आयकर अपीलीय अधिकरण "D" न्यायपीठ मुंबई में

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

श्री महावीर सिंह, उपाध्यक्ष एवं श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष ।
BEFORE SRI MAHAVIR SINGH, VP AND SRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं./ ITA No. 7268/Mum/2019
(निर्धारण वर्ष / Assessment Year 2009-10)

Shri Ramachandran A Pothi 513, Laxmi Plaza, Laxmi Industrial Estate Andheri West, Mumbai-400 053	बनाम/ Vs.	The Jt. Commissioner of Income Tax, Circle 24(2) Room No.504, 4th Floor, Piramal Chambers, lalbaug, Mumbai-400 012
(अपीलार्थी / Appellant)		(प्रत्यर्थी/ Respondent)
स्थायी लेखा सं./PAN No. AACPP8620K		

अपीलार्थी की ओर से/ Appellant by	:	Shri Rushabh Mehta, AR
प्रत्यर्थी की ओर से/ Respondent by	:	Shri Bharat Andhle, Sr. AR

सुनवाई की तारीख / Date of hearing:	02.08.2021
घोषणा की तारीख / Date of pronouncement:	08.10.2021

आदेश / O R D E R

महावीर सिंह, उपाध्यक्ष के द्वारा /

PER MAHAVIR SINGH, VP:

This appeal of the assessee is arising out of order of the Commissioner of Income Tax (Appeals)]-36, Mumbai [in short CIT(A)], in Appeal No. Mumbai-36/11494/2016-17 vide dated 30.10.2019. The Assessment was framed by the Jt. Commissioner of Income Tax, Circle 24(2), Mumbai (in short JCIT/ AO) for the A.Y.

2009-10 vide order dated 29.11.2011 under section 143(3) of the Income-tax Act, 1961 (hereinafter 'the Act').

2. The only issue in this appeal of assessee is against the order of CIT(A) confirming the action of the Assessing Officer in passing rectification order under section 154 of the Act that due to typing error penalty under section 271(1)(c) of the Act for concealment of income remain to be typed. For this, assessee has raised the following ground No.1: -

> *"(a) The corrigendum cum order passed u/s. 154 of the I.T. Act, 1961 is invalid and without jurisdiction as it suffers from infirmity and against the principle of natural justice.*
>
> *(b) The ld. CIT (A) erred in facts and law in confirming the action of ld. Assessing Officer in initiating penalty proceedings u/s. 271(1)(c) through corrigendum cum order u/s. 154 after the assessment order passed u/s. 143(3) of the Act dated 29.11.2011.*
>
> *(c) The ld. CIT (A) erred in facts and law in not appreciating the fact that once the Id. Assessing Officer had applied his mind on a particular issue to not to initiate penalty u/s. 271(1)(c) then he ought not to have thereafter initiated penalty through a separate order in the garb of rectification u/s. 154 stating it as a "typing error" where the assessment was already concluded and attained finality vide order dated 29.11.2011.*
>
> *(d) The ld. CIT (A) grossly erred in accepting the version of the ld. Assessing Officer to treat a "typing error" in initiating*

penalty u/s. 271(1)(c) as a mistake apparent from record u/s. 154 which is not even remotely discernable from the assessment order passed."

3. Brief facts are that for the relevant Assessment Year 2009-10 assessment was framed under section 143(3) of the Act vide order dated 29.1102011 in which the Assessing Officer made the addition on the following:-

"Add: Disallowable items considered separately
as per statement *59,471/-*

Add: Purchases debited as correction charges
Disallowance as discussed (as per para 5) *1,00,36,101/-"*

Add: Unexplained cash credits
as discussed (as per Para 6) *9,40,000/-*

1,09,6,101

4. The Assessing Officer on the addition of unexplained cash credit initiated the penalty proceedings in Para 6.3 and the relevant part of the Para read as under:-

"6.3…… hence the unsecured loans of ₹9,40,000/- as detailed here in earlier para (all in cash and below ₹20,000/-) as added to the returned income within the meaning of section 68 of the Act. Penalty proceedings u/s 271(1)(c) are initiated for concealment of income."

5. But no penalty was initiated in regard to addition on account of purchases debited as correction charges, disallowed at ₹1,36,101/-. However, on 01.12.2011 the Assessing Officer issued corrigendum

cum order under section 154 of the Act correcting the mistake in the order and the relevant mistake in regard to initiation of penalty proceedings under section 271(1)(c) for concealment of income was rectified as under:-

> *"Further, due to typing error, the following sentence has estimated to be typed below para 5.7 which is glairing from the order.*
>
> *Penalty proceedings under section 271(1)(c) are initiated for concealment of income.*
>
> *Thus typing error is corrected by this order and this is forming part of the assessment order under section 143(3) dtd. 29.11.2011."*

6. Aggrieved, against this corrigendum cum order under section 154 of the Act dated 02.12.2011, the assessee preferred the appeal before CIT(A), who after a lapse almost 8 years passed the order on 30.10.2019 confirming the action of the Assessing Officer. The CIT(A) held that non-initiation of penalty proceedings under section 271(1)(c) of the Act is a mistake apparent from record. For this, he observed in Para 4,1.5 and 4.1.6 as under:-

> *"4.1.5 The rival submissions have been carefully considered. The various judicial rulings relied upon by the appellant lay down that the mistake proposed to be rectified u/s 154 should not be such which requires a long drawn process of reasoning and on which two reasonably contrary opinions are conceivable. But at the same time it has also been held by the Hon'ble Court that an obvious or self*

evidenced mistake can be rectified u/s 154. Any prima-facie mistake falls within the purview of section 154. In the case of the appellant the assessment order clearly indicates the findings of the AO based on facts and his proposed intention which is clearly evident in his narration in the quantum assessment order. Two issues in relation to claim of correction expenses of Rs.1,00,36,101/- & unexplained cash credit of Rs.9,40,000/- were dealt with in the assessment order. With regard to unexplained cash credit of Rs.9,40,000/- the AO initiated penalty proceedings for concealment but with regard to the issue of correction expenses the AO after giving his detailed findings omitted to mention that "Penalty proceedings u/s. 271(1)(c) are initiated for concealment of income". The body of the order clearly indicates that addition on both the issues was made by the AO and due to typing error penalty remained uninitiated with respect to the first issue of correction expense.

4.1.6 It was held by the Hon'ble Supreme Court in the case of M. K. Venktachalam /ITO Vs. Bombay Dyeing and M.S.G Company Ltd. (1958) 34 ITR 143 that if a mistake of fact apparent from the record of assessment order can be rectified, there is no reason why the mistake of law which is glaring and obvious cannot be similarly rectified. It is an accepted legal position that the power to rectify the order of assessment conferred upon the AO is to ensure that injustice to the assessee or to the revenue may be avoided. Section 154(1) lays down that with a view to rectifying any mistake apparent from the record, the income-tax authority referred

to in section 116 may amend any order passed by if under the provisions of this Act. Thus, the expression "any order" used in the section makes it clear that it is not necessarily ordinary assessment order that can be rectified, but it could be any order including the amended or rectified order.

In the appellant's case the mistake is not only apparent from the record but is also patent. It is a glaring mistake and should be rectified to ensure that the interest of the Revenue is not prejudiced. The Id. A.O. has rightly rectified the said mistake by passing an order u/s 1 54of the Act. No interference is called for with the order on the said ground. Accordingly, The Ground of appeal nos. 1, 2 & 3 is Dismissed."

Aggrieved, now assessee is in appeal before Tribunal.

7. We have heard the rival contentions and gone through the facts and circumstances of the case. First of all, we have to consider whether initiation of penalty proceedings under section 271(1)(c) of the Act is debatable point of law or not? We are aware that a debatable point of law cannot be construed as a mistake apparent from record. The existence of conditions stipulated in section 271(1)(c) of the Act is a sine qua non for initiation of penalty proceedings and should be discernible from the assessment order. Penalty proceedings are distinct and separate from assessment proceedings. Initiation of penalty requires due application of mind of the Assessing Officer and initiation of penalty under section 271(1)(c) of the Act depends upon the fulfillment of certain conditions

stipulated by the section and therefore, it is a clear point of law and matter of judgment on part of the assessing authority whether a particular case is a fit case for levy of penalty. Accordingly, where there exists a debatable issue and the ultimate action depends upon the wisdom of the assessing authority, it cannot be termed as mistake apparent from record. In the present case, what the Assessing Officer has rectified is his omission of judgment or a decision on facts which were under process of assessment. Such an omission of a judgment to initiate penalty proceedings cannot be presumed to be a mistake apparent from record. The quantum addition had been discussed at length in the assessment order where there was no mention of any concealment of income. Initiation of penalty entails reasoning and alternative arguments and therefore, failure to initiate the same is not a mere mistake apparent from record.

8. Further in the present case, on a perusal of the assessment order, it is abundantly clear that in respect of those heads where the Assessing Officer considered it appropriate to initiate penalty proceedings under section 271(1)(c) of the Act, he made a specific direction to that effect. In other words, in respect of issue of unexplained cash credits of ₹ 9,40,000/- there has been a specific direction by the Id. Assessing Officer to initiate penalty proceedings for concealment of income in the assessment order. Therefore, the absence of a reference to the initiation of proceedings under section 271(1)(c) of the Act is not an inadvertent omission since it is clear that in respect of other issue of cash credits, where the Assessing Officer did consider it appropriate to initiate penalty proceedings, he

made an observation to that effect and accordingly, failure to initiate penalty proceedings for this issue of claim of correction charges is not any 'mistake apparent from record. Also, the Id. Assessing Officer has treated the failure of initiation of penalty proceedings as a 'typing error' which is not tenable.

9. We are of the view that as per the provisions of the Act, recording of satisfaction before initiating penalty under section 271(1)(c) of the Act is must. In the context of penalty provisions of section 271(1)(c) of the Act, there has been an ongoing dispute between the Revenue and the taxpayers on whether the Assessing Officer is required to record his satisfaction before initiating penalty proceedings. Conflicting views were taken by the Hon'ble Delhi High Court and the Hon'ble Allahabad High Court in the cases of CIT vs. Ram Commercial Enterprises Ltd. (2001) 167 CTR (Del) 321 and Shyam Biri Works (P) Ltd. vs. CIT (2003) 185 CTR (All) 510 respectively. The Hon’ble Delhi High Court had taken a view that the assessing authority had to form its own opinion and record its satisfaction before initiating penalty proceedings whereas the Hon'ble Allahabad High Court was unable to agree with the view of the Hon'ble Delhi High Court and rendered that although the Assessing Officer must have satisfaction as required under section 273 of the Act. It is not necessary for him to record that satisfaction in writing before initiating penalty proceedings under section 273 of the Act. In view of the said conflicting judicial opinion on this issue, section 271(1B) of the Act was inserted vide Finance Act, 2008 w.e.f. 01.04.1989 which reads as follows:

> *"(1B) Where any amount is added or disallowed in computing the total income or loss of an assessee in any order of assessment or reassessment and the said order contains a direction for initiation of penalty proceedings under Clause (c) of sub-Section (1), such an order of assessment or reassessment shall be deemed to constitute satisfaction of the Assessing Officer for initiation of the penalty proceedings under the said Clause (c)."*

10. As per the amendment, a mere direction for initiating of penalty proceedings under sub- Section (1) of Section 271, shall be deemed to constitute satisfaction of the Assessing Officer for initiating penalty proceedings under sub-Section (1) of that Section. However, a combined reading of the provisions of section 271(1)(c) and 271(IB) of the Act makes it clear that the assessment order should contain at least a direction for initiation of penalty proceedings to constitute satisfaction of the Assessing Officer for initiation of penalty proceedings under Section 271(1)(c) of the Act. Even post Section 271(1B) of the Act, still a prima facie satisfaction of Assessing Officer that the case may deserve imposition of penalty should be discernible from the order passed during the course of assessment proceedings Ms. Madhushree Gupta vs. Union of India [2009] 317 ITR 107 (Delhi). The Hon'ble Delhi High Court also pointed out that Section 271(1)(c) of the Act has to be read in consonance of Section 271(1B) of the Act. If Section 271(1B) Act is read in isolation, the Assessing Officer would be in such a situation to pick a case for initiation of penalty merely because there is an addition or disallowance without arriving at a prima facie satisfaction with respect to infraction by the

assessee of clause (c) of sub- Section (1) of Section 271 of the Act: A requirement which is mandated by the provision itself. Section 271(IB) of the Act clearly indicates that initiation of penalty under section 271(1)(c) of the Act is not an inherent right given to the Assessing Officer but has to be expressly stated in the assessment order after due application of mind on being satisfied for the default committed by the assessee.

11. Thus, to initiate a penalty proceedings or not is a matter of application of mind and satisfaction to that effect by the Assessing Officer. If after applying his mind, the Assessing Officer made himself satisfied that there was no concealment/furnishing of inaccurate particulars of income and accordingly, did not initiate the penalty proceedings in the body of assessment order, he cannot proceed for penalty proceedings. The absence of 'direction' for initiation of penalty proceedings under Section 271(1)(c) of the Act in the body of assessment order, cannot even be ratified by issue of notice under Section 271(1)(c) read with section 274 of the Act along with assessment order or by taking recourse to Section 154/292B of the Act, otherwise it will render Section 271(IB) of the Act meaningless and otiose. Therefore, a combined reading of both the penalty provisions demonstrates the principle that the Assessing Officer ought to have arrived at a prima fade satisfaction for concealment of income and also given a direction for initiation of penalty anywhere in the body of the assessment order. Accordingly, in background of the above legislative history and in absence of any iota of evidence in the assessment order that the Assessing Officer had a prima facie

satisfaction per section 154 of the Act which is not permissible as per law.

12. It is once again reiterated that the assessment order should contain at least a direction for initiation of penalty proceedings to constitute satisfaction of the Assessing Officer for initiation of penalty proceedings under Section 271(1)(c) of the Act. In the present case, the Assessing Officer initiated the penalty proceedings separately by way of rectification order under section 154 of the Act after the assessment proceedings were already concluded on 29.11.2011. It is pertinent to note that any order passed under section 154 of the Act cannot be said to be an 'assessment made under section 143 or 144 of the Act which is the definition of 'regular assessment' as given in section 2(40) of the Act. Moheema Ltd. (No. 2) vs. CIT [1990] 182 ITR 377 (Gauhati). Accordingly, in view of the above, the initiation of penalty proceedings vide rectification order under section 154 of the Act is not only bad in law but also not a 'mistake apparent from record'.

13. A plain reading of the provision of section 154 of the Act reveals that there shall essentially exist any 'mistake apparent from the record' to invoke the section. Accordingly, at this juncture, it is important to interpret that what does mistake' and 'apparent from record' construe for the purpose of section 154 of the Act. A 'mistake' is an ordinary word, but in the Income Tax law, it has a special signification. It comprehends errors which are discerned. It is something which a duly and judiciously instructed mind can find out from the record. One of the meanings given for the word 'mistake is

that it is an omission made not by design but mischance and a 'mistake apparent' is a mistake that is manifest, plain or obvious, a mistake that can be realized without a debate or a dissertation. [District Excise Officer vs. ITO [1998] 66 ITD 168 (Delhi Trib.)]

14. Accordingly, a combined interpretation of both the terminologies, 'mistake' and 'apparent from record', makes it clear that any 'mistake apparent from record' must be an obvious and patent mistake and not something which can he established by a long- drawn process of reasoning on points on which there may be conceivably two opinions. A decision on a debatable point of law is not a mistake apparent from the record T.S. Balaram, Income-tax Officer Vs. Volkart Brothers [1971] 82 ITR 50 (SC). It would necessarily mean an obvious error which is incapable of argument or debate. [District Excise Officer v. ITO [1998] 66 ITD 168 (Delhi Trib.)] A careful reading of the above interpretations makes it amply clear that any mistake in order to be rectified has to be something which is apparent, in other words, glaring, conspicuous and self-evident from the face of the records which is incapable of any debate or argument. In the context of section 154 of the Act, it would mean that any mistake apparent from the record should he evident on a reasonable reading of the record to show that there has been committed by the Id. Assessing Officer, a mistake in the order which needs to be rectified. Having attained clarity on the above phenomena, the question now arises as to whether failure of initiation of penalty proceedings under section 271(1)(c) of the Act can be construed as 'a mistake apparent from the record' as per the provisions of section 154 of the Act. Accordingly, in view of the

above, the initiation of penalty proceedings vide rectification order under section 154 of the Act is not only bad in law but also not a 'mistake apparent from record'. Hence, the appeal of assessee is allowed.

15. In the Result, the appeal of the assessee is allowed.

Order pronounced in the open court on 08.10.2021.

Sd/-	Sd/-
(मनोज कुमार अग्रवाल / MANOJ KUMAR AGGARWAL)	(महावीर सिंह /MAHAVIR SINGH)
(लेखा सदस्य / ACCOUNTANT MEMBER)	(उपाध्यक्ष / VICE PRESIDENT)

मुंबई, दिनांक/ Mumbai, Dated:08.10.2021

सुदीप सरकार ,व .निजी सचिव/ *Sudip Sarkar, Sr.PS*

आदेश की 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 (Astt. Registrar)/ **व.निजी सचिव (**Sr.PS)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**