

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'डी', अहमदाबाद ।
IN THE INCOME TAX APPELLATE TRIBUNAL
“D” BENCH, AHMEDABAD

BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER And
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A. No.468/Ahd/2016
(निर्धारण वर्ष / Assessment Year : 2008-09)

Gujarat State Electricity Corp.Ltd. Vidyut Bhavan Race Course Circle, Baroda	बनाम/ Vs.	Pr.CIT-I Vadodara
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACG 6864 F		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी ओर से/ Appellant by :	Shri J.P. Shah, AR
प्रत्यर्थी की ओर से/Respondent by :	Shri Jagdish, CIT-DR

सुनवाई की तारीख / Date of Hearing	06/03/2019
घोषणा की तारीख/Date of Pronouncement	13/03/2019

आदेश / O R D E R

PER SHRI RAJPAL YADAV, JUDICIAL MEMBER :

The Assessee is in appeal before us against the order of Ld.Pr.Commissioner of Income Tax, Vadodara-1 ['Pr.CIT' in short] dated 11/01/2016 passed u/s. 263 of the Income Tax Act, 1961 (hereinafter referred to as "the Act") for Assessment Year (AY) 2008-09.

2. The grievance of the assessee is that the Ld.Pr.CIT has erred in invoking the provisions of section 263 of the Act and setting aside the reassessment order dated 07/03/2014 for fresh assessment.

3. The brief facts of the case are that assessee has filed its return of income on 30/09/2008 declaring total income under the normal provisions of Income Tax Act at Rs.NIL and book profit u/s.115JB at Rs.66,70,41,000/-. An assessment order was passed u/s.143(3) on 30/12/2010 determining the total income under the normal provisions of IT Act NIL after setting off of brought forward losses to the extent of Rs.2,30,84,16,895/- and book profit was determined at Rs.72,38,04,750/-. The Assessing Officer thereafter given effect to the order of Ld.CIT(A) on 06/08/2012. He determined the book profit u/s.115JB at Rs.72,37,98,000/-.

4. The assessment was reopened and fresh assessment order was passed u/s.147. The Ld.AO again determined total income under normal provisions of the Income Tax Act at Nil after setting off of brought forward losses to the extent of Rs.2,85,24,39,945/-. The book profit u/s.115JB of the Act was determined at Rs.72,37,98,000/-. The Ld.Commissioner after perusal of the record formed an opinion that reassessment order dated 07/03/2014 is an erroneous order which has

caused prejudice to the revenue. Hence, it requires to be revised and he issued a show-cause notice by assigning following reasons:

“As per the Schedule 16 to P&L Account, assessee had debited Rs.16,87,67,000/- on account of provision for loss on dispute under the head Administrative & Other expenses. It was further noticed that the same was not ascertained as on 31/03/2008. This being an unascertained liability, Rs.16,87,67,000/- was required to be added while computing Book Profit u/s.115JB of the IT Act.

5. The above reason has been reproduced by the Ld.Commissioner in para No.2 of the impugned order. In response to the show-cause notice, the assessee has filed submission which has been reproduced by the Commissioner in para No.3 and thereafter Ld.Commissioner set aside the reassessment order. The submission of the assessee and finding thereon by the CIT reads as under:

“3. Accordingly, notice u/s 263(1) of the IT Act, dated 09.10.2015 was issued fixing hearing on 02.11.2015 at 12.00 p.m. In reply, an adjournment application wherein further time was sought for submissions was filed. In response, assessee was granted further time upto 07.12.2015. Accordingly, assessee vide letter dated 20.11.2015 filed submissions in tapal on 07.12.2015 requesting to drop the proceedings. The relevant part is reproduced as under:

"With reference to the captioned subject...

1) Provision for loss on dispute

While issuing the notice under section 263 of the IT Act, it has been indicated that the expenditure of Rs.16,87,67,000/- on account of provision for loss on dispute under the head Administrative and General Expenses is an unascertained liability and requires to be added to the book profits under section 115JB of the IT Act, 1961.

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It is submitted that during FY 2007-08, relevant to AY 2008-09, the Company has billed sale of energy to CUVNL, the holding company as per the orders of GERC. However, the GUVNL has debited the accounts of the Company and credited their power purchase accounts for the followings:

(a) The Company was eligible as per order of GERC 896/2006 considering Station Heat Rate of 1950 KCL/KWh In respect of Utran TPs whereas bills were raised considering SHR of 2100 KCL/KWh, resultantly, Rs.11.23 crore was reversed by GUVNL

(b) The Company was eligible as per order of GERC 896/2006 considering Station Heat Rate of 1950 KCL/KWh in respect of Dhuvaran TPs whereas bills were raised considering SHR of 2900 KCL/KWh, resultantly, Rs.5.64 crore was reversed by GUVNL.

On receipt of the above advice from GUVNL (copies enclosed in Annexure-l), the Company took up the matter with GUVNL.- However, GUVNL did not accept the company's arguments and hence the above amount was written off in the books of account.

Thus the entire expenditure is allowable as business expenditure. Merely because the wordings used are provision for loss does not mean that it is a provision. The amount has actually been a loss incurred and accounted in the books.

This apart, there is no element of estimation in it so as to term it as "Unascertained liability" in as much as the amount of loss incurred on sale of energy was fully determinable and certain.

In view of the above, it is submitted that the said amount cannot be treated as unascertained liability and can under no circumstances be added under section 115JB of the IT Act.

*In view of the facts and circumstances,
.....”*

4. I have carefully considered the submissions made by the Assessee. I am of the view that the A.O. has failed to make proper enquiries, examine the records and appreciate the facts and the law while completing the assessment.

5. In the case of *K.A. Ramaswamy Chettiar* (220 ITR 657) the Hon'ble Madras High Court has held that when the ITO is expected to make an enquiry of a particular item of income and if he does not make an enquiry as expected, that would be a ground for the Commissioner of Income Tax to interfere U/s.263 with the order passed of the ITO, since such an order passed by the ITO is erroneous and prejudicial to the interest of the revenue.

5.1 In the case of *Swarup Vegetable Products vs. Commissioner of Income Tax* (1990) 187 ITR 412 (All), it was held by Hon'ble Allahabad High Court as under:-

“It is beyond dispute that, U/s. 263 of the IT Act, the CTT does have the power to set aside the assessment order send the matter for a fresh assessment if he is satisfied that further enquiry is necessary, and that the order of the ITO is prejudicial to the interest of the Revenue.”

6. Failure on the part of the A.O. with regard to examination/verification of the vital issue discussed in Para 2 herein above has rendered the assessment erroneous, in so far as, it is prejudicial to the interest of revenue. Therefore in exercise of the powers conferred by the Section 263 of the Income-tax Act, 1961, the assessment is **set-aside** with the directions that the assessment should be framed afresh by the A.O. after proper enquiries / verification on the aforementioned issue, examining the accounts and records of the assessee and after allowing reasonable opportunity of being heard to the assessee.”

6. Before us, at the very outset, ld.counsel for the assessee contended that sub-clause(2) of section 263 of the Act provides time limit for taking action at the end of the Ld.Commissioner. It contemplates that no order shall be made “under sub-clause(1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed.”

7. Emphasizing on the above, it was contended that action under sub-clause (1) of section 263 could be taken before the expiry of two years from

the end of the financial year in which the order sought to be revised was passed. The Assessing Officer has not reopened the assessment for making any variation to the book profit computed by him in the original assessment order. Therefore, the issue related to recomputation of book profit was never the subject matter of order passed on 07/03/2014 u/s.147 r.w.s. 143(3) of the Act. Thus, if there is any error crept in the order of the Assessing Officer which has caused any prejudice to the revenue for computing the book profit is concerned, i.e. the order dated 30/09/2010 passed u/s.143(3) of the Act. The time limit to initiate proceeding u/s.263 of the Act would have expired much earlier, then even passing of the4 reassessment order. Thus, Ld.Commissioner has erred in taking cognizance u/s.263 on reassessment order for disturbing the computation of book profit u/s.115JB which was not the subject matter of the reassessment order. The figure of book profit in 147 order as well as u/s.143(3) orders are identical. Even if some variation is there, then that variation is by virtue of order giving effect passed on the basis of CIT(A)'s order but again that was also not subject matter of section 263 of the Act.

8. For buttressing his contention, he placed on record copy of reasons recorded by the Assessing Officer in reopening of the assessment. He also relied upon the judgement of Hon'ble Supreme Court in the case of CIT, Chennai vs. Alagendran Finance Ltd. reported in 293 ITR 01 (SC).

9. The Ld.DR, on the other hand, relied upon the order of Pr.CIT.

10. We have duly considered the rival contentions and gone through the record carefully. Admittedly, the assessment completed u/s.143(3) on 30/12/2010 was not reopened for escapement of any amount from computation of book profit. For this purpose, we have specifically perused the reasons. Thus, the issue with respect to computation of book profit u/s.115JB of the Act attained finality when Assessing Officer has given effect to the order of the CIT(A) dated 06/08/2012 as well as the assessment order dated 30/12/2010. The Ld.Commissioner took cognizance on the reassessment order which has nothing to do with computation of book profit. The Hon'ble Supreme Court has considered this aspect in the judgement referred by the ld.counsel for the assessee. The following observation of the Hon'ble Apex Court will make the issue clear:

“13. It may be of some interest to notice that a similar contention raised at the instance of an assessee was rejected by a 3-Judge Bench of this Court in CIT vs. Shri Arbuda Mills Ltd. (1998) 147 CTR (SC) 474 : (1998) 231 ITR 50 (SC). This Court took note of the amendment made in s. 263 of the Act by the Finance Act, 1989 with retrospective effect from 1st June, 1988, inserting Expln. (c) to sub-s. (1) of s. 263 of the Act stating :

"The consequence of the said amendment made with retrospective effect is that the powers under s. 263 of the CIT shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in an appeal. Accordingly, even in respect of the aforesaid three items, the powers of the CIT under s. 263 shall extend and shall be deemed always to have extended to them because the same had not been considered and decided in the appeal filed by the assessee. This is sufficient to answer the question which has been referred."

We, therefore, are clearly of the opinion that in a case of this nature, the doctrine of merger will have no application.

14. *The Madras High Court in A.K. Thanga Pillai (supra), in our opinion, has rightly considered the matter albeit under s. 17 of the WT Act, 1957 which is in pari materia with the provisions of the Act. Relying on Sun Engineering Works (P) Ltd. (supra), it was Held :*

"Under s. 17 of the WT Act, 1957, even as it is under s. 147 of the IT Act, proceedings for reassessment can be initiated when what is assessable to tax has escaped assessment for any assessment year. The power to deal with underassessment and the scope of reassessment proceedings as explained by the Supreme Court in the case of CIT vs. Sun Engineering Works (P) Ltd. (1992) 107 CTR (SC) 209 : (1992) 198 ITR 297 (SC), is in relation to that which has escaped assessment, and does not extend to reopening the entire assessment for the purpose of redoing the same de novo. An assessee cannot agitate in any such reassessment proceedings matters forming part of the original assessment which are not required to be dealt with for the purpose of levying tax on that which had escaped tax earlier. Cases of underassessment are also treated as instances of escaped assessment.

The order of reassessment is one which deals with the assessment already made in respect of items which are not required to be reopened, as also matters which are required to be dealt with in order to bring what had escaped in the earlier order of assessment, to assessment. An assessee who has failed to file an appeal against the original order of assessment cannot utilise the reassessment proceedings as an occasion for seeking revision or review of what had been assessed earlier. He may only question the extent of the reassessment insofar as the escaped assessment is concerned. The Revenue is similarly bound."

The same principle was reiterated by a Division Bench of the Calcutta High Court in CIT vs. Kanubhai Engineers (P) Ltd. (2000) 158 CTR (Cal) 219 : (2000) 241 ITR 665 (Cal).

15. *We, therefore, are clearly of the opinion that keeping in view the facts and circumstances of this case and, in particular, having regard to the fact that the CIT exercising its revisional jurisdiction reopened the order of assessment only in relation to lease equalization fund which being not the subject of the reassessment proceedings, the period of limitation provided for under sub-s. (2) of s. 263 of the Act would begin to run from the date of the order of assessment and not from the order of reassessment. The revisional jurisdiction*

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having, thus, been invoked by the CIT beyond the period of limitation, it was wholly without jurisdiction rendering the entire proceeding a nullity.

16. The Tribunal and the High Court, therefore, in our opinion were correct in passing the impugned judgment. The appeal, therefore, being devoid of any merit is dismissed with costs. Counsel's fee assessed at Rs. 25,000."

11. Respectfully following the judgement of Hon'ble Supreme Court, we are of the view that the Commissioner has taken cognizance u/s.263 of the Act after expiry of limitation and his order is not sustainable in the eye of law. Hence, we quash the impugned order.

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

Order pronounced in the Court on 13th March-2019 at Ahmedabad.

Sd/-
(PRADIP KUMAR KEDIA)
ACCOUNTANT MEMBER

Sd/-
(RAJPAL YADAV)
JUDICIAL MEMBER

Ahmedabad; 13/ 03 /2019

टी.सी.नायर, व.नि.स./T.C. NAIR, Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)/ Pr.CIT, Vadodara-1.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER.

सत्यापित प्रति //True Copy//

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आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad