

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.8.2021

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNAMAM

and

THE HONOURABLE MR.JUSTICE SATHI KUMAR SUKUMARA KURUP

Tax Case Appeal No.64 of 2015

The Commissioner of Income Tax,
Chennai

...Appellant

Vs

M/s.Indian Overseas Bank,
Balance Sheet Management
Department, Chennai-2

...Respondent

APPEAL under Section 260A of the Income Tax Act, 1961
against the order dated 08.8.2014 passed by the Income Tax
Appellate Tribunal, Madras 'B' Bench, Chennai made in
I.T.A.No.1384/Mds/2014 for the assessment year 2004-05.

For Appellant: Mrs.R.Hemalatha, SSC
For Respondent : Mr.R.Vijayaraghavan for
M/s.Subbaraya Aiyer Padmanabhan

Judgment was delivered by T.S.SIVAGNAMAM,J

This appeal has been filed by the Revenue under Section 260A

of the Income Tax Act, 1961 ('the Act' for brevity) challenging the order dated 08.8.2014 passed by the Income Tax Appellate Tribunal, Madras 'B' Bench, Chennai (the Tribunal for brevity) made in I.T.A.No.1384/ Mds/2014 for the assessment year 2004-05.

2. The above appeal was admitted on 03.11.2015 to consider the following substantial questions of law:

"1. Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the order passed under Section 263, which set aside the assessment order dated 26.12.2011 was barred by limitation as per Section 263(2) ? and

2. Is not the finding of the Tribunal bad by holding that the order passed under Section 263 was against the order made under Section 143(3) dated 28.12.2006 and not in respect of order passed under Section 143(3) read with Section 147 dated 26.12.2011 ?"

3. We have heard Mrs.R.Hemalatha, learned Senior Standing Counsel for the appellant – Revenue and Mr.R.Vijayaraghavan, learned counsel appearing for the respondent – assessee.

4. The assessee filed their return of income for the year under consideration and it was processed under Section 143(1) of the Act

on 28.3.2005. Subsequently, the case was selected for scrutiny and a notice under Section 143(2) of the Act dated 12.9.2005 was issued. After the case was discussed, the assessment was completed under Section 143(3) of the Act vide order dated 28.12.2006. Thereafter, the assessment was reopened by notice dated 22.2.2011. The assessee addressed to the Assessing Officer requesting reasons for reopening. Further, the reasons were communicated to the assessee by letter dated 12.8.2011.

5. The reasons for reopening are as hereunder :

"1. It has been observed from the assessment proceedings of the AY 2004-05 that the assessee has made investments in M/s.IOB Properties Pte Limited situated outside India (Singapore). During the current year M/s.IOB Properties Pte Limited has merged with Indian Overseas Bank and a sum of Rs.7.77 Crores representing the net surplus in the investment was appropriated to capital reserve. Since the IOB Properties Pte Limited is not incorporated in India, the surplus arising out of merger is taxable in India as per the provisions of the Indian Income Tax Act. In view of the above, it is clear that the assessee has not furnished all the material facts fully and truly in the return of income for the

purpose of assessment on the above issue.

2. Further, assessee has debited an amount of Rs.93,04,142/- as prior period items during the current year. Since the assessee is following mercantile system of accounting, the same cannot be allowed as deduction in the current year. Reliance in this regard is placed on the decision of the Hon'ble Kerala High Court in the case of CIT Vs. Southern Cables & Engineering Works [289 ITR 167]."

6. The assessee submitted their reply dated 13.9.2006. Thereafter, the assessment was completed by order dated 30.12.2011 under Section 143(3) read with Section 147 of the Act. The Assessing Officer, after taking into consideration the reply given by the assessee, held that no disallowance was required to be made in respect the prior period expenses. In other words, the explanation offered by the assessee was found to be satisfactory by the Assessing Officer.

