MR. VIMAL C. PUNMIYA CHARTERED ACCOUNTANTS

ORGANISED By: WIRC of ICAI
SUBJECT: Rectification of mistake, Power related to amendment in order and Dispute Resolution Scheme
DATE & DAY : 22.10.2016 (Saturday)
Time: 2.15 pm to 5.30 pm
VENUE: J. S. Lodha Auditorium, ICAI Bhawan, Cuffe Parade, Colaba, Mumbai – 400 005

BY CA VIMAL PUNMIYA

a.i.1.I. Rectification of mistake and power related to make amendment in order

Section 154 Provides for rectification of mistakes:-

a) Any order passed by an Income Tax Authority can be rectified under this section.

b) Intimation or Demand Intimation u/s 143(1) can also be rectified under this section.

c) Rectification is possible only if there is a **"MISTAKE APPARENT FROM THE RECORD"**. In other words, the mistake must be a prima facie i.e. apparent mistake from record.

d) Mistake can be classified under two categories- (i) Apparent from record, and (ii) arguable/ disputable/ debatable mistake.

e) The scope of section 154 is limited to the rectification of mistake apparent from record and it' s not extended to arguable/ disputable/ debatable mistake.

However, the Parliament has not prescribed any guidance in Income Tax Act related to classification of mistake. But based on court decisions, followings are some of the examples of apparent mistake-

- Arithmetical mistakes
- Mistakes in application of any limit/amount/percentage prescribed in the law
- A view taken against the decision of jurisdictional High Court or Supreme Court.

i.B.A.i.II.i. ***Honda Siel Power Products Limited Vs.Dy CIT and Anr***

The Assessing Officer could not have resorted to Section 154 proceedings to disallow expenditure under Section 14A of the Act. This was not possible in 154 proceedings as it was not an error or mistake apparent from the record.

i.B.A.i.II.ii. ***T. S. Balaram, Income-tax Officer v. Volkart Brothers,***

wherein the Supreme Court held that a mistake apparent on the record must be an obvious and apparent mistake and not something which could be established by a long drawn process of reasoning on points on which there may be conceivably two opinions.

i.B.A.i.II.iii. ***Arvind N. Mafatlal v. T. A. Balakrishnan, Deputy Controller of Estate Duty and Burmah-Shell Refineries Ltd. v. G. B. Chand***

A decision on a debatable point of law is not a mistake apparent from the record.

i.B.A.i.II.iv. ***Tata Iron & Steel Co. Ltd. v. N. C. Upadhyaya & Anr. (1974) 96 ITR 1 (Bom.)***

Issue involved is disputable, therefore provision of sec.154 not applied.

i.B.A.i.II.v. ***Dy CIT v. Waman Hari Pethe Sons (2011)138 TTJ (Mumbai) 451***

The AO has in detail tried to justify the addition to be made u/s. 68 and accordingly, has passed the detailed order giving the elaborate reasons. Now the law is well-settled in respect of the limitation of the AO to rectify any order u/s. 154.

f) Rectification can be done only by an income-tax authority covered by section116. Hence ITAT, High court or Supreme Court etc. cannot make a rectification u/s 154 as they are not income tax authorities within the meaning of section 116.

g) Rectification is done by the same authority i.e. the authority who passed the order sought to be rectified.

h) Where the relevant order (i.e. the order sought to be rectified) is subject matter of any appeal/ revision/ rectification is possible in relation to any such matter as is not considered and decided in appeal/revision (Doctrine of partial merger).

i) Rectification can be done-

i. On own motive by the concerned authority or
ii. On an application by the assessee or
iii. On an application by the assessing officer (if the authority taking action u/s 154 is CIT[A]).

j) If the result of the rectification is likely to be against assessee i.e. the result shall be increase in tax liability or reduction in refund, an opportunity of being heard shall be given to the assessee before passing an order under this section.

k) Rectification can be done within 4 years from end of the financial year in which the order sought to be rectified is passed.

l) Where the assessee files application for rectification, the order of rectification shall be passed within 6 months from end of the month in which such application is received by the department. However, the law does not provide as to what will happen if the department does not pass order within 6 months.

CIRCULAR No.73 dated 07.01.1972:

Where a valid application u/s 154 has been filed by the assessee within the statutory time limit but it was not disposed by the concerned authority within the time limit of 4 years. It can still be disposed by the authority.

CIRCULAR No.669 dated 25/10/1993

Where the amount of tax, duty etc. as specified in section 43B had been paid within the prescribed time but evidence of payment has not been furnished with the return, the assessee can submit an application u/s 154.

Notifications issued after completion of assessments

Where notifications under section 10(23C) or section 35(1) are issued much after the completion of the assessments of the assessment years to which such notification apply, there is a mistake apparent from the record which can be rectified under section 154. However, while disposing of the rectification applications, the Assessing Officer must ensure that the conditions prescribed in the notifications are satisfied. - Circular : No. 725, dated 16-10- 1995.

INSTRUCTION NO.02/2016

Sometimes assessing officers pass rectification orders online without giving a copy to the taxpayer. In such situations the taxpayers were devoid of a copy of the order and could not appeal or review the rectification.

CBDT has released a circular directing all assessing officer to pass the rectification order in writing. And this must be duly provided to the taxpayer.

Hind Wire Industries Ltd. V/s CIT (1995) 212 ITR 639 (SC)

Order sought to be rectified does not necessarily mean the original order. It could be any order including the amended or rectified order itself. Thus if the order of reassessment is sought to be rectified, the time limit of 4 years shall be computed from end of the financial year in which the order of reassessment was passed.

The CBDT has addressed a letter dated 5th June 2015 expressing concern that the rectification applications u/s 154 filed by the taxpayers before the field officers are not being dealt with promptly. It is pointed out that the Citizen's Charter of the Department requires that applications for rectification are to be disposed of within two months from the end of the month in which application is received. The CBDT has directed that all rectification applications that were received up to 31″ March 2015 should be disposed of on or before 20th June 2015. It I stated that the Income-tax Department is committed to prompt redressal of taxpayer grievances and all the officers of the Department are expected to take lead in fulfilling this commitment.

The procedure to be followed for making an application of rectification :

Before making any rectification application the taxpayer should keep following points in mind.

- The taxpayer should carefully study the order against which he wants to file the application for rectification.
- Many times the taxpayer may feel that there is any mistake in the order passed by the Income-tax Department but actually the taxpayer's calculations could be incorrect and the CPC might have corrected these mistakes, e.g. the taxpayer may have computed incorrect interest in return of income and in the intimation the interest might have been computed correctly.
- Hence, to avoid application of rectification in above discussed cases the taxpayer should study the order and should confirm the existence of mistake in the intimation, if any.
- If he observes any mistake in the order then only he should proceed for making an application for rectification under section 154.
- Further, he should confirm that the mistake is one which is apparent from the records and it is not a mistake which requires debate, elaboration,
- An amendment or rectification which has the effect of enhancing the assessment or reducing a refund or otherwise increasing the liability of the taxpayer (or deductor) shall not be made unless the authority concerned has given notice to the taxpayer or the deductor of its intention to do so and allowed the taxpayer (or the deductor) a reasonable opportunity of being heard. [As amended by Finance Act, 2016].

Pre-Requisites to file online Rectification Request U/s. 154

1. The Income Tax Return for the Assessment Year should have been processed in CPC, Bangalore.
2. An Intimation under Section 143(1) OR an order under Section 154 passed by CPC, Bangalore for the e-Filed Income Tax return should be available with the taxpayer.
3. For Electronic returns filed and processed at CPC, only online rectifications will be considered.
4. If the refund arising out of return processed at CPC is adjusted against the demand of other Assessment Years and then the assessee is challenging the demand itself, in that case

i) Rectification application has to be filed for the demand year, if the demand was raised by CPC then online application has to be filed

ii) For the demand raised by the Field Assessing Officer, the application has to be filed before him.

Below listed are the steps to file Rectification for Rectification:

Step 1 - LOGIN to e-Filing application and GO TO –> My Account –> Rectification request.

Step 2 - Select the Assessment Year for which Rectification is to be e-Filed, enter Latest Communication Reference Number (as mentioned in the CPC Order), and Latest CPC Order Date (as mentioned in the CPC Order).

Step 3 – Click 'Submit'.

Step 4 – Select the 'Rectification Request type'

–> **'Taxpayer Correcting Data for Tax Credit mismatch only'** − On selecting this option, three check boxes, TCS, TDS, IT, are displayed. You may select the check-box for which data needs to be corrected. You can add a maximum of 10 entries for each of the selections. No upload of an Income Tax Return is required.

–> **'Taxpayer is correcting the Data in Rectification'** − select the reason for seeking rectification, Schedules being changed, Donation and Capital gain details (if applicable), upload XML and Digital Signature Certificate (DSC), if available and applicable. You can select a maximum of 4 reasons.

–> **'No further Data Correction required. Reprocess the case'** − On selecting this option, three check-boxes, Tax Credit mismatch, Gender mismatch, Tax/ Interest mismatch are displayed. You may select the check-box for which re-processing is required. No upload of an Income Tax Return is required.

Step 5 – Click the 'Submit' button.

Step 6 – On successful submission, an Acknowledgment number is generated and sent for processing to CPC, Bangalore.

Post processing, the rectification order under Section 154 will be issued.

Section 263 Revision Of Order Prejudicial To The Interest Of Revenue

- The provision deals with the revisionary powers of the Commissioner of Income Tax (CIT) which are supervisory in nature. The CIT can call for and examine the **record of any proceedings** under the act and if he considers that any order passed by **the assessing officer** is **erroneous in so far as it is prejudicial to the interest of revenue,** he can take action under this section.
- The CIT can exercise revision only if the following circumstances exist:

i) The order of the Assessing Officer is erroneous. **and**

ii) The order of the Assessing Officer is prejudicial to the interest of the Revenue.

- 'Record' shall include all records relating to any proceedings of the Act available at the time of examination by the CIT.
- The words "Any Proceedings" would mean proceedings of any kind such as assessment, penalty, interest, rectification etc. **CIT V/s Christian Mic Industries Ltd. (1979) 120 ITR 627 (Cal)**
- However, the CIT has to given an opportunity of being heard before any order is passed under this section.
- **Power of CIT**

The CIT can pass such order as the circumstances may justify including followings types of orders—

a) Order enhancing assessment,

b) Order modifying assessment

c) Order cancelling assessment

d) Order directing fresh assessment

This implies that the CIT is empowered to modify the assessment order passed by the Assessing Officer, if the order is found to be erroneous and prejudicial to the interest of the Revenue. If the order of the Income Tax Officer is erroneous but not prejudicial to the interest of the Revenue or if the order of the ITO is prejudicial to the interest of the Revenue and not erroneous, recourse to Section 263(1) cannot be taken by the CIT. **[CIT Vs. Smt.Minalben S. Parikh [1995] 215 ITR 81 (Guj.)]** It can never be implied that every order that is erroneous is also prejudicial to the interest of the Revenue.

- If the order passed by the Assessing Officer has been subject matter of appeal, the power of the CIT shall extend to such matters as had not been considered and decided in such appeal. However, he will not have revisionary powers on matters which have been decided in the appeal. In such a situation, the appellate order stands merged with the order of the Assessing Officer.
- Provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer. **[Malabar Industrial Co. Ltd. Vs. CIT [2000] 243 ITR 83 (SC).**

Time Limit

- The act prescribed two time-limits, viz (i) two years time limit, and (ii) indefinite time-limit

Two year Time limit: Normally, order u/s 263 can be passed within a period of 2 years from end of financial year in which order sought to be revised was passed by the Assessing Officer.

In computing the period of 2 years, following periods shall be excluded----

a) Period taken in giving an opportunity of re-hearing u/s 129

b) Period during which proceeding u/s 263 are stayed by an order/ injunction of any court.

Indefinite time limit:

An order passed in consequence of, or to give effect to, any finding or direction contained in an order of the ITAT, high Court or Supreme Court, can be revised at any time.

Doctrine of Partial Merger

Where an order passed by the assessing officer has been subject matter of any appeal, the CIT can revise that part of the order which has not been considered and decided in appeal.

The orders which can be revised u/s 263 :

Apart from the order passed by the Assessing Officer [including order u/s 143 (1)], the following orders can also be revised by the CIT:

i) An order of assessment made by Assistant Commissioner of Income Tax (ACIT) or

ii) Deputy Commissioner of Income Tax Officer (DCIT) or Income Tax Officer on the basis of direction from Joint Commissioner of Income Tax (JCIT) u/s 144A.

iii) An order made by the JCIT conferred on him under the order issued by the Board or CCIT or DG u/s 120.

Meaning of the word 'erroneous' and 'prejudicial to the interest of the revenue'

1. **CIT Vs. Shri Ashish Rajpal, High Court of Delhi (16.11.2007)**

"An order is erroneous when it is contrary to the law or proceeds on an incorrect assumption of facts or in breach of principles of natural justice or is passed without application of mind, that is stereo-typed, in as much as, the Assessing Officer, accepts what is stated in the return of the assessee without making any enquiry called for in the circumstances of the case, that is proceeds with undue haste. The expression 'prejudicial to the interest of the Revenue' while not to be confused with the loss of tax will certainly include an erroneous order which results in a person not paying tax which is lawfully payable to the Revenue."

Both conditions need to be satisfied in order to exercise powers u/s 263.

1. **Malabar Industrial Co. Ltd. [2000]243 ITR 83**

Held that pre-requisite for exercise of suo motu revisional jurisdiction by the Commissioner under Section 263 of the Income Tax Act is that, the order of the Income Tax Officer is erroneous in so far as it is pre-judicial to the interest of the Revenue and if the twin conditions, namely, (1) the order of the Assessing Officer sought to be revised is erroneous, and (2) it is prejudicial to the interests of the Revenue, the exercise of suo motu revisional power under Section 263(1) of the Act would be justified.

Revisional powers cannot be exercised on the ground that the AO should have gone deeper into the matter or should have made a more elaborate discussion.

1. **CIT vs. Leisure W ear Exports Ltd. [2010] 46 DTR (Del) 97**

"Where the assessment order has been passed by the AO after taking into account assessee's submissions and documents furnished by him, and no material is brought on record by the CIT which shows that there was any discrepancy or falsity in the evidence furnished by the assessee, the order of the AO cannot be set aside for making deep enquiry only on the presumption that something new may come out."

2. CIT v. Development Credit Bank Ltd., (323 ITR 206) (Bom.);
3. CIT v. Hindustan Marketing and Advertising Co. Ltd.,(341 ITR 180) (Del.);
4. CIT v. Ganpati Ram Bishnoi, (296 ITR 292) (Raj.);
5. CIT v. Unique Autofelts (P) Ltd., (30 DTR 231) (P&H);
6. Hari Iron Trading Co. v. CIT, (263 ITR 437) (P&H); and
7. CIT v. Goyal Private Family Specific Trust, (171 ITR 698) (All.).

Powers u/s 263 cannot be invoked when assessment order is subject to appeal effect because appellate order stands merged with the Assessment Order (provided the issues raised in the order u/s 263 deal with the issues subject to appeal effect).

1. **Fortaleza Developers Vs. Assessee (ITA NO. 2648/MUM/2012)**

Once the deduction u/s 80 IB (10) was a subject matter of appeals , the entire issue of 80 IB(10) was open in appeal and according to the followings decisions, so far as it relates the deductions u/s 80IB (10), the assessment order has merged with the appellate order passed by the CIT(A).

2. **Marico Industries Ltd. Vs Assisstant Commissioner of Income Tax (312 ITR 259)**

It was held that since deduction u/s 80IB(10) was the subject matter of appeal before CIT(A), the order of Assessing officer got merged with the order of CIT(A).

3. **Ranka Jewellers Vs Additional Commissioner of Income Tax (328 ITR 148)**

Once the issue was considered and decided by the CIT(A) , the remedy of the revenue cannot lie in the invocation of the jurisdiction under Section 263.

4. **Commissioner of Income Tax Vs. Farida Prime Tannery (259 ITR 342)**

Held, it was clear from the express language of Section 263 of the Income Tax Act, 1961 that issues on which the Appellate Authority had already deliberated, the matter could not be reopened by way of revision- Answered the question against the Revenue and in favour of the Assessee.

5. *M/s Keshvi Developers Vs. ITO (ITA NO. 3832/MUM/2011)*
6. *Commissioner of Income Tax Vs. Mehsana District Co-operative Milk Producers Union Ltd. (263 ITR 645)*
7. *Commissioner of Income Tax Vs. Nirma Chemicals Works P. Ltd. (309 ITR 67)*
8. *Sonal Garments Vs. Joint Commissioner of Income Tax (95 ITD 363)*
9. *ITO Vs. Ch. Atchaiah (218 ITR 239)*

Where two views are possible and the AO adopts one view with which the CIT does not agree, the order cannot deemed to be erroneous or prejudicial to the interest of the Revenue even if there is a loss of the revenue.

1. **CIT Vs. Honda Siel Power Products Ltd. [(2010) 6 TAXMANN 15]**

In cases where the Assessing Officer adopts one of the courses permissible in law or where two views are possible and the Income-tax Officer has taken one view, the Commissioner of Income-tax cannot exercise his powers under Section 263 to differ with the view of the Assessing Officer even if there has been a loss of revenue. Of course, if the Assessing Officer takes a view which is patently unsustainable in law, the Commissioner of Income-tax can exercise his powers under Section 263 where a loss of revenue results as a consequence of the view adopted by the Assessing Officer.

2. CIT Vs Max India Ltd [2007] 295 ITR 282 (SC) : 213 CTR 266 (SC)
3. Jamnadas T. Mehta Vs. ITO [2002] 257 ITR (AT) 90 (Pune) (TM)
4. Patel Cotton Co.Ltd. Vs ACIT [1998] 64 ITD 273 (Mum)
5. Sobha Developers Ltd. Vs. Commissioner of Income Tax (ITA No. 339/Bang/2011)
6. Malabar Indusrtial Co. Ltd. Vs Commissioner of Income Tax (2000)

Powers u/s 263 cannot be invoked merely because the CIT had a different opinion on the matter.

1. **Ramakant Singh Vs CIT [2011] 8 ITR (Trib) 403 (Pat)**

It was held, that the questionnaire issued by the Assessing Officer covered all the points raised by the Commissioner in his show-cause notice and in the order passed under section 263 and on all these points, reply along with necessary details and evidence was furnished by the assessee before the Assessing Officer in the course of assessment proceedings and hence, it had to be accepted that the Assessing Officer had applied his mind on all these issues and even if such enquiry was inadequate in the opinion of the Commissioner, this did not give power to the Commissioner to pass order under section 263 merely because he had a different opinion on the matter. The order of the Commissioner under section 263 was not sustainable.

There is a difference between 'lack of enquiry' and 'inadequate inquiry'.

1. **ITO Vs. D G Housing Project Ltd. (343 ITR 329),**
2. **CIT Vs Hero Auto Ltd. (343 ITR 342)**

If there was inquiry, even inadequate, that would not by itself give occasion to the Comm0issioner to pass order under section 263 of the Act merely because he has a difference of opinion in the matter. It is only the cases of 'lack of inquiry' that such a course of action would be open.

The order of the AO cannot be branded as erroneous merely because, according to the Commissioner, the order should have been written more elaborately.

1. **CIT v. Gabriel India Ltd.,203 ITR 108 (1993)**

The Court observed that the Commissioner cannot initiate proceedings with a view to starting fishing and roving enquiries in the matters or orders which are already concluded. The power u/s.263 can be exercised only when the order is erroneous and due to this, prejudice has been caused to the interests of the Revenue. The order cannot be branded as erroneous by the Commissioner because according to him the order should have been written more elaborately.

Remedy Against order

If the order passed by CIT u/s 263 is not acceptable, the assessee can avail following remedies—

a) If the order suffers from prima facie mistake, an application u/s 154 for rectification can be filed to the CIT, or
b) If the order suffers from a **disputable mistake,** an appeal u/s 253 can be filed to the ITAT.

Section 264 Revision of Orders Prejudicial To The Interest Of Assessee.

- An assessee can file appeal against an order passed by the Assessing Officer to the CIT(A) or He can prefer an appeal to the CIT for revising the order passed by the AO.

Revision of Which Order?

The CIT can revise any order (other than to which section 263 applies) passed by a subordinate authority. The revision under this section can be done---

a) Either on own motion of CIT, or
b) On an application by the assessee

Time Limit For Submission of Application:

The Assessee can submit application for revision u/s 264 within 1 year from the date on which the order was communicated to him or the date on which he otherwise came to know of it, whichever is earlier. However CIT can admit belated application.

Time Limit For Submission of Application:

a) **Where the CIT takes action on his own motion—**

1 year from the date of the order sought to be revised.

b) **Where the assessee submits application for revision—**

1 year from the end of the financial year in which such application is submitted by the assessee. While computing this period of limitation following periods shall be excluded-

i) Period taken in giving an opportunity of re-hearing u/s 129
ii) Period during which proceeding u/s 263 are stayed by an order/ injunction of any court.

However, An order passed u/s 264 can be passed at any time in consequence of, or to give effect to, any finding or direction contained in an order of the ITAT, high Court or Supreme Court.

Powers of CIT:

The CIT can pass such order as he thinks fit, subject to the restriction that the order passed by him cannot be prejudicial to the interest of assessee-

- An order passed by CIT declining to interfere,
- An order in which neither favour nor unfavour is done by the CIT,
- An order in which both favour and unfavour are done by the CIT but the net result is favourable to the assessee or NIL.

Payment of Fee:

A fee of Rs. 500/- is to be paid.

No Revision In Some Cases:

CIT can't revise following orders u/s 264-

a) An order which is appellable to CIT(A)/ITAT cannot be revised so long the time within which appeal may be made, expires. However, the CIT can make revision if the assessee waives his right of appeal.

b) If the order has been made subject matter of appeal before CIT(A)/ ITAT, revisional powers of CIT come to an end. Thus CIT cannot make revision during the pendency or even after the disposal of appeal.

Remedy Against Orders U/s 264:

Since the order u/s 264 cannot be prejudicial to the interest of assessee, normally there is no need of filling further appeal etc. however, if the order is not acceptable, the assessee can avail following remedies—

a) If the order suffers from a **prima facie mistake**, an application u/s 154 for rectification can be filed to the CIT or

b) If the order suffers from a disputable mistake, the assessee can file a writ petition under article 226 of the constitution of India as decided by the supreme court in case of **Dwarka Nath V/s ITO 1965 57 ITR 349**.

Some Relevant Point

- Those cases which are not appealable before the CIT (A) can be referred by the assessee to the CIT for revision or modification.
- Even those orders which are not appealable before the Dy.CIT(A) or CIT(A), may be referred by the assessee to the CIT for seeking revision or modification. **[Dwarka Nath Vs ITO 57 ITR 349 (SC)].**
- A remedy u/s 264 is contemplated by the Legislature only to meet a situation faced by an aggrieved assessee who is unable to approach the appellate authorities for relief and has no other alternative remedy under the Act.
- The revisional powers conferred by Section 264 on the CIT are very wide. It is open to the CIT to entertain even a new ground, not urged before the lower authorities, while exercising revisional powers. -- **C.Parikh & Co Vs CIT 138 ITR p.689 (All).**
- Hindustan Aeronautics Ltd. Vs. CIT (2000) 243 ITR 808 (SC)-The CIT does not have power to revise an order u/s 264 if the same order has been made subject-matter of appeal to the ITAT, even though the relief claimed in appeal is different from the relife claimed in revision and irrespective of fact whether the appeal is filed by the assessee or by the revenue.
- CIT can interfere both on question of fact and law as his power is co-extensive with that of the original and the first appellate authority.
- Second time revision by CIT is not possible.
- The assessee should be given an opportunity of being heard by fixing a date of hearing even where a written submission is there.

- CIT's power u/s 264 is discretionary. CIT may even refuse to interfere in a case where, for reasons to be stated, the assessee has disentitled himself to get the relief at the revisional stage by his own conduct.

An order u/s 264 cannot be prejudicial to the interest of the assessee.

ACIT Vs M.V.Kenlucky, 60 ITD 492 (Pune - Trib)

In this case, on a petition U/s 264 by the assessee the CIT set aside the assessment, with a direction to make a fresh assessment. The AO completed the fresh assessment without any change in total income and tax originally assessed. The AO also initiated penalty proceedings U/s 271(1)(c), though no such penalty proceedings were initiated in the original order of the AO. The Hon. Tribunal held that order U/s 264 of the CIT, had indirectly resulted in the levy of penalty U/s 271(1)(c) and as such was prejudicial to the interest of the assessee. The cancellation of order U/s 271(1)(c) was accordingly held to be justified.

A new claim for deduction made by the assessee in revision petition is to be examined on merits

Rashtriya Vikas Ltd Vs CIT 99 CTR 68.

The CIT has the power U/s 264, to issue directions to the AO.

Mohammadi Begum Vs CIT 158 ITR 622 (AP)

The assessee can file a revision petition against an addition erroneously accepted by him.

The CIT cannot reject a petition for revision on the ground that the assessee itself had returned income which it claims in the revision petition as not its income. In such a situation the CIT is bound to apply his mind to the question whether the assessee is liable to be taxed in respect of that income. **[Pt. Sheonath Prasad Sharma Vs CIT 66 ITR p.647 (All)].**

Even an order passed in violation of the principles of natural justice can be corrected U/s 264.

Mohammadi Begum Vs CIT 158 ITR p.622 (AP)

Even an order wherein the principles of natural justice have been ignored, can be corrected in exercise of revisional powers U/s 264.

DIRECT TAX DISPUTE RESOLUTION SCHEME-2016

India image get affected in business community because of the long lasting litigations going on in Tax regime. To reduce the litigation and give a tax friendly regime and environment of distrust in addition to increasing the compliance cost of the tax payer and administrative cost of government. There are over 3 lac tax cases pending with the commissioner of Income tax (Appeal) with disputed amount of tax of about 5.5 lac Crores. In order to reduce the huge backlog of cases and to enable the Government to realise its dues expeditiously, a New Scheme "Direct Tax Dispute Resolution Scheme, 2016 has been introduced. This Scheme provides an opportunity to taxpayers to settle their past cases by making payment of the prescribed tax, interest or penalty in respect of any tax arrear or specified tax.

- *Scope of Scheme:-*

Appeal pending before the CIT(A) on 29/02/2016 under direct tax is covered under this scheme.

- *Eligibility:-*

A declarant can file a declaration in relation to tax arrears or specified tax in respect of which appeal is pending before the CIT(A).

a) Tax Arrear

Amount of tax, interest or penalty determined under the IT Act or WT Act, in respect of which appeal is pending before the CIT(A) or CWT(A) as on 29.02.2016. The pending appeal could be against an assessment order or a penalty order.

b) Specified Tax

Tax determined in consequence of or is validated by an amendment made with retrospective effect in IT Act or WT Act, for a period prior to the date of enactment of such amendment and a dispute in respect of which is pending as on 29.02.2016.

Under the Scheme, if the amount of disputed tax is

• Up to Rs.10 lakh, complete waiver from levy of penalty and from initiation of prosecution is provided on payment of assessed tax along with the interest.

• More than Rs.10 lakh, the declarant is required to pay only 25% of the minimum penalty leviable along with the due tax and interest.

In respect of penalty appeals, the declarant shall get waiver of the 75% of the penalty levied and immunity from prosecution. In respect of specified tax, the declarant gets complete waiver of/immunity from levy of penalty and immunity from prosecution.

- *Time limits for declaration*

Declaration can be made anytime on or after 1st June, 2016 to 31st December, 2016.

- *Form for declaration and Steps:-*

Step 1:- Declaration will be furnished in Form No.1 to the Commissioner of Income Tax in respect of "Tax Arrear" and "Specified Tax". In case of "Specified Tax" undertaking to voluntarily waive all rights in respect of specified tax, to seek or pursue any remedy or any claim in respect of specified tax in Form No.2 will also be filed with Form No.1.

Step 2:- After receipt of declaration the jurisdictional Principal CIT/ CIT will issue an Certificate of intimation in Form-3 to the declarant within 60 days from the receipt of declaration. In this intimation CIT direct the declarant to pay the assessment year wise tax arrears/ specified tax amount within 30 days from the date of receipt of this certificate.

Step 3:- The declarant shall furnish Intimation of payment alongwith Challan details to the jurisdictional Principal CIT/CIT in Form-4 within 30 days from the date of receipt of certificate in form No.3. Any amount paid in pursuance of declaration shall not be refundable.

Step 4:- After receipt Intimation of payment in form No.4 jurisdictional Principal CIT/CIT shall issue a certificate in Form-5 for full and final settlement of "Tax Arrears" and in case of "Specified Tax" certificate will be issued in Form No.6. There is no time limit is fix for issuing certificate.

- *Amount to be Paid & Immunity:-*

Category	*Amount To be Paid*	*Immunity*
Tax Arrears	1. *On Assessment order : Tax + Interest (up to date of assessment).* 2. *If disputed Tax > Rs. 10 Lacs: 25% of minimum penalty is leviable.* 3. *On Penalty Order: 25% of Minimum penalty leviable*	a) *Prosecution and Penalty proceedings* b) *Interest leviable after the date of assessment* c) *Penalty for remaining 75%*
Specified Tax	4. *only payment of disputed tax*	d) *Prosecution proceedings* e) *Penalty and Interest*

- *Scheme shall not apply in following cases:-*
  1) Cases where prosecution has been initiated before 29.02.2016.
  2) search or survey cases where the declaration is in respect of tax arrears
  3) cases relating to undisclosed foreign income and assets

4) cases based on information received under DTAA u/s 90 or 90A where the declaration is in respect of tax arrears

5) Person notified under Special Courts Act, 1992

6) Cases covered under Narcotic Drugs and Psychotropic Substances Act, Indian Penal Code, Prevention of Corruption Act or Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974

Amount paid not refundable

– It has been provided in Section 203 that any amount paid in pursuance to declaration shall not be refundable under any circumstances.

Effect of false declaration

– Sub-section (5) of Section 200 provides that where any material particular furnished in the declaration is found to be false or the declarant violates any of the conditions of the scheme or the declarant acts in a manner which is not in accordance with the undertaking given by him under sub-section (4) of Section 200, it shall be presumed that as if the declaration was never made under the scheme and all the consequences under the Income-tax Act or Wealth-tax Act, as the case may be, will follow and appeal or other proceedings shall be deemed to have been revived.

Whether declaration can be made where tax demand stands full or partly paid?

– The pre-condition for filing the declaration is that there should be 'tax arrears' or 'specified tax' and dispute should be pending as on 29-2-2016. The term 'tax arrears' as defined in Section 198(1)(h) refers to the amount of tax, interest or penalty determined under the Income-tax Act or Wealth-tax Act. It does not provide that there should be tax outstanding either on 29-2-2016 or on the date of declaration. Similarly, 'specified tax' defined u/s. 198(1)(g) refers to determination of tax consequent upon retrospective amendment relating to period prior to the date of amendment. There is no condition provided that there should be outstanding tax payable as on the date of declaration. In this connection reference can also be made to provisions of sub-section (1) of Section 201 of the Finance Bill, which provides that Designated Authority on receipt of the declaration shall determine the amount payable by the declarant in accordance with the scheme setting forth therein the particulars of tax arrears or specified tax, as the case may be, and the sum payable after such determination. In other words, in the certificate to be issued by the Designated Authority, after determining the amount payable under the scheme and giving particulars of tax arrears and specified tax, shall also determine the amount payable after such determination. It would mean that it is not necessary that always there should be a positive sum payable after determination, there may be nil amount payable after such determination on account of tax had already been paid by the declarant.

– Similar is the position in regard to filing of declaration in a case where appeal pending relates to penalty. In such a case the assessee is liable to pay penalty to the extent of 25% of minimum penalty leviable whereas the declarant might have already made payment against demand of penalty more than 25% of the amount.

– It is well-known that after raising demand the department pressurizes for the payment of the same and stay is granted very reluctantly or for a part of the demand. As a result in large number of cases amount of demand stands paid notwithstanding that assessee is disputing the liability in appeal.

– The important question for consideration is that if for any reason the Government's intention is to allow benefit of scheme only in the cases where demand is outstanding it would be unfair to the assessees who have already made payment of tax either under the pressure of the department or otherwise. Therefore, the benefit of the scheme should be available to all the assessees irrespective of the fact whether the demand has been paid by the assessee or not.

– If reference is made to Kar Vivad Samadhan Scheme, 1998, there it was specifically provided that the scheme was applicable with reference to unpaid tax as on the date of declaration and on that basis, disputed income was to be determined on which the amount payable under the scheme was to be determined. Under the above scheme benefit was

granted not only in respect of penalty and interest, but also in regard to part of the tax payable. Therefore, it was restricted to the disputed income determined with reference to unpaid tax. In the present scheme basically the waiver is being granted in respect of penalty, partly or fully. Therefore, benefit should be available to all the assessees where disputes are pending, which will reduce the litigation at the cost of waiver of penalty.

– If declaration can be filed even in a case where either there is no demand or the assessee has made payment which is more than the amount payable as per the scheme, the assessee will be entitled to refund of the excess amount paid by the assessee.

How the amount payable under the scheme is to be determined where the disputed tax is less than the tax payable as per assessment?

– Section 199 of the Finance Bill provides that in a case where disputed tax does not exceed Rs. 10 lakh, the assessee has to pay whole of the disputed tax and interest on disputed tax and where disputed tax is more than Rs.10 lakh, he has to pay disputed tax, interest thereon and also the penalty to the extent of 25%. There may be cases where the AO has made certain disallowances in the assessment order in respect of which tax demand has been raised but the assessee might not have challenged all the additions / disallowances in appeal. Accordingly, there can be cases where tax arrears might be more than Rs. 10 lakh but disputed tax does not exceed Rs. 10 lakh. The issue will arise in such a case, how the liability for tax, interest or penalty is to be determined. It may be that declaration will be effective only in respect of disputed income and disputed tax, which is a subject matter of appeal and liability with reference to other additions is to be dealt with separately. Position, however, needs to be clarified in this regard.

Liability for penalty payable in a case where penalty proceedings have not been initiated?

– In the assessment order the AO might not have initiated penalty proceedings. In such a case no penalty will be leviable under the law and therefore, the assessee will not be liable to pay any amount of penalty. The position needs to be clarified by the Govt.

Whether the amount paid under the scheme will be refundable in case declaration is presumed to be non-est?

– Section 200(5) provides for certain circumstances in which it will be presumed that as if the declaration was never made under the scheme and consequently all proceedings will revive. Section 203 of the Finance Bill provides that any amount paid pursuant to any declaration shall not be refundable under any circumstances. Though it goes without saying that once it has been presumed that as if no declaration has been filed the amount paid by the assessee is to be considered as payment against the outstanding tax liability, the position, however, needs to be clarified.

Whether the assessee can file a declaration in respect of disputed tax as per the assessment made other than pursuant to search for the same year?

– Clause (i) of sub-section (a) of Section 205 of the Finance Bill provides that the scheme shall not apply in respect of tax arrears or specified tax "relating to an assessment year in respect of which assessment has been made u/s. 153A or 153C". As per provisions of Income-tax Act an assessment might have been made in case of an assessee in the normal way and certain additions might have been made. Thereafter, search would have taken place resulting in another assessment order passed u/ss. 153A and 153C of the Act. Since the word used in the clause is "assessment year" as per the reading of the clause the assessee will be totally excluded from availing the scheme for that particular year notwithstanding that there may be two orders of assessment, one in the normal course and another pursuant to the search. The position in this regard needs to be clarified.

Stage of withdrawal of litigation

– In terms of Section 200(2) appeal pending before CIT(A) shall be deemed to be withdrawn on filing declaration in case of tax arrears. In a case of specified tax litigation has to be withdrawn before filing declaration. Principally appeal etc. should be deemed to be withdrawn only on passing the order by the Designated Authority on payment of tax as per the scheme. This is what has been provided in the scheme for Indirect Tax also in Section 213(1). An undertaking can be taken in declaration form that the declarant will withdraw the appeal etc. non acceptance of declaration.

Whether the assessee will not be able to claim immunity from penalty and prosecution in respect of assessment orders passed henceforth till AY 2016-17?

– Though this particular issue is not directly related to the scheme under reference, the issue, however, is arising for the reason that a new Section 270AA is proposed to be inserted in Income-tax Act providing an option to the assessee that he can make payment of tax and interest liability and can file an application before the AO to grant immunity from imposition of penalty and initiation of prosecution proceedings and the AO will grant the immunity and the assessee will not file the appeal in such a case before the CIT(A). The aforesaid section is in line with the scheme being inserted to reduce the litigation. The important issue, however, in this regard is that present scheme is applicable in respect of appeals pending before CIT(A) as on 29-2-2016. New Section 270AA will come into force w.e.f. 1-4-2017 and will apply to AY 2017-18 onwards. Provisions of old section 271(1)(c) will be applicable up to AY 2016-17. Accordingly, there is a gap, which appears to be unintentional. The Govt. has, accordingly, to clarify the position and if need be necessary amendment should be made in the Finance Bill.

Circular No.33 of 2016

Question No.1: In a case an appeal was pending before CIT (Appeals) as on 29.02.2016. However, before making declaration under the Scheme the appeal is disposed of by CIT (Appeals). Is the assessee eligible to avail the Scheme?

Answer: In such a case where the appeal was pending before CIT (Appeals) as on 29.02.2016 and the CIT (Appeals) has already disposed of the same before making the declaration, the declaration under the Scheme cannot be filed.

Question No.2 : In a case where the appellant has filed a declaration under the Scheme or has intimated the CIT(Appeals) his intention to file declaration under the Scheme, whether the CIT(Appeals) will dispose-off the appeal?

Answer: The CIT (Appeals) have been instructed vide letter F.No.279/Misc./M-30/2016 dated 30.3.2016 that appeals where the appellants have expressed their intention to avail the Scheme should be kept pending. Further, vide letter F.No.279/Misc./M-74/2016-ITJ dated 19.07.2016, the designated authority have been instructed to obtain an endorsement from CIT(Appeals) concerned that the appeal for which declaration has been filed was pending on 29.2.2016 and has not yet been disposed. Therefore, in a case where the declaration has been made under the Scheme or an intention to avail the Scheme has been made by the appellant, the CIT (Appeals) shall not dispose the pending appeal.

Question No.3: Appeal against quantum as well as penalty under section 271(1)(c) is pending before CIT(Appeals). If the assessee files a declaration in respect of the quantum appeal under the Scheme, what would be the fate of penalty appeal?

Answer: As per the Scheme, in a case where disputed tax in quantum appeal is more than Rs.10 lakh, the declarant has to pay the disputed tax, interest and 25% of minimum penalty leviable. Further, in a case where the disputed tax in quantum appeal does not exceed Rs.10 lakh, the declarant is required to pay only the disputed tax & interest and there is no requirement for payment of any amount in respect of penalty leviable. Section 205(b) of the Act provides immunity from imposition or waiver of penalty under the Income-tax Act or the Wealth-tax Act in respect of tax arrear covered in the declaration to the extent the penalty exceeds the amount of penalty referred to in section 202(I) of the Act. Hence, in both the situations (i.e. whether disputed tax in quantum appeal exceeds Rs.10 lakh or not), where a valid declaration under the Scheme is made in respect of quantum appeal, the appeal against penalty levied under section 271(1)(c) of the Income-tax Act, relating to the quantum appeal pending before the Commissioner (Appeals) shall be deemed to be withdrawn and the penalty or the balance amount of penalty, as the case may be, shall be deemed to be waived.

Question No.4: Section 203(2) reads that consequent to the declaration in respect of tax arrear, the appeal pending before Commissioner (Appeals) shall be deemed to be withdrawn. From what point of time does the provision become operative?

Answer: The appeal pending with Commissioner (Appeals) shall be deemed to be withdrawn from the date on which the certificate under section 204(1) is issued by the designated authority.

Question No.5: The addition made in assessment has the effect of reducing the loss but penalty has been initiated under section 271(1)(c) of the Income-tax Act. Is the assessee eligible to avail the Scheme?

Answer: The Scheme is applicable to cases where there is disputed tax. Since in the case of reduction of loss, there is no disputed tax the assessee shall not be eligible to avail the Scheme. However, if an appeal is pending before Commissioner (Appeals) in respect of penalty order framed as a result of variation in quantum loss, the declarant may file a declaration in respect of such penalty order.

Question No.6: In a case the time period specified under section 249 of the Income-tax Act for filing of appeal expired on 29.2.2016. The assessee filed an appeal in this case on 5.4.2016 with a request to condone the delay in filing of appeal. The Commissioner (Appeals) condoned the delay in filing of the appeal. Is the Scheme available to the assessee in such a case?

Answer: In condonation cases, a declarant shall be eligible for the Scheme, if:
(i) the time limit for filing of appeal under section 249 of the Income-tax Act, 1961 has got barred by limitation on or before 29.02.2016;
(ii) the appeal and condonation application has been filed before Commissioner (Appeals) before 01.06.2016; and
(iii) the delay in filing of such appeal is condoned by the Commissioner (Appeals)
Hence, in the present case the Scheme is available to the assessee.

Question No.7: In a case the Commissioner (Appeals) has given a notice of enhancement. Is such a case eligible for availing the Scheme?

Answer: A case where notice of enhancement has been received by the declarant before the date of commencement of the Scheme i.e. 01.06.2016 shall not be eligible for the Scheme.

Question No.8: A survey was conducted during F.Y. 2013-14. Incriminating documents relating to assessment year 2011-12 were found and assessment under section 147 of the Income-tax Act for the said year was made based on these documents and other enquiries conducted. Is the assessee's case for A.Y. 2011-12 which is pending with Commissioner (Appeals) eligible for the Scheme?

Answer: As per section 208 of the Act, the Scheme shall not be available for assessment or reassessment on which survey conducted under section 133A of the Income-tax Act has a bearing. Hence, in the present case, A.Y. 2011-12 is not eligible for the Scheme.

Question No.9: In a case, appeal against penalty order under section 271(1)(c) is pending before Commissioner (Appeals) and appeal against quantum addition is pending with higher appellate authority. As per the Scheme, the amount payable is 25% of the minimum penalty leviable and the tax and interest payable on the total income finally determined. What should be construed as 'total income finally determined' for computing the quantum of tax, interest and penalty payable under the Scheme? Further, what would be the effect of any variation in quantum addition as a result of appellate order(s) passed subsequent to filing of declaration?

Answer: In case of an appeal relating to penalty under section 271(1)(c), the amount payable under the Scheme is 25% of the penalty amount and also the tax and interest payable on the total income finally determined. For this purpose the total income finally determined shall be the total income as determined after giving effect to the last appellate order passed on or before the date of filing declaration under the Scheme. Any variation to the total income as a result of any appellate order passed subsequent to the date of declaration shall be ignored for the purposes of computing the amount of penalty payable under the Scheme.

Question No.10: Where certain income has been charged to tax in the hands of two different persons or where it has been charged to tax in the case of same person in two different assessment years, one on substantive basis and the other on the protective basis, will the declarant or the other person get advantage in respect of additions made both substantively and protectively?

Answer: The assessees are advised to make declarations in cases or for assessment years where the additions are made on substantive basis. The protective demand is not subjected to recovery unless it is finally upheld. Once the declaration in a substantive case or year is accepted, the tax arrear in protective case/year would no longer be valid and will be rectified by suitable orders in the normal course.

Question No.11: By filing declaration under the Scheme for one assessment year, does the taxpayer forego his right of appeal on the same issue in another assessment year?

Answer: No. The order under the Scheme does not decide any judicial issue. It only determines the sum payable under the Scheme with reference to tax arrear or specified tax, as the case may be. It only provides for a dispute resolution mechanism in respect of cases for which declaration has been made.

Question No.12: The declarant has not paid the tax payable under the Scheme within 30 days of the order under section 204(1) for any reason including the non-realisation of the cheque presented to the bank. Will the declarant be eligible for the relief under the Scheme?

Answer: No. The tax payable under the Scheme should be paid to the credit of the Government on or before the due date as specified in the Scheme. The assessees are advised to pay the tax well on time so as to avail the relief under the Scheme.

Question No.13: There is no time limit specified for intimating the payments made by the declarant in accordance with the certificate issued in Form-3. Further, there is also no time limit specified for issuance of order under section 204(2) of the Act by the designated authority. Please clarify?

Answer: The declarant shall intimate the fact of payment along with the proof of the same to the designated authority within one month from the date on which time limit for making payment under the Scheme expires. The designated authority shall issue the order under section 204(2) of the Act within one month from the end of the month in which intimation regarding payment is received in Form-4 from the declarant.

Question No.14: Whether refund will be granted in cases where the assessee has already paid the penalty amount in full or in part while the appeal is still pending at CIT(A) stage and the assessee opts for this Scheme?

Answer: As per section 202(I)(b) of the Scheme, in case of pending appeal related to penalty, 25% of the minimum penalty leviable alongwith tax and interest on the total income finally determined is required to be paid. Therefore, if an assessee who has already paid an amount over and above the amounts referred to in section 202(I)(b) opts for the Scheme, he shall be eligible for refund of the excess payment already made. However, the declarant shall not be eligible for claim of interest on such refund under section 244A of the Income-tax Act, 1961.

Thanking You.