

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "G" MUMBAI

BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)
AND
SHRI PAVAN KUMAR GADALE (JUDICIAL MEMBER)

ITA No. 3217/MUM/2022
Assessment Year: 2009-10

Yash Developers,
1st Flr Anand, 7th Road,
Maryland Apartment, D.K.
Sandhu Marg, Chembur,
Mumbai-400071.
PAN No. AAIFY 6171 A
Appellant

DCIT-27(3),
4th floor, Tower No. 6, Vashi
Station Complex,
Vashi-400703
Vs.

Respondent

Assessee by : Mr. Mandar Vaidya, AR
Revenue by : Mr. Harmesh Lal, DR

Date of Hearing : 23/02/2023
Date of pronouncement : 31/03/2023

ORDER

PER OM PRAKASH KANT, AM

This appeal by the assessee is directed against order dated 26.11.2021 passed by the Ld. Commissioner of Income-tax (Appeals) – National Faceless Appeal Centre, Delhi [in short ‘the Ld. CIT(A)] for assessment year 2009-10, in relation to rectification order passed by the Assessing Officer. The relevant grounds raised by the assessee are reproduced as under:



1. *The Ld. CIT(A) erred in not considering that the proceedings u/s. 154 were time-barred.*
2. *The Ld. CIT(A) fell in error of law in not appreciating that, the facts & circumstances of the case, the limitation period for passing an order u/s. 154, commenced from the date of the original assessment order dated 21 November 2011.*
3. *The Ld. CIT(A) failed to appreciate that, in the facts & circumstances of the case, the original assessment order, did not merge with the original order of the d. CIT(A), to the extent of the issue raised in the proceedings us. 154*
4. *The Ld. CIT(A) misdirected himself in not appreciating that there was no mistake apparent in the original assessment order and hence recourse to the proceedings w/s. 154 was improper, bad and illegal*
5. *The Ld. CIT(A) erred in ignoring that. the very fact that an additional document was required to be taken into consideration & record for the purpose of adjudicating the appeal, itself established that there was no mistake apparent in the original assessment order.*

2. Briefly stated, facts of the case are that the assessee filed return of income for the year under consideration declaring total income of Rs.70,46,488/-. In the return of income, the assessee claimed deduction for remuneration/salary to partners amounting to Rs.47,71,285/-. The return of income filed by the assessee was selected for scrutiny assessment which was completed on 21.11.2011 determining total income at Rs.80,01,582/-. The claim of remuneration/salary to partners was not disturbed by the Assessing Officer or to say it was accepted. The assessee contested the assessment order before the Ld. First Appellate Authority, who granted partial relief to the assessee vide appellate order dated



16.01.2014. Subsequently, the Assessing Officer noticed that salary/remuneration to the partners should have been limited to Rs.1,20,000/- only and therefore, he issued notice for rectifying mistake , which according to him was apparent from the record. After giving opportunity to the assessee, the Assessing Officer passed order u/s 154 of the Act on 29.06.2017 wherein he rejected the objection of the assessee as to the expiry of the limitation for passing order u/s 154 and made addition to the extent of Rs.46,51,485/-. On further appeal, the Ld. CIT(A) admitted the additional evidence under Rule 46A of the Income-tax Rules, 1961 (in short 'the Rules'). In the additional evidence, the assessee filed supplementary partnership deed dated 25.11.2008, according to which the remuneration payable to working partners was determined as per the provisions of section 40(b)(ii) of the Act. The Ld. CIT(A) accordingly allowed the enhanced remuneration for the period w.e.f. 28.11.2008 to 31.03.2009. However, for the earlier period of the financial year from 01.04.2008 to 27.11.2008 remuneration was granted according to old partnership deed. Accordingly, the Ld. CIT(A) allowed part relief on the quantum of the addition.

3. Before us, the assessee is aggrieved on the issue of not deciding expiry of the limitation for passing order u/s 154 as according to assessee, the original assessment order did not merge



with the order of the Ld. CIT(A) to the extent of issue raised in proceedings u/s 154 of the Act.

4. We have heard rival submission of the parties on the issue-in-dispute and perused the relevant material on record. In the assessment order passed u/s 143(3) of the Act on 21.11.2011, the claim of the assessee of remuneration to partners amounting to rs.47,71,285/- was accepted by the Assessing Officer but subsequent to the order of the Ld. CIT(A) dated 16.01.2014. The Assessing Officer gave effect to the order of the Ld. CIT(A) on 02.04.2014 and thereafter sought to rectify the claim of the assessee of remuneration to partners. It is contention of the Assessing Officer that under the original partnership agreement monthly salary/remuneration of Rs.5,000/- only was provided to the working partners and there being two working partners , remuneration could have been allowed to the assessee to the extent of Rs.1,20,000/- and therefore, the excess remuneration paid was disallowable. According to Assessing Officer, this being a mistake apparent from record, he rectified the claim of the assessee of remuneration to partners vide order u/s 154 of the Act dated 29.06.2017. Before us, the contention of the assessee that the order sought to be rectified u/s 154(7) of the Act is the original assessment order and therefore order dated 29.06.2017 passed by the Ld. Assessing Officer u/s 154 of the Act is barred by the limitation. The Assessing Officer however in the assessment order



rejected this objection of the assessee. According to him, the effect of the order of the Ld. First Appellate Authority was given on 02.04.2014 and thus the period of limitation of the four years as contemplated in section 154 of the Act is to be reckoned from the end of the financial year in which to the effect of the Ld. CIT(A) has been given. According to him the assessment order got merged with the order of the Ld. CIT(A) and therefore, the limitation has to be reckoned from the order of the Ld. CIT(A). In support of his finding, he relied on the decision of the Hon'ble Delhi High Court in the case of **CIT v. Tony Electronics Ltd. in ITA No. 196 of 2009**. The relevant finding of the Ld. Assessing Officer is reproduced as under:

“5.2 As regards the assessee's second contention that the mistake should be apparent from record and the same was barred by limitation it would suffice to say that the mistake was apparent from record on account of excess set off of the salary as per order u/s 143(3) dated: 21.11.2011. Further the assessee's assertion that the action u/S 154 is time barred it would be suffice to say that subsequent to the passing of order us 143 the assessee had filed appeal before the CIT(A)-7. The CIT(A) vide his order No/IT-215/2013-14 dated: 16.01.2014 given some relief to the assessee's . The effect to this order was given vide order dated 02.04.2014. Thus the period of limitation of 4 years as contemplated in section 154 is to be reckoned from the end of the F.Y in which the effect to the order of the CIT(A) has been given. In this context reliance is placed upon the relevant decision of Delhi High Court ITA No.196 of 2009 Commissioner of Income tax vs Tonly Electronics Ltd. The same is reproduced herein below:

13. We find substance in the submissions of learned counsel for the Revenue. In fact, answer to the issue at



hand is provided by the judgment of the Supreme Court in *Hind Wire Industries (supra)*. Dealing with the same provision, namely, sub-section (7) of [Section 154](#) of the Act, the Court was of the view that the answer rested on the word „Order“ used in the expression "from the date of the order sought to be amended" occurring in sub-section (7) of [Section 154](#) of the Act. The Court categorically opined that the word „Order“ had not been qualified in any way and it does not necessarily mean the original order. It can be any order, including the amended or rectified order. The Court was further of the view that once a reassessment order or rectification order was passed giving effect to the order of the appellate forum, the original order ceases to operate. Following discussion on this aspect is relevant for our purpose :-

"A similar expression in rule 38 of the Mysore sales Tax Rules fell for consideration in International Cotton Corporation (P) Ltd. v. Commercial Tax Officer, (1975) 35 STC 1; (1975) 2 SCR 345. Dealing with the point raised, this court held as under :

"The other attack that the rectification order is beyond the point of time provided in rule 38 of the Mysore Sales Tax Rules is also without substance. What was sought to be rectified was the assessment order rectified as a consequence of this court's decision in Yaddalam's case (1965) 16 STC 231. After such rectification the original assessment order was no longer in force and that was not the order sought to be rectified. It is admitted that all the rectification orders would be within time calculated from the original rectification order. Rule 38 itself speaks of „any order“ and there is no doubt that the rectified order is also „any order“ which can be rectified under rule 38."

This decision was endorsed in Deputy Commissioner of Commercial Taxes v. H.R. Sri Ramulu, (1977) 39 STC 177 when this court observed there as follows :

"The reason for that is that once an assessment is reopened, the initial order for assessment ceases to be



operative. The effect of reopening the assessment is to vacate or set aside the initial order for assessment and to substitute in its place the order made on reassessment. The initial order for reassessment cannot be said to survive, even partially, although the justification for reassessment arises because of turnover escaping assessment in a limited field or only with respect to a part of the matter covered by the initial assessment order. The result of reopening the assessment is that a fresh order for reassessment would have to be made including for those matters in respect of which there is no allegation of the turnover escaping assessment. As it is, we find that in the present case, the assessment orders made under section 12A were comprehensive orders and were not confined merely to matters which had escaped assessment earlier. In the circumstances, the only orders which could be the subject matter of revision by the appellant were the orders made under section 12A of the Act and not the initial assessment orders.

(Emphasis supplied)"

14. What follows from the aforesaid is that after the rectification order, initial order of assessment ceases to operate. It is no more in existence and is substituted by the fresh assessment order passed. The Court, thus, categorically held that the word „any□ in the expression "order sought to be amended" would mean even the rectified order.

15. Legal position with which there cannot be any quarrel is that once an appeal against the order passed by an authority is preferred and is decided by the appellate authority, the order of the said authority merges into the order of the appellate authority. With this merger, order of the original authority ceases to exist and the order of the appellate authority prevails, in which the order of the original authority is merged. For all intent and purposes, it is the order of the appellate authority that would be seen. Doctrine of Merger has been explained by the courts in number of



judgments. Our purpose will suffice by referring to one judgment where this doctrine is explained along with the rationale behind it. It is in the case of Gojer Bros. (Pvt.) Ltd. Vs. Shri Ratan Lal Singh (1974)2SCC453, which reads as under:

"11. The juristic justification of the doctrine of merger may be sought in the principle that there cannot be, at one and the same time, more than one operative order governing the same subject-matter. Therefore the judgment of an inferior court, if subjected to an examination by the superior court, ceases to have existence in the eye of law and is treated as being superseded by the judgment of the superior court. In other words, the judgment of the inferior court loses its identity by its merger with the judgment of the superior court."

In another case of Commissioner of Income-tax Bombay v. Amritlal Bhogilal & Co. [1958] 34 ITR 130(SC), the position in regard to the doctrine of merger was stated thus by Gajendragadkar J. who spoke for the Court:

"16. There can be no doubt that, if an appeal is provided against an order passed by a tribunal, the decision of the appellate authority is the operative decision in law. If the appellate authority modifies or reverses the decision of the tribunal, it is obvious that it is the appellate decision that is effective and can be enforced. In law the position would be just the same even if the appellate decision merely confirms the decision of the tribunal. As a result of the confirmation or affirmance of the decision of the tribunal by the appellate authority the original decision merges in the appellate decision and it is the appellate decision alone which subsists and is operative and capable of enforcement."

16. Once we understand the Doctrine of Merger in its true sense, as explained above, and relying upon the interpretation given to the word „any□ or „order□ given to sub-section (7) of Section 154 of the Act by



the Apex Court in Hind Ware Industries (supra), the inescapable conclusion would be that the original order of assessment had ceased to operate on the decision given by the CIT(A) and had merged with the orders of the appellate authority. The final orders passed by the appellate authority were dated 28.6.2004 and acting thereupon the AO passed assessment order, giving appeal effect thereto, on 23.7.2004. Thus, it is the order of 28.6.2004 passed by the CIT(A) which remains on record for all intent and purposes as the original order of assessment has been merged. Once the matter is viewed from this angle, it is no explanation that the error which is sought to be rectified occurred in the original assessment order and was not subject matter of appeal. Obviously, it was a calculation error which could not have been the subject matter of appeal.

17. There appears to be some substance in the submission of learned counsel for the Revenue that such error could be corrected by the AO exercising the inherent power as, otherwise, the assessee is let off by getting double depreciation, which is not permissible under the Act. In any case, once we opine that the assessment order had merged with the order of CIT(A) passed on 28.6.2004, the limitation for the purpose of sub-section (7) of Section 154 is to be counted from this date. Interestingly, even the learned counsel for the assessee agreed to the extent that when the order is passed during the re-assessment of proceedings, initial order of proceedings does not survive in any manner or to any extent. This principle would be applicable also when the assessment order is challenged in the appeal and appellate authority passes order at variance with the orders passed by the AO, on the basis of which fresh order under Section 143(3) read with Section 250 of the Act is required to be passed by the AO giving effect to the order of the appellate authority.

18. No doubt, the rectification order passed under Section 154 would mean the assessment order as rectified and the assessment order is not obliterated



thereby. However, what would be the position when assessment order is not challenged and amended by the appellate authority. Once rectification order under Section 154 of the Act is passed it would mean that the appeal effect order is rectified.

From this it follows the rectification can be done up to 31.03.2019. In view of this it would rather be incorrect on the part of the assessee to assert that the action u/s 154 was barred by limitation. Thus I do not find any merit in assessee's this contention.

The explanation of the assessee is not tenable. The mistake is being apparent from record is therefore here by rectified.

The total income of the assessee is computed as under

| | |
|--|------------------|
| Total income as per order giving effect to the order of the Hon'ble CIT dated 02.04.2014 | Rs.72,52,468/- |
| Add: payment of remuneration to partner u/s 40(b)(ii) | Rs.46,51,285/- |
| Total income | Rs.1,19,03,753/- |
| Rounded off | Rs.1,19,03,760/- |

Revised accordingly. Give credit for the taxes paid after due verification. Issued revised demand notice/refund accordingly.”

4.1 However, before us, the Ld. Counsel of the assessee has relied on the decision of the **Hon'ble Bombay High Court in the case of CIT v. Sakseria Cotton Mills Ltd. 124 ITR 570 (Bom)**, wherein it is held that if the Ld. First Appellate Authority has not been called upon or has not actually dealt any part of the assessment order made by the Assessing Officer, then there is no question of merging/superseding of that part of the order with the order of the Ld. CIT(A). Therefore, in view of the Hon'ble Bombay High Court, the assessment order passed by the Assessing Officer do not fully



merge with the order of the appellate authority but merger take place to the extent of part of order in respect of which the First Appellate Authority has exercised his appellate jurisdiction. The relevant finding of the Hon'ble Bombay High Court (supra) is reproduced as under:

“The powers which the AAC exercises are not merely appellate powers which a normal appellate authority exercise because normally an appellate authority is called upon to deal with the grievance of the appellate which he makes in respect of the order passed by the subordinate authority. In addition to the general powers which an appellate authority possesses, that is, either confirming modifying or setting aside an order which in the case of an assessment has been described as the power to confirm, reduce or annul the assessment, the AAC has also been given the power to enhance the assessment. This power to enhance the assessment is, however, made subject to the proviso that the appellatu should be given a reasonable opportunity of showing cause against such enhancement. Thus, under sub-s. (3) of s. 31, apart from dealing with the grievance which has been made by an assessee against the order of the ITO, the AAC can go further and look into the correctness of the order of assessment made by the ITO and if the AAC is satisfied that there was a case for enhancing the assessment he can make an order enhancing the assessment, Thus, if the AAC is satisfied that the ITO has granted either excessive relief or the assessment of income and tax is in any way erroneous, he has the power to make an order enhancing the assessment while deciding the appeal filed by the assessee. In that sense, it is possible to say that the entire assessment proceedings are open before the AAC. It is common knowledge that while making an assessment and bringing the income of the assessee to tax, the ITO has to deal with several contentions made by the assessee for determining the taxable income and the tax



