IN THE HIGH COURT OF JUDICATURE AT CALCUTTA

SPECIAL JURISDICTION (INCOME TAX)

ORIGINAL SIDE

RESERVED ON:13.12.2022
DELIVERED ON: 23.12.2022

CORAM:

THE HON'BLE MR. JUSTICE T.S. SIVAGNANAM

AND

THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA

ITAT/211/2022

IA NO. GA/01/2022

PRINCIPAL COMMISSIONER OF INCOME TAX 1, KOLKATA

VERSUS

M/S. BRITANNIA INDUSTRIES LIMITED

Appearance:-
Mr. Amit Sharma, Adv.

.....For the Appellant.

Mr. R.K. Muraka, Sr. Adv.
Ms. Sutapa Roy Choudhury, Adv.
Ms. Aratrika Roy, Adv.

.....For the Respondent.

JUDGMENT

(Judgment of the Court was delivered by T.S.SIVAGNANAM, J.)

1. This appeal by the revenue filed under Section 260A of the Income Tax Act, 1961(the Act) is directed against the order dated 28.03.2022 passed by the Income Tax Appellate Tribunal "B" Bench Kolkata in ITA No. 1501/Kol/2021 for the assessment year 2016-2017.

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

(i) Whether the Learned Tribunal is justified in setting aside the order under Section 263 of the said Act passed on the ground that the Assessing Officer had already conducted enquiry on the issues on which the order under Section 263 of the Income Tax Act, 1961 was passed, when the order of Assessing Officer is erroneous and bases on non application of mind as well as against the provisions of law and when no such embargo has been put in the language of the section that when the Assessing Officer passed the order after conducting enquiry it cannot be reviewed and, the intention of the legislature was never such so as to render the revenue remedies against erroneous orders of the Assessing Officer or to make the revenue suffer a continuous wrong?

(ii) Whether the provisions of the Section 263 of the said Act can be invoked in case where the Assessing Officer though makes thorough enquiry, ignores to appreciate that deductions claimed by the assessees are not in consonance with the provisions of law and it is found that the Assessing Officer failed to apply his mind?

(iii) Whether the Learned Tribunal erred in law in interpreting the provisions of Section 263 of the said Act and holding that the action of the learned PCIT in the present case is not justifiable and cannot be sustained under the facts and circumstances of the present case?

3. We have heard Mr. Amit Sharma, learned standing counsel for the appellant and Mr. R.K. Muraka, learned senior advocate assisted by Ms Sutapa Roy Chowdhury, and Mrs. Aratrika Roy, learned advocates for the respondents.

4. The assessee had filed its return of income for the assessment year under consideration (A.Y. 2016-2017) on 30.11.2016 declaring a total income of Rs. 1062,44,65,120/-. Subsequently revised return was filed on 27.03.2018 declaring a total income of Rs. 1054,14,38,420/- and the case was selected for scrutiny and notices under Section 143(2) and Section 142(1) were issued. In response to such notices and the queries which were raised the assessee submitted documents and on certain discrepancies which were found the assessing officer issued show cause notice dated 23.12.2018 for which reply was submitted by the assessee on 26.12.2018 after which the assessment was completed by order dated 30.12.2018 under Section 143(3) of the Act. The Principal Commissioner of Income Tax, Calcutta (PCIT) issued the show cause notice dated 15.03.2021 under Section 263 of the Act. Pointing out two issues:-

(i) That in the Schedule 19 of TAR, the assessee debited an amount of Rs. 21,95,56,764/- to the profit and loss account however the amount admissible under Section 35 of the Act is only Rs. 20,61,11,598/- and in the computation of total income excess debited amount of Rs. 1,34,45,166/- (i.e. Rs. 21,95,56,764 - Rs. 20,61,11,598) has not been added back to the total income.

(ii) That Schedule 27b of TAR reveals that the assessee company debited an amount of Rs. 9,89,485/- on account of advertisement to the profit and loss account, the expenditure is a prior period expenditure relating to the financial year 2014-2015 and as this expenditure does not relate to the year under consideration the same deserves to be disallowed.

5. According to the PCIT, the assessing officer failed to verify the above issues and therefore it was proposed to invoke Section 263 of the Act.

6. With regard to the first query, the assessee in their response dated 24.03.2021 stated that the allegation is factually incorrect. It was stated that the assessee has suo moto added back Rs. 1,34,45,166/- while computing the taxable income for the relevant assessment year. The assessee also furnished break-up of the amount of Rs. 21,95,56,764/- debited to the profit and loss account as reported in Schedule 19 of the TAR. After giving all the facts and the figures, the assessee stated that it is evident the said sum of Rs. 1,34,45,166/- was added back in the computation of income which proves that the allegations mentioned in the show cause notice is factually erroneous and unsustainable in law. Further the assessee stated that the assessing officer had made due enquiries on the said issue and after being satisfied that the excess sum has been added back to the total income the assessment was completed under Section 143(3) of the Act. Further it was pointed out that in the notice dated 08.10.2018 issued under Section 142(1) of the Act specific details were called for on the said issue which was furnished by the assessee by the letters dated 20.11.2018 and 03.12.2018. It was further stated that the assessing officer examined the

details of scientific research expenditure as claimed as deduction vis-a-vis the amount debited to profit and loss account including depreciation debited in books in relation to scientific research assets. Thereafter, another show cause notice was issued on 23.12.2018 requiring the assessee to explain as to why the excess deduction claimed under Section 35 (2AB) of the Act should not be allowed. For this query the assessee submitted their reply dated 26.12.2018. It was contended that it is clear that the assessing officer had gone through the tax audit report, financials, income tax return, submissions in response to the notices after which he made further enquiries inter alia scientific research expenditure before completing the assessment. Mr. Muraka had placed before us the copy of the income tax return which also establishes that the amount was suo-moto added back by the assessee.

7. With regard to the second issue, the assessee pointed out that sum of Rs. 9.89,485/- pertains to the advertisement expenditure for employment charged by "LINKED IN" and bank charges therein and the details of the invoices raised by the "LINKED IN" were furnished. It was stated that though invoices were raised in the month of June 2014, they being a non-resident essential documents like copy of TRC, no PE certificate etc. were provided by them only during the financial year 2015-2016 and hence the assessee could account and pay for all the bills only during the financial year 2015-2016. Further the assessee referred to several decisions for the proposition that expenses pertaining to earlier years, which was quantified and crystallized during the previous year was allowable deduction.

8. The PCIT after briefly setting out the objections raised by the assessee to the show cause notice issued under Section 263 of the Act came to the conclusion that the assessing officer has passed the assessment order without making enquiries or verification and therefore clause (a) of explanation (2) to Section 263 (1) of the Act is attracted and accordingly held the assessment order to be erroneous in so far as it is prejudicial to the interest of revenue. After referring to a few decisions the PCIT by order dated 27.03.2021 set aside the assessment order and directed the assessing officer to pass a fresh assessment order after considering the two issues which were pointed out. Aggrieved by such order, the assessee preferred appeal before the tribunal which has been allowed by the impugned order.

9. Firstly, we need to point out that the both the issues on which the show cause notice under Section 263 of the Act was issued are fully factual. The learned tribunal which is the last fact-finding authority has elaborately considered the factual position and granted relief to the assessee. Unless and until the order passed by the learned tribunal suffers from any perversity or ignores any vital fact in an appeal under Section 260A of the Act, we are not expected to interfere in such an order.

10. Nevertheless, since elaborate submissions were made by Mr. Sharma and Mr. Muraka we embarked upon the fact finding exercise though not required to be done. The respondent assessee filed a paper book containing all documents which was filed before the learned tribunal including the written submissions filed by the assessee. From the annexure, it is seen that under the column amount admissible under Section 35, in the sub column A1 the figure debited to the statement of profit and loss has been shown as

Rs. 219,556,764/- in column A(ii)the amount admissible (net depreciation and asset written off) Rs. 206, 111,599/- has been mentioned. In column B(1) (i) the amount not debited to the statement of profit and loss-capital expenditure has been given as Rs. 218,424,479/- and in column b(2) the amount admissible is shown as Rs. 210, 494, 435/-. The details of the scientific research expenditure reported in Schedule 19 of the TAR has been explained as follows:-

SL NO.	**PARTICULARS**	**AMOUNT**
A.	*Operating Expenses on SR*	20,61,11,598
B.	*Depreciation on SR Assets*	94,90,862
C.	*SR Asset written off*	39,81,203
D.	*Loss on sale of SR Assets*	4295
E.	*Profit on sale of SR Assets*	(-) 31,194
F.	**TOTAL**	**21,95,56,764**
G.	*Amount allowable u/s 35 [Sch 19 of TAR]*	20,61,11,598
H.	*Difference [B+C+D+E]*	1,34,45,166

**SR= Scientific Research*
**FS=Financial Statements*

Items B,C,D & E were debited under the respective Heads viz., Depreciation, Assets Written off, Profit/Loss on Sale of Assets.

11. The assessee also furnished the relevant extracts of the financial statement for the financial year 2015-2016 highlighting all the relevant

details. Further the location wise break up of those items of expenses as reflected in the profit and loss account were also placed before the learned tribunal and it was explained that the items set out in the Column (B)(C)(D)(E) in the above table formed part of the depreciation on scientific research assets; assets written off and profit and loss on sales of asset debited in the profit and loss account. Thus, it was explained that the sum of Rs. 1,34,45,166/- was added back in the computation of income. This aspect of the matter has been analyzed by the learned tribunal and it has found that the said sum was added back in the computation of income and therefore there was absolutely no basis for the PCIT to invoke his power under Section 263 of the Act. Furthermore, records clearly show that the assessing officer had issued notices to the assessee on the very same issue considered their reply thereafter pointing out certain discrepancies issued show cause notice for which reply was submitted by the assessee and after a detailed enquiry the assessment has been completed. Thus, it is not a case of lack of enquiry or lack of proper enquiry. The PCIT does not in as many words states that there was lack of enquiry or lack of proper enquiry and all that is said is that the assessing officer did not verify these aspects which is factually incorrect. Therefore, it is not a case where the PCIT could have invoked his jurisdiction under Section 263 of the Act.

12. With regard to the second issue, the learned tribunal had noted the facts that the invoices issued by the “LINKED IN” towards advertisement expenses in June 2014 were admitted as liability and crystallized for payment in the year under consideration owing to the fact that the “LINKED IN” being non-resident had furnished the necessary documents in

the such as TRC under Section 90(4) of the Act read with Rule 21 AB of the Rules and no PE certificate etc. only in the assessment year under consideration. Further the tribunal noted it is not the case where these expenses were charged as deduction in the preceding year more importantly, the tribunal noted that there is no revenue implication and no prejudice is caused to the revenue since the tax rate applicable to the assessee during the assessment year 2015-2016 to which invoices relates and the tax rates applicable for the assessment year 2016-2017 in which the invoices were accounted and paid were the same.

13. At this juncture, we take note of the decision in the case of the Hon'ble Supreme Court in ***Malabar Industrial Company Limited Versus Commissioner of Income Tax*** [1] wherein it was held that every loss of revenue cannot be treated as prejudicial to the interest of revenue and if the assessing officer has adopted one of the courses permissible under law or where two views are possible and the assessing officer has taken one view with which the CIT does not agree, it cannot be treated as an erroneous order, unless the view taken by the assessing officer is unsustainable under law. Furthermore, on facts the tribunal found that the PCIT has not carried out any enquiry on his own and merely set aside the assessment order and sent the file back to the assessing officer to re-examine the issues which is contrary to the law as laid down in several decisions and the tribunal rightly noted the decision in ***Income Tax Officer Versus DG Housing Projects Limited*** [2]**.**

[1] (2000) 243 ITR 83 (SC)
[2] (2012) 343 ITR 329 (Del)

14. Thus, for all the above reasons, we find that no questions of law much less substantial questions of law arises for consideration in this appeal. Accordingly, the appeal fails and is dismissed.

(T.S. SIVAGNANAM, J)

I agree

(HIRANMAY BHATTACHARYYA, J)

(P.A – SACHIN)