आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES,"A" JAIPUR

डा॰ एस. सीतालक्ष्मी, न्यायिक सदस्य एवं श्री राठोड कमलेश जयन्तभाई, लेखा सदस्य के समक्ष
BEFORE: DR. S. SEETHALAKSHMI, JM & SHRI RATHOD KAMLESH JAYANTBHAI,

आयकर अपील सं./ITA No. 811/JP/2023
निर्धारण वर्ष/Assessment Years : 2015-16

| | | |
|---|---|---|
| Om Infra Limited,<br>Om Tower, M. I. Road Church Road, | बनाम<br>Vs. | DCIT,<br>Central Circle-01, Jaipur |
| स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AAACO 8245 J | | |
| अपीलार्थी/Appellant | | प्रत्यर्थी/Respondent |

निर्धारिती की ओर से/ Assessee by : Sh. P. C. Parwal (CA)
राजस्व की ओर से/ Revenue by : Sh. A. S. Nehra (Addl. CIT)

सुनवाई की तारीख/ Date of Hearing : 08/05/2024
उदघोषणा की तारीख/Date of Pronouncement: 31/07/2024

आदेश/ ORDER

PER: RATHOD KAMLESH JAYANTBHAI, AM

This appeal filed by assessee is arising out of the order of the Commissioner of Income Tax (Appeals)-4, Jaipur dated 30/10/2023 [here in after ld. CIT(A)] for assessment year 2015-16 which in turn arise from the order dated 08.12.2020 passed under section 154 of the Income Tax Act, by DCIT, Circle-01, Jaipur.

2. In this appeal, the assessee has raised following grounds: -

"1. That the ld. AO grossly erred in passing the order u/s 154. That the ld. CIT(A) also erred in dismissing the grounds of appeal, though the mistake pointed by ld. AO is not rectifiable & apparent the issue is debatable hence cannot be rectified u/s 154.

2. That the ld. AO grossly erred in restricting the disallowance u/s 80IC @ 30 percent in place of 100 percent claimed by the assessee and thereby made the addition of Rs. 7602852/- and withdrawn the MAT credit by Rs. 25,84,210/-. That the Ld. CIT(A) also erred in dismissing the ground though the assessee company took deduction u/s 80(IC) for 5 year.

3. That Appellant, craves to leave, add, alter the grounds of Appeal."

3. Succinctly, the fact as culled out from the records is that the assessee company was engaged in business activity of manufacturing, supply & installation of dam gates, Hydro mechanical equipment for irrigation & power projects, hiring income & interest receipts, multiplex cinema, hotel & restaurant, real estate, wind power generation & automobile etc. The assessment of the appellant company was completed u/s 143(3) of the Act on 20.12.2017 at a total income of Rs. 16,29,58,540/ and book profit of Rs. 53,86,12,299/- which was later rectified to Rs. 36,56,88,510/- vide order u/s 154 dated 27.12.2017. Since tax u/s 115JB was higher than the tax on normal income tax was charged on book profit of Rs. 36,56,88,510/-. The ld. AO noticed that the appellant claimed and was allowed one-hundred percent deduction of Rs. 1,08,61,217/- u/s 801C(2)(b)(ii) on the profit derived from business covered under the

provision of the section in the order passed u/s 143(3) dated 20.12.2017 as well in the order passed u/s 154 of the Act dated 27.12.2017. The appellant was claiming the deduction from initial assessment year 2010-11, the AY 2015-16 being the sixth assessment year, thus the deduction was to be allowed at the rate of thirty percent only. Therefore, the deduction under section 80IC(2)(b)(ii) was allowable of Rs. 32,58,365/- only as against allowed at Rs. 1,08,61,217/-. This has resulted into allowing of excess deduction of Rs. 76,02,852/- (10861217-3258365) u/s 801C(2)(b)(ii) of the Act involving excess carry forward MAT credit of Rs. 25,84,210/- with total income to the extent. Since the mistake being apparent from the face of record, the same was rectified u/s 154 of the Act vide dt. 08.12.2020 by the ld. AO.

4. The assessee challenged that order passed under section 154 of the Act before the ld. CIT(A). Apropos to the grounds so raised by the assessee the relevant finding of the ld. CIT(A)/NFAC is reiterated here in below:-

> **Decision of ld. CIT(A) on technical ground raised by the assessee**
>
> 4.2 I have considered the facts of the case and written submissions of the appellant as against the observations/findings of the AO in the order for the year under consideration. The contentions/submissions of the appellant are being discussed and decided as under:-

The appellant has not shown how the issue is debatable. The appellant has taken various legal grounds and has submitted judgments on the issue that rectification cannot be done on an issue which is debatable and having more than one bonafide opinions however the submission of the appellant is only legal in nature and the appellant has not been able to show how those judgments and the legal principles are applicable to the present facts of the case. The appellant has not submitted any judgments which support the view of the appellant on the facts of the case. There is no dispute that in case there are two bonafide opinions and there are judgments which are Sontradictory on an issue such an issue cannot be rectified under section 154. However in the present case appellant has not cited any such bonafide explanation or judgment in its support in view of the discussion, this ground of Appeal is dismissed.

