IN THE INCOME TAX APPELLATE TRIBUNAL MUMBAI BENCH "F", MUMBAI

Before Shri Pawan Singh (JM) & Shri Rifaur Rahman (AM)

ITA No. 2640/Mum/2018(Assessment year: 2008-09)

Jani Properties Pvt Ltd GKDJ & Associates, CAs 333, Sohrab Hall, 21, Sassoon Road, Opp Jehangir Hospital, Pune-411 001 PAN : AAACJ7356D	Vs	ITO, 2(2)(1), Aayakar Bhavan, M.K. Road, Mumbai -400020
APPELLANT		**RESPONDEDNT**

Appellant by	Shri Dharmesh Shah AR
Respondent by	Shri Mohammed Rizwan Add. CIT-Sr DR
Date of hearing	09-12-2019
Date of pronouncement	13-12-2019

O R D E R

PER PAWAN SINGH, JM :

1. This appeal by assessee is directed against the order of learned CIT(A)-5, Mumbai dated 29-12-2017, in confirming the order of assessing officer passed under section 154 of income tax Act (Act), passed on 08-07-2014 for assessment year 2008-09. The assessee has raised the following grounds of appeal:-

> "1. The Ld. CIT(A) has erred in law and in facts in not appreciating that the assessing Officer passed the rectification order u/s. 154 of the Act in violation of the principles of natural justice without providing adequate opportunity of being heard to the appellant.
>
> 2. The Ld. CIT(A) has erred in law and in facts in not appreciating that the original order passed by the Assessing Officer did not suffer from any mistake apparent on record.

3. Without prejudice to above, the Ld. CIT(A) has erred in law and in facts in confirming the determination of tax liability on book profits u/s. 115JB of the Act by including surcharge and cess while comparing with tax on normal income."

2. In addition to the original grounds of appeal, the assessee, vide application dated 26-06-2019 raised the following additional ground of appeal:-

"1.The Ld. Commissioner of Income-tax (Appeals) erred in law and in facts in not appreciating that the order passed by the Assessing Officer was bad in law and invalid as the same was time barred."

3. The brief facts of the case are that intimation under section (u/s) 143(1)(a) of the Act, was given by assessing officer (AO) to the assessee in accepting the assessee's claim of computation of profit under section (u/s) 115JB on 26-11-2009. On receipt of intimation the assessee filed application for rectification of intimation in respect of the following:-

"1.1 We have filed a revised ITR on 4^{1h} September 2008 bearing acknowledgement, no 5120000068 and e-filed on 2nd September 2008 bearing acknowledgement no. 34777990020908. Advance Tax and' Tax on Dividend is paid on time. (e-filing acknowledgement • attached ref **Annexure A]**

1.2 While calculating tax on total Income you have directly calculated at 30% i.e. at normal rates instead of special rates i.e. 20% applicable for Long Term Capital Gain.

1.3 Our Client has paid Advance Tax for which you have not given us Credit Details are given below (challan attached **Annexure** B)

UTI Bank 23/8/2007 Rs 1696000/- Challan Sr No 71088

1.4 Our client has also paid Tax on distribution profits u/s 115-0/115P with delayed interest, Details are given below (challan attached **Annexure C).**

27/8/2007 Rs.2685210/- Challan Sr No.71263

1.5 The difference in interest u/s 234B& 234C are consequential to the above. We are herby enclosing the detail reconciliation working of interest u/s 234B & 234C **Annexure**-D.

1.6 Please take the above on record and rectify the mistake apparent on record and issue us the refunds along with interest.

2. In case you need / have any other /further information/ evidence please let us know or give personal hearing."

4. Accordingly, the AO rectified the error as pointed out by the assessee in its application dated 26-08-2010 by passing order u/s 154 dated 13-03-2012. The AO again issued show cause notice u/s 154 for rectification of assessment order. In the show cause notice the AO noted " *the assessee claimed deduction of Rs. 26,85,210/- paid under the head dividend distribution tax paid u/s 115O of the IT Act for computing book profit u/s 115JB which in not correct. The tax u/s 115JB being higher than normal income tax pad as per 115JB.*

5. The assessee filed its reply dated 16-12-2013 raising objection against proposed rectification vide reply dated 16-12-2013. The contents of the

reply are extracted by AO on page 1 of the impugned order. The reply of assessee was not accepted by AO. The AO rectified the assessment order thereby raising demand of Rs.41,220/- vide order dated 08-07-2014. Aggrieved by the rectification order, the assessee filed appeal before Ld. CIT(A) but without success. Further aggrieved by the order of ld. CIT(A), the assessee has filed this appeal before the Tribunal.

6. We have considered the submission of both the parties, perused the record carefully. The Ld. AR of the assessee submits that the assessee has raised additional ground of appeal; vide its application dated 26-06-2019. The Ld.AR of the assessee submits that no new facts are necessarily to be brought on record for adjudicating the additional ground of appeal. The additional ground of appeal is purely legal in nature and all facts necessary for adjudication of additional ground are on record. In support of his submission, the Ld. AR for the assessee relied upon the decision of Hon'ble Supreme Court in National Thermal Power Corporation Vs CIT 229 ITR 381 and in Jute Corporation of India vs CIT (187 ITR 688 SC).

7. On the other hand, the Ld. DR for the revenue objected to raising of additional ground of appeal. Though, no reply in writing objecting the additional grounds of appeal id filed by the revenue.

8. We have considered the submissions of both the parties. Perusal of additional ground of appeal reveals that the assessee has raised legal ground that rectification order passed by AO is bad in law, invalid and is time barred. In our view, the additional ground of appeal raised by assessee is purely legal in nature. No new facts for adjudication of this ground are required to be brought on record. Therefore, the additional ground of appeal raised by assessee is admitted for adjudication.

9. In support of additional ground of appeal, the Ld. AR of the assessee submits that the rectification order dated 08-07-2014 was passed after four years from the end of the financial year in which the order sought to be modified was passed. The Ld.AR submits that order u/s 143(1) was passed on 26-11-2009. The impugned rectification order was passed on 08-07-2014. Therefore, the same is beyond the time limit prescribed u/s 154(7) of the Income-tax Act, 1961. The Ld.AR submits that the AO counted the period of limitation from first rectification order dated 13.03.2012, passed at the behest of assessee. The Ld. AR submits that the rectification order passed by AO which is impugned before this Tribunal has no casual connection / related / subject matter of first rectification. The subject matter of both the rectification orders are altogether different and accordingly, the time limit for second

rectification order dated 08.07.2014 has to be reckoned from the assessment order (intimation) u/s 143(1) dated 26-11-2009. In support of his submission, the Ld.AR of the assessee relied upon the decision of Tribunal in the following cases:-

- Ashu Engineers & Plastics Pvt Ltd ITA No.3453/Mum/2010 dt 29.04.2011,
- ITO vs BFIL Finance Ltd ITA No.3828/Mum/2015 dt 27.11.2017,
- DCIT vs Godrej Industries ITA No.4339/Mum/2015 dt 7.4.2017,
- CIT vs Sekseria Cotton Mills Ltd 124 ITR 570 (Bom),
- CIT vs Shriram Engineering Construction Co Ltd 330 ITR 568 (Mad)

10. On the other hand, the Ld. DR for the revenue strongly relied upon the orders of the AO / CIT(A). The ld. DR for the revenue submits that for the purpose of second rectification order, the limitation should be considered from 13.03.2012.

11. We have considered the rival submissions of the parties and perused the orders of lower authorities. There is no dispute that assessment order / intimation us/ 143(1)(a) was rectified at the behest of assessee on its application dated 26-08-2010 vide order dated 13-03-2012. The AO issued fresh show cause notice u/s 154 on the ground that dividend distribution tax paid u/s 115O for computing book profit u/s 115JB is not correct. The tax u/s 115JB being higher than normal income-tax,

the assessee should have paid tax as per section 115JB. The assessee filed reply and besides other contentions, the assessee stated that dividend distribution tax is not a tax on income and hence, not allowable as deduction for computation of income under normal provisions of the Act, but the same is allowable as deduction for the purpose of calculating book profit. Admittedly, the issue of book profit / computation of book profit were not the subject matter of rectification order dated 26-08-2010. The AO raised the issue of book profit u/s 115JB in a fresh show cause notice. The Ld.AR of the assessee vehemently submitted that the time limit of section rectification is to be reckoned from the end of relevant financial year when order u/s 143(1)(a) was passed.

