

O-166

ITA/15/2021

IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction (Income Tax)
ORIGINAL SIDE

PRINCIPAL COMMISSIONER OF
INCOME TAX-3, KOLKATA

-Versus-

DAMODAR VALLEY CORPORATION

Appearance:

*Ms. Smita Das De, Adv.
...for the appellant.*

*Ms. Udit Saraf, Adv.
...for the respondent.*

BEFORE:

The Hon'ble JUSTICE T.S. SIVAGNANAM

-And-

The Hon'ble JUSTICE SUPRATIM BHATTACHARYA

Date : 27th September, 2022.

The Court : This appeal filed by the revenue under Section 260A of the Income Tax Act, 1961 (the 'Act' for brevity) is directed against the order dated 21st February, 2018 passed by the Income Tax Appellate Tribunal, "B" Bench, Kolkata (the Tribunal) in ITA No.401/Kol/2017 for the assessment year 2012-13.

The appeal was admitted on the following substantial questions of law:

"Whether the impugned order of the tribunal dated 21st December 2018 setting aside the order under Section

263 of the Income Tax Act, 1961 passed by the Commissioner is erroneous in law ?”

We have heard Ms. Smita Das De, learned standing counsel for the appellant/revenue and Ms. Udit Saraf, learned advocate appearing for the respondent/assessee.

The short question involved in the instant case is whether the learned Tribunal was right in setting aside the order passed by the Principal Commissioner of Income Tax-III, Kolkata (PCIT) dated 12th January, 2017 passed under Section 263 of the Act. The assessee raised several grounds before the Tribunal and the first and foremost ground raised before the Tribunal was that PCIT was not justified in reviewing the assessment order on the ground of lack of enquiry with regard to the issue of allowability of prior period expenses even though in the show cause notice there was no such allegation and it was not a ground on which the PCIT alleged that the assessment order was erroneous on the ground of lack of enquiry. Further it was contended that the PCIT committed error in setting aside the assessment order on a ground which is entirely different than the ground on which the assessment order was sought to be revised under Section 263 of the Act. That apart, the assessee had also raised other grounds touching upon the merits of the claim by contending that facts on record establish that liability had crystallised during the relevant

year, no deduction for the trading liability was admittedly allowed in the earlier year and the tax rates in the earlier year and the current year being the same, no prejudice was caused to the interest of revenue and there is no justification for invoking the power under Section 263 of the Act. The learned Tribunal having noted that as many as six grounds were raised by the respondent before the Tribunal, took up for consideration the ground as to whether the procedure required to be adopted while ensuring proceedings under Section 263 of the Act was followed or not and also the fact whether the assessee had adequate opportunity to put forth their submission. The assessee contended before the Tribunal that they have been established under the Central Act, 1948 and engaged in the business of generation and distribution of power. They operate hydro and thermal power stations which are set up in various location in the State of Jharkhand and State of West Bengal. For the thermal plants, the principal raw materials is coal which the assessee sources from subsidiaries of Coal India Limited which is another public sector undertaking. For the purpose of sourcing of coal, the assessee entered into a coal supply agreement with Coal India Limited in terms of which the subsidiaries of Coal India Limited supply the coal to various plants of the respondent/assessee. Further, it was contended that since the Coal India Limited

enjoys almost monopoly status in coal mining and supply business in India like any other customer, the respondent/assessee has to make advance payment to subsidiary of Coal India Limited based on the estimated monthly supply of coal. Further, it was submitted that the assessee's power plants critically depend on the regular supply of quality coal and the assessee has to make payment to Coal India Limited on advance basis. Further, at the time when the advances were paid, individual account of Coal India Limited is debited in the books maintained at the Kolkata head office. The amount so paid, appeared in the head office book under the category "advance" and on receipt of the advance, the supply orders are released and accordingly the subsidiary of Coal India Limited despatches the coal to different plant location of the respondent/assessee. At the relevant time, the subsidiary of Coal India Limited raised invoices on the respondent/assessee's concerned power project and in the books of the respective projects the supply of coal is initially accounted. However, before the bill for the coal supplied is approved and passed for payment, the said bills go through detailed process for verification and for this purpose numerous checks and balances have been put in place by the assessee. The assessee offered the following explanation with regard to the claim of the

deduction for the assessment year under consideration namely, A.Y. 2012-13.

"During FY 2010-11 a joint reconciliation of claims and counterclaims was arrived at between representative of Bharat Coking Coal Ltd. (BCCL) and the assessee in respect of coal supplies made by BCCL to assessee's Mejia Thermal Power Plant (MTPP). The joint reconciliation was carried out in the month of December 2010 in meeting attended by the representatives of BCCL & DVC. A copy of the Joint Reconciliation Statement signed and executed in December 2010 is enclosed for your ready reference and record. After the joint reconciliation was arrived at the same was sent to the fuel section of MTPP for final approval and onward recommendation to the head office for passing requisite accounting entries in the assessee's books. Inadvertently, however, the senior account executives of the assessee posted at MTPP were deputed on election duty as the West Bengal Assembly Elections were held in early 2011. Since the concerned account executive of the assessee was on election duty; necessary recommendations for passing the entries in the books to give accountings effect to the settlement with BCCL could only be issued in the FY 2011-12. As soon the head office of the assessee at Kolkata received the recommendation from MTPP giving accounting effect to the settlement of BCCL was given by passing entries in the financial books of DVC. Your goodself will thus note that the process of settlement of dispute with BCCL attained finality only in FY 2011-12 and accordingly the entries were passed by the assessee in its books of accounts in FY 2011-12 and therefore the deduction was rightly claimed and allowed in the assessment of AY 2012-13".

The assessee also submitted the following facts to support their contention that the power under Section 263 may not be invoked and the proceedings should be dropped.

"In case of dues arising from settlement reached by mutual consent liability of an assessee gets crystallised only when the parties arrive at mutually accepted terms and associate procedures are complied with. In the assessee's case the documents on record will show that such settlement was arrived at the meeting jointly conducted between BCCL & DVC representatives in December 2010 and thereafter the accounting effect to the settlement was given in the accounts for the year ended 31.03.2012. In the facts and circumstances set out in the foregoing, it shall be appreciated that the liability to pay Rs.39,34,86,241/- had attained finality only in the relevant FY 2011-12. Accordingly, such sum which was debited in the assessee's financial books under the head "prior period expenditure" had been rightly claimed by the assessee and allowed by the AO as deduction from the profits of the business for the relevant year. It is further material to submit that the amount claimed as deduction in AY 2012-13 pertained to supply of coal. The consumption of coal is a prerequisite for carrying on assessee's business of power generation. Cost of coal supply is always allowed as deduction in computing assessee's business income. In the year in which the coal was supplied the assessee had not claimed deduction for its entire cost since the dispute between assessee and BCCL was not resolved and the full liability had not crystallised. You will thus appreciate that no deduction was allowed to the assessee even though the coal was supplied and consumed in the earlier years and therefore to the extent of unsettled amount the company's income was assessed. It is therefore submitted that since the assessee was not allowed deduction for the full value of coal

purchased in the year of supply then in the year in which the liability was settled and the same should be allowed as deduction since in the earlier years the assessee was not allowed any deduction for such cost."

Though the assessee submitted such explanation in response to the proceeding initiated under Section 263 of the Act, the PCIT without affording an opportunity of hearing to the assessee on the alleged ground that no enquiry was conducted by the assessing officer had rejected the contentions and confirmed the proposal in the show cause notice holding that the assessment order was erroneous in so far as it is prejudicial to the interest of revenue.

The learned Tribunal considered the contentions advanced by the assessee before it and pointed out that the PCIT did not specifically mention any error in the contentions advanced by the assessee in reply to the show cause notice and held that the assessment order was erroneous in so far as it is prejudicial to the interest of revenue solely on the ground that the assessing officer failed to verify necessary facts. Furthermore, there was no such allegations made in the show cause notice under Section 263 of the Act and, therefore, no opportunity was afforded on the said issue. Thus, the learned Tribunal taking note of the decision of the Hon'ble Supreme Court in the case of *CIT vs. Amitabh Bachchan* reported in 384 ITR 200 (SC) held that failure to give any opportunity would

render the revisional order under Section 263 of the Act legally fragile not on the ground of lack of jurisdiction but on the ground of violation of principles of natural justice.

Thus, we are of the considered view that the learned Tribunal rightly went into the matter and held in favour of the assessee. Furthermore, we note that in terms of Section 263 of the Act, the PCIT is empowered to invoke the power if, in his opinion, the assessment order is erroneous in so far as it is prejudicial to the interest of revenue. However, before doing so he is required to give the assessee an opportunity of being heard and after making enquiry or causing to be made such enquiry as he deems necessary, pass an order under the said provision. The learned Tribunal has found that opportunity was not granted to the assessee. That apart no enquiry was conducted by the PCIT before passing the order.

Thus, the learned Tribunal was fully justified in interfering with the order passed by the PCIT. In the result, the appeal filed by the revenue (ITA/15/2021) is dismissed and the substantial question of law is answered against the revenue.

(T.S. SIVAGNANAM, J.)

(SUPRATIM BHATTACHARYA, J.)