REPORTABLE

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

{ITA No.418 of 2009}
{ITA 225/2008}
{ITA 233/2008}

Judgment reserved on:23.09.2010
Judgment delivered on:29.11.2010

ITA 418/2009

COMMISSIONER OF INCOME TAX . . . APPELLANT

Through: Mr. N.P. Sahni, Advocate

VERSUS

M/S JOHN TINSON & COM (P) LTD. . . .RESPONDENT

Through: Mr. P.N. Monga, Advocate with
Mr. Manu Monga, Advocate.

ITA 225/2008

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CORAM:-

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. This appeal was admitted on the following substantial question of law:-

> "Whether the ITAT was correct in law and on facts in holding that the order of the AO imposing penalty is barred in view of the provisions of Section 275 (1) (a) of the Act?"

By this order, we propose to decide the aforesaid question.

2. The factual matrix that needs to be noticed may first be narrated keeping in view the commonality of the question, the parties and the impugned order of the Tribunal. Instead of referring to the facts of each case, our purpose would be served by taking note of the facts from ITA 418/2009.

3. This appeal relates to the assessment year 1993-94. For this year, the respondent-assessee had filed return of income declaring loss of ₹ 3352/-. The Assessing Officer, however, did not accept the aforesaid return as filed by the assessee. Instead, he framed the assessment under Section 143 (3) of the Act by assessing the income at ₹ 12,05,724/- vide orders dated 18th July, 1996. In the process, the Assessing Officer made additions on three counts which are as under:-

(i) The depreciation claimed by the assessee on used gas cylinders was denied by the Assessing Officer

(ii) Certain rents on the property let out by the assessee to the tenant which were deposited in the court which the assessee had not accepted and in respect of which the Assessing Officer was of the opinion that the rent was released by depositing in the Court and exigible to tax.

(iii) The claim of ₹ 368374/- as business expenses was not allowed holding that the assessee's income was not exigible under the head 'income from business'.

4. While passing this assessment order, the Assessing Officer also directed initiation of penalty proceedings under Section 271 (1) (c) of the Act on the ground that the assessee had concealed particulars of income under the aforesaid heads.

5. The assessee filed appeal against this order of the Assessing Officer. The CIT (Appeal) decided the said appeal giving substantial relief to the assessee and reducing the assessed income from ₹ 12,05,724/- to ₹ 70,932/- . On all the aforesaid three counts, the appeal of the assessee was allowed.

6. Not satisfied with this order, the Revenue took the matter before the Income Tax Appellate Tribunal. Since the matter was pending before the Tribunal, the penalty proceedings were kept in abeyance. The Tribunal ultimately decided the appeal allowing the appeal of the department. The order of the CIT (A) was set aside and that of the Assessing Officer in respect of additions mentioned at Sl. No.1 and 3 was restored. In respect of additions at Sl.no.2 whereby the Assessing Officer had taxed the rent which was deposited in the

7. We may point out here that the Tribunal had passed a comm order in respect of assessment years 1991-92, 1992-93 and 1993-94, with which we are concerned. In a similar manner, other appeals of the department were also allowed partly, though these appeals are taken up separately.

8. The Assessing Officer thereafter issued notice to the assessee and passed orders dated 28th February, 2005 re-computing the income in accordance with the direction given by the Tribunal in the aforesaid order. In this assessment order also, he directed initiation of penalty proceedings under Section 271 (1) (c) of the Act and thereafter passed penalty orders dated 26th August, 2005.

9. The Tribunal has set aside this penalty order on the ground that it was time barred. According to the Tribunal as per Section 275 (1) (a) of the Act, the order should have been passed within six months from the date of receipt of the copy of orders passed by the Tribunal in the quantum appeal. Since that order was passed on 2nd August, 2004, six months expired in April, 2005 and the order passed on 26th August, 2005 was thus time barred. The case of the Revenue is that it is clause (c) of sub Section (1) of Section 275 of the Act which would be applicable and as per this, six months period is to be counted from 28th February, 2005 when fresh assessment orders were passed. If Six months is to be counted from 28th February, 2005, the order passed on 26th August, 2005 is well within limitation.

10. In this backdrop, the appeal was admitted on the question of law which has been extracted in the beginning.

11. The issue thus is as to whether clause (a) is applicable in the

February, 2005. We extract herein below Section 275(1) (a) of t Act:-

> **"Bar of limitation for imposing penalties.**
>
> (1) No order imposing a penalty under this Chapter shall be passed-
>
> (a)In a case where the relevant assessment or other order is the subject matter of an appeal to the Commissioner (Appeals) under section 246 or an appeal to the Appellate Tribunal under Section 253, after the expiry of the financial year in which the proceedings, in the course of which action for the imposition of penalty has been initiated, are completed, or six months from the end of the month in which the order of the Commissioner (Appeals), or as the case may be, the Appellate Tribunal is received by the Chief Commissioner or Commissioner, whichever period expires later."

12. In ***N.A. Malbary and Bros.*** *Vs.* ***Commissioner of Income-Tax, Bombay North.,*** *51 ITR 295*, which was a case under the Income Tax Act, 1922 the Assessing Officer had passed first penalty order where under penalty was imposed on the basis of estimated income. Thereafter, second penalty order was passed imposing higher penalty after the account books were produced and when the Assessing Officer could get the correct figure of concealment of income on the basis of production of those account books. The issue before the Supreme Court was as to whether second order imposing penalty was illegal because of the reason that in respect of same concealment, the Income Tax Officer had already passed first penalty order and, therefore, she had no jurisdiction to make the second order while the first stood. The Supreme Court decided this issue in favour of the Revenue holding that the penalty under Section 28 of the Act of 1922 had to be correlated to the amount of the tax which

facts and realised that a much higher penalty should have be imposed, he had jurisdiction to recall the earlier order imposing penalty on the basis of the estimated income and pass another order imposing the higher penalty. He had the jurisdiction to make the second order and he would not lose that jurisdiction because he had omitted to recall the earlier order, though it may be that the two orders could not be enforced simultaneously or stand together. As, however, the first order had been cancelled there was only one order and the second order was therefore a legal order under Section 28 of the old Act (corresponding to Section 271 of the new Act).

13. In ***Seth Panchhi Ram and Co. Vs. Commissioner of Income Tax,*** *192 ITR, 289* decided by the Himachal Pradesh High Court, it was held that when the original order of assessment was set aside and matter remanded back to the Assessing Officer on the basis of which fresh order of assessment was passed, the limitation would start running from the passing of the fresh assessment order. The Court explained the provisions of Section 275 of the Act in the following manner:-

> "By looking at the provisions of Section 275, it would be seen that wherever there has been an appeal against the assessment order or other order and if the matter reaches a finality, the period as fixed by Sub-clause (ii) of Clause (a) is six months from the end of the month in which the aforesaid final order is received by the Commissioner. In cases where the proceedings are not completed with the order of the Appellate Assistant Commissioner or the Appellate Tribunal, Sub-clause (ii) would have no application but when

> emphasis is on the words "the proceedings . . . are completed". When the proceedings imposing penalty, initiated with the assessment originally made, were subsequently dropped and set aside after the proceedings for assessment which were taken in appeal to the higher authorities and were set aside with an order of remand with a direction to make a fresh assessment, it cannot be said that the proceedings for assessment were completed on the date when the first order of assessment was made. As pointed out, the emphasis is on the words "proceedings . . . are completed", The effect of the order of remand is to remove from the file the order appealed against and when the original order of assessment is taken away, there is no assessment. As such, it is the or.der passed subsequently which is relevant and not the earlier one, which had been set aside. "The relevant assessment or other order" occurring in Clause (a) obviously refers to the subsequent assessment made by the Income-tax Officer after remand. The first assessment cannot, by any stretch of imagination, be considered to be "relevant assessment proceedings or other order".

14. This issue came up for consideration before the Bombay High Court as well in the case of ***Caltex Oil Refining (India) Ltd.*** *Vs.* ***Commissioner of Income-Tax,*** *202 ITR 375.* In that case, for the assessment year 1970-71, by an order dated February, 11, 1972, the Income-tax Officer assessed the total income of the assessee at ₹ 82,72,020 and allowed interest under section 214 of the Income-tax Act, 1961, on advance payment of tax in excess of the tax determined on regular assessment. The matter went in appeal up to

80,70,666. The Income –tax Officer gave effect to the order of the Tribunal on June 15, 1974, and observed that interest payable to the assessee by the Government under Section 214 will remain unchanged. Against the order of assessment passed giving effect to the appellate order, the assessee went in appeal before the appellate Assistant Commissioner. The question which arose for consideration was as to whether such an appeal was maintainable against the orders passed giving effect to the order of the appellate authority. Normal provision for appeal under Section 246 of the Act provides appeal against the order of the Assessing Officer. It was in this context, the provisions of Section 246 of the Act were interpreted. However, the answer depended on the question as to whether the second assessment order passed, even though giving effect to the order of the appellate authority, was a fresh assessment order. The Court held that such an appeal was maintainable and discussed the legal position in the following manner:-

> "So far as the first submission, which relates to the nature of an order passed by the Income-tax Officer in consequence of orders of the appellate authorities with a view to giving effect to the directions contained therein, is concerned, it is difficult to hold that such an order is an administrative order. The power of the Income-tax Officer is to make assessment under section 143 or 144 of the Act. It is that assessment which is the subject-matter of appeal. The appellate authority, on an appeal against an order of assessment, has power to confirm, reduce, enhance or annul the assessment or to set aside the assessment and refer the case back to the Income-tax Officer for

> the order either stands confirmed, reduced or enhanced or it stands annulled or set aside. In the case of confirmation, reduction or enhancement, the original order of assessment stands modified to the extent of the directions given by the appellate authority. In the case of annulment the order becomes non est. In case an order is set aside, the authority has to start the entire process afresh and make a fresh order of assessment complying with the directions given by the appellate authority. It is thus clear that what remains as a final order after giving effect to the orders of the appellate authorities is an order of assessment under Section 143 or 144. It cannot be anything else."

15. The aforesaid discussion leads to one direction *namely* the answer to the question formulated depends on the issue as to whether the assessment order dated 28th February, 2005 is a fresh and new assessment order, a*lbeit* on the direction of the Tribunal after the matter was remitted back to the Assessing Officer or is a mechanical order which in essence was only giving effect to the orders dated 2nd August, 2004 passed by the Tribunal. If the case falls in the first category, then limitation is to be counted from 28th February, 2005 and the penalty order would be within limitation. Otherwise, the penalty order is time barred. Thus, we revert back to the orders dated 2nd August, 2004 passed by the Tribunal in the quantum appeals.

16. As pointed out above, by this order, the Tribunal partly allowed the appeals of the Revenue. One of the issues related to claim of depreciation by the assessee on used gas cylinders which arose in all

the issue as to whether these agreements were in the nature of lea agreements or it was a financial arrangement. The Tribunal concluded that the actual transaction was in fact in the nature of financial arrangement between the assessee and the so-called lessee and as such, the assessee was not entitled for depreciation over those equipments. At the same time, the Tribunal also opined that the Assessing Officer could not have invoked the provisions of Section 43 (1) Explanation-3 in order to determine the cost of cylinders. The discussion on this issue was, thus, summed up in the following manner:-

> "It is a case of financial arrangement between the assessee and the so-called lessee and, as such, the assessee is not entitled for depreciation over the impugned equipments. So far as the rental income is concerned, we are of the view that the assessing officer has wrongly taxed the rental income in the hands of the assessee because it was only a repayment of the loan with interest advanced by the assessee in order to purchase the impugned equipments. At the most the interest earned in the year under account can only be taxed. So far as invocation of provisions of Section 43 (1) explanation (3) is concerned, we are of the view that this provision was wrongly invoked by the assessing officer. Accordingly we set aside the order of the Commissioner of Income –tax (Appeals) and restore the matter to the file of the assessing officer with the directions to tax only the interest income earned by the assessee during the year under account"

17. In respect of issue at Sl. No.2 above, the Tribunal found that the

of loan was not the regular activity of the assessee and, therefore income earned there from could not be held as his business income. Thus the opinion arrived at was that the Assessing Officer was justified in treating this income as income from other sources. The Tribunal, thereby set aside the order of the CIT (A) and restored that of the Assessing Officer. Thus, deciding the issue, the Tribunal gave following directions:-

> "Accordingly we set aside the order of the CIT (Appeals) on this count and restore that of the assessing officer for all the assessment years and direct the assessing officer to compute the interest earned by the assessee during the year and tax the same instead of lease rental income"

18. In this backdrop, we have to understand the exercise undertaken by the Assessing Officer which resulted in the passing of the assessment orders dated 28th February, 2005. No doubt, while passing order dated 28th February, 2005, the Assessing Officer has given effect to the orders of the Tribunal while rejecting the claim of depreciation and claim of expenses treating the same as not the business expenditure as the income earned from the financial transaction was not treated as business income. At the same time, the Assessing officer was also required to undertake fresh exercise which was not done at the time of the passing the original assessment order. This exercise, more particularly, related to computing the interest earned by the assessee during the year.

19. Seen in that light, we have to hold that in the facts and circumstances of the case, the assessment order dated 28th February, 2005 was a fresh and new assessment order. Though, on

made for the first time in this order by undertaking fresh exerci could be subject matter of appeal, if the assessee was aggrieved against the manner in which these calculations were made. Therefore, we are of the opinion that the orders dated 26th August, 2005 passed by the Assessing Officer were not time barred but within the period of limitation provided under section 275 of the Act. We thus answer the question in the negative holding that the Tribunal was not right in treating the order of the Assessing Officer imposing penalty as time barred.

20. The order of the Tribunal is accordingly set aside. Since the appeals before the Tribunal were not decided on merits, those appeals shall now be heard and decided on merits by the Tribunal.

(A.K. SIKRI)
JUDGE

(REVA KHETRAPAL)
JUDGE

NOVEMBER 29, 2010.
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