

AFRJudgment reserved on 27.02.2017Judgment delivered on 07.03.2017**Court No. - 3****Case :-** INCOME TAX APPEAL No. - 14 of 2014**Appellant :-** M/S Shree Naw Durga Bansal Cold Storage & Ice Factory**Respondent :-** Commissioner Of Income Tax Income Tax Office Faizabad & Anr.**Counsel for Appellant :-** Pradeep Agrawal**Counsel for Respondent :-** Sidharth Dhaon**Hon'ble Sudhir Agarwal,J.****Hon'ble Ravindra Nath Mishra-II,J.**

1. Heard Sri Pradeep Agarwal, learned counsel for appellant, and Sri Siddharth Dhaon, counsel for respondents.

2. This is Assessee's appeal under Section 260-A of Income Tax Act, 1961 (hereinafter referred to as "Act 1961") who is aggrieved by judgment and order dated 07.01.2014 passed by Income Tax Appellate Tribunal, Lucknow Bench, Lucknow (hereinafter referred to as "Tribunal") in Income Tax Appeal no. 702/LKW/2013 relating to Assessment Year 2003-04. Appellant has formulated nine substantial questions of law which basically relate to interpretation and consequence of expression "from the date of orders sought to be amended," under Section 154 (7) of Act 1961". The aforesaid questions excluding, question no. 5, read as under:-

" (i) Whether the consequential order passed by the assessing authority suo-moto u/s 154 of the Act to give effect to remand report sought by the CIT (A) for complying the directions issued in ITA No. 239/LUC/2007 decided by the ITAT on 13.6.2008 on 25.1.2011 will be deemed to the rectified order of the original assessment.

(ii) Whether the learned Tribunal was justified in holding that the consequential order passed by the assessing officer cannot be called to be rectified order and the doctrine of merger would not apply. The original assessment would not be called to have been merged with the order of the assessing officer passed consequent to the directions of the Appellate Authorities.

(iii) Whether the word "order" in the expression "from the date of orders sought to be amended" in Section 154 (7) of the Act means the

original order or it could be any order including the amended order or rectified order.

(iv) Whether the learned Tribunal was justified to hold that the Application u/s 154 dated 18.5.2011 filed by the Appellant to claim the set off long term capital loss of Rs. 12,49,130/- was barred by time since the original order of assessment was passed on 31.3.2006.

(v) Whether the learned Tribunal misdirected himself in law by calculating limitation u/s 154 (7) of the Income Tax Act, 1961 with reference only to the date of original order of assessment.

(vi) Whether the learned Tribunal was justified to hold that the limitation can only start from the original assessment order for rectification and not from the date of rectified order dated 25.1.2011.

(vii) Whether the learned Tribunal was justified in holding that the order passed at the direction of the CIT (Appeals) and the Tribunal that the order dated 25.1.2011 passed by the assessing officer cannot be said to have been merged in the original order.

(viii) Whether the learned Tribunal was justified in recording perverse findings of fact as well as the interpretation of Section 154 of the Income Tax Act without application of mind, which is against the legislative spirit of the Act."

3. We have excluded Question no. 5 since Tribunal has decided appeal on the ground of limitation and therefore, Question no. 5 does not arise from the judgment of Tribunal.

4. Before adjudicating upon aforesaid questions, a brief factual matrix would be necessary to understand real dispute.

5. Assessee, M/s Shree Nav Durga Bansal, Cold Storage & Ice Factory (hereinafter referred to as "Assessee"), for Assessment Year (hereinafter referred to as "A.Y.") 2003-04, filed Return under Section 139 (1) of Act 1961 on 30.10.2013 declaring business loss of Rs. 27,035/- and long term capital gain of Rs. 1,706/-, after claiming set off, brought forward capital loss of Rs. 12,49,310/- relating to A.Y. 2002-03. Return was processed under Section 143 (1) of Act 1961 on 07.01.2004. Assessee's case was selected for scrutiny.

6. A notice under Section 143 (2) of Act 1961 was issued. Assessing Authority (hereinafter referred to as "A.A.") passed assessment order dated 31.03.2006 under Section 143 (3), computed long term capital gain chargeable to tax, as Rs. 62,99,941/-. Total income was computed at Rs. 66,56,400/-. Assessee preferred appeal before Commissioner of Income Tax (Appeals) I, Lucknow

[hereinafter referred to as "CIT (A)"]. Appeal was rejected vide order dated 27.12.2006. CIT (A) considered three issues;

(a) Disallowance and expenses claimed in profit and loss account for both period. On this aspect assessment order was upheld,

(b) Disallowance of interest amounting to Rs. 1,99,104/-. This amount was in respect to Alok Bansal and M/s Shri Durga Bansal Fertilizers Ltd. CIT (A) deleted interest worked out in respect of Alok Bansal but confirmed disallowance qua M/s Durga Bansal Fertilizers Ltd. Hence on this ground partial relief was given to Assessee.

(c) Addition on account of long term capital gain amounting to Rs. 62,99,941/-. This issue was decided against Assessee and assessment order was confirmed.

7. Assessee then went before Tribunal in Income Tax Appeal no. 239/LUC/2007. Eight grounds were raised before Tribunal. Grounds no. 1, 2, 3 and 8 related to "long term capital gain". On this aspect Tribunal held that it would be fair and reasonable if A.A. is asked for valuation from Valuation Authorities, to arrive at fair and reasonable price of land on the date of transfer. Matter therefore, was remanded to A.A. for limited purpose of arriving at fair market value on the date of transfer, by referring to Valuation Authority. Ground no. 4 related to disallowance of interest on account of debit balance appearing in the account of M/s Shri Durga Bansal Fertilizers Ltd. Tribunal granted relief and deleted the said addition by reversing orders of A.A. and CIT (A) on this aspect. Tribunal rejected claim with regard to Rs. 14,444/- towards donation but in respect to other ad hoc disallowances it directed to limit the same by 5 percent of expenses. Grounds no. 7 and 8 were found not liable for adjudication. Appeal was partly allowed vide order dated 13.06.2008.

8. With regard to "long term capital gain" on remand, assessment order was passed on 31.12.2009 computing "long term capital gain" as Rs. 33,40,926/- and total income at Rs. 34,35,920/-. This order of assessment was passed in absence of report of Valuation Officer since period to make assessment was going to expire on 31.12.2009. Report of Assistant Valuation Officer (hereinafter referred to as the "A.V.O.") dated 20.05.2010 thereafter was received in the office on 28.06.2010, determining fair market value as on

01.04.2002, at Rs. 64,98,300/-. In view thereof, computation of "long term capital gain" was modified suo-moto by A.A. in purported exercise of power under Sections 154, 254, 143 (3) of Act 1961 and it worked out "long term capital gain" chargeable to tax at Rs. 13,19,962/- and total income at Rs. 14,14,959/- vide order dated 25.01.2011. Assessee thereafter filed application dated 09.05.2011 under Section 154 of Act 1961 stating that capital loss (long term) of Rs. 12,49,310/- which was carried forward to next year has to be set off against capital gain but the same has been missed by A.A. This application was rejected by A.A. vide order 30.11.2011 against which CIT (A) dismissed appeal vide order dated 19.08.2013 and Assessee's further filed appeal before Tribunal also failed having been dismissed vide order dated 07.01.2014 which is impugned in this appeal.

9. Sri Pradeep Agarwal, learned counsel appearing for appellant, contended that A.A. was under statutory obligation to allow set off to brought forward capital loss of Rs. 12,49,310/- and since last order was passed by A.A. on 25.01.2011, for the purpose of Section 154 (7) of Act 1961, limitation would count from this order, and in any case, from order dated 31.12.2009 which was passed after remand by Tribunal. He contended that order dated 31.03.2006 merged in the judgment of Tribunal dated 13.06.2008 whereby matter was remanded to A.A. When assessment order dated 31.12.2009 was passed after remand by A.A., for the purpose of Section 154 (7), limitation would commence from that date. He submitted that CIT (A) and Tribunal, both erred in law, by observing that the purpose of Section 154, in the present case, limitation would commence from assessment order dated 31.03.2006 and not subsequent orders. Learned counsel for Assessee placed reliance on judgment of Supreme Court in **Hind Wire Industries Ltd. Vs Commissioner of Income-Tax, (1995) 212 ITR 639** and Delhi High Court in **Commissioner of Income-Tax Vs Tony Electronics Limited, (2010) 320 ITR 378**.

10. In the assessment order dated 31.03.2006, we find that allowance or disallowance or set off to capital loss (long term) of Rs. 12,49,310/-, though under part (A) and (B) different kind of expenditures were considered and in part (C) interest paid and capital gain (long term) was considered, but there was no set off capital loss (long term) carried forward at all. In the appeal preferred by Assessee before CIT (A) against assessment order dated 31.03.2006, we do not find any claim made by Assessee in this regard. The

issue therefore died with the order of assessment dated 31.03.2002. Similarly even before Tribunal, when Income Tax Appeal no. 239/LUC/2007 was filed against CIT (A)'s order dated 27.12.2006, no claim with respect to alleged carry forward capital loss (long term) was made. Therefore, this part had already attained finality when assessment order dated 31.03.2006 was passed by A.A. since in appeal before CIT (A) and Tribunal, Assessee did not raise this plea at all.

11. The order of remand passed by Tribunal was only confined to determination of "long term capital gain" and not for any other purpose. It was limited, partial remand, confined to a particular purpose. Tribunal's order itself makes it clear as is evident from following:-

*"We find that it shall be fair and reasonable if the A.O. asks for the valuation report from the valuation authorities to arrive at the fair and reasonable price of the land on the date of the transfer. Therefore, **the issue is restored to the file of the A.O. for the limited purpose** to arrive at the fair market value on the date of transfer by referring to the Valuation Authority."* (emphasis added)

12. The above general concept of 'merger' in respect to judicial and quasi-judicial orders has been considered and recognised time and again.

13. In **Chandi Prasad and Others Vs. Jagdish Prasad and Others [2004 (8) SCC 724]**, Court said :

*"It is trite that **when an Appellate Court passes a decree, the decree of the trial court merges with the decree of the Appellate Court** and even if and subject to any modification that may be made in the appellate decree, the decree of the Appellate Court supersedes the decree of the trial court. In other words, merger of a decree takes place irrespective of the fact as to whether the Appellate Court affirms, modifies or reverses the decree passed by the trial court."* (emphasis added)

14. In **Gangadhara Palo Vs. The Revenue Divisional Officer & Another [2011 (4) SCC 602]**, the Court said :

*"According to the doctrine of merger, the **judgment of the lower court merges into the judgment of the higher court**. Hence, if some reasons, however meagre, are given by this Court while dismissing the special leave petition, then by the doctrine of merger, the **judgment of the High Court merges into the judgment of this Court** and*

after merger there is no judgment of the High Court. Hence, obviously, there can be no review of a judgment which does not even exist."

(emphasis added)

15. However, in taxing statutes like Act, 1961, Legislature has not thought it fit to apply general 'Doctrine of Merger', but 'Doctrine of Partial Merger' has also been adopted. Once the issue of merger is governed by statutory provisions, then, obviously, it is the statute which shall prevail over general doctrine of 'merger'. Herein 'doctrine of partial merger' we find in Explanation 'C' of Section 263(1) of Act, 1961. This Explanation, having sub clauses (a) and (b) was inserted by Taxation Laws (Amendment Act, 1984) with effect from 01.10.1984. Thereafter, entire explanation was substituted by Finance Act, 1988 with effect from 01.06.1988, which had Clause (c) also. Some minor amendments came to be made in Explanation (c) by Finance Act, 1989, which was given effect from 01.06.1988. Section 263(1) with explanation as it stands after aforesaid amendments, read as under:

"263. (1) The Commissioner may call for and examine the record of any proceedings under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, 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

(Explanation.- For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,-

(a) an order passed [on or before or after the 1st day of June, 1988] by the Assessing Officer shall include-

(i) an order of assessment made by the Assistant Commissioner [or Deputy Commissioner] or the Income-tax Officer on the basis of the4 directions issued by the [Joint] Commissioner under section 144A;

(ii) an order made by the [Joint] Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred on, or assigned to, him under the orders or directions issued by the Board or by the Chief Commissioner or Director General or Commissioner authorised by the Board in this behalf under section 120;

(b) "record" [shall include and shall be deemed always to have included] all records relating to any proceeding under this Act available at the time of examination by the Commissioner;

(c) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal [filed on or before or after the 2st day of June, 1988], the powers of the Commissioner under this sub-section shall extend [and shall be deemed always to have extended] to such matters as had not been considered and decided in such appeal]"

16. Words "filed on or before or after 1st day of June, 1988" and further words "and shall be deemed always to have extended" came to be inserted in Clause (c) by Finance Act, 1989, which was given effect from 01.06.1988.

17. Amended Explanation initially came up for consideration before a three Judge Bench in **CIT Vs. Sri Arbuda Mills Ltd. [(1998) 231 ITR 50 (SC)]**. Therein for the assessment year 1975-76, ending on 31st December, 1974, assessment was completed under Section 143(3) read with Section 144B of Act, 1961, on 31st March, 1978. The net business loss computed at Rs.3,61,086/- and income under head 'capital gains' at Rs.38,844/-. Assessing Officer made certain additions and denied two deductions and one loss, as disclosed by assessee. Assessee preferred appeal to the extent Assessing Officer made additions and disallowance and refused to accept income and loss disclosed by assessee. Appeal was decided by Commissioner (A) on 15th December, 1979. In respect of three items which Assessee declared and accepted by assessing officer, substantially there was no appeal since finding with respect to those items was in favour of Assessee. It is in respect of these three items, Commissioner sought to exercise revisional power under Section 263 of Act, 1961. An argument was advanced firstly, that amendment has come into force w.e.f. 01.06.1988, therefore, would not apply to assessment order and order of appeal, finalised long back. Secondly, that after merger of order of assessment in the appellate order, Section 263 cannot be invoked. Relying on Explanation Clause (c) and holding that it will cover all earlier matters, Court said as under :

"The consequence of the said amendment made with retrospective effect is that the powers under section 263 of the Commissioner shall extend and shall be deemed always to have extended to such matters as had not been

considered and decided in an appeal. Accordingly, even in respect of the aforesaid three items, the powers of the Commissioner under Section 263 shall extend and shall be deemed always to have extended to them because the same had not been considered and decided in the appeal filed by the assessee. This is sufficient to answer the question which has been referred." (emphasis added)

18. Matter again came up in **CIT Vs. Jai Kumar B. Patil [(1999) 236 ITR 469 (SC)]**. The two questions up for consideration before Court were as under:-

"The Revenue sought the reference of the following two questions :

(1) Whether, on the facts and in the circumstances of the case, the Tribunal was right in law, in holding that the commissioner of Income-tax had no jurisdiction and powers to initiate proceedings under section 263 of the Income Tax Act, 1961, in respect of issues not touched by the Commissioner of Income-tax (Appeals) in his appellate order?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that not only the issues dealt with in the assessment order but also the other issues were merged in the Commissioner of Income-tax (Appeals)'s order ignoring the provisions contained in clause (c) of Explanation to sub-section (1) of section 263 of the Income-tax Act, 1961?"

19. Relying on **CIT Vs. Abuda Mills Ltd. (supra)**, the Court answered both the aforesaid questions in negative i.e. in favour of Revenue and against Assessee.

20. In **EIMCO K.C.P. Ltd. Vs. C.I.T., (2000) 242 ITR 659 (SC)**, a question arose whether Commissioner can exercise power under Section 263 of Act, 1961, against an order of assessment against which appeal is pending before Commissioner (A), raising point upon which notice under Section 263 is issued, Court up held the notice issued under Section 263 and held that such notice can be issued.

21. The decision in **CIT Vs. Abuda Mills Ltd. (Supra)** has been followed by this Court in **CIT Vs. Dhampur Sugar Mills Co. Ltd. [(2004) 270 ITR 576 (All)]**, **CIT Vs. Indo Persian Rugs [(2008) 299 ITR 300 (All)]** and **CIT Vs. Span International [(2004) 270 ITR 538 (All)]**.

22. In **CIT Vs. Amrit Banaspati Co. Ltd. [(2005) 277 ITR 559 (All)]**, Court held that in respect of items which have not been considered in appeal, power of Commissioner under Section 263(1) shall be extended to that extent. After referring to various authorities this Court in para 31 observed as under:-

*"Now looking to the facts of present case, in the light of exposition of law discussed above, we find that claim of assessee seeking exemption under Section 10B of Act, 1961 for assessment year 2011-12, was not doubted by Assessing Officer. Applicability of Section 10B of Act, 1961 for assessment year 2011-12, as claimed by assessee, was accepted by him. Thus, this aspect was not in appeal at any stage. It is only on the question of "quantum of profit" for which exemption was claimed that the appeal was filed. The Assessing Officer discussed the matter and found that instead of Rs.4,97,28,163.45 which was claimed by assessee, it was entitled to exemption to the extent of Rs.4,61,90,179.58 under Section 10B and there is taxable income of Rs.3537980/-. **On taxability of aforesaid amount, assessee preferred appeal and only that aspect was considered by CIT(A) as also Tribunal. At no stage, the issue whether assessee was entitled to claim exemption under Section 10B at all or not, having already exhausted beyond the period of exemption permissible under Section 10B, was not a subject matter of consideration before appellate authorities. Hence, this question was open to be looked into by Commissioner. In our view, he has rightly exercised power under Section 263 of Act, 1961, by taking aforesaid view we find support from a decision in CIT Vs. Ratilal Bacharilal And Sons [(2006) 282 ITR 457 (Bom.)], wherein almost in similar circumstances, the Court said as under :-***

"..... At the instance of the assessee, the allowance on the sum of Rs. 5,63,350 could not have been the subject matter of appeal before the Commissioner of Income-tax (Appeals) as the assessee was never aggrieved with that part of the order. In other words, so far as weighted deduction under section 35B in the sum of Rs. 5,63,350 is concerned, the same was not a subject matter of the appeal before the Commissioner of Income-tax (Appeals). Factually, in this case, the doctrine of merger could not have been applied by the Tribunal to that part of the order ; which was not a subject matter of appeal as indicated, so as to exclude revisional jurisdiction of the Commissioner of Income-tax under section 263 of the Act."

23. We also find that judgment relied by learned counsel for Assessee in **Hind Wire Industries Ltd. (supra)** also supports the aforesaid view expressed by us. Therein an assessment order was passed on 21.09.1979. On a rectification petition filed under Section 154, assessment order was rectified on 12.07.1982. Assessee again filed rectification on 04.07.1986 contending that he was entitled for depreciation allowance on the factory building at the rate of ten percent, while he was allowed depreciation only to five percent. This application was rejected by Assessing Officer being barred by time under Section 154 (7) and order was confirmed by Commissioner in appeal. Tribunal took the view that for the purpose of Section 154 (7), limitation would commence from rectified order 12.07.1982 but on a Reference, High Court reversed the view taken by Tribunal and held that period of four years could be calculated from initial order of assessment made on 21.09.1979 and not rectified assessment order dated 12.07.1982. Supreme Court while construing Section 154 observed that word 'order' has not been qualified in any way and does not necessarily means "original order". It can be any order including the "amended" or "rectified order". Assessee therein had sought rectification of order dated 12.07.1982 and Court held that word 'order' under Section 154 (7) would include even "rectified order".

24. In **Commissioner of Income-Tax Vs Tony Electronics Limited (supra)**, Court has held that judgment in **Hind Wire Industries Ltd. (supra)** lays down that once an order is rectified, initial order ceases to operate and it is no more in existence. Relevant observation reads as under:-

*"What follows from the aforesaid is that **after the rectification order, the 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.**"*

(emphasis added)

25. With respect to Delhi High Court judgment, the inference drawn from reading of judgment in **Hind Wire Industries Ltd. (supra)** is much more than what has actually been said therein. Supreme Court very clearly has said that;

"word 'order' has 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."

(emphasis added)

26. The aforesaid word "including" makes it very clear that an amended or rectified order would not result in nullifying original order and to say that the original order would cease to exist, the observations made in Delhi High Court judgment is more than what has been said. The judgment referred in **Hind Wire Industries Ltd. (supra)** related to the cases wherein Court found that effect of reopening and reassessment of assessment is to vacate the initial order of assessment and to substitute in its place the order made on reassessment. With this proposition there cannot be any quarrel and this aspect is already covered in **Deputy CCT Vs Sri Ramulu (H.R.) (1977) 39 STC 177 (SC)**, **V. Jaganmohan Rao and others Vs Commissioner of Income-Tax and Excess Profits Tax, Andhra Pradesh, (1970) 75 ITR 373 (SC)** and **CST Vs H.M. Esufali H.M. Abdulahi (1973) 90 ITR 271 (SC)**.

27. In **Hind Wire Industries Ltd. (supra)** Supreme Court has used word "including" in the amended or rectified order would mean that word "order" as the case may be can be either "original order" or "amended order" or "rectified order" depending upon the fact as to in which order Assessee is seeking rectification. To read it as if, once rectified order is passed, original order would disappear, would result in nullifying the effect of word "including" in the observations made by Supreme Court, while reading meaning of word "order" in Section 54 (7) of Act 1961.

28. In our case there may exist more than one orders. As is evident from the fact that Section 154 (7) used expression "order sought to be amended" meaning thereby for the purpose of attracting Section 154 (7), such order which is sought to be amended, would determine period of limitation.

29. In the present case, subsequent orders dated 31.12.2009 and 25.01.2011 were not in respect to assessment of other items but confined to limited issue of "long term capital gain" since that was the only aspect whereupon, Tribunal has remanded matter to A.A. Issue of set off etc. was not subject matter of consideration before A.A. when he passed orders dated 31.12.2009 and 25.01.2011. Assessee, in fact, wanted amendment in the "original order" dated 31.03.2006 and hence limitation would count from that order.

30. We may also notice at this stage that Supreme Court's judgment in **Hind Wire Industries Ltd. (supra)** has been considered in **Commissioner of Income-Tax Vs Alagendran Finance Ltd. (2007) 292 ITR 1 (SC)** and it has been said therein that there may not be any doubt or dispute that once an

order of assessment is reopened, previous assessment would be held to be set aside and the whole proceedings would start afresh but the same would not mean that even when the subject matter of reassessment is distinct and different, the entire proceedings would deem to have been reopened. Court further said:-

*"Any Assessee cannot agitate in any such reassessment proceedings matters forming part of the original assessment **which are not required to be dealt with for the purpose of levying tax on that which had escaped tax earlier.** Cases of under reassessment are also treated as instances of escaped assessment. The **order of reassessment is one which deals with the assessment already made in respect of items which are not required to be reopened, as also matters to be dealt with in order to bring what had escaped in the earlier order of assessment, to assessment.**"*

31. Learned counsel for Assessee also could not dispute that mistake regarding set off loss had occurred in the assessment order dated 31.03.2006 but on this aspect Assessee did not either carry dispute in appeal before CIT (A) or Tribunal or filed application for rectification within the period of limitation under Section 154 (7). Therefore, in the garb of remand order in relation to some other aspect, Assessee, could not have taken advantage of extension of limitation by seeking commencement thereof from the order passed by A.A. on the issue on which remand was made.

32. The questions therefore, formulated above are answered against Assessee and in favour of Revenue. Appeal lacks merit. Judgment of Tribunal is hereby confirmed.

33. Appeal is accordingly dismissed.

Order Date :- 07.03.2017

Pravin