IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD ñCòBENCH

Before: Shri Rajpal Yadav, Judicial Member
And Shri Amarjit Singh, Accountant Member

ITA No. 2915/Ahd/2015
Assessment Year 2009-10

Urmil D. Patel, C-19, Meeraj Apartment, B/h Natubhai Centre, Gotri Road, Baroda-390007 PAN: ACQPP6563K (Appellant)	Vs	The ITO, Ward-2(6), Baroda-390007 (Respondent)

Revenue by: Shri Lalit P. Jain, Sr. D.R.
Assessee by: Shri T.P. Hemani, A.R.

Date of hearing : 17-10-2018
Date of pronouncement : 30-10-2018

आदेश/ORDER

PER : AMARJIT SINGH, ACCOUNTANT MEMBER:-

This assesseeôs appeal for A.Y. 2009-10, arises from order of the CIT(A)-5, Vadodara dated 22-07-2015, in proceedings under section 154 of the Income Tax Act, 1961; in short ñthe Actò

2. The assessee has raised following grounds of appeal:-

"1.00 Indexed Cost of Acquisition taken at Rs.14,55,000/- as against Rs.25,02,600/- as prayed by appellant.
1.01 On the facts and circumstances of your appellant's case and in law, the Id CIT (A) has resorted to a very technical adjudication for confirming action of Id AO of rejection of claim of appellant for arriving at "Correct Income" by considering Indexed Cost of Acquisition to be Rs.14,50,000/- as against Rs.25,02,600/- as prayed.
1.02 Your appellant therefore prays that appellant should be taxed on "Correct Income" as against "Returned Income".

3. Both the grounds of appeal are inter-connected to the common issue, therefore, the same are adjudicated together.

4. In this case, assessee has filed rectification application u/s. 154 of the act before the assessing officer dated 7th July, 2012 pointing out that during the year under consideration he has earned income in the form of long term gain from share in sale of land to the tune of Rs. 12,11,666/-, however, while working out long term capital gain from sale of land, indexation in respect of the cost of acquisition was taken from the financial year 1990-91 as against correct cost of indexation is to be taken as of 01.04.1981. It was also submitted that the sold property was jointly owned by assessee along with other two other persons Sh.Mukund R. Patel and Satish R.Patel. Regarding cost of acquisition, he has stated that the said property was purchased before 1st April, 1981,therefore, the cost of indexation is to be taken as on 01-04-1981. The assessing officer has rejected the rectification application stating that as per provision of section 139(5) of the I.T. Act if any person having furnished a return u/s. 139(1) and discovered any wrong submission therein he may furnish a revised return at any time or before the expiry of one year or the end of the relevant assessment year or before the completion of the assessment whichever is earlier. As the assessee has not submitted any revised return u/s. 139(5) of the act which has been processed u/s. 143(1) and no mistake has occurred while processing the return of income, therefore, the application of the assessee was rejected on the ground that no mistake is apparent from the record.

5. Aggrieved assessee filed appeal before the ld. CIT(A). The ld. CIT(A) has dismissed the appeal of the assessee. The relevant part of the decision of ld. CIT(A) is reproduced as under:-

> *"5.3 I have considered the facts and the circumstances of the case, the observations of the Assessing Officer, material available on the record and the judicial pronouncements on the subject. In this case, the sole issue for decision his application u/s is whether appellant's request in his application u/s. 154 of the Act, to adopt the date of acquisition of the transferred asset as 01.04.1981 for computation of Capital Gains, instead of 27.01.1990, as declared in the Return of Income, constitutes "Mistake apparent from the Records" and whether the same could have been rectified, considering that the original*

order was made u/s 143(1) and not u/s 143(3) of the Act, as the scope of intimation u/s 143(1) is severely limited. It is a fact not disputed by the appellant that he filed a voluntary Return of Income u/s 139(1) on 07.09.2009, declaring Total Income of Rs.31,20,290/-. In the said Return of Income, the assessee had taken the date of acquisition as 27.01.1990 (i.e. the date of inheritance of the asset by the assessee) and accordingly, indexed cost of acquisition was calculated at Rs.14,45,500/-. The said Return was processed u/s 143(1) of the Act, at the returned income itself. Later on, the appellant filed an application u/s 154 dated 07.01.2012, requesting the Assessing Officer to adopt date of acquisition of the asset in the hands of the assessee as 01.04.1981 i.e. the date on which the asset was acquired by the previous owner, from whom the same was inherited by the appellant. Appellant's application u/s 154 of the Act was rejected by the Assessing Officer vide his order dated 28.03.2014. While rejecting appellant's application u/s 154, the Assessing Officer held as under-

> ***"2. Your application has been considered carefully. As per provisions of section 139(5) of the IT Act, 1961, if any person, having furnished a return u/s. 139(1) or in response of notice u/s. 142(1), discovers any omission or any wrong statement therein, he may furnish a revised return at any time before the expiry of one year from the end of the relevant assessment year or before the completion of the assessment whichever is earlier. 3. You have not submitted any revised return u/s. 139(5) of the IT Act You have filed your return of income u/s. 139(1) of the Act for the AY 2009-10, which has been processed at income disclosed by you in the return. Hence, no mistake has occurred while processing the return u/s. 143(1) of the IT Act***
>
> ***4. Thus, your claim that mistake occurred and the mistake is apparent from the record."***

5.4 It is clear from the records that the'assessee had failed to file a Revised Return u/s 139(5) of the Act to correct any omission or wrong statement in his Return u/s 139(1) of the Act. It is also not disputed that the Return filed u/s 139(1) was processed u/s 143(1) at the Income Returned by the assessee. Therefore, there was no mistake apparent from the Records, as the details furnished by the assessee in his Return of Income were accepted by the Assessing Officer. Even otherwise, the Assessing Officer could not have made any adjustment u/s 143(1), as the scope of processing u/s 143(1) is very limited and questions of fact or law cannot be taken up in the processing u/s 143(1). Therefore, the Assessing Officer could not have changed the date of acquisition to 01.04.1981, once the Return of Income declares the date of acquisition as 27.01.1990, in his order u/s 143(1). What the Assessing Officer could not do directly, he could not have done indirectly through a rectification order u/s 154 of the Act. It is clear that the assessee had filed his Return of Income u/s 139(1) and the same was processed u/s 143(1) at the income disclosed by the appellant in the Return of Income, therefore, there was no "mistake apparent from the record".

***5.5** As held by Gentle CJ and Yahya Ali, J., in **CIT vs O. RM. M. SM. SV. Sevugan [(1948) 16 ITR 59 (Mad)],** "Section 35 «* 1922 Act, corresponding to section 154 of the 1961 Act) has limited application.... Clearly that section.... Permits only some error, which is apparent on the face of the record, to be corrected." Hon'ble Supreme Court in the case of **Satyanarayan Laxminarayan Hegde vs Mailikarjun Bhavanappa Tirumale [AIR 1960 SC 137]** held that where the*

error is far from self-evident, it ceases to be an apparent error. In this case, the error was not self evident and was not apparent on the face of the record. The claim was never made in the Return of Income filed by the assessee u/s 139(1) of the Act. The Return was processed u/s 143(1) and the returned income was accepted by the Assessing Officer. In such a situation, it cannot be said that there was mistake apparent from the record. Even otherwise, the change in the date of acquisition of the assets could not have been effected in order u/s 143(1), as such kind of adjustments are beyond the purview of the provisions of section 143(1). What cannot be done u/s 143(1) of the Act, cannot be

done u/s 154 of the Act, by rectifying the above referred order u/s 143(1). Therefore, appellant's contentions in this regard cannot be accepted.

5.6 *All the decisions cited by the appellant refer to cases where the original orders were passed u/s 143(3) of the Act and not u/s 143(1) and therefore, are not applicable or relevant to the facts of the present case. The provisions of section 143(1) allow a very limited scope for adjustment of assessee's income, whereas, the provisions of section 143(3) have wide import and all the legal claims can be allowed under these provisions. The original order which was sought to be rectified in this case, was passed u/s 143(1) of the Act and not u/s 143(3) of the Act and therefore, the scope of adjustment was extremely limited. The date of acquisition could not have been adjusted in the order u/s 143(1) and if it cannot be done u/s 143(1), it cannot be allowed to be done u/s 154 of the Act. In view of above discussion, appellant's pleas in this regard are rejected and the order of Assessing Officer u/s 154 of the Act, rejecting assessee's application of rectification, is upheld. The assessee fails on this ground of appeal."*

6. During the course of appellate proceedings before us, the ld. counsel has submitted paper book containing detail of submission made before the assessing officer and CIT(A) at the time of assessment and appellate proceedings. He has also contended that the land in dispute was inherited by the assessee on 27th Jan, 1990 upon the death of his father and the said property was acquired by his father before 01.04.1981, therefore indexation is to be considered from financial year 1981 to 82. He has also placed reliance on the decision of Delhi ITAT in the case of Devindra Prakesh Kalra vs. ACIT (2005) 97 TTJ 372 (Delhi). He has also referred decision of Co-ordinate Bench of the ITAT Ahmedabad in the case of Zen Tobacco (P) Ltd. vs. ACIT (2016) 65 taxmann.com 320 (Ahmedabad-Trib). He also submitted that assessee was a co-owner along with Satish K. Patel and Mukund R. Patel and in their cases benefit of indexation was provided by taking the indexation as on 01.04.1981. On the other hand, ld. departmental representative has supported the order of CIT(A).

