Reportable

* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ ITA No. 196 of 2009

% *Reserved on : September 24, 2009*
Pronounced on : October 09, 2009

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

through : Ms. Prem Lata Bansal, Advocate

VERSUS

Tony Electronics Limited . . . Respondent

through : Mr. Satyen Sethi with
Mr. Manu K. Giri, Advocates

CORAM :-
THE HON'BLE MR. JUSTICE A.K. SIKRI
THE HON'BLE MR. JUSTICE VALMIKI J. MEHTA

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

1. An interesting question of law relating to the limitation of correcting error under Section 154 of the Income Tax Act, 1961 (hereinafter referred to the 'Act') arises in this appeal. The issue is: from which date the period of limitation provided under Section 154 of the Act is to be reckoned.

2. The assessment order was framed by the Assessing Officer (AO) under Section 143(3) of the Act on 24.11.1998 framing the income at Rs.8.77 crores. While doing so, the AO had made various additions,

which were not palatable to the respondent/assessee. The respondent/assessee filed appeal against that order. The Commissioner of Income Tax (Appeal), vide his order dated 20.5.1999, gave partial relief to the assessee. The matter had gone to the CIT (A) again and, therefore, order recording appeal effects had to be passed three times. The relevant dates in this behalf are tabulated as under :-

24.11.1998	Assessment under Section 143(3) was completed.
20.5.1999	Appeal against assessment order dated 24.11.1998 was disposed of by the CIT(A).
8.5.2003	First appeal effect order under Section 143(3)/250 was made and thereby income was assessment at Rs.1,26,57,100/-.
28.6.2004	Appeal against 2nd appeal effect order dated 8.5.2003 was disposed of by the CIT (A).
23.7.2004	Order under Section 143(3)/250 giving effect to order of CIT(A) dated 28.6.2001 was passed. For the purposes of giving effect, income determined vide order dated 27.5.1999, i.e. Rs.1,26,57,100/- was taken as the starting point and income was reduced to Rs.32,12,675/-.
30.1.2006	Notice under Section 154 of the Act, alleging that there was mistake in the order dated 23.7.2004 was issued. Mistake pointed out was that opening income for giving appeal effect taken at Rs.1,26,57,100/- should have been taken at Rs.1,39,14,788/-.
26.4.2006	Order under Section 154 of the Act was passed.

3. On 30.1.2006, however, the AO issued notice under Section 154 of the Act to the assessee stating that the opening amount of the income was wrongly taken at Rs.1,26,57,100/- instead of correct amount of Rs.1,39,14,788/-. He also stated that in the order dated 8.5.2003, giving appeal effect to the orders of the CIT(A), the figure was

wrongly taken at Rs.1,26,57,100/- as double deduction was allowed on account of depreciation. He stated that the depreciation of Rs.6,28,842/- with respect to Unit-I and Namoli Unit was not available to the assessee. Therefore, the same was to be reduced from the total amount of depreciation of Rs.54,86,162/- and only the balance depreciation of Rs.48,57,200/- was allowable to the assessee. However, instead of doing so, the then AO had allowed total depreciation of Rs.54,86,162/- and again reduced the same i.e., Rs.6,28,842/- from the profits of the business and, thus, had allowed deduction of Rs.6,28,842/- twice, which had resulted into under assessment by Rs.12,57,688/-.

4. The assessee questioned the jurisdiction of the AO to pass the rectification order under Section 154 of the Act on the ground that in view of sub-section (7) of Section 154, such a rectification order could be passed within four years *"from the end of the financial year in which the order sought to be amended was passed"*. According to the assessee, since the assessment was framed on 24.11.1998, the period of four years had lapsed long ago and, therefore, the proposed action on the part of the AO was time barred. The AO did not accept this plea while passing the orders dated 26.4.2006. According to him, the period of four years was to be calculated from 23.7.2004 when the AO had given appeal effect and passed revised assessment order on that date, on the basis of decision of the Tribunal.

5. The assessee questioned this wisdom of the AO by filing appeal before the CIT(A). The CIT(A) confirmed the action of the AO and dismissed the appeal on 4.12.2006. Still aggrieved, the assessee approached the Income Tax Appellate Tribunal (for short, the 'Tribunal') by filing further appeal. The assessee has succeeded in its effort before the Tribunal, as vide impugned orders dated 25.4.2008 the Tribunal has quashed the AO's order on the ground that the same was barred by limitation. Now, it is the turn of the Revenue to feel dissatisfied with the order of the Tribunal.

Hence, the present appeal.

6. It is in this backdrop the appeal was admitted on the following substantial question of law :-

> "Whether the Tribunal misdirected itself in law by calculating limitation under Section 154(7) of the Income Tax Act, 1961 with reference only to the date of the original order of assessment?"

7. The submission of learned counsel for the revenue is twofold, namely:

(i) The mistake occurred in the present case was not related to any legal dispute, but was a totaling mistake and the AO had inherent power to rectify such a mistake which crept in while computation. For this purpose, limitation prescribed under sub-section (7) of Section 154 of the Act was not even applicable. Dilating this submission, it was argued that determination of assessed income under Section 143(3) of the Act presupposes the computation to be made by the AO correctly. If any error has been committed then the AO has the

inherent power to rectify the same. The rectification does not require any argument from the assessee nor require any permission from the assessee. As admitted by the assessee and recorded by the Tribunal, the assessee had not filed any appeal against withdrawal of depreciation of Rs.6,28,842/- pertaining to Unit-I and Namoli Unit before CIT(A).

In the case of ***ITO*** v. ***M.K. Mohammad Kunhi,*** the Supreme Court had discussed that where an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means, as are essentially necessary to this execution. Thus, once the power is granted to determine the assessed income, it is the inherent power vested in the same authority to rectify a mistake which has been occurred in making computation. Totaling mistake, as occurred in the present case, is outside the scope of Section 154 of the Act and, therefore, the limitation prescribed in sub-section (7) of Section 154 is not applicable.

(ii) Alternate submission was that even if it is held that the error committed in the present case falls within the ambit of Section 154, then also the limitation prescribed therein may not be made applicable to such cases. Otherwise, it would frustrate the object and purpose of determining the taxable income and to collect the tax thereon. Again, even if it is held that limitation under sub-section (7) of Section 154 of the Act is applicable, then also it is contended that it would start to run

from the last order, i.e. order dated 23.7.2004, and not from the order dated 27.5.1999, i.e. the first appeal effect.

In the case of ***Hind Wire Industries Limited*** v. ***CIT***, 212 ITR 639, the Supreme Court has held that the word *'order'* in the expression *"from the date of the orders sought to be amended"* in Section 154(7) of the Act, is not qualified in any way, it does not necessarily mean the original order; it could be any order including the amended order or rectified order. The Court relied upon the judgment in the case of ***International Cotton Corporation (P) Ltd.*** v. ***CTO,*** (1975) 2 SCR 345, in which it is held that after rectification, the original assessment order no longer remains in force. What was sought to be rectified by the Officer was the assessment order as rectified by him. There is no doubt that the rectified order is also *'any order'* which can be rectified under Rule 38.

8. The contention of the Revenue is that the original order of assessment, assessing the income at Rs.8.77 crores, had been merged into the order of CIT(A) and the order of CIT(A) stood merged with the order of Tribunal, which was passed on 28.6.2004. Giving appeal effect to this order of the Tribunal, when the revised assessment orders were passed on 23.7.2004, it would be this date which would be relevant for the purpose of ticking up the clock insofar as limitation is concerned. Submission of the respondent/assessee, on the other hand, is that the orders of CIT(A)

as well as the Tribunal dealt with altogether different aspects, namely, issues regarding deductions under Sections 80-H, 80-I and 80-IA of the Act and it is those aspects which were determined by the CIT(A) as well as the Tribunal. The *doctrine of Merger* would, therefore, be applicable only in respect of those issues before the appellate authorities. However, the purported mistake, which is taken note of by the AO, had crept in the original order dated 24.11.1998 and was not the subject matter of appeals. The submission of the respondent/assessee, therefore, is that for correcting such an error, the starting point would be the original assessment order dated 24.11.1998 and umbrage under the orders passed by the Tribunal cannot be taken and *doctrine of Merger,* on this issue, shall not apply.

9. In this manner, thus, the learned counsel for the Revenue sought to invoke the *doctrine of Merger* and submitted that since the mistake had occurred at the time of passing orders dated 28.6.2004, while giving effect to the decision of the CIT(A), limitation should start from that date.

10. According to the respondent, the error in regard to the computation of depreciation had occurred while computing total income in the original assessment order passed on 24.11.1998 and the figure of Rs.1,26,57,100/- had been arrived at by the AO in his order dated 27.5.1999. Thus, it was not a mistake in the opening income

occurred in the order under Section 250 dated 23.7.2004, as stated in his notice by the AO under Section 154 of the Act, but it was a mistake that had taken place in the order dated 27.5.1999. Thus, rectification made by the AO on 26.4.2006 was barred by limitation.

11. Refuting the aforesaid contended learned counsel for the Revenue, Mr. Satyan Sethi argued that sub-section (1) of Section 154 of the Act categorically provided that the AO could amend any order passed by it *"with a view to rectifying any mistake apparent from the record"*. The mistake which was sought to be rectified, as appearing on the record, was regarding alleged double depreciation which occurred while giving appeal effect to the orders of CIT(A), but while passing the first appeal effect order dated 27.5.1999. He, thus, argued that mistake was not in the order dated 23.7.2004, rather the same was in original assessment order dated 24.11.1998. This fact is not in dispute. Both CIT(A) and the Tribunal has recorded a finding that mistake was in order dated 24.11.1998. Mistake was that depreciation instead of being added to the income was reduced from the assessee income resulting in double deduction.

12. Countering the submission of the Revenue predicated on the *doctrine of Merger*, the learned counsel submitted that the purpose for passing appeal effect order was altogether different. He argued that the effect of reassessment is to set aside original order and substitute in its place the order made in reassessment proceedings. The initial order of assessment does not survive in any manner or to any extent

{See - ***CIT*** v. ***K. Kesava Reddiar,*** (1989) 178 ITR 457) and ***Sharda Trading Company*** v. ***CIT***, (1984) 149 ITR 19 (Del)}. However, rectification order under Section 154 of the Act does not obliterate the original order. After the order rectifying the mistake is passed, what remains is not the rectification order but the assessment order as rectified {See – ***S. Arthanari*** v. ***First ITO***, (1972) 83 ITR 828 (Mad), ***Jeewanlal*** v. ***ACIT,*** (1977) 108 ITR 407, and ***J.N. Sahni*** v. ***ITAT,*** (2002) 257 ITR 16}. Since order under Section 154 is confined to amendment carried out and what survives is the assessment as rectified, therefore, though the mistake in the original order continues. But, for the purposes of amendment, rectification order cannot be the order sought to be amended because rectification order has no independent existence.

13. We find substance in the submissions of learned counsel for the Revenue. In fact, answer to the issue at hand is provided by the judgment of the Supreme Court in ***Hind Wire Industries*** (supra). Dealing with the same provision, namely, sub-section (7) of Section 154 of the Act, the Court was of the view that the answer rested on the word *'Order'* used in the expression *"from the date of the order sought to be amended"* occurring in sub-section (7) of Section 154 of the Act. The Court categorically opined that the word *'Order'* had 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. The Court was further of the view that once a reassessment order or rectification order was passed giving effect to

the order of the appellate forum, the original order ceases to operate. Following discussion on this aspect is relevant for our purpose :-

> ""A similar expression in rule 38 of the Mysore sales Tax Rules fell for consideration in *International Cotton Corporation (P) Ltd.* v. *Commercial Tax Officer*, (1975) 35 STC 1; (1975) 2 SCR 345. Dealing with the point raised, this court held as under :
>
> > "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 (1965) 16 STC 231. 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."
>
> This decision was endorsed in *Deputy Commissioner of Commercial Taxes* v. *H.R. Sri Ramulu*, (1977) 39 STC 177 when this court observed there as follows :
>
> > "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 justification for reassessment arises because of turnover escaping assessment 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 circumstances, the only orders which could be

> the subject matter of revision by the appellant were the orders made under section 12A of the Act and not the initial assessment orders.
>
> (Emphasis supplied)"

14. What follows from the aforesaid is that after the rectification order, initial order of assessment ceases to operate. It is no more in existence and is substituted by the fresh assessment order passed. The Court, thus, categorically held that the word *'any'* in the expression *"order sought to be amended"* would mean even the rectified order.

15. Legal position with which there cannot be any quarrel is that once an appeal against the order passed by an authority is preferred and is decided by the appellate authority, the order of the said authority merges into the order of the appellate authority. With this merger, order of the original authority ceases to exist and the order of the appellate authority prevails, in which the order of the original authority is merged. For all intent and purposes, it is the order of the appellate authority that would be seen. *Doctrine of Merger* has been explained by the courts in number of judgments. Our purpose will suffice by referring to one judgment where this doctrine is explained along with the rationale behind it. It is in the case of ***Gojer Bros. (Pvt.) Ltd. Vs. Shri Ratan Lal Singh (1974)2SCC453,*** which reads as under:

> "11. The juristic justification of the doctrine of merger may be sought in the principle that there cannot be, at one and the same time, more than one operative order governing the same subject-matter. Therefore the judgment of an inferior court, if subjected to an examination by the superior court, ceases to have existence in the eye of law and is treated as being superseded by the judgment of the superior court. In other words, the judgment of the inferior court loses its identity by its merger with the judgment of the superior court."

In another case of ***Commissioner of Income-tax Bombay v. Amritlal Bhogilal & Co. [1958] 34 ITR 130(SC),*** the position in regard to the doctrine of merger was stated thus by Gajendragadkar J. who spoke for the Court:

> "16. There can be no doubt that, if an appeal is provided against an order passed by a tribunal, the decision of the appellate authority is the operative decision in law. If the appellate authority modifies or reverses the decision of the tribunal, it is obvious that it is the appellate decision that is effective and can be enforced. In law the position would be just the same even if the appellate decision merely confirms the decision of the tribunal. As a result of the confirmation or affirmance of the decision of the tribunal by the appellate authority the original decision merges in the appellate decision and it is the appellate decision alone which subsists and is operative and capable of enforcement."

16. Once we understand the *Doctrine of Merger* in its true sense, as explained above, and relying upon the interpretation given to the word *'any'* or *'order'* given to sub-section (7) of Section 154 of the Act by the Apex Court in ***Hind Ware Industries*** (supra), the inescapable conclusion would be that the original order of assessment had ceased to operate on the decision given by the CIT(A) and had merged with the orders of the appellate authority. The final orders passed by the appellate authority were dated 28.6.2004 and acting thereupon the AO passed assessment order, giving appeal effect thereto, on 23.7.2004. Thus, it is the order of 28.6.2004 passed by the CIT(A) which remains on record for all intent and purposes as the original order of assessment has been merged. Once the matter is viewed from this angle, it is no explanation that the error which is sought to be rectified occurred in the original assessment order and

was not subject matter of appeal. Obviously, it was a calculation error which could not have been the subject matter of appeal.

17. There appears to be some substance in the submission of learned counsel for the Revenue that such error could be corrected by the AO exercising the inherent power as, otherwise, the assessee is let off by getting double depreciation, which is not permissible under the Act. In any case, once we opine that the assessment order had merged with the order of CIT(A) passed on 28.6.2004, the limitation for the purpose of sub-section (7) of Section 154 is to be counted from this date. Interestingly, even the learned counsel for the assessee agreed to the extent that when the order is passed during the re-assessment of proceedings, initial order of proceedings does not survive in any manner or to any extent. This principle would be applicable also when the assessment order is challenged in the appeal and appellate authority passes order at variance with the orders passed by the AO, on the basis of which fresh order under Section 143(3) read with Section 250 of the Act is required to be passed by the AO giving effect to the order of the appellate authority.

18. No doubt, the rectification order passed under Section 154 would mean the assessment order as rectified and the assessment order is not obliterated thereby. However, what would be the position when assessment order is not challenged and amended by the appellate authority. Once rectification order under Section 154 of

the Act is passed it would mean that the appeal effect order is rectified.

19. We, thus, answer the question, as formulated, in favour of the Revenue and against the assessee holding that the Tribunal misdirected itself in law by calculating limitation under Section 154(7) of the Act with reference only to the date of original order of assessment. As a consequence, order of the Tribunal is set aside and the rectification order, as passed by the AO and affirmed by the CIT(A), is upheld and restored. There shall, however, be no order as to costs.

(A.K. SIKRI)
JUDGE

(VALMIKI J. MEHTA)
JUDGE

October 09, 2009
nsk