IN THE INCOME TAX APPELLATE TRIBUNAL,
CUTTACK BENCH, CUTTACK

BEFORE S/SHRI GEORGE MATHAN, JUDICIAL MEMBER
AND ARUN KHODPIA, ACCOUNTANT MEMBER

ITA No.323/CTK/2019
Assessment Year : 2009-2010

Grid Corporation of Orissa Ltd., GRIDCO House, Janapath, Bhubaneswar.	Vs.	ACIT (TDS), Bhubaneswar.
PAN/GIR No.AABCG 5398 P		
(Appellant)	..	(**Respondent**)

Assessee by : S/Shri Ved Jain/P.Venugopal Rao, ARs
Revenue by : Shri M.K.Gautam, CIT DR

Date of Hearing : 20/02/2023
Date of Pronouncement : 20/02/2023

O R D E R

Per Bench

This is an appeal filed by the assessee against the order of the ld CIT(A)-1, Bhubaneswar, dated 12.7.2019 in Appeal No.0035/17-18 for the assessment year 2009-2010.

2. S/Shri Ved Jain and P.Venugopal Rao, ld ARs appeared for the assessee and Shri M.K.Gautam, ld CIT DR appeared for the revenue.

3. It was submitted by ld AR that the single issue in assessee's appeal was against the action of the Assessing Officer in withdrawing the interest granted to the assessee u/s.244A in an order u/s.154 of the Act on the ground that the delay was attributable to the assessee company and not

on the part of the department. It was the submission that this is a debatable issue for which purposes, he placed reliance on the decision of the Co-ordinate Bench of this Tribunal in the case of Nathpa Jhakri Joint Venture, Mumbai vs ACIT in ITA No.1190/Mum/2010 order dated 15.2.2011, wherein in para 8, the Coordinate Bench of Mumbai Tribunal has held as follows:

> "8. In any case, the question as to whether the proceedings resulting in the refund were delayed for reasons attributable to the assessee is a question the answer to which will depend on an examination of the record and the facts that are relevant for the decision and even after all the facts have been gathered, there could still be possibility of an argument as to whether the delay was attributable to the assessee. For example, even if an adjournment was sought for by the assessee before the CIT(A), and an unduly long one at that, still if the CIT(A) had in fact adjourned the matter, a question may arise as to whether it can be said that the delay is attributable to the assessee in the light of the fact that the CIT(A) himself adjourned the matter and did not consider the request of the assessee as unreasonable or for an unduly long period. These are all matters on which more than one view is possible and it is only after a long drawn process of argument or debate that the rival view-points can be established. Such a matter cannot obviously fall within the purview of rectification proceedings as a mistake apparent from the record in view of the legal position adumbrated by the Supreme Court in the judgment cited supra."

4. It was also the submission that a perusal of the provisions of section 244A(2) of the Act clearly provides that the attribution of the delay in granting of the refund to the assessee is to be decided by the Pr. CCIT or the CCIT or the Principal Commissioner or the Commissioner. It was the submission that the Assessing Officer could not be an adjudicator on this issue.

5. In reply, ld CIT DR has vehemently supported the order of the Assessing Officer and the ld CIT(A). He has placed the decision of the Co-ordinate Bench of the Delhi Tribunal in the case of MMTC Ltd reported in 60 taxmann.com 38 (Del), wherein, it has been held that if the issue whether the provisions of section 244A(2) has not been adjudicated by the Pr. CIT/Appropriate authority, then the issue can be restored to the file of the Assessing Officer for re-adjudication. Ld CIT DR has filed written submission, as follows:

> "i.) This is an assessee's appeal against the rectification order dated 15.05.2017 u/s. 154 of the Act carried out by the ACIT,TDS, Bhubaneswar.
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> ii.) In this case, the CIT(A)-l, Bhubaneswar while adjudicating the appeal in relation to charging of interest u/s. 201(1) had restored the issue to the file of the A.O. with a direction that assessee might file the necessary evidences to show that REC and PGCIL had duly shown interest incomes/wheeling charges in their returns of income for A.Y. 2009-10 and that there was no tax liabilities as such or the recipient had paid taxes on such incomes.
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> iii.) While giving effect to the order of CIT(A)-l, Bhubaneswar on 29.11.2013, the A.O. had inadvertently granted refund of Rs.42,34,776/- to the assessee company. However delay in issue of refund was solely attributable to the assessee company. In para-3 of the rectification order dated 15.05.2017, the A.O. has highlighted the fact that for giving appeal effect to the order of CIT(A), the hearing was fixed on I7.09.20L0, but there was no compliance by the assessee company. Again the A.O. had issued a letter dated 09.04.2013 to the assessee company to file the requisite documents from REC and PGCIL by 19.04.2013. However the assessee company filed incomplete information on 06.05.2013. As a result, the A.O. was constrained to directly call for information from REC and PGCIL. The REC filed the information vide letter dated 20.05.2013 and PFCIL. The letter dated 29.07.2013 issued to PGCIL remained un-complied with. Finally the assessee company filed the necessary

ledger extracts on 13.09.2013 along with written submissions and appeal effect was finally carried out.

iv.) In these facts & circumstances, the A.O. held that delay in issue of refunds was attributable to the assessee and not to the department as per section 244A(2) of the Act. Thus excess interest of Rs.34,02,944/- was allowed to the assessee company. For carrying out rectification u/s.l54 of the Act, the A.O. had allowed an opportunity to the assessee company fixed the hearing on 09.03.2017 but there was no compliance by the assessee company. The A.O. thus held that the assessee company had nothing to say in the matter and it had no objection to said rectification u/s.154 of the Act. The A.O. held that delay in issue of refund u/s.244A was attributable to the assessee and excess interest of Rs.34,02,944/- granted earlier was accordingly withdrawn.

v.) Since the A.O. had granted excess interest u/s.244A to the assessee, it was a mistake apparent from the record and rectification u/s. 154 could not be faulted with. When the A.O. has ignored or overlooked mandatory provisions of law, it will constitute a mistake apparent from the record.

vi.) The Hon'ble Punjab & Haryana High Court in the case of CIT vs. Steel Strips Ltd. (11 taxmann.com 361) has held that overlooking of statutory provision is clearly a mistake apparent on record, and on that basis, rectification under section 154 is clearly admissible. In said case, assessment of the assessee company for the assessment year 1985-86 was completed. Thereafter, the Assessing Officer noticed that while re-computing income, provision of section 80VVA was overlooked and deduction allowed was in excess of limit stipulated. Accordingly, a notice under section 154 was issued. The assessee objected the notice on the ground that the said provision stood omitted with effect from 01.04.1988 and issue being debatable was outside the scope of section 154. The Assessing Officer rejected the assessee's objection and made the rectification by allowing deduction under section 80VVA as per statutory limit. On appeal, the Commissioner (Appeals) set aside the order of the Assessing Officer on the ground that rectification did not relate to a 'mistake apparent on record' as required for invoking section 154 and was on a debatable issue. The Tribunal also upheld the order of the Commissioner (Appeals). On appeal, the Hon'ble Punjab & Haryana High Court held in para-5 as under:

" 5. It is clear from the order of the Assessing Officer that depreciation was allowed overlooking section 8OVVA of the Act. Overlooking of a statutory provision is clearly a mistake apparent on record and on that basis, rectification under section 154 of the Act was clearly admissible. Impermissibility of deduction is not debatable if section 80VVA is applied. This being so, the CIT(A) as well as the Tribunal erred in law in holding that rectification was beyond the scope of section 154 of the Act. It is clear that the statutory provision having come into force with effect from 1-4-1984, the same could have been applied for the assessment year 1984-85 and thereafter. However, while applying the said provision for the assessment year 1984-85, claim or carry forward or set off, had to be considered in accordance with law as in force during the said assessment year even if it relates back to an earlier year. The question is accordingly answered in favour of the revenue and against the assessee."

vii.) The Hon'ble Supreme Court in the case of L. Hirday Narain vs. ITO (78 ITR 26) held that exercise of power to rectify an error apparent from the record is conferred upon the Income-tax Officer in aid of enforcement of a right. The Income-tax Officer is an officer concerned with assessment and collection of revenue, and the power to rectify the order of assessment conferred upon him is to ensure that injustice to the assessee or to the revenue may be avoided. It is implicit in the nature of the power and its entrustment to the authority invested with quasi-judicial functions under the Act, that to do justice it shall be exercised when a mistake apparent from the record is brought to his notice by a person concerned with or interested in the proceeding. The High Court was, in our judgment, in error in assuming that exercise of the power was discretionary and the Income-tax Officer could, even if the conditions for its exercise were shown to exist, decline to exercise the power.

viii.) In the case of Addl. CIT vs. India Tin Industries (P.) Ltd. (166 ITR 454), for assessment year 1963-64 the assessee company claimed development rebate of Rs.16,754/- including development rebate of Rs.5740/- on dyes and tools. The ITO disallowed the claim for rebate in respect of dyes and tools and allowed development rebate of only Rs. 11,011. On appeal, the AAC allowed the claim of the assessee for development rebate in respect of dyes and tools. This order was accepted by the revenue. However section 34 (3)(a) was overlooked by the A.O. Section 34(3)(a) provides that the development rebate 'shall not' be allowed unless an amount specified therein is debited to the profit and loss account of the relevant previous year and also credited to the reserve account to be utilized

in the manner and for the period specified therein. This section, therefore, lays down that the development rebate shall not be allowed unless the conditions specified therein are complied with. The creation of a reserve fund from out of the profit and loss account of the relevant previous year is a condition to be satisfied by an assessee. The transfer of the 'reserve fund' has, therefore, to be made at the time of making up the profit and loss account of the relevant previous year. The assessee, in the present case, admittedly did not create the reserve fund at the time of making up the profit and loss account of the relevant year and had, therefore, not fulfilled the conditions prescribed for getting the concession given under section 33. Therefore, the assessee, in the present case, not having complied with or fulfilled one of the conditions prescribed under section 34(3(a) was not entitled to the development rebate under section 33. Thereafter, the ITO made an order under section I54, holding that as the assessee had created development rebate reserve of Rs.7172/- only, the maximum development rebate that might be allowed was Rs.9,563/- in respect of machinery only, disallowing a sum of Rs.7,201/- out of Rs. 16,751 already allowed by the AAC. On appeal by the assessee, the AAC held that there was effective compliance with the provisions of section 34(3)(a) and, therefore, the assessee was entitled to the entire claim of development rebate of Rs.16,751/- and as such, the provisions of section 154 were not attracted to the facts of the present case. On appeal by the revenue, the Tribunal also upheld the AAC's order. On reference, the Hon'ble Karnataka High Court held that to attract the provisions of section 154, there must be a mistake and it must be a mistake apparent from the record. Overlooking a mandatory provision of law which leaves no discretion to the taxing authorities like admission to tax, surcharge or interest is a mistake apparent from record. Conditions under section 34(3)(a) have to be complied with and unless they are complied with an assessee is not entitled to claim the development rebate under section 33 of the Act. Allowing the concession of development rebate to an assessee who had not fulfilled the conditions specified was a mistake apparent from the record because the grant of development rebate was by overlooking the mandatory provisions of section 34(3)(a) of the Act. This mistake was a mistake apparent from the records and, therefore, attracted the provisions of section 154. Therefore, the ITO was justified in rectifying the assessment to withdraw the excess development rebate already allowed.

ix.) The Hon'ble Punjab & Haryana High Court in the case of CIT vs. Ram Nath Prem Kumar (124 ITR 404) was dealing with a case wherein payments had been made in cash in violation of section 40A (3) of the Act. The assessee firm which followed the mercantile system of accounting got some quantity of rice husked by another firm, and thus became liable to pay to the said firm, Rs.37,952/- out of which, an amount of Rs.17,728/- only was paid during the said financial year. The balance liability of the assessee for the payment of Rs.20,224/- to the firm, remained undercharged until after 31-3-1969. The Income-tax Officer, in view of the assessee's mercantile system of accounting, allowed to the assessee the full expenditure of Rs.37,952/-. Later on, the Income-tax Officer, discovered that the payment of Rs.20,224/- had been made by the assessee otherwise than by crossed cheque or crossed draft drawn on bank as contemplated in section 40A(3). He, therefore, applying the first proviso to section 40A{(3), read with section 154, rectified his earlier order by which the expenditure of Rs.20,000/- odd was allowed as a deduction. The AAC confirmed the said rectification order. The Tribunal, however, set aside the rectification order on the ground that the provisions of section 154 were not attracted to the facts of the case. On appeal, the Hon'ble Punjab & Haryana High Court held that the payment of the expenditure in question was made on 2-5-1969, i.e., after 31-3-1969. Admittedly, the payment exceeding Rs.2,500 was made otherwise than by a crossed cheque drar,rm on a bank or by a crossed bank draft. In view of the proviso to section 40A(3), the allowance originally made, for the expenditure incurred and paid, would be deemed to have been wrongly made and the Income-tax Officer was in law authorized to re-compute the total income of the assessee for the previous year in which such liability was incurred and the Income-tax Officer was thus entitled to make the necessary amendment in the original assessment order. The proviso specifically makes the provisions of section I54, so far as they may apply thereto, applicable in such cases. It was held that the order of Tribunal that the non-application of the provisions of section 40,4.(3) by the Income-tax Officer, to the expenditure incurred to get the rice husked, did not constitute a mistake, apparent from the record within the meaning of section 154(1), was thus not justified.

The Hon'ble Delhi ITAT in the case of Shiv Shakti Traders vs. ACIT (139 tilonann.com 193) held that where Assessing Officer completed assessment under section 143(3) and thereafter he, on basis of audit objection to effect that assessee had made payments for purchasing of trading goods in violation of provisions of section 40A(3) passed a rectification order under section 154, then overlooking mandatory

provision of law in original assessment was held to be an apparent mistake of law rectifiable under section 154 of the Act. The observations of Hon'ble Delhi ITAT in para-10 are reproduced as under:

"10. Perusal of the order under section I54 reveals that during the certificatory proceedings the Ld. AO required the assessee to show cause as to why its income be not recomputed as payments amounting to Rs. 23,72,40,000/- for expenditure made in violation of section 404.(3) of the Act were liable to be disallowed. Notice under section 154 dated 5-7-2018 was duly received by the Ld. AR of the assessee who appeared on 16.7 2018 but did not provide any reply and requested for adjournment which was granted. The hearing was adjourned Lo 19-7-2018 but on that date also neither the assessee nor the Ld. AR filed any reply. Ld. AO, therefore, passed exparte order. In the appellate order the Ld. CIT(A) observed that without filing any application under rule 464., the assessee furnished undated copies of letters addressed to ACIT,CircIe-2, Ghaziabad as part of submission. Before us the plea taken by the assessee in the grounds of appeal is that the Ld. AO has not disputed the genuineness of the impugned expenditure and accepted the sale made by the assessee based on such expenditure. We are of the view that this is not enough to bring the case of the assessee out of the ambit of the mandatory provision of section 40A(3). The assessee also claimed that its case is covered under rule 6DD without specifying under which sub-rule of rule 6DD as amended by the Income Tax (Seventh Amendment) Rules, 2008 its case falls. In such scenario, in our opinion it would be just and fair if the matter is restored to the file of the Ld. AO for decision afresh. Ld. AO shall give reasonable opportunity to the assessee to present its case and to bring on record all the material in support of its claim that its case falls under rule 6DD. Thereafter, Ld. AO shall pass reasoned and speaking order in accordance with law."

x.) The Hon'ble Madras High Court in the case of Cuddalore District Central Co-operative Bank vs. DCIT (130 tilonann.com 239) held that where Assessing Officer issued impugned notice under section 154 on ground that deduction claimed under section 36(1)(viia) was to be restricted to provisions of doubtful debt made by assessee in financials, since nature of mistake proposed to be rectified was regarding amount of bad and doubtful debts debited to provision for bad and doubtful debt account, said mistake would be apparent from record and would fall under ambit of section 154 of the Act. It was held in para-l9 that in the instant case, the revenue has stated clearly

that the provision for bad and doubtful debts is under section 36(1)(viia). Unless amount of bad and doubtful debts is debited to the provision for bad and doubtful debts account and the deduction admissible under section 36(1)(vii) is limited to the amount by which such debt or part thereof exceeds the credit balance in the provision for bad and doubtful debts account. The language and intention of the legislature is clear and unambiguous and therefore the mistake in this case is apparent from record and thus issue of notice under section 154 is within the ambit of section 154 and it is a mistake apparent from record. It was further held that Revenue had intended to rectify the mistake regarding the amount of bad and doubtful debts is debited to the provision for bad and doubtful debts account and the deduction admissible under section 36(1)(vii) is limited to the amount by which such debt or part thereof exceeds credit balance in the provision for bad and doubtful debts account. Therefore, such a mistake apparent from record was to be rectified.

