Analyzing Validity of Rectification Order Passed Sans Opportunity of Being Heard

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S. 154(1) of the Income Tax Act ("the Act") provides that if there is any mistake in the order passed by the Income-tax authorities, the said authority can rectify such mistake. The power to rectify the mistake may be exercised by the authority concerned on his own initiative/motion or when mistake is brought to his notice by the assessee or tax deductor or collector or where the income tax authority is the CIT(Appeal), he shall make such amendment which has been brought to its notice by the AO also.

S. 157A, inserted by S. 4 of the Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 ("TOLA") w.e.f. 01/11/2020, empowers the Central Government to make a scheme, *inter-alia*, for the purpose of rectification of mistake apparent from record under Section 154. Proviso to S. 157A(2) provides that no directions shall be issued after 31st March 2022. It is to be noted that till date, no Scheme has been specified for S. 157A of the Act.

The Commissioner is empowered to rectify any order passed by him in revision under section 263 or 264. The Commissioner (Appeals) may rectify any order passed by him under section 250.

The Income-tax authority can rectify the mistakes which are apparent in the following order/intimation:

a) any order passed by it under the Act 1961;

b) any intimation or deemed intimation issued under section 143(1);

c) any intimation issued after processing of statement of TDS under section 200A(1) and any intimation after processing of statement of TCS under section 206CB(1).

However, the power of rectification is subject to the following exceptions:

1. Rectification can be done only by the authority who has passed the order.

2. S. 154(1A) lays down that rectification can be done for any matter other than the matter considered and decided in appeal/revision. Where any matter has been considered and decided in any proceeding by way of appeal or revision, rectification of such a matter cannot be done by the Assessing Officer under section 154 *(Piramal Investment Opportunities Fund v. ACIT* [TS-622-HC-2019(BOM)] and *CIT v. Birla Arenja [2015] (All)*. However, the matter which has not been considered and decided in the appeal/revision can be rectified under section 154 *(N. Arjunan v. ITO* [TS-6755-HC-2018(Madras)-O] and there is no embargo on power of ratification where an appeal of revision is pending *(Piramal Investments Opportunity Funds v. ACIT*.

3. If a notice has been issued under Section 143(2) for scrutiny assessment after sending the intimation under Section 143(1), any mistake in the intimation can't be rectified by the authorities [see *Lakhanpal National Ltd. v. DCIT* [TS-5710-HC-1996(Gujarat)-O] and *CIT v Manjit Singh Sachdeva* [TS-5257-HC-2008(Karnataka)-O]

In the case of S.A.L. Narayan Row v. Ishwarlal Bhagwandas AIR 1965 SC 1818, the Hon'ble Supreme Court held that, "*an omission to do what he was bound to do under law was an error apparent on the face of the record"* and therefore the Income-tax Officer was competent to rectify an order passed under section 35 of the Income-tax Act. the Hon'ble Supreme Court in *M. K. Venkatachalam, ITO v. Bombay Dyeing & Mfg Co. Ltd.* [TS-3-SC-1958-O] held that if a mistake of fact apparent from record of the assessment order can be rectified, there is no reason why a mistake of law which is glaring and obvious cannot be similarly rectified.

Only a "mistake" apparent from the "record" can be rectified.

In the case of *Maharana Mills (P.) Ltd. v. ITO* [TS-5011-SC-1959-O], the Hon'ble Supreme Court examined the word "record". It held the word "record" as contemplated by section 35 of the Income-tax Act, 1922 does not mean only the order of the assessment but it comprises of all proceedings on which the assessment order is based, and the assessing authority is entitled to look into the whole evidence and the law applicable to ascertain whether there was an error. The Supreme Court in the case of *Anchor Pressings (P) Ltd. v CIT* [TS-5030-SC-1986-O] held that record does not necessarily mean only the order sought to be rectified but it comprises all proceedings on which the order is based. The Madras High Court in *CIT v. M.R.M Plantations (P.) Ltd.* [TS-5509-HC-1998(Madras)-O], held that the word "record" for the purpose of section 154(1), is the "record" available with the authorities at the time of initiation of proceedings for rectification, and not merely the record of the original proceedings sought to be rectified. However, reference to documents outside the record and the Law is impermissible *(CIT v. Keshri Metal (P.) Ltd.* [TS-5028-SC-1999-O].

A mistake can be regarded as apparent only when it is obvious, self-evident and whose discovery is not dependent on argument or elaboration [Satyanarayan Laxminarayan Hegde v. Mallikarjun Bhavanappa Tirumale, AIR 1960 SC 13]. If on a question of construction on a point of law, two views are possible, no rectification can be done for review or recall earlier order. A mistake which can be rectified under section 154 is one which is patent, which is obvious, but not a mistake/error in determining WDV or recomputation/recalculation of turnover or a decision on a question of law on which judgement of Assessing Officer was based had been reversed or modified by subsequent decision of the Superior Court and whose discovery is not dependent on argument or elaboration. It must not involve a debatable point of law as held in *T.S. Balram, ITO v. Volkart Bro* [TS-15-SC-1971-O]; *CIT v. Delhi Cement Stockists* [TS-5004-HC-1971(Delhi)-O]; *CIT v. Mulchand Electric & Radio Industries Ltd.* [TS-5110-HC-1982(Bombay)-O]; *CIT v. Russel Properties Pvt. Ltd.* [TS-5729-HC-1985(Calcutta)-O]; CIT v. Indian Steel & Wire Products Ltd. [TS-5323-HC-1989(Calcutta)-O]; *CIT v. Hero Cycles (P.) Ltd.* [TS-33-SC-1997-O]; CIT v. Ram Bahadur Thakur Ltd. [TS-5967-HC-1998(Kerala)-O]; *Asian Tech Ltd. v. CIT* [TS-5593-HC-1999(Kerala)-O]; *CIT v. Richa and Co* [TS-5147-HC-2001(Delhi)-O]; *Southern India Industrial Corpn. Ltd. v. CIT* [TS-5636-HC-2002(Madras)-O]; *Jagatdal June and Industries Ltd. v. CIT* [TS-5040-HC-2004(Calcutta)-O]; *CIT v. Udaipur Distillery Co Ltd.* [TS-5393-HC-2003(Rajasthan)-O]; *CIT v. Udaipur Distillery Co Ltd.* [TS-5448-HC-2003(Rajasthan)-O]; *CIT v. TTK Pharma Ltd.* [TS-5100-HC-2007(Madras)-O], *CIT v. Faizan Shoes (P.) Ltd.* [TS-5519-HC-2007(Madras)-O] and *Grasim Industries Ltd. v. CIT (2009)* [TS-5228-HC-2009(Bombay)-O] *(Bom)*; *CIT v. Essel Mining & Industries Ltd. [2015] (Cal.); K. S. Venkatesh v. DCIT [2015]; Bajaj Auto Finance Ltd. v. CIT* [TS-5344-HC-2018(Bombay)-O]; *Nagaraj & Co. (P.) v. ACIT* [TS-5266-HC-2020(Madras)-O]; PCIT v. Engineering Works [TS-6500-HC-2021(Andhra Pradesh)-O]; etc.

In the same breadth, the Supreme Court in *CIT v. Hero Cycles (P.) Ltd.* [TS-33-SC-1997-O] held that the point which was not examined on fact or in law (also see Smriti Properties (P.) Ltd. v. Settlement Commission [2005] 278 ITR 274 (Cal cannot be dealt with as "mistake apparent from record". The Supreme Court also held that rectification is not possible if the question is debatable. But rectification can be made when glaring mistake of fact or law has been committed by the Officer passing the order and it becomes apparent from the record. Similarly, a mistake discovered on interpretation of the Act cannot be said to be a mistake apparent from record *(CIT v. Satyanarayan Bhalotia* [TS-5670-HC-1989(Calcutta)-O] *(Cal.)).* However, overlooking of statutory provision (CIT v. Steel Strips Ltd. [2011] or misreading a clear provision (CIT v. McLeod & Co. Ltd. [1982] 134 ITR 674 (Cal.)) or applying an inapplicable provision *(T. Manickavasagam Chettiar v. CIT* [TS-5104-HC-1983(Madras)-O] *(Mad.))* is clearly a mistake apparent on record justifying amendment.

Absence of reasoning cannot be a mistake apparent from records as desiring any rectification under section 154. In estimating or assessing the taxable income and tax on it, it is not necessary to give reasons when the decision is in favour of the assessee. Therefore, absence of reasons cannot be a mistake apparent from the records. *[Vijay Mallya v. ACIT* [TS-5450-HC-2003(Calcutta)-O]*]*. A look at the records must show that there has been an error that may be rectified; reference to documents outside the records and the law is impermissible when applying the provisions of S. 154. [CIT v. Keshri Metal Pvt. Ltd. (1999) 237 ITR 165 (SC)]

The possibility of forming a different opinion from the one expressed in the order passed under section 254(1) cannot be treated as ground for entertaining an application under section 254(2). *[Popular Engg. Co. v. ITAT* [TS-5080-HC-2001(Punjab)-O]*.*

