

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CIVIL APPLICATION NO. 2818 of 2018**

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HARYANA PAPER DISTRIBUTORS PVT LTD

Versus

PR COMMISSIONER OF INCOME TAX 2

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Appearance:

MS VAIBHAVI K PARIKH(3238) for the PETITIONER(s) No. 1

MRS MAUNA M BHATT(174) for the RESPONDENT(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE AKIL KURESHI**

and

HONOURABLE MR.JUSTICE B.N. KARIA

Date : 16/04/2018

ORAL ORDER

(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)

1. Petitioner has challenged a notice dated 22.11.2017 issued by the respondent-Principal Commissioner of Income Tax, Ahmedabad under section 263 of the Income Tax Act, 1961 ['the Act' for short].

2. Brief facts are as under:

Petitioner is a private limited company and is engaged in the business of dealing in paper and board. For the assessment year 2011-12, the petitioner had filed return of income. The assessee had shown purchases worth Rs. 4.33 crores from one M/s. Tarini Trading Pvt. Ltd. During the course of

reassessment proceedings, the Assessing Officer doubted the genuineness of such purchases on the basis of information received from the VAT department at Mumbai. The Assessing Officer called upon the assessee to prove such purchases and desired to examine the vendor i.e. representative of M/s. Tarini Trading Pvt. Ltd. The assessee was accordingly asked to produce such representative. Assessee complied with such directions. Shri Rajkumar Sharma, Director of M/s. Tarini Trading Pvt. Ltd. appeared before the Assessing Officer. His statement was recorded under section 131 of the Act. In such statement, he agreed that the sales worth Rs. 4.33 crores were made to the assessee during the year under consideration. However, Assessing Officer noticed from the supporting documents which included bills and delivery challans submitted by Director of M/s. Tarini Trading Pvt. Ltd. that the goods in question were directly delivered to the persons as instructed by the assessee. Though the bill was raised in the name of the assessee, delivery was made directly to the ultimate purchaser of the goods from the assessee. Assessing Officer was therefore, of the opinion that the assessee had not incurred any expenditure of transportation in such dealings. He therefore proposed addition of Rs. 17.33 lacs (rounded off) and called upon the assessee to respond. The assessee objected to such addition raising several contentions. In the alternative, the assessee pointed out that it had already disclosed profit @ 1.79% from such trading of goods purchased from M/s. Tarini Trading Pvt. Ltd. If the Assessing Officer was of the opinion

that the assessee's profit from such dealings should be at the rate of 4 % of the turnover, the profit already shown should be adjusted.

3. The Assessing Officer accepted the assessee's later contention and while proposing addition at the rate of 4% GP rate on the purchase of Rs. 4.33 crores, granted adjustment of the already offered GP at the rate of 1.79%. Eventually, he has scaled down his addition from Rs. 17.33 lacs as originally proposed, to Rs. 9.57 lacs made in the order of assessment.
4. The assessee carried the matter in appeal before the Commissioner (Appeals). The assessee desired that the entire addition be deleted. While this issue was thus pending before the Appellate Commissioner, the present respondent issued the impugned notice seeking to take the order of assessment in suo motu revision. His sole ground was that the Assessing Officer having held that the entire purchase of Rs. 4.33 crores from M/s. Tarini Trading Pvt. Ltd. being bogus, had erred in limiting the addition to only Rs. 9.57 lacs on the basis of gross profit ratio.
5. While this notice was pending and the petitioner had yet to file reply to the notice, the Appellate Commissioner heard and decided the petitioner's appeal against the order of assessment on 05.01.2018. In such order, he held that the Assessing Officer could not have made the addition of Rs. 9.57 lacs on GP basis. His observations were as under:

“2.3 I have carefully considered the facts of the case, assessment order and submission of the appellant. The AO has made the addition of rs. 9,57,635/- by estimating the G.P @ 4% on the purchase of Rs. 4,33,31,886/- made from M/s. Tarinin Trading Pvt. Ltd. The AO has reopened assessment on the basis of information from Sales Tax Department that appellant has purchased goods from M/s. Tarini Trading Pvt. Ltd. who is indulged in issuing bills without transaction of goods. The AO during the course of reassessment examined the accounts of the appellant and summoned the director of M/s. Tarini Trading Pvt. Ltd and held that the purchase from M/s. Tarini Trading Pvt. Ltd as genuine. However, the AO found that the purchase made from above concern has been directly sold and delivered to third party on the instruction of appellant. In view of this, AO held that appellant has not incurred any expenditure on this transaction and the AO estimated a profit @ 4%. As the appellant has shown profit @ 1.79%, the AO added difference of 2.21% of Rs. 4,33,31,886/- in the total income as G.P.”

6. Armed with this decision of the Appellate Commissioner, the petitioner filed a detailed reply to the impugned show-cause notice on 13.02.2018. In such reply, the assessee took various contentions, principal being that the order of assessment was neither erroneous nor prejudicial to the interest of the Revenue and further that the Appellate Commissioner having already granted relief to the assessee, on this very ground, on the principal of merger also, the revisional powers would not be available.
7. Appearing for the petitioner, counsel Mr. Hemani raised two principal contentions:

(i) That the Commissioner was wrong in observing that the Assessing Officer had held that the purchases were bogus. This was contrary to the findings of the Assessing Officer and the impugned notice thus, proceeded on erroneous factual premises;

(ii) That the Assessing Officer had made part additions on this very issue. The assessee had carried the matter before the Appellate Commissioner who had deleted such additions. In terms of clause (c) to Explanation 1 of section 263 of the Act and on the principal of merger, the respondent now cannot exercise revisional powers. Counsel relied on the decision of this Court in case of **Commissioner of Income Tax vs. Nirma Chemicals Works P. Ltd.** reported in **309 ITR 67**.

8. On the other hand, learned counsel Ms. Bhatt opposed the petition contending that the petitioner has approached at a stage where the Commissioner has merely issued a show-cause notice. Prima facie it emerges from the record that the order passed by the Assessing Officer was erroneous and prejudicial to the interest of the Revenue. She lastly contended that the issue of the purchases made by the petitioner from M/s. Tarini Trading Pvt. Ltd. being bogus, was not part of the proceedings before the Appellate Commissioner.

9. We have recorded the broad controversy and the different stages through which the matter proceeded. To recapitulate,

relevant facts, in the reassessment proceedings the assessee's purchases from M/s. Tarini Trading Pvt. Ltd. to the tune of Rs. 4.33 crores came up for detailed examination by the Assessing Officer. He examined the Director of the said seller who appeared before him and confirmed the sales. The Assessing Officer did not dispute this transaction any further while accepting this factum of the genuineness of the purchases made by the petitioner. He noticed that the goods were delivered directly to the petitioner's purchaser and the petitioner was not billed for such transportation. In his opinion therefore, the petitioner should have disclosed higher profit since he was rid of the transportation charges. He put the petitioner to notice and made addition @ 4% GP on the gross turnover. In the process, he gave benefit of the profit already disclosed by the petitioner.

10. Two things thus immediately become clear. First that the Assessing Officer did not hold that petitioner's purchases from M/s. Tarini Trading Pvt. Ltd. were bogus. In fact, he held to the contrary accepting the evidence produced by the petitioner mainly in the form of the statement of the Director of M/s. Tarini Trading Pvt. Ltd. that the purchases were made. It was only after Assessing Officer had believed that the purchases were made that the question of transportation of the goods by the assessee or some one else would arise. Secondly, he made limited addition on the premise that when the petitioner was

not required to bear the transportation cost, his profit from such dealings would be higher than normal.

11. The Commissioner in the impugned show-cause notice thus committed an error in recording that the Assessing Officer had held that the purchases were bogus. This very foundation for issuance of the notice was incorrect. His further observations were merely consequential in nature. In his opinion, when the Assessing Officer had found the purchases to be bogus, there was no question of limiting the addition on the basis of GP ratio. When we find that the Commissioner was wrong in its very foundational fact, the consequential observations, which are more in the nature of corollary, cannot survive.

12. Equally importantly, the issue itself had travelled before the Appellate Commissioner at the hands of the assessee. To the extent, the Assessing Officer rejected the assessee's request for making no additions, the assessee carried the matter in appeal. Appellate Commissioner deleted even the limited additions made by the Assessing Officer. The limited additions made by the Assessing Officer and the larger additions proposed by the Commissioner in the impugned notice are inextricably inter linked. The Commissioner argues that the entire purchases were bogus. The Assessing Officer accepted the purchases as genuine but added certain amount on the premise that the assessee's profit from such dealings would have been higher than disclosed. The entire issue was at large before the

Appellate Commissioner. It is well known that the Commissioner (Appeals) while hearing the assessee's appeal has powers to even enhance the assessment. If he was of the opinion that not only limited additions made by the Assessing Officer but much larger additions were justified, he could have certainly exercised such powers, of course after putting the assessee to notice. In this context, we may refer to clause (c) of Explanation 1 to sub-section (1) of section 263 of the Act. As is well known sub-section (1) of section 263 of the Act empowers the Principal Commissioner or the Commissioner to call for and examine the record of any proceeding and revise the same if he considers that the order passed therein by the Assessing Officer was erroneous insofar as it is prejudicial to the interest of the Revenue. Clause (c) of Explanation 1 of sub-section (1) provides that for removal of doubts it is hereby declared that, for the purpose of the said sub-section,-

“(c) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal [filed on or before or after the 1st day of June, 1988], the powers of the [Principal Commissioner or] 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.]”

13. Clause (c) of Explanation 1 may be worded in a manner as suggesting the extent of the powers of the Commissioner for taking an order in revision, its effect is of circumscribing such

powers in cases where the order passed by the Assessing Officer has been subject matter of any appeal and such subject matter has been considered and decided in such appeal. This provisions thus statutorily recognizes the principle of merger and avoids any conflict of opinion between two quasi judicial authorities of the same rank. This issue has been considered at length by Division Bench of this Court in case of **Nirma Chemicals Works P. Ltd. (supra)**. It was held as under:

“20. The stand of the revenue that the assessment order was silent as regards eligibility or otherwise of section 80-I of the Act cannot thus be accepted. As noted hereinbefore the entire section lays down a complete codified scheme in itself for deciding not only the eligibility but also for the computation of the relief to which the assessee is entitled. When the section talks of profits and gains derived from an industrial undertaking the requirement is in relation to the industrial undertaking to which the section applies and which fulfills all the conditions laid down in sub-section (2) of section 80-I of the Act. It is not possible to read the provisions in any other manner whatsoever. Hence, the contention that the eligibility or otherwise u/s.80-I of the Act was never the subject matter of Appeal requires to be rejected. The Tribunal thus committed an error in law in coming to the conclusion that the prohibition imposed by Explanation (c) to section 263 of the Act would not be applicable.”

14. When we therefore hold that the Commissioner had no jurisdiction to exercise revisional powers, asking the petitioner to submit to said impugned notice does not arise. Impugned notice is therefore set aside.

15. The petition is disposed of accordingly.

(AKIL KURESHI, J)

(B.N. KARIA, J)

JYOTI V. JANI

