IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'F' NEW DELHI

BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
&
SHRI K.NARASIMHA CHARY, JUDICIAL MEMBER

ITA No.1252/Del/2016
Assessment Year: 2010-11

Asstt. Comr. of Income-tax (E), Circle 1(1), New Delhi.	vs	M/s Association of Road Transport Undertaking, Plot No.4A, PSP Block, Pkt. 14, Sector-8, Dwarka, New Delhi. PAN: AAAAA0233A

ITA No.1724/Del/2016
Assessment Year: 2010-11

M/s Association of Road Transport Undertaking, Plot No.4A, PSP Block, Pkt. 14, Sector-8, Dwarka, New Delhi PAN: AAAAA0233A	vs.	ADIT (E), Circle 1(1), New Delhi. .
(Appellant)		(Respondent)

Assessee by: Shri Tarandeep Singh
Revenue by: Shri Surender Pal, Sr. DR
Date of hearing: 26.11.2018
Date of Pronouncement: 29.11.2018

ORDER

PER K. NARASIMHA CHARY, JM

ITA No.1252/Del/2016 is preferred by the revenue challenging the order of the Commissioner of Income-tax (Appeals)- 40, New

Delhi and ITA No.1724/Del/2016 is preferred by the assessee challenging the order of the Commissioner of Income-tax(Appeals)-21, New Delhi {in short "CIT(A)}".

2. Brief facts of the case are that the assessee is a society registered for coordinating of all nationalized state road Transport Corporation and working under the aegis Ministry of Road Transport and Highways. It was registered u/s 12AA of the Income-tax Act, 1961 ("the Act") by order dated 27.4.1982 and subsequently u/s 10(23C)(vi) vide notification dated 31.10.2007 valid for the Asstt. Year 2007-08 and onwards.

3. For the Asstt. Year 2010-11, they have filed their return of income on 31.3.2011 declaring nil income. During scrutiny, learned AO observed that in respect of one unit of the assessee, viz., Central Institute of Road Transport, Pune ("CIRT"), the assessee incurred an expenditure of Rs.13,81,48,083/- and there is surplus of Rs.63,15,344/-. Learned AO sought the explanation of the assessee on the aspect of the applicability of the amended proviso to Section 2(15) and after hearing the assessee reached a conclusion that the assessee fails to qualify as an organization for charitable purpose and also as a mutual association and, therefore, by invoking proviso to Section 2(15) of the Act, he computed the total income of the assessee by making addition of Rs.63,15,344/-.

4. Aggrieved by the addition of Rs.63,15,344/-, assessee preferred an appeal before the learned CIT(A) in ITA No.1724/Del/2016. When

such appeal was pending, learned AO issued notice dated 27.6.2014 u/s 154 of the Act seeking to rectify the mistake by taxing the surplus of the CIRT unit of the assessee instead of the entire surplus all the units. It was contended by the assessee before the learned AO that while passing the assessment order, the learned AO considered the entire activities of the assessee and the applicability of the proviso to Section 2(15) vis-à-vis the activity of the assessee and took a conscious decision that the surplus of the CIRT unit was to be taxed and not the entire surplus. Further, the nature of the activities of the assessee remained the as was in the earlier and such a question of the nature of the activities of the assessee was considered in the earlier years also by the appellate authorities and by the Tribunal in ITA Nos.2824, 4720/1971-72, 3179 & 3180/72-73 where the issue was held in favour of the assessee.

5. Further, it was submitted by the assessee that the applicability of the provision to Section 2(15) is dependent upon the settlement of the issue as to whether proviso to Section 2(15) is an amendment of law or merely a declaratory of the law that was in force earlier. Further, it was submitted that the applicability of the proviso to the entire activities of the assessee is a debatable issue and in view of the judgment of the Hon'ble Madras High Court in the case of CIT vs. A.G. Granites (P) Ltd.{Tax Case(Appeal) No.946 of 2007} is not available to be dealt with u/s 154 of the Act. Assessee placed reliance on the decision of the Hon'ble Supreme Court in the case of T.S. Balram, ITO vs. Volkart Bros., 82 ITR 50 for the principle that a

mistake apparent on the record must be an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may be conceivably two opinions and a decision on a debatable point of law is not a mistake apparent from the record which is not amenable for rectification u/s 154 of the Act.

6. By order dated 8.8.2014, learned AO, however, brushed aside the objections of the assessee and while stating that the case law relied upon by the assessee is distinguishable from the facts of the present case, held that the present case is a clear case of mistake apparent from the record and needs to be rectified as such. Then he proceeded to substitute the figure of Rs.5,53,40,483/- in place of Rs.63,15,340/- being the total income of the assessee. Assessee preferred appeal against this order u/s 154 also.

