

IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH 'A' KOLKATA

[Before Hon'ble Shri N.V.Vasudevan, JM & Shri M.Balaganesh, AM]

ITA No.135/Kol/2016
Assessment Year : **2011-12**

KND Engineering Technologies Ltd. -versus- Pr.C.I.T Kolkata-4,
Kolkata Kolkata
(PAN:AABCK 2863 R)
(Appellant) (Respondent)

For the Appellant: Shri Akkal Dudhwewala, ACA
For the Respondent: Shri Hari Shankar Lal, CIT

Date of Hearing : 19.07.2016.

Date of Pronouncement : 03.08.2016.

ORDER**PER N.V.VASUDEVAN, JM:**

This is an appeal by the assessee against the order dated 16.12.2015 of CIT, Kolkata-4, passed u/s 263 of the Income Tax Act, 1961 (Act).

2. The Assessee is a company. It is engaged in the business of civil construction and real estate development. For A.Y.2011-12 the assessee filed return of income on 27.09.2011 declaring total income of Rs. Nil. Order of assessment u/s 143(3) of the Act was passed on 27.03.2014 determining the total income of the assessee at a loss of Rs.1,63, 515/-.

3. The CIT in exercise of his powers u/s 263 of the Act was of the view that the aforesaid order of AO was erroneous and prejudicial to the interest of the revenue for the reason that the assessee had not deducted tax at source as required by the provisions of Sec.194C of the Act, on payment of Rs.2,19,93,296/- to various sub-contractors and therefore the aforesaid sum ought to have been disallowed u/s 40(a)(ia) of the Act, while computing the total income of the assessee. CIT further

noticed that the AO passed an order dated 03.04.2012 u/s 154 of the Act, in and by which he rectified the defect in the calculation of disallowance u/s 14A of the Act. The CIT was of the view that this order of AO passed u/s 154 of the Act was also erroneous and prejudicial to the interest of the revenue. The CIT accordingly issued show cause notice dated 15.12.2014 u/s 263 of the Act calling upon the assessee to show cause why the order of AO dated 03.04.2014 should not be revised u/s 263 of the Act.

4. In reply to the show cause notice the assessee pointed out that by order 11.08.2014 and 09.09.2014 passed u/s 154 of the Act, the AO disallowed payments to contractors without deduction of TDS and by invoking the provision of section 40(a)(ia) of the Act. The Assessee pointed out that a sum of Rs.1,36,54,434/- was disallowed u/s.40(a)(ia) of the Act for non deduction of tax at source on payments made to contractors by order dated 11.08.2014, and by order dated 09.09.2014 the sum of disallowance was reduced to Rs.1,34,04,262/-. The assessee therefore submitted that order of AO was neither erroneous nor prejudicial to the interest of the revenue and therefore proceedings u/s 263 of the Act should be dropped.

5. The CIT however disregarded the contention of the assessee and was of the view that the rectification order passed by the AO u/s 154 of the Act was challenged by the assessee by filing an appeal against the said order. He was of the view that the issues dealt with by the AO in the order u/s 154 of the Act cannot said to be mistake apparent from the record and therefore the interest of the revenue would suffer, if the appeals against those orders are allowed. He thereafter held that this issue was not properly investigated when the original assessment order was passed nor was properly investigated while passing the order u/s 154 of the Act. After making the aforesaid observations the CIT concluded as follows :-

“Considering the facts of case, available records and submission of assessee, I am satisfied that the order dated 27.03.2014 passed u/s 143(3) of the I. T Act, 1961 is erroneous in so far as prejudicial to the interest of revenue as the payment made to sub-contractor without deducting TDS is violation of provision u/s 194 C of the Act 1961

and the AO also failed to examine the authenticity of payment made to sub-contractor as assessee failed to establish the identification of sub-contractor. Therefore, the order passed u/s 143(3) of the I.T act, 1961 dated 27.03.2014 is Set Aside de novo with a direction to AO to examine the applicability of section 40(a)(ia) in the case of payment made to Sub-Contractors and also examine the authenticity of payment.”

6. It can be seen from the aforesaid observation that the CIT has set aside the order of 27.03.2014 passed u/s 143(3) of the Act. Once when the original order dated 27.03.2014 is rectified by an order u/s 154 of the Act it loses its identity to the extent it stood rectified by order u/s 154 of the Act. In respect of matter which stood rectified by order u/s 154 of the Act, the CIT has no jurisdiction to set aside that portion of the order which existed prior to the rectification order. It was so held by the Hon'ble Madhya Pradesh High Court in the case of CIT vs Kalyan Solvent Extraction Ltd. 276 ITR 154 (MP), a decision which was brought to our notice by the Id. Counsel for the assessee. It was submitted by the Id. Counsel for the assessee that in the light of the aforesaid decision of the Hon'ble Madhya Pradesh High Court, the order of the CIT u/s 263 of the Act cannot be sustained and the same has to be quashed. The Id. DR relied on the order of CIT.

7. After considering the rival submissions we are of the view that the impugned order cannot be sustained. As we have already seen that the order dated 27.03.2014 was rectified by the AO by order dated 11.08.2014 and 09.09.2014 whereby a sum of Rs.1,34,04,262/- which was a payment made to the contractors was disallowed for non deduction of TDS u/s 194C of the Act and by invoking the provision of section 40(a)(ia) of the Act. Order of the AO passed u/s 143(3) dated 27.03.2014 stood rectified to this extent. While so the CIT in the impugned order has sought to invoke powers u/s 263 of the Act in respect of payments to the contractors for non deduction of TDS u/s 194C of the Act in the light of the provision of section 40(a)(ia) of the Act. As we have already seen that this part of the order u/s 143(3) of the Act already stood rectified and cannot be regarded as part of the order dated 27.03.2014. The CIT in exercise of his powers u/s 263 of the Act passed the impugned order on 16.12.2015 on which date the orders u/s 154 of the Act dated 11.08.2014 and 09.09.2014 had ITA No.135/Kol/2016- KND Engineering Technologies Ltd. A.Y.2011-12

already been passed whereby order dated 27.03.2015 u/s 143(3) of the Act stood modified and rectified. In the given facts and circumstances the impugned order of CIT revising the order of AO dated 27.03.2014 on a non existing issue in the said order cannot be sustained. The same is hereby quashed. The appeal of the assessee is allowed.

8. In the result the appeal of the assessee is allowed.

Order pronounced in the Court on 03.08.2016.

Sd/-

[M.Balaganesh]
Accountant Member

Sd/-

[N.V.Vasudevan]
Judicial Member

Dated : 03.08.2016.

[RG PS]

Copy of the order forwarded to:

1.KND Engineering Technologies Ltd., 2nd Floor, 7A Hospital Street, Kolkata-700072.

2. Pr.C.I.T., Kolkata-4, Kolkata.

3. CIT(DR), Kolkata Benches, Kolkata.

True Copy

By order,

Asst. Registrar, ITAT, Kolkata Benches

