

Santosh

IN THE HIGH COURT OF BOMBAY AT GOA
TAX APPEAL NO. 1 OF 2016
WITH
CIVIL APPLICATION NO.17 OF 2016

Vedanta Limited,
Erstwhile Sesa Sterlite Ltd./Sesa Goa Ltd.
With its office at Sesa Ghor, 20,
EDC Complex Patto, Panaji, Goa. ... Appellant.

Versus

Commissioner of Income Tax
having his office at
Aaykar Bhavan, Patto, Panaji, Goa. ... Respondent

Mr. R.G. Ramani, Senior Advocate with Mr. Pranav S. Shenvi
Kakodkar, Advocate for the Appellant.

Ms. Susan Linhares, Standing Counsel for the Respondent.

Coram:- M. S. SONAK &
DAMA SESHADRI NAIDU, JJ.

Date :- 27th November, 2020

ORAL JUDGMENT:- (Per M. S. Sonak, J.):

Heard the learned Counsel for the parties. The learned Counsel for the parties state that they have no objection to this Bench taking up this matter.

2. This Appeal was clubbed along with several writ petitions and tax appeals, including Tax Appeal No.83/2015. By an order dated 19th September, 2017, Rule was issued in the writ petitions and the tax appeals were admitted on the substantial questions of law set out in the said order. As many as six substantial questions of law were in fact framed.

3. Mr. Ramani, the learned Senior Advocate for the Appellant, however, submits that none of the substantial questions of law as framed, really arise in the present Appeal. He submitted that this Court, in terms of Section 260A of the Income Tax Act, 1961 (IT Act) has sufficient powers to frame substantial questions of law which arise in the matter, even at the stage of final hearing of such an appeal. Accordingly, he proposes framing of the following substantial questions of law as set out in clauses (i) and (ii) at paragraph 17 of the Memo of Appeal :

i) Whether on the facts and in the circumstances of the case the Income Tax Appellate Tribunal is right in law in rejecting the appeal of the Appellant u/s 263 dated 9.1.2015 and confirming the assumption of jurisdiction as well as the merits of the issues raised therein ?

ii) Whether on the facts and in the circumstances of the case the Income Tax Appellate Tribunal is right in law in not accepting the submissions of the Appellant that the issues with regard to the report of SFIO had been raised by the Commissioner of Income Tax for Assessment Year 2006-07, 2007-08 and 2009-10 and had been held in the Appellant's favour after a detailed consideration of the matter by the Assessing Officer applying the principle of consistency and considering the identical factual and legal position for Assessment Years between 2006-07, 2007-08 and 2009-10 ?

4. Ms. Linhares, the learned Standing Counsel for the Revenue consented to the framing of the aforesaid substantial questions of law, subject to the liberty of contending that the same do not arise, or in any case, are required to be answered against the Assessee and in favour of the Revenue, in the facts and circumstances of the present case.

5. Accordingly, by granting liberty to the Revenue to urge all permissible defences, we frame the aforesaid substantial questions of law and with the consent of the learned Counsel for the parties, proceed to consider the same.

6. The Appellant-Assessee filed returned of income on 30/09/2008 for the Assessment Year 2008-09. Since some element of Transfer Pricing was involved, the case of the Appellant was referred to the Transfer Pricing Officer (TPO) in terms of Section 92CA of the IT Act.

7. The TPO made an order dated 31/10/2011, determining the arm's length price in respect of certain transactions relating to imports and exports. Based thereon, the Assessing Officer (AO) made draft order under Section 143(3), read with Section 144-C of the IT Act on 30/12/2011. The Appellant filed objections to the draft order and the matter was duly referred to the Dispute Resolution Panel (DRP) in terms of Section 144-C(2)(b) of the IT Act. The DRP, by an order dated 7/9/2012 rejected the Appellant's objections and based thereon, the AO made the final assessment order dated 19/10/2012 under Section 143(3), read with Section 144-C(13) of the IT Act.

8. The concerned Commissioner of Income Tax (CIT), by notice dated 3/2/2014, sought to exercise the revisional powers under Section 263 of the IT Act, *inter alia*, by reference to Serious Fraud Investigation Officers' reports, which were available in the meanwhile. The Appellant, vide letter dated 11/3/2014, lodged objections to the exercise of such revisional jurisdiction.

9. The CIT, on 11/11/2014, issued yet another notice to the Assessee, this time referring to, *inter alia*, Justice Shah Commission Report which was available in the meantime. Again, the Assessee vide letter dated 3/12/2014, lodged its objections to the exercise of revisional jurisdiction. The CIT, vide order dated 9/1/2015, in exercise of its revisional jurisdiction, set aside the assessment order and directed the Assessee to pass a fresh assessment order, after verifying and examining all the relevant facts of the case, legal position and giving adequate opportunity of being heard to the Assessee.

10. The Assessee instituted an appeal bearing No.107/PNJ/2015 before the Income Tax Appellant Tribunal (ITAT) against the CIT's order dated 9/1/2015. By the impugned Judgment and Order dated 10/9/2015, the ITAT dismissed this appeal. Hence, the present appeal under Section 260-A of the IT Act on the aforesaid substantial questions of law.

11. Mr. Ramani, the learned Senior Advocate for the Assessee submits that the AO's order dated 19/10/2012 had merged into the order of the Commissioner (Appeals) dated 17/5/2013 in ITA No.89/PNJ/2012. He, therefore, submits that it was not open to the CIT to thereafter initiate revisional proceedings under Section 263 of

the IT Act. He submits that, in any case, the issues for the Assessment Year 2008-09 are identical to the issues which arise in the Assessment Year 2009-10. He submits that for the Assessment Year 2009-10, the Revenue has practically accepted most of the contentions of the Assessee and, therefore, applying the principle of consistency any different view for the Assessment Year 2008-09, was unsustainable. Mr. Ramani submits that for these two reasons, amongst others, the impugned orders made by CIT on 9/1/2015 and the ITAT on 10/9/2015 deserve to be set aside.

12. Mr. Ramani also submitted that the Commissioner was not entitled to exercise the revisional jurisdiction based upon the SFIO reports which were at the later stage withdrawn or clarified or the Justice M.B. Shah report which had recorded its findings without compliance with the principles of natural justice and fair play. He relied upon the decision of this Court in *Sesa Sterlite Limited vs. The Assistant Commissioner of Income-Tax and ors.*¹ in support of these contentions.

13. Mr. Ramani finally submitted that on behalf of the Assessee several grounds, as indicated in paragraph 2 of the ITAT's order dated 10/9/2015 were in fact raised, but the ITAT chose to focus only on

¹ Writ Petition No.141/2015 and connected matters dated 9/7/2019

one of the grounds and this is also a good reason to interfere with the ITAT's impugned order.

14. For all the aforesaid reasons, Mr. Ramani submitted that the substantial questions of law as framed are required to be answered in favour of the Assessee and against the Revenue. As a consequence, he submitted that the impugned orders made by the CIT and the ITAT in this matter are required to be set aside.

15. Ms. Linhares, the learned Standing Counsel for the Revenue submitted that only one ground was pressed before the ITAT and, therefore, it is not open to the Assessee to urge any further grounds in this Appeal. She points out that the record of the ITAT bears some sacrosanctity and the same cannot be questioned in this appeal, particularly since the Assessee never bothered to take out any rectification application before the ITAT.

16. Ms. Linhares submits that the principles of *res judicata* as such are not applicable to the income tax proceedings as each year is a separate unit for assessment and, therefore, there is no breach of any principle of consistency as urged on behalf of the Assessee.

17. Ms. Linhares relies upon the reasoning reflected in the

impugned orders and submits that the present appeal may be dismissed, particularly since full opportunity has been guaranteed to the Assessee in the fresh assessment which the AO has been directed to undertake.

18. The rival contentions now fall for our determination.

19. From the perusal of the ITAT's order dated 10/9/2015, it is apparent that though several grounds may have been raised by the Assessee in its Appeal Memo, only one ground based upon consistency, was pressed by relying upon the order of the AO for the Assessment Year 2009-10.

20. The ITAT has quite correctly held that since the CIT's order dated 9/1/2015 had merely directed the AO to pass fresh assessment order, the issues as to whether the facts and circumstances for the Assessment Year 2009-10 were identical to the issues for the Assessment Year 2008-09 can always be gone into by the AO after granting full opportunity to all concerned.

21. Besides, the ITAT has also quite correctly held that the principles of *res judicata* as such are not applicable in such matters. This is because every year is a separate unit for assessment and the facts

and circumstances relevant to every such assessment order are required to be assessed accordingly.

22. At this stage, it is not possible to accept the contention raised on behalf of the Assessee that several other grounds had, in fact, been urged before the ITAT and that the same were not considered. It is settled position in law that the record before a Court or a Tribunal cannot be challenged in this manner. If the Assessee was indeed serious about this contention, then, a minimum that was expected of the Assessee was to have pointed this out to the ITAT soon after the impugned order was made. It is not uncommon that several grounds are raised in the Appeal Memo, but at the time of arguments, only one or two grounds are actually pressed.

23. The CIT, in exercising its revisional jurisdiction, has satisfied the twin requirements as prescribed in Section 263 of the ITAT Act. There was material before the ITAT to at least *prima facie* infer that there was under-invoicing and that this aspect of under-invoicing was not considered by the AO in making his assessment order. The CIT, in exercising its revisional jurisdiction, has not shut out any of the defences open to the Assessee, but has directed the AO to pass a fresh assessment order after verifying and examining all the relevant facts of the case, legal position and giving adequate opportunity of being heard

to the Assessee.

24. In *Malabar Industrial Co. Ltd. vs. Commissioner of Income Tax*², the Hon'ble Supreme Court has held that the CIT can pass an order under Section 263 of the IT Act even on debatable issues. Similarly, it is clear where the assessment was completed without proper inquiries which circumstances necessitated, it is competent for the CIT to invoke the revisional jurisdiction and direct fresh assessment, after verifying and examining all relevant facts, as well as legal position as may be involved.

25. The ruling in *Sesa Sterlite Limited* (supra) relied upon by Mr. Ramani was in the context of challenges to the orders of reopening of the assessment by issuance of notices under Section 148 of the IT Act. No doubt, as contended by Mr. Ramani, certain observations in the said Judgment may have some bearing on the assessment and, therefore, it ought to be clarified by us that the Assessee can rely upon the said ruling in case the AO is to be permitted to make a fresh assessment.

26. Both, the CIT, as well as the ITAT, have already made clear that adequate opportunity of being heard is required to be extended to

² 243 ITR 83

the Assessee in the fresh assessment proceedings to be undertaken by the AO. Therefore, no liberty or clarification is necessary. In any case, it is clarified that the Assessee will be entitled to rely upon all legally permissible material, including the decision of this Court in *Sesa Sterlite Limited* (supra) and there is no doubt that the AO, in undertaking the fresh assessment, will take into account all such contentions of the Assessee and make a fresh order in accordance with law, on its own merits.

27. In the aforesaid circumstances, the substantial questions of law are required to be answered against the Assessee and in favour of the Revenue and this appeal is required to be dismissed.

28. The Appeal is, accordingly, dismissed, but with clarification that all the contentions of the Assessee, as well as the Revenue, are to be taken into account by the AO in making the fresh assessment order.

29. The interim order made in this Appeal is hereby vacated.

30. The Appeal and the Misc. Application are disposed of in the aforesaid terms. There shall be no order as to costs.

DAMA SESHADRI NAIDU, J.

M. S. SONAK, J.