आयकरअपीलीय अधिकरण, जयपुरन्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES,"A" JAIPUR

डा॰ एस. सीतालक्ष्मी,न्यायिकसदस्य एवंश्रीराठोडकमलेशजयन्तभाई, लेखा सदस्य के समक्ष
BEFORE: DR. S. SEETHALAKSHMI, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकरअपील सं./ITA No. 75/JP/2022
निर्धारणवर्ष/AssessmentYear : 2016-17

Dinesh Choudhary Prop. Balaji Construction C- 186, Chandravardai Nagar, Rajasthan	बनाम Vs.	ACIT, Circle-02, Ajmer
स्थायीलेखा सं./जीआईआर सं./PAN/GIR No.: ADOPC 4804 F		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओरसे/Assesseeby : None
राजस्व की ओरसे/Revenue by: Sh. A. S. Nehara, Add. CIT

सुनवाई की तारीख/Date of Hearing : 02/08/2022
उदघोषणा की तारीख/Date of Pronouncement: 16/08/2022

आदेश/ORDER

PER: RATHOD KAMLESH JAYANTBHAI, AM

This appeal by the assessee is directed against the order passed by the National Faceless Appeal Centre, Delhi [hereinafter referred to as (NFAC)] dated 28-12-2021 for the assessment year 2016-17 which in turn arise from the order passed by the ACIT, Circle-2, Ajmer under section 154 of the Act dated 09.12.2020.

2. The assessee has taken following grounds in this appeal;

"1. That the learned AO rectified his order without appreciating the full facts and circumstances of the case and without specifically deal with our objections raised prior to passing such illegal order

2. That the disallowance of Depreciation for Rs. 8,32,212 by such illegal order of rectification is quite wrong and unjustified. As the assessee is paying highest slab of 30 percent income tax every year since long hack, he should have been allowed depreciation on such different higher WDV for subsequent years as per law and to avoid double taxation on such income suo-moto by passing rectified orders of subsequent assessment from 2017 2018 to AY. 2020 2021 every year.

3. That as the order of AO merged in CIT (Appeals) order the same cannot be rectified by ITO and it should have been rectified, if any, by CIT (Appeals), Ajmer.

4. That as there is different views on rate of depreciation on such asset, the same cannotbe covered in the purview of rectification under section 154 of Income Tax Act.

5. That the firms accounts got audited by CA Firm who had conducted Tax Audit and alsoallowed depreciation in full & hence no intention to charge higher depreciation byassessee firm and there is no mistake apparent on face of record and not covered in section 154 of Income Tax Act.

6. That the order is bad in law and theory of merger not applied and the order has beenpassed without authority of law and beyond jurisdiction.

7. That the assessee reserves his rights to add, amend or alter any of the grounds on or before the date of hearing."

3. The fact as culled out from the records is that the assessee filed his Return of Income for the A.Y. 2016-17 on 16.10.2016 and the assessment u/s 143(3) of the Act was completed on 21.12.2018 at assessed income of Rs. 49,67,410/-. After the completion of assessment, the AO found from the assessment records that excessive claim of depreciation has been allowed

in the assessment order. Accordingly, the AO issued a notice u/s 154/155 of the Act on 15.10.2020 to rectify the mistake. The appellant filed a written submission in response to rectification notice and an order u/s 154 r.w.s143(3) of the I.T. Act, 1961 was passed by the ACIT, Circle-2, Ajmer on 09.12.2020 wherein depreciation on motor cars/buses/taxies, etc was restricted to 15% against the claim @ 30%. Thus, the AO made addition of Rs.8,32,212/-on account of excessive depreciation. Aggrieved from the said order of the assessing officer the assessee has preferred the appeal before the commissioner of Income Tax, Appeals.

4. In first appeal, the ld. CIT/NFAC confirmed the action of the AO by giving detailed finding on the issue of depreciation claimed by the assessee. The relevant finding of the ld. CIT(A) / NFAC is reproduced here in below for the sake of brevity :

> "4. Decision: I have carefully considered the facts on record, rectification order, written submissions of the appellant made and cited case law by the appellant during appellate proceedings. The ground-wise decision is as under:
>
> 4.1 Ground No. 1: The appellant raised this ground stating that the learned AO rectified his order without appreciating the full facts and circumstances of the case and without specifically deal with our objections raised prior to passing such illegal order. I have gone through the rectification order and seen that proper opportunity of being heard was given to the appellant and also considered the submission of the appellant before passing the rectification order. Also the

appellant has not made any specific submission on this ground. Thus, this ground of appeal is dismissed.

4.2 Ground No.2& 3: The appellant raised this ground stating that the disallowance of Depreciation ofRs. 8,32,212/- by such illegal order of rectification is quite wrong and unjustified. In this ground, the appellant has mainly raised the objection that the order u/s 143(3) of the Act cannot be rectified specifically when the order passed u/s 143(3) of the Act has been merged in the order of CIT(A), Ajmer. On perusal of rectification order, it is seen that the excessive claim of depreciation was found from the Tax Audit Report (TAR) by the AO and the TAR was very much part of the assessment record and can't be said that it is a debatable issue. Hence, the plea of the appellant that the mistake is not apparent from record is not correct and rejected. Further, the plea of the appellant about merger of assessment order with CIT(A) order, the appellant failed to show me that the issue was considered in the assessment order and the same issue of excessive depreciation was before the Ld CIT(A), who had applied his mind on the issue and gave any finding on this issue. In fact, the appellant failed to substantiate that the issue of excessive depreciation was examined in the assessment proceedings by filing copy of submission made during assessment proceedings.Also, the appellant has relied on several case laws without demonstrating the applicability of these decision in appellant's case due to similarity of facts of the instant case as well as cited case.

The main issue relates to the excessive depreciation on motor car/motor taxies/ lorry, etc on which AO restricted the depreciation by specifically stating that the appellant is not into the business of hiring of vehicle. The appellant is silent on this issue in his submission before the AO during rectification proceedings as well as before me during appellant proceedings. The appellant's another plea that the chartered accountant firm has allowed the higher rate of depreciation so there was no mistake is also wrong. I am of the opinion that anything, which might have wrongly been mentioned in TAR, doesn't empower the entitlement/disentitlement to the assessee. So main thing is the facts of the case, which has not been elaborated by the appellant during the appellate proceedings. In view of the aforesaid discussion, these grounds of appeal are dismissed.

So far as the argument of the appellant that the AO should take suo-moto rectification action in subsequent years, it is correct that the appellant shall be entitled lower depreciation in subsequent years also, if he had claimed depreciation @30% in the subsequent years. On the other hand, if the appellant had claimed deprecition@15% in subsequent years then he will be entitled for higher deprecation in subsequent years due to disallowance of depreciation in the present financial year. Hence, the AO is directed to take remedial action against excessive depreciation in subsequent years, if there is any loss of revenue. Further, the appellant is also entitled for taking remedial action under the Income tax Act for subsequent years, if lower depreciation has been claimed in the subsequent years due to disallowance of depreciation in the present financial year,

5. In the result, the appeal of the appellant is dismissed."

5. Aggrieved from the said order of the CIT(A)/NFAC the assessee has filed this appeal before us. When the appeal called for hearing on the date of hearing fixed on merits the ld. AR on behalf of the assessee submitted that they have placed their written submission on records and they do not intend to say further in the matter. Therefore, we decide this appeal based on written submission, as filed and extracted here in below;

"1. That the written submission in detail was submitted before CIT (Appeals) may kindly be considered alongwith fully covered & binding decision of Higher Courts referred in our submission & also at the time of hearing.

