribunal and the High Court concealed and suppressed the material fact of dismissal of their appeal by the High Court have played fraud with the Tribunal. The ld. DR submitted that the order obtained by fraud by the assessee or their counsel dated 28.07.2011 is nullity and non-est in the eyes of law and such order cannot be allowed to stand. The ld. DR relied upon certain decisions of the Hon'ble Supreme Court, copies of which are placed on record. The ld. DR, however, strongly relied upon the findings and observations of Hon'ble Supreme Court relevant to the present issue under consideration in the case of Ramjas Foundation and Another vs. Union of India and Others delivered on 09.11.2010 in Civil Appeal No. 6662/2004 and the same reads as under :

> *"14. The principle that a person who does not come to the Court with clean hands is not entitled to be heard on the merits of his grievance and, in any case, such person is not entitled to any relief is applicable not only to the petitions filed under Articles 32, 226 and 136 of the Constitution but also to the cases instituted in others courts and judicial forms. The object underlying the principle is that every Court is not only entitled but is duty bound to protect itself from unscrupulous litigants who do not have any respect for truth and who try to pollute the stream of justice by resorting to falsehood or by making misstatement or by suppressing facts which have bearing on adjudication of the issue(s) arising in the case."*

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Hon'ble Apex Court further observed –

> *"In the last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final & quot."*

9. On the other hand, the ld. counsel for the assessee justified the action of the assessee in moving miscellaneous application before the Tribunal and submitted that there were no need to disclose order of Hon'ble Allahabad High Court dated 17.08.2010 while filing the miscellaneous application because the order of the High Court is not material fact to be disclosed in the miscellaneous application. He has submitted that when no appeal was admitted by the High Court would mean that no appeal has been filed. He has submitted that ITAT has no power to review its orders and earlier order of Tribunal dated 28.07.2011 allowing the appeal of the assessee is not review of the earlier order dated 27.04.2007 because it is a rectification made in the order of the Tribunal. He has submitted that res judicata applies to Income-tax proceedings. He has submitted that present M.A. filed by the Revenue is barred by limitation, which is filed on 03.02.2012, i.e., after four years from the date of original order dated 27.04.2007. He has submitted that the order u/s. 254(2) dated 28.07.2011 passed by the Tribunal in

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M.A. No. 02/2011 will merge with the original order dated 27.04.2007, therefore, the same would continue to be an order u/s. 254(1) of the IT Act. He has relied upon the decision of Hon'ble Madras High Court in the case of Dr. S. Panneerselvam vs. ACIT, 319 ITR 135, in which it was held that –*"any order passed under section 254(2) of the Income-tax Act, 1961, either allowing amendment or refusing to amend gets merged with the original order passed. The order as amended or remaining unamended is the effective order for all practical purposes. The same continues to be an order under section 254(1). That is the final order in appeal. Successive applications for rectification of the original order cannot be maintained as it will defeat the object of section 254(2) of the Act."* He has further submitted that the order of Hon'ble Allahabad High Court dated 17.08.2010 was available with the Revenue Department, i.e., the AO and CIT, Agra on 03.09.2010 prior to M.A. moved by the assessee on 24.01.2011. Therefore, it was also duty of the AO and the CIT, Agra to disclose fact of dismissal of appeal of the assessee by the High Court to the Tribunal while miscellaneous application was argued by the DR. The ld. counsel for the assessee, therefore, submitted that miscellaneous application of the Revenue may be dismissed. He has also filed copies of some other decisions on record. During the course of arguments, the ld. counsel for the assessee was asked to explain that if the assessee would have disclosed in Misc. application the decision of Hon'ble

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Allahabad High Court dated 17.08.2010, whether ITAT Agra Bench would still have allowed the miscellaneous application of the assessee, the ld. counsel for the assessee could not explain. He was also asked to explain when the appeal of the assessee has been dismissed by the Hon'ble High Court, instead of approaching Hon'ble Supreme Court, whether it was fair on the part of assessee to move miscellaneous application by concealing the material fact from the Tribunal, i.e., the decision of High Court. The ld. counsel for the assessee also did not have any answer to this query.

10. The ld. DR further contended that the original order of the Tribunal dated 27.04.2007 was in favour of the Revenue, therefore, there was no reason for department to move any miscellaneous application against the said order. He has submitted that the order dated 28.07.2011 passed in miscellaneous application filed by the assessee is the order passed u/s. 254(2) of the IT Act and the same would get merged with the original order passed by the Tribunal. Therefore, the order of Tribunal dated 28.07.2011 would deemed to be an order u/s. 254(1) of the Act, hence, the present miscellaneous application filed by the Revenue on 03.02.2012 is filed within four years from the date of this order and as such the same is filed within the period of limitation. The ld. DR submitted that since

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fraud is played with the tribunal at the stage of miscellaneous application, therefore, the original order of Tribunal dated 27.04.2007 may be restored.

11. We have considered the rival submissions and the material available on record. The passing of different orders by the Tribunal and the Hon'ble Allahabad High Court are not in dispute. ITAT, Agra Bench while considering the penalty appeal of the assessee in ITA No. 468/2004, dismissed the appeal of the assessee vide order dated 27.04.2007 holding that the revised return filed by the assessee on 01.10.2003 cannot be taken as voluntary disclosure on behalf of the assessee. Thus, the finding of fact was made against the assessee that the assessee concealed the particulars of income u/s. 271(1)(c) of the IT Act read with Explanation 1 attached to the same section/provision. The assessee preferred appeal before the Hon'ble High Court against the said decision of Tribunal dated 27.04.2007 and the appeal of the assessee in ITA No. 477/2007 has been dismissed by High Court vide order dated 17.08.2010. The assessee did not prefer any appeal before the Hon'ble Supreme Court against the aforesaid decision of Hon'ble Allahabad High Court. Hon'ble Supreme Court in the case of A.V. Papayya Sastry & Ors vs. Government Of A.P. & Ors., (2007) 4 SCC 221 held as under in various paras of the judgment :-

> "*Even if the counsel for the appellants is right in submitting that after dismissal of SLPs the respondent herein could not have*

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approached the High Court for recalling its earlier order and the High court could not have entertained such applications, nor the recalling could have been done, in the facts and circumstances of the case and in the light of the finding by the High Court that fraud was committed by the landowners in collusion with the officers of the Port Trust Authorities and the Government, no fault can be found against the approach adopted by the High Court and the decision taken. The High Court rightly recalled the order, and remanded the case to the authorities to decide the same afresh in accordance with law.

Fraud may be defined as an act of deliberate deception with the design of securing some unfair or undeserved benefit by taking undue advantage of another. In fraud one gains at the loss of another. Even the most solemn proceedings stand vitiated if they are actuated by fraud. Fraud is thus an extrinsic collateral act which vitiates all judicial acts, whether in rem or in personam.

A judgment, decree or order obtained by playing fraud on the court, tribunal or authority is a nullity and non est in the eye of the law. Such a judgment decree or order – by the first court or by the final court – has to be treated as nullity by every court, superior or inferior. It can be challenged in any court, at any time, in appeal, revision, writ or even in collateral proceedings.

The matter can be looked at from a different angle as well. Suppose, a case is decided by a competent court of law after hearing the parties and an order is passed in favour of the plaintiff applicant which is upheld by all the courts including the final court. Let us also think of a case where the Supreme Court does not dismiss special leave petition but after granting leave decides the appeal finally by recording reasons. Such order can truly be said to be a judgment to which Article 141 of the Constitution applies. Likewise, the doctrine of merger also gets attracted. All orders passed by the courts/authorities below, therefore, merge in the judgment of the Supreme Court and after such judgment, it is not open to any party to the judgment to approach any court or authority to review, recall or reconsider the order.

The above principle, however, is subject to exception of fraud. Once it is established that the order was obtained by a successful party by practicing or playing fraud, it is vitiated. Such order cannot be held legal, valid or in consonance with law. It is non-existent and non est and cannot be allowed to stand. This is the fundamental

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principle of law. The principle of "finality of litigation" cannot be stretched to the extent of an absurdity that it can be utilized as an engine of oppression by dishonest and fraudulent litigants."