payable having regard to the several provisions of the I.T. Act. It is only in respect of claims with regard to which the ITO passes an order adverse to the assessee that the assessee goes in appeal to the AAC. If the assessee is satisfied with a part of the assessment order, he does not make that part a subject of appeal. It is thus open to the AAC deals with the appeal, it is mainly that part of the order of the ITO which has been challenged by the assessee which is dealt with by the AAC. The exercise of his appellate jurisdiction is normally limited to the grievance made by the assessee unless of course the AAC choose to exercise his power of enhancing the assessment, it the AAC disposes of the appeal and deals with the grievance made by the assessee and confirms the assessment, nothing more is required to be done further by the ITO after the order of the AAC. But if the ACC, while disposing of the appeal, reduces the assessment, then the ITO has to give effect to the directions of the AAC. These directions are restricted to the order made by the AAC because a part of the assessment has not been made the subject of appeal by the assessee, in a given case, if the AAC wishes to enhance the assessment, even though the assessee has not made any part of the assessment order the subject of appeal, in view of the special provisions in s. 31(3), it is permissible for him to interfere with that part of the order of the ITO. The scheme of the provision of s. 31(3) is, however, clear that the assessee is entitled to challenge a part of the assessment order by which he feels aggrieved and where the AAC does not decide to scrutinise the remaining part or any other aspect of the assessment. Which has not been made the subject of appeal, the AAC is not called upon to deal with that part made the subject of appeal the AAC is not called upon to deal with that part of the assessment order. Only that part of the order of the ITO is, therefore, affected by the order of the AAC in respect of which the AAC has exercised his appellate jurisdiction which may consist of confirming, reducing, enhancing or annulling the assessment. If the AAC has not been called upon or has not actually dealt with any part of the assessment



order made by the ITO. There is no question of that part of the order merging or being superseded by the order of the AAC. The effect of s. 31(3), therefore, appears to us, having regard to the provisions of the I.T. Act, to be that only that part of the order of the ITO merges or stands superseded by the order of the AAC in respect of which the AAC has exercised his appellate jurisdiction. So far as the remaining part of the order of assessment is concerned to have its independent existence unaffected by the AAC. The doctrine of merger, therefore is not wholly applicable in the case of such orders made the I.T. Act.

It is important to noticed another aspect of the provisions relating to rectification of mistakes, the provisions of s. 35 of the Indian I.T. Act, 1922, and the corresponding provisions of s. 154 of the I.T. Act, 1961, give a power of rectification to the Commissioner, the AAC and the ITO only in respect of the orders passed by them. The ITO can exercise his power of rectification in respect of the order made by him. The AAC can exercise the powers of rectification only in respect of the orders made by him, when the statute has given powers of rectification to the ITO in respect of his own order, the position is that he is able to rectify his own order within the prescribed period if the whole of the order or a part of the order has not been subjected to appeal. If the theory of merger is accepted as being attracted wholly, the provision relating to rectification of mistake by the ITO in a case where even a part of the assessment order is made the subject of appeal is likely to become nugatory. It, therefore, clearly appears to us that the provisions of the I.T. Act contemplates that in a case where an assessment is made the subject of an appeal, the assessment orders made by the ITO do not wholly merge with the orders of the appellate authority but that the merger would take place only in respect of that part of the order in respect of which the AAC has exercised his appellate jurisdiction.”



4.2 We further find that the Tribunal in the case of **DCIT v. Godrej Industries in ITA No. 4339/Mum/2015** following the finding of the Hon'ble Bombay High Court in the case of Sakseria Cotton Mills Ltd. (supra) and also following the decision of the Hon'ble Supreme Court in the case of Alagendran Finance Ltd.(supra) held that issue which has not been decided in reassessment order, the limitation for rectification same will start from the original assessment order passed u/s 143(3) of the Act and not from the date of reassessment order passed u/s 147 of the Act. The relevant finding of the Tribunal(supra) is reproduced as under:

