

**IN THE INCOME TAX APPELLATE TRIBUNAL,
'B' BENCH, KOLKATA**

**Before Shri Rajpal Yadav, Vice-President (KZ)
&
Shri Rajesh Kumar, Accountant Member**

**I.T.A. No. 2219/KOL/2018
Assessment Year: 2012-2013**

***M/s. Ganapati Agro Products,.....Appellant
C/o. Piru Dutta,
Netaji Nagar, Alamganj,
P.O. Nutanganj,
Burdwan-713102
[PAN: AAHFG3761D]***

-Vs.-

***Principal Commissioner of Income Tax,....Respondent
Burdwan,
Aayakar Bhawan, Court Compound,
Burdwan-713101***

Appearances by:

*Shri Soumitra Choudhury, Advocate, appeared on behalf
of the assessee*

*Shri Sudipta Guha, CIT (DR), appeared on behalf of the
Revenue*

Date of concluding the hearing : January 24, 2023

Date of pronouncing the order : March 27, 2023

O R D E R

Per Rajpal Yadav, Vice-President (KZ):-

The assessee is in appeal before the Tribunal against the order of Id. Principal Commissioner of Income Tax, Burdwan dated 24.08.2018 passed under section 263 of the Income Tax Act in assessment year 2012-13.

2. Though the assessee has taken six grounds of appeal, but its grievances revolve around a single issue, namely ld. CIT has erred in taking cognizance under section 263 of the Income Tax Act and thereby setting aside the assessment order passed under section 147 read with 143(3) of the Income Tax Act on 29.08.2017.

3. Brief facts of the case are that the assessee has filed its return of income on 31.03.2013 declaring total income of Rs.29,170/-. This return was processed under section 143(1). Thereafter it was reopened by issuance of a notice under section 148 of the Income Tax Act. The ld. Assessing Officer has passed the assessment order on 29.08.2017. He determined the taxable income of the assessee at Rs.9,61,638/-.

4. The ld. Commissioner gone through the assessment record and formed an opinion that assessment order is erroneous as much as it is prejudicial to the interest of Revenue. Therefore, he issued a show-cause notice of 05.07.2018. A copy of the show-cause notice is available at page no. 15 of the paper book. Ld. Commissioner after making reference to the history of assessment confined his reason, which reads as under:-

Show-Cause Notice under Section 263 (Relevant Part)

“On verification of records and the assessment order the following issues are observed:-

On perusal of records as well as the assessment order, it is seen that the WDV of block of fixed assets of the assessee as on 31.03.2012 was Rs.65,33,297/-. It is also seen from the sale deed, registered on 17.03.2012, and available in the records that the entire block of fixed assets was sold at full value of consideration of Rs.2,04,48,979/-. Therefore, there arises short term capital gain of Rs.1,39,15,682/- out of the said transaction. During the course of assessment u/s 147/143(3) of the Act, the assessing officer has not taken into account the transaction of sale of the entire block of fixed assets and has not brought to tax the resultant short term capital gain of Rs.1,39,15,682/- arises out of the said transaction”.

5. The assessee filed written submission and the relevant part of the written submission has been noticed by the Id. CIT in the impugned order. We deem it appropriate to take note of this submission of the assessee including finding of the Id. CIT, which reads as under:-

“(a) The partners, Piru Dutta, Mousumi Dutta, Sk. Nazrul Islam, Sk Saukat Ali and Montajara Begum were owners of the sold out rice mill, Ganapati Agro Product. The mill was constructed the partners.

(b) M/s Ganapati Agro Product was not the owner of the rice mill. The partners used Trade name for carrying on rice milling business. Hence, the sold out rice mill property would not be assessed on excess sum if any got after sale price of aforesaid rice mill as short-term or long-term capital gains in the hands of the M/s Ganapati Agro Product. More so 'Ganapati Agro Product' is an artificial person in the eye of law and as such the real owners are partners.

(c) *The rice mill was sold on 17th March, 2013. Out of the sale consideration of Rs. 2,04,48,979/- , the purchaser has repaid the bank liability of the rice mill of Rs. 1,76,00,000/- and vendors were received Rs. 28,48,979/- as a part consideration against the partners capital liability of Rs. 54,99,834/-. Thus "Ganapati Agro Product" does not attract any capital gain either in the hands of the assessee firm or in the hands of the partners.*

4.1. *The submission of the assessee is perused. It is a agreed fact that M/s Ganapati Agro Product is a partnership firm having partners Piru Dutta, Mousumi Dutta, Sk. Nazrul Islam, Sk Saukat Ali and Montajara Begum and was constituted by the Partnership Deed registered with the Registrar of Firms having Registration No. L70752 dated 19th September 2007. M/s Ganapati Agro Product being an entity recognized by the law was obtained PAN, was engaged in the business of rice milling managed by the partners. It also maintained books of accounts as per law, got its Profit & Loss accounts and Balanace sheet prepared and audited by recognized accountants as per law. Every persons who was at the time of discontinuation or dissolution of a firm shall be jointly and severally liable for the amount of tax, penalty or other sum payable, and all the provisions of this Act, so far as may be, shall apply to any such assessment or imposition of penalty or other sum.*

4.2. *The assessee firm was assessed u/s 147/143(3) of the Act on 29/08/2017. The assessment proceedings was duly represented and no objection was raised during the assessment proceedings. Proceedings u/s 263 of the Act is only an extended proceedings of the assessment proceedings of M/s Ganapati Agro Product on the issues which is considered to be erroneous and prejudicial to the interest of revenue. Therefore, proposed proceedings u/s 263 of the Act was rightly initiated on M/s Ganapati Agro Product within the parameter of the Act.*

4.3. *It is evident from the sale deed dated 17th March 2012 that M/s Ganapati Agro Product is the Vendor and M/s M.P.S. Greenery Developers Ltd is the Purchaser. M/s Ganapati Agro Product was represented by its partners Piru Dutta, Mousumi Dutta, Sk. Nazrul Islam, Sk Saukat Ali and Montajara Begum. The agreed sales consideration was Rs. 2,02,00,000/- which was received by the partners on behalf of the Vendor, M/s Ganapati Agro Product as evident at page-14 of the sale deed. Therefore, full value of the consideration has been received by the vendor against the sale of rice mill premises, including land, building, furniture, fixture and plant & machineries owned by M/s Ganapati Agro Product. The assessed market value as determined by the registration authorities was Rs. 2,04,48,979/.*

4.4. *Therefore, the difference between the sales consideration and the written down value as available in the balance sheet of the assessee firm attracts short term capital gain/loss as per Income Tax Act, 1961 in the hand of M/s Ganapati Agro Product.*

4.5. *In view of the above, the submission of the assessee is not tenable and accordingly rejected.*

5. *It is explicitly evident from the available documents that that the assessing officer had not examined/verified the issue of short term capital gain arises out of the transaction of sale of block of fixed assets, evidence by the sale deed registered on 17.03.2012 and has not taken it into account for computation of total income of the assessee firm during the assessment stage u/s 147/143(3) of the Act. Therefore, the order passed by the Assessing Officer u/s 147/143(3) of the Act on 29/08/2017 is deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, within the parameter laid down in Explanation 2(a) of Section 263 of the Income Tax Act, 1961.*

6. *Under the present circumstances, considering the judgment of Hon'ble Supreme Court in the case of Deniel Marchant P. Ltd Vs. ITO & Ors dated 29.11.2017, in the interest of natural justice, the assessment order passed u/s 147/143(3) dated 29.08.2017 for the A.Y. 2012-13 is set aside and restored to the file of the assessing officer with direction to make the assessment afresh. The AO is directed to :*

(i)Examine/Verify the issue of short term capital gain arises out of the transaction of sale block of fixed assets, evidence by the sale deed registered on 17.03.2012 with reference to the assessed value of consideration and the VVDV of the block of assets.

(ii)Compute the short term capital gain, if any, arises out of the said transaction of sale of block of fixed assets.

(iii) Re-compute the total income of the assessee taking into consideration the STCG as computed above.

6. *The AO should afford reasonable opportunity of being heard to the assessee before assessment is reframed by him.*

7. *Order is passed u/s 263 of the Income Tax Act, 1961”.*

6. We have heard the ld. Representatives and with their assistance gone through the record carefully. Before we embark upon an enquiry on the facts and issues agitated before us to find out whether the action u/s 263 of the Act, deserves to be taken against the assessee or not, it is pertinent to take note of this section. It reads as under:-

“263(1) The Commissioner may call for and examine the record of any proceeding under this Act, and if he

considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interest of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.

[Explanation.- For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,-

(a) an order passed on or before or after the 1st day of June, 1988 by the Assessing Officer shall include-

(i) an order of assessment made by the Assistant Commissioner or Deputy Commissioner or the Income Tax Officer on the basis of the directions issued by the Joint Commissioner under section 144A;

(ii) an order made by the Joint Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred on, or assigned to, him under the orders or directions issued by the Board or by the Chief Commissioner or Director General or Commissioner authorized by the Board in this behalf under section 120;

(b) "record shall include and shall be deemed always to have included all records relating to any proceeding under this Act available at the time of examination by the Commissioner;

(c) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal filed on or before or after the 1st day of June, 1988, the powers of the Commissioner under this sub-section shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal.

(2) No order shall be made under sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed.

(3) Notwithstanding anything contained in sub-section (2), an order in revision under this section may be passed at any time in the case of an order which has been passed in consequence of, or to give effect to, any finding or direction contained in an order of the Appellate Tribunal, National Tax Tribunal, the High Court or the Supreme Court.

Explanation.- In computing the period of limitation for the purposes of sub-section (2), the time taken in giving an opportunity to the assessee to be reheard under the proviso to section 129 and any period during which any proceeding under this section is stayed by an order or injunction of any court shall be excluded.”

7. A bare perusal of the sub section-1 would reveal that powers of revision granted by section 263 to the learned Commissioner have four compartments. In the first place, the learned Commissioner may call for and examine the records of any proceedings under this Act.

For calling of the record and examination, the learned Commissioner was not required to show any reason. It is a part of his administrative control to call for the records and examine them. The second feature would come when he will judge an order passed by an Assessing Officer on culmination of any proceedings or during the pendency of those proceedings. On an analysis of the record and of the order passed by the Assessing Officer, he formed an opinion that such an order is erroneous in so far as it is prejudicial to the interests of the Revenue. By this stage the learned Commissioner was not required the assistance of the assessee. Thereafter the third stage would come. The learned Commissioner would issue a show-cause notice pointing out the reasons for the formation of his belief that action u/s 263 is required on a particular order of the Assessing Officer. At this stage the opportunity to the assessee would be given. The learned Commissioner has to conduct an inquiry as he may deem fit. After hearing the assessee, he will pass the order. This is the 4th compartment of this section. The learned Commissioner may annul the order of the Assessing Officer. He may enhance the assessed income by modifying the order. He may set aside the order and direct the Assessing Officer to pass a fresh order. At this stage, before considering the multi-fold contentions of the ld. Representatives, we deem it pertinent to take note of the fundamental tests propounded in various judgments relevant for judging the action of the CIT

taken u/s 263. The ITAT in the case of Mrs. Khatiza S. Oomerbhoy Vs. ITO, Mumbai, 101 TTJ 1095, analyzed in detail various authoritative pronouncements including the decision of Hon'ble Supreme Court in the case of Malabar Industries 243 ITR 83 and has propounded the following broader principle to judge the action of CIT taken under section 263.

(i) The CIT must record satisfaction that the order of the AO is erroneous and prejudicial to the interest of the Revenue. Both the conditions must be fulfilled.

(ii) Sec. 263 cannot be invoked to correct each and every type of mistake or error committed by the AO and it was only when an order is erroneous that the section will be attracted.

(iii) An incorrect assumption of facts or an incorrect application of law will suffice the requirement of order being erroneous.

(iv) If the order is passed without application of mind, such order will fall under the category of erroneous order.

(v) Every loss of revenue cannot be treated as prejudicial to the interests of the Revenue and if

the AO has adopted one of the courses permissible under law or where two views are possible and the AO has taken one view with which the CIT does not agree. It cannot be treated as an erroneous order, unless the view taken by the AO is unsustainable under law.

(vi) If while making the assessment, the AO examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determine the income, the CIT, while exercising his power under s 263 is not permitted to substitute his estimate of income in place of the income estimated by the AO.

(vii) The AO exercises quasi-judicial power vested in him and if he exercises such power in accordance with law and arrive at a conclusion, such conclusion cannot be termed to be erroneous simply because the CIT does not feel stratified with the conclusion.

(viii) The CIT, before exercising his jurisdiction under s. 263 must have material on record to arrive at a satisfaction.

(ix) If the AO has made enquiries during the course of assessment proceedings on the relevant

issues and the assessee has given detailed explanation by a letter in writing and the AO allows the claim on being satisfied with the explanation of the assessee, the decision of the AO cannot be held to be erroneous simply because in his order he does not make an elaborate discussion in that regard.

8. In the light of above, let's examine the facts of the present case. A perusal of the impugned order would suggest that the ld. CIT is of the view that the assessee including its partners are jointly and severally liable for the amount of tax penalty and other sum payable by them. He further construed that in this transaction of sale of Rice Mill, a short-term capital gain has arisen to the assessee, which has not been examined by the ld. Assessing Officer.

9. It is pertinent to observe that ld. Commissioner failed to appreciate the transaction in right perspective. As far as the proposition is concerned, that any short-term capital gain arose to a partnership firm, then it is taxable either in the hands of the firm or in the hands of the partner on its dissolution/discontinuation. The moot question is whether any gain is available or not. The assessee has specifically pointed out that purchaser took responsibility of the loan required to be paid by the assessee on these assets and such low liability was of Rs.1,76,00,000/-. The ld. CIT only took into consideration the

Written Down Value of the assets in the books of account and failed to recognize the loan liability. This transaction is not to be examined in isolation. The assessee has disposed of its assets and the purchaser has discharged the liability. In this factual background, no short-term capital gain has arisen to the assessee and if arisen, then it is to be set off with the ultimate loss going to be suffered by the assessee on account of loan liability, thus in practicality, no gain to the assessee. The ld. Commissioner has not recorded any factual finding when assessee has brought all these details to its notice. He simply set aside the assessment for *de novo* enquiry. The section does not contemplate so, the ld. Commissioner has to demonstrate as to how the order is erroneous and only thereafter for verification purposes, he can set aside. In the present case, when the assessee brought it to the notice of the ld. Commissioner that block of assets have been sold and which does not give rise to any capital gain, then he should have recorded specific finding as to how this claim of the assessee is factually incorrect and only thereafter the issue can be set aside to the ld. Assessing Officer for verification of those details and re-adjudication. It is to be appreciated that both the authorities were aware about the fact that block of assets have been sold. The ld. Assessing Officer has specifically took into cognizance this fact and thereafter disallowed the depreciation. Thus it cannot be said that ld. Assessing Officer has not conducted inquiry and has not gone through the complete details before accepting the claim of assessee. The ld. Assessing Officer has made reference to these

facts as also the balance-sheet. Therefore, we are of the view that the impugned order is not sustainable, it is quashed.

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

Order pronounced in the open Court on 27th March, 2023.

Sd/-
(Rajesh Kumar)
Accountant Member

Sd/-
(Rajpal Yadav)
Vice-President (KZ)

Kolkata, the 27th day of March, 2023

*Copies to : (1) M/s. Ganapati Agro Products,
C/o. Piru Dutta,
Netaji Nagar, Alamganj,
P.O. Nutanganj, Burdwan-713102*

**(2) *Principal Commissioner of Income Tax,
Burdwan,
Aayakar Bhawan, Court Compound,
Burdwan-713101***

*(3) Principal Commissioner of Income Tax,
Burdwan*

(4) Commissioner of Income Tax- , Kolkata;

(5) The Departmental Representative

(6) Guard File

TRUE COPY

By order

*Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata*

Laha/Sr. P.S.