

**IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN**

Before Shri Chandra Poojari, AM & Shri George George K, JM

ITA No.70/Coch/2017 : Asst.Year 1994-1995
ITA No.71/Coch/2017 : Asst.Year 1995-1996
ITA No.72/Coch/2017 : Asst.Year 1996-1997
ITA No.73/Coch/2017 : Asst.Year 1997-1998
ITA No.74/Coch/2017 : Asst.Year 1998-1999

Sri.T.Abdul Majeed Prop. Fair Pharma Broadway, Ernakulam PAN : AAZPA9927F.	Vs.	The Dy.Commissioner of Income-tax, Circle 1 Range - 2 Ernakulam.
(Appellant)		(Respondent)

Appellant by : Sri. C.B.M.Warrier, CA
Respondent by : Smt.A.S.Bindhu, Sr.DR

Date of Hearing : 18.12.2018	Date of Pronouncement : 1912.2018
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ORDER

Per George George K., JM

These appeals at the instance of the assessee are directed against five orders of the CIT(A), all dated 17.10.2016. The relevant assessment years are 1994-1995 to 1998-1999. Since common issue is raised in all these appeals, they were heard together and are being disposed by this consolidated order.

2. The solitary issue argued by the learned AR was whether the assessment orders completed for assessment years 1994-

95 to 1998-99, pursuant to the order of the ITAT dated 08.03.2007 is barred by limitation u/s 153(2A) of the I.T.Act.

3. The brief facts of the case are as follows:-

The assessee is an individual and proprietor of a concern known as M/s.Fair Pharma. For the assessment years 1994-95 to 1998-99, the assessment orders were completed, wherein among other additions, foreign gifts received by the assessee was assessed as 'income from business'. The addition of foreign gift under the head "income from business" was confirmed by the CIT(A). On further appeal by the assessee, the Tribunal vide its order dated 08.03.2007 directed the A.O. to adjudicate afresh the issue of foreign gifts. The relevant finding of the Tribunal, reads as follows:-

"13. In this case, as per the facts on record, except the contention of the assessee in the form of Affidavit, nothing is on record to determine the nature of these receipts. We, therefore, consider it fit to restore this issue to the file of the A.O. for all the assessment years under appeal with a direction that he should adjudicate this issue afresh after giving a reasonable opportunity of being heard to the assessee as per the principles of natural justice. We are not expressing anything on merits and the AO can take his own independent decision. The AO should also consider the following decisions relied on by the Id.counsel in the light of evidence before him.

- (i) CIT v. Abdul Gani Gurdeji 213 ITR 798 (Raj)
- (ii) CIT v. Prof.P.G.A.Nath 234 ITR 854 (Del)
- (iii) General Exporters v. CIT 234 ITR 860 (Mad)

We accordingly, set aside the order of the CIT(Appeals) on this issue."

4. The Assessing Officer gave effect to the ITAT's orders for assessment years 1994-95 to 1998-99 vide orders dated 01.03.2010. The assessee had contended that fresh order of assessment pursuant to ITAT's order is barred by limitation as per section 153(2A) of the I.T.Act. The above contention of the assessee was rejected by the Assessing Officer by holding that no fresh assessment order was passed in pursuant to the order of the Tribunal passed u/s 254 of the I.T.Act. According to the Assessing Officer, the Tribunal has not set aside or cancelled the earlier assessment order, and therefore, the original assessment never ceased to operate. The relevant finding of the Assessing Officer, rejecting the argument of the assessee that the assessment pursuant to the Tribunal order is barred by limitation by virtue of section 153(2A) of the I.T.Act reads as follows:-

"3.2 The plea that provisions of Sec.153(2A) are applicable in this case cannot be accepted. In that section it is laid down that 'an order of fresh assessment' in pursuance of an order under Sec.250 or Sec.254 or Section 263 or Sec.264, 'setting aside or cancelling' (emphasis supplied) an assessment, may be made at any time before the expiry of one year from the end of the financial year in which the order u/s 250 etc. is received. In the instant case, the original assessment was neither set aside nor cancelled by the Hon'ble Tribunal, but only direction was to afford reasonable opportunity to the assessee of being heard and adjudicate the issue afresh as per principles of natural justice, for which the limited

issue of genuineness of the claim of gifts / donations was restored to the file of the Assessing Officer. In other words, the Assessing Officer was allowed to take his own decision on merits and the Tribunal also made it abundantly clear that they are not expressing anything on merits. To facilitate such recourse, the Tribunal had set-aside the operation of the orders of the first Appellate Authority. Having passed such order by the Tribunal, the original order u/s 143(3) dated 29/03/2001 remained validly made, but the Assessing Officer is required to afford fresh opportunity to the assessee as per principles of natural justice and to adjudicate the impugned issue vis-à-vis the arguments put forth before the Hon'ble Tribunal. Therefore, the limitation as envisaged in Sec.153(2A) does not apply in the present case as the original assessment never ceased to operate."

5. The CIT(A) confirmed the view taken by the Assessing Officer.

6. Aggrieved by the order of the CIT(A), the assessee has filed the present appeals before the Tribunal. As regards grounds raised with regard to the issue on merits, no arguments were raised by the assessee. The assessee has raised additional ground of appeal and they read as follows:-

"The Assessing Officer has gone wrong and the Commissioner of Income Tax Appeals has gone wrong in confirming the validity of the assessment without considering the facts that the assessment is barred by limitation as per provisions of section 153(2A) of the Act."

"The grounds of appeal regarding the time barring of the assessment was omitted to be included in the original Grounds of Appeal by an inadvertent

omission and the appellant may request to condone the delay and admit and adjudicate the additional Grounds of Appeal."

7. It was submitted by the learned Counsel that the additional ground now raised was omitted to be raised in the original memorandum of appeal. It was submitted that the issue of limitation was raised before the A.O. as well as the CIT(A). As regards the additional ground, the assessee has filed a brief written submission. The relevant portion of the same reads as follows:-

"4. The order of the Hon'ble Bench dt.08-03-2007, if it is considered as received by the Commissioner of Income Tax on or before 31-03-2007, the assessments should have been completed before 31-12-2007. In the event of receiving the order by the Commissioner of Income Tax between 01-04-2007 and 31-03-2008, the orders should have been passed on or before 31-12-2008. But reasonably we should expect that the order, under any circumstances is received before 31-03-2008, the assessments are barred by limitation or 01-03-2010, the date on which the orders are passed by the Deputy Commissioner of Income Tax.

5. This legal issue regarding limitation was submitted before the Assessing Officer as per para 2 of the order. But as per para 3.2 (page 3) of the Assessment Order, the Assessing Office rejected the claim of the appellant.

6. The above issue regarding time barring was taken up before the Commissioner of Income Tax (Appeals-II), Cochin in ITA NO.136/2009-10. The Commissioner of Income Tax (Appeals) rejected the

claim of the appellant regarding time barring as per para 6 (Page 4) of the Appellate Order.

7. In view of the provisions of the Act in Section 153(2A), I may humbly submit that the orders of the Assessing Officer is barred by limitation and liable to cancelled."

8. In support of the above written submission, the learned Counsel for the assessee had relied on the unreported judgment of the Hon'ble jurisdictional High Court in the case of *Dr.R.P.Patel v. ACIT [WP(C) No.29193 of 2008 (A) – order dated 9th March, 2015]*.

9. The learned Departmental Representative present supported the orders of the Assessing Officer and the CIT(A).

10. We have heard the rival submissions and perused the material on record. The issue raised in the additional ground was an issue raised before the Assessing Officer and the CIT(A). The issue raised in additional grounds is a pure legal issue and same was omitted to be raised in the original memorandum of appeal. Therefore, we admit the additional grounds raised and take up the same for adjudication.

11. The solitary issue that is raised in the additional grounds is whether the time limit prescribed u/s 133(2A) of the I.T.Act is applicable for the assessment i.e. completed on 01.03.2010, pursuant to the ITAT's order dated 08.03.2007. The Hon'ble Kerala High Court in the case of *Dr.R.P.Patel v.*

ACIT (*supra*) have held that even when one issue has been directed to be considered afresh, time limit prescribed u/s 153(2A) of the I.T.Act is attracted. The Hon'ble High Court had followed the judgment of the Hon'ble Punjab & Haryana High Court in the case of *Bharti Engineering Corporation v. Union of India and others* [(2008) 298 ITR 400 (P&H)] and the Hon'ble Delhi High Court in the case of *CIT v. Bhan Textile P. Ltd.* [(2008) 300 ITR 176 (Delhi)]. The relevant finding of the Hon'ble Kerala High Court, after extracting the findings of the Hon'ble Delhi High Court, reads as follows:-

"12. The resultant position therefore is that, even in a case where only one issue has been directed to be considered afresh, the limitation under Section 153(2A) would apply. It is clear from the passage in [(2008)300 ITR176 (Delhi)] (supra) extracted above that, sub section (3) of Section 153 applies to a different situation where only a consequential order has to be passed in implementation of a direction issued by the appellate forum. In the present case, as already found above the direction was to consider the issue afresh. Therefore, Section 153(2A) of the Act is attracted. In view of the above, this is a case in which the Assessing Officer ought to have passed a consequential order within the time limit stipulated. Since no such order was passed the petitioner is entitled to succeed.

In view of the above findings the writ petition is allowed. It is held that in so far as the issue that was remitted to the respondent Assessing Officer for fresh consideration, the time bar contained in Section 153(2A) of the Act operates. The petitioner shall therefore be entitled to the refund sought for, in accordance with law. It is made clear that on all other aspects the assessment order is final and

binding on the assessee. Such refund shall be made as expeditiously as possible and at any rate within a period of three months of the date of receipt of a copy of this judgment."

12. It was submitted by the learned AR that the judgment of the Kerala High Court in the case of *Dr.R.P.Patel v. ACIT (supra)* was accepted by the Department and no further appeal was preferred by the Revenue. The learned DR was unable to controvert the above assertion of the learned AR. Section 153A states – *"Notwithstanding anything contained in sub-section (1), (1A), (1B) and (2), in relation to the AY commencing on the 1st day of April 1971, and any subsequent AY, an order of fresh assessment in pursuance of an order u/s 250, sec. 254, sec. 263, or sec.264, setting aside or cancelling an assessment, may be made at any time before the expiry of one year from the end of the financial year in which the order u/s 250 or sec. 254 is received by the Chief Commissioner or Commissioner or, as the case may be, the order u/s 263 or sec. 264 is passed by the Chief Commissioner or Commissioner."* In the instant case, the Tribunal order dated 08.03.2007 was admittedly served on the Commissioner of Income-tax on 20.03.2007. Therefore, going by the dictum laid down by the judgment of the Hon'ble jurisdictional High Court in the case of *Dr.R.P.Patel v. ACIT (supra)*, the assessment ought to have been completed on or before 31.12.2007. Since the assessment order pursuant to the Tribunal order was completed only on 01.03.2010, going by the dictum laid down by the Hon'ble jurisdictional High Court cited supra, we hold

that the assessment was barred by limitation. It is ordered accordingly.

13. In the result, the appeals filed by the assessee are partly allowed, as indicated above.

Order pronounced on this 19th day of December, 2018.

Sd/-
(Chandra Poojari)
ACCOUNTANT MEMBER

Sd/-
(George George K.)
JUDICIAL MEMBER

Cochin ; Dated : 19th December, 2018.
Devdas*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-II, Kochi
4. The CIT – II, Kochi.
5. DR, ITAT, Cochin
6. Guard file.

BY ORDER,

(Asstt. Registrar)
ITAT, Cochin