आयकर अपीलीय अधीकरण, न्यायपीठ – "ए" कोलकाता,

IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH "A" KOLKATA

Before **Shri J.Sudhakar Reddy, Accountant Member** and
Shri S.S.Godara, Judicial Member

ITA No.1015/Kol/2018 Assessment Year: 2009-10

Partha Chatterjee C/o S.N.Ghosh & Associates, Advocates' "Seven Brotherrs' Lodge" P.O.Buroshibtala, P.S.Chinsurah, Dist.Hooghly, Pin-712105 [**PAN No.ACEPC 8818 Q**]	बनाम **/** **V/s.**	ACIT, Circle-1, HG Aaykar Bhawan, G.T. Road, Khadina More,P.O. Chinsurah, P.S.Chinsurah, Dist. Hooghly, Pin-712101
अपीलार्थी /Appellant	..	प्रत्यर्थी /Respondent

अपीलार्थी की ओर से/By Appellant	Shri Somnath Ghosh, Advocate
प्रत्यर्थी की ओर से/By Respondent	Altaf Husain, JCIT-DR
सुनवाई की तारीख/Date of Hearing	19-02-2019
घोषणा की तारीख/Date of Pronouncement	17-01-2020

आदेश /O R D E R

PER S.S.Godara, Judicial Member:-

This assessee's appeal for assessment year 2009-10 arises against the Commissioner of Income Tax (Appeals)-6, Kolkata's order dated 28.02.2018 passed in case No.360/CIT(A)-6/Kol/2014-15, involving proceedings 154 of the Income Tax Act, 1961; in short 'the Act'.

Heard both the parties. Case file(s) perused.

2. The assessee' pleadings raised in the instant case seeks to reverse both the lower authorities' action disallowing / adding cost of construction amounting to ₹27,88,995/- in exercise of their rectification jurisdiction vested u/s. 154 of the Act. The CIT(A)'s detailed discussion to this effect reads as under:-

"This appeal is directed against the assessment order u/s. 154 of the Income -tax Act,1961 (hereinafter referred to as "the Act") passed on 10.11.2014 by the Assistant Commissioner of Income Tax, Circle-1, Hooghly (hereinafter referred to as "the Assessing Officer"). The appeal was filed on 08.12.2014.The ITNS was sent on 21.09.2015 and it is accordingly concluded that the appeal is filed within stipulated time and is accordingly heard on merits.

2. Aggrieved with the purported assessment order passed u/s. 154 of Act by the AO, the appellant has raised the following grounds:-

1. FOR THAT none of the conditions precedent required to be satisfied for the assumption of jurisdiction U/3. 154 of the Income Tax Act, 1961 existed and/ or have been complied with by the Ld. Income Tax Officer, Ward 1, Bankura (hereinafter referred to as the Ld. Assessing Officer for the sake of brevity) and the basis of the impugned order passed u/ s. 143(3)/154 of the Income Tax Act, 1961 without satisfying the conditions precedent therefore and hence therefore ab initio void, ultra vires and ex-facie null in law.

2. FOR THAT the Ld. Assessing Officer misled himself and acted precipitately in resorting to a catastrophic addition of Rs. 27,88,995/- without considering the matter in the proper perspective and such conclusion reached on that behalf on extraneous considerations not germane to the issue in J dispute is totally illegal, illegitimate and infirm in law.

3. The facts covering both the grounds are like this. The appellant is an individual carrying on a business of civil construction under the name and style of M/s. Dreamland Construction. The appellant had incurred expenditure of an amount of Rs.1,61,79,440/- on account of cost of construction and disclosed the sum of Rs 2,29,29,570/- as proceeds of sale of flats. How, the AO made an addition in the sum of Rs.9,70,000/- by applying a rate 6% for disallowance out of the cost of construction in the assessment order framed u/s 143(3) of the Act dated 30.12.2011. Thereafter, the AO issued notice u/s 154 of the Act and passed the order dated 10.11.2014 observing as under:-

"Assessee had submitted details of project wise cost of allocation sheet in respect of Mukti Apartment 4, 5, & 11. It is found that the assessee had shown Rs.2,08,17,020/- under the head cost of construction sold. On verification of details, submitted by the assessee, it is revealed that cost was allocated proportionately in Apartment no. 4 & 11 between sold and unsold area but in respect of Apartment no. 5 cost allocation was disproportionate, higher for the area sold and lower for the area unsold. Thus, there was an under assessment by Rs.27,88,995/-."

4. The A/R of the appellant made exhaustive submissions disputing the action of the AO, the relevant portion of such submissions is reproduced as under: -

"At the outset and in respect of ground no. 1, it is vehemently contended that in the instant case the assumption of jurisdiction by the Ld. Assessing Officer u/ s. 154 of the Income Tax Act, 1961 was not within the statutory parameters. It is most respectfully pointed out that there is no apparent mistake in the return and enclosures thereto and therefore the Ld. Assessing Officer exceeded his power and acted contrary to law in invoking s. 154 of the Income Tax Act, 1961 to impose his view that the cost allocation between sold and unsold area was disproportionate. An apparent mistake presupposes an arithmetical error and such obvious mistake so as not to require any process of interpretation to arrive at such conclusion. The application of the provisions of s. 154 of the Income Tax Act, 1961 is restrictive and extends only to errors which are beyond the pale of any argument. However, it was entirely a matter of subjective opinion of the Ld. Assessing Officer to arrive at the conclusion that the cost allocation in respect of sold area of Apartment no. 5 was higher whereas the same for unsold area was lower. Such an assumption cannot be the subject matter for presuming jurisdiction u/ s. 154 of the Act and the notice issued

in this regard and. the order passed in pursuance thereto is outside the scope of such enactment. No authority can pass a valid order by exceeding powers vested in him under the law and the provisions of s. 154 of the Act excludes bringing into play such an action, as resorted to by the Ld. Assessing Officer in the instant case, as otherwise there would be no limit whatever in taking recourse to such provision to the detriment of assessees at his sweetwill. The Legislature in its wisdom specifically precluded such an invasion upon the rights of the assessee simply and specifically providing that only mistakes "**apparent from record**" are embraced within the scope thereof, It is most respectfully contended that the alleged perception of the Ld. Assessing Officer in this respect is a matter of debate and in absence of any proposition sanctioned in law to that effect, it is inconceivable that the said issue can be a matter of jurisdiction u/ s. 154 of the Act. To reiterate, in order to invoke the provisions of s. 154 of the Income Tax Act, 1961 it is essential that the mistake apparent from the record must be obvious and established objectively. In order to consider the mistake apparent from record it is not permissible for the Ld. Assessing Officer in rectification proceedings to reconsider or to seek to interpret the true scope of a provision. This is so because when a mistake is discovered by interpretation or debatable construction of provisions of the Act it can never be a mistake apparent from record. Therefore, assumption of jurisdiction u/s.154 of the Income Tax Act, 1961 to bring into its ambit the cost incurred on unsold area which was conceived as low having regards to the sold area is entirely baseless. The power of rectification can be exercised only if there is a mistake apparent from the record of the assessment of the assessee. In other words, in order to attract the power to rectify, it is not sufficient, if there is merely a mistake in the order sought to be rectified. The mistake to be rectified must be one which is apparent from the record. A mistake apparent from record must be an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on which there may be conceivably two opinions. It is settled in the case of STAR ROLLING MLLS P. D. - VS- C.I.T. (1988) 174 ITR 396 (CAL) that the provision of s. 154 of the Act is applicable obvious mistake only. There must be a mistake apparent on the face of the record. It does not cover any mistake which may be discovered by a process investigation, argument of proof It is also settled in the case of BALARAM, I.T.O. -vs- VOLKART BROTHERS (1971) 82 ITR 50 (SC) that not open to the ITO to go into the true scope of the relevant provisions of Act in a proceeding under section 154 of the 1961 Act. A mistake apparent 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 conceivably be two opinions. Further in the case of C.I.T.–VS- SATYANARAYAN BHALOTIA (1994) 74 TAXMAN 34 (CAL), when a mistake has to be discovered on the interpretation or the construction of the provisions of the Act, it could never be a mistake apparent from the record. Again, in the case of BATA INDIA LTD. -VS- I.A.C. (2001) 249 ITR 491 (CAL), where the alleged mistake pertained to ascertain the correctness and incorrectness of the assessment order, then there would be an occasion for reopening of this assessment order resulting inevitably in a debatable issue on the allowability of a deduction, which was allowed in the previous assessment years, therefore there was neither any subsequent development nor any occasion to depart from the stand taken by the department on earlier occasion. Similarly in the instant case, the Ld. Assessing Officer has sought to reopen an item from the assessment order under the garb of s. 154 of the Act which is impermissible in law. It is, thus, conclusively established that the Ld. Assessing Officer exceeded his jurisdiction in this respect and as such, the order passed in pursuance to notice u/ s. 154 of the Income Tax Act, 1961 is ex-facie ultra vires, ab initio void and null in law.

Without prejudice to the aforesaid arguments regarding the validity of notice u/ s. 154 of the Income Tax Act, 1961 and in respect of ground no. 2, it is most respectfully submitted that the

addition made under the garb of unexplained investment is also without any basis and is disputed independently. Adverting to the merits of the addition of Rs. 27,88,995/-, the Ld. Assessing Officer assumed that the appellant had understated in the cost of construction of the unsold area in Apartment no. 5, which was not fully disclosed in the return of income filed for the assessment year under dispute which led him to construe that the cost of construction remains unexplained within the province of s. 69 of the Act. It is most respectfully submitted that the cost of construction was properly disclosed by the appellant. In fact, the cost of construction upon which the main issue hinges could easily be referred to the Valuation Officer u/ s. 142A of the Act. A plain reading of the provisions of s. 69 of the Act would show that it envisages two situations when an addition can be made on account of unexplained investments. The first situation is a contingency, where the assessee does not offer any explanation about the nature and source of the investment. The second situation arises where the explanation offered by the assessee is, in the opinion of the Assessing Officer, not satisfactory. Therefore, the action of the Ld. Assessing Officer to resort to the impugned addition of the sum of Rs. 27,88,995/- without giving any basis thereof in the order framed u/s 154 of the Act is thoroughly illegal and unfounded. In fact, there is no material evidence with the Ld. Assessing Officer to construe that such cost of construction was not actually incurred by the appellant. Therefore, his action was born of unilateral surmise, suspicion and conjecture not amenable to reason and having no relevance to facts. It is settled in the case of C.I.T. - vs- MAHARAJADHIRAJA KAMESWAR SINGH OF DARBHANGA (1933) 1 ITR 94 (PC) that an assessment is not a leap in the dark. The AO is not entitled to make a guess without evidence. It is also settled in the case of DHAKESWARI COTTON MILLS LTD. - VS- C.I. T. (1954) 26 ITR 775 (SC) that an assessment which is based on conjecture, suspicion and surmise is invalid and unsustainable in law. In the present context, it is submitted that the investment in the sum of Rs.27,88,995/- in cost of construction does not warrant application of provisions of s. 69 of the Act. It is reiterated that the appellant has duly appropriated the cost of construction in actuality and thus, it goes without saying that it would be monstrously impossible to treat the investment as undisclosed. In this connection, it is apt to refer to the decision of Apex Court in the case of C.I. T. - vs- P.K. NOORJAHAN (2000) 237 ITR 570 (SC), wherein it has been held that mere rejection of an explanation would not automatically entitle the Assessing Officer to conclude that the assessee had concealed the particulars of income and for that purpose addition envisaged u/ s. 69 of the Act shall not be warranted. When the stand of the appellant is vindicated by proven facts, there cannot be any further onus fastened on him in that regard. The law does not allow the discretion of an omnibus option to the Assessing Authority to act otherwise or other than in consonance with proven facts. That being so, the addition made invoking the provisions of s. 69 of the Act is liable to be deleted."

