IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH: KOLKATA
[Before Shri M. Balaganesh, AM & Shri S. S. Viswanethra Ravi, JM]

I.T.A Nos.1317-1318/Kol/2016
Assessment Year: 2010-11

Mukund Rungta (PAN:ACWPR8842H) Vs. Deputy Commissioner of Income-tax, Central Circle-V, Kolkata.
(Appellant) (Respondent)

&

I.T.A Nos.1319-1320/Kol/2016
Assessment Year: 2010-11

Nandlal Rungta (PAN:AGHPR2545J) Vs. Deputy Commissioner of Income-tax, Central Circle-V, Kolkata.
(Appellant) (Respondent)

Date of hearing: 09.03.2017
Date of pronouncement: 09.03.2017

For the Appellant: Shri Subash Agarwal, Advocate
For the Respondent: Shri R. S. Biswas, JCIT

ORDER

Per Shri M. Balaganesh, AM:

The captioned appeals being ITA Nos. 1317 & 1319/Kol/2016 by different assessees are arising out of common revision order of Pr. CIT-1, Kolkata vide No. Nil dated 03.09.2015 and appeal nos. 1318 & 1320/Kol/2016 by different assessees are arising out of common order of Ld. CIT(A)-20, Kolkata vide appeal no. 1255&1256/CIT(A)-20/CC-1(3)/15-16 dated 23.05.2016. Since facts are identical and grounds are common and all the appeals have been heard together, we dispose of the same by this consolidated order for the sake of convenience.

2. The only issue to be decided in these appeals is as to whether the ld CIT was justified in invoking revisionary jurisdiction u/s 263 of the Act in the facts and circumstances of the case.

2.1. The facts in the case of Mukund Rungta are considered herein and taken up for adjudication and the decision rendered thereon would apply with equal force in the hands of Nandilal Rungta also in view of identical facts and identical addition.

2.2. The brief facts of this issue is that the assessee is a partner of a firm styled as "M/s Mangilal Rungta and derived income in the form of Directors Remuneration, share of profit from partnership firm, income from house property , interest and dividend. The original return of income for the Asst Year 2010-11 was filed on 18.8.2010 declaring total income of Rs. 11,13,87,024/- and no assessment u/s 143(3) of the Act was made in this case. A search and seizure operation was conducted u/s 132 of the Act on 6.2.2012 in the residential and business premises of various persons belonging to Rungta Group of Cases and Survey u/s 133A of the Act was conducted in the business premises of Rungta Mines Ltd at Saraikela- Kharsawan ; Barbil – Orissa and Sundargarh - Orissa. The books of accounts and documents were impounded in the course of survey conducted u/s 133A of the Act which were also subsequently released by the investigation wing after necessary verification. In addition to the above, assets and documents, bank accounts, passports and credit cards etc were found in the name of various persons of this Group. No person or concern of the group had admitted any undisclosed income in the course of search and seizure operation or thereafter.

2.3. Notice u/s 153A of the Act was issued on 4.2.2013 and the return in response to such notice was filed by the assessee on 21.3.2013 showing the original returned income of Rs. 11,13,87,024/-. The assessment was completed on 6.3.2014 u/s 143(3) / 153A/153D of the Act determining total income at Rs. 11,14,14,636/- which admittedly included disallowance u/s 14A of the Act made in the sum of Rs. 27,613/- and exempt income in the form of share of profit from firm u/s 10(2A) n the sum of Rs. 9,96,87,857/- , among others. No appeal was preferred against this assessment order.

2.4. Later this assessment order was subjected to revision proceedings u/s 263 of the Act by the ld CIT vide order dated 3.9.2015 on the ground that the share of profit from partnership firm amounting to Rs. 9,96,87,857/- (exempt income) included last year's share of profit in the form of wrongly claimed excess depreciation by the firm amounting to Rs. 1,20,79,827/-. In other words, the exempt income in the sum of Rs. 9,96,87,857/- included last year exempt income of Rs. 1,20,79,827/-. This is explained more elaborately in the later part of this order. No appeal was initially preferred by the assessee against the order u/s 263 of the Act passed by the ld CIT before this tribunal. The ld CIT had set

aside the assessment order passed u/s 143(3) / 153A /153D of the Act dated 6.3.2014 treating it as erroneous and prejudicial to the interests of the revenue and directed the ld AO to make assessment de novo after giving full opportunity to the assessee.

2.5. Pursuant to the said order u/s 263 of the Act by the ld CIT on 3.9.2015, the ld AO framed the assessment vide order u/s 263/154/143(3)/153A/153D of the Act on 30.11.2015 wherein he added the sum of Rs. 1,20,79,824/- towards excess allowance of exemption u/s 10(2A) of the Act. Against this order, the assessee preferred an appeal before the ld CITA who dismissed the appeal on the ground that assessee had not preferred any appeal against the section 263 order of the ld CIT before the tribunal and hence he is not inclined to interfere with the findings of the ld CIT u/s 263 of the Act. According to ld CITA, the assessment framed on 30.11.2015 by the ld AO is only pursuant to the directions of the ld CIT u/s 263 of the Act. The assessee on realizing this problem, preferred an appeal before this tribunal as below:-

a) Appeal against the order passed by the ld CIT u/s 263 of the Act with a delay of 223 days duly supported by a delay condonation petition explaining the reasons
b) Appeal against the order of the ld CITA dated 23.5.2016 in respect of assessment framed pursuant to order passed u/s 263 by the ld CIT.

2.6. In respect of delay of 223 days in preferring the appeal before us, the ld AR argued that the assessee was under the bona fide belief that no appeal would lie before the tribunal against the order of the ld CIT passed u/s 263 of the Act as it did not involve any tax liability on the advice given by his then counsel. Later on receipt of the order of the ld CITA dated 23.5.2016 supra, the assessee had approached the present counsel who had advised him to prefer an appeal against the section 263 order of the ld CIT before the tribunal together with a delay condonation petition as the assessee has got a good case and fair chance of succeeding in appeal. In support of this, the ld AR relied on the following decisions for condonation of delay :-

(a) Decision of co-ordinate bench of Hyderabad Tribunal in the case of Andhra Organics Ltd vs DCIT in ITA No. 1457/Hyd/2013 dated 5.3.2014

(b) Decision of co-ordinate bench of Mumbai Tribunal in the case of Ashok Kumar Shivpuri vs CIT in ITA No. 631/Mum/2014 dated 7.11.2014

(c) Decision of co-ordinate bench of Kolkata Tribunal in the case of Sri Anupam Biswas vs ITO in ITA No. 2198/Kol/2014 dated 9.12.2015

The ld DR vehemently objected to the condonation of delay and argued that ignorance of law should not be taken as an excuse.

2.7. We have heard the rival submissions. We find from the reasons stated in the condonation petition and the decisions relied upon hereinabove, the assessee had adduced sufficient and justifiable reasons for preferring the appeal belatedly and we feel it is a fit case to condone the delay. We also find that the co-ordinate bench of Mumbai Tribunal supra had specifically dealt with this issue as under :-

> *"8. It was noticed that there was a delay of 285 days in filing the impugned appeal. The AR appearing in the matter, informed that Affidavit, giving reasons for the delay in filing of the appeal was filed along with the Memorandum of Appeal in Form No. 36, seeking condonation of delay, which reads,*
>
> > *"I, Ashok Kumar Shipuri, son of late Shri Pandit Tapeshwar Nath Shipuri, aged about 78 years, r/o Arihant Sparsh, Flat no. 702, 7th Floor, Plot No. 13 & 14, Sector 26, Vashi, Navi Mumbai -400 703 do hereby state on oath as under:*
> >
> > > *(1) That the order dated 05/02/2013 passed u/s 263 of the Income Tax Act, 1961 for AY 200809 was received by me on 13/02/2013. *
> > >
> > > *(2) That the last date for filing an appeal before the Hon'ble ITAT, Mumbai was 14/04/2013 but I could manage to file it only on 24/01/2014, resulting in a delay of about 9 months.*
> > >
> > > *(3) That the ld. CIT vide his order dated 5/2/2013 had directed the AO to pass a fresh assessment order after giving due opportunity of being heard and at that time, the importance of the order was not understood by me.*
> > >
> > > *(4) That in pursuance of the order of the ld. CIT, an assessment order dated 29/11/2013 u/s 143 r w s 263 was passed, levying a huge demand of Rs. 20,22,300/-.*
> > >
> > > *(5) That I am an engineer by qualification and being a retired person was appearing in my own matters till that stage.*
> > >
> > > *(6) That faced with this huge demand, I realized that I would need professional help. To that purpose I approached Smt. Ritika Agarwal, CA LLB, (Advocate High Court). She advised me to file an appeal against the assessment order dated 29/11/2013 passed u/s 143(3) r w s 263. She further advised me to file an appeal albeit belatedly against the order u/s 263 dated 5/02/2013 as well, since it was the foundation of the assessment order dated 29/11/2013.*
> > >
> > > *(7) That based upon such professional advice, I have filed an appeal against the order u/s 263 of the Act.*

> *(8) That, I humbly submit before your honours that the omission to file the present appeal in time occurred because of my lack of knowledge about the income Tax Laws.*
>
> *(9) That mere technicality or delay in filing the appeal which was not caused prejudice to the department, deserves to be condoned in the larger interest of justice, equity and fair play and to reject the appeal at the threshold because of delay committed would result in a great loss and violation of principle of natural justice.*
>
> *(10)In support of my plea for condonation of delay, reliance is placed on the judgment in the case of Motilal Padampat Sugar Mills Co Ltd vs State of Uttar Pradesh and Others (1979) 118 ITR 326 (SC) wherein Lord Atkin has been quoted from Evans v Bartlam (1937) AC 473 that "there is the rule that ignorance of law does not excuse, a maxim of very different scope and application".*
>
> *(11)That in view of the above facts and circumstances of the case, it is respectfully prayed that the delay of approximately 9 month in filing the appeal may kindly be condoned and appeal be admitted for adjudication on merits".*

9. The AR submits that a lenient view may be taken .

10. The DR on the other hand has strongly objected to the prayer for condonation of delay and submitted that the delay cannot be condoned on the mere plea of ignorance of Income Tax Laws.

11. We have heard the parties on the issue and we are of the view that provisions of law have to be adhered strictly and that one cannot be allowed to act in leisure and make a mockery of enacted law, because law & provisions are laid down to benefit both sides of litigation. Be that as it may, we have to do justice and the Hon'ble Supreme Court in the case of Collector, Land Acquisition vs Mst. Katiji and others , reported in 167 ITR 471, (1988 SC 897) (7) observes ….

> *"4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non deliberate delay."*

13. When we weigh these two aspects then the side of justice becomes heavier and casts a duty on us to deliver justice.

14. We, therefore, condone the delay and proceed with the appeal as filed by the assessee."

In view of the aforesaid facts and circumstances of the case and respectfully following the judicial precedent relied upon hereinabove, we hereby condone the delay in filing of appeals by the assessee in ITA No. 1317/Kol/2016 and ITA No. 1319/Kol/2016 and admit those appeals for adjudication.

3. The primary facts which triggered the revision proceedings u/s 263 of the Act by the ld CIT are as follows :-

(a) The assessee is a partner of the firm M/s Maniglall Rungta and has 50% share in the profits of the firm along with another partner Mr Nandilal Rungta. During the financial year 2008-09 relevant to Asst Year 2009-10, the firm had inadvertently provided depreciation on plant and machinery at the rate of 35% instead of 15%. As a result of this, the firm provided excess depreciation of Rs. 2,41,59,654.71 (50% share works out to Rs. 1,20,79,827.36) in its books of accounts which further resulted in reduction of book profit of the firm. This mistake was discovered during the previous year 2009-10 relevant to Asst Year 2010-11 after the books for the financial year 2008-09 were closed. Thereafter a rectification entry was passed in the books of the firm in the financial year 2009-10 relevant to Asst Year 2010-11. The assessee further submitted that the share of profits from the firm attributable to assessee is Rs. 9,96,87,857.23 as against Rs. 8,76,08,029.88 as alleged by the ld CIT and the ld AO and the difference of Rs. 1,20,79,827.36 has arisen only due to different accounting treatment. The above accounting entries have no impact as far as taxation of the firm is concerned as the firm is taxed on the total income which has been arrived at after adding back the depreciation as per books and reducing the depreciation as per Income Tax Rules in both the Asst Years 2009-10 and 2010-11 which is duly accepted by the income tax department in the assessment proceedings and further that from the perusal of the above provision, it is the firm alone, which can be taxed with respect to the profits of the firm and not the partners' themselves. It was further submitted that the CBDT vide its Circular No. 8/2014 [F.No. 173/99/2013-ITA-I] dt 31.3.2014 had clarified that ' *a reference has been received in the Board in connection with the interpretation of provisions of section 10(2A) of the Income Tax Act, 1961 seekign clarification as to what will be the amount exempt in the hands of the partners of a partnership firm in cases where the firm has claimed exemption / deduction under Chapter III or VIA of the Act. The matter has been examined. Sub-section (2A) of Section 10 was inserted by the Finance Act, 1992 w.e.f. 01-04-1993 due to a change in the scheme of taxation of partnership firms. Since assessment year 1993-94 , a firm is assessed as such and is liable to pay tax on its total income. A partner is not liable to tax once again on his share in the said total income.*"

It was specifically pointed out to the ld CIT during section 263 proceedings that there was absolutely no tax impact or tax loss to the exchequer due to mistake in claiming depreciation by the partnership firm as ultimately the said excess book depreciation has been added back in the memo of income and only depreciation as per income tax rates were claimed as deduction by the partnership firm and taxes paid accordingly. The ld CIT however not convinced with the arguments of the assessee sought to revise the assessment of the ld AO and treated the same as erroneous and prejudicial to the interests of the revenue within the meaning of section 263 of the Act by observing as under :-

> *"I carefully perused the submission furnished by the assessee. Assessee's contention that his share of profit from M/s Mangilal Rungta amounting to Rs.9,96,87,857/- for Assessment Year 2010-11 also includes last year's undisclosed profit in the form of wrongly claimed excess depreciation by M/s Mangilal Rungta amounting to Rs.1,20,79,827/- (i.e. 50% of total wrongly claimed depreciation), does not hold much water. It is unjustified for assessee to show last year's share of profit or part thereof from firm in subsequent year and claim it as exempt income u/s 10(2A) of Income- tax Act, 1961.Therefore, I set aside the Assessment Order passed u/s 143(3)/153A/153D dated 06.03.2014 for being erroneous and prejudicial to the interest of revenue and direct the A.O. to make assessment de novo in the light of the discussion above, after giving full opportunity to the assessee."*

4. We find that the ld AO had passed the order dated 30.11.2015 pursuant to the section 263 order of the ld CIT and disallowed a sum of Rs. 1,20,79,827/- by observing as under:-

> *"(The contention of the assessee that his share of profit from M/s. Mangilall Rungta among to Rs. 9,96,8Z,857.23/- for A.Y. 2010-11 also includes last year's undisclosed profit in the form of wrongly claimed excess depreciation by M/s. Mangilall Rungta amounting to Rs.1,20,79,827.36/- (i.e. 50% of total wrongly claimed depreciation) is not acceptable. The income tax assessment is done assessment year-wise. The assessment of income is independent for each assessment year. So, for Income Tax assessment point of view, any prior period profit should not be added to the partner's profit for the successive year to reach the partner's share of profit from firm. Further, it is also not true that whatever action is taken regarding depreciation in case of a firm has no tax implication in the individual partner's hand, as it is seen that there was an increase in the partner's capital to Rs. 9,96,87,857.23/-. The partner has also offered Rs. 9,96,87,857.23/- as income from firm in their Return of Income. However, the quantum of exemption u/s 10(2A) was incorrectly claimed, which should not exceed the partner's share (i.e. Rs. 8,76,08,029.88 being 50% share of profit from firm) in the total income of the firm(i.e. Rs.17,52, 16,059.76/-). However, it is also noticed that the net profit of the firm is Rs. 23,37,16,059.76/- and taxable income of the firm is Rs. 18,92,19,093/- [as per order u/s 143(3) dated 07-03-2014]. Moreover, as there is a difference between the depreciation as per books and depreciation as per Income Tax Act, depreciation as per books of accounts should not be taken into consideration in computing income of the firm for computing deduction u/s 10(2A} of the Act. In view of above, whatever is the reason for increase in partner's share of capital, the exemption has to be in accordance to section 10(2A) of the I. T. Act, 1961. Hence excess allowance of· exemption u/s 10(2A) of Rs.1,20,79,827/-[9,96,87,857 - 50% of 17,52,16,060 = 9,96,87,857 - 8,76,08,030] is disallowed."*

5. We find that the ld CITA in ITA NO. 1255/CIT(A)-20/CC-I(3)/15-16 dated 23.5.2016 dismissed the appeal of the assessee by observing as under:-

> *"I have considered the finding of the AO in the assessment order and assessee's written submission filed during the appellate proceedings. I have also considered Board circular No. 8/2014. From calculation of profit with assessee's share filed, the AR has made out a case showing that assessee's share of profit from M/s. Mangilall Rungta for AY 2010-11 also includes last year undisclosed profit in the form of wrongly claimed excess depreciation by M/s. Mangilall Rungta. There is some logic and force in assessee's contention and submission but I do not make any comment on the finding given by the Ld. Principal Commissioner of Income Tax, Central-1, Kolkata in his order passed u/s. 263 (as the assessee has not preferred any appeal against the order in ITAT) which has become the basis of the order passed by the AO on 30.11.2015. Accordingly, assessee's appeal on ground no. 2 and 3 are dismissed."*

6. The ld AR narrated the entire facts of the case and drew our attention to Page 19 of the Paper Book containing profit and loss account of the firm for the year ended 31.3.2010 which contained assessee's share of profit at Rs. 8,76,08,029.88 (50% share) and to page 20 of the Paper book containing the break up of Partners Capital Account as below:-

Schedule "I"

Head Office Account :

Partners Capital Account

Sri N.L. Rungta

Opening Balance	518249232.09	
Less: Withdrawal during the year	7000000.00	

		511249232.09
Add: Excess Depreciation provided in P&M (9MVA) Adjusted (F.Y. 08-09)	12079827.35	
Add: Share of Profit	87608029.88	
	------------------	99687859.23

Closing Balance		610937089.32

Sri Mukund Rungta

Opening Balance	510460668.90	
Less: Withdrawal during the year	600000.00	

		504460668.90

Add: Excess Depreciation provided in P&M (9MVA) Adjusted (F.Y. 08-09)	12079827.35	
Add: Share of Profit	87608029.88	
	------------------	99687859.23

Closing Balance		604148526.14

The ld AR also referred to page 14 of the paper book containing the profit and loss account of the assessee wherein he had separately credited the share of profit from partnership firm at Rs. 9,96,87,857.24 on the income side thereon.

He reiterated the point that both the ld CIT u/s 263 of the Act and the ld AO ultimately had only sought to reduce the exempt income claimed u/s 10(2A) of the Act towards share of profit from partnership firm which according to them had contributed to the increase in partners capital account during the year under appeal. Both the ld CIT and ld AO had not found any concealment of taxable income or furnishing of inaccurate particulars of taxable income reported by the assessee in the returns. Hence there is no prejudice that could be caused to the interests of the revenue and hence no revision u/s 263 of the Act could be made in the instant case and accordingly both the section 263 order of ld CIT as well as the order passed pursuant to section 263 order by the ld AO should be quashed. In response to all these arguments, the ld DR vehemently relied on the orders of the lower authorities.

7. We have heard the rival submissions and perused the materials available on record. We have gone through the paper book of the assessee comprising of ITR Acknowledgement, computation of income and final accounts for Asst Year 2010-11 (Pages 1 to 14 of PB) ; ITR Acknowledgement, computation of income and final accounts for Asst Year 2010-11 of Mangilall Rungta (Pages 15 to 25 of PB) ; Schedule of Depreciation as per Income Tax Act for Asst Year 2010-11 (Pages 26 to 28 of PB) ; Ledger account of Plant and Machinery (9MVA model) for the Asst Year 2010-11 vide page 29 of PB ; Schedule of depreciation as per books of accounts for the Asst Year 2010-11 (pages 30 to 38 of PB) ; ITR Acknowledgement, computation of income and final accounts for Asst Year 2009-10 of Mangilall Rungta (Pages 39 to 49 of PB) ; Schedule of

Depreciation as per Income Tax Act for Asst Year 2009-10 (Pages 50 to 52 of PB) ; Ledger account of Plant and Machinery (9MVA model) for the Asst Year 2009-10 vide page 53 of PB and Schedule of depreciation as per books of accounts for the Asst Year 2009-10 (pages 54 to 61 of PB). We find lot of force in the arguments of the ld AR as stated above which are not reiterated herein for the sake of brevity as they are in consonance with the evidences submitted in the paper book of the assessee as above. We find that the ld CIT had only sought to reduce the claim of exempt income towards share of profit from partnership firm in the hands of the assessee partner which has got absolutely no tax impact on the revenue. First of all, we hold that the action of the partnership firm M/s Mangilall Rungta in passing rectification entries with regard to withdrawal of excess claim of depreciation as per books of accounts have got nothing to do with the computation of taxable income of the said firm as they had duly added back the book depreciation and claimed deduction only in respect of Income tax depreciation. The ld AO and the ld CIT had not found any discrepancy in the computation of taxable income of the said partnership firm. The assessee is only a partner in the said firm and had derived share of profit from the said firm which is exempt u/s 10(2A) of the Act. Even if there is some mistake , which in our opinion, there is none, in the said share of profit from firm which is exempt u/s 10(2A) of the Act, it would definitely not cause any prejudice to the interests of the revenue as there is no tax impact on the same. Hence in these circumstances , the ld CIT , in our considered opinion, erred in invoking revisionary jurisdiction u/s 263 of the Act without looking into the facts and circumstances of the case and the decision of the Hon'ble Supreme Court in the case of Malabar Industrial Holdings reported in 243 ITR 83 (SC) which categorically held that twin conditions (i.e order should be erroneous and it should be prejudicial to the interests of the revenue) should be satisfied before invoking jurisdiction u /s 263 of the Act. In the instant case, definitely no prejudice is caused to the interests of the revenue. Hence we hold that the ld CIT grossly erred in persuading himself to pass a revision order u/s 263 of the Act by setting aside the order of assessment vide his order dated 3.9.2015.

In view of the aforesaid facts and circumstances, we hold that the revision proceedings u/s 263 of the Act by the ld CIT deserves to be quashed and accordingly we quash the same . Accordingly the grounds raised by the assessee in ITA No. 1317/Kol/2016 are allowed.

7.1. Since the revision proceedings u/s 263 of the Act are quashed, the subsequent order of assessment by the ld AO on 30.11.2015 becomes infructuous and deserves to be quashed. Accordingly the grounds raised by the assessee in ITA No. 1318/Kol/2016 are allowed.

7.2. The decision rendered in the case of Mukund Rungta would apply with equal force to Nandilal Rungta as the facts are exactly identical.

8. In the result, the appeals of the assessee in
ITA Nos. 1317-1318 / Kol /2016 in the hands of Mukund Rungta are allowed and
ITA Nos. 1319-1320 / Kol /2016 in the hands of Nandilal Rungta are allowed

Order is pronounced in the open court on 09.03.2017

Sd/-	Sd/-
(S. S. Viswanethra Ravi)	(M. Balaganesh)
Judicial Member	Accountant Member

Dated : 9th March, 2017

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1. APPELLANT – Shri Mukund Rungta & Shri Nandlal Rungta, 8A, Express Tower, 42a, Shakespeare Sarani, Kolkata-700 017.
2. Respondent – DCIT, Central Circle-V & DCIT, C.C-1(3), Kolkata.
3. The CIT(A), Kolkata
4. CIT, Kolkata.
5. DR, Kolkata Benches, Kolkata

/True Copy, By order,

Asstt. Registrar.