

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "B", MUMBAI

Before Shri R.S.Syal, AM and Shri D.K.Agarwal, JM

M.A.No.418/Mum/2011

(Arising out of ITA No.1197/Mum/2007 : Asst. Year 2003-2004)

The Asstt.Commissioner of Income-tax Circle 1(1) Mumbai.	Vs.	M/s.Birla Sunlife Distribution Co.Ltd. Industry House, 1 st floor 159 Churchgate, Reclamation Road Mumbai – 400 020. PAN :AAACB8843M.
(Applicant)		(Respondent)

Applicant by : Shri Jitendra Yadav

Respondent by : Shri J.D.Mistry

Date of Hearing : 17.02.2012

Date of Pronouncement : 22.02.2012

ORDER

Per R.S.Syal, AM :

This Miscellaneous Application u/s.254(2) of the Income-tax Act, 1961 has been moved by the Revenue praying for the rectification of the order of the Tribunal dated 22nd December, 2008 in ITA No.1197/Mum/2007 for the A.Y. 2003-04.

2. As per this miscellaneous application, the Revenue filed additional ground of appeal before the Tribunal on 08.11.2007 and in its order passed on 16.12.2008 the said additional ground was omitted to be disposed off. In support of the contention that the additional ground was raised and also argued, Shri Pitambar Das, Additional Commissioner of Income-tax has filed a letter confirming that the case was argued by him as the Senior Departmental Representative and the additional ground was also argued before the Members. In support of the Miscellaneous application, the learned Departmental Representative submitted that the Tribunal order be recalled to the extent of non-disposal of additional ground.

3. In the opposition Shri J.D.Mistry, the learned Senior AR contended that the Counsel who argued the appeal before the Tribunal has filed an affidavit to the effect that : “the learned Departmental Representative, did not mention that the Income-tax department has filed any additional ground”. The learned Sr. A.R. also argued that the present miscellaneous application has been filed by the Revenue in 2011 as against the order passed by the Tribunal dated 22.12.2008 which belies the Revenue’s contention that any such additional ground was raised or argued before the Tribunal.

4. We have heard the rival submissions and perused the relevant material on record. According to the Department, the following additional ground was raised before the Tribunal on 8.11.2007:-

“On the facts and in the circumstances of the case an din law, the Ld.CIT(A) erred in deleting the addition made on account of disallowance of depreciation on intangible assets as the assets claimed as intangible assets are not assets but in the nature of goodwill and non compete fees.”

5. Firstly it is noticed that this ground arises very much from the order passed by the learned CIT(A). Secondly a letter dated 08.11.2007 addressed to the Registry, I.T.A.T, by Shri Pankaj Kumar, ACIT, Circle 1(1), Mumbai is there on record containing the direction of the CIT to file additional ground against the order of the CIT(A) in the instant appeal. Accompanied with this letter is the copy of additional ground which has been signed and verified by Shri Pankaj Kumar, ACIT on 8th November, 2007. It is a different matter that while moving this rectification application Shri P.S.Walia, ACIT, Circle 1(1) has also filed simultaneously Form No.36 dated 3rd August, 2011 with the identical additional ground of appeal. The fact that the additional ground was raised by the Revenue on 8th November, 2007 is borne out from the record of the Tribunal in the form of

availability of such letter of Shri Pankaj Kumar, the then ACIT, Circle 1(1), Mumbai. Simply because the Department, at the time of filing miscellaneous application also once again filed additional ground with the current date, cannot obliterate the letter of the Department raising such ground in the year 2007, well before the conclusion of hearing and the consequential passing of order. It clearly proves that the additional ground was taken up before the Tribunal. It is further relevant to consider that the order sheet of the tribunal in the original appeal file has following noting:-

"Letter dt. 8.11.07 received from A.C.I.T.(1) M'bai filing 3 copies of additional grounds of appeal. May be consider by the Hon'ble bench at the time of hearing & one copy of additional ground of appeal may be sent to respondent a/w hearing notice."

6. From the above noting in the order sheet of the Tribunal along with availability of the Departmental letter dated 8th November, 2007 raising additional ground before the Tribunal leaves nothing to doubt that the said ground was, in fact raised. The non-disposal of such additional ground in the order of the Tribunal, in our considered opinion, constitutes a mistake apparent from record requiring rectification.

7. The contention of the learned Sr.AR to the effect that the Revenue moved rectification application in the year 2011 i.e. after around 3 years from the date of passing of the Tribunal order u/s 254(1), belies the Revenue's stand of such ground having been in fact taken, is without any force. When section 254(2) provides a period of limitation of four years from the date of passing of the order, it implies that any rectification application moved within this statutory period of four years requires consideration. As the instant application u/s.254(2) is well within the stipulated period, in our considered opinion, there is no justification in not accepting it.

8. We, therefore, recall the original order of the Tribunal in ITA No.1197/Mum/2007 for the limited purpose of disposal of the additional ground on merits after allowing opportunity of hearing to both the sides. The Registry is directed to fix this appeal for hearing on any convenient date in May 2012.

9. In the result, the miscellaneous application is allowed.

Order pronounced on this **22nd day of February, 2012.**

Sd/-
(D.K.Agarwal)
JUDICIAL MEMBER

Sd/-
(R.S.Syal)
ACCOUNTANT MEMBER

Mumbai : **22nd February, 2012.**
Devdas*

Copy to :

1. The Applicant.
2. The Respondent.
3. The CIT concerned
4. The CIT(A) – VIII, Mumbai.
5. The DR/ITAT, Mumbai.
6. Guard File.

TRUE COPY.

By Order

Assistant Registrar, ITAT, Mumbai.