The following are some of the illustrative cases of the mistake apparent from the records:

(a) clerical or arithmetical mistake *(ITO v. Ashok Textiles Ltd.* [TS-5077-SC-1960-O]. Under section 154, the power to rectify the error must extend to the elimination of the error, even though the error may be such as to go the root of order and its elimination may result in the whole order falling to the ground. *[Blue Star Engineering Co. (Bombay) Pvt. Ltd. v. CIT* [TS-5313-HC-1968(Bombay)-O]; *CIT v S.S. Gupta* [TS-5480-HC-2001(Rajasthan)-O]. On the other hand, it does not cover any mistake which may be discovered by a complicated process of investigation, argument or proof (M. Subbaraj Mudaliar v. CIT [1958] 33 ITR 228 (Mad.)).;

(b) where the Assessing Officer had failed to do what was required under law at time of passing assessment order and had passed assessment order with such defects, such assessment order could be rectified by Assessing Officer by exercising power under section 154 *(Sabari Alloys & Metals India (P.) Ltd. v. DCIT* [TS-139-HC-2024(MAD)]*;*

(c) an incorrect computation of the cost of acquisition of a depreciable asset (CIT v. Pierce Leslie & Co. Ltd. [1998] 227 ITR 759 (Mad.));

(d) allowing credit of TDS to the person who is not entitled for it *(CIT v. Tanjore Permanent Black Ltd.* [TS-5349-HC-1983(Madras)-O]*;*

(e) the power of rectification can be invoked with reference to the law prevailing at the time of the original order. The fact that subsequent decisions may lead to a different inference cannot justify rectification. [CIT v. India Cements Ltd. (2000) 241 ITR 62 (Mad.)]. However, an order not in conformity with the law subsequently declared by the Apex court can be rectified (Southern Industrial Corporate Ltd. v. CIT [2002] 258 ITR 481 (Mad.); (Dinosaur Steels Ltd. v. CIT [2007] 288 ITR 476 (Mad.)).

The Courts in *CIT v. Subodhchandra S. Patel* [TS-5610-HC-2003(Gujarat)-O] and Hindustan Lever Ltd. v. JCIT [TS-5242-HC-2019(Culcutta)-O] (Cal.) held that non-consideration of a judgment of the jurisdictional High Court or the Apex Court would always constitute a mistake apparent from record regardless of the judgment being rendered prior to or subsequent to the order proposed to be rectified.

(f) an assessment order which is inconsistent with retrospective amendment in the law *(CIT v. Smt. Eva Raha* [TS-5341-HC-1979(Gauhati)-O] and *CIT v. E. Sefton & Co. (P.) Ltd.* [TS-5387-HC-1989(Calcutta)-O], however, such rectification can only be passed within the statutory limitation period (CIT v. Smt. Eva Raha (1980) (Gau)); and

(g) consequential rectification in the assessment order of the assessee due to modification in his assessment in another year or due to modification in assessment of any another person (S. 155).

An order of rectification is required to be passed within a period of 4 years from the end of the financial year in which the order (sought to be rectified) was passed. An order sought to be amended does not necessarily mean the original order. It could be any order including the amended or rectified order. Thus, for subsequent rectification, the time limit of 4 years shall be from the end of the financial year in which the earlier rectification order was passed. *[Hind Wire Industries Ltd. v. CIT* [TS-5003-SC-1995-O]*]*

However, where an application for rectification is made by the assessee, deductor or collector, the

income tax authority is required to pass an order rectifying the mistake within a period of 6 months from the end of the month in which the application is received by it. The CBDT vide Instruction No. 1/2016, dated 15/02/2016, has directed that the time-limit of 6 months shall be strictly followed by the Assessing Officers while disposing of applications for rectification of mistake apparent from record. The authorities making rectification have been authorised by the CBDT Circular No. 73, dated 07/01/1972 to dispose of an application even after the expiry of 6-month time-limit, if a valid application had been filed by the assessee within the statutory time-limit but was not disposed of by the concerned authority within the aforesaid time-limit.

Where Transfer Pricing Officer has passed an order, under Section 92CA, determining the Arm's Length Price in relation to an International Transaction or specified transaction and it contains a mistake apparent from record, the Assessing officer is required to rectify the order to correct such mistakes. Such rectification can be made any time within 4 years from the end of the previous year in which order of Transfer Pricing Officer was passed.

Where the book profit of the assessee has increased due to an advance pricing agreement or secondary adjustment, the Assessing Officer shall, on an application made by the assessee in this behalf, re-compute the book profit of the past years and tax payable thereon. Consequently, the Assessing Officer needs to amend the assessment order within 4 years from the end of the financial year in which such application is received by him.

However, S. 154(3) provides that the opportunity of being heard is necessary if rectification results into enhancement, etc. If such a rectification order has the effect of enhancing an assessment or reducing a refund or otherwise increasing the liability of the assessee, the authority concerned MUST give notice to the assessee of its intention to do so and an opportunity of being heard must be given to the assessee. The Income-tax Authority must follow the following steps: -

1. before rectifying the mistake, a notice should be given to the assessee/deductor/collector providing reasonable opportunity of being heard,

2. after passing the rectification order the Assessing Officer shall serve on the assessee/deductor/collector a notice of demand, and

3. where the rectification has the effect of reducing the assessment, the Assessing Officer shall make any refund which may be due to the assessee/deductor/collector.

If any rectification order under section 154 is passed and such an order results in enhancement of liability on the taxpayer without providing notice and an opportunity of being heard to the taxpayer, such an order will not be valid. Section 154(3) reads as below:

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(3) An amendment, which has the effect of enhancing an assessment or reducing a refund or otherwise increasing the liability of the assessee or the deductor or the collector, shall not be made under this section unless the authority concerned has given notice to the assessee or the deductor or the collector of its intention so to do and has allowed the assessee or the deductor or the collector a reasonable opportunity of being heard.

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The provisions contained in section 154(3) are in pari materia with section 35(1) of the 1922 Act. The Supreme Court in M. Chockalingam & M. Meyyappan v. CIT [1963] 48 ITR 34 (SC) in held that action under section 35 may be taken in favour of the taxpayer without any notice to him but if the action has the effect of enhancing an assessment or reducing the refund, the AO must send a notice to the assessee and give him a reasonable opportunity of being heard. Similarly in the case of Catherine Thomas v. ACIT

(2015) (Ker) it was held that where rectification order was passed in respect of short levy of interest under sections 234A and 234B, but the assessee was never given opportunity to file his objections, said order, being in violation of principles of natural justice, was to be set aside.

Where the taxpayer is not given any notice and provided with an opportunity of being heard as required by section 154(3) of the Act and where it is not the case that the taxpayer did not avail himself of the opportunity which was given to him ,the order under section 154(3) is not only violative of the general principles of natural justice but is in clear breach of the mandate of section 154(3) [see Hukamchand Mills Ltd v. ITO [TS-5623-ITAT-1982(Bombay)-O];*CIT v. Turner Morrison & Co. Ltd.* [TS-5385-HC-1986(Calcutta)-O]; *CIT v. Gangaram Chapolia & Co.* [TS-5481-HC-1990(Orissa)-O]; CIT v. Pankaj Gupta [1991] 188 ITR 184 (All); ITO v. Kamalchand Nawalakha [1995] (Jp.) (Mag.); Shiv Narain Shivhare v. ACIT [1996] 222 ITR 620 (MP); ACIT v. Sandeep Khanna [1998] 67 ITD 23 (Chd) (TM); Pala Marketing Cooperative Society Ltd. v. State of Kerala [1999] 236 ITR 604 (Ker); *Sahyadri Aerosols Ltd. v. ACIT* [TS-5211-ITAT-2007(Mumbai)-O]; *Mintri Tea Co. (P.) Ltd v. CIT* [TS-5244-HC-2009(Calcutta)-O]; ADIT v. Linklaters [TS-329-ITAT-2014(Mum)]; Mrs. Mugdha Shirish Agarkar v. PCIT [TS-5225-HC-2018(Bombay)-O]; Gajendra Nath Chhoker v. ITO [2018] (Agra); PCIT v. Humboldt Wedag India (P.) Ltd [2024] (Del HC) [para 7 of the Order)

Conclusion

Provisions of S. 154(3) are mandatory in nature and are meant to ensure that no order of rectification is passed to the detriment of the assessee without affording him the due opportunity of being heard. The three expressions used in S. 154(3) mandating a pre-decisional hearing before order of rectifications can be made, are ‘enhancing the assessment, reducing the refund’ or ‘increasing the liability of the assessee’. All are in the context relatable to the determination of taxable income, reduction of refund, enhancing tax liability, resulting in adverse effect on the taxpayer’s tax liability arising under the Act, which in its wider connotation, includes not only the tax at specified rates on the taxable income, but also interest and penalties payable in respect thereof. Accordingly, an adverse rectification order cannot be passed unless the AO gives notice to the taxpayer of his intention to do so and allows the taxpayer a reasonable opportunity of being heard and such order of rectification will not be valid and is liable to be quashed.