

आयकर अपीलीय अधिकरण, कोलकाता पीठ 'बी', कोलकाता
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH KOLKATA

श्री संजय गर्ग, न्यायिक सदस्य एवं श्री मनीष बोरड, लेखा सदस्य के समक्ष
Before Shri Sanjay Garg, Judicial Member and Dr. Manish Borad, Accountant Member

I.T.A. Nos.1168&1169/Kol/2019
Assessment years: 2010-11 & 2011-12

Champalal Omprakash.....Appellant
49, Madan Mohan Burman Street,
Kolkata-700007.
[PAN:AABFC8279L]

vs.

ITO, Ward-43(2), Kolkata.....Respondent

I.T.A. Nos.1545&1546/Kol/2019
Assessment years: 2010-11 & 2011-12

ITO, Ward-43(2), Kolkata..... Respondent

vs.

Champalal Omprakash.....Appellant
49, Madan Mohan Burman Street,
Kolkata-700007.
[PAN:AABFC8279L]

Appearances by:

Shri J. P. Khaitan, Sr. Counsel, appeared on behalf of the appellant.

Shri P. P. Barman, Addl. CIT-DR, appeared on behalf of the Respondent.

Date of concluding the hearing : December 13, 2023

Date of pronouncing the order : January 15, 2024

आदेश / ORDER

संजय गर्ग, न्यायिक सदस्य द्वारा / Per Sanjay Garg, Judicial Member:

The captioned are cross-appeals preferred by the assessee as well as by the Department against the impugned common order dated 19.03.2019 of the Commissioner of Income Tax (Appeals)-13, Kolkata [hereinafter referred to as 'CIT(A)'] passed u/s 250 of the Income Tax Act (hereinafter referred to as the 'Act'). Since common issues involved

in all these appeals, hence these have been heard together and are being disposed of by this common order. The assessee's appeal ITA No.1169/Kol/2019 is taken as the lead case for the purpose of narration of facts.

2. **ITA No.1169/Kol/2019** – The brief facts of the case are that an information was received from the Investigation Wing pursuant to a survey and search action carried out in the case of one Shri Sanjiw Kumar Singh who has been found to be involved in providing accommodation entries in the form of bogus bills to various parties in lieu of commission. It was pointed out that the assessee was also one of the beneficiaries and had received accommodation entries to the tune of Rs.8,53,30,337/- during different financial years including Rs.4,13,29,247/- in F.Y 2010-11 relevant to A.Y 2011-12. On the basis of the said information, the Assessing Officer noted that he has reasons to believe that the income of the assessee has escaped assessment and he accordingly reopened the assessment of the assessee. The assessee filed objections against the reopening of the assessment pleading that there was no valid reason for the Assessing Officer to reopen the assessment as that the information provided by the Investigation Wing was vague. However, the Assessing Officer proceeded to frame the assessment without deciding the objections of the assessee against the reopening of the assessment. During the assessment proceedings, the Assessing Officer issued notices u/s 131 of the Act to five parties from whom the assessee was reported to have received the accommodation entries to the tune of Rs.2,34,61,090/- in the F.Y 2009-10. However, the said summons was returned unserved by the postal authority. The Assessing Officer also asked the assessee to produce the concerned

parties for purpose of verification of the purchases. However, since the said parties were not produced before the Assessing Officer, therefore, the Assessing Officer treated the said purchases as not genuine and made the additions of transactions amounting to Rs.4,13,29,247/- treating the same as bogus and unexplained.

3. Before the ld. CIT(A), the assessee taken the ground that reopening of the assessment was bad in law. That the assessment framed by the Assessing Officer was not valid because of non-adjudication of the objections filed by the assessee. The ld. CIT(A) called remand report from the Assessing Officer in this respect. However, since the Assessing Officer did not send any remand report, the ld. CIT(A) proceeded to decide the objections of the assessee himself and held that the Assessing Officer was justified in forming the reasons to believe that the income of the assessee has escaped assessment. However, on merits, the ld. CIT(A) observed that the Assessing Officer since had not disputed the corresponding sales to the aforesaid purchases, therefore, only profit element was required to be added. The ld. CIT(A) therefore estimated the GP margin @10.74% as was recorded for A.Y 2009-10 as against the GP margin declared by the assessee @8.21%. He further observed that since the bogus purchases were good part of the whole purchases, therefore, he applied the GP rate @10.74% on the entire turnover and as a result restricted the additions to Rs.3142800/- as against the addition of Rs.4,13,29,247/- made by the Assessing Officer.

4. Being aggrieved by the said order of the CIT(A), the assessee has come in appeal agitating the action of the CIT(A) in confirming the

addition of Rs.3142800/-, whereas, the revenue has come in appeal agitating the action of the CIT(A) in deleting the addition of Rs.3,81,86,447/-. Similarly, in relation to A.Y 2010-11, the ld. CIT(A) is restricted the addition of Rs.3,55,428/-, as against the addition made by the Assessing Officer of Rs.23461090/-. The assessee has filed appeal agitating the confirmation of addition of Rs.3,55,428/-, whereas, the revenue has come in appeal agitating the action of the CIT(A) in deleting Rs.23105662/-.

5. We have heard the rival contentions and gone through the record. At the outset, the ld. counsel for the assessee has submitted that firstly reopening of the assessment was bad in law. He inviting our attention to the reasons recorded by the Assessing Officer has submitted that the Assessing Officer has simply reproduced the investigation report and has not applied his independent mind to the facts of the case. He has further submitted that even the assessee had filed written objections against the reopening of the assessment, however, the Assessing Officer without deciding the said objections, proceeded to frame the assessment which was bad in law. He in this respect has relied upon the decision of the Hon'ble Supreme Court in the case of GKN Driveshafts (India) Ltd. v. ITO (2003) 259 ITR 19 (SC)/[2002] 125 Taxman 963 (SC) and further on the decision of the Hon'ble Bombay High Court in the case of Asian Paints Ltd. v. DCIT (2009) 308 ITR 195 (Bom.). The ld. counsel in this respect has placed reliance upon the decision of the Jurisdictional Calcutta High Court in the case of PCIT vs. M/s Sambuddha Tracon Pvt. Ltd. ITAT/90/2022 IA No.GA/2/2022 vide order dated 15.11.2022. Even the ld. counsel for the assessee on merits has contended that no defect has been pointed out by the

Assessing Officer or by the CIT(A) in the books of account of the assessee. That the books of account of the assessee have been rejected by merely acting on the report of the investigation wing without any corroborative evidences. That the ld. CIT(A) was not justified in enhancing the gross profit margin of the assessee on the entire turnover.

6. The ld. DR, on the other hand, has contended that the objections of the assessee regarding the validity of the reopening of the assessment has been duly decided by the CIT(A). That the powers of the CIT(A) were co-terminus with that of the Assessing Officer and therefore, the assessee is not left with any grievance on that issue. He has contended that the Assessing Officer was justified in making the addition of the purchases as the assessee had failed to prove the purchases as none of the five parties appeared before the Assessing Officer when called upon for the purpose of verification of the purchases.

7. It may be observed that the Hon'ble Supreme Court in the case of GKN Driveshafts (India) Ltd. v. ITO (supra) has held that the Assessing Officer has to supply reasons for reopening of the assessee after which the assessee can file objections and thereafter the same have to be disposed of by way of a speaking order. The Hon'ble Bombay High Court in the case of Asian Paints Ltd. v. DCIT (supra) has held that if the Assessing Officer does not accept the objections of the assessee, he shall not proceed further in the matter for a period of four weeks from the date of rejection of the said objections. The purpose is to enable the assessee to avail his legal remedies against the rejection of those objections. In this case, admittedly, the Assessing Officer did not decide

the objections of the assessee. The ld. CIT(A) has clearly mentioned in the impugned order, *“the violation of the apex court guidelines in the above case in this respect appears to have been done by the A.O”*. However, the ld. CIT(A) thereafter noted that the said violation was not fatal to the assessment but that was only an irregularity. He further observed that it can be taken care of by asking the Assessing Officer to deal with the objections. The ld. CIT(A) thereafter directed the Assessing Officer to deal with the objection and called for remand report. However, the Assessing Officer did not respond to the directions of the CIT(A) to comment on or enquire into the submissions of the assessee before the CIT(A) which inter alia included the objections against the reopening of the assessment. However, the ld. CIT(A) observed that since the powers of the CIT(A) were co-terminus with that of the Assessing Officer, therefore, he himself rejected the assessee's objections to reopening of assessment.

8. We are not convinced with the justification of the aforesaid action of the CIT(A). The power of reopening of assessment is specifically vested with the Assessing Officer only. It is the Assessing Officer who has to form the belief that the income of the assessee has escaped assessment. The reopening of the assessment has to be bona fide. It cannot be a mere pretence of the Assessing Officer. If the assessee files objections against the reopening of the assessment order, the Assessing Officer is supposed to decide the objections. If the same are decided against the assessee, the Assessing Officer is supposed not to pass the final assessment order for a period of four weeks from the date of disposal of objections. Though the ld. CIT(A) has been given the power of enhancement and can look into the other issues by giving notice to

the assessee during appellate proceedings, however, the power to reopen the assessment exclusively vests with the Assessing Officer only. It is the Assessing Officer who has to form the belief of escapement of income of the assessee and it is the Assessing Officer who has to decide the objections against the reopening of the assessment and further to give opportunity to the assessee to seek his legal remedy, if the objections are decided against the assessee and not to pass an assessment order for a period of four weeks from the rejection of objections. Therefore, the assessment framed by the Assessing Officer without disposal of objections of the assessee cannot be held to be a valid assessment. The issue is squarely covered by the decision of Jurisdictional Calcutta High Court in the case of PCIT vs. M/s Sambuddha Tracon Pvt. Ltd. (supra), wherein, the Hon'ble Calcutta High Court has observed as under:

“15. Be it as it may it is absolutely clear that the objections raised by the assessee to the reasons recorded for re-opening and the re-opening itself vide its letter dated 22.11.2017 and 24.11.2017 were not disposed off by the AO. Thus the completion of assessment without disposal of these objections, makes the assessment bad in law as held in the case of Rabo India Finance Ltd. vs. DCIT (2012) 346 ITR 528 (Bombay) and in the case of Vishwanath Engineers vs. ACIT (2013) 352 ITR 549 (Gujarat). Thus this finding of the ld. CIT (A) has to be upheld.”

9. In view of above discussion, the assessment framed by the Assessing Officer held to be bad in law and therefore, the consequential additions made by the Assessing Officer in the reopened assessment are not sustainable.

10. Since, we have decided the legal issue in favour of the assessee holding that the assessment framed in this case was bad in law, therefore, other grounds/issues taken by both the parties on merits are

rendered academic in nature. Since, facts and issues involved in all the appeals are identical, hence our findings given above will mutatis mutandis apply to all the appeals.

11. In view of the above discussion, both the captioned appeals of the assessee I.T.A. Nos.1168&1169/Kol/2019 are hereby allowed, whereas, both the captioned appeals of the revenue in I.T.A. Nos.1545&1546/Kol/2019 are hereby dismissed.

Kolkata, the 15th January, 2024.

Sd/-
[मनीष बोरड /**Manish Borad**]
लेखा सदस्य /**Accountant Member**

Sd/-
[संजय गर्ग /**Sanjay Garg**]
न्यायिक सदस्य /**Judicial Member**

Dated: 15.01.2024.

RS

Copy of the order forwarded to:

1. Champalal Omprakash
2. ITO, Ward-43(2), Kolkata
3. CIT
(A)-
4. CIT- ,
5. CIT(DR),

//True copy//

By order

Assistant Registrar, Kolkata Benches