11.1 In the case of A.V. Papayya Sastry & Ors. (supra) Hon'ble Supreme Court observed that even if counsel for appellant is right in submitting that after dismissal of SLPs, the respondent therein could not have approached the High Court for recalling its earlier order and the High Court could not have entertained such application nor the recalling could have been done in the facts and circumstances of the case, but when fraud is committed by the land owners in collusion of the officers of Port Trust Authorities and the Government, no fault could be found against the approach of High Court and its decision taken. In the present case after dismissal of appeal of the assessee by Hon'ble Allahabad High Court, the assessee if at all was aggrieved, should have moved SLP before the Hon'ble Supreme Court and should not have approached the ITAT, Agra Bench for recalling/review of the earlier order of the Tribunal dated 27.04.2007. It is the duty of the assessee to disclose the decision of Hon'ble Allahabad High Court to the Tribunal while moving miscellaneous application. The assessee and their counsel, therefore, did not come to ITAT, Agra Bench in miscellaneous application with clean hands. In this view of the matter and the decision of Hon'ble Supreme Court above, the concealment / suppression of decision of Hon'ble Allahabad High Court in miscellaneous application filed by the assessee

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is, therefore, relevant and material fact and could not have been ignored as is argued by the ld. counsel for the assessee.

11.2 Finding of fact of ITAT, Agra Bench in its original order dated 27.04.2007 was that revised return was not voluntary because it was filed when the assessee was cornered by the AO. Hon'ble Allahabad High Court confirmed the order of the Tribunal and finding of fact was confirmed. The decision of ITAT, Agra Bench as was confirmed by the Hon'ble Allahabad High Court was also in consonance with various judgments on the same identical matter in issue and as such could not have been found fault with the same in subsequent miscellaneous application filed by the assessee concealing the decision of High Court. Some of the decisions confirming the above view of the Tribunal and the Hon'ble High Court are reproduced as under :

11.3 Hon'ble Bombay High Court in the case of Jyoti Laxman Konkar vs. CIT, 292 ITR 163 held –

> "*The assessee had filed a return for the assessment year 1999-2000 declaring an income of Rs.7,40,510. Not satisfied therewith, the Assessing Officer carried out a survey under section 133A of the Income-tax Act, 1961, and during the survey found that there was a discrepancy in stock to the tune of Rs.18,28,706 which was brought to the notice of the assessee, and the assessee filed a revised return disclosing additional income of Rs.18,28,706. The Assessing Officer*

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imposed penalty under section 271(1)(c) and this was upheld by the Tribunal. On appeal to the High Court :

Held, *dismissing the appeal, that the question whether there is concealment of income or not has to be decided with reference to the facts of a given case and the fact finding authorities under the Act having come to the conclusion that in the facts of the case, the assessee had concealed the income initially with a view to avoid the payment of tax, the imposition of penalty was valid."*

11.4 Hon'ble jurisdictional Allahabad High Court in the case of CIT vs. Rakesh Suri 331 ITR 458 held –

"The assessee filed his return for the assessment year 2004-05 disclosing total of Rs. 1,17,600. The case was selected for scrutiny. It was found that the assessee had shown long-term capital gains on sale of shares. He had constructed a house between financial years 2001-02 and 2004-05 investing Rs.56,74,567. The income-tax authorities repeatedly required the assessee to furnish the contract note of purchase and sale of shares sold with a copy of bill of broker, justify holding of shares, which were sold, year-wise investment in the house property, valuation report of the approved valuer, confirmation of salary received from the company and other documents. The assessee did not furnish full details. His statement that the shares had been sold through the Delhi Stock Exchange was found to be false. The assessee was directed to furnish reply in terms of the order dated November 9, 2006. He was further directed to furnish the name of the stock exchange through which shares were purchased and sold, rate of shares in the stock exchange on date of purchase and sale on or before December 6, 2006. On December 6, 2006, the assessee surrendered the entry appearing in his bank account on sale of shares amounting to Rs. 61,35,844 on agreed basis. The Assessing Officer treated the sum of Rs. 61,35,844 as income from undisclosed sources under section 69A of the Income-tax Act, 1961, and also levied penalty. The Commissioner (Appeals) cancelled the penalty and this was confirmed by the Tribunal. On appeal to the High Court:

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Held, allowing the appeal, that the assessee had concealed the material facts and given incorrect statement of facts in the application and also not provided information required by the Assessing Officer, after receipt of notice. Accordingly the action of the assessee was neither bona fide nor voluntary. The manner in which the assessee had tried to prolong the case before the Assessing Officer by not providing information immediately and by narrating incorrect facts in the letter dated December 6, 2006 showed that the assessee had concealed the income and disclosure was not voluntary but under compulsion being cornered by the Assessing Officer. Penalty had to be imposed."

11.5 Hon'ble Gujrat High Court in the case of LMP Precision Engg.. Co. Ltd. vs. DCIT, 330 ITR 93 held –

"The Deputy Director of Income-tax (Investigation), Bombay undertook survey action some time in September, 1988 and on verification of certain purchases made by the assessee it was found that the purchases did not appear to be genuine. Before the proceedings could be finally concluded the assessee filed a declaration under section 273A of the Act disclosing additional income of Rs. 54,71,463 as being relatable to assessment year 1985-86. On the same day, declaration was also made of a sum of Rs.18 lakhs each for assessment years 1986-87, 1987-88 and 1988-89. This application under section 273A of the Act was followed by revised returns filed on February 14, 1989 for all the three assessment years declaring identical additional income in the revised returns. Before assessments could be finalised, after regularising the same by issuance of notice under section 148 of the Act, the assessee came forward with another application declaring additional income of Rs. 78,56,613. The first declaration was in relation to purchases from ISC while the second disclosure was in relation to purchase made from SC, NB and NPST. The assessments were not challenged by the assessee. The Assessing Officer initiated penalty proceedings under section 271(l)(c). The explanation of the assessee for all the three years was that revised returns were voluntary, additional income in each of the revised returns was declared to purchase peace and no concealment was involved. It

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was submitted that the returns were revised even before issuance of notice under section 148 of the Act. The Assessing Officer did not accept the explanation of the assessee and levied penalties. Successive appeals filed by the assessee before the Commissioner (Appeals) and the Tribunal were dismissed by the two appellate authorities confirming the penalties levied by the Assessing Officer. However, the Tribunal came to the conclusion that the assessee had co-operated in finalisation of the assessment and accepted the assessment of additional income and so, the Tribunal reduced the penalty levied from the maximum to the minimum. On a reference:

Held, that it was only after the statement of the chairman and managing director was recorded by the Deputy Director of Income-tax (Investigation Mumbai, that the first disclosure dated October 20,1988, Rs. 54,71,463 was made accompanied by another disclosure of Rs. 54 lakhs in a round figure being divided into three segments of Rs. 18 lakhs each for assessment yean 1986-87, 1987-88 and 1988-89. The revised return declaring a sum of Rs.78,56,613 came about as a consequence of follow-up proceedings undertaken by the Deputy Director of Income-tax in relation to the other three suppliers, viz., SC, NB and NPST. Therefore, the assessee could not be stated to have voluntarily come forward to disclose income which had unintentionally been omitted from the original return of income. The imposition of penalty was valid."

11.6 In view of the above decisions, there appears no scope to review the earlier order of the Tribunal dated 27.04.2007, which was also confirmed by the Hon'ble Allahabad High Court. Thus, the whole approach of the assessee was to get favourable order from the Tribunal by concealing and suppressing the material fact from the Tribunal. We may also note here that the assessee and his counsel has a motive to get the favourable order from the Tribunal because on the same matter in issue before confirmation of penalty by the Tribunal on dated

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27.04.2007, the Revenue department as per reply of AO/DR have already launched a criminal prosecution against the assessee on 29.03.2006 and the same is pending against the assessee. We may also note here that there are case laws to the effect that when the Tribunal allowed the appeal of the assessee, no prosecution on the same matter in issue may continue. Thus, the assessee and their counsel were aware of the fact that the criminal prosecution against the assessee would continue after dismissal of their appeal by the Tribunal and confirmed by the High Court, therefore, they with their predetermined mind and ulterior motive moved miscellaneous application on 24.01.2011 against the original order of Tribunal dated 27.04.2007 with delay of more than three and half years. The assessee and their counsel with ulterior motive to get a favourable order from the Tribunal did not disclose dismissal of their appeal by the High Court in their miscellaneous application. Whatever arguments were made originally have been taken care of by the Tribunal and altogether new plea was taken in miscellaneous application, which has been accepted by the Tribunal and the entire order has been reviewed. The assessee did not explain why new plea taken in MA was not earlier raised before Hon'ble High Court in appeal. The Tribunal in original order held that assessee concealed the particulars of income and explanation-I to section 271(1)(c) applies, then where was need to reconsider the question of whether assessee concealed the particulars of income or furnished

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inaccurate particulars of income as submitted by assessee in his Misc. application.

