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

Reserved on: 23.05.2018
Pronounced on: 20.07.2018

\+ **ITA 907/2017, C.M. APPL.38789/2017**

PR. COMMISSIONER OF INCOME TAX-II ..... Appellant

versus

SHRI BRAHAM DEV GUPTA ..... Respondent

\+ **ITA 1162/2017, C.M. APPL.46234/2017**

PR. COMMISSIONER OF INCOME TAX ..... Appellant

versus

BRAHM DEV GUPTA ..... Respondent

Through: Sh. Zoheb Hossain, Sr. Standing Counsel with Sh. Deepak Anand, Jr. Standing Counsel and Sh. Piyush Goyal, Advocate, for the appellant.

Sh. Salil Aggarwal with Sh. Madhur Aggarwal and Sh. Uma Shankar, Advocates, for respondent.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE A.K. CHAWLA

MR. JUSTICE S. RAVINDRA BHAT

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1. The question of law in these two appeals is common:

"Did the Income Tax Appellate Tribunal ("ITAT") erred in holding that invocation of Section 263 of the Income Tax Act, 1961 in the assessee's case, for two years (AY 2011-12 and 2012-13) was not warranted?"

2. On 02.09.2010, during the year under consideration, there was a survey at the business premises of the assessee. It surrendered ₹18.25 odd crores as additional income on account of excess stock found in his premises. The assessee's returns for AY 2011-12 declared income of ₹21,

58,62,170/-, (inclusive of ₹18.25 crores surrendered during survey). For AY 2012-13, the return disclosed income of ₹25,36,38,801/-. The returns were selected for scrutiny and notice issued to the assessee. The Assessing Officer (AO) added some amounts to the declared income of the assessee on the basis of disallowance of 10% non-business expenditure; likewise, 10% of the amount claimed towards vehicle expenditure was disallowed. On 01.10.2015, the Commissioner (CIT) issued a Show Cause Notice under Section 263 of the Income Tax Act, 1961 [hereafter "the Act"] to the assessee observing that the AO failed to make any enquiry as regards, *inter alia*, the, incurring of trading loss amounting to ₹38,62,38,61/- amongst other issues.

3. The revision orders under Section 263 of the Act enhanced the assessee's income, holding that the AO's original order was erroneous and prejudicial to the interest of Revenue; reliance was placed on *Commissioner of Income Tax v Gotzee India Limited*, 361 ITR 505 (HC); *Commissioner of Income Tax v Nagesh Knitwears Pvt. Ltd.* 345 ITR 135 and *Gee Yee Enterprises v Additional Commissioner of Income Tax* 99 ITR 375 which held that the AO's role also involves investigation and that an order is erroneous when such enquiries are not made. The CIT held that the assessee had shown trading loss in its of books of accounts. The assessee was proprietor of M/s DSM International. It came to the Revenue's notice that to Directorate of Revenue Intelligence (DRI) was making enquiries as regards the role of M/s DSM International on account of fraudulent exports. Further, the brother of the assessee - Sahdev Gupta is under the radar of DRI for claiming duty drawback on bogus exports. The assessee is also in the same kind of business. The AO has failed to make any enquiry as regards the huge

duty drawback claimed by the assessee and the *modus operandi* of the assessee. During the scrutiny carried out under Section 263 of the Act, it was found that the assessee could not supply the PAN of certain creditors. Even during the proceedings under Section 263, the assessee failed to supply the same. Therefore, there was a lack of inquiry on the part of the AO to find out bogus purchases or inflation of expenses so as to reduce profits. The AO should get necessary information from concerned authorities like DRI as regards the role of assessee in making bogus exports and the low profits being shown by the assessee. It was also held that the assessee claimed interest in P&L account (₹1,81,32,989/-), and, on the other hand, made interest free advances by saying that these are out of interest free funds. The AO did not make any inquiry as regards the utilization of borrowed funds for non-business purposes. The CIT also faulted the AO in failing to inquire about genuineness of these transactions. It was held that there were a number of credits, even in crores of rupees, and immediately cheque is issued either on the same day or within 2 or 3 days to some persons. Even though they were family members, yet it was the duty of the AO to enquire into the genuineness of the transactions, as these persons are not showing very high return of income. The CIT held that on perusal of the accounts of Jai Dev Gupta, Kapil Dev Gupta and Maya Gupta, it was found that certain credits were in the name of Mangal