The Hon'ble Mumbai ITAT in the case of GTC Industries vs. DCIT (104 ITD 86) had an occasion to adjudicate the similar matter. In said case, the assessee company's claim for deduction in respect of provision for bad and doubtful debts was allowed in the assessment under section 143(3) of the Act. The Assessing Officer, however, disallowed the same subsequently, by invoking section 154 on the ground that the said provision was not an admissible deduction, as according to him the making of a provision would not be regarded as 'write off'. On appeal, the Commissioner (Appeals) upheld the impugned disallowance. On second appeal, the assessee contended that the validity of the Assessing Officer's order under section 154 had to be judged in the light of law as it existed on the statute book as on 17-6-1996, i.e., the date of the order of the Assessing Officer passed under section 154, on which date, the legal position as laid down by the several High Courts, including the jurisdictional High Court, was that the debiting of the profit and loss account and the crediting of the reserve for bad debts/provision for bad debts account, constituted sufficient compliance with the requirements of section 36(1)(vii) and the amendment brought out in the year 2001, by way of insertion of the Explanation to the said section with effect from 1-4-1989, could not be looked at to support the earlier order passed under section 154. The Judicial Member accepted the submission of the assessee but the Accountant Member held that the assessee's said claim did not fall under section 36(1)(vii) in view of the insertion of the Explanation to said section by the Finance Act, 2001 with retrospective effect from 1-4-1989 and omission to apply the said statutory provisions was surely a mistake apparent from the

> record, capable of being rectified under section 154 by the Assessing Officer. Since there was a difference of opinion between the two Members, the matter was referred to the Third Member. The Third member held in para-6 that the Supreme Court in M.K. Venkatachalam, ITO vs. Bombay Dyeing and Manufacturing Co. Ltd. (1958) 34 ITR 143 held that for finding out whether there is a mistake apparent from the record, the authority has to look at the amended law and not the law that existed at the time of making the original record. If an order is plainly or obviously inconsistent with the specific and clear provision, as retrospectively amended, there is a mistake apparent from record, which would be rectifiable under section 154. Therefore, the view expressed by the Accountant Member on the disputed issue was agreed with by the Third member. In view of above facts, the appeal filed by the assessee company is required to be dismissed. "

6. We have considered the rival submissions. Coming to the issue as to whether the issue of responsibility for the delay can be attributed under section 244A(2) of the Act is concerned, restoring the issue to the file of the AO in the present case would be an act of futility. This is because we are faced with an order under section 154 of the Act. If at all the direction u/s.244A(2) was to be granted by the appropriate authority, who admittedly is not the AO, then such direction could have been issued before the issuance of show cause notice u/s.154 of the Act. Now when the issue is before the Tribunal and much water has flowed under the bridge, by restoring the issue to the file of the AO, no purpose would be served insofar as such a direction cannot be obtained from the appropriate authority for a fresh issuance of a show cause notice u/s.154 of the Act, as the same would be substantially time barred. In these circumstances, as it is noticed that the Assessing Officer is not the authority who could attribute the delay

in the issuance of the refund under section 244A(2) as also on the ground that the issue is highly debatable issue, we are of the view that the order passed u/s.154 is unsustainable and consequently, the order of the Assessing Officer and that of the ld CIT(A) stands quashed.

7. In the result, appeal of the assessee stands allowed.

Order dictated and pronounced in the open court on 20/02/2023.

Sd/-	sd/-
(Arun Khodpia)	**(George Mathan)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Cuttack; Dated 20/02/2023
B.K.Parida, SPS (OS)

Copy of the Order forwarded to :

1. The Appellant : Grid Corporation of Orissa Ltd., GRIDCO House, Janapath, Bhubaneswar
2. The Respondent: ACIT (TDS), Bhubaneswar
3. The CIT(A)-1, Bhubaneswar
4. Pr.CIT-1, Bhubaneswar
5. DR, ITAT, Cuttack
6. Guard file.

//True Copy//

By order

Sr.Pvt.secretary
ITAT, Cuttack