

आयकर अपीलीय अधिकरण "बी" न्यायपीठ पुणेमें।
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCHES "B" :: PUNE

BEFORE SHRI S.S.GODARA, JUDICIAL MEMBER
AND
DR. DIPAK P. RIPOTE, ACCOUNTANT MEMBER

आयकर अपीलसं. / ITA No.136/PUN/2021
निर्धारण वर्ष / Assessment Year : 2015-16

Rajkumar Premchand Tulsani, Sr.No.46/8, Bombay Pune Road, Akurdi, Pune – 411038. PAN: AAWPT 8002 B Assessee/ Appellant	V s	The Pr.Commissioner of Income Tax-5, Pune. Respondent /Revenue
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Assessee by	Shri M.K.Kulkaani – AR/Advocate
Revenue by	Shri Sardar Singh Meena,IRS – DR Commissioner of Income Tax.
Date of hearing	03/05/2023
Date of pronouncement	06/07/2023

आदेश/ ORDER

PER DR. DIPAK P. RIPOTE, AM:

This appeal filed by the Assessee is directed against the order of Id.Principal Commissioner of Income Tax-5, Pune dated 27.03.2020 under section 263 of the Income Tax Act, emanating from assessment order under section 143(3) of the Act dated 12.12.2017 for A.Y.2015-16. The Assessee has raised the following grounds of appeal:

“1. On the facts and in the circumstances of the case and in law

the Ld.Pr.CIT-5, Pune was not justified assuming jurisdiction under S. 263 of the Act to brand the order of the A.O. as order erroneous and prejudicial interest of Revenue. The assessee was legally entitled to claim the expenditure of Rs.51,22,390/- paid to Government which was statutory liability thrust on the appellant by law. In such circumstances discharge of legal liability is an allowable expenditure u/s 37 of the Act. The Ld. Pr. CIT was wrong in holding such liability as not that of the assessee. The order passed by Pr. CIT assuming jurisdiction u/s 263 is not according to law.

2. *On the facts and in the circumstances of the case and in law and such circumstances and payment made towards the discharge of legal liability (Govt, liability) cannot be termed as order of the A.O. as erroneous and prejudicial to the interest of revenue to apply provisions of S. 263 of the Act. The Revision order passed under S. 263 be cancelled.*

3. *On the facts and in the circumstances of the case and in law the Ld. Pr. CIT was also not justified in invoking the provision of S. 43B of the Act as legally and presentally the provisions of S. 43B are not attracted. The revision order passed under S.263 be cancelled.*

4. *On the facts and in the circumstances of the case and in law the assessee was responsible for discharge of such legal fiction which has support of the law. The Ld. Pr. CIT cannot disallow the discharge of this legal fiction which contrary to provision of law. The expenditure which assessee is entitled to pay by the provisions of law be allowed to the assessee by cancelling the Revision order passed under s. 263 of the Act.*

5. *The appellant craves to leave, add/amend or alter any of the above grounds of appeal.”*

Brief facts of the case :

2. The assessee is an individual and is proprietor of M/s.Rajkumar Enterprises which is engaged in the business of reselling of steel. During the year, assessee filed Return of Income on 30.09.2015 declaring Rs.6,23,910/- under the -head “Capital Gain” and business loss of Rs.41,11,249/-. The assessee’s case was selected for scrutiny. The assessment order was passed on 12.12.2017 accepting the returned income. The AO has not discussed any issue in the assessment order. The Id.Pr.CIT invoked the provisions of section 263. The Id.Pr.CIT has observed that the assessee has debited an amount of Rs.51,22,390/- towards Sales Tax and Interest pertaining to Financial Year 2008-09 and 2009-10, which was made on behalf of the seller of the material as the seller did not pay Sales Tax to the Sales Tax Department. The Id.Pr.CIT after giving opportunity to the assessee, discussed this issue at length in the order under section 263 and held that the assessment order is erroneous and prejudicial to the interest of the Revenue. The Id.Pr.CIT directed the AO to pass afresh assessment order after conducting necessary enquiries. Aggrieved by the order of the Id.Pr.CIT, the assessee filed Appeal before this Tribunal.

Submission of Id.AR :

3. The assessee is proprietor of M/s.Rajkumar Enterprises engaged in the business of reselling of steel. The Id.Authorised Representative of the assessee submitted that Id.Pr.CIT has erred in invoking provisions of section 263. The assessee's case for A.Y.2015-16 was selected for complete scrutiny. The Assessing Officer(AO) called for details and after verification of all the details passed the assessment order dated 12.12.2017 accepting the Returned income. Ld.AR read out the Para 3 of the assessment order to demonstrate that Id.AO had called for copy of Sales Tax Department's order with reference to the expenses claimed in the Profit and Loss Account on account of Sales Tax Payment.

4. The Id.AR submitted that assessee had paid VAT of Rs.51,22,390/- to Sales Tax Department which was not paid by the original seller i.e. the Dealer. It was assessee's legal liability to discharge the same if it is not discharged by the seller. The assessee could not avoid this legal obligation. The Id.AR further submitted his written submissions as under :

3) The MVAT Act makes obligation of the purchaser-Assessee to pay such outstanding demand of the taxes under provision of MVAT Act, 2002. The provisions of the said Act are reproduced below:

S. 33 Special mode of recovery: (1) Notwithstanding anything contained in any law 'or' contract 'to the 'contrary; the Commissioner may, on -noticing that there is an Outstanding liability of tax, interest or penalty against a dealer or person, or on whom a notice Under sub-Section (4) of Section 32 has already-been Served; at' any time, by notice in .Writing, require,

(a) any person whom any amount of Money is due, or may become due, to the said dealer or person, or

(b) any person who holds or may subsequently hold money for or on account of such dealer or person,

to pay to the Commissioner, either forthwith upon the money becoming due or being held or within the time specified in the notice (but not before the money becomes due or is held as aforesaid), an amount equal to the amount due and outstanding from such dealer as aforesaid :

Provided that, no action under this sub-section shall be taken till the date prescribed for filing of appeal, if the dealer makes an application in the prescribed form to the Commissioner before the said date Stating therein that he is proposing to file an appeal against the order in pursuance of which the said notice Under sub-section (4) of section 32 has been served on him.

Explanation.- For the purposes of this section, the amount of money due to a dealer from, or money held for or on account of a dealer, by any person, shall be calculated after deducting therefrom such claims (if any) lawfully subsisting., as may have fallen due 'for payment by such dealer to such person.

(2)The Commissioner may, at any time, amend or revoke any such notice, or extend the time for making any payment in pursuance of the notice.

(3) Any person making any payment in compliance with a notice under this section shall be deemed to have made the payment under the authority of the dealer or a person, and the receipt of the Commissioner shall constitute, a good and sufficient discharge of the liability of such person, to the extent of the amount referred to in the receipt.

(4) Any person discharging any liability to the dealer or person after receipt of the notice referred to in this section, shall be personally liable to the Commissioner to the extent of the liability discharged, or the extent of the liability of the dealer or person for tax, penalty, interest and sum forfeited, whichever is less.

(5) Where a person to whom a notice under this section is sent proves to the satisfaction of the Commissioner that the sum demanded or any part thereof is not due to the dealer or a person; or that he does not hold any money for or on account of the dealer or a person; then, nothing contained in this section shall be deemed to require such person to pay any such sum or part thereof, as the case maybe, to the Commissioner.:

(6) Subject to the provisions of sub section (5), any amount of money which a person is liable to pay to the Commissioner, shall, under sub-section. (1) read with sub section (4), if it remains unpaid, be recoverable as if it is a sum demanded under section 32 and accordingly any notice served under this section shall be deemed for the purposes of this Act to be a notice served under section 32 and the unpaid amounts shall be recoverable as arrears of land revenue:-

34. Special powers of Sales Tax Authorities for recovery of tax as arrears of land revenue:- (1) For the purpose of effecting recovery of the amount of tax, penalty, interest, amount forfeited or any other sum, due and recoverable from any dealer or other person by or under the provisions for recovery of this Act, as arrears of land revenue,—

(i) the Commissioner of Sales Tax shall have and exercise all the powers and perform all the duties of the Commissioner under the Maharashtra Land Revenue Code, 1966 ; XLI

(ii) the Additional Commissioner of Sales Tax shall have and exercise all the powers and perform all the duties of the Additional Commissioner under the said Code ;

(iii) the Joint Commissioner of Sales Tax shall have and exercise all the powers and perform all the duties of the Collector under the said Code ;

(iv) the Senior Deputy Commissioner and the Deputy Commissioner of Sales Tax shall have and exercise all the powers (except the powers of confirmation of sale and arrest and confinement of a defaulter in a civil jail) and perform, all the duties of the Assistant or Deputy Collector under the said Code ;

(v) the Assistant Commissioner and the Sale Tax Officer shall have and exercise all the powers (except the powers of confirmation of sale and arrest and confinement of a defaulter in a civil jail) and perform all the duties of the Tahsildar under the said Code.

(2) Every notice issued or order passed in exercise of the powers conferred by sub-section (1) shall, for the purposes of sections 24, 25, 26, 27 and 85 be deemed to be a notice issued or an order passed under the said Act.

35. Provisional attachment to protect revenue in certain cases:

(1) If during the course of inquiry in any proceedings including proceedings related to recovery of any amount due, in respect of any person or dealer or during any inspection or search in relation to the business of any person or dealer under this Act, the Commissioner is of the opinion that for the purpose of protecting the interests of the revenue it is necessary so to do, then he may, notwithstanding anything contained in any law for the time being in force or any contract to the contrary, attach provisionally by order in writing any money due or which may become due to such person or dealer from any other person or any money which any other person holds or may subsequently hold for or on account of such person or dealer:

Provided that, the Commissioner shall specify in his order the amount of money to which the order applies :

Provided further that, the Commissioner may, by an order, revoke such order, if the dealer furnishes, to the Commissioner, a bank guarantee, in such time, for such period, as may be specified, in the said order.

(2) Every such provisional attachment shall cease to have effect after the expiry of a period of one year from the date of service of the order issued under sub-section (1):

Provided that, the Commissioner may, for reasons to be recorded in writing, extend the aforesaid period by such further period or periods as he may think fit so, however that the total period of extension shall not in any case exceed two years.

(3) The powers under this section shall be exercised by the Commissioner himself or the Additional Commissioner having jurisdiction over the entire State or, as the case may be, by any Joint Commissioner to whom the Commissioner has delegated such powers by a notification published in the Official Gazette.

(4) Where an order under sub-section (1) is served upon any person, provisionally attaching any money, then, such person shall be personally liable, so long as the attachment order is not revoked or has not ceased to have effect, to pay to the Commissioner, the amount of money so attached.

(5) If the said person or the dealer makes an application in the prescribed form to the Commissioner within fifteen days of the date of service of the order specified in sub-section (1), or as the case may be, within fifteen days of the date of service of the order extending the period under sub-section (2), then the Commissioner, after affording such person or dealer a reasonable opportunity of being heard, and, having regard to the circumstances of the case, may confirm, modify or cancel the order.

(6) An appeal against any order passed under sub-section (5) shall lie with the Tribunal and all other provisions of section 26 shall apply accordingly.

4) This is covered by Legal Fiction as under:

legal fiction. (17c) *An assumption that something is true even though it may be untrue, made esp. in judicial reasoning to alter how a legal rule operates; specif., a device by which a legal rule or institution is diverted from its original purpose to accomplish indirectly some other object. The constructive trust is an example of legal fiction. — Often shortened to fiction. — Also termed fiction of law; fictio juris. [Cases: Trusts (z.D91.)]*

"1 . . employ the expression 'Legal Fiction' to signify any assumption which conceals, or affects to conceal. the fact

that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified.

It is not difficult to understand why fictions in all their forms are particularly congenial to the infancy of society. They satisfy the desire for improvement, which is not quite wanting, at the same time that they do not offend the 'superstitious disrelish for change which is always present.' Henry S. Maine, Ancient Law 21-22 (17th ed. 1901).

"Legal fiction is the mask that progress must wear to pass the faithful but blear-eyed watchers of our ancient legal :treasures. But though legal fictions are useful in thus miti-:gating or absorbing the shock of innovation, they work havoc in the form of intellectual confusion." Morris R. Cohen, Law and the Social Order 126 (1933).

5) The word 'liability' in its widest import means an obligation or duty to do something or to refrain from doing something. Parliament intended to include in the word 'liability' not only a financial obligation but also obligations of every other kind, including one of reinstating a government servant wrongly dismissed. *W. W. Joshi v. State of Bombay*, AIR 1959 Bom 363, 365. [States Reorganisation Act (37 of 1956), Ss. 87, 88

6) It is the view of the Ld. CIT in the order passed under S. 263 not accepting the fact that the assessee purchaser was entitled to claim deduction of Rs. 51,22,390/- being outstanding demand not paid by the seller will not be allowed as expenditure to the assessee when liability is discharged. But law is otherwise. The liability is fastned on the purchaser is liability is not discharged by the seller for reasons best known to him. The law binds the purchaser in the absence of the seller not discharging his liability and it legally transferred to the purchaser. And in such circumstances if purchaser discharge the liability by making the such payments it is also regarded his purchaser when paid by him increase his losses. The provisions of S. 43B are not applicable since it is not a direct purchase of material

but discharge of liability legally thrust on him. S. 43B is not attracted. S. 43B is reproduced below:

Submission of Id.DR :

5. The Id.Departmental Representative for the Revenue relied on the order of the Id.Pr.CIT. The Id.DR explained that the amount paid by assessee was not an allowable expenditure and hence the AO has erred in allowing it. The Id.DR relied on the decision of the Hon'ble Supreme Court in the case of Malabar Industrial Company Limited.

6. Ld.DR explained that the liability claimed to have been paid was not assessee's Liability. It was the VAT dues of the Dealer from whom the assessee claimed to have purchased the goods. Therefore, it was the liability of the Dealer and this is an admitted fact by the assessee. Under section 43B only the liability of the assessee are allowable.

7. Ld.DR submitted even without prejudice, it is for argument's sake considered that the VAT liability was actually paid by the assessee, then also, as per Section 145A of the Act the impugned amount needs to be added to the Purchase amount

debited by the assessee in the Profit and Loss Account, therefore, accordingly, the value of the Closing Stock needs to be reworked. All these facts have been mentioned by the Id.Pr.CIT in the order.

7.1 The AO has not verified any of these facts.

7.2 Ld.DR further submitted that in this case the Assessee has not filed copy of any notice u/s.142 or any submission made by the Assessee during the Assessment Proceedings to demonstrate that the issue was verified by the AO. Rather, no paper book has been filed by the assessee, Ld.AR has made only oral averments.

7.3 Therefore, the Id.DR submitted that assessment order was erroneous and prejudicial to the interest of the Revenue.

Findings and Analysis :

8. We have heard both the parties and perused the records.

8.1 On perusal of the assessment order it is observed that it is a cryptic assessment order. The AO has not discussed why and under which section he has allowed the impugned claim of the

assessee. The relevant paragraph of the assessment order is reproduced here as under :

“[3] The assessee is the Proprietor of M/s Rajkumar Enterprises which is engaged in the business of Steel business i.e re-selling of steel. During the year under consideration, the assessee has shown total receipt of Rs.2,33,18,708/- and after claiming various direct and indirect expenses the gross loss declared at Rs.(-) 46,08,059/-. During the course of the assessment proceedings, the AR submitted computation of income, Audit report, bank account Statement, Ledger & confirmation of sundry creditors, copy of Immovable property agreements and Sales Tax Department order in respect of expenses claimed in P & L. The documents furnished by the assessee are placed on records.

[4] Subject to the above, the total income of the assessee for A.Y. 2010-11 is computed as follows :-

<i>Sr.No.</i>	<i>Particulars</i>	<i>Amount</i>
<i>1.</i>	<i>Total Income as per return</i>	<i>Rs.6,23,910/-</i>
	<i>Addition:</i>	
	<i>Total taxable income</i>	<i>Rs.6,23,910/-</i>
	<i>Rounded off to</i>	<i>Rs.6,23,910/-</i>

*Assessed Total Income - Rs.6,23,910/-
Carry Forward Business Losses- Rs. (-41,12,249/-)”*

8.2 Thus, it can be seen from the above paragraph of the assessment order that the AO has allowed the amount of Sales Tax Liability, though, it is mentioned as Sales Tax Liability in the assessment order, but it was VAT Liability, without making any discussion. In paragraph 4, the AO has even mentioned incorrect assessment year. The figure of the business Loss mentioned in paragraph four of the assessment order does not match with the figure of the Business Loss mentioned in the

introductory Paragraph 1 of the assessment order. The assessment order effectively has only one paragraph i.e. Paragraph No.3, which is reproduced above.

8.3 It is also an admitted position by the assessee that the impugned MVAT liability was not the assessee's liability but it was the liability of the Dealer from whom the assessee claimed to have purchased the goods. In these facts and circumstances, it was definitely not an allowable expenditure u/s.43B of the Act.

9. The Id.AR relied on the letter of the Joint Commissioner, Maharashtra Value Added Tax dated 30.05.2014, which is reproduced by the Id.Pr.CIT in the order under section 263 of the Act. It is aptly clear from the said letter of Joint Commissioner, Maharashtra Value Added Tax that the impugned amount was liability of the Dealer, from whom assessee has claimed to have purchased the goods. As per section 32(5) of the Maharashtra Value Added Tax Act, 2002, the Government can recover the tax as arrears of land revenue. The relevant section is reproduced here as under :

“(5) Any tax, penalty, interest, fine or sum forfeited, which remains unpaid after the service of notice under sub-section

(4), or any instalment not duly paid or any amount due or payable under this Act, shall be recoverable as an arrears of land revenue.”

9.1 Similarly, section 33 of the Maharashtra Value Added Tax Act, 2002 is reproduced here as under :

“33. Special mode of recovery. - (1) Notwithstanding anything contained in any law or contract to the contrary, the Commissioner may, on noticing that there is an outstanding liability of tax, interest or penalty against a dealer or person, or on whom a notice under sub-section (4) of section 32 has already been served, at any time, by notice in writing, require, -
(a) any person from whom any amount of money is due, or may become due, to the said dealer or person, or
(b) any person who holds or may subsequently hold money for or on account of such dealer or person, to pay to the Commissioner, either forthwith upon the money becoming due or being held or within the time specified in the notice (but not before the money becomes due or is held as aforesaid), an amount equal to the amount due and outstanding from such dealer as aforesaid:.....

Explanation

(2)

(3) Any person making any payment in compliance with a notice under this section shall be deemed to have made the payment under the authority of the dealer or a person, and the receipt of the Commissioner shall constitute a good and sufficient discharge of the liability of such person to the extent of the amount referred to in the receipt.”

10. The section 33 of MVAT Act mentions special mode of recovery. As per section 33 of MVAT Act the Commissioner may issue a notice to any person from whom any amount of money is due to the defaulter Dealer. In this case, it seems that

recovery letter has been issued to the assessee presuming that there is any amount due to the defaulter Dealer. In this case, as per section 33 of MVAT Act the assessee had to pay only if any amount was due to the defaulter dealer. It indirectly means whatever was due to the Dealer, it was to be paid towards the VAT liability instead of paying to the dealer. Therefore, in this case, the assessee has to prove that there was some amount outstanding which was payable to the defaulter Dealer. However, no enquiry has been made by the AO on this issue. We have already mentioned that the assessment order is absolutely cryptic. The Id.AR has also not brought on record any document to demonstrate that during the assessment proceedings, assessee had submitted all these details and AO had verified all these details. This itself explains that neither the AO had asked any questions nor the assessee had submitted these details during the assessment proceedings.

11. Be it as it may be, as mentioned by the Id.Pr.CIT in the order u/s.263 and as vehemently pleaded by the Id.DR, even if the liability was paid by the assessee as claimed by the assessee, since the VAT was paid for the purchases it needs to be added to

the cost of purchases as per section 145A of the Act. This aspect has not been verified by the AO at all. We agree with Id.DR that this would have changed the valuation of the closing stock and thus Profit would have also changed. We also agree with the Id.DR that this aspect has not been verified by the AO.

12. The Ld.AR has pleaded that it was the Liability of the assessee being purchaser as the Dealer had defaulted, however, the Ld.AR could not bring to our notice any provision of MVAT Act which makes it mandatory for the purchaser to pay the VAT if there is default by the Dealer. Hence, we reject the said pleading. However, the AO has not verified this aspect also. The Id.AR has not brought on any record to demonstrate that this aspect was verified by Id.AO during assessment proceedings.

13. Section 263 is reproduced here as under for ready reference
Revision of orders prejudicial to revenue.

“263. (1) The Principal Commissioner or 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 interests 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 1.—For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,—

.....

Explanation 2.—For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal^{2a}[Chief Commissioner or Chief Commissioner or Principal] Commissioner or Commissioner,—

- (a) the order is passed without making inquiries or verification which should have been made;*
- (b) the order is passed allowing any relief without inquiring into the claim;*
- (c) the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or*
- (d) the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person.*

13.1 Thus, as per Explanation 2 to Section 263, the Assessment order passed without making inquiries which should have been made is erroneous and prejudicial to the interest of the revenue.

14. We have already demonstrated in earlier paragraphs that the Assessing Officer had failed to carry out the necessary inquiries. The AO has allowed the claim of the assessee without carrying any inquiries.

15. The Hon'ble Bombay High Court has held in the case of Vedanta Ltd Vs. CIT 279 Taxman 358 (Bombay) [27-11- 2020] as under :

Quote, “24. In Malabar Industrial Co. Ltd. v. CIT [2000] 109 Taxman 66/243 ITR 86 (SC) the Hon'ble Supreme Court has held that the CIT can pass an order under section 263 of the IT Act even on debatable issues. Similarly, it is clear where the assessment was completed without proper inquiries which circumstances necessitated, it is competent for the CIT to invoke the revisional jurisdiction and direct fresh assessment, after verifying and examining all relevant facts, as well as legal position as may be involved.” Unquote.

16. Therefore, in these facts and circumstances of the case, since AO failed to carry out necessary enquiries as discussed in earlier paragraphs, respectfully following the law laid down by the Hon'ble Supreme Court and the Hon'ble Jurisdictional High Court(supra), we agree with the ld.Pr.CIT that the assessment order is erroneous and prejudicial to the interest of the Revenue. In this case, the ld.Pr.CIT in the order under section 263 has set-aside the assessment order and asked the AO to complete the assessment afresh after due verification. Thus, the assessee will be having sufficient opportunity to explain his case before the AO. Accordingly, we uphold the order u/s.263 of the Act. Accordingly, the grounds of appeal of the assessee are dismissed.

17. In the result, appeal of the assessee is dismissed.

Order pronounced in the open Court on 6th July, 2023.

Sd/-
(S.S.GODARA)
JUDICIAL MEMBER

Sd/-
(DR. DIPAK P. RIPOTE)
ACCOUNTANT MEMBER

पुणे / Pune; दिनांक / Dated : 6th July, 2023/ SGR*

आदेशकीप्रतिलिपिअग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A), concerned.
4. The Pr. CIT, concerned.
5. विभागीयप्रतिनिधि, आयकर अपीलीय अधिकरण, “बी” बेंच,
पुणे / DR, ITAT, “B” Bench, Pune.
6. गार्डफ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// TRUE COPY //

Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे/ITAT, Pune.