IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL No.1560 of 2011

==========

A C I T - PANCHMAHAL RANGE - GODHRA - Appellant(s)
Versus
MODERN CEMENT INDUSTRIES LTD - Opponent(s)

==========

Appearance:
MR KM PARIKH for Appellant(s): 1,
None for Opponent(s): 1,

==========

CORAM : HONOURABLE MR. JUSTICE AKIL KURESHI

and

HONOURABLE MS. JUSTICE HARSHA DEVANI

Date : 16/10/2012

ORAL ORDER
(Per : HONOURABLE MS. JUSTICE HARSHA DEVANI)

1. The appellant-revenue has challenged order dated 30th June, 2011 passed by the Income Tax Appellate Tribunal (hereinafter referred to as "the Tribunal") by proposing the following questions:-

I. *"Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in quashing the order passed u/s. 263 of the I.T. Act, holding that the Ld. Commissioner has acted beyond the limitation prescribed?"*

II. *"Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in not appreciating that the assessment has been done by the A.O.,*

afresh, in accordance with law as directed by the Ld. Tribunal and also ignoring the ratio of Hon'ble Bombay High Court's decision in the case of Bombay Burmah Trading Corporation Ltd. Vs. CIT reported in (1922) 195 ITR 328?"

2. The assessment year is 1992-93. The Assessing Officer framed assessment under section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as "the Act") on 28th March, 1995 and made addition of Rs.59,56,000/- in respect of unverified share application money received by the assessee. He also granted deduction of Rs.15,88,490/- under section 80I of the Act at the rate of 30% calculated on the total assessed income inclusive of the above addition of Rs.59.56 lacs. The assessee carried the matter in appeal before the Commissioner (Appeals) who deleted the addition of Rs.59,56,000/-. Against the said order, the revenue went in appeal to the Tribunal, which remanded the matter to the Assessing Officer on the issue pertaining to the addition of Rs.59,56,000/- for deciding the same afresh in accordance with law. Pursuant to the remand, the Assessing Officer framed a fresh assessment order and again made an addition of Rs.59,56,000/-. After making the said addition, the Assessing Officer determined the total income at Rs.52,94,965/- and allowed depreciation of Rs.10,60,854/- on the said income as well as deduction at the rate of 30% under section 80I of the Act, which was worked out at Rs.15,88,490/-.

3. The Commissioner of Income Tax (hereinafter referred to as "the Commissioner") was of the view that the order passed by the Assessing Officer allowing deduction of

Rs.15,88,490/- under section 80I of the Act was erroneous insofar as it was prejudicial to the interests of the revenue and accordingly passed an order under section 263 of the Act and disallowed the claim of the assessee under section 80I of the Act. The assessee carried the matter in appeal before the Tribunal. The Tribunal held that the order passed by the Commissioner under section 263(1) of the Act was barred by limitation inasmuch as no order could have been made after the expiry of two years from the end of the financial year in which the order sought to be revised was passed. It, accordingly, allowed the appeal of the assessee and set aside the order passed by the Commissioner under section 263 of the Act.

4. Mr. Ketan Parikh, learned senior standing counsel for the appellant, assailed the impugned order by submitting that the period of limitation for making an order under section 263 of the Act is two years from the end of the financial year in which the order which is sought to be reviewed is passed. In the present case the assessment order was made on 31st March, 2005 whereas the order under section 263(1) was made on 30th March, 2007 before the expiry of two years from the end of the financial year in which the assessment order was made and as such was made within the prescribed period of limitation. The Tribunal was, therefore, not justified in holding that the order under section 263(1) of the Act was barred by limitation.

5. The facts as emerging from the record reveal that in the initial assessment order an addition of Rs.59,56,000/- was made in respect of unverified share application money received

by the assessee. In the said order, the Assessing Officer had granted relief under section 80IA at the rate of 30% calculated on the total assessed income inclusive of the addition of Rs.59,56,000/-. The assessee challenged the said order before the Commissioner (Appeals) who deleted the addition of Rs.59,56,000/-. Against the said order the revenue went in appeal before the Tribunal. It appears that there was a difference of opinion, and hence the matter was referred to a third member. In accordance with the majority view, by an order dated 25th July, 2003, the order of the Commissioner (Appeals) was set aside and the issue pertaining to addition of Rs.59,56,000/- was remitted to the file of the Assessing Officer for deciding the same afresh in accordance with law after giving an opportunity of hearing to the assessee. Thus, the matter was remitted for reconsideration of the above issue alone. Pursuant to such remand the Assessing Officer framed assessment under section 143(3) read with section 255(4) of the Act on 31st March, 2005 holding that Rs.59,56,000/- credited in the books of account by way of share application money was an unexplained credit out of income from undisclosed sources of the assessee. While computing the total income the Assessing Officer granted deduction of Rs.15,88,490/- under section 80I of the Act being 30% of total income inclusive of the income assessed under section 68 of the Act. It is this order of the Assessing Officer which was taken in revision under section 263 of the Act on the ground that as the total income was inclusive of unexplained share application money of Rs.59,56,000 which was not income derived by the assessee from any industrial activity as contemplated under section 80I of the Act, the allowance of deduction of Rs.15,88,490/- by the Assessing Officer had rendered the order

erroneous insofar as it was prejudicial to the interests of the revenue. In the aforesaid factual backdrop the Tribunal, noted that the subject matter of remand was distinct and different than the question of correctness of the deduction under section 80I of the Act and was accordingly of the view that if at all the Commissioner wanted to invoke the provisions of section 263 of the Act, he had to exercise jurisdiction within two years from the date of the original assessment order wherein deduction under section 80I was initially granted. Having regard to the fact that the original assessment order was passed on 28th March, 1995, the Tribunal, in the light of the decision of the Supreme Court in the case of ***Commissioner of Income-tax v. Alagendran Finance Ltd.,*** *293 ITR 1*, was of the view that the order dated 30th March, 2007 passed by the Commissioner under section 263(1) of the Act was much beyond the period of limitation.

6. In ***Commissioner of Income-tax v. Alagendran Finance Ltd.*** (supra), the Supreme Court was dealing with a case wherein the original assessment orders were passed on 23.11.1994, 27.11.1995 and 26.11.1997 for assessment years 1994-95, 1995-96 and 1996-97 respectively. In the said assessment orders, the deduction of the amount of "Lease Equalisation Fund" from the gross lease rent was accepted. Subsequently reassessment proceedings were initiated. However, such proceedings were not in respect of the Lease Equalisation Fund but only in respect of certain other items. Reassessment orders were passed on 28.3.2002. Thereafter on 29.3.2004, the Commissioner of Income-tax, exercising his revisional jurisdiction under section 263 of the Act reopened all the three assessments and directed the Assessing Officer to

check and assess the lease rentals from the Lease Equalisation Fund and to bring the same to tax. Accordingly, reassessment proceedings were carried out and the deduction made from the gross lease rent was disallowed and added to the income of the assessee. The Tribunal held that the said proceedings under section 263 of the Act were barred by limitation. The High Court upheld the said order. Before the Supreme Court, it was contended on behalf of the revenue that in view of the Explanation to section 263(3) of the Act and also in view of the doctrine of merger, the limitation period commenced from the date of the reassessment order viz. 28.3.2002 and not from the date of the initial assessment, and as the proceeding under section 263 was initiated on 5.3.2004, the provision of section 263(2) was not attracted. Dismissing the appeal, the Supreme Court held that the order passed by the Commissioner of Income-tax clearly demonstrated that only that part of the assessment order which related to the lease equalisation fund was found to be prejudicial to the interest of the revenue. The proceedings for reassessment had nothing to do with the said head of income. The doctrine of merger, therefore, would not apply in a case of this nature. It was further held that Explanation (c) to section 263(1) of the Act is clear and unambiguous as in terms thereof the doctrine of merger applies only in respect of such items, which were subject-matter of appeal and not those items which were not. 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 was not subject matter of the reassessment proceedings, it was held that 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. It was, accordingly, held that 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.

7. Applying the principles enunciated in the above decision to the facts of the present case, in the original assessment order deduction under section 80I had been granted on the total income, inclusive of the income under section 68 of the Act. The grant of such deduction was not questioned by the revenue at the relevant time. When the matter reached the Tribunal, the same was remitted to the Assessing Officer for reconsideration of the issue pertaining to addition of Rs.59,56,000/- credited in the books of account by way of share application money on the ground that the same was an unexplained credit out of income from undisclosed sources of the assessee. The question of deduction under section 80I of the Act, inclusive of undisclosed income under section 68 of the Act was not subject matter of remand. In the assessment order made pursuant to remand the addition of Rs.59,56,000/- was sustained and deduction of 30% under section 80I of the Act as allowed under the original assessment order, was granted. The provision of section 263 of the Act has been invoked by the Commissioner of Income-tax as while computing the deduction granted under section 80I of the Act, the total income was inclusive of unexplained share application money of Rs.59,56,000/-. The scope of remand pursuant to the order of the Tribunal remitting the matter to the Assessing Officer, was limited to the addition of Rs.59,56,000/-, evidently, therefore, such deduction under section 80I of the Act was not

in issue in the remand proceedings. Under the circumstances, the limitation qua the issue of grant of deduction under section 80I of the Act would have to be computed from the date of the original assessment order wherein the Assessing Officer had granted 30% deduction on the total income inclusive of the income under section 68 of the Act, that is, from 28th March, 1995. When so computed, the order dated 30th March, 2007 passed under section 263 of the Act, is hopelessly time barred, the prescribed period of limitation for making such order being two years from the end of the financial year in which the order sought to be revised was passed.

8. In the light of the above discussion, it is not possible to state that there is any infirmity in the impugned order of the Tribunal so as to give rise to any question of law, much less, a substantial question of law so as to warrant interference. The appeal is, accordingly, dismissed.

(Akil Kureshi, J.)

(Harsha Devani, J.)

hki