1. That in addition to above submission, we further give following decisions similar to the facts of our case for your honour'sconsideration:-

(i) Section 154 – Rectification of Mistake – As held by Madras High Court in the case of L-Cube Innovative Solutions (P) Ltd. Vs CIT reported in (2021) 435 ITR 566 (mad.) for the purpose of rectification of error apparent on the face of record can be corrected. The expression record is not merely confined to error/mistake in the assessment order. It would include the mistake of return & documents which accompanied the returns as a part of the record. As decided in (2021) 320 CTR 241 (Mad.) – It is well settled that an oversight of a fact cannot constitute an apparent mistake rectifiable under this section. As decided by (ITAT Jaipur) in the case of HarinarainGattani Vs. DCIT reported in (2021) ITD 434 – The applicability or non-applicability of provisions of section 115BBE on the facts is debatable issue which should have been taken in completing regular assessment made in our case under section 143(3) & not in proceedings under section 154 of the Act. This is not an obvious or patent mistake which is apparent from the record & specially when in earlier & subsequent years, the same rate of depreciation allowed to us on such assets. Accordingly also, the past &/or earlier history should have been followed. Thus, the action of AO in invoking his jurisdiction under section 154 is not legally tenable as beyond the scope of power under section 154 of the Act& the order of above-said assessment year i.e. 2016-17 has been decided by CIT (Appeals) & hence merged in the order of Appellate Authority.

(ii) As held in ACIT Vs. Misuree (India) Pvt. Ltd (2020) 32 ITCD On Line 97(ITAT Bangalore) Held – Rectification is not possible if the question is

debatable. A point which was not examined on facts or in law cannot be dealt with as a mistake apparent from the record. Thus, the disallowance cannot be proceeded under section 154 as this is a debatable issue & previously always allowed 30% depreciation on such assets.

(iii) As held in the case of Manju Choudhary Vs. DCIT (2020) 32 ITCD ON Line 082 (ITAT-Kolkata) – A mistake apparent on record should be one which is on the face of the record & which does not require consideration.

(iv) As held in Pr. CIT Vs Engineers Works (AP) – the High Court opinion that deduction of depreciation from gross receipts of income estimated at 12.5% on main contractual receipts is a debatable question of law & fact. Since the issue is not a palpable mistake on record but involves interpretation of the ratio laid down in KNR Constructions in the light of the law declared in Y. Ramchandra Reddy (Supra), we are of the opinion that the invocation of jurisdiction under section 154 of Act was not justified.

As the income was assessed under section 143(3), no such disallowance under section 154 of the Act can be made in such estimation of income on GP rate basis in any case & specially when the same rate allowed in past & also in subsequent years, except this year which was also allowed in original assessment made under section 143(3) but later on disallowed by rectification order for which we came in this appeal. As per past history & depreciation claimed & allowed to us, we enclosed herewith the complete details & accordingly also there is no revenue loss ultimately & specially when we are covered in Highest slab of tax @30% every years& hence we have also not gained any sums. Accordingly in the interest of justice also we should be allowed depreciation as claimed as per earlier allowed in all years in past.

(v) That following more major points for consideration as per appeal order also:-
(a) That as per decision of Supreme Court in (2011) 270 ELT page 625 (SC) – In pursuance of rectification application it cannot appreciate the evidence & consider its legal view taken earlier. As decided in (2010) 190 Taxman 406 (Karala) JCB Machine which is used on the road is registered as a Motor Vehicle therefore the assessee claim for depreciation of earth moving equipment namely JCB @30% is quite correct as held in above case. In this regard the decision is fully applicable in our case, our JCB machine is also registered in Motor Vehicle Act & running on road. In this regard ITAT Jaipur Bench also in (2017) Tax Pub. (DT) 373 (JP Trib.) where the issue relating to allowability of higher depreciation on JCB & other equipment's had been decided by different High Court & Coordinate Benches & two views has been expressed onit therefore the view which favours the assessee had to be adopted & depreciation @ 50% was to be allowed.
(vi) That the power under section 154 can be invoked only to correct an error & not to disturb a concluding finding given in scrutiny assessment made under

section 143 (3) of IT Act-(2015) 378 ITR 311(Karala) – We have submitted so many similar decision in our appeal grounds & CIT (Appeal) referred the same in his order, according to which also ITO is not empowered to rectify any deduction &/or expenses at his own by invoking section 154 of IT Act. Please refer page 6 to 15 of Appeal order & decisions given in his order but not considered.

Without prejudice to all above, it is quite wrong to mention in his order that the excessive claim of depreciation was found from the Tax Audit Report which also verified at the time of assessment made under section 143 & not found excessive claim of depreciation as alleged by CIT (Appeals) at his own ideas without verification of Tax Audit report which was shown as part of records & hence the fact mentioned by Appellate Authority is also wrong. That the complete order was in Appeal i.e. complete addition made on GP rate & appeal was filed before CIT (Appeals) for addition, which was reduced in Appeal & accordingly depreciation facts was also in Appeal & covered in GP rate reduced by CIT (Appeals), Ajmer. It is quite wrong to allege that at that time also there was an excessive depreciation as it was never considered &/or held by AO at the time of original order made under section 143(3) that there was excess deprecation because all expenses except some disallowed by AO fully considered &/or allowed by AO which includes depreciation also. We request your honour to consider our submissions submitted before CIT (Appeals) who has not considered the same as per facts of our case & with his independent view.

As seen from the order of CIT (Appeals), he has seen the TAR & depreciation claimed therein as allowable at the time of scrutiny assessment & no such mistake was found &/or reported to us at the time of assessment because of assessment made on GP Rate addition basis & appeal was filed for complete assessment order which has been merged in Appeals order & hence it is quite wrong that this point of depreciation not separately discussed by Appellate Authority. The Appeal Order dtd. 10-06-19 vide Appeal no. 401/2018-19 was fully covered in Appeal order as per AO order & (2001) 167 ITR page 367 (Raj.) is fully applicable in our case. The abovesaid order of AO was passed under section 143(3) on 21-12-18 fully merged in appeal order dtd. 10-06-19, so please consider and allow our appeal on this point even as decided by Raj High Court.

Hope you will allow our Appeal and oblige."

6. Per Contra, the ld. DR is heard who relied on the findings of AO and CIT(A)/NFAC and submitted that the disallowance of claim for higher depreciation made by the AO be sustained and the appeal of the assessee be dismissed based on the findings recorded in the order of the lower authorities.

7. All the ground raised by the assessee in this appeal is on account of action of ld. AO passing the order under section 154 of the Act restricting the depreciation @ 15 % as against claimed by the assessee @ 30 % therefore, the same is considered all together while deciding this appeal.

8. We have heard the rival contentions and perused the material placed on record. It is not the case the return of income was processed under section 143(1) of the Act, the case of the assessee already completed under scrutiny assessment and consequent upon and order under section 143(3) was made on 21.12.2018. Thereafter, on 09.12.2020 passing off an order under section 154 of the Act restricting the claim of the assessee for depreciation @ 30 % is challgned by the AO and has restricted the depreciation claim @ 15 % and difference amount was added as income of the assessee. Since, this order is passed under section 154 of the Act it is appropriate to extract the provision of section 154 of the Act which states that ;

Rectification of mistake.

154. (1) With a view to rectifying any mistake apparent from the record an income- tax authority referred to in section 116 may,—

(*a*) amend any order passed by it under the provisions of this Act;

(*b*) amend any intimation or deemed intimation under sub-section (1) of section 143;

(*c*) amend any intimation under sub-section (1) of section 200A;

(*d*) amend any intimation under sub-section (1) of section 206CB.

(1A) Where any matter has been considered and decided in any proceeding by way of appeal or revision relating to an order referred to in sub-section (1), the authority passing such order may, notwithstanding anything contained in any law for the time being in force, amend the order under that sub-section in relation to any matter other than the matter which has been so considered and decided.]

(2) Subject to the other provisions of this section, the authority concerned—

(*a*) may make an amendment under sub-section (1) of its own motion, and

(*b*) shall make such amendment for rectifying any such mistake which has been brought to its notice by the assessee or by the deductor or by the collector, and where the authority concerned is the Commissioner (Appeals), by the Assessing Officer also.

(3) An amendment, which has the effect of enhancing an assessment or reducing a refund or otherwise increasing the liability of the assessee or the deductor or the collector, shall not be made under this section unless the authority concerned has given notice to the assessee or the deductor or the collector of its intention so to do and has allowed the assessee or the deductor or the collector a reasonable opportunity of being heard.

(4) Where an amendment is made under this section, an order shall be passed in writing by the income-tax authority concerned.

(5) Where any such amendment has the effect of reducing the assessment or otherwise reducing the liability of the assessee or the deductor or the collector, the Assessing Officer shall make any refund which may be due to such assessee or the deductor or the collector.

(6) Where any such amendment has the effect of enhancing the assessment or reducing a refund already made or otherwise increasing the liability of the assessee or the deductor or the collector, the Assessing Officer shall serve on the assessee or the deductor or the collector, as the case may be a notice of demand in the prescribed form specifying the sum payable, and such notice of demand shall be deemed to be issued under section 156 and the provisions of this Act shall apply accordingly.

(7) Save as otherwise provided in section 155 or sub-section (4) of section 186[32] no amendment under this section shall be made after the expiry of four years from the end of the financial year in which the order sought to be amended was passed.

(8) Without prejudice to the provisions of sub-section (7), where an application for amendment under this section is made by the assessee or by the deductor or by the collector on or after the 1st day of June, 2001 to an income-tax authority

referred to in sub-section (1), the authority shall pass an order, within a period of six months from the end of the month in which the application is received by it,—

(*a*) making the amendment; or

(*b*) refusing to allow the claim.

9. Ongoing through the provision of the law and after hearing the rival contention and after going the submission made before us we found force in the arguments of the ld. AR of the assessee that the adjustment that has been done by the AO under the pretext of provisions of section 154 of the Act is not permitted under that provisions as the allowability of depreciation @ 15% or 30 % is not a mistake apparent on record. For exercising the power of rectification, the mistake should be an obvious or patent mistake which is apparent from the record & specially when in earlier & subsequent years, the same rate of depreciation allowed to the assessee on such assets the claim of higher deprecation cannot considered as mistake apparent on record and when the case has already been subjected a scrutiny under section 143(3) of the Act. Thus, the action of AO in invoking his jurisdiction under section 154 is not legally tenable as beyond the scope of power under section 154 of the Act and the ld. DR did not demonstrate before us as to what is the mistake apparent on record so as to sustained the order of the ld. AO. In terms of these observation, we quash the order

passed by the AO under provision of section 154 of the Act dated 09.12.2020 and allow the appeal of the assessee.

10. In the result the appeal of the assessee is allowed.

Order pronounced in the open court on 16/08/2022.

Sd/-	Sd/-
(डा॰ एस. सीतालक्ष्मी)	(राठोड कमलेश जयन्तभाई)
(Dr. S. Seethalakshmi)	(Rathod Kamlesh Jayantbhai)
न्यायिकसदस्य / Judicial Member	लेखासदस्य / Accountant Member

जयपुर / Jaipur
दिनांक / Dated:- 16/08/2022
*Ganesh Kr.
आदेश की प्रतिलिपिअग्रेशित / Copy of the order forwarded to:

1. The Appellant- M/s Balaji Construction/ Dinesh Choudhary, Chandravardai Nagar
2. प्रत्यर्थी / The Respondent- ACIT, Circle-2, Ajmer
3. आयकरआयुक्त / The ld CIT
4. आयकर आयुक्त(अपील) / The ld CIT(A)
5. विभागीय प्रतिनिधि, आयकरअपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्डफाईल / Guard File (ITA No. 75/JP/2022)

आदेशानुसार / By order,

सहायकपंजीकार / Asstt. Registrar