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IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "E", MUMBAI

BEFORE SHRI N.V.VASUDEVAN(J.M) & SHRI R.K.PANDA(A.M)

ITA NO.7567/MUM/2005(A.Y. 1995-96)

V.B. Desai Financial Services Ltd. 24/26, Cama Building, 1st Floor, Dalal Street, Fort, Mumbai – 23. PAN: AAACV 3460E	Vs.	The DCIT, Cen. Circle 29, Mumbai.
(Appellant)		(Respondent)

Appellant by : S/Shri J.D.Mistry/Vijay Mehta
Respondent by : Dr. P.Daniel

ORDER

PER N.V.VASUDEVAN, J.M,

This is appeal by the assessee against the order dated 28/10/2005 of CIT(A)-IV, Mumbai relating to assessment year 1995-96. The grounds of appeal raised by the assessee read as follows:

> "On the facts and circumstances of the case, the Ld. Commissioner of Income Tax (Appeals), Central IV, Mumbai erred in passing the order u/s 250 of the Act for AY 1995-96 against the order u/s 154 dated 24.01.2000 passed by the Deputy Commissioner of Income Tax, Central Circle 29, Mumbai on the following among other grounds:
>
> (a) The CIT(A) erred in holding the views that the order u/s 154 passed by the AO on 24.01.2000 was valid without considering your appellant's submission which were also supported by the AO's remand report dated 19.09.2005 that the aforesaid order u/s 154 passed by the AO on 24.01.2000 was not

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served within the reasonable period of time from passing of the said order but your appellant was provided a copy of the same only on 04.05.2005 and that too, when your appellant asked for the same vide letter dated 20.04.2005. Even the said copy of the order which was provided on 04.05.2005 was without the Notice of Demand u/s 156 read with section 154(6) of the Act. In fact, the AO in his remand report confirmed that there was no notice of demand on assessment records.

Without prejudice to the aforesaid ground

(b) the CIT(A) erred in confirming the disallowance of depreciation of Rs.5,53,080/- on leased assets i.e. plant & machinery without considering your appellant's submission in its proper perspective that whether the AO legally and/or otherwise entitled to carry out the above rectification which was not within the purview and powers of section 154. However, any such rectification and/or adjustments if any, would have been possible only under section 147 read with Explanation 2(c) iii or iv and/or both, read with section 148.

(c) The CIT(A) erred in confirming the interest charged u/s 234A, 234B and 234C in the order u/s 154 of the Act without considering the submission / Explanation in its proper perspective that whether the AO was legally and/or otherwise was entitled to carry out such rectification in aforesaid order u/s 154 which is not a regular assessment as defined in section 2(40) and also when the AO had not charged in his original regular assessment order u/s 143(3) dated 30.03.1998, interest under any of the sections including section 234A, 234B and 234C. Whether the AO was entitled to carry out such rectification of charging such interest u/s 234A, 234B and 234C when the AO had not disclosed his intention about the aforesaid proposed rectification either in the notice u/s 154(3) dated 07.12.1998 or in his letter dated 29.06.1999.

(d) Whether the AO was legally or otherwise entitled to carry out such rectification in his order u/s 154

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dated 24.01.2000 when your appellant's appeal against the AO's order u/s 14393) dated 30.03.1998, was pending for hearing and disposal".

2. Originally this appeal was heard an order dated 4/5/2009 was passed dismissing the assessee's appeal. The assessee filed miscellaneous application No.420/M/09 pointing out certain mistakes apparent in the order of the Tribunal and praying for rectification of the same. The assessee also raised objection that the Tribunal has decided Ground No.(a) raised by the Assessee by relying on decisions which were not cited by either of the parties at the time of hearing and did not adjudicate the other grounds of appeal. The Tribunal vide its order dated 27/8/09 rejected the contention of the assessee with regard to mistake pointed in the decision rendered on Ground No.(a). The Tribunal, however, held that the Tribunal had not adjudicated the other grounds of appeal raised by the assessee in its ground of appeal and to the limited extent of adjudication of the said grounds the miscellaneous application was allowed. In the meantime the assessee had field an appeal against the original order of the Tribunal dated 4/5/2009 before the Hon'ble Bombay High Court. The Hon'ble Bombay High Court by its order dated 16/12/2009 in ITA 3164 of 2009 directed that the entire appeal to be heard afresh. Thus the entire appeal was heard afresh.

2. Facts and circumstances giving rise to the present appeal by the assessee are as follows. The assessee is engaged in the business of leasing,

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hire purchase, issue management, underwriting commission and also deals in shares and debentures. The Assessing Officer had made an assessment under section 143(3) for the year under appeal at an income of Rs.1,95,96,500/- as against the returned income of Rs.39,88,680/-. The assessee had filed appeal against the additions to the CIT(A) and subsequently to the Tribunal. However, in the meantime, the Assessing Officer found that the depreciation claimed by the assessee for the year under appeal was incorrect and that the assessee had not attached the depreciation chart along with the return. The Assessing Officer had accordingly issued a letter dated 7th of December 1998, to the assessee company, pointing out that the depreciation permissible to the assessee works out to Rs.4,16,497/- as against Rs.16,95,926/- wrongly allowed under section 143(3) of the Act. The assessee had been asked to file objection, if any, to the proposed rectification, for correctly working out the depreciation. The assessee replied vide letter dated 21st of December 1998 and also enclosed Schedule of depreciation as per Income Tax Rules for the assessment years 1995-96 and 1994-95. After taking the figures from the charts furnished by the assessee, the Assessing Officer found that as per the Schedule of depreciation filed by the assessee along with the letter dated 21st of December 1998, the total value of the plant and machinery (WDV) minus deductions works out to Rs.29,05,389/-. The depreciation claimed by the assessee at the rate of 25% works out to Rs.7,26,347/- as against which the assessee had wrongly claimed deduction of Rs.12,79,428/-. The assessee

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was accordingly informed by the Assessing Officer vide letter dated 29th of June 1999 about the mistake. In reply, the assessee, vide letter dated 7th of July 1999, informed the Assessing Officer that they have no objection in rectifying the mistake, which was apparent from record. Finally the Assessing Officer passed an order under section 154 on 24th of January 2000 and excess depreciation allowed to the assessee earlier was withdrawn. Interest under sections 234A, 234B and 234C was also charged.

3. The Assessee filed an appeal against the order dated 24-1-2000. The assessee appeal against the above order to the CIT(A) on 1st of June 2005. The assessee contended before CIT(A) that the order under section 154 was served on him only on 4/5/2005. It was also contended that a notice of demand was also not served on the assessee on or before 4/5/2005. The Assessing Officer in his remand report filed before the CIT(A) accepted the fact that the order under section 154 as well as the notice of demand under section 156 of the Act was served on 4/5/2005. It was also reported that there was no copy of notice of demand in ITNS 150 on record. There was only calculation sheet (ITNS 150A) on record. The CIT(A) however upheld the order under section 154 of the Act. The ground raised by the assessee before CIT(A) were as follows:

> "1. The appellant objects to the order u/s 154 of the Income tax Act, 1961 dated 24.01.2000 passed by the Deputy Commissioner of Income Tax, Central Circle 29, Mumbai on the following among other grounds.

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2. The Assessing Officer erred in completing the assessment u/s 154 of the Income Tax Act, 1961 on the income of Rs.2,01,49,580/- as against the returned income of Rs.39,88,680/-.

3. The Assessing Officer erred in making an addition on account of disallowance of depreciation of Rs.5,53,080/- on Plant & Machinery without considering the fact that the assessment made u/s 143(3) on 30.03.1998 was the subject matter of appeal before the Commissioner of Income Tax, Central II, Mumbai. The AO also failed to issue notice u/s 154 of the Act to your appellant while passing the order u/s 154 of the Act on 24.01.2000.

4. The Assessing Officer also erred in charging interest u/s 234A, 234B and 234C of the Act without considering the fact that the order u/s 154 dated 24.01.2000 is not a regular assessment within the meaning of section 2(40) of the Income Tax Act".

5. The CIT(A) held that there was proper opportunity afforded to Assessing Officer before passing an order under section 154 of the Act. The CIT(A) also held that charging of interest under section 234A, 234B & 234C is mandatory and, therefore, the objection of the assessee that interest cannot be charged in an order u/s. 154 was rejected.

6. Aggrieved by the aforesaid order of the CIT(A) the assessee has preferred the present appeal before the Tribunal.

7. Ground No.(a) raised by the assessee is with regard to the order u/s. 154 not having been passed by the Assessing Officer within the period of limitation. In this regard we called for the original record and the same were

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produced at the time of hearing. Under the provisions of section 154(7) of the Act the period of limitation for passing an order under section 154 is four years from the end of the financial year in which the order sought to be amended was passed. The order u/s. 154 seeks to amend an order of assessment passed on 30/3/1998. Therefore, in terms of section 154(7) the order u/s. 154 had to be passed on or before 31/3/2002.

8. The learned counsel for the Assessee addressed arguments on the validity of the order passed u/s.154 of the Act, raised in Ground No.(a). It was first submitted that the order u/s.154 ought to have been passed within a period of 4 years from the end of the financial year in which the order sought to be amended was passed. The impugned order u/s.154 seeks to amend the order of Assessment dated 30/3/98. The period of limitation in terms of Sec.154(7) would therefore be 31/3/2002. He brought to our notice the following facts in the case of the Assessee. The AO originally issued notice u/s.154 of the Act dated 7.12.1998 proposing to rectify the depreciation allowed in the order u/s.143(3) of the Act. The Assessee by its letter dated 21/12/1998 gave a reply and the AO again addressed a letter dated 29/6/1999 giving a figure of excess depreciation allowed in the order u/s.143(3) of the Act as Rs.5,52,080/-. The Assessee vide letter dated 7/7/1999 informed the AO that it had no objection to rectifying the mistake to the extent of excess claim of depreciation of Rs.5,53,000/-. The AO passed the impugned order on 24/01/2000. Though the impugned order is

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dated 24/01/2000, it is the submission of the learned counsel for the Assessee that the following circumstances would go to show that the order purported to have been passed on 24/01/2000 was in fact not passed on the said date:

(a) The said order was not served on the Assessee till 4/5/2005.
(b) There was no notice of demand u/s.156 ever served on the Assessee nor available on the record of the AO. The provisions of Sec.154 (6) provides that where any amendment u/s.154 has the effect of enhancing the assessment, the AO shall serve on the Assessee a notice of demand in the prescribed form specifying the sum payable and such notice of demand shall be deemed to be issued u/s.156 and the provisions of the Act shall apply to such notice.
(c) There is a tax calculation sheet in Form No. ITNS 150 which purports to have been signed by the AO but is not dated. The said calculation sheet was given to the Assessee first on 6/6/2005 when it was insisted by the CIT(A) that a copy should be given to the Assessee.
(d) Despite a huge demand, not steps were ever taken to recover the demand.

9. His further submission was that u/s.143(3) of the Act, the AO after considering the evidence produced by the Assessee and after taking into account all relevant material which he has gathered, shall by order in writing, make an assessment of the total income or loss of the Assessee and determine the sum payable by him or refund of any amount due to him on the basis of such assessment. According to him an order u/s.154 which modifies the order u/s.143(3) of the Act, and which has the effect of enhancing the assessment has to be made in writing and should also determine the tax payable. In this regard, he also drew our attention to the provisions of Sec.154 (4) which provides that where an amendment is made

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under this section, an order shall be passed in writing by the Income-tax authority concerned. He also drew our attention to the provisions of Sec.154 (6) which provides that where any such amendment has the effect of enhancing the assessment or reducing a refund already made, the Assessing Officer shall serve on the assessee 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. Our attention was drawn to the decision of the Hon'ble M.P.High Court in the case of CIT Vs. Miss.Swarn Taneja 186 ITR 348 (M.P.) for the proposition that rectification formed part of assessment which requires determination of tax liability of the Assessee. In particular he relied on the following observations made by the Hon'ble Court:

> "The expression "assessment" is not used in the Income-tax Act merely in the sense of computation of income. The determination of the tax payable by the assessee is as much mandatory as the determination of his income. Section 143(1)(a) of the Income-tax Act, 1961, enjoins upon the Income-tax Officer not only a duty to assess the income of an assessee, but also a duty to determine the sum payable or refundable to the assessee on the basis of such assessment. It is, therefore, obvious, that an assessment under section 143(1) comprises computation of income and computation of tax on such income. A bare reading of the provisions of sections 143, 154 and 156 would show that where the income-tax authority amends any assessment order which has the effect of enhancing the assessed income, he is bound to issue and serve on the assessee a notice of demand under section 156 of the Act. Such notice would indicate the tax demanded. It is, therefore, apparent that the rectification of an assessment order would include rectification of computation of income as also rectification of computation of tax earlier made during the regular assessment and such rectification of mistake would take effect from the date the demand notice under section 156 is served on the assessee."

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10. He also relied on the decision of the Hon'ble Supreme Court in the case of Kalyankumar Ray Vs. CIT 191 ITR 634 (SC) wherein the Hon'ble Supreme Court has held that "Assessment" is one integrated process involving not only the assessment of the total income but also the determination of the tax. According to him, in the case of the Assessee, the non service of either the order u/s.154 or the calculation of tax as per Form No.ITNS 150 (this is a tax/refund calculation sheet based on which Notice of Demand u/s.156 is raised) on or before the period of limitation specified u/s.154(7) can lead to only one conclusion that the order u/s.154 was not passed as required by law or before the period of limitation specified in Sec.154(7) of the Act.

11. He again referred to the decision of the Hon'ble Madhya Pradesh High Court in the case of CIT Vs. Miss.Swarn Taneja (supra). In the aforesaid case, an order of assessment for AY 1976-77 and 1977-78 were passed u/s.143(1) of the Act on 29-10-1977. Later on certain mistakes in the said orders were noticed and notices for rectification were issued. The Assessee filed reply on 24-10-1981 and was heard on the same day. The AO purported to have passed an order on 24-101981. The time limit for passing the order of rectification was 25-10-1981. The rectification resulted in an enhancement of tax payable by the Assessee. But notice of demand was served on the Assessee only on 27-3-1982. The stand of the Assessee was that rectification formed part of assessment which requires determination of

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tax liability of the Assessee and since such tax calculation was not done on or before 25-10-1981, which is the time limit for passing order u/s.154, the order u/s.154 is void and it has to be presumed that the order was passed only in March, 1982 and not on 24-10-1981. Factually the stand of the Assessee was found to be correct and the Hon'ble M.P.High Court held as follows:

> "The materials brought on record in the present case would show that the reply to the show-cause notice was filed and the arguments of the assessee were heard on the very date, i.e., October 24, 1981, when the order under section 154(1) of the Act was said to have been passed by the Income-tax Officer. The calculations of tax were also shown to have been made on October 24, 1981, in the ITNS-150 forms whereas the notices of demand were served on the assessee on March 27, 1982. Had the assessment order been passed and calculations of tax made on October 24, 1981, the notices of demand would also have been served on the assessee on October 24, 1981, itself. As a matter of fact, the Tribunal and the Appellate Assistant Commissioner have both held that though the calculations of tax were shown to have been made on October 24, 1981, they were, in fact, made somewhere in March, 1982. In the light of these facts, no credence can be attached to the date mentioned in the rectification orders under section 154(1) of the Act by the Income-tax Officer nor is the purported date sacrosanct. Accordingly, it must be held that the orders of rectification under section 154 were barred by limitation.'

12. Our attention was also drawn to a decision of the Hon'ble Supreme Court in the case of State of Andhra Pradesh Vs. M.Ramakishtaiah & Co. 93 STC 406 wherein it was held that where an order passed by the Deputy Commissioner of sales Tax under the A.P. General Sales Tax Act,1957 revising the order of assessment, was served on the Assessee after substantial delay and where there was no explanation for the delay, it can be

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presumed that the order was not made on the date it purports to have been made and further could be presumed to have been made after the expiry of the period of limitation. Further reliance was also placed on the decision of the Hon'ble Rajasthan High Court in the case of Peeru Lal, Mohan Lal Vs. CIT 257 ITR 198 (Raj) wherein it was held that the process of assessment means assessment of income as well as determination of tax and both are necessary for completion of assessment. Where both the processes are not completed within the period of limitation the same is barred by limitation. It was further held that where an assessment is time barred, Sec.292-B of the Act cannot come to the rescue of the revenue.

13. The learned D.R. on the other hand submitted that the order u/s.154 is dated 24-01-2000. The order also mentions "Copy issued to the Assessee along with ITNS 150". The record of assessment has a copy of Tax calculation in ITNS 150 which is signed by the AO. According to him the fact that the order u/s.154 was served on the Assessee only on 24/5/2005 should not be a reason to come to a conclusion that the order u/s.154 was not passed within the period of limitation. The fact that there is a tax calculation in ITNS 150 signed by the AO also goes to show that the order u/s.154 had been passed in accordance with law within the time, i.e., on 24/01/2000, the time specified in the order u/s.154 of the Act. It was his further submission that the AO originally issued notice u/s.154 of the Act dated 7.12.1998 proposing to rectify the depreciation allowed in the order

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u/s.143(3) of the Act. The Assessee by its letter dated 21/12/1998 gave a reply and the AO again addressed a letter dated 29/6/1999 giving a figure of excess depreciation allowed in the order u/s.143(3) of the Act as Rs.5,52,080/-. The Assessee vide letter dated 7/7/1999 informed the AO that it had no objection to rectifying the mistake to the extent of excess claim of depreciation of Rs.5,53,000/-. According to him, when the Assessee has accepted to the proposed rectification, there was no need to the AO to back date an order to get over period of limitation. His further submission was that as laid down by the Hon'ble Supreme Court in the case of Kalyankumar Ray (Supra), the order u/s.154 was passed in writing and the tax payable was also duly determined, thus completing the process of rectifying the order of assessment in accordance with law. The learned D.R. thus submitted that the order u/s.154 was passed well within the period of limitation.

14. The learned counsel for the Assessee in rejoinder submitted that the Assessee's letter dated 7/7/1999 accepting the proposed rectification to the extent of disallowing excess claim of depreciation allowed in the order u/s.143(3) was not the end of the matter. In this regard, the learned counsel for the Assessee pointed out that even after the said letter there were exchange of correspondence between the AO and the Assessee. His further submission was that had it been a case where the AO merely accepted the Assessee's letter dated 7/7/1999, there was no reason for the AO to have waited till 24/01/2000 to pass the order u/s.154 of the Act.

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Notwithstanding the letter dated 7/7/1999, the Assessee has been agitating the issue regarding excess claim of depreciation. In the given circumstances, the only presumption that needs to be drawn is that the order u/s.154 had not been passed on 24/01/2000 but on or after the period of limitation set out in Sec.154(7) of the Act.

15. We have considered the rival submissions. In the decision of Kalyankumar Ray (Supra), the Hon'ble Supreme Court has held that an order of assessment becomes complete only when the order of assessment is passed in writing and the tax payable pursuant to such order is also computed within the period of limitation for passing of the order of assessment. There is no dispute that rectification formed part of assessment and where pursuant to a rectification order tax is payable by an Assessee then the requirement of an order in writing and determination of tax liability of the Assessee within the period of limitation in the same manner as is required u/s.143(3) is necessary. The crucial question in this case is as to whether the order u/s.154 and the tax payable pursuant thereto i.e., the calculation of tax in Form No.ITNS 150 had been passed/determined within the period of limitation laid down u/s.154(7) of the Act.

16. We have called for and perused the records. A remand report had also been filed by the AO before CIT(A) on the issue with regard to service of the order of assessment u/s.154 of the Act and the service of notice of demand u/s.156 of the Act. There is no dispute that the order u/s.154 of the Act

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purported to have been passed on 24/01/2000 was not served on or before 24/5/2005. There is no notice of demand u/s.156 of the Act. The tax calculation in Form No.ITNS 150 is on the file. The same is not dated but signed by the AO. The fact that the order u/s.154 mentions "Copy issued to the Assessee along with ITNS 150" is not conclusive in the matter, especially when admittedly the order u/s.154 as well as the calculation of tax payable in Form No.ITNS 150 have been first served on the Assessee only on 24/5/2005 and 6/6/2005 respectively. There have been no recovery proceedings by the Revenue despite a huge demand for tax and interest pursuant to the order u/s.154 of the Act. There has been no notice of demand u/s.156 on the record. The proceedings u/s.154 commenced by issue of a notice u/s.154 of the Act dated 7.12.1998 proposing to rectify the excess depreciation allowed in the order u/s.143(3) of the Act. The Assessee by its letter dated 21/12/1998 gave a reply to the said notice pointing out that there is no mistake in the order u/s.143(3). In this letter there is a noting as follows:

> "(a) The matter u/s.154 is being dropped.
> (b) Assessee has filed depreciation chart along with his letter ....."(not legible in the copy filed in paper book)

The above endorsement is not signed but found on the letter of the Assessee dated 21/12/1998. The AO again addressed a letter dated 29/6/1999 giving a figure of excess depreciation allowed in the order u/s.143(3) of the Act as Rs.5,52,080/-. The Assessee vide letter dated 7/7/1999 informed the

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AO that it had no objection to rectifying the mistake to the extent of excess claim of depreciation of Rs.5,53,000/-. There has however been correspondence between the Assessee and the AO on the issue of depreciation even after 7/7/1999. The order u/s.154 merely refers to the fact that there was excess depreciation allowed in the order u/s.143(3) of the Act by Rs.5,53,080/- and the Assessee by letter dated 7/7/99 accepted the proposed rectification. If the order u/s.154 was passed on the basis of admission of the Assessee, there is no explanation as to why the order was passed only on 24/01/2000 i.e., after a period of more than 6 months, even without referring to any of the other correspondence on the issue between the Assessee and the AO. All the above circumstances clearly go to show that the order u/s.154 was not passed on 24/01/2000. The above circumstance also shows that there is no evidence to show that the tax calculation in Form No.ITNS 150 was in fact made within the period of limitation. The revenue has not been able to bring any other circumstance which will go to show that the order u/s.154 was in fact passed on 24/01/2000. In these circumstances, we have no hesitation in coming to the conclusion as laid down by the Hon'ble supreme Court in the case of State of Andhra Pradesh Vs. M.Ramakishtaiah & Co. (supra) that the order u/s.154 was not made on the date it purports to have been made and further could be presumed to have been made after the expiry of the period of limitation. In that view of the matter, we hold that the order u/s.154 is not legal as the same has been passed beyond the period of limitation. The

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same is therefore cancelled. In view of the above conclusion, we are not going into the other issues raised in the other grounds of appeal of the Assessee.

17. In the result, the appeal of the Assessee is allowed.

Order pronounced in the open court on the 8th day of Oct.2010

Sd/-	Sd/-
(R.K.PANDA)	(N.V.VASUDEVAN)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Mumbai, Dated. 8th Oct..2010

Copy to: 1. The Appellant 2. The Respondent 3. The CIT City –concerned 4. The CIT(A)- concerned 5. The D.R"E" Bench.

(True copy) By Order

Asst. Registrar, ITAT, Mumbai Benches
MUMBAI.

Vm.