

IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH : KOLKATA

[Before Hon'ble Sri N.V.Vasudevan, JM & Shri Waseem Ahmed, AM]

I.T.A No. 134/Kol/2016

Assessment Year : 2011-12

M/s. SPML Infra Ltd.  
Kolkata  
[PAN : AADCS 2469 K]  
(Appellant)

-vs.-

Pr.C.I.T.-3,  
Kolkata

(Respondent)

For the Appellant : Shri Sajjan Kumar Tulsian, Advocate

For the Respondent : Shri G.Mallikarjuna, CIT(DR)

Date of Hearing : 11.07.2016.

Date of Pronouncement : 15.07.2016.

**ORDER**

**Per N.V.Vasudevan, JM**

This is an appeal by the assessee against the order dated 01.12.2015 of C.I.T., Kolkata-3, Kolkata passed u/s 263 of the Income Tax Act, 1961 (Act).

2. The assessee is a company and it is engaged in the business of construction of water, environment, electrical and civil infrastructure works on contract basis. The Assessee filed return of income for the assessment year 2011-12 declaring total income of Rs.2,70,10,360/-. The Assessing Officer (A.O.) completed the assessment u/s 143(3) of the Act dated 25.3.2014 determining total income of the Assessee at Rs.68,01,50,080/- under normal provisions and Rs.31,32,70,078/- u/s. 115JB of the Act. In the assessment so completed the AO disallowed/ added back under several heads aggregating to Rs.6,23,78,564/- and also denied exemption u/s 80-1A of the Act of Rs.61,77,71,512/- claimed by the Assessee.

3. Subsequent to the passing of the said assessment order dated 25.03.2014, the Ld. Principal C.I.T. (CIT) issued a show-cause notice u/s. 263 of the Act dated 28/09/2015 alleging that:

(i) the assessee had debited in its P/L Account a sum of Rs.14,83,51,419/- being provision for future losses on construction contracts and claimed the same as deduction while computing income from business. According to the CIT this was an anticipated and unascertained liability and could not have been construed as an accrued liability allowable as deduction while computing business income for AY 2011-12. According to the said show-cause notice, such anticipated losses were not allowable in mercantile system of accounting.

(ii) According to the CIT, the assessee had taken accommodation entries in the nature of bogus expenditure amounting to Rs.5.42 crores from M/s. Sintex Infra Projects Ltd. which was not admissible expenditure.

On the basis of the above alleged reasons, the CIT wanted to hold the order of the AO erroneous and prejudicial to the interest of the revenue and called upon the Assessee to show-cause why appropriate orders should not be passed u/s.263 of the Act.

4. The Assessee by reply dated 29.10.2015 explained that with regard to anticipated loss on construction contracts which were claimed and allowed as deduction in the assessment proceedings, that queries in respect of future losses with reference to Accounting standard followed by the Auditor and verification of the same done by the A.O. during assessment proceeding in the light of several judicial pronouncements on the issues. With regard to the allegation of accommodation entries of bogus expenditure it was explained that the assessee made payments subject to TDS through banking channel to M/ s. Sintex Infra Projects Ltd. for the services rendered by them as sub-contractor. The Assessee submitted that the details and background of the said company and other documents evidencing their financial worth are in public domain and the same were also filed before the CIT. It was thus submitted CIT that the A.O. while

completing the assessment had adopted one of the courses permissible in law and, therefore, the provisions of sec. 263 of the Act are not attracted. It was, therefore, requested to drop proceeding initiated u/s.263 of the Act.

5. The CIT was, however, not satisfied with the explanation of the assessee and supporting evidences etc. filed. On the issue of future loss on construction contracts of Rs.14,83,51,419/-, which was claimed and allowed as deduction in the assessment proceedings, he held as under:-

"On going through the assessment records, I find that the A.O. had not made any enquiry whatsoever to ascertain the nature of the transaction or that of the contract and the circumstances that led to premature termination of the contract. It is apparent that without ascertaining these facts, it is not possible to arrive at a finding regarding allowability of the impugned deduction. On going through the assessment records. I find that neither the details of the circumstances leading to premature termination on the part of the contract nor terms and conditions of the contract were looked into by the A.O. without which the nature of the provisions of Rs.14,83,51,419/- cannot be ascertained. The failure on the part of the assessee thus, certainly makes the assessment order erroneous in so far as prejudicial to the interest of revenue as the deduction of Rs.14,83,51,419/- was allowed by the A.O. without even ascertaining its real nature. I, therefore, have no hesitation in holding that the assessment order dated 25.03.2014 for the Asst. Year 2011-12 is erroneous in so far as prejudicial to the interest of the revenue."

6. On the other issue of alleged bogus expenditure of Rs.5.42 crores paid to M/s. Sintex Infra Projects Ltd., the Assessee had contended that the A.O. had not made any enquiry while completing the assessment because the information regarding the payment to M/S.Sintex Infra Projects Ltd., being in the nature of an accommodation entry and therefore bogus was received from JCIT, Range-8, Ahmedabad much after the conclusion of the Assessment proceedings by the AO and therefore there was no basis on which the AO could have made any investigation on the said sum being genuine or not. The CIT did not accept this contention of the Assessee also and he held as under :-

"On consideration of the assessee's submission and arguments, I find that although the assessee has stated that the services rendered by the said company to the

assessee was also established but has not been able to produce any material or evidence from which it can be conclusively established that M/s. Sintex Infra Projects Ltd. had rendered the services in lieu of the payment received by it. In a collusive transaction, it always happens that the payments are made through banking channels and TDS is deducted in confirmation with the relevant provisions so as to render a cover of genuineness to otherwise not a genuine transaction in reality. The real nature of the transaction can only be ascertained if the A.O. makes enquiries in this regard. However, from the assessment order, I find that no such enquiry to ascertain the genuineness of the transaction, more specifically whether M/ s. Sintex Infra Projects Ltd. had rendered any service to the assessee in lieu of the payment made by the assessee was conducted by the A.O. The A.O. had also not examined the bank statements to look into the movement of the fund out of the payment made by the assessee. As these enquiries which were required to be made before accepting the claim of the assessee were not made, the assessment order is erroneous in so far as prejudicial to the interest of revenue as deduction of the sum of Rs.5.42 crores was allowed without making any enquiry."

7. The CIT accordingly set aside the order of the AO and directed the AO to make proper inquiries with regard to the claim of the Assesee for deduction on account of provision for future loss of Rs.14.83,51,419. The CIT also set aside the order of the AO in so far as it relates to the payment of Rs.5.42 crores to M/s. Sintex Infra Projects Ltd with the following observations :-

"On consideration of the assessee's submission and arguments, I find that although the assessee has stated that the services rendered by the said company to the assessee was also established but has not been able to produce any material or evidence from which it can be conclusively established that Is. Sintex Infra Projects Ltd. had rendered the services in lieu of the payment received by it. In a collusive transaction, it always happens that the payments are made through banking channels and TDS is deducted in conformation with the relevant provisions so as to render a cover of genuineness to otherwise not a genuine transaction in reality. The real nature of the transaction can only be ascertained if the A.O. makes enquiries in this regard. However, from the assessment order, I find that no such enquiry to ascertain the genuineness of the transaction, more specifically whether M/s. Sintex Infra Projects Ltd had rendered any service to the assessee in lieu of the payment made by the assessee was conducted by the A.O. The A.O. had also not examined the bank statements to look into the movement of the fund out of the payment made by the assessee. As these enquiries which were required to be made before accepting the claim of the assessee were not made, the assessment order is erroneous in so far as prejudicial to the interest of revenue as deduction of the sum of Rs.5.42 Crores was allowed without making any enquiry. I, therefore, hold that the assessment order dated 25.03.2014 completed u/s. 143(3) for the Asst. Year 2011-12 is erroneous and prejudicial to the

interest of revenue, which is therefore with a direction for fresh assessment after giving assessee opportunity of being heard.

8. Aggrieved by the aforesaid order the assessee has preferred the present appeal before the Tribunal.

9. We have heard the submissions of the Id. Counsel for the assessee and the Id. DR. The Id. Counsel for the assessee submitted that as per AS-7 issued by Institute of Chartered Accounts of India (ICAI), provision for foreseeable loss in the case of assessee engaged in construction business and following percentage construction method is allowable as deduction. In particular our attention was drawn to column 17(k) of the Tax Audit Report wherein the basis on which provision for future losses were claimed as deduction has been clearly set out by the Assessee as follows :-

“Rs.14,83,51,419/- being provision for future losses on construction contracts in terms of Accounting Staneard-7 notified by the Companies Accounting Standard Rules, 2006 (as amended). The Company has relied on the decision of the Mumbai Income Tax Appellate Tribunal (ITAT) (AIT-2009-285-ITAT) in the case of Jacob Eng. India Pvt. Ltd. and accordingly it has considered foreseeable loss, in respect of an incomplete contract computed in accordance with AS-7, as an allowable expense. ”

It was submitted that in the light of the material available on record, the AO accepted the claim of the assessee. It was submitted by him that the fact that the AO did not make any enquiries in this regard before allowing the claim of the assessee would not be material as on the basis of the material available on record it can be presumed that the AO has accepted the claim of the assessee after due consideration of the Tax Audit Report referred to above and the judicial pronouncements referred to therein. Reference was made to the decision of the Hon'ble Supreme Court in the case of Malabar Industrial Co.Ltd. vs CIT 243 ITR 83 (SC). It was submitted that two views are possible on the question of allowing foreseeable losses as deduction and the AO has taken one of the possible views and the CIT in exercise of powers u/s 263 of the Act cannot revise the order of AO on the ground that he does not agree with the view of the AO.

10. With regard to the bogus expenditure of Rs.5.42 crore paid to M/s. Sintex Infra Projects Ltd the Id. Counsel for the assessee submitted that the AO completed the order of assessment on 25.03.2014. Thereafter i.e. 30.03.2014 information was received from JCIT, Range-8, Ahmedabad which was to the effect that the assessee had taken accommodation entries in respect of expenditure paid to M/S.Sintex Infra Projects Ltd., and these expenses were therefore bogus. It was submitted that since information in question was received after the conclusion of the assessment proceedings, it cannot be said that the AO ought to have made enquiries into the alleged Accommodation entry. It was submitted that the conclusion of the CIT that the order of AO was erroneous for not making proper enquiries, in the given facts and circumstances cannot be sustained. It was again highlighted that in respect of payments made to M/s. Sintex Infra Projects Ltd tax has been deducted at source and all the payments were through banking channels. It was highlighted that the payee company is found in the rolls of register of companies and has been an active business. It was therefore submitted that identity of the payee company cannot be disputed. It was also argued that the CIT has passed the impugned order u/s 263 of the Act on the basis of material obtained behind the back of the assessee and this was not permissible under law. Reference was made to the decision of the Hon'ble Delhi High Court in the case of CIT vs Rajesh Kumar 306 ITR 27 (Delhi) and the decision of the Hon'ble Supreme Court in the case of Andaman Timber Industries Vs. Commissioner of Central Excise 281 CTR 241(SC). The Id. Counsel for the assessee prayed that the order of 263 be quashed.

11. The Id. DR placed reliance on the order of CIT and submitted that on both the issues the AO did not make any enquiries and therefore the CIT was fully justified in passing the impugned order. It was submitted by him that the assessee could always explain the merits of the claim with regard to allowing the provision for future losses and also payments to M/s. Sintex Infra Projects Ltd and therefore the assessee cannot

have any grievances. Reliance was placed by him on the decision of the Hon'ble Delhi High Court in the case of Gee Vee Enterprises 99 ITR 375 (Del).

12. We have given a very careful consideration to the rival submissions. It is clear from the material on record that the AO while completing the assessment u/s 143(3) of the Act did not make any enquiries whatsoever with regard to the provision for future losses on construction contract of Rs.14,83,51,419/- claimed by the assessee. The submission of the ld. Counsel for the assessee was that since the basis on which this loss was claimed was set out in the tax Audit Report in col. 17(k) and since this material was available before the AO, the AO is deemed to have applied his mind to the claim of the assessee for deduction. We are of the view that this stand taken by the assessee cannot be sustained. The basis on which the loss was arrived has not been enquired into by the AO. As to whether AS-7 will apply to the case of the assessee and as to whether the computation of the loss done by the assessee in accordance with AS-7 is a matter which ought to have been enquired into by the AO. His failure to make an enquiry on these aspects and accepting the claim of the assessee for deduction was erroneous and prejudicial to the interest of the revenue. The law is well settled that if the AO fails to make an enquiry on an issue, which in the given facts and circumstances of the case, calls for an enquiry then the order of the AO should be held to be erroneous and prejudicial to the interest of the revenue. The decision of the Hon'ble Delhi High Court in the case of Gee Vee (supra) clearly supports the stand of the revenue in this regard. The Hon'ble Delhi High Court in the aforesaid decision has held that the ITO being not only an adjudicator but also an investigator, he cannot remain passive in the face of a return which is apparently in order but calls for further enquiry in the facts and circumstances of the case and the word 'erroneous' in s. 263 includes the failure to make such an enquiry. We are therefore of the view that exercise of jurisdiction u/s 263 of the Act in respect of provision for future losses on construction contract was fully justified.

13. With regard to the payments made to M/s. Sintex Infra Projects Ltd of Rs.5.42 crores is concerned, it is no doubt true that the information with regard to payments being in the nature of accommodation entry came into the possession of the AO after the conclusion of the assessment proceedings. It is however seen that at the time when the CIT invoked the provision u/s 263 of the Act, information in question was available on the record of the assessment. The definition of “record “as contained in Explanation 1(b) to section 263(1) of the Act makes its clear that record shall include and shall be deemed always to have included all records relating to any proceedings under this act available at the time of examination by the Commissioner. It is permissible for the CIT to invoke jurisdiction u/s 263 of the Act on the basis of the material which comes to the possession of the AO after conclusion of the assessment proceedings, and which is part of the record before CIT when the jurisdiction u/s.263 of the Act is being invoked by the CIT. We are supported in the above conclusions by the decision of the Hon’ble Supreme Court in CIT vs. Shree Manjunathesware Packing Products & Camphor Works 231 ITR 53 (SC) wherein the Hon’ble Supreme Court after examining the legislative amendment to s. 263 including the amendment made with retrospective effect for amplifying the scope of the term ‘record’, did not accept the narrow interpretation of the word ‘record’ which had appealed to the Calcutta High Court in the case of Ganga Properties vs. ITO 118 ITR 447 (Cal) and the apex Court held as under :

". . . . The revisional power conferred on the CIT under s. 263 is of wide amplitude. It enables the CIT to call for and examine the record of any proceeding under the Act. It empowers the CIT to make or cause to be made such enquiry as he deems necessary in order to find out if any order passed by the AO is erroneous insofar as it is prejudicial to the interests of the Revenue. After examining the record and after making or causing to be made an enquiry, if he considers the order to be erroneous, then he can pass the order thereon as the circumstances of the case justify. Obviously, as a result of the enquiry he may come into possession of new material and he would be entitled to take that new material into account. If the material, which was not available to the ITO when he made the assessment could thus be taken into consideration by the CIT after holding an enquiry, there is no reason why the material which had already come on record though subsequent to the making of the assessment cannot be taken

into consideration by him. Moreover, in view of the clear words used in cl. (b) of the Expln. to s. 263(1), it has to be held that while calling for and examining the record of any proceeding under s. 263(1), it is and it was open to the CIT not only to consider the record of that proceeding but also the record relating to that proceeding available to him at the time of examination."

The Hon'ble Calcutta High Court itself in a subsequent decision in B.P.Agarwalla & Sons Ltd. Vs. CIT 208 ITR 863 (Cal) made a remark that the CIT can certainly take into consideration subsequent information for the purpose of initiating proceedings under s. 263 so that an assessment order which was good when it was made in the light of such subsequent information may appear erroneous. Under the analogous provisions of the WT Act, 1957, the Kerala High Court in CWT Vs. Smt.B.Indira Devi 208 ITR 26 (Ker) opined that the amendment of Sec.25(2) of the Wealth Tax Act, 1957 is retrospective, and is declaratory of what the law always was. The High Court hence held that even for the asst. yrs. 1976-77 and 1977-78 "record" would include all records relating to any proceeding under the WT Act, available at the time of examination by the CWT; consequently report of the valuation cell received subsequent to the completion of assessment can be considered by the CWT while exercising his suo-motu power of revision.

14. We therefore are of the view that the CIT was justified in invoking the jurisdiction u/s 263 of the Act even in respect of the payments made to M/s. Sintex Infra Projects Ltd.

15. In the given facts and circumstances we do not find any ground to interfere in the order of CIT. As rightly contended by the CIT DR before us, the assessee is at liberty to put forth all contentions with regard to the allowability of the provision for future losses on construction contract and also as to how the payments made to M/s. Sintex Infra projects Ltd is not in the nature of accommodation entries and are genuine. The AO will look into the submissions of the assessee and after taking into consideration the evidence and materials before him, he is free to come to the conclusion as to whether

the claim made by the assessee has to be accepted or not, uninfluenced by the fact that the assessment is being made to direction u/s.263 of the Act. With these observations, we dismiss the appeal of the assessee.

16. In the result the appeal of the assessee is dismissed.

**Order pronounced in the Court on 15.07.2016.**

Sd/-  
[Waseem Ahmed]  
Accountant Member

Sd/-  
[ N.V.Vasudevan ]  
Judicial Member

Dated : 15.07.2016.  
[RG PS]

Copy of the order forwarded to:

1. M/s. SPML Infra Limited, 22, Camac Street, A-Block, 3<sup>rd</sup> Floor, Kolkata-700016.
2. Principal C.I.T.-3, Kolkata.
3. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Asstt.Registrar, ITAT, Kolkata Benches