

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

डॉ. मनीष बोराड, लेखा सदस्य
एवं
श्री संजय शर्मा, न्यायिक सदस्य
के समक्ष

Before

**DR. MANISH BORAD, ACCOUNTANT MEMBER
&
SONJOY SARMA, JUDICIAL MEMBER**

**I.T.A. No.: 151/KOL/2022
Assessment Year: 2017-18**

***Sunny Trexim Pvt. Ltd.....Appellant
[PAN: AADCS 6026 Q]***

Vs.

PCIT, Kolkata-2, Kolkata.....Respondent

Appearances:

Assessee represented by: Sh. Sunil Surana, A/R.

Department represented by: Sh. S. Datta, CIT (D/R).

Date of concluding the hearing : July 3rd, 2023

Date of pronouncing the order : September 26th, 2023

ORDER

Per Manish Borad, Accountant Member:

This appeal filed by the assessee pertaining to the Assessment Year (in short 'AY') 2017-18 is directed against the order passed u/s 263 of the Income Tax Act, 1961 (in short the 'Act') by the Pr. Commissioner of Income Tax (in short ld. 'Pr. CIT'), Kolkata-2 dated 24.03.2022 arising out of the assessment order framed u/s 143(3) of the Act dated 25.12.2019.

2. The assessee is in appeal before this Tribunal raising the following grounds:

“1. The notice issued u/s 263 by the Ld. Pr. Commissioner of Income-Tax, PCIT - 2, Kolkata (hereinafter referred to as « PR.CIT ») and the order passed u/s 263 are illegal, bad in law and without jurisdiction

2. That having regard to the facts and circumstances of the case the Ld. Pr. CIT has erred in law and on facts in assuming jurisdiction in passing the order u/s 263, more so when the assessment order passed u/s 143(3) is neither erroneous nor prejudicial to the interest of revenue.

3. That having regard to the facts and circumstances of the case, the Ld. Pr. CIT has erred in setting aside the assessment order passed u/s 143(3) of the Act by the ACIT, Circle 5(1) Kolkata on the ground that ‘no detailed investigations’ have been carried out by the ACIT.

4. That the Ld. Pr. CIT has failed to consider that the assessment as framed by the ACIT, Circle 5(1) Kolkata was after due application of mind and after considering the detailed replies on various dates as filed before him during the course of assessment proceedings.

5. That the Ld. Pr. CIT has failed to appreciate that details of - expenses were filed as required by the ACIT, Circle 5(1), Kolkata and the assessment order has been passed after due application of mind.

6. That the assessment order passed after detailed enquiries does not become erroneous merely because Ld. Pr. CIT feels that further enquiries should have been made. Hence the notice issued u/s 263 and the order passed u/s 263 is illegal, bad in law and without jurisdiction.

7. That without prejudice, the Ld. Pr. CIT was wrongly and illegally held that the order passed by the ACIT, Circle 5(1), Kolkata is erroneous and prejudicial to the interest when no independent enquiry has been made by the Ld. Pr. CIT.

8. Hence the notice issued u/s 263 of the IT Act 1961, and the order passed u/s 263 is illegal and bad in law.

9. That without prejudice, the Ld. Pr. CIT has jurisdiction in setting aside the assessment order and directing the ACIT, Circle 5(1), Kolkata to make do novo assessment when his notice and the order passed is limited to certain issues only. Hence the order passed u/s

263 is illegal and bad in law. That the evidence filed and materials available on record have not been properly construed and judiciously interpreted, hence the direction for addition/ disallowance is uncalled for

10. The appellant craves leave to add, to alter to amend the above ground of appeal at the time of hearing.”

3. The facts in brief are that the assessee is a private limited company. Income of Rs. 1,27,56,100/- declared in the e-return filed on 30.10.2017. Assessee is engaged in the business of export, import and trading of cotton, jute, food grains and yarn. Assessment proceedings were completed on 25.12.2019 after making addition of Rs. 27,035/- and income assessed at Rs. 1,27,83,135/-. Subsequently, ld. Pr. CIT called for the assessment records invoking the powers provided u/s 263 of the Act and noticed that the assessee has paid brokerage of Rs. 5,62,07,050/- claimed to have been paid to non-resident brokers having no permanent establishment in India. Ld. Pr. CIT further, noticed that as per the tax auditor no tax was deducted by the assessee u/s 195 of the Act on the above stated brokerage paid to non-resident brokers. After going through the assessment records, ld. Pr. CIT noticed that the Assessing Officer (in short ld. 'AO') has not examined this issue and no evidence has been put forth by the assessee to prove that whether such entities have or do not have permanent establishment in India and whether the assessee failed to deduct tax at source u/s 195 of the Act on the alleged brokerage at Rs. 5,62,07,050/-.

4. During the course of revisionary proceedings, the assessee stated that ld. ACIT has duly considered the fact about payment of brokerage to non-resident and non-applicability of provisions of

Section 195 of the Act and that Section 40(a)(ia) of the Act cannot be attracted in respect of payment of brokerage to non-resident brokers. However, ld. Pr. CIT was not satisfied and he was of the view that the assessment dated 25.09.2019 is erroneous and prejudicial to the interests of the revenue and accordingly directed the AO to frame assessment afresh.

5. Aggrieved, the assessee is now in appeal before this Tribunal. Ld. Counsel for the assessee referring to the paperbook containing 154 pages submitted that in the past also assessment u/s 143(3) of the Act for AY 2010-11 & AY 2012-13 have been completed u/s 143(3) of the Act and no such disallowance of brokerage paid to non-resident brokers have been made. He also stated that declaration by parties of not having any permanent establishment in India along with their tax residency certificate were filed before ld. Pr. CIT who ought to have considered the same. It was also submitted that reply was given to the notice u/s 142(1) of the Act on 10.12.2019. It was also submitted that such brokerage expenses have been consistently paid by the assessee in the past and Revenue authorities have accepted that these parties are non-resident brokers having no permanent establishment in India and therefore, no tax is required to be deducted u/s 195 of the Act.

6. On the other hand, vehemently argued supporting the order of ld. Pr. CIT.

7. We have heard rival contentions and perused the records placed before us. Invocation of the revisionary power u/s 263 of the Act and holding the order of the AO as erroneous and prejudicial to the interests of the revenue is in dispute before us.

The matter relates to payment of brokerage to non-resident brokers amounting to Rs. 5,62,07,050/-. These expenses have been paid in US\$ and have been booked as other expenses. In clause 34A of the Audit Report it is reported that no tax was deducted on the said sum by the assessee u/s 195 of the Act.

8. Since the issue before us pertains to the invocation of jurisdiction u/s 263 of the Act, we find that the provisions of Section 263 of the Act has direct bearing on the issue raised before us, therefore, it is pertinent to take note of this Section which 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 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- 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."

8.1. On 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.

8.2. Hon'ble Supreme Court in the case of *Malabar Industrial Co. Ltd. vs. CIT (2000) 243 ITR 83 (SC)* has laid down following ratio with regard to provisions of section 263 of the Act:

“There can be no doubt that the provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer; it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind. The phrase 'prejudicial to the interests of the revenue' has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of

revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the revenue, for example, when an ITO adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the ITO has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the revenue unless the view taken by the ITO is unsustainable in law. It has been held by this Court that where a sum not earned by a person is assessed as income in his hands on his so offering, the order passed by the Assessing Officer accepting the same as such will be erroneous and prejudicial to the interests of the revenue - Rampyari Devi Saraogi v. CIT [1968] 67 ITR 84 (SC) and in Smt. Tara Devi Aggarwal v. CIT [1973] 88 ITR 323 (SC). [Emphasis Supplied]"

9. Now, examining the facts of the case in light of the above provisions of Section 263 of the Act and the judicial pronouncements, we notice that when the assessment records were called for by ld. Pr. CIT, there is no discussion about the issue of deduction of tax at source on the brokerage paid in US\$ to non-resident brokers in the assessment order. He also lay hand on the tax audit report where it is reported that tax has not been deducted u/s 195 of the Act on the alleged brokerage. We also notice that in the assessment records declaration by the parties of not having any permanent establishment in India having tax residency certificates of other countries were not available. This fact is admitted by ld. Counsel for the assessee as in the paperbook index at Sl. No. 4 it is mentioned that the declaration by the parties of not having any permanent establishment in India along with their tax residency certificates have not been filed before the AO and have been filed only for the first time before ld. Pr. CIT. Therefore, when ld. Pr. CIT noticed that no such details were available in the assessment records, he was well within his jurisdiction to invoke the provisions of Section 263 of the Act and carried out the

revisionary proceedings and therefore, carrying out such proceedings is well within the provisions of Section 263 of the Act and the relevant grounds of the assessee challenging such invocation of revisionary powers are hereby dismissed.

10. Now, coming to the merits of the case as to whether the AO is erroneous and prejudicial to the interests of the revenue. It is an admitted fact that brokerage of Rs. 5,62,07,050/- has been paid by the assessee in US\$ and no tax at source has been deducted thereon. So, on one hand, payment has gone out of the country in foreign currency and secondly, no tax was withheld before making such payment. Whenever an assessee makes any payment outside India, it has to furnish Form 15CB before the banking authorities and such Form 15CB are also uploaded in the income tax portal. So, when the case of the assessee was selected for scrutiny proceedings and in the assessment order ld. AO has observed that the reason includes (1) foreign remittance made to persons located in low tax jurisdiction countries and (2) value of foreign remittance sent by the assessee is higher than the gross total income. As per the audited financial statement against the gross receipts of Rs. 430.16 Crore the net profit before tax is Rs. 1.31 Crore whereas the brokerage paid to agents outside India is Rs. 5.62 Crore. So, based on both the issues as referred by the AO in the assessment order it was bare minimum expected from the AO to have called for the details of all the non-resident brokers to whom the brokerage has been paid and the basis of its calculation and why tax has not been deducted. The AO has not called for any such details and therefore, the assessee did not file these details. The copy of the notice u/s 142(1) of the Act has also not been filed by

the assessee. We thus, find that no such question was raised by the AO during the course of assessment proceedings about the alleged issue of deductibility of tax at source u/s 195 of the Act on the payment of brokerage of Rs. 5,62,07,050/-. By not calling these details the assessment proceedings are erroneous and since the Revenue is involved which has not been examined by the AO, the assessment proceedings are prejudicial to the interests of the revenue also.

11. So far as the contention of the assessee that ld. Pr. CIT ought to have raised independent enquiry on the issue, we fail to find any merit in this issue raised by the assessee because it is not a case of any incomplete enquiry for which ld. Pr. CIT ought to mention that what should have been done by the AO. It is a case where there is an apparent issue mentioned in the reason for selecting the case for scrutiny which should have been examined by the AO but nothing has been done on the part of the AO. Ld. Pr. CIT has called for the complete details from the assessee which have been filed by it before ld. Pr. CIT and which is placed at page 48 to 89 of the paperbook. Now, the further course of action cannot be taken up by ld. Pr. CIT to examine each and every party who has claimed to be non-resident and not liable to be taxed in India because it does not have any permanent establishment in India. This exercise ought to be carried out by the AO only.

12. We therefore, are of the considered view that ld. Pr. CIT was justified in invoking the revisionary power u/s 263 of the Act and has rightly held the order of the AO dated 25.12.219 as erroneous and prejudicial to the interests of the revenue and has rightly

directed the AO to examine the issue mentioned in the impugned order. Thus, no interference is called for in the impugned order and all the grounds raised by the assessee are hereby dismissed.

13. In the result, the appeal filed by the assessee is dismissed.

Kolkata, the 26th September, 2023

Sd/-

[Sonjoy Sarma]
Judicial Member

Sd/-

[Manish Borad]
Accountant Member

Dated: 26.09.2023

Bidhan (P.S.)

Copy of the order forwarded to:

- 1. Sunny Trexim Pvt. Ltd., C/o Sri Jitendra Kaushik, Advocate, 19D, Muktaram Babu Street, Kolkata-700 007.**
- 2. PCIT, Kolkata-2, Kolkata.**
3. CIT(A)-
4. CIT-
5. CIT(DR), Kolkata Benches, Kolkata.

// True copy //

By order

Assistant Registrar
ITAT, Kolkata Benches
Kolkata