

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

ITAT/207/2023
IA NO: GA/2/2023
PRINCIPAL COMMISSIONER OF INCOME TAX, ASANSOL
VS.
M/S. BARDHAMAN DHARMARAJ PAPER MILL PVT. LTD.

BEFORE :

THE HON'BLE THE CHIEF JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE SUPRATIM BHATTACHARYA
Date : 3rd January, 2024

Appearance :
Ms. Smita Das De, Adv.
...for appellant
Mr. Subash Agarwal, Adv.
...for respondent

The Court : This appeal by the revenue filed under Section 260A of the Income Tax Act, 1961 (the Act) is directed against the order dated 10th October, 2022 passed by the Income Tax Appellate Tribunal, 'A' Bench, Kolkata in I.T.A. No. 160/Kol/2021 for the assessment year 2014-15.

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

- a) Whether in the facts and the circumstances of the case the Tribunal was justified in law to quash the order under Section 263 of the said Act without considering the judgement of the Hon'ble Apex Court in the case of N. K.

Proteins Ltd. vs. DCIT wherein the Hon'ble Apex Court observed that addition on the basis of undisclosed income could not be restricted to certain percentage when the entire transaction has been found as bogus ?

- b) Whether in the facts and the circumstances of the case the Tribunal was justified in law to affirm the order of the Assessing Officer despite the fact that the Assessing Officer did not make any enquiry as to the credibility and the genuineness of the transaction made by the assessee ?
- c) Whether in the facts and the circumstances of the case the Tribunal was justified in law to rely upon the decision of the Hon'ble Jurisdictional Calcutta High Court in the case of Excel Commodity and Derivative (P) Ltd. which is distinguishable both in fact as well as in law since in the said case the duty of the Assessing Officer was discussed for due verification of any information available or data uploaded before initiation of the reassessment proceedings whereas in the instant case the order under Section 147 of the said Act had already been passed ?

We have heard Ms. Smita Das De, learned standing Counsel appearing for the appellant/revenue and Mr. Subash Agarwal, learned Counsel for the respondent/assessee.

Two issues arise for consideration in this appeal. The substantial question of law no.(c) as suggested by the revenue pertains to the correctness of the order passed by the learned Tribunal in placing reliance on the decision of this Court in the case of Excel Commodity and Derivative (P) Ltd. vs. Union of India & Ors.,

APOT 132 of 2022, dated 29th August, 2022. The facts of the case which are required to be considered are that the Assessing Officer completed the reassessment by order dated 28th December, 2018 under Section 143(3) read with Section 147 of the Act. By the said order the books of accounts of the assessee to the extent of trade in business were rejected and it was held that the purchases to the tune of Rs.13,36,56,176/- from one M/s. Siddi Enterprise was treated as bogus. Thereafter the Assessing Officer proceeded to estimate the gross profit and fixed the gross profit at 7.85% of the sale of the trade in goods and completed the assessment. The Audit wing of the Income Tax department issued an audit memo and based on which the Principal Commissioner of Income Tax, Asansol (PCIT) issued notice under Section 263 of the Act. One of the allegations against the assessee was that in the inside portal written information has been made available and the PCIT opines that the assessee has made some kind of bogus purchases from four entities. Thus, the language adopted by the PCIT will clearly show that there was no definite conclusion arrived at by the PCIT that the assessee has effected bogus purchases. In this regard the learned Tribunal noted decision of this Court in Excel Commodity wherein Court took into consideration the circular issued by the Central Board of Direct Taxes, dated 22nd August, 2022 giving instruction to the departmental officers with regard to uploading of data and on functionality – portal of the Income Tax department. After noting the said circular, it was held as follows :-

“From the above it is clear that it has come to the notice of CBDT that in several cases information made available/data uploaded by the reporting

entries are not fully accurate due to error of human nature, technical nature etc. Therefore, the department was advised to effect due verification and opportunity of being heard given to the tax payers before initiating proceedings under Section 148/147 of the Act. Thus, in the preceding paragraph we have pointed out the factual position in the case on hand and it appears that proper verification was not done on the information which was available with the assessing officer at the time of issuance of notice under Section 148A(b) of the Act which has led to an erroneous order dated 7th April, 2022 being passed.”

Mr. Subash Agarwal, learned advocate appearing for the respondent/assessee places reliance on the decision of the High Court of Guwahati in the case of Bongaigaon Refinery & Petrochemicals Ltd. Vs. Union of India reported at [2006] 287 ITR 120 (GAU.) with regard to under what circumstances, the jurisdiction under Section 263 of the Act is exercisable and had relied upon the following paragraphs of the said decision :

“17. Entertainment of a view different from the one adopted by the Assessing Officer, if plausible would not clothe the Commissioner with the power to interfere therewith under the said provision of the Act. Differently put, an error within the jurisdiction of the Assessing Officer on an evaluation of the materials available would not be exposed to interference in exercise of suo motu revisional powers under section 263 of the Act. The provision though permits the Commissioner to initiate an enquiry as he may deem necessary does not authorise a roving probe into the facts with the disposition to pick out errors to sustain the eventual interference. This assumes great significance in the context of the statutory framework of the Act outlining the jurisdictional contours of different authorities to adjudicate the issues

as legislatively stipulated. The Commissioner in exercise of his revisional powers cannot arrogate to himself a status to surrogate the other authorities and supplant their roles under the Act. The Commissioner is not a substitute for the other statutorily prescribed fora with codified functions dischargeable in terms of the prescribed procedure in the situations comprehended thereby. The Commissioner, therefore has to be rigorously held to the limits of his suo motu revisional jurisdiction lest any transgression of statutorily ordained prerogatives of other authorities under the Act result from an unbridled exercise of such power. The Act envisages a compartmentalisation in the functioning of the authorities prescribed who have to dwell within the legally stipulated parameters so much so that it would be impermissible to overreach the legislatively mandated frontiers. Any other approach would be antithetical to the scheme and alignment of the Act.

18. The jurisdiction exercisable under section 263 of the Act being supervisory in nature, permitting suo motu review of any assessment already made, the statutorily enjoined sanctions circumscribing the same have to be rigorously construed. The legislative intendment of conditioning the plenitude of the power conferred is manifest in the two preconditions lodged in the section. To sustain the delicate balance between this supervisory and other remedial jurisdictions, as designed by the lawmakers, a constricted connotation and purport of the enabling prerequisites for the exercise of the revisional powers is an imperative necessity.”

As pointed out earlier, the PCIT even at the time of issuing show cause notice under Section 263 was not definite as to whether or not the assessee had effected certain bogus purchases but merely referred to the inside portal and

doubted that there may be chances that the assessee has made bogus purchases from four entities. Thus, the learned Tribunal was fully justified in granting relief to the assessee by referring to the decision in Excel Commodity and Derivative (P) Ltd. Therefore, the substantial question of law no.(c) is answered against the revenue.

With regard to the substantial questions of law (a) and (b) are concerned, they pertain to bogus purchases effected by the assessee from M/s. Siddi Enterprises. The Assessing Officer did not accept the explanation offered by the assessee wherein the assessee pointed out that they had purchased articles from the person registered under the West Bengal Value Added Tax Act, 2003 which has raised sale bill to the assessee for all the sales by mentioning its VAT number and charged Value Added Tax of such purchases. Further, the assessee had stated that they have also mentioned all such purchases in its VAT return for the quarter ended March, 2024 and based on the purchases made from the said Enterprise and purchase bill received from it, the assessee has discharged the onus cast upon them. Further, the assessee contended that they sold all the writing papers to NKR Enterprise who are also registered VAT dealer and the assessee has also made such sales notice, VAT return and therefore the assessee contended that each purchase and sale were genuine and the Assessing Officer did not comment upon the correctness of this stand taken by the assessee but proceeded to hold against the assessee on the ground that those purchases must have been effected from various third parties without bills and an accommodation bill was obtained from Siddi Enterprises. After having come to

such a conclusion the Assessing Officer proceeded to assess the gross profit. In fact, the assessee for the purpose of bringing the matter to finality had agreed for offering the increase in trade in gross profit by 1 to 1½%. The Assessing Officer after considering the entire matter, examining the records estimated the gross profit at 7.85%. It is the submission of the learned Advocate for the respondent/assessee that this amount was highly inflated. The question would be as to whether the manner in which the Assessing Officer completed the assessment could have found fault with by the PCIT by exercising his power under Section 263 of the Act.

The learned Tribunal while considering the correctness of the order of the PCIT has taken note of the various decisions and held that since the purchase and sales have been duly granted, the view taken by the assessing officer was of the plausible view and the reassessment order cannot be said to be erroneous. The basis on which the power under Section 263 was invoked by the PCIT is largely on two grounds, firstly on the ground that an audit memo was issued by the audit department and secondly, by placing reliance the reference to the decision in the case of N.K. Industries Ltd. Vs. DCIT, reported at [2006] 72 taxmann.com 289 (Guj.). The said decision could not have been applied without referring to the facts and circumstances of the case. In fact, paragraph 8 of the judgment would support the case of the respondent/assessee which is quoted hereunder :

“8. So far as the question regarding addition of Rs.3,70,78,125/- as gross profit on sales of Rs.37.08 crores made by the Assessing Officer

despite the fact that the said sales had admittedly been recorded in the regular books during Financial Year 1997-98 is concerned, we are of the view that the assessee cannot be punished since sale price is accepted by the revenue. Therefore, even if 6% gross profit is taken into account, the corresponding cost price is required to be deducted and tax cannot be levied on the same price. We have to reduce the selling price accordingly as a result of which profit comes to 5.66%. Therefore, considering 5.66% of Rs.3,70,78,125/- which comes to Rs.20,98,621.88 we think it fit to direct the revenue to add Rs.20,98,621.88 as gross profit and make necessary deductions accordingly. Accordingly, the said question is answered partially in favour of the assessee and partially in favour of the revenue.”

The decision in the case of the Principal Commissioner of Income Tax-17 Vs. M/s. Mohammed Haji Adam & Co. in ITA No.1004 of 2016 dated February 11, 2019 would also support the case of the assessee and the relevant paragraph of the said decision is quoted hereunder :

“8. In the present case, as noted above, the assessee was a trader of fabrics. The A.O. found three entities who were indulging in bogus billing activities. A.O. found that the purchases made by the assessee from these entities were bogus. This being a finding of fact, we have proceeded on such basis. Despite this, the question arises whether the Revenue is correct in contending that the entire purchase amount should be added by way of assessee’s additional income or the assessee is correct in contending that logic cannot be applied. The finding of the CIT(A) and the Tribunal would suggest that the department had not disputed the assessee’s sales. There was no discrepancy between the purchases shown by the assessee and the sales declared. That being the position, the Tribunal was correct in coming to the conclusion that the

*purchases cannot be rejected without disturbing the sales in case of a trader. The Tribunal, therefore, correctly restricted the additions limited to the extent of bringing the G.P. rate on purchases at the same rate of other genuine purchases. The decision of the Gujarat High Court in the case of **N.K. Industries Ltd.** (supra) cannot be applied without reference to the facts. In fact in paragraph 8 of the same judgement the Court held and observed as under -*

“So far as the question regarding addition of Rs.3,70,78,125/ as gross profit on sales of Rs.37.08 Crores made by the Assessing Officer despite the fact that the said sales had admittedly been recorded in the regular books during Financial Year 1997-98 is concerned, we are of the view that the assessee cannot be punished since sale price is accepted by the revenue. Therefore, even if 6% gross profit is taken into account, the corresponding cost price is required to be deducted and tax cannot be levied on the same price. We have to reduce the selling price accordingly as a result of which profit comes to 5.66%. Therefore, considering 5.66% of Rs.3,70,78,125/- which comes to Rs.20,98,621.99 we think it fit to direct the revenue to add Rs.20,98,621.88 as gross profit and make necessary deductions accordingly. Accordingly, the said question is answered partially in favour of the assessee and partially in favour of the revenue”.

In the light of the law as could be culled out from the aforementioned decisions, and also the decision of this Court in PCIT Vs. Subarna Rice Mill in ITA/196/2015, we find there is no error in the order passed by the learned Tribunal setting aside the order passed by the PCIT under Section 263 of the Act.

For the above reasons, the substantial questions of law (a) and (b) are also answered against the appellant/revenue.

In the result, the appeal is dismissed and the substantial questions of law are answered against the appellant/revenue.

The stay application IA NO: GA/2/2023 also stands dismissed.

(T.S. SIVAGNANAM)
CHIEF JUSTICE

(SUPRATIM BHATTACHARYA, J.)

SN/S.Das
AR(CR)