IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE ANTONY DOMINIC
&
THE HONOURABLE MR. JUSTICE SHAJI P.CHALY

TUESDAY, THE 8TH DAY OF SEPTEMBER 2015/17TH BHADRA, 1937

ITA.No. 242 of 2014 ()

AGAINST THE ORDER IN ITA 756/2013 of I.T A.TRIBUNAL,COCHIN BENCH DATED 27-06-2014.

APPELLANT(S)/RESPONDENT/ASSESSEE:

K.K.J.FOUNDATIONS,
NAYANA GARDENS, POONKUTTY, ELANJI P.O ,
ERNAKULAM -686 665(PAN-AAATK 6120D)

BY ADVS.SRI.B.ASHOK SHENOY
SMT.C.G.PREETHA
SRI.K.V.GEORGE
SRI.P.N.RAJAGOPALAN NAIR
SRI.P.S.GIREESH

RESPONDENT(S)/APPELLANT/REVENUE:

THE ASSISTANT DIRECTOR OF INCOME TAX (EXEMPTION),
RANGE 4 KOCHI 682 018.

BY ADV. SRI.P.K.R.MENON,SR. COUNSEL, GOI(TAXES)
SRI.JOSE JOSEPH, SC, FOR INCOME TAX

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 17-08-2015, THE COURT ON 08.09.2015 DELIVERED THE FOLLOWING:

P.T.O.

I.T.A. NO.242 OF 2014

APPENDIX

APPELLANT'S ANNEXURES:

ANNEXURE-A	TRUE COPY OF ASSESSMENT ORDER DATED 31.12.2008 ISSUED IN RESPECT OF APPELLANT FOR THE ASSESSMENT YEAR 2006-07 BY THE DEPUTY DIRECTOR OF INCOME TAX (EXEMPTION), ERNAKULAM.
ANNEXURE-B	TRUE COPY OF THE ORDER UNDER SECTION 154 OF INCOME TAX ACT, 1961, DATED 17.04.2009 ISSUED IN RESPECT OF APPELLANT FOR THE ASSESSMENT YEAR 2006-07 BY THE DEPUTY COMMISSIONER OF INCOME TAX (EXEMPTION), ERNAKULAM.
ANNEXURE-C	TRUE COPY OF APPELLATE ORDER DATED 23 09 2013 ISSUED IN RESPECT OF APPELLANT FOR THE ASSESSMENT YEAR 2006-07 BY THE COMMISSIONER OF INCOME TAX (APPEALS) II, KOCHI IN APPEAL NO.ITA2/R-II/E/CIT-II/2009-10.
ANNEXURE-D	TRUE COPY OF APPEAL DATED NIL FILED BY RESPONDENT BEFORE THE INCOME TAX APPELLATE TRIBUNAL, COCHIN BENCH AS ITA NO.756/COCH/2013.
ANNEXURE-E	CERTIFIED COPY OF ORDER DATED 27.06.2014 PASSED BY INCOME TAX APPELLATE TRIBUNAL, COCHIN BENCH IN ITA NO.756/COCH/2013.

RESPONDENT'S ANNEXURES: NIL

//TRUE COPY//

P.S. TO JUDGE

St/-

ANTONY DOMINIC
&
SHAJI P. CHALY, JJ.

I.T.A.No.242 of 2014

Dated this the 8th day of September, 2015

JUDGMENT

Shaji P. Chaly, J.

This appeal is filed by the assessee against the order dated 27.06.2014 of the Income Tax Appellate Tribunal, Cochin Bench in I.T.A.No.756/Coch/2013 for the assessment year 2006-07. By this order, the Appellate Tribunal has allowed the appeal filed by the Revenue and held that there was no mistake apparent from the record in the order of the Assessing Officer so as to seek rectification under Sec.154 of the Income Tax Act.

2. Brief facts required for the disposal of the appeal are as follows:

The assessee is a Trust registered under Sec.12AA of the Income Tax Act, 1961 (hereinafter called "the Act"). Assessee filed its return of income for the assessment year 2006-07 on 31.10.2008, declaring nil return. Notice under Sec.143(2) was issued and since there was no response, notice under Sec.142

(1) of the Act was issued. In response to the same, assessee appeared and produced the books of accounts and other relevant documents called for. Even though opportunity was provided to produce the required documents on various occasions, neither the appellant nor its authorized representatives had furnished the relevant documents of the funds being corpus, apart from a letter which merely indicated the transfer of the loan funds to the capital and did not specify the actual utilization of the funds in the hands of the Trust.

3. The Assessing Authority after taking into account the facts and circumstances, found that the assessee Trust has no corroborative evidence to prove that the donation received by it was a capital donation and therefore the entire receipt of the Trust during the assessment year in question was treated as its income and the claim of the appellant for exemption under Sec.11 of the Act was rejected and thereupon the assessment was completed accordingly.

4. Aggrieved by the order, appellant had chosen to file an application for rectification under Sec.154 of the Act, seeking to rectify the order of assessment, contending that out of the gross income of Rs.2,66,50,000/- an amount of

Rs.84,00,000/- was received during the previous year ending 31.03.2005 from Mr. K.K. Joseph as loan and Rs.1,62,50,000/- was also received as loan from K.K. Joseph during the current year. Further, it was contended that vide book entry dated 31.03.2006, Rs.1,01,00,000/-was shown as corpus donation, and that the appellant vide his letter dated 07.01.2009 had raised objection against the treatment of the same as the income of the Trust by the Assessing Officer.

5. Aggrieved by the order passed by the Assessing Officer, the appellant preferred appeal before the Commissioner of Income Tax (Appeals) and by Annexure-C order, the Commissioner allowed the appeal partly and held that the treatment of Rs.1,00,00,000/- as corpus donation in the hands of the assessee, since the trustee has given letter of consent that the amount of loan earlier given should be treated as corpus donation, this amount that was converted from loan account to corpus donations even though by way of book entry would fall in the category of voluntary contributions as envisaged under Sec.11(1)(d) of the Income Tax Act and hence should not be included in the total income or receipts of the assessee. Since the source of introduction of initial loan

that was converted into corpus donation was also treated as explained, the addition made by the Assessing Officer by treating this receipt as income for the purpose of gross receipts was held not correct and thereby the Assessing Officer was directed to exclude the corpus donation from the total income.

6. Aggrieved by the said order, Revenue preferred appeal before the Appellate Tribunal. The Tribunal, without going into the merits of the case, entered into a finding that in case the assessee was aggrieved against the decision of the Assessing Officer, the remedy *de facto* did not lie before the Assessing Officer. Holding so, it was found that there was no mistake apparent from record in the order of the Assessing Officer so as to seek the rectification under Sec.154 of the Act and therefore the appeal filed by the Revenue was allowed. It is thus aggrieved by the said order, this appeal was preferred by the assessee.

7. Heard the learned counsel for the appellant and the learned Standing Counsel for the Revenue.

8. According to us, the whole issue revolves round Sec.154 of the Income Tax Act whereby a remedy by way of

rectification of an order is provided. In order to appreciate the law involved in the case, it is only proper that Sec.154 of the Act is extracted hereunder:

> *"**154. Rectification of mistake***
>
> *(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;*
>
> *(c) amend any intimation under sub-section (1) of section 200A.*
>
> *(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 (or by the deductor), and where the authority concerned is the Commissioner (Appeals), by*

the (Assessing) Officer also.

(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), shall not be made under this section unless the authority concerned has given notice to the assessee (or the deductor) of its intention so to do and has allowed the assessee (or the deductor) a reasonable opportunity of being heard.

(4) Where an amendment is made under this section, an order shall be passed in writing by the income-tax authority concerned.

(5) Where any such amendment has the effect of reducing the assessment or otherwise reducing the liability of the assessee or the deductor, the Assessing Officer shall make any refund which may be due to such assessee or the deductor.

(6) Where any such amendment has the effect of enhancing the assessment or reducing a refund (already made or otherwise increasing the liability of the assessee or the deductor, the Assessing Officer shall serve on the assessee or the deductor, as the case may be) a notice of demand in the prescribed form specifying the sum payable, and such notice of demand shall be deemed to be issued under section 156 and the provisions of this Act shall apply accordingly.

(7) Save as otherwise provided in section 155 or sub-section (4) of section 186, no amendment under this section shall be made after the expiry of four years (from the end of the financial year in which the order

sought to be amended was passed).

(8) Without prejudice to the provisions of sub-section (7), where an application for amendment under this section is made by the assessee (or by the deductor) on or after the 1st day of June, 2001 to an income tax authority referred to in sub-section (1), the authority shall pass an order, within a period of six months from the end of the month in which the application is received by it,--

(a) making the amendment; or

(b) refusing to allow the claim."

9. On a reading of Sec.154, what we could gather is that rectification is provided in the Statute for the purpose of rectification of any mistake which is apparent from the record. The Income Tax Authority referred to in Sec.116 is conferred with the power to amend any order passed by it under the provisions of the Act etc. etc. Therefore, the question was whether there was any error apparent from the record so as to invoke the power under Sec.154 of the Act. It is true that the Assessing Authority as well as the Appellate Authority have considered the subject matter on merits. According to us, in a matter like this, the course open to the authorities concerned were to consider first whether such an application was maintainable in law or not. That error committed by the

authorities was considered by the Tribunal and the Tribunal found that there was no mistake apparent from the record so as to invoke Sec.154 of the Act.

10. The learned counsel has invited our attention to the judgment in '***Asian Techs Ltd. v. C.I.T., Cochin***' [2000 KHC 846] and contended that the mistake apparent from record is not a clerical or arithmetical error alone that comes within its purview but it also comprehends errors which, after judicious probe into the record from which it is supposed to emanate are discerned. But, after considering the factual circumstances in the said case, this Court found that the mistake to be rectified must be one apparent from the record and a decision rendered on a debatable point of law is not a mistake apparent from the record. Further, it was held that the word "apparent" must be something which appears to be so ex facie and it is incapable of argument or debate and therefore it 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. Therefore, according to us, the said judgment would not render any assistance to the arguments advanced by the learned counsel for the appellant.

11. In our view, the power conferred under Sec.154 is something akin to the power of review conferred on a Civil Court under Sec.114 of the Code of Civil Procedure. By invoking the power of rectification, the ultimate conclusion of a decision cannot be changed. So also, the employment of the words phraseologies in Sec.154 shows that by rectification it intended only to correct any mistake and amend the same accordingly. It is a settled proposition of law that rectification is a process by which a mistake is set at right. It thus means correcting an error which was apparent from record and not deciding the matter over and again on merits and that the rectified order does not supersede the original order but continues with the incorporated changes.

12. Moreover, we have come across two judgments of the Hon'ble Apex Court in '***S. Nagaraj** v. **State of Karnataka***' [(1993) Supp. 4 SCC 595] and '***Ammonia Supplies Corporation Pvt. Ltd.** v. **Modern Plastic Containers Pvt. Ltd***.' [AIR 1998 SC 3153], by which it was held in the former judgment that rectification of an order stems from fundamental principle that justice is above all. It is exercised to remove the error and not for disturbing finality. In the

latter judgment, it was held that rectification connotes something what ought to have been done but by error is not done and what ought not to have been done was done requiring rectification. Rectification, in other words, is the failure to comply with the directions under the Act. Therefore, it is apposite and clear that the power under Sec.154 can be invoked only to correct an error and not to disturb a concluded finding.

13. Therefore, on a perusal of the facts, the orders rendered by the statutory authorities and the Tribunal and appreciating the pleadings put forth, we are of the considered opinion that the question raised for invoking Sec.154 of the Act was a question ought to have been raised in a regular appeal and the same has nothing to do with rectification of any mistake apparent from the record. The findings entered by the Assessing Authority was based clearly on facts which was susceptible to an appeal. We also did not find any error apparent from the record which enabled the assessee to invoke the said provision.

13. In the said circumstances, we do not find any illegality or other legal infirmities in the finding entered by the Appellate Tribunal so as to invoke our jurisdiction conferred under Sec.260A of the Income Tax Act, 1961.

Appeal fails and accordingly same is dismissed.

Sd/-
ANTONY DOMINIC
JUDGE

Sd/-
SHAJI P. CHALY
JUDGE

//true copy//

P.S. to Judge

St/-