Reportable

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **ITA No.595 of 2011**

Reserved On: May 24, 2011.

% Pronounced On: June 03, 2011.

COMISSIONER OF INCOME TAX . . . Appellant

through : Mr. N.P. Sahni, Sr. Standing Counsel with Mr. Ruchesh Sinha, Advocate.

VERSUS

EASTERN MEDIKIT LTD . . .Respondent

through: Mr. Anoop Sharma, Advocate with Mr. Manu K. Giri, Advocate.

CORAM :-
HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE M.L. MEHTA

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

1. This appeal was admitted on the following substantial questions of law:

> "1. Whether on the facts and circumstances of the case, the ITAT was correct in law in annulling the order of the CIT passed under Section 263 of the Income Tax Act?
>
> 2. Whether on the facts and circumstances of the case, the ITAT has erred in law in holding that the assessee is entitled for deduction under Section 80IB of the Income Tax Act for the present assessment year i.e. 2005-06?
>
> 3. Whether the ITAT could go into the merits of the disputes, while examining the validity of the order passed by the CIT under Section 263 of the Act, when CIT had

remitted the case back to the AO for determining the issue on the ground that in the assessment order this aspect was not considered by the AO?"

2. Learned counsel for the parties were ready to argue the matter, immediately after the admission. The arguments were heard on the aforesaid questions of law and orders reserved. By this judgment, we proceed to answer the aforesaid questions.

3. We would like to comment at the outset that all the three questions touch one issue, viz., validity of the order passed by the Commissioner of Income Tax (hereinafter referred to as 'the CIT') under Section 263 of the Income Tax Act (for brevity 'the Tax') whereby the CIT has asked the Assessing Officer (AO) to go into the question as to whether the assessee company had commenced its operation in the Financial Year 1994-95 and therefore, the Assessment Year 1995-96 was the first year to claim deduction under Section 80IB of the Act and on that basis, whether deduction would be admissible for the Assessment Year 2005-06. This issue has cropped up in the following factual background.

4. For the Assessment Year 2005-06, the respondent-assessee had filed return of income declaring income of ₹5,22,73,660/-. In this year, the assessee had also claimed deduction under Section 80IB of the Act. It also filed Audit Report in Form

No.10CCB, wherein it was mentioned that the operation of the assessee company commenced in Financial Year 1995-96 and the initial assessment year from which deduction is being claimed was Assessment Year 1996-97. The AO had allowed the deduction to the assessee to the extent of ₹3,55,33,360/-.

5. CIT initiated proceedings under Section 263 of the Act observing that the assessee company had commenced its operation in Financial Year 1994-95. On this basis, initial assessment for which deduction was to be claimed under Section 80IB of the Act would be the Assessment Year 1995-96, since the deduction is available for 10 consecutive assessment years. Therefore, the assessee could have claimed deduction upto the Assessment Year 2004-05 only and hence, the assessee would not be entitled for any deduction under Section 80IB of the Act for the assessment year in question, i.e., 2005-06. As we will point out later, though the order of the CIT is not very happily worded, it categorically states that the AO had not applied his mind on the issue as to in which year, the assessee commenced its operation. If it is the Financial Year 1994-95, as viewed by the CIT, then for the instant assessment year, the assessee would not be entitled to deduction as that would be the 11th year. On the other hand, if the assessee commenced its operation in the Financial Year 1995-96, then for the

assessment year the assessee would be entitled to deduction claimed being the 10th and last year availing deduction under Section 80IB of the Act. Thus, the year in which the assessee commenced its operation becomes material. The CIT, thus, asked the AO to make the assessment afresh after giving reasonable opportunities for being heard.

6. The assessee challenged this order by filing the appeal before the Income Tax Appellate Tribunal (hereinafter referred to as 'the Tribunal') which has set aside the order of the CIT holding that the year of commencement of operation is Financial Year 1995-96. The entire discussion on this issue can be traced in Para 7 of the impugned order, which reads as under:

> "7. We have rival submission and have gone through the entire material available on record. We have verified the copy of audit report in form no.10CCB in which in column no.8, the date of commencement of operation by the undertaking has been mentioned by the CA as F.Y. 1995-96, which clearly implies A.Y. 1996-97. The sales tax and excise registration record does not indicate the commencement of production in A.Y. 1995-96. We find merit in the argument of the learned counsel for the assessee that by omission of word "F.Y." in column no.9, CIT(A) has taken a reference that the first year of eligible of deduction u/s 80-IB start from A.Y. 1995-96. In our view, the inference is misplaced and on proper verification of record. This position is amply clear. In view therefore, the impugned order of AO for A.Y. 1996-97 is neither erroneous nor prejudicial to the interest of revenue. In view therefore, we set aside 263 proceedings on these facts."

7. Against this order, the present appeal is preferred which was admitted on the substantial questions of law already extracted above.

8. Neat submission made by Mr. N.P. Sahni, learned counsel for the Revenue, was that the basis of the assumption of the jurisdiction under Section 263 of the Act by the CIT was that the AO had not applied his mind as to whether the assessee commenced the operation in the Financial Year 1994-95 or 1995-96. Therefore, the Tribunal was required to only go into this aspect and to decide as to whether the exercise of jurisdiction by the CIT in the aforesaid circumstances was justified or not. It was not proper for the Tribunal to give its decision on merits and decide the year of commencement of operation by the respondent undertaking. It was submitted that by doing so, the Tribunal has exceeded its jurisdiction.

9. We find force in the aforesaid submissions of the learned counsel for the Revenue. Learned counsel for the respondent assessee could not dispute that the AO while framing the assessment had not adverted to this aspect at all. The year of commencement of operation would be relevant to find out as to whether the assessee would be entitled to deduction under Section 80IB of the Act for the Assessment Year 2005-06 as only on that determination, it would be known whether the instant year is the 10th year or the 11th year. Since this issue had not been gone into and without arriving at any finding on

this aspect, the AO allowed the exemption, it is clear that twin conditions laid down for exercising revisionary jurisdiction under Section 263 of the Act stood satisfied inasmuch as the lack of inquiry/investigation resulted in allowing the deduction which could be erroneous and prejudicial to the interest of Revenue, if it was the 11th year from the year when the operation commenced.

10. We would like to point out that at one stage, the CIT has remarked that:

> "On verification of the case records, it is observed that the business for the assessee company had been commenced in FY 1994-95 and thus the initial assessment year from which the assessee is entitled to claim deduction under Section 80IA/80IB, is assessment year 1995-96. And since the deduction under Section 80IA/80IB is available for the first 10 assessment years, therefore, the assessee could have claimed deduction under Section 80IA/80IB of the I.T. Act up to the assessment year 2004-05. As a result of this, the assessee had wrongly been allowed deduction under Section 80IA/80IB, which was not due to be allowed to it."

11. However, we would like to clarify that this was only a *prima facie* observations as immediately thereafter the CIT had made pertinent observations on the following two aspects:

(i) The issue was never considered by the AO while framing the assessment order and thus, it was a case of lack of inquiry/investigation.

(ii) The respondent/assessee had produced the necessary details and records in support of its

claim, but the same required verification to decide as to from which Financial Year business had started and thus, inquiry was necessary. It so stated in the following words:

> "Sh. Prakash Gupta, CA appeared and filed necessary details and the case was discussed. It is seen that the business Activity/Production with regard at Unit No.205 needs verification with regard to books of accounts and other relevant details to decide as to from which F.Y./A.Y. business has started with production of books of accounts and other details. Before coming to any conclusion on the allowability of the deduction u/s 80IB for assessment year 2005-06 such verification is essential. It is needless to mention that the case record would reflect that the AO has not applied his mind on the issue before allowing the claim of the assessee. This lack of inquiry/investigation has resulted in erroneous allowance of deduction is both erroneous as well as prejudicial to interest of revenue."

12. Thus, the conjoint and accumulative reading of the order in its entirety would clearly show that the CIT had not conclusively determined that the year of commencement of the business was Financial Year 1994-95. On the contrary, he had categorically stated that before coming to any such conclusion, it was necessary to verify the records and for this purpose, he referred the matter back to the AO for afresh assessment after giving the assessee reasonable opportunity of being heard. In a case like this, the Tribunal could not have gone into the merits which also, according to us, is done in a perfunctory manner as it would be clear from the reading of Para 7. Once it

is found that the invocation of the provisions of Section 263 of the Act was proper and valid, such an order passed by the CIT could not have been tinkered with by the Tribunal by going into the merits of this issue. Since these contentions were satisfied and the matter was relegated to the AO to conduct an inquiry, the Tribunal should have limited its discussion focusing on the proprietary of order by the CIT invoking his power under Section 263 of the Act and keeping in view the scope of that provision.

13. In this backdrop, we would like to refer to the judgment of Kerala High Court in the case of ***V. Kunhikannan Vs. Commissioner of Income Tax*** **219 ITR 235**. In the said case, the High Court held that:

> "It is true that the Explanation was inserted and came into effect from April 1, 1989, that is, after the search was made in this case. But, the Explanation thereunder seeks to clarify the necessary import of the main provision contained in Sub-section (4) of Section 132 of the Act. It does not change the substantive provision of the Act; nor does it lay down a different method of using the statement recorded under Sub-section (4) of Section 132 of the Act. It permits interrogation of persons not only in relation to the books of account, etc., found as a result of the search but also on any other matter relevant for any proceeding under this Act. In this view of the matter, we hold that the authorised officer had the power to record statements on oath on all matters pertaining to the suppressed income. The statement cannot be confined only to the books of account. If a partner of the firm came forward to disclose about non-entry of the excess stock in the registers during the course of the search, there is no reason why the Income-tax Officer shall not make use of it even though

there is no actual verification of the stock. The Tribunal has clearly found that the statement was made voluntarily. It observed that the best and independent evidence in the matter would have been that of the two witnesses to the search, who are traders in the same locality. The assessee had not obtained any statement or affidavit from them in support of the plea that the statement was obtained by coercion or intimidation. So, the assessee has totally failed to discharge the burden of proving that fact. In this case, the assessment has been made based on the statement of the assessee. Since no case has been made out that the statement was made under a mistaken belief of fact or law, and as has been held above, the statement being a voluntary one, there is no scope for the assessee to challenge the correctness of the assessment as has been done in this case. A further contention raised by the assessee was that, having rejected a portion of his statement regarding unaccounted investment in a cinema theatre, there is no justification to rely on another portion of the very same statement for the purpose of sustaining addition of unaccounted stock. The addition on account of unexplained investment in the cinema theatre was rejected not on the ground that the statement was taken from the assessee on threat or coercion but on the ground that the cinema theatre was owned only by three of the four partners of the firm and that a presumption that unexplained investment, if any, was made by the assessee-firm could not be made."

14. Learned counsel for the assessee submitted that the Tribunal was within its jurisdiction to decide the issue on merits as it is the factual finding of fact. For this proposition, he referred to the judgment of the Bombay High Court in the case of ***Ballarpur Paper and Straw Board Mills Ltd. Vs. Commissioner of Income-Tax, Vidarbha and Marathwada, Nagpur [118 ITR 613]***, wherein it was held as under:

> "Coming to question No.1 above referred to, the argument of Mr. Joshi, on behalf of the revenue, was that the Tribunal was not justified in going into the merits of the case and

> determine whether the expenditure relating to guarantee commission, stamp charges and interest formed or did not form part of the actual cost of the plant and machinery for the purpose of claiming depreciation and development rebate. It is not possible for us to accept the contention urged on behalf of the revenue. If the order of the Addl. CIT was subject to appeal, then the **Tribunal was fully justified in going into the merits of the decision given by the Addl. CIT as regards the claim for depreciation and development rebate with reference to the amounts of interest, guarantee commission and stamp charged.** Our attention has not been drawn by Mr. Joshi to any special provision of the Act or the Rules which would justify the submission that the Tribunal had no jurisdiction to go into the merits of the case and decide the question whether the expenditure relating to guarantee commission, stamp charges and interest formed part of the actual cost of the plant and machinery for the purpose of claiming depreciation and development rebate."
>
> (Emphasis Supplied)

15. We are afraid these judgments would be of no sustenance to the assessee. No doubt, where the CIT while exercising powers under Section 263 of the Act, sets aside the order of the AO on merits as well and gives his categorical finding on the issue involved, naturally the Tribunal will be within its right to examine as to whether the decision on the said issue was proper or not and for this purpose, the Tribunal itself would be entitled to examine the issue on merits. It was, in these circumstances, the aforesaid two cases were decided. However, where the issue was not examined by the AO and on this ground CIT revised the order without giving his own findings, but directing the AO to do the necessary exercise, it was not proper for the Tribunal to decide the same, converting

itself to a Court of first instance and deciding the factual aspect on which neither AO nor CIT(A) had returned any findings.

16. We, thus, decide the question Nos. 1 and 3 in favour of the Revenue and against the assessee. Insofar as question No.2 is concerned, we hold that the Tribunal erred in law in holding that the assessee is entitled for deduction under Section 80IB of the Act for the present assessment year i.e. 2005-06 as that aspect needs to be considered by the AO afresh.

17. This appeal is accordingly allowed and the order of the CIT is restored. However, it is made clear that the CIT has not given any findings that the operations of the assessee commenced for the year Financial Year 1994-95. It is also clarified that the AO will not reopen the entire assessment, but would only deal with this limited issue of admissibility of deduction under Section 80IB of the Act.

(A.K. SIKRI)
JUDGE

(M.L. MEHTA)
JUDGE

JUNE 03, 2011
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