

IN THE HIGH COURT OF KARNATAKA, BENGALURU

DATED THIS THE 3RD DAY OF JULY, 2015

PRESENT

THE HON'BLE MR. JUSTICE VINEET SARAN

AND

THE HON'BLE MR. JUSTICE ARAVIND KUMAR

ITA NO.416/2009

BETWEEN:

K.S.VENKATESH
NO.29, WEST PARK ROAD
MALLESWARAM
BENGALURU-560 010

..APPELLANT

(BY SRI.A.SHANKAR & SRI.M.LAVA, ADVOCATES)

AND:

THE DEPUTY COMMISSIONER
OF INCOME TAX
CENTRAL CIRCLE-1(3),
CENTRAL REVENUE BUILDINGS
QUEENS ROAD,
BENGALURU-560001

..RESPONDENT

(BY SRI.K.V.ARAVIND, ADVOCATE)

THIS ITA IS FILED UNDER SECTION 260-A OF
INCOME TAX ACT, 1961 ARISING OUT OF ORDER
DATED 09-04-2009 PASSED IN ITA NO.60/BNG/2009,

FOR THE ASSESSMENT YEAR 2004-05, PRAYING THAT THIS HON'BLE COURT MAY BE PLEASED TO:

I. FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW STATED THEREIN,

II. ALLOW THE APPEAL AND SET ASIDE THE ORDER PASSED BY THE ITAT BANGALORE BENCH, BANGALORE IN ITA NO.60/BANG/2009,DATED 09-04-2009, IN THE INTEREST OF JUSTICE AND EQUITY.

THIS APPEAL COMING ON FOR FINAL HEARING, THIS DAY, **ARAVIND KUMAR J.**, DELIVERED THE FOLLOWING:

JUDGMENT

Assessee is in appeal questioning the correctness of the order passed by Income Tax Appellate Tribunal (ITAT), Bangalore Bench in ITA No.60/BANG/2009.

2. Facts in brief which has led to the filing of this appeal are as under:

Return of income came to be filed for the assessment year 2004-05 claiming a loss of ₹24,23,760/- and the jurisdictional Assessing Officer after issuing notice under section 143(2) of the Income

Tax Act (for short '**Act**') framed the assessment order under section 143(3) of the Act on 30.11.2006 whereunder the carried forward loss of ₹24,23,760/- came to be accepted by the Assessing Officer and was allowed to be set off against total income of the assessee comprising "Income from Other Sources", "Income from House Property" apart from "business income". Subsequently by issuance of notice under section 154 the said order of assessment was sought to be rectified to which the assessee filed his objections contending that the issue involves long drawn process of reasoning and as such assessment order cannot be rectified under section 154. However, it was noticed by the authority that assessee had himself shown interest income earned from the Banks, NSCs and Fixed Deposits had been indicated as "Income from Other Sources" in the return of income and as such it came to be held that it is an error apparent on the face of the record and as such order passed by the Assessing Officer dated 30.11.2006 came to be rectified and the business loss as determined

for the assessment year 2003-04 at ₹21,43,917/- was brought forward to the assessment year 2004-05 and was allowed to be set off only against business income of ₹6,23,596/- for the current year as per provisions of section 72 of the Act. Being aggrieved by the said order assessee filed an appeal before CIT(Appeals) who by order dated 24.11.2008 dismissed the appeal and affirmed the order passed by the jurisdictional Assessing Officer. Assessee carried the matter further in appeal before the Tribunal in ITA No.60/BANG/2009 and the appellate Tribunal after considering the rival contentions held that one cannot change the “head” in proceedings under section 154 and therefore Assessing Officer could not have changed the head from “income from other sources” as claimed by assessee to that of “income from business” and could not have allowed to set off against the carry forward business. As such the Tribunal dismissed the appeal filed by the Assessee by order dated 09.04.2009 and confirmed the orders passed by the authorities. Hence, this appeal by the assessee which

has been admitted by order dated 15.12.2009 to consider the following substantial questions of law:

- (i) *“Whether the Tribunal was justified in law in holding that the provisions of section 154 of the Act are applicable to the facts and circumstances of the case?”*
- (ii) *Whether the Tribunal erred in law in holding that the appellant was not entitled to set off of the carry forward business loss on the facts of the appellant’s case?”*

4. We have heard the arguments of Sri.A.Shankar, learned counsel appearing for appellant-assessee and Sri.K.V.Aravind, learned counsel appearing for the respondent-revenue.

5. It is the contention of Sri.A.Shankar, learned counsel appearing for the assessee that jurisdictional Assessing Officer could not have invoked section 154 of the Act since there was no error apparent on the record of the assessment order dated 30.11.2006 and if two (2) views are possible and one view has been adopted by the Assessing Officer, rectification proceedings cannot be initiated to take a different view and as such relies on the decision of Apex Court in T.S.Balaram, Income Tax Officer, Company Circle IV, Bombay Vs Volkart Brothers and others reported in 1971 (82) ITR 50 contending it is squarely applicable to the facts on hand whereunder it has been held if issue involves long drawn process of reasoning same cannot be construed as ground to hold there is error apparent on the face of the record for being rectified under section 154 of the Act. He has also contended that the word “head” found in sub-section (1) of Section 72 preceding the words “profits and gains of business or profession” is conspicuously absent in sub-clause (i) of section 72 and as such there is no

impediment on the part of the assessee to seek for set off of the business loss for the assessment year in question against “profits and gains” and such business loss cannot be restricted to business profits only. Hence, he would pray for order of the authorities being set aside by answering substantial questions of law in favour of assessee. In support of his submission he has relied upon the following Judgments:

1. (1971) 82 ITR 50 – T.S.Balaram, Income Tax Officer, Company Circle IV, Bombay Vs Volkart Brothers and others
2. (2012) 210 TAXMAN 9 (Delhi) – Lavish Apartment (P) Ltd., Vs Assistant Commissioner of Income Tax
3. (2003) 259 ITR 26 (Madras) – Commissioner of Income tax Vs Ramnath Goenka
4. Unreported Judgment of this court rendered on 09.06.2015 in ITA No.432/2009 – The Commissioner of Income Tax and anr Vs M/s.Crane Software International Ltd.

6. Per contra, Sri.K.V.Aravind, learned counsel appearing for respondent-revenue would support the orders passed by the authorities and contend that when the assessee himself had declared in his return of income filed for the assessment year 2004-05 that the income earned was from "other sources" Assessing Officer had committed an error in giving a set off towards loss in respect of the income earned from business and this being an error apparent on the face of the record and Assessing officer having no jurisdiction to change the head of income had committed an error in doing so in the assessment order dated 30.11.2006 and as such rectification proceeding was initiated against the assessee by issuance of notice under section 154 and as such it cannot be faulted with. Hence, he prays for answering the substantial questions of law against the assessee and in favour of the revenue and prays for dismissal of the appeal. In support of his submissions he has relied upon the following Judgments:

1. (1997) 93 TAXMAN 502 – Tuticorin Alkali Chemicals and Fertilizers Ltd., Vs Commissioner of Income Tax.

2. (2003) 128 TAXMAN 0011 – Commissioner of Income Tax Vs Menon Impex (P) Ltd.

7. After having heard the learned Advocates appearing for the parties and on perusal of the case papers we find from the records that undisputedly the assessment order which came to be passed on 30.11.2006 for the assessment year 2004-05 was under section 143(3) whereunder the assessee had claimed “income from other sources” at ₹20,41,899/- and had also sought for business loss to the tune of ₹24,23,760/- being set off against total income of ₹27,07,925/- which comprised “Income from Other Sources”, “Income from House Property” apart from “Income from Business”. This came to be accepted by the Assessing Officer and accordingly assessment order came to be framed on 30.11.2006. It is also not in dispute that assessee is

carrying on the business of money lending and had deposited money in Fixed Deposits, NSCs, Banks and had earned interest and in the return of income filed had shown the interest income earned under the head “Income from other sources”. As to whether the interest earned on the Fixed Deposits, NSCs is an income which can be set off under section 72 would arise for examination by us while answering substantial question of law No.2 formulated above only in the event of this court arriving at a conclusion that substantial question of law No.1 is to be answered in the affirmative. As such at this juncture without examining said issue we are examining substantial question of law No.1.

RE: SUBSTANTIAL QUESTION OF LAW NO.1:

8. A bare reading of section 154 of the Act would clearly indicate that Assessing Officer would be empowered to invoke section 154 namely amend any order passed by it under the provisions of the Act, amend with intimation or deemed intimation under sub-

section(1) of Section 143 or on intimation under sub-section(1) of section 200A as indicated under section1(a)(2) to (8) of Section 154 in order to rectify any mistake apparent from the record. Thus, keeping in mind this tenor of the language used in section 154, the facts on hand are required to be examined.

9. In the instant case the rectification proceeding was invoked by the jurisdictional Assessing officer on the ground that for the assessment year 2004-05 the carried forward business loss to the tune of ₹24,23,760/- had been allowed to be set off against “Income from Other Sources” and “Income from House Property” same should have been restricted to be set off only against “Business Income” as stipulated under section 72 of the Act on the ground that assessee himself had declared the interest earned from Banks, NSCs and Fixed Deposits as “Income from Other Sources” in his return of income. As to whether this set off which has been claimed by the assessee is to be construed as one falling within four

corners of Section 72 of the Act itself would be a debatable point and as such if the issue involves examination in detail, we are of the considered view that the Assessing Officer could not have resorted to invoking section 154 of the Act so as to bring within the sweep of “error apparent on the face of the record”. The Hon’ble Apex Court in T.S.Balaram Vs Volkart Brothers and others reported in 1971 (82) ITR 50 has observed that a mistake apparent on the record must be obvious and patent mistake and not something which is established by long drawn process of reasoning. It has been held by the Hon’ble Apex Court in the said case as under:

“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. 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 Vs Mallikarjun Bhavanappa Tirumale, 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 Andannappa Manvi Vs Commissioner of Income tax. 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”.

10. Thus, keeping in mind the dicta laid down in the above referred case when the facts on hand are perused yet again, we are left with irresistible conclusion that in the instant case the Assessing Officer sought to rectify the original assessment order on the ground that carried forward business loss was to the tune of ₹24,23,760/- and same had been set off against the total

income which was inclusive of the income earned by the assessee under the head “Income from Other Sources” and “Income from House Property” as declared by him in the return of income and carried forward loss could have been set off against “Business Income” only. As already observed by us herein above the issue as to whether the said income earned by way of interest on Fixed Deposits, NSCs, would be available to the assessee to seek for set off as business loss or not under section 72 of the Act is a debatable issue and as such we are of the considered view that said issue could not have been gone into in a proceeding under section 154 of the Act. The “brought forward loss” came to be set-off against the total income earned by the assessee as per the assessment order dated 30.11.2006. As to whether income earned by way of interest would form part of total income so as to allow the assessee to seek set-off is an issue which will have to be gone into in detail and mere declaration in the return of income by assessee would not alter its status and as such it cannot be held that an error had occurred in the

assessment order so as to enable the Assessing Officer to invoke section 154 of the Act for rectification. In that view of the matter we are of the view that substantial question of law No.1 formulated herein above is required to be answered in the negative i.e., in favour of assessee and against the revenue.

11. Since we have answered substantial question of law No.1 in the negative i.e., in favour of assessee examining second substantial question of law which relates to the merits of the claim does not arise. Accordingly we proceed to pass the following:

ORDER

1. ITA 416/2009 is hereby allowed.
2. Order dated 09.04.2009 passed in ITA No.60/Bang/2009 by ITAT, Bangalore Bench, Bangalore, Order dated 24.11.2008 passed in ITA No.42/DCIT CC 1(3)/B'lore/CIT(A)-VI/2007-08 and Order dated 14.12.2007 passed by Deputy

Commissioner of Income Tax, Circle -1(3),
Bangalore in No.DCIT.CC 1(3)/2007-
2008/154/Venkatesh are hereby set aside by
answering the substantial question of law No.1 in
favour of the assessee.

3. Costs made easy.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

SBN