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

BEFORE SHRI SANJAY ARORA, ACCOUNTANT MEMBER AND
SHRI SANJAY GARG, JUDICIAL MEMBER

MA No.81/M/2016
(Arising out of ITA No.2367/M/2011 date of decision: 14.08.2013)
Assessment Year: 2003-04

MA No.82/M/2016
(Arising out of ITA No.3426/M/2010 date of decision: 14.08.2013)
Assessment Year: 2004-05

MA No.83/M/2016
(Arising out of ITA No.3425/M/2010 date of decision: 14.08.2013)
Assessment Year: 2005-06

MA No.84/M/2016
(Arising out of ITA No.3424/M/2010 date of decision: 14.08.2013)
Assessment Year: 2006-07

MA No.85/M/2016
(Arising out of ITA No.8143/M/2011 date of decision: 14.08.2013)
Assessment Year: 2007-08

MA No.86/M/2016
(Arising out of ITA No.458/M/2012 date of decision: 14.08.2013)
Assessment Year: 2008-09

M/s. Prolific Consultancy Services Pvt. Ltd., (now known as Prolific Ventures Pvt. Ltd.), Wilson House, Nagardas Road, Andheri (E), Mumbai – 400 069 **PAN: AACCP5402E**	Vs.	Income Tax Officer, Ward 8(2)(4), Mumbai
(Appellant)		(Respondent)

Present for:
Assessee by : Shri Firoz B. Andhyarujina, A.R.
Revenue by : Shri Pavan K. Beerla, Sr. A.R.

Date of Hearing : 26.08.2016
Date of Pronouncement : 19.09.2016

O R D E R

Per Sanjay Garg, Judicial Member:

The above captioned miscellaneous applications have been moved by the assessee under section 254(2) of the Act pleading that an error apparent on record has occurred in the common order dated 14.08.13 passed in relation to ITA Nos.2367/M/2011 and others as mentioned above relating to assessment years 2003-04 to 2008-09. The issue involved in the above stated appeals was as to the rental income earned by the assessee from sublease of the property which was taken on lease by the assessee whether to be assessed under the head "income from house property" or as "business income" of the assessee. The Tribunal, after considering the relevant submissions of the parties, vide order dated 14.08.13 held that the rental income earned by the assessee from sublease of the premises was to be assessed as income from 'house property'. However, the Tribunal had accepted the contention of the assessee that the income in relation to any services provided by the assessee was to be assessed as 'income from other sources'.

2. Now through the present miscellaneous petitions, the assessee has come with the pleading that in the light of the decision of the Hon'ble Supreme Court in the case of "Chennai Properties & Investments Ltd." (civil appeal No.4494 of 2004 & others) decided vide order dated April 9, 2015; the rental income earned by the assessee from sublease of the property is required to be assessed as 'business income' of the assessee. It is the say of the Ld. Counsel for the assessee that in the subsequent decision of the Hon'ble Supreme Court in the case of "Chennai Properties & Investments Ltd." (supra), the correct legal position has been stated and that the decision of the Hon'ble Supreme Court is the law of the land. Therefore a mistake has occurred in the order dated 14.08.2013 (supra) of this Tribunal. He has also relied upon the CBDT circular No.68 dated 17.11.1971 to contend that a mistake arising as a result of

subsequent interpretation of law by the Hon'ble Supreme Court would constitute a mistake apparent from records and in that event rectificatory action under section 154 of the Act would be in order. The Ld. Counsel has also brought our attention to the subsequent order of the Tribunal in the own case of the assessee for A.Y. 2009-10 wherein the Tribunal while relying upon the decision of the Hon'ble Supreme Court in the case of "Chennai Properties & Investments Ltd." (supra) has decided the issue in favour of the assessee. The Ld. Counsel has further relied upon a subsequent decision of the Hon'ble Supreme Court in the case of "M/s. Rayala Corporation Pvt. Ltd. vs. ACIT" (civil appeal No.6437 of 2016 & others) vide order dated August 11, 2016 and has therefore submitted that since the income earned by the assessee during the year was only from subleasing of the premises, hence the said income was required to be assessed as business income of the assessee and not under the head "income from house property". The Ld. Counsel, thus, has stressed that even the subsequent decision of the Hon'ble Supreme Court would operate as if it was the law of land at the time of adjudication of the issue by the Tribunal on a date prior to the decision of the Hon'ble Supreme Court and if the lower authorities have interpreted a certain provision in contravention to the interpretation done by the Hon'ble Supreme Court, then such interpretation will be a mistake apparent on record and can be rectified under section 254(2) of the Act.

3. On the other hand, the Ld. D.R. has stated that there is no mistake apparent on record and that no rectification is required in order dated 14.08.2013 of this Tribunal.

4. We have considered the rival contentions and have also gone through the applications of the assessee, order of the Tribunal dated 14.08.13 (supra) and subsequent order of the co-ordinate Bench of the Tribunal dated 27.05.15 and the relevant case laws relied upon by the Ld. Counsel for the assessee. There

is no disagreement to the contention of the Ld. Counsel for the assessee that the law declared by the Hon'ble Supreme Court is the law of the land and the same is binding on all subordinate courts including this Tribunal. We, further, find that the Hon'ble Supreme Court in the case of "Chennai Properties & Investments Ltd." (supra) has held that from the facts and circumstances of the case before them, an irresistible conclusion was that the letting of the property was in fact the business of the assessee. However, we find that the facts in the case of "Chennai Properties & Investments Ltd." (supra) were entirely different as that of the case of the assessee. In case of "Chennai Properties & Investments Ltd." (supra) in the memorandum of association of the appellant company, it was mentioned that the main object of the appellant company was to acquire and hold the property known as "Chennai house" and "Firhavin Estate" and to let out those properties as well as make advance upon the securities and lands and buildings or other properties or any interest therein. The Hon'ble Supreme Court emphasized that holding the aforesaid properties and earning income by letting out those properties was the main objective of the company. The Hon'ble Supreme Court also relied upon its earlier decision in the case of "Karanpura Development Company Ltd. vs. CIT" 44 ITR 362 (SC) wherein the facts were that the assessee company was formed with the object, inter alia of acquiring and disposing of the underground coal mining rights in certain coal fields and it was doing the activities of acquiring coal mining leases over large areas, developing them as coal fields and then subleasing them to collieries and other companies and thus leasing out of the coal fields to the collieries and other companies was business of the assessee. The Hon'ble Supreme Court held that in case of a company with its professed objects and the manner of its activities and the nature of its dealings with its property, it was possible to say on which side the operations fall and to what head the income was to be assigned. Applying the said principle, the Hon'ble Supreme Court treated the income of the assessee in that case as 'business income' of the assessee. We may further point out that the Hon'ble Supreme

Court has further observed that the facts of the case before them [Chennai Properties & Investments Ltd. (supra)] were distinguishable so far as the observations of the Hon'ble Supreme Court in the case of the "East India Housing Land Development Trust Ltd. vs. CIT" (1961) 42 ITR 49 as well as the constitutional bench decision in the case of "Sultan Brothers Pvt. Ltd. vs. CIT" (1964) 5 STR 807 were concerned. It has also been discussed by the Hon'ble Supreme Court that in the case of "East India Housing Land Development Trust Ltd. vs. CIT" (supra) the facts were that the company was incorporated with the object of buying and developing landed properties and promoting and developing markets. Thus, the main objective of the company was to develop the landed properties into markets. It so happened that some shops and stalls, which were developed by it, had been rented out and income was derived from the renting of the said shops and stalls. In those facts, the question arose for consideration was as to whether the rental income that was received was to be treated as income from the 'house property' or the 'income from the business'. Hon'ble Supreme Court while holding that the income should be treated as income from the 'house property', rested its decision in the context of the main objective of the company and took note of the fact that letting out of the property was not the object of the company at all. The court was therefore, of the opinion that the character of that income which was from the house property had not altered because it was received by the company formed with the object of developing and setting up properties. The Hon'ble Supreme Court further observed that in the case of "Sultan Brothers (P) Ltd. the Constitutional Bench of the Supreme Court has clarified that merely an entry in the object clause showing a particular object would not be the determinative factor to arrive at an conclusion whether the income is to be treated as income from business and such a question would depend upon the circumstances of each case, viz., whether a particular letting is business or not. This has been so stated in the following words: -

> "We think each case has to be looked at from a businessman's point of view to find out whether the letting was the doing of a business or the exploitation of his property by an owner. We do not further think that a thing can by its very nature be a commercial asset. A commercial asset is only an asset used in a business and nothing else, and business may be carried on with practically all things. Therefore, it is not possible to say that a particular activity is business because it is concerned with an asset with which trade is commonly carried on. We find nothing in the cases referred, to support the proposition that certain assets are commercial assets in their very nature."

5. Now coming to the decision of the Tribunal dated 14.08.13 in the case of the assessee, we find that following specific observations have been made by the Tribunal relating to the case of the assessee.

> "Since the assessee is deemed owner of the property and had received rental income, the same has been rightly held assessable as income from house property. It is not a case of commercial exploitation of the property in which case it could be assessed as income from business. The assessee has simply sub leased the property to enjoy the rental income. It is also not a case of organized activities of taking properties on lease and letting out. The assessee had taken on lease one building which had been sub-leased to tenants and, therefore, the rental income has to be assessed as income from house property. We accordingly uphold the decision of authorities below to assess the rental income as income from house property."

6. While giving a factual finding in this respect, the Tribunal noted that the income from sublease of the premises was to be assessed as rental income of the assessee. This Tribunal also took note of the services provided by the assessee along with renting of the building. We have also noted the details of services as enumerated in the order and have found that most of those are general in nature which a landlord is supposed to provide to his tenants. We find that the Tribunal has also held that the said services rendered by the assessee was not part of any organized activity with a view to earn such income and held that the income from services on the facts of the case has to be assessed as income from other sources and all expenses incurred by the assessee for earning of such income has to be allowed as deduction under section 57 of the Income Tax Act. It was also held that if any expenditure in relation to services which is also included in relation to expenses on repair and maintenance of the portion of the building let out, such expenses have to be

excluded as the same were already covered in the statutory allowance under section 24(c) of the Income Tax Act while computing the house property income. The above narrated part of the order of the Tribunal reveals beyond doubt that the Tribunal has well considered the proposition of law that if an income is earned from the business activity of letting out of the properties or the commercial exploitation of the property by way of organized activities of taking properties on lease and letting out etc. then the income is to be assessed as business income of the assessee as held subsequently by the Hon'ble Supreme Court in the case of "Chennai Properties & Investments Ltd." (supra). It is pertinent to mention here that the Hon'ble Supreme Court in the case of "Chennai Properties & Investments Ltd." (supra) has relied upon another decision of the Tribunal of the Hon'ble Supreme Court in the case of "Karanpura Development Company Ltd." (supra) which was well considered by the Tribunal while passing the impugned order dated 14.08.13. Hence, the proposition of law as laid down subsequently by the Hon'ble Supreme Court in the case of "Chennai Properties & Investments Ltd." (supra) and further in the case of "M/s. Rayala Corporation Pvt. Ltd." (supra) has already been taken into consideration while passing the impugned order by the Tribunal because in the subsequent decision of the Hon'ble Supreme Court, the earlier decision of the Hon'ble Supreme Court in the case of "Karanpura Development Company Ltd." (supra) has been relied upon which was well considered by the Tribunal while passing the impugned order. However, the Tribunal in its wisdom has held that the facts of the case of the assessee do not suggest that the assessee was in the business of commercial exploitation of the property or leasing out of the properties and held that the income earned by the assessee from the sublease of the premises was simple case of letting out of the property and thus income there from was assessable under the head "Income from the house property".

7. We further find that the main objects of the assessee in this case are providing advisory, consultancy and technical services in the area of real estate and properties such as architectural, civil construction, maintenance and related services. None of the above objects suggest that letting out of the premises was the business activity of the assessee. We may further point out that the premises in question even have not been developed by the assessee. The premises in question has been taken on lease by the assessee and further subletted. The facts of the case of the assessee, in our view, are identical to that of the case before the Hon'ble Supreme Court in the case of "East India Housing Land Development Trust Ltd." (supra) as discussed above wherein the Hon'ble Supreme Court has held that when letting out of the property was not the object of the company then rental income can not be assessed as 'business income'. In the case in hand it is neither the object nor the business activity of the assessee company to take on lease and sub let the properties. So far as the reliance of the Ld. Counsel on the decision of the Hon'ble Supreme Court in the case of "M/s. Rayala Corporation Pvt. Ltd." (supra) is concerned; we find that the facts were also different in the said case. The Hon'ble Supreme Court in para 5 of the said order has observed that as per the memorandum of association, the business of the company was to deal into real estate and also to earn income by way of rent by leasing or renting the properties belonging to the assessee company. The contention of the Revenue was that leasing and letting out of shops and properties was not the main business of the assessee as per memorandum of association. It was the contention of the Revenue that rent should be the main source of income or the purpose for which the company is incorporated should be to earn income from rent so as to make the rental income to be taxed under the head profits and gains of business or profession. The Hon'ble Supreme Court rejected the above contention and held that since the assessee company had stopped all other activities except the business activity of leasing its property or earning rent there from and therefore the business of the company was to lease its

property and to earn rent and therefore the income so earned should be treated as its business income. The distinguishable fact in the case of "M/s. Rayala Corporation Pvt. Ltd." (supra) was that as per memorandum of association of that company, one of the objects was to earn income by way of rent by leasing or renting the properties belonging to the assessee company. The Hon'ble Supreme Court, thus, held that renting of the property was part of the business activity of the assessee. However, in the case in hand, the Tribunal after appreciation of facts has held that the sub leasing of the property was not part of the business activity of the assessee. The Tribunal, as the facts were available before it, has given a categorical factual finding upon which the relevant case laws have been relied upon. With due respect to the all case laws relied upon by the Ld. Counsel for the assessee, we find no mistake apparent on record in this case as the said case laws are not applicable because the factual finding given by the Tribunal is contrary to the facts of the cases before the Hon'ble Supreme Court as relied upon by the Ld. Counsel for the assessee. So far the reliance of the Ld. Counsel on the subsequent decision of the Tribunal is concerned, in our view, any finding arrived by a co-ordinate Bench of the Tribunal in subsequent decision can not be held to be a reason enough to hold that there was any mistake in the earlier order of different Bench of the Tribunal. Moreover, we deem it fit to mention further here that this Tribunal has no power to review etc. If the assessee has any grievance against the impugned order, proper course to agitate the same is by filing an appeal before the next appellate authority i.e. the Hon'ble Bombay High Court, but, not with the present application under section 254(2) of the Act. The Tribunal, vide impugned order, has not only considered the submissions of the assessee but has given a categorical finding on all of the issues which were raised before the Tribunal by the Ld. Counsel for the assessee. The Hon'ble Bombay High Court in the case of 'Commissioner Of Income-Tax vs Ramesh Electric And Trading Co.' 1993 203 ITR 497 (Bom.), while relying upon the decision of the Hon'ble Supreme Court in the case of 'T. S. Balaram, ITO v. Volkart

Brothers' [1971] 82 ITR 50 and further relying upon the decisions of the various High Courts has categorically held that the power of rectification under section 254(2) of the Income-tax Act can be exercised only when the mistake which is sought to be rectified is an obvious and patent; mistake which is apparent from the record, and not a mistake which requires to be established by arguments and a long drawn process of reasoning on points on which there may conceivably be two opinions. The Tribunal, under such circumstances, has no jurisdiction under section 254(2) to pass the second order.

8. In view of our above observations and the legal position as stated above, we do not find any merit in these applications and the same are accordingly hereby dismissed.

Order pronounced in the open court on 19.09.2016.

Sd/- **(Sanjay Arora)** **ACCOUNTANT MEMBER**	**Sd/-** **(Sanjay Garg)** **JUDICIAL MEMBER**

Mumbai, Dated: 19.09.2016.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.