**Decision of ld. CIT(A) on merits of the disallowance**

"6.2 I have considered the facts of the case and written submissions of the appellant as against the observations/findings of the AO in the order for the year under consideration. The contentions/submissions of the appellant are being discussed and decided as under:-

6.3 The careful perusal of the section 80IC provisions would show that before the introduction of section 80IC, the deduction for the backward states was available in terms of section 801B(4), Section 801C is a continuation of the benefits / provisiona under erstwhile section at 801B.The identification of years is same and overlapping in both the sections. The approach of the appellant in picking and choosing of the assessment year createsanamoly and renders 80IC(6) as otiose In this regard reference is also made to sub section (6) in Section 80IC which is as under

*"(6) Notwithstanding anything contained in this Act, no deduction shall be allowed to any undertaking or enterprise under this section, where the total period of deduction inclusive of the period of deduction under this section, or under the second proviso to sub-section (4) of section 80-IB or under section 10C, as the case may be, exceeds ten assessment years".*

6.4 The third proviso to sub-section (4) to section 801B makes it clear that after 31.3.2004, this deduction will be available only u/s 80IC. The sub section (4) to section 80IB further makes it clear that deduction would be 100% for the first five years and thereafter @ 25%. Further, the first proviso makes it clear that deduction will not. exceed 10 consecutive assessment years. The second proviso further makes it clear that in the case of states of North-Eastern regions, the deduction would be 100% for all the 10 years. Thus, even in the earlier provision only in case of North-Easter states, the deduction of 100% was allowable for 10 consecutive years whereas in the case of states of Himachal Pradesh, the deduction was allowable @ 100% for first five years and 25% for next five years.

Sub-section (3) of section 801B reads as under:-

*(3) The amount of deduction in the case of an industrial undertaking shall be twenty-five per cent for thirty per cent where the assessee is a company), of the profits and gains derived from such industrial undertaking for a period of ten consecutive assessment years (or twelve consecutive assessment years where the assessee is a co-operative society) beginning with the initial assessment year subject to the fulfilment of the following conditions, namely…….*

*(1) it begins to manufacture or produce, articles or things or to operate such plant or plants at any time during the period beginning from the 1st day of April, 1991 and ending on the 31st day of March, 1995 or such further period as the Central Government may, by notification in the Official Gazette, specify with reference to any particular undertaking;*

*(n) where it is an industrial undertaking being a small scale industrial undertaking, it begins to manufacture or produce articles or things or to operate its cold storage plant (not specified in sub-section (4) or sub-section (5) at any time during the period beginning on the Ist day of April, 1995 and ending on the 31st day of March, 2002.*

Sub-section (4) of section 801B reads as under:-

*(4) The amount of deduction in the case of an industrial undertaking in an industrially backward State specified in the Eighth Schedule shall be hundred per cent of the profits and gains derived from such industrial undertaking for five assessment years beginning with the initial assessment year and thereafter twenty five per cent (or thirty per cent where the assessee is a company) of the profits and gains derived from such industrial undertaking Provided that the total period of deduction does not exceed ten consecutive assessment years (or twelve consecutive assessment years where the assessee is a co-operative society) subject to fulfilment of the condition that it begins to manufacture or produce articles or things or to operate its cold storage plant or plants during the period beginning on the 1st day of April, 1993 and ending on the 31st day of March, 2004:*

*Provided further that in the case of such industries in the North-Eastern Region, as may be notified by the Central Government, the amount of deduction shall be hundred per cent of profits and gains for a period of ten assessment years, and the total period of deduction shall in such a case not exceed ten assessment years:*

*Provided also that no deduction under this sub-section shall be allowed for the assessment year beginning on the 1st day of April, 2004 or any subsequent year to any undertaking or enterprise referred to in sub-section (2) of section 80-IC:*

*Provided also that in the case of an industrial undertaking in the State of Jammu and Kashmir, the provisions of the first proviso shall have effect us if for the figures, letters and words '31st day of March, 2004", the figures, letters and words "31st day of March, 32/2012) had been substituted Prouded also that no*

*deduction under this sub-section shall be allowed to an industrial undertaking in the State of Jammu and Kashmir which is engaged in the manufacture or production of any article or thing specified in Part C of the Thirteenth Schedule.*

6.5 The concept of "initial assessment year and the years of deduction in Section SOIC have been referred and the scheme of the section has been discussed by the Hon'ble Supreme Court in the case of PCIT Vs. Aarham Softronics (CIVIL APPEAL NO(S). 1784 OF 2019 (ARISING OUT OF SLP (C) NO. 23172 OF 2018)). Section 801C(6) as discussed above has also been referred by Hon'ble Supreme Court in the judgement. Some of the relevant observations and findings in the judgement are as under:-

10. ……It brings out the following aspects:

(a) Those undertakings or enterprises fulfilling the conditions mentioned in sub section (2) of Section 80-IC become entitled to deduction under this provision.

(b) This deduction is allowable from the initial Assessment Year. Irutiol Assessment Year' is defined in Section 80-IB(14)(c) of the Act.

(c) The deduction is @ 100% of such profits and gains for first 5 Assessment Years and thereafter a deduction is permissible @ 25% (or 30% where the assessee is a company).

(d) Total period of deduction is 10 years, which means 100% deduction for first 5 years from the initial Assessment Year and 25% (or 30% where the assessee is a company) for the next 5 years.

…….

……..

*18. The Court is supposed to give effect to the provisions of Section 80-ICby reading various provisions conjointly. For the purpose of these cases, relevant provisions are sub-section (2)(a)(ii), sub-section 3(ii), sub-section (6) and sub-section (8)) and (ix). Cinuse (ii) of sub-section (2) provides that in case an undertaking or enterprise sets up a unit of the nature specified therein in the State of Himachal Pradesh or the State of Uttaranchal between the 7th January, 2003 and 1st April, 2015, such an undertaking or enterprise shall become eligible for the deductions from such profits and gains, as specified in sub-section (3). In respect of State of Himachal Pradesh fin respect of which these cases pertain to) sub-section (3) enumerates the extent of deduction. It is 100% of profits and gains for first five initial assessment years commencing with the initial assessment year and thereafter 25% (or 30% where the assessee is a company) of the profits and gains. The deduction @ 25% for the next five years in on the assumption that the new unit remains static insofar as expansion thereof is concerned. However, the moment substantial expansion takes place, another 'initial assessment year gets Iringered. This new event entitles that unit to start getting deduction @ 100% of the profits and gains. At the same time, new period*

*of 10 years does not start. It is because of the reason that total period for which deduction can be allowed is capped at 10 years, inasmuch as sub-section (6) in no uncertain terms stipulates that deduction shall be not allowed for a period exceeding 10 assessmentyears. In fact, this period of 10 years relates not only in respect of deduction under Section 80-IC but under the second proviso to sub-section (4) of Section 80- IB as well. It would mean that total deduction under Section 80-IB as well as 80-IC is for a period of 10 years.*

(Emphasis Supplied)

6.6 In view of the above, it is clear that once the initial assessment year is identified he appellant is to get the deduction under section 801C for a period of first initial five wears ("first five initial assessment years commencing with the initial assessment year as per judgement of Hon'ble Supreme Court in PCIT Vs. Aarham Softronics (supra)).