12. Fraud would mean wrongful or criminal deception intended to result in financial or personal gains. Fraud was committed by the assessee and material facts were deliberately suppressed by him with his counsel Shri K.G. Agarwal, C.A. The assessee and his Chartered Accountant were aware of the fact that High Court has dismissed the appeal of the assessee and the order of the Tribunal is confirmed and reached finality. Therefore, deliberately attention of the Tribunal was not invited to the order of the High court clearly revealed that there was total fraud on the part of the assessee and his Chartered Accountant and to some extent even the AO and CIT, Agra would be responsible for the fraud played with the Tribunal in the facts and circumstances of the case. If the assessee and his C.A. would have disclosed the decision of High Court dismissing the appeal of the assessee, perhaps the Tribunal would not have recalled the entire order and would not have allowed the appeal of the assessee contrary to the earlier order passed on 27.04.2007 and confirmed by the High Court. By dismissing the appeal of the assessee, Hon'ble Allahabad High Court confirmed the correctness of the order of the Tribunal, but the assessee and their counsel deliberately impressed upon the Tribunal in their miscellaneous application that their order is not correct by

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concealing the decision of Hon'ble Allahabad High Court. Such is a glaring example of fraud committed by the assessee and their counsel with the Tribunal and administration of justice. The order obtained by playing fraud on the Tribunal is thus nullity and non est in the eyes of law. It can be challenged by the Revenue legally in the present miscellaneous application. If the present miscellaneous application by the Revenue would not have been moved and correct facts would not have been brought to the knowledge of the Tribunal, the assessee would have financially and personally gained the benefit on dismissal of his criminal prosecution and payment of penalty amount in the matter. It is, therefore, established on record that the assessee and their counsel have obtained the favourable order from the Tribunal by practicing / playing fraud, therefore, the entire order of the Tribunal dated 28.07.2011 is vitiated and such an order cannot be held to be legal, valid or in consonance with law. It is non-existent and non est and cannot be allowed to stand. Even the propriety demands that when the order of the Tribunal dated 27.04.2007 has been confirmed by the Allahabad High Court, the entire order dated 27.04.2007 should not have been recalled vide order dated 28.07.2011 and the appeal of the assessee should not have been allowed taking a totally contrary view on the matter in issue. There is thus mistake apparent from record of Tribunal, same can be rectified by recalling order dated 28.07.2011.

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12.1 The ld. counsel for the assessee contended that the miscellaneous application filed by the Revenue on 03.02.2012 is barred by limitation because it is filed after four years from passing of the original order dated 27.04.2007. The contention of the ld. counsel has no merit and is accordingly rejected. The original order dated 27.04.2007 of the Tribunal was in favour of the Revenue, therefore, there could not have been any mistake in the order of the Tribunal from the point of view of the Revenue Authorities. The ld. counsel for the assessee , however, rightly contended that the order dated 28.07.2011 passed u/s. 254(2) would merge with the original order dated 27.04.2007 u/s. 254(1) of the IT Act, therefore, when the appeal of the assessee has been allowed vide order dated 28.07.2011, this order would be treated as order passed u/s. 254(1) of the IT Act. The Revenue has filed the present miscellaneous application within four years from the date of the order dated 28.07.2011 because the Revenue gets aggrieved after passing the aforesaid order. According to the decision in the case of Dr. S. Panneerselvam (supra) when the order u/s. 254(2) is passed, allowing appeal of assessee, the same would get merged with the original order passed, therefore, the same would amount to an order u/s. 254(1) of the IT Act. The Revenue, therefore, rightly filed present miscellaneous application u/s. 254(2) of the IT Act against the order now passed u/s. 254(1) of the IT Act allowing appeal of

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assessee. The miscellaneous application of the Revenue is, therefore, filed within the period of limitation. The ld. counsel for the assessee also contended that the order of the High Court was also within the knowledge of AO/CIT, Agra prior to filing of miscellaneous application by the assessee. Therefore, they should have disclosed the material fact before the Tribunal. It appears from the facts and circumstances that the order of High Court was available with the AO and ld. CIT, Agra prior to filing of miscellaneous application by the assessee on 24.01.2011. Therefore, it is also equally their duty to bring correct and material facts to the knowledge of the Tribunal in order to arrive at just decision in the matter. The action of the AO and the ld. CIT, Agra in not bringing relevant and material facts to the knowledge of the Tribunal would amount to misleading the Bench and the matter therefore, requires action by CBDT. There is no dispute that the Tribunal has no power to review its earlier order, but the earlier Bench of Tribunal vide order dated 28.07.2011 has already reviewed the entire original order passed on 27.04.2007. Therefore, the Revenue was justified in taking steps in the matter. Principle of res judicata do not apply to the Income-tax proceedings and is also not relevant to the matter in controversy now. The ld. counsel for the assessee cited certain decisions with regard to formulation of substantial question of law etc. On going through the same decisions, copy of which are placed on record, we do not find them to be applicable to the facts and circumstances of the

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case because the core issue before the Tribunal is when the assessee played fraud with the Tribunal, what legal action requires to be taken in the matter. The decision of Hon'ble Supreme Court in the case of A.V. Papayya Sastry (supra) squarely applies to the facts and circumstance of the case in favour of the Revenue and against the assessee.

12.2 Considering the facts and circumstances of the case and discussion above in the light of the decision of Hon'ble Allahabad High Court dated 17.08.2010, and Hon'ble Supreme Court above, we recall the earlier order of the Tribunal dated 28.07.2011 which was obtained by fraud and restore the original order of the Tribunal dated 27.04.2007.

13. We may also note here that the conduct of the assessee and his counsel Shri K.G. Agarwal, C.A. in concealing the relevant and material fact from the Tribunal would amount to professional misconduct on the part of the Chartered Accountant. The Chartered Accountant has not only the duty to defend the case of litigant to the best of his ability, but equally has duty to maintain dignity and decorum of the courts. He has to assist the Bench as per law in arriving at the just decision in the matter. Shri K.G. Agarwal, C.A. consciously and deliberately in the garb of legal advice has concealed and suppressed the relevant and material

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facts from the Tribunal while filing miscellaneous application and arguing the same before the Tribunal. Therefore, his conduct is not above the board and requires action by the President, Institute of Chartered Accountant of India. We, therefore, recommend a disciplinary action against Shri K.G. Agarwal, Chartered Accountant. Copy of this order be forwarded to the President, Institute of Chartered Accountant of India, ICAI Bhawan, Indraprashtha Marg, New Delhi-110 002 for necessary action in this regard. Copy of this order be also forwarded to the Chairman CBDT, New Delhi to take necessary action in the matter. We also direct the ld. CIT-I, Agra to place copy of this order before the Criminal Court where the criminal prosecution of the assessee is pending on the matter in issue for appraisal of the concerned court and ensure implementation of this order.

14. We may also add here that both the ld. DR and the ld. counsel for the assessee now appeared before the Tribunal have assisted the Bench properly in arriving at the just decision in the matter. While defending the case of assessee, the ld. counsel for the assessee has advanced arguments in support of the assessee, but at the same time, the ld. DR, while repudiating the contentions of opposite party, has made successful efforts to invite our attention to several judicial pronouncements and relevant facts for arriving at just decision in the

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matter in issue under consideration. Such an assistance by the ld. DR is worthy of appreciation. We appreciate their valuable suggestions and assistance in the matter, so that fraud with judicial authorities should not be repeated.

15. With the above observations, the miscellaneous application filed by the Revenue is allowed.

Order pronounced in the open court.

Sd/-	Sd/-
(A.L. GEHLOT)	**(BHAVNESH SAINI)**
Accountant Member	Judicial Member

*aks/-
Copy of the order forwarded to :

1. Appellant
2. Respondent
3. CIT(A), concerned
4. CIT, concerned
5. DR, ITAT, Agra
6. Guard file

By order

Sr. Private Secretary

True copy

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