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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **INCOME TAX APPEAL NO. 294/2013**

Date of decision: 19th July, 2013

COMMISSIONER OF INCOME TAX: DELHI -I

..... Appellant

Through Mr. Abhishek Maratha, Sr. Standing
Counsel & Ms. Anshul Sharma, Advocate.

versus

BHARTI AIRTEL LIMITED

..... Respondent

Through Nemo.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

SANJIV KHANNA, J. (ORAL):

This appeal by the Revenue, which pertains to Assessment Year 2005-06, has to be dismissed in view of the authoritative pronouncement of the Supreme Court in *Commissioner of Income Tax versus Alagendran Finance Limited*, (2007) 293 ITR 1 (SC).

2. Relevant facts in brief may be noticed. Return filed by the assessee for Assessment Year 2005-06 was taken up for scrutiny and income was assessed at Rs.860,18,30,950/- vide assessment order dated 31st December, 2007 after the setting off of brought forward losses and unabsorbed depreciation amounting to Rs.1941,17,35,146/-.



3. There appears to be another order under Section 154 read with Section 143(3) dated 7th March, 2008, where the income under the normal provisions was assessed as “nil” after setting off brought forward losses and unabsorbed depreciation and the book profits were assessed at Rs.1724,82,75 449/- under Section 115JB of the Act.
4. Subsequently, the Assessing Officer issued notice under Section 147 and an order under Section 147 read with Section 143(3) dated 10th December, 2009 was passed. In the re-assessment order, two additions were made in respect of non-deduction of tax at source on payment of interest to ABN Amro Bank, Stockholm Branch. The second addition was made on account of ESOP expenses. The said order also discusses set off or brought forward loss or unabsorbed depreciation.
5. Subsequently, the Commissioner of Income Tax Delhi - I made an order under Section 263 of the Act dated 24th March, 2011 for failure to deduct TDS under Section 194H on free air time provided to distributors and under Section 194J on roaming charges paid to other network operators. The Commissioner invoked Section 40(a) (ia) to make the said disallowance.
6. Section 263(2) of the Act postulates and prescribes time limit of two years as it stipulates that no order in revision will be passed by the Commissioner after expiry of two years from the end of the financial year in which the order sought to be revised was passed.



7. The question raised is whether the first order under Section 143(3) dated 31st December, 2007 or the second order under Section 147 read with Section 143(3) dated 10th December, 2009 will be the starting point of limitation under Section 263(2) of the Act. If the first order dated 31st December, 2007 is taken as the starting point, the order passed under Section 263, dated 24th March, 2011 is barred by limitation, but if we treat the second order dated 10th December, 2009 under Section 147/143(3) as the starting point, the order passed on 24th March, 2011 will be within time.

8. It is factually correct and cannot be disputed that the two aspects/questions, which have been dealt with and additions which have been made in the order under Section 263 dated 24th March, 2011, have not been dealt with or examined in the second assessment or the re-assessment order dated 10th December, 2009. The second order or the re-assessment order is on different aspects. In these circumstances, the decision of the Supreme Court in *Alagendran Finance Limited* (supra) is clearly applicable and the following ratio is binding on us:-

“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 its revisional jurisdiction reopened the order of assessment only in relation to lease equalisation fund which being not the subject of the 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.”

9. In the said case, second or re-assessment order was passed under Section 147 of the Act. Order under Section 263 passed by the Commissioner was held to be barred by limitation as the subject matter of additions made in the said order were not dealt with in the reassessment order. Thus doctrine of merger it was held would not apply and limitation would begin from the date of the first or original assessment order. It has been held that once reassessment order was passed, original underassessment was set aside, to the extent of underassessment but not in respect of matters covered by the original assessment and not subject matter of reassessment proceedings or order. Earlier judgments in *Hind Wire Industries Limited versus Commissioner of Income Tax*, (1995) 212 ITR 639 (SC), *Commissioner of Income Tax vs. Sun Engineering Works Private Limited* (1992) 198 ITR 297 (SC) and other cases, were examined before the said opinion and ratio was expounded.

The appeal is accordingly dismissed.

SANJIV KHANNA, J.

SANJEEV SACHDEVA, J.

JULY 19, 2013
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