IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "E", MUMBAI

BEFORE SHRI M. BALAGANESH (AM) AND SHRI RAM LAL NEGI (JM)

ITA No. 4219/MUM/2018
Assessment Year: 2007-08

The DCIT (LTU)-2, World Trade Centre, Centre No. 1, 29th Floor, Cuffe Parade, Mumbai - 400005	**Vs.**	M/s Tata Motors Ltd., Bombay House, 24, Homi Mody Street, Hutatma Chowk, Mumbai - 400001 PAN : AAACT2727Q
(Appellant)		**(Respondent)**

Revenue by : Shri R. Manjunatha Swamy (CIT)

Assessee by : Shri Rajan Vora & Nikhil Tiwari (ARs)

Date of Hearing: 21/11/2019
Date of Pronouncement: 18/02/2020

O R D E R

PER RAM LAL NEGI, JM

The revenue has filed the present appeal against the order dated 03.03.2018 passed by the Commissioner of Income Tax (Appeals)-1 (for short 'the CIT(A), Mumbai, for the assessment year 2007-08, whereby the Ld. CIT(A) has partly allowed the appeal filed by the assessee against the assessment order passed u/s 143 (3) of the Income Tax Act, 1961 (for short the 'Act').

2. Brief facts of the case are that the assessee filed its return of income for the assessment year under consideration declaring total income of Rs. 1284,54,70,964/- under the normal provisions of the Act and Rs. 2188,13,41,552/- u/s 115JB of the Act. The case was selected for scrutiny, and the AO passed assessment order u/s 143 (3) r.w.s. 144C determining the total income of the assessee at Rs. 1287,74,27,653/- under normal provisions of the Act and Rs. 2375, 41, 87,553/- under section 115JB of the Act. Subsequently, order u/s 143 (3) r.w.s. 263 of the Act was passed and the

income of the assessee was determined at Rs. 1414,20,12,200/- under the normal provisions of the Act. Further, order u/s 154 was passed to rectify the order passed u/s 143(3) read with section 263 of the Act and determined the total income at Rs. 1444,34,52,200/- under the normal provisions of the Act. Since, it was noticed that the assessee had excluded gain on exchange fluctuation amounting to Rs. 39,22,70,379/- from the taxable income and credited to the profit and loss account, the AO passed order u/s 154 and added the said amount to the total income of the assessee rejecting the contention of the assessee that foreign exchange fluctuation is on capital account and hence excluded from computation of income. In the first appeal, the Ld. CIT (A) set aside the order passed by the AO and deleted the addition. The revenue is in appeal against the said findings of the Ld.CIT (A).

3. The revenue has challenged the impugned order passed by the Ld. CIT (A) on the following effective grounds:-

> *1.On the facts and in the circumstances of the case & in law, the ld. CIT (A) erred in holding the order passed by the assessing officer u/s 154 of the Income-tax Act as bad in law when the order was passed by the assessing officer in exercise of powers conferred by the section 154 of the Income tax Act to rectify the mistake apparent from record and was within the boundaries of law.*
> *(ii) On the facts and in the circumstances of the case and in the law, the ld. CIT (A) erred in holding that forex loss or gain arising on account of Foreign exchange fluctuation pertaining to Foreign currency convertible bonds (FCCB) utilized for general business purpose and not with respect to capital account is in the nature of "Capital Loss".*

4. Before us, the Ld. Departmental Representative (DR) submitted that the Ld. CIT (A) has erred in holding that the foreign exchange loss or gain arising on account of foreign exchange fluctuation pertaining to foreign currency convertible bonds (FCCB) utilized for general purpose business and not with respect to capital account is in the nature of capital loss. The Ld. DR further submitted that the Ld. CIT (A) has wrongly held that the order passed by the AO u/s 154 of the Act is bad in law as section 154 confers powers to rectify the mistake apparent from record. The Ld. DR. further submitted that since the Ld.

CIT (A) has wrongly deleted the addition made by the AO, the said order may be set aside and the order passed by the AO may be restored.

5. Per contra, the Ld. counsel for the assessee submitted that this issue is covered in favour of the assessee by the judgment of the Hon'ble Supreme Court in the case of *Tata Locomotive and Engineering Company Ltd. (60 ITR 405 SC)* the judgment of the Hon'ble Delhi High Court in the case of *CIT vs. Jagjit Industries Ltd. (2010) 191 Taxman 54 (Delhi)* and the judgment of the Hon'ble Madras High Court in the case of *CIT vs. PVP Ventures (2012) 23 taxmann.com 286* (Madras). The Ld. counsel further submitted that since the order passed by the Ld. CIT (A) is in accordance with the law laid down by the Hon'ble Supreme Court and the High Courts in the cases referred above, there is no merit in the appeal of the revenue, hence the same is liable to be dismissed.

6. We have heard the rival submissions of the parties and carefully gone through the material on record including the cases relied upon by the Ld. counsel. The Ld. CIT (A) has decided this issue in favour of the assessee on the grounds that the issue involved is covered in favour of the assessee by the various judgments of the Courts and the issue involved in the present case is beyond the scope of section 154 of the Act. The findings of the Ld. CIT (A) read as under:-

> *"5.3.1. I have considered the facts and circumstances of the case and the detailed submission of the appellant. Firstly, the issue of exclusion of gain arising on account of foreign exchange fluctuation held for capital purpose is settled in favour of the appellant in its own case by the Hon'ble Apex Court which was also followed further by the Hon'ble Apex Court in the case of Sutlej Cotton Mills Ltd. vs. CIT (116 ITR 1) (SC). The relevant portion of the decision of Apex Court in Sutlej Cotton (supra) is reproduced as under:-*
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> > *"The law may, therefore, now be taken to be well settled that where profit or loss arises to an assessee on account of appreciation or depreciation in the value of foreign currency held by it, on conversion into another currency such profit or loss would ordinarily be a trading profit or loss if the foreign currency is held by the assessee on revenue account or as a*

trading asset or as a part of circulating capital embarked in the business. But, if on the other hand, the foreign currency is held as a capital asset or as fixed capital, such profit or loss would be of capital nature."

5.3.2. Secondly, even on the scope of Sec, 154 of the Act, the issue that such gain is chargeable to tax or not is an issue that is not free from doubt and requires a long drawn exercise which does not amount to mistake apparent from record for invoking the provisions of section 154 of the Act. The appellant has relied on a number of judgments to contend that the instant rectification order is beyond the scope of sec 154 of the Act. In this regard, it has relied on the decision of Hon'ble Apex Court in the case of T S Balaram, ITO vs Volkart Bros. (1971) 82 ITR 50 (SC), the operative portion is reproduce as under:-

"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 conceivably be two opinion. As seen earner, the High Court of Bombay opined that the original assessments were in accordance with law though in our opinion the High Court was not justified in going into that question. In Satyananrayn Laxminarayan Hedge v. MallikarjunBhavanappa Tirumale (1960) 1 SCR 890, this court while spelling out the scope of the power of a High Court under article 226 of the Constitution ruled that an error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions cannot be said to be an error apparent on the fact of the record. A decision on a debatable point of law is not a mistake apparent from the record.-

See SidhramappaAndannappaMani v. Commissioner of Income Tax (1952) 21 ITR 333 (Bom). The power of the officers mentioned in section 154 of the Income Tax Act, 1961, to correct "any mistake apparent from the record" is undoubtedly not more than that of the High Court to entertain a writ petition on the basis of an "error apparent on the face of the record." In this case it is not necessary for us to spell out the distinction between the expressions "error apparent on the record" and "mistake apparent from the record". But suffice it to say that the Income-tax Officer was wholly wrong in holding that there

was a mistake apparent from the record of the assessments of the first respondent."

5.3.3 In view of the above, respectfully following the Apex Court in Volkart Bros.(supra), the order passed by the AO u/s 154 of the Act on the issue that is settled in favour of the appellant by the Hon'ble Apex Court is held to be bad in law. Therefore, grounds no. 1 to 3 are allowed."

7. As pointed out by the Ld. counsel for the assessee this issue is covered in favour of the assessee by the judgment of the Hon'ble Supreme Court in the case of Tata Locomotive and Engineering Company Ltd. (supra). The question before the Apex Court was

"(1) Whether on the facts and in the circumstances of the case, the surplus or difference arising as a result of devaluation in the process of converting dollar currency in regard to the sum of $ 36,123.02 repatriated to India was profit which was taxable in the hands of the assessee?

(2) Whether the said sum of $ 36,123.02 having been taxed in the relevant earlier year the surplus or difference in dollar exchange account arising by reason of the repatriation thereof as a result of devaluation was rightly taken as profit taxable?"

8. Since, the Hon'ble Bombay High Court had answered both the questions in negative, the revenue challenged the said findings before the Hon'ble Supreme Court. The Hon'ble Supreme Court affirmed the findings of the Hon'ble High Court holding as under:-

"A number of cases have been cited before us, but it seems to us that the answer to the questions depends on whether the act of keeping the money, i.e. $ 36,123.02, for capital purposes after obtaining the sanction of the Reserve Bank was part of or a trading transaction. If it was part of or a trading transaction then any profit that would accrue would be revenue receipt, if it was not part of or a trading transaction then the profit made would a capital profit and not taxable. There is no doubt that the amount of $ 36,123.02 was a revenue receipt in the assessee's business of commission agency. Instead of repatriating it immediately, the assessee obtained the sanction of the Reserve Bank to utilize the commission in its business of

manufacture of locomotive boilers and locomotive for buying capital goods. That was quite an independent transaction, and it is the nature of this transaction, which has to be determined. In our view it was not a trading transaction in the business of manufacture of locomotive boilers and locomotive it was clearly a transaction of accumulating dollars to pay for capital goods, the first step to the acquisition of capital good. If the assessee had repatriated $ 36,123.02 and then after obtaining the sanction of the Reserve Bank remitted $ 36,123.02 to the U.S.A., Mr. Sastri does not contest that any profit made on devaluation would have been a capital profit. But in our opinion, the fact that the assessee kept the money there does not make any difference especially, as we have pointed out, that it was a new transaction which the assessee entered into, the transaction being the first step to acquisition of capital goods.

In the view we have taken it is really not necessary to discuss cases cited at the bar because none of the cases are exactly in point. In our view the High Court was right in answering the questions in the negative. In the result appeal fails and is dismissed with costs."

9. In the case of *CIT vs. PVP Ventures* (supra) the Hon'ble Madras High Court has upheld the findings of the ITAT directing the AO to treat the entire gain on account of exchange rate fluctuation as capital receipt. The ITAT had decided the said issue by following the judgment of the Hon'ble Madras High Court in the case of *E.I.D. Parry Ltd. vs. CIT 174 ITR 11*, in which the Hon'ble court had held that if foreign currency is held as capital asset or as fixed capital, profit or loss arising on account of fluctuation in the value of foreign currency would be in the nature of capital receipt.

10. It is apparent from the notes filed by the assessee along with the revised computation of income that the assessee has excluded the net exchange fluctuation from the computation of income being on capital account. The exchange fluctuation was on borrowings (foreign currency convertible bonds) utilized for purchase of domestic fixed assets (non imported assets), loan given and investment made; (b) loans given; (c) deposit placed out of above foreign currency convertible bonds.

11. Further, the paper book contains the following detail filed by the assessee regarding treatment of foreign exchange fluctuation of capital account in computation from AY 2007-08 to AY 2012-13:-

Sr. No.	A.Y.	Particulars	Amount disallowed)/excluded in tax computation
1	2007-08	Exchange fluctuation Gain on Capital Account (Net)	39,22,70,379
2	2008-09	Exchange fluctuation Gain on Capital Account (Net)	90,63,52,598
3	2009-10	Exchange fluctuation Gain on Capital Account (Net)	36,98,29,864
4	2010-11	Exchange fluctuation Loss on Capital Account (Net)	-1,06,12,81,083
5	2011-12	Exchange fluctuation Loss on Capital Account (Net)	-1,79,00,41,294
6	2012-13	Exchange fluctuation Gain on Capital Account (Net)	2,82,70,37,436
		Total	**1,64,41,67,900**

12. The aforesaid detail shows that the assessee has been consistently following the same treatment for all the subsequent. During the course of original assessment proceedings, while responding the query on section 14A of the Act, the assessee has specifically stated that foreign currency convertible bonds were used for capital account purposes. The revenue has not rebutted the fact that the assessee has followed the same treatment in earlier years. The Ld. counsel invited our attention to page 147 of the paper book wherein the assessing officer has reproduced the assessee's submission in its order. We notice that the assessee has contended before the AO that as per the settled law foreign exchange gain on capital account transaction is not chargeable to tax, therefore, the case is covered in favour of the assessee. Hence, we find merit in the contention of the Ld. counsel that there is no infirmity in the findings of the Ld. CIT(A).

13. So far as the action of the AO in passing order u/s 154 of the Act is concerned, the coordinate Bench in the assessee's own case ITA No. 1075/Mum/2003 for the AY 1996-97 has upheld the findings of the Ld. CIT (A) holding that as per the settled law the only mistake apparent from record can be rectified u/s 154 of the Act and a debatable issues cannot be said to be a mistake apparent from record.

14. In view of the ratio laid down by the Hon'ble Supreme Court and the Hon,ble High Court discussed above, we are of the considered view that the findings of the Ld. CIT (A) are based on the settled principles of law. Hence, we do not find any infirmity therein to interfere with. We therefore, uphold the order of the Ld.CIT (A) and dismiss the appeal of the revenue.

In the result, appeal filed by the revenue for assessment year 2007-08 is dismissed.

Order pronounced in the open court on 18th February, 2020.

Sd/-	*Sd/-*
(M. BALAGANESH)	(RAM LAL NEGI)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 18/02/2020

Alindra, PS

आदेश प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
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