ITAT won't deal with issues not raised before it

Summary – The Mumbai ITAT in a recent case of Reuters Ltd., (the Assessee) held that where Tribunal remanded matter back to Assessing Officer for deciding question of existence or otherwise of PE of assessee in India so as to determine taxability of payment under distribution assessment as 'business profits' since revenue did not raise a ground before Tribunal regarding treatment of payment in question as royalty or FTS, there could have been no point in rendering any decision on said issue and, thus, impugned remand order did not require any rectification

This Miscellaneous Application u/s.254(2) of the Income-tax Act, 1961 has been moved by the Revenue praying for the rectification of the order of the Tribunal dated 29th July, 2009 passed in ITA No.1325/Mum/2001 for the captioned assessment year.

The learned Departmental Representative contended that the Tribunal erred in noting in para 7 of its order that the learned CIT(A)'s decision about the distribution fees paid under the DA agreement as not being royalty or FTS, was not challenged before the Tribunal. It was contended that the ground taken was on wholesome basis encompassing not only the finding of the learned CIT(A) about the amount being not taxable as 'Business profits' under Article 7 but also in the alternative as 'Royalty' or 'FTS'. It was, therefore, prayed that necessary rectification be done to the impugned order. In the opposition the learned AR strongly contended that no such issue was taken up or argued before the Tribunal. He submitted that the contents of the present miscellaneous application do not arise from the ground taken itself by the Revenue before the Tribunal. It was, therefore, contended that there was no mistake in the impugned order requiring any rectification.

After considering the rival submissions and perusing the relevant material on record, we find that the learned CIT(A) held that the amount received under DA was in the nature of business income but not chargeable to tax because of the assessee having no permanent establishment in India. He further held that this amount could not be considered as royalty or FTS. The Revenue preferred appeal before the Tribunal with the solitary ground that "On the facts and circumstances of the case and in law, learned CIT(A) erred in holding that the assessee had no P.E. in India, and that the Distribution Agreement payments amounting to Rs. 27,64,92,799/- cannot be taxed in India in view of provisions of Article 7 of DTAA."

From the above ground it is apparent that the Revenue was aggrieved about the direction of the CIT(A) that the assessee had no PE in India and further DA payment could not be taxed in India in view of the provisions of Article 7 of DTAA being "Business profits". The Tribunal decided this ground by remitting the matter to the file of A.O. for deciding the question of existence or otherwise of the PE of the assessee in India and the appeal of the Revenue was allowed for statistical purposes.

The ITAT held that it is unable to appreciate as to how any decision can be given on the question of such DA being treated as royalty or FTS in the absence of any such ground raised by the Revenue. The ground as extracted above is crystal clear that it challenged the decision of the CIT(A) on Article 7 of DTAA read with the existence or otherwise of PE of the assessee in India.

When the Revenue chose not to raise a ground before the Tribunal *qua* the consideration of the payment of DA as royalty or FTS, there could have been no point in rendering any decision on such issue.

We are, therefore, of the considered opinion that there is no infirmity in the impugned order requiring any rectification.

In the result, the miscellaneous application is dismissed.