

आयकर अपीलीय अधीकरण, न्यायपीठ –“B” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH: KOLKATA
[Before Shri P. M. Jagtap, Vice-President and Shri A. T. Varkey, JM]

I.T.A. No. 1007/Kol/2018
Assessment Year: 2013-14

M/s Alpha National Trading Co. (PAN:AATFA 1401 A)	Vs.	PCIT-10, Kolkata
Appellant		Respondent

Date of Hearing (Virtual)	05.11.2020
Date of Pronouncement	04.12.2020
For the Appellant	Shri S. M .Surana, Advocate
For the Respondent	Shri Imokaba Jamir, CIT

ORDER

Per Shri A.T. Varkey, JM:

This is an appeal preferred by the assessee against the order of Ld. Pr. CIT-10, Kolkata dated 20/23.03.2018 for 2013-14 passed u/s 263 of the Income Tax Act, 1961 (hereinafter referred to as the “Act”).

2. At the outset the Id. A.R of the assessee Shri S. M. Surana, Advocate drew our attention to the fact that the Ld. Pr CIT had issued a show cause notice dated 12.01.2018 which is placed at page 1 of PB wherein he had raised only one issue i.e. in respect of salary of one of its employees namely Shri Angad Singh which question is discernible on perusal of the show cause notice (SCN) which is reproduced as under for ready reference:

Dated : 12/01/2018

No. PCIT-10/Kolkata/263/20/2017-18/ 6844

To
The Managing Partner,
M/s AN Trading
PAN- AATFA1401A
28C, Satish Mukherjee Road
Kolkata - 700026.

Sub : Show cause notice u/s 263 of the Income Tax Act in your case, for the A.Y. 2013-14 - matter regarding.

This refers to the above.

2. On examination of your assessment records for the above mentioned assessment year, it appears prima facie that there was failure on the part of the A.O. to assess the income correctly and as such, the instant order u/s 143(3) is erroneous in so far as it is prejudicial to the interest of the Revenue within the ambit of sec. 263 of the Income Tax (IT) Act, 1961.

3. In this regard the following discrepancy has been observed:

During scrutiny of your assessment folder, it was noticed that in response to department's notice u/s 133 (6) dated 02.02.2016, it was informed by one of your employee, namely, Sri Angad Singh vide letter dated 09.02.2016 that total salary receivable from you, during the relevant A.Y 2013-14 was Rs 18 lakhs , out of which Rs 3,45,565 /- was deducted at source (TDS). Therefore, net salary receivable by Sri Singh was Rs 14,54,435 /-. It also transpires from his reply that he had taken an advance of Rs 6 lakhs from you, in the F.Y 2012-13, relevant to A.Y 2013-14. But, as evident from your balance sheet as at 31.03.2013, the same transaction was shown as liability instead of asset being advance given. (Schedule 3- Advance from customers) and the same was not recorded in your books of account as investment/asset. Therefore, the value of investment , understated in the books, to the tune of Rs.12 lakh [Rs 6 lakh (+) Rs 6 lakh] , resulted in an underassessment of income of an equivalent amount.

4. In view of the above, you are hereby allowed an opportunity of being heard , either personally or through an authorized representative, in my office at **5th floor, Aayakar Bhawan Dakshin, 2 Gariahat Road South, Kolkata - 700068**, on **24.01.2018 at 12.30 P.M.**, and show cause as to why an order u/s 263 of the I. T. Act shall not be passed in your case, enhancing/modifying/cancelling the assessment order in question or directing a fresh assessment to be made.

5. In the event of failure to comply with the above, it shall be presumed that you have no objection to the proposed action and the matter shall be finalised on merits on the basis of material on record, without further notice.

3. According to Id. A.R in response to the show cause notice, the assessee filed written submission on 24.01.2018 (page 2 of paper book) wherein the assessee denied understatement of investment of Rs. 12 lakhs as alleged by the Ld. Pr. CIT in SCN in respect of its employee Shri Angad Singh and attributed the confusion caused on the person who prepared the Balance Sheet of Shri Angad Singh for AY 2013-14 wherein according to assessee, the inadvertent mistake crept into the balance sheet (Shri Angad Singh) while showing the amount receivable from assessee (M/s. A. N. Trading) at Rs.8,54,435/- instead of the amount receivable at Rs.20,50,435/- and thus

it was submitted that there was no error committed on this score by the AO. However, the Ld. Pr. CIT while setting aside the assessment order dated 21.03.2016 directed fresh assessment not only on this issue (Rs. 12 lakh understatement) as is discernible from para 4.2 of the impugned order, wherein Ld. Pr. CIT observed ‘*The genuineness and reasonableness of the payments made to Shri Angad Singh is required to be verified from the angles of section 37(1) and Section 40(b) read with Section 40A(2) of the Act. Likewise, it is seen that various expenses claimed as per the profit and loss account also remained to be verified by the Assessing Officer. He is now required to verify them as per the provision of section 37(1) and related sections of the Act.*’ (hereinafter referred to as **additional issues**). According to Id. A.R, while passing the impugned order, the Ld. Pr. CIT in addition to Rs. 12 lakh understatement as stated in SCN directed the AO to enquire into these additional issues i.e. payments made by assessee to Shri Angad Singh to be looked from the angles of section 37(1) and section 40(b) read with section 40A(2) of the Act. As well as various expenses claimed in the P&L account to be verified as per section 37(1) and related provision of the Act. According to Ld. AR, these additional issues were never a subject matter of Show Cause Notice issued by Ld. Pr. CIT. So, this observation followed by direction of Ld. Pr. CIT at para 5 while setting aside the assessment order for fresh assessment on the additional issues discussed at para 4.2 also, according to Ld. AR, was bad in law, since according to him, neither these additional issues were subject matter of the show cause notice nor the assessee was given any opportunity of hearing on these additional issues. This omission on the part of Ld. Pr. CIT i.e, not providing an opportunity of hearing on these additional issues was bad in law for violation of Natural Justice as held by the Hon’ble Supreme Court in the case of CIT vs. Amitabh Bachan in 384 ITR 200 (SC) wherein it was held as under:

“In fact, Section 263 has been understood not to require any specific show-cause notice to be served on the assessee. Rather, what is required under the said provision is an opportunity of hearing to the assessee. The two requirements are different; the first would comprehend a prior notice detailing the specific grounds on which revision of the assessment order is tentatively being proposed. Such a notice is not required. What is contemplated by Section 263, is an opportunity of hearing to be afforded to the assessee. Failure to give, such an opportunity would render the revisional order legally fragile not on the ground of lack of jurisdiction but on the ground of violation of principles of natural justice.”(emphasis given by us)

4. Thus, according to Ld. AR, since a portion of the observation in para 4.2 which is termed as additional issues (reproduced supra) along with direction at para 5 by Ld. Pr. CIT to AO to frame fresh assessment on the additional issues are bad in law for violation of Natural Justice as held by the Hon'ble Supreme Court in Amitabh Bachan (supra). Therefore, according to ld. A.R, the impugned order of the Ld. Pr. CIT needs to be modified; and accordingly the legally untenable portion should not be given effect to by the AO while passing the fresh assessment. Thus, according to ld. AR, only the issue which was legally valid i.e. the fault pointed out by Ld. Pr. CIT while issuing SCN which is about understatement of value of Investment/Asset of Rs. 12 lakh (Rs. 6 lakh + Rs. 6 lakh) can only be looked into by AO while giving effect to the impugned order of Ld. Pr. CIT. For that he relied on the decision of this Tribunal in M/s Tirupati Construction vs. CIT in ITA No. 1186/Kol/2014 for AY 2009-10 dated 03.02.2016 wherein the Tribunal in that case was pleased to modify the order of Ld. Pr. CIT in respect of understatement of receipt to the tune of Rs. 1.20 crores because it was neither the subject matter of the show cause notice nor opportunity was given to the assessee on that issue during the revisional proceedings by that Ld. Pr. CIT. According to Ld. A.R, this order in M/s Tirupati passed by the Tribunal was challenged by the Revenue before the Hon'ble Calcutta High Court and the Hon'ble High Court was pleased to uphold the order of the Tribunal, a copy of which is found placed at page no. 45 of PB. In the light of the aforesaid submission, the Ld. AR wants us to modify the order of Ld. Pr. CIT in respect of the additional issues discussed in para (3) supra other than the issue of understatement of investment in respect of Shri Angad Singh to the tune of Rs.12 lakh.

5. Per contra, the Ld. CIT DR vehemently opposed the plea of the ld. A.R. However, when the Bench asked him (Ld. CIT, DR) as to whether during revisional proceedings any opportunity of hearing was granted by Ld. Pr. CIT to assessee in respect of the additional issues (other than the issue mentioned in SCN), he (Ld. CIT, DR) was fair to admit after perusing the case records including the order sheet maintained by the ld. Pr. CIT during the revisional proceedings that no such opportunity has been given to assessee. In order to ensure, we asked specific queries

to Ld. CIT, DR viz, (1) whether Ld. Pr. CIT asked any question to assessee during the course of revisional proceedings on the issue of reasonableness and genuineness of the payments made to Shri Angad Singh or (2) why there was a requirement to verify it from the angles of section 37(1) and section 40(b) read with Section 40A(2) of the Act, etc. (3) And whether any question regarding various expenses claimed by the assessee as per the P & L Account was sought from assessee (4) and why there was any occasion for further verification u/s 37(1) of the Act was necessary or not. And in addition, whether the assessee was put to notice on the additional issues by the Ld. Pr. CIT during the revisional jurisdiction on 12.01.2018 or afterwards before he passed the impugned order on 20/23/03/2018. However, after perusal of the order sheet and the case records, the Ld. CIT D.R fairly conceded that there was no mention about any such query being raised by the Ld Pr CIT on these additional issues during the revisional proceedings before him. Thus, we find that there was no opportunity of hearing was provided to assessee on the additional issues as contemplated in section 263 of the Act before the Ld Pr CIT passed the impugned order.

6. We note that on 12.01.2018 the Ld. Pr. CIT had issued show cause notice wherein he brought to the notice of the assessee his intention to exercise his revisional jurisdiction u/s 263 of the Act in respect of the assessment order dated 21.03.2016 for AY 2013-14 and pointed out only one issue i.e. in respect of advance taken by the assessee's employee Shri Angad Singh to the tune of Rs. 6 lacs in the F.Y. 2012-13 in this A.Y. 2013-14, which was shown in the balance sheet as liability in place of asset. Therefore, according to him, since the advance given to an employee is an asset and not a liability, the value of investment was understated to the tune of Rs. 6 lacs + 6 lacs i.e. Rs. 12 lakh which omission have resulted in under assessment qua this amount. So, the Ld. Pr. CIT issued notice (supra) pointing out this fault, pursuant to which, the assessee filed reply dated 24.01.2018 wherein the assessee gave its explanation regarding this fault for which the Pr CIT wanted to interfere in the assessment order passed on 21.03.2016 and tried to explain the same and contended that there was no error in the order of AO on this issue. However, not being satisfied by the reply, the Pr CIT has passed impugned order dated 20.03.2018 setting aside the

impugned order dated 21.03.2016 and directing the fresh assessment on certain additional issues as discussed at Para 4.2 (of the impugned order) which is given below:

“The genuineness and reasonableness of the payments made to Shri Angad Singh is required to be verified from the angles of Section 37(1) and Section 40(b) r.w. Section 40A(2) of the Act. Likewise, it is seen that various expenses claimed as per the P & L A/c also remained to be verified by the A.O. He is now required to verify them as per the provisions of Section 37(1) and related Sections of the Act.”

7. From a perusal of the aforesaid issues, we note that these additional issues for which also Ld. Pr. CIT has given direction to AO for fresh assessment was neither a subject matter of the SCN nor an opportunity was given by the Ld. Pr. CIT before passing the impugned order. We note that the Ld. CIT, DR after perusal of the order sheet of Ld. Pr. CIT has fairly conceded the fact that there was no mention about Ld. Pr. CIT asking any question to assessee regarding these additional issues to assessee as stated (reproduced supra) in para 4.2 of the impugned order. Therefore, (these additional issues (reproduced supra) should not be given effect to by the AO while carrying out fresh assessment as directed by Ld. Pr. CIT, because these additional issues were not confronted by the Ld. Pr. CIT to the assessee before passing the impugned order, so these additional issues are fragile for violation of Natural Justice and so bad in law as held by Hon’ble Supreme Court in Amitab Bachan (supra). Therefore, we modify the order of Ld. Pr. CIT and direct the AO not to give effect to the additional issues as directed by Ld. Pr. CIT in his impugned order. The order of the Ld Pr. CIT stands modified to that extend as discussed. And the AO to give effect to the order of Ld. Pr. CIT on the issue which was dealt by him in SCN in accordance to law after hearing the assessee.

8. In the result, appeal of the assessee is partly allowed as discussed.

Order is pronounced in the open court on 04.12.2020.

Sd/-

(P. M. Jagtap)
Vice President

Sd/-

(A. T. Varkey)
Judicial Member

Dated: 04.12.2020

SB, Sr. PS

Copy of the order forwarded to:

1. Appellant- M/s Alpha National Trading Co. (Formerly A. N. Trading Co.) 28C,
Satish Mukherjee Road, Kolkata-700026
2. Respondent- Pr. Commissioner of Income Tax-10, Kolkata
3. The CIT(A)- , Kolkata (sent through e-mail)
4. CIT- , Kolkata
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata