IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'B', NEW DELHI

BEFORE SH. R. K. PANDA, ACCOUNTANT MEMBER
AND.
MS. SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA No.5945/Del/2014
Assessment Year: 2005-06

DCIT Circle -1 (1) Gurgaon	Vs.	Sh. Chanchal Singh Dhek Prop. M/s. Great Roadways Anaj Mandi Chowk, Gurgaon PAN No. AAOPD6087G
(APPELLANT)		**(RESPONDENT)**

Appellant by	Ms. Ashima Neb, Sr. DR.
Respondent by	Sh. Pratap Gupta, CA

Date of hearing:	28/08/2019
Date of Pronouncement:	14/10/2019

ORDER

PER R.K PANDA, AM:

This appeal filed by the revenue is directed against the order dated 29.08.2014 of CIT(A), Faridabad relating to A.Y. 2005-06.

2. Although a number of grounds have been raised by the revenue in the grounds of appeal, these all relate to the order of the CIT(A) in quashing the order passed by the AO u/s. 154 of the IT Act.

3. Facts of the case, in brief, are that the assessee is an individual and derives income from lorry hire and transportation. He filed his return of income on 30.10.2005 declaring total income of Rs.9,78,805/-. The AO completed the assessment u/s. 143 (3) on 18.12.2007 wherein he made addition of Rs.91,920/- being disallowance of 1/8th of the expenses out of telephone vehicle repair and maintenance and depreciation on motor car and Rs.354/- on account of disallowance u/s. 44B. Subsequently the AO found that assessee has debited lorry hire charges to the extent of Rs.1,66,43,122/-on which no TDS was deducted by the assessee. He, therefore, issued a notice u/s. 154 of the IT Act. Since there was no compliance from the side of the assessee, the AO following the provisions of section 40 (a) (ia) made addition of Rs.1,66,43,120/- to the total income of the assessee and determined the total income at Rs.1,77,14,200/-.

4. In appeal the Ld. CIT(A) quashed the order passed u/s. 154 of the IT Act, 1961. While doing so, he observed that the rectification order was passed by the AO on the basis of an audit objection raised by the audit party on 08.09.2008. Subsequent to this the AO issued the notice u/s. 154 on 26.12.2008. Then for a period of more than 2 years there is no correspondence or action on this front between 2008 on 2010. Subsequently, on 15.02.2010 the AO issued a notice u/s. 154 fixing the case on 19.03.2010 and passed the order on 29.03.2010. He observed from the records that the notice issued by the AO u/s. 154 on 15.03.2010 was received back by the department unserved on the assessee on 25.03.2010. He, therefore, inferred that on the date

on which the AO passed the order u/s. 154 i.e. 29.03.2010, the unserved notice had already been received back in the office of the AO on 25.03.2010 thus, the order passed by the AO was without giving any opportunity to the assessee of being heard. He, therefore, held that the order passed by the AO is bad in law as it clearly violates the provisions of section 154 (3). Relying on various decisions where in it has been held that where any order u/s. 154 is passed without giving notice and opportunity to the assessee and the income of the assessee is enhanced or refund is reduced the order is bad. He further held that the rectifiable mistake is a mistake which is obvious and not something which has to be established by a long drawn process of reasoning or where two opinions are possible. Decision on debatable point of law cannot be treated as mistake apparent from the record. He accordingly held that the rectification carried out by the AO is bad in law as it was passed without giving a proper opportunity to the assessee of being heard and also because of the fact that rectification carried out falls out of this scope of section 154 as it is a debatable issue and dependent on elaborate arguments and has to be established by a long drawn process of reasoning.

5. Aggrieved with such order of the CIT(A), the revenue is in appeal before the Tribunal.

6. The Ld. DR strongly challenged the order of the CIT(A). He submitted that it was apparent from record that no TDS was deducted on lorry hire charges paid and hence the non deduction of this amount was a mistake apparent from record and was covered u/s. 154 of the IT Act. He submitted that the CBDT

circular No.715 dated 08.08.1995 has clarified that if the goods are transported continuously in pursuance of a contract for a specific period or quantity, each GR will not be separate contract and all GR's relating to that period or quantity will be aggregated for the purpose of TDS. It is not a debatable issue. Further there is no discussion on this issue in the order passed u/s. 143 (3). He further submitted that the order passed by the CIT(A) is factually incorrect and should be set aside.

6.1 The Ld. Counsel for the assessee on the other hand strongly supported the order of the CIT(A). Referring to provision of section 194C(3), he submitted that the provision will be applicable where the amount paid to each party exceeds Rs.50,000/-. He submitted that there is no apparent mistake coming out of the assessment order and the AO could not have assumed jurisdiction u/s. 154 of the IT Act. He submitted that it requires a long drawn process to come to the conclusion that the provisions of section 40 (a) (ia) are applicable. He submitted that the provision of section 263 could have been invoked which has not been done in the instant case. Therefore, the order of the CIT(A) be upheld and the grounds raised by the revenue should be dismissed.

7. We have considered the rival arguments made by both the sides and perused the orders of the authorities below. We find the AO in the instant case passed the assessment order on 18.12.2007 u/s. 143 (3) determining the total income of the assessee at Rs.10,71,080/- as against the returned income of Rs.9,78,805/- wherein he disallowed certain expenses on

estimate basis and made addition u/s. 43 B. There is absolutely no discussion on the issue of disallowance u/s. 40 (a) (ia) for non-deduction of tax from lorry hire charges. We find the AO passed the order u/s. 154 on 29.03.2010 wherein he made addition of Rs.1,66,43,122/- u/s. 40 (a) (ia) of the IT Act. We find the Ld. CIT(A) quashed the rectification order passed u/s. 154 on the ground that assessee was not given any opportunity of being heard while enhancing the income u/s. 154 of the IT Act and further the issue is not a mistake apparent from record and is debatable issue and dependent on elaborate arguments and has to be established by a long drawn process of reasoning.

7.1 We do not find any infirmity in the order of the CIT(A) quashing the reassessment proceedings. Admittedly there is no discussion on the issue of disallowance u/s. 40 (a) (ia) on account of non deduction of tax from lorry hire charges. Therefore, only course of action available was order u/s. 263 and the AO could not have assumed jurisdiction u/s. 154 of the IT Act. We find the Ld.CIT(A) while quashing the rectification order passed by the AO has followed the decision of Hon'ble Kolkata High Court in the case of Oil India reported in 183 ITR 412 wherein the issue of rectification u/s. 154 vis-a-vis the disallowance u/s. 40 (a) (v) has been dealt with in detail. The relevant observation of the Hon'ble High Court reads as under :-

> *"The short question which falls for determination is whether the order of remand which was made by the Tribunal in a proceeding arising out of the order passed under section 154 is valid or not. It is now well-settled that if the mistake has to be ascertained on investigation into facts, it will not be a mistake apparent from the*

records. The Income- tax Officer cannot, in such a case, invoke section 154 of the Act. The nature of the mistake as considered by the Income-tax Officer in his order is as follows:

"On the above explanation and facts on record given by the company at the time of assessment, it is clear that the company was not entitled to any deduction of the expenses and allowances incurred and claimed on account of the bungalows, etc., provided free for use to the employees. The provisions of section 40(a)(v) are very clear in this regard. Then, in computing the expenditure, what is to be included is not the value of the perquisite, benefit or amenity as is assessable in the employees' hands, but the cost incurred in providing such benefit, amenity or perquisite. The fact remains that the expenses and allowances incurred and claimed by the company relate to the quarters, etc., which are meant for the use of the employees. It is immaterial so far as the position in law is concerned even if the employees go on leave for a month. Even according to the company's own admission, such quarters during the leave period of one employee is given to another member of the staff. On the facts which are on record, it is clear that, by mistake, the deduction claimed by the company was allowed. The objection of the company is, therefore, not acceptable and the assessment is rectified under section 154".

If there is no dispute that the deduction claimed by the assessee is not, allowable in law, in that event, there will be a mistake apparent from the record and the Income-tax Officer would be justified in rectifying the mistake. Once it is established that there is a mistake apparent from the records, the Income-tax Officer assumes jurisdiction and in rectifying such mistake if the quantum of deduction has to be determined on ascertaining certain facts, the Income-tax Officer will not be precluded from

doing so under section 154. In such a case, it cannot be said that the determination of mistake depends on the investigation of facts. But when the mistake itself has to be determined on investigation of facts, Income –tax officer will have not jurisdiction to proceed under section 154.

The Tribunal should have decided whether the Income-tax Officer was justified in invoking section 154 for disallowing deduction under section 40(a)(v). The Tribunal, instead of doing that, has held that it was necessary to restore the appeals *to the Appellate Assistant Commissioner for fresh disposal after examining as to whether the details filed by the assessee are correct and whether the expenses disallowed by the Income-tax Officer under section 40(a)(v) are justified. This direction may be construed to mean that the Tribunal found that there was a mistake apparent from the records. But the Tribunal did not decide although such an issue was raised whether the proceeding under section 154 was validly initiated. The Tribunal has, however, gone into the merits. The Tribunal should have first considered whether the Income-tax Officer rightly invoked section 154 and whether there was any mistake apparent from the records. Only thereafter, the determination of quantum of disallowance could have been left to the Income-tax Officer and the Appellate Assistant Commissioner. For the reasons aforesaid, we are of the view that the Tribunal's order in remanding the case to the Appellate Assistant Commissioner for fresh disposal in the appeal arising out of a proceeding under section 154 without first deciding whether there was a mistake apparent from the records was not in accordance with law."*

8. Respectfully following the decision cited (supra) we are of the considered opinion that the CIT(A) was fully justified in quashing the rectification proceedings on the ground that the issue is not a mistake apparent from record and is a debatable issue and dependent on elaborate arguments and has to be established by a long drawn process of reasoning. The grounds raised by the revenue are accordingly dismissed.

9. In the result, the appeal filed by the Revenue is dismissed.

Order pronounced in the open court on 14.10.2019.

Sd/-	Sd/-
(SUCHITRA KAMBLE)	**(R.K PANDA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Neha
Date:-14.10.2019
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	09.10.2019
Date on which the typed draft is placed before the dictating Member	10.10.2019
Date on which the approved draft comes to the Sr.PS/PS	14.10.2019
Date on which the fair order is placed before the Dictating Member for Pronouncement	14.10.2019
Date on which the fair order comes back to the Sr. PS/ PS	14.10.2019
Date on which the final order is uploaded on the website of ITAT	14.10.2019
Date on which the file goes to the Bench Clerk	14.10.2019
Date on which file goes to the Head Clerk.	
The date on which file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	