7. We have heard both the sides and perused the material on record carefully. It is noticed that during the year under consideration the assessee has filed return of income declaring total income to the tune of Rs. 31,20,290/- including 1/3 shares towards sale of land on which capital gain was worked out. The sold property was originally belonged to Rambhai D. Patel, father of the assessee which was acquired by him before 1st April, 1981 pursuant to his

death on 18th July, 1990, the property was inherited by the assessee along with other two persons Shri Satish R. Patel and Mukund R. Patel. At the time of filing of return of income, the cost of indexation was taken from financial year 1990-91 the year in which the property was inherited by the assessee as against the financial year 1981-82 in which the property was owned by the father of the assessee. Therefore, the assessee has requested the assessing officer to re-work long term capital gain by taking cost of indexation from financial year 1981-82. The assessing officer has rejected the application u/s. 154 of the act stating that there is no apparent mistake from the record and further the assessee has not filed any the revised return u/s. 139(5) of the act.

It is noticed that in respect of regular assessment in respect of two other co-owners Shri Satish R. Patel and Mukund R. Patel the assessing officer has not re-worked the capital gain, however, during the appellate proceedings the ld. CIT(A) has allowed the revised claim of capital gain by taking the cost of indexation as of 01.04.1981.

As per section 49 of the act, the cost of indexation is to be applied for calculation of long term capital gain shall be in the year in which the asset is held by the assessee. It is undisputed fact that in the case of the assessee the property was owned and held by the original owner the father of the assessee before 01.04.1981. We have also perused the decision of Co-ordinate Bench in the case of Zen Tobacco Pvt. Ltd. Vs. ACIT (2016) 65 taxmann.com 320 (Ahmedabad-Trib) wherein the assessee has filed its revised return of income which was processed u/s. 143(1) and it was held that assessing officer should have rectify such intimation and allow assessee's claim. Relevant part of the decision of Co-Ordinate Bench is reproduced as under:-

> *"5.1. We have given our thoughtful consideration to the rival contentions raised at Bar by the respective representatives of the parties. The issue to be decided is that whether the mistake on the part of the AO in the return so filed can be rectified by invoking the provisions of section 154 of the Act. At this stage, it would be appropriate to examine the relevant provisions relating to filing of the return and process of the same.*
>
> *5.2. As per Section 139(1) of the Act, return is required to be filed by every person, (a) being a company (or a firm) or; (b) being a person other than a company (or a firm), if his*

total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax. Shall, on or before the due date, furnish a return of his income or the income of such other person during the ITA No.2100/Ahd/2011 Zen Tobacco Pvt.Ltd. vs. ACIT Asst.Year - 2007-08 previous year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed.

5.3. As per Section 139(5) of Act, If any person, having furnished a return under sub-section (1), or in pursuance of a notice issued under sub-section (1) of section 142, discovers any omission or any wrong statement therein, he may furnish a revised return at any time before the expiry of one year from the end of the relevant assessment year or before the completion of the assessment, whichever is earlier. The return so filed is required to be processed as per section 143(1) which reads as under:-

> *"Where a return has been made under section 139, or in response to a notice under sub-section (1) of section 142, such return shall be processed in the following manner, namely:--*
> *(a) the total income or loss shall be computed after making the following adjustments, namely:--*
> *(i) any arithmetical error in the return; or*
> *(ii) an incorrect claim, if such incorrect claim is apparent from any information in the return."*

5.4. As per section 143(1)(b), the tax and interest, if any, shall be computed on the basis of the total income computed under clause (a) and the income under clause (a) is required to be computed after making the adjustment, namely:- (i) any arithmetical error in the return; or (ii)an incorrect claim, if such incorrect claim is apparent from any information in the return.

5.5. From the provisions, it is evident that it is not the case that Revenue Authorities have to accept whatever stated in the return and compute the taxable income mechanically. As per provisions of section 143(1) of the Act, the concerned Revenue Authority has to examine whether any claim as made by the assessee is correct or not. In our considered view, this includes under statement and overstatement of the income. If the Revenue Authority failed to take note of any incorrect claim with regard to total income of the assessee, such failure would necessarily mean mistake apparent from the record. The Revenue has relied upon the judgement of the Hon'ble High Court of Kerala rendered in the case of M.Far Hotels Ltd. vs. CIT (supra), the facts of the present case are different from the facts of the case before the Hon'ble High Court of Kerala. The ld.counsel for the assessee has relied upon the judgement of Hon'ble High Court of Delhi rendered in the case of Pawan Kumar Aggarwal vs. CIT(supra), wherein the Hon'ble High Court has held as under:-

> *"6 Section 154 to the extent it is relevant is extracted below: -*
> *"Rectification of mistake,*
> *154. [(l) With a view to rectifying any mistake apparent from the record an income-tax authority referred to in section 116 may, -*
> *(a) amend any order passed by it under the provisions of this Act; [(b) amend any intimation or deemed intimation under subsection (l) of section 143.]] [(IA) Where any matter has been considered and decided in any proceeding by -way of appeal or revision relating to an order referred to ITA No.2100/Ahd/2011 Zen Tobacco Pvt.Ltd. vs. ACIT Asst.Year - 2007-08 in sub-section (1), the authority passing such order may, notwithstanding anything contained in any law for the*

> *time being in force, amend the order under that sub-section in relation to any matter other than the matter which has been so considered and decided.] (2) Subject to the other provisions of this section, the authority concerned--*
> *(a) may make an amendment under sub-section (1) of its own motion, and*
> *(b) shall make such amendment for rectifying any such mistake which has been brought to its notice by the assessee, and where the authority concerned is the [***] [Commissioner (Appeals)], by the [Assessing] Officer also. "*
> *It is apparent from the bare reading of the above provision that the power of rectification extends to amendment of an intimation or deemed intimation under Section 143. This power enures even after 'the matter' has been considered and decided in any proceeding by way of appeal or revision. Necessarily, this power extends even at the stage of the appeal and the further appeal to the ITAT. Even after such decision, it is open to the AO to amend the intimation under Section 143 (1) if the circumstances so warrant. We are wholly in agreement with the decision in Sam Global 's matter (supra) that the technicalities in the given circumstances of the case ought not to obscure the justice. The justice demands, in the peculiar facts of the case, that there is no impediment to relief. That appears to have been overlooked in entirety by the lower authorities and the Tribunal had failed to notice that the controlling expression in Section 154 is not "an error" which is somewhat coloured by the exercise of power by the authorities. Instead, the controlling expression is "any mistake" which has wider connotation and includes mistakes committed by the parties also."*

5.6. The ld.counsel for the assessee has also placed reliance on the decision of the Coordinate Bench (ITAT Kolkat Bench 'B') rendered in the case of Dy.CIT vs. Justic Dilip Kumar Seth reported at (2006) 98 ITD ITA No.2100/Ahd/2011 Zen Tobacco Pvt.Ltd. vs. ACIT Asst.Year - 2007-08 241 (Kol.), wherein the Hon'ble Coordinate Bench following the judgement of the Hon'ble Calcutta High Court in the case of CIT vs. Premier Polymers (P.) Ltd. reported at (1992) 107 CTR 310 and also the judgement of Hon'ble Supreme Court in the case of CIT vs. D.P.Sandhu Bros., Chembur (P.Ltd. reported at (2005) 273 ITR 1::142 Taxman 713 (SC), has decided this issue by observing as under:-

> *"19. In view of the above facts and circumstances and considering the decision by the Hon'ble Supreme Court and Calcutta High Court, it is apparently clear that the above amount received by the assessee prior to his elevation could not be taxed and, therefore, the assessee has rightly moved a petition under section 154 to rectify the intimation sent by Assessing Officer, and the Assessing Officer was well-competent to rectify such intimation in view of the provision as laid down in sections 143(1)(ii) and 154(2)(b) of the Act and in view of the decision by the Hon'ble Calcutta High Court in case of Bhaskar Mitter (supra) and in ease of Premier Polymers (P.) Ltd. (supra). We, therefore, in the light of above discussion, are of the considered opinion that the ld. CIT(A) while deciding the above two issues has passed a well reasoned and speaking order which does not call for any interference from our side. We, therefore, uphold the same and reject the grounds raised by the revenue."*
> *20. In the result, the appeal filed by the revenue is dismissed."*

5.7. Therefore, respectfully following the judgement of the Hon'ble Delhi High Court and the decision of the Coordinate Bench, we hereby set aside the order of the ld.CIT(A) and direct the AO to allow the application of the assessee made u/s.154 of the Act and grant refund amount of Rs.1,88,580/-. Thus, this ground of assessee's appeal is allowed."

8. We have also considered the decision of the ITAT Delhi in the case of Devindra Prakash Kalra (2006) 151 Taxman 17 (Delhi) wherein it is held that it is mandatory for the assessing officer to grant benefit irrespective of whether benefit is claimed in the original return or by application u/s. 154 of the act.

After considering the above facts, judicial findings and the decision of the coordinate bench we direct the assessing officer to allow the rectification application of the assessee after verification of material on record and after affording adequate opportunity to the assessee. Accordingly the appeal of the assessee is allowed for statistical purposes.

9. In the result, the appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open court on 30-10-2018

Sd/-	**Sd/-**
(RAJPAL YADAV)	**(AMARJIT SINGH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Ahmedabad : Dated 30/10/2018

आदेश क□□तिलिप अ□ेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलय आ□धकरण,
अहमदाबाद