OD – 14

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

ITAT/85/2022
IA NO. GA/1/2022
INDIAN EXPLOSIVES PVT. LTD.
Vs
PRINCIPAL COMMISSIONER OF INCOME TAX-4, KOLKATA

BEFORE :
THE HON'BLE JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
Date : NOVEMBER 03, 2022.

Appearance:
Mr. J.P. Khaitan, Sr. Adv.
Mr. Pratyush Jhunjhunwala, Adv.
Mr. Mrigank Kejriwal, Adv.
…for appellant
Mr. Om Narayan Rai, Adv.
…for respondent

The Court :- This appeal filed by the assessee under Section 260A of the Income Tax Act, 1961 (the Act) is directed against the order dated September 17, 2021 passed by the Income Tax Appellate Tribunal "A" Bench, Kolkata in ITAT No. 1265/Kol/2019 for the assessment years 2014-15. The assessee has raised the following substantial questions of law for consideration :-

i) *Whether the Tribunal was justified in law in holding that the order dated December 26, 2016 passed by the Assessing Officer is erroneous in so far as it is prejudicial to interests of the revenue and its observations and findings in this regard are erroneous, contrary to law and perverse ?*

ii) *Whether the order dated February 7, 2019 passed by the Principal Commissioner of Income Tax under section 263 of the Income Tax Act, 1961 is erroneous, contrary to law, perverse and/or without jurisdiction ?*

iii) *Whether the CIT was justified in merely setting aside the assessment order to the file of the Assessing Officer for fresh adjudication without giving any findings or observations on the merits of the issues involved ?*

iv) *Whether the CIT was justified in applying explanation 2 to section 263 of the Act without appreciating the fact that Explanation 2 to section 263 inserted by Finance Act 2015 w.e.f. 01-06-2015 is applicable prospectively and is not applicable for AY 2014-15?*

v) *Whether the Principal Commissioner of Income Tax needs to consider the material submitted by the appellant on the issues raised by him in the course of the proceedings under section 263 of the Act before arriving at the finding that the assessment order passed by the Assessing Officer is prejudicial to the interests of the revenue ?*

vi) *Whether in cases where issues and discrepancies are raised on the basis of Form 26AS and books of accounts which had been submitted by the appellant during the course of assessment and examined by the Assessing Officer, the Principal Commissioner of Income Tax can form the opinion that the assessment was completed without making inquiries or verifications or lacked inquiries only after reviewing the submissions and reconciliations submitted by the appellant and coming at a prima facie finding that the interests of the revenue have been prejudiced ?*

vii) *Whether the circular no. 3 of 2016 dated March 10, 2016 issued by the Central Board of Direct Taxes renders the power bestowed upon the*

Assessing Officer under section 92C(3) of the Act to determine the arm's length price otiose and impinges upon the discretion given to the Assessing Officer under section 92CA of the Act to refer cases to the Transfer Pricing Officer in cases which he considers it to be necessary or expedient ?

viii) Whether the assessment order dated December 26, 2016 can be said to be erroneous in so far as it is prejudicial to the interests of the revenue for not referring the case to the Transfer Pricing Officer when the Assessing Officer himself had examined Form 3CEB and the appellant's transactions with associated enterprises ?

We have heard Mr. J.P. Khaitan, learned Senior Counsel duly assisted by Mr. Jhunjhunwala, learned counsel for the appellant/revenue and Mr. Om Narayan Rai, learned standing Counsel for the respondent. The order impugned before us in this Court below is that of the Tribunal forming the order passed by the Principal Commissioner of Income Tax, Kolkata-4 (PCIT) dated 7th February, 2019 passed in exercise of powers conferred under Section 263 of the Act. Before we examine the merits of the matter the first hurdle which the revenue has to cross is as to whether the PCIT had passed a speaking order on the various queries raised and the reply submitted by the assessee. To satisfy ourselves we have carefully gone through the order passed by the PCIT dated 7th February, 2019. From the said order it is seen that the authority has classified the queries under five heads on give grounds which are as follows :-

A) It is seen that as per 26AS statement total interest income of the assessee was Rs.8,10,93,121/-. However, as per accounts and computation of income total interest income was to the tune of Rs.8,00,14,210/-. Hence, the A.O. failed to reconcile or add the difference during the course of assessment proceedings.

B) *It further appears from 26AS statement that there were other incomes in the nature of contractual, commission, technical etc. Though no separate heads of incomes are available in the P&L accounts, it appears that all such incomes were clubbed under 'Miscellaneous income' under Sch.16. However, as per 26AS total receipts were of Rs.1,32,40,556/- as against the disclosed income of Rs.78L (approx). Hence, the A.O. failed to reconcile or add the difference during the course of assessment proceedings.*

C) *Deduction of TDS u/s 194IA of the Act in the Form 26AS suggests sale of any immovable property other than agricultural land. However, no capital gain/loss was booked on account of such sale. Neither fixed asset statement of the assessee indicates any such sale.*

D) *It is seen that the assessee made adjustments on account of arms length mark up. However, the case was not referred to TPO. As per Para 3.2 of CBDT's Instruction No. 3 of 2016, the instant case had to be mandatorily referred to the TPO (the Transfer Pricing Officer) by the A.O after obtaining the approval of Principal CIT. However, the A.O has completed assessment u/s. 143(3) of the Act on 26-12-2016 without referring the matter to Transfer Pricing officer.*

E) *One of the reasons for selection of the case in scrutiny was verification of Commission payment. However, the same was not verified by the A.O during the course of assessment proceedings.*

The assessee had submitted reply to the show cause notice issued under Section 263 of the Act along with annexures and also has filed the written submission during the course of personal hearing. On perusal of the order passed by the PCIT we find that the order is bereft of reasons. We say so, because the discussion starts from paragraph 4 of the order and the findings rendered by the PCIT is in the last five lines of paragraph 4.

The remaining part of the order deals with the power of revision under Section 262 of the Act and the various decisions rendered by the Court and the other high Courts in the country. When the PCIT has formal five queries and the assessee has submitted reply to those queries along with annexures it is expected that the authority should deal with the submission made by the assessee and passed a speaking order. However, the only reason which appears to have been well played in the mind of the PCIT the details were not furnished before assessing officer. The learned Senior Advocate appearing for the appellant points out that such finding is factually incorrect and has drawn our attention to the letter of the assessee dated 20th December, 2016, from which we find not only the assessee has submitted on the merits of the matter but pointed out the legal position and the letter contains as many as seventeen annexures. Therefore, we can safely conclude that the order passed by the PCIT is a non speaking order.

The assesee being aggrieved carried the matter up to the appeal before the Tribunal. On perusal of the order passed by the Tribunal we have no hesitation to hold that the order passed by the Tribunal is also a non speaking order of course the learned Tribunal could not be faulty because it was testing the correctness of the order which was without reasons. This conclusion would be sufficient for us to interfere with the order passed by the Tribunal. However, we note after the order was passed by the PCIT it giving effect to an order passed by the assessing officer dated 28th November, 2019 in which the assessing officer has accepted the stand taken by the assessee except for queries (A) and (E). So far as queries, (B), (C) & (D) the assessing officer has accepted the stand taken by the assessee. Therefore, in our considered view the matter has to be remanded back to the PCIT for a fresh consideration and to pass a speaking order only with regard to queries (A) and (E). For the above reasons the appeal is allowed. The order passed by the Tribunal is set aside and the order passed by the PCIT dated 7th

February, 2019 is also set aside and the matter stands remanded to the PCIT for fresh consideration of queries (A) and (E) alone. The appellant assessee is permitted to file additional submissions before the PCIT after considering the same and affording the personal hearing to the assessee. Fresh order be passed on merits and in accordance with law assigning reasons.

Consequently, the substantial questions of law are left open.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)

Pkd/GH