

IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, MUMBAI

BEFORE SHRI AMIT SHUKLA, JM
AND
SHRI PRASHANT MAHARISHI, AM

ITA No. 777/MUM/2021

(Assessment Year 2015-16)

Bic Cello (India) P. Ltd.
(As Successor to Bic Cello
Exports P.Ltd)
G-1,701/702, Lotus
Corporate Park, Jaicoach W
E Highway, Goregaon East,
Mumbai- 400 063

(Appellant)

PAN No. AACCC9698R

PR.CIT(CENTRAL)-3
Room No-1991, 19THFloor,
Air India Building, Nariman
Point, Mumbai-400 021

(Respondent)

Assessee by : Shri. Dhanesh Bafana, & Ms.
Hirali Desai.

Revenue by : Dr. Mahesh Akhade, CIT DR.

Date of hearing: 11.08.2022

Date of pronouncement: 09-11-2022

ORDER

PER PRASHANT MAHARISHI, AM:

1. This appeal is filed by assessee against the order passed under section 263 of the Income Tax Act, 1961 [The ACT] by The Principal Commissioner of Income Tax (Central)- 3, Mumbai [The Ld. PCIT] for A.Y. 2015-16 on 18.03.2021 wherein it is held that the assessment order passed under section 143(3) of the Income Tax, 1961 [The Act] on 30.06.2017 by the DCIT-CC 5/2, Mumbai (The Learned AO) is erroneous and so far as prejudicial to the interest of revenue.

2. Assessee has raised four grounds of appeal as under:

"1. On the facts and in the circumstances of the case and in law, the Ld. Principal Commissioner of Income tax, Central-3 ('PCIT') erred in passing the order dated 18 March 2021, under section 263 of the Act, in the name BIC Cello Exports Private Limited, an entity which is not in existence on the date of passing the impugned order on account of its merger with the Appellant.

It is the humble prayer of the Appellant that the order dated 18 March 2021 passed under section 263 of the Act by the Ld. PCIT be held as bad in law, null and void-ab-initio and as such deserves to be quashed.

Incorrect invocation of jurisdiction under section 263 of the Act

2. On the facts and in the circumstances of the case and in law, the Ld. PCIT erred in invoking section 263 of the Act for revising the assessment order dated 30 June 2017 passed by the Ld. Assessing Officer ('AO') under section 143(3) of the Act without appreciating that the assessment order is neither erroneous nor prejudicial to the interest of revenue.

It is the humble prayer of the Appellant that the revision proceedings initiated by the Ld. PCIT under section 263 of the Act be quashed.



Ignoring principles of natural justice

3. *Without prejudice to ground no's 1 and 2 above, on the facts and in the circumstances of the case and in law, the Ld. PCIT erred in passing the order under section 263 of the Act on 18 March 2021 without granting adequate opportunity of being heard.*

It is the humble prayer of the Appellant that the order dated 18 March 2021 passed under section 263 of the Act by the Ld. PCTT be held as bad in law and as such deserves to be quashed.

Allowability of claim on merits

4. *Without prejudice to the above, on the facts and in the circumstances of the case and in law, the learned PCIT erred in not allowing the claim of "Other current assets written off" under the head other expenses amounting to ₹7,15,32,254/- and remanded back the matter to the Assessing officer for fresh adjudication.*

It is prayed that the claim of "Other current assets written off" under the head Other expenses amounting to ₹7,15,32,254/- be allowed as a business deduction/business loss."

3. At the inception itself the assessee does not want to press Ground No. 3 wherein violation of principles of natural justice were challenged. Therefore, Ground No. 3 is dismissed.



4. Brief facts of the case show that assessee is a company engaged in the business of manufacturing of writing instruments, finance, and investment activities. It filed return of income on 30.11.2015 declaring total income of ₹ 34,06,05,630/-. This return was revised on 30.03.2016 at ₹ 34,01,31,850/-. The return of income was picked up for scrutiny under CASS. Vide order dated 30.06.2017, It was assessee at returned income under section 143(3) of the act.
5. Learned PCIT pursued the record and noticed that assessee has claimed 'other current assets- write off' under the head 'other expenses' of ₹ 7,15,32,254/- which has not been examined by the learned assessing officer, as no question relating to the above expenses were asked and examined during the course of assessment proceedings. No details of such expenses were also available on record. Thus, the learned Assessing Officer allowed this expenditure without making any verification or enquiry. The learned Assessing Officer simply accepted the above expenses as genuine expenditure without examining the nature of this expenses and hence, it was not ascertained by him that how the claim is allowable. Further, the assets being part of the balance-sheet is prima facie on capital nature and write off a capital expenditure is not allowable under section 37 of the Act.
6. Based on this, a notice under section 263 was issued to the assessee on 11-03-2021. The assessee did not respond to the same. And, therefore, the revision order

under section 263 of the Act was passed ex parte on 18.03.2021 invoking explanation 2 to section 263 of the Act. The learned PCIT held that since the Assessing Officer has not raised any query on the issue of allowability of the above write off and no enquiry has been made to ascertain allowability of such claim and further any item in balance-sheet is prima facie of capital in nature, allowance of claim in such circumstances makes the assessment order erroneous in so far as it is prejudicial to the interest of revenue. Accordingly, the assessment order was set aside, and the direction was given to the Assessing Officer to conduct proper inquiries on the above issue and to pass assessment order de novo after due inquiries and affording reasonable opportunity of the heard to the assessee.

7. The assessee is aggrieved with the same preferred this appeal.
8. First ground of appeal is that the order under section 263 of the Act has been passed in the name of "Bic Cello Exports private limited" an entity which is not at all in existence on the date of passing of the impugned order. The learned authorized representative submitted a paper book containing 59 pages. He referred letter dated 30.07.2018, by which the DCIT, Mumbai was intimated stating that the scheme of amalgamation of "Bic Cello Exports Private Limited" has been proposed and the copy of the Company Application No. 87 of 2018 was submitted. According to that letter, the scheme of amalgamation was

proposed between "Bic Cello Exports Private Limited" with "Bic Cello (India) Private Limited", under section 230 and 232 of the Companies Act, 2013. On Sept 14, 2018, one more letter was addressed to the Assessing Officer that if he is desirous of opposing the above petition, he may submit his objection to Vaish Associates Advocates. Further, on 12.11.2018 NCLT, Ahmadabad passed an order approving the scheme of amalgamation there by "Bic Cello Exports Private Limited" was amalgamated with "Bic Cello (India) Private Limited". The learned authorized representative referred to notice under section 263 of the Act dated 11.03.2021 issued by the PCIT addressed to "Bic Cello Exports Private Limited". According to that notice, the case was fixed for hearing on 17.03.2021 at 3.00 pm. Assessee on 17.03.2021 requested adjournment up to 24.03.2021 as per login date 17.03.2021 at 18.19.12. Assessee submitted that pursuant to the scheme of amalgamation the company is filing response and further due to COVID-19 there are practical difficulties in calling the details and therefore the matter may be adjourned, and assessee may be allowed a time of one week.

9. Subsequently, assessee complied with the notice by submitting a paper book by covering letter on 24.03.2021 at 21.17 hours. However, unfortunately the learned PCIT passed the order under section 263 of the Act on 18.03.2021. This order was also passed in the name of 'Bic cello Exports Private Limited'. Therefore, the contention of the learned AR is that revisionary order is passed in the name of non-existing companies and

therefore same is bad in law and liable to be quashed. The learned authorized representative heavily relied on the decision of the Hon'ble Delhi High Court in case of PCIT Vs. Kaizen Products Private Limited 406 ITR 311 as well as the decision of Kolkata bench of ITAT Emerald Company Ltd Vs ITO on 176 TTJ 276. The learned authorized representative also relied upon the decision of the Hon'ble Supreme Court in case of PCIT Vs. Maruti Suzuki India Limited Civil Appeal No. 5409 of 2019 wherein the order passed on the non-existing company was quashed. He also stated that as the order has been passed on 'Bic Cello Exports Private Limited' which is no more in existence as same is merged with 'Bic Cello (India) Private Limited'. He also submitted that 'Bic Cello Exports Private Limited' submitted on 13.03.2020 for A.Y. 2019-2020 also that this company has merged with 'Bic Cello India Private Limited' and therefore, not required to file return of Income.

10. The learned DR submitted that there is no intimation given by the assessee to the PCIT that 'Bic Cello Exports Private Limited' has merged with 'Bic Cello Exports India Private Limited'. It was stated that show cause notice was issued to the assessee on 11.03.2021 fixing the date of hearing on 17.03.2021, the assessee did not file any response to the above notice thereby the matter was decided ex-parte on merits of the case. Learned CIT DR stated that in absence of any response by the assessee, within due time, order was passed ex parte. He also enclosed the proceedings of ITBA portal. The learned CIT DR also relied on the decision of the Hon'ble Supreme Court in case of

PCIT Vs. Mahagun Realtors Private Limited dated 05.04.2022 and stating that the case of the assessee is covered by this decision of the Hon'ble Supreme Court in case of Mahagun Realtors Pvt Limited dated 5/4/2022 **2022] 137 taxmann.com 91 (SC)/[2022] 287 Taxman 566 (SC) and decision of Hon. SC of Pr. CIT v. Maruti Suzuki India Ltd. [2019] 107 taxmann.com 375/265 Taxman 515/416 ITR 613 (SC)** does not apply for the reason that assessee did not intimate the PCIT about the amalgamation.

11. We have carefully considered the rival contentions and the relevant decisions submitted before us. We find that in this case the notice u/s 263 of the income tax act was issued on 11 March 2021 wherein the hearing was fixed on 17th of March 2021 at 3 PM. Assessee responded above notice by seeking an adjournment on 17 March 2021 at 6.19 p.m. Thus, the response submitted by the assessee was after the appointed time. No doubt the detailed reasons attached with the above communication clearly shows that assessee mentioned that pursuant to the scheme of amalgamation u/s 230 to 232 of the companies act, 2013, Bic Cello export private limited has been amalgamated with Bic Cello (India) private limited with effect from 1 April 2017 by order of the national company law tribunal, Ahmedabad on November 12, 2018. The learned PCIT passed an order u/s 263 of the income tax act on 18 March 2021. naturally in this case, the window was open for apply till 17 March 2021 at 3 PM on ITBA. Till that time, there was no intimation to the learned PCIT about the amalgamation. The response filed by the assessee on

17 March 2020 in response to non-filing of return was for assessment year 2019 – 20 and not for the impugned assessment year i.e. 2015 – 16, therefore, it cannot be said that for the impugned assessment year, the learned PCIT have any information about the amalgamation. In view of this, we do not find any reason to hold that assessee has duly informed the PCIT about the amalgamation of the company and yet the assessment order was passed in the name of a non-existent company. Therefore the fact of the case squarely falls within the ratio laid down by the Honourable Supreme Court in case of PCIT versus Mahagun Realtors private limited(supra). Accordingly, we do not find any infirmity in the order of the learned PCIT passed in the name of Bic Cello exports private limited.

12. However, as we have gone the intimation about the amalgamation, this appellate order is passed in the name of Bic Cello (India) private limited i.e. in the name of existing amalgamated company. Therefore, ground number 1 of the appeal of the assessee fails and hence dismissed.
13. Adverting to ground number 2, The learned authorized representative further submitted that the order passed under section 263 of the Act is not in order as same was issued without mentioning the DIN.. The learned authorized representative referred to the Circular No. 19 of 2019 dated 14th August 2019 and submitted that any communication which is not in conformity with the above

circular shall be treated as invalid. He submitted that 263 orders passed by the learned PCIT is a manual document and does not contain any DIN No and therefore same is invalid.

14. The learned Departmental Representative referred to the affidavit of PCIT dated 10.08.2022. According to that affidavit it was stated that order under section 263 of the Act was passed on 18.03.2022 and it was also generated on the same date in ITBA system Bearing DIN No. ITBA/Rev5/M/2021/1031620657(1). The printout of ITBA system with the above DIN was also submitted. Affidavit also contain the case history on ITBA portal. Thus, the affidavit states that the order generated under section 263 in case of the assessee was sent by email on 18.03.2021. However, the Email bounced, and such copy was also attached as per annexure 3. It was stated that as the order under section 263 dated 18.03.2021 bounced and it was sent by an Email through attachment vide letter dated 19.03.2021 which also bounced. Same was also submitted as per annexure 4. He also referred to intimation letter for order under section 263 wherein it was mentioned that order under section 263 dated 18.03.2021 having a DIN is generated. Therefore, the affidavits state that the 263 order contains the valid DIN. The learned DR further referred to the decision of the Hon'ble Madras High Court in 138 taxmann.com 566 wherein the revisionary order passed by the Commissioner under section 263 of the Act could not be set to be without jurisdiction merely because of the reason that the DIN of the impugned order was



intimated 1 day after said order was passed. Thus, it was stated that the order under section 263 dated 18.03.2021 was intimated to the assessee on 19.03.2021 with the DIN No. Accordingly, the argument of the learned authorized representative that revisionary order passed under section 263 is without DIN and even otherwise if it is with DIN then it is in violation of circular No. 19 of 2019 as DIN was intimated on the next dated is not correct. The learned DR also submitted that these guidelines are merely administrative guidelines.

15. We have carefully considered the rival contention and find that revisionary order u/s 263 of the income tax act was passed on 18th of March 2022 and generated on ITBA system with a proper DIN. This is also supported by way of an affidavit by the learned PCIT along with the relevant annexures showing that there was proper din generated at the time of passing of the order. Further the case history on ITBA also supports and relied upon by the learned PCIT. It was also shown that on the same date the order was sent by email to the assessee which bounced. The adequate evidences in the form of print out were also shown. Further the PCIT further tried by sending another email which also bounced. Thereafter, the assessee was given copy which is stated to be Manual order. Further on 19 March 2021 the learned PCIT also intimated the assessee about the passing of the order u/s 263 dated 18 March 2021 and it's DIN. Honourable Madras High Court in 138 taxmann.com 566 in case of Taxmo precision castings UK Ltd versus CIT wherein paragraph number 48

the Honourable High Court considering circular number 19/2019 dated 14/8/2019 has clearly held that communication issued manually can be regularized within 15 days of the issuance by referring to paragraph number 5 of the circular, held that even the communication of DIN after even one day of the order is proper. However here in the present case, the affidavit of the learned PCIT clearly shows that order was passed on 18 March 2021 and on the same date it carried DIN. Email communications sent to the assessee got bounced. There are adequate evidence produced before us in the form of affidavit, which supports the case of the revenue. Therefore, we hold that the order passed u/s 263 of the income tax act by the learned PCIT was issued with proper DIN. Hence, this argument of the learned authorized representative is rejected.

16. The next issue that arises that the order u/s 263 of the income tax act was passed ex parte. On the appointed date on 17 March 2021, though only after almost 3 hours of the appointed time, assessee requested for adjournment of 7 days. This adjournment application has not at all been considered by the learned PCIT. on 24th of March 2021 assessee furnished reply in detail raising all the arguments before the learned PCIT, but unfortunately same could not be considered as adjournment application filed by the assessee was overlooked, not rejected. The explanation is placed before us at page number 26 – 58 of the paper book. The above explanation is also uploaded on the ITBA website by E-Proceedings response acknowledgement dated 24 March 2021 at 21.17 hours.



Therefore, in all fairness, the learned PCIT should consider the explanation of the assessee, and decide the issue in accordance with the law. The learned departmental representative also did not object to the above proposition. Accordingly, adverting to ground number 4 of the appeal of the assessee, we set-aside the whole issue back to the file of the learned principal Commissioner of income tax to decide the issue on the merits of the case after considering the expression furnished by the assessee. Needless to say, proper opportunity of hearing to the assessee would be afforded and the issue would be decided on the merits of the case. Accordingly, ground number 4 of the appeal of the assessee is allowed for statistical purposes.

17. In the result, appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in the open court on 09-11-2022.

Sd/-
(AMIT SHUKLA)
(JUDICIAL MEMBER)

Sd/-
(PRASHANT MAHARISHI)
(ACCOUNTANT MEMBER)

Mumbai, Dated:09-11-2022

Sudip Sarkar, Sr.PS

Copy of the Order forwarded to:

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

BY ORDER,



True Copy//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai