

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "G", MUMBAI**

**BEFORE SHRI MAHAVIR SINGH (JUDICIAL MEMBER)
AND
SHRI ASHWANI TANEJA (ACCOUNTANT MEMBER)**

I.T.A. No.556/Mum/2015
(Assessment Year: 2004-05)

M/s Whistling Woods International Ltd, Film City Complex, Goregaon(E) Mumbai 400 065	Vs	ITO 9(3)(4), Aayakar Bhavan, M.K. Rd. Mumbai-20
PAN : AAACW4307R		
(Appellant)		(Respondent)

Appellant by	Dr. K Shivram
Respondent by	Miss Rampriya Raghavan

Date of hearing : 24-11-2016
Date of pronouncement : 30-11-2016

ORDER

Per ASHWANI TANEJA, AM:

This appeal has been filed by the assessee against the order of Commissioner of Income-tax (Appeals)-20, Mumbai [hereinafter called CIT(A)] dated 17-10-2014 passed against the rectification order u/s 154 of the AO dated 13-09-2013 for A.Y. 2004-05 on the following grounds:

"1. The learned CIT(A) erred in confirming the order of the Assessing Officer rejecting application u/s. 154 without appreciating that assessee is entitled to exemption on dividend income on units of mutual fund Rs.48,90, 114/- u/s. 10(35) of Income tax Act. 1961.

2. Without prejudice to above when the Assessing officer has not allowed the set off or expenses against income from other sources, he ought to have allowed the exemption in respect of dividend income on mutual funds as all the details were available from the P&L Account and Balance Sheet which were filed along with return of income and on identical facts exemption u/s 154 was allowed for the A.Y.2005-06.”

2. The brief facts in this case as brought out before us are that the assessee company was incorporated on 10-01-2001. The company had commenced its activities as per the main object of establishing research and training institute and related activities thereto. The assessee had opened development expenses account for accounting income and expenses towards construction of the institute. In the said account, the assessee had set off the dividend income received from mutual funds amounting to Rs. 48,23,594/- against its expenses. But, the AO vide order dated 26-09-2006 treated the interest on fixed deposits, interest received on loan and income from mutual funds (i.e. dividend) as ‘Income from other sources’ and did not reduce the same from development expenses. Finally, the matter reached before the Tribunal, where appeal of the assessee was rejected on merits. The assessee had also raised a ground before the Tribunal that alternatively, its dividend income should be treated as exempt u/s 10(35) of the Act. But the Tribunal did not adjudicate this issue on the ground that this issue was not arising out of the order passed by the lower authorities, and therefore, no relief was given to the assessee.

3. Subsequently, the AO while giving effect to the order of the Tribunal recomputed the entire income which was assessed as ‘Income from other sources’, and no expenses were allowed u/s 57 in view of the order of the

Tribunal. Further, the AO did not also grant exemption on the dividend income. Finally, the assessee filed application u/s 154 dated 14th March, 2014 which reads as under:-

“Dear Sir,

With reference to above we are in receipt of Assessment order passed u/s 143(3) of the Income Tax Act 1961 for the above year, we write to you as under :-

Without prejudice to our contention in the appeal filed against the above order we have to request you to kindly pass an order rectifying the mistake apparent from record as stated below and oblige.

Sir, while treating the Income from Mutual Fund as Income from Other Sources of Rs. 76,40,047/-, out of which the deduction of Rs. 48,90,114/- for being dividend on units of Mutual Fund which is exempted is not considered for exemption.”

4. Being aggrieved, the assessee filed appeal before the Ld. CIT(A) wherein it was submitted that the assessee is eligible for exemption u/s 10(35) on the amount of dividend income received from mutual funds which the AO ought to have allowed himself while re-computing the income of the assessee and taxing the aforesaid income as ‘Income from other sources’. But, Ld. CIT(A) was not satisfied with the submission of the assessee and he rejected the submissions on the ground that no relief could have been provided to the assessee u/s 154. Being aggrieved, the assessee filed appeal before the Tribunal.

5. During the course of hearing before us, arguments were made in detail by the Ld. Counsel appearing on behalf of the assessee as well as Ld. DR appearing on behalf of the revenue. It was submitted by the Ld. Counsel that as per law and facts of this case, dividend income on units of mutual funds of Rs. 48,90,114/- received by the assessee during the year was exempt u/s 10(35). Therefore, the lower authorities have erred in not

granting the benefit of exemption, as a result of which the income of the assessee has been assessed more than the amount the assessee was liable to be taxed. It was further submitted by him that similar situation arose in assessment year 2005-06 wherein petition was made u/s 154 to the AO, and the AO vide his order passed u/s 154 dated 10-06-2008 had granted requisite relief to the assessee by granting benefit of exemption u/s 10(35) on the dividend income on mutual fund amounting to Rs. 7,70,674/-. Under these circumstances, by not granting exemption in this year for the identical amount, there was an apparent mistake in the final assessment order passed by the AO which required necessary rectification for which application u/s 154 was filed within four years from the date of assessment order, and the AO should have allowed the application by granting benefit of exemption due to the assessee as per law and facts of this case. He further submitted that there is no denial to the fact that assessee was eligible for the benefit of exemption u/s 10(35) but only for the reason that the claim was not made in the original proceedings, the benefit has been wrongly denied to the assessee. In this regard, it was submitted that the claim of exemption was an alternative claim and its need arose only when the dividend income has been assessed as 'income from other sources' as against claim of the assessee for its set off against the Development expenses as was made in the return of income filed by it. Under these circumstances, there was a bounden duty upon the shoulders of the AO to assess the income as per law and to grant the benefit of exemption due to the assessee as per plain provisions of law. Reliance was placed in this regard upon the circular issued by the CBDT dated 11-04-1955 wherein it was instructed to the revenue officers that they should not take undue advantage of the ignorance of the assessee

and the income of the assessee should be assessed strictly in accordance with law after granting proper relief due to the assessee as per law.

6. Per contra, the Ld. DR relied upon the orders of the lower authorities. She further submitted that there was a technical lapse on the part of the assessee, thus claim made u/s 154 has rightly been rejected by the lower authorities.

7. We have gone through the facts of the case and arguments made by both the sides and also the orders passed by lower authorities. The only dispute which is required to be addressed by us is that if the assessee is eligible for the benefit of exemption u/s 10(35) upon the dividend income received from mutual funds during the year amounting to Rs.48,90,114/-, then whether the same can be denied to the assessee, if the claim of such benefit was not made in the original return, but made through petition u/s 154 only when its need arose as a result of re-computing of income by the AO.

8. We have analysed full facts of this case and also examined legal position under the income tax law as would be applicable under such situations, as has been explained by various courts in our country time to time. In this regard it is firstly noted by us that original return of the assessee was filed by setting off entire income (including impugned dividend income) against the development expenses incurred during the year, and the balance amount of the development expenses after debiting the aforesaid income was added to the capital work-in-progress. Thus, the assessee did not show the impugned dividend income from the units of mutual funds in the return of income as taxable. However, the AO did not accept the return of the assessee as it is, but separately brought to tax the entire interest income and dividend income as 'Income from other sources'. The assessee

contested action of the AO before the appellate authorities. The action of the AO was ultimately upheld by the Tribunal. Under these circumstances, the issue of exemption of dividend income received from units of mutual funds could have arisen only at the time of passing of fresh assessment order by the AO wherein the impugned income was held as taxable as 'Income from other sources' by the AO. At this stage, the AO ought to have given opportunity to the assessee to make any further claims available under the law, so as to enable the AO to compute taxable income in accordance with law. Nothing was brought before us to show that any such opportunity was given by the AO to the assessee. Therefore, under these circumstances, after passing of the said assessment order, the assessee filed a rectification application u/s 154 before the AO pointing out that its income should be assessed as per law only, and therefore benefit of exemption available to the assessee u/s 10(35) with respect dividend received from mutual funds should be granted by the AO for determining taxable income of the assessee. However, the AO rejected the application on the ground that taxability of the income had attained finality on the basis of order of the Tribunal.

9. We do not agree with views of the Ld. AO on this aspect, since in our opinion what attained finality at the stage of the Tribunal was that the entire interest income and dividend income should be assessed as 'Income from other sources' and it would not be adjusted against the development expenses, as was claimed by the assessee in its return. But, the other aspect whether any part of the aforesaid income was eligible for benefit of exemption or not, was not adjudicated upon by the Tribunal. Thus, it was open before the AO to assess the income as per law after granting requisite exemption.

10. The second obstacle mentioned by the AO for giving relief to the assessee was that no such relief could have been given u/s 154, since only a mistake apparent on record could have been rectified and not any debatable issue. In this regard, it has been brought to our notice that AO had himself carried out rectification u/s 154 vide his order dated 10-06-2008 for A. Y. 2005-06 wherein benefit of exemption has been granted upon the identical amount of dividend income received from mutual funds. Relevant part of the order passed by Ld. AO u/s 154 for AY 2005-06 reads as under:-

“ORDER UNDER SECTION 154 OF THE INCOME TAX ACT, 1961

The assessee's representative, M/s. Shamit Majumdar Associates, C.As., vide letter dated.18.2.2008 has stated that during the course of assessment proceedings u/s. 143(3), while treating the income from Mutual Fund as Income 'from other sources of Rs. 11,08,963/-, out of which 'the deduction of Rs. 7,79,674/- for being dividend on units of Mutual Fund which is exempted is not considered for exemption. In this regard, assessee has furnished the details.

2. *On going through the record, it is seen that during the course of assessment proceedings u/s. 143(3), assessee's representative has not submitted any details with regard to the exempted income of Mutual Fund amounting to Rs7,79,674/-. Now, assessee has submitted' the ledger copy of the accounts of dividend on units of Mutual Fund. As the assessee has not submitted the details during the course of assessment proceedings u/s 143(3), the same are submitted now, which are placed on record after due verification. The contention of the assessee is found to be correct. Hence, assessment is hereby rectified u/s 154 of the Income-tax Act, 1961.*

3. *The revised total income of the assessee is computed as under:-*

1) Rent Income received	Rs. 10,836/-
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II)	(a) Interest earned on Fixed Deposit	Rs. 88,047/-
	(b) Interest on loans	Rs.7,11,717/-
	(c) Income from units of Mutual Fund	
		Rs.11,08,963/-
	<u>Less : Deduction as</u>	<u>Rs. 7,79,674/-</u>
		<u>Rs. 3,39,289/-</u>
	REVISED TOTAL INCOME	<u>Rs.11,39,889"</u>

11. Thus, from the perusal of the above, it is evident that the AO had himself granted the benefit of exemption and that too u/s 154. Thus, the AO was very much aware of this fact that dividend income of the assessee is eligible for the benefit of exemption u/s 10(35). In our considered view, not granting similar relief by the AO in the year before us, under these circumstances, constitutes a mistake apparent on records. Further, courts have time and again held that if technical considerations are pitted against the substantive justice, it is the latter which prevails. Moreover, article 265 of the Constitution of our country clearly stipulates that no tax can be collected except with the authority of law. Thus, main object of the income tax proceedings is to enable the AO to compute the taxable income and tax payable thereon in accordance with law. The role assigned to the AO by the legislature is quite onerous. While performing this role objectivity should always be maintained. Therefore, the AO should not take undue advantage of ignorance of the assessee and should follow a fair approach by allowing legitimate claims of the assessee so that only that amount of tax is recovered from the assessee which is due as per law. In this manner, the faith of the tax payers upon the working of income tax

department shall increase, which shall in turn give a boost to voluntary compliance by the taxpayers.

12. With the assistance of both the parties it was seen by us that the impugned income has been received by the assessee from Kotak Mutual Fund which is duly eligible for the benefit of exemption u/s 10(35). No doubts were raised by the Ld. DR also in this regard before us. Under these circumstances, in our considered opinion, the AO should have granted benefit of exemption to the assessee. Thus, we direct the AO to grant the benefit of exemption u/s 10(35) with respect to impugned amount of dividend income received from mutual fund.

13. In the result, appeal of the assessee is allowed.

Order pronounced in the court on this _30th_ day of November, 2016.

Sd/-	Sd/-
(MAHAVIR SINGH)	(ASHWANI TANEJA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dt : 30th November, 2016

Pk/-

Copy to :

1. The appellant
2. The respondent
3. The CIT(A)
4. The CIT
5. The Ld. Departmental Representative for the Revenue, G-Bench

(True copy)

By order

ASSTT.REGISTRAR, ITAT, MUMBAI BENCHES