IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH : BANGALORE

BEFORE SHRI ARUN KUMAR GARODIA, ACCOUNTANT MEMBER AND
SHRI LALIET KUMAR, JUDICIAL MEMBER

ITA No.157/Bang/2017
Assessment Year : 2012-13

Shri V.N.K. Memon, KHB Colony, Sandur, Bellary District. **PAN: AGXPM5124G**	vs.	The Assistant Commissioner of Income Tax, Circle – 1, Bellary.
APPELLANT		RESPONDENT

Appellant by	:	Shri B.S. Balachandran, Advocate
Respondent by	:	Shri Muzaffar Hussain, CIT (DR)

Date of hearing	:	26.02.2019
Date of Pronouncement	:	15.03.2019

O R D E R

Per Shri A.K. Garodia, Accountant Member

This appeal is filed by the assessee and the same is directed against the order of Pr. CIT, Kalaburagi dated 18.11.2016 for Assessment Year 2012-13 passed u/s. 263 of IT Act.

2. The grounds raised by the assessee are as under.

> "*1. There being no error or even prejudice to the interest of the Revenue, the Principal CIT erred in exercising the jurisdiction under Section 263 of the Act.*
>
> *2. Without prejudice, the CIT ought to have appreciated that the assessing officer had called for various details during the course of the assessment proceedings and after being satisfied, had taken one of the possible views in the order under Section 143(3) and, therefore, exercise of revisional powers under Section 263 is only on mere change of opinion which is not sustainable in the eye of law.*
>
> *3. None of the twin conditions for invoking revisional powers under Section 263 being present, the impugned order passed under Section 263 is not in terms with the decisions rendered by the Hon'ble Supreme Court in the cases of (a) Malabar Industrial Co. Ltd vs. CIT*

(2000) 243 ITR 83 (SC) and (b) CIT vs. Max India Ltd (2007) 295 ITR 282 (SC) and therefore the impugned order is liable to be set aside.

4. Without prejudice, the assessing officer having adopted one of the possible views, the exercise of jurisdiction under Section 263 by the CIT is not justified.

5. For these and such other grounds that may be urged at the time of hearing, the appellant prays that the appeal may be allowed."

3. It was submitted by ld. AR of assessee that in para 3.1 of the impugned order of Pr. CIT, full facts are noted along with the objections of the assessee and finding of Pr. CIT. Hence, we reproduce this Para 3.1 from the order of Pr. CIT as under.

"*3.1 In respect of the objection filed that no sale invoice issued any time by the assessee and no VAT return were filed by the assessee, is not acceptable. The assessee has accounted 80% of the sales made through e-auction and failed to book 20% sale amount retained by CEC. If no sale invoice was issued by the assessee and no VAT return were filed by the assessee then why he himself has accounted 80% of the said sale. It is only an afterthought.*

Further, in connection with the illegal mining activities in Karnataka, the Hon'ble Supreme Court has established a Monitoring Committee called Central Empowered Committee (CEC) to monitor the e-auction sales of the iron ore and other related work entrusted to it. In this regard. in the case of SamajParivartanaSamudaya& others Vs. State of Karnataka & others, vide its order in Writ Petition No. 562 of 2009 dated 23.09.2011 along with SLP No. 7366-7367, the Hon'ble Supreme Court in para no. 2(x) has held that 20% of the sales proceeds may be retained presently. It was no where mentioned in the said order that amount retained for ever or amount retained for any undefined period. Further, in the same order, the Hon'ble Apex Court, has described the modalities for the sale of iron ore and has clearly mentioned the procedure to be adopted for e-auction of iron ore and procedure for accounting of sale proceeds. The account of sale proceeds is being maintained by the Government under double entry system of accounting which is duly being monitored by CEC. As per double entry system of accounting, the assessee should have accounted the entire sales consideration in its P&L account and balance 20% of sale amount should be shown as receivable from Government. The 20% of the sale amount will be reflecting as payable to seller-assessee in the accounts of the Government. Accordingly, the receipt of balance 20% of the sale consideration is nowhere in suspense or in uncertainty.

Further, the statement made by the assessee in para 4 of its

submission that there was no clarity/ certainty whether the amount would be refunded or retained and further stated that 10% of the amount out of 20% retained. was refunded on 21.05.2014 and same was accounted as income as receipt basis in F.Y. 2014-15 are contradictory in nature. If part of the amount is received then there is no question of uncertainty involved. Since the assessee has been following mercantile system of accounting, the assessee should have offered the entire sale consideration to tax on receivable basis and later on if it's not refunded, the assessee could have written off the same in books of account as not received. How can an assessee follow hybrid system of accounting only for this transaction on cherry pick basis, is not acceptable.

Further, the assessee was well aware of the fact to whom the sale was made and also what is the amount of sale price. The assessee should have accounted the sale in its books accordingly. The assessee has booked all its expenditure related to the sales made through e-auction, however, failed to book the sales. If the assessee has transferred the stock from its mine to the buyer, as per accounting policies the closing stock figure should have reduced and sale figure should have increased. However, in the present case, the closing stock figure is not appearing at all and also the assessee has not hooked the sale to the extent of 20% sale amount retained by the CEC.

Reliance is placed on the decision of the Hon'ble Supreme Court in case of CIT Vs K.C.P. Limited (SC) 245 ITR 421 dated 09.08.2000 wherein the assessee has collected excess amount of levy price on sugar as against the levy price fixed by the Government. The assessee has challenged the same by filing of a Writ Petition. The assessee, protected by an interim order, continued to sell sugar at higher price. The assessee was following mercantile system of accounting. It maintained separate account for such excess realization. Writ was subsequently vacated and the assessee could no longer charge excess price. However, neither the interim order specifically cast a liability on the assessee to refund excess amount to purchasers from whom the same was realized in event of writ being dismissed, nor did final order of High Court direct the assessee to refund said excess amount. Subsequently, the Sugar Price Equalization Fund Act, 1976 came into effect which made provision for depositing excess amount in a fund established under that Act. The assessee transferred the excess realization to fund in 1997 It was held that the excess amount was realized in the ordinary course of its business activity as price of sugar sold by the assessee. Accordingly, the Hon'ble Supreme Court has rightly held that excess collected is income in the year of collection even if it is retained in a separate account and subsequently transferred to Sugar Equalization Fund of the Govt.

Further, the retention money is a part of the sales proceeds and it ought to be recognized as revenue. The assessee was following

Mercantile System of accounting and in Mercantile System of accounting the retention money is accrued to the assessee as soon the entries are posted in the books of account. There are only two recognized methods of accounting namely the cash method of accounting and the mercantile method of accounting. In mercantile method of accounting, entries are posted in the books of accounts on the date of transaction when the rights accrue or liabilities are incurred, irrespective of the date of payment. The right to receive the said retained amount has accrued to the assessee and it cannot be diverted on the plea contrary to the accounting practice, since the assessee company is following accrual method of accounting, a part of receipt cannot be taken on piecemeal / receipt basis. The reliance is placed on the following decisions wherein it is held that the transaction cannot be split in to mercantile and cash method of accounting:

- *G PadmanabhaChattivar& Sons vs. CIT 182 ITR 1, 5 (Mad.),*
- *Reform Flour Mills Pvt. Ltd. vs CIT 132 ITR 184,196 (Cal)*
- *CIT v/s A Krishnaswamy Mudaliar& Others 53 ITR 122 (SC).*

Further, reliance is placed on the following decisions of the Hon'ble Apex Court wherein it was held that the amount receivable has to be credited irrespective of the receipt thereof and the expenditure therefore has to be debited irrespective of the payment thereof in case of mercantile method of Accounting. As the assessee has claimed entire expenditure corresponding to the amount of sales proceeds which was retained by the CEC, the entire sales including retained amount of 20% has to be credited to the P&L account.

- *Keshav Mills Ltd. Vs CIT (1953) 23 ITR 230,239 (SC)*
- *Calcutta Co Ltd. Vs CIT (1959) 37 ITR 1,3 (SC)*
- *CIT Vs Swadeshi Cotton & Flour Mills Pvt. Ltd. (1964) ITR 134,137 (SC)*

In view of the above discussion, the objection filed by the assessee on this account, is not acceptable."

