



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE EDJURISDICTION

WRIT PETITION NO.10160 OF 2009

Ashoka Buildcon Ltd.,
"Ashoka House", Ashoka Marg,
Vadala, Nashik - 422 001. ..Petitioner.

V/s.

1. Asstt. Commissioner of Income Tax,
Circle-2, Having his office at Wani
House, 1st Floor, New Mumbai Agra
Road, Nashik - 422 002.
2. Commissioner of Income Tax-1,
having his office Kendriya Rajaswa
Bhawan, Gadkari Chowk, Old Agra
Road, Old Agra Road, Nashik-422 002. ..Respondents.

Mr. Percy J. Pardiwala, Senior Advocate with Kr. Gopal, Jitendra
Singh and Satendra Pandey for petitioner.

Mr. Vimal Gupta for respondents.

**CORAM : DR. D.Y.CHANDRACHUD
AND J.P.DEVADHAR, JJ.**

DATED : 23RD APRIL, 2010

ORAL JUDGMENT (PER DR. D.Y.CHANDRACHUD, J.)

1) Rule, by consent made returnable forthwith. Counsel for the respondents waives service. With the consent of counsel, the petition is taken up for final hearing.

2) The challenge in this proceeding is to a notice issued by the Commissioner of Income Tax-I, Nashik on 30 April, 2009 seeking to exercise the revisional jurisdiction under Section 263 of the Income Tax Act, 1961.

3) The facts in so far as they are relevant to the controversy before the Court lie in a narrow compass. The petitioner filed a return of income for assessment year 2004-2005 on 1 November 2004 declaring a total income of Rs.2.81 crores. An order was passed by this Court on 28 February 2005 in exercise of the jurisdiction under Sections 391 to 394 of the Companies Act, 1956 by which six companies were amalgamated with the assessee with effect from 1 April 2006. Consequent to the order of amalgamation a consolidated return had to be filed. On 30 October 2005 the return was revised. On 27 December 2006 the Assessing Officer passed an order of assessment under Section 143 (3). The assessment was sought to be reopened on 6 March 2007. The basis on which

the assessment was sought to be reopened was that the benefit of Section 72A, which deals with the carry forward and set off of accumulated losses and unabsorbed depreciation allowances in cases inter alia of amalgamation and merger was wrongly allowed. On 27 December 2007 an order of reassessment was passed under Section 143(3) read with Section 147 in terms of which the claim under Section 72A was disallowed. On 30 April 2009 the Commissioner of Income Tax-I, Nasik issued the impugned notice by which the powers conferred by Section 263 are sought to be invoked. It has been observed that the assessment order passed on 27 December, 2007 for assessment year 2004-05 was erroneous and prejudicial to the interests of the Revenue.

4) The submission which has been urged on behalf of the assessee by Counsel is that, though in form the Commissioner of Income Tax has sought to revise the order dated 27 December, 2007 which was passed on a reassessment made under Section 143(3) read with 147, in substance and in essence, what is sought to be revised is the original order of assessment dated 27 December 2006. The submission is that in respect of the original order of assessment dated 27 December 2006, the period of limitation for exercising the revisional powers has expired on 31 March 2009 having regard to the provisions of Section 263 (2) and that

consequently, the notice that is issued on 30 April 2009 is barred by limitation. Alternatively, it has been submitted that if the order dated 27 December 2007 is sought to be revised, ex-facie, the impugned notice dated 30 April, 2009 does not find any error in that order in so far as a reassessment is made of income which had escaped assessment with reference to the provisions of Section 72A. Reliance has been placed on the judgment of the Supreme Court in **Commissioner of Income Tax V/s. Alagendran Finance Ltd.**¹

5) Now, in the present case, it would be appropriate at the outset to advert to the admitted position as it emerges from the record. The original order of assessment under Section 143(3) dated 27 December 2006 was sought to be reopened on 6 March 2007 solely on the basis that the benefit of Section 72A had been wrongly allowed to the assessee. In the order of reassessment that was passed thereupon under Section 143(3) read with Section 147 on 27 December 2007, the claim made by the assessee with reference to the provisions of Section 72A was disallowed. While seeking to exercise his jurisdiction under Section 263, the Commissioner of Income Tax does not find any error in the order of reassessment dated 27 December 2007 as regards the disallowance claimed by the assessee on the basis of the provisions

1 (2007) 293 I.T.R. 1

of Section 72A.

6) The impugned notice dated 30 April 2009 adverts to issues which, as a matter of fact, do not form either the subject matter of the notice that was issued under Section 148 on 6 March 2007 nor the order of reassessment thereupon which was passed on 27 December 2007. The jurisdiction under Section 263 is sought to be exercised with reference to issues which are unrelated to the grounds on which the original assessment was reopened and reassessed. Hence for the sake of clarity, it would be appropriate to set out at this stage the basis on which the notice under Section 263 has been issued. According to the impugned notice : (i) On a perusal of the assessment order, it was seen that several payments were made to associated concerns which fell in the category of Section 40A(2)(b) which expenses were allowed by the Assessing Officer without calling for the assessee to explain the reasons for the entries in the expenses for the previous year; (ii) The Assessing Officer did not examine the claim under Section 36(1)(iii) as regards interest on advances furnished by the assessee to associate companies for which interest was paid on funds borrowed from Financial Institutions; (iii) In respect of the squared up accounts, the Assessing Officer did not examine the genuineness of the transactions pertaining to certain losses and advances at the time

when he made the assessment; (iv) The Assessing Officer failed to examine the increase in deposits in the previous year; (v) The Assessing Officer did not conduct an inquiry into the genuineness of the advances and depreciation during the year; (vi) The Assessing Officer failed to make an inquiry into the genuineness of a liability in the Share Suspense Account; (vii) The Assessing Officer did not conduct an inquiry in respect of the liability in the Share Premium Amount. According to the impugned notice, the failure of the Assessing Officer to examine the aforesaid issues, to verify the justification of the claims and to conduct inquiries to ascertain the correctness of the claim of expenditure, rendered the assessment erroneous and prejudicial to the interests of the Revenue.

7) Section 263 empowers the Commissioner to call for and examine the record of any proceedings under the Act and to pass such orders as the circumstances of the case justify, including an order enhancing, modifying or cancelling the assessment and directing a fresh assessment, if he considers that any order passed by the Assessing Officer is erroneous in so far as it is prejudicial to the interest of the Revenue. Sub-section (2) of Section 263 stipulates that no order shall be made under sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed. That period of two years

from the end of the financial year in which the original order of assessment dated 27 December 2006 was passed, has expired on 31 March 2009. Hence the exercise of the revisional jurisdiction in respect of the original order of reassessment is barred by limitation. This is sought to be obviated by the Commissioner of Income Tax by seeking to revise, under Section 263, the order dated 27 December 2007. The order dated 27 December, 2007 was passed after the assessment was reopened on the ground of an escapement of income under Section 147 and an order of reassessment was passed by which the claim under Section 72A came to be disallowed. The submission that has been urged on behalf of the assessee is that, since the assessment was opened and an order of reassessment was passed only one issue namely, the claim under Section 72A, when the Commissioner as a Revisional Authority under Section 263 seeks to exercise his jurisdiction on matters which did not form the subject of the order of reassessment, the period of limitation would begin to run from the original order of assessment. This submission which has been urged on behalf of the assessee would have to be accepted in view of the judgment of the Supreme Court in *Commissioner of Income Tax V/s. Alagendran Finance Ltd.* The issue which arose before the Supreme Court was whether, for the purpose of computing the period of limitation envisaged under sub-section (1) of Section 263, the date of the

order of assessment or of the order of reassessment is to be taken into consideration. In that case, the assessee filed its return for assessment years 1994-95, 1995-96 and 1996-97 and the assessments were completed on 27 February 1997, 12 May 1997 and 30 March 1998. In the orders of assessment, the return of the assessee under the head of "Lease Equalisation Fund" were accepted. Proceedings for reassessment were initiated by the Assessing Officer and orders of reassessment were passed in respect of the following items namely (i) expenses claimed for share issue; (ii) bad and doubtful debts; and (iii) excess depreciation on gas cylinders and goods containers. Though the return of income in respect of the "Lease Equalisation Fund" was not the subject matter of the reassessment proceedings, the Commissioner of Income Tax invoked his revisional jurisdiction under Section 263 and by his order came to the conclusion that the assessee had not furnished complete details and the order of the Assessing Officer was prejudicial to the interest of the Revenue. The Tribunal held that the order which was passed under Section 263 on 29 March 2004 was barred by limitation. The Supreme Court held that the Commissioner of Income Tax, while exercising his jurisdiction under Section 263 found that only that part of the order of assessment which related to the lease equalisation fund was prejudicial to the interests of the Revenue. But the proceedings for reassessment had nothing to do

with the said head of income. The Supreme Court clearly held that the doctrine of merger was not attracted to a case of that nature. The Supreme Court followed its earlier judgment in **C.I.T. V/s. Sun Engineering Co. Pvt. Ltd.**² and held that the Tribunal had found that all the subsequent events were in respect of matters other than the lease equalisation fund. In other words, this was not a case where the subject matter of the assessment and the reassessment was the same. The Supreme Court then held 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 his revisional jurisdiction reopened the order of assessment only in relation to lease equalisation fund which being not the subject of 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. "

8) Where an assessment has been reopened under Section 147 in relation to a particular ground or in relation to certain

2 (1992) 198 I.T.R. 297

specified grounds and, subsequent to the passing of the order of reassessment, the jurisdiction under Section 263 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 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.

9) Section 147 empowers the Assessing Officer, if he has reason to believe that any income chargeable to tax has escaped assessment for any assessment year to assess or reassess the said income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under the Section. Explanation 3 which has been inserted by the Finance Act (No.2) of 2009 with retrospective effect from 1 April, 1989 provides that for the purpose of assessment or reassessment under the Section, the Assessing Officer may assess or reassess 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 the Section, notwithstanding that the reasons for such issue have not been included in the reasons recorded under sub-section (2) of Section

148. The substantive part of Section 147 empowers the Assessing Officer to assess or reassess the income chargeable to tax which has escaped assessment and any other income which comes to his notice subsequently in the course of proceedings under the Section. The effect of Explanation 3 is to empower the Assessing Officer to assess or reassess the income in respect of any issue which comes to the notice in the course of the proceedings under the section, though the reasons which were recorded in the notice under Section 148(2) did not contain reference to that issue.

10) The submission which has been urged on behalf of the Revenue is that when several issues are dealt with in the original order of assessment and only one or more of them are dealt with in the order of reassessment passed after the assessment has been reopened, the remaining issues must be deemed to have been dealt with in the order of reassessment. Hence, it has been urged that the omission of the Assessing Officer, while making an order of reassessment to deal with those issues under Section 143 (3) read with 147 constitutes an error which can be revised in exercise of the jurisdiction under Section 263. The submission cannot be accepted either as a matter of first principle, based on a plain reading of the provisions of Sections 147 and 263, nor is it sustainable in view of the law laid down by the Supreme Court. The Supreme Court has

now clearly held in the decision in *Alagendran Finance* that the doctrine of merger does not apply where the subject matter of reassessment and of the original order of assessment is not one and the same. In other words, where the assessment is sought to be reopened only on one or more specific grounds and the reassessment is confined to one or more of those grounds, the original order of assessment would continue to hold the field, save and except for those grounds on which a reassessment has been made under Section 143(3) read with Section 147. Consequently, an appeal by the assessee on those grounds on which the original order of assessment was passed and which do not form the subject of reassessment would continue to subsist and would not abate. 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. Where a reassessment has been made pursuant to a notice under Section 148, the order of reassessment prevails in respect of those items which form part of reassessment. On items which do not form part of the reassessment, the original assessment continues to hold the field. When the Assessing Officer reopens an assessment on a particular issue, it is open to him to make a reassessment on that issue as well as in respect of other issues which subsequently come to his notice during the course of the proceedings under Section 147. The

submission of the Revenue is that by not passing an order of reassessment in respect of other independent issues, the order of the Assessing Officer can be construed to be erroneous and to be prejudicial to the interest of the Revenue within the meaning of Section 263. The submission cannot be accepted in the facts of the present case. The substantive part of Section 147 as well as Explanation 3 enables the Assessing Officer to assess or reassess income chargeable to tax which he has reason to believe had escaped assessment and other income which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under the section. There is nothing on the record of the present case to indicate that there was any other income which had come to the notice of the Assessing Officer as having escaped assessment in the course of the proceedings under Section 147 and when he passed the order of reassessment. The Commissioner, when he exercised his jurisdiction under Section 263, in the facts of the present case, was under a bar of limitation since limitation would begin to run from the date on which the original order of assessment was passed. We must however clarify that the bar of limitation in this case arises because the revisional jurisdiction under Section 263 is sought to be exercised in respect of issues which did not form the subject matter of the reassessment proceedings under Section 143(3) read with 147. In respect of those

issues, limitation would commence with reference to the original order of assessment. If the exercise of the revisional jurisdiction under Section 263 was to be in respect of issues which formed the subject matter of the reassessment, after the original assessment was reopened, the commencement of limitation would be with reference to the order of reassessment. The present case does not fall in that category.

11) Counsel appearing on behalf of the Revenue relied upon the judgment of the Supreme Court in **Income Tax Officer V/s. K.L. Srihari (UHF)**³. That was a case where an assessment was reopened under Section 147. The Supreme Court, after considering the original order of assessment dated 19 March 1983 and the order of reassessment dated 16 July 1987 passed under Section 147 held that the subsequent order made a *fresh assessment of the entire income* of the assessee. Once, in the exercise of the power under Section 147, the Assessing Officer had reassessed the entire income of the assessee, the Supreme Court held that the original order would stand effaced by the subsequent order. *Srihari* was, therefore, a case where the subject matter of the original order of assessment as well as of the order of reassessment was the same. This is distinct from the situation in the subsequent judgment of

3 (2001) 118 Taxman 890 (S.C.)

Alagendran Finance where the Supreme Court noted that the subject matter of the original assessment and the order of reassessment was not the same. The facts of the present case are similar to those in *Alagendran Finance* which must, therefore, apply.

12) For these reasons, we are of the view that the exercise of the revisional jurisdiction under Section 263 is barred by limitation. We clarify that this would not preclude the Revenue from taking recourse to any other remedy that may be available in law.

13) Rule is made absolute in terms of prayer clause (a) by setting aside the impugned notice dated 30 April 2009 issued under Section 263. There shall be no order as to costs.

(J.P.DEVADHAR, J.)

(DR. D.Y.CHANDRACHUD, J.)