

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX APPEAL NO.332 OF 2016

Shoreline Hotel Private Limited ... Appellant

Vs

The Commissioner of Income Tax-Central-1 ... Respondents

Mr.Nitesh Joshi a/w Mr.Atul Karsandas Jasani for the Appellant.
Mr.P.C. Chhotaray for the Respondent.

**CORAM : S.C. DHARMADHIKARI &
B.P.COLABAWALLA, JJ.**

TUESDAY, 11TH SEPTEMBER, 2018

P.C. :

1 By this Appeal, the assessee challenges the order passed by the Income Tax Appellate Tribunal Bench at Mumbai dated 19th June 2015 for the Assessment Year 2011-2012.

2 Mr.Nitesh Joshi appearing in support of this Appeal would submit that the questions proposed at pages 23 and 24 of the paper-book are substantial questions of law.

3 He would submit that they squarely arise from the order passed by the Tribunal and impugned in this Appeal.

4 It is stated that the appellant is a company engaged in the business of running of a Five Star Hotel called "Hotel Marine Plaza". In order to run the hotel in an efficient manner and to attract guests, the appellant is required to maintain a high standard of operations and it, therefore, purchases numerous goods and articles from various suppliers from time to time. All payments are made by the appellant by account payee cheques and the purchases are supported by bills and delivery challans in some cases. During the assessment proceedings, the Assessing Officer called upon the appellant to prove the genuineness of the purchases aggregating to Rs.3,60,24,582/-. Though voluminous documentary evidence was produced to establish the genuineness of these purchases, the Assessing Officer was not satisfied therewith and asked the appellant to show cause why this entire amount should not be assessed as non-genuine purchases. With a view to buy peace and to avoid unending litigation, the appellant/assessee offered that the gross profit rate of the said purchases may be assessed as income. After considering the submissions of the appellant/assessee,

the Assessing Officer passed the Assessment Order dated 28th March 2014 under section 143(3) read with section 145(3) of the Income Tax Act 1961 and held that 15% of the said purchases be assessed as income. Though the said view was taken by the Assessing Officer after a careful consideration of the facts and circumstances of the case, the respondent/Commissioner of Income Tax took a view that this assessment is erroneous insofar as it is prejudicial to the interest of the Revenue and for that purpose, invoked section 263 of the Income Tax Act 1961. He passed an order dated 27th January 2015 to this effect.

5 The view of the Commissioner was that the Assessing Officer ought to have treated the entire purchases as non-genuine and not assessed only 15% thereof.

6 Such an order was challenged before the Tribunal and by the impugned order, the Tribunal has dismissed the Appeal.

7 Mr.Joshi would submit that the respondent had no jurisdiction to pass the order impugned before the Tribunal. The legal pre-requisite or pre-requirement thereof is that the Commissioner

should be satisfied that the order is not only erroneous, but prejudicial to the interest of the Revenue. There is no such finding recorded, but the Commissioner has substituted his view with that of the Assessing Officer. This course is impermissible in law and that is how the questions proposed would arise in this case and the Appeal be admitted.

8 Reliance is placed on the following judgments and orders of this Court:-

i) *Commissioner of Income-Tax Vs. Gabriel India Ltd.* [(1993) 203 ITR 110 (BOM)];

ii) *MOIL Ltd. Vs. Commissioner of Income Tax* [(2017) 396 ITR 244(BOM)];

iii) *The Commissioner of Income Tax Mumbai Vs. M/s Maharashtra Hybrid Seeds Co. Ltd.* [**Income Tax Appeal No.47 of 2002 decided on 4th September 2018**]

9 On the other hand, Mr.P.C. Chhotaray appearing for the respondent would submit that the order of the Commissioner speaks for itself. He was satisfied that the revisional power ought to be exercised so as to prevent a huge revenue loss. Secondly, he was satisfied that the order of the Assessing Officer was erroneous and prejudicial to the interest of the Revenue. This is not a case of substitution of the views

of the Assessing Officer, but a clear case where the revisional power has been exercised to correct the assessment, which is *ex-facie* illegal and erroneous.

10 With the assistance of both counsel, we have perused the Appeal paper-book and the annexures thereto, including the order of the Assessing Officer and that of the Commissioner.

11 It is evident from the order passed by the Assessing Officer that prior to the same being passed and promulgated, the Assessing Officer issued a communication dated 20th February 2014 to the appellant/assessee. In that he relied upon the information received from the Sales Tax Department of the Government of Maharashtra. That communication and information is in relation to certain parties, who have been issuing bills and accommodation entries so as to facilitate evasion of taxes. These parties were the modes or medium through which a huge sum due and payable as tax was evaded. Thus, the transactions with them are not genuine and they have merely accommodated the parties like the appellant/assessee. No goods have been supplied to them. Twenty Five (25) such entities are named in

this communication and, therefore, the appellant is called upon to furnish details and give clarifications with regard to the transactions with these parties. It is evident that the Assessing Officer called for supporting documentary evidence which, *inter alia*, means copies of purchase orders and mode of dispatch of goods, copy of the ledger of the party with invoices raised, details of payment made with copy of the bank account from where the payment was made and such other and further relevant details. Pertinently in this communication, the Assessing Officer pointed out that his office has issued notice under section 133(6) of the Income Tax Act 1961 to 16 of such parties, but the notices have been returned back by the postal authorities with remarks “Not known”. Further, a personnel was deputed to serve the notice by hand delivery in person. He also not been able to locate these parties.

12 In the circumstances, the assessee furnished information on 18th March 2014 and purported to give clarification. It is stated that the transactions were genuine and how they can be termed as genuine is then pointed out by relying upon the purchases of goods, which are plumbing and furniture items, painting and building items from some of

the parties. Then there is stationary and guest supplies items. The photo-copies of the purchase bills, ledger account with PAN number, bank statements etc. have been forwarded and reliance was placed on the books of account of the assessee in that regard. The Assessing Officer then took on record the explanation of the assessee and also referred to the reliance placed by the assessee on the judgments supra. After all this, he proceeded to make the Assessment Order, copy of which is at Exhibit H to this paper-book. In regard to issue of non-genuine purchases, the Assessing Officer referred to his communication as also the clarifications/reply of the assessee. He specifically recorded that the assessee failed to furnish relevant information and also failed to disclose true and fair affairs of its business. Therefore, Mr.Rahim Maredia, Director of the assessee/appellant was summoned and his statement on oath was recorded in terms of section 131 of the Income Tax Act 1961. The matter pertained to non-genuine bills to the extent of Rs.3,60,24,582/-. This Director was also called upon to give an explanation. The explanation was that these are genuine purchases or business transactions, but the matter is very old and the assessee company would not be able to produce the parties before the Assessing Officer. Thus, neither complete details were produced nor the parties

could remain present before the Assessing Officer. Shri Maredia requested that the company is desirous to buy peace of mind and avoid protracted litigation. The company agreed that gross profit on such transactions can be offered to tax. He requested that no penal action be taken. It is thereafter that the Assessing Officer followed and as a matter of consistent policy that though the books of account of the assessee are liable to be rejected but the gross profit of the assessee in the year under consideration is 10.20% whereas in the preceding two Assessment Years i.e. Assessment Year 2009-2010 it is 13.31% and for Assessment Year 2010-2011, it is 12.93%. The average of this comes to 12.12%. Taking the base of this percentage, gross profit was estimated on the above transaction at 15%. That is why a sum of Rs.54,03,687/- was added to the total income of the assessee. Even penal action was initiated. It is in these circumstances the Assessing Officer passed the order.

13 Thereafter the assessee attempted to rectify this order and sought rectification thereof, but in the meanwhile, the Commissioner-respondent before us intervened. The Commissioner issued the notice in that regard dated 4th September 2014, copy of which is at Exhibit J

page 131 of the paper-book. He has stated in his notice that the entire alleged bogus purchases should have been disallowed. Pertinently because the assessee is engaged in running a hotel and there is no corresponding sales against these purchases. The Assessment Order, therefore, was termed by the Commissioner as erroneous and prejudicial to the interest of the Revenue. That is why, he/she issued a show cause notice calling upon the appellant/assessee to give an explanation as to why recourse to section 263 of the Income Tax Act 1961 be not made in this case.

14 On 10th December 2014, the assessee replied to this communication/show cause notice and reiterated its stand before the Assessing Officer. It supported the assessment by saying that every single transaction has been referred by the Assessing Officer and he has also taken into consideration the stand of the assessee. That is why no action under section 263, much less of revising of assessment should be taken.

15 There were two detailed replies filed. The categorical assertion therein is that the Assessing Officer has passed the Assessment

Order after seeking of the information. He was satisfied with the explanation. That since the record is very old, but the assessee wanted to buy peace, it allowed the Assessing Officer to make an estimate of profits. This is, therefore, not a order which can be termed as erroneous and prejudicial to the interest of the Revenue, more so, when the Assessing Officer has considered all the materials before him and satisfied himself about the allowability of the purchases.

16 The Commissioner was not satisfied with this detailed explanation of the assessee. The Commissioner came to the conclusion that the assessee has not disputed that the parties from whom the purchases were claimed to have been made are those whose names appear on the website of the Sales Tax Department as accommodation entry providers. That is why the Assessing Officer called for separate details and they were provided to him. The Assessing Officer is also to investigate in the sense that he/she has to ascertain the truth by due inquiry. If there is failure to make such inquiry, then, his/her order is erroneous insofar as it is prejudicial to the interest of the Revenue. With regard thereto, reference is made to the notice issued by the Assessing Officer to the assessee seeking clarification and explanation.

It is clear that if the Value Added Tax Authorities have declared certain parties or suppliers/dealers as 'hawala operators', then, that is a good ground to initiate the investigation. It is in these circumstances, the Commissioner did not agree with the Assessing Officer as also the assessee/appellant before us. There are reasons assigned, which to our mind appear to be cogent and satisfactory. The Commissioner held that once the assessee could not produce any material nor he could ensure the presence of the supplier before the Assessing Officer, citing difficulties and agreeing to addition of gross profit on the purchases would mean that the Assessing Officer was expected to complete the exercise in accordance with law. There was no reason for the Assessing Officer to accommodate the assessee in the manner done. His order was termed as erroneous inasmuch as it is prejudicial to the interest of the Revenue.

17 The Tribunal, in the impugned order, has upheld this view of the Commissioner and once again detailed reasons have been assigned to reject the contentions of the assessee. In paragraph 9 of the order under challenge, the Tribunal has referred to the records. It also referred to all the relevant judicial decisions in the field. It also referred

to the Value Added Tax and Sales Tax Authorities communications. It also referred to the records produced by the assessee in the form of certain details with regard to the purchases, the bills and copies of the invoices. The Tribunal held that the Assessing Officer did not make any inquiry with regard to the expenses claimed by the assessee. In fact, no inquiry was made for instance in relation to certain purchases which are claimed to be of furniture items. Whether the furniture was actually acquired and installed and whether the party providing the goods was dealing in furniture items has thus not been ascertained. Similar is the position with regard to those dealers and suppliers who allegedly supplied plumbing, electrical, painting and stationary items etc. Thus, these are nothing but bogus purchases. We are, therefore, not in agreement with Mr.Joshi that the Tribunal has committed any error of law apparent on the face of the record. Mr.Joshi would urge that this is a clear case of the Commissioner substituting his views with that of the Assessing Officer. In that regard, reliance is placed upon the judgment of this Court delivered in the case of *Commissioner of Income Tax Vs. Gabriel India Ltd.* (supra).

18 The facts in that case were that in the Assessment Year

under consideration, the assessee before the Court claimed deduction of certain amount described as 'plant-re-lay-out expenses'. The Income Tax Officer made a query with regard to this expenditure. It was explained by the assessee by a writing/letter and the explanation was that these expenses were incurred in connection of the merger of two existing plants for the manufacturing of shock absorbers. These plants were located side by side at its factory at Mulund. As the lay-out of the two plants was not conducive, the Management merged those two plants and re-laid-out the same according to the flow of operations conducive to more production. The exercise of merging the two plants necessarily called for relocation of the facilities as well as adapting the existing structure and other services necessary for the plant as a whole. That is how the expenditure was incurred. This was a business expenditure allowable as deduction in computation of the assessee's income. This explanation was accepted by the Income Tax Officer and the deduction as claimed by the assessee was allowed.

19 It is after completion of this assessment, the Commissioner sought to revise by exercising powers under Section 263 of the Income Tax Act 1961. The Commissioner faulted the assessment by concluding

that it was on a presumption that it was a revenue expenditure whereas in his view, the expenditure was in the nature of capital expenditure.

20 It is in this backdrop that this Court referred to the detailed arguments of both sides, the ambit and scope of the powers conferred in the Commissioner under section 263 of the Income Tax Act, 1961 and made the observations so also recorded the conclusions heavily relied upon by Mr.Joshi. They are to be found at pages 114 and 115 of this report.

21 There is absolutely no quarrel with regard to the legal proposition. The application of that would depend upon facts and circumstances of each case. There was never any doubt that Gabriel India Ltd. was in the manufacture of shock absorbers. There was never any dispute that there were plants located side by side at its factory at Mulund. There was never any dispute that the items were manufactured at these plants. There was a merger of those two plants and, therefore, re-lay-out expenses were incurred and they were claimed as business expenses. The Commissioner could not have then launched a fishing and roving inquiry in matters which are concluded.

Merely because another view could have been taken by the Income Tax Officer is thus no ground to revise the assessment. This is, therefore, a clear case of substitution of views. The jurisdictional facts enabling exercise of powers are thus lacking. That is how this Court answered the question referred to it in affirmative, namely, in favour of the assessee and against the Revenue. The facts, therefore, were clearly summarized at page 117 of the report.

22 In the second order relied upon in the case of *Manganese Ore India Ltd. Vs Commissioner of Income Tax* (supra), the assessee is a public sector company. It is wholly owned by the Government of India. It is in the business of extraction and sale of manganese ore, generation of electricity and manufacturing and sale of certain items, including ferro minerals. It filed an electronic return for the Assessment Year 2009-2010 and declared certain income. A notice was issued under Section 142(1) of the Income Tax Act 1961 pertaining to this Assessment Year for furnishing the details in respect of 20 items. The Assessing Officer called upon the assessee to furnish a detailed note of expenditure for one of the item No.9-corporate social responsibility alongwith the bifurcation of the expenses under different heads. That is

how the bifurcation under several heads towards discharge of this responsibility was provided by the assessee. The Assessing Officer allowed certain claims without making a specific reference to them in the Assessment Order and disallowed some after giving detailed reasons for the disallowance. The Commissioner invoked the powers under Section 263 of the Income Tax Act 1961 after holding that the Assessing Officer has passed the Assessment Order without making any inquiry regarding the allowability of the expenses claimed by the assessee under the head 'corporate social responsibility'. He termed the order as erroneous and prejudicial to the interest of the Revenue. He remanded the matter to the Assessing Officer to carry out fresh assessment in respect of this claim.

23 The Tribunal did not interfere with this order, but the Appeal of MOIL Ltd. was allowed by this Court by holding that wherever the claims were disallowable, they have been discussed in that Assessment Order. There was discussion or reference in respect of the claims that were allowed, but by that alone it cannot be said that the expenses were not incurred under this head or the claim was allowed without making any inquiry. The query pertaining to corporate

social responsibility was exhaustive. It was answered with requisite details. Under each head of the claim in respect of this corporate social responsibility, the data and the details were provided. Once the Assessing Officer was satisfied with this explanation and particularly coming from a public sector undertaking, that the Division Bench held that there is no scope for invoking Section 263 of the Income Tax Act 1961. Once again, this judgment is rendered in the peculiar facts and circumstances. This was a clear case where only one of the item i.e. item No.9 was taken up out of about 20 items in relation to the corporate social responsibility. That the expenses were incurred and the expenditure as well in relation to the discharge of such a social responsibility and by making contribution towards health, environment, sports, education activity and for each of these different heads, particulars were given in respect of every minor and major expenses, then, the explanation running into about 8 paragraphs and 5 pages led to the Assessing Officer's view, that there was no justification in then interfering with such detailed explanation. Once again this was not a case where the power under section 263 could have been exercised at all. That provision was not permissible to be invoked in the peculiar facts and circumstances pertaining to MOIL Ltd.

24 Once this view is taken on facts, then, our recent order delivered in *The Commissioner of Income Tax Mumbai Vs. M/s Maharashtra Hybrid Seeds Co. Ltd.* (supra) as well is of no assistance. There, the Division Bench found that firstly, the assessee had no opportunity of meeting additional grounds on which the Assessment Order was sought to be revised in the notice issued by the Commissioner. In the Assessment Order, there was no reference to these grounds, but the Commissioner sought to revise the assessment also on these grounds pertaining to which, he did not mention anything in his notice preceding his order. This, and the other grounds on merits brought the matter entirely within the purview of law laid by this Court in the case of *Gabriel India Ltd.* (supra). It is in these facts and circumstances that the question referred was answered in favour of the assessee and against the Revenue.

25 Once we do not find that in this case there is any substitution of the views of the Assessing Officer, but there was a clear failure to abide by the statutory mandate and by making an estimate so also accepting a vague and general explanation of the assessee, the assessment has been made, then, it will undoubtedly be erroneous

insofar it is prejudicial to the interest of the Revenue. It is erroneous insofar as the same is prejudicial to the interest of the Revenue because the Assessing Officer has failed to carry out his statutory obligation and duty and failed to discharge it by holding further probe and inquiry. More so, when the assessee virtually had no answer to his notice. Secondly, very reliable and genuine information was received from the VAT and Sales Tax authorities with regard to the operations with these dealers styled as 'hawala traders'. This certainly brought the matter within the purview of section 263 of the Income Tax Act 1961. No error of law or perversity is committed either by the Commissioner or the Tribunal. We do not find that their order raised any substantial questions of law.

26 The Appeal is, therefore, dismissed, but without any order as to costs.

B.P. COLABAWALLA, J.

S.C. DHARMADHIKARI, J.