IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'C' BENCH, KOLKATA
(Virtual Court)

(Before Sri J. Sudhakar Reddy, Accountant Member & Sri S.S. Godara, Judicial Member)

I.T.A. No. 893/Kol/2019
Assessment Year: 2007-08

Manju Choudhary..Appellant
[PAN: ACYPC 5082 A]

Vs.

DCIT, Circle-38, Kolkata…………………...Respondent

Appearances by:

Sh. Miraj D. Shah, A/R, appeared on behalf of the Assessee.

Sh. Supriyo Pal, Addl. CIT, appeared on behalf of the Revenue.

Date of concluding the hearing : November 19th, 2020
Date of pronouncing the order : December 4th, 2020

<u>ORDER</u>

Per J. Sudhakar Reddy, AM:

This is an appeal filed by the assessee directed against the order of the Learned Commissioner of Income Tax (Appeals)-11, Kolkata, [hereinafter the "CIT(A)"], passed u/s. 250 of the Income Tax Act, 1961 (the 'Act'), dated 02.11.2018 for the Assessment Year 2007-08.

2. The AO in this case passed an order u/s 143(3) of the Act on 29.12.2009. Thereafter he passed an order u/s 154 of the Act on 28.02.2011. In this order passed u/s 154 of the Act, which runs into six pages, the AO states that the assessee has violated the provisions of Section 197(1B) as he did not deduct TDS from the payment of interest to loan creditors and hence she is liable for disallowance u/s 40(a)(ia) of the Act. As this disallowance was not done in the assessment order passed u/s 143(3) of the Act on 29.12.2009, the same requires rectification u/s 154 of the Act. A notice was given to the assessee, after receiving the reply, the AO concluded as follows:

> *"The assessee did not comply with the notice u/s 154 except submitting an information that she received 15G forms from the loan creditors and deposited these to the office of CIT-XIII, Kol. As to the provision of Section 197(1B) and Section 40(a)(ia) she offered no explanation. On the*

> *other hand she made an attempt to make the action u/s 154 void. Even in this respect she did not reply as to the position of the earlier authorization.*
>
> *As per Section 194A the assessee was liable to deduct tax at source at the time of crediting their account with interest but she did not. This consequently invites the application of Section 40(a)(ia). A mistake crept in the order dated 29.12.2009 in not disallowing the payment of interest exceeding the maximum amount which is not chargeable to tax. The mistake is apparent from records because mistake of law is also a mistake apparent from records. It has been held by Apex court that the error may be either an error of fact or an error of law. ITO V. Bombay Dyeing & Mfg. Co. Ltd. (1958) 34 ITR 143 (SC). Moreover there is no scope for two opinions in application of the Section 40(a)(ia) because this is overriding. The AO overlooked to apply the mandatory provision and the lapse comes under rectification. (CIT v. Kesaria Tea Co. Ltd.) (1998) (233 ITR 700) (Ker)."*

3. Aggrieved, the assessee carried the matter in appeal challenging both the jurisdiction of the AO to invoke his powers u/s 154 of the Act, on the ground that the issue in question is not a mistake apparent on record and that it is a highly debatable issue. The ld. CIT(A) passed an *ex-parte* order. At para 4.8 of his order he held as follows:

> *"4.8. In view of the above, the ld. AO is directed to verify from the return of income filed by the recipients of interest from the appellant and check if they have declared the receipt of interest in their return of income or not. If the interest received by them have been disclosed in their return of income, the appellant may be given relief to that extent. Further, where the recipients have income which is not taxable and whether declaration under Form No.15G is available, further relief to the appellant may be given. If the recipients have not declared the receipt of interest in their return of income, disallowances made u/s 40(a)(ia) to the extent of interest received by them remain sustained."*

4. Aggrieved, the assessee is before us.

5. The ld. Counsel for the assessee submits that the issue in question is highly debatable. He submitted that Section 197(A) of the Act has various requirements. He submitted that the assessee has submitted Form No.15G obtained from the loan creditors and that under those circumstances the tax deduction at source need not be made in those cases and consequently disallowance cannot be made u/s 40(a)(ia) of the Act. He further pointed out that the judgement of the Hon'ble Supreme Court in the case of *M/s. Hindustan Coca Cola Beverage (P.) Ltd. vs. Commissioner Of Income Tax [2007] 163 Taxman 355 (SC)* held that, if the payee had filed its return of income, no further deduction of tax need be made by the payer. He submits that all these entries require verification and hence the order passed u/s 154 of the Act is bad in law.

6. The ld. D/R relied on the order of the ld. CIT(A) specifically at para 4.7 and submitted that the assessee was liable to deduct tax at source on interest payments. He relied on the decision of the Delhi High Court in the case of *CIT vs. Ansal Land Mark*

Township (P.) Ltd. in *IT APPEAL NOS. 160 AND 161 OF 2015* dated 26.08.2015 and other decisions in support of the contention that the disallowance was required to be made u/s 40(a)(ia) of the Act and not making the same was a mistake apparent on record.

7. We find that the ld. CIT(A) at page 10 last para held as follows:

> *"The details submitted by the appellant before the AO as well as during the appellate proceedings have been considered. The figures and their reconciliation have also been verified. I find that this issue is squarely covered by the decision of the Hon'ble Supreme Court in the case of Hindustan Coca Cola Beverages vs. Commissioner of Income Tax. The said judgment was delivered on 16.08.2007. The issue to be decided in that case was that the appellant had paid certain amounts to the warehouse owner and a short deduction of TDS was made as a result of which the AO treated it as an assessee in default u/s 201 (1A)."*

8. This finding along with his finding at para 4.8 of his order which extracted above clearly shows that the issue is highly debatable. Hence, no disallowance can be made in this case without verification. This is not a mistake apparent on record. Thus we agree with the submission of the assessee that the issue is highly debatable and that an order could not have been passed under those circumstances u/s 154 of the Act on the ground that, a mistake apparent on record has crept into the assessment order and the same is being rectified. A mistake apparent on record should be one which is on the face of the record and which does not require consideration of fresh facts. In this case the ld. CIT(A) has directed the AO to take into account a number of facts and then arrive at the question of disallowance. This cannot be done in a proceeding u/s 154 of the Act. In the result, we cancel this order and allow the appeal of the assessee.

9. In the result, the appeal filed by the assessee is allowed.

Kolkata, the 4th December, 2020.

Sd/-	Sd/-
[S.S. Godara]	[J. Sudhakar Reddy]
Judicial Member	Accountant Member

Dated: 04.12.2020
Bidhan (P.S.)

Copy of the order forwarded to:

1. ***Manju Choudhary, 1/1 A, Nando Mullick Lane, Kolkata-700 006.***
2. ***DCIT, Circle-38, Kolkata.***
3. CIT(A)-11, Kolkata. (sent through mail)
4. CIT-
5. CIT(DR), Kolkata Benches, Kolkata. (sent through mail)

True copy

By order

Assistant Registrar
ITAT, Kolkata Benches