“8. After hearing both the sides and going through the facts of the case, we find that the issue raised in the present appeal of the Revenue is whether the order of the AO under section 154 of the Act dated 29-03-2014 to rectify the order giving effect to the Tribunals order dated 13-04-2009 is bar by limitation or not? The assessee has filed chronology of events of order which reads as under: -

| Sr.No. | Particulars | Date of the Order |
|--------|--|-------------------|
| 1 | Assessment Order u/s 143(3) of the Act | Feb. 27, 2004 |
| 2 | Order of the Commissioner of Income Tax (Appeals) -21 | October 5, 2004 |
| 3 | Order Giving Effect to the Order of the learned CIT(A)-21 | March 31, 2005 |
| 4 | Order of ITAT(Annexure A) | August 30, 2007 |
| 5 | Order Giving Effect to the above Order of the ITAT(Annexure B to this submission) | April 13, 2009 |
| 6 | Notice issued u/s. 154 of the Act | January 21, 2014 |
| 7 | Order u/s.154 for rectification based on retrospective amendment | March 29, 2014 |

9. We find that the rectification order has been passed to give effect to the retrospective amendment made by the Finance Act 2009 whereby clause 1 was inserted in explanation 1 to section 115JB of the Act. The said clause deals with book profit to be increased by the amounts set aside as provision that diminution in



value of any asset and the said retrospective amendment was made to overcome the decision of Hon'ble Supreme Court in the case of CIT vs. HCL Comnet System & Services (2008) 305 ITR 409 (SC). It is an admitted and undisputed position that the issue of the book profit to be increased by the provision made for diminution in the value of an asset was never the subject matter of appeal either before the CIT(A) or before the Tribunal. The issues raised in appeal before the CIT(A) and Tribunal were disallowance u/s.14A of the Act, taxability of non-compete fees, addition on account of MODVAT credit, disallowance of foreign exchange loss and computation of deduction u/s.80HHC of the Act. These very issues were also the subject matter of appeal before the Tribunal in cross appeals filed by the parties. But AO issued notice u/s.154 of the Act dated 21 January 2014 seeks to rectify the order dated 13th April 2009 passed consequent to the Hon'ble Tribunal's order in ITA No. 8983/M/2004 dated 30th August 2007 i.e. the order giving appeal effect to the order of ITAT.

We find from the facts of the case that the CIT(A)' order, against which the present appeal is filed, has discussed this issue at page 6 para 3.2 and has followed an order passed in the case of the group concern of the assessee company on a similar issue. The said order in the case of group concern was also challenged by the Revenue by filing an appeal to the Tribunal and the Tribunal in the case of ACIT vs. M/s Godrej Sara Lee Ltd. (Now amalgamated into Godrej Consumer Products Ltd.) in ITA No.118/Mum/2015 vide order dated 22- 08-2016 has dismissed the Revenue's appeal and decided this very issue of limitation in favor of the assessee by observing as under: -

“We have heard the rival submissions and perused the material before us. We find that, while completing the original assessment, the AO had determined book profit of the assessee at Rs.40.89 crores, that the assessee had preferred an appeal before the FAA against the order of the AO passed u/s.143 (3) of the



Act, that in the appeal it had not agitated the issue of 115 JB of the Act ,that it had challenged the additions made by the AO under the normal provisions, that the matter had travelled up to the Tribunal, that neither in the order of the FAA nor in the order of the Tribunal the issue of completion of book profit was deliberated upon. In the circumstances the order passed by the AO on 28/11/2008 could be rectified up to 31/03/2013. The AO had passed the rectification order in the month of January, 2014. Clearly, the order of the AO was barred by limitation. We find that in the case of Tony Electronics Limited (supra),the Hon'ble Delhi High Court decided the issue in favour of the Department consider -ing the peculiar facts of that case. In that case the AO had made certain additions u/s.143(3) of the Act that were challenged before the FAA. The AO had passed order giving effect to the order of the FAA. Therefore, theHon'ble Court had held that once an appeal against the order passed by an authority was decided by an Appellate Authority the order of the said authority would merge in the order of the FAA. However, in the case under consideration, as stated earlier, issue of computation u/s. 115JB was never adjudicated upon. First four cases relied upon by the assessee support the view taken by us. Even on merits, we find that the issue stands decided in favour of the assessee as held by the Hon'ble Supreme Court in case of Vijaya Bank (supra). Hence, in our opinion, the order of the FAA does not suffer from any legal infirmity. Confirming his order, we decide the effective ground of appeal against the AO.”

