

ITA/5/2018
IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

COMMISSIONER OF INCOME TAX-14, KOLKATA
VERSUS
M/S. ASSAM BENGAL CARRIERS

BEFORE :
THE HON'BLE JUSTICE SURYA PRAKASH KESARWANI
AND
THE HON'BLE JUSTICE RAJARSHI BHARADWAJ
Date : 30th April, 2024.

Appearance:
Mr. Amit Sharma, Advocate
... for the appellant.
Mr. Ananda Sen, Advocate
... for the respondent.

1. Heard Sri Amit Sharma, learned standing counsel for the appellant and Mr. Ananda Sen, learned counsel for the respondent/assessee.
2. This appeal relates to the assessment year 2008-09.

Facts:-

3. Briefly stated facts of the present case are that an assessment order dated 23.08.2010 under Section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act, 1961') for the assessment year 2008-09 was passed by the assessing officer (ACIT, Circle-56, Kolkata) in respect of the assessee determining total income at 'Nil'. Subsequently, the

Commissioner of Income Tax, Kolkata- 21, Kolkata noticed that the assessment order is erroneous and prejudicial to the interest of revenue on certain grounds. Accordingly, a notice dated 26.02.2013 was issued by the Commissioner of Income Tax, Kolkata- 21, Kolkata under the signature of Sri Brij Lal Meena, ACIT, Hqrs-21, Kolkata for the Commissioner of Income Tax, Kolkata. The aforesaid notice dated 26.02.2013 is reproduced below:

*“Office of the Commissioner of Income Tax, Kolkata – XX – Kolkata
No. CIT, Kol-XX1/263/M/S Assam Bengal Carriers/2012-13/4622
Dated 26.02.2013*

*To
The Principal Officer,
M/S. ASSAM BENGAL CARRIERS
40/8, Ballygunje Circular Road,
Kolkata- 700 019.*

Sir,

Sub: Show Cause Notice u/s.263 of the I.T. Act, 1961 in the case of M/s. Assam Bengal Carriers PAN: AAFFA0462R against the order u/s.143(3) of the I.T.Act, 1961 for the A.Y. 2008-09- Matter reg.

In this case, the order YU/s. 143(3) of the Act was passed by A.C.I.T. Circle-56, Kolkata for A.Y. 2008-09 on 23-08-2010, determining the total income at Rs.NIL. Thereafter, it is noticed that:

- i) Dividend income for Rs.5,018/- was claimed to be exempted by the assessee. Relatable expenditure earning such dividend income was calculated to Rs.1,000/- and only Rs.4,018/- was claimed as exempted on account of Dividend income and the same was allowed by the A.O. However, as per provision of section U/s.14A of the I.T.Act, read with the Rule-D, expenditure should have been worked out of Rs.97,315/- (1/2% of average value of investment of Rs.1,94,62,975/-). Thus, it has resulted in underassessment of income of Rs.96,315/-.*
- ii) Further, loss on sale of motor car amounting to Rs.1,93,771/- was wrongly allowed to the assessee as it ceased to exist in the relevant block of assets on the last day of the previous year.*

- iii) FBT of Rs.11,546/- and income Tax of Rs.3,190/- were required to be disallowed as these were pertaining to earlier years.

Consider that the order passed u/s.143(3) of the A.O. is erroneous in so far as it is prejudicial to the interests of the revenue.

You are, therefore, hereby allowed an opportunity of being heard and to show cause as to why the order passed by the A.O. u/s.143(3) for the A.Y. 2008-09 should not be enhanced/modified or fresh assessment be directed accordingly. **The date of hearing fixed on 06/03/2013 at 2.30 P.M.**

I am directed to request you to represent in your case either personally or through authorised representative **on the above mentioned date & time.**

Your Faithfully
Sd/-
(Brij Lal Meena)
ACIT- Hqrs-21, Kolkata
For- Commissioner of Income Tax"

4. Pursuant to the aforesaid notice, the **respondent/assessee appeared before the Commissioner of Income Tax, Kolkata-21 and submitted his explanation/reply on the points noted in the afore-quoted notice.** The Commissioner of Income Tax considered the explanation/submission of the respondent/assessee and passed an order dated 20.03.2013 under Section 263 of the Act, 1961 holding that the assessment order is erroneous and prejudicial to the interest or revenue. Accordingly, the CIT set aside the assessment order and remitted the matter to the assessing officer to pass an order in accordance with the provision of the Act, 1961 after giving due opportunity to the assessee.
5. Aggrieved with the aforesaid order of the CIT(A), the respondent/assessee filed an appeal being ITA no.707/K901/2013 (assessment year 2008-09)

before the Income Tax Appellate Tribunal, Kolkata which has been allowed by the impugned order dated 15.01.2016 holding that “assumption of jurisdiction under Section 263 of the Act, in the present case is not valid since the notice was not signed by the CIT rather it was signed by the ACIT-Hqrs-21, Kolkata”. Accordingly, the ITAT had set aside the order of the CIT and allowed the appeal.

6. Aggrieved with the aforesaid order of the ITAT, the revenue has filed the present appeal.

Submissions:-

7. Learned counsel for the appellant submits that from the language of Section 263 it is clear that the notice issued under Section 263 is not a jurisdictional notice for assumption of jurisdiction rather it is an intimation to the concerned assessee so as to afford an opportunity of hearing. In the present set of facts, the notice was issued by or under direction of the Commissioner of Income Tax-21, Kolkata although it was signed by the ACIT, Hqrs-21, Kolkata with clear intimation to the respondent/assessee to appear before the Commissioner of Income Tax on the date and time fixed. Therefore, the Tribunal has committed a manifest error of law to set aside the order of the CIT passed under Section 263 of the Act, 1961.
8. Learned counsel for the respondent/assessee supports the impugned order of the ITAT and submits that to call for record and to afford an

opportunity of hearing, it was mandatory for the CIT to sent a notice to the assessee under his own signature and since it has not been done, therefore, the notice itself was void *ab initio*, and consequently, the order passed by the CIT under Section 263 of the Act, 1961 is without jurisdiction and bad in law. The ITAT has not committed any error to set aside the aforesaid order of the CIT.

Discussion and Findings :

9. This appeal was admitted by this Court by order dated 19.01.2018 on the following **substantial question of law:**

(i) Whether the decision of the Income Tax Appellate Tribunal is perverse in quashing the proceeding under Section 263 of the Income Tax Act, 1961, for non-signing of the show cause notice by the Commissioner of Income Tax himself ?”

10. We have carefully considered the submissions of learned counsel for the parties and perused the paper book.
11. Before we proceed to examine the rival submissions of learned counsel for the parties, it would be appropriate to reproduce the provision of Section 263 of the Act, 1961, as then existed, as under :

“Revision of orders prejudicial to revenue.

263. (1) *The Commissioner may call and examine the record of any proceeding under this Act, and if he considers that **any order passed therein by the [Assessing] Officer is erroneous** in so far as it is prejudicial to the interests of the revenue, he may, **after giving the assessee an opportunity of being heard** and after*

making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.

[Explanation.- For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,-

- (a) an order passed [on or before or after the first day of June, 1988] by the Assessing Officer shall include-*
 - (i) an order of assessment made by the Assistant Commissioner [or Deputy Commissioner] or the Income-tax Officer on the basis of the directions issued by the [Joint] Commissioner under Section 144A;*
 - (ii) an order made by the [Joint] Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred on, or assigned to, him under the orders or directions issued by the Board or by the Chief Commissioner or Director General or Commissioner authorised by the Board in this behalf under section 120;*
- (b) “record [shall include and shall be deemed always to have included] all records relating to any proceeding under this Act available at the time of examination by the Commissioner;*
- (c) where any order referred to in the sub=-section and passed by the Assessing Officer had been the subject matter of any appeal {filed on or before or after the first day of June,*

1988}, the powers of the Commissioner under this sub-section shall extend [and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal]

[(2) No order shall be made under sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed.]

(3) Notwithstanding anything contained in sub-section (2) an order in revision under this section may be passed at any time in the case of an order which has been passed in consequence of, ought to give effect to, any finding or direction contained in an order of the Appellate Tribunal, [National Tax Tribunal,] the High Court or the Supreme Court.

Explanation.- In computing the period of limitation for the purposes of sub-section (2), the time taken in giving an opportunity to the assessee to be reheard under the proviso to section 1 to 9 which any proceeding under this section is stayed by order or injunction of any court shall be excluded.”

12. The clear mandate of sub-section (1) of Section 263 of the Act, 1961 is that the Commissioner may call for and examine the record of any proceeding under this Act, **if he considers that any order passed therein by the assessing officer is erroneous** so far as it is **prejudicial to the interest of revenue**, he may **after giving the assessee an opportunity of being heard and after making or causing to be made such enquiry as he deems necessary** pass such order thereon as the circumstances of the case justify, including an order enhancing or

modifying the assessment, or cancel the assessment and directing a fresh assessment. The mandatory requirement for passing an order under Section 263(1) of the Act, 1961 is that the order of the assessing officer is erroneous and it is prejudicial to the interests of the revenue. The third requirement is that such an order may be passed by the Commissioner of Income Tax after giving the assessee an opportunity of being heard and after making or causing to be made such enquiry as he deems necessary.

13. The scope of Section 263 of the Act, 1961 has also been explained by Hon'ble Supreme Court in Commissioner of Income Tax, Shimla v. The Greenworld Corporation (2009) 7 SCC 69 [paragraphs 28 and 41], as under:-

*“28. Before, however, advertng to the jurisdictional issue raised by the assessee herein, we may consider the jurisdiction of the Commissioner of Income Tax to issue notice in terms of Section 263 of the Act. **It provides for a revisional power.** It has its own limitations. An order can be interfered with suo motu by the said authority not only when an order passed by the assessing officer is erroneous but also when it is prejudicial to the interests of the Revenue. Both the conditions precedent for exercising the jurisdiction under Section 263 of the Act are conjunctive and not disjunctive. An order of assessment passed by an Income Tax, Officer, therefore, should not be interfered with only because another view is possible.*

*41. The scope of provisions of Section 263 of the Act is no longer res integra. **The power of exercise suo motu revision in terms of***

Section 263(1) is in the nature of supervisory jurisdiction and same can be exercised only if the circumstances specified therein viz. (1) the order is erroneous; (2) by virtue of the order being erroneous prejudice has been caused to the interest of the Revenue, exist.”

14. In Commissioner of Income Tax, Mumbai v. Amitabh Bachchan (2016) 11 SCC 748 [paragraphs 10, 11 and 12], Hon'ble Supreme Court considered the provisions of Section 263 of the Act, 1961 and held that the **power of revision under Section 263 is not contingent on the giving of a notice to show-cause. In fact, Section 263 has been understood not to require any specific show-cause notice to be served on the assessee. Rather, what is required under the said provision is an opportunity of hearing to the assessee. There is nothing in Section 263 to infer the notice under Section 263 to the status of a mandatory show-cause notice affecting the initiation of the exercise of jurisdiction or to require the CIT to confine himself to the terms of the notice and foreclosing the consideration of any other issue or question of fact.** While CIT is free to exercise his jurisdiction of consideration of all relevant facts, full opportunity to controvert the same and to explain the circumstances surrounding such facts, as may be considered relevant by the assessee, must be afforded to him by the CIT prior to the finalisation of the decision. The notice/intimation given under Section 263 is not a jurisdictional notice or notice to assume jurisdiction.

15. Thus, the powers conferred upon the Commissioner of Income Tax under Section 263 of the Act, 1961 is in the nature of supervisory jurisdiction and the same can be exercised in the circumstances specified in Sub-section (1) of Section 263 namely (1) the order is erroneous; and (2) the order is prejudicial to the interests of the Revenue. Another rider contained in Sub-section (1) of Section 263 of the Act, 1961 is that before passing the order, the Commissioner of Income Tax shall give an opportunity of hearing to the assessee and make or cause to be made such enquiry as it deems necessary. Notice under Section 263 of the Act, 1961 is issued by the Commissioner of Income Tax so as to comply with the mandate of “giving the assessee an opportunity of being heard”. Thus, notice issued by the Commissioner of Income Tax under Section 263 of the Act, 1961 is in exercise of his supervisory power. Thus, a notice under Section 263 of the Act, 1961 is not a jurisdictional notice to assume jurisdiction, rather it is an intimation to the assessee so as to give him an opportunity of being heard pursuant to the statutory mandate of Sub-section (1) of Section 263 of the Act, 1961.
16. In the present set of facts, we find that the notice under Section 263 of the Act, 1961 so as to afford opportunity of hearing to the respondent assessee was issued by the Commissioner of Income Tax – 21, Kolkata. However, it was signed by the ACIT, Hqrs – 21, Kolkata for the Commissioner of Income Tax, with a clear stipulation in the notice that he

has been directed by the Commissioner to request the assessee to represent in his case either personally or through authorised representative on the date and time mentioned. Undisputedly, pursuant to the aforesaid notice dated 26.02.2013, the respondent assessee appeared before the Commissioner of Income Tax – 21, Kolkata and submitted its explanation/reply which was considered by the Commissioner of Income Tax and thereafter he passed the order dated 20.03.2013 under Section 263 of the Act, 1961. Thus, the statutory mandate of giving the assessee an opportunity of being heard has been fully satisfied by the Commissioner of Income Tax. The Commissioner of Income Tax has recorded a finding in his order that the assessment order passed by the assessing officer is erroneous and it is prejudicial to the interests of the revenue. Thus, both the requirements of Sub-section (1) of Section 263 of the Act have been satisfied in the order passed by the Commissioner of Income Tax. The Tribunal has committed manifest error of law to set aside the order of the Commissioner of Income Tax on the ground of wrong assumption of jurisdiction due to signing of the notice by the ACIT.

17. For all the reasons aforestated, the impugned order dated 15.01.2016 in ITA No.706/Kol/2013 (assessment year 2008-09) passed by the Income Tax Appellate Tribunal “D” Bench, Kolkata setting aside the order of the CIT dated 20.03.2013 under Section 263, cannot be sustained and is

hereby set aside. The substantial question of law is answered in affirmative i.e. in favour of the revenue and against the assessee.

(SURYA PRAKASH KESARWANI, J.)

(RAJARSHI BHARADWAJ, J.)