

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "C", MUMBAI
BEFORE SHRI R.C.SHARMA, ACCOUNTANT MEMBER AND
SHRI PAWAN SINGH, JUDICIAL MEMBER
ITA No.7480/Mum/2013
Assessment Year: 2005-06**

Creative Textile Mills Pvt. Ltd., 211, Cama Industrial Estate, Sun Mill Compound, Lower Parel, Mumbai-400013 PAN: AACCC0812F	Vs.	ACIT- Circle 6(2), Aayakar Bhavan, M.K.Road, Mumbai-400020
(Appellant)		(Respondent)

Assessee by Shri Dharmesh Shah
Revenue by : Shri Satyapal Kumar (DR)

Date of hearing : 19.08.2015
Date of Pronouncement : 28.10.2015

ORDER

PER PAWAN SINGH, JM:

1. This appeal is filed by the Assessee against the order of CIT(A)-12 Mumbai dated 01.11.2013 in respect of Assessment Year (AY) 2005-06 on the following grounds of appeal:

1"On the facts and in the circumstances of the case, the present order passed u/s 154 is bad in law, void ab initio and impermissible in the law.

1.1. On the facts and in the circumstances of the case and in law the CIT Appeals legally erred in upholding the Assessing Officer (AO)

for setting-off of the long term capital gain with the business loss determined for the relevant Assessment Year as per the order passed u/s 250 of the Income Tax Act.

2. *The Appellant craves leave to add, to alter or amend the Grounds of Appeal on or before the hearing of this appeal.*

2. Brief facts of the case are that the assessee, who is engaged in the business of Processing, Manufactures and Export of Readymade Garments & Fabric, filed its return of income on 30.10.2005 declaring total loss of Rs. 4,37,23,576/-. The return of assessee was selected for scrutiny and after giving an opportunity of hearing, the assessment order was passed on 31.12.2007 declaring total loss of ₹. 2,29,98,454/-.

3. However, the AO made a rectification of the assessment order u/s 154 of the I.T. Act in its order dated 29.03.2012 on the pretext that computation of loss has not been adjusted against the capital gain and that excess loss has been allowed to the assessee and thus a sum of ₹. 1,82,,65,501/- was added on account of LTCG, against which an appeal was filed before the CIT(A) on the ground, the order u/s 154 was bad in law, void, ab-initio and was impermissible under the law.

4. However, the Id. CIT(A) upheld the order of AO and dismissed the appeal of the assessee in the impugned order dated 24.04.2012 against which the present appeal is filed.

5. We have heard the Authorised Representative (AR) of the assessee as well as Departmental Representative (DR) of the Revenue and perused the material available on record. Id. DR of the Revenue supported the order of authorities below, the Id. AR of the assessee relied upon the judgment reported in 82 ITR 50 (SC) titled as T.S.Balaram, ITO Vs Vokart Brothers & Others wherein it was held *"that mistake apparent from the record must be an obvious and patent mistake and not something which can be established by a long drawn process and of reasoning*

on points on which there may be conceivably two opinions. A decision on a debatable point of law is not a mistake apparent from the record''. The Ld AR further relied upon the cases of CIT vs. Victoria Mills Ltd. [153 ITR 733], CIT vs. British Insulated Calender's Ltd. [202 ITR 354], Addl. Second ITO vs. C.J. Shah [10 ITD 151 (TM) and DCIT vs. Shri Harshavardan Himatsingka [ITA No. 1333 to 1335/Kol/2012] (Bom. High Court).

6. In DCIT (Kol.) vs. Harshavardan Himatsingka , it was held that the order passed by the AO u/s 154 of the Act adjusting the business loss against capital gain in terms of provisions of section 71(1) of the Act, wherein assessee is entitled to carry forward the business loss without adjusting the same from capital gain or the same is mandatory required to be adjusted. It was further held by co-ordinate bench that this aspect of provision of section 71(1) of the Act is also a subject matter of dispute and there are case law both in favour and against the said proposition as convased. Hence issue is debatable cannot be said that there was a mistake apparent on record which could be rectified u/s 154 of the Act, hence the order passed by AO u/s 154 of the Act is not sustainable.

7. We respectfully following the judgment of co-ordinate bench, we hold that the order passed by the AO, which was affirmed by the CIT(A) which is not sustainable under the law as there was apparent error on the face of order passed by AO on 31.12.2007.

8. We have further seen that in the regular assessment, certain disallowance/additions were made by the AO which was deleted by Id. CIT(A) in further appeal and the appeal filed by the department against the order of CIT(A)

has also been dismissed by the Tribunal and the case had already travelled up to the ITAT till then no such interference was drawn at the time of regular assessment or during the appellate stage.

9. In view of the above, we hold that the order passed by the AO u/s 154 which was subsequently upheld by CIT(A) is void, ab-initio and the same is liable to be set-aside and is not permissible under the law.

10. In the above, discussion, the appeal filed by the assessee is accepted.

As a result, appeal filed by the Assessee is allowed.

Order pronounced in the open court on this day 28th of October, 2015.

Sd/-

(R.C.SHARMA)

ACCOUNTANT MEMBER

Sd/-

(PAWAN SINGH)

JUDICIAL MEMBER

Mumbai, Dated: 28.10.2015

Sharwan P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT(A) Concerned, Mumbai
The DR "C" Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.