

आयकर अपीलीय अधिकरण, कोलकाता पीठ 'ए', कोलकाता
IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH KOLKATA

श्री संजय गर्ग, न्यायिक सदस्य एवं श्री मनीष बोरड, लेखा सदस्य के समक्ष
Before Shri Sanjay Garg, Judicial Member and Dr. Manish Borad, Accountant Member

I.T.A No.160/Kol/2021
Assessment year: 2014-15

Bardhaman Dharmaraj Paper Mill Pvt. Ltd.....Appellant
C/o Subash Agarwal &
Associates, Advocates
Siddha Gibson,
1, Gibson Lane, Suite 213,
2nd Floor, Kolkata-700069.
[PAN: AAECB0141J]

vs.

PCIT (Central), Asansol.....Respondent

Appearances by:

Shri Subash Agarwal, Advocate, and Siddharth Agarwal, Advocate, appeared on behalf of the appellant.

Md. Ghayasuddin, CIT-DR, appeared on behalf of the Respondent.

Date of concluding the hearing : September 06, 2022

Date of pronouncing the order : October 10, 2022

आदेश / ORDER

संजय गर्ग, न्यायिक सदस्य द्वारा / Per Sanjay Garg, Judicial Member:

The present appeal has been preferred by the assessee against the revision order dated 31.03.2021 of the Principal Commissioner of Income Tax (hereinafter referred to as the 'PCIT') passed u/s 263 of the Income Tax Act (hereinafter referred to as the 'Act').

2. The brief facts are that the assessment in this case of the assessee was reopened u/s 147 of the Act to verify the transactions of the assessee with the party M/s Siddhi Enterprises due to discrepancy found in the accounts.

3. The Assessing Officer noted that the assessee had failed to prove the genuineness of the purchases made from M/s Siddhi Enterprises. However, he further noted that the assessee not only had shown such purchases in the books of account but also had recorded corresponding sales thereto. Therefore, the Assessing Officer held that since the

assessee had recorded the sales of the trading goods, the same might have been purchased by the assessee from the open/grey market at lesser price, as there cannot be any sale without purchase. The Assessing Officer thereafter relying upon the decision of Hon'ble Mumbai Bench of the ITAT in the case of Ratnagiri Stainless Private Limited vs. ITO (164 ITD 136) and further decision of the Hon'ble Gujarat High Court in the case of CIT vs. Simit P Sheth [(2013) 256 ITR 451] assessed the gross profit @7.85% on the sales and calculated the same at Rs.1,05,52,821/-. Since the assessee had shown gross profit at Rs.7,74,677/-, therefore, the Assessing Officer added the difference of Rs.97,78,144/- into the income of the assessee.

4. In the revision proceedings carried out u/s 263 of the Act, the ld. PCIT relying on the decision of the Hon'ble Gujarat High Court in the case of N K Proteins Ltd. vs. DCIT [2016] 72 taxmann.com 289 (Gujarat), the SLP against the said decision being dismissed by the Hon'ble Supreme Court vide order dated 16.01.2017 reported in [2017] 84 taxmann.com 195, held that the Assessing Officer must have added the entire bogus purchases made from M/s Siddhi Enterprises instead of estimating the gross profit on the sales. The ld. PCIT further observed that the Assessing Officer should have also verified the genuineness of purchases from other parties also, as detailed in para 3 of the impugned order of the ld. PCIT. He, therefore, set aside the impugned assessment order dated 28.12.2018 for de novo assessment as per the directions passed by him.

5. Being aggrieved by the said order, the assessee has preferred the present appeal. At the outset, the ld. counsel for the assessee has submitted that in the case of the assessee, the purchases were duly accounted for and it was not the case of the Assessing Officer that the assessee had introduced his unaccounted money into the purchases. That the corresponding sales have also been shown. That under the circumstances, as held by the various High Courts, only the gross profits have to be estimated which the Assessing Officer has rightly done as per the settled law. The ld. counsel has further submitted that the decision cited by the ld. PCIT of the Hon'ble Gujarat High Court in the case of "N K Proteins Ltd." (supra) was not applicable to the facts and circumstances of the case of the assessee because in that case, there was a search and seizure action carried out and during which various incriminating materials including blank cheque books in the name of

different entities were found, which conclusively proved that the assessee had not made any purchases; whereas, in the case of the present assessee, no such facts were involved. That the assessee had duly established not only the purchases, but the corresponding sales also and both the purchases and sales were duly accounted for. The ld. counsel, in this respect, has relied upon the following case laws, wherein in the facts and circumstances as involved in the case of the assessee, the decision in the case of N K Proteins Ltd. (supra) has been distinguished and the estimation of GP rate in respect of bogus purchases has been upheld:

1. *Smt. Rajlakhmi B. vs. Principal CIT 6188/Mum/2018; D Bench order dated 18.03.19*
2. *Urvi Dhankumar Vakharia vs Pr. CIT 2558/Mum/19; F Bench, order dated 28.11.19*
3. *DCIT vs. Shree Ganesh Retails Pvt. Ltd. 3905/Mum/2017; K Bench order dated 25.10.2017*
4. *Rajal Enterprises vs. Pr. CIT; 2273/Mum/2018; D Bench order dated 31.10.2018*

The ld. counsel has further relied upon the following decisions to submit that even otherwise, it has been held by the various High Courts that in such circumstances the action of the Assessing Officer in estimating GP rate was justified:

5. *Vijay Trading Co 388 ITR 377 (Guj)*
6. *Nangalia Fabrics 40 taxmann.com 206 (Guj)*
7. *M/s Diagnostics, ITA No.153 of 200 (Cal)*
8. *M/s Mohammad Hazi Adam & Co. (bom.) ITA No.1004 of 2006.*

6. The ld. DR, on the other hand, has submitted that the ld. PCIT has rightly invoked his jurisdiction u/s 263 of the Act as the Assessing Officer has not added the entire bogus purchases in the light of the decision of the Hon'ble Gujarat High Court in the case of N K Proteins Ltd. (supra), the SLP against the said decision being dismissed by the Hon'ble Supreme Court.

7. We find that the issue in this case is squarely covered by the decision of the Coordinate Mumbai Bench of the Tribunal in the case of Smt. Rajlakhmi B vs. PCIT in ITA No.6188/Mum/2018 order dated 18.03.2019, wherein, on identical facts, wherein the PCIT had invoked jurisdiction u/s 263 relying upon the decision in the case of N. K. Proteins Ltd. vs. DCIT (supra) and had held that the Assessing Officer was supposed to

add the entire bogus purchases, the Coordinate Bench of the Tribunal while further relying upon another decision of the Tribunal in the case of Rajal enterprises vs. PCIT [ITA No.2273/Mum/2018 dated 31.10.2018] has quashed the order passed by the Id. PCIT u/s 263 of the Act. The relevant part of the order in the case of Smt. Rajlakshmi B (supra) is reproduced as under:

“1. Aforesaid appeal by assessee for Assessment Year [in short referred to as 'AY'] 2010-11 contest the validity of order of Ld. Pr. Commissioner of Income-Tax-29, Mumbai [in short referred to as 'Pr.CIT'] in invoking revisional jurisdiction u/s 263 vide order dated 28/03/2018.

2. Agitating the same, Ld. Authorized Representative for Assessee [AR] submitted that the jurisdiction u/s 263 as invoked by Ld. Pr. CIT on identical facts has been set aside by the Tribunal in the case of Rajal Enterprises Vs. Pr.CIT [ITA No. 2273/Mum/2018 dated 31/10/2018]. The copy of the order has been placed on record. Although Ld. Departmental Representative [DR] supported the impugned order, however, could not point out any distinguishing facts or features.

3. The facts on record reveal that the assessee was subjected to reassessment proceedings u/s 143(3) read with Section 147 for the impugned AY vide order dated 30/01/2016 wherein the assessee was saddled with estimated addition of 12.5% on account of certain alleged bogus purchases. While estimating the same, Ld. AO relied upon the decision of Hon'ble Gujarat High Court rendered in Simit P.Sheth 356 ITR 451.

4. However, subsequently, upon perusal of case records, Ld. Pr.CIT noted that the assessee was not maintaining any quantitative register and could not substantiate the delivery of the material and therefore, the full disallowance was to be made as against 12.5% estimated by Ld. AO keeping in view the decision Hon'ble Apex Court rendered in N.K.Proteins Ltd. Vs. DCIT [84 Taxmann.com]. Therefore, applying clause (a) and (d) of explanation 2 to Section 263(1), the order was treated as erroneous as well as prejudicial to the interest of the revenue. Accordingly, the order on the stated issue was set aside for re- adjudication. Aggrieved, the assessee is in further appeal before us.

5. We find that the co-ordinate bench of this Tribunal in the cited case of Rajal Enterprises Vs. Pr.CIT [ITA No. 2273/Mum/2018 dated 31/10/2018], on identical set of facts, quashed the revisional proceedings u/s 263, by observing as under: -

5. We have considered rival submissions and perused material on record. Factual matrix of the case reveals that on the basis of specific information received indicating that the purchases made by the assessee are bogus, the Assessing Officer reopened the assessment under section 147 of the Act. It is also evident, in course of assessment proceeding the Assessing Officer has conducted necessary inquiry by calling for various information from the assessee as well as independently to ascertain the genuineness of the purchases made by the assessee. After examining the material available on record the Assessing Officer, though, was of the view that the assessee has failed to prove the genuineness of purchases made, however, he found that not only the assessee has shown the

purchases made in the books of account but has also recorded the corresponding sales effected. Thus, he proceeded to make addition of the profit element embedded in the bogus purchases by estimating the same at 10%. Thus, a reading of the assessment order makes it clear, the Assessing Officer not only has conducted due inquiry to ascertain the genuineness of the purchases made by the assessee but has made addition on account of bogus purchases in terms with the principle laid down in various judicial precedents. It is observed, learned PCIT has held the assessment order to be erroneous and prejudicial to the interest of revenue primarily for two reasons. Firstly, due to non-consideration of the decision of hon'ble Supreme Court in case of N. K. Protein (supra) and secondly, due to lack of proper inquiry. As regards the second allegation of the PCIT, we are unable to agree with the same. The assessment order clearly reveals that the Assessing Officer made necessary inquiry to find out genuineness of purchases. As regards the allegation of non- consideration of the decision in case of N.K. Protein (supra), it is relevant to note, the said decision was rendered by the hon'ble apex court on 16.01.2017 which is much after the completion of assessment on 02.03.2016. Therefore, there is no occasion on the part of the Assessing Officer to consider the said decision. That being the case, the exercise of power under section 263 of the Act for non- consideration of the aforesaid decision of the hon'ble apex court is wholly misconceived. In any case of the matter, the addition to be made on the basis of bogus purchase is a purely factual issue and varies from case to case depending upon the facts of each case. In case of N.K. Protein (supra) the facts involved clearly reveal that there was a search and seizure action carried out in case of N.K. Protein during which various incriminating material including blank cheque books in the name of different entities were found which conclusively proved that the assessee had not made any purchases. Thus, in the context of those facts 100% addition on account of bogus purchases was upheld. Whereas, in the case of the present assessee no such facts are involved. In any case of the matter, when the assessee was able to link the purchases with corresponding sales, the logical conclusion which one can arrived at is, the assessee might not have purchased goods from the declared source but from some other parties. In that event, only the profit element embedded in the bogus purchases can be considered for addition. Therefore, the decision of the Assessing Officer to restrict the addition to 10% of the bogus purchases is in tune with the consistent view of the tribunal and different high courts in similar nature of cases. That being the case, in our view, the exercise of power under section.263 of the Act in the facts of the present case is invalid. Accordingly, the impugned order passed by the leaned PCIT under section 263 of the Act deserves to be quashed. Accordingly, we do so. Consequently, the order passed by the Assessing Officer is restored.

Facts and circumstances of the present appeal are pari-materia the same. No distinguishing features could be pointed out by the revenue. Therefore, respectfully following the view of co-ordinate bench of the Tribunal, we quash the impugned order passed u/s 263 and restore the order of Ld. AO.

6. The appeal stands allowed.”

8. The identical view has been taken by the various Benches of the Tribunal as referred to above. The Hon'ble Jurisdictional Calcutta High Court in the case of PCIT vs. M/s Subarna Rice Mill ITAT 196 of 2015 has held as under:

“The assessee refers to a judgment of the Gujarat High Court reported at 388 ITR 377. The principle enunciated in such judgment is that when undisclosed purchases of such nature are discovered, it is only the profit embedded in the transaction which can be added to the total income. The Gujarat High Court relied on some of its previous judgments to hold that "not the entire purchase price but only the profit element embedded in such purchases can be added to the income of the assessee.”

In the circumstances and particularly since the factual findings rendered by the Commissioner (Appeals) as to the quantum of additional stocks have now been restored, the order impugned on the methodology for the ascertainment of the income which escaped assessment would pass muster. The Appellate Tribunal merely directed the gross profit that the additional purchase was capable of generating to be regarded as the additional income for tax to be assessed on such basis. Such view of the Appellate Tribunal does not call for any interference.”

9. Since the purchases and sales have been duly accounted for, hence, in view of the above stated legal position, the view taken by the Assessing Officer was one of the possible views and hence, the impugned order of the Assessing Officer cannot be said to erroneous on this issue.

10. Further, the Hon'ble Jurisdictional Calcutta High Court in the case of Excel Commodity and Derivative Pvt. Ltd. APOT/132/2022, ITA No.GA/1/2022 vide order dated 29.08.2022 has observed as under:

“Further, we take note of the Circular issued by the Central Board of Direct Taxes (CBDT) dated 22nd August, 2022 giving instruction to the departmental officers with regard to the uploading of data on functionality/portal of the Income Tax Department. This circular emphasises the earlier circular dated 1st August, 2022 and in paragraph 3 therein, it has been stated as follows:

“3) Further, it is re-emphasized that –

i) Before initiating proceedings under section 148/147 of the Act, any information available on data-base/portal of the Income Tax Department shall be verified before drawing any adverse inference against the taxpayers. It is not out of place to mention here that the information made available/data uploaded by the reporting entities may not be fully accurate due to inter alia, error of human nature technical nature, etc. Therefore, due verification may be carried out and opportunity of being heard be given to the taxpayer before initiating proceedings under Section 148/147 of the Act.

ii) *The Supervisory authorities are hereby advised to keep an effective supervision so as to ensure that all extant Instructions/Guidelines/Circulars/SOPs are duly followed by the Assessing Officers in their charge. "*

From the above it is clear that it has come to the notice of CBDT that in several cases information made available/data uploaded by the reporting entries are not fully accurate due to error of human nature, technical nature etc. Therefore, the department was advised to effect due verification and opportunity of being heard given to the tax payers before initiating proceedings u/s 148/147 of the Act. Thus, in the preceding paragraph we have pointed out the factual position in the case on hand and it appears that proper verification was not done on the information which was available with the Assessing Officer at the time of issuance of notice u/s 148A(b) of the Act which has led to an erroneous order dated 7th April, 2022 being passed.

In Divya Capital One (P) Ltd. vs. Assistant Commissioner of Income Tax reported in [2002] 139 taxmann.com 461 (Delhi), the Court had considered the new re-assessment claim and held as follows:

"7. This Court is of the view that the new re-assessment scheme (vide amended Sections 147 to 151 of the Act) was introduced by the Finance Act, 2021 with the intent of reducing litigation and to promote ease of doing business. In fact, the legislature brought in safeguards in the amended re-assessment scheme in accordance with the judgment of the Supreme Court in GKN Driveshafts (India) Ltd. v. ITO, (2003) 259 ITR 19 (SC) before any exercise of jurisdiction to initiate re-assessment proceedings under Section 148 of the Act.

8. This Court is further of the view that under the amended provisions, the term "information" in Explanation 1 to Section 148 cannot be lightly resorted to so as to re-open assessment. This information cannot be a ground to give unbridled powers to the Revenue. Whether it is "information to suggest" under amended law or "reason to believe" under erstwhile law the benchmark of "escapement of income chargeable to tax" still remains the primary condition to be satisfied before invoking powers under Section 147 of the Act. Merely because the Revenue-respondent classifies a fact already on record as "information" may vest it with the power to issue a notice of re-assessment under Section 148A(b) but would certainly not vest it with the power to issue a re-assessment notice under Section 148 post an order under Section 148A(d)."

As pointed out in the aforesaid mentioned decision, the term "information" in Explanation-1 under Section 148 cannot be lightly resorted to so as to reopen assessment and this information cannot be a ground to give unbridled power to the revenue. In fact, in the case on hand, the information has been lightly used which resulted in issuance of notice. As pointed out earlier, the assessee had submitted the explanation to the notice along with documents in support of their claim. The assessing officer has given up the said allegation which formed the basis of the notice and proceeded on a fresh ground for alleging that the transaction with some other company was an accommodation entry. Therefore, on that score also the order dated 7th April, 2022 is liable to be set aside in its entirety without giving any opportunity to reopen the matter on a different issue.

For the above reasons, the appeal filed by the assessee (APOT/132/2022) is allowed and the order dated 7th April 2022 u/s 148A of the Act is set aside and the

direction issued by the learned Single Bench remanding the matter to the Assessing Officer is also set aside. Consequently, no further action can be taken by the department against the appellant/assessee on the subject issue.”

11. In this case, the ld. PCIT has not pointed out any adverse evidence in respect of purchases made from other parties warranting re-verification of the transactions. The Assessing Officer found the purchases made from one party i.e. M/s Siddhi Enterprises as bogus. However, the Assessing Officer accepted the purchases shown to have been made from the other parties and corresponding sales also. Since no adverse evidence has been pointed out against such sales and purchases, under the circumstances, the ld. PCIT in our view is not justified to set aside the assessment order only for re-verification of the transaction/purchases from other parties on the light of the proposition of law laid down by the jurisdictional Calcutta High Court in the case of “Excel Commodity and Derivative Pvt. Ltd. (supra). In view of the above, we do not find any merit in the revision order passed u/s 263 of the Act and the same is hereby quashed.

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

Kolkata, the 10th October, 2022.

Sd/-
[डॉक्टर मनीष बोरड /Dr. Manish Borad]
लेखा सदस्य /Accountant Member

Sd/-
[संजय गर्ग /Sanjay Garg]
न्यायिक सदस्य /Judicial Member

Dated: 10.10.2022.

RS

Copy of the order forwarded to:

1. Bardhaman Dharmaraj Paper Mill Pvt. Ltd
2. PCIT (Central), Asansol
3. CIT(A)-
4. CIT- ,
5. CIT(DR),

//True copy//

By order

Assistant Registrar, Kolkata Benches