

OD - 3

ITAT/67/2023
IA No.GA/1/2023
GA/2/2023

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

PRINCIPAL COMMISSIONER OF
INCOME TAX, CENTRAL-I, KOLKATA

-Versus-

M/S. TECHNO TRACOM PVT. LTD.

BEFORE :
THE HON'BLE JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
Date : 27th March, 2023

Appearance :
Mr. Tilak Mitra, Adv.
...for the appellant

Mr. J. P. Khaitan, Sr. Adv.
Mr. Pratyush Jhunjhunwala, Adv.
Mr. Anil Dugar, Adv.
...for the respondent.

The Court : There is a delay of 168 days in filing the appeal.

We have heard Mr. Tilak Mitra, learned counsel for the appellant and Mr. J. P. Khaitan, learned Senior Counsel for the respondent and perused the averments set out in the affidavit filed in support of the application for condonation. We find sufficient cause has been shown for not preferring the appeal within the period of limitation.

Accordingly, the application for condonation of delay (IA No.GA/1/2023) is allowed and the delay in filing the appeal is condoned.

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 18th April, 2022 passed by the Income Tax Appellate Tribunal, "B" Bench, Kolkata (the Tribunal) in ITA No.205/Kol/2021 for the assessment year 2009-10.

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

- (i) *Whether the Tribunal has erred in quashing the revisionary order under Section 263 passed by the Learned Pr. Commissioner of Income Tax as bad in law thereby deleting the addition made on the basis of unexplained cash credit under Section 68 of the Act ?*
- (ii) *Whether the Learned Tribunal has erred in ignoring the discussion and findings rendered by the Principal Commissioner of Income Tax in his order under Section 263 of the Act ?*

We have heard Mr. Tilak Mitra, learned standing counsel for the appellant/revenue and Mr. J.P. Khaitan, learned Senior Counsel assisted by Mr. Pratyush Jhunhunwala and Mr. Anil Dugar, learned Advocates for the respondent/assessee.

The short issue which falls for consideration in this appeal is whether the assumption of jurisdiction by the

Principal Commissioner of Income Tax (PCIT) under Section 263 of the Act was justified and whether the order passed under the said provision was valid and sustainable in law. To find answer to the said query, we need to take note of certain facts.

The original assessment under Section 143(3) of the Act was completed for the assessment year under consideration on 28th March, 2011. The PCIT exercised its jurisdiction under Section 263 of the Act and passed by the order dated 28th March, 2013. Prior to the order being passed under Section 263 of the Act, a search and seizure operation was conducted on the assessee on 18th February, 2013. The assessee challenged the order passed under Section 263 of the Act before the Tribunal. The Tribunal by order dated 1st October, 2019 set aside the order dated 28th March, 2013 passed under Section 263 of the Act and remanded the matter back to the PCIT for a fresh decision. While the matter was pending, the Assessing Officer completed the assessment pursuant to the search and seizure operation under Section 153A read with Section 143(3) by order dated 23rd March, 2015. The assessee moved the Tribunal and filed a miscellaneous application stating that in the light of the order passed under Section 154A dated 23rd March, 2015, the assumption of jurisdiction by the PCIT under Section 263 of the Act was unsustainable. Though the Tribunal rejected the said miscellaneous application by order dated 22nd January, 2020,

there was a direction issued to the Commissioner of Income Tax to consider the argument which was placed by the assessee before the Tribunal in the miscellaneous application before passing the order under Section 263. Thus, the Commissioner was required to consider the effect of the order passed under Section 153A. However, this was ignored by the Commissioner by stating that it is irrelevant and the Commissioner proceeded to pass the order under Section 263 of the Act dated 30th March, 2021. This was impugned before the Tribunal. The Tribunal after taking note of various decisions of the Hon'ble Supreme Court and High Courts and, more particularly, the decision of this Court in the case of *CIT vs. S.M. Oil Extraction Pvt. Ltd.* reported in (1991) 190 ITR 404 (Cal) wherein it was held that the Commissioner is entitled for the purpose of exercising his revisional jurisdiction to look into the whole evidence. The Court explained the expression "record" as used in Section 263 of the Act to be comprehensive enough to include the whole record of evidence on which the original assessment order was based. Further it was held that where any proceeding is initiated in the course of assessment proceedings, having a relevant and material bearing on the assessment to be made and the result of such proceedings was not available with the Income Tax Officer before the completion of the assessment but the result came subsequently, the revising authority (PCIT) is entitled to look into the search material as it forms part of

the assessment records of the particular assessment year. Bearing the above legal principle in mind, the Tribunal proceeded to examine the facts of the case and has recorded the following findings:

"So in the light of the aforesaid ratio of the decision made by the Hon'ble Supreme Court after considering the meaning of '**records**' which has been answered in the light of the Explanation (1) inserted by the Finance Act, 1988, which state that record shall include and shall be deemed always to have been included all records relating to any proceedings under this Act available at the time of examination by the Ld. Pr. CIT or Commissioner. In the light of the aforesaid given in the statute, the Ld. Pr. CIT while calling for and examining the record of any proceeding under this Act was duty bound to look into the records available at the time of examination of the Ld. Pr. CIT while exercising his revisional jurisdiction after the direction of the Tribunal dated 01.10.2019 read with order dated 22.01.2020 had passed the impugned order dated 30.3.2021 wherein he has taken into consideration the order passed by the Tribunal dated 01.10.2019 and 22.01.2020. Before the Ld. Pr. CIT the assessee had brought to his notice about the search which happened in the assessee's premises on 18.02.2015. The Ld. Pr. CIT while passing the impugned order has taken a narrow view by indiciously stating that the Tribunal had set aside the order of the AO dated 28.03.2022 and not that of the AO dated 23.03.2015 and, therefore, he was of the opinion that the order passed by the AO u/s. 153A of the Act dated

23.03.2015 for AY 2009-10 was immaterial and irrelevant which view of Ld. Pr. CIT according to us is ex-facie wrong in the light of the deeming fiction/explanation given for **records u/s. 263 of the Act**. It has been brought to our notice that the Assessing Officer before framing the assessment order u/s. 153A of the Act dated 23.03.2015 had made enquiry into the share capital and premium collected by the assessee during the relevant assessment year (AY 2009-10). Before us the assessee had filed paper book consists of 125 pages and a perusal of which we note that the AO during the re-assessment proceedings u/s. 153A of the Act has asked the assessee to file about the 'nature and source' of the share capital and premium collected by the assessee during the relevant assessment year. Pursuant to the notice u/s. 142(1) of the Act dated 11.11.2014, placed at pages 67 to 68 of the paper book. The assessee had filed the details of shares allotted and documents filed before the ROC as well as the bank statement including the bank book filed. It is noted that after the assessee having filed the details of the twenty five (25) SHARE subscribers, the AO had issued notice u/s. 133(6) of the Act to all the shareholders in order to examine their respective identity, creditworthiness and genuineness which is available from page nos. 72 to 94 of the paper book. It is also noted that all the share subscribers have directly replied to the Assessing Officer (Central Circle) pursuant to the notice u/s. 133(6) of the Act which are available from pages 95 to 119 of the paper book. Thus it is seen that the Assessing Officer had in fact enquired about the nature and source of the share subscribers which all

had contributed tot he share capital of the assessee. It is also noted that the Assessing Officer while passing the order dated 23.03.2015 u/s. 153A/143(3) which is available at pages 16 to 20 of paper book has not drawn any adverse inference against the share capital/premium collected by the assessee during the year under consideration. It should be borne in mind that as per the law for AY 2009-10, if here is any credit appearing in the books of the assessee, and section 68 of the Act is attracted, then the initial burden is on the assessee to prove the 'nature and source' of it and in this case the assessee on enquiry by Assessing Officer albeit [in the second round] had filed the documents pertaining to twenty five (25) share subscribers and the Assessing Officer had verified the veracity of the same by issuing notice u/s. 133(6) of the Act to all the share subscribers and after verification has accepted the share capital and premium of the assessee. In the light of the aforesaid action taken by the Assessing Officer albeit during the search assessment proceedings dated 23.03.2015, it cannot be said that the Assessing Officer has not enquired about the nature and source of the share capital and premium collected by the assessee. Here it has to be taken note that under section 263 of the Act, the Ld. Pr. CIT has to examine all the records pertaining to the assessment year at the time of examination by him, which includes in this case the post-search assessment proceedings dated 23.03.2015 and thereafter only if he finds that the order passed by the AO on any issue is erroneous in so far as it is prejudicial to the interest of the

revenue, then only he may interfere by enhancing/modifying/cancelling the assessment order”.

In our considered view, the finding rendered by the learned Tribunal was perfectly justified as in our opinion the PCIT could not have ignored the order passed under Section 153A of the Act dated 23rd March, 2015 as being immaterial and irrelevant. The Tribunal not stopping with that has also examined as to the exercise undertaken by the Assessing Officer while completing the assessment under Section 153A of the Act and found that the entire records were examined and no adverse inference was drawn against the assessee.

Thus, in our view the Tribunal rightly granted relief to the assessee and the order does not call for any interference.

For the above reasons, the appeal (ITAT/67/2023) fails and is dismissed and the substantial questions of law are answered against the revenue.

Consequently, the connected application for stay (IA No.GA/2/2023) also stands closed.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)