

THE HON'BLE SRI JUSTICE DILIP B.BHOSALE

AND

THE HON'BLE SRI JUSTICE A.RAMALINGESWARA RAO

-

WRIT PETITION No.29925 of 2012

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ORAL ORDER: (per the Hon'ble Sri Justice Dilip B.Bhosale)

This writ petition under Article 226 of the Constitution of India impugns a notice issued by the

1st respondent-Assistant Commissioner of Income Tax under Section 154 of the Income Tax Act, 1961 (for short "the Act") on 31.08.2012, proposing to rectify the concluded assessment for the Assessment Year 2005-06, as illegal, arbitrary and barred by limitation. The

1st respondent issued the notice proposing to rectify a mistake in the order of re-assessment dated 19-03-2010, made under Section 143(3) of the Act. The mistake mentioned in the notice was "incorrect set off of unabsorbed depreciation pertaining to Assessment Years 1993-94, 1994-95, 1995-96 and 1996-97 against income (under normal provisions) of Assessment Year 2005-06."

2 . M/s. Rastriya Ispat Nigam Limited, (for short "the assessee"), the Government of India undertaking, is engaged in the business of manufacture and sale of Iron and Steel products. For the Assessment Year 2005-06, the assessee had filed return of income on 28-10-2005 declaring 'NIL' income after setting off of unabsorbed depreciation of Rs.3081,03,64,095/-. The assessee admitted total income of Rs.3099.81 Crores and claimed set off of unabsorbed depreciation of Assessment Years 1993-94 to 1998-99 aggregating Rs.3914.69 Crores. Further, the assessee admitted book profit under Section 115JB of the Act at Rs.1107.17 Crores and the tax thereon was worked out at Rs.86.81 Crores. The return of income was accordingly processed under Section 143(1) of the Act on 31-03-2006, accepting the

income returned, and it resulted in refund of Rs.28.91 Crores. Thereafter, a case of the assessee was taken up for scrutiny and re-assessment was completed under Section 143(3) of the Act, vide order dated 26-03-2007, determining the total income at Rs.3127,21,34,124/- and after setting off of the unabsorbed depreciation to the extent of the income so determined, the taxable income under normal provisions was again computed at 'NIL'. The assessment, that was completed vide order dated 26-03-2007, was then reopened by issue of a notice under Section 148 of the Act dated 20-10-2009, in respect of computation of Minimum Alternative Tax. The reassessment was finally resulted in an order, dated 19th March, 2010, under Sections 147 of the Act, raising certain additional demands. Book profit was accordingly assessed at Rs.2266.25 Crores as against Rs.1107.17 Crores admitted by the assessee. In this backdrop, the impugned notice dated 31.08.2012 under Section 154 of the Act was issued, proposing to rectify the mistake, as indicated in the notice, in the assessment completed vide order dated 19-03-2010. It would be relevant to reproduce the impugned notice dated 31.08.2012, which reads thus:

NOTICE UNDER SECTION 154/155 OF THE INCOMETAX ACT, 1961

Office of the

Assistant Commissioner of Income Tax

Circle-3(1), Visakhapatnam

PAN AABCR0435L/2005-06 Date. 31-08-2012.

TO

M/s.Rashtriya Ispat Nigam Ltd.,

Visakhapatnam.

Sir,

The order u/s.143 (3) r.w.s. 147 of the I.T. Act., 1961 for the A.Y. 2005-06 made on 19-03-2010 in your case requires to be amended as there is a mistake apparent from the record within the meaning of section 154/155 of the income tax Act, 1961. The rectification of the mistake, as per details given below, will have the effect of enhancing the assessment/reducing the refund/increasing your liability and therefore, if you wish to be heard in this connection you are

requested to appear in person or by an authorized representative in my office at Visakhapatnam On 17-09-2012 at 11.30 AM. If so however, you intend sending a written reply to this notice and do not wish to be heard in person, you are requested to ensure that your reply reaches me on or before the date mentioned above.

Yours faithfully,

(Ch.HIMA BINDU)

Assistant Commissioner of Incometax

Circle-3(1), Visakhapatnam.

Details of Mistake :

Incorrect set off of unabsorbed depreciation pertaining to

Asst.Years 1993-94, 1994-95, 1995-96 & 1996-97 against

Income (under normal provisions) of Asst.Year 2005-06.

3. The assessee had commenced its business in 1982, and according to them, they had accumulated unabsorbed depreciation aggregating Rs.3914.68 Crores with respect to Assessment Years 1993-94 to 1998-99. Under the provisions of Section 32(2) of the Act, as it stood at the relevant time, depreciation to the extent it was not adjusted in any assessment could be carried forward and treated as depreciation for subsequent year, and so on until the entire unabsorbed depreciation was adjusted against the income. By Finance Act (No.2), 1996 w.e.f 04-07-1997, a time limit was introduced for adjusting the unabsorbed depreciation. After this amendment, such an unabsorbed depreciation could be carried forward only for a limited period of eight assessment years, subsequent to the year in which depreciation was computed. On the basis of a clarification issued by the Finance Minister, the Central Board of Direct Taxes issued Circular No.762, dated 18-02-1997 clarifying that depreciation computed upto 1996-97 i.e., prior to the amendment with effect from 1997, could be carried forward and considered for set off against income under any head for Assessment Year 1997-98 and seven subsequent assessment years. The Parliament again amended Section 32 of the Act by Finance Act, 2001 w.e.f.01-04-2002 and the original

provisions of Section 32 of the Act were restored, removing the time limit of eight years that was introduced with effect from 04.07.1997. In view thereof, according to the assessee, in the return filed for the Assessment Year 2005-06, which went through various processes as indicated above, the depreciation to the extent it was unabsorbed and had been determined upto the years 1996-97 was adjusted and as such their income was determined/computed at Nil.

3.1 It is against this backdrop, according to the assessee, what was sought to be reopened by issue of notice under Section 148 dated 20.10.2009 was the book-profit in the assessment order dated 26-03-2007, which had escaped assessment at the time of assessment under Section 143 (3) of the Act. Further, according to the assessee, there was no reference in the re-assessment order dated 19-03-2010 about the income sought to be determined under the regular provisions of the Act. The case of the assessee is that the re-assessment proceedings initiated vide notice dated 20.10.2009 under Section 148 of the Act was only to consider the book-profit that escaped the assessment at the time the original assessment was completed.

4. The question, therefore, falls for our consideration is whether the limitation for issuing notice under Section 154 of the Act, commences from the date of assessment order under Section 143 (3) of the Act or from the order of re-assessment under Section 147 read with Section 148 of the Act? According to the assessee since the dispute relates to allowing unabsorbed depreciation, in the assessment order dated 26.03.2007, under Section 143(3) of the Act, the limitation of four years under Section 154(7) would commence from the date of the assessment order dated 26.03.2007 and not from the date of re-assessment order, under Section 147 read with Section 148 of the Act, dated 19.03.2010. As against this, according to the Revenue, original order dated 26.03.2007 under Section 143 (3) got merged with the reassessment order dated 19.03.2010 and, therefore, limitation of four years under Section 154(7) would commence from the date of reassessment order under Section 147 read with 148 of the Act.

5. We have heard the learned counsel for the parties at considerable length and with their assistance gone through the entire material placed before us and the relevant provisions of the Act. We have also perused the judgments cited by them in support of their contentions.

6. Sri S.Ravi, the learned Senior Counsel for the assessee, at the outset, submitted that the proposed rectification under Section 154 of the Act for the Assessment Year 2005-06 is barred by limitation. After inviting our attention to the order of assessment under Section 143(3) of the Act dated 26-03-2007, he submitted that the order of reassessment under Section 147 of the Act dated 19-03-2010 did not disturb the said order (26.03.2007) of assessment made under regular provisions of the Act, and what was considered in the reassessment was only computation of income for the purpose of levy of Minimum Alternative Tax under Section 115JB of the Act. In short, he submitted that income under the regular provisions of the Act and the computation thereof was not touched in the order dated 19.03.2010. He, therefore, submitted that limitation provided in Section 154(7) of the Act would begin to run from the end of the financial year in which the order sought to be rectified was passed i.e., order dated 26-03-2007. He submitted that the last date of the previous year was 31-03-2007 and four years limitation under Section 154 (7) would expire on 31-03-2011 and, therefore, notice under Section 154 of the Act issued on 31-08-2012 was hopelessly barred by limitation. In support of this contention, he placed reliance upon the judgment of the Supreme Court to which we will make reference, in the course of the judgment, at an appropriate stage.

7. On the other hand, Sri B.Narasimha Sarma, learned Counsel for the Revenue placed heavy reliance upon the judgment of the Supreme Court in ***Hind Wire Industries Ltd., Vs. Commissioner of Income Tax()*** to submit that the order of assessment merges with the order of re-assessment and, therefore, the period of limitation requires to be computed from the order of reassessment. In present case, he submitted, the order of assessment under

Section 143 (3) of the Act dated 26-03-2007 merged with the order of reassessment under Section 147 dated 19-03-2010 and, therefore, the period of limitation would start to run from 31-03-2010, and would expire on 31-03-2013, and since the notice was issued on 31-08-2012, it cannot be stated to be barred by limitation. He also invited our attention to the impugned notice to contend that the notice itself makes it clear that the order under Section 143(3) read with 147 of the Act dated 19-03-2010 requires amendment under Section 154 of the Act. The notice also refers to the details of mistake. He, therefore, submitted that when the notice specifically speaks about reassessment order dated 19-03-2010, the Court, at this stage of the proceedings, cannot proceed on the assumption that it was in respect of the regular assessment dated 26-03-2007.

8. In rejoinder, Sri S.Ravi, the learned Senior Counsel invited our attention to the judgment of the Supreme Court in ***Commissioner of Income Tax, Chennai Vs. M/s.Alagendran Finance Ltd.,()*** and submitted that the Supreme Court has clarified that “merger”, as observed in ***Hind Wire Industries Ltd.,(supra)***, is only on the points which are dealt with in the later proceedings and it would not mean that the entire proceedings has been reopened. He submitted that although the Supreme Court in *M/s.Alagendran Finance Ltd., (supra)* was concerned with Section 263 of the Act, the judgment is on all fours. He submitted that use of the word ‘*any order*’ in Section 154 of the act and the words ‘*the order*’ in Section 263 was necessitated by the fact that in the former case it is the very same officer invokes the jurisdiction, but in the latter case it is a superior officer.

9. Before we deal with the question, it would be advantageous to reproduce the relevant portion of Section 154 of the Act, which reads thus:-

Rectification of mistake.

154. (1) With a view to rectifying any mistake apparent from

the record an income -tax authority referred to in

section 116 may,-

a. amend **any order passed by it under the provisions of this Act;**

b.

c.

(1A) Where any matter has been considered and decided in any proceeding by way of appeal or revision relating to an order referred to in sub-section (1), the authority passing such order may, notwithstanding anything contained in any law for the time being in force, amend the order under that sub-section in relation to any matter other than the matter which has been so considered and decided.

(2) Subject to the other provisions of this section, the authority concerned-

(a) may make an amendment under sub-section (1) of its own motion, and

(b) shall make such amendment for rectifying any such mistake which has been brought to its notice by the assessee [or by the deductor], and where the authority concerned is the Commissioner (Appeals), by the [Assessing] Officer also.

(3)

(4)

(5)

(6)

(7) Save as otherwise provided in section 155 or sub-section (4) of section 186 **no amendment under this section shall be made after the expiry of four years** [from the end of the financial year in which the order sought to be amended was passed].

(8)”

Similarly, it would be necessary to reproduce relevant portion of the provisions contained in Section 147 of the Act, which reads thus:-

Income escaping assessment.

147. If the [Assessing] Officer [has reason to believe] that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recomputed

the loss or the depreciation proceedings under this section, ore recomputed the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year):

Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year:

.....

.....

.....

*Explanation 2.*_ For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely:-

- a.
- b.
- c. Where an assessment has been made, but-
 - (i) income chargeable to tax has been underassessed; or
 - (ii)
 - (iii)
 - (iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed;]

10. The arguments advanced by learned counsel for the parties detained our attention for quite sometime on the judgments of the Supreme Court in ***Hind Wire Industries Limited (supra)*** and ***M/s.Alagendran Finance Ltd., (supra)***. We deem it appropriate to look into these judgments in detail, to appreciate and to find out whether these judgments support their submissions.

10.1 In ***Hind Wire Industries Limited (supra)*** Sub-section (7) of Section 154

of the Act, as it then stood, fell for consideration, in particular the expression “from the date of order sought to be amended” therein, of the Supreme Court. The background facts against which the Supreme Court considered the said provision are that the assessee was assessed for income tax originally under the assessment order dated 21-09-1979. The assessee had filed a petition for rectification of the said order under Section 154 of the Act on the ground that the Income Tax Officer had not taken into consideration the shift allowance available to the assessee. Consequent upon this application, the assessment order was rectified on 12-07-1982. Thereafter, the assessee again applied for rectification of the fresh order of 12-07-1982 on 4th July, 1986 contending that while he was entitled to depreciation on factory building at the rate of 10%, he was allowed the depreciation only at the rate of 5%. The Income Tax Officer dismissed the assessee’s claim on the ground that the application was beyond time. This order was confirmed by the Appellate Assistant Commissioner. In the appeal, the Tribunal allowed the application holding that application made on 4th July, 1986 was within 4 years of the fresh order of assessment made on 12th July, 1982 and hence within limitation. On reference, the High Court reversed the order of the Tribunal holding that the period of 4 years ought to have been calculated from the initial order of assessment viz., from 21st September, 1979 and not from the fresh order of assessment passed on 12th July, 1982. There was no dispute that the assessee was entitled to 10% depreciation allowance on the factory building and, therefore, it was observed that it had to be granted to him if it was held that the rectification application was made within time.

10.2 In this backdrop, the Supreme Court considered the expression “from the date of order sought to be amended” in Sub-section (7) of Section 154, as it stood then and observed that it is obvious that the word ‘order’ has not been qualified in any way and it does not necessarily mean the original order. It can be “any order” including the amended or rectified order.

10.3 The Supreme Court considered several judgments to which we would make a brief reference in the subsequent paragraphs of this judgment. At this

stage, we would like to reproduce the concluding paragraph in ***Hind Wire Industries Limited (supra)*** which reads thus:

“ In view of these authorities taking the view that the word ‘any’ in the expression “order sought to be amended” would mean even the rectified order, we are satisfied that the High Court was wrong in setting aside the decision of the Tribunal Shri G.Viswanatha Iyer, learned senior counsel cited before us the decisions of the Calcutta, Gujarat, Madras and Orissa High Courts in *Bharat Textiles Works v. Income Tax Officer Circle-IV, 3-A,(Company)* (1978) 114 ITR,28: (1979) Tax LR 206), *Ahmedabad Sarangpur Mills Co.Ltd. v. A.S.Manohar, Income-Tax Officer, Circle IV, Ward-A,(Companies) Ahmedabad* (1976) 102 ITR 712, *Kothari (Madras) Ltd. V. Agriculture Income Tax Officer, (1989) 177 ITR 538: (1988 Tax LR 1505), and Commr. Of Income-Tax v. Kalinga Tubes (1991) 187 ITR 595, respectively in support of his contention that the word ‘any’ used in the expression “order sought to be amended” would mean the original order of the assessment. As against this, Dr.Shankar Ghose, learned senior counsel referred us to the decisions of the Patna and Karnataka High Courts in *Bihar State Road Corporation v. Commr.of Income-Tax, (1986) 162 ITR 114 at 130 and Commr Income-Tax, Karnataka-II Bangalore v. Mysore Iron and Steel Ltd., (1986) 157 ITR 531, respectively which decisions have taken the contrary view. However, in view of the decisions of this Court referred to above, we are of the opinion that the view taken by the Tribunal in the present case is the correct one. We, therefore, set aside the impugned order of the High Court and restore that of the Tribunal. The appeals are allowed accordingly with no order as to costs.**

(emphasis supplied)

11. The Supreme Court in ***M/s.Alagendran Finance Ltd., (supra)*** considered the question “whether for the purpose of computing the period of limitation envisaged under Sub-section (2) of Section 263 of the Act, the date of order of assessment or that of the reassessment, is to be taken into consideration?”. The question arose for consideration against the facts that the assessee had filed its returns for the Assessment Years 1994-95, 1995-96 and 1996-97 on 23-11-1994, 27-11-1995 and 26-11-1997 respectively and the assessment for the year 1994-95 was completed on 27-02-1997 and those of the Assessment Years 1995-96 and 1996-97 were completed on 12-05-1997 and 30-03-1998 respectively. In the orders of assessment, the assessee’s return under the Head “Lease Equalization Fund” was accepted.

11.1 The proceedings for reassessment were initiated by the Assessing Officer on 05-03-2002. Orders of reassessment were passed on 28-03-2002. Proceedings for reassessment, however, were initiated only in respect of three items viz, (i) the expenses claimed for share issue, (ii) bad and doubtful debts and (iii) excess depreciation on gas cylinders and goods containers. Although the assessee's return in respect of lease equalization was not the subject matter of the reassessment proceedings, the Commissioner of Income Tax purported to invoke his revisional jurisdiction in terms of Section 263 of the Act and by an order dated 29-03-2004 held that the Orders of the Assessing Officer were prejudicial to the interest of Revenue as the lease rentals had not been properly brought to tax. Having so observed, all the three assessments were reopened under Section 263 of the Act and the Assessing Officer was directed to check and assess the lease rentals from Lease Equalization Fund, if any, and to bring it to tax for all the above three years.

11.2 The Assistant Commissioner, accordingly, carried out the reassessment proceedings only in respect of income on equalization reserve holding that the deduction made from the gross lease rent is only a provisional and not an actual expenditure, and therefore, the same was to be disallowed and added to the income returned. The Income Tax Appellate Tribunal found favour with the contention of the assessee that the said purported proceedings under Section 263 of the Act were barred by limitation. The Tribunal after referring to several decisions of the Supreme Court and High Courts, ultimately held that the order passed under Section 263 of the Act, dated 29-03-2004 was clearly barred by limitation with reference to the orders passed under Section 143(3) of the Act.

11.3 The Revenue preferred an appeal against the order of Tribunal before High Court. The High Court dismissed the appeal and confirmed the order passed by the Tribunal. Against the order of the High Court, the parties were before the Supreme Court. The Supreme Court after considering its judgment in ***Hind Wire Industries Limited (supra)*** in paragraphs 9 and 10 observed thus:-

"9. We may at this juncture also notice the decision of this Court in **Hind Wire Industries Ltd. (supra)** wherein the decision of this Court in V. Jaganmohan Rao v. CIT and CEPT (75 ITR 373) interpreting the provisions of Section 34 of the Act was reproduced which reads as under :

"Section 34 in terms states that once the Income tax officer decides to reopen the assessment, he could do so within the period prescribed by serving on the person liable to pay tax a notice containing all or any of the requirements which may be included in a notice under Section 22(2) and may proceed to assess or reassess such income profits or gains. It is, therefore, manifest that once assessment is reopened by issuing a notice under sub-section (2) of Section 22, the previous underassessment is set aside and the whole assessment proceedings start afresh. When once valid proceedings are started under Section 34(1) (b), the Income-tax Officer had not only the jurisdiction, but it was his duty to levy tax on the entire income that had escaped assessment during that year."

10. There may not be any doubt or dispute that once an order of assessment is reopened, the previous underassessment will be held to be set aside and the whole proceedings would start afresh but the same would not mean that even when the subject matter of reassessment is distinct and different, the entire proceeding of assessment would be deemed to have been reopened.

(emphasis supplied)

11.4 Then, in paragraph 12 of the judgment (in M/s. Alagendran Finance Ltd.) the Supreme Court after referring to ***Sun Engineering Works Pvt.Ltd., (supra)*** in depth, observed thus:

12. We may at this juncture also take note of the fact that even the Tribunal found that all the subsequent events were in respect of the matters other than the allowance of 'lease equalization fund'. The said finding of fact is binding on us. **Doctrine of merger, therefore, in the fact situation obtaining herein cannot be said to have any application whatsoever. It is not a case where the subject matter of reassessment and subject matter of assessment were the same. They were not".**

(emphasis supplied)

11.5 The Supreme Court, then proceeded to consider the judgment of Madras High Court in ***Commissioner of Wealth-Tax Vs. A.K.Thanga Pillai()*** and the judgment of the Supreme Court in Commissioner of ***Income Tax Vs. Shri Abuda Mills Ltd.,()*** and in concluding paragraph 15 of the judgment (in M/s.Alagendran Finance Ltd.) observed thus:-

15. We, therefore, are clearly of the opinion that keeping in view the facts and circumstances of this case and, in particular, having regard to the fact that the Commissioner of Income Tax exercising its revisional jurisdiction reopened the order of assessment only in relation to lease equalization fund which being not the subject of the reassessment proceedings, **the period of limitation provided for under sub-section (2) of Section 263 of the Act would begin to run from the date of the order of assessment and not from the order of reassessment. The revisional jurisdiction having, thus, been invoked by the Commissioner of Income Tax beyond the period of limitation, it was wholly without jurisdiction rendering the entire proceeding a nullity.**

(emphasis supplied)

12. In ***Hind Wire Industries Ltd. (supra)*** the Supreme Court considered the provisions contained in Section 154 of the Act, in the light of almost similar facts. The only difference is that, in the case before the Supreme Court, the assessee had filed a petition for rectification of the re-assessment order dated 12.07.1982 contending that while he was entitled to depreciation on factory building at the rate of 10%, he was allowed only at the rate of 5%. In this backdrop, the Supreme Court held that the assessee would be entitled for rectification if his petition under Section 154 of the Act was within the time.

12.1 In ***M/s.Alagendran Finance Ltd., (supra)*** the question of Limitation was raised in the proceedings under Section 263 of the Act. While dealing with the question, on the facts and in the circumstances of the case, the Supreme Court observed that the order passed by the Commissioner of Income Tax would clearly demonstrate that only that part of order of assessment which related to lease equalization fund was found to be prejudicial to the interest of the Revenue. The proceedings for reassessment have nothing to do with the said

head of income. Doctrine of merger, therefore, would not apply in a case of this nature. Further, in this case Court considered the judgment in ***Hind Wire Industries Limited (supra)*** and without disturbing the ratio laid down therein, on the facts and in the circumstances of the case and in exercise of the revisional powers under Section 263 of the Act, observed that once an order of assessment is re-opened, the previous under-assessment would be held to be set aside and the whole proceedings would start afresh and then added that but the same would not mean that when the subject matter of re-assessment is distinct and different, the entire proceedings of assessment would be deemed to have been re-opened.

13. In ***International Cotton Corporation Vs. C.T.O()*** the Supreme Court considered the similar expression in Rule 38 of the Mysore Sales Tax Act and while dealing with the point, as raised in the instant writ petition, in paragraph 9 of the judgment observed thus:-

“The other attack that the rectification order is beyond the point of time provided in Rule 38 of the Mysore Sales Tax Rules is also without substance. What was sought to be rectified was the assessment order rectified as a consequence of this Court’s decision in Yaddalam’s case (AIR 1965 SC 1510). **After such rectification the original assessment order was no longer in force and that was not the order sought to be rectified. It is admitted that all the rectification orders would be within time calculated from the original rectification order. Rule 38 itself speaks of “any order” and there is no doubt that the rectified order is also “any order” which can be rectified under Rule.38**”

(emphasis supplied)

14. The decision of the Supreme Court in ***International Cotton Corporation(supra)*** was endorsed by the Supreme Court in ***Deputy Commissioner of Commercial Taxes Vs. H.R.Sri Ramulu()*** in the following terms:-

“The reason for that is that once an assessment is reopened, the initial order for assessment ceases to be operative. The effect of reopening the assessment is to vacate or set aside the initial order for assessment and to substitute in its place the order made

on reassessment. The initial order for reassessment cannot be said to survive, even partially, although the jurisdiction for reassessment arises in a limited field or only with respect to a part of the matter covered by the initial assessment order. **The result of reopening the assessment is that a fresh order for reassessment would have to be made including for those matters in respect of which there is no allegation of the turnover escaping assessment.** As it is, we find that in the present case the assessment orders made under Section 12A were comprehensive orders and were not confined merely to matters which had escaped assessment earlier. In the circumstance, the only orders which could be subject-matter of revision by the appellant were the orders made under Section 12A of the Act and not the initial assessment orders. In the case of *J.Jatganmohan Rao v. Commr. Of Income-tax and Excess Profits Tax, Andhra Pradesh* (1970) 75 ITR 373 : AIR 1970 SC 30-0), this Court dealt with Section 34 of the Indian Income-tax Act, 1922, which relates to reassessment in the case of income escaping assessment. **It was held by this Court that once assessment is reopened, the previous under-assessment is set aside and the whole proceedings start afresh.** Ramaswamy, J., speaking for the court observed: “ Section 34 in terms states that once the Income-tax Officer decides to reopen the assessment he could do so within the period prescribed by serving on the person liable to pay tax a notice containing all or any of the requirements which may be included in a notice under Section 22(2) and may proceed to assess or reassess such income, profits or gains. **It is, therefore, manifest that once assessment is reopened by issuing a notice under sub-section (2) of Section 22 the previous under-assessment is set aside and the whole assessment proceedings start afresh.** When once valid proceedings are started under Section 34(1)(b), the Income-tax Officer had not only the jurisdiction but it was his duty to levy tax on the entire income that held escaped assessment during that year.”

(emphasis supplied)

15. Similarly, in *Commissioner of Sales Tax, Madhya Pradesh Vs. H.M.Esufali H.M.Abdulali()* the Supreme Court dealt with reassessment made under Section 19 of the Madhya Pradesh Central Sales Tax Act, 1958 and held that when reassessment is made, the former assessment is completely reopened and in its place fresh assessment is made. While considering the said decision, the Supreme Court dealt with the expression “date on which the order was passed”, which is similar to the expression, as aforementioned, in

Sub-section (7) of Section 154 of the Act and observed that relevant provision did not qualify the word 'order' and hence period of 4 years has to be calculated from the date of rectification order. For taking such view, the Supreme Court referred to its earlier judgment in ***International Cotton Corporation (supra)*** in which the Supreme Court had observed that “*what is true of the assessment must also be true of reassessment because reassessment is nothing but a fresh assessment*. When reassessment is made under Section 19 (of the Madhya Pradesh Central Sales Tax Act, 1958), the former assessment is completely reopened and in its place fresh assessment is made. While assessing a dealer, the assessing authority does not merely assess him on the escaped turnover, but it assesses him on his total estimated turnover. While making reassessment under Section 19, if the assessing authority has no power to make best judgment assessment, all that the assessee need to do to escape reassessment is to refuse to file a return or refuse to produce, taken on behalf of the assessee is correct, the assessee can escape his liability to be reassessed by adopting an obstructive attitude. It is difficult to conceive that such could be the position in law.”

16. Observations made by the Supreme Court in ***Commissioner of Income Tax Vs. Sun Engineering Works Pvt. Ltd.,()*** are also relevant to appreciate and understand the provisions contained in Section 147 of the Act better. The relevant observations read thus:

“Section 147, which is subject to Section 148, divides cases of income escaping assessment into two clauses i.e. viz. (a) those due to the non-submission of return of income or non-disclosure of true and full facts and (b) other instances. Explanation (1) defines as to what constitutes escape of assessment. In order to invoke jurisdiction under Section 147(a) of the Act, the ITO must have reason to believe that some income chargeable to tax of an assessee has escaped assessment by reason of the omission or failure on the part of the assessee either to make a return under Section 139 for the relevant assessment year or to disclose fully and truly material facts necessary for the assessment for that year. Both the conditions must exist before an ITO can proceed to exercise jurisdiction under Section 147(a) of the Act. Under Section 147(b) the Income-tax Officer also has the jurisdiction to initiate proceedings for

reassessment where he has reason to believe, on the basis of information in his possession, that income chargeable to tax has been either under assessed or has been assessed at too low a rate or has been made the subject of excessive relief under the Act or excessive loss or depreciation allowance has been computed. In either case whether the Income-tax Officer invokes his jurisdiction under Clause (a) or Clause (b) or both, the proceedings for bringing to tax an 'escaped assessment' can only commence by issuance of a notice under Section 148 of the Act within the time prescribed under the Act. Thus, under Section 147, the assessing officer has been vested with the power to "assess or reassess" the escaped income of an assessee. The use of the expression "assess or reassess such income or recompute the loss or depreciation allowance" in Section 147 after the conditions for reassessment are satisfied, is only relatable to the preceding expression in Clauses (a) and (b) viz. "escaped assessment". The term "escaped assessment" includes both "non-assessment" as well as "under assessment". Income is said to have "escaped assessment" within the meaning of this section when it has not been charged in the hands of an assessee in the relevant year of assessment. The expression "assess" refers to a situation where the assessment of the assessee for a particular year is, for the first time, made by resorting to the provisions of Section 147 because the assessment had not been made in the regular manner under the Act. The expression "reassess" refers to a situation where an assessment has already been made but the Income-tax Officer has, on the basis of information in his possession, reason to believe that there has been under assessment on account of the existence of any of the grounds contemplated by the provisions of Section 147(b) read with the Explanation (I) thereto."

17. In yet another judgment of the Supreme Court in ***M/s.Kundan Lal Srikishan, Mathura (U.P.) Vs. Commissioner of Sales Tax, U.P and another*** the question considered was whether for purposes of limitation, the date of order of assessment for the year 1975-76 should be the date of original assessment order, i.e.,

07-02-1979 or whether it should be the date of order passed under Section 21 of the U.P. Sales Tax Act (15) 1948, i.e.18-01-1980 (for short "the Sales Tax Act")? In this case, the original assessment order for the year

1975-76 was passed on 07-02-1979. The reassessment order under Section 21 of the Sales Tax Act was passed on 18-01-1980. Thereafter, in 1982 the assessee filed an application under Section 22 for the Assessment Years 1975-

76, 1976-77, 1977-78 and 1978-79 for rectification on the ground that turnover in respect of purchases made on behalf of ex U.P. Principals had been wrongly assessed to sales tax.

17.1 The Sales Tax Officer rejected all applications, whereas the appellate authority allowed the applications relating to Assessment Years 1976-77, 1977-78 and 1978-79 and dismissed the application for the Assessment Year 1975-76 on the ground that application for rectification was barred by limitation. The Sales Tax Tribunal allowed the appeal filed by the appellant/assessee for the year 1975-76 on the ground that the application was within limitation, holding that the original assessment order dated 07-02-1979 had ceased to exist on the reopening of the assessment and the reassessment order being passed on 18-01-1980. The High Court set aside the order of Tribunal holding that the application for rectification of assessment for the Assessment Year 1975-76 had been filed beyond three years from the date of original order dated 07-02-1979 and that the order dated 18-01-1980 had no effect on the ground of limitation.

17.2 Against this order, matter reached the Supreme Court. The Supreme Court set aside the order of the High Court and held that once a notice is issued for the purpose of making reassessment, the earlier proceeding gets reopened and the initial order of assessment ceases to be operative. The effect of reopening the assessment is to vacate or set aside the initial order for assessment and to substitute in its place the order made on reassessment. The Supreme Court also observed that once an assessment order had been rectified and it was sought to make a further rectification of that order, the period of limitation for making such further rectification would commence not from the date of original assessment but from the date of earlier rectification order. The observations made by the Supreme Court in the concluding paragraph are relevant. Paragraph 9 of the judgment reads thus:-

“9. We do not find any merit in the submission made on behalf of the Department that the order passed on 18-1-1980 should be understood as an order discharging the notice issued under S. 21 of the Act and not an order of reassessment as such. This is

obvious from the language of S. 21 itself. Section 21 authorises the assessing authority to make an order of assessment or reassessment. It says that if the assessing authority has reason to believe that the whole or any part of the turnover of a dealer, for any, assessment year or part thereof, has escaped assessment to tax or has been under assessed or has been assessed to tax at a rate lower than that at which it is assessable under the Act, or any deductions or exemptions have been wrongly allowed in respect thereof, the assessing authority, may, after issuing notice to the dealer and making such inquiry as it may consider necessary, assess or re-assess the dealer or tax according to law. The assessing authority gets jurisdiction to make the reassessment by issuing a notice to the dealer as provided by S. 21 of the Act. **When once the notice is issued under that section the original order of assessment gets re-opened and thereafter any order made under S. 21 of the Act alone would be the order of assessment in respect of the period in question. Section 21 of the Act does not require the assessing authority to pass an order** deciding whether it is necessary to proceed with the inquiry under that section or not before passing an order of assessment or reassessment under that section. The only order which the assessing authority is required to make under S. 21 after a notice is issued to the dealer under that section is an order of assessment or reassessment. It is not required to pass first an order whether it should proceed with the reassessment proceedings or not. Such a preliminary order is not contemplated under S. 21 of the Act. Hence the order dated 18-1-1980 has to be treated as an order of assessment even though it is not in the form in which an order of assessment has to be passed and not as an order merely on the question whether the reassessment proceedings under S. 21 of the Act should be proceeded with or not. In other words, it should be held that the assessing authority had adopted the earlier order as the order of assessment passed at the conclusion of the proceedings under S. 21 of the Act. **The period of limitation for the application for rectification should, therefore, be calculated from the date of the order under S. 21 of the Act.** We cannot, therefore, subscribe to the view of the High Court expressed in its observation that since no fresh order of assessment had been passed after examining the accounts of the assessee the 'original assessment order should be considered to remain intact as nothing is added or altered in pursuance of the order under S. 21 of the Act."

(emphasis supplied)

18. In the present case, the assessment was reopened by issue of notice under Section 148 of the Act on 20-10-2009 and the re-assessment order was passed on 19.03.2010. Before that, the assessment under Section 143 (3) was concluded vide order dated 26.03.2007. Having regard to the position of Law settled by the Supreme Court, the effect of reopening the assessment under section 148 would be to vacate or set aside the initial order

for assessment under Section 143(3) and to substitute in its place the order made under Section 147 of the Act. Therefore, the initial order for reassessment would not survive even partially, although the justification for reassessment arises in a limited field or only with respect to a part of matter covered by the initial assessment order. In other words, once a notice under Section 148 of the Act is issued for the purpose of making re-assessment, the earlier proceedings get reopened and where the re-assessment under Section 147 is done, the initial order of assessment under Section 143 (3) ceases to be operative. Thus, the result of reopening the assessment under Section 148 is that a fresh order for reassessment would have to be made including for those matters in respect of which there is no allegation of turnover escaping the assessment. Apart from that, in the present case, the notice under Section 154 clearly states that the order under Section 147 of the Act made on 19-03-2010 requires amendment as there is a mistake apparent from the record and the notice also referred to the details of mistake.