7. Thereafter, the Commissioner of Income Tax (Large Tax Payer Unit) [for short, the CIT] issued a notice under Section 263(1) of the Act stating that the assessment proceedings were erroneous and prejudicial to the interest of Revenue. The case was discussed by affording an opportunity of personal hearing. The assessee objected

to the exercise of power under Section 263(1) of the Act on the ground of limitation as well as on merits. However, by order dated 26.3.2014, the objections raised by the assessee were rejected by the CIT, the reassessment order dated 30.12.2011 was set aside and the matter was sent back to the Assessing Officer for de novo consideration with regard to the claim of business loss of Rs.72.75 Crores.

8. Aggrieved by that, the assessee preferred an appeal before the Tribunal, which, by the impugned order dated 08.8.2014, allowed the appeal. As against that, the Revenue is before us by way of this appeal.

9. The issue, which falls for consideration in this appeal, is as to whether the proceedings initiated under Section 263(1) of the Act were beyond the period of limitation.

10. In the preceding paragraphs, we have noted the facts and they are recapitulated as hereunder :

The original assessment was completed under Section 143(3) of the Act by order dated 28.12.2006. The re-assessment was completed by order dated 30.12.2011. If, according to the CIT, the order of re-assessment was erroneous and prejudicial to the interest of Revenue, he could have exercised his powers under Section 263(1)

of the Act within the period of limitation under Section 263(2) of the Act i.e before expiry of two years from the end of financial year, in which, the order sought to be revised was passed. Therefore, the period of limitation would commence from 31.3.2007 and would come to an end on 31.3.2009.

11. Admittedly, the proceedings under Section 263(1) of the Act were initiated much beyond the said date and if 31.3.2009 is the date, on which, the limitation expires, the proceedings under Section 263 of the Act have to be held to be time barred. The CIT was of the view that the limitation would commence from the end of the financial year, in which, the re-assessment proceedings were completed i.e on 31.3.2012 and if this date is taken, then the exercise of power under Section 263 of the Act would be within the period of limitation.

12. In the preceding paragraphs, we have set out the reasons for reopening and we find the issue pertaining to the claim of business loss of Rs.72.75 Crores was not one of the reasons for reopening. In fact, the Assessing Officer issued a notice to the assessee on 18.7.2006 raising 16 queries, of which, query No.11 related to the nature and allowability of the claim of loss arising out of non recoverable investments being stock in trade written off

debited to provision for depreciation on investments – Rs.72,75,00,000/-.

13. The assessee submitted their reply dated 13.9.2006 stating that the said amount of Rs.72,75,00,000/-, being non recoverable investments, were written off during the year by debit to provision for depreciation on investment account and that the provision made in each year towards depreciation on investments was added back and offered to tax. Therefore, it was submitted that when the non recoverable investments were written off by debit to the provision account, the same had to be allowed as deduction in computing the total income.

14. Thus, the explanation offered by the assessee was found to be acceptable by the Assessing Officer and the assessment was completed under Section 143(3) of the Act by order dated 28.12.2006. This aspect of the matter has not even been referred to by the CIT when the notice was issued under Section 263(1) of the Act.

15. The question as to whether the date, on which the order under Section 147 of the Act was passed should be reckoned as the starting point of limitation, considering the facts and circumstances of the case, has been dealt with by several decisions of the Hon'ble

Supreme Court and the earliest of such decisions is in the case of ***CIT Vs. Alagendran Finance Limited [reported in (2007) 293 ITR 1]*** wherein it was held that in respect of an issue, which was not subject matter of reassessment, limitation under Section 263(2) of the Act would run from the date of original assessment and that revisional proceedings initiated in respect of such issue beyond the period of two years from the date of original assessment were barred by limitation.

16. The relevant portion of the said judgment reads as follows :

"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."

17. The High Court of Bombay, in the decision in the case of **Ashoka Buildcon Ltd. vs ACIT [reported in (2010) 325 ITR 574]**, while considering a similar issue and after following the said decision of the Hon'ble Supreme Court in the case of **Alagendran Finance Limited**, held that *where an assessment has been reopened under Section 147 of the Act in relation to a particular ground or in relation to certain specified grounds and subsequent to the passing of the order of reassessment, the jurisdiction under Section 263 of the Act is sought to be exercised with reference to issues which do not form the subject of the reopening of the assessment or the order of reassessment, the period of limitation provided for in Sub-Section (2) of Section 263 of the Act would commence from the date of the order of assessment and not from the date on which the order reopening the reassessment has been passed. It was further held that the order of assessment cannot be regarded as being subsumed within the order of reassessment in respect of those items which do not form part of the order of reassessment.*

18. As pointed out earlier, the reasons for reopening under Section 147 of the Act were only two and the issue, on which, the CIT sent the notice under Section 263 of the Act was pertaining to a claim

of business loss of Rs.72.75 Crores, which was not one of the issues in the re-assessment proceedings, but was an issue, which was raised by the Assessing Officer in the original assessment under Section 143(3) of the Act, in which, a show case notice was issued, the assessee submitted their explanation and thereafter, the assessment was completed.

19. For all purposes, if, according to the CIT, the decision on the claim of business loss was erroneous and prejudicial to the interest of Revenue, then the proceedings under Section 263 of the Act ought to have commenced before 31.3.2009. Therefore, by applying the above decisions, the only conclusion that can be arrived is to hold that the proceedings are barred by limitation.

20. The learned Senior Standing Counsel appearing for the appellant – Revenue has placed reliance on the decision of the Bombay High Court in the case of **CIT-3 Vs. ICICI Bank Ltd. [ITA.No.6375 of 2010 dated 08.2.2012]**.

21. In the decision of the Bombay High Court in the case of **ICICI Bank Ltd.**, the substantial question of law framed for consideration was as to whether, in the circumstances of the case, the Tribunal was right in holding that the order of the CIT passed under Section 263 of the Act was barred by limitation under Section 263(2)

of the Act. While answering the said question, it was held that *the order of assessment under Section 143(3) of the Act allowed the deduction, which was claimed under Sections 36(1)(vii) and 36(1)(viii) of the Act and that neither in the first order of re-assessment dated 22.2.2000 nor in the second order of re-assessment dated 26.3.2002 were these aspects determined.* In other words, it was held that *on the three issues, the original order of assessment dated 10.3.1999 passed under Section 143(3) of the Act continued to hold the field and if that is the factual position, the doctrine of merger would not apply.*

22. The learned Senior Standing Counsel appearing for the appellant has placed reliance on Explanation III to Section 147 of the Act and submitted that there is enough power vested with the Assessing Officer to assess or re-assess the income in respect of any issue, which has escaped assessment and such issue comes to his notice subsequently in the course of the proceedings under Section 147 of the Act notwithstanding that the reasons for such issue have not been included in the reasons recorded under Sub-Section (2) of Section 148 of the Act.

23. In our considered view, Explanation III to Section 147 of the Act will not alter the position nor improve the case of the

Revenue. By virtue of the said Explanation, the Assessing Officer is empowered to assess or re-assess income in respect of any issue, though it has not been specifically mentioned as a reason for reopening under Section 148(2) of the Act.

24. However, in the case on hand, the jurisdiction under Section 263(1) of the Act was exercised with reference to an issue, which was covered in the original assessment order dated 28.12.2006 and it was not an issue, based on which, the reopening of assessment was made under Section 143 of the Act. For all purposes, the period prescribed under Sub-Section (2) of Section 263 of the Act should commence from 31.3.2007 and the two years' period would come to an end on 31.3.2009. As it is not in dispute that the proceedings under Section 263 of the Act were initiated well beyond the said date, exercise of such power has to be held to be without jurisdiction and barred by limitation.

25. For all the above reasons, the tax case appeal is dismissed and the substantial questions of law framed are answered against the Revenue. No costs.

10.8.2021

Speaking Order

12/14

Index/Internet : Yes

To
The Income Tax Appellate Tribunal, 'B' Bench, Chennai.

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T.S.SIVAGNAM,J
AND
SATHI KUMAR SUKUMARA KURUP,J

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