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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 26.02.2018

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M/S HUMBOLDT WEDAG INDIA PRIVATE LIMITED.

..... Appellant

Through Mr. Kamal Sawhney, Mr. Shikhar
Garg and Mr. Upkar Agrawal, Advs.

versus

CIT, CIRCLE- 3, KOLKATA

..... Respondent

Through Mr. Asheesh Jain, Senior Standing
Counsel.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A. K. CHAWLA

HON'BLE MR. JUSTICE S. RAVINDRA BHAT (ORAL)

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1. Admit.
2. The following question of law arises for consideration:

“Did the ITAT fall into error in upholding the revisional order made by the Commissioner of Income Tax under Section 263 of the Income Tax Act in the circumstances of the case.?”

3. The assessee for the AY 2007-08 was issued with notice by the CIT under Section 263 of the Income Tax Act, 1961 ('the Act') on 6.12.2012. The order stated that the sum of ₹1973.59 lacs, reflected for the year as provisional for warranty/promise obligation was added by the AO without enquiry as to whether such deduction was calculated on the basis of a scientific method. The assessee/appellant

resisted the notice. During the course of the proceedings, the CIT (A) provided a ledger extract from the account of Tuticorin and Taral in March, 2013. The assessee submitted its response to these materials protesting that apart from the ledger copy, the documents indicated statement of one Mr. Praveen Agarwal, copy of which was not provided to them. The Commissioner proceeded to pass the final order requiring the AO to re-examine the matter afresh. The ITAT concurred with the view of the Commissioner. Revenue urges on the strength of the Supreme Court's decision in *CIT Vs. Amitabh Bachchan*, (2016) 384 ITR 200 (SC), where it was held that whilst notice on a particular point cannot be a pre-condition to exercise of revisional jurisdiction, nevertheless, the Commissioner ought to provide the material which will be basis of the final order without which the effort could be rendered questionable on account of lack of opportunity to controvert it. Likewise, decision of Madras High Court in *Cairn India Ltd. vs. Director of Income Tax (IT)*, (2017) 87 taxmann.com 310 (Madras) and a previous judgment of this Court in *Commissioner of Income Tax vs. Ashish Rajput*, (2009) 180 Taxman 623 (Del) has been cited.

4. Ld. counsel for the Revenue urges that the ITAT has not committed any error of law much less a substantial error of law. Mere upholding of facts – even if the material ultimately has not resulted in prejudice to the assessee, who will get a chance to urge all contentions. This would include naturally the request for a cross-examination. That stage, it is submitted, has not yet arisen and would

occur only in the course of fresh assessment proceedings mandated by the Commissioner.

5. In *Amitabh Bachchan's* (*supra*) even while holding that the Commissioner can proceed on an issue, upon which notice has not been given to the assessee, the Court sounded a note of caution in the following terms:

"11.5. The judgment of the Supreme Court rendered in CIT Vs. Amitabh Bachchan, (2016) 384 ITR 0200 (SC), on which reliance was placed by the learned counsel for the Revenue, to our minds, does not articulate a principle, which is any different from what is stated hereinabove by us. This is, clearly, evident, if, one were to have regard to the observations made in paragraph 11 of the judgement. For the sake of convenience, the same are extracted hereafter :

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 C.I.T. 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 C.I.T. 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 may be considered relevant by the assessee, must be afforded to him by the C.I.T. prior to the finalization of the decision".

The above view was taken note of by the Madras High Court which applied the decision in *Amitabh Bachchan's* case to a case, where opportunity was denied to the assessee in respect of an aspect that was not the subject matter of a notice under Section 263. The findings of the Madras High Court at paras 11.2 and 11.6 are, as follows:-

“11.2. It is our view that, if, the Assessee is not confronted with material, which is available with the DIT, which has caused him to exercise the revisional power vested in him under Section 263 the exercise of jurisdiction would be irregular. Section 263 of the 1961 Act confers powers on the DIT to revise the assessment order, albeit, after giving the Assessee an opportunity of being heard, and after making and causing such enquiry to be made, as may be deemed necessary. In our opinion, failure to put to the Assessee areas of concern and/or objection and underlying material, if any, that the DIT may have in his possession would turn the exercise of granting an oral hearing an empty formality.

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11.6. A close scrutiny of the facts obtaining in the aforementioned judgement of the Supreme Court would show that the reason the appeal of the Revenue was allowed, was that, the record did not show that the revisional authority had not given an opportunity to the Assessee to controvert, the facts on the basis of which it had concluded that the order of the Assessing Officer was erroneous and prejudicial to the interest of the Revenue. As noted above by us, the departmental file produced before us did not show that the concerns raised by the DIT, in his order dated 12.03.2009, or the material, if any, that he had in his possession were put to the Assessee. Therefore, in our view, as rightly contended by Mr.Agrawal, there has been a breach of the principles of natural justice.”

The previous ruling of this Court in *Ashish Rajput (Supra)* is to the same effect. This Court also notices that in a recent judgment [*BSES Rajdhani Power Ltd. vs. Principal Commissioner of Income*, (ITA No.387/2017 decided on 08.11.2017)] a similar view was expressed by this Court where while upholding the order as far as it pertained to the aspects covered, this Court was of the opinion that on the aspects not covered by the notice under Section 263, withholding of material was not justified. A de novo hearing was directed before the CIT.

6. In the present case the facts narrated in the subject order would disclose that the assessee was issued with notice with respect to the specific head i.e. the warranty claimed on the ground that the AO had not conducted proper enquiries. The assessee replied to the notice. In the course of the revisional proceedings, the CIT furnished a copy of a ledger extract to the assessee. The other documents indicated that ledger extract was based upon the existence of statement of one Mr. Praveen Aggarwal. Having regard to these materials the assessee demanded that the copy of the statement be provided to it. Concededly that statement was not provided. The revisional order of the CIT proceeds to record this aspect and directs a fresh enquiry by the AO in the following terms:-

“I have considered the matter. The A.O. has not applied his mind to this issue and has not examined the method by which provision for warranty has been calculated. A simple estimation would result in grant of deduction which should have been disallowed. I, therefore, hold that the assessment is erroneous and has caused prejudice to the interest of revenue.

In view of these facts, I set aside the assessment and direct the A.O. to reframe the assessment after examining, all aspects of the provision for warranty carefully. The same should be disallowed if it is found that the basis of calculating warranty is not based on sound technical and scientific methods.

Information was received from the Investigation Wing by the A.O. that during search operations carried out at the premises of a entry operator by the name of Shri. Praveen Agarwal, evidence was found which showed that the assessee had booked bogus expenses amounting to ₹4,38,33.222/-. Ledger copies of the assessee company found in the books of companies run by the entry operator were also forwarded by the Investigation Wing. The entry operator gave a statement that the expenses had not been incurred and only entries provided. This information was conveyed to the assessee's A/R vide order sheet entry doted 15-03-2013. He was also given a copy of the ledger accounts of the assessee appearing in the books of Shri Praveen Agarwal's companies.

The assessee's A/R filed a written submission. In this it was stated that the expenses were genuine and statement of Shri Praveen Agarwal could not lead to any inference that the transactions were bogus. I have considered the matter. The A.O. has not looked into these expenses and verified their genuineness. The assessment is therefore, erroneous with regard to this issue also and has caused prejudice to the interests of revenue. I, therefore, direct the A.O. to take up the matter at the time of reassessment to determine the genuineness or otherwise of the expenses: Information received from the Investigation Wing should be considered while passing the assessment.”

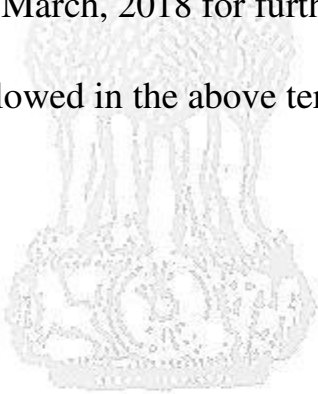
It is quite evident therefore that Mr. Praveen Aggarwal's statement was apparently a part of the record that persuaded the CIT to direct the AO to conduct a fresh enquiry. The statement was not provided to the assessee. In terms of the judgment of the Supreme Court in *Amitabh Bachchan's* case, the CIT was under an obligation to

provide that statement. Consequently, it is held that the order to that extent cannot be sustained. The matter is accordingly directed to be gone into afresh by the Commissioner who will in the remanded proceedings provide a copy of the statement of Mr.Praveen Aggarwal and any other material that he chooses to rely upon and after hearing the objections of the assessee, proceed to make the final order. It is clarified that if the statement (of Mr.Praveen Aggarwal or anyone else) is denied and a cross examination is demanded, that can be the appropriate subject matter of enquiry by the AO.

7. The parties are directed to appear before the concerned Commissioner on 19th March, 2018 for further proceedings.

8. The appeal is allowed in the above terms.

Order *dasti*.



S. RAVINDRA BHAT, J

A. K. CHAWLA, J

FEBRUARY 26, 2018

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