

Rectification application shall be governed by law of limitation as applicable on date of passing ITAT order

Summary – The Kolkata ITAT in a recent case of Gifford & Partners Ltd., (the Assessee) held that Miscellaneous application filed after amendment made in section 254(2) by Finance Act, 2016, with effect from 1-6-2016, will continue to be governed by law of limitation laid down on date when order against which application is sought to be filed was passed and not as per law as amended with effect from 1-6-2016

Facts

- The assessee entered into a contract with a GRSE for rendering the services with regard to modernisation of the existing shipyard of GRSE. The said services were to be performed both from India as well as from the United Kingdom ('UK'). Fees for the said services were payable in two parts, *i.e.*, foreign currency payment in USD and local currency payments in INR.
- The issues that arose for consideration was regarding taxability in India of the sums received from GRSE for services rendered under the aforesaid contract.
- The Tribunal held that the sums received from GRSE accrued and arose in India and that the same was taxable in India as Fees for Technical Services (FTS). The Tribunal further held that FTS had to be taxed under Article 13(2) of the DTAA between India and UK.
- The assessee filed instant miscellaneous application (M.A.) contending that the provision of domestic law or DTAA whichever is beneficial was applicable to the non-resident assessee. It was the plea of the assessee that under section 115A, FTS was chargeable to tax at the rate 20 per cent on the basis of the gross receipts, whereas as per the provision of Article 13(2)(bb)(ii), FTS was taxable at the rate 15 per cent of the gross amount of such FTS.
- The assessee contended that since the provisions of the DTAA were more beneficial, the Tribunal ought to have directed that tax should be levied in accordance with the provision of DTAA rather than the provision of section 115A of the Act.
- When the miscellaneous application was taken up for consideration it was noticed that it was filed on 17-03-2017 whereas the order of the Tribunal was passed on 06-04-2016. As per the provision of section 254(2) as amended by the Finance Act, 2016 with effect from 1-06-2016 an application for rectification of apparent errors in the order of the Tribunal had to be filed within six months from the end of the months in which the order was passed. Prior to the aforesaid amendment, an application for rectification of mistake apparent on the record could be filed at any time within four years from the date of the order.
- Since the instant miscellaneous application had been filed after the aforesaid statutory amendment by the Finance Act, 2016, a question that was raised was as to whether miscellaneous application would be barred by time under the amended provision of law.

Held

- It can be seen from the amendment by Finance Act, 2016 with effect from 1-6-2016, that the time limit for filing miscellaneous application under section 254(2) has been curtailed to 6 months from the date of the passing of the order from a period of 4 years from the date of the order.
- The admitted facts in the instant miscellaneous application are that the order against which it is being filed was passed prior to 1-6-2016 and the application under section 254(2) in respect of such order is filed after 1-6-2016. The question is as to whether in respect of orders passed prior to 1-6-2016 and where M.A. under section 254(2) in respect of such orders is filed after 1-6-2016, whether the time limit prescribed under section 254(2) prior to the Amendment by Finance Act, 2016 should apply or the time limit prescribed after the Amendment by Finance Act, 2016 should apply?
- The apex Court in the case of *M. P. Steel Corpn. v. Commissioner of Central Excise* [2015] 7 SCC 58 held that though periods of limitation, being procedural law, are to be applied retrospectively, yet if a shorter period of limitation is provided by a later amendment to a statute, such period would render the vested right of action contained in the statute nugatory as such right of action would now become time barred under the amended provision. Therefore a statute which while procedural in its character, if it affects vested rights adversely it has to be construed as prospective.
- Following the aforesaid decision, it is held that the MA though filed after 1-6-2016 will continue to be governed by the law of limitation laid down under section 254(2) on the date when the order against which application is sought to be filed was passed and not as per the law as amended by the amendment with effect from 1-6-2016. The MA therefore has to be construed as one filed within the period of limitation and has to be accepted as validly presented within the period of limitation.
- Coming to the merits of the case, there is an agreement between India and U.K. for avoidance of double taxation and, therefore, the assessee is entitled to plead that taxability has to be as per the provision of the Act or the DTAA whichever is beneficial is to the assessee. Since the taxability of FTS at 15 per cent of the gross receipts as per Article 13(2)(bb)(ii) of DTAA is more favourable than the provision of section 115A of the Act, the FTS in question has to be taxed at 15 per cent on gross basis as per the DTAA. The mistake pointed out in the miscellaneous applications is apparent in the face of the record. Even assuming that the long drawn processing of reasoning is required to decide the miscellaneous application but if ultimately there can be only one possible view then it cannot be said that the power to rectify such mistake is outside the ambit of section 254(2) of the Act.
- The revenue's arguments that the assessee is seeking review of the order of the tribunal is not correct. As already stated that this plea was already put forth in the submissions made before the Tribunal but was not considered and omitted to be considered by the tribunal. For all the above reasons the miscellaneous applications filed by the assessee is allowed.