

OD-18 & 19

ITAT/28/2022

ITAT/29/2022

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

PRINCIPAL COMMISSIONER OF
INCOME TAX-9, KOLKATA

-Versus-

MRS. PREMLATA TEKRIWAL

Appearance:
Mr. Soumen Bhattacharyya, Adv.
...for the appellant.

BEFORE:

The Hon'ble JUSTICE T.S. SIVAGNANAM

-And-

The Hon'ble JUSTICE HIRANMAY BHATTACHARYYA

Date : 22nd November, 2022.

The Court: The affidavit of service is kept with the records.

These appeals have been filed by the revenue challenging a common order passed by the Income Tax Appellate Tribunal, "B" Bench, Kolkata (the 'Tribunal') in a batch of cases in ITA Nos.1129, 1130 & 1131/Kol/2018 for the assessment years 2009-10, 2010-11 and 2011-12 and 2010-11 & 2011-12. The revenue had preferred appeals against three of the assessment years before this Court in ITAT/27/2022, ITAT/32/2022 and ITAT/33/2022 and by judgment dated 15th July, 2022, the appeal

filed by the revenue was allowed. The operative portion of the judgment reads as follows:

"Since the facts are identical, we take up the facts for consideration in ITAT 27/2022 where the assessee is Premlata Tekriwal. The said assessee filed the return and income for the assessment year 2009-10 declaring a total income of Rs.3,85,822/-. The assessment was reopened based on information received from the Director General of Income Tax (Investigation). The reasons for reopening was based on information received from Maharashtra Sales Tax Department who carried out various searches on the persons/entities involved in issuance of fictitious purchases. The data of the said searches carried out by the Maharashtra Sales Tax Department were communicated to the Director General of Income Tax (Investigation) who, in turn, vide letter dated 23rd December, 2013 communicated the details of the fictitious purchases and the name of the assessee was found in the list as a beneficiary of such accommodation bills. After following the due procedure and discussing the case with the various representatives of the assessee, the Assessing Officer while completing the assessment by order dated 28th March, 2016 pointed out that the only inference can be drawn is that the assessee did not purchase from the parties mentioned in the said bill and at the same time the assessee did purchase goods from some other suppliers may be without the bill. Therefore, the purchase rate mentioned by the assessee was rejected. With a view to afford opportunity to the assessee to establish genuinity of the purchases, opportunity was given to the assessee. In response to such opportunity the assessee stated that they are not in a position to produce the mentioned records and requested to treat 2% of the purported bogus purchase of Rs.54,13,476/- to be added to the total income for the said years. The Assessing Officer rejected such

submission. After doing so he had observed that the assessee got same benefit of such bogus purchase, there would be no denial of the fact that the assessee's estimated income will increase to a certain extent. After making such an observation, the Assessing Officer estimates the addition at 3% of the bogus purchase and accordingly a sum of Rs.1,62,405/- was added to the total income of the assessee. The Principal Commissioner of Income Tax - 10, Kolkata exercised his power under Section 263 of the Act. It is seen that the Assessing Officer himself had submitted before the PCIT that an error has occurred in the assessment order. After perusing the entire files as well as the stand taken by the Assessing Officer, the PCIT was of the prima facie opinion that the Assessing Officer failed to take logical action on the information available with him and therefore, opined that the assessment order is erroneous in so far as it is prejudicial to the interest of the revenue. Accordingly, the show-cause notice dated 30th January, 2018 was issued to the assessee under Section 263 of the Act. The averments contained in the show-cause notice are as follows :-

"...On examination of your assessment records for the above mentioned assessment year., it appears prima facie that there was failure on the part of the A.O. to assess the income correctly and as such the instant order u/s 143(3)/147 dated 28.03.2016 is erroneous in so far as it is prejudicial to the interest of the Revenue within the ambit of sec. 263 of the Income Tax (IT) Act, 1961.

3.On examination of your assessment records for the above mentioned assessment year, it is observed that your case was reopened u/s 147 of the Act, on 30/03/2015 on the basis of incriminating information received by the AO. In the said assessment order it was established that expenditure worth

Rs.54,14,476/-, claimed by you as purchase, was bogus. When expenditure is established as bogus, there is no provision in the act, whereby partial disallowance to the bogus expenditure can be made. However, in your case, the A.O. has disallowed a sum of Rs.1,62,405/-, being 3% of such bogus expenditure/purchases whereas the entire amount was required to be disallowed.

4. In view of the above, you are hereby allowed on opportunity of being heard, either personally or through an authorized representative, in my office at **5th floor, Aayakar Bhawan Dakshin, 2 Gariahat Road South, Kolkata - 700068, on 14.02.2018 at 1.00 P.M.**, and show cause as to why an order u/s 263 of the I.T. Act shall not be passed in your case, enhancing/modifying/canceling the assessment the assessment order in question or directing a fresh assessment to be made.

5. In the event of failure to comply with the above, it shall be presumed that you have no objection to the proposed action and the matter shall be finalised on merits on the basis of material on record, without further notice."

Though the show cause notice was served on the assessee none appeared before the PCIT. Thereafter, with a view to offer further opportunity the matter was adjourned twice. However, the assessee failed to appear.

Having left with no option the PCIT proceeded to take for considering the matter and passed the order dated 5th March, 2018. It was held that from materials available on record it is proved beyond doubt that the alleged purchase claimed by the assessee against the parties were bogus. The PCIT referred to Section 69C of the Act and pointed out that once it is established that the expenditure is unexplained/bogus, the entire amount of bogus expenditure is

to be added to the total income of the assessee. Reliance was placed on the decision of the Hon'ble Supreme Court in *N.K. Proteins Vs. DCIT* [2017] 84 taxmann.com 195(SC). Further, the PCIT pointed out that the assessment officer had to examine each and every transaction and finally assess the correct income of the assessee. However, the assessing officer without arriving at any logical conclusion and without conducting any inquiry made a disallowance only to the extent of 3% of the bogus purchase. With regard to the aspect of the assessing officer as to making inquiries, the PCIT referred to the decision of the Hon'ble Supreme Court reported in *Rampyari Devi Saraogi Vs. CIT* (1968) 67 ITR 84, *Smt. Tara Devi Aggarwal Vs. CIT* (1973) 88 ITR 323 (SC) and the decision of the other High Courts. Further, the PCIT took note of the Explanation 2 to Section 263 of the Act inserted by the Finance Act, 2015 with effect from 1.6.2015 and pointed out if an order has been passed by the Assessing Officer without making any inquiry or verification then it would be a case where the order is deemed to be erroneous in so far as it is prejudicial to the interest of the revenue. Accordingly, the PCIT held that the entire expenses has to be disallowed as being bogus purchases. The Assessing Officer was directed to reassess the income of the assessee for the relevant assessment years.

The assessee carried the matter on appeal to the Tribunal. The Tribunal had allowed the assessee's appeal by relying upon the decision of the Coordinate Bench in *Om Foregoing & Engineering P. Ltd. Vs. PCIT* in ITA Nos. 509& 510/Kol/2017 for the assessment years 2010-2011 and 2011-2012 dated 13.12.2017 and the decision of this Court in *PCIT Vs. M/s. Subarna Rice Mill*, ITAT/196/2015, dated 20.06.2018. Firstly, we find that the decision in *Om Foregoing & Engineering Pvt. Limited* is clearly distinguishable on facts. In the said case the assessee had filed records and the copies of the sales bills etc. were filed in the form of

a paper book and on facts the Court found that inquiry was conducted by the assessing officer and, therefore, the Commissioner was wrong in exercising his power under Section 263 of the Act. The facts as mentioned in the said judgment had been quoted by the Tribunal in paragraph 6 of its order. Reading of the said order will clearly show that the said decision could not have been applied to the assessee's case. The decision of this Court in the case of M/s. Subarna Rice Mill (supra) also is distinguishable on facts as the source from where the purchases were made was identified. At this juncture, it would be relevant to note that when the assessing officer gave an opportunity to the assessee to explain the transaction, the assessee did not produce any document, but stated that 2% of the purported bogus purchase may be added to the total income. Thus it would mean that the assessee had accepted the allegations against them and precisely for such reason they offered that 2% of the bogus purchase may be added to the total income. If such was the factual position in the case on hand then it is incumbent upon the Assessing Officer to inquire into the matter and take the proceedings to the logical end. Having not done so, the PCIT was fully justified in exercising jurisdiction under Section 263 of the Act. Thus, we are of the view that Tribunal erroneously interfered with the order passed by the PCIT.

In the result, the appeals filed by the revenue are allowed and the order passed by the Tribunal is set aside.

Consequently, the order passed by the Principal Commissioner Of Income Tax - 10, Kolkata dated 5th March, 2018 is restored.

Accordingly, the substantial questions of law are answered in favour of the revenue."

Since a common order passed by the learned Tribunal had been reversed by this Court in the aforementioned appeals, the said decision will apply to the cases on hand as well.

For the above reasons, the appeals filed by the revenue (ITAT/28/2022 and ITAT/29/2022) are allowed and the order passed by the learned Tribunal is set aside.

Consequently, the order passed by the Principal Commissioner of Income Tax is restored. The substantial questions of law are answered against the revenue.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)