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Court : Income Tax Appellate Tribunal ITAT

Decided On : Jun-02-2005

Judge : G Chowdhury, D R Shah

Appellant : infosys Technologies Ltd.

Respondent : Joint Cit

Judgement :

1. All these appeals by assessee are directed against the common order of the learned CIT-HI, Bangalore dated 20-2-2001 under Section 263 of the Income Tax Act (the Act).

2. We first take up the appeal pertaining to assessment year 1994-95.

Learned CIT, during the revision proceedings under Section 263, issued a notice under Section 143(3) dated 6-12-2000 proposing revision of orders passed under Section 143(3). Learned CIT was of the opinion that the credit as available under Double Tax Avoidance Agreement (DTAA) between India and Canada was granted without properly applying the provision of art. 23 of the said DTAA. Subsequently, a second notice was issued on 31-1-2001 proposing to revise the orders passed under Section 143(3) whereby learned CIT was of the opinion that credit for tax paid in Canada as well as in Thailand were granted erroneously without applying the provision of relevant DTAA with Canada as well as Thailand. By order under Section 143(3) dated 27-2-1997, for assessment year 1994-95, the assessing officer has granted the credit for tax paid in Canada amounting to Rs.

12,63,746. Since the credit was granted as claimed, the issue was not carried further in appeal before learned Commissioner (Appeals), though appeal was preferred to Commissioner (Appeals) on other grounds. The assessing officer gave effect to Commissioner (Appeals)s order by order dated 31-3-1999. In the said order also, the assessing officer gave the credit in respect of tax paid in Canada as claimed by the assessee. Learned CIT in revision proceedings, held that the order to be revised is order dated 31-3-1999 whereby credit under DTAA with Canada was given without applying the relevant provision of the DTAA. The assessee objected to the notice holding that the same is barred by limitation as the order under Section 143(3) was passed on 27-2-1997 and the order dt, 31-3-1999 giving effect to the Commissioner (Appeals)s order never dealt with issue on credit under DTAA with Canada. Learned CIT, relying on the decision of Honble Supreme Court in the case of Hind Wire Industijes Ltd. v. CIT (SC) held that provision of Section 154 and Section 263 are in pari mateiia and held as under: Sub-section (7) of Section 154 prescribes limitation for passing rectification order which reads as under: Save as otherwise provided in Section 155 or Sub-section (4) of Section 186 no amendment under this section shall be made after the expiry of four years from the date of the order sought to be amended." What falls for consideration in the present case is the interpretation of the expression "from the date of the order sought to be amended" in Sub-section (7) of Section 154 as it stood then. It is obvious that the 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.

It may be seen that the expression used in Sub-section (2) of Section 263 and Sub-section (7) of Section 154 are practically the same. In sub-section 2 of Section 263, "it is the order sought to be revised".

In sub-section 7 of Section 154, it is "the order sought to be amended". Following the reasoning given by the Supreme Court in Hind Wire Industries Ltd. v. CIT it has to be held that the orders sought to be revised under Section 263 need not necessarily mean the original order and it can be any order including an amended order or rectified order, in view of the fact that the word order has not been qualified in any way. Hence, initiation of proceedings under Section 263 to revise

the order dated 31-3-1999 is not barred by limitation." 2.1 learned CIT thereafter concluded in para 11 of his order that the claim of assessee was allowed without verifying whether the claim is in accordance with the provisions of the relevant DTAA with Canada and Thailand. The failure on the part of assessing officer has rendered the orders erroneous and prejudicial to the interest of the revenue.

Relying upon the decision of Honble Delhi High Court in CWT v. Anokha Singh , learned CIT held that if the assessment order contains some apparent error of reasoning or of law or fact or where the order is stereotyped, which simply accepts what the assessee has stated and fails to make enquiries, which are called for in the circumstances, it amounts to an erroneous order, which can be revised under Section 263. In conclusion, he directed the assessing officer to compute the DTAA relief in accordance with art. 23(2) of DTAA with Thailand and art. 23(3) of DTAA with Canada. The assessee is in further appeal before us.

3. Learned counsel for assessee Shri Padam Khincha submitted that a notice under Section 263 was originally issued. The appellant- company replied to this notice. In the original notice under Section 263 there was an attempt to point out the mistake committed by the assessing officer. After receiving the reply of the appellant, a revised notice was issued stating that there are certain mistakes in the original notice. What mistakes were there in the original notice were not stated.

Issue of a second notice when the first notice is already pending is bad in law. Proceedings taken consequent to such an invalid notice are to be regarded as bad in law as held in Smt. Nilofer Hameed & Anr. v.Income Tax Officer (Ker).

For all the years under consideration, the assessing officer on several occasions had asked for and received responses from the appellant- company relating to the manner and calculation of claim of relief from double taxation.

Additionally, for all the years a notice under Section 154 was issued proposing to rectify the double taxation relief. Detailed responses were filed to such notice. No action of rectification was taken. It is, therefore, to be presumed that the action under Section 154 was dropped. The above indicates that there has been an application of mind and formation of an opinion by the assessing officer about the

double taxation relief available to the appellant- company. The observation of the CIT that there has been a lack of enquiry and that there was no application of mind, therefore, is not correct.

It has been held in Bhaval Synthetics (India) Ltd. v. CIT (2004) 82 TTJ (Jd) 336: (2003) 130 Taxman 178 (Jd)(Mag) that an order passed after an enquiry, after application of mind could not be said to be erroneous or prejudicial to the interest of revenue.

The CIT, through the order under Section 263 has substituted his own opinion to that of the opinion of the assessing officer, which opinion had been formed after an application of mind and consideration of the relevant materials. Sec. 263 of the Act does not permit a substitution of the opinion of the CIT in place of the opinion of the assessing officer as held in case of Blue Dart Express Ltd. v. Jt. CIT (2001) 71 TTJ (Munibai) 548.

Sec. 263 confers a power to the CIT to make further enquiry before passing the final order. This power of further enquiry is to enable to reach a conclusion that the order of the assessing officer is erroneous insofar as it is prejudicial to the interest of the revenue. The CIT could have made the necessary enquiry. He has failed to do so. Instead he has directed the assessing officer to conduct an enquiry. Directing the assessing officer to cause an enquiry to be made, to detect the error, is not permissible in an action under Section 263.

Further the CIT has not pointed out the error. He has only referred to the provisions of art. 23 of the treaty between India and Thailand and India and Canada. He has not demonstrated in what manner the claim of credit of taxes paid in Canada and Thailand made by the appellant- company and allowed by the assessing officer was wrong. Not having demonstrated the error, the order of the CIT is bad in law as held in CIT v. Kanda Rice Mills .

The CIT has also failed to notice that the article on relief from double taxation in the treaty between India and Thailand is not identically worded with that in the Treaty between India and Canada.

The CIT has limited his discussion to the provisions of the article in the treaty between India and Canada, probably presuming that the same analogy should hold good for the treaty between India and Thailand also. The CIT thus proceeded with the action in a routine and mechanical manner, without application of mind.

For an action under Section 263, the order sought to be revised must be both erroneous as well as prejudicial to the interest of the revenue.

Both these tests must be satisfied. Merely being erroneous without being prejudicial or vice versa would not suffice. The CIT not having clarified how the order was erroneous, one of the limbs of Section 263 is not satisfied. The order under Section 263 is therefore bad in law.

The commentary to the model conventions-both OECD as well as UN-explicitly recognize that there could be lot of difficulties in applying the article on relief from double taxation. More than one alternative solution may be possible. The commentary suggests that the domestic law of each country should address this issue and provide for the necessary solution. India does not have any rules in the domestic legislation governing relief from double taxation. In the absence of specific rules and in situations where more than one solution is possible, adoption of one of the many alternatives should not mean that the order passed by the assessing officer is erroneous.

For the years under consideration there are six computations on record made by different assessing officers and authorities at different points of time. These different alternatives, all of which appear apparently correct, suggest that more than one solution is possible.

Choosing one such solution from the many alternatives would not mean that the assessment order is erroneous. The Supreme Court in Malabar Industrial Co. Ltd. v. CIT (2000) 159 CTR (SC) 1 : (2000) 243 ITR 83 (SC) held that where two views are possible and the Income Tax Officer has taken one view with which the CIT does not agree, it cannot be treated as an order amenable to an action under Section 263. The same view was also held inShnivasa Hatcheries (P). Ltd. v. Dy. CIT (2004) 89 TTJ (Hyd) 545 : (2002) 81 ITD 36 (Hyd);CIT v. Max India Ltd. (P (c)

CIT v. Mehsana District Co-operative Milk Producers Union .

It is now well settled rule that when there are two or more interpretations possible or permissible, the one in favour of the assessed is to be adopted as held in CIT v. Vegetable Products Ltd. and other cases.

The decision of Hind Wire Industries case (supra) relied on by the CIT in his order under Section 263 may not be appropriate for the following reasons: (a) The Supreme Court in the above decision was not concerned with the merger theory explicitly provided for in Section 263.

(b) The Supreme Courts interpretation in the said decision was to give a benefit/relief to the assessee. The CBDT also has recognized that action under Section 154 may be taken beyond the stipulated time of 4 years, if it is to confer a benefit to the assessee. This indicates that the time-limit under Section 154 is not sacrosanct.

The time-hmit for an action under Section 263 on the other hand, -is binding.

Apart from above arguments pertaining to all the years under appeal, Shri Khincha, for assessment year 1994-95, specifically submitted that the order of revision is time-barred as it was taken more than two years after the original assessment order was passed. The issue of relief from double taxation was not a part of the appeal before the Commissioner (Appeals) for the said year. The time for limitation is to be therefore reckoned from the date of original assessment order. The above is supported by Circular No. 528, dated 16-12-1998. The ratio of the decision of the Karnataka High Court in Kalasa Tea Produce Co. Ltd. v. CCT is not applicable for the following reasons: (a) The decision was in the context of the Agrl. Income Tax Act whereunder the CIT has powers to revise even the orders of the appellant authorities. Such powers are not available under Section 263. Explanation (c) to Section 263(l) provides that the CIT cannot revise the matters considered and decided by the Commissioner (Appeals).

(b) Section 263 explicitly provides for only a partial theory of merger. The merger happens only to the extent provided for in Section 263.

(c) If the merger is said to be full as contended by the departmental Representative then the CIT is precluded from revising the order. This is because what remains thereafter is the order of the Commissioner (Appeals) which cannot be revised by the CIT under Section 263.

If it is held that there is no full merger since the subject-matter was not carried in appeal, then it is order of the assessing officer that survives on the matter of relief from double taxation (as the same was not contested in appeal). The order of the CIT under 263, being passed more than two years from the date of original order would then be bad in law. -Either way the order of the CIT under 263 is bad in law.

Even otherwise, the Supreme Court in CIT v. Sun Engineering Works Ltd. , at p. 320, held that one should be circumspect in too readily applying the ratio of one decision to another case particularly when the enactments are different and the underlying provisions are dissimilar.

4. Learned departmental Representative, Shri Ajit Korde, filed written submissions. As regards whether the order is barred by limitation, learned departmental Representative submitted that the contentions of the assessee may not be accepted on the following two grounds: (a) The nature of error is, prima facie, rectifiable error for which limitation timelimit of two years starts from the date of order sought to be revised.

(b) According to theory of merger laid down by the Karnataka High Court, issues not appealed against, undecided issues also merge with the appellate order.

He further submitted that tax computation is an integral part of the assessment order. Error is in the tax computation part of the assessment. The dispute is regarding credit of taxes paid by the assessee. Tax credit is given while determining tax payable by the assessee or tax refundable to the assessee. The tax computation follows the assessment of income as done in the body of the assessment order.

Thus, determination of income and tax payable thereof are integral part of the assessment. In this connection, attention is drawn to the judgment of the Supreme

Court in which the Supreme Court has held as under Assessment is one integrated process involving not only the assessment of the total income but also the determination of the tax. The Income Tax Officer has to determine by order in writing not only the total income but also the nets on which will be payable by the assessed for the assessment year in question and the demand notice has to be issued under Section 156 of the Income Tax Act, 1961 in consequence of such an order If, therefore, the Income Tax Officer first draws up an order assessing the total income and, indicating the adjustments to be made, directs the officer to compute the tax payable on that basis and then approves of it, either immediately or some time later no fault can be found with the process, though it is only when both the computation sheets are signed or initiated by the Income Tax Officer that the process described in Section 143(3) will be complete." (Kalyankumar Ray v. CIT ; CIT v. Girdbar R.) The order passed by the assessing officer giving effect to the Commissioner (Appeals) order is only a modification of the original assessment order passed by the assessing officer. The assessing officer in pursuance to the appellate order merely modifies the original assessment order, either by giving relief or by enhancing income as held by the Commissioner (Appeals) in his appellate order. Thus, the order giving effect to the Commissioner (Appeals) is also order passed under Section 143(3). The attention is invited to the following: An order of assessment is one in which there is computation or computation of tax or both. The computation and tax can be made by the Income Tax Officer not only in a regular assessment made under Section 143 of the Income Tax Act, 1961, but also orders passed from time-to-time giving effect to the decisions of the appellate authorities. The order passed by the Income Tax Officer giving effect to the decision of the appellate authority is as much an assessment order as the one passed by him by way of regular assessment under Section 143 of the Act." (Bakelite Hylam Ltd. v. CIT .) Therefore, after giving effect to the Commissioner (Appeals)s order, the assessing officer determines tax payable by the assessee as this also is an assessment order.

1. Determination of income and 2. Determination of tax payable on the basis of the income determined by the assessing officer.

Generally income is determined after scrutiny of the case which may involve examining of accounts and carrying out investigations.

assessing officers error, if any, would normally be of the . type where appropriate decision can be taken only after discussion or debate, whereas, tax computation error is mostly of prima facie and arithmetical in nature where no two views are possible.

Once an appellate order is passed, the assessment order gets merged with the appellate order on all issues, whether appealed against or not, whether decided or not decided by the appellate authority in the appellate order as held by Honble Karnataka High Court in (2004) 267 ITR 29 (supra). The tax computation which is integral part of the assessment order continues to be part of the order giving effect to the Commissioner (Appeals)s order as well. Tax computation is mandatory. Assessing Officer does not have any scope for exercising discretion.

The assessing officers error in this case pertains to the tax computation part. Nature of the error is of not giving tax credit of the taxes paid abroad according to the article of the DTAA. The assessee contended that the applicability of DTAA provisions was not before the Commissioner (Appeals). Therefore, to that extent, the original assessment order has not merged with the appellate order and fience the order under Section 263 is passed beyond time.

Though, this issue was not before the Commissioner (Appeals), tax computation has not become final as, applicability of the DTAA provisions will have to be considered even at the stage of computing of taxes payable in consequence to the Commissioner (Appeals)s order.

For assessment year 1994-95 and assessment year 1995-96. though the CIT has revised the order giving effect to the Commissioner (Appeals)s order under Section 263, real nature of revision made is of rectification of prima facie in nature. Error in computation of tax is a mistake rectifiable under Section 154 as credit is to be given on doubly taxed income and to the extent specified in art. 23 of the DTAA. Both are not debatable issues. There cannot be two views on quantum of doubly taxed income and quantum of tax credit under article of 23A. Therefore,

error made on these counts is error that can be rectified under Section 154.

The assessee himself has treated this error as a rectifiable error.

In assessment year 1995-96, when assessing officer did not give credit of tax deducted in Canada, the assessing officer (sic assessee) did not prefer appeal against it before the Commissioner (Appeals), but filed rectification application dated 2-5-1997, sought tax credit under Section 154 (p. 156 of the assessees paper book).

Above view is strengthened by the decision in which it is held by the Court In a case where two views are not possible, if by misreading the section or miscalculation of the rate provided in the section, a mistake is committed, such a mistake would come within purview of Section 154. (Income Tax Officer v. Raleigh Investments Co. Ltd. 4.1 Shri Korde further submitted that for a rectifiable error, the period of, limitation starts from the last order. For rectification proceedings limitation period starts from the date of the order to be rectified and not from the date of original order. Attention was invited to the headnote of the Supreme ourt judgment extracted herein: The appellant was assessed to income-tax originally under an assessment order dated 21-9-1979. It filed a petition for rectification of the assessment order under Section 154 of the Income Tax Act, 1961, on the ground that the Income Tax Officer had not taken into consideration the shift allowance available to the appellant. The assessment order was rectified on 12-7-1982.

Thereafter, the appellant again applied for rectification of the fresh order of July, 1982, on 4-7-1986, contending that while it was entitled to depreciation allowance on the factory building at the rate of ten per cent, it was allowed depreciation only at the rate of five per cent .....

Held, reversing the decision of the High Court, that since the word order in the expression from the date of the order sought to be amended in Section 154(7) was not qualified in any way, it did not necessarily mean the original assessment order; it could be any order including the amended or rectified order. The view taken by the Tribunal was the correct one and the High Court was wrong in setting aside

the decision of the Tribunal." (Hind Wire Inds, Ltd. v. CIT (supra). I In the result, our answer to the question is that the time-limit provided under Section 154(7) should be computed from the date of the order of reassessment and not from the earlier order of rectification." (CIT v. Mysore Iron & Steel Ltd. ; Bihar Road Transport Corporation v. CIT Here, error in tax computation was neither appealed against nor considered by the appellate authority, therefore the issue of tax computation has not merged with the appellate order. Such part can be revised. This ratio is laid down by the Full Bench of the Karnataka High Court in the case of Kalasa Tea Produce Co. Ltd. v. Commr. of Commercial Taxes (supra).

The assessing officer passed assessment order under Section 19(3) on 31-5-1989, for assessment years 1981-82, 1982-83, 1983-84 and 1984-85. The assessing officer granted initial depreciation on new assets for these years. However, depreciation was not subject-matter in the appeal. Assessee challenged the assessment order on the issue of estimation of income of coffee. The appellate authority allowed all appeals and directed assessing authority to consider overhead expenses incurred by the assessee during the period under appeal in respect of coffee and cardamom. Assessing Officer vide order dated 11-11-1991 gave effect to the order of the appellate authority. The Cornmr. of Agrl. IT, Karnataka, in exercise of suo motu power conferred on him, issued show-cause notice on 25-7-1995 asking assessee, why depreciation for assessment years 1981-82 to 1984-85 should not be modified. Subsequently revision order was passed on 16-10-1995.

The Karnataka High Court held that, the order dated 16-10-1995, passed by the revisional authority was not barred by limitation. The decision of the Karnataka High Court is based on following two reasons Since under Income Tax Act, CIT does not have power to revise orders of the Commissioner (Appeals), second reason given in the Karnataka High Courts decision may not hold good. However, High Courts decision on theory of merger is applicable even after amendment to clause (c) as explained in the following paragraphs.

We do not find any substantial difference in the language employed in Section 263 of the Income Tax Act which was considered by the Full Bench of this Court in the

case of CIT v. Hindustan Aeronautics Ltd. and Sub-section (5) of Section 32 of the Act.

Amendment to clause (c) to Sub-section (1) of Section 263 and the departments Circular No. 528 do not alter the law laid down by the Karnataka High Court in this matter. It may be mentioned that Circular No. 528 ((1989) 76 CTR (St) 691 is Explanatory Notes to the Finance Act, 1988. The relevant portion reads as under: 39.2 Regarding the circumstances under which the order of an assessing officer merges with that of an appellate authority, conflicting decisions have been given by the Courts. The judicial controversy centers around the question as to whether the entire order of assessment passed by an assessing officer merges with the order of the first appellate authority or the merger is only with respect to that part,of the order of the assessing officer which relates to the matters considered and decided by such an authority.

Some High Courts have held that there is complete merger once an appeal is decided against an order even on one or two points alone, while a number of High Courts have held that there is only a partial merger confined to points adjudicated upon. To eliminate any further litigation, the Finance Act has amended Section 263 by inserting an Explanation to the effect that the CIT win be competent to revise an order of assessment passed by: an assessing officer on all matters except those that have been considered and decided in appeal. This amendment also has been carried out for removal of doubts.

Reading of the circular makes it clear that the legislature has stayed away from the controversy of theory of merger. It has merely overruled the part of the decision of some Courts on the issues which can be revised. In such decisions Courts had held that, the issues not decided by the appellate authority also merges with the appellate orders therefore, revisional authority cannot revise such issues. The amendment merely clarifies that, the issues not in appeal before the appellate authority can always be revised by the CIT.It may be mentioned that the amendment is on revisionary power of CIT and not on theory of merger or on limitation. There word of merger is not mentioned in the amended clause (c). There cannot be implied interpretation of the statute when words are clear.

Interpretation of statutes is resorted to only when there is a difficulty in interpreting section. Therefore, the law laid down by the Karnataka High Court on theory of merger is final (supra). Therefore, Karnataka High Courts judgment is applicable to this case even after amendment to Section 263.

In view of the above, the CITs orders passed under Section 263 are not time-barred for the asst, yrs. 1994-95 and 1995-96.

He further submitted that in this case, the assessing officer has failed to apply statutory provision in terms of the art. 23 of the DTAA. Therefore, assessing officers failure to apply statutory provisions constitutes an order erroneous and prejudicial to the, interests of revenue. In the case of CIT v. South India Shipping Colp.

it is held: ..... that the assessment had been completed by the Income Tax Officer without verifying the nature of expenses and eligibility for weighted deduction, that weighted deduction claimed by the assessee has been accepted by the Income Tax Officer without verifying the sub-clause of Section 35(l)(b) under which the claim would be admissible and therefore, the assessment order was erroneous and prejudicial to the interest of the revenue.

Moreover, disclosure of facts by assessee does not-preclude revision as held in CIT v. Emery Stone Manufactunng Co. (1995) 126 CTR (Raj) 345: (1995) 213 ITR 843 (Raj) wherein it was observed thus: Even in a case, where the facts have been disclosed by the assessee to the assessing authority if the correct provisions of law have not been examined by the assessing authorities, the power under Section 263 of the Income Tax Act, 1961 can be invoked.

4.2 Both the counsel have invited our attention to the decision of the Honble Supreme Court in the case of Malabar Industrial Co. Ltd. v. CIT (supra), wherein it was held thus: an incorrect assumption of facts or an incorrect application of law win satisfy the requirement of the order being erroneous; in the same category falls orders passed without applying the principle of natural justice or without application of mind. The phrase prejudicial to the interests of revenue is not an expression of art and is not defined in- the Act. . Understood in its ordinary

meaning it is of wide import and is not confined to loss of tax. The scheme of the Act is to levy and collect tax in accordance with the provisions of the Act and this task is entrusted to the revenue. If due to an erroneous order of the Income Tax Officer, the revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to the interest of revenue.

4.3 learned departmental Representative further submitted that the CIT has rightly asked the assessing officer to apply provisions of the DTAA and pass the assessment order.

There is nothing in Section 263 of the Act to show that the CIT-should in an cases record his final conclusion on the points in controversy before him. It would all depend upon the facts of each case to decide whether the CIT had exercised the powers properly or not." (CIT v. Seshasayee Paper & Boards Ltd. 4.4 Shri Korde further submitted that the case laws relied on by the learned representative and the arguments on why they are not applicable to this case are given as under: Order cannot be considered if the assessing officer takes one of the possible two views. (Malabar Industrial Co. Ltd. v. CIT (supra); CIT v. Max India Ltd. (supra); CIT v. Mehsana Dim Co-op. Milk Prod.

Union (supra); Bhaval Synthetics (India) Ltd. v. CIT (supra); Shnivasa Hatcheries (P) Ltd. v. Dy. CIT (supra); Blue Dart Express Ltd. v. Jt. CIT (supra.).) These judgments are not applicable to the facts of the case as there cannot be two views on application of art. 23 of the DTAA for giving tax credit.

Learned representative submitted following judgments for the proposition that, CIT has to draw firm conclusion on error which should be based on material on record. (Kanda Rice Mills v. CIT (supra): Raylon Silk Mills v. CIT ; CIT v. T The above judgments are not relevant to the case as, the issue here is of non application of provision of the DTAA. In this case, the assessing officer has given fun credit without applying DTAA. Fresh notice under Section 148 cannot be issued when assessments under Section 148 are pending. (Smt. Nflofer Hameed v. Income Tax Officer (supra); CIT v. Jaideo Jain & Co. .) These judgments are irrelevant as present proceedings are under Section 263 in which no fresh notice issued when proceedings were complete. Otherwise also, the judgments given adjudicating on

sections 147 and 148 are not relevant for deciding issue under Section 263.

Rectification proceeding are part of the assessment proceedings (Bihar State Road Transport Corporation v. CIT (supra); Nicco Corporation Ltd. v. CIT .) Above judgments in fact support contention of the department for rectifiable error, time-limit should commence from the date of the order sought to be revised (see ratio of (supra).) 5. We have carefully considered the relevant facts, arguments advanced and host of the decisions cited. For assessment year 1994-95, firstly we need to determine whether the order under Section 263 dated 20-2-2001 is barred by limitation. From the facts narrated above, it is seen that the assessee was given full credit for Canadian tax, in the order under Section 143(3), dated 27-2-1997. In the said order, no discussion is made as regards how the credit is eligible or to be allowed. Since the credit was allowed as claimed, the matter was not carried before Commissioner (Appeals). The Commissioner (Appeals) while deciding certain other disputes, gave partial relief.

The effect of said order was given on 31-3-1999. In this order also, the credit for Canadian tax was fully given. Meanwhile, the assessing officer by notice under Section 154 dated 6-4-2000 sought to reduce the credit for Canadian tax paid. The assessee explained by letter dated 17-4-2000 and 21-4-2000 that the credits are appropriately given. The reasoning for claim was also justified in the said reply. The assessing officer never passed a rectification order. Subsequently, the order giving effect to Commissioner (Appeals) dated 31-3-1999 was revised. It is the contention of the assessee that same is barred by limitation. It is the contention of learned departmental Representative that based on the parity of provision of sections 154 and 263 as well as the decision of Honble Karnataka High Court in (2004) 187 CTR (Kar)(FB) 428 : (2004) 267 ITR 29 (Kar)(FB) (supra) rendered in reference to Karnataka Agrl.

IT, the order is within limitation period.

5.1 For proper appreciation of controversy, Section 263 of the Act and relevant provision under Karnataka Agrl. Income Tax Act, 1957, are reproduced hereunder: 32. Appeal against assessinent-(1) Any assessee aggrieved by any of the following orders of an Agrl. Income Tax Officer may appeal to the Dy.

Commissioner(Appeal) against such orders,- Provided that no appeal shall lie in respect of an assessment made under Sub-section (4) of Section 19.

(ii) set aside the assessment and direct the Agrl. Income Tax Officer to make a fresh assessment after such further inquiry as may be directed; or (b) in the case of any other order, confirm, cancel or vary such order Provided that no enhancement of an assessment or penalty shall be made under this section unless the appellant has had a reasonable opportunity.

Explanation : For the removal of doubts, it is hereby declared that subject to the provisions of Sub-section (2), the revisional power conferred on the Dy. Commissioner by Sub-section (1) shall be exercisable in respect of an order passed under this Act by any authority subordinate to him before or after the conferment of revisional power on him.

35. Reidsion by Comn2iSSioner or it. Commissioner of orders prejudicial to revenue-(1) The Commissioner or A. Commissioner may call for and examine the record.of any proceeding under this Act, and if he considers that any order passed therein by any authority subordinate to him is erroneous insofar 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, cancelling the assessment and directing a fresh assessment.

(2) No power shall be exercisable under Sub-section (1) after the expiry of four years from the date of order to be revised. " 5.2 From the aforesaid revision (sic) of the Asstt. Commissioner, it is clear that an order under Section 263 can be passed by Commissioner revising the order by an assessing officer being the Asstt.

Commissioner or Dy. Commissioner or Income Tax Officer or A.Commissioner. As per clause (c) of the Explanation to Section 263(l), the Commissioner can revise an order by an assessing officer, which has been subject-matter of appeal, if the matters had not been considered and decided in such appeal, such matters can also be revised by Commissioner under Section 263(l). As per Section 263(2), the

order cannot be made after expiry of 2 years from the end of the financial year in which the orders sought to be revised is passed. Under Karnataka Agrl. Income Tax Act, the power of Dy. Commissioner(A) are the same as power of Commissioner(A) under Section 251 of the Income Tax Act. However, the revision power by Commissioner under Section 35 of Karnataka Agrl. Income Tax Act extends to the order of Dy.

Commissioner(A) even on issue considered and decided by him as he is the authority subordinate to Commissioner. Such powers are not available to CIT under Section 263 of the Act. Thus, though under Karnataka Agrl. Income Tax Act, the order of Dy. Commissioner(A) merges into the order of assessing officer, yet the same can be revised under Section 35 of the Karnataka Agrl. Income Tax Act. If the analogy of Honble Karnataka High Court rendered in case under Agrl. Income Tax Act is applied to order under revision under Section 263 of the Act, the CIT cannot revise such order as entire order of assessing officer can be said to have merged in appellate order. In view of clause (c) of Explanation to Section 263 of the Act, order of assessing officer, though carried in appeal before Commissioner (Appeals) can be revised, on such matters as had not been considered and decided in such appeal.

In effect, there is no complete merger of assessment order with appellate order for the purpose of revision. Hence, due to substantial power of Commissioner to revise an order under Section 35 of the Karnataka Agrl. Income Tax Act, which is not available under the Income Tax Act, the ratio laid down under Karnataka Agrl. Income Tax Act cannot be applied under the Income Tax Act. If it is held, that the order sought to be revised has merged in the appellate order, such assessment order cannot be revised. However, if it is held that issues not considered and decided by Commissioner (Appeals) has not merged, the error, if any, is in the original order and not in the order giving effect to appellate order. Thus, if CIT can revise an order of assessing officer, which has not merged into the order of appellate order, the mistake should be in the original order, which is sought to be revised. Imphedly, the time-limit will commence from the date of order sought to be revised. Admittedly, in this case, the credit for tax paid in Canada was granted in order under Section 143(3), dt, 27-2-1997. If the CIT in revision proceeding is of

the opinion that this credit is not properly given or is not in accordance with law, he can revise such order provided the same is within limitation period.

It is settled policy of law that there must be point of finality in all legal proceedings, that settled issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi judicial controversies as it must in other spheres of human activity. These principles are required to be observed by all concerned in administration of statutory enactments.

It is not the case that there is any mistake in giving effect to appellate order by Commissioner (Appeals). Thus, under Section 263(2), an order souglat to be revised cannot be so revised after expiry of two years from the end of the financial year in which such order was passed. We, accordingly, hold that since the CIT has sought to revise an assessment order dated 27-2-1997, the same is outside the limitation period prescribed under Section 263(2).

It is not correct to say that "rectification" is equal to "revision" under the Act. The power of rectification is available under Section 154 whereas the power of revision is available under Section 263 of the Act. If rectification and revision were same, the assessing officer would have rectified the order under Section 154 itself, when he proposed to do so specifically by issue of notice on 6-4-2000. However, after receiving the reply of assessee dated 17-4-2000 and 21-4-2000, the assessing officer thought it fit not to rectify as it was either not rectifiable or there was no error. Rectification can be at the instance of either the assessee or the assessing officer. However, the power under Section 263 can be exercised by CIT only where an order sought to be revised is erroneous insofar as it is prejudicial to the interest of revenue. Thus, the power available under Section 154 to rectify mistake apparent on record is different than a power to revise an order, under Section 263. Thus, even the decision of Honble Supreme Court in Hind Wire Indusuial Ltd. (supra) cannot be applied when a subject-matter is revision and not rectification. We, accordingly, set aside the order of CIT under Section 263 for assessment year 1994-95.

6. We now take up the appeal relating to assessment year 1995-96. The following chronology of events will explain the facts: Mistake in tax and interest calculation rectified-Canadian tax credit was not given (a) Justifying the method of credit claimed (b) Proceedings are barred by limitation Matter relating to the rectification of TDS credit of Thailand for assessment year 1996-97 inserted (a) Proceedings are barred by limitation (b) Credit for tax paid in Canada and Thailand have been claimed correctly Directing assessing officer to verify claim in accordance with DTA provision Since the CIT revised the order directing the assessing officer to verify whether the claim is in accordance with relevant provision of DTAA with Canada and Thailand, the assessee is in further appeal before us.

7. Learned counsel for assessee Shri Khincha reiterated the stand taken in appeal pertaining to assessment year 1994-95. He further submitted that credit for tax paid in Canada was not given in original assessment order. An application under Section 154 was made asking for credit for tax paid in Canada to be given. Issues carried in appeal before the Commissioner (Appeals) did not include the ground of relief from double taxation. Credit for tax paid in Canada was given in the order giving effect to the order of the Commissioner (Appeals). Although the relief from the double taxation was given in the order giving effect to the order of the Commissioner (Appeals), it was not because there was a direction to that effect by the Commissioner (Appeals). The credit for tax paid was thus given in pursuance of the letter of rectification, filed. The effect of rectification of mistake is to correct the error in the original assessment order. The rectification order therefore dates back to the date of original assessment order as held in Bihar State Road Transport Corporation v. CIT (supra) and Nicco Corporation Ltd. v. CIT (supra). As the subject-matter of the relief from the double taxation was not an issue before Commissioner (Appeals) and the order of rectification dates back to the original order of assessment, the order of the CIT under Section 263 is beyond time as it has been passed more than 2 years from the expiry of the year in which the assessment order was passed.

7.2 learned departmental Representative reiterated the submission made as noted earlier while dealing with the appeal for assessment year 1994-95.

8. We have carefully considered the relevant facts and arguments advanced. In this case, originally the tax payable in respect of Canadian income and Thailand income was not given. When the assessee perused the matter and submitted the details, the same was given while giving effect to the appellate order. The dispute relating to non-giving of credit for tax paid in Canada and Thailand was not raised before Commissioner (Appeals) but was pursued by the assessee before assessing officer under Section 154. After having satisfied himself, the assessing officer gave the credit. Once again, this credit was sought to be withdrawn by assessing officer invoking Section 154. Once again on the reply filed by assessee no action under Section 154 was taken by assessing officer. This means that the assessing officer has satisfied himself that tax credit was properly claimed and allowed. The CIT in revision proceedings has not given any finding that the credit is erroneously given. No such error has been pointed out. The CIT has mentioned as under: As mentioned earlier, the assessing officer has allowed the assessees claim without verifying whether the claim is in accordance with the provisions of the relevant double taxation agreements with Canada and Thailand. This failure on the part of thp assessing officer has rendered the three orders erroneous and prejudicial to the interest of revenue. As observed by the Delhi High Court in the case in CWT v. Anokha Singh , if the assessing officers order contains some apparent error of reasoning or of law or fact, or it is a stereotyped order which simply acce ts what the assessee has stated in his return of income and failure to make enquiries which are called for in the circumstances, such order can be revised under Section 263. The present case is one such case where the assessing officer simply accepted the claims of the assessee for credit of TDS in Canada and Thailand without verifying whether the claim of the assessee is in accordance with the relevant provisions of double taxation agreements with these countries. Hence these orders are erroneous and prejudicial to the interest of the revenue. The assessing officer is, therefore, directed to revise the three orders by computing the double taxation avoidance relief in accordance with the provisions of art. 23(2) of the Agreement with Thailand and art. 23(3)(a) of the agreement with Canada." It is not demonstrated as to how the order of assessing officer is erroneous. When the credit was not given by the assessing officer, the assessee filed all the requisite details. The assessee explained as to what is the doubly

taxed income. The assessee also produced proof for having tax paid in Canada and Thailand. Only after satisfying himself, the credit for such taxes paid in Canada and Thailand was given. This credit was given while giving effect to appellate order. Originally, the credit for Canadian tax was not given. However, while giving effect to the appellate order, the credit was given by order dated 31-3-1999. The CIT has sought to revise the order dt, 31-3-1999 giving the credit. Though the issue regarding the credit under DTAA was not subject-matter of appeal, however, since the credit was given for the first time while giving effect to the appellate order, the order sought to be revised is order dated 31-3-1999 and will not relate back to order under Section 143(3) dated 31-3-1999. Thus, so far as limitation is concerned, the same is within the limitation period prescribed under Section 263(2).

On merits, we deal with the matter now. Once again the assessee explained as to how the credit was claimed and is proper. Having satisfied that there is no error in giving credit, the proposal to rectify under Section 154 was dropped. This shows that the assessing officer has applied his mind and has come to a conclusion that the credit was properly claimed. It is therefore not correct on the part of the CIT to hold that "the assessing officer has allowed the assessees claim without verifying whether the claim is in accordance with the provision of relevant DTAA". It is settled law that once the matter has been examined and considered but not mentioned in the assessment order, does not render the assessment order erroneous insofar as prejudicial to the interest of the revenue. If the assessing officer has failed to conduct an enquiry, which he should conduct, makes an order erroneous. However, having satisfied himself after proper enquiry, not only once but twice, it cannot be said that the assessing officer has allowed the claim without verifying the claim in accordance with law. Even in the revision order, the CIT has not been able to point out any mistake in giving the credit.

An order can be revised only when the order is demonstrated to be erroneous. The assessing officer has adopted one of the possible modes of granting credit in respect of income arising in Canada and Thailand. Since the CIT has not pointed out any error in such order, we set aside the order of CIT passed under Section 263 for assessment year 1995-96 also.

Credit for Canadian TDS claimed Rs. 47,94,816, Thailand TDS claimed Rs. 64,469 Full credit for Canadian TDS was given Rs. 47,94,816 and Thailand TDS Rs. 64,469 Giving clarification on Canadian Tax and Thailand credit claimed in return Full credit for Canadian TDS was given Rs. 47,94,816 and Thailand TDS Rs. 64,469 (a) Justifying the method of credit claimed (b) Proceedings are barred by limitation Full credit for Canadian TDS was given Rs. 47,94,816 and Thailand TDS Rs. 64,469 Matter relating to the rectification of TDS credit of Thailand for assessment year 1996-97 inserted (a) Proceedings are barred by limitation (b) Credit for tax paid in Canada and Thailand have been claimed correctly Since the CIT revised the order directing the assessing officer to verify whether the claim is in accordance with relevant provision of DTAA with Canada and Thailand, the assessee is in further appeal before us.

9.2 learned counsel for assessee, Shri Khincha reiterated the stand taken in appeal pertaining to assessment year 1996-96. He further submitted that credit for tax paid in Canada was not given in original assessment order. An application under Section 164 was made asking for credit for tax paid in Canada to be given. Issues carried in appeal before the Commissioner (Appeals) did not include the ground of relief from double taxation. Credit for tax paid in Canada was given in the order giving effect to the order of the Commissioner (Appeals).

Although the relief from the double taxation was given in the order giving effect to the order of the Commissioner (Appeals), it was not because there was a direction to that effect by the Commissioner (Appeals). The credit for tax paid was thus given in pursuance of the letter of rectification filed. The effect of rectification of mistake is to correct the error in the original assessment order. The rectification order therefore dates back to the date of original assessment order as held in Bihar State Road Transport Colporation v.CIT (supra) and Nicco Corporation Ltd. v. CIT (supra). As the subject-matter of the relief from the double taxation was not an issue before Commissioner (Appeals) and the order of rectification dates back to the original order of assessment, the order of the CIT under Section 263 is beyond time as it has been passed more than 2 years from the expiry of the year in which the assessment order was passed.

9.3 learned departmental Representative reiterated the submission made as noted earlier while dealing with the appeal for assessment year 1995-96.

9.4 In this case, it is seen that before the order under Section 143(3) was passed, the assessee was required to explain how he has claimed the credit in respect of Canadian tax and Thailand tax by its letter dated 17-3-1999. The assessee had claimed the credit on following basis: We have claimed credit in respect of tax deducted in Canada on the invoices raised by us on Bell Northern Research. As per the Indo-Canadian Double Taxation Avoidance Agreement, the amount of Canadian tax payable under the laws of Canada and in accordance with the provisions of the agreement, whether directly or by deduction, by a resident of India in respect of sources from, within Canada which has been subjected to tax both in Canada and in India, shall be allowed as a credit against the Indian tax payable in respect of such income but in an amount not exceeding that proportion of Indian tax which such income bears to the entire income chargeable to Indian tax.

The gross amount of billings on Canadian customers during the year ended 31-3-1996 is Rs. 3,19,65,440.. The total turnover and profit before depreciation and tax during the year are Rs. 89,04,40,276 and Rs. 32,23,55,529, respectively. The proportionate income from Canadian sources works out at Rs. 1, 15,72,069. As per the income-tax computation the total income (business related) and the tax liability are Rs. 2,64,28,487 and Rs. 1, 16,97,104, respectively.

We also refer to Indo-Thailand Double Taxation Avoidance Agreement, wherein the credit for. Thailand tax is worked out as under: The gross amount of billings on Thailand customers during the year ended 31-3-1996 is Rs. 44,64,002. The total turnover and profit before depreciation and tax during the year are Rs. 89,04,40,276 and Rs. 32,23,55,529, respectively. The proportionate income from Thailand sources works out at Rs. 16,16,050. As per the income-tax computation the total income (business related) and the tax liability are Rs. 2,54,28,487 and Rs. 1, 16,97,104, respectively.

This was accepted by the assessing officer. Thus it cannot be said that the assessing officer has allowed the claim in respect of -Canadian tax and Thailand

tax without verifying whether the claim is in accordance with the provision of relevant DTAA. The assessing officer once again by his notice under Section 154 dated 6-4-2000 sought to rework the credit in respect of Canadian and Thailand tax. The assessee reiterated the stand taken earlier as explained by its letter dated 17-4-2000 and further elaborated by letter dated 21-4-2000. At this time also, no fault was found with the manner in which the credit was claimed and allowed.

The assessing officer therefore took no actin for modifying the claim.

Learned CIT in his revision jurisdiction has simply mentioned that the claim of assessee has been allowed without verifying the provision of relevant DTA As. No error has been pointed out in the order when the credit has been given. It is not correct to say that the claim has been allowed without verification. The assessing officer was made aware of the manner in which the claim has been put forward. The assessing officer has adopted one of the possible views. In revision, learned CIT has merely set aside the order to rework the credit in respect of Canadian and Thailand tax claimed under DTAA provision without mentioning any error in the original order sought to be revised. In our opinion, this is not permissible course under the provision of Section 263 of the Act. The order cannot be set aside for making roving enquiry without pointing any error in the order. Similar view has been adopted by the Honble High Court of Bombay in the case of CIT v. Gabriel India Ltd. . The power of revision is not meant to be exercised for the purpose of directing the officer to hold another investigation when the order of assessing officer is not found to be erroneous. Similar view has been adopted by the Honble Madras High Court in the case of CIT v. Sakthi Charities (2000) 160 CTR (Mad) 107.

For making a valid order under Section 263(l), it is essential that CIT has to record an express finding to the fact that the order sought to be revised is erroneous as well as prejudicial to the interest of the revenue. In absence of any such finding, the order under Section 263 is liable to be set aside. It is pertinent to note that the assessing officer has not given the credit without verifying the details. The assessing officer not only once but twice called for the details as well as to what extent the claim is allowable. After satisfying himself, the assessing officer has

allowed the claim. It is a different thing that the CIT may not agree with such a view, but if the view adopted by assessing officer is one of the possible views, revision cannot be resorted to on the ground that the CIT do not accept such view or that necessary enquiry has not been made in this regard.

It is the contention of the learned departmental Representative that even though in the revision order, it is mentioned that the assessing officer has allowed the claim without verifying the claim in accordance with provision of DTAA, since the claim is allowed contrary to the provision of art. 23 of DTAA, the revision order is to be upheld. We are not in agreement with the submission by learned departmental Representative. An order of revision by CIT cannot be upheld on a different ground than the ground on which it has been revised. If the CIT has revised on the ground that the assessing officer has not verified the details and the facts reveal that the claim has been property verified after necessary application of mind, the power of revision is not available. It is true that if a claim has been allowed without making necessary enquiry required for the purpose, the CIT can revise the order by setting aside the original order and directing the assessing officer to make further enquiries. However, if necessary enquiry has been made and satisfaction of assessing officer has been arrived at, though not clearly mentioned in the assessment order, such order cannot be revised on the ground that the claim has been allowed without verifying the relevant provision of law. We once again mention that without pointing out an error in the assessment order, the CIT is not justified in passing an order in revision directing the assessing officer to make further enquiries. We, accordingly, set aside the order of learned CIT for assessment year 1996-97.

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