

OD-11

A.F.R.

ITA/14/2012

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (Income Tax)
ORIGINAL SIDE

COMMISSIONER OF INCOME TAX
CENTRAL-I, KOLKATA

-Versus-

BHARAT HYDRO POWER
CORPORATION

BEFORE :
THE HON'BLE JUSTICE SURYA PRAKASH KESARWANI
And
THE HON'BLE JUSTICE RAJARSHI BHARADWAJ
Date : 24th January, 2024

Appearance:
Ms. Smita Das De, Adv.
...for the appellant.

Mr. J. P. Khaitan, Sr. Adv.
Mr. Avra Mazumdar, Adv.
Mr. Samrat Das, Adv.
...for the respondent.

1. Heard Ms. Smita Das De, learned standing counsel for the appellant/income tax department and Mr. J. P. Khaitan, learned senior counsel assisted by Mr. Avra Mazumdar and Mr. Samrat Das, learned Advocates for the respondent/assessee.
2. This appeal has been filed praying to set aside the order dated 24.06.2011 passed in ITA No.427/Kol/2011 (Bharat Hydro Power Corporation Ltd. vs. Commissioner of Income Tax, Central-1, Kolkata) passed by the Income

Tax Appellate Tribunal, Bench- “B” , Kolkata whereby the appeal filed by the respondent/assessee to challenge the order of the Commissioner of Income Tax (Central-1), Kolkata dated 14.01.2011 under Section 263 of the Income Tax Act, 1961 was allowed and the aforesaid order of the Commissioner of Income Tax under Section 263 of the Act, 1961 was set aside. While allowing the appeal of the respondent/assessee, the Tribunal has solely relied upon a judgment of the Hon’ble Supreme Court in the case of *Commissioner of Income Tax vs. Algendran Finance Ltd.* reported in (2007) 293 ITR 1(SC) .

3. Learned counsel appearing for the appellant submits that the assessment order stood merged with the re-assessment order and, as such, the limitation under Section 263 of the Act, 1961 would start from the date of re-assessment order and not from the date of original assessment order. She relied upon a judgment of the Hon’ble Supreme Court in the case of *Income Tax Officer, Azamgarh vs. M/s. Mewalal Dwarka Prasad* reported in 1989 (176) ITR 529.
4. We have carefully considered the submission of the learned counsel for the parties and perused the paper book.
5. Briefly stated facts of the present case are that an assessment order for the assessment year 2004-05 was passed by the assessing officer on 20.03.2006 under Section 143(3) of the Act, 1961. Thereafter, the assessing officer initiated proceedings under Section 147/148 of the Act, 1961 and passed a re-assessment order dated 05.12.2008 under Section

148/143 of the Act, 1961. Aggrieved with this re-assessment order, the assessee filed an appeal before the Commissioner of Income Tax (Appeal) which was allowed by the CIT(A) by order dated 29.10.2009.

6. It is thereafter that a notice dated 08.11.2010 under Section 263 of the Act, 1961 was issued by the Commissioner of Income Tax on three points which were not the subject-matter of re-assessment proceedings or the re-assessment order. The Commissioner passed the order under Section 263 of the Act, 1961 on 14.01.2011. Aggrieved with the aforesaid order dated 14.01.2011 under Section 263 of the Act, 1961, the respondent/assessee filed the aforesaid appeal being ITA No.427/Kol/2011 before the Income Tax Appellate Tribunal, Bench- "B", Kolkata which has been allowed by the impugned order dated 24.06.2011 relying upon the aforesaid judgment of Hon'ble Supreme Court in the case of *Algendran Finance Ltd. (supra)*.
7. It is undisputed that the Commissioner has sought to revise the re-assessment order on three points which were not the subject-matter of the re-assessment order or re-assessment proceedings.
8. Sub-section (2) of Section 263 of the Act, 1996 is reproduced below:

"No order shall be made under sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed."
9. The present appeal was admitted by this Court by order dated 25.01.2012 on the following substantial question of law:

1. *Whether on the facts and in the circumstances of the case the learned Tribunal was justified in law in not appreciating the ratio laid down by the Hon'ble Apex Court in the case of Alagendran Finance Limited (2931 ITR 1) ?*
2. *Whether on the facts and in the circumstances of the case the learned Tribunal was justified in holding that the notice under Section 263 of the Act dated 8.9.2010 is barred by limitation despite the fact that the original assessment order dated 20.3.2006 stand merged with the re-assessment order dated 5.12.2008 in view of the amendment made by inserting explanation 3 to section 147 by Finance Act, 2009 with retrospective effect from 1.4.1989 ?*
3. *Whether on the facts and in the circumstances of the case the learned Tribunal was justified in holding that the original assessment is modified to the extent and only in respect of those items which have been considered in the re-assessment order and does not make the original assessment order non-existent in respect of concluded items which were not the subject matter of re-assessment proceeding?"*

10. The main issue involved in the impugned order the Tribunal is as to whether the proceedings initiated by the Commissioner of Income Tax and the order passed under Section 263 of the Act, 1961 is beyond the limitation provided under sub-Section (2) of Section 263. This question depends upon the question as to whether the limitation would start from the date of passing of the assessment order or from the date of passing of the re-assessment order.

