

OD- 18

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

IA No.GA/1/2022
ITAT/3/2021

M/S. SHEO SHAKTI COKE INDUSTRIES
-Versus-
ASSISTANT COMMISSIONER OF INCOME
TAX, CIRCLE-37, KOLKATA

Appearance:
Mr. Mainak Bose, Adv.
Mr. Arijit Chakrabarti, Adv.
Mr. Kajal Ray, Adv.
...for the appellant.

Mr. Amit Sharma, Adv.,
. . . for the respondent.

BEFORE:
The Hon'ble JUSTICE T.S. SIVAGNANAM
-And-
The Hon'ble JUSTICE HIRANMAY BHATTACHARYYA

Date : 8th April, 2022.

This appeal filed by the assessee under Section 260A of the Income Tax Act, 1961 (the 'Act' in brevity) is directed against the order dated 14th September, 2021 passed by the Income Tax Appellate Tribunal, "A" Bench, Kolkata (in short the

'Tribunal') in ITA No.2597/Kol/2019 for the assessment year 2015-16.

The assessee has raised the following substantial questions of law for consideration :

- "I) Whether the Income Tax Authority has the authority to assume the percentage of gross profit of an assessee on being unsatisfied as to the correctness of the accounts?*
- II) Whether the decision of the Income Tax Authority in summarily reducing the percentage of gross profit of the assessee is perverse, contrary to and without authority of law?"*

We have heard Mr. Mainak Bose, learned standing counsel appearing for the appellant/assessee and Mr. Amit Sharma, learned counsel appearing for the respondent/revenue.

The short question involved in the instant case is whether the percentage of gross profit as determined by the Commissioner of Income Tax (Appeals) - 11, Kolkata [CIT(A)] at 40 per cent was justified or not. The tribunal confirmed the order passed by the CIT(A) and has not given any independent finding. The assessee filed the return of income on 30th September, 2013 and the case was selected for scrutiny and notice under Section 143(2) was served and, thereafter, notice under Section 142(1) with requisitions was issued and served on the assessee. One of the issues before the assessing officer was with regard to the claim

for deduction made by the assessee under Section 80IC of the Act. The assessing officer by an order dated 22nd February, 2016 rejected the entire claim of deduction made by the assessee under Section 80IC of the Act. The assessee carried the matter in appeal before the CIT(A) and the CIT(A) after considering the manner in which the assessing officer proceeded to deal with the matter followed the order passed by the assessing officer and held that the conclusion of the assessing officer to be incorrect and, accordingly, rejected the same. Such finding has been rendered in paragraph 21 of the order passed by the CIT(A) which is quoted below :

"I have carefully considered the rival contentions and submissions. The issue that comes out starkly is that the appellant's sales have been made in cash for which there is no reliance evidence. Looking at the assessment order, I form an impression that the ld. AO has based his approach on presumption and has got swayed away by his own approach, so much so, that he has ignored evidences furnished by the appellant during the assessment proceedings. I find that he was incorrect in concluding that the appellant's business did not exist at all. He also erred in holding that there is were no purchases or sales and that all that had been presented by the appellant was a mere hog wash to claim the exemption u/s 80IC of the Act. To this extent, the ld. AO's conclusions are found to be incorrect and are rejected".

After having come to such a conclusion, the CIT(A) proceeded to examine as to whether the claim of gross profit made by the assessee at 57.01 per cent was justified or not. The CIT(A) took note of certain details as well as the gross profit of the sister concerns and held that the books of accounts submitted by the assessee were revealed the true and correct picture of the profit earned by the assessee. Accordingly, the books were rejected under Section 143(3) of the Act. Thereafter, in paragraph 31.1 of the order the CIT(A) holds that 40 per cent should be taken as the gross profit. The assessee was in appeal against the said order before the tribunal stating that their claim at 50 per cent ought to have been accepted. The revenue was in appeal before the tribunal stating that the order of the assessing officer should have been affirmed by the CIT(A) and the appeal by the assessee ought to have been dismissed. The assessee is before us by way of this appeal. The question would be whether the assessee could have been denied of any appeal filed as against the direction of the entire claim for deduction under Section 80IC by the assessing officer. The settled legal principle is that the appellant cannot be put to a situation worse than what they would have been if they have not preferred appeal. In this regard, we place reliance on the decision of the Hon'ble Supreme Court in Benarasi & Others Vs. Ram Phal, reported in (2003) 9 SC 606. In the instant case had the CIT(A) not proceeded further after

concluding that order of the assessing officer was incorrect, in all probabilities the matter would not have travelled this far. In fact, we find that the CIT(A), while coming to the conclusion that the order of the assessing officer is incorrect, would point out that the finding of the assessing officer was on presumptions and that he ignored the evidences furnished by the assessee during the assessment proceedings. If such was the conclusion of the CIT(A), the question would be whether the books could have been rejected under Section 145(3) of the Act. This inconsistency also has led to a decision by the CIT(A) which is also based on certain presumptions or the opinion of the CIT(A). It appears that the assessee was not put on specific notice that the gross profit should have been determined at 40 per cent qua their claim of gross profit at 57.01 per cent. Thus, the best course that should have been adopted by the CIT(A) was to remand the matter back to the assessing officer to re-do the assessment and issue certain guidelines or on the other hand directed the assessing officer to submit a remand report. The CIT(A) did not adopt either of these two courses but proceeded to determine the gross profit once again by way of guess work which in our opinion was incorrect in so far as the assessing officer had completed the assessment. As pointed out earlier the tribunal has not given any independent reason for affirming the order of the CIT(A). Thus, taking note of the peculiar facts and circumstances of the case, we are of the

considered view that the matter should be remanded back to the assessing officer to consider only the aspect as to whether the denial of the gross profit to the extent of 17.01 per cent by the CIT(A) as affirmed by the tribunal was correct or not. In this regard, the assessee should be given an opportunity by the assessing officer to place records and documents to justify that the gross profit as determined by them at 57.01 per cent was correct.

We make it clear that whatever relief granted by the CIT(A), namely, determination of gross profit at 40 per cent cannot be altered and the same stands affirmed and what remains is only to consider as to whether the remaining amount of gross profit, namely, 17.01 per cent of which relief was denied to the assessee by the CIT(A) which requires to be considered by the assessing officer.

For all the above reasons, the appeal is allowed. The order passed by the tribunal is set aside and the matter is remanded to the assessing officer for fresh consideration in terms of the observations and directions contained therein. The assessing officer shall afford an opportunity of personal hearing to the authorised representative of the assessee and permit them to produce the books and records and, thereafter, pass a reasoned order on merits in accordance with law. Consequently, the substantial questions of law are left open.

In light of the above, the appeal (ITAT/3/2022) stands disposed of. Consequently, the connected application (GA/1/2022) stands closed.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)

S.Das
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