5. I have heard the contentions of the AIR of the appellant and gone through the assessment order framed by the AO. I am not impressed by the submissions advanced by AIR of the appellant. The judgment in the case of T. S. Balaram ITO (supra) has no manner of application because the question for determination in that case was whether rectification proceedings were competent in a case wherein it was found that the cost of construction of sold and unsold area was disproportionately disclosed. It was contended by the AIR that the case was not free from doubt and therefore rectification was not competent. The question for determination in the present case was whether the cost of sold area and unsold area are proportionately disclosed by the appellant or not. It was apparent that it was a clear case of the AO that the appellant did not disclose the same proportionately and in fact, in the arguments had admitted of the same. If the contention is that this question which arose for consideration was a very complex question, which could not have been considered under section 154 of the Act, then the initial prayer of the appellant could not also have been considered under section 154. The appellant cannot be permitted to have two standards for the selfsame issue. If he chooses to raise the jurisdictional sword, then he shall be perished by the same sword. The submission that the AD was satisfied, after verifying all records, when he passed the order u/s 143(3) of the Act dated 30.12.2011 is altogether unmeritorious. In

such view of the matter, I have no hesitation to hold that the order passed by the AD under section 154 of the Act is valid in the eye of law, as the true intent behind passing such a rectification order is to ensure that the mistake apparent from record, is stricto sensu given effect to. Thus, the grounds raised in this respect ***fails***."

3. Learned authorized representative vehemently submitted during the course of hearing that both the lower authorities have erred in law and on facts in taking recourse to sec. 154 rectification proceedings despite the fact that the impugned show-cause notice dated 10.11.2014 (supra) had made it clear that it was an instance of under assessment of income amounting to ₹27,88,995/- than that of an apparent error. The Revenue draws strong support of the lower authorities' impugned action. We notice in this backdrop of pleadings that the learned lower authorities' action invoking sec. 154 proceedings is not liable to be concurred with. We reiterate that the Assessing Officer has himself treated the assessee's case as involving under assessment and not rectification as indicated in preceding paragraphs. Hon'ble jurisdictional high court's decision in *Commissioner of Income Tax, Kolkata-IV vs. M/s J.L. Morison India Ltd.* **ITAT No. 180 of 2014 GA No. 4075 of 2014** dated 11.06.2018 holds that such rectification proceedings do not involve a long drawn process of arguments or reasoning but an error apparent from records. There is no such reason in the Assessing Officer's said show cause notice. We therefore draw strong support from their lordships decision and reverse both the lower authorities' action invoking sec. 154 rectification jurisdiction for the purpose of partly disallowing the assessee's cost of construction.

4. This assessee's appeal is allowed.

Order pronounced in open court on 17/01/2020

Sd/-	Sd/-
(लेखा सदस्य)	(न्यायिक सदस्य)
(J.Sudhakar Reddy)	(S.S.Godara)
Accountant Member	Judicial Member

*Dkp-Sr.PS
दिनांकः- 17/01/2020 कोलकाता / Kolkata

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant-Partha Chatterjee, C/o S.N.Ghosh & Associates, Advocates
"Seven Brothers' Lodge", P.O. Buroshibtala, P.S. Chinsurah
Dist. Hooghly, Pin-712105
2. प्रत्यर्थी/Respondent-ACIT, Cir-1, Aayakar Bhawan, G.T. Road,Khadina More, P.O. & P.S. Chinsurah Dist. Hooghly, Pin-712101
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण कोलकाता/DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,

/True Copy/

सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता ।