

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

श्री राजपाल यादव, उपाध्यक्ष (कोलकाता क्षेत्र)

एवं

श्री संजय अवरथी, लेखा सदस्य

के समक्ष

Before

SRI RAJPAL YADAV, VICE-PRESIDENT

&

SRI SANJAY AWASTHI, ACCOUNTANT MEMBER

I.T.A. No.: 930/KOL/2024

Assessment Year: 2015-16

MAK Engineering Industries Ltd.....Appellant
[PAN: AACCM 3927 H]

Vs.

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

Appearances:

Assessee represented by: N.S. Saini, A/R & Priyanka Salarpuria, A/R.

Department represented by: Subhendu Datta, CIT D/R.

Date of concluding the hearing : June 3rd, 2024

Date of pronouncing the order : June 10th, 2024

ORDER

Per Sanjay Awasthi, Accountant Member:

The present appeal arises from the order passed u/s 263 of the Income Tax Act, 1961 (in short the 'Act') dated 27.03.2024 by the Pr. Commissioner of Income Tax (Central), Kolkata-2 [in short ld. Pr. CIT], pertaining to AY 2015-16.

2. In this case, the facts in brief are that the assessee filed return of income for AY 2015-16 on 26.11.2015 at 'NIL' income. An income of Rs. 3,37,897/- was declared u/s 115JB of the Act on which Rs. 64,386/- was paid as tax. The said return was processed u/s 143(1) of the Act on 11.04.2019 at the

returned income. In the instant case, there was a search and seizure action on 30.03.2016 after which an assessment order u/s 153A of the Act was passed on 20.04.2021 at the income as 'NIL', i.e. by accepting the original return of the assessee. Subsequently, a notice u/s 263 of the Act was issued by Id. Pr. CIT on 19.07.2023, seeking to reopen the assessment order passed u/s 153A of the Act dated 20.04.2021 on the following basis:

“Issue related to provision for payment of gratuity amounting to Rs. 3,54,625/-:- In the instant case, it is observed from the assessment records mainly from the Profit & Loss Account ended on 31.03.2015 (Note No. -19) that you have booked expenses to the tune of Rs. 3,54,625/- towards gratuity. It is further reported in Form No. - 3CD [(SI. No. -21(e)] that there is the provision for payment of gratuity to the tune of Rs. 3,54,625/-which is not an allowable expense under section 40A(7) of the Act, 1961. It is further reported in Form No. - 3CD [(SI. No. - 26(i)(B)(b)] that the instant gratuity had not been paid on or before the due date for furnishing the return of income for the year under consideration u/s 139(1) of the Act, 1961.

In mew of the above, the provision for payment of gratuity to the tune of Rs. 3,54,625/-is not an allowable expense. Further, it has been observed from the records that you have failed to disallow the instant amount/not taken into account in the computation of income and thus violated the provisions of section 40A(7) of the Act, 1961. Therefore, Rs. 3,54,625/- was required to be disallowed as per the provisions of Section 40A(7) of the Act, 1961 and added back to your total assessed income.

Issue related to payment of leave encashment to the tune of Rs. 76,016/-:- In the instant case, it is further observed from Form no. - 3CD [(SI. No. - 26(i)(B)(b)] that you had not paid leave encashment to the tune of Rs. 76,016/- on or before the due date for furnishing the return of income for the year under consideration u/s 139(1) of the Act, 1961 and thus liable to be disallowed.

In view of the above, the leave encashment to the tune of Rs. 76,016/- is not an allowable expense. Further, it has been observed from the records that you have failed to disallow the instant amount/not taken into account in the computation of income. Therefore, Rs. 76,016/- was required to be disallowed as you have not paid the instant leave encashment on or before the due date for furnishing the return of income for the year under consideration u/s 139(1) of the Act, 1961 and added back to your total assessed income.

In light of the above, it is evident that the A.O had failed to disallow the amount of Rs. 4,30,641/- (Rs. 3,54,625/- + Rs. 76,016/-) as described in the above paras herein during the assessment proceedings. The failure of

the Assessing Officer to disallow the above expense, as it appears, rendered the assessment order u/s 153A/143(3) of the Act dated 20.04.2021 erroneous and prejudicial to the interest of Revenue, within the meaning of section 263 of the Act.”

2.1. Thereafter, the ld. Pr. CIT proceeded to set aside the order dated 20.04.2021 passed u/s 153A/143(3) of the Act and directed the Assessing Officer (in short ld. 'AO') to disallow the provision for gratuity amounting to Rs. 3,54,625/- and Rs. 76,016/- on account of leave encashment.

2.2. Aggrieved with this action of ld. Pr. CIT, the appellant is before us through the following grounds of appeal:

“1. That on the facts and in the circumstances of the case and law, the order passed by the Ld. Pr. CIT under section 263 of the Income-tax Act, 1961 (IT Act) is illegal, invalid and not sustainable in law.

2. For that on the facts and in the circumstances of the case, the assessment for the AY 2015-16 had not abated and since there was no incriminating material found during the search, the assessment order was completed u/s 153A on 20.04.2021 as per the returned income. The action u/s 263 can only be taken if a valid assessment order existed. Once the foundation has extinguished, there cannot be any order on the basis of assessment proceedings. Therefore the order passed by the Pr. CIT u/s 263 against the order passed u/s 153A dated 20.04.2021 is unsustainable in law.

3. For that on the facts and in the circumstances of the case and law, even otherwise, no order u/s 263(1) of the Act can be made after the expiry of 2 years from the end of the Financial Year in which the order sought to be revised was passed. In the instant case, only intimation was issued u/s 143(1) of the Act on 30.03.2016 and the limitation period for revising the same u/s 263(1) of the Act expired on 31.03.2018. Hence the proceedings initiated u/s 263 of the Act by the issue of impugned notice on 19.07.2023 are bad in law and the consequential order passed u/s 263 of the Act dated 27.03.2024 is bad in law and the same is liable to be quashed.

4. The Appellant craves leave to add, alter, amend and/or withdraw any of the grounds or grounds of appeal either before or at the time of the appeal hearing.”

3. It is evident from the grounds that the action of ld. Pr. CIT has been challenged mainly on two substantive issues viz firstly, action u/s 263 of the Act is non-maintainable once an order has been passed u/s 153A of the Act and secondly, it has been averred that the original intimation u/s 143(1) of

the Act dated 30.03.2016 needs to be considered for deciding limitation u/s 263 of the Act. For the sake of convenience, the first issue as per ground no. 2 is being dealt with to begin with.

3.1. The ld. A/R has basically taken us through the submissions filed before ld. Pr. CIT and has also pointed out that he has placed before us the same in the shape of written submissions as under:

“It is submitted that the assessment for the AY 2018-19 had not abated and since there was no incriminating material found during the search, therefore the order passed u/s 153A dated 22.04.2021 accepting the return income. The action under section 263 can only be taken if a valid assessment order exists. Once the foundation has been extinguished, there cannot be any order based on the assessment proceeding. Hence the proceeding initiated u/s 263 is bad in law. We rely on the decision of the Kolkata Bench of the ITAT in the case of Salarpuria Properties Pvt Ltd Vs. PCIT reported in [2022] 143 taxmann.com 396 (Koi Trib.) and Hon'ble Patna High Court in the case of ACIT V. Satish Kumar Keshri in Misc. Appeal no 823 of 2017 dated 21.07.2023. Even otherwise it is submitted that as per provisions of Sec. 263(2) of the Act, no order u/s 263(1) of the Act shall be made after the expiry of 2 years from the end of the Financial Year in which the order sought to be revised was passed. In the instant case, only intimation was issued u/s 143(1) of the Act on 11.04.2019 and the limitation period for revising the same u/s 263(1) of the Act expired on 31.03.2022. Hence the proceedings initiated u/s 263 of the Act by the issue of impugned notice on 01.08.2023 are bad in law and the consequential order passed u/s 263 of the Act dated 30.03.2024 is bad in law and the same is liable to be quashed. We rely on the decision of the Hon'ble Supreme Court in the case of CIT V. Alagendran Finance Ltd reported in [2007] 293 ITR 1 (SC).”

3.2. The ld. D/R relied on the order of the ld. Pr. CIT.

4. We have carefully examined the contention of ld. A/R, the documents placed before us and the case laws relied upon. It has been argued with respect to ground no. 2, that since there was no incriminating material found during the course of search and seizure operation and thus the assessment had to be perforce completed on the returned income/loss. A reading of the extant provisions of the Act and the authorities cited persuade us to hold that through action u/s 263 of the Act new issues which were not emanating from any seized material, cannot be brought into the picture at this stage. In this regard, the findings of this Tribunal in the case of *M/s. Salarpuria Properties*

Pvt. Limited vs. PCIT in ITA No. 130/KOL/2021 order dated 03.08.2022, where on somewhat similar facts, this issue has been decided. The critical findings deserve to be reproduced as under:

“11. In the light of above, let us examine the facts of the present case. The assessment order passed under section 143(3) dated 26.03.2013 attained finality. No seized material was found during the course of search with respect to 2010-11. Hence, ITAT has held that in the absence of any seized material, the assessment order passed on 26.03.2013 would not abate. The income of the assessee could be re-examined qua those aspects for which incriminating material was found and seized. Since there was no material with respect to this year, the same item of income cannot be re-appreciated. The ITAT has quashed the assessment. We have reproduced the finding recorded by the Tribunal in the appeal against the assessment order passed under section 153A read with section 143(3). The action under section 263 can only be taken if a valid assessment order is existed. Once the foundation has extinguished, there cannot be any order on the basis of assessment proceeding. Therefore, we allow this appeal and quash the impugned order passed by the ld. Commissioner.”

4.1. Our attention has also been drawn to the case of *Commissioner of Income-tax (Central), Nagpur vs. Murli Agro Products Ltd.* Reported in [2014] 49taxmann.com172 (Bombay). Furthermore, strength is also drawn from the order of the Hon'ble Apex Court in the case of *Commissioner of Income-tax, Chennai vs. Alagendran Finance Ltd.* reported in [2007] 293 ITR 1 (SC) to hold that in the absence of incriminating material found during search and seizure an unabated assessment, as in this case, would perforce have to be accepted on the basis of returned income/loss. Even at the cost of repetition it needs to be stated that in the absence of any incriminating seized material, there is no scope for any extrapolation of income escaping assessment through the mechanism of any action u/s 263 of the Act. It is felt that the Department had an option to explore the alleged escapement of income through proceedings u/s 147/148 of the Act, but certainly not through the mechanism of seeking to revise the order u/s 153A/143(3) of the Act through Section 263 of the Act. Accordingly, the impugned order deserves to be quashed and the appellant gets relief with regard to ground no. 2.

5. Since the impugned order has been quashed in any case, it is not felt necessary to adjudicate on ground no. 3.

6. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open Court on 10th June, 2024.

Sd/-

[Rajpal Yadav]
Vice President

Dated: 10.06.2024

Bidhan (P.S.)

Copy of the order forwarded to:

- 1. Metsil Exports Pvt. Ltd., Barlow House, 59C, Chowringhee Road, 4th Floor, Kolkata, West Bengal, 700020.**
- 2. PCIT, Cen.-2, Kolkata.**
3. CIT(A)-
4. CIT-
5. CIT(DR), Kolkata Benches, Kolkata.

//True copy //

Sd/-

[Sanjay Awasthi]
Accountant Member

By order

Assistant Registrar
ITAT, Kolkata Benches
Kolkata