

IN THE INCOME TAX APPELLATE TRIBUNAL "A", BENCH KOLKATA

BEFORE SHRI S.S.GODARA, JM & DR. A.L.SAINI, AM

आयकरअपीलसं./ITA No.2047/Kol/2018

(निर्धारणवर्ष / Assessment Year:2013-14)

M/s Subhlabh Steels (P) Ltd. 2nd Floor, Room No. 202, 1, British India Street, Kolkata- 700069	Vs.	PCIT-1, Kolkata
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: AAECA 4597 P		
(Appellant)	..	(Respondent)

Appellantby : Shri Ravi Tulsian, FCA

Respondent by :Shri Ram Bilash Meena, CIT

सुनवाईकीतारीख/ Date of Hearing : 29/01/2020

घोषणाकीतारीख/Date of Pronouncement : 20/03/2020

आदेश / O R D E R

Dr. A.L. Saini, AM:

The captioned appeal filed by the Assessee, pertaining to assessment year 2013-14, is directed against the order passed by the Pr. Commissioner of Income Tax-1, Kolkata under section 263 of the Income Tax Act, 1961 (in short the 'Act') dated 26/03/2018.

2. The grounds of appeal raised by the assessee are as follows:

1. That the ld. Principal CIT-1, Kolkata on the facts and circumstances of the case and in law erred in assuming jurisdiction u/s 263 of the Act in order to impose his own views on the A.O. on the same set of facts & evidences considered by the A.O. by holding that the order passed by the A.O. u/s 143(3) of the Act on 09.02.2016 was erroneous inasmuch as it was prejudicial to the interest of revenue.

2. That, on the facts and circumstances of the case, the Ld. Pr. CIT erred in assuming jurisdiction u/s 263 of the Act on the alleged ground of A.O's failure to examine the entire trading of goods in absence of bills/challans for purchases and sales in spite of the fact that the A.O. after proper scrutiny rejected the audited books of account, treated the entire transaction as paper transaction and took a plausible view in reducing the gross loss of Rs.8,74,38,653/- declared by the appellant to Nil.

3. That, the Ld. Pr. CIT grossly erred on facts and in law in invoking jurisdiction u/s. 263 of the Act and referring the case back to the A.O. for fresh examination of estimating the NP at 1% on the turnover declared by the appellant simply by differing with the plausible view taken by the A.O., even though the disallowance of loss made in 143(3) assessment is already a subject matter of appeal before the Ld. CIT(A) and the matter is thus debatable.

4. That, the Ld. Pr. CIT further erred in not appreciating that the judicial and official acts have been regularly performed by the A.O. while taking a possible view in the matter and furthermore without application of mind the questions/queries raised in the notice u/s. 142(1) of the Act could not have been formulated and hence jurisdiction invoked u/s. 263 of the Act was beyond the sanction of law.

5. That, the Ld. Pr. CIT acted beyond the scope of provisions of sec.263 of the Act in assuming that the A.O. had taken the trading result at nil without investigation in spite of the fact that after thorough scrutiny the A.O. had rejected the book results and treated the entire purchase and sale as paper transactions and hence direction to estimate NP at 1% on non-existing paper transaction is without any valid reason and basis and hence bad in law.

6. That, therefore, as the assessment order u/s. 143(3) of the Act is neither erroneous nor prejudicial to the interest of the revenue and moreover the said assessment is already a subject matter of appeal before the Ld. CIT(A) and the matter is thus debatable, the impugned order u/s.263 of the Act of the Ld. Pr. CIT directing to reframe the assessment as per his guidelines on the same set of facts and evidence on record is liable to be quashed and the appellant be given such relief(s) as prayed for.

7. That the appellant craves leave to amend, alter, modify, substitute, add to, abridge and/ or rescind any or all of the above grounds.

3. Brief facts qua the issue are that the assessee is a resident company and filed its return of income for the A.Y. 2013-14 which was assessed u/s. 143(3) on 09.02.2016 at a total income of Rs.3,61,73,584/-. Later on, Id Principal Commissioner of Income-1, Kolkata (in short 'PCIT') has exercised his revisional jurisdiction under section 263 of the Income Tax Act on the following grounds:

"From the assessment order for the year 2013-14, it is seen that the books of accounts of the assessee was rejected as because the assessee company failed to produce copies of bills for purchases and sales as well as could not produce any documents in support of

other payments, challans etc. Accordingly, the entire trading of goods could not be examined and were treated as paper transactions/ accommodation entries and the business income of the assessee company was compared as nil.

It was also seen from the assessment order for the A.Y.2011-12 dated: 30.03.2014 of the said assessee company that the books of accounts were also rejected on the same ground and the business income was computed on estimated basis at the rate 1% of total sales. The order for the A.Y. 2011-12 which has also been held several times that the method adopted by the A.O. has to be followed in succeeding year unless there is significant change. Although no scenario has changed, the department computed the business income on estimate basis at the rate 1% of total sales i.e. of Rs. 7,68,30,34,008/- which comes to Rs. 7,68,30,340/-. In resulting underassessment of income of Rs. 7,68,30,008/- and under charge of tax of Rs. 2,29,27,604/-."

Based on the above grounds the Jurisdictional Principal Commissioner of Income Tax (PCIT) was satisfied that it was a case of erroneous assessment insofar as it was prejudicial to the interests of the revenue. Therefore, Id PCIT issued a show cause notice u/s 263 of the Act to the assessee.

4. In response to the show notice of Id. PCIT u/s 263 of the Act, the assessee submitted written submission before him which is reproduced below:

"The assessee company is engaged in the business of trading of iron & steels. For the relevant assessment year, return of income was filed by the assessee company on 30/09/2013 at a total income of Nil and carried forward loss of Rs. 5,65,64,157/-.

Subsequently, the case was selected for scrutiny under CASS and accordingly notices u/s. 143(2) & u/s. 142(1) were served on the assessee.

Thereafter, on transfer of jurisdiction over this case to the DCIT, Circle 1(2), notice u/s. 142(1) along with questionnaire were duly served on the assessee. In response to the above, the AR of the assessee company appeared from time to time and produced details and documents as per questionnaire issued.

From perusal of the details filed, the AO alleged that assessee has made fake claim of Input Tax Credit.

Again, on examination of the accounts of the relevant assessment year and from perusal of the records of A.Y. 2011-12, wherein the book of accounts of the assessee company was rejected and the profit was computed @1% of total sales engaged in the same line of business, the AO observed that during the relevant year also the assessee has failed to produce copy of bills of purchase and sale of goods to examine the actual purchases and sales. The AO further held that no labour payment was made for loading and unloading of goods and no transportation cost was claimed by assessee for inward and outward movement of goods.

Finally, the Ld.AO arrived at the conclusion that in absence of bills, evidencing the purchase and sale of goods, the entire trading of goods could not be examined, which under such circumstances were to be treated as paper transactions.

In view of the above and in view of the fact that since both the purchases and sales are bogus, there is no point of making ad hoc addition as done by the predecessor AO in the preceding AY 2011-12 against which the assessee has already filed an appeal which is pending for disposal, the Ld.AO rejected the entire trading result of the assessee company as disclosed in its accounts for the relevant assessment year and the resultant loss claimed from business activities of the assessee was disallowed, thereby computing the business income of the assessee from trading activity as Nil.

As such, it is clear from the above that the Ld.AO after having taken note of the details submitted in course of the assessment proceeding and after conducting proper enquiry in this regard, has completed the assessment thereby disallowing the entire loss claimed from business activities.”

5. However, the ld. PCIT rejected the contention of the assessee and held as follows:

“11. Having regard to the facts and circumstances of the case and in the light of the aforesaid decisions of Hon’ble Supreme Court and Hon’ble High Court, and in accordance with the amendment made in Section 263 of the Act with effect from 01.06.2015, I hold that the impugned assessment order dated 09.02.2016 passed by the A.O. is erroneous in so far as it is prejudicial to the interests of the revenue. I further hold, after giving the assessee an opportunity of being heard, that the impugned assessment order dated 09.02.2016 is liable to set-aside. Therefore, I set aside the said assessment order directing the A.O. to frame the assessment afresh after considering the aforesaid observations, Hon’ble Supreme Court and Hon’ble High Court decisions and as per law.

12. In the result, the assessment order u/s 143(3) dated 09.02.2016 for A.Y. 2013-14 is set-aside to the file of the Assessing Officer with a direction to pass a fresh assessment order after considering the aforesaid observations, as per law and after giving an opportunity of being heard to the assessee.”

6. Aggrieved by the order of ld. PCIT, the assessee is in appeal before us.

7. The ld. Counsel, Shri Ravi Tulsiyan, begins by pointing out that after conducting proper enquiry and taking note of the details submitted by the assessee, the A.O. had framed the assessment order holding that both the sales and purchases were bogus. The entire trading result of the assessee company and the resultant loss claimed by the assessee was disallowed. As far as addition of 1% of

turnover done by the predecessor of the AO in AY 2011-12 is concerned, the same was a subject matter of appeal which has still not been disposed of. The initiation of proceedings under section 263 of the Income Tax Act, 1961 relating to A.Y. 2011-12 was also challenged by assessee as it failed to meet the twin conditions of the order being erroneous and prejudicial to the interest of Revenue. In the assessee's case under consideration, the AO has taken one of the possible views therefore, order passed by AO u/s 143(3) of the Act is neither erroneous nor prejudicial to the interest of the Revenue.

8. On the other hand, the Ld. DR for the Revenue has primarily reiterated the stand taken by the Ld PCIT, which we have already noted in our earlier para and is not being repeated for the sake of brevity.

9. We have heard both the parties and carefully gone through the submission put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the fact of the case including the findings of the LdPCIT and other materials available on record. First, we have to see whether the requisite jurisdiction necessary to assume revisional jurisdiction is there existing before the Pr. CIT to exercise his power. For that, we have to examine as to whether in the first place the order of the Assessing Officer found fault by the Principal CIT is erroneous as well as prejudicial to the interest of the Revenue. For that, let us take the guidance of judicial precedence laid down by the Hon'ble Apex Court in Malabar Industries Ltd. vs. CIT [2000] 243 ITR 83(SC) wherein their Lordship have held that *twin* conditions needs to be satisfied before exercising revisional jurisdiction u/s 263 of the Act by the CIT. The twin conditions are that the order of the Assessing Officer must be erroneous and so far as prejudicial to the interest of the Revenue. In the following circumstances, the order of the AO can be held to be erroneous order, that is (i) if the Assessing Officer's order was passed on incorrect assumption of fact; or (ii) incorrect application of law; or (iii) Assessing Officer's order is in violation of the principle of natural justice; or (iv) if the order is passed by the Assessing Officer without application of mind; (v) if the AO has not investigated the issue before him; then

the order passed by the Assessing Officer can be termed as erroneous order. Coming next to the second limb, which is required to be examined as to whether the actions of the AO can be termed as prejudicial to the interest of Revenue. When this aspect is examined one has to understand what is prejudicial to the interest of the revenue. The Hon'ble Supreme Court in the case of Malabar Industries (supra) held that this phrase i.e. "*prejudicial to the interest of the revenue*" has to be read in conjunction with an *erroneous order* passed by the Assessing Officer. Their Lordship held that it has to be remembered that every loss of revenue as a consequence of an order of Assessing Officer cannot be treated as prejudicial to the interest of the revenue. When the Assessing Officer adopted one of the courses permissible in law and it has resulted in loss to the revenue, 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 prejudicial to the interest of the revenue "**unless the view taken by the Assessing Officer is unsustainable in law**".

10. Taking note of the aforesaid dictum of law laid down by the Hon'ble Apex Court, let us examine whether order passed by the AO is erroneous and prejudicial to the interest of Revenue. It is abundantly clear that recourse to Section 263(1) of the Income Tax Act, 1961 cannot be taken by the Principal Commissioner if either of the above conditions are not satisfied, i.e. if the impugned assessment order is erroneous but not prejudicial to the interest of the revenue; or if the impugned assessment order is prejudicial to the interest of the revenue but not erroneous.

We note that Finance Act, 2015 inserted 'Explanation 2' in the section 263 of the Act w.e.f 01-06-2015, which reads as follows:

[Explanation 2.- For the purposes of this section, it is hereby declared that an order passed by the AO shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if in the opinion of the Principal Commissioner or Commissioner,-

- i) *the order is passed without making inquiries or verification which should have been made;*
- ii) *the order is passed allowing any relief without inquiring into the claim;*

- iii) *the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or*
- iv) *the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person.]*

From a bare reading of the above, it stands clear that if an assessment order is passed in non compliance to any of the aforementioned clauses of Explanation 2 to section 263(1) of the Income Tax Act, 1961 the assessment order so passed by the Ld. AO shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue.

In light of the above, Ld Counsel for the assessee submitted before us that the Ld. PCIT had issued the show cause notice in assessee`s case, seeking to invoke the powers of revision provided u/s 263(1) of the Income Tax Act, 1961 on the alleged premise that in the assessee's case while passing the assessment orders for both A.Y.s. 2013-14 and 2011-12, books of accounts of the assessee were rejected as the assessee failed to produce copies of bills for purchases and sales as well, and assessee could not produce any documents in support of other payments, challans etc., however for the A.Y. 2011-12 business income was computed on estimated basis @ 1% of total sales whereas for the A.Y. 2013-14 business income was computed as NIL.

It was thus alleged that since there is no change in scenario between A.Y. 2011-12 and A.Y. 2013-14, therefore in the assessee's case for the A.Y. 2013-14, the AO should have computed business income @ 1% of sales amounting to Rs.768,30,34,008/- which comes to Rs.7,68,30,340/-.

On the basis of the above alleged reasoning, the Ld. PCIT passed the impugned order u/s 263(1) of the Income Tax Act, 1961 on 26.03.2018, setting aside the assessment order passed in the assessee`s case for the relevant A.Y. on 09.02.2016 for a fresh assessment by observing that the AO has failed to make any enquiry in the assessee`s case with regard to rejection of books of accounts and treatment of business income in line with the Assessment Order passed for the A.Y. 2011-12 rendering the Assessment Order passed u/s 143(3) of the Income Tax Act, 1961 on 09.02.2016 as erroneous and prejudicial to the interest of the Revenue.

11. We note that page 3, para 6 of the Assessment Order passed u/s 143(3) of the Income Tax Act, 1961 on 09.02.2016 by the Ld. AO for the A.Y. 2013-14, wherein the Ld. AO referring to the Assessment Order passed u/s 143(3) of the Income Tax Act, 1961 for the A.Y, 2011-12 held as follows:

“Further on examination of record of preceding year viz: Assessment Order 2011-12 it observed that Deputy Commissioner of Sales Tax Bureau (Investigation)(Unit-1) on dated 4.3.2014 made investigation and found huge quantity of Input Tax Credit claimed by dealer on purchase which were invalid as per the provision of WB VAT Act 2003 on account, Transport Agency was fake, Vehicle used for transportation is fake, Tax invoices related to dealers purchase were found invalid, book Adjustment no payment was made. Most of the transaction are merely paper transaction. The enquiry was also made by the Income Tax Department and it gathered that some parties are not existing, transport agency are fake, therefore the books of accounts of assessee company was rejected and profit was computed @ 1% of total sales engaged in the same line of business.”

From the above it is evident that the Ld. AO while passing the Assessment Order u/s 143(3) of the Income Tax Act, 1961 on 09.02.2016 for the relevant Assessment Year had duly referred and considered the Assessment Order passed in the assessee's case for the A.Y. 2011-12.

Having observed the above in page 3, para 6 of the Assessment Order passed u/s 143(3) of the Income Tax Act, 1961 on 09.02.2016 for the relevant Assessment Year, the Ld. AO further observed the following in continuation in page 4 of the said Assessment Order:

“During the year under consideration no scenario has changed. During the year assessee Purchased and Sold Iron & Metal, Armed Cables and claimed Direct Trading Loss of Rs. 8,74,38,653/- on Trading of goods. The assessee company has not produced copy of bills for Purchase and sales of such goods.....

..... From the List of Debtor submitted by assessee it is seen that most of Goods sold to twogroup, viz. SPS Group 224A, AJC Bose Road Kolkata & Bholanath Group 1, British India Street, Kolkata. No actual payment was received and made but most of entries are made through adjustment entries of transfer of balance to debtor/creditor/advance. From the aforesaid adjustment entries in the Books of Accounts it is dear that no actual purchase & sale was made but accommodation entry with aforesaid two group was made on paper only and with other two parties. The assessee even failed to furnish any challan for transportation of Iron & Metal product and Armed Cable to assessee godown destination and from assessee godown. The assessee company not deployed any staff, labour, nor claimed any electricity charges, Telephone charges, Travelling & Conveyance etc.. which clearly signifies that assessee company not engaged in any actual trading activity.....

..... *The entire trading result of assessee company disclosed has been rejected and the loss claimed from business activities of assessee company has been disallowed and thereby Business income of assessee company from trading activity computed as NIL.*”

The above finding of the assessing officer establishes beyond doubt that the Ld. AO had conducted detailed enquiries and investigations before passing the Assessment Order u/s 143(3) of the Income Tax Act, 1961 on 09.02.2016 in the assessee's case for the relevant Assessment Year and that too in light of the Assessment Order passed u/s 143(3) of the Income Tax Act, 1961 in the assessee's case for the A.Y. 2011-12. The Ld. AO on examination of the assessee's accounts of the relevant Assessment Year and from perusal of the records of A.Y. 2011-12, wherein the book of accounts of the assessee company was rejected and the profit was computed @1% of total sales engaged in the same line of business, observed that during the relevant year also the assessee has failed to produce copy of bills of purchase and sale of goods to examine the actual purchases and sales. The AO further held that no labour payment was made for loading and unloading of goods and no transportation cost was claimed by assessee for inward and outward movement of goods. Finally, the Ld.AO arrived at the conclusion that in absence of bills evidencing the purchase and sale of goods, the entire trading of goods could not be examined, which under such circumstances were to be treated as paper transactions, implying that there was neither any sale nor purchase. Therefore, the Ld. AO had rightly assessed the business income at Nil since no income can arise out of non existent sales and purchases. Therefore, order passed by the AO should not be erroneous.

12. We note that another stand of the Id PCIT was that that sufficient/proper enquiries were not conducted by the Ld. AO during the assessee's assessment u/s 143(3) of the Income Tax Act, 1961 for the relevant Assessment Year. We are of the view that the assessee cannot be held to be at fault and subjected to revision proceedings u/s 263(1) of the Income Tax Act, 1961 for 'inadequate enquiry' being conducted by the Ld. AO. In other words, fresh enquiry cannot be conducted on completed assessments on the premise that the enquiries and investigations

conducted during assessment were not proper/incomplete/inadequate. For that we rely on the judgment of the Hon'ble Delhi High Court in the case of Commissioner of Income-tax vs. Sunbeam Auto Ltd. reported in [2011] 332 ITR 0167-(Del), wherein it was held as follows:

“The Assessing Officer in the assessment order is not required to give a detailed reason in respect of each and every item of deduction, etc. Whether there was application of mind before allowing the expenditure in question has to be seen. If there was any inquiry, even inadequate that would not by itself give occasion to the Commissioner to pass orders under section 263 of the Income-tax Act, 1961, merely because he has a different opinion in the matter. It is only in cases of lack of inquiry that such a course of action would be open. An order cannot be termed erroneous unless it is not in accordance with law. If an Income-tax Officer acting in accordance with law makes a certain assessment, it cannot be branded as erroneous by the Commissioner simply because, according to him, the order should have been written more elaborately. Section 263 does not visualise a case of substitution of the judgment of the Commissioner for that of the Income-tax Officer who passed the order unless the decision is held to be erroneous. Where the Income-tax Officer has exercised the quasi-judicial power vested in him in accordance with law and arrived at a conclusion such a conclusion cannot be found to be erroneous simply because the Commissioner does not feel satisfied with the conclusion. There must be some prima facie material on record to show that tax which was lawfully exigible has not been imposed or that by the application of the relevant statute on an incorrect or incomplete interpretation a lesser tax than what was just has been imposed. ”

On the identical facts, the Hon'ble Bombay High Court in the case of Grasim Industries Ltd. vs. CIT reported in (2010) 321 ITR 0092 (Bom) held as follows:

“The above judicial precedents clarify that if a query was raised at the time of assessment and the same was responded to by the assessee would not lead to the conclusion that the AO has not applied his mind to render the assessment order erroneous and prejudicial to the interests of the revenue. ”

On the identical facts our view is fortified by the judgment of the Hon'ble Delhi High Court in the case of CIT vs. Leisure Wear Exports Pvt. Ltd. reported in (2012) 341 ITR 166 (Delhi) wherein it was held as follows:

“The power of revision is not meant to be exercised for the purpose of directing the Assessing Officer to hold another investigation without describing as to how the order of the Assessing Officer is erroneous. From this it also follows that where the assessment order has been passed by the Assessing Officer after taking into account the assessee's submissions and documents furnished by him and no material whatsoever has been brought on record by the Commissioner which showed that there was any discrepancy or falsity in evidence furnished by the assessee, the order of the Assessing Officer cannot be set aside for making deep inquiry only on the presumption and assumption that something new may come out. ”

13.We note that the Assessing Officer has considered the documents and submissions made by assessee and AO has also considered the assessment order for A.Y. 2011-12 passed in assessee`s case and taking into account all the facts and circumstances the AO has adopted one of the courses permissible in law and even if it has resulted in loss to the revenue, the said decision of the Assessing Officer cannot be treated as erroneous and prejudicial to the interest of the revenue as held by Hon`ble Supreme Court in Malabar Industries Ltd. vs. CIT (supra). Since the order of the Assessing Officer cannot be held to be erroneous as well as prejudicial to the interest of the revenue, in the facts and circumstances narrated above, the usurpation of jurisdiction exercising revisional jurisdiction by the Principal CIT is “null” in the eyes of law and, therefore, we are inclined to quash the very assumption of jurisdiction to invoke revisional jurisdiction u/s 263 by the Principal CIT.

14. In the result, the appeal of the assessee is allowed.

Order pronounced in the Court on 20.03.2020

Sd/-
(S.S.GODARA)
न्यायिकसदस्य / JUDICIAL MEMBER

Sd/-
(A.L.SAINI)
लेखासदस्य / ACCOUNTANT MEMBER

कोलकाता /Kolkata;

दिनांक/ Date: 20/03/2020

(SB, Sr.PS)

Copy of the order forwarded to:

1. M/s Subhlabh Steels (P) Ltd.
2. PCIT-1, Kolkata.
3. C.I.T(A)-
4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.
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