

**IN THE INCOME TAX APPELLATE TRIBUNAL 'D' BENCH, MUMBAI
BEFORE SHRI B.R BASKARAN, AM AND SHRI RAVISH SOOD, JM**

आयकर अपील सं./ I.T.A. No.616/Mum/2015
(निर्धारण वर्ष / Assessment Year: 2007-08)

DCIT 4(1)(1), R.No. 640, 6 th Floor, Aaykar Bhawan, M.K Road, Mumbai – 400 020.	बनाम/ Vs.	Dalal Barocha Stock Broking P. Ltd. 506, Maker Chambers, V 221 Nariman Point, Mumbai – 400 021.
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(अपीलार्थी / Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by	:	Shri Purshottam Kumar
प्रत्यर्थी की ओर से / Respondent by	:	Shri. Vijay Mehta

सुनवाई की तारीख / Date of Hearing	:	10/01/2017
घोषणा की तारीख / Date of Pronouncement	:	07/04/2017

आदेश / O R D E R

PER RAVISH SOOD, JM:

The present appeal is directed against the order passed by the CIT(A)-10, Mumbai, dated 29.10.2014, therein rejecting the application of the revenue seeking rectification of the appellate order dated. 23.11.2010 passed by his predecessor u/s 250(6) of the Income-tax act, 1961 (for short 'Act'). The revenue assailing the refusal on the part of the CIT(A) to carry out the rectification, had raised the following grounds of appeal before us:-

1. *“On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in rejecting the A.O’s request for rectifying the earlier order passed by the Ld. CIT(A) in spite of the fact that subsequently in a judgment of the Special bench of the Hon’ble Mumbai Tribunal in the assessee’s own case for A.Y. 2006-07 (ITA No. 5792/M/2009), the Tribunal had held that the commission paid to the directors are not allowable u/s 36(1)(ii) of the Act.”*

2. *“The appellant craves leave to amend or alter any ground or add a new ground which may be necessary.”*

2. Briefly stated, the facts of the case are that the A.O while framing assessment vide order dated. 19.11.2009 had disallowed u/s 36(1)(ii) the commission paid by the assessee company to its directors, and after making a consequential addition of Rs. 1,50,00,000/- on the said count had assessed its income at Rs. 11,60,50,240/-. That on appeal the CIT(A)-10, Mumbai, vide his order dated. 23.11.2010, taking cognizance of the fact that the Tribunal while disposing of the appeals of the assessee for A.Y.2004-05 and A.Y.2005-06 had concluded that the commission paid by the assessee company to its directors was allowable as a deduction and the provisions of Sec. 36(1)(ii) were not attracted, thus adopting the said view of the Tribunal deleted the disallowance of Rs. 1,50,00,000/-(supra) made by the A.O during the year under consideration and allowed the appeal of the assessee.

3. That subsequently the **‘Special bench’** of the **ITAT, Mumbai**, which was seized of the appeal of the assessee for A.Y. 2006-07, therein vide its order dated. 22.06.2011 in ITA No. 5792/M/2009, reported as : **Dalal Bracha Stock Broking (P) Ltd. Vs. Addl. CIT (2011) 131 ITD 0036 (Mum)(SB)**, being of the view that the payment of commission by the assessee company to its directors was not allowable as deduction u/s 36(1)(ii) or Sec. 37(1), dismissed the appeal of the assessee.

4. That pursuant to the aforesaid order of the ‘Special bench’ of the Tribunal in the case of the assessee for A.Y. 2006-07, the A.O being of the view that the order of the CIT(A), dated. 23.11.2010, passed in the case of the assessee for the year under consideration, viz. A.Y. 2007-08, was inconsistent with the order passed by the ‘Special bench’ of the Tribunal in the assessee's own case for A.Y. 2006-07, therein sought a rectification of the same by filing an application dated. 29.05.2012 with the CIT(A). The CIT(A) after deliberating on the objections raised by the assessee, rejected the application for rectification filed by the revenue.

5. The revenue being aggrieved with the order of the CIT(A) had thus carried the matter in appeal before us. That during the course of hearing of the appeal the Ld. Authorized representative (for short ‘A.R’) for the assessee strongly supported the order of the CIT(A) and therein averred that the application filed by the revenue seeking rectification of the order passed by the CIT(A) was rightly rejected in the backdrop of the facts of the case read in light of the scope of the powers as stood vested with the CIT(A) u/s 154 of the ‘Act’. The Ld. A.R in order to drive home his

aforesaid contention, therein relied on the order passed by a coordinate bench of the **ITAT, Mumbai bench “C”, Mumbai** in the case of : **M/s Prolific Consultancy Services Pvt. Ltd. Vs. ITO, Ward 8(2)(4), Mumbai (M.A No. 81-86/M/2016; dated. 19.09.2016)** and **ITAT , Bench “A”, Kolkata** in the case of : **Global Venture Corporation, Kolkata Vs. DCIT, Circle-49, Kolkata (M.A No. 55/Kol/2012; dated. 01.06.2012)**, wherein though the ITAT, Mumbai in the case of : M/s Prolific Consultancy Services Pvt. Ltd. (supra) had held that a subsequent finding arrived by a coordinate bench of the Tribunal in a subsequent decision cannot be held to be a reason enough to hold that there was any mistake in the earlier order of a different bench of the Tribunal taking a different view, while for the ITAT, Kolkata had arrived at a similar finding in the backdrop of a subsequent order of a ‘Special bench’ of the Tribunal. The Ld. A.R taking support of the aforesaid orders of the coordinate benches of the Tribunal therein submitted that a subsequent order of the ‘Special bench’ of the Tribunal cannot be a basis for conferring jurisdiction with the CIT(A) to rectify an order which was passed by him prior to the order of the ‘Special bench’ of the Tribunal. Per contra, the Ld. D.R relied on the CBDT Circular No. 68 of 1971, and submitted that the CIT(A) had erred in law by rejecting the application filed by the A.O seeking rectification of the order passed by his predecessor, as a result whereof the order of the CIT(A) was rendered inconsistent with the order passed by the ‘Special bench’ of the Tribunal in the assesses own case for A.Y. 2006-07.

6. We have heard the authorized representatives of both the parties, perused the orders of the lower authorities and the material placed on our record. We have given a thoughtful consideration to the facts of the case and find that the CIT(A) had allowed the appeal of the assessee for A.Y. 2007-08, vide his order dated. 23.11.2010, by following the earlier orders of the Tribunal in the case of the assessee for A.Y. 2004-05 and A.Y. 2005-06, in ITA No. 2461/Mum/2008 and ITA No. 7194/Mum/2008, respectively, dated. 31.03.2010. The order of the 'Special bench' of the Tribunal in case of the assessee for A.Y. 2006-07 was delivered on 22.06.2011, i.e much subsequent to the order passed by the CIT(A) in the case of the assessee for the year under consideration, viz. A.Y. 2007-08. Thus to be brief and explicit, the order of the 'Special bench' of the Tribunal was not available at the time when the CIT(A) had passed his order for the year under consideration, viz. A.Y. 2007-08. We in the present case have been called upon to adjudicate as to whether the order which was passed by the CIT(A) in the case of the assessee for A.Y. 2007-08 by following the earlier orders passed by the Tribunal in the case of the assessee for A.Y. 2004-05 and A.Y. 2005-06, could be held to be suffering from a 'mistake' apparent from record on the basis of a contrary view taken in the subsequent order passed by the 'Special bench' of the Tribunal in the case of the assessee for A.Y. 2006-07?. We have given a thoughtful consideration to the issue under consideration and are of the considered view that no infirmity can be related with the order of the CIT(A) rejecting the rectification application of the revenue, for the reason that the order passed by the 'Special

bench' of the Tribunal in the case of the assessee for A.Y. 2006-07 was not in existence at the time when the order in the case of the assessee for the year under consideration, viz. A.Y. 2007-08 was passed by his predecessor. We though are not oblivious of the settled position of law that an order of the 'Special bench' of the Tribunal as per judicial discipline would have precedence as against an order passed by a 'division bench' of the Tribunal, and if the same would had been there before the CIT(A) on the date of passing of the order, but had remained omitted to be considered by him, then the same would have clearly been a 'mistake' apparent from record, therein rendering his order amenable for rectification. We however find that the revenue though being well aware of the fact that the order of the 'Special bench' of the Tribunal in the case of the assessee for A.Y. 2006-07 was not available at the time when the CIT(A) had passed the order for the year under consideration, viz. A.Y. 2007-08 by following the order passed by the Tribunal in the case of the assessee for A.Y. 2004-05 and A.Y. 2005-06, is however trying to impress upon us that the subsequent order of the 'Special bench' of the Tribunal taking a contrary view, would suffice to characterize the order of the CIT(A) for the year under consideration, viz. A.Y. 2007-08, as suffering from a 'mistake' apparent from record, and as such would render it amenable for rectification u/s 154 of the 'Act'. We are afraid that such a view which is canvassed by the Ld. D.R before us cannot be accepted. We are of the considered view that an income-tax authority while exercising its rectification powers u/s 154 of the 'Act' is statutorily bound to confine itself to mistakes which are glaring, patent, obvious and apparent from

record. Thus any 'mistake' which emerges by referring to or taking support of an extraneous material not forming part of the 'record', or involving a debatable issue involving a long drawn process of reasoning, cannot confer jurisdiction with the income-tax authority to exercise his powers u/s 154. We further are of the considered view that the reliance placed by the Ld. D.R on CBDT Circular No.68, dated.17.11.1971, is absolutely misconceived, as the same only provides that where as a result of a subsequent interpretation of law by the **Hon'ble Supreme court**, an order passed prior thereto is found to be inconsistent, then the same would tantamount to a mistake apparent from record, which would be amenable for rectification under section 35/154 of the 1922 Act/1961 Act. We fail to understand as to from where a similar analogy is being drawn by the Ld. D.R in his attempt to facilitate vesting of a similar power of rectification with an income-tax authority, by bringing in parity a subsequent order passed by a 'Special bench' of the Tribunal, as against a judgment of the Hon'ble Supreme Court. That though there is no doubt that proceedings for rectification of an order can be initiated on the basis of a subsequent order of the jurisdictional High Court or the Hon'ble Supreme Court, which view of ours stands fortified by the judgment of a '**Full bench**' of the **Hon'ble High Court of Punjab & Haryana** in the case of **CIT Vs. Smt. Aruna Luthra. (2001) 252 ITR 0076 (P&H)(FB)**, wherein the Hon'ble High Court observing that proceedings for rectification of an order can be initiated on the basis of an order passed by the **jurisdictional High Court** or **Hon'ble Supreme Court** subsequent to the order passed by an authority under the 'Act', had held as under:-

"8. There is another aspect of the matter. In a given case, on interpretation of a provision, an authority can take a view in favour of one of the parties. Subsequent to the order, the jurisdictional High Court or their Lordships of the Supreme Court interpret the same provision and take a contrary view. The apparent effect of the judgment interpreting the provision is that the view taken by the authority is rendered erroneous. It is not in conformity with the provision of the statute. Thus, there is a mistake. Should it still be perpetuated ? If the contention raised on behalf of the assessee were accepted, the result would be that even though the order of the authority is contrary to the law declared by the highest Court in the state or the country, still the mistake couldn't be rectified for the reason that the decision is subsequent to the date of the order."

We are of the considered view that the revenue by filing the application seeking rectification of the order of the CIT(A), had made a futile attempt to undo the lapse on its part in not assailing the said order of the CIT(A) before the Tribunal. That our aforesaid view is further fortified from the very fact that we have been informed by the Ld. A.R that the revenue had even exhausted its efforts for seeking rectification of the orders passed by the Tribunal in the case of the assessee for A.Y. 2004-05 by filing a miscellaneous applications u/s 254(2), which however had been rejected. We strongly feel that such back door entry attempted by the revenue by filing the present application for rectification, instead of approaching the proper forum, needs to be deprecated.

7. We thus, in light of our aforesaid observations are of the considered view that the CIT(A) had rightly rejected the application of the revenue seeking rectification of the order passed by his predecessor, for the reason that the contrary view which was arrived at by the 'Special bench' of the Tribunal in the case of the assessee for another year, viz. A.Y. 2006-07, was not in existence at the time when the order was passed by the CIT(A). The Ld. D.R had neither drawn our attention to any such mandate of law which requires rectification of a mistake on the basis of a subsequent order of a Tribunal, nor had placed on record any judicial pronouncement to support his aforesaid contention. We thus in the backdrop of the factual matrix read in light of the settled position of law, therein finding no reason to take a view different from that arrived at by the CIT(A) on the basis of a well reasoned order, coupled with the fact that a similar view on the said issue has been arrived at by coordinate benches of the Tribunal, i.e ITAT, Mumbai bench "C", Mumbai in the case of M/s Prolific Consultancy Services Pvt. Ltd.(supra) and ITAT, Bench "A", Kolkata in the case of Global Venture Corporation, Kolkata (supra), are thus persuaded to subscribe to the view taken by the CIT(A), and therefore uphold the order passed by him.

8. Resultantly, the appeal filed by the revenue is dismissed.

Order pronounced in the open court on 07.04.2017

Sd/-

(B.R Baskaran)

Sd/-

(Ravish Sood)

लेखासदस्य / Accountant Member न्यायिकसदस्य / Judicial Member

मुंबई Mumbai; दिनांक Dated :07.04.2017

PS Rohit Kumar

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि,आयकरअपीलीयअधिकरण, मुंबई/ D.R, ITAT, Mumbai
6. गार्डफाईल/ Guard File

आदेशानुसार/BY

ORDER, उप/सहायकपंजीकार

(Dy./Asstt. Registrar)

आयकरअपीलीय अधिकरण, मुंबई/

ITAT, Mumbai