10. We notice from the provision of Section 154(1A) of the Act which provides that the AO can rectify the order in respect of a matter other than the matter which has been considered and decided by the appellate/revisional authority. In the instant case since the issue of diminution in value of an asset for calculating book profit was not a subject matter of appeal or revision, the original order u/s. 143(3) of the Act dated 27th February 2004 is the order which can be rectified by the AO and since the order passed in 2004 cannot be rectified after a period of 4 years, the



order passed under 154 of the Act dated 29th March 2014 is barred by section 154(7) of the Act. The Revenue in its submissions filed before the Tribunal also accepts that they cannot rectify the order u/s.143(3) of the Act. It is the case of the Revenue that what is sought to be rectified is the order giving effect to the Tribunal's order dated 13th April 2009 and therefore the order under 154 of the Act dated 29th March 2014 is within limitation. If this proposition is accepted then the effect would be that the AO is sitting in appeal over the Tribunal's order and more so when the issue of diminution in the value of an asset for calculating book profit was not the subject matter of the Tribunal's order. It is a settled position that the AO while giving effect to the Tribunal's order cannot go beyond the directions of the Tribunal and since in the instant case the issue of calculation of book profit qua diminution in the value of an asset was not the subject matter of the appeal, the Revenue is not justified in contending that the order is within the time limit. 11. We also find that this issue of doctrine of merger came for consideration of the Hon'ble Bombay High Court in the case of Seksaria Cotton Mills (Supra). The Hon'ble High Court has on similar facts held by applying the doctrine of merger theory that the limitation will be recognized from date of the original order in respect of points not subjected to appellate jurisdiction. A similar issue arose before the Hon'ble Bombay High Court in the case of Ratilal Bacharilal & Sons 282 ITR 457 (page 32 of case law compilation) wherein after applying the doctrine of merger theory, the Hon'ble High Court held that since the deduction u/s.35B of Rs. 563,350/- was not the subject matter of appeal, the CIT was justified in exercising jurisdiction u/s 263 of the Act qua Rs. 563,350/- although deduction under 35B on Rs. 327,326/- was in appeal.

12. We have gone through the judgment of Hon'ble Supreme Court in the case of Hind Wire Industries(Supra), wherein the Apex Court was posed with the interpretation of section 154(1)(a) of the Act and not section 154(1A) of the Act with which this appeal is concerned because in Hind Wire Industries



the original order was not the subject matter of appeal and what was sought to be rectified was the order u/s.143(3) read with 154 of the Act. The relevant facts are as under:

(i) The assessee was assessed to tax vide the original assessment order dated September 21, 1979.

(ii) There was a mistake in the said order, and consequent thereto, the assessee filed a petition for rectification of the said order under section 154 of the Act.

(iii) Consequent thereto, the assessment order was rectified on July 12, 1982

(iv) However, there was a mistake in the said rectification order, and consequent thereto, the assessee again applied for rectification of the fresh order dated July 12, 1982, vide letter dated July 4, 1986.

(v) The Income Tax Officer dismissed the claim of the assessee, saying that it was time barred, and such order was confirmed by the Commissioner (Appeals).

(vi) The Tribunal however upheld the contention of the assessee that the rectification application was within the time period as per the statute.

(vii) The High Court once again reversed the order of the Tribunal, and held that the period of four years was to be counted from the date of the initial assessment, and not from the fresh order passed on July 12, 1982.

(viii) On the basis of these facts, the Supreme Court held that the assessment order dated July 12, 1982 could be rectified as per the application dated July 4, 1986, in view of the fact that there was a mistake in the order dated July 12, 1982 and consequent thereto, the application for rectification dated July 4, 1986 was not time barred.



