

आयकर अपीलीय अधीकरण, न्यायपीठ –“B” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH: KOLKATA
[Before Shri J. Sudhakar Reddy, AM and Shri A. T. Varkey, JM]

I.T.A. No. 129/Kol/2021
Assessment Year: 2011-12

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| Prism Logistics Pvt. Ltd. (PAN: AADCP0377P) | Vs. | Pr. Commissioner of Income-Tax-1, Kolkata |
| Appellant | | Respondent |

| | |
|---------------------------|----------------------------------|
| Date of Hearing (Virtual) | 12.05.2021 |
| Date of Pronouncement | 18.06.2021 |
| For the Appellant | Shri Manish Tiwari, AR |
| For the Respondent | Shri Tushar Dhuni Singh, CIT, DR |

ORDER

Per Shri A. T. Varkey, JM:

This is an appeal filed by the Assessee against the revisional order of Ld. PCIT-1, Kolkata dated 31.03.2021 passed u/s 263 of Income Tax Act, 1961 (hereinafter referred to as the Act) for Assessment year 2011-12.

2. At the outset, the Ld. AR Shri Manish Tiwari, challenged the usurpation of jurisdiction by the Ld. PCIT for exercising revisional jurisdiction u/s. 263 of the Act without satisfying the condition precedent as laid down in section 263 of the Act i.e. *without spelling out as to how the order of the AO is erroneous as well as prejudicial to the interest of the revenue.* According to the Ld. AR, the Ld. PCIT failed to demonstrate in the impugned order that AO’s order is erroneous as well as prejudicial to the interest of the revenue, therefore, according to him, Ld. PCIT did not enjoy jurisdiction u/s. 263 of the Act to interdict the order passed by the AO dated 24.12.2018 and, therefore, he pleads that the order of the Ld. PCIT may be quashed.

3. Brief facts of the case is that the Ld. PCIT noted that in this case for AY 2011-12 the AO had reopened the assessment u/s. 147/143(3) of the Act and has passed the

reassessment order on 24.12.2018. According to Ld. PCIT the premise on which the case of assessee was reopened was in respect of escapement of income to the tune of Rs.2,75,40,000/- through accommodation entry provided by Akash Agarwal group in the garb of bogus billing. However, according to the Ld. PCIT, the AO completed the reassessment by taking a different approach and recomputed assessee's income by invoking the provision of section 44AD of the Act. Further, according to the Ld. PCIT, the gross contract receipt of the assessee from M/s. Usha Martin Group exceeded Rs. 60 lacs during the relevant previous year 2010-11, therefore, section 44AD of the Act was not applicable. In the aforesaid circumstances, according to the Ld. PCIT there was under-assessment of the income to the tune of Rs.2,37,44,120/- (Rs.2,75,40,000/- - Rs.37,95,880/-) which resulted in potential tax effect of Rs.78,87,203/-. Therefore, he issued show cause notice to the assessee stating that since the action of the AO in framing the reassessment order dated 24.12.2018 has been found by him to be erroneous as well as prejudicial to the interest of the revenue he proposed to interfere with the order invoking section 263 of the Act. Pursuant to the show cause notice, the assessee filed written submission which has been reproduced by the Ld. PCIT wherein the assessee contended that it is a genuine contract and that it is engaged in the business of carrying out contractual works for various prestigious entities such as M/s. BHEL, Larson & Toubro Ltd., Usha Martin Ltd. etc. According to the assessee, it had sub-contracted certain works procured from M/s. Usha Martin Ltd. in the remote areas situated in the iron ore mines at Barajamba, Jharkhand, Oxygen Plant, Jharkhand and other remote areas where the assessee was not having adequate infrastructure for execution of contract. Therefore, the assessee sub-contracted the work from M/s. Usha Martin Ltd. through another entity M/s. Simplex Infra Project Pvt. Ltd. and in order to prove that the works were executed on ground/field submitted photographs and other evidences in support of the execution of works at various sites. According to the assessee, since the AO has looked into the veracity of its claim/expenditure because it has executed its work/project through sub-contractor M/s. Simplex, the expenditure incurred by it for construction cannot be disallowed even if there is some discrepancy in the bills. According to Ld. AR without incurring expenditure, the construction could not have been possible in the remote areas. So the expenditure incurred by the assessee could not have been fully disallowed and at

any rate only the net profit embedded in the transaction could have been brought to tax and not the entire expenditure made to the sub-contractor. Therefore, according to the assessee, the AO after making thorough enquiry on the issue of claim of expenditure and was satisfied with the explanation and proof submitted by the assessee in respect of the execution of work by the sub-contractor, he (the AO) has decided not to tax the entire expenditure given by the assessee to M/s. Simplex. However, the AO taking note of the assessee submitting bill of M/s. Simplex on the expenditure, and the fact that assessee had executed the work, presumed that the billing of M/s. Simplex might have been made by the assessee to inflate the expenses. So, in order to guard the leakage of revenue, he applied 8% as per provision of sec. 44AD of the Act to determine the profit in relation to contract work of M/s. Usha Martin Ltd in the project for which the assessee claimed the expenditure in question. Therefore, the assessee prayed before the Ld PCIT that the AO's order is not erroneous as well as prejudicial to the interest of the revenue. However, the Ld. PCIT did not agree. According to him, the income of Rs.2,75,40,000/- has escaped assessment through accommodation entry provided by Akash Agarwal group in the garb of bogus billing and since the contract receipt by assessee from M/s. Usha Martin Ltd. exceeded Rs. 60 lakhs, therefore, section 44AD of the Act was not applicable. According to him, the entire bogus sub contractual payments to the paper entity should have been added to the income of the assessee and therefore, he was pleased to hold that the assessment order dated 24.12.2018 as erroneous in so far as it is prejudicial to the interest of the revenue. Therefore, he set aside the reassessment order dated 24.12.2018 and directed the AO to frame the assessment afresh. Aggrieved by the aforesaid action of the Ld. PCIT, the assessee is before us.

4. We have heard rival submissions and gone through the facts and circumstances of the case. We note that the assessee had filed return declaring income of Rs.80,47,179/- by filing it on 27.09.2011. Thereafter the assessment was completed u/s. 143(3) of the Act on 28.02.2014 determining the assessed income at Rs.82,30,050/-. Thereafter, the assessee's case was reopened on an information received from the DCIT, Circle-14, Kolkata on 10.08.2017 wherein an information was received that during a survey conducted on Akash Agarwal Group on 10.02.2015 by the Investigation Wing, Kolkata a statement of Shri Akash Agarwl and Shri Navin Kr. Sharma was recorded and as per their statement they

had accepted that they were providing bogus entry through their companies. Further it was stated that they had provided accommodation entry in the form of bogus billing for contractual receipt and sub-contractual payments through their jamakharchi companies to several beneficiaries. Based on this information the AO noted that the assessee company M/s. Prism Logistics Pvt. Ltd. has availed accommodation entry for bogus billing in the form of sub-contractual payment to M/s. Simplex Infra Projects to the tune of Rs.2,75,40,000/-. Thereafter, the scrutiny assessment was reopened u/s. 147 of the Act after serving of statutory notices as per law the AO has observed as under:

“3. In response to the above the assessee submitted a written submission, gist of which is as under:

The assessee has submitted that it is a genuine contractor and has carried out contractual on work for many entities in its course of business, and has also done contractual work on behalf of BHEL (a Government Enterprises), Larsen & Toubro Ltd. which are big names. During the year the assessee also carried out some work on behalf of principle M/s. Usha Martin Ltd. The contract of M/s. Usha Martin was sub-contracted to M/s. Simplex Infra Project Pvt. Ltd.. Details of contract carried out of M/s. Usha Martin Ltd. is as under:

| <i>Name of the contractee</i> | <i>Order Number</i> | <i>Scope of work</i> | <i>Billing quantity</i> | <i>Rate</i> | <i>Billing amount</i> |
|-------------------------------|-------------------------------|---|-------------------------|------------------|-----------------------|
| <i>UshaMartin Ltd.</i> | <i>CALMD/AM/2010-33115</i> | <i>Construction of new road having width 8 mtrs. In the new lease area at Vijaya II Iron Ore Mine Barajamda, Jharkhand</i> | <i>11 Km</i> | <i>20,00,000</i> | <i>2,20,00,000</i> |
| <i>UshaMartin Ltd.</i> | <i>JSR/USAD/UM/2010-33803</i> | <i>Levelling and grading using mechanized machinery along with tools, tackles & labour for site at Oxygen Plant, Jharkhand</i> | <i>77,000 (CUM)</i> | <i>150</i> | <i>1,15,50,000</i> |
| <i>Usha Martin ltd.</i> | <i>JSR/USAD/UM/2010-33802</i> | <i>Formation of village road on either side of railway track for shifting of level crossing along with materials, tools, tackses and labour for site at Gamharia Station yard Jharkhand</i> | <i>1,76,000 (CUM)</i> | <i>110</i> | <i>1,93,60,000</i> |
| | | | | <i>Total</i> | <i>5,29,10,000</i> |

This job was outsourced to M/s. Simplex Infra project Pvt. Ltd. It is aware about the full credentials of M/s. simplex Infra Project Pvt. Ltd. but the work was carried out in remote areas where it did not have any regular network of contractors or readily available infrastructure. It had to rely on recommendations of local project incharge and other contractors associated with the nearby projects. In support the assessee had submitted full profile of its company and some photographs related to work carried out on behalf of M/s. Usha Martin Ltd.

4. Conclusion;

The assessee submission was analyzed in detail, and it was seen that actual contractual work was carried out by the assessee. The credentials of the sub-contractee M/s Simplex Infra Project ltd. could not be verified as its not traceable.

However, there is no doubt that the actual work was carried out by some other entity and the billings were made in the name of M/s Simplex Infra Project Ltd. for reasons best known to the assessee.

As some contractual work seems to have been carried out, the only ostensible purpose of the assessee seems to be inflation of expenses.

In view of the above as work seems to have been carried out and the creditability of the expenses related to work of M/s Usha Martin Ltd. cannot be verified in totality beyond doubt the only recourse left is to adjudicate profits as per provisions of Sec. 44AD of the I.T. Act.

Hence, the profit determine in relation to contract work of M/s Usha Martin Ltd. is as under:

$$8\% \text{ of Rs. } 5,29,10,000/- = \text{Rs. } 42,32,800/-$$

On principles of natural justice, the above addition is being reduced by quantum in terms of percentage of overall profit already disclosed by the assessee.

The assessee disclosed, profits in computation of income of Rs. 80,47,179 on turnover of Rs. 58,27,26,985/-. This profit was inclusive of interest income of Rs.7,90,080/-. the rate of disclosed profits comes to 1.2% of contractual receipts. Hence, the quantum of profit estimated on contractual work of M/s. Usha Martin Ltd. is being reduced by 1.2%. Therefore. Rs.6,34,920/- is being reduced from the proposed quantum of addition i.e. Rs, 42,32,800/-."

5. This action of AO the Ld. PCIT has interdicted by invoking his revisional jurisdiction u/s. 263 of the Act by passing the impugned order. The assessee has challenged before us the jurisdiction of Ld. PCIT to invoke the revisional jurisdiction u/s. 263 of the Act without satisfying the condition precedent as stipulated in sec. 263 of the Act.

6. Before we advert to the facts and law involved in this lis before us, let us revise the law governing the issue before us. The assessee has challenged in the first place, the very usurpation of jurisdiction by Ld. Principal CIT to invoke his revisional powers enjoyed u/s 263 of the Act. Therefore, first we have to see whether the requisite jurisdiction necessary to assume revisional jurisdiction is existing in this case before the Pr. CIT rightfully

exercises his revisional power. For that, we have to examine as to whether in the first place the order of the Assessing Officer found fault by the Principal CIT is erroneous as well as prejudicial to the interest of the Revenue. For that, let us take the guidance of judicial precedence laid down by the Hon'ble Apex Court in *Malabar Industries Ltd. vs. CIT* [2000] 243 ITR 83(SC) wherein their Lordship have held that *twin* conditions needs to be satisfied before exercising revisional jurisdiction u/s 263 of the Act by the CIT. The twin conditions are that the order of the Assessing Officer must be erroneous and so far as prejudicial to the interest of the Revenue. In the following circumstances, the order of the AO can be held to be erroneous order, that is (i) if the Assessing Officer's order was passed on incorrect assumption of fact; or (ii) incorrect application of law; or (iii) Assessing Officer's order is in violation of the principle of natural justice; or (iv) if the order is passed by the Assessing Officer without application of mind; (v) if the AO has not investigated the issue before him; [*because AO has to discharge dual role of an investigator as well as that of an adjudicator*] then in aforesaid any event the order passed by the Assessing Officer can be termed as erroneous order. Coming next to the second limb, which is required to be examined as to whether the actions of the AO can be termed as prejudicial to the interest of Revenue. When this aspect is examined one has to understand what is prejudicial to the interest of the revenue. The Hon'ble Supreme Court in the case of *Malabar Industries* (supra) held that this phrase i.e. "*prejudicial to the interest of the revenue*" has to be read in conjunction with an *erroneous order* passed by the Assessing Officer. Their Lordship held that it has to be remembered that every loss of revenue as a consequence of an order of Assessing Officer cannot be treated as prejudicial to the interest of the revenue. When the Assessing Officer adopted one of the courses permissible in law and it has resulted in loss to the revenue, or where two views are possible and the Assessing Officer has taken one view with which the CIT does not agree, it cannot be treated as an erroneous order prejudicial to the interest of the revenue "**unless the view taken by the Assessing Officer is unsustainable in law**".

7. Therefore, in order to adjudicate as to whether Ld. PCIT is justified to invoke power u/s. 263 of the Act by observing that the AO's action of applying u/s. 44AD of the Act i.e. 8% on the purported accommodation entry to the tune of Rs.2,75,40,000/- from Akash Agarwal group is erroneous and resulted in under assessment of income. Now, we

have to examine whether the action of AO in the facts and circumstances was plausible or an action which was unsustainable in law.

8. It is noted that AO has reopened the scrutiny assessment order dated 28.02.2014 and has taken note of the background of the case which triggered the reopening as under:

“Background of the case:

1. Information was received from the office of DCIT, Central Circle-1(4), Kolkata on 10.08.2017 which was related to the assessee. The information received is summarized as under:

It has been reported by the DCIT, Central Circle-1(4), Kolkata that a survey was conducted on Akash Agarwal Group on 10.02.2015 by the Investigation Wing, Kolkata and a statement of Sri Akash Agarwal and Sri Navin Kumar Sharma were recorded. As per statement, they accepted that they provided bogus accommodation entry through their companies. It has been stated that they had provided accommodation entry in the form of bogus billings for contractual receipt and sub-contractual payment through their jama kharchi companies to several beneficiaries. It has been found that the assessee company M/s. Prism Logistics (P) Ltd. had availed accommodation entry for bogus billing in form of sub-contractual payments to M/s. Simplex Infra Project during the FY 2010-11 to the tune of Rs.2,75,40,000/-.”

9. Thus it is noted that AO had reopened the assessment based on information from the DCIT, CC-1(4), Kolkata that a survey conducted on Akash Agarwal Group on 10.02.2015 by the Investigation Wing revealed that they were invoked in providing bogus accommodation entry through their jama kharchi companies to their beneficiaries. And it was found that assessee had availed accommodation entry from M/s. Simplex Infra Project in the form of bogus billing as sub-contractual payment to the tune of Rs.2,75,40,000/-.

10. Based on the aforesaid information, the AO reopened the assessment and after calling for relevant details/material/evidences (supra) has concluded by making a finding of fact that assessee had carried out actual contractual work by observing that *“there is no doubt that the actual work was carried out by some other entity and the billing were made in the name of M/s. Simplex Infra project Ltd.....”* and in the light of the aforesaid fact that since actual contractual work (construction of new road (11 km.), leveling, formation of village road etc. as given in the table supra) has been found to have been executed by some other persons in the remote areas of mines situated at Barajamda, Jharkhand, the AO presumed that the purpose of availing the billing from M/s. Simplex must be for inflation of expenses and thereafter adopted the presumptive tax rate as envisaged u/s. 44AD of the Act.

11. Since the AO's aforesaid finding is based on the evidence in the form of photos/work, completion report and the payment released by reputed companies for the successful completion/execution of works contract, the finding of the AO is a plausible view and cannot be termed perverse. It is trite law that only the net income can be brought to tax. For that expenditure incurred by the assessee has to be allowed to determine the net income of the assessee. In this case, the AO has found that assessee has executed the contract through some one. For execution of the work contract, the assessee received payment from the contractor and the assessee's expenditure incurred need to be allowed. For doing that AO has found that though bogus billing has been made through M/s. simplex, work contract has been executed through some one. So, he was of the opinion that procuring the bills through M/s. Simplex was for inflation of expenses and to plug the revenue loss on account of that he applied the presumptive tax rate u/s. 44AD of the Act, which is in line with various judicial precedents as given below:

1. CIT-XII Vs. Subodh Gupta, 54 taxmann.com 343 (Delhi) [2015]
2. CIT-XIII Vs. Lovish Oberoi, 54 taxmann.com 23 (Delhi) [2015]
3. Ecoasfalt SA Vs. Addl. DIT, International Taxation, Range-3, New Delhi, 24 taxmann.com 349 (Delhi) [2012]
4. Allied Engineers Vs. CIT, Karnal, 180 Taxman 70 (Delhi) (MAG) [2009]
5. CIT Vs. Jain Construction Co., 34 taxmann.com 84 (Rajasthan) [2013]
6. Eastern Construction Company Vs. ITO, 59 ITJ 723 (Delhi) [1997]
7. ITO Vs. D.G. Housing Projects Ltd., 20 taxmann.com 58-7 (Delhi) [2012]

12. Therefore, the action of AO on the facts and circumstances as discussed is a plausible action and cannot at any rate be termed as "unsustainable in law". Therefore, the action of Ld. PCIT to invoke the revisional jurisdiction is absent and therefore, the impugned action of Ld. PCIT is held to be bad in law and so quashed.

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

Order is pronounced in the open court on 18th June, 2021

Sd/-
(J.S. Reddy)
Accountant Member

Sd/-
(A. T. Varkey)
Judicial Member

Dated: 18.06.2021

SB, Sr. PS

Copy of the order forwarded to:

1. Appellant- M. Prism Logistics Pvt. Ltd., 33A, Chatterjee International Centre, Jawaharlal Nehru Road, Room No. 3, 4th floor, Kolkata-700 071.
2. Respondent – PCIT-1, Kolkata
3. The DCIT, Circle- 8(2), Kolkata
4. CIT- , Kolkata
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata