

IN THE INCOME TAX APPELLATE TRIBUNAL KOLKATA “B” BENCH, KOLKATA
[Before Shri Rajesh Kumar, Accountant Member & Shri Sonjoy Sarma, Judicial Member]

I.T.A. No. 90/Kol/2022
Assessment Year : 2010-11

M/s. Anshu Metals Pvt. Ltd. (PAN: AAGCA 6287 N)	Vs.	Pr. CIT – 5, Kolkata
Appellant		Respondent

Date of Hearing	14.09.2022
Date of Pronouncement	30.11.2022
For the Appellant	Shri Amit Agarwal, Advocate
For the Respondent	Shri Sudipta Guha, CIT, D.R

ORDER

Per Shri Sonjoy Sarma, JM:

This is an appeal preferred by the assessee against the order of the Ld. Pr. Commissioner of Income Tax - 5, Kolkata [hereinafter referred to as ('the Act')] dated 16.03.2020 for the assessment year 2010-11. The assessee has raised the following grounds of appeal:

“i. That the order dated 16th March, 2020 passed by Ld. Principal Commissioner of Income Tax 5, Kolkata under section 263 of the Income Tax Act, 1961, setting aside the assessment order dated 28th December, 2017 passed by Ld. Income Tax Officer, Ward-15(1), Kolkata under section 143(3)/147 of Income Tax Act, 1961, is without jurisdiction, against law and facts of the case and therefore liable to be quashed.

ii. That the impugned order dated 16th March, 2020 passed under Section 263 of the Income Tax Act, 1961 is void ab initio and without jurisdiction in as much as the re-assessment proceedings initiated vide Notice dated 28th March, 2017 issued under Section 148 of the Income Tax Act, 1961 and the resultant order dated 28th December, 2017 passed under section 143(3)/147 of the Income Tax Act, 1961 where itself initiated/passed on non-existing, unlawful ground and without authority of law.

iii. That the assessment order dated 28th December, 2017 passed by the Ld. Income Tax Officer, Ward-15(1), Kolkata under section 143(3)/147 of the Income Tax Act, 1961 was neither erroneous nor prejudicial to the interest of Revenue within the meaning of section 263 of the Act and therefore Ld. Principal

Commissioner of Income Tax 5 Kolkata erred in assuming jurisdiction under section 263 of the Act and thereby directing to set aside the aforesaid order dated 28th December, 2017 passed under section 143(3)/147 of the Act.

iv. That the Ld. Principal Commissioner of Income Tax 5 Kolkata erred in assuming jurisdiction under section 263 of the Act and trying to substitute his own opinion to that of the Assessing Officer on the very same issue which was Examined by Assessing Officer and after all necessary verification/examination relief was allowed to the Assessee Company in the course of assessment proceedings, which had been arbitrarily set aside by the impugned Order date 16th March, 2020 passed under section 263 of the Act.

v. That the Ld. Principal Commissioner of Income Tax 5 Kolkata erred in assuming jurisdiction under section 263 of the Act for setting aside the aforesaid order dated 28th December 2017 passed under section 143(3)/147 of the Act on the basis of factually wrong allegation that the Assessee Company had not Submitted any details in the course of the assessment proceedings and further on the basis of wrong ground that there was lack of inquiry by Ld. Assessing Officer on the issue of commodity transactions entered through NMCE Platform.

vi. That the impugned Order dated 16th March, 2020 passed by the Ld. Principal Commissioner of Income Tax 5, Kolkata is perverse and is liable to be quashed as no independent inquiry was conducted by the Ld. Principal Commissioner of Income Tax - 5, Kolkata to justify assumption of jurisdiction under section 263 of the Income Tax Act, 1961.”

2. At the outset, we find that there is a delay of 641 days in filing of this appeal by the assessee. We after perusing the petition for condonation, we are convinced that the assessee was prevented by sufficient cause from filing the appeal in time hence delay is condoned and appeal is admitted.

3. At the time of hearing, the ld. AR submitted that the assessment of the assessee was reopened to verify the total loss claimed by the assessee of Rs. 41,33,000/- in its account. This transaction was made by the assessee through R.S. Enterprise, Rupam Traders and Suruchi Trading during the A.Y. 2010-11. The ld. PCIT cannot for the very same reason revise the assessment order passed by the ld. AO. He drew the attention of the bench by submitting copy of the reasons recorded for reopening the assessment as well as show cause notice issued by the ld. PCIT

prior to passing of his order u/s 263 of the Act to demonstrate that on both occasions were for the very same reason. The AO while completing the assessment u/s 143(3)/147 of the Act on 28.12.2017 had conducted enquiry / obtained information relevant documents as per notice u/s 142 and ld. AO had not made any addition. The ld. AO had made adequate enquiry and it is not a case of lack of enquiry or lack of application of mind and that revision cannot be made on the ground of inadequate enquiries. Moreover, the ld. PCIT did not conduct any enquiry for coming to the conclusion that the order requires revision. Such lack of enquiry and non-application of mind by ld. PCIT makes the order bad in law. Besides that the ld. AO in the reassessment order dated 28.12.2017 has not made any addition passed on the order relating to the reasons on which the revision was made and therefore, such assessment order is bad in law and consequently, the revision of such reassessment order is bad in law. The ld. DR, on the other hand, submitted that the ld. AO has not examined the matter and has completed the assessment without due enquiry and verification. Hence the order passed was erroneous and prejudicial to the interest of revenue. Therefore, he is relying on the order of ld. PCIT.

4. We have heard the rival contention and perused the material on record. We observe from the order passed by ld. PCIT that the issues proposed to be raised, were already examined by the AO. We note that the AO in the reassessment examined these issues by specifically calling the information from the assessee. The fact of having examined is also evident from the reasons recorded u/s 148(2) of the Act which extracted below:

“On the basis of information received from Deputy Directorate of Income Tax (Investigation), Unit-3(1), Kolkata it is found that the information with regard to systematic evasion of taxes by Clients/Members of the NMCE M/s. National Multi-Commodity Exchange during the different financial years by misuse the NMCE platform.

Based on the Forwards Market Commission (FMC) report that clients/members of NMCE were found to be involved in creating artificial volume and

suspected evasion of income tax by misuse of NMCE platform" DDIT(Inv), Kolkata to verify whether the contrived losses booked on NMCE were used to set off any income/profit available in the books.

On the basis of above information, investigation was carried out by the investigation unit, Kolkata and during the investigation it was found that some more information.

Broker wise trade ledger/full back up of the trade data etc. were required for Verification of contrived bogus commodity loss, therefore a letter was sent to the concerned directorate and National Multi Commodity Exchange, Ahmedabad also with request to provide the same and later the desired data was received from NMCE, Ahmedabad. Most of the entities who had booked bogus loss are dummy entities who have facilitated bogus loss or profit to other real beneficiaries.

It transpires from the Data based information CD that Code No.CLO153 1-S1087 name of client M s. Anshu Metals Pvt. Ltd. During the F.Y 2009-10 relevant to the A.Y 2010-11 had total buying of Rs.1,23,87,600/- and total selling of Rs. 1,24,89,512.5/- and the difference is Rs. 1,01,.912.5/- as profit and then total buying of Rs. 1.23,46,400/- and total selling of Rs. 82,13,400/-, total loss claimed of Rs. 41,33.000/- in his P:L booked. This transaction was made through (Sub Broker (Ledger file) "R.S. Enterprise, Rupam Taders and Suruchi Trading" during the A.Y. 2010-11.

The assessee company filed I. T return for the A. Y 2010-11 on 07.10.2010 showing income of Rs. Nil. Consequently, the assessee company has made high value banking transaction which is not commensurate with its return of income. Thus, the information clearing funds are followed by outgoing transfer and the funds appeared to be washed using the banking system. The points of suspicious are the company's explanation about the credentials of transactions which were not convincing. The transfer had no logic to support the act of layering.

By these modus operandi the assessee brought back his unaccounted income in his regular books of accounts. In this situation further investigation is required as per provision of I.T Act for the benefit of revenue as the assessee brought back loss of Rs. 41,33,000/-to reduce its income.

In view of the above reason recorded as per order sheet, your case has been re-opened u/s 147."

5. Thereafter, the AO asked the assessee to produce relevant documents as per notice u/s 142(1) of the Act. After this exercise, the AO has not made any addition in

the order passed u/s 143(3) r.w.s. 147 of the Act on 28.12.2017. The ld. PCIT proposed the revision of reassessment order dated 16.03.2020 by giving show cause notice dated 28.01.2020 following para of this notice as under:

“In order to judge the merit of the order passed by the Assessing Officer, the assessment records were perused. The records available revealed that your company brought bogus loss of Rs. 41,33,000/- (difference of total buying & selling) which were not at all examined/verified by the Assessing Officer while passing the assessment order u/s 143(3)/147 of the Income Tax Act, 1961.

In view of the above facts, the order passed u/s 143(3)/147 of the Income Tax Act, 1961 on 28.12.2017 for A.Y. 2010-11 appears to be erroneous in so far as it is prejudicial to the interest of revenue on this point.”

6. From the above, it is clear that reasons recorded for reopening of the assessment and the reasons for initiating proceedings u/s 263 of the Act, are the same and based on same material. The allegation in this show cause notice issued u/s 263 of the Act is that the Assessing Officer has failed to examine and verify the brought forwarded loss of Rs. 41,33,000/- which is factually incorrect. It is well settled legal position that inadequate enquiry cannot be a ground for exercising of revisionary power u/s 263 of the Act. From the papers on record, it is clear that AO had conducted enquiries with the assessee in respect of alleged brought forward loss. The ld. PCIT cannot substitute his opinion for that of the AO. It is also seen that ld. PCIT has not conducted any re-verification or prima facie investigation on his own to come to a conclusion that the order passed by the AO is erroneous to the interest of revenue. He also failed to notice that enquiries were made by the AO. The law on this issue is clear. The Hon'ble Jurisdictional High Court, Kolkata in the case of PCIT vs Anindita Steels Ltd. ITAT No. 178 of 2021 had considered judgement on this issue exercising jurisdiction u/s 263 of the Act by holding as under:

“5. The short issue which falls for consideration is whether the Principal Commissioner of Income Tax, Central Calcutta (PCIT) was justified in invoking its power under section 263 of the Act. The Tribunal considered the factual issue and more particularly the fact that on the very same issue the assessment was

reopened under section 147 of the Act and after discussing the case and conducting an enquiry relief was granted to the assessee.

6. In spite of such being the factual position, the PCIT proposed to revise the reassessment order dated 20th May, 2016 by issuing show-cause notice dated 8th March, 19 on the same issue. The Tribunal after considering the factual issue held as follows :

"From the above it is clear that reasons recorded for reopening of the assessment and the reason for initiating proceedings u/s 263 of the Act, are the same and based on the same material. The allegation in this show cause notice issued u/s 263 of the Act, is that the Assessing Officer has failed to examine and that no enquiry was conducted into the veracity of the loans by the Assessing Officer, is factually incorrect. It is well settled that inadequate enquiry cannot be a ground for exercising of revisionary power u/s 263 of the Act. It is for the Assessing Officer to determine the extent of enquiry and investigation to be done on a particular issue. From the papers on record it is clear that the Assessing Officer had conducted enquiries both with the assessee as well as with the third parties and on receipt of all the information, copies of which are placed from pages 43 to 72 of the paper book, has accepted these loans as genuine. The ld. Pr. CIT cannot substitute his opinion for that of the Assessing Officer. It is also seen that the ld. Pr. CIT has not conducted any verification or prima facie investigation on his own to come to a conclusion that the order passed by the Assessing Officer is erroneous and prejudicial to the interest of the revenue. He also failed to notice that enquiries were in fact made by the Assessing Officer."

7. Furthermore, the Tribunal rightly took note of the law laid down by the Hon'ble Supreme Court in *Malabar Industrial Co. Ltd. v. CIT* [2000] 109 Taxman 66 and allowed the appeal filed by the assessee. In the said decision the Hon'ble Supreme Court pointed out that the phrase "prejudicial to the interest of revenue" occurring in section 263 of the Act has to be read in conjunction with the expression "erroneous" order passed by the Assessing Officer. Further every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interest of the revenue. In the case at hand the Tribunal rightly pointed out that the ground on which notice under section 263 of the Act was issued was identical to the reason for reopening the assessment earlier. Furthermore, the Tribunal noted that no independent enquiry was conducted by the PCIT to justify assumption of jurisdiction under section 263 of the Act. It is settled legal principle that the PCIT cannot substitute its opinion to that of the Assessing Officer on the same material which was noted by the Assessing Officer in the reassessment proceeding. Thus, we find that the Tribunal rightly granted relief to the assessee.

8. In the result, the appeal is dismissed and the substantial questions of law are answered against the revenue.”

7. Applying the proposition of law to the facts of the case, we hold that the order passed u/s 263 of the Act dated 16.03.2020 is bad in law. Therefore, we quash the order passed by the ld. PCIT u/s 263 of the Act as bad in law and allow the appeal of the assessee.

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

Order is pronounced in the open court on 30.11.2022

Sd/-

(Rajesh Kumar)
Accountant Member

Sd/-

(Sonjoy Sarma)
Judicial Member

Dated: 30.11.2022

Biswajit, Sr. PS

Copy of the order forwarded to:

1. Appellant- M/s. Anshu Metals Pvt. Ltd., 58, N.S. Road, Liluah, Howrah-711203.
2. Respondent – Pr. CIT – 5, Kolkata.
3. Ld. CIT
4. Ld. CIT(A)
5. Ld. DR

True Copy

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata