

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL,
JAIPUR BENCH 'B', JAIPUR

श्री विजय पाल राव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
Before : Shri Vijay Pal Rao, JM & Shri Vikram Singh Yadav, AM

आयकर अपील सं./ITA No. 1052/JP/2017
निर्धारण वर्ष/Assessment Year : 2011-12

Shri Rajendra Agarwal 8/138, Vidhyadhar Nagar Jaipur 302 039	बनाम Vs.	The ITO Ward- 7(1) Jaipur
स्थायी लेखा सं./जीआईआर सं./ अपीलार्थी/ Appellant	PAN/GIR No.:	AATPA 7184 Q प्रत्यर्थी/ Respondent

निर्धारिती की ओर से/ Assessee by : Shri Mahendra Gargieya, Advocate
राजस्व की ओर से/ Revenue by : Smt. Runi Paul, JCIT-DR

सुनवाई की तारीख/ Date of Hearing : 10/01/2020
घोषणा की तारीख/ Date of Pronouncement : 03 /03/2020

आदेश/ ORDER

PER VIJAY PAL RAO, JM

This appeal by the assessee is directed against the order of Id.
CIT(A)-3, Jaipur dated 01-11-2017 for the Assessment Year 2011-12.

The assessee has raised the following grounds.

“1 The impugned order u/s 154 is totally without jurisdiction being a case of review and for various other reasons. Hence, the same may please be quashed.

2. The Id. CIT(A) erred in law in confirming the action of the AO and the impugned order passed u/s 154 dated 20-05-2015

which in fact was completely beyond scope of section 154 and hence was passed without jurisdiction.

3. The Id. CIT(A) further erred in law as well as in the facts of the case in confirming the following additions and also erred in disallowing the deductions claimed (and allowed originally vide order passed u/s 143(3) dated 30-12-2013) being completely beyond the scope and jurisdiction of section 154.

- (i) Denial of the claim of the deduction u/s 54F of Rs. 5,25,700/-.
- (ii) Disallowance of the indexed cost of improvement of Rs. 1,80,514/-
- (iii) Disallowance of transfer expenses of Rs. 60,000/-

4. The AO further erred in law as well as on the facts of the case in charging interest u/s 234B of the Act. The appellant totally denies its liability of charging of any such interest. The interest so charged, being contrary to the provisions of law and facts, kindly deleted in full.

2.1 The assessee is an individual and filed his return of income on 14-02-2012 declaring total income of Rs. 1,86,420/-. During the scrutiny assessment, the AO noted that the assessee has declared capital gains of Rs. 1,81,604/- on sale of property bearing No. B-277, Vigyan Nagar, Jaipur for sale consideration of Rs. 15.21. lacs. The AO further noted that the assessee has claimed indexed cost of acquisition while computing capital gains. Accordingly, the AO accepted returned income while framing the assessment u/s 143(3) of the Act on 30-12-2013. Thereafter the AO proposed to rectify the mistake in the assessment order u/s 154 of the Act to withdraw the claim of deduction u/s 54 of the I.T.

Act, 1961 on 20-05-2015. The assessee challenged the order passed u/s 154 of the Act before the Id. CIT(A) and submitted that withdrawal of deduction u/s 54/54F is beyond the scope of rectification of apparent and patent mistake as per Section 154 of the Act. The Id. CIT(A) did not accept the objection of the assessee and upheld the order of the AO passed u/s 154 of the Act.

2. Before us, the Id.AR of the assessee submitted that during the year under consideration, the assessee sold the plot bearing No. B-277, Vigyan Nagar, Jaipur for a sale consideration of Rs. 15.21 lacs vide sale deed dated 24-11-2010 against which the assessee claimed indexed cost of acquisition/ indexed cost of improvement/ construction total amounting to Rs. 2,17,526/- and thereby computed Long Term Capital Gain of Rs. 13,03,474/-. The assessee claimed exemption u/s 54 of the Act of Rs. 5,25,700/- on account of construction of first floor on the existing house property bearing 8/138, Vidhyadhar Nagar, Jaipur . The Id.AR of the assessee submitted that the assessee had produced the evidence in support of the construction of first floor during the assessment proceeding which includes agreement dated 25-10-2010 with the contractor Shri Lokesh Shah Prop: M/s. Ritu Construction. The AO

after verification of the documents produced by the assessee in support of claim of deduction u/s 54 of the Act accepted the claim while passing the scrutiny assessment u/s 143(3) of the Act. Thereafter the successor AO issued notice u/s 154 of the Act on 19-01-2015 whereby he proposed to withdraw the claim of deduction u/s 54 of the Act. While passing the order u/s 154 of the Act, the AO not only disallowed the claim of deduction u/s 54 of the Act but also disallowed the cost of improvement as well as transfer expenses. The AO computed the Long Term Capital Gains at Rs. 9,74,818/- while passing the order u/s 154 of the Act as against capital gains declared and accepted by the AO while passing the scrutiny assessment at Rs. 1,81,604/-. Thus the AO has made an addition of Rs. 7,66,214/- while passing the impugned order u/s 154 of the Act. The Id.AR of the assessee thus contended that withdrawal of deduction u/s 54 of the Act as well as disallowance of cost of improvement and transfer expenses are beyond the scope of section 154 of the Act as these are not apparent mistakes which can be rectified. The Id.AR of the assessee contended that it is settled proposition of law that mistake which is apparent and patent can be rectified u/s 154 of the Act and not something which could be established by a long drawn process of

reasoning on the point of issue involved. The ld.AR of the assessee relied on the decision of Hon'ble Supreme in the case of T.S. Balaram, Income Tax Officer vs Volkart Brothers & Ors, 82 ITR 50 (SC). The ld.AR of the assessee further contended that Hon'ble Supreme Court has considered the term apparent, patent and manifest mistake on the face of the record in number of decisions including the decision in the case of ACIT vs Saurashtra Kutch Stock Exchange Ltd [2008] 219 CTR 90 as well as decision in the case of CIT vs Hero Cycles (P) Ltd (1997) 228 ITR 463 (SC). Thus the ld.AR of the assessee submitted that the AO while passing the scrutiny assessment on 30-12-2013 had given a finding on the issue of deduction u/s 54 of the Act as well cost of acquisition and improvement. The AO accepted the claim after verification of the necessary evidences and he was satisfied about the allowability of deduction. Therefore, withdrawing the claim by the AO in the proceedings u/s 154 of the Act is also beyond the scope and jurisdiction of the AO u/s 154 of the Act. Thus the jurisdiction and scope of proceedings u/s 154 of the Act is limited to rectify the apparent and patent mistake on the face of the record and not to review the order passed u/s 143(3) of the Act. The ld.AR of the assessee thus submitted

that even if the AO noted from the records that deduction u/s 54 of the Act was wrongly allowed then proper remedy was to initiate proceedings u/s 263 of the Act and not to initiate proceedings u/s 154 of the Act. Thus the ld.AR of the assessee submitted that the impugned order passed u/s 154 of the Act is not sustainable in law as it is beyond the scope and jurisdiction conferred u/s 154 of the Act.

2.3 On the other hand, the ld. DR has submitted that there is an apparent mistake on record as the AO found that what was sold by the assessee was not a residential house but a plain plot of land and therefore, the deduction u/s 54 of the Act is not allowable. Further the assessee has neither purchased nor constructed a new house but claimed to have invested in building the first floor of the existing house occupied by the assessee. Even in support of that claim, the assessee filed so called agreement with Contractor on a plain paper which is not verifiable. The ld. DR thus relied on the orders of the lower authorities.

2.4 We have considered the rival submissions as well as relevant materials available on record. The AO while passing the scrutiny assessment u/s 143(3) of the Act on 30-12-2013 accepted the returned income declared by the assessee as capital gains from sale of plot bearing

No. B-277, Vigyan Nagar,Jaipur. The AO has discussed the facts relating to the transaction of sale and investment made towards construction of first floor of the existing house bearing No. 8/138, Vidhyadhar Nagar, Jaipur in para 1 to 3 as under:-

“1. During the year under consideration the assessee mainly purchased a land for Rs. 99,21,000/- on 28-04-2010 jointly with his wife Smt. Abha Agarwal. The share of investment of the assessee comes to Rs. 52,36,070/-. The assessee has filed the details of the various sources from which Rs. 42,36,070/- was invested in the purchase of the above property. Rs. 10 lac was paid on 28-04-2012 to the seller of the property. During the year under consideration, the assessee has declared capital gain for taxation at Rs. 1,81,604/-.

2. Necessary evidences were filed for sale/purchase of properties which were considered and place on file. The assessee has sold a plot No. B-277, Vigyan Nagar,Jaipur for Rs. 15,21,000/- to Smt. Soniya Ahuja wife of Shri Ramesh Ahuja on 24-11-2010. After indexing the capital gain comes at Rs. 13,03,474/-. Against the capital gain the assessee has invested in separate unit at first floor at his residence at Plot No. 8/138, Vidhyadhar Nagar, Jaipur. Rs. 5,25,700/- was paid to Mr. Lokesh Shah Prop. M/s. Ritu Construction, Jaipur for construction of first floor and Rs. 1,01,700/- was paid to contractor Shri Ghasilal Kumawat for boundary wall of the plot. During the year under consideration, the assessee has sold shares of various companies and loss adjusted against the capital gain.

3. In view of above facts and circumstances of the case, after discussion and considering the details/ information placed on file, the returned income of Rs. 1,86,420/- is accepted and assessed to tax.”

It is manifest from the scrutiny assessment order passed u/s 143(3) of the Act that the AO has duly considered the relevant facts as well as documents filed by the assessee in support of claim of investment made for construction of first floor at his residential house bearing No. 8/138,

Vidhyadhar Nagar, Jaipur. The AO has also considered the cost of acquisition, improvement and other expenditure towards transfer of the property. Though the claim of deduction u/s 54 of the Act may not be allowable in the case if the immovable property sold by the assessee bearing No. B-277, Vigyan Nagar, Jaipur is only a plot of land and not residential house, however, in such a situation, the deduction u/s 54F of the Act would be allowable and quantum of deduction may be less than the deduction claimed u/s 54 of the Act. Even if it is presumed that the AO while passing the scrutiny assessment has wrongly allowed the claim u/s 54 of the Act then the same would not fall in the ambit of apparent, patent and manifest mistake on the face of record. It may be a mistake of decision on the part of the AO. The remedy for such erroneous order passed by the AO lies u/s 263 of the Act and not u/s 154 of the Act. The AO is not empowered to review its own order or predecessor order even if such order suffers from error and mistake but those errors and mistakes are the errors of judgement and decision and not an apparent and patent error on the face of it. A mistake apparent on record must be an obvious and patent mistake and not something which could be established by a long drawn process of reasoning on the point of issue involved on which

there may conceivably be two opinions. A decision on debatable point of law is not a mistake apparent from record as held by the Hon'ble Supreme Court in the case of T.S. Balaram, Income Tax Officer vs Volkart Brothers & Ors (supra). Only the glaring and obvious mistake on the face of record can be rectified u/s 154 of the Act. A point which is not examined on facts or on law cannot be held as a mistake apparent from record. Therefore, a mistake of decision of wrong appreciation of facts does not fall in the ambit of obvious, patent and apparent mistake from record which can be rectified u/s 154 of the Act. The Hon'ble Supreme Court in the case of CIT vs Hero Cycles (P) Ltd. (1997) 228 ITR 463 has held in para 2 as under:-

“2. The High Court declined to call for a reference under Section 256(2) of the I.T. Act, 1961. It appears that the claim for deduction u/s 35B was not originally allowed at all. Thereafter, on assessee's application an order was passed by the CIT(A), Jalandhar, in which he directed certain allowances to be given on proportionate basis after verification of the assessee's claim u/s 35B.

The AO thereafter entertained assessee's prayer for rectification of the order and allowed the assessee's claim in respect of matters like coloured albums, export staff travelling expenses, export sales commission, ECGC, foreign dealers visiting expenses. Rectification u/s 154 can only be made when glaring mistake of fact or law has been committed by the officer passing the order becomes apparent from the record.. Rectification is not possible if the question is debatable. Moreover, the point which was not examined on fact or in law cannot be dealt as mistake apparent on the record. The dispute raised a mixed question of fact and law.

The Tribunal was in error in upholding the assessee's claim for weighted deductions.

There is no point in sending the matter to the High Court to deal with the question raised at this stage. We treat the question as referred to this Court and answer the question in the negative and in favour of the Revenue. There will be no order as to costs. The appeal is allowed.’’

The Hon'ble Supreme Court has held that rectification is not possible if question is debatable. Moreover, the point which was not examined on facts or in law cannot be dealt as mistake apparent on record when the dispute raised a mixed question of facts and law. In the case in hand, it can be a matter of lack of enquiry or lack of proper enquiry on the part of the AO while passing scrutiny assessment order u/s 143(3) of the Act but the decision taken by the AO after considering the facts and evidences produced by the assessee cannot be held as a mistake apparent and patent on the face of the record. The AO while passing the order u/s 154 of the Act has stated that on perusal of the record of the assessee and specifically on perusal of the sale deed dated 24-11-2010 whereby the assessee sold the immovable property bearing No. B-277, Vigyan Nagar, Jaipur, there was nowhere mentioned about the construction of the said property. Therefore, the AO in proceedings u/s 154 of the Act has re-appreciated the evidences which was already available on record and

considered by the AO while passing the scrutiny assessment order u/s 143(3) of the Act. The AO has no jurisdiction u/s 154 of the Act to re-appreciate the evidences already considered by the AO during the scrutiny assessment as it would amount to review of its own order. The AO has travelled beyond the jurisdiction and scope of Section 154 of the Act while passing the impugned order. It is a gross misuse of the provisions and powers u/s 154 of the Act. Instead of sending a proposal for revision of the order u/s 263 of the Act, the AO has assumed the powers and jurisdiction u/s 154 of the Act to review the earlier order in the garb of rectification of mistake. Thus it is pertinent to note that on the date of initiation of proceedings u/s 154 of the Act, the limitation for invoking the provisions of Section 263 of the Act was very much available but instead of taking the step for appropriate proceedings u/s 263 of the Act, the AO assumed the jurisdiction which is otherwise not permissible u/s 154 of the Act. Even otherwise, if there is an error in the earlier order for allowing deduction u/s 54 of the Act, this is a mistake of question of law and facts. The ascertainment of facts requires a proper investigation and verification of the record as well as reality on the ground. Therefore, such an exercise of investigation and examination

cannot be undertaken u/s 154 of the Act. Accordingly, the order passed by the AO u/s 154 of the Act is a gross misuse and abuse of the provisions of the Act in the garb of rectification of mistake. Hence, the order of the AO is quashed which is without jurisdiction. Thus the appeal of the assessee is allowed.

3.0 In the result, the appeal of the assessee is allowed

Order pronounced in the open court on 03 /03/2020.

Sd/-
(विक्रम सिंह यादव)
(Vikram Singh Yadav)
लेखा सदस्य/ Accountant Member

Sd/-
(विजय पाल राव)
(Vijay Pal Rao)
न्यायिक सदस्य/ Judicial Member

जयपुर/ Jaipur
दिनांक/ Dated:- 03/03/ 2020

*Mishra

आदेश की प्रतिलिपि अग्रेषित/ Copy of the order forwarded to:

1.अपीलार्थी/ The Appellant- Shri Rajendra Agarwal, Jaipur

2.प्रत्यर्थी/ The Respondent- ITO, Ward- 7(1), Jaipur

3.आयकर आयुक्त(अपील) / CIT(A),

4.आयकर आयुक्त/ CIT,

5.विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर/DR, ITAT, Jaipur

6.गार्ड फाईल/ Guard File (ITA No.1052/JP/2017)

आदेशानुसार/ By order,

सहायक पंजीकार/ Assistant. Registrar