12. The co-ordinate bench of Tribunal, while considering the similar ground of appeal in Ashu Engineers & Plastics Pvt Ltd (supra) passed the following order:-

> *"6.* We have heard the rival contentions, perused the material on record and duly considered the factual matrix of the case as also the applicable legal position.
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> 7. In the case of CIT vs. Sakseria Cotton Mills Ltd., 124 ITR 570(Bom), Hon'ble Bombay High Court was *in seisin* of a situation in which a somewhat identical issue came up for consideration before Their Lordships, The original assessment order passed by the Assessing Officer carried out in appeal before the AAC but grant of rebate was not the issue on which the assessment order was carried out in appeal. The Assessing Officer subsequently passed the order rectifying the

mistake and, while doing so, computed the time limit under section 154(7) with reference to appellate order. On these facts, Their Lordships held that since granting of rebate was not subject matter of appeal to the AAC, the limitation of order for rectification to withdraw the said rebate start from the date of original order and not from order giving effect to the appellate order. In other words, what was held by Their Lordships was that time limit under section 154(7) is to be computed with reference to the date on which order dealing with the subject matter of such rectification was passed and as long as subsequent order did not deal with the same issue, mere passing of the later order does not extend the time limit under section 154(7). In the case of Kothari Industrial Corporation Ltd v Agricultural Income Tax Officer(1998) 230 ITR 307(Kar), Hon'ble Karnataka High Court had an occasion to deal with the same issue. One of the questions before Their Lordships in this case was where an order of an authority is rectified, whether the original order merges with the order of rectification, and whether, in the event of second rectification, the period of limitation for such subsequent rectification should be reckoned from the date of the original order or the date of the order of first rectification. After an elaborate survey of judicial precedents on the issue. Their Lordships concluded that "if the subject matter of subsequent rectification is not the subject matter of first rectification, the period of limitation will have to be calculated from the date of original order" In view of these discussions, it is clear that the legal position is that the time limit for rectification of mistake under section 154(7) is to be considered from the date of the original order or in subsequent rectification order only if the said rectification order dealing with the same which is sought to be rectified. In this view of the matter and having noted that the first rectification order dealt with entirely different issue i.e. excess allowance of TDS credit, it is clear that the time limit for passing the impugned order indeed expired on expiry of four years from the end of the financial year, in which, the original order sought to be rectified was passed i.e. on 31.3.2007. There is no dispute that in terms of provisions of section 154(7), no amendment under section 154 can be carried out after the expiry of four years from the end of the financial year in which the said order was passed. Learned Departmental Representative, however, has an interesting argument. He points out that limitation under section 154(7) applies

only in cases covered by section 154(l)(a) i.e. deal with rectification of any order passed under the provisions of this Act, whereas the impugned order is in fact covered by section 154(a)(b), which deal with "any intimation or deemed intimation under sub-section(l) of Section 143. It is stated that, as evident from the wordings of Section 154(1), an intimation is not an order and is covered in the scope of Section 154 by the virtue of specific inclusions of 'intimations' under clause 154 (l)(b). His argument is that while there is a time barring limit for orders to be passed under section 154(l)(a), there no such limit for orders under section 154(l)(b), as time limit set out in section 154 (7) refers only to an 'order' and there is no specific inclusion of 'intimations'. It is, therefore, contended that section 154(7) does not come into play so far as rectification of intimation or deemed intimation under section 143(l)(a) is concerned. We are unable to see any substance in this plea because if accepted it will lead to absurdity inasmuch as no finality can ever given to an intimation under section 143(1) and to the summary assessments. Not only that it is simply absurd that the intimation under section 143(l)(a) never receives finality, it is also impracticable because even maintaining of records is not necessary beyond time limit. It is only elementary that the statue is to be interpreted *ut res magis valeat quam pereat,* i.e., to make it workable rather than redundant. Neither the Income tax Department nor the assessee is under obligation to maintain records beyond a particular time limit and in such a situation, it will be wholly unworkable to deprive the intimations under section 143(l)(a) ever receiving finality. In this view of the matter and in accordance with the scheme of Section 154, we consider it fit and proper to construe the time set out under section 154 (7) as applicable to intimation under section 154(l)(b) as well. In any event, even when no time limit is set out in the statute, a reasonable time limit is to be applied. While on this aspect of the matter, it will be useful to take note of a co-ordinate Bench decision in the case of Sibonarayan Patra vs ITO (54 TTJ 644 (CTK), wherein, somewhat identical issue came up for consideration before the Tribunal. Even in the absence of any time barring limitation set out in the Statue, the co-ordinate Bench held that in proceedings under the Income tax Act must have a reasonable time limit and it cannot be open any one to proceed on the basis of proceedings, which can be initiated at any stage. Speaking through one

of us (i.e. learned Vice President], the co-ordinate Bench has observed as follows:

> "9. It is the case of the learned Departmental Representative that s. 275 deals with procedural law and in the case of procedural law, the provisions as it stood at the time of initiation of penalty proceedings are applicable as there is no vested right to the assessee in such matters. We have given careful consideration to the submissions of the learned Departmental Representative. The amended provisions of s. 275 which have come into effect from 1st April, 1989, are applicable only to those cases where the limitation as per the unamended provisions, is not expired. In fact, in the case cited by the learned Departmental Representative i.e., Bhikari Charan Panda vs. CIT (supra) their Lordships have held that two year period mentioned in s. 275 of the unamended Act had not expired at the stage when the new provisions have been introduced. Per contra, it implies that in case where the limitation has expired before the amended provisions have come into force, the new provisions cannot be applied to such assessee as the vested right which has already been acquired by the assessee before the amendment cannot be taken away. The Hon'ble Delhi High Court in the case of CIT vs. Pratap Singh of Nabha (1982) 138 ITR 27 (Del) has dealt with a similar case wherein their Lordships have held that as per the law as it then stood, penalty order has to be passed within two years and since there is no change of law within this period, the period of limitation cannot be extended by applying the amended provisions. In the present case, as on 31st Jan., 1989, penalty proceedings have not been initiated. As we have already held that under the unamended provisions of s. 275 the AO is required to initiate penalty proceedings in the course of the assessment proceedings. The non-initiation thereof would take away the jurisdiction of the AO to initiate proceedings subsequently. Thus, before the amendment of s. 275, i.e., 1st April, 1989, the AO ceased to have jurisdiction to levy penalty and thus the amended provisions cannot be applied to disturb the vested right of the assessee. We, therefore, hold that the amended provisions of s. 275 of the Act are not applicable to the given facts.
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> 10. For the sake of argument, we proceed on the presumption that the provisions of the amended s. 275 are applicable to the facts of the case. The Notes on Clauses, appended to the Direct Tax Laws (Amendment) Bill, 1987 [(1988) 67 CTR (St) 98 at 127 : (1988) 168 ITR (St) 301 at 352] reads as under : "Clause (c) incorporates the provisions of the existing cl. (b). However, the limitation for passing penalty order where no appeal is filed is reduced from two years from the end of the financial year, to the end of the financial year itself in which assessment order, etc. is passed or six months from the end of the month in which penalty proceedings were

initiated, whichever is later." On a reading of the provisions of s. 275(c) along with the Notes on Clauses, we are of opinion that the amended cl. (c) is no different from the unamended cl. (c) of s. 275(1) of the Act and the legislature only intended to reduce the period of limitation which was hitherto two years from the end of the financial year. Thus, to our mind, the same interpretation which was placed on the unamended cl. (1) of s. 275 applies to the provisions of amended w.e.f. 1st April, 1989. We may further observe that even accepting for a moment that there is no time-limit prescribed under the Act for initiating penalty proceedings under s. 271B/275 of the Act, as rightly submitted by the learned counsel for the assessee, by taking the spirit of the provisions of s. 275 fixing the time-limit for initiation of penalty proceedings under s. 271(l)(aJ, 271(l)(b), etc. in the case of the assessee, penalty proceedings have to be initiated by the AO within a reasonable period of time and any proceeding initiated after an abnormal delay, is liable to be treated as invalid in law. Admittedly, the assessments were completed in 1989 and penalty proceedings were initiated after about 43 months after the date of completion of the assessment and about 50 months from the date of obtaining the audit report. The subsequent incumbent AO has initiated the penalty proceedings. To our mind, taking the limitation period prescribed in s. 275 for initiation of penalty proceedings under the other sections of this Chapter and also by respectfully following the judgment of the jurisdictional High Court in the case reported in 1990 CrLJ 1110. maximum of two years from the end of the assessment year in which the assessments are completed, can be said to be a reasonable time within which the AO could have initiated the penalty proceedings. As in the present case, the penalty proceedings have been initiated about 43 months after the completion of the assessment, we are of the opinion that the penalty proceedings are barred by limitation and consequently penalties levied under s. 271B cannot be sustained.

11. In this context we may also draw support from the judgment of the Hon'ble Andhra Pradesh High Court in the case of K.P. Narayanappa Settv & Co. vs. CIT f!975} 100 ITR 17 (AP) wherein their Lordships have held that though no specific period was prescribed within which penalty may be levied, there should not be inordinate delay and the penalty should be levied within reasonable time. We may further observe that the intention of the legislature cannot be otherwise, in as much as, Democles Sword cannot be allowed to hang on the head of the assessee perennially giving discretion to the AO before whom the audit report is submitted and the successor AO, to initiate the penalty proceedings at any time. The other fact that only 6 months is provided for completion of assessment proceedings from the date of initiation indicates that the initiation itself should be within a reasonable time."

8. In the case of Mahindra & Mahindra Limited Vs DCIT (30 SOT 374), Special Bench of this Tribunal, dealing with similar plea of the assessee in the context of time limit being read into Section 201, observed as follows:

> "The Id. DR has contended that the Tribunal is not competent to lay down any time limit. If this contention is brought to the logical conclusion it will mean that the unlimited time will be available to the Departmental authorities at their sweet-will for taking action under this section. In our considered opinion this contention raised on behalf of the revenue is bereft of any force for the simple reason that certainty is the hallmark of any proceedings. It is beyond our comprehension that how, in the absence of any time limitation provided in the section, the action can be taken in indefinite period. It is wholly impermissible to argue that unlimited time limit be granted to the revenue for taking action under this section. The sword of taxing authorities cannot be allowed to hang, forever, over the head of the tax payers. If this proposition of the learned D.R. is accepted that will give license to the authorities to take action even after 30, 40 or 50 years. The canons of limitation are ordinarily provided expressly in the Act and in their absence, they are to be impliedly inferred by taking into consideration the scheme of the relevant provisions."

9. In view of the above discussions, the hyper technical plea of the learned Departmental Representative is only fit to be rejected. Learned Departmental Representative as indeed the authorities below have also relied on in the case of Hind Wire Industries Ltd v.CIT,[supra] but then it is a case in which the subject matter of first rectification was the same as the subject matter of second rectification was sought. In the present case, however, subject matter of two rectification proceedings is altogether" different and7~therefore7~the ratio of Hon'ble Supreme Court's judgment in the case of Hind Wire Industries Ltd v. CIT(supra) does not come into play. When this proposition was put to Learned D.R., he did not have much to say except placed his bland reliance of Hon'ble Supreme Court's judgment in the case of Hind Wire Industries Ltd v. CIT(supra) and also the stand taken by the authorities below. We are unable to see any merits in learned Departmental Representative's reliance on Hind Wire Industries (supra) either. We are of the considered view that the ratio laid down in the case of Hind Wire Industries Ltd v. CIT (supra) remains confined to a case where subject matter of second rectification is the same as the first rectification and it was only in such a situation that the time limit of second rectification proceedings gets extended by the fact of first rectification proceedings. In a situation in which the subject matter of second rectification proceedings is wholly unrelated to the subject matter of first rectification proceedings as is the

situation in the present case, the time limit for second rectification proceedings remains unaffected by the first rectification proceedings. In view of the these discussion, as also bearing in mind entirety of the case, we are of the considered view that the impugned rectification order, having been passed well after the end of four years from the end of financial year, in which, intimation under section 143(l)(a) passed, is time barred. In any event, by no stretch of logic, a rectification of mistake almost after eight years of processing an intimation under section 143(l)(a) can be said to have been made within a reasonable time limit. We, accordingly, quash the impugned rectification order."

13. Further, in ITO vs BFIL Finance Ltd (supra), while considering the similar ground of appeal, the coordinate bench, on the point of limitation for passing order u/s 154, held as under:-

"9. We have considered rival contentions and carefully gone through the orders of the authorities below and found from record that AO has rectified the order passed by him on 28/12/2007. While framing the assessment order, AO has not computed income of assessee u/s.115JB. This omission was identified at a subsequent date accordingly AO has passed the order to rectify the same. The impugned order so passed by the AO was dated 21/01/2014, which is much beyond the limitation period to be reckoned from the end of the Financial Year 2007-08. Even though AO has mentioned in his order that the order is passed to give the effect to the order of CIT(A)'s order. However, in fact the rectification has been made in respect of mistake committed by him in the order passed u/s. 143(3) dated 28/15/2007. Accordingly, we do not find any infirmity in the order of CIT(A) for holding that the order passed u/s. 154 was time barred under the provisions of Section 154(7) of the Act. The issue under consideration is also squarely covered by the decision of Bombay High Court in case of Sakseria Cotton Mills Ltd., 124 ITR 570 wherein it was held that rectification of mistake-period of limitation u/s. 154(7) will apply from the date of original order of the ITO and not from the date of ITO's order giving effect to the AAC's order in respect of points not the subject matter of the order u/s. 154.

10. In view of the above, we do not find any infirmity in the order of CIT(A). The cross objection has been filed in support of CIT(A)'s order and since we have already dismissed revenue's appeal, cross objection has become academic."

14. Now adverting to the facts of the present case, the first rectification order was passed by the AO on 13.03.2012 at the instance of assessee. Admittedly no issue of book profit under section 115JB was the subject matter of the rectification order passed on 13.03.2012. The AO issued show cause notice for rectifying the order on the issue of book profit only for the second proposed rectification. From the above discussions, it is clear that the legal position is that the time limit for rectification of mistake under section 154(7) is to be considered from the date of the original order or in subsequent rectification order only if the said rectification order dealing with the same which is sought to be rectified. In this view of the matter and having noted that the first rectification order dealt with entirely different, it is clear that the time limit for passing the impugned order indeed expired on expiry of four years from the end of the financial year, in which, the original order sought to be rectified was passed i.e. on 31.3.2009. Considering the aforesaid decisions of Tribunal and respectfully following the decision of coordinate bench of the Tribunal in Ashu Engineers & Plastic Pvt Ltd (supra), we are of the view that the rectification order passed u/s 154 dated 08-07-2014 is clearly beyond the prescribed limitation of period provided u/s 154(7).

Therefore, we accept the additional ground of appeal raised by assessee and hold that the rectification order dated 30-03-2016 is beyond the time limit prescribed u/s 154(7) and the same is invalid.

15. As we have allowed the legal ground raised by the assessee in the additional ground and held the order as invalid, therefore, adjudication of other grounds of appeal on merit has become academic.

16. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 13-12-2019.

Sd/-	Sd/-
(S.Rifaur Rahman)	(Pawan Singh)
ACCOUNTANT MEMBER	JUDICIALMEMBER

Mumbai, Dt : 13th December, 2019
Pk/-
Copy to :

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

/True copy/ By order

Asstt. Registrar, ITAT, Mumbai