7. When the assessee preferred appeal against the order u/s 154 of the Act and it is pending, it is submitted on behalf of the assessee that under mistaken impression and without proper instructions, the Authorized Representative of the assessee submitted a letter dated 5.1.2016 (reproduced below) before the learned CIT(A):

> "Assessee filed the above appeal on 11.4.2013 against assessment order u/s 143(3) dated 14.3.2013 (Appeal No.60/13-14). However, subsequently the order u/s 154/143(3) dated 8.8.2014 was passed. Assessee again filed appeal against the said order on 9.9.2014 vide Appeal No.283/14-15. There can be only one appeal for one assessment year. Therefore, appeal filed on 11.4.2013 against the

> assessment order u/s 143(3) dated 14.3.2013 (Appeal No.60/13-14) become infructuous and the same should be treated as withdrawn."

8. Learned CIT(A) recorded the same and in view of the fact that the appeal and the issues involved therein are not being pressed by the assessee, learned CIT(A) dismissed the appeal as withdrawn. Against this order, the assessee preferred Appeal No. 1724/Del/2016 before us, contending that the Ld. CIT(A) committed error in dismissing the appeal as withdrawn without considering the fact that no such instructions were issued by the assessee to their authorize representative engaged to represent the appeal.

9. Learned CIT(A) heard the appeal preferred by the assessee against the order dated 8.8.2014 u/s 154 of the Act and disposed it off by order dated 23.12.2015. Learned CIT(A) agreed with the submissions of the assessee that the order passed u/s 154 is void ab initio since the mistake apparent from record must be an obvious and patent mistake. It should not be such which can be established by a long drawn process of reasoning on points in which there may be conceivably two opinions. He further held that a mistake can be regarded as apparent only when it is glaring, obvious or self evident and at the same time free from a question which is debatable. While holding so, learned CIT(A) allowed the appeal and quashed the order passed u/s 154 of the Act. Revenue is, therefore, aggrieved by such order and challenged the same in ITA No.1252/2016 by stating that the learned CIT(A) ignored the fact that in view of amended proviso

to Section 2(15) has been attracted in this case, the AO considered it a clear case of mistake apparent from record which needs to be rectified and accordingly AO did so.

10. It is the argument of the learned DR that learned AO in the assessment order dated 14.3.2013 clearly held in the penultimate paragraph that the assessee fails to qualify as an organization for charitable purpose and also as a mutual associate and, therefore, the assessee's assessment was complete by invoking proviso to Section 2(15) of the Act in view of the activities of the assessee. It is, therefore, clear that there was no intention on the part of the learned AO to confine the application of the proviso to Section 2(15) to CIRT alone but it is only a mistake that while computing the income the surplus of Pune unit along was considered, as such, it is a mistake apparent on the face of the record and appropriately rectified by the AO.

11. He further submitted that it is only at the request of the assessee, learned CIT(A) dismissed the appeal of the assessee against the original assessment treating it as withdrawn and now it is not open for the assessee to turn around and say that the learned CIT(A) should not have dismissed the appeal on the ground that there were proper instructions from the assessee to the Authorized Representative. He submitted that there is no mechanism available with the learned CIT(A) to verify whether there is a specific instruction from the assessee for withdrawal of the appeal or not. He, therefore, prayed

that ITA No.1252/Del/2016 may be allowed and ITA No.1724/Del/2016 may be dismissed.

12. Per contra, it is the submission of the learned AR that it is not for the first time that the assessment of the assessee had taken place and one earlier occasions also when the question as to the nature of the activities of the assessee had arisen, the appellate fora consistently held that the assessee has been conducting the charitable activities and there is no change in the activities of the assessee over a period of time. In view of the consistent view taken by the appellate fora in assessee's own case and for quite some time, it is not open for the learned AO to raise the same issue time and again without preferring any further appeal against the orders of the appellate fora.

13. He submitted that as a matter of fact, the assessee does not stand to gain by getting the appeal against the original assessment dismissed and it is only the miscommunication between the assessee and the counsel that resulted in letter dated 5.1.2016 and since the withdrawal was without the authority. The assessee is put to prejudice inasmuch as they are fastened with the liability to the tune of Rs.63,15,340/- by way of addition, and it is, therefore, just and fair to consider the case of the assessee on merits also. On merits, it is submitted that a consistent view has been taken by the appellate fora for quite some time and the same may be followed.

14. In respect of the order u/s 154, it is submitted that the order itself speaks that it is the result of long drawn process. It is submitted that it

could be seen from the order u/s 143(3) of the Act that the learned AO did not discuss the activities of the all the units of the assessee to fall within the mischief of Section 2(15) of the Act and he discussed the activities of CIRT, Pune alone to drew the inference that the surplus amount of Rs.63,15,340/- was to be taxed. It is only an after thought and change of opinion of the learned AO that resulted in the order u/s 154 of the Act.

15. Learned AR placed reliance on the decision reported in the case of CIT vs. A.G. Granite Ltd. (supra) wherein after referring to the catena of decisions on the aspects, the court reached the conclusion that a debatable issue would not fall within the purview of Section 154 of the Act. He further submitted that in view of the decision of the Hon'ble Supreme Court in the case of India Trade Promotion Organization vs DIG (Exemption), 371 ITR 333, ICAI vs DGIT(E) (2012) 374 ITR 99; and ICAI vs DGIT(E) (2013) 358 ITR 91, "Business Trade" or "Commerce" as used in proviso to Section 2(15) of the Act is not objected to exclude entities which are essential for charitable purpose but are conducting some activities for a consideration or a fee without any profit motive and these words used in the first proviso must be interpreted restrictively and whether the main object of the association is charitable then any incidental activity in furtherance of the object does not fall within the expression "trade" "business" or "commerce" for the profit motive. In view of these decisions, learned AR submits that the issue of the proviso to Section

2(15) hitting the entire activities of the assessee, is a debatable one and cannot be rectified u/s 154 of the Act.

16. We have gone through the record. It is clear from the order u/s 143(3) of the Act that the learned AO did not refer to the entire activities of the assessee in respect of its units but there is a specific reference to CIRT, Pune and its activities. Ultimately, the surplus attributable to CIRT, Pune to the tune of Rs.63,15,340/- was brought to tax. As observed by the Hon'ble Madras High Court after referring to the cases in T.S. Balram vs Volkart Bros. (supra) and CIT vs. Sheshasayee Paper and Boards Ltd. (2006) 283 ITR 200, the debatable issue does not fall under the purview of Section 154 of the Act and also the long drawn process of reasoning on points on which there could be two opinions, by resorting to Section 154 of the Act is impermissible. With this view of the matter, we are of the considered opinion that the order of the learned CIT(A) in quashing the order u/s 154 of the Act does not suffer any illegality or irregularity and it does not warrant any interference by this Tribunal. We, therefore, uphold the order of the learned CIT(A) in quashing the order u/s 154 of the Act and dismiss ITA No.1252 of 2016.

17. Now coming to ITA No.1724/2016, as stated earlier, this is an appeal against the order of the learned CIT(A) dismissing the appeal treating it as withdrawn. Now, it is submitted on behalf of the assessee that there was no instructions by the assessee to the Authorized Representative to withdraw the appeal but it occurred only

due to miscommunication. From the letter, we find that it is only in view of the appeal against the order u/s 154/143(3) of the Act, the assessee wanted to withdraw the matter stating that there could be only one appeal for one assessment year. Obviously, it is a mistaken incorrect statement because the appeals were preferred against two separate orders operating in two different domains. Even assuming for a while that the assessee withdrew the appeal, there is nothing for us at this stage not to believe the statement of the assessee that such an act of withdrawal by the Authorized Representative is without instruction. As a matter of fact, the assessee does not stand to gain by withdrawal of the appeal and getting it dismissed as withdrawn, simply because the result in the appeal preferred against the order u/s 154/143(3) does not wipe out the liability of the assessee under the order u/s 143(3) of the Act. Further when the technical consideration is pitted against the delivery of substantial justice, it is a settled principle of law that the former must give way to the latter. Above all, by affording an opportunity to the assessee, the highest that would happen is that a cause could be decided on merits.

18. Since the learned CIT(A) had not considered the case of the assessee on merits, we are of the considered opinion that it is a fit case to set aside the impugned order and remand the matter back to the file of the learned CIT(A) for disposing it off on merits. Therefore, ITA No.1724/2016 is allowed for statistical purposes.

19. In the result, whereas appeal of the revenue is dismissed, the appeal of the assessee is allowed for statistical purposes.

Order pronounced in the Open Court on 29th November, 2018.

Sd/-	sd/-
(PRASHANT MAHARISHI)	**(K. NARASIMHA CHARY)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 29th November, 2018
VJ
Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

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