6.7 In view of the detailed discussion above, the appellant assesse cannot choose or reject the years of deduction at his discretion and will and once the initial assessment year is identified the appellant is to get 100% deduction under section 80IC for a period of first five initial assessment years. A.Y. 2010-11 is the first initial assessment year for which the appellant claimed the deduction u/s 80IC of the Act and further years of deduction will be as per law i.e. first five initial assessment years commencing with the initial assessment year. Thus the action of the appellant of picking and choosing the assessment years for the deduction under this section is not as per law. A.Y. 2015-16 is the first sixth initial assessment year commencing with the initial assessment year. Thus the action of the learned assessing officer of restricting the deduction for the current assessment year i.e. 2015-16 under appeal by treating it as the 6th assessment year of deduction u/s 801C is upheld.

Further, the issue is purely legal and is settled as per the language of law and further as per the judgment of honourable Supreme Court which is considered as the law and further any action which is in contradiction of the judgment of Hon. Supreme Court is also considered a mistake apparent from record and is rectifiable under section 154 of the Act. This is settled law on Section 154. Even subsequent interpretation of the law by the Hon'ble Supreme Court would constitute "mistake apparent from records".

- B.V.K. Seshavataram Vs. CIT (1994) 210 ITR 633 (AP))
- ACIT Vs. Saurashtra Kutch Stock Exchange Ltd. (2008) 305 ITR 227 (SC)
- Circular: No. 68 [F.No.245/17/71-A & PAC), dated 17-11-1971

6.8 In view of the above, the action of the Id. assessing officer in the rectification order is upheld and the ground no. 3 of the appeal of the appellant is dismissed."

5. Feeling dissatisfied and aggrieved from the finding so recorded in the order of the ld. CIT(A) the assessee challenged that order of the ld. CIT(A) before this tribunal on the grounds as reproduced herein below stating that the mistake is not apparent and the deduction claimed by the assessee is correct based on the facts. To support the contentions so raised in the grounds of appeal raised by the assessee the ld. AR appearing on behalf of the assessee relied upon the following written submissions :

> "The company filed ITR declaring income of Rs. 15,52,17,730/- it was assessed u/s 143(3) vide order dtd. 20.12.2017 at the income of Rs. 16,29,58,540/- Book Profit u/s 115JB Rs. 53,86,12,299/-. Thereafter the Ld. A.O. passed an order u/s 154 on 30.03.2015 by that the Book Profit u/s 115JB was determined at Rs. 36,56,88,150/-.
>
> The Company filed appeal before the Hon. CIT(A) Jaipur on 06.01.2018 which is pending before the Hon. CIT(A)- I, Jaipur now with Ld. CIT(A)-4, Jaipur.
>
> Then the Ld. A.O. issued notice u/s 154 on 16.03.2020 fixing the date 24.03.2020 but due to lockdown, the hearing was, not attended & the written reply was sent on 26.05.2020. but the Ld. A.O. states that, None attended nor any reply was filed. Then after the gap of 9 Months the Ld. A.O. passed order without giving fresh Opportunity.
>
> That the Ld. A.O. disallowed the deduction already allowed u/s 80IC(2)(b)(iii) out of that the Ld. A.O. restricted the deduction @ 30% instead of 100% claimed & allowed earlier. That it is the matter of discussion. Hence this is not a mistake to be covered u/s 154 of I.T. Act.
>
> That the Ld. A.O. arbitrarily passed the order (ex-parte) u/s 154 and made the addition of Rs. 76,02,852/- and thereby assessed and revised income Rs. 17,05,61,392/- in Place of Rs. 16,29,58,540/- and Book Profit u/s 115JB Rs. 36,56,88,510/-. Hence this appeal.
>
> The company filed appeal before Ld. CIT(A)-4, Jaipur and the Ld. CIT(A) dismissed the Appeal vide order dtd. 30.10.2023.
>
> GROUNDS OF APPEAL

1. *That the Ld. A.O. grossly erred in passing the order u/s 154. That the Ld. CIT(A) also erred in dismissing the grounds of appeal, though the mistake pointed by Ld. A.O. is not rectifiable & apparent the issue is debatable hence cannot be rectified u/s 154.*
2. *That the Ld. A.O. grossly erred in restricting the disallowance u/s 80IC @ 30% in place of 100% claimed by the assessee and thereby made the addition of Rs. 7602852/- and withdrawn the MAT credit by Rs. 25,84,210/-.*

   *That the Ld. CIT(A) also erred in dismissing the ground though the assessee company took deduction u/s 80(IC) for 5 year.*

3. *That Appellant, craves to leave, add, alter the grounds of Appeal.*

SUBMISSIONS :

Ground No. 1 :

*That the Ld. A.O. grossly erred in passing the order u/s 154. That the Ld. CIT(A) also erred in dismissing the grounds of appeal, though the mistake pointed by Ld. A.O. is not rectifiable & apparent the issue is debatable hence cannot be rectified u/s 154.*

Submissions:

The rectification u/s 154 can be made for the mistake which is apparent on record the Ld. A.O. issued notice u/s 154 for allowing of deduction u/s 80IC(2) b-III. That allowing or disallowing the deduction is a matter of discussion and legal matter which cannot be rectified in order u/s 154. Thus it is debatable issue hence cannot be covered u/s 154 of I.T. Act, 1961.

*Section 154, scope of.-Section 154 confers jurisdiction on the Assessing Officer carry out rectification in respect of apparent mistakes which are self-evident from the record. Issue which are debatable or controversial in nature and about which there could conceivably be two opinions would clearly be outside the limited purview of section 15 Asst. CIT v. Smt. Nina Arora, (2002) 80 ITD 348, 352 (Ahmd) = 74 TTJ 952]*

*There is no dispute with regard to scope of provision of section 154. The well settled legal proposition is that powers of rectification under section 154 can be exercised only if there is a mistake apparent from record of the assessment. In order to attract the power rectify under section 154, it is not sufficient, if there is merely a mistake in the order sought to be rectified, the mistake to be rectified must be one apparent from the record. A mistake apparent from the record must be an obvious and patent and not something which can be established by a long drawn process of reasoning and on the points where there may be conceivably two opinion. A decision on the debatable point of law is not a n take apparent from record [Deputy CIT v. N.V. Marketing (P.) Ltd., (2009) 122 TTJ 247, 255] Del)*

*Section 154, object of.- The provisions of section 154 are meant to rectify an apparent error committed by the Assessing Officer. They cannot be sought to be invoked to rectify an error committed by the assessee while filing the return of income [Mold-Tek Plastics Lid. v. Deputy CIT, (2002) 81 ITD 251, 259 (Hyd) = 76 TTJ 85].*

*Mistake apparent, connotation of.-A 'mistake apparent' is a mistake that is manifest, plain or obvious; a mistake that can be realized without a debate or dissertation. The plain meaning of the word 'apparent' is that it must be something, which appears to be ex facie that it is incapable of argument or debate. The mistake can be regarded as 'apparent only when it is glaring, obvious of self-evident mistake. The Supreme Court, in the case of T.S. Balaram, ITO V. Volkart Bros: [1971] 82 ITR 50 (SC), has held that a mistake apparent from record must be an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there can conceivably be two opinions. A decision on a debatable point of law is not mistake apparent from the record [Banswara Syntex Ltd. v. Asst. CIT, (2007) 108 ITD 48, 63-64 Jodh) 109 TTJ 274].*

*A decision on a debatable point of law is not mistake apparent from record.-The power of rectification under section 154 could be exercised only if there is a mistake apparent from the record of the assessment of the assessee. In other words, in order to at tract the power to rectify under section 154, it is not sufficient if there is merely a mistake in the order sought to be rectified. The mistake to be rectified must be one apparent from the record. A mistake apparent on the record must be an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may be conceivably two opinions. A decision on a debatable point of law is not a mistake apparent from record . Thus, if a statutory provision is capable of two interpretations taking one such interpretation cannot give rise to an error apparent from the record even if one is of the view that the other interpretation was more correct in this context. The plain meaning of the word 'apparent ' is that it must be something which appears to be so ex facie and is incapable of argument or debate. It, therefore, follows that decision on debatable point of law or fact or failure to apply the law to a set of facts which remained to be investigated cannot be corrected by way of rectification. A mistake apparent from the record is one to point out which no elaborate argument is required. II must be a glaring , obvious or self-evident mistake. A mistake which is not gatherable from the record as it stands and requires for being shown to be a mistake . Matter or evidence extraneous to record is not a mistake apparent from the record . In a nutshell it can be taken to be well settled that the provisions of section 154 cannot be resorted to in order to make a revision in a matter on which there could be two plausible interpretation Munjal Showa ltd. v. Deputy CIT, (2000) 69 TTJ (Del) 480, 484-851 .*

*There are other decision viz Sahney Kirkwood (P.) ltd. v. Deputy CIT, (2011) 131 ITD 3-U (Mum)= 14 TTJ 338 = 9 ITTR 57; Asst. CIT v. Haryana Telecom Ltd., (2011) 133 ITD 99 (Del)= 10 ITTR 428; Asst. DIT v. Linklaters, (201433 IITR 470 (Mum); Otis~ Elevators Comp,111·} (India) ltd. v. Deputy CIT, (2015) 38 ITR 631 (Mum).*

*(4) Provisions of section 154 were inapplicable inasmuch as entire issue being debatable, act of withdrawing interest could not be of nature of rectifying mistake apparent from record [V.M. Salgaocar & Bros. (P.) Lid. v. 1TO, (1995) 53 ITD 34, 37 (Bang) = 52 TTJ (Bang) 218 = (1996) Tax LR 72].*

*Section 154 when can be invoked.-The ITO was bound to consider whether the case would fall within the terms of rules allowing for waiver of interest even if there were no application and that he must be deemed to have considered it if he had omitted to charge interest. Section 154 can be invoked only if the mistake is apparent from the record and is not one which can be established only by a long drawn process of reasoning. In the present case, since the question whether there was a mistake is itself open to dispute, it is held that there was no mistake apparent from the record which could be rectified under\ section 154 of the Act |/TO v. Kuldip Singh Bhasin, (1978) 5 TTJ (Gauh) 514, 516].*

*Decision on debatable point of law cannot be mistake apparent from record.-As regards the question of levy of interest under section 154 through rectification of assessment order, the peculiarity of section 154 is that it can be invoked only to rectify a mistake apparent from the record. An apparent mistake would mean a clerical or arithmetic mistake which is glaring and obvious, may it be of law or of facts. If the mistake is to be discovered through a long process of reasoning, it would not be a mistake apparent from the record. A decision on a debatable point of law cannot be mistake apparent from record. Highly debatable issues are out where as hardly debatable issues fall in purview of the section IAsst. CIT v. Norasia Lines (Malta) Lid., (2007) 107 ITD 301, 324 (Coch) (SB) = 109 TTJ 152].*

Section 154 in The Income- Tax Act, 1961

154. Rectification of mistake

(1) With a view to rectifying any mistake apparent from the record an income-tax authority referred to, in section 1 16 may,-

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

(b) amend any intimation sent by it under sub- section (1) of section 143, or enhance or reduce the amount of refund granted by it under that sub- section.]

(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, and where the authority concerned is the[5] Deputy Commissioner (Appeals)]

(5) there is also a view that an assessment which is right at the time it was made with reference to the law prevailing at the relevant time cannot become wrong because of the subsequent decision, so as to justify rectification as held in Geo Miller and Co. ltd. v DICT where the Revenue has not chosen to keep a matter alive, it is inferable that it was satisfied that the waiver of interest is consistent with the law, if not with the circular. There should be a difference between cases where the Revenue has challenged the finding of the Settlement Commission on a question of law and where it has not so done. What had become time-barred cannot be brought back to life for whatever reason as was found in Godgil (SS v/ Lal & Co..)

The Calcutta High Court in a batch of cases found that the issue of waiver is not a simple mater, since it would involve investigation of facts and application of law on a debatable point involving long drawn arguments, so that the jurisdiction under section 154 should not be as applicable to it. In coming to the conclusion, it followed the Delhi High Court view while dissenting from the Gujrat view in AOP of Sanjaybhai R. Patel v AO/A CIT.

*Issues which are debatable & controversial cannot be taken up in proceedings u/s 154.*

*Asstt. CIT v/s Smt. Neena Arora (2002) 80ITD 348 (Ahmd.)*
*Deputy CIT v/s N.V. Marketing (P) ltd. (2009) 1132 TTT Delhi 247 -255*

*ITO v/s M/S. Volkart Brothers (1971) 82 ITR 501 (SC)*

*Page -4 (last Para) page -5 (First Para)*

*The High Court took the view that the original assessments made on the respondents were prima facie in accordance with law and at any rate as there was no obvious or patent mistake in those orders of assessment, the Income- tax Officer was incompetent to pass the impugned orders. The first question that we have to decide is whether on the facts and in the circumstances of the 'case. The Income-tax Officer was within his 'powers in making the impugned rectifications. He purported to make those rectifications under s. 154 of the Income-tax Act, 1961. That section to the extent material for our present purpose reads:*

*From what has been said above, it is clear that the question whether S. 17(1) of the Indian Income-tax Act, 1922 was applicable to the case of the first respondent is not free from doubt. Therefore the Income-tax Officer was not justified in thinking that on that question there can be not two opinions. It was not open to the Income-tax Officer to go into the true scope of the relevant provisions of the Act in a proceeding under S. 154 of the Income-tax Act, 1961. A mistake apparent on the record must be an obvious and patent mistake and not ,something which can be established by a long drawn process of reasoning on points on which there may conceivably be two opinions. As seen earlier, the High Court of Bombay opined that the original assessments were in accordance with law though in our opinion the High Court was not justified in going into that question. In Satyanarayan Laxminarayan Hegde and ors. v. Millikarjun Bhavanappa Tirumale(1) this Court while Spelling out the scope of the power of a High Court under Art. 226 of the Constitution ruled that an error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions cannot be said to be an error apparent on the face of the record. A decision on a debatable point of law is not a mistake apparent from the record-see Sidhamappa v.. Commissioner- of Income-tax, Bombay(2). The power of the officers mentioned in S. 154 of the Income-tax Act, 1961 to correct "any mistake apparent from the record" is (1) [1960] 1 S.C.R. 890.*

*(2) 21 I.T.R. 333.*

*undoubtedly not more than that of the High Court to entertain a writ petition on the basis of an "error apparent on the face of the record". In this case it is not necessary for us to spell out the distinction between the expressions or error apparent on the face of the record" and "mistake apparent from the record". But suffice it to say that the Income tax Officer was wholly wrong in holding that there was a mistake apparent from the record of the assessments of the first respondent.*

*Thus when deduction u/s 80-I is debatable issue then cannot be taken up u/s 154 similar issue is here in this case deduction u/s 80IC of I.T. Act, 1961.*

*CIT V/s Nakodar Co-Operative Sugar Mills Ltd (P & H High Court) 04.09.2013)*
*ITA No.918 of 2008 (O&M)*
*Page 2 Para 1(2)*

*1. Briefly, the facts necessary for adjudication of the controversy, as narrated in the appeal, may be noticed. The income of the assessee was assessed at ` 3,68,56,040/- as against nil income shown in the return of income. At the time of making assessment, the Assessing Officer allowed deduction under section 80I of the Act on the total income after reducing there from brought forward losses. Deduction under section 80I of the Act was worked out at ` 90,87,694/-.*

*Thereafter, the assessee filed an application under section 154 of the Act claiming that the deduction under section 80I of the Act had been wrongly allowed at ` 90,87,694/- against admissible deduction of ` 1,36,24,492/-. The Assessing Officer rejected the assessee's claim for rectification after considering the application. Aggrieved by the order of the Assessing Officer, the assessee filed an appeal before the Commissioner of Income Tax (Appeals) [CIT(A]. Vide order dated 5.11.2003, the CIT(A) allowed the appeal. Not satisfied with the order, the revenue filed appeal before the Tribunal. Vide order dated 27.10.2005, the Tribunal allowed the appeal and reversed the order passed by the CIT(A). In view of the findings of the Tribunal, income of the assessee was again determined at ` 3,54,79,477/- and demand of `43,62,116/- was raised as payable by the assessee.*

*ACIT v/s Nakodar Co-Operative Sugar Mills Ltd (27.10.2005) ITAT Amritsar Bench*

*ITA Nos. 61 & 62/Asr/2004*

*Para 5/6 (Para 4- 6.4 & Para 5 )*

*Such view is inconformity with the definition of gross total income as defined in s. 80B(5) of the IT Act. The judgment of Supreme Court in the case of CIT vs. Kotagiri Industrial Co-operative Tea Factory Ltd. (supra) is directly on this issue and supports this view. In this case, Hon'ble Supreme Court has held that in order to arrive at the "gross total income" defined under s.80B(5), brought forward business losses of the earlier years are required to be set off under s.72 of the Act, before allowing deduction under s. 80P. Provisions of s. 80P are similar to the provisions of s. 80-I. For arriving at such a view, the Hon'ble Supreme Court has also relied on its two earlier decisions in the cases of Distributors (Baroda) (P) Ltd. vs. Union of India &Ors. (1985) 47 CTR (SC) 349 : (1985) 155 ITR 201 (SC) and H.H. Sir Rama Varma vs. CIT(1994) 116 CTR (SC) 55 : (1994) 205 ITR 433 (SC). In the case of Motilal Pesticides (I) (P)Ltd. vs. CIT (supra), Hon'ble Supreme Court has observed that provisions of s. 80AB were merely of a clarificatory nature and only declared the law as it always stood in relation to deductions to be made under Chapter VI-A of the Act. The special deduction under s. 80-I is allowable only on the net income as computed in accordance with the provisions of the Act and not on the gross income.*

*6.1 In addition to the judgments of Supreme Court referred to above, the following judgments of the various High Courts also support the same view :*

*(i) CIT vs. Rane Brake Linings Ltd. (1979) 120 ITR 82 (Mad)*

*The Madras High Court by relying on the judgment of Supreme Court in the case of Cambay Electric Supply Industrial Co. vs. CIT 1978 CTR (SC) 50 : (1978) 113 ITR 84 (SC) held that deduction under s. 80-I of the Act will have to be computed after adjustment of brought forward losses of earlier years.*

*154 of the IT Act. From the facts discussed above, it is obvious that the Assessing Officer had restricted the claim of the assessee for deduction under s. 80-I at the time of completing the assessment under sub-section (3) of s. 143. The assessee moved an application under s. 154. As per provisions of s. 154 of the IT Act, the Assessing Officer has limited powers to rectify the mistakes of facts or law, which are apparent from record. In the case of T.S. Balaram, ITO vs. Volkart Brothers & Ors. (1971) 82 ITR 50 (SC), the Hon'ble Supreme Court held that a mistake apparent on the record must be an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there maybe conceivably two opinions. A decision on a debatable point of law is not a mistake apparent from the record. Now the issue whether the deduction under s. 80-I is to be allowed in respect of income without allowing set off of brought forward loss or after allowing set off of brought forward losses of the earlier years is highly debatable and contentious. The fact that the issue is contentious and debatable is evident from the reason that the matter has travelled upto the Supreme Court in the various cases referred to above.*

*Therefore, this issue fell outside the scope and powers of the Assessing Officer under s. 154of the Act. If the assessee had any grievance against the action of the Assessing Officer for restricting the claim to the extent mentioned above, it could have filed an appeal against the order under s. 143(3) instead of moving an application under s. 154. Thus, the order of the CIT(A) deserves to be set aside on this account also.*

(3) Review not permissible in the guise of rectification – A review cannot be undertaken in the guise of rectification. The Kerala High Court held that. Having decided that only an amount of Rs. 15 lakhs was allowable as payment for vacating tenancy in computation of capital gains, the entire claim of Rs. 30 lakhs, cannot be allowed by the Tribunal in an order purposed to be a rectification order on the ground, that it made a mistake in the earlier order in assuming wrongly, that it had the power to restrict the allowance to a reasonable extent. The High Court held that there was possible a mistake in the original order, but it was a debatable one. Rectification power could not be used in such a case.

Thus on debatable issue i.e. the deduction will be allow 10% or 30% u/s 80IC is a debatable issue cannot be rectified u/s 154 of I.T. Act, 1961.

Ground No. 2 :
*That the Ld. A.O. grossly erred in restricting the disallowance u/s 80IC @ 30% in place of 100% claimed by the assessee and thereby made the addition of Rs. 7602852/- and withdrawn the MAT credit by Rs. 25,84,210/-.*

*That the Ld. CIT(A) also erred in dismissing the ground though the assessee company took deduction u/s 80(IC) for 5 year.*

Submissions:
On facts

The law u/s 80IC (2)b-III is very much clear that up to 5 years the deduction will be available @ 100% thereafter 30%. Since we have claimed the deduction in following years.

1. *2010-11 - 150323504.00*
2. *2011-12 - 127303977.00*
3. *2012-13 - 74503477.00*
4. *2013-14 - 76169180.00*
5. *2014-15 - NIL*
6. *2015-16 - 16861217.00*

The Ld. CIT(A) quoted the decision of Hon. S.C. in the case of PCIT v/s AARHAM SOFTRONICS

But in this case the ground was

*"Whether an assessee who sets up a new industry of a king mentioned in sub-section (2) of Section 80-IC of the Act and starts availing exemption of 100 percent tax under sub-section (3) of Section 80-IC (which is admissible for five years) can start period of five years on the ground that the assessee has not carried out substantial expansion in its manufacturing unit?"*

Thus on expansion whether the new 5 year benefit will be available or not

*"In all these cases assesses has stated availing exemption under Section 80-IC on the setting up of new industrial units. All these assesses have availed 100% deduction for a period of 5 years. As noticed above, from sixth year, in normal course, deduction is admissible @ 25% of the profits and gains. For next five years (or 30% where the assessee is a company. However, all these assesses, after the expiry of five years, carried out substantial expansion of their existing units. This substantial expansion is in accordance with the provision of Section 80-IC and there is no dispute about the same. From the year such substantial explanations were carried out by the assesses the assesses demanded deduction @ 100%, instead of 25%/30% for the remaining period of 10 years which is the maximum period or which deduction is admissible."*

That the above decision is on deduction available on expansion @ 100% after 5 years does not have connection to our case.

as such we submit that we have claimed deduction in Assessment year, not beyond the period of 5 years the deduction have been claimed rightly we informed this thing to the Ld. A.O. but he has passed the order without

considering our submission i.e. he passed order ex-parte after the gap of 9 months from previous notice."

6. To support the contention so raised in the written submission reliance was placed on the following evidence / records / decisions:

| S. N. | Particulars | Page No. |
|---|---|---|
| | | |
| 1 | Copy of Written Submission CIT(A)-4, Jaipur | 1- 7 |
| 2 | Copy of written submission CIT (A)-4, Jaipur submitted on dtd. 10.09.2023. | 8 - 12 |
| 3 | Copy of written submission CIT (A)-4, Jaipur submitted on dtd. 26.12.2022. | 13 - 19 |
| 4 | Copy of Order u/d 154 dtd. 30.03.2015. | 20 - 21 |
| 5 | Copy of Assessment order dtd. 20.012.2017. | 22 - 32 |
| 6 | Copy of Case Law of ITAT, Amritsar (Nakodar Co-operative Sugar Mills Ltd. v/s ACIT). | 33 - 38 |
| 7 | Copy of Case Law of Supreme Court of India (M/s Volkart Brother, Bombay v/s T.S. Balaram, I.T. Officer, Bombay) | 39 - 43 |
| 8 | Copy of Case Law of High Court Panjab-Haryana (M/s Nakodar Co- operative Sugar Mills Ltd. v/s CIT Jalandhar) | 44 - 50 |
| 9 | Copy of Case Law of Supreme Court of India (M/s Aarham - Soft | 51 - 75 |

7. The ld. AR of the assessee in addition to the written submission so filed vehemently argued that deduction for which the adjustment made in the returned income vide order dated 154 of the Act on 08.12.2020 is outside the purview of the provision of section 154 of the Act. The claim when verified by passing an order u/s 143(3) of the Act on 20.12.2017

again the same cannot be subject matter of provision of section 154 of the Act. The issue as to allowability of deduction based on the provision of section 80IC(2) & (3) is not subject matter of mistake apparent on records. The decision of the supreme court relied in the case of the assessee by the ld. CIT(A) is on the issue that *"Whether an assessee who sets up a new industry of a kind mentioned in sub-section (2) of Section 80-IC of the Act and starts availing exemption of 100 percent tax under sub-section (3) of Section 80-IC (which is admissible for five years) can start period of five years on the ground that the assessee has not carried out substantial expansion in its manufacturing unit?"* Thus, in this case the issue was that whether the new 5 year benefit will be available or not. Considering that aspect of the matter and the fact that the issue that what is decided in the scrutiny assessment cannot be rectified u/s.154 of the Act as the mistake that if any pointed out is not apparent on record. To drive home this contention the ld. AR of the assessee relied upon the various decision in his paper book.

8. The ld. DR is heard who relied on the findings of the lower authorities and more particularly advanced the similar contentions as stated in the order of the ld. CIT(A). The ld. DR also submitted that the assessee has claimed the 100 % deduction even though the same is not allowable in the

sixth year based on the provision of section 80IC of the Act. He also supported the detailed finding of ld. CIT(A) on the technical ground as well as merits of the disallowance made.

9. We have heard the rival contentions and perused the material placed on record. The limited issue in this case when the assessing officer having examined the issue of allowability of deduction claimed by the assessee u/s. 80IC can again be examined under the guise of provision of section 154 of the Act or not. Before going further to decide the issue on hand it would be necessary to recite the relevant facts related to the disputes. The assessee company filed ITR on 30.09.2015 declaring income of Rs. 15,52,17,730/-. The case of the assessee was selected under CASS for scrutiny. The assessment was completed as per provision of section 143(3) of the Act vide order dated 20.12.2017 at the income of Rs. 16,29,58,540/- and Book Profit u/s 115JB at Rs. 53,86,12,299/-. That order of assessment was rectified as per provision of section 154 of the Act on 27.12.2017 wherein the book profit was determined at Rs. 36,56,88,150/-. The assessee preferred an appeal against that order rectifying the income of the assessee before the ld. CIT(A) Jaipur on 06.01.2018 which is pending before the Hon. CIT(A)- I, Jaipur now with Ld. CIT(A)-4, Jaipur.

10. In the meanwhile, again a notice was issued u/s 154 of the Act on 16.03.2020 fixing the date of the hearing on 24.03.2020 but due to lockdown, the hearing was, not attended but the written reply was sent on 26.05.2020. Even though the ld. A.O. states that, none attended, nor any reply was filed. Then after the gap of 9 Months the ld. A.O. passed order dated 08.12.2020 without giving fresh opportunity to the assessee. In that order passed u/s. 154 of the Act the Ld. A.O. disallowed the deduction already allowed u/s 80IC(2)(b) (iii) restricting claim @ 30% instead of 100% claimed & allowed earlier in the assessment order passed u/s. 143(3) of the Act. Thus, that second order passed u/s. 154 of the Act comes under the ambit of the provision of section 154 of the Act or not. The ld. CIT(A) has merely dismissed the ground of appeal challenging the proceeding under section 154 of the Act by stating that the assessee has not shown how the issue is debatable, and the assessee has not submitted any legal principles which are applicable to the present facts of the case.

11. The assessee challenged that finding of the ld. CIT(A) in this appeal vide ground no. 1 raised. The grievance of the assessee is that ld. AO grossly erred in passing the order and the mistake pointed out is debatable hence cannot be rectified as per provisions of section 154 of the Act. Under

Section 154 of the Income Tax Act, an order for rectification can be passed to correct any apparent mistakes in records or orders. This can be initiated by the assessee, the deductor, the collector, or the income tax authority itself. Here in this case we note that assessment order determining the income of the assessee was passed on 20.12.2017. Thereafter, within 7 days an order u/s. 154 of the Act dated 27.12.2017 was passed. Again on 16.03.2020 a notice u/s. 154 of the Act was issued contending that deduction u/s. 80IC(2)(b)(ii) after five years from the initial assessment year was to be allowed at the rerate of thirty percentage instead of allowed at the rate of one hundred percent. Therefore, the assessee was asked to reply by 24.03.2020. The assessee filed the reply on 26.05.2020 as for the intervening period there was outbreak of covid-19, and the country was under lock down for some of the period. Upon the situation getting normal the assessee filed the reply on 26.05.2020. The revenue did not dispute the aspect of the fact that the assessee complied with the notice before us. The ld. AO issued notice on 04.11.2020 which the assessee contended before us as not received and thereby contended that the order is passed without affording the proper opportunity of being heard to the assessee. Thus, the contention of the ld. AO that the assessee neither attended nor filed any reply in connection with those notices so issued is incorrect.

12. The rectification u/s 154 can be made for the mistake which is apparent on record the issue for allowing of deduction u/s 80IC(2)(b)(ii) is a matter of verification and discussion based on the provision of law prevailing. Where there is no mistake apparent on record when the ld. AO passed two order one u/s. 143(3) of the Act and another u/s. 154 of the Act on 20.12.2017 and 27.12.2017 respectively. The review of the order under the grab of section 154 of the Act is not possible and that too the ld. AO noted that the issue that he has raised in the order u/s. 154 needs verification and that order cannot be passed against the assessee without first justifying as to what is the mistake apparent on record. Thus, verification of again the assessment record and making the review of the income which has already been assessed again the issue which requires verification of fact and figure and that too on the debatable issue cannot be covered u/s 154 of I.T. Act, 1961. A mistake apparent from the record must be an obvious and patent and not something which can be established by a long-drawn process of reasoning and on the points where there may be conceivably two opinion or view is possible. We get strength to our view on the issue from the decision of the jurisdiction Rajasthan High court in the case of Commissioner of Income Tax, Udaipur Vs. Historic Resort Hotels [ (2013) 31 taxmann.com 7 (Rajasthan) ] where in the court held that

**10.** The scope and applicability of section 154 of the Act has been delineated by the Hon'ble Supreme Court in the case of *T.S Balaram, ITO* v. *Volkart Brothers* [1971] 82 ITR 50 as under:-

"...It was not open to the Income-tax Officer to go into the true scope of the relevant provisions of the Act in a proceeding under section 154 of the Income-tax Act, 1961. A mistake apparent on the record must be an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may conceivably be two opinions...."

**11.** Similarly, in the case of *Mepco Industries Ltd.* v. *CIT* [2009] 319 ITR 208/185 Taxman 409 (SC), the Hon'ble Supreme Court has observed that,-

"Before concluding, we may state that in *Deva Metal Powders (P.) Ltd.* v. *Commissioner, Trade Tax*, Uttar Pradesh, reported in [2008] (2) SCC 439, a Division Bench of this court held that a "rectifiable mistake" must exist and the same must be apparent from the record. It must be a patent mistake, which is obvious and whose discovery is not dependant on elaborate arguments.

To the same effect is the judgment of this court in the case of *Commissioner of Central Excise, Calcutta* v. *A.S.C.U. Ltd.* [2003] 151 ELT 481, wherein it has been held that a "rectifiable mistake" is a mistake which is obvious and not something which has to be established by a long drawn process of reasoning or where two opinions are possible. Decision on debatable point of law cannot be treated as "mistake apparent from the record".

**12.** In the present case, the questions as to whether the assessee is entitled to get the current year depreciation for assessment year 2000-01 even if it has not been claimed; or as to whether amendment to section 32 of the Act in 2002-03 has a prospective effect or a retrospective effect on the application of current year's depreciation and unabsorbed business losses and depreciation for the purpose of computation of Income-tax, had been the disputable issues and had been of such questions of law which required further deliberation and discussion. Clearly, in view of the principles expounded and explained in *T.S Balaram, ITO* case (*supra*) and *Mepco Industries* case (*supra*), such aspects did not fall in the category of mistake apparent from the record and, therefore, could not have been dealt with under section 154 of the Act.

**13.** In the aforesaid view of the matter, we find the ITAT fully justified in affirming the order as passed by the CIT(A) and in holding that the assessment order could not have been taken up for modification in the name of rectification under section 154 of the Act. There was no occasion for applying section 154 of the Act in the present case as allowing of set off in the original assessment could not have been considered to be that of any mistake apparent from the record.

**14.** In the result, we find no substantial question of law being involved in this appeal.

**15.** The appeal fails and is, accordingly, dismissed.

13. Respectfully following the binding precedent of the jurisdictional high court, we are of the view that ld. AO cannot review his own order in the guise of rectification. When he has already undertaken the scrutiny assessment and also once rectified the mistake apparent on record which is also disputed by the assessee and thereby again on the issue of allowability of deduction invocation of provision of section 154 of the Act is not in accordance with the purpose of the provision of section 154 of the Act so as to decide the allowability of deduction. Based on this discussion technical ground no. 1 raised by the assessee is allowed. Since, we have decided the issue on technical ground, ground no. 2 on merits of the claim becomes infructuous.

In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 31/07/2024.

| | |
|---|---|
| Sd/- | Sd/- |
| ( डा॰ एस. सीतालक्ष्मी ) | ( राठोड कमलेश जयन्तभाई ) |
| (Dr. S. Seethalakshmi) | (Rathod Kamlesh Jayantbhai) |
| न्यायिक सदस्य / Judicial Member | लेखा सदस्य / Accountant Member |

जयपुर / Jaipur
दिनांक / Dated:- 31/07/2024
*Ganesh Kumar, Sr. PS
आदेश की प्रतिलिपि अग्रेशित / Copy of the order forwarded to:

1. The Appellant- Om Infra Limited, Jaipur
2. प्रत्यर्थी / The Respondent- DCIT, Central Circle-01, Jaipur
3. आयकर आयुक्त / The ld CIT
4. आयकर आयुक्त(अपील) / The ld CIT(A)

5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 811/JP/2023)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar