Time-Limit for Disposal of Rectification Application— Section 154(8)— *Directory or Mandatory?*

'Rectification of mistake apparent from record' (Section 154) is a very interesting tool provided by the Income-tax Act. It is very important in the sense that most of the obvious issues get resolved at the rectification stage itself, without resorting to the costly & time consuming appellate route. However, any remedy available under the Act is useful only when it is afforded within a specific time frame. This is where sub-Section 8 of Section 154 comes into play which specifies the time limit for passing a rectification order by the assessing officer. However, unfortunately, this remedy has been obstructed by the controversy of Directory vs. Mandatory provision of law. The author in this article discusses the law on Directory vs. Mandatory provisions with reference to the Section 154(8) of the Income-tax Act. Read on…

To invoke the provisions of Section 154, there should be a *mistake apparent from the record.* A cursory look at the record must indicate that there is an error and the same may be rectified under Section 154. Reference to documents outside the records and the law is impermissible while applying the provisions of Section 154. A mistake which can be rectified under Section 154 is one which is glaring, obvious and patent and whose discovery is not dependent on argument or elaboration. Where the controversy can be resolved only by way of a complicated process of investigation, recourse cannot be taken to Section 154. A *rectifiable mistake* is a mistake which is obvious and not something which can be established by a long drawn process of reasoning on points on which there may be conceivably two opinions and hence a decision on a debatable point of law is not a mistake apparent from record.

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Period of Limitation

Earlier, Section 154(7) provides that rectification order cannot be passed after the expiry of four years from the end of the financial year in which the order sought to be rectified was passed. The said time-limit was uniformly applicable irrespective of whether the rectification order was passed by the Income-tax Authority-

(i) on its own motion; or
(ii) on an application by the assessee; or
(iii) in case of the Income-tax Authority being the CIT(A) on an application by the Assessing Officer.

Section 154(8) has been inserted by the Finance Act, 2001 to provide that 'without prejudice to the provisions of Section 154(7), where an application

for amendment under this sub-section is *made by an assessee* on or after 1st June 2001 to an income-tax authority referred to in Section 154(1), the authority shall pass an order within *six months* from the end of the month in which the application is received by it, either making the amendment or refusing to allow the claim.

However, unfortunately, the consequences of failure to pass such an order within the said time-limit of *six months* have not been worded in the Income-tax Act.

CBDT Circular No. 14/2001 - Finance Act, 2001 - Explanatory Notes on Provisions Relating to Direct Taxes [Para 68.5]

Considering the absence of any specific time-limits regarding disposal of application for rectification under Section 154, and *with a view to ensure time-bound disposal of rectification applications,* the Act has inserted a new sub-Section (8) in Section 154 to provide that where an application for amendment under this Section is made by an assessee on or after 1st June 2001 to an income-tax authority referred to in the said Section, the authority shall pass an order within six months from the end of the month in which the application is received by it, either making the amendment or refusing to allow the claim. *The overall time-limit of four years provided in the Section for passing any rectification order shall however continue to apply.* In other words, the period of six months mentioned in the new sub-Section (8) cannot extend, under any circumstances, beyond the overall time-limit of four years from the end of the financial year in which the order sought to be rectified was passed.

These amendments will take effect from 1st June 2001.

Debate

Section 154(8) is in line with sub-Section (2) of Section 12AA of the Act (Procedure for registration of a charitable trust), which says:

> *Every order granting or refusing registration under clause (b) of sub-section (1) shall be passed before the expiry of six months from the end of the month in which the application was received under clause (a) or clause (aa) of sub-section (1) of Section 12A.*

Both the Sections are silent on the consequences of failure to pass such an order by the concerned

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authority within the said time-limit of six months. Naturally, the CBDT also restrained itself from throwing light on the same. However, it can be argued that, application should be deemed to have been allowed since the word used in both the Sections is *'shall'* and not *'may'*.

Therefore, decisions in case of Section 12AA can be referred to in deciding the cases involving Section 154(8) also, since both Sections use the same language.

Theory of *Deemed Registration* of Charitable Trusts-Section 12AA

In the case of *Society for the Promotion of Education, Adventure Sport & Conservation of Environment vs. CIT [2008] 171 Taxman 113 (Allahabad),* the Allahabad High Court upheld the theory of automatic/deemed registration:

> *In the present case, we find that there is not such public interest/element. Taking the view that non-consideration of the registration application within the time fixed by Section 12AA(2) would result in deemed registration, may at the worst cause loss of some revenue or income tax payable by that individual assessee. This would be similar to a situation where the assessing authority fails to make the assessment or reassessment within the limitation prescribed for the same. This also leads occasionally to loss of revenue from individual assessee.*
>
> *On the other hand, taking the contrary view and holding that not taking a decision within the time fixed by Section 12AA(2) is of no consequence would leave the assessee totally at the mercy of the income-tax authorities, inasmuch as the assessee has not been provided any remedy under the Act against non-decision.*

We do not find any good reason to make the assessee suffer because the IT Department is not able to keep its officers under check and control, so as to take timely decisions in such simple matters such as consideration for registration even within the large six month period provided by Section 12AA(2) of the Act.

The decision of the Delhi High Court in *Sambandh Organization* vs. *CIT (2006) 156 Taxman 183* and the ITAT Delhi in *Bhagwad Swarup Shri Shri Devraha Baba Memorial Trust vs. CIT (2007) 111 TTJ (Del)(SB) 424* is also available on the same line. These decisions of the High Court/ITAT in respect of the Section 12AA(2) of the Act can very well be applied to the cases of Section 154(8) of the Act where the same time-limit of six months for passing an order under Section 154 is specified. However, in practice it is seen that, income-tax authorities least bother about the mandatory time limit specified under Section 154(8) by pretending that the time limit prescribed is *directory* only and not *mandatory*.

Theory of *Deemed Acceptance of Application under Section 154* - Section 154(8): Contrary View- in Favour of Revenue

The ITAT Mumbai in *Desai Investment Pvt. Ltd. vs. ITO (2010) 45 DTR 75 (dt. 31st March 2010)* thought otherwise and held:

Rectification—Validity—Order passed after limitation period mentioned under s. 154 (8)— CIT(A) passed an order on rectification application beyond the period mentioned under sub-s. (8) of s. 154 —Rectification is not deemed to have been automatically allowed and order is not to be treated as time-barred—Even though word 'shall' is used in sub-s. (8) of s. 154, in the case of application under s. 154 , first of all it has to be seen whether there is any rectifiable mistake or not—Deemed allowance of application does not arise and the AO or the other authorities under the Act have to pass an order either allowing or rejecting the claim even if it is belated.

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While deciding as above, the ITAT considered all the decisions on Section 12AA(2) and the related theory and rejected the same:

However, on a careful analysis of the contentions of both parties we are of the view that just because there is similarly used phraseology 'shall' available in both the provisions [i.e. Section 12AA(2) and Section 154(8)], the principles established while considering the registration of trust cannot be invoked for rectification of mistakes under Section 154. As submitted by the learned DR the registration of trust does not establish any rights to either parties and the claims of exemptions are to be examined by the AO in the course of assessment proceedings as mandated under Sections 11, 13, etc. Accordingly, even though registration is one of the prescribed methods, the assessees do not get any right automatically to claim exemption under the Act as there are other provisions to safeguard various claims. However, in the case of application under s. 154 , first of all it has to be seen whether there is any rectifiable mistake or not. As considered by the Hon'ble Supreme Court in the case of the T.S. Balaram, ITO vs. Volkart Bros. & Ors. (1971) 82 ITR 50 (SC), a mistake apparent from record must be an obvious and apparent mistake and not something which can be established by a long-drawn process and raising of points on which there may be conceivable two opinions. The decision on debatable point is not a mistake apparent from record. Accordingly once a petition has been filed, it requires application of mind primarily to decide whether there is a mistake apparent from record under the provisions of the Act. Then only the question of allowing or rejecting the issue will come into picture. In view of this, deemed allowance of application does not or should not arise and the AO or the other authorities under the Act have to pass an order either allowing or rejecting the claim even if it is belated. **(Para 13)**

The ITAT further relied on the decision of the Supreme Court in *Sree Ayyanar Spinning & Weaving Mills Ltd. vs. CIT (2008) 216 CTR (SC) 351* [which

While determining whether a provision is mandatory or directory, in addition to the language used therein, the Court generally examines the context in which the provision is used and the purpose it seeks to achieve. It may also be necessary to find out the intent of the legislature for enacting it and the serious and general inconveniences or injustice to persons relating thereto from its application.

was in the context of Section 254(2)] wherein the Supreme Court had held that in case an application for rectification was made within four years it is the Tribunal who took its own time to dispose of the application under Section 254(2) and the order passed by the Tribunal on the application after expiry of four-year period cannot be held to be time-barred.

Relying on the above principle and in view of the similarity in the provisions of Sections 254(2) and 154(8) [the second part of the provisions of Section 254(2) uses the word "shall" if the mistake is brought to the notice of tribunal by the assessee or the AO] it was held by the ITAT that even though the order passed by the CIT(A) was beyond the time-limit prescribed *(i.e.,* beyond six months), since the application was filed within time the order *cannot be nullified* on that principle alone and it has to be considered on merits.

Interestingly, the ITAT Mumbai in one of its earlier decisions, *i.e.,* in the case of *Rajesh R. Shah vs. DCIT (2010) 35 DTR (Mumbai)(Trib) 388 (dt. 20th April 2009),* wherein the AO failed to decide the petition under Section 154 within six months as stipulated in Section 154(8) and then rejected thereafter, while remanding the matter back to the AO for fresh consideration of petition under Section 154 on merits, also approved the theory of *deemed acceptance of application under Section 154(8):*

> *….. It is also further noticed that the AO should have passed the order within six-months under the provisions of s. 154 (8) and if it is not passed it should have been deemed to have been accepted.]* **(Para 6)**

Issue for Consideration - *Directory vs. Mandatory* Provision of Law

The ITAT in *Desai Investment's case (supra)* indirectly concluded that though the word *'shall'* has been used in Section 154(8), the provision is *directory* and not mandatory. In this context, issue arises for consideration is under what circumstances *'shall'* is to be interpreted as *directory only*, especially in taxing statutes.

While determining whether a provision is mandatory or directory, in addition to the language used therein, the Court generally examines the context in which the provision is used and the purpose it seeks to achieve. It may also be necessary to find out the intent of the legislature for enacting it and the serious and general inconveniences or injustice to persons relating thereto from its application. The provision is mandatory if it is passed for the purpose of enabling the doing of something and prescribes the formalities for doing certain things.

In *State of Haryana & Anr. vs. Raghubir Dayal (1995) 1 SCC 133,* the Apex Court observed:

> *The use of the word 'shall' is ordinarily mandatory but it is sometimes not so interpreted if the scope of the enactment, on consequences to flow from such construction would not so demand. Normally, the word 'shall' prima facie ought to be considered mandatory but it is the function of the Court to ascertain the real intention of the legislature by a careful examination of the whole scope of the statute, the purpose it seeks to serve and the consequences that would flow from the construction to be placed thereon. The word 'shall', therefore, ought to be construed not according to the language with which it is clothed but in the context in which it is used and the purpose it seeks to serve. The meaning has to be described to the word 'shall; as mandatory or as directory accordingly. Equally, it is settled law that when a statute is passed for the purpose of enabling the doing of something and prescribes the formalities which are to be attended for the purpose, those prescribed formalities which are essential to the validity of such thing, would be mandatory. However, if by holding them to be mandatory, serious general inconvenience is caused to innocent persons or general public, without very much furthering the object of the Act, the same would be construed as directory.*

Lashmansami G. vs. CIT (1991) 100 CTR (SC) 274: Words and phrases - *'Shall' - The word shall should be construed in the light of the purpose the Act or Rule seeks to serve…The construction ultimately depends upon the provision itself, keeping in view the intendment of the enactment or of the context in which the word 'shall' has been used and the mischief it seeks to avoid.* Under Section 36 of the Tamil Nadu

Revenue Recovery Act, 1894 *specification of the date and place of sale is mandatory -Forms prescribed are only procedural and the omission of specification of the place of sale in the form renders the sale not merly irregular also invalid.*

Lachmi Narain, etc. vs. Union of India [1976 CTR (SC) 1]: The primary key to the problem whether a statutory provision is mandatory or directory, is the intention of the law-maker as expressed in the law, itself. The reason behind the provision may be a further aid to the ascertainment of that intention. If the legislative intent is expressed clearly and strongly in imperative words, such as the use of 'must instead of "shall", that will itself be sufficient to hold the provision to be mandatory, and it will not be necessary to pursue the enquiry further. If the provision is couched in prohibitive or negative language, it can rarely be directory; the use of peremptory language in a negative form is per indicative of the intent that the provision is to be mandatory.

The Supreme Court in the case of *May George vs. Special Tehsildar & others (2010) 13 SCC 98*, after analysing all the precedents available on the subject matter, summarised the law on this issue:

> *...in order to declare a provision mandatory, the test to be applied is as to whether non-compliance of the provision could render entire proceedings invalid or not. Whether the provision is mandatory or directory depends upon the intent of Legislature and not upon the language for which the intent is clothed. The issue is to be examined having regard to the context, subject matter and object of the statutory provisions in question. The Court may find out as what would be the consequence which would flow from construing it in one way or the other and as to whether the Statute provides for a contingency of the non- compliance of the provisions and as to whether the non-compliance is visited by small penalty or serious consequence would flow there from and as to whether a particular interpretation would defeat or frustrate the legislation and if the provision is mandatory, the act done in breach thereof will be invalid.*

Is Provision of Section 154(8) Mandatory or Directory in Nature?

A) With the above background, let's analyse sub-Section (8) of Section 154. Firstly legislative intent behind the introduction of Section 154(8) by the Finance Act, 2001 and overall object of the provision needs to be unearthed. Generally, the CBDT circular explaining the amendments by the Finance Act is considered to be the document revealing the legislative intent behind the amendments.

Prior to Section 154(8), the absence of any specific time-limit regarding the disposal of application for rectification under Section 154 was causing serious general inconvenience and injustice to the taxpayers at large. And, to get rid of this *justice delayed is justice denied* kind of scenario finance act introduced Section 154(8). CBDT Circular No. 14/2001 also made it clear in following words:

> *Considering the absence of any specific time-limits regarding disposal of application for rectification under Section 154, and with a view to ensure time-bound disposal of rectification applications, the Act has inserted a new sub-Section (8) in Section 154 to provide that where an application for amendment under this section is made by an assessee on or after 1st June 2001 to an income-tax authority referred to in the said section, the authority shall pass an order within six months from the end of the month in which the application is received by it, either making the amendment or refusing to allow the claim.*

The amendment was specifically made effective for applications made by an assessee on or after 1st June 2001 meaning thereby, the mandatory time limit of six months was not applicable to applications under Section 154 made prior to that and conversely, all applications made on or after 1st June 2001 should be decided within stipulated time of six months, *mandatorily*. Any other view would make nonsense of the time-limit and effective date of applicability of provision.

B) In view of the starting words of sub-Section (8), i.e. *Without prejudice to the provisions of sub*

Thus, if, for example, application under Section 154 is made by assessee three months prior to date of expiry of four years as stipulated in sub-Section (7), the AO shall have to decide the application within three months (and not six months) from date of receipt of application and as per the CBDT, the period of six months mentioned *in the new sub-Section (8) cannot extend, under any circumstances, beyond the overall time-limit of four years.*

section (7) ….” the CBDT further clarified:

…The overall time-limit of four years provided in the section for passing any rectification order shall however continue to apply. In other words, the period of six months mentioned in the new sub-Section (8) cannot extend, under any circumstances, beyond the overall time-limit of four years from the end of the financial year in which the order sought to be rectified was passed.

Thus, if, for example, application under Section 154 is made by assessee three months prior to date of expiry of four years as stipulated in sub-Section (7), the AO *shall have* to decide the application within three months (and not six months) from date of receipt of application and as per the CBDT, *the period of six months mentioned in the new sub-Section (8) cannot extend, under any circumstances, beyond the overall time-limit of four years.*

The words *'cannot extend, under any circumstances'* used by the CBDT themselves explain the legislative intent of making the provision of Section 154(8) *mandatory*.

C) The above CBDT clarification acquires more significance in view of its earlier Circular No. 73, dt. 7th Jan. 1972 *[pre Section 154(8) scenario].* Even if the taxpayers had filed rectification applications under *Section 154(2)* within statutory time limit of four years as per Section 154(7), as a routine practice, these applications used to remain unattended by authorities till expiry of limitation period of four years. Thereafter assessing officers were refusing to process the same under the pretext of expiry of limitation period. To curb this, Circular No. 73 (*supra*) clarified that, the application under *Section 154(2)* of the Act filed by an assessee within the statutory time limit, if not disposed of by the authority concerned within the time specified under sub-Section (7) of Section 154, it may be disposed of by that authority even after the expiry of the statutory time limit, on the merits and in accordance with law. [Also refer to *Vithaldas vs. ITO (1969) 71 ITR 204 (All.)]*

This facility extended to entertain 154 applications even beyond four years, by necessary implications, now stands withdrawn with the introduction of sub-Section (8) read with Circular No. 14/2001 which made it abundantly clear that *'the period of six months mentioned in the new sub-section (8) cannot extend, under any circumstances, beyond the overall time-limit of four years'* resulting in to deemed acceptance of 154 application, if not decided within time stipulated under Section 154(8). If Section 154(8) is construed to be directory, there was no reason for introduction Section 154(8) in view of clarifications and flexibility already available by way of Circular No. 73, dt. 7th Jan. 1972.

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D) Even otherwise, provisions regarding time may be considered mandatory if the intention of the legislature appears to impose literal compliance with the requirement of time. If interpreted otherwise, the sections imposing time limits would become meaningless and otiose and would frustrate the intention of legislature.

In this context, decision of the Apex Court in *DLF Universal Ltd. vs. Appropriate Authority [2000] 243 ITR 730* is worth readers' attention, wherein it was held that (though in the context of some other sections), *where a time-limit is provided for offices functioning under the law, it should be treated as mandatory, so that any other view would make a nonsense of the time-limit.*

E) The mischief sought to be plucked [inaction on part of IT officers in processing the rectification applications under Section 154] from the system needs to be focused while interpreting the provisions like Section 154(8). If thought accordingly, one would conclude that the provision is undoubtedly *mandatory* & not *directory.*

Conclusion

In the author's considered opinion, construing the provision of sub-Section (8) of Section 154 as mandatory would meet the very purpose the provision seeks to achieve. Judicial decisions available in respect of the time-limit of six months specified in Section 12AA(2) as discussed above may be taken help of in deciding the Section 154(8) matters also, since both sections use the same language. To put the controversy at rest, a clarifying amendment in Section 154(8) is necessary. ■