11. From bare perusal of the scheme of the Act, 1961 and more particularly, the provisions of Sections 143(3), 147/148 and Section 263 of the Act, 1961 we are of the considered view that the limitation would normally start from the date of the assessment order under Section 143(3) of the Act, 1961. But if the grounds on which the order is sought to be revised by the Commissioner of Income Tax under Section 263 of the Act, 1961 was subject-matter of re-assessment order, then the limitation for the purpose of Section 263(2) of the Act, 1961 would start from the date of re-assessment. In the present set of facts, the grounds on which Section 263 was attempted to be involved by the Commissioner of Income Tax, were not subject-matter of re-assessment proceedings or re-assessment order. Under the Circumstances, the date of assessment order (20.03.2006) would be relevant for the purpose of sub-Section (2) of Section 263. Since the notice under Section 263 was issued by the Commissioner of Income Tax on 08.11.2010, therefore, it was clearly barred by time. Hence, the entire proceedings initiated by the Commissioner of Income Tax under Section 263 of the Act, 1961 was without jurisdiction being barred by limitation.
12. The issue as has been raised in the present appeal is also covered by the judgment of the Hon'ble Supreme Court in the case of *Commissioner of Income Tax, vs. Alagendran Finance Ltd. (supra)* (paragraphs 14, 20 and 25) which is reproduced below:

14. *A bare perusal of the order passed by the Commissioner of Income-tax would clearly demonstrate that only that part of the order of assessment which related to lease equalisation fund was found to be prejudicial to the interests of the Revenue. The proceedings for reassessment have nothing to do with the said head of income. The doctrine of merger, therefore, would not apply in a case of this nature.*
20. *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 matters other than the allowance of "lease equalisation fund". The said finding of fact is binding on us. The 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 the subject-matter of assessment were the same. They were not.*
25. *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 his revisional jurisdiction reopened the order of assessment only in relation to lease equalisation 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.”

13. For all the reasons afore-stated, we hold that in respect of the grounds on which powers under Section 263 of the Act, 1961 were invoked by the Commissioner of Income Tax, being not part of or subject-matter of reassessment proceedings under Section 147/148 of the Act, the doctrine of merger of the original assessment order with the subsequent reassessment order would not apply.
14. Since the Commissioner of Income Tax has not invoked the powers under Section 263 on any of the grounds or subject matters on which reassessment order was based, therefore, the principle of merger for the purposes of limitation would not apply and the limitation under sub-section (2) of Section 263 would start keeping in mind the date of assessment order i.e. 20.03.2006. Thus, having regard to the fact that the Commissioner of Income Tax had exercised his revisional jurisdiction on grounds which were not subject matter of reassessment proceedings, the period of limitation provided for in sub-section (2) of Section 263 of the Act would begin to run from the date of order of assessment and not from the date of order of reassessment. The revisional jurisdiction having been invoked by the Commissioner of Income Tax beyond the period of limitation, it was wholly without jurisdiction rendering the entire proceedings a nullity.

15. We have also perused the judgment of Hon'ble Supreme Court in the case of *Messrs. Mewalal Dwarka Prasad (supra)* heavily relied by learned counsel for the appellant/department. We find that the said judgment has no relevance on facts of the present case inasmuch as it relates to the validity of a reassessment proceeding. In the present set of facts, we are mainly concerned with the running of limitation under sub-section (2) of Section 263 of the Act 1961 and which issue stands concluded directly by the judgment of Hon'ble Supreme Court in the case of *Alagendran Finance Limited (supra)*.
16. Under the circumstances, the Income Tax Appellate Tribunal has not committed any manifest error of law to set aside the order dated 14.01.2011 passed by the Commissioner of Income Tax under Section 263 of the Act 1961. All the three substantial questions of law, as reproduced above, are answered in favour of the assessee against the revenue. **The appeal (ITA/14/2012) is dismissed.**

(SURYA PRAKASH KESARWANI, J.)

(RAJARSHI BHARADWAJ, J.)