

IN THE INCOME TAX APPELLATE TRIBUNAL
"SMC" Bench, Mumbai
Before Shri Shamim Yahya, Accountant Member

I.T.A. No. 7010/Mum/2019
(Assessment Year 2009-10)

Crescent Construction Co. 527, Arneja Corner Sector-17, Vashi Navi Mumbai-400 703 PAN : AACFC3931A (Appellant)	Vs.	ITO-28(1)(3) 3 rd Floor, Tower No.6 Vashi Railway Station Complex, Vashi Mumbai-400 703 (Respondent)
---	-----	--

Assessee by	Shri Prakash Jotwani
Department by	Shri Smita Verma-DR
Date of Hearing	14.10.2021
Date of Pronouncement	20.12.2021

O R D E R

Per Shri Shamim Yahya (AM) :-

This appeal by the assessee is directed against the order of learned Commissioner of Income Tax (Appeals)-26 dated 26.09.2019 and pertains to assessment year 2009-10.

2. Grounds of appeal read as under:-

1. The Ld. CIT (A) erred in confirming the action of the assessing officer of assuming jurisdiction to rectify u/s 154 the assessment order passed u/s 143 (3) of the Income Tax Act as there was no 'mistake apparent from record' which could be rectified under section 154 of the Act.
2. The Ld. CIT (A) erred in holding that Interest on Bank Fixed Deposits (FDRs) of Rs 12,28,999/- and Rs 1,26,142/- are taxable under the head "Income from other sources" and not under head "Business Income" as held by the A.O in spite of documentary evidence filed evidencing that fixed deposits were kept as margin money and hence interest income arising therefrom would be construed as business income

3. The Ld. CIT (A) erred in confirming the Rental income of Rs 300,000/-earned on Bolero/jeep of the Appellant Company as income from other sources as against Business Income. Whereas the Vehicle was a business asset and was given on rent on temporary basis when the vehicle was not required for the appellants business activities
4. The Ld. CIT (A) erred in confirming that income of Rs 2,15,450/- earned from sale of scrap as Income from other sources, whereas the scrap is out of business activity and has to be assessed as business income. It also failed to consider that in the earlier assessment year the sale of scrap was accepted by AO as business income.
3. Brief facts of the case are as under:-

The assessee is a firm engaged in the business of Civil Construction. For the year under consideration, the assessee filed its return of income on 29.09.2009 declaring total income of Rs. 1,103/- after claiming set off of brought forward losses of Rs. 44,50,350. Subsequently, the case was picked up for scrutiny and the assessment was completed u/s. 143(3) of the Act vide order dated 30.11.2011 assessing the total income at Rs. 1,103/- after allowing set off of the losses of Rs. 47,29,215/-.

4. Thereafter, AO invoked jurisdiction u/s. 154 and held as under:-

Thereafter, it was observed by the AO that the assessee has shown the following incomes as business income which fall under the head of income from other sources

S. No.	Income from	Amount (Rs.)
1	Interest on loan	45,88,851/-
2	Interest on FD (DCB)	1,26,1427-
3	Interest on FD (Abhyudaya)	12,28,999/-
4	Rent	3,00,000/-
5	Sale of scrap	2,15,450/-
	Total	64,59,442/-

Based on the above factual observation, the AO proceeded to rectify the assessment order u/s. 154 of the Act after giving opportunity to the assessee. The various issues are discussed as under –

- a) Interest on loan (Rs. 45,88,851/-): The assessee during the proceedings u/s. 154 of the Act contended that there was no receipt of any interest on loan of Rs, 45,88, 851/-, the income was received from M/s. Crescent Cold Storage

Pvt Ltd as business income against long outstanding debtors in respect of the work done at cold storage. The assessee furnished copies of Running Account Bills and copies of the P&L account for various years to establish the same. However, the AO rejected the contentions of the assessee and held that there were factual discrepancies in the submission of the assessee and that the amount receivable from M/s. Crescent Cold Storage Pvt Ltd (CCSPL) was disclosed under two heads viz. sundry debtors and loans and advances.

b) Interest on FD (DCB & Abhyudaya) (Rs. 1,26,142/- and Rs. 12,28,999/-):
With

respect to the interest income received against the fixed bank deposits, the assessee submitted that the same was its business income as the interest was received against the security deposits which were required to be made for Bank Guarantee facility availed by the assessee for the reward of works. The AO rejected the same as no supporting documents were furnished by the assessee.

c) Income from Rent (Rs. 3,00,000/-): It was submitted by the assessee that it was the income received from the hire of Bolero Jeep to transport certain passengers from one place to another. The AO held that the same was not business income and was liable to be treated as income from other sources.

d) Income from sale of scrap (Rs. 2,15,450/-): The assessee stated that the in the business of construction scrap was generated on the sites which was subsequently sold by the assessee. The AO rejected the contention of the assessee in absence of any documentary evidence

The AO thereby, treated the above incomes as income from other sources and revised the income of the assessee at Rs. 47,30,320/- after giving set off of losses of Rs. 17,30,227/-.

5. Before the Ld.CIT(A), assessee has submitted as under:-

“During the course of appellate proceedings, the assessee has submitted that the order passed by the AO u/s. 154 of the Act is without jurisdiction and invalid as the same is based on change of opinion and is not on account of a mistake apparent from record. The assessee has also relied on some case laws for the same. The contention of the assessee has been duly considered, however, it is not found to be tenable.”

6. Without dealing with the case laws submitted by the assessee, Ld.CIT(A) proceeded to hold that the case laws are not applicable and referred to the Hon'ble Madras High Court case law, which was in the context of section 10B that matter can

be rectified under section 154. The Ld.CIT(A) proceeded to grant only part relief and confirmed the rest.

7. Against the above order, assessee is in appeal before the ITAT.

8. I have heard both the parties and perused the records. I note that AO has passed an order u/s. 143(3) of the Act. Thereafter, he has assumed jurisdiction u/s.154 of the I.T.Act. Section 154 of the I.T.Act permits rectification of mistake which are apparent from the record. It is settled law that issues where only the prima-facie adjustment can be done can be subject matter of section 154, as it can be said to be mistake apparent from the record. The decision of Hon'ble Madras High Court referred by Ld.CIT(A) is not at all applicable as it was in the context of section 10B and treatment of interest therein. In the present case, AO has completed the assessment order u/s.143(3). Now, he is changing his opinion and identifying issues where no disallowances has been made. Even for the purpose of reopening change of opinion is not permitted. So change of opinion by no stretch of imagination can be basis of assuming jurisdiction u/s. 154. By no stretch of imagination under normal tax laws treatment of interest under head business income or income from other sources can be said to be a matter which is not debatable. Hence, I hold that AO has passed an order u/s. 143(3) and thereafter, he is changing his opinion and passing rectification order under the garb of rectification of mistakes under section 154. This is not at all sustainable. Hence, I set aside the orders of the authorities below. I direct that addition to be deleted.

5. In the result, appeal by the assessee is allowed.

Pronounced in the open court on 20 .12.2021

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 20 /12/2021

Thirumalesh, Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai