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IN THE HIGH COURT OF DELHI AT NEW DELHI

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ITA 853/2015

TULSI TRACOM PRIVATE LIMITED

..... Appellant

Through: Mr. C.S. Aggarwal, Senior Advocate
with Mr. Prakash Kumar and Ms.
Pushpa Sharma, Advocates.

versus

COMMISSIONER OF INCOME TAX – 9

..... Respondent

Through: Mr. Ashok Manchanda, Senior
Standing Counsel with Mr.
Raghvendra Singh and Mr. Anand K.
Chaudhari, Advocates.

**CORAM: JUSTICE S.MURALIDHAR
JUSTICE PRATHIBA M. SINGH**

**ORDER
14.09.2017**

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Prathiba M. Singh J.,

1. This is an appeal under Section 260 A of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') impugning order dated 30th July, 2015 passed by the Income Tax Appellate Tribunal ('ITAT') Kolkata, Bench-B, Kolkata in ITA No. 1905/Kol/2013 for the Assessment Year ('AY') 2008-09.

2. On 17th December, 2015, this Court had rejected the preliminary objection raised by the Respondent as regards the maintainability of the appeal on the

ground of lack of territorial jurisdiction. The appeal was admitted and the following two questions of law were framed:

“(i) Did the notice dated 18th March 2013 issued by the Commissioner of Income Tax, Kolkata to the Assessee at the address shown therein satisfy the requirements of Section 263(1) of the Act as regards providing the Assessee an opportunity of being heard?”

“(ii) If the answer to questions (i) is in the affirmative, whether on merits the order dated 30th March 2013 passed by the Commissioner of Income Tax, Kolkata under Section 263 of the Act is sustainable in law.”

Brief facts

3. The Appellant is a company engaged in the business of trading and investment of shares and is assessed to tax. It had filed its return of income for AY 2008-09 on 16th May, 2008 before the ITO Ward-4(1), Kolkata (hereinafter referred to as ‘ITO’). Proceedings were initiated under Section 147 of the Act and the assessment order was passed on 10th May, 2010 under Section 143(3)/147 of the Act. According to the Appellant, while passing the assessment order under Sections 143 (3)/147, the Assessing Officer (‘AO’) had conducted a detailed inquiry with respect to the Appellant’s books of accounts and the share capital contribution from the various shareholders.

4. At the time of filing of the returns for AY 2008-09, the Appellant had its registered office at 2, Raja Woodmunt Street, Kolkata-700001(‘hereinafter referred as ‘Raja Woodmunt Street’). It thereafter shifted its registered

office to 14, Weston Street, 2nd Floor, Kolkata-700012. This shifting of the registered office was duly communicated to the Ministry of Company Affairs on 1st June, 2010. For AY 2010-11 and 2011-12 it filed its return with this address. With effect from 31st May, 2012, the Appellant shifted its registered office to B-222, 2nd Floor, Okhla Industrial Area, Phase-I, New Delhi-110020 (*hereinafter 'Delhi address'*). For AY 2012-13 it filed its return on 25th September, 2012, reflecting this address.

5. On 18th March, 2013, the Respondent issued a show cause notice ('SCN') under Section 263 of the Act proposing to revise the assessment order dated 10th May, 2010 under Section 143 (3)/147 for AY 2008-09. Pursuant to the said notice, order dated 30th March, 2013 came to be passed by the Commissioner of Income Tax ('CIT') holding that the assessment order dated 10th May, 2010 passed by AO was erroneous and prejudicial to the interest of the Revenue. The CIT directed the AO to pass a fresh assessment order after conducting adequate inquiries and verification.

6. Thereafter, the AO passed a fresh assessment order on 29th March, 2014 for AY 2008-09 under Sections 144/263/143 (3)/147 of the Act, assessing the Appellant and making an addition of Rs. 4,39,70,000/- as unexplained cash credit under Section 68 of the Act. On 3rd September, 2015, the CIT (A)-2 Kolkata allowed the appeal of the Assessee and held that the Appellant was able to establish the identity and authenticity of the share applicants as also the genuineness of the transaction and deleted the addition of Rs. 4,39,70,000/- made under Section 68 of the Act. This order of the AO dated 29th March 2014 is not subject-matter of this Appeal.

7. Independently of the proceedings before the AO, the Assessee challenged the order dated 30th March 2013 passed by the CIT before the ITAT. The ITAT dismissed the said appeal on 30th July, 2015, thereby upholding the notice under Section 263 and the order passed thereon.

Submissions of the Appellant

8. Mr. C.S. Aggarwal, learned Senior Counsel appearing for the Appellant submits that the notice under Section 263 of the Act was never issued to and/or served upon the Appellant and hence it was not given a hearing prior to the passing of the order dated 30th March, 2013. The main plank of the submissions of Mr. Aggarwal is that the ITO had sent the notice under Section 263 to an incorrect address which resulted in the Appellant not being given an opportunity of being heard on 22nd March, 2013 before the ITO. A copy of the said SCN dated 18th March, 2013 is on record which shows that the same is addressed to the Appellant with the Raja Woodmunt Street address. It is his submission that this address was the old address of the Appellant and the ITO had sufficient knowledge of the shifting of the registered office of the Appellant, in view of the various returns filed for the AY 2009-10, 2010-11, 2011-12 and 2012-13.

9. Mr. Aggarwal relies on the note sheet of the Respondent's file which shows that the copy of the notice under Section 263 was returned to the ITO and was placed back on the file. According to Mr. Aggarwal the order dated 30th March, 2013 was thus passed without hearing the Appellant and is thus bad in law. Mr. Aggarwal submits that the note sheet reveals a noting that

'the evidence of shifting of registered office of the company filed by the 'a' (sic Assessee) is received and placed on file'. According to Mr. Agarwal this noting is deliberately undated as the ITO was well aware of the new registered office of the Appellant.

10. Mr. Aggarwal specifically placed reliance upon ***CIT vs. Chandra Agencies 10 Taxmann.com 176 (Del)*** (hereafter '*Chandra Agencies*') as also ***Rajesh Kumar vs. DCIT [2006] 287 ITR 91 (SC)*** and ***J.T. (India) Exports vs. Union of India [2003] 262 ITR 269 (Del)*** to submit that since no notice was served upon the Appellant, no notice was received by the Appellant, and the Appellant having not been given an opportunity of being heard, the proceedings under Section 263 are thus, void and the order passed pursuant to the said notice is contrary to law and unsustainable.

11. Mr. Aggarwal also refers to Section 282 of the Act to submit that service of the notice ought to have been done in compliance with any of the modes provided and recognised therein and in the absence of the same there was no proper opportunity of hearing afforded to the Assessee.

Submissions of the Respondent

12. Mr. Manchanda, Senior Standing Counsel for the Revenue has taken pains to point out to the court that the Revenue had in fact issued the notice to the correct address i.e. the Delhi address of the Appellant. He points to the original file from the ITO, produced in Court, to demonstrate that the notice dated 18th March, 2013 was initially issued to the Appellant at the Raja Woodmunt Street address. However, when the notice server went to deliver

the same, he was informed of the correct address at New Delhi. Accordingly, the same notice of 18th March, 2013 was re-posted to the Delhi address of the Appellant on 20th March, 2013. Mr. Manchanda produced the original envelope as also the acknowledgment slip to show the handwritten noting of the notice server of the new address on the acknowledgement slip and the re-posting of the same to the Delhi address of the Appellant. He submits that even the notice to the Delhi address was returned to the ITO, Kolkata who then proceeded ex-parte and passed the impugned order dated 30th March, 2013. According to Mr. Manchanda, the ITO is left with no option under such circumstances as he has complied with the requirements under Section 263. In fact, according to Mr. Manchanda, no notice needs to be issued under Section 263 as per the judgment of the Hon'ble Supreme Court in ***CIT vs. Amitabh Bachchan [2016] 384 ITR 200*** (hereinafter '*Amitabh Bachchan*') and only a hearing is to be given.

13. Mr. Manchanda vehemently contends that the Assessee was all along aware of the proceedings and there was a lapse by the Assessee in informing the ITO about the change of its address. Mr. Manchanda relies upon a letter of the Assessee intimating the ITO of the factum of shifting of its registered office to New Delhi. He submits that while the copy of the letter filed by the Assessee at page 5 of the additional documents shows delivery of the said letter on 8th April, 2013, the letter itself is undated. This is a deliberate mischief played by the Assessee who was well aware of the proceedings under Section 263. The fact that the letter is undated and received only on 8th April, 2013, which is subsequent to the order dated 30th March 2013, shows that an incorrect averment is made in the writ petition that the Assessee had

informed the ITO of the change of its registered office prior to the order dated 30th March, 2013. Mr. Manchanda, thus submitted that there was no error on the part of the ITO in passing the impugned order and the same deserves to be sustained.

Analysis and Findings

14. The law insofar as it relates to a notice under Section 263 is well-settled by the judgement of the Supreme Court in ***Amitabh Bachchan (supra)***. Para 11 of the said judgment reads as under:

“...11. It may be that in a given case and in most cases it is so done a notice proposing the revisional exercise is given to the Assessee indicating therein broadly or even specifically the grounds on which the exercise is felt necessary. But there is nothing in the section (Section 263) to raise the said notice to the status of a mandatory show-cause notice affecting the initiation of the exercise in the absence thereof or to require the Commissioner of Income-tax to confine himself to the terms of the notice and foreclosing consideration of any other issue or question of fact. This is not the purport of Section 263. Of course, there can be no dispute that while the Commissioner of Income-tax is free to exercise his jurisdiction on consideration of all relevant facts, a full opportunity to controvert the same and to explain the circumstances surrounding such facts, as maybe considered relevant by the Assessee, must be afforded to him by the Commissioner of Income-tax prior to the finalisation of the decision....”

(emphasis added)

15. Thus, what is required to be given is a full opportunity to the Assessee to

controvert the contents of the notice under Section 263 of the Act and explain the circumstances as may be considered to be relevant by the Assessee.

16. The short question that, therefore, arises is as to - whether such an opportunity was afforded to the Appellant in the present case?

17. A perusal of the records reveals that the ITO was well aware of the various addresses of the Appellant including the latest address at New Delhi at the time when the notice under Section 263 of the Act dated 18th March, 2013 was to be issued. The Appellant had filed its return for AY 2012-13 on 25th September, 2012 i.e. a full five months prior to the issuance of the notice under Section 263 of the Act. Thus, the first error committed by the ITO was to issue the notice under Section 263 on 18th March 2013, to the address of the Appellant which was changed as far back in AY 2010-11. There was no justification whatsoever to issue a notice of hearing under Section 263 of the Act to the Assessee at an address which was at least three years old. This shows that the ITO did not do the bare minimum of even perusing the various returns filed by the Assessee prior to the issuance of the notice.

18. From the records produced before us, the submission of Mr. Manchanda is correct to the extent that the notice which was returned to the ITO was re-posted to the Delhi address of the Appellant on 20th March, 2013. What needs to be borne in the mind, however, is that the notice was dispatched on 20th March, 2013 to the Delhi address and the hearing was fixed for 22nd

March, 2013 at 4pm in the ITO's office at Kolkata. This notice sent on 20th March 2013, was also returned to the ITO, Kolkata on 25th March, 2013, with an endorsement at the back of the envelope, which was not readable either to the counsels or the Court.

19. While agreeing with Mr. Manchanda that the notice was issued on 20th March, 2013, to the Delhi address, the question as to whether it constituted a full opportunity to the Assessee to attend the hearing on 22nd March, 2013 needs no answer as it is obvious that even if the notice had been served, the Assessee did not have adequate time to attend a hearing in Kolkata. Under such circumstances, the CIT recorded in the impugned order dated 30th March, 2013 that it is proceeding ex-parte in the matter. The noting in the impugned order reads:

“The showcause notice, which was served by post calling for compliance on 22-03-2013. The notice was returned by the postal authority 25.03.2013. This order is therefore being passed ex-parte.”

20. The CIT who issued the order under Section 263 of the Act ought to have been fully satisfied that adequate opportunity was given to the Assessee to controvert the facts stated in the notice under Section 263 of the Act and to explain the circumstances surrounding such facts. The satisfaction of the CIT on these counts could not have been arrived at as per the narration of facts and events as discussed hereinabove as the process commencing with the issuance of the notice under Section 263 culminating in the order dated 30th March 2013, was completed hurriedly - in a matter of 10 days even if the date of posting of the notice i.e., 20th March 2013 is

included. Thus, the satisfaction of the CIT was misplaced.

21. The ITO, Kolkata could not have expected the Assessee to receive the notice being posted on 20th March, 2013, and attend the hearing on 22nd March, 2013. This Court has no doubt that this does not constitute *full opportunity* as required by the Supreme Court in ***Amitabh Bachchan (supra)*** in respect of a notice under Section 263 of the Act.

22. It, thus, appears that the notice having been given initially at the wrong address and thereafter posted to the correct address just two days prior to the said hearing and the said notice also having been returned unserved due to the reasons which are not decipherable, the requirement under Section 263 (1) of the Act is not satisfied. In ***Chandra Agencies (supra)*** this Court has gone to the extent of holding that refusal by the Assessee's son to receive the notice under Section 148 of the Act does not constitute good service.

23. This Court has also examined the question as to whether an opportunity of hearing could now be afforded to the Appellant. However, Section 263 (2) of the Act is a clear bar for any order being passed pursuant to a notice under Section 263 of the Act, after the expiry of two years from the end of the financial year in which the order sought to be revised was passed. Thus, there is an outer limit in the statute under Section 263 which, in the present case, is 31st March, 2013. Since, no useful purpose will be served in giving an opportunity to the Appellant of being heard at this stage, this Court answers question No.1 in the negative i.e. in favour of the Assessee and

against the Revenue.

24. In view of the above, question No.2 does not survive. The appeal is allowed and the notice dated 18th March 2013 as also order dated 30th March, 2013 are set aside. There will be no order as to costs.

PRATHIBA M. SINGH, J

S.MURALIDHAR, J

SEPTEMBER 14, 2017
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