19. The difference between the words “any order” in section 154 and the words “the order” in section 263 of the Act would also have to be noticed and read to understand the words “any order” to mean even an order of re-assessment or the amended/rectified order passed by an Income-Tax authority. There cannot be any doubt that the re-assessment order under Section 147 read with Section 148 of the Act is also “any order” which could be rectified by issuing a notice under Section 154 of the Act. In other words, the words “any order” in Section 154 (1) (a) of the Act would mean even the re-assessment order under Section 147 of the Act. Merely because in the case under Section 154, it is the same Officer who invokes the jurisdiction and in the case under Section 263, it is a superior Officer, would not mean or it cannot be stated that both the expressions, “any order” and “the order”, as occur in Sections 154 and 263 respectively would have the same meaning. The word ‘the’ clearly denotes the specific order, while the word “any” would mean any order passed by the Income-Tax Authority.

20. In ***Hind Wire Industries Limited (supra)***, the Supreme Court was dealing with the provisions of Section 154 of the Act, as has fallen for our consideration in the present case, and in that case the subject matter of re-assessment was distinct and different and that the rectification sought was in respect of the same subject matter which was considered in the original assessment order. The facts of our case are similar. Having regard thereto, in our opinion, the present case, arising from the notice under Section 154 of Act, is covered by the judgment of the Supreme Court in *Hind Wire Industries Limited (supra)* and so also the other judgments referred to in the foregoing paragraphs, in particular ***Kundan Lal Srikishan*** and ***H.R. Sri Ramulu (supra)***, and in view thereof we hold that the doctrine of merger would apply to the facts of the present case. The limitation, therefore, would start to run from the date of re-assessment order dated 19.03.2010 and since the notice under Section 154 was issued on 31.08.2012, it was well within the time stipulated under sub-section (7) of Section 154 of the Act.

21. Thus, we answer the first question in the negative.

22. Next, the learned Senior Counsel for the petitioners raised a question whether the issues, which are highly debatable could be the subject matter of the proceedings under Section 154 of the Act. He submitted that the jurisdiction under Section 154 of the Act is extremely narrow and restrictive and could be exercised only to rectify any mistake apparent from the record and obvious and patent mistake and not something which could be established by long drawn process and reasoning on points on which there may be conceivably two opinions. On the other hand, the learned counsel for the Revenue submitted that the question as raised by the petitioners cannot be entertained in a writ jurisdiction under Article 226 of the Constitution of India unless the action complained of is without jurisdiction.

23. The notice under Section 154 of the Act was issued on 31-08-2012 by the 1st respondent. The petitioners responded to it by an exhaustive reply submitted by them on 17-09-2012. In the reply, they raised all questions

including the questions raised before us. It is apparent from the dates that the reply was submitted by the petitioners within the time stipulated in the notice dated 31-08-2012, and within less than three days therefrom the instant writ petition was filed. The questions whether the mistake, pointed out in the impugned notice is an obvious and patent mistake, and whether to establish such mistake a long drawn process and reasoning would require, in our opinion, cannot be and need not be gone into in writ jurisdiction under Article 226 of the Constitution, when a notice under Section 154 of the Act would have to be decided on merits. It is true that the jurisdiction under Article 226 of the Constitution can be exercised in a case where the action complained of is without jurisdiction or is taken/initiated on assumption of power not vested in the Officer. It is well settled that where the exercise of power *ex facie* appears to be without jurisdiction, the Court would be inclined to interfere but even in that case lack of jurisdiction would have to be revealed from the notice and reasons on the face thereof and not by discussion on merits. Challenge to the notice under Section 154 of the Act, in the present case, is not on the ground of jurisdiction or assumption of power not vested in the authority. The petitioners have already filed their objections, which respondent No.1 will have to decide, after following due procedure and taking into consideration the reply filed by the petitioners, by passing a speaking order. The 1st respondent is bound to furnish reasons for deciding the notice and deal with all contentions urged by the petitioners in their reply. In the circumstances, we are not inclined to entertain the second question raised for our consideration, and we keep all contentions of the parties, in respect thereof, open to be considered by the 1st respondent. It is always open to the petitioners to challenge the order, if adverse to them, in an appropriate proceeding raising all contentions/questions of law for consideration. In this view of the matter, even the submission that writ petition cannot be dismissed on the ground of alternative remedy deserves no consideration and must be rejected.

24. In the result, the writ petition is dismissed. However, there shall be no order as to costs.

25. Miscellaneous petitions pending in the writ petition, if any, also stand disposed of.

Dilip B.Bhosale, J

A.Ramalingeswara Rao, J

15th April, 2015.

Tsnr

L.R. Copy to be marked : Yes / No