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# IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 22<sup>nd</sup> August, 2014

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## INCOME TAX APPEAL 1/2014

JRD STOCK BROKERS (P) LTD. .... Appellant  
Through Mr. R.P. Garg and Mr. K.N. Ahuja,  
Advocates.

versus

COMMISSIONER OF INCOME TAX-II ..... Respondent  
Through Mr. Kamal Sawhney, Sr. Standing  
Counsel with Mr. Sanjay Kumar, Jr. Standing  
Counsel.

### **CORAM:**

**HON'BLE MR. JUSTICE SANJIV KHANNA**

**HON'BLE MR. JUSTICE V. KAMESWAR RAO**

### **SANJIV KHANNA, J. (ORAL)**

The assessee, a Chartered Accountant, was subjected to search on 24<sup>th</sup> November, 2000 under Section 132 of the Income Tax Act, 1961 ('Act', for short), for providing accommodation entries in the form of share loss or share gain by issuing bills for shares without actual sale and purchase by the party mentioned in the bills. The difference, i.e. gain or loss in sale and purchase was settled by issuing or taking cheques from the party. In case of gain, the party first used to give dummy drafts/cheques or cash against which cheque for the predetermined profit stated in the bills used to be given. In case of



loss, however, cheque was taken from the party to claim loss/expenditure and money re-paid in cash. In other words, the appellant-assessee was indulging in money laundering as majority of the sale and purchase transactions recorded in the books were mere accommodation entries.

2. The Assessing Officer vide assessment order dated 27<sup>th</sup> November, 2002, held that the assessee had earned commission @ 1.5% from the said transactions on the turnover of Rs.1,04,76,94,004/-. Undisclosed income of Rs.1.57 crores as commission earned was assessed. In the first appeal, Commissioner of Income Tax (Appeals) upheld the factual finding that the appellant had entered into and settled bogus transactions to provide accommodation entries, through several bank accounts including dummy and feeder bank accounts in the name of third parties. He observed that the total quantum of credit in various bank accounts was Rs.1,04,76,94,004/-, which was the total turnover/transactions relating to accommodation entries. Before the Commissioner of Income Tax (Appeals), the primary contention of the appellant-assessee was that the computation of commission @ 1.5% was highly excessive and in similar cases, income by way of brokerage had been computed @ 0.5%. The said argument was, however, rejected by the Commissioner of Income Tax (Appeals).

3. Income Tax Appellate Tribunal ('Tribunal', for short) by their



order dated 30<sup>th</sup> November, 2004, held that in the light of the mater available on record, the provisions of Chapter XIV-B were rightly applied, as it was a case where the appellant-assessee had undisclosed income. Most of the transactions recorded in the books were fictitious, and were meant to provide accommodation entries to the clients, who were interested in showing fictitious profit or loss in the share transactions. The books of accounts did not reflect the true nature of business or activities and in fact the appellant-assessee was carrying on business outside the books of accounts. On the question of rate of commission, they referred to the seized documents indicating commission charged was between 1% to 1.25%, whereas the same was shown to be between 0.05% to 0.1%. There was direct evidence of the assessee's indulgence in earning undisclosed income through accommodation/fictitious entries and it was not possible to ignore the seized material. In paragraph 16, the Tribunal specifically recorded that there was substantial credit of Rs.104 crores in the large number of accounts maintained by the assessee, including *benami* accounts, described as dummy/feeder/main accounts. Through the said accounts, the assessee had carried on fictitious and under cover business. The relevant sub-paragraph read as under:-

“16. ....Similar are the entries in other pages. The contention of the assessee that the assessee did not carry on transaction with Sh. Jitesh



(named on page 28) or that some, rough estimates and not actual transactions have to force. Further argument that entries in the sized record should have further been corroborated with other material, is also required to be rejected. It is clear from above that the assessee was charging various rates of commission between .35%. to 1% depending upon the type of ' entry i.e. whether it related. to long term or short term capital gains. However, in the regular bills the rate was shown at 0.35% or 0.5%. There is direct evidence of assessee indulging in earning undisclosed income through accommodating/fictitious entries and it is not possible to, ignore the seized material. The huge credit in large number of accounts maintained by the assessee dealing more than Rs.104 crores as also maintenance<sup>1</sup> of several benami Accounts describing as dummy/feeder/main accounts used to carry on fictitious and ostensible business of share dealing, leave no amount of doubt that the assessee was involved in earning undisclosed income on a very large scale. It is therefore, not possible accept that the assessee did not earn any undisclosed income and that income in it's (sic) case was to be computed on the basis of books produced by the assessee. We reject the arguments of the assessee.”

(emphasis supplied)

4. Thereafter, in paragraph 18, the Tribunal observed as under:-

“18. We now face the question as to what should be reasonable rate of commission in this case having regard to material available on record. The assessee did not dispute that quantum of turnover for providing the accommodationn entries to various clients during the year as computed by the AO at Rs.1,04,76,94,004/- is not correct. The commission stated to have been charged and admitted by the assessee ranged from .25% to .5%. The rate as evident from the seized material which has been referred to by the lower authorities, does reflect that the assessee had



charged a rare (sic) as high as 1%. As against this, the revenue authorities have applied @ .1.5% to the entry turnover irrespective of the nature of entries whether long term, short term gain etc. It is also note worthy that the gross rate of commission .charged by the assessee can also not be said to be profit eligibly, to tax. The credit for the expense incurred in running the business is also required to be considered while estimating the income from business of providing accommodation entries. The total turnover also includes some genuine transactions carried' on by the assessee on which rate of commission was admittedly much lower ranging between 0.25% to 0.50%, Therefore, having regard to the entire gamut of facts, circumstances and material which is available on record, there does riot appear to be justifiable reasons to estimate the commission brokerage of the assessee by applying rate of 1.5% A of the total turnover. In our view it would be in the fitness of the things that the income earned. by the assessee by was of commission/brokerage on the turnover including accommodation entries provided to its clients is computed @.6% on the total turnover of Rs.1,04,96,94,004/- on which' there is no dispute. We accordingly direct the AO to compute income on count of commission/brokerage.”

(emphasis supplied)

5. Accordingly, the Tribunal directed that the commission/brokerage of the assessee should be computed by applying the rate of .6% on the total turnover of Rs.1,04,76,94,004/-, which was not disputed and accepted as the sum total of all transactions. The Tribunal deleted addition of Rs.7.13 crores representing peak cash credit, observing that Section 68 should not be applied in the facts of the present case as the commission income was taxed in the hands of



the appellant-assessee. Similarly, addition of Rs.11,16,380/- account of negative balance shown in certain accounts was deleted on the ground that the assessee had earned commission income, which was directed to be computed. It was observed that there was a negative balance or loss in the bank accounts because the transactions in question were both fake and fictitious, and it had to be ascertained whether or not payment was made to square up the losses.

6. Order dated 30<sup>th</sup> November, 2004 passed by the Tribunal has attained finality.

7. As per the appellant-assessee, he had filed an application under Section 154 of the Act before the Assessing Officer on 13<sup>th</sup> June, 2005, stating (i) that the gross rate of commission had been computed without allowing expenditure incurred to earn such commission; (ii) though in the appraisal report by the Investigation Wing, the turnover was shown as Rs.91,48,97,000/-, but as per the assessment order the turnover was Rs.104,76,94,004/-; (iii) the figure of turnover should be reduced or exclude; (a) the funds transferred from one bank account to another resulting in calculation of turnover twice; (b) credit entries in bank statements regarding margin imposed by SEBI, which were in regular course of business and were not connected with the business of earning brokerage; and (c) the amounts representing dishonoured cheques on account of insufficient funds. Thereafter, another



application dated 11<sup>th</sup> May, 2006 for rectification under Section 1 was filed on 30<sup>th</sup> August, 2006. On request for supply of copy of bank statements, these were furnished on 1<sup>st</sup> October, 2008. On 2<sup>nd</sup> December, 2008, the appellant-assessee wrote a letter that there were debit/credit entries of bounced cheques aggregating Rs.8.06 crores in the bank statements. Cheques transferred from one bank, to another, for Rs.4.40 crores, and, Rs.2.12 crores was received from the Delhi Stock Exchange. These amounts should not have been added to the turnover. The aforesaid entries of Rs.14.59 crores should be reduced from the total turnover of Rs.104.76 crores.

8. These applications were rejected by the Assessing Officer vide order dated 2<sup>nd</sup> February, 2009, observing that there was no dispute with regard to the turnover of Rs.104.76 crores and this was confirmed in the order of the Tribunal dated 30<sup>th</sup> November, 2004. Further, there was no mistake apparent from the record and the issue being debateable was outside the ambit and scope of Section 154 of the Act.

9. Commissioner of Income Tax (Appeals) dismissed the appeal of the assessee observing that the Assessing Officer did not have jurisdiction to go into the issues raised as doctrine of merger would apply, for the turnover was computed and made subject matter of appeal.

10. The appellant-assessee preferred further appeal, but the same has



been dismissed by the Tribunal vide order dated 17<sup>th</sup> May, 201

observing:-

“7. We have heard both the sides and gone through the application of the assessee and relevant provisions of law. Before advertng to the facts of the present case, it would be relevant first to discuss the provisions relating to section 154. A bare look at section 154 of the Act makes it amply clear that a ‘mistake apparent from the record’s is rectifiable. In order to attract the application of sec. 154, a mistake must exist and the same must be apparent from the record. The power to rectify the mistake, however, does not cover cases where a revision or review of the order is intended. ‘Mistake’ means to take or understand wrongly or inaccurately; to make an error in interpreting, it is an error; a fault, a misunderstanding, a misconception. ‘Apparent’ means visible; capable of being seen; easily seen; obvious; plain. A mistake which can be rectified u/s 154 is one which is patent, which is obvious and whose discovery is not dependent on argument or elaboration. The language used in section 154 is permissible where it is brought to the notice of the Tribunal that there is any mistake apparent from the record. Accordingly, the amendment of an order does not mean obliteration of the order originally passed and its substitution by a new order which is not permissible under the provisions of sec. 154. Further, where an error is far from self-evident, it ceases to be an apparent error. It is no doubt true that a mistake capable of being rectified u/s 154 is not confined to clerical or arithmetical mistakes. On the other hand, it does not cover any mistake which may be discovered by a complicated process of investigation, argument or proof. As observed by the Supreme Court in *Master Construction Co. (P) Ltd. vs. State of Orissa* [1996] 17 STC 360, an error which is apparent on the face of the record should be one which is not an error which depends for its discovery on elaborate arguments on questions of fact or law. A similar view was also expressed in *Satyanarayan Laxinarayan Hege vs. Mallikarjun Bhavanappa Tirumale* AIR 1960 SC137. It is to be noted that the language used in Order 47, Rule 1 of the Code of Civil Procedure, 1908 is different from the language used in sec. 154 of the Act. Power is given to various authorities to rectify any ‘mistake apparent from the record’ is 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’. Mistake is an ordinary word, but in taxation laws, it has a special significance. It is not an arithmetical or clerical error alone that comes within its purview. It comprehends errors which, after a judicious probe into the record from which it is supposed to emanate, are discerned. The word ‘mistake’ is inherently indefinite in scope, as what may be a mistake for one may not be one for another. It is mostly subjective and the dividing line in border areas is thin and indiscernible. It is something which a duly and judiciously instructed mind can find out from the record. In order to attract the power to rectify u/s 154 it is not sufficient if there is merely a mistake in the orders sought to be rectified. The mistake to be rectified must be one apparent from the record. A decision on the debatable point of law or undisputed question of fact is not a mistake apparent from then record. The plain meaning of the word ‘apparent’ is that it must be something which appears to be so *ex facie* and it is in capable of argument or debate. It is, therefore, follows that a decision on a debatable point of law or fact or failure to apply the law to a set of facts which remains to be investigated cannot be corrected by way of rectification.

8. Now reverting to the facts of the case in the light of rival submissions and case law cited, we find that the assessee, through this application u/s 154 before the AO sought reconsidering and re-determining the turnover, which was confirmed by the Tribunal vide order dated 30.11.2004 at 104,76,94,004/- on which there being no dispute (as observed by ITAT) which has already attained finality as income has been computed and further reduction has been ordered by ITAT by computing commission/brokerage @ 0.6% on the turnover determined and question of change in turnover has not been raised before CIT(A) or before ITAT in earlier proceedings by way of any permissible mode and, in our considered opinion the action of the assessee to seek interference in already settled issue upto ITAT level is not permissible u/s 154. Since no case has been made out by the assessee for rectification, in view of facts and circumstances of the case, therefore, the action of authorities on all the issues as raised is upheld being just, proper and correct and as such appeal of the assessee is dismissed being devoid of any merits.”



11. Learned counsel for the appellant-assessee has drawn c  
attention to the observation made by the Tribunal to the effect that the turnover was not a subject matter of challenge in the appeal preferred against the original assessment order under Section 143(3), which had resulted in order dated 30<sup>th</sup> November, 2004. He submits that in view of the aforesaid position, Section 154(1A) would be applicable, as turnover was not an issue which was considered and decided by way of appeal or revision. We have already referred to the order dated 30<sup>th</sup> November, 2004 and quoted the relevant paragraphs wherein the figure of Rs.104 crores has been specifically mentioned and accepted as correct. We have noted that the Tribunal has observed that the aforesaid figure represents genuine as well as fictitious turnover. It is apparent that at that time, the appellant-assessee had not challenged the said turnover and had accepted the same as true and correct. This was the basis on which the entire appellate proceedings were heard and decided. Therefore, there is merit in the submission of the Revenue, which was accepted by the Tribunal that the subject matter of appeal at that time included in its ambit the question of turnover involved and the observations of the Tribunal cannot be read in isolation, but meaningfully without indulging in semantics. Moreover and importantly, Section 154 can be only invoked to rectify a mistake apparent from the record. It is on this aspect the Tribunal in paragraph



7 of the impugned order have quoted the factual position and observed why rectification in the present case was beyond the scope of Section 154 of the Act. What the appellant-assessee wants and seeks, by way of rectification, is re-examination of entire bank accounts and re-computation of the turnover. Further, the assessee wants enquiry on whether or not the assessee had received commission even when cheques had bounced or whether commission was paid on the transactions which had been made through the stock exchange. In the order dated 30<sup>th</sup> November, 2004, the Tribunal made it clear that 0.6% rate of commission would apply to the entire transaction of Rs.104.76 crores including the transactions which were genuine, i.e. the transactions which were recorded in the stock exchange. Similarly, the case of the appellant-assessee, that there were cross transactions amongst bank accounts, will require detailed scrutiny, examination and verification of entries and details. This cannot be undertaken in exercise of power under Section 154. There may be or may not be any error but the said determination would not be confined to arithmetical or adding figures, but explanation and answers would be required. In the facts of the present case, therefore, we do not think that the impugned order passed by the Tribunal, rejecting the application under Section 154, can be interfered with. It is interesting to note that the Tribunal had an occasion to deal with the similar issue on quantum of



turnover when question of levy of penalty under Section 158 BFA( ,  
was examined and the Tribunal in paragraph 5.1 of their order dated  
18<sup>th</sup> July, 2008, observed that the appellant had raised the question of  
turnover, but when questioned on the evidence, learned counsel  
appearing for the appellant-assessee had stated that no evidence was  
available with the assessee in this behalf.

12. The appeal is accordingly dismissed. No costs.

**SANJIV KHANNA, J.**

**V. KAMESWAR RAO, J.**

**AUGUST 22, 2014**  
**NA**