

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **I.T.A. No.335/2011**

% **Date of Decision: 23.02.2011**

Commissioner of Income Tax ..... Appellant  
Through: Ms. Prem Lata Bansal, Sr. Advocate  
with Mr. Deepak Anand, Advocate

Versus

Goyal M.G. Gases Pvt. Ltd. .... Respondent  
Through: None.

**CORAM:**  
**HON'BLE MR. JUSTICE A.K. SIKRI**  
**HON'BLE MR. JUSTICE M.L. MEHTA**

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| 1. Whether reporters of Local papers may be allowed to see the judgment? | No |
| 2. To be referred to the reporter or not?                                | No |
| 3. Whether the judgment should be reported in the Digest?                | No |

**A.K. Sikri, J. (ORAL)**

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1. Before coming to the nature of the impugned order passed by the Income Tax Appellate Tribunal (hereinafter referred to as "the Tribunal"), it would be apposite to take note of the backdrop facts for the reason that the impugned order passed is in the second round of litigation and the orders which were passed in the first round of litigation have direct bearing on the issue.

2. The respondent had filed the income tax return for the assessment year 1999-2000 declaring income of Rs.2.31 crores. The assessment was completed under Section 143(3) of the Income Tax Act (hereinafter referred to as "the Act") at an income of R.3.56 crores. Since additions were made by the Assessing Officer while passing the assessment order that order was challenged by the assessee in appeal which was deiced by CIT(Appeals) on 19.06.2002 granting partial relief to the assessee. In the meantime, the Commissioner of Income Tax exercised its jurisdiction under Section 263 of the Act and passed order on 25.03.2004 opining that the Assessing Officer while passing the order had not taken into consideration the interest income of the assessee on mercantile basis. Direction was accordingly given by the Commissioner in the said order to the Assessing Officer to recalculate the interest income on mercantile basis of accounting after obtaining details from the assessee. It was also directed that consequential order be passed within a period of three months. This order of the Commissioner passed under Section 263 of the Act was challenged by the assessee by filing appeal before the Tribunal. This appeal came up for hearing on 23.11.2007. The Tribunal took note of the fact that more than four years have passed when the Commissioner had given directions under Section 263

of the Act vide order dated 25.03.2004 but consequential order had not been passed by the Assessing Officer till then. After verifying this fact from record, which the departmental representative was directed to produce, the Tribunal held the view that as substantial time have elapsed and consequential order was not passed within three months as directed by the Commissioner, the appeal preferred by the assessee had become infructuous. In a sense, the Tribunal was of the opinion that after a lapse of so much time, Assessing Officer was not competent to pass any consequential order. Though the appeal was disposed of as infructuous, which was preferred by the assessee, the Revenue also understood the implication of that order, namely, it may prevent the Assessing Officer from passing the consequential order at the stage, therefore, Revenue felt aggrieved by that order of the Tribunal preferred an appeal before this Court, i.e., ITA No.1038 of 2008. This appeal was dismissed vide detailed order dated 10.09.2008. We have summoned the file of that appeal and find that following questions of law were raised by the Revenue in the said appeal:

- a) Whether ITAT was correct in law in holding that the appeal filed by the assessee had become infructuous, and decision of any ground of appeal would be of academic interest as the Assessing Officer had not passed the consequential order in

pursuance to order passed by Ld. CIT within the limitation period?

- b) Whether ITAT was correct in law in holding that the time limit for framing the consequential order in pursuance to direction given by CIT was expired and therefore, appeal had become infructuous.
- c) Whether order passed by ITAT is perverse in law and on facts when it did not interpret the provisions of Section 153(3)(ii) of the Act and treated the appeal filed by the assessee as infructuous?

3. However, this Court did not agree with the submissions of the Revenue and took the view that order of the Tribunal did not call for any interference. Three reasons were given in support of this view, which are as under:-

“First of all, the Tribunal has not invoked any statutory provision to set up a statutory bar of limitation for passing a consequential order. Therefore, the submissions made by the learned counsel for the appellant pertaining to the provisions of Section 153(2A) and 153(3)(ii) are of no consequence. This is so because the Tribunal has not referred to these provisions. Secondly, the Tribunal has only gone by the direction given by the Commissioner in his order passed under Section 263 of the said Act. Under Section 263(1) the Commissioner is empowered to call for and examine the record of any proceeding under the Act and if he considers that any order passed by an Assessing Officer is erroneous in so far as it is prejudicial to the interest of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to make such enquiry as he deems fit, *“pass such order thereon as the circumstances of the case justify”*, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment. In view of this provision it is clear that the Commissioner may pass any order as the

circumstances of the case justify. In the present case we find that the Commissioner while passing the order under Section 263 has given a specific direction that the Assessing Officer shall pass the consequential orders within a period of three months approximately. This direction would certainly fall within the expression “such order thereon as the circumstances of the case justify” appearing in Section 263(1) of the said Act. It appears that it is in this context that the Tribunal concluded that the time for passing the order had expired. The consequential order had not been passed for over a period of approximately three years and eight months. Thirdly, we are of the view that where no period of limitation is prescribed then, in any event, a reasonable period of limitation ought to be adopted. The non-specification of a period of limitation does mean that the Assessing Officer can wait interminably or for an infinite period before passing the consequential order. And, in the context of the direction given by the Commissioner for passing the consequential orders within three months approximately, a period of three years and eight months is certainly much beyond the reasonable period that could be allowed to the Assessing Officer to pass the consequential order.”

4. It is abundantly clear from the reading of the aforesaid order that this Court categorically held that even if there was no period of limitation prescribed under Section 153(3)(ii) of the Act, Assessing Officer was required to pass the order within reasonable period and non-specification of period of limitation would not mean that the Assessing Officer can wait for indefinite period before passing the consequential order.
5. The Assessing Officer, however, passed the consequential order on 2<sup>nd</sup> September, 2008 giving effect to the order passed by the

Commissioner under Section 263 of the Act. This order was passed much after the order passed by the Tribunal but a few days before the aforesaid order dated 10.09.2008 in ITA No.1038/2008.

6. Against the order of the Assessing Officer passed on 2<sup>nd</sup> September, 2008, the assessee preferred appeal in which assessee was successful as CIT(Appeal) reversed the aforesaid order holding that the Assessing Officer was precluded from passing that order in view of the orders passed by the Tribunal and the High Court as aforesaid. Revenue's appeal against the order of the CIT(Appeal) has been dismissed by the Tribunal in the aforesaid circumstances, against which the present appeal is preferred.
  
7. Ms.Bansal, learned senior counsel appearing for the appellant, raised two-fold submissions, namely, (i) no limitation is provided under Section 153(3)(ii) of the Act and, therefore, the Assessing Officer was not precluded from passing the order giving effect to the directions made by the CIT (Appeals) in its order passed under Section 263 of the Act. (ii) when this Court had delivered judgment on 10.09.2008 in ITA No.1038/2008, the Court was not

informed that the Assessing Officer had already passed the consequential order.

8. Both the submissions of the learned counsel are of no relevance to the appeal. Insofar as the first contention is concerned, as per the extracted portion of the judgment dated 10.09.2008 passed in ITA No.1038/2008, it has become abundantly clear that this issue was specifically dealt and rejected. It is stated at the cost of repetition that the Court was of the opinion that even when the aforesaid order does not prescribe definite period of limitation that would not mean that the Assessing Officer could wait interminably or for an indefinite period. It was noted that the period of three years and eight months had expired, which was certainly “much beyond the reasonable period that can be allowed to the Assessing Officer to pass the consequential order”
9. Likewise, the second contention would not have any bearing on the outcome of the issue. The aforesaid observation that more than reasonable time had expired which can be allowed to the Assessing Officer to pass the consequential order would still prevail. As noted above, the Tribunal had held the appeal to be infructuous on 23.11.2007 taking note of the fact that by that date no consequential order had been passed. It is this order, which was upheld by this Court and the period of three years and

eight months, which is mentioned in the order is calculated by order dated 23.11.2007 because order of the CIT (Appeal) under Section 263 of the Act was passed on 25.03.2004. Otherwise by that time, the High Court passed the order, i.e., on 10.09.2008, period of four years and eight months have elapsed. Admittedly, the Assessing Officer passed the order much after 23.11.2007.

10. Against the order dated 10.09.2008 passed by this Court, no action was taken by the Revenue. No appeal was filed. Even no application for review was filed on the ground that the order had already been passed by the Assessing Officer. We again reiterate that this Court had simply upheld the order of the Tribunal, which was passed on 23.11.2007 and by that order's date, there was no order of the Assessing Officer.
11. For these reasons, we are of the opinion that no question of law arises. The appeal is dismissed.

**A.K. SIKRI, J.**

**FEBRUARY 23, 2011**  
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**M.L. MEHTA, J.**



\* **THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment delivered on : 10.09.2008

+ **ITA No.1038/2008**

**Commissioner of Income Tax Delhi-IV** ..... **Appellant**

**versus**

**Goyal M.G.Gases Pvt. Ltd.** ..... **Respondent**

**Advocates who appeared in this case:**

For the Appellant : Ms Prem Lata Bansal

For the Respondent : Mr Prakash Kumar

**CORAM :-**

**HON'BLE MR JUSTICE BADAR DURREZ AHMED**  
**HON'BLE MR JUSTICE RAJIV SHAKDHER**

1. Whether the Reporters of local papers may be allowed to see the judgment ?
2. To be referred to Reporters or not ?
3. Whether the judgment should be reported in the Digest ?

**BADAR DURREZ AHMED, J (ORAL)**

1. This appeal is directed against the order passed by the Income Tax Appellate Tribunal on 23.11.2007 in the assessee's appeal before it for the assessment year 1999-2000. The facts relevant for the present appeal are that an assessment was framed under Section 143(3) of the Income Tax Act, 1961. The Commissioner, Income

Tax invoking the provisions of Section 263 of the said Act passed an order on 25.3.2004 setting aside the said assessment order and directing the Assessing Officer to calculate taxable income according to the merchantile system of accounting. The Commissioner of Income Tax gave a specific direction that the Assessing Officer shall pass the consequential orders “within a period of three months approximately”.

The assessee being aggrieved by this order passed by the Commissioner, Income Tax preferred the said appeal before the Tribunal. When the appeal came to be heard by the Tribunal on 13.11.2007, the learned counsel for the assessee pointed out that the Assessing Officer had not framed any assessment order in consequence of the impugned order and that the time limit for framing such order had already expired. The learned counsel for the appellant submitted that the appeal had, therefore, become infructuous. The Tribunal had directed the departmental representative to examine the case records and inform as to whether any consequential order had been passed pursuant to the order passed by the Commissioner Income Tax on 25.3.2004. The impugned order indicates that the departmental representative

produced their case records on 15.11.2007 and pointed out that no such consequential order had been passed by the Assessing Officer. The learned counsel for the assessee also made a statement at the Bar that no consequential order had been passed pursuant to the order passed by the Commissioner. In these circumstances, the Tribunal was of the view that the appeal before it had become infructuous and any decision on any of the grounds of appeal would only be of academic interest. The Tribunal, therefore, dismissed the appeal as having become infructuous by virtue of the impugned order dated 23.11.2007.

It is the revenue's contention in this appeal before us that no period of limitation has been prescribed in respect of orders which are to give consequential effect to orders passed by the Commissioner of Income Tax in exercise of his powers under Section 263 of the Act. The learned counsel for the appellant referred to the provisions of Section 153(2A) and 153(3)(ii) to submit that no period of limitation has been prescribed for passing orders consequential to the order passed by the Commissioner Income Tax under Section 263. She submitted that the period of limitation that has been prescribed by virtue of Section 153(2A) only

relates to cases where the entire assessment order has been set aside and a fresh assessment has been directed by the Commissioner in exercise of his powers under Section 263 of the said Act. She submits that to this extent the Tribunal has gone wrong in agreeing with the assessee that the appeal had become infructuous because no assessment order was framed within the time limit for framing such an order.

Having heard counsel for the parties, we are of the view that the order passed by the Tribunal does not call for any interference. There are several reasons for this. First of all, the Tribunal has not invoked any statutory provision to set up a statutory bar of limitation for passing a consequential order. Therefore, the submissions made by the learned counsel for the appellant pertaining to the provisions of Section 153(2A) and 153(3)(ii) are of no consequence. This is so because the Tribunal has not referred to these provisions. Secondly, the Tribunal has only gone by the direction given by the Commissioner in his order passed under Section 263 of the said Act. Under Section 263(1) the Commissioner is empowered to call for and examine the record of any proceeding under the Act and if he considers that any order passed by an Assessing Officer is erroneous

in so far as it is prejudicial to the interest of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to make such enquiry as he deems fit, “*pass such order thereon as the circumstances of the case justify*”, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment. In view of this provision it is clear that the Commissioner may pass any order as the circumstances of the case justify. In the present case we find that the Commissioner while passing the order under Section 263 has given a specific direction that the Assessing Officer shall pass the consequential orders within a period of three months approximately. This direction would certainly fall within the expression “such order thereon as the circumstances of the case justify” appearing in Section 263(1) of the said Act. It appears that it is in this context that the Tribunal concluded that the time for passing the order had expired. The consequential order had not been passed for over a period of approximately three years and eight months. Thirdly, we are of the view that where no period of limitation is prescribed then, in any event, a reasonable period of limitation ought to be adopted. The non-specification of a period of limitation does mean that the

Assessing Officer can wait interminably or for an infinite period before passing the consequential order. And, in the context of the direction given by the Commissioner for passing the consequential orders within three months approximately, a period of three years and eight months is certainly much beyond the reasonable period that could be allowed to the Assessing Officer to pass the consequential order.

For all these reasons, we find that the Tribunal has come to the correct conclusion that the time limit for framing the consequential order had expired and in accepting the assessee's plea that its appeal before the Tribunal had consequently become infructuous. We see no reason to interfere with the impugned order. No substantial question of law arises for our consideration. The appeal is dismissed.

**BADAR DURREZ AHMED, J**

**RAJIV SHAKDHER, J**

**September 10, 2008**  
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