But in the instant case, since the original order was subjected to appeal and hence provisions of section 154(IA) of the Act would be applicable and the decision of Hon'ble Supreme Court will not apply on facts of the case. Hon'ble Supreme Court in the case of Alagendran Finance Ltd(Supra) was dealing with section 263(2) of the Act read with clause(c) to Explanation 263(1) which is identical to section 154(1A) of the Act. The Hon'ble Supreme Court held that since issue of lease equalization fund was not the subject matter of reassessment proceedings, the limitation for revising the assessment order qua lease equalization fund will start from the original assessment order passed u/s. 143(3) of the Act and not from the date of reassessment order passed u/s. 147 of the Act. Therefore, according to us the facts of the instant appeal are identical to the case of Alagendran Finance Ltd. and therefore the issue is squarely covered against the Revenue and in favor of the assessee. Hence, we confirm the order of CIT(A) and this appeal of Revenue is dismissed.”

4.3 We find that in the above decision, the Tribunal has also distinguished decision of the Hind Wire Industries -which has been discussed by the Hon'ble Delhi High Court in the case relied upon the Ld. Assessing Officer. Further, we note that the Tribunal in the case of **Jani Properties Pvt. Ltd. in ITA No. 3640/M/2018** for assessment year 2008-09 again held that the time limit for rectification u/s 154 is to be considered from the date of the original or in subsequent rectification order only, if the said rectification deals with the order, which is sought to be rectified. The relevant finding of the Tribunal (supra) is reproduced as under:

“14. Now adverting to the facts of the present case, the first rectification order was passed by the AO on



13.03.2012 at the instance of assessee. Admittedly no issue of book profit under section 115JB was the subject matter of the rectification order passed on 13.03.2012. The AO issued show cause notice for rectifying the order on the issue of book profit only for the second proposed rectification. From the above discussions, it is clear that the legal position is that the time limit for rectification of mistake under section 154(7) is to be considered from the date of the original order or in subsequent rectification order only if the said rectification order dealing with the same which is sought to be rectified. In this view of the matter and having noted that the first rectification order dealt with entirely different, it is clear that the time limit for passing the impugned order indeed expired on expiry of four years from the end of the financial year, in which, the original order sought to be rectified was passed i.e. on 31.3.2009. Considering the aforesaid decisions of Tribunal and respectfully following the decision of coordinate bench of the Tribunal in Ashu Engineers & Plastic Pvt Ltd (supra), we are of the view that the rectification order passed u/s 154 dated 08-07-2014 is clearly beyond the prescribed limitation of period provided u/s 154(7). Therefore, we accept the additional ground of appeal raised by assessee and hold that the rectification order dated 30-03-2016 is beyond the time limit prescribed u/s 154(7) and the same is invalid.”

5. Before us, the Ld. Departmental Representative (DR) did not bring any other decision of the Hon’ble Jurisdictional High Court contrary to the above decision and therefore, we being in the jurisdiction of the Hon’ble Bombay High Court, are bound to follow the decision of the jurisdictional High Court. Accordingly, following the decision of the Hon’ble Bombay High Court in the case of **Sakseria Cotton Mills Ltd. (supra)**, we hold that in the case limitation for expiry of 4 years for the purpose of section 154(7) of



the Act has to be reckoned from the original assessment u/s 143(3) of the Act which is dated 21.11.2011 whereas the order u/s 154 has been passed on 29.06.2017, which is clearly beyond the period of four years specified and therefore, the 154 order passed by the Assessing Officer is beyond the period of the limitation provided. Accordingly, same is invalid in law and thus it is quashed. The grounds of appeal of the assessee are accordingly allowed.

6. In the result, the appeal of the assessee is allowed.

Order pronounced in the open Court on 31/03/2023.

Sd/-
(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Sd/-
(OM PRAKASH KANT)
ACCOUNTANT MEMBER

Mumbai;
Dated: 31/03/2023
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai