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

BEFORE SRI MAHAVIR SINGH, JM

ITA No.6119/Mum/2016

(A.Y:2010-11)

Shri Rangji Realties Pvt. Ltd. (Formerly known as Shri Ranghi Investment Pvt. Ltd.) 1-B, 1st Floor, Court Chambers, 35, SIR Vitthaldas Thackersey Marg, New Marine Lines, Churchgate. Mumbai- 400 020 **PAN No. AAICS5225J**	Vs.	**Income Tax Officer-1(3)(1)** 5th Floor, Aayakar Bhavan, M.K. Road, Mumbai-400 020
Appellant	..	**Respondent**

Assessee by	..	Shri Vijay Mehta, AR
Revenue by	..	Shri Rakesh Ranjan, DR

Date of hearing	..	**05-06-2017**
Date of pronouncement	..	**09-06-2017**

O R D E R

PER MAHAVIR SINGH, JM:

This appeal by the assessee is arising out of the order of CIT(A)-3, Mumbai, in appeal No. CIT(A)-3/ITO 1(3)(1)/IT-63/2015-16 dated 29-08-2016. The rectification order passed by the ITO Ward-1(3)(1), Mumbai for the A.Y. 2010-11 vide order dated 19-05-2015 under section 154 of the Income Tax Act, 1961 (hereinafter 'the Act').

2. The only issue in this appeal of assessee is against the order of CIT(A) confirming the action of the AO in rectifying the assessment order passed by the AO under section 154 of the Act and therefore not allowing credit for TDS. For this assessee has raised following two grounds: -

> *"1. On the facts and circumstances of the case and in law, the assessment order passed by the AO under section 154 of the Income Tax Act, 1961 ('the Act') is bad in law and therefore needs to be quashed.*

> *2. On the facts and circumstances of the case and in law, the ld. CIT(A) had erred in not allowing the TDS credit of Rs 3,16,001/- as claimed by the appellant."*

3. Briefly stated facts are that the assessee company is an investment company having investment in shares, mutual funds and immovable properties etc. The assessee filed its return of income for the AY 2010-11 on 14-10-2010 and assessment was finally completed under section 143(3) of the Act by the AO vide order dated 03-12-2012. Later on, the AO noticed that the assessee company has offered income under the head of income from house property after deducting the amount of unrealized rent under Rule 4 of the Income Tax Rules 1962 (hereinafter, the rules) and claimed TDS credited on both, realized as well as unrealized rent. The AO restricted the allowances of TDS credited to the extent of actual amount of rent received. The AO rectified this mistake under section 154 of the Act. Aggrieved, assessee preferred the appeal before CIT(A), who also confirmed the action of the AO by observing in Para 7.6 and 7.7 as under: -

> *"7.6 I have carefully considered the rival submissions. The AO has rightly given the proportionate claim of TDS credit. Though the AU has not mentioned the relevant provision, but his case is well sounded with the provisions of section 199(3) read with Rule 37BB (3) (i)/(ii). Accordingly, the provision of credit for Tax Deducted at Source and paid to the central government shall be given for the AY for which such income is available. Since the unrealized rent has not been assessed to tax, the TDS deducted on such rent is not to be claimed as tax deducted and paid to the central government.*

7.7 The order u/s 154 of the IT Act read with order 143(3) dated 03.12.2012 is not clear as whether the AO has examined the conditions laid down in section 23 (1) read with Rule-2 have been fulfilled by the appellant Therefore, the AO is directed to re-examine and re-compute the gross rental income of the appellant and allow deduction u/s 23(1) read with rule (4) only if the appellant is fulfilling the conditions prescribed in the said rule. Failure to which, the appellant is not entitled to such deduction on account of vacancy allowance except the standard deduction u/s 24[1](a) of the IT Act. In view of the above facts and circumstances of the case, the Grounds raised do not succeed and hence dismissed on the above direction to the AO."

Aggrieved, now assessee is in second appeal before me.

4. I have heard the rival contentions and gone through the facts and circumstances of the case. The learned counsel for the assessee first of all drew my attention to the computation of income filed by assessee along with return of income for the relevant AY 2010-11 and the computation of income contains income from house property which is as under: -

I. **Income from House Property**			
Gross Rent		63,56,768	
Less : Unrealised Rent (FY 09-10)	37,25,658		
TDS Certificate Recd (474001-79000)	3,95,001	33,30,657	
		30,26,111	
Less : Deduction @ 30% u/s 24(1)(a)		9,07,833	21,18,278

II. Income under the Head Business			
Net Profit as per Profit & Loss A/c.			17,97,112
Add : Items disallowable or considered seperately			
Disallowance u/s 14A		60,000	
Society Charges		83,100	
STT on Investments		18,674	1,61,774
			19,58,886
Less : Items allowable as per I.T. Act or considered seperately			
Dividend, considered separately		7,74,483	
Rent, considered separately		13,67,669	21,42,152
Income from business and profession			**(1,83,266)**
IV Income from Other Sources			
Dividend		7,74,483	
Less : Exempt u/s 10(35)		7,74,483	-
Gross Total Income			**19,35,012**
Less : Deduction U/S 80G			-
Total Income			**19,35,012**
Tax @30%		5,80,504	
Add : Surcharge :		-	
		5,80,504	
Add : EC & SHEC @ 3%		17,415	
Total Tax Payable	**(A)**		**5,97,919**
Calculation of Tax under MAT U/S 115JB			
Net Profit		17,97,112	
Less : Dividend Exempt		7,74,483	
Book Profit		10,22,629	
MAT @ 15.45%	**(B)**	**1,57,996**	
Tax Payable (A) or (B) whichever is higher			**5,97,919**
Less : Advance Tax		5,00,000	
Tds Receivable		5,86,412	10,86,412
			(4,88,493)
Add : Interest			
- u/s 234C		207	
- u/s 234B		0	207
Net Tax Payable/(Refundable)			**(4,88,286)**

5. In the computation, the assessee claimed full credit of TDS of Rs. 5,86,412/- but the AO while acting under section 154 of the Act allowed credit of Rs. 2,70,411 on the rental income received actually. The learned counsel for the assessee stated that assessee has offered a total rental income of Rs. 63,56,768/- but claim deduction of unrealized rent for FY

2009-10 relevant to this AY 2010-11 at Rs. 37,25,658/-. The learned counsel for the assessee admitted that it has not received partial rent from one party M/s Sports and Leisure Apparel Ltd. ('the tenant') to the extent of Rs. 33,30,657/- out of total rent of 48,00,000/-. It was claimed that the assessee has claimed deduction on account of unrealized rent amounting to Rs. 33,30,657/- under the provisions of section 23(1) of the Act read with Rule 4 of the Rules. The learned counsel for the assessee first of all stated that this is highly debatable issue and it cannot be rectified under section 154 of the Act. For this proposition the learned Counsel for the assessee relied on the decision of Hon'ble Supreme Court in the case of T.S. Balram, ITO vs. Volkart Bros. (1971) 82 ITR 50 (SC), wherein it is held as under: -

> *" 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 In Satyanarayan Laxminarayan Hegde and ors. v. Millikarjun Bhavanappa Tirumale(1) this Court while Spelling out the scope of the power of a High Court under Art. 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 Sidhamappa v. Commissioner- of*

> *Income-tax, Bombay(2). The power of the officers mentioned in S. 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 66 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."*

6. Apart from this argument, the learned counsel for the assessee also argued that on merits also the assessee is entitled to credit of entire amount of TDs being offered as income but claim this as deduction in view of provisions of section 23(1) of the Act read with rule 4 of the rules. The learned Counsel for the assessee also relied on the decision of co-ordinate bench of this Tribunal in the case of Chandrashekar Agarwal (2016) 157 ITD 626 (Del).

7. I have gone through the facts and circumstances of the case and find that the facts are not in dispute that the assessee has disclosed rental income but claimed deduction of unrealized rent under section 23(1) read with rule 4 of the Rules. I find that the Unrealized rent is deduction which is claimed u/s 23(1) of the Act, read with Rule 4 of the Rules, from the total rental income offered during the year. The unrealized rent is not an exempt income. As the total rental income (including unrealized rent) is duly offered to tax under the head 'Income from House Property', corresponding TDS credit needs to be allowed. There similar instances, where although the deduction is allowed with respect to total income offered during the year, still the claim of TDS with

respect to such deduction claim is duly allowable under the Act i.e. TDS credit is allowed on deduction of Income under u/s 8OIA, 8OIB, 80IC of the act, etc and also TDS credit is allowed on bad debts claimed u/s 36(1)(vii) of the Act. Accordingly I am of the view that that the Unrealized rent is duly offered to tax by the assessee at first instance, and then the same is claimed as deduction from Rental Income u/s 23(1) of the Act r.w. Rule 4 of the rules. I also find that that the TDS amount, which corresponds to claim of unrealized rent is duly offered to tax the entire Amount of TDS (of Rs. 5,86,412/-, including TDS on unrealized rent) as Rental income for the year by the assessee u/s 198 of the Act which reads as under: -

> "Section 198. All sums deducted in accordance with the foregoing provisions of this Chapter shall, for the purpose of computing the income of an assessee, be deemed to be income received."

In this regard, Ld Counsel refered to Section 199 of the Act r.w. Rule 37BA for claim of TDS credit, which reads as under:-

> Credit for tax deducted
>
> "Section 199. (1) Any deduction made in accordance with the foregoing provisions of this Chapter and paid to the Central Government shall be treated as a payment of tax on behalf of the person from whose income the deduction was made, or of the owner of the security, or of the depositor or of the owner of property or of the unit-holder, or of the shareholder, as the case may be.
>
> (2) Any sum referred to in sub-section (IA) of section 192 and paid to the Central Government shall be treated as the tax paid on behalf of the person in respect of whose income such payment of/ax has been made.

(3) The Board may, for the purpose of giving credit in respect of tax deducted or tax paid in terms of the provisions of this Chapter, make such rules: as may be necessary, in including the rules for the purpose of giving credit to a person other than those referred to in sub-section (1) and sub section (2) and also the assessment for which such credit may be given.'

"Rule 37BA. (1) Credit for tax deducted at source and paid to the Central Government in accordance with the provisions of Chapter XVII, shall be given to the person to whom payment has been made or credit has been given (hereinafter referred to as deductee) on the basis of information relating to deduction of tax furnished by the deductor to the in conic-tax authority or the person authorised by such authority.

(2) if,) Where under any provisions of the Act, the whole or any part of income on which tax has been deducted at source is assessable in the hands of a person other than the deductee, credit for the whole or any pan of the tax deducted at source, as the case may be, shall be given to the other person and not to the deductee:

Provided that the deductee files a declaration with the deductor and the deductor reports the tax deduction in the name of the of/jet person in the information relating to deduction of tax referred to in sub-rule (1).

(ii) The declaration filed 19 the deductee under clause (i) shall contain the name, address, permanent account number of the person to whom credit is to be given, payment or credit in relation to which credit is to be given and reasons for giving credit to such person.

(iii) The deductor shall issue the certificate for deduction of tax at count in the name of the person in whose name credit is shown in

the information relating to deduction of tax referred to in sub-rule (I) and shall keep the declaration in his safe custody

(3) (i) Credit for tax deducted at source and paid to the Central Government, shall be given for the assessment year for which such income is assessable.

(ii) Where tax has been deducted at source and paid to the Central Government and the income is assessable over a number of years. credit for tax deducted at fount shall be allowed across those years in the same proportion in which, the income is assessable to tax-.

(4) Credit for tax deducted at source and paid to the account of the Central Government shall be granted on the basis of— (i) the information relating to deduction of tax furnished by the duductor to the income tax authority or the person authorized by such authority; and (ii) the information in the return of income in respect of the claim for the credit, subject to verification in accordance with the risk management strategy formulated by the Board from time to time.

The assessee duly fulfills all the conditions as laid down in section 198 r.ws. 199 r.w. Rule 378A of the Act. I find that TDS had been deducted and paid to the Central Government by the deductee and Payment/ Credit of Rent Income has been included in the accounts of the assessee. The deductor had duly filed requisite TDS returns as per Rules and also issued TDS certificate to the assessee and the same was furnished to the AO. Amount of TDS claimed, corresponding to claim of unrealized rent, is duly offered to tax as income of the assessee, in view of section 198 of the Act and also assessed by the AO.

8. I also find that this issue is covered by the decision of co-ordinate bench of this tribunal in the case of Chander Shekhar Aggarwal Vs. ACIT (2016)157 ITD 626 (Delhi- Trib), wherein it is held as under:- (from head notes)

“Facts - The assessee adopted cash method of accounting. In the return filed for the assessment year 2011-12, he claimed credit of tax deducted at source [IDS] of Its. 80 laths. The Assessing Officer allowed the credit of 'IDS of Its. 71 labs. The Commissioner (Appeals) upheld the order of the Assessing Officer. She held that the credit of 'IDS was to be allowed in terms of rule 37BA(2). As such, the credit would be allowable on pro mu basis in the year in which the certificate was issued and also in future where balance of such income was found to be assessable as per the mandate of section 199. Any amount which had not been assessed in any year but referred in the TDS certificate could not be claimed under section 199.

Held by Tribunal as under -"A reading of the aforesaid will make if apparent that Rule 37BA(1) of Act provides rules relating to have credit for the purpose of section 199 of the Act as is provided in section 199(3) of the Act. Rule 37BA(3)(i) of Act provides that credit for tax deducted at source and credited to the account of Central Government shall be given for the assessment year for which, such income is assessable. Thus, if the said rule is read, it is clear that the assessee is entitled to get mdl of the tax deducted at source once such income is included in his income. The admitted facts of the case of the appellant is that the tax deducted at source has been offend as income by the appellant in his return of income and therefore, having regard to even the rules, the assessee is entitled to credit of the tax deducted at source. The assessee before the CTT(A) had provided an illustration whereby it was submitted that assuming an assessee follows cash system of accounting and raises an invoice of Rs. 100/- for the services rendered in Financial Year 2010-11 on this client and the said client deposits TDS of Rs. 10/- to the credit of the account of assessee and issued a certificate of TDS to the asses see and thus, it was submitted that an amount of Rs. 10/- was since

deducted in respect of the assessee. the said sum is income of assessee which is assessable to lax. It was submitted that once an income is assessable to tax, the assessee is eligible for credit despite the fact that remaining amount would be taxable in the succeeding years. We are in an agreement with the above submission that the TDS deducted by the deductor on behalf of the assessee and objected as income is to he allowed as audit in the year of deduction of tax deducted at source. Ride 37BA of the Act provides that credit for TDS should he allowed in the year in which income is assessable. Further clause (ii) of Rule 37BA(3) of Act provides that where tax has been deducted at source paid to the Central Government and the income is assessable over a number of years, credit for tax deducted at source shall be allowed across those years in the same proportion in which the income is assessable to tax. In our considered opinion this rule is only applicable where entire compensation is received in advance but the same is not assessable to tax in that year but is assessable in a number of and however, such rule has no applicability. where assessee follows cash system of accounting. This can be supported from the illustration that suppose as assessee who following cash system of raises an invest of Rs. 100/ - in respect of which deductor deducts TDS of Rs. 10/ - and deposits to the account of the Central Government. Accordingly, the assessee would offer an income of Rs. 10/ - and claim TDS of Rs. 10/-. I however in the opinion of the revenue, the assessee would not be entitled to credit of entire TDS of Kr. 10/. but would be entitled to proportionate credit only. Now let us assume that Rs. 90/. is never paid to the assessee by the deductor. In such circumstances Rs. 9/- which was deducted as TDS by the deductor would never be available for credit to the assessee through the said sums stand duly deposited to the account of Central Government. Rule 37BA (3) of the Act cannot be interpreted so as to say that TDS deducted at source and deposited to the account of the central Government

is though income of the assessee but is not eligible for credit of tax in the year when such TDS was offered as income. This view is otherwise also not in accordance with the provisions contained in section 198 and 199 of the Act. The proposition as laid out by the CIT('A) and learned DR before us therefore cannot be countenanced in arriving at the above conclusion, we also derive support from the decision of Visakhapatnam Bench in the case of Peddu Srinivasa Rao [IT Appeal No. 234 (Vizag.) of 2009, dated 03-03-2011]

Conclusion - For the reasons stated above, the claim of the assessee is allowed in as much as it is held that the assessee would be entitled to credit of the entire TDS offered as income by the assessee in his return of income. The grounds raised are therefore, allowed."

In my considered opinion, assessee's action is in accordance with provisions of section 199 of the Act and the assessee is eligible for seeking credit of the TDS amount. Hence, I set aside the order of the authorities below and decide the issue in favour of the assessee. However, this issue is highly debatable and cannot be acted upon by the revenue.

9. **In the result, the appeal of assessee is allowed.**

Order pronounced in the open court on 09-06-2017.

Sd/-

(MAHAVIR SINGH)
JUDICIAL MEMBER

Mumbai, Dated: 09-06-2017
Sudip Sarkar /Sr.PS

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT (A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//
BY ORDER,

Assistant Registrar
ITAT, MUMBAI