4. Thereafter, he submitted that this is the case of the assessee that as per the directions of Hon'ble Supreme Court, a monitoring committee called Central Empowered Committee (CEC) to monitor the e-auction sales of the iron ore and other related work entrusted to it and Hon'ble Supreme Court held that 20% of the sale proceeds may be retained presently. He further submitted that this was the claim of the assessee before CIT that there was no certainty as to whether the amount retained by CEC to the extent of 20% of sale proceeds would be refunded to the assessee or not and only 50% of such retained amount was

actually refunded on 21.05.2014 and the assessee has accounted for the same as income in Financial Year 2014-15 on receipt basis. He submitted that under these facts, the income on account of retention money has not accrued to the assessee in the present year in view of uncertainty of receipt of this amount. He placed reliance on the Tribunal order rendered in the case of M/s. M. Hanumantha Rao Vs. ACIT in ITA No. 158/Bang/2017 dated 19.12.2017 and submitted a copy of this Tribunal order. He submitted that facts of this case are identical except one difference that in that case, retention money was only 15% because in that case, mine in question was category B mine whereas in the present case, the mine in question is A category mines. He submitted that in that case, the Tribunal held that although the assessee has followed mercantile system of accounting but there was no accrual of right to receipt of payment having regard to the ratio laid down by the Hon'ble Apex Court rendered in the case of CIT Vs. ShoorjiVallabhdas& Co. (46 ITR 144) and in the case of CIT Vs. Birla Gwalior (P) Ltd. (89 ITR 266) and in several other cases noted by the Tribunal in para 9 of its order. He submitted that the facts are identical and therefore, the issue in the present case should also be decided on similar line in favour of the assessee. The ld. DR of revenue supported the order of CIT.

4. We have considered the rival submissions. First of all, we reproduce paras 2 and 3 of this Tribunal order rendered in the case of M. Hanumantha Rao Vs. ACIT (supra) because the facts of this case are noted in these two paras.

> "2. *Briefly, the facts of the case are that the appellant is an individual engaged in the business of extraction and sale of iron ore. The return of income for the assessment year 2012-13 was filed on 28.09.2012 declaring income of Rs.4,32,33,043/- and this was revised on 28.02.2013 at a total income of Rs.13,09,79,754/-. The variation between the original return of income and revised return of income was stated to be on account of offering of E-auction sale proceeds of Rs.14,68,19,400/-. Against the said return of income, the assessment was completed by the ACIT, Circle-1, Bellary vide order dated 01.08.2014 passed under section 143(3) of the Act. After making an adhoc disallowance of Rs.25,00,000/-, there were no further proceedings on this assessment as the ad-hoc disallowance was made on concession.*

3. While the matter stood thus, the learned Principal CIT, issued a show cause notice dated 12.05.2015 under section 263 of the Act proposing to revised assessment order, as the Assessing Officer had failed to assess the amount of Rs.2,59,09,307/- being 15% of proceeds of E-auction of Iron Ore of Rs.17,27,28,707/-. This amount was deducted by the Central Empowered Committee (CEC) towards the special purpose vehicle. The Principal Commissioner was of the opinion that this amount is an application of income and therefore cannot be allowed as a deduction. Subsequently, a revised show cause notice dated 16.03.2016 was issued wherein the learned Principal CIT held that apart from 15% of the E-auction sale proceeds, a further sum of Rs.6,05,00,000/- paid by the appellant-firm as a penalty towards compensation for illegal mining was proposed to be revised, as same cannot be allowed as a deduction as it is penal in nature by virtue of the Explanation to section 37(1) of the Act. In response to the above show cause notice, the appellant filed his reply vide his letter dated 18.03.2016 which is as under:

Ref. No. Date 18/03/2016

The Pr Commissioner of Income Tax.
Kalburgi

Sir

Ref: - Your revised show cause notice No. F. NO. 02/CIT-GLB/263/2015-16
M. Hanumanth Rao, A.Y 12-13PAN: AANFM.1777.H

With reference to above we wish to submit as follows

1) *The Honorable Supreme Court of India, vide its order No. SLP 7366- 7367/2010 dated 29/07/2011 has banned the iron ore activities in the district of Bellary. Tumkur & Chitradurga. Accordingly the Dept of Mines & Geology (DMG) has instructed the mining companies to suspend the iron ore activities until further orders.*

In light of the above orders the firm had suspended the mining activities from the month of July 2011 The sale of the iron ore held in stock was also not permitted.

The Hon. Supreme Court vide its order dated 02/09/2011, recommended the Central Empowered Committee's (CEC) proceedings dated 01/09/2011, where by instructed the Monitoring Committee to regulate & monitor the sale of iron ore held in stock by the mining companies through e-auctions mode conducted online by M.S.T.C. – an PSU to conduct e-auction of iron ore apart from other commodities.

Accordingly the MSTC conducted the open bid sales on various dates, where by the prospective bidders were allowed to visit, in advance the respective mines whose ore was to be auctioned on the specified date, to inspect the ore for its quality & other details. On the date of the e-auction the prospective bidders bid for the iron ore over and above the base price fixed by the monitoring committee. The highest bidder was then allotted the material he bid for.

The invoice for the said e- auction was raised by the Monitoring Committee, Dept of Mines & Geology, Khanija Bhavan, Race Course Road, Bangalore 560001, vide their TIN 29860633143. The successful bidders were asked to remit the value of the e-auction together with the Royalty, VAT, FDT & the Security Deposit with the MSTC. Thereafter the buyer was issued permit to transport the iron ore from the mines.

2) We hereby make it clear that at no time we have issued any sales invoice to E-auction buyers. Even the Vat returns for the above E-auction sales were filed by CEC.

Ref. 3No. The assessee has declared in its trading account the net money received from CEC. Date

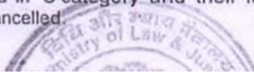
4) In the letter dated 03/01/2013 CEC has retained 15% of E- auction proceeds towards special purpose vehicle (SPV) The Money retained is not going to be refunded to the assessee, hence net receipts have been accounted in the trading account.

5) The amount retained by CEC as SPV will be used exclusively for the development of mining area, nearby residents & local population and infrastructure development like maintenance and widening of roads. The above expenditure retained is very much related to mining business and damages caused to public due to mining operations like blasting excavation crushing and various types of air & dust pollutions and environmental damages. Hence the 15% amount retained is related to mining business and will be exclusively used for the development of mining.

6) The 15% amount retained is akin to a cess for mining development activities to be under taken by the government. In these circumstances the assessee has no other go but to take the net proceeds in the trading account. Taxing the money retained by the government itself is against the equity and justice. There is no fault on the part of the assessee in this regard. The retention is not a penalty as suggested in your letter referred above.

7) Compensation Payments (Regarding your Point 2 (ii)

The CEC has retained 60500000/- as compensation for land (Mining Pit) and for dumps .The said amount retained is not a Penalty but compensation in nature and allowed under the Income Tax Act 1961. We have not done any illegal mining, hence our mines is categorized in 'B 'category. The persons, who have done illegal Mining are categorized in 'C'category and their Mining operations are suspended and their leases are cancelled.



a) **Compensation for land (mining pit)**
The CEC has retained Rs. 32500000/- towards compensation for illegal mining (digging of land) outside our area. We bring to your kind information that digging of land is done by nearby villagers near our lease area for which already FIR is lodged in the Police station. We once again submit that we have not done any offence which is prohibited under law. The said amount retained by CEC is compensatory in nature and is allowable under the Income Tax Law. The copy of FIR is enclosed for your kind perusal.

Ref. No b) **Compensation for dumps**: Date

The compensation for dumps Rs. 28000000/ retained by CEC is towards waste accumulated dumps falling in other area apart from our lease area. The spreading of dumps in other area is natural because of natural calamities like heavy rain and sliding of dump over a period of time. The amount retained is compensation in nature and allowable under the Income Tax Act. We have not done any illegal mining as mentioned in your letter dated 16.3.2016. Further the letter issued by Dept of mines and geology Bangalore have clearly mentioned as compensation, which is allowable under the I.T Act.

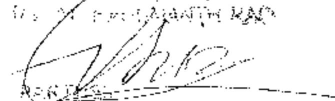
8) All these facts and papers were duly produced and filed before the A.O at the time of assessment U/s 143 (3). The A.O had properly applied his mind, considered all the facts and then completed the Assessment. Since the assessee has no control over the way an assessment order is drafted and since, generally, the issues which are accepted by the AO do not find mention in the assessment order and only those points are taken note of on which the assessee's explanations are rejected and additions / disallowances are made, the mere absence of the discussion would not mean that the AO had not applied his mind to the said provisions. In this connection, reference is invited to the decisions in CIT V/s Honda Siel Power Products Ltd (Delhi High Court), CIT V/s Mulchand Bagri (108 CTR 206 Cal) CIT V/s D P Karai (266 ITR 113 Guj) and Paul Mathews V/s CIT (263 ITR 101 ker).

9) We therefore submit that revising the above order referred order under U/s 263 would be change of opinion. Revising the order U/s 263 is against the law, justice and circumstances of the case.

10) We therefore request to you to kindly drop the proposal to revise the order u/s 263 & oblige.

Thanking you

Yours faithfully



5. From the above paras reproduced from this Tribunal order it is seen that the facts in the present case and in those cases are identical except this difference that there was retention of 15% whereas in the present case, retention is 20% and this difference was explained that in that case, the mine in question was category B mine whereas in the present case, the mine in question is Category A mine. Therefore, the rate of retention is different in these two cases but otherwise, the facts are identical. In that case also, this was the case of the revenue that the retention money of Rs. 2.59 Crores had accrued to the assessee and since the amount was retained by CEC constituted by Hon'ble Supreme Court, this is nothing but retention of income. Hence it is seen that the facts and arguments of

revenue are same in the present case also. Now we reproduce para 9 of this Tribunal order as per which the issue in dispute was decided by Tribunal in that case. This para is as under.

> "*9. The appellant had not made any direct sales. The stock is under the control of the Central Empowered Committee. It is only the Central Empowered Committee alone which is empowered to conduct the E-auction in terms of the Hon'ble Supreme Court order. The material factor to be taken into consideration is that the Hon'ble Supreme Court had passed the order after the end of the previous year relevant to assessment year under consideration. In the given facts of the case, it cannot be said that the sale proceeds had accrued to the appellant though it was following mercantile system of accounting as there was no accrual of right to receive payment, having regard to the ratio laid down by the Hon'ble Apex Court laid down in the cases of CIT vs. ShoorjiVallabhdas& Co. (46 ITR 144), CIT vs. Birla Gwalior (P) Ltd. (89 ITR 266) Poona Electric Supply Co. Ltd. vs. CIT (57 ITR 521), R.B.Jodha Mal Kuthiala vs. CIT (82 ITR 570) and State Bank of Travancore vs. CIT (158 ITR 102). Thus, it is clear that the sale proceeds had accrued to the appellant only by virtue of the order of the Director of Department of Mines and Geology vide proceedings No.DMG/MONCOM/E-Auction/2012-13 dated 03.01.2013. The taxability or otherwise of it can be considered only during the period ending on 31.03.2013, whereas the assessment year before us is pertaining to the previous year ending on 31.03.2012. Furthermore, the orders of Hon'ble Supreme Court imposing the compensation/penalty, empowering the Central Empowered Committee to retain 15% of the sale proceeds were also paid subsequent to the assessment year under consideration and interlinked with the transaction of E- auction sale proceeds.*
>
> *Therefore it is clear that the appellant had offered an income which is not assessable for that year. Even after the deductions, there was income offered to tax which is not otherwise assessable for the assessment year under consideration. It is the duty of the AO to assess the correct income in the right assessment year. However, this failure of the AO had not resulted in any prejudice to the revenue. Therefore, the assessment order passed by the AO, though erroneous, but cannot be termed as prejudicial to the interests of revenue. It is trite law that the pre-conditions for invoking the provisions of section 263 of the Act, the twin conditions that order is erroneous and also prejudial to interests of revenue are required to be satisfied simultaneously. Reliance can be placed on the decision of the Hon'ble Supreme Court in the case of Malabar Industrial Co. Ltd. vs. CIT (243 ITR 823)(SC). In the present case, in the absence of satisfaction of these twin conditions, the order of revision passed by the Principal CIT is not valid in law.*"

6. We also find that in para 3.1 of its order as reproduced above, it is stated by CIT that if part of the amount is received then there is no question of

uncertainty involved. We find no merit in this logic of CIT because if only part amount is received in Financial Year 2014-15 to the extent of 50% of retention money, it has to be accepted that uncertainty was this about receipt of retention money and this is not the case of the revenue that by now, the balance amount of 50% of the retention money is received by the assessee. Hence, in the facts of present case, we are of the considered opinion that in fact, there was uncertainty in respect of receipt of retention money of 20% sale receipts and therefore, to the extent of retention money, sale proceeds has not accrued to the assessee and therefore, the order of the AO is neither erroneous nor prejudicial to the interest of revenue in the facts of present case. Respectfully following this Tribunal order, we decide the issue in favour of the assessee.

7. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on the date mentioned on the caption page.

Sd/-	Sd/-
(LALIET KUMAR)	(ARUN KUMAR GARODIA)
Judicial Member	Accountant Member

Bangalore,
Dated, the 15th March, 2019.
/MS/

Copy to:

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

By order

Assistant Registrar,
Income Tax Appellate Tribunal,
Bangalore.