

IN THE INCOME TAX APPELLATE TRIBUNAL "C", BENCH MUMBAI

BEFORE SHRI R.C.SHARMA, AM
&
SHRI RAM LAL NEGI, JM

ITA No.3690/Mum/2014
(Assessment Year :2009-10)

Mumbai Metropolitan Region Development Authority, Plot No. C-14 & 15, Bandra Kurla Complex, Bandra (East), Mumbai – 400 051	Vs.	Director of Income Tax (Exemptions), Mumbai
PAN/GIR No.		AAATM7106R
Appellant)	..	Respondent)

Assessee by	Shri S.E. Dastur with Shri Madhur Agarwal
Revenue by	Shri Sanjay Bahadur
Date of Hearing	09/01/2017
Date of Pronouncement	06/04/2017

आदेश / O R D E R

PER R.C.SHARMA (A.M):

This is an appeal filed by the assessee against the order of CIT(A) dated 28/03/2014 for the assessment year 2009-10, in the matter of order passed u/s. 263 of the IT Act.

2. The following grounds have been taken by the assessee:-

1.1 On the facts and in the circumstances of the case and in law, the order passed by the Ld. DIT(E) under section 263 of the Act is invalid, bad in law & without jurisdiction.

1.2 The DIT(E) failed to appreciate and ought to have held that:

a. order passed by the AO after due inquiry/ investigation on question! issue could not per se be treated as erroneous in nature;

b. order could not be held as erroneous u/s. 263 of the Act simply because according to the CIT/DIT(E) the order should have been written more elaborately or only for making further enquiries;

c. once the AO has taken one of the permissible view on the basis of the enquiry, order cannot be said to be erroneous merely because the CIT/DIT(E) entertains a different opinion in the matter; and

d. where there is no difference on taxability of income, order cannot be treated as prejudicial to the interest of the revenue.

e. where the issue was subject matter of appeal before the First Appellate Authority, the order cannot be revised u/s. 263 of the Act.

1.3 On the facts and in the circumstances of the case and in law, the Ld. DIT(E) ought to have held that the proviso to section 2(15) is not applicable on the facts of the present case.

1.4 The Appellant prays that order passed u/s. 263 of the Act to be struck down as null and void ab initio.

The Appellant craves leave to add, amend, alter and / or delete any/all of the above grounds of appeal.

3. It was argued by learned Senior Counsel that the twin condition for invoking provisions u/s.263 were not satisfied in so far as no prejudice has been caused to the Revenue since AO in his order has declined the claim of exemption u/s.12A and brought to tax net entire income declared as per income and expenditure account. He further contended that before declining exemption u/s.11, the AO has made full enquiry and assessee has furnished all the information required by the AO claiming benefit of Section 11 by virtue of its registration u/s.12A, therefore, it cannot be said that order passed by AO was erroneous.

4. Learned AR also placed on record the order of the Co-ordinate Bench in the case of Slum Rehabilitation Authority ITA No.2435/Mum/2014 order dated 30/10/2015 wherein under similar facts and circumstances, the Tribunal have annulled the order passed by CIT(A) u/s.263. Precise observation of the Tribunal was as under:-

9. On the other hand, Ld. CIT DR submitted that, once there was a specific amendment brought in [section 2\(15\)](#) by enacting a new Proviso, explaining the scope of "charitable purposes" in the case of institutions / trusts advancing the objects of general public utility and such an activity has been held to be non-charitable, if they are involve in carrying out any activity which are in the nature of trade, commerce or business then, it was incumbent upon the AO to examine the assessee's case from such a statutory and legal angle, which admittedly he has failed to do so. There is no whisper or mention about proviso to [section 2\(15\)](#) in the assessment order or in assessment records. The AO has just picked up the issues and grounds that were coming from the earlier years and has not tried to analyze the things independently or applied his mind on the proviso which he was required to do so. Thus, to this extent, the order of the AO is definitely erroneous. The phrase "prejudicial to the interest of the revenue" has to be seen from the broader perspective and cannot be narrowed down in the terms of tax effect only as canvassed by Ld. Sr. Counsel, because ultimately if the matter goes against the assessee on Proviso, then the assessee would be liable to pay the tax on surplus. Here, the assessee might have submitted the reply to the AO on proviso to [section 2\(15\)](#), but the AO has neither raised any query nor applied his mind. Therefore, the order of the DIT setting aside the assessment is well within the scope and jurisdiction of [section 263](#). Thus, Ld. DR strongly relied upon the impugned order of the DIT.

9. We have heard the rival contentions, perused the relevant finding given in the impugned order and the material placed on record. It is an undisputed fact that the entire exemption of claim u/s 11 was denied by the AO in the assessment order passed u/s 143(3) which is the subject matter of revision u/s 263 here in this appeal. As a result of such an order, the entire surplus amount revealed from income and expenditure account of Rs. 83.98

crores was assessed. The entire assessment order and the assessed income was subject matter of appeal before the CIT(A), wherein the entire exemption u/s 11 stood allowed. In the order giving effect to the appellate order, the income has been finally assessed at "nil". In the second appeal also the subject matter and the issue of exemption u/s 11 again got merged. Now, in the revisionary jurisdiction u/s 263, the Ld. DIT is trying to set aside the original assessment order u/s 143(3) dated 22.12.2011 on the ground that, AO has failed to consider the amended provisions of [section 2\(15\)](#), that is, the Proviso inserted by [Finance Act, 2008](#) w.e.f. assessment year 2009-10 has not been considered and examined. If the proviso would be applied then there might be a situation where assessee's activity may not be held to be for "charitable purposes" and exemption u/s 11 may not be available. In other words exemption u/s 11 is being sought to be denied on the ground of newly inserted Proviso to [section 2\(15\)](#). Even if such an exercise is done, then the result would be same, that is, again the entire assessment would be completed on the same income of Rs. 83,98,10,894/-. There would be no deviation of the income at all what was assessed originally u/s 143(3) and the income which is now being sought to be assessed as per the order of the Ld. DIT. In such a situation, two aspects needs to be seen, firstly, whether the assessment order which has been completely merged with the order of the Tribunal can be set aside by the Ld. DIT u/s 263; and secondly, whether the impugned order can be considered to be erroneous in so far as it is prejudicial to the interest of the revenue, because even after giving effect to the impugned order, there is no revenue effect.

10. On both counts, we are inclined to agree with the contention of the Ld. Senior Counsel. Because, firstly, when the entire basis of the assessment and the whole of the surplus amount has been challenged before the CIT(A), then the entire assessment order including taxing of the entire exempt income u/s 11 is the subject matter of appeal and there is complete merger with the order of the CIT(A) within the terms and ambit of [section 263](#) read with clause (c) Explanation 1. Thus, if the subject matter of revision u/s 263 is again the denial of exemption u/s 11, though on different footing, then same is beyond the scope of [section 263](#). On these facts, it can be very well held that the issue of exemption u/s 11 which was the subject matter of appeal before CIT(A) and then before the Tribunal, the Ld. DIT do not have the power to consider and decide "such matter" within the scope of [section 263](#). On the second aspect also, which is purely academic, it is seen that, so far as tax effect is concerned, there is no difference at all between the income which was assessed in the original assessment order and the income which is now being sought to be assessed in wake of

order u/s 263. Under both the assessments the surplus amount of Rs. 83.98 crores will get taxed. Hence, no prejudice is caused to the revenue so far as tax effect is concerned, except for the fact that section 11 is being sought to be examined from a different perspective. Accordingly, we hold that, firstly, the subject matter of revision u/s 263 has been merged with the order of the Tribunal, therefore, Ld. DIT is precluded to revise or set aside such order as it is beyond the second of section 263; and secondly, such an order cannot be held to be 'prejudicial to the interest of the revenue', because the income which has been sought to be assessed in pursuance of order u/s 263, is the same which was originally assessed by the AO. Thus on both the counts, the impugned order passed u/s 263 is cancelled and the grounds raised by the assessee are thus allowed. Other arguments of ld. Sr. Counsel are not being adjudicated upon.

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

5. On the other hand, learned CIT DR contended that the order of the AO has now merged with the order of CIT(A) wherein exemption has been granted to the assessee as claimed u/s.11 which resulted in nil tax, accordingly there was fulfilment of both the condition of order being erroneous as well as prejudicial to the interest of the Revenue.

6. We have considered rival contentions and carefully gone through the orders of the authorities below.

7. From the record we found that the assessee filed its return of income on 30.09.2009 along with the Income & Expenditure Account, Balance Sheet and Audit Report in Form No.10B declaring total income at Rs.NIL. The trust is registered as a Charitable Organisation with DIT(E), Mumbai u/s. 12A under vide Registration No.INS/36714. The trust claims to be engaged in Planning and Development and during the course of scrutiny assessment, AO after making detailed enquiry

declared assessee's claim of exemption u/s.11 after observing as under:-

In the case the assessee Exemption u/s. 11 of the LT. Act, was denied to the assessee in A. Y. 2004-05. In the assessment Order dated 21.12.2006 u/s. 143(3) of the IT. Act. elaborate discussion was made. The AO has also referred the relevant case laws i.e. Bombay High Court in the case of Madhav Prasad Nathuran Pandit Vs. Mohilal Ramchand Mahesee 30 Bom LR 186 AIR 1928 Bom 97 : 108 I.c.. 482 and Madras High Court in the case of the case of R. Venugopala Reddian Vs. Krishna Swamy Reddiar AIR1971 Mad 262.

During this year relevant to the assessment v ear there is also no change in the fact and circumstances of the case of the assessee. Therefore, the assessee's claim of Exemption u/s. 11 of the IT. Act, 1961 is denied on the following grounds:

1) By introducing the MMRDA Act, 1974, the handing over of ownership control, management of the MMRDA belonging to State Government is considered not a lawful Trust within the meaning of term Trust used for the purpose of sec. 11, 12, 12A, 12AA and 13 of the I.T. Act, 1961.

2) The MMRDA was created as a Local Authority within the meaning of term "person" for the purpose of Income-tax Act, 1961 and with effect from its inception. MMRDA cannot be considered as a Public Trust or Charitable Trust.

In view of the nature and activities being carried out by the authority as well as the legal status discussed in the foregoing paragraphs the claim of Exemption u/s. 11 of the IT Act by the MMRDA cannot be entertained.

The assessee has claimed itself as a Local authority but it cannot be considered as Local authority within the meaning of section 10(20) of the I.T. Act. Hence, its income from house property, interest, etc is liable to be tax. Reliance is placed in the decision of the Hon'ble Allahabad High Court in the case of U. P. State Road Transport Corporation vs. Commissioner of Income tax (2006) 286 ITR 350 (ALL.) wherein it has been held that the U.P. State Road Transport Corporation is not a Local Authority within the meaning of section 10(20) of the I.T. Act, 1961 and its, income from house property, capital gains and business of supply of goods and services is not exempt to the extent provided in section 10(20) of the I.T. Act. While

deciding the issue the decision in the case of Calcutta State Transport Corporation vs. CIT 1996 (219 ITR 515) (SC) and CIT vs. U.P. Forest corporation (1998)230 ITR 945 (SC) were followed. In the said case the assessee for the A.Y. 1977-78 had claimed exemption u/s 11 of the I.T. Act on the basis that the corporation had been formed for the advancement of an object of general public utility not involving the carrying on any activity for profit.

8. After the AO passed the order CIT(A) set aside the same u/s.263 by its order dated 28/03/2014 after observing as under:

4. I have examined the records and the assessment order passed by the Assessing Officer. In spite of proviso have been inserted to Section 2(15) vide Finance Act, 2008 w.e.f. 2009, having application for assessment year 2009-10, the AO has not mentioned a single word about the same in the assessment order or in any of the correspondence with the assessee. Further, the AO has also not invoked the provisions of Section 13(2)(a) of the I.T.Act, 1961 with reference to the facts mentioned above. By not considering the relevant provision which affected the taxability of income of the assessee and by considering provision of tax which was not relevant to the assessee in the said assessment, the AO has passed an order which is erroneous.

4.1 The CIT(A) vide its order No..CIT(A)-I/IT-E1(119)/2011-12 dated 30.10.2012 has decided the appeal and by following orders of her predecessor has partly allowed the appeal. It is pertinent to note that even though the CIT(A) has same powers of that of AO there was no invocation of proviso to Section 2(15) in the appellate order. Therefore, it can be seen that this particular issue regarding the application of newly amended proviso to Section 2(15) and the provision of Section 13(2)(a) of the I.T.Act, 1961 was neither invoked nor considered by the AO or CIT(A). Therefore, these issues are a separate matter and even though the appellate order has been passed for this assessment year, since these issues have not been considered proceedings u/s, 263 have been initiated.

There is no doubt that the assessee has been constituted by the Government of Maharashtra and does not have share capital. However, the State government has created adequate resource mobilization sources for the assessee to

generate enough revenue to finance the projects undertaken by it.

14. The CIT (A) has granted relief to the assessee following the appeal for earlier years relying on the Apex Court decision in the case of CIT vs. Surat City Gymkhana 300 ITR 214 and CIT vs. Gujarat Maritime Board 295 ITR 561. But the proviso to section 2(15) was inserted by the Finance Act 2008 with effect from April 1, 2009. The second proviso was inserted by the Finance (No. 2) Act, 2009 with retrospective effect from April 1, 2009. The monetary limit in the second proviso was revised by the Finance Act 2011, with effect from April 11, 2012. Hence, while passing the order for earlier assessment years, the then AO had not covered this proviso as it was not in existence at that time. However, the AO while framing the order for AY 2009-10 was aware of the proviso and had also asked the assessee to submit its explanation but failed to mention the same in the assessment order. Hence, even when the AO was aware as he had recommended to the DIT(E) cancellation of the registration granted to the assessee u/a 12AA(3), he did not cover the section in the assessment order and that certainly is an error and therefore the order is an erroneous order.

15. The order is prejudicial to the interest of revenue as the AO by only relying on the order of the earlier year has not applied his mind to the newly inserted proviso to section 2(15). Therefore, knowing fully well that the issue that he is mentioning is covered in favour of the assessee, he should have invoked the recently inserted proviso to section 2(15) which was not tested in appeal. By not doing so, he has caused prejudice to the interest of revenue. The AO by simply repeating the old order allowed the case to be lost in appeal which would have got strengthened by citing of the newly inserted proviso to section 2(15). Therefore, the order is also prejudicial to the interest of revenue.

16. The other contention of the assessee is that the issue which has been decided by CIT(A) and hence cannot be taken up in proceedings u/s 263. In the instant case, the issue of applicability of proviso to section 2(15) was not taken in appeal and also not considered and decided but however the same was otherwise capable of being considered and decided as the CIT(A) has the same power as that of the AO. The proviso to section 2(15) was newly inserted and since the AO had failed to mention the same erroneously in the order. the CIT(A) could have done so as he has the powers to enhance the assessment which power is not available to

even the Hon 'ble ITA T. The powers conferred upon the first appellate authority by the Income-tax Act are much wider than the powers of an ordinary Court of appeal. The first appellate authority is not an ordinary Court of appeal, considering that only one party to the original decision taken is entitled to appeal. It is on account of this peculiar position that the statute has conferred wide powers to the first appellate authority.

17. Once the assessment comes before the CIT(A), his jurisdiction is not restricted to examining only those issues that have been taken up by the appellant in appeal, but ranges over the whole assessment and it is open to him to correct the assessment order not only in regard to the matters taken in appeal, but also with regard to matters which were considered by the Assessing Officer in the assessment proceedings. He can examine every process which results in ultimate computation and assessment of income, even if his decision leads to enhancement of income.

18. However, in the area of powers of enhancement, there are contrary decisions: while one view relying upon the decisions in the cases of: CIT v. Shapoorji Pallonji Mistry, 44 ITR 891 (SC) and CIT v. Rai Bahadur Hardut Roy Motilal Chamaria, 66 ITR 445 (SC) is that the power of enhancement is restricted to only those areas and sources of income which were considered by the Assessing Officer at the assessment stage, and hence, such enhancement should not lead to a new source of income.

18.1 The other view relying upon the decisions in the cases of CIT v. Kanpur Syndicate Ltd., 53 ITR 225 (SC) and CIT v. Nirbheram Daluram, 224 ITR 610 (SC) is that such power of enhancement can even lead to an addition in respect of a new source of income.

In CIT v. Nirbheram Daluram, 224 ITR 610 (SC), the Apex Court relied upon the three judges Bench decisions in the cases of Jute Corporation of India v. CIT, 187 ITR 688 (SC) and CIT v. Kanpur Coal Syndicate, 53 ITR 229 (SC) to hold that the CIT(A) (or AAC as in that case) has plenary powers in disposing of an appeal. The scope of his power is coterminous with that of the Assessing Officer. He can do what the Income-tax Officer can do and can also direct him to do what he has failed to do.

18.2 The ratio of the decision in the case of Nirbheram Daluram should prevail considering that it was pronounced in

the context of S. 251 of the Act, while the earlier decision was in the context of the corresponding provision of 1922 Act. Since, the powers of the AO are coterminous with that of the CIT(A), the issue of application of proviso to section 2(15) in the instant case was capable of being considered and decided.

18.3 The issue of applicability of proviso to section 2(15) is not debatable as the AO had not applied the same to the case at all. Had he applied and taken one view then it was correct to presume that the proceedings u/s 263 was merely a change of opinion. However, since the AO erred in not applying the said proviso at all in this case and hence the issue is not debatable.

18.4 The decisions of Lucknow Development Authority were relating to assessment years prior to the introduction of proviso to section 2(15) and the Sabarmati Gaushala case is dealing with totally different fact. The issue therein is with respect to profit motive whereas the issue hereunder pertains to whether the assessee was carrying on any activity in the nature of trade, commerce or business or any activity of rendering any service in relation to any trade, commerce or business. This proviso comes with a rider that states 'irrespective of the nature of use or application, or retention, of the income from such activity'. The issue of profit motive is redundant if the receipts exceeds Twenty five lakhs and the assessee is having activity that can be in nature of trade, commerce or business or any activity of rendering any service in relation to any trade, commerce or business.

18.5 Section 13(8) could not have been invoked by the AO as this section was introduced by Finance Act, 2012 with retrospective effect from April 1,2009 while the said assessment was done on December 14, 2011.

9. We had carefully gone through the order passed by the AO u/s.143(3) as well as the order passed by CIT(A) u/s.263, as well as the order of the Tribunal dated 31/10/2015. We found that exactly under similar facts and circumstances, the order passed by CIT(A) u/s.263 was cancelled by observing that in so far as entire assessment order of

the whole of the surplus amount has been challenged before the CIT(A), then the entire assessment order including taxing of the entire exempt income u/s.11 is the subject matter of the appeal and there is complete merger with the order of CIT(A) within the terms and ambit of section 263 read with clause (c) Explanation 1. Tribunal also observed that in so far as tax effect is concerned, there is no difference at all between the income which was assessed in the original assessment order and the income which is now being sought to be assessed in wake of order u/s.263. Under both these assessments surplus amount will get taxed, hence, no prejudice is caused to the Revenue so far as tax effect is concerned, except for the fact that Section 11 is being sought to be examined from a different perspective.

10. In view of the above discussion, respectfully following the order of the Tribunal in case of Slum Rehabilitation Authority ITA No.2435/Mum/2014 order dated 30/10/2015, we do not find any merit in the order of CIT(A) u/s.263 of the IT Act.

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

Order pronounced in the open court on this 06/04/2017

Sd/-
(RAM LAL NEGI)
JUDICIAL MEMBER

Sd/-
(R.C.SHARMA)
ACCOUNTANT MEMBER

Mumbai; Dated 06/04/2017
Karuna Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

सत्यापित प्रति //True Copy//

(Asstt. Registrar)
ITAT, Mumbai