

**IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN**

BEFORE S/SHRI B P JAIN, AM & GEORGE GEORGE.K, JM

**ITA Nos.287/Coch/2015
(Asst Year 2007-08)**

M/s The Thirumbadi Rubber Co Ltd Thirumbadi Estate Mukkum 673 602, Calicut	Vs	The Dy Commr of Income Tax Circle 1, Range 1, Kochi
(Appellant)		(Respondent)

PAN No.	AABCT0021G
Assessee By	Sh R V Veeramani
Revenue By	Sh Shantom Bose, CIT-DR
Date of Hearing	7 th June 2016
Date of pronouncement	16 th June 2016

ORDER

PER GEORGE GEORGE. K. JM:

This appeal, at the instant of the assessee, is directed against the CIT's order dated 26.3.2015 passed u/s 263 of the Act. The relevant assessment year is 2007-08.

2 The ground raised read as follows:

i) The order passed u/s 263 on 26.3.2015 by the CIT is barred by limitation in so far as it seeks to set aside an order u/s 143(3) which was passed on 28.12.2009. It is incorrect to say that the CIT is only setting aside the order u/s 143(3) r.w.s 147 since in the said order no computation of income u/s 115JB was made.

2. The decision of the Hon'ble Supreme Court in CIT vs Alagenda Finance Ltd reported in (2007) 211 CIT 69 (SC); (2007) 162 Taxman 465 (SC) is relied

on, in which it was held that limitation for purpose of section 263 starts from the date of original assessment and Not reassessment.

3. The following table will throw light on the chronology of events:

	Normal	115JB
143(3) order dt 28.12.09: Income	40,42,740	78,61,212
IT+SC+Cess	13,60,786	7,86,121
Went in appeal: CIT order dt 29.7.13 gave partial relief		
Order dt 10.10.13 by ACIT -re-fixed income at	40,13,917	
ITAT order dt.3.1.14 deleting rubber tree sale 7135011x35%	24,97,254	
143(3) r.w.s 147 AO dt 25.2.13 (addn 2665965) Income	67,08,710	
Order dt 22.4.14 By ACIT refixed income (after ITAT relief)	41,82,628	
CIT(A) order dt 30.10.2014 against 143(3) rws 147 ;deleted	26,65,965	
Order dt 28.1.2015 giving effect to the above	15,16,663	78,61,212

Thus, in none of the orders passed between 2009 and 2015 the MAT income was recomputed.

4. Without prejudice to the foregoing, the appellant wishes to submit that the decision of the Hon'ble Kerala High Court cannot be said to have become final since the appellant has filed appeals before the Hon'ble Supreme Court. Hence, it cannot be said that for purpose of sec115JB, sale of old rubber trees should not be reduced; it that be so, the assessment order cannot be said to be erroneous and hence, the order u/s 263 is not warranted.

3 Briefly stated the facts of the case are as follows:

The assessee is a company derived income from rubber plantation. For the assessment year under consideration, return of income was filed on 27th Oct 2007 declaring 'nil' income and book profits 'nil'. The assessment was taken up for scrutiny and the assessment was completed u/s 143(3) vide order dated 28.12.2009 fixing the total income at Rs. 40,42,740/- and the book profit of Rs.78,61,212/-. Thereafter, the assessment was reopened by issuance of notice u/s 148 on 23.02.2012 and the reassessment u/s 143 r.w.s 147 was completed

vide order dated 25.2.2013 fixing the total income under the normal provisions at Rs. 67,08,710/-.

4 Subsequently, the CIT issued notice u/s 263 of the Act for the reasons that when the assessment u/s 143(3) r.w.s 147 was completed vide order dated 25.2.2013, the AO omitted to calculate the book profits as per section 115JA(1) of the Act. The CIT relied on the CBDT circular no.495 dated 22.9.1987, explaining that the AO should compute the total income of a company as per the normal provisions of the income tax Act as well as the book profits under section 115JA of the Act. The proposed revision was objected to by the assessee by stating that the same was barred by limitation within the meaning of section 263 (2) of the Act. The assessee submitted that the order sought to be revised, is the order u/s 143(3) passed on 28.12.2009 and hence, the same is beyond two years for passing the revision under section 263 of the Act . Further it was submitted that as regards the issue of inclusion of sale of rubber tree for the computation of income on book profit u/s 115JA of the Act, the judgment of the Hon'ble Kerala High Court in assessee's own case for the AY 1997-98 to 2000-02 has not attained finality and the assessee has filed SLP before the Hon'ble Supreme Court.

5 The CIT, however, rejected the objections raised by the assessee and order passed u/s 263 of the Act setting aside the assessment us 143(3) r.w.s 147 dated 25.2.2013. The CIT was of the view that the AO having not computed the

book profit as required under section 115JA(1), the assessment order passed u/s 143 r.w.s 147 is passed without proper application of mind.

5 Aggrieved, the assessee is in appeal before us. The Id AR relied on the grounds. The Id DR, on the other hand, supported the order of the CIT.

6 We have heard the rival submissions and perused the material on record. The solitary issue that arises for our consideration is whether the impugned order date 26.3.2015 passed u/s 263 of the Act is barred by limitation. To examine the issue, we have to understand which is the order sought to be revised u/s 263 of the Act. If it is the assessment order dated 28.12.2009 passed u/s 143(3) of the Act is sought to be revised, the same is barred by limitation. On the other hand, if it is the reassessment order dated 25.2.2013 passed u/s 143(3) r.w.s 147 of the Act is sought to be revised; the same is well within the time limit prescribed u/s 263 of the Act. The reassessment u/s 143(3) r.w.s 2147 of the Act was completed on 25.2.2013 to bring to tax a sum of Rs. 26,65,965/- being the provision created for wage arrears. The AO held that the provision does not relate to the relevant Assessment Year and the expenditure claimed was added back to the income returned. The relevant observations of the AO in completing the reassessment u/s 143(3) r.w.s 147 of the Act read as under:

"5. I have carefully considered the submissions of the assessee. Since the provisions does not relate to th wages of the previous year relevant to AY 2007-08, this cannot be considered as an allowable expenditure. Therefore, the

provisions thus created on account of wage arrears amounting to Rs. 26,65,965/- is added to the income returned. Assessment is completed accordingly."

6.1 The revision u/s 263 of the Act was initiated for the reason that the AO ought to have calculated the book profit u/s 115JA of the Act, without reducing 65% of the total sale proceeds of old and unyielding rubber trees amounting to Rs. 46,37,757/-. Here, it is pertinent to note that the original assessment order was completed u/s 143(3) on 28.12.2009, wherein the AO had reduced 65% of the sale proceeds of un-yielded rubber trees while computing the book profits u/s 115JA of the Act. As mentioned earlier, the reassessment order dated 25.2.2013 is concerned only with regard to the disallowance of certain expenses on the ground that the expenditure does not relate to the current assessment year. The reassessment order is unrelated to the issue whether the sale proceeds of rubber trees are to be included for the purpose of computation of book profits. The order of the CIT u/s 263 of the Act has not been passed with any of the issues which has been decided in the reassessment order dated 25.2.2013; but sought to revise the issue decided in the original assessment order dated 28.12.2009 passed u/s 143(3) of the Act which continue to hold the field as regards to the issue of sale proceeds of rubber trees whether is to be included for the purpose of computation of book profits u/s 115JA of the Act. Therefore, the assessment order dated 28.12.2009 did not merge with the order of the reassessment dated 25.2.2013 in respect of the issue which did not form part of the subject matter of reassessment. Hence, according to us, the CIT

can only revise the assessment order u/s 143(3) dated 28.12.2009 which is clearly barred by limitation.

6.2. The issue as to when the period of limitation would commence for an order under section 263 was considered by the Hon'ble Supreme Court in CIT v. Alagendran Finance Ltd. [2007] 293 ITR 1 (SC). In that case, orders of assessment for the assessment years 1994-95, 1995-96 and 1996-97 were passed on February 27, 1997, May 12, 1997, and March 30, 1998. In the said orders of assessment the assessee's return under the head "lease equalisation fund" was accepted. Proceedings for reassessment were initiated and were completed on March 28, 2002. The proceedings for reassessment, however, were in respect of three items and the assessee's return in respect of lease equalisation fund was not the subject-matter of the reassessment proceedings. The Commissioner invoked his jurisdiction under section 263 on March 29, 2004, in respect of the return under the head of "lease equalisation fund". On these facts, the Hon'ble Supreme Court held that only that part of the order of assessment which related to the lease equalisation fund was found to be prejudicial to the interests of the Revenue. The proceedings for reassessment had nothing to do with that head of income and hence the doctrine of merger would not apply in a case of that nature. The Hon'ble Supreme Court further held that once an order of assessment is reopened the previous assessment will be held to be set aside and the whole proceeding would start afresh but that 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. Since the Commissioner in exercise of his revisional jurisdiction reopened the order of assessment in relation to the lease equalisation fund which was not the subject-matter of the reassessment proceedings, the period of limitation provided under sub-section (2) of section 263 would, it was held, begin to run from the date of the order of assessment and not from the order of reassessment.

6.3 Further, the Hon'ble Bombay High Court on identical facts has decided the issue in favour of the assessee. The Hon'ble High Court was considering the case relating to the AY 1996-97 wherein the order of assessment was passed on 10.3.1999 u/s 143(3) of the Act, allowing the deduction claimed by the assessee under clauses (vii) and (vii-a) of section 36(1) of the Act and the foreign exchange rate difference. Pursuant to notice under section 148 of the Act, the reassessment was carried out on February 22, 2000, reworking the deduction under section 80M. An appeal against the order under section 143(3) was decided by the Commissioner (Appeals) on March 28, 2001. Thereafter, a second notice was issued under section 148 following which a second order of reassessment was passed on March 26, 2002, for reworking of the deduction under section 36(1)(viii). On March 28, 2003, the Commissioner passed an order under section 263 for disallowance under section 36(1)(vii), (vii-a) and in respect of foreign exchange rate difference. The Tribunal set aside the order as barred

by limitation. On further appeal, to the Hon'ble Bombay High Court, it was contended by the revenue that when the Assessing Officer reopened the assessment and passed his order dated 26 March, 2002, the Explanation to clause (vii) of section 36(1) had been introduced on the statute book and the Assessing Officer was duty bound to apply the law as amended, which he failed to do, and that Explanation 3 to section 147 of the Act having been amended to provide that the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment, and coming to his notice subsequently in the course of the proceedings. The Hon'ble High Court repelled the above contentions raised by the revenue and dismissed the appeal of the revenue. It was held by the Hon'ble Bombay High Court as under:

"Sub-section (2) of section 263 stipulates a period of limitation of two years within which an order under sub-section (1) has to be passed. Under sub-section (2), no order under section 263(1) can be made after the expiry of two years from the end of the financial year in which the order sought to be revised was passed. The order of assessment under section 143(3) in the present case allowed the deduction which was claimed under section 36(1)(vii), section 36(1)(viii) and in respect of foreign exchange rate difference. Neither in the first order of reassessment dated February 22, 2000, nor in the second order of reassessment dated March 26, 2002, were these aspects determined. In other words on the aforesaid three issues, the original order of assessment dated March 10, 1999, passed under section 143(3) continued to hold the field. Once that is the position, then clearly the doctrine of merger would not apply. The order under section 143(3) passed on March 10, 1999, cannot stand merged with the orders of reassessment in respect of those issues which did not form the subject-matter of the reassessment. Consequently, Explanation 3 to section 147 will not alter that position. Explanation 3 only enables the Assessing Officer, once an assessment is reopened, to assess or reassess the income in respect of any issue, even an issue in respect of which no reasons were indicated in the notice under section 148(2). This, however, will not obviate the bar of limitation under section 263(2). Where the jurisdiction under section 263(1) is sought to be exercised with reference to an issue which is covered by the original order of assessment under section 143(3) and which does not form the subject-matter of the reassessment, as in the

present case, limitation must necessarily begin to run from the order under section 143(3)."

7 In view of the aforesaid reasons and the judicial pronouncements, cited supra, we hold that the impugned order passed u/s 263 of the Act is barred by limitation and the same is hereby quashed. It is ordered accordingly.

8 In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open Court on this 16th day of June 2016.

Sd/ (B P JAIN)	Sd/- (GEORGE GEORGE K)
Accountant Member	Judicial Member

Cochin: Dated 16th June 2016

Raj*

Copy to:

1. Appellant –
2. Respondent –
3. CIT(A)
4. CIT,
5. DR
6. Guard File

By order

Assistant Registrar
ITAT, COCHIN

1	Date of dictation	15 June 2016
2	Dt on which the typed draft is placed before the dictating Member	15 June 2016
3	Dt on which the approved draft comes to the Sr PS/PS	
4	Dt on which the fair order is placed before the dictating Member	
5	Dt of pronouncement	
6	Dt on which the file goes to the Bench Clerk	
7	Dt on which the file goes to the Head Clerk	
8	Dt on which the file goes to AR	
9	Dt of dispatch of the order	