IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 29.07.2015

CORAM

THE HONOURABLE MR. JUSTICE R.SUDHAKAR
AND
THE HONOURABLE MS. JUSTICE K.B.K.VASUKI

T.C.A. NO. 536 OF 2005
AND
T.C.A. NO. 590 OF 2008

M/s.Indus Finance Corporation Ltd.
(Formerly Known as Subuthi Finance Ltd.)
114, 1st Floor, Kothari Buildings
M.G.Road, Nungambakkam
Chennai 600 034. .. Appellant in both appeals
(cause title amended vide order
dated 13.1.15 made in MP 1/2014)

- Vs -

The Commissioner of Income Tax
No.121, Nungambakkam High Road
Chennai 600 034. .. Respondent in TCA 536/05

The Deputy Commissioner of Income Tax
Special Range X
Chennai 600 034. .. Respondent in TCA 590/08

T.C.A. No.536/05 filed under Section 260-A of the Income Tax Act against the order dated 15.9.04 passed by the Income Tax Appellate Tribunal, Chennai 'B' Bench, made in ITA SS (A) No.155 of 2002.

T.C.A. No.590/08 filed under Section 260-A of the Income Tax Act against the order dated 10.11.06 passed by the Income Tax Appellate

Tribunal, Chennai 'B' Bench, made in M.P. No.120/Mds/2004.

For Appellant : Mr. S.Sridhar

For Respondents : Mr. M.Swaminathan

COMMON JUDGMENT

(DELIVERED BY R.SUDHAKAR, J.)

Aggrieved by the order of the Tribunal in dismissing the appeal and miscellaneous petition filed by it, the appellant/assessee is before this Court by filing the present appeals. This Court, vide orders dated 24.10.05 and 7.7.08, while admitting TCA Nos.536/05 and 590/08, framed the following substantial questions of law for consideration :-

"***TCA No.536/2005***

1) Whether the Tribunal is right in law in holding that Section 154 (1A) is a bar to the rectification of the errors in question?

2) Whether the Tribunal is right in its interpretation of the scope of Section 154 (1A) and in its conclusion that notwithstanding the question of the inclusion of the rental income not being in issue in the appeals before the Tribunal and the High Court, such an issue cannot be covered in the rectification proceedings.

3) Whether the Tribunal is right in holding that notwithstanding the lease transactions having been proved to

be bogus, the assessee is not entitled to seek rectification u/s 154 for the exclusion of the lease rentals which have been included in the total income in the block return?

TCA No.590/08

Whether the Tribunal is right in holding that notwithstanding the lease transactions having been proved to be bogus, the appellant is not entitled to seek rectification under Section 254 (2) of the Income Tax Act for the exclusion of lease rentals which have been included in the total income in the returns?"

2. **Section 154 (2) of the Income Tax Act provides for rectification of mistake. In these appeals, we are now concerned with an application filed by the assessee under Section 154 (1A). Section 154 (1A), clothes the authority, who passed the order, with power to deal with the order, for the purpose of amending the order under sub-section (1) in relation to any matter other than the matter which has been so considered and decided**. For better appreciation, Section 154 (1A), on which much stress is laid by the learned counsel for the assessee/appellant to canvass his argument for rectification, is extracted hereunder :-

"154. .....

(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."

3. Mr.Sridhar, learned counsel appearing for the appellant has raised a legal plea that despite the issue being held against the assessee in the assessment order, which has subsequently been confirmed by the CIT (Appeals), the Tribunal, the High Court as well as the Supreme Court, the assessee would still then be entitled to make an application under Section 154 invoking the provisions of Section 154 (1A) of the Income Tax Act and seek amendment of the original order, which follows as a consequence of those proceedings.

4. Before we advert to the above legal issue, the facts in the present case, in a nutshell, are as follows :-

The appellant is engaged in the business of financing and leasing. A search, under Section 132 of the Income Tax Act (for short 'the Act'), was conducted on 7.8.96 and consequent to the search, block assessment under Section 158BC of the Act was framed by the Assessing Officer for the block period comprising assessment years 1993-1994 to 1996-1997 on 29.10.97.

Prior to the search, the appellant/assessee had filed regular return of income for the various years. In the original return of income filed for the assessment year 1995-1996, prior to the date of search, the transaction relating to purchase and lease of two pusher type furnaces was disclosed and the income accrued from the leasing of the equipment as well as the depreciation on the leased equipment was claimed as a part of computation of the total taxable income. Similarly, lease income in relation to the said transaction was also deducted for the next assessment year 1996-1997 in the return filed in the normal course. After the search, as prescribed under Chapter XIVB of the Act, the appellant filed block returns in Form 2B for the assessment years 1993-1994 to 1996-1997 in response to the notice issued by the Assessing Officer under Section 158BC of the Act. In that, the appellant maintained the original claim of income/lease as well as depreciation.

5. In the course of search proceedings, the transaction of the assessee in respect the agreement with Duckfin International Pvt. Ltd., relating to leasing of continuous pusher type furnaces on sale and lease back was found to be fictitious. The acts in relation to the said transaction is recorded in paras 3 and 4 of the order passed under Section 158BC. The statement of the Managing Director, K.V.Balakrishnan was also recorded and his response

is found in para 6.1 of the order. For better appreciation of the case on hand, the said portion of the order is extracted hereinbelow :-

> *"6.1 When these facts were put to the Managing Director, Shri K.V.Balakrishnan at the time of giving sworn statement u/s 132 (4) of the IT Act agreed for surrender of Rs.1.31 crores on claim of depreciation in the return and to admit it as income. Since he himself agreed for this surrender there is no valid reason for him to take a different stand at this state. the entire transaction is routed as money transaction for non-existing assets and it is a money lending business. The asset has already suffered depreciation. Therefore, the assessee's acceptance before the authorities for surrender of depreciation claimed is correct. For the above reasons, depreciation to the extent of Rs.1.31 crores claimed is disallowed and added to the total income."*

6. Based on the records and the answers elicited in the course of assessment, order was passed by adding the depreciation, claimed at Rs.1,30,38,000/= to the income, in the following manner :-

TOTAL INCOME

Assessment Year	*Income Already Declared*
1993-94	*(-) Rs. 5,21,200/-*
1994-95	*Rs. 3,27,000/-*
1995-96	*(-) Rs.66,07,849/-*
1996-97	*Rs.66,85,857/-*

Additions as discussed above :

In para No.5 Depreciation has been withdrawn	*Rs. 1,30,38,000/-*
In para No.7 5% on lease expenses of Rs.3,61,64,802/- has been disallowed	*Rs. 18,08,240/-*
Undisclosed income for the block period	*Rs.1,48,46,240/-*

TAX CALCULATION

Income Tax thereon	*Rs. 89,07,744*
Add : Surcharge	*Rs. 13,36,162*
Balance Payable	*Rs.1,02,43,906*

This should be paid as per Demand Notice and challan enclosed."

7. Aggrieved by the order passed under Section 158BC, the assessee filed appeal before the Tribunal. The Tribunal, after referring to the factual matrix, recorded a finding by relying upon the statement of Balakrishnan, Managing Director to Question No.24, wherein K.V.Balakrishnan had categorically asserted the claim for depreciation on said assets and on that basis agreed to file return and pay the tax. For better appreciation, the relevant portion of the order is extracted hereunder :-

"5. ..... Question No.24 and the answer to that question are reproduced below for the sake of facility :-

Q. 24) *I am showing you a copy of statement of Shri*

Deepak Bhargava, Director (Finance) of M/s.Duckfin International Ltd., dt. 1.8.96 wherein it is stated that no asset has been provided or installed at any of this factory premises and the suppliers M/s.Paras Inds. are paper concerns only. What do you have to say particularly in view of the fact that the assets leased by you have not been identified by you and you have not taken any machinery number such particulars as mentioned in answer to Q.No.8. Moreover you have also claimed dep. of 1.3 crores in your books on the so called and lease to M/s.Duckfin Intl.?

Ans : *Based on the documents provided and facts given to us by M/s.Duckfin Intl., we entered into the lease agreement and claimed depreciation. In view of the additional fact and statement made by Shree Deepak Bhargava, I surrender on behalf of the company the dep. claimed of Rs.1.3 crores on the assets leased to M/s.Duckfin International in F.Y. 94-95. We shall file the return for the block period and pay the taxes accordingly."*

8. The Tribunal, after considering the plea of the assessee that it is a genuine transaction and the challenge to the assessment order under Section 158BC on merits, and taking into consideration the statement recorded from the Managing Director, on oath, coupled with the documents, which proved that there was a false and bogus claim, came to hold that the assessment order passed under Section 158BC was justified and, accordingly, the claim of the assessee was dismissed. The relevant portion of the order is quoted hereunder for better appreciation :-

"This was followed by regular assessment and in the regular assessment the assessee used to contend that the statement given u/s 132 (4) cannot be applied in regular assessment proceedings and the Courts have decided in favour of the assessee as well as in favour of the Department. The decision of the Courts were based on the fact that search proceedings are not necessarily the starting point for the framing of the regular assessment. However, these decisions would have no applicability at all in view of the special provisions for search cases having been introduced in the statute. As mentioned earlier, section 158-B of the Act while defining the block period refers to the period of search ending with the period in which the search was made u/s 132 of the Act. It also draws reference of the undisclosed income for which search is made on various persons. There being a direct link between section 132 and Chapter XIV-B of the Act, the statement of the Managing Director of the assessee cannot be refuted by him any longer and his surrendering of depreciation claim during the course of search in a statement given under oath cannot be retracted. In our opinion, the claim of the assessee in view of the above observations is to be rejected and accordingly we reject the same."

9. Aggrieved by the said order, the assessee pursued the matter in appeal, TCA No.238/01, before this Court. It would be useful and relevant to extract the grounds raised by the assessee in the appeal before the Tribunal, which forms part of the papers filed in the appeal before this Court:-

"Aggrieved by the said order appellant preferred an appeal to the Tribunal wherein the following issues were canvassed in support for quashing the said block assessment order.

a) The investigation reports were not put to the appellant and as such there was gross violation of the principles of natural justice.

b) The copy of the statement recorded from Mr.Deepak Bargawa was not provided to the appellant.

c) The surrender of depreciation claim in the sworn statement recorded from the Managing Director shouldn't be considered as a hindrance for the allowability of claim of depreciation inasmuch as the Managing Director of the appellant in the said statement had categorically explained and affirmed the entire transaction except in the answer to the last question on difference consideration.

d) The disallowance of a claim would not come within the purview of the definition of 'undisclosed income' as defined in section 158B of the Act so as to make a block assessment.

e) Bonafide nature of the said claim was not considered while framing the assessment inasmuch as the assets were inspected by the Officials of M/s.Bank of Madura, Authorities of the Insurance Company and Financial Institution of State of Madhya Pradesh.

f) ***Booking of lease income receivable for the respective years in the regular returns filed before the date of search****.*

g) Violation of Provisions of Section 158BG of the Act should be considered.

h) In the alternative the loss incurred by the appellant in the said transaction should be considered as business loss in terms

of Section 28 of the Act.

As regards the disallowance of estimated lease expenses the following arguments were advanced :

a) Estimated disallowance would not be considered as undisclosed income within the definition.

b) All the details were provided to support the expenses.

c) No opportunity was given before the said disputed disallowance.

***The appellant had also objected the correctness of the chargeability of surcharge by the respondent**."*

10. The assessee also challenged the order of the Tribunal by raising the following grounds in its appeal before this Court :-

"vi. The Tribunal failed to appreciate that the block assessment and consequential demand notice was passed on 27.10.1997 without the approval of the Commissioner as contemplated inasmuch as the said approval was obtained only on 28.10.1997.

vii. The Tribunal failed to appreciate that as prescribed in the said Section 158BG of the Act, the approval should have been obtained before passing the block assessment order in question.

* * * * * * * * *

xxii. The Tribunal failed to appreciate that in the regular returns filed before the date of search the appellant had shown the lease income from the said transaction and further failed to appreciate that surrender of depreciation claim in the sworn statement should be considered in the context of admission of said lease income in the regular return inasmuch as in any

event the difference of the said amount of depreciation claim and the lease income in the regular returns filed for the respective years should alone be assessable under the block assessment.

xxiii. The Tribunal failed to appreciate that in the alternative the difference between the lease income booked and the depreciation disallowed should alone be considered as undisclosed income.

xxiv. The tribunal erred in not considering the legal submission to the effect that the loss incurred consequent to the said transaction should be considered as business loss in terms of Section 28 of the Act.

xxiv. The Tribunal failed to give any findings on the arguments raised with reference to estimated disallowance of lease expenses of 5% on the total claim.

xxv. The Tribunal failed to give any finding on the submissions and arguments with regard to the correctness of chargeability of surcharge while making the computation of undisclosed income in terms of Chapter XIV B of the Act."

11. Nine substantial questions of law were raised in the appeal, TCA No.238/01. Though so many questions of law were raised, at the time of hearing of the appeal, the very same counsel represented and argued the matter before the Bench and canvassed the following three issues, which were considered by the Bench in its order, which, for clarity, is quoted hereinbelow :-

"3. Before this Court, the learned counsel for the appellant

put forth three fold submissions, viz., (a) that the order was issued without obtaining prior approval of the Commissioner of Income Tax as stipulated under Section 158BC of Income Tax Act; (b) that the appellant was not given opportunity of hearing and necessary copies of documents were not furnished; and (c) that the depreciation on two continuous push type furnaces that were leased to M/s.Duckfin International Ltd., was not allowed."

12. The Bench, after hearing either side, disposed of the matter on 19.4.04, rejecting the plea of the assessee on all the three issues. On the first issue, the Court held that the Tribunal, on verification of the original records, came to hold that approval was granted by the Commissioner of Income Tax as provided under Section 158BC. The plea of violation of principles of natural justice was rejected in para-5 of the order. On the third and merit issue, the issue was considered in depth and the contention was dismissed by this Court. The relevant portion of the order, which is at para-6, is extracted hereinbelow :-

"6. As far as the third submission is concerned, it appears that the assessee had entered into a lease agreement with M/s.Duckfin International Ltd., for leasing continuous push type furnaces on sale and lease back transaction. M/s.Paras Industries manufactured the furnace and delivered to M/s.Duckfin International Ltd., which were installed at the cost of Rs.66 lakhs each. The same is stated to have been entered into by the assessee with M/s.Duckfin International Ltd., on

sale and lease back transaction at Rs.1,30,38,000/-. When the search was conducted at the business premises of the assessee at Mumbai, no lease agreement was found and only a copy of invoice was located. Mr.Balakrishnan stated that the transaction was supposed to be in the nature of sale and lease back and at the request of the lessee the name of M/s.Paras Industries was introduced for routing the transaction. Statements from Mr.Deepak Bhargava, Director of M/s.Duckfin International Ltd., was recorded at Bhopal on 1.8.1996, who had stated that no asset had been brought into existence and no assets were supplied and installed by virtue of this lease deed. He also stated that M/s.Paras Industries does not exist and the so called lease was more paper transaction and the assets mentioned in these leases did not exist. When Mr.Balakrishnan, Managing Director was confronted, he surrendered on behalf of the company the depreciation claimed to the tune of Rs.1.30 crores on the assets leased to M/s.Duckfin International Ltd. That being so, the depreciation on two continuous push type furnaces that were leased to M/s.Duckfin International Ltd., was rightly disallowed."

13. Except the above three issues, no other issues/questions of law were canvassed by the appellant before the Bench, though very many questions of law were raised in the appeal by the appellant.

14. As a matter of record, the issue was appealed before the Supreme Court, which dismissed the plea of the assessee, holding as under :-

"Delay condoned.

The special leave petition is dismissed."

15. Even while the appeal in TCA No.238/01 was pending before this court, it appears that the assessee filed a petition on 1.3.02 under Section 154 of the Act for rectification before the Assistant Commissioner of Income Tax, Company Circle VI(4) praying to delete the lease rental of Rs.86.94 lakhs offered as income. On 14.3.02, supplementary petition under Section 154 was filed before the Assessing Officer praying for deletion of Rs.18,08,240/= being adhoc disallowance at the rate of 5% of the lease expenses. However, on 18.3.02, the Assessing Officer, viz., Assistant Commissioner of Income Tax, declined to rectify the order on the ground that the subject matter of proceedings is already pending before the Tribunal in M.P. No.70/01, which the appellant/assessee had filed on 21.5.01, wherein the scope of the petition is as under :-

> *"It is submitted that certain issues raised at the time of hearing are not considered by the Hon'ble Bench while disposing off the said appeal in their order dated 12.04.2001. It is further submitted that in the light of the said factual position, the entire order of the Tribunal is liable to be recalled for fresh hearing in the interest of justice. To fortify the above submissions, the petitioner is bringing to the notice of the Hon'ble Bench the following issues which are originally agitated and not considered while passing the said order :-*
>
> *á) Denial of opportunity to cross examine Mr.Deepak*

Bargava of M/s.Duckfin International Limited while framing the said assessment.

b) Even copy of the statement of the Mr.Deepak Bargava was not furnished and thereby principles of natural justice was grossly violated while framing the assessment.

c) Opportunity was not provided even before the Commissioner of Income Tax while granting approval in terms of Section 158BG of the Act.

d) Disallowance of depreciation would not come within the purview of the definition of "undisclosed income" as defined in Section 158B of the Act.

e) Declaration of the lease income from the said transaction in the regular returns before the date of search would clearly indicate to the effect that the said disallowance of depreciation would not lead to the legal presumption to the effect that there was no undisclosed income to be assessed in terms of Chapter XIVB of the Act. In the alternative depreciation claim might be considered as undisclosed income subject to the due set off for the lease income admitted in the regular returns.

f) Decision of the Bangalore Bench in the case of Microland Limited - 67 ITD 446 and 504 would squarely applicable to the facts of the case.

g) Statement of the Managing Director of the petitioner company should be read as a whole and answer to the last question should not be considered in isolation before deciding the issue of granting depreciation on the disputed transaction.

h) The entire transaction should be considered as transaction entered under bona fide circumstances based on the materials placed on record and as a consequence while rejecting the said transaction as sham the loss arising on

account of the same should be considered for allowability in terms of Section 28 of the Act.

i) Disallowance of lease charges on an estimated basis was wrongly made.

j) Surcharge was levied as against the rate of taxation prescribed for Chapter XIV B assessment.

In the circumstances, it is prayed that the order of the Tribunal dated 12.04.2001 may be recalled and a direction may be issued to the Registry to refix the said appeal for fresh hearing in the interest of justice. It is further submitted that the issues which were raised on the legal position at the time of original hearing ought to have been considered and inasmuch as the same will go to the root of the said block assessment with far reaching legal consequences. There is every necessity for giving due attention and weightage to this issue raised before coming to any decision on admissibility of depreciation claim arising out of the said transaction."

16. In the petition filed under Section 154, the appellant has highlighted the erroneous computation made with regard to the undisclosed income. For better appreciation, the relevant portion of the petition is extracted hereinbelow :-

"11. In the light of the conclusion by the Assessing Authority that there was no genuine lease transaction on the ground that there was no existing asset in respect of which the aforesaid lease was entered into and consistent with the said finding the lease rental income included in the return as well as in the income computed in respect of the aforesaid furnaces

for the Asst. Years 1995-96 and 1996-97 included in the block period income will have to be excluded. While this is so, the Assessing Authority has, by mistake on the one hand included the lease income of Rs.12,22,000/= for the assessment year 1995-96 and Rs.74,72,000/- for the assessment year 1996-97, while at the same time disallowed the claim for depreciation amounting to Rs.1,30,38,000/=.

12. The petitioner states and submits that the inclusion of the aforesaid lease rental income in the total income for the block period while disallowing the claim for depreciation in respect of the same asset in respect of which the lease transaction was claimed by the petitioner amounts to a patent error, which is liable to be rectified. The error comprises either in including the lease income or in disallowing claim for depreciation. Both the aforesaid transactions cannot simultaneously stand. Insofar as the assessing authority has taken a conscious decision that the assets claimed to have been leased did not exist and there was no lease transaction but only a money transaction and in this view, disallowed the claim for depreciation, he should have consistent therewith not included the lease rental income amounting to Rs.86,94,000/= in the income computed for the block period.

13. The petitioner in the above circumstances submits that the computation of the undisclosed income for the block period is erroneous insofar as it has included the lease rental amounting Rs.86,94,000/= and the said mistake has to be rectified by excluding the said amount from the total income computed. Accordingly the petitioner states and submits that as against the undisclosed income for the block period determined at Rs.1,48,46,240/= the lease rental income

included thereon amounting to Rs.86.94 lacs will have to be excluded and this inclusion being an error apparent on the face of the record will have to be rectified by excluding the said amount."

17. Plea has also been raised in relation to search under Section 154 of the Act in the rectification petition, for the first time, and for better clarity, the same is extracted hereinbelow ;-

"14. The petitioner further states and submits that in the aforesaid assessment for the block period, apart from levying tax on the undisclosed income determined by the assessing authority at the rate of 60% he has added surcharge amounting to Rs.13,36,162/=. The petitioner states and submits that surcharge is not leviable in respect of an assessment under Chapter XIV-B. Surcharge is levied under Finance Act relating to each year. Insofar as the block assessment is made for a block period and not for any specific year of assessment, surcharge cannot be levied in respect of such an assessment."

18. This new plea of deletion of income from lease, consequent to disallowance of claim of depreciation, was raised in the application filed under Section 154. It will be pertinent to point out that though this plea was raised in the appeal before this Court, even at the first instance, however the same was abandoned, as is evident from the order passed by the Bench in TCA No.238/2001 on 19.4.04, wherein only three issues were canvassed by

the assessee. In the order that came to be passed by the Assistant Commissioner of Income Tax under Section 154 of the Act, the following four issues were considered :-

> *"(i) Exclusion of lease rentals of Rs.86.94 lacs from the undisclosed income computed in the assessment order dated 29.10.97.*
>
> *(ii) Rectification of calculation mistake in the computation of undisclosed income.*
>
> *(iii) Recomputation of income tax on the income arrived at after the above rectification.*
>
> *(iv) Deletion of surcharge."*

19. On the plea of deletion of income from lease rentals, the authority held that though depreciation is disallowed on account of the finding of non-existent asset, since there was a receipt of income consequent to finance transaction, therefore, treated the said amount as income. The authority was of the view that in a proceeding under Section 154, such an issue could not be raised and even otherwise, the assessee having filed a miscellaneous petition before the Tribunal, there was no scope for taking up proceedings under Section 154. The relevant portion of the order, for better appreciation of the case, is quoted hereinbelow :-

> *"From the facts, it will appear that since the asset did not exist, the transaction was treated as a finance transaction and the claim for depreciation on the non-existing asset was disallowed. It is not the assessee's case that it did not receive*

the lease rentals. The question whether the money received in the name of lease rentals is assessee's income or not is obviously not a matter to be decided in a proceeding under section 154. Be that as it may. I am given to understand that the issue has been taken up by the assessee in a miscellaneous petition filed before the ITAT and, therefore, I do not propose to go into the merits of the issue. A mistake apparent from record must be an obvious and patent mistake. It must not involve a debatable point of law or fact. Suffice it to say that this not one which can be termed as a mistake apparent from records."

20. On the issue of disallowance of 5% of lease expenses, it was held that the same cannot be termed as a mistake apparent from the records and the said issue being a legal issue, cannot be agitated in a petition filed under Section 154. Further, the assessee has taken up this issue as well in the miscellaneous petition filed before the Tribunal and, for the above reasons, the said contention was rejected. The relevant portion is extracted hereinbelow :-

"5. The assessee's objection to the disallowance of 5% of lease expenses also cannot be termed as a mistake apparent from records. Whether a deduction of this nature can be made in a Block Assessment Order appears to be a legal issue and is not amenable to jurisdiction u/s 154. The assessee has also taken up this issue in the Miscellaneous Petition filed by it before the ITAT."

21. The arithmetical error pointed out by the assessee was verified and found to be baseless and was accordingly rejected. On the imposition of surcharge, it was held that the matter having already been taken up before the Tribunal in the miscellaneous petition, the said issue was not gone into. The relevant portion of the order is extracted hereinbelow :-

> *"6. It is submitted by the assessee's representative that there is an arithmetical error in the computation of undisclosed income made in the assessment order. I find that the assessee has added the income computed in the regular assessment for assessment years covered by the block period to the undisclosed income assessed in the block assessment and has arrived at the figure of Rs.1,47,30,048. It is the assessee's contention that, therefore, the figure of Rs.1,48,46,240, viz., the undisclosed income determined in the block assessment is erroneous. I have verified the arithmetical calculation and find that the assessing officer has correctly added only the undisclosed income.*
>
> * * * * * * * * *
>
> *8. The next contention is that surcharge is not leviable in a block assessment and reliance is placed in the decision of the ITAT, Bangalore Bench in the case of Microland Ltd. - Vs - ACIT (67 ITD 446). Under Sec. 113, the total undisclosed income of the block period shall be chargeable to tax @ 60% and the Finance Act of each year provides that the amount of income tax computed in accordance with provisions of Sec. 113 shall be increased by a surcharge as provided in paragraphs A, B, C, D & E of Part-I of First Schedule. This*

issue has also been taken up by the assessee in the Misc. Petition filed by the assessee before the ITAT. Therefore, I do not propose to go into the merits of the issue. For the above reasons, there is no mistake apparent from records."

22. Against this order, appeal was filed to the CIT (Appeals), who decided the matter on 9.8.02 by upholding the order of the adjudicating authority in the following manner :-

"2. Appellant is aggrieved with the above findings of the Assessing Officer. The grounds and the subsequent written submission filed has been duly considered. I find from these grounds that the appellant is mere arguing on the merits of the issue rather than on the scope of the sec. 154. It is also important to note that the substantive appeal has already been dismissed by the Tribunal. The issues raised in the petition relate to the nature of rental income, nature of deduction to be allowed and the possibility of levy of surcharges in block assessment. These issues are by their very nature certainly debatable. Though the appellant has filed miscellaneous application, no cogent reason has been given as to how these issues which are debatable in nature can be considered as mistake apparent from records. In the circumstances, the Assessing Officer's proceedings u/s 154 and the findings thereon is confirmed."

23. Further appeal by the assessee to the Tribunal came to be dismissed on 15.9.04. The Tribunal was of the view that there was no scope

for considering an issue, which has already been considered and decided in the appeal by the Hon'ble High Court. The Tribunal further went on to interpret Section 154 (1A) and held that the scope of Section 154 (1A) provides that matters which were considered and decided by the appellate authority cannot be rectified and further went on to hold that matter means all facts of the matter, which comes within the scope of the appeal. The Tribunal further held that if the appeal is filed relating to the matter and the same was considered and decided or be treated to have been considered and decided by the appellate authority, it is no longer open to the Assessing Officer to reopen or reagitate or rectify the said issue or matter. For more clarity, the relevant portion of the order is set out hereunder :-

> *".... The powers of the Assessing Officer under sec.154 of the Act flow from the provisions of that section only. The language of sec.154(1A) of the Act makes it abundantly clear that the matter which is considered and decided by the appellate authority cannot be rectified.* ***The matter means all facts of the matter which come within the scope of the appeal. If the appeal is filed relating to the matter and the same was considered and decided or be treated to have been considered or decided by the appellate authority, it is no longer open for the assessing authority to re-open or re-agitate or rectify the said issue or matter.*** *The appellate authority is obliged to dispose of all aspects of the matter and to act in accordance with the law even though a particular point has not been raised. Even it not raised, the same is taken to have been considered and*

decided by the appellate authority. In the present case, the assessee on lease transaction claimed depreciation, which ultimately proved to be bogus and the assessee itself offered the income during search, then it is not open for it to re-agitate through rectification under sec.154 of the Act for exclusion of lease rentals which has been declared by itself in the block return.

12. In view of the above, we are of the considered opinion that the issues taken up by the assessee are debatable and these cannot be taken up by way of rectification under sec. 154 of the Act. Even otherwise, when the matter is considered by the appellate authorities and the Hon'ble High Court and this issue was not raised through all these proceedings, then the same is taken to have been considered and decided by the appellate authorities. In view of this, we do not agree with the assessee on rectification under sec.154 of the Act, on these issues and accordingly, the orders of the authorities below are confirmed."

24. While TCA No.536/05 is filed aggrieved by the said order, the other appeal, TCA No.590/08 is filed against the dismissal of the miscellaneous application by the Tribunal on the ground that the appellant cannot seek rectification under Section 254 (2) to rectify the mistake apparent on record.

25. The application for rectification under Section 254 (2), viz., M.P. No.70/01, has been admittedly filed before the Tribunal after the appeal has been disposed of by the High Court and the Supreme Court. Against the

order passed by the Tribunal in dismissing the said application, TCA No.590/08 is filed stating that in effect the relief sought for under Section 254 (2) is to grant the benefit, which the appellant wanted to claim in terms of the application filed under Section 154 before the Assessing Officer.

26. Mr.Sridhar, learned counsel appearing for the appellant/assessee urged that in terms of Section 154, any matter other than the matter, which has been considered and decided, can be raised in an application under Section 154 (1A). Since the income from lease was not an issue raised and decided in the appeal or revision and the entire grounds raised in the appeal being in relation to false claim of depreciation, the application under Section 154 of the Act to delete the lease income is in order. The application under Section 154 actually flows as a consequence of the proceedings culminating before the Supreme Court. The sole object of the order is disallowance of depreciation holding the transaction as bogus or paper transaction. If the income is booked on such a transaction, it has to be naturally deleted from the income. So also the claim of surcharge, which flows out of the order of the Supreme Court. Learned counsel relies upon the circular of the Board in No.68 dated 17.11.1971, wherein it has been clarified that any subsequent interpretation of law, which has been laid down by the Supreme Court would constitute a mistake apparent from the records and, therefore, any

rectification application filed by the assessee under Section 35/154 of the Act would be in order, provided the same is filed within the period of limitation.

27. Learned counsel for the assessee also relied upon the decision of this Court in the case of ***Commissioner of Income Tax – Vs – Lakshmi Vilas Bank (2010 (329) ITR 591)***, to drive home the point that issues, which have not been decided earlier can be raised in an application filed for rectification under Section 154.

28. The decision of the Calcutta High Court in the case of ***CIT – Vs – Karam Chand Thapar (1990 (186) ITR 368)***, was also relied on by the assessee to pursue his plea that consideration of the matter should be the necessity with regard to the issue that is raised, agitated and decided and not one which is now pleaded by him in the application under Section 154. Since, there was no consideration or decision in relation to income, which is the essential requisite to the making of the order, the order passed by the Tribunal would be, in effect, a non-existent order.

29. Mr.Swaminathan, learned standing counsel appearing for the respondent/Department submitted that the assessee having abandoned the plea in the first round of litigation, which has reached finality, cannot now

raise a new plea under the guise of rectification of mistake. To buttress this argument, learned counsel for the Revenue relied upon the decision of the Orissa High Court in ***Utkal Galvanizers P. Ltd. - Vs - Assistant Commissioner of Income Tax (2008 (298) ITR 53)***, wherein the Orissa High Court held that the power vested under Section 154 (1A) is limited to mistakes apparent from the record and the same does not include powers to revise or review/reappraise one's earlier order.

30. Heard the learned counsel appearing for the appellant/assessee and the learned standing counsel appearing for the respondent/Department and perused the materials available on record as also the provisions of law and the decisions relied on by the learned counsel appearing on either side.

31. In the light of the facts, as culled out from the typed set filed by the appellant, this Court would like to examine the provisions of Section 154 of the Act as to the powers vested on the authority in relation to rectification of mistakes apparent on record.

32. Section 154 of the Income Tax Act provides for rectification of mistake. In the present case, this Court is concerned with an application filed by the assessee under Section 154 (1A). For better appreciation of the

case, at the risk of repetition, Section 154 of the Act is extracted hereinbelow :-

> *"**Rectification of mistake.***
>
> *154. (1) With a view to rectifying any mistake apparent from the record an income-tax authority referred to in section 116 may,—*
>
> *(a) amend any order passed by it under the provisions of this Act ;*
>
> *(b) amend any intimation or deemed intimation under sub-section (1) of section 143.*
>
> ***(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 [Commissioner (Appeals)], by the [Assessing] Officer also."*

33. The object of Section 154 (1) of the Act is to rectify any mistake apparent from the record. The Income Tax authority has got power to

rectify any mistake apparent on the record and amend any order passed by it under the provisions of the Act. In doing so, certain constraints have been placed on the authority in the matter of rectification. The constraint is that, where any matter is considered and decided in any proceeding by way of appeal or revision relating to an order referred to under sub-section (1), i.e., the order that is sought to be rectified, the authority passing such order may amend the order under sub-section (1) in relation to any matter other than the matter, which has been considered and decided. A reading of this provision would only mean that the power to rectify the mistake in the order should not be in relation to the issues considered and decided in the said order. What is excluded from rectification are matters, which have already been the subject matter of appeal. Such being the purport of the above provision, we do not subscribe the view of the assessee that in the guise of amendment to the order by way of rectification, a new plea could be raised, as is now sought to be raised by the assessee. As has been held in a catena of decisions, the scope of rectification of mistake is very limited, in that it is intended to correct mistakes apparent on the face of the record. Interpretation of the legal provisions and claims based upon such interpretation cannot be a ground to seek rectification of the order already passed.

34. In ***Utkal Galvanizers P. Ltd. - Vs - Assistant Commissioner of Income Tax (2008 (298) ITR 53)***, the Orissa High Court, while dealing with the scope of rectification of mistakes apparent on record in an application filed under Section 154 held that the power vested under Section 154 (1A) is limited to mistakes apparent from the record and the same does not include powers to revise or review/reappraise one's earlier order. In the said judgment, the Orissa High Court held as under :-

> *"14. Placing reliance on the two judgments referred to above, it would be clear that permitting the Assessing Officer to exercise power under section 154 in the matters which have already been carried in appeal, would lead to judicial anarchy. If the Revenue in any manner was dissatisfied, it was open to it to challenge the same in the second appeal before the Tribunal. In the absence of any challenge permitting the Assessing Officer to vary or review or revise his own order under a plea of correcting the mistake as contemplated under section 154 is to in effect allow him to override or overreach the order passed by the higher authorities in appeal or revision. This is clearly not the intention of legislation of section 154(1A) of the Income-tax Act. We are of the view that the scope of section 154(1A) remains limited to the "mistakes apparent from records". Such mistakes cannot and do not include powers to revise or review/reappraise one's earlier order. We are of the view that in the present case, exercise of power under section 154 in so far as "depreciation" is concerned, is also without jurisdiction."*

35. Further, the decision in *Lakshmi Vilas Bank case (supra)* relied on by the learned counsel for the appellant/assessee does not further the case of the appellant as we find that the following observations of the Court would only throw light in support of our findings in the present case, as made above :-

> *"15. In the judgment reported in CIT v. Hero Cycles Pvt. Ltd. [1997] 228 ITR 463 (SC), the Hon'ble Apex Court was pleased to hold that a rectification under section 154 can only be made when there is a glaring mistake of fact or law committed by the officer passing the order becomes apparent from the record. In the said case, the issue was the consideration of the granting of weighted deduction under section 35B of the Act. The Hon' ble Apex Court was pleased to observe that the said issue being a debatable issue the same cannot be gone into under section 154 of the Income-tax Act, 1961. In view of the fact that the facts involved in the said case are being totally different, the judgment rendered by the Hon'ble Apex Court is not applicable to the present case on hand wherein there is no dispute on the facts and there is no debatable issue involved.*
>
> *16. In the judgment reported in Utkal Galvanizers P. Ltd. v. Asst. CIT [2008] 298 ITR 53 (Orissa) the issue of merger was considered by the Division Bench of the Orissa High Court.* ***In the said case, the issue which was decided earlier before the appellate authority was sought to be raised again before the Assessing Officer by invoking section 154. Therefore, under those circumstances, the Division Bench of the Orissa High Court was pleased to hold that***

when an issue was already decided then permitting the said issue to be raised again under section 154 would lead to judicial anarchy. *In this connection, it is useful to refer the judgment reported in CIT v. Sundaram Textiles Ltd. [1984] 149 ITR 525 (Mad) wherein the tax Bench of this High Court was pleased to hold that only in a case where a particular item is dealt with in the appeal, the Income-tax Officer is precluded from dealing with the said item by invoking section 154. Therefore, the said judgment relied upon by the learned counsel appearing for the Revenue is also not applicable to the present case on hand.*

18. In the judgment reported in CIT v. Y. K. Shoji Stone Indo P. Ltd. [2008] 304 ITR 390 (Mad) (in which one of us is a party K. Raviraja Pandian J.) it has been observed as follows (page 393) :

> *"It is well recognised law that any erroneous assessment cannot be the subject-matter for rectification under section 154 of the Income- tax Act. The erroneous order of assessment can be rectified only under procedure known to law by carrying the matter before the appropriate authority to rectify the erroneous order or revise it as per law. A debatable point cannot be a reason for rectification under section 154. Further, in order to invoke section 154 for rectification of mistake, the mistake sought to be rectified should be a mistake apparent on the record and must be an obvious and patent mistake and not something which could be established by long drawn process of reasoning on the point in issue on which there may be conceivably two opinions. A decision on a debatable point of law cannot be*

regarded as a mistake apparent on the face of the record amenable for rectification under section 154 of the Income-tax Act. Useful reference can be had to the judgments of T. S. Balaram v. Volkart Brothers reported in [1971] 82 ITR 50 (SC) and CIT v. Hero Cycles Pvt. Ltd. reported in [1997] 228 ITR 463 (SC). Hence, we do not find any question of law, much less, substantial question of law, for entertaining this appeal as the issue has already been covered by the decisions of the Supreme Court. Therefore, the tax case (appeal) is dismissed."

(Emphasis supplied)

36. Reliance was placed by the assessee on Circular No.68 dated 17.11.1971, issued by the Board relating to rectification of mistakes in pursuant to the interpretation of law by the Supreme Court. For better clarity, the said circular is extracted hereinbelow :-

"The Board are advised that a mistake arising as a result of subsequent interpretation of law by the Supreme Court would constitute "a mistake apparent from the records" and rectificatory action under s. 35/154 of the 1992 Act/1961 Act would be in order. It has, therefore, been decided that where an assessee moves an application under s.154 pointing out that in the light of a later decision of the Supreme Court pronouncing the correct legal position, a mistake has occurred in any of the completed assessments in his case, the application shall be acted upon, provided the same has been filed within time and is otherwise in order. Where any such applications have already been rejected and the assessee files

fresh applications within the statutory time-limit, the same may also be treated on par with the applications which may either be pending or received after the issue of this circular.

2. The Board desire that any appeals or references pending on the point at issue may please be withdrawn."

37. From a reading of the above circular, relied on by the assessee, it would be evident that the above circular would be relevant in a proceeding under Section 154 only in relation to such issues, which have already been considered in the order and have subsequently been put to rest by the decision of the Supreme Court and, thereafter, it can be a ground for rectification. If, in the original order, there is no such issue, a new plea, based on a decision of the Supreme Court, cannot be raised in an application under Section 154.

38. Insofar as the issue of surcharge is concerned, the same also was not a contentious issue raised by the assessee in the original order. Even otherwise, we are constrained to hold that though the assessee raised many issues before the High Court in the first round of appeal, but restricted itself to only three substantial issues, which were decided in TCA No.238/01 against the assessee, which was subsequently affirmed by the Supreme Court. Further, an application under Section 154 was also pursued simultaneously, which we find is akin to riding two horses at the same time.

Unfortunately, the assessee having abandoned the plea before the High Court, the plea, which was raised in the Section 154 application would clearly show that it is a new plea, which they want to pursue in terms of the provisions of Section 154.

39. Yet another factor, which goes against the assessee in the original order itself relates to the plea of income from lease equipment, which was treated as income from financial transaction. Even at the initial point of time, it was well within the appellant/assessee's knowledge that the said income, though not treated as an income from lease, was treated as income from finance transaction in respect of the same party. Therefore, the new plea taken by the appellant that consequent to disallowance of depreciation, the income should also be deleted, has no legs to stand. That fact was not the issue in the first round of appeal. At best it may be treated as a finding of the Assessing Officer, accepted by the assessee and abandoned in the course of appeal proceedings, but it cannot be said that it is a mistake apparent on record warranting invocation of rectification proceedings under Section 154 of the Act. For the reasons abovesaid, this Court holds that the provisions of Section 154 (1A) does not provide for rectification in the manner, which the appellant now pleads before this Court. The case of the appellant/assessee does not fall within the scope of Section 154 (1A)

warranting rectification as envisaged in the said provision. Accordingly, ***the substantial questions of law raised in TCA No.536/05 are answered against the appellant/assessee and in favour of the Department/respondent***.

40. Insofar as the other appeal is concerned, viz., TCA No.590/08, in view of the finding, which we have rendered in TCA No.536/05, holding that the three issues urged before the High Court were dismissed and held against the assessee, which was subsequently upheld by the Supreme Court, there was no scope for the Tribunal to rectify any mistake apparent from the record, and the application for rectification under Section 254 (2) cannot be sustained. As rightly pointed out by the learned counsel for the respondent/Revenue, on 21.5.01 a miscellaneous petition was filed before the Tribunal in M.P. No.70/01 and, thereafter, on 1.3.02, application under Section 154 was filed before the Assistant Commissioner on the same plea. It is trite law that a person is estopped in pursuing parallel proceedings before two authorities for the same relief. Therefore, the Tribunal was correct in declining to interfere with its earlier order and dismissing the application, as there was no scope for rectifiying any mistake, since there was no mistake apparent from the record, as envisaged under Section 154 (1A), in view of the findings rendered earlier. For the reasons aforesaid, ***the***

substantial question of law raised in TCA No.590/08 is answered in favour of the respondent/Revenue and against the appellant/assessee.

41. In the result, the appeals are dismissed. However, in the circumstances of the case, there shall be no order as to costs.

(R.S.J.) (K.B.K.V.J.)

29.07.2015

Index : Yes/No

Internet : Yes/No

GLN

To

1) The Commissioner of Income Tax
   No.121, Nungambakkam High Road
   Chennai 600 034.

2) The Deputy Commissioner of Income Tax
   Special Range X
   Chennai 600 034.

3) The Income Tax Appellate Tribunal
   Chennai 'B' Bench, Chennai.

R.SUDHAKAR, J.
AND
K.B.K.VASUKI, J.

GLN

T.C.A. NO. 536 OF 2005
AND
T.C.A. NO. 590 OF 2008

29.07.2015