IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad 'A' Bench, Hyderabad

Before Shri Rama Kanta Panda, Accountant Member
AND
Shri Laliet Kumar, Judicial Member

Sl. No	ITA No	C.O.No.	A.Y	Appellant / Revenue	Respondent / Cross Objector
1-2	1605/Hyd/2014	68/Hyd/2014	2006-07	Income Tax Officer, Ward – 5(3), Hyderabad	Shri Krishna Kumar D Shah, HUF, PAN : AAEHK4597A
3-4	1606/Hyd/2014	69/Hyd/2014	2007-08	-do-	Brij Gopal P. Shah, HUF PAN : AADHB8251M
5-6	1607/Hyd/2014	70/Hyd/2014	2007-08	-do-	Pramod P. Shah, HUF PAN : AAFHP5091P
7-8	1608/Hyd/2014	71/Hyd/2014	2007-08	-do-	Sandeep P. Shah, HUF PAN : AAJHS8511F

Appellant by : Shri C.P. Ramaswamy

Respondent by : Shri Rajendra Kumar, CIT-DR

Date of Hearing : 04.05.2023

Date of Pronouncement : 16.05.2023

O R D E R

PER BENCH :

These batch of appeals filed by the revenue and the batch of cross objections filed by the assessee are directed against the separate orders of the Commissioner of Income Tax (Appeals) – V, Hyderabad dt. 11.06.2014 for the A.Ys 2006-07 and 2007-08. Since common issues are involved in all these appeals and Cross Objections, therefore, these were heard together and are being dispose of by this common order.

2. ITA No.1605/Hyd/2014 (Grounds of appeal)

"1. The learned CIT{A) erred both on facts and in law.

2. The CIT(A) erred in holding that assessment U/s.153A of I.T. Act in pursuance of notice under section 153A issued to the appellant-HUF when the HUF was not searched U/s.132 of the I.T. Act is bad in law without appreciating the fact that the debatable issues cannot raised in the applications U/s.154.

3. The CIT(A) erred in not appreciating that section 153C is enabling section to make assessment of any other person other than the person referred in section 153A and the assessment of income of such other person shall have to be made in accordance with the provisions of section 153A, thereby the order of the Assessing officer is in order.

4. The CIT(A) out to ought to have appreciated that the orders made under section 153A are appealable as per section 246A(1) of the I.T. Act and orders under section 158C do not figure as applicable order from which it is very clear that all the orders made in pursuance of search and seizure are orders made U/s153A of I.T. Act. Hence the order of the AO. in framing the order under section 153A is in order.

5. The learned CIT(A) erred in concluding that even issuance of notice U/s153C to the HUF would not arise since no document, much less incriminating document, was found or seized in the course of search.

6. The learned CIT(A) ought to have appreciated that the incriminating material pertaining to the assessee was seized during the course of search operations in the group cases.

7. The learned CIT(A) ought to have appreciated that non-mentioning of section 153C either in notice or in the order would not vitiate the order passed under section 153A as the assessment has to be made, in the case of person searched and also in cases of other persons as mentioned in section 153C, under section 153A of the I.T. Act.

8. The learned CIT{A) ought to have followed the decision of Hon'ble Madras High Court in the case of CIT vs K.M. Ganesham reported in 333 ITR 562 where in it was held that notice issued under section 158BC is only in accordance with the provisions of section 158BD.

9. The learned CIT(A) erred in holding that the A.O. erred in observing that assessee sought to review/recall the concluded issues in the applications made under section 154 of the I.T. Act?

10. The CIT (A) erred in holding that appellant actually sought rectification of patent, apparent and glaring mistakes.

11. The CIT(A) erred in holding that first and third applications under section 154 raised the issues which were not dealt within the assessment order and the appellate orders

12. The CIT(A) ought to have appreciated that the entire addition of Rs. 14,32,38,499/- was considered and confirmed by the Hon'ble ITAT.

13. The CIT(A) erred in annulling the order made u/s. 153A which became final by virtue of dismissal of the appeal filed by the assessee before the ITAT without appreciating the provisions of section 154 which restricts the power of A.O. as well as the appellate authorities to only issues that are not debatable.

14. The CIT(A) erred in relying upon the decision of the blue star Engineering -Co (Bombay)Ltd vs CIT reported in 73 ITR 283 (Bombay High Court).

15. The CIT(A) ought to have appreciated that the above decision was dissented by Hon'ble High Court of Karnataka in the case of CIT vs McDowell & Co Ltd reported in 188 ITR 0518 (2004).

16. The CIT(A) ought to have appreciated the principle laid down by the Apex Court in the case of Mepco Industries Ltd (219 ITR 208) that order under section 154 is not possible wherever facts are to be examined.

17. The CIT(A) ought to have appreciated the principle laid by Hon'ble Apex Court in the case of Volkarts Brothers (82 ITR 50) that mistake must be obvious and patent-not something which can be established by a long drawn process of reasoning on points on which there may be two opinions.

18. The learned CIT(A) erred in observing an issue relating to jurisdiction can be raised at any time by relying on the decision of the Hon'ble Supreme Court in the case of Hotel Blue Moon (2010) 3211TR 362.

19. The learned CIT(A) ought to have appreciated that the question before Hon'ble Supreme Court in the case of Hotel Blue Moon was whether issuance of notices under section 143(2) and 142(1) within prescribed time limit for the purpose of making the assessment under section 143(3) is mandatory?

20. The learned CIT(A) erred in not appreciating that the question before him was whether jurisdiction issue can be raised Under section 154 after the assessment has become final?

21. Any other ground that may be urged at the time of hearing."

3. CO.No.68/Hyd/2014 (Grounds of appeal)

1 (a) The learned CIT(A) erred in stating that the provisions of section 154 did not apply to the request of the appellant in relation " to adoption of S.R.O. value' as per section 5OC of the Income Tax Act, 1961.

(b) The learned CIT(A) incorrectly inferred that the issue relating to adoption of the value as per section 50C was considered in the assessment whereas it was neither raised nor considered in the assessment order.

2 (a) The learned CIT(A) erred in holding that the claim of deduction u/s 54F is merely academic in nature without realizing that he ought to have adjudicated on the ground raised.

(b) The learned CIT(A) erred in not adjudicating the ground of appeal No. 2(i) before him relating to restriction of capital gains to the land (i.e., 64% of Ac.11.34 guntas) allegedly transferred as per the development agreement.

3. The learned CIT(A) erred in not adjudicating the ground No. 3(1) raised by the appellant before him relating to the request for deduction of land Ac. 2.28 guntas acquired by the State Government in the succeeding year from the computation of capital gains. He erred in holding that the matter was academic in nature."

4. As all the captioned appeals and cross-objections are identical, we take ITA 1605/Hyd/2014 and the C.O.No.68/ Hyd/2014 for the A.Y. 2006-07 as the lead case.

5. The brief facts of the case are that a search operation u/s 132 of the I.T.Act was initiated on 9-10-2007 in the case of 1st assessee, namely, Shri Krishna Kumar D. Shah, being the Kartha of HUF at his residential premises i.e., 4-3-348/2, Opp. Bank of India, R.B.H. Lane, Koti, Hyderabad. Simultaneously, a search action was conducted in respect of the remaining assessees, who are none other than his three sons. The search action was launched in these cases on the basis of specific information gathered by the revenue that the assessee had sold their land property by way of entering into Joint Development Agreement (JDA) with developers. The AO issued notices u/s 153A to Krishna Kumar D. Shah in the status as Individual as also in the HUF status for the Asst. Years 2002-03 to 2007-08. During the course of assessment proceedings, as per the said JDA, Assessing Officer had proposed to tax capital gains on transfer of property by virtue of deemed transfer u/s 2(47)(v) of the Act. Accordingly, a show cause notice was issued

dt.23.11.2009 calling for assessees' objections. After receiving the response from the assessee, AO had completed the assessment u/s 143(3) r.w.s. 153A against the assessee HUF for the aforesaid years.

5.1. Thereafter, assessee HUF filed an appeal to the ld.CIT(A), who had also dismissed the appeal of the assessee. Feeling aggrieved by the order passed by the Ld. CIT(A), the assessee filed an appeal before the income tax appellate tribunal. The income tax appellate tribunal after hearing the parties had decided all the grounds of the assessee appeal, against the assessee on 12.07.2012.

5.2 Thereafter the assessee had filed an application under section 254 before the tribunal seeking rectification of the order passed by it, however the said application for rectification was also dismissed by the tribunal through the speaking order dt 26.07.2013.

5.3 The assessee had not preferred any appeal before the Hon'ble High Court seeking the reversal of the order passed by the tribunal. In the light of the above the order passed by the tribunal had attained finality and was enforceable and executable against the assessee.

5.4. Thereafter the assessee filed three separate applications u/s 154 requesting the Assessing Officer to rectify the assessment orders. Assessing Officer had disposed of all those three applications filed u/s 154 by passing a combined order dt.31.03.2014 holding that the scope of section 154 was limited and that the power u/s 154 could not be used to review an order.

6. Feeling aggrieved with the order passed by the Assessing Officer dismissing the applications of the assessee, the assessee carried the matter before the ld.CIT(A) and the ld.CIT(A) had granted partial relief to the assessee by holding as under :

> *"7.5 I have carefully examined the appellants' contention and the written and oral submissions made by the appellants AR in support of the plea of cancellation of annulment of the order. This is a legal issue and it is settled law that a legal issue can be raised at any time. The judgments of the Supreme Court relied upon by the AR specifically support his contention that an issue relating to jurisdiction can be raised at any time. I also note that in ACIT v. Hotel blue Moon (2010) 321 ITR 362, the Supreme Court held that notice u/s. 158BC was the very foundation of jurisdiction and if the notice was defective, the assessment could not be saved. This decision was followed by the Karnataka High Court in CIT v. Micro Labs Ltd. [2012] 348 ITR 75 (Karn.) I also find that section 292BB of the IT Act cannot cure any defect in the notice. [ref CIT v. Bihari Lal Agarwal (2012) 346 ITR 67(All) and Kuber Tobacco Products P Ltd. v. DCIT [2009] 310 ITR (AT) 300 (Delhi). If such is the case with a defective notice, a notice which has had no foundation, such as notice u/s. 153A to a person who was not searched, cannot survive.*
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> *7.5.1 I find that in the case on hand, the Assessing Officer issued notice u/s. 153A to the assessee in the status of HUF even though the warrant of authorization was issued on the individual name. the panachanama bears witness to this. Thus, it is obvious that the warrant of authorization u/s. 132 was not taken on the HUF. It is clear that notice u/s. 153A can be issued only to a person against whom a search u/s. 132 has been initiated. When the search is not on the HUF, notice u/s. 153A cannot be issued to the HUF. Thus, it is evident that the Assessing office referred in issuing notice u/s. 153A could be issued where the notice should have been u/s. 153C. He probably meant that in the case of the assessee, HUF, notice u/s. 153C should have been issued whereas wrongly notice u/s. 153A was issued but both are interchangeable and hence the assessment was valid. There is no law which supports this view. Besides, even the contingency of issuing notice u/s. 153C to the HUF would not arise in this case since no document, much less an incriminating document, was found or seized in the course of search. Therefore, it is clear that the HUF could not have been visited with notice either u/s. 153A or u/s. 153C of the Income Tax Act, 1961*
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> *7.5.2 The question is whether the issue of jurisdiction can be raised u/s. 154 after the assessment on merits has gone through the appellate channels since in the case of the appellant, the issue on merits has already been adjudicated by the CIT(A) as also the ITAT. The judgments of the Supreme Court relied upon by the AR support his contention that an issue relating to jurisdiction can be raised at any time, including at the stage of recovery (execution of decree). The appellant's AR specifically invited my attention to the decision of the Bombay High court in blue Star Engineering co. (Bombay) Ltd. v. CIT (1969) 73 ITR 283 (bom) where the question of jurisdiction came up for decision u/s. 154 after the matter had been decided on merits in the appellate for a by then. The High Court held that the issue of jurisdiction was covered u/s. 154 and if the rectification resulted in annulment of the assessment in toto, that too was permissible.*

> *7.5.3 I have carefully gone through the judgment and find that it indeed is squarely applicable to the case of the appellant. I also find that there is no judgment to the contrary. Therefore, I respectfully follow the decision of the Bombay High Court cited above.*
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> *7.5.3 In view of the above, I hold that assessment made u/s. 153A in pursuance of notice u/s. 153A issued to the appellant-HUF was not searched u/s. 132 is bad in law. Accordingly, the assessment order cannot survive. It is hereby annulled as ab initio void.*

7. Feeling aggrieved with the order of ld.CIT(A), the Revenue and assessee are now in appeal before us on the grounds mentioned hereinabove.

8. Before us, ld. DR submitted that the assessee had filed the application u/s 154 of the Act before the Assessing Officer after getting a dismissal order from the Tribunal on 12.07.2012. The Tribunal while dismissing the appeal of the assessee had held as under :

> *"16. Being so, in our opinion, the condition laid down in section 2(47)(v) has been complied with and the lower authorities justified in treating the transaction is liable for capita gain.*
>
> *17. Accordingly, we confirm the order of the lower authorities in the case of all these assessees as the facts in all these appeals are common in nature.*
>
> *18. The assessee raised one more ground that CIT(A) ought to have determined the market value based on the records of the Registrar of Assurance. We have gone through the case records. This ground does not emanates from order of the CIT(A), being so, we decline to entertain the same.*
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> *19. In the result, all the appeals of the assessee are dismissed."*

9. Feeling aggrieved by the order of the Tribunal, the assessee had filed M.A. No.89/Hyd/2013 before the Tribunal. The said application of the assessee was dismissed by the Tribunal vide its order dt 26.07.2013. The relevant finding of the order reads as under :

> *6. We have heard both the parties and perused the material on record. The argument of the AR is totally misconceived. The Tribunal considered the issue in dispute in its order and given a categorical finding that the issue does not emanate from the order of the CIT(A). Now, the ssessee's*

counsel wants to re-argue the case for which the Tribunal has no power to review its own order.

7. It is well settled that statutory authority cannot exercise power of review unless such power is expressly conferred. There is no express power of review conferred on this Tribunal. Even otherwise, the scope of review does not extent to re-hearing of the case on merit. It is held in the case of CIT vs. Pearl Woollen Mills (330 ITR 164):

"Held, that the Tribunal could not readjudicate the matter under section 254(2). It is well settled that a statutory authority cannot exercise power of review unless such power is expressly conferred. There was no express power of review conferred on the Tribunal. Even otherwise, the scope of review did not extent to rehearing a case on the merits. Neither by invoking inherent power nor the principle of mistake of court not prejudicing a litigant nor by involving doctrine of incidental power, could the Tribunal reverse a decision on the merits. The Tribunal was not justified in recalling its previous finding restoring the addition, more so when an application for the same relief had been earlier dismissed."

8. The scope and ambit of application of section 254(2) is very limited. The same is restricted to rectification of mistakes apparent from the record. We shall first deal with the question of the power of the Tribunal to recall an order in its entirety. Recalling the entire order obviously would mean passing of a fresh order. That does not appear to be the legislative intent. The order passed by the Tribunal under s. 254(1) is the effective order so far as the appeal is concerned. Any order passed under s. 254(2) either allowing the amendment or refusing to amend gets merged with the original order passed. The order as amended or remaining un-amended is the effective order for all practical purposes. An order under s. 254(2) does not have existence de hors the order under s. 254(1). Recalling of the order is not permissible under s. 254(2). Recalling of an order automatically necessitates rehearing and re-adjudication of the entire subject matter of appeal. The dispute no longer remains restricted to any mistake sought to be rectified. Power to recall an order is prescribed in terms of Rule 24 of the ITAT Rules, 1963, and that too only in case where the assessee shows that it had a reasonable cause for being absent at a time when the appeal was taken up and was decided ex-parte. Judged in the above background the order passed by the Tribunal is indefensible.

9. The words used in s. 254(2) are 'shall make such amendment, if the mistake is brought to its notice'. Clearly, if there is a mistake, then an amendment is required to be carried out in the original order to correct that particular mistake. The provision does not indicate that the Tribunal can recall the entire order and pass a fresh decision. That would amount to a review of the entire order and that is not permissible under the IT Act. The power to rectify a mistake under s. 254(2) cannot be used for recalling the entire order. No power of review has been given to the Tribunal under the IT Act. Thus, what it could not do directly could not be allowed to be done indirectly.

10. In the case of CIT vs. Hindustan Coca Cola Beverages (P) Ltd. (2007) 207 CTR (Del) 119; (2007) 293 ITR 163 (Del), their Lordships while considering the powers of the Tribunal under s. 254(2) of the IT Act, 1961 observed as under:

"Under s. 254(2) of the IT Act, 1961, the Tribunal has the power to rectify mistakes in its order. However, it is plain that the power to rectify a mistake is not equivalent to a power to review or recall the order sought to be rectified. Rectification is a species of the larger concept of review. Although it is possible that the pre-requisite for exercise of either power may be similar (a mistake apparent from the

record), by its very nature the power to rectify a mistake cannot result in the recall and review of the order sought to be rectified."

11. Thus the scope and ambit of application u/s. 254(2) is as follows:

(a) Firstly, the scope and ambit of application of s. 254(2) of IT Act is restricted to rectification of the mistakes apparent from the record.

(b) Secondly, that no party appearing before the Tribunal should suffer on account of any mistake committed by the Tribunal and if the prejudice has resulted to the party, which prejudice is attributable to the Tribunal's mistake/error or omission, and which an error is a manifest error, then the Tribunal would be justified in rectifying its mistake. The "rule of precedent" is an important aspect of legal certainty in the rule of law and that principle is not obliterated by s. 254(2) of the Act and non-consideration of precedent by the Tribunal causes a prejudice to the assessee.

(c) Thirdly, power to rectify a mistake is not equivalent to a power to review or recall the order sought to be rectified.

(d) Fourthly, under s. 254(2) an oversight of a fact cannot constitute an apparent mistake rectifiable under the section.

(e) Fifthly, failure on the part of the Tribunal to consider an argument advanced by either party for arriving at a conclusion is not an error apparent on record, although it may be an error of judgement.

(f) Sixthly, even if on the basis of a wrong conclusion the Tribunal has not allowed a claim of the party it will not be a ground for moving an application under s. 254(2) of the Act.

(g) Lastly, in the garb of an application for rectification under s. 254(2) the assessee cannot be permitted to reopen and reargue the whole matter as the same is beyond the scope of s. 254(2) of the IT Act.

12. In view of the above discussion, we find no merit in the argument of the assessee's counsel. The Tribunal cannot review its own order and the remedy lies elsewhere. We do not find any mistake apparent on record which warrants rectification of Tribunal's order. Accordingly, the ground raised by the AR is rejected.

13. In the result, all the MAs by different assessees are dismissed."

10. Ld. DR further submitted that once the proceedings in the case of the assessee have finalized and the statutory period for filing the appeal before the Hon'ble High Court had lapsed, the assessee resorted to filing of application u/s 154 of the Act before the Assessing Officer and in the said application, the assessee had claimed various reliefs. However, the Assessing Officer vide order dt.31.03.2014 had dismissed the M.A. filed by the assessee by recording the following reasons :

a) The scope and ambit of section 154 of the I.T.Act,1961 is limited.

b) A mistake apparent from record, by it's very nature, is the power to rectify a mistake and can not used to review/recall of the order sought to be rectified.

c) In the garb of an application under section 154 of the I.T.Act, the assessee can not be permitted to re-open and re-argue the whole matter as the same is beyond the scope of section 154 of the I.T.Act, particularly when the subject Asst.Order has suffered the test of second appeal and the assessee neve, raised the grounds either before the CIT(A) or the ITAT.

d) There is a categorical finding, in respect issues raised in applications dt. 03.03.2014 and 20.03.2014, in the order passed that sought to be amended/rectified as mistake apparent from record. Now, the assessee prays to review the order passed by the Assessing Officer when there was a provision in the Act to raise the above grounds in appellate forums.

e) The entire demand raised by the A.O in the aforesaid order was contested by the assessee before the Commissioner of Income tax(Appeals) as well as before ITAT but could not succeed in those appeals. The Hon'ble ITAT even rejected the Mise. Application filed by the assessee . Now, the assessee made last minute failed effort to thwart/postponement of the sale of attached properties.

f) The order of the A.D. that sought to be amended stands concluded as the same has been upheld by the highest fact finding authority i.e. ITAT as the appeal filed by the assessee against the order of CIT(A) and Mise. Petition filed against the Tribunal order were dismissed. Hence, the A.O. has no powers to rectify the order.

g) the same can not be raised at this juncture as the assessment made has become final for the afore said reasons in (f) above. Hence, it is beyond the scope of rectification. Further, various courts have held that order made under section 153A in the cases mentioned in Section 153C is a valid order.

h) The assessee also raised fresh claim under section 54 F for the first time in his application filed now. The same is rejected as no claim of deduction/exemption can be With regard to issue raised by the assessee questioning the validity of issue of notice, made only by filing revised returns as held by Hon'ble Supreme Court.

i) Section 154 only confers power of rectification if there is a mistake apparent on the face of the record, Limit of rectification can be stretched only to the field where the mistake is glaring, obvious, patent and apparent on the face of the record. Glaring, obvious, patent, and apparent mistakes are those for which no investigation in to facts or determination of law or discussion of debatable points are involved, to establish which long drawn argument would not be necessary and in respect of which no two opinions are possible.

In view of the above stated reasons, the applications filed by the assessee are hereby rejected."

11. In support of the case of the revenue, ld. DR has filed the following written submissions :

"Grounds of Appeal of the Department are as follows:

The main and actual ground of appeal of the department with ITAT is that

1. The CIT(Appeals) erred in holding that Assessment u/s.153A in pursuance to the notice u/s. 153A issued to the appellant - HUF when HUF was not searched u/s.132 of the Income tax Act is bad in law without appreciating the fact that the debatable issues cannot be raised in the application u/s. 154. Also, the CIT(A) erred in not appreciating that section 153C is enabling section to make assessment of any other person, other than the person referred in section 153A and the assessment has to be made in accordance to the provisions of 153A

Assessing Officer:

Proceedings of the Income tax Officer u/s.154 dated 31.03.2014 in the case of the assessee, Krishna Kumar D. Shah, HUF AY. 2006-07 [p- 16] The application u/s.154 filed by the assessee is rejected on the following grounds:

1. The scope and ambit of section 154 is limited to mistakes apparent from record but is not used to review or recall the whole issue.
2. In the garb of an application u/s.154, the assessee cannot be permitted to reopen and re-argue the whole matter. Moreover, the subject Assessment Order suffered test of second appeal.
3. The assessee's prayer to review and recall the Order passed cannot be done as there is a provision in the act to raise the above grounds in appellate forums.
4. The order of the AO that sought to be amended stands concluded as the same has been upheld by the highest fact finding authority, ITAT.
5. Various courts have held that order made u/s.153A in the cases related to 153C is a valid order.
6. The assessee also raised a fresh claim u/s.54F for the first time in the 154 application. The same is rejected as no such claim can be with regard to issue raised questioning the validity of issue of notice and can be done only by filing revised return as held by Hon'ble Supreme court. View points of the Assessing Officer:

1. The CIT(A) ought to have followed the decision of Hon'ble Madras High Court in the case of CIT vs. K.M.Ganesham reported in 333 ITR 562 wherein it was held that notice issued under section 158BC is only in accordance with the provisions of section 158BD.

2. The CIT(A) erred in holding that the AO erred in observing that the assessee sought to review / recall the concluded issues in his application u/s.154 and without appreciating the fact that the provisions of section 154 restricts the power of the AO to only issues which are not debatable. In this issue the following cases laws have to be examined:

1. The CIT(A) erred in relying upon the decision of Blue star engineering company (Bombay) Ltd Vs. CIT reported in 73 ITR 283 (Bombay High court)

2. The CIT(A) ought to have appreciated the principle laid down by the Apex court in Mepco

Industries Ltd (219 ITR 208) that Order u/s. 154 is not possible in this case.

3. The CIT(A) ought to have appreciated the principle laid down by the Apex court in Volkarts Brothers (82 ITR 50) that the mistake must be obvious and patent and not something which can be established by a long drawn process.

4. The CIT(A) erred in relying on the decision of the Hon'ble Supreme court in case of Hotel Blue Moon (2010) 321 ITR 362 in observing issue relating to jurisdiction and He should have appreciated that the fact, was whether issuing notices u/s. 143(2) and 142(1) within the prescribed time limit is mandatory.

12. In support of its case, Revenue had relied upon the following decisions of jurisdictional High Court and Supreme Court.

1. *N.R. Portfolio (P) Ltd. Vs. PCIT reported in (2019) 108 taxmann.com 266 (SC).*
2. *Indus Finance Corporation Ltd Vs. CIT, Chennai reported in (2017) 79 taxmann.com 233.*
3. *JRD Stock Brokers (P) Ltd Vs. CIT – II, New Delhi reported in (2015) 56 taxmann.com 15 (SC).*

13. It was the contention of the ld. AR for the assessee that the jurisdictional issue being legal in nature can raised by the assessee in the proceedings under section 154 proceedings being a collateral proceedings and also at any stage . It was the submission of ld. AR that the Jurisdiction of Assessing Officer goes to the root of the matter therefore the order passed by any authority, without jurisdiction would be void ab initio. Ld. AR further submitted that Hon'ble Delhi High Court in the case of CIT (Central – II) Vs. ITAT and others (W.P.(C) No.4684 of 2010) had examined the identical issue and held in para 14 to 16 of its order as under:-

"14. It was further contended by the learned counsel for the assessee that in any event the question of assumption of jurisdiction by any statutory authority and its validity can be set up by the aggrieved party at any point or at any stage of the proceedings and can even be taken during collateral proceedings. In support of this submission, which was made without prejudice to the main contention noted in the preceding paragraph, our attention was drawn to the judgment of the Gujarat High Court in P.V. Doshi v. CIT [1978] 113 ITR 22.

15. In Kiran Singh v. Chaman Paswan AIR 1954 SC 340 it was observed by T.L. Venkatarama Ayyar, J. speaking for a Bench of four Judges as follows:-

> *"It is a fundamental principle well-established that a decree passed by a Court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree and such a defect cannot be cured even by consent of parties."*

16. The aforesaid principle was reiterated by the Supreme Court in Superintendent of Taxes v. Onkarmal Nathmal Trust AIR 1975 SC 2065 and Dasa Muni Reddy v. Appa Rao AIR 1974 SC 2089. In the first of these decisions it was pointed out that revenue statutes protect the public on the one hand and confer power upon the State on the other, and the fetter on the jurisdiction is one meant to protect the public on the broader ground of public policy and, therefore, jurisdiction to assess or reassess a person can never be waived or created by consent. This decision shows that the basic principle recognized in Kiran Singh (supra) is applicable even to revenue statutes such as the Income Tax Act. Dasa Muni Reddy (supra) is a judgment where the principle of coram non-judice was applied to rent control law. It was held that neither the rule of estoppel nor the principle of res judicata can confer the Court jurisdiction where none exists. Here also the principle that was put into operation was that jurisdiction cannot be conferred by consent or agreement where it did not exist, nor can the lack of jurisdiction be waived. These two later judgments were noticed by the Gujarat High Court in the case of P.V. Doshi (supra). This case arose under the Income Tax Act with reference to the provisions of Section 147 dealing with re-assessment. The facts make interesting reading. There the assessment was sought to be reopened under Section 147 and notice under Section 148 was issued. On the completion of the reassessment, the assessee filed an appeal before the Appellate Assistant Commissioner ("AAC") challenging the jurisdiction to reopen the assessment as also the merits of the additions made in the reassessment order. However, before the AAC the contention against the validity of the assumption of jurisdiction was given up and the challenge was confined to the merits of the additions made. The AAC dismissed the appeal. The assessee carried the matter in further appeal before the Tribunal where the only controversy was with regard to the merits of the addition made in the reassessment order. The Tribunal restored the matter to the Assessing Officer with the directions to permit the assessee to cross-examine the witness, who had filed an affidavit implicating the assessee, and thereafter to complete the reassessment in accordance with law. When the matter came back to the assessing officer the assessee specifically raised the point of jurisdiction to reopen the assessment, contending that the notice of reopening was prompted by a mere change of opinion. This plea was rejected. Even on merits the addition was repeated in the reassessment order. The assessee again carried the reassessment order before the AAC. In this appeal the assessee again took up the point of jurisdiction. The AAC found from the assessment record that no reasons had been recorded by the Income Tax Officer before issuing notice under Section 148 (1) of the Act. According to him, Section 148 (2) which requires the Assessing Officer to record reasons for reopening the assessment was mandatory and failure to obey the mandate was fatal to the jurisdiction of the Assessing Officer to reopen the assessment. The AAC, therefore, accepted this ground and also held the reassessment to be bad on the further ground that in the original assessment proceedings themselves the assessee had explained the investments and, therefore, the reopening of the assessment was the

result of a mere change of opinion. Thus, on both the grounds he annulled the reassessment order. Against the order of the AAC the Revenue went in appeal before the Tribunal and specifically raised the plea that the question of jurisdiction to reopen the assessment having been expressly given up by the assessee in the appeal against the reassessment order in the first round, the assessee was debarred from raising that point again before the AAC and the AAC was equally wrong in permitting the assessee to raise that point which had become final in the first round and in adjudicating upon the same. The plea of the Revenue impressed the Tribunal which took the view that after its earlier order in the first round of proceedings the matter attained finality with regard to the point of jurisdiction which was given up before the AAC and not agitated further and that in the remand proceedings what was open before the Assessing Officer was only the question whether the addition was justified on merits and the point regarding the jurisdictional aspect was not open before the Assessing Officer. According to the Tribunal, the assessee having raised the point in the first round and having given it up could not revive it in the second round of proceedings where the issue was limited to the merits of the additions. In this view, the Tribunal accepted the Revenue's plea. The assessee thereafter carried order of the Tribunal in reference before the Gujarat High Court. The High Court after considering various judgments of the Supreme Court on the point of jurisdiction to reopen the assessment and also after specifically discussing the judgment of the Supreme Court in Onkarmal Nathmal Trust (supra) and Dasa Muni Reddy (supra) held that the Tribunal was in error in holding that the question of jurisdiction became final when it passed the earlier remand order. It was held that neither the question of res judicata nor the rule of estoppel could be invoked where the jurisdiction of an authority was under challenge. According to the Gujarat High Court, the rule of res judicata cannot be invoked where the question involved is the competence of the Court to assume jurisdiction, either pecuniary or territorial or over the subject matter of the dispute. The Court further held that since neither consent or waiver can confer jurisdiction upon the Assessing Officer where it did not exist, no importance could be attached to the fact that the assessee, in the first round of proceedings, expressly gave up the plea against the erroneous assumption of jurisdiction by the assessing authority. According to the Court, the "finality or conclusiveness could only arise in respect of orders which are competent orders with jurisdiction and if the proceedings of reassessment are not validly initiated at all, the order would be a void order as per the settled legal position which could never have any finality or conclusiveness. If the original order is without jurisdiction, it would be only a nullity confirmed in further appeals". In this view of the matter, the Court finally answered the reference in favour of the assessee."

14. Ld. AR further submitted that in the present case, no search has been taken place in the hands of the assessee and therefore, there was no occasion to find out any incriminating material against the assessee, therefore, there was no reason for making the addition in the hands of the assessee. It was submitted that addition made by the Assessing Officer and confirmed by the Tribunal were rightly annulled by the ld.CIT(A) in 154 proceedings and therefore, the appeal of the Revenue is required to be dismissed.

14.1 Ld. AR had submitted Para-wise comments to the arguments of ld.DR, which is to the following effect :

"The opening sentence of the synopsis of the arguments furnished by the learned DR states that the search warrant was in the name of the karta of the HUF. This is factually incorrect, devious, misleading and mischievous in intent. It gives an impression that the search was initiated against the HUF. The fact is that the search was carried out against the individual. The warrant, as borne out by the panchanama, was in the name of the individual and not the HUF. The second sentence states that the search was conducted against the three Sons of the assessee as well. This also is factually incorrect. The assessee and the other three are related but not of the kind mentioned by the learned DR. Sri Krishna Kumar Shah is the uncle of the other three. The addresses too of Sri Krishna Kumar Shah and the other three are different and not the same as stated by the DR.

1.1 Paragraph 1.1 refers to the cause of the search. It is submitted that this is not relevant to the appeal on hand. The DR states that notice was issued by the AO u/s 153A to the assessee in the status as the karta of the HUF. The fact is that the AO issued notice u/s 153A to the HUF while the search was initiated against the individual. The other averments as to the proceedings before the AO are not relevant for the purpose of the present appeal. Similar is the case with the averments paragraphs 1.3 and 1.4.

2. Paragraph 2 refers to the fact of filing of application u/s 154 before the AO. In paragraph 2.2, the learned DR mentions that the contentions against assumption of jurisdiction by the AO were not raised while the assessment was made originally. The assessee's contention has been that it is settled law that a matter affecting assumption of jurisdiction could be raised at any stage.

3. Paragraph 3 relates to the order of the CIT(A). Since the assessment was held as a nullity by the CIT(A), he did not dispose of a few grounds of appeal on merits. Since the revenue has filed an appeal against that order, the assessee has filed the cross objections.

In paragrpahs 3.4 and 3.5, the learned DR refers to the decision of the CIT(A) and states that he cancelled the original assessment order even though that was not the subject matter of appeal before him. The DR remarks that the CIT(A) exceeded his jurisdiction. The assessee's appeal before the CIT(A) was that the assessment was bad in law owing to the fact that it was the outcome of assumption of jurisdiction incorrectly. The CIT(A) allowed the appeal. The CIT(A) was competent to dispose of the appeal. There is no warrant for the DR to contend that the CIT(A) exceeded his jurisdiction. The claim of the DR (vide para No.3.5) that "the CIT(A) would have arrived at a conclusion ……..directing the A.O. not to reject the rectification of application and consider the same on merits of the issue raised in such applications ……." is contrary to the provisions of section 251(1)(a) because w.e.f. 1.6.2001 the CIT(A) has no power to set aside an order of assessment. The order u/s 154, the subject matter of the appeal, is continuation of the assessment u/s 153(A) r.w.s. 143(3).

4. In paragraph 4, the learned DR deals with the scope of section 154. He has relied upon the decisions in T. S. Balram, ITO v. Volkart Brothers reported in 82 ITR 50 (SC), CIT v. Hero Cycles (Pvt.) Ltd. [1997] 228 ITR 463 (SC) and many others to say that a matter which is debatable cannot be covered within the scope of section 154. The decisions cited by the learned DR in fact support the assessee's plea because an issue relating to assumption of jurisdiction strikes at the very root of any decision and the settled Law is that it can be raised at me. In fact, in paragraph 4.3, the learned DR states that an order can be rectified u/s 154 by taking cognizance of the settled legal position. In the case on hand, the settled law supports the assessee's application u/s 154 and therefore the order of the CIT(A) that the assessment order made on assumption of wrong i8iiction is a nullity is unassailable.

5. In paragraph 5, the learned DR admitted that the ratio of the judgement in Blue Star Engineering Co. (Bombay) [1969] 73 ITR 283 (Born) (P) Ltd. v. CIT may be applicable but since there is no decision of the supreme Court or the jurisdictional High Court on the issue, the issue has to be treated as debatable. It is submitted that the learned DR omitted to take cognizance of the decisions of the Supreme Court and the AP High Court on the issue relied on by the counsel at the time of hearing and which were part of the written submissions filed in 2015. The same extracted from the written submissions filed by the AR in reply to the issues raised paragraphs 4.0 to 6.5 of DR's synopsis are as below:

Grounds of appeal filed by Revenue (in brief) and the assessee's submission in brief as under: -

"There is no jurisdictional defect because notices u/s 153A and u/s 153C are one and the same. And, even if there is a mistake in assumption of jurisdiction, it cannot be rectified u/s 154. Further, where the assessment order has become final in appeal, action u/s 154 cannot be pressed into service to annul the order on account of a jurisdictional defect."

The assessee's submissions in brief: (1) The fact is that the AO erred in issuing notice u/s 153A to the HUF when the searched party was the individual. Besides, there was no seizure made during the course of search. In fact, the AO called for the development agreement vide his letter dated 29-9-2009 and it was furnished by the assessee on 8-10-2009. In the absence of seizure of any document, the AO have could not ever assume jurisdiction u/s 53C against the assessee HUF. Thus, the AO has had no authority to assume jurisdiction in the case either u/s 153A or u/s 153C. But he issued notice to the HUF u/s 153A and completed the assessment. The assessment made against the HUF the strength of an invalid notice is nullity in law.

(2) Mistakes of jurisdiction are patent and obvious. In Mahendra V. Desai v. AAC [1975] 99 ITR 135, the Supreme Court has held that the record for the purpose of sec. 154 includes all proceedings and materials on which the assessment is based. In West Bengal State Warehousing Corporation v. CIT (1986) 157 ITR 149 (Cal), it was held that error of jurisdiction is a glaring and obvious error which could be rectified. In CIT v. Kurban Hussain Ibrahimji Mithiborwala [1971] 82 ITR 821 (SC), the Hon'ble Supreme Court has held that if a notice issued is invalid, the entire proceedings would become void for want of jurisdiction. In

Asst. CIT v. Hotel Blue Moon [2010] 321 ITR 362 (SC), it has been held that a jurisdictional defect cannot be cured. This has been followed by the Karnataka High Court in CIT v. Micro Labs Ltd. [2012] 348 ITR 75 (Kam).

(3) The department has raised a ground that there is no difference between notices u/s 153A and u/s 153C. The department has relied on the decision in the case of CIT v. K. M. Ganesan [2011] 333 ITR 562 (Madras) in support of this view. It is submitted that this decision is not an authority on the proposition that issue of notice u/s 153A in law would tantamount to issue of notice u/s 153C. In the case of Manish Maheswari v. ACIT [2007] 289 ITR 341 (SC), the Apex Court has held that satisfaction that money, bullion, etc. belong to the party other than the searched person is a precondition to initiate proceedings u/s 1 58BD. That satisfaction is sine qua non for initiating action u/s 158BD has been emphasised by the Apex Court in CIT v. Calcutta Knitwears [2014] 362 ITR 673 (SC). Thus, the revenue's reliance on the decision in the case of K. M. Ganesan (supra) is misplaced. It may kindly be noted that in the case of the assessee, the AD could not have assumed jurisdiction either u/s 153A or u/s 153C because the search was not conducted against the assessee nor was any document related to the assessee was found in the premises of the searched person. Further, for the sake of argument, even if it is assumed for a moment that this was a fits case for issue of -notice u/s 153C, yet issue of notice u/s 153A would not have met the requirement in law. In DCIT v. M/s Reliance Granite Private Ltd. in ITA No. 1071/H/1 4, vide order dated 14-1-2015, the ITAT, 'B' Bench, Hyderabad has held the assessment order passed consequent to wrong assumption of jurisdiction is ab initio void. In the case of Rao Subba Rao (HUF) v. DCIT in ITA No.790/Hyd/2011, the ITAT, 'A' Bench, Hyderabad has held that the assessment made u/s Hon'ble High Court of A.P. and Telangana since has affirmed this decision in I T. T.A. No. 254 of 2014 dated 15.04.2014. This is the jurisdictional High Court decision and is binding on the authorities. Therefore, it is submitted that the decision of the ld.CIT(A) is free from any infirmity.

(4) The department has taken a ground that the decision in Blue Star Engineering Co. (Bombay) Ltd. (supra) has been dissented to by Karnataka High Court in CIT v. McDowell & Co. Ltd. [2004] 269 ITR 451. It is submitted that this decision in McDowell & Co. was rendered in the context of the scope of the power of the Tribunal u/s 35 of the Wealth Tax Act and is distinguishable on facts. Moreover, the High Court has referred to many other decisions with which it has differed. It is submitted that where two views are possible, the view favourable to the subject should be preferred as held in the judgments of the Apex Court, inter alia, in Union of India v. Onkar S. Kan war and Others reported in 258 ITR 760 and CIT v. Vegetable Product Ltd. [1973] 88 ITR 192. Thus, the decision in CIT v. McDowell & Co. Ltd. [2004] 269 ITR 451 may not be applied to the case of the assessee. Above all, it is submitted that decision in the case of Blue Star Engineering Co. (Bombay) Ltd. (supra) accords with the decisions of the Supreme Court.

(5) It is settled law that jurisdiction defect can be raised even after the wrong order has been confirmed in appeal. When jurisdiction has been assumed by issue of an invalid notice, all orders passed consequent to such invalid notice are bad in law and a challenge against such orders can be set up at any time as has been held by the Supreme Court in Kiran Singh v. Chaman Paswan (AIR 1954 SC 340), The Delhi High Court in CIT v. ITAT in

W.P. (C) No. 4684/2010 dated 3-8-2012 relied on the decision of the Supreme Court in Superintendent of Taxes v. Onkarmal Nathumal Trust (AIR 1975 SC 20) to state that the decision in Kiran Singh (supra) is applicable to the Income Tax Act (Paragraphs 15 & 16). The Court also referred to the decision of the Gujarat High Court in P. V. Doshi v. CIT [1978] 113 ITR 22 wherein it has been held that the "finality or conclusiveness could only arise in respect of -orders which are competent orders with jurisdiction and if the proceedings of reassessment are not validly initiated at all, the order would be a void order as per the settled legal position which could never have any finality or conclusiveness. If the original order is without jurisdiction it would be only a nullity confirmed in further appeals." (paragraph 16). Therefore, the decision of the CIT(A) is correct and unassailable.

> Significantly, the DR did not offer any comments on the above quoted decisions of the Hon'ble Supreme Court and of the Hon'ble Delhi High Court and Hon'ble Gujarat High Court.

> Paragraphs 7 to 7.6 of the DR's Synopsis: They cover the issues on merits raised in the cross objections by the assessee because the CIT(Appeals) did not adjudicate on the grounds relating to section 54F and sec. 50C (as observed by the CIT(A) in paras 5 and 6 of his order at page 5 thereof). In fact, the CIT(A) held that those grounds had become academic. Since no submissions were made by the AR on such issues, no comments are offered here. It is submitted that the Hon'ble Bench had made it known at the time of hearing that the appeal was being heard on the matter of jurisdiction and the cross-objections would be taken up for hearing, if required, after notice to the parties.

> Paragraphs 8.0 to 8.6 of the DR's Synopsis give unsolicited advice to the assessee. The observations of the DR are irrelevant and approach the issue on hand tangentially.

> Paragraphs 9.0 to 9.3 of the DR's Synopsis: Regarding maintainability of cross objections. This issue was not argued by the DR at the time of hearing. It is raised for the first time in the Synopsis.

> Indeed, the Hon'ble Bench observed in the course of the hearing of the appeals that in case the revenue's appeals' on the challenge to the assumption of jurisdiction is allowed, then the remaining issues arising out of the Cross Objections filed by the Rejoinder to DR's arguments/ITA. No.1605/H/2014 and out of the Cross Objections filed by the assessees would be restored to the file of the CIT(Appeals) for adjudication on merits.

> Hence the submission that cross objections filed against paragraphs 5 and 6 of the CIT(Appeals) order, are maintainable and not hit by the decision of the Bengaluru Bench.

In view of the foregoing and the oral submissions made, it is prayed that the appeal of the department has no merit and may kindly be dismissed."

15. We have heard the rival submissions and perused the material on record. Before we deal with the issue, the facts of the case are required to be appreciated. In the present case, search proceedings have been initiated on the premises of the assessee and some incriminating documents were found. Thereafter, the Assessing Officer had issued notice to the assessee and in response thereto, the assessee had filed the return of income u/s 153A of the Act. The assessee at that time had not raised any objection with respect to the jurisdiction of the Assessing Officer. Thereafter, the Assessing Officer had made addition and the said addition was confirmed by the ld.CIT(A). The assessee had preferred the appeal before the Tribunal and the Tribunal had also confirmed the additions against the assessee. Thereafter, the assessee had filed M.A. before the Tribunal and the Tribunal had also dismissed the said M.A. filed by the assessee vide order dt.26.07.2013.

15.1 As a matter of fact, before the Assessing Officer, ld.CIT(A) or before the Tribunal or in the rectification application, the grounds of jurisdiction were never raised by the assessee. Having failed at all forums, the assessee filed M.A. before the Assessing Officer and the details of which are mentioned hereinabove. The Assessing Officer has dismissed rectification application of the assessee vide reasoned order which are reproduced hereinabove.

16. The moot question before us is whether after finalization of the assessment proceedings up to the level of the Tribunal and after dismissing the M.A. can assessee file an application under section 154 of Income Tax Act 1961 before the Assessing Officer on the same issue For the above said purposes, it is necessary to point out the mistakes pointed by the assessee which were

captured by the Assessing Officer in the rectification / dismissal order at page 56 of the paper book (Paras 1 to 4). Before we dwell upon the legal submissions raised by the assessee, it is necessary to reproduce section 154 of the Act which gives power to the Assessing Officer to rectify any mistake apparent from the record.

17. In this regard, we may reproduce section 154 of the Act, which read as under :

> *Rectification of mistake.*
>
> *154. (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;*
>
> *(d) amend any intimation under sub-section (1) of section 206CB.*
>
> *(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 or by the collector, and where the authority concerned is 71[the Joint Commissioner (Appeals) or] 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 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.*
>
> *(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 or the collector, the Assessing Officer shall make any refund which may be due to such assessee or the deductor or the collector.*

(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 or the collector, the Assessing Officer shall serve on the assessee or the deductor or the collector, 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 or by the collector 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.

.

18. From the bare perusal of section 154 of the order, it is clear that the power of rectification is given to the Assessing Officer to rectify any mistake which is apparent from the record. The immediate questions arise as to whether there was any apparent mistake in the order passed by the Assessing Officer in the year 2009 . The apparent mistake is one which can be found out without any efforts and reasonings or for which no detailed reason or enquiry is required. In this regard, the law has been fairly settled by the Hon'ble Supreme Court in the case JRD Stock Brothers (P) Ltd. Vs. CIT (supra), wherein the Hon'ble Supreme Court has dismissed the SLP filed by the assessee and upheld the decision of Hon'ble Delhi High Court. Similarly, in the case of TS Balram Vs. Volkart Brothers (1971) 82 ITR 50 (SC), the Hon'ble Supreme Court had held as under :

"We have now to see whether the Income-tax Officer was justified in opining that in the original orders of assessment, there was any apparent mistake. As seen earlier, in the original assessments of the firm for the relevant assessment years, the Income-tax Officer adopted the slab rates applicable to registered-firms. The question for decision is whether the first respondent's firm came within the mischief of section 17(1) of the Indian Income-tax Act, 1922. Section 17(1) reads :

"Where a person is not resident in the taxable territories and is not a company, the tax, including super-tax, payable by him or on his behalf on his total income shall be an amount equal to—

(a) the income-tax which would be payable on his total income at the maximum rate, plus
(b) either the super-tax which would be payable on his total income at the rate of nineteen per cent. or the super-tax which would be payable on his total income if it were the total income of a person resident in the taxable territories, whichever is greater. ..."
(Proviso to the section is not relevant for our present purpose.)
Section 17(1)can apply to a "person". The expression "person" is defined in section 2(9) of the Indian Income-tax Act, 1922, thus :
"'Person' includes a Hindu undivided family and a local authority."
Unless a firm can be considered as a "person", section 17(1) cannot govern the assessment of the first respondent. In the Income-tax Act, 1961 (section 2(31)), the expression "person" is defined differently. That definition reads :
"'Person' includes—
(i) an individual,
(ii) a Hindu undivided family,
(iii) a company,
(iv) a firm,
(v) an association of persons or a body of individuals, whether incorporated or not,
(iv) a local authority, and
(vii) every artificial juridical person, not falling within any of the preceding sub-clauses."
It is a matter for consideration whether the definition contained in section 2(31) of the Income-tax Act, 1961, is an amendment of the law or is merely declaratory of the law that was in force earlier. To pronounce upon this question, it may be necessary to examine various provisions in the Act as well as its scheme.
Section 113 of the Income-tax Act, 1961, corresponded to section 17(1) of the Indian Income-tax Act, 1922, but that section has now been omitted with effect from April 1, 1965, as a result of the Finance Act, 1965.
*From what has been said above, it is clear that the question whether section 17(1) of the Indian Income-tax Act, 1922, was applicable to the case of the first respondent is not free from doubt. Therefore, the Income-tax Officer was not justified in thinking that on that question there can be no two opinions. It was not open to the Income-tax Officer to go into the true scope of the relevant provisions of the Act in a proceeding under section 154 of the Income-tax Act, 1961**. A mistake apparent on the record must be an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may conceivably be two opinions.** (emphasis supplied by us) As seen earlier, the High Court of Bombay opined that the original assessments were in accordance with law though in our opinion the High Court was not justified in going into that question. In Satyanarayan Laxminarayan Hegde v. MallikarjunBhavanappa Tirumale [I960] 1 SCR 890, this court while spelling out the scope of the power of a High Court under article 226 of the Constitution ruled that an error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions cannot be said to be an error apparent on the face of the record. A decision on a debatable point of law is not a mistake apparent from the record—see Sidhramappa AndannappaManvi v. Commissioner of Income-tax [1952] 21 ITR 333 (Bom.). The power of the officers mentioned in section 154 of the Income-tax Act, 1961, to correct "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." In this case it is not necessary for us to spell out the distinction between the expressions "error apparent on the face of the record" and "mistake apparent from the record". But suffice it to say that the Income-tax Officer*

was wholly wrong in holding that there was a mistake apparent from the record of the assessments of the first respondent.

For the reasons mentioned above, we dismiss this appeal with costs."

19. Similarly, in the case of PCIT Vs. Engineer Works reported in (2021) 132 taxmann.com 172, the Hon'ble Andhra Pradesh High Court vide paras 5 to 9 of its order, held as under :

"5. Section 154 of the Act empowers an Assessing Officer to rectify a mistake which is apparent from the record. A mistake can be said to be apparent on the record when it is a palpable and glaring one and not something which can be established by a long drawn process of reasoning on which may conceivably yield two opinions. A debatable point of law is not a mistake apparent on the face of the record. Only when such patent and obvious mistake is apparent from the record, the Assessing Officer is permitted to rectify or amend the Assessment Order, vide T.S. Balaram Income Tax Officer v. Volkart Brothers [1971] 82 ITR 50 (SC)

6. Mrs. M. Kiranmayee, learned standing counsel contends that the Assessing Officer in palpable contradiction to the ratio in KNR Constructions (supra), allowed deduction on the ground of depreciation after gross income was estimated at 12.5% on the main contractual receipts upon rejection of the books of accounts. Reliance is also placed on Indwell Constructions (supra) and it is argued in the event books of accounts are rejected, the same cannot be used to allow deduction on gross income. On the other hand, on behalf of the assessee, referring to the decision in Y. Ramachandra Reddy (supra) it is contended that depreciation is permissible even if the income is based on the estimation. Relevant portion of the said report reads as follows:

"If an assessee is entitled to claim deduction of interest, be it under section 36(1)(iii) of the Act or any other relevant provision and of depreciation under section 37 of the Act, in the ordinary course of assessment, there is no reason why the same facilities be not extended to him, merely because of the profit is determined on the basis of estimation as was done in the instant case. We are of the view that depreciation and interest, which are otherwise deductible in the ordinary course of assessment, remain the same legal character, even where the profit of assessee is determined on percentage basis."

7. The legal position enunciated in Y. Ramachandra Reddy (supra) is that an assessee is not automatically disentitled to depreciation where the profit is determined on percentage basis. Hence, the issue of deduction on the score of depreciation from gross income which is computed on the basis of estimation is a debatable one and cannot be a palpable error on the face of the record.

8. We also find much substance in the argument on behalf of the assessee that in Indwell Constructions (supra), the Bench was not dealing with the issue of depreciation. In this regard it may be profitable to refer to the observations of this Court in Y. Ramachandra Reddy (supra) where the Bench distinguished Indwell Constructions (supra) in the following manner:-

"The learned counsel for the appellant relied on a judgment of this Court in Indwell Constructions v Commissioner of Income Tax. That was a case in which this Court took the view that once the books of account are disbelieved for a particular purpose, they cannot be relied upon in the context of interest. In the instant case, we are concerned with the depreciation. The occasion to deny the deduction of depreciation or interest would arise if only the material placed before the Assessing Authority in proof of purchase of machinery and other items and payment of interest is disbelieved. No finding of that nature was recorded by the Assessing Officer."

9. In view of the ratio laid down in Y. Ramachandra Reddy (supra), we are of the opinion deduction of depreciation from gross receipts of income estimated at the rate of 12.5% on main contractual receipts is a debatable question of law and fact. Since the issue is not a palpable mistake on record but involves interpretation of the ratio laid down in KNR Constructions in the light of the law declared in Y. Ramachandra Reddy (supra), we are of the opinion that the invocation of jurisdiction under section 154 of the Act was not justified. Hence, no case to admit the appeal on the proposed questions of law or otherwise is made out.

10. The appeal is, accordingly, dismissed. No order as to costs.

11. Miscellaneous petitions, if any pending in this appeal, shall stand closed."

20. The word "any" under the income tax authority is defined u/s 116 of the Act which includes the Assessing Officer and ld.CIT(A) and etc. However, the question which is required to be examined is whether the income tax authorities mentioned under section 116 of the Act can rectify any mistake in its order which is though not apparent but will have any effect of setting aside the order passed by the superior authorities. There cannot be any doubt that the income tax authority can rectify any apparent mistake in its order however, when the order of the Assessing Officer, has been upheld by the ld.CIT(A) and thereafter by the Tribunal, in that eventuality, Assessing Officer is denuded from rectifying any such mistake, as it would lead to giving unbridled power to Assessing Officer/ ld.CIT(A) to unsettled the settled position of fact and law and will lead to chaos and anarchy.

21. In the present case, after the Tribunal had dismissed the appeal of the assessee on merit, the Assessing Officer has rightly dismissed the rectification application filed by the assessee as the Assessing Officer was duty bound to implement the order passed by the Tribunal. The Hon'ble Hon'ble Supreme Court and High Courts had time and again reiterated the concept of merger of order of lower authority with the order of superior authority i.e., when the order of lower authority is approved by the superior authority/Tribunal then the order of the lower authority merged with the order of the superior authority. In other words after approval of the order without modification by the superior authority, the order of the lower authority ceases to exist.

22. The order of the Tribunal/superior authority passed by it can only be modified, set aside and annulled by process known to law. Admittedly, the Tribunal has neither recalled its order nor an appeal has been preferred against the order passed by the Tribunal before the hon'ble High Court. Therefore, the order passed by the Tribunal has attained finality and is required to be executed / enforced by the Assessing Officer. We cannot subscribe the view of the ld. AR that by rectification, the alleged jurisdictional issue can be looked into by the Assessing Officer or ld.CIT(A) thereby annulling the entire assessment proceedings, more particularly, when the assessment proceedings have already attained finality by virtue of the order of the Tribunal. There cannot be two contradictory orders of the Tribunal one by upholding the assessment and other quashing the assessment based on the jurisdictional error.

23. Further, we may point out that the decisions relied upon by the assessee are not applicable to the facts of the case as there was no pending assessment proceedings before the Assessing Officer.

For the purpose of applying the ratio of all the judgments relied upon by the assessee, it is necessary that there should be live proceedings or collateral proceedings pending before the Assessing Officer / ld.CIT(A). In the present case, neither the substantial proceedings nor the collateral proceedings were pending before the Assessing Officer and therefore, the Assessing Officer was right in not entertaining the application for rectification filed by the assessee and had rightly dismiss the same. Further, a mistake which can be rectified is required to be apparent and should be known to the Assessing Officer without any in-depth analysis. The Hon'ble Supreme Court in the case of Volkart Brothers (supra) had elaborately discussed the scope of section 154 , hence the mistake pointed by the assessee can not be said to be apparent in nature . Examining the issue either from the prospective of finality of the first order or from the scope of section 154, we allow the appeal of Revenue and accordingly, the appeal of the Revenue is allowed.

25. In the result, the appeal of revenue in ITA No.1605/Hyd/2014 is allowed.

26. Now, we will take C.O.No.68/Hyd/2014 filed by the assessee.

27. So far as the grounds raised by the assessee in the cross objections are concerned, the same are in support of the order of the ld.CIT(A). Since, we have allowed the appeal filed by the Revenue, therefore, the cross objection of the assessee is dismissed.

28. Since the facts in remaining appeals and cross objections are identical to facts decided in ITA No.1605/Hyd/2014 & CO.No.68/Hyd/2014 for AY 2006-07, therefore following similar reasonings, the above appeals filed by the revenue are allowed

and the respective cross objections filed by the assessees are dismissed.

29. To sum up, all the appeals of Revenue are allowed and all the C.Os. of assessees are dismissed.

Order pronounced in the Open Court on 16th May, 2023.

Sd/-	**Sd/-**
(RAMA KANTA PANDA) **ACCOUNTANT MEMBER**	**(LALIET KUMAR)** **JUDICIAL MEMBER**

Hyderabad, dated 16th May, 2023
TYNM/Sr.PS

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5	Income Tax Officer, Ward – 5, Hyderabad
6	CIT-V, Hyderabad
7	DR, ITAT Hyderabad Benches
8	Guard File

By Order