

OD-13

ITAT/328/2017
IA No.GA/2/2017 (Old No.GA/3184/2017)

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

M/S. OLYMPUS SUPPLIERS PVT. LTD. &
ANR.

-Versus-

THE PRINCIPAL COMMISSIONER OF
INCOME TAX, KOLKATA-2 & ANR.

Appearance:
Mr. Pranit Bag, Adv.
Mr. Soumyadeep Biswas, Adv.
...for the appellant.

Mr. Vipul Kundalia, Adv.
Mr. Prithu Dudheria, Adv.
Mr. Anurag Ray, Adv.
...for the respondent.

BEFORE:

The Hon'ble JUSTICE T.S. SIVAGNANAM

-And-

The Hon'ble JUSTICE HIRANMAY BHATTACHARYYA

Date : 4th May, 2022.

The Court : 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 August 5, 2016 passed by the Income Tax Appellate Tribunal, "D" Bench, Kolkata (the 'Tribunal' in short) in ITA No.1088/Kol/2016 for the assessment year 2009-10.

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

- (a) *Whether the Tribunal failed to consider that any order made beyond March 31, 2015, would be hit by sub-section (2) of section 263 of the said Act in the present case, as no order can be made under sub-section (1) of section 263 of the said Act, after expiry of 2 years from the end of the financial year, 2012-13, in which the order sought to be revised, was passed, as the order under section 263 was deemed to be made over to the petitioners on February 29, 2016 in terms of the order of the Hon'ble Court dated April 20, 2015 ?*
- (b) *Whether the Tribunal failed to consider that an enquiry was conducted by the Assessing Officer on the issue of share capital and during such enquiry, all the materials documents were placed before the Assessing Officer and as such, the Commissioner of Income Tax cannot direct for an enquiry on the same issue by holding that enquiry conducted, was not sufficient and/or adequate ?*
- (c) *Whether the Ld. Tribunal was justified in holding the order of the Commissioner of Income Tax who held that the re-assessment order passed by the Assessing Officer under section 147 of the Income Tax Act, 1961, is erroneous and prejudicial to the interest of the revenue on the ground of lack of proper enquiry as to the issue of share capital premium without considering that the case was re-opened for the specific purpose of escapement of share dealing ?*
- (d) *Whether the Ld. Tribunal was justified in law in upholding the order passed by the Commissioner of Income Tax, under section 263 of the said Act without any specific reasons and on a general and vague conclusion drawn from the case of Subhlakshmi Vanijya Private Ltd. vs. CIT [ITA No.1104/Kol/2014, dated 30.07.2015 for the AY 2009-10] ?*
- (e) *Whether the Tribunal was justified in law in ignoring that no order under section 263 of the said Act can be made under section 263(1) of the said Act, after expiry of 2*

years from the end of the financial year in which the order sought to be revised, was passed ?

We have heard Mr. Pranit Bag, learned counsel assisted by Mr. Soumyadeep Biswas, learned advocate appearing for the appellant/assessee and Mr. Vipul Kundalia, learned counsel assisted by Mr. Prithu Dudheria and Mr. Anurag Ray, learned advocates for the respondent/revenue.

The assessee was in appeal before the learned tribunal challenging an order passed by the Principal Commissioner of Income Tax, Kolkata-2 (PCIT, in short) dated 23rd March, 2015 passed under Section 263 of the Act. The appellant/assessee had raised the following grounds before the learned tribunal:

- "1. For that the order passed u/s 263 by the Ld. CIT is barred by limitation, as such, the order passed u/s 263 is liable to be quashed.*
- 2. For that on the facts and in the circumstances of the case, the order passed by the Ld. CIT u/s 263 of the Act is bad in law and is liable to be quashed.*
- 3. For that on the facts and in the circumstances of the case the Ld. CIT was not justified in initiating proceedings u/s 263.*
- 4. For that the Ld. CIT erred in exercising the power of revision for the purpose of directing the A.O. to hold another investigation when the order of the A.O. was neither erroneous nor prejudicial to the interest of the revenue.*
- 5. For that the Ld. CIT was not justified in holding that creditworthiness and identity of the shareholders from whom share capital money was received and genuineness of the transaction in the instant year remains to be verified*

though the A.O. completed the assessment after making proper verification.

- 6. For that the CIT was not justified in holding the order passed by the A.O. to be erroneous on the issue of share capital/premium when no addition u/s 68 can be made in the instant case in view of the judgments of the Hon'ble Supreme Court in the case of Lovely Exports 319 ITR (St.) and also in the case of Bharat Engineering & Construction Co. Ltd. 83 ITR 187.*
- 7. For that in exercising revisionary powers u/s 263 the Ld. CIT lost sight of the well settled legal position that in the assessment u/s 147, the A.O. is not entitled to embark upon a fishing expedition and to make roving enquiries as such, assuming but not admitting that proper enquiries were not done in respect of the share capital raised by the assessee, there was no error in the order passed by the A.O. u/s. 147.*
- 8. For that the Ld. CIT exceeded his jurisdiction by directing the Ld. A.O. as to how the fresh assessment should be framed by him."*

From the above grounds of appeal filed by the assessee before the tribunal, we find that the first ground urged before the tribunal is that the order passed by the PCIT under Section 263 of the Act is barred by limitation. There are other grounds which have been raised by the assessee which are not required to be gone into for taking a decision in the present appeal. The learned tribunal had heard the appellant's appeal petition along with three other cases and by a common order dated 5th August, 2016 dismissed all the appeals. We find from paragraph 2 of the impugned order that the prayers sought for by the assessee for

condonation of delay of 19 days in filing the appeal was considered by the tribunal. The appellant's case was that as against the order passed under Section 263 of the Act, they had filed a writ petition before this Court in WP No.3116(w) of 2016 contending that the order made under Section 263 of the Act on March 23, 2015 was not served on the appellant/assessee. The learned Writ Court considering the submissions made by the appellant as well as the revenue, by order dated 20th April, 2016 held that since it appears that the non-service of the order dated March 23, 2015 was on account of a mistake on the part of the department, such order is now deemed to have been received by the appellant/assessee on February 29, 2016. Further, the learned Writ Court held that the assessee will be at liberty to pursue their remedies against the order dated March 23, 2015 and consequential orders in accordance with law by reckoning the date of receipt of such order on February 29, 2016. In the light of such direction, the merits of the order under Section 263 of the Act was not gone into and it was left open to the parties to canvass their grounds before the appropriate forum. Further, there was a direction to the respondent/department to immediately communicate the assessment order made consequent to the order under Section 263 of the Act to the petitioning assessee. In terms of the liberty granted, the assessee had preferred an appeal before the tribunal which on the date of filing was barred by

limitation, it was delayed by a period of 19 days. The learned tribunal took note of the direction issued by the learned Writ Court in the said writ petition and condoned the delay in filing the appeal. The next course that the tribunal should have adopted is to consider the appellant's appeal petition on merits, more particularly on the grounds which have been canvassed before the tribunal as noted above. However, the tribunal was of the view that the issues raised in all the four appeals which were heard together are squarely covered by several orders passed by the tribunal including the order in the case of *Subhlakshmi Vanijya Private Ltd. vs. CIT* passed in ITA No.1104/Kol/2014, dated 30.07.2015 for the Assessment Year 2009-10.

In paragraph 4 of the impugned order, the learned Tribunal briefly notes the facts of the case. But, however, we find that the facts of the appellants' case have not been noted.

Thereafter, in paragraph 5 of the impugned order, the learned Tribunal states that it has disposed of more than 500 cases involving the same issue by certain orders with the impugned order having been passed in a group of cases led by Subhalakshmi Vanijya Pvt. Ltd., dated July 30, 2015.

In paragraph 6 of the impugned order, the learned Tribunal states that it has been admitted by the learned Departmental representative that the facts and and circumstances of the issues in consideration are *mutatis mutandis* similar to those decided

earlier in the case of Subhalakshmi Vanijya Pvt. Ltd. Thereafter, it proceeds to quote the conclusion in the said decision.

In paragraph 7 of the impugned order, the learned Tribunal states that all or some of the conclusions recorded by it in the decision in the case of Subhalakshmi Vanijya Pvt. Ltd. are applicable to the appellants before it and accordingly the appeals were dismissed and the order passed by the PCIT was upheld.

The learned Tribunal has not ventured to consider the facts of the assessee's case; more importantly, when they have challenged the order passed by the PCIT under section 263 of the Act firstly on the ground that it is barred by limitation. That apart, the appellants had approached this Court and filed a writ petition against the order passed under section 263 of the Act and in the said writ petition the appellants were granted liberty to pursue their remedies against the order dated March 29, 2015 by reckoning the date of receipt of such order as on February 29, 2016. Therefore, the issue would be whether the proceedings are barred by limitation.

Thus, the appellants ought to have been granted liberty to canvass the issue before the learned Tribunal. More particularly when they have specifically raised the same as one of the grounds in the appeal memorandum filed before the learned Tribunal.

The learned Advocate appearing for the appellants would submit that on merits also the appellants have got an excellent

case. However, since the learned Tribunal has not touched upon the merits of the appellants' case, we are not inclined to go into the said aspect.

The learned senior counsel appearing for the respondents placed reliance on the decision of the Hon'ble Supreme Court in the case of ***Commissioner of Income Tax, Chennai -vs- Md. Meeran Shahul Hameed, reported in (2022) 1 SCC 12.***

As observed by us, since we are not going into the merits of the impugned order nor the correctness of the said order of the learned Tribunal, we leave it to the Department to canvass all points at the appropriate stage. Thus, we are of the considered view that the matter has to be sent back to the learned Tribunal to take a decision on merits and in accordance with law, specifically with regard to the grounds canvassed by the appellants before it.

For the above reasons, the appeal is allowed and the stay application stands closed and the order passed by the learned Tribunal is set aside and the appeal in ITA No.1088/KOL/2016 for the assessment year 2009-10 stands restored to the file of the learned Tribunal and the said appeal shall be heard and decided by the learned Tribunal on merits and in accordance with law.

In view of the above liberty is granted to the appellants as well as the respondents to canvass all points, both on facts as

well as on law, before the learned Tribunal, consequently the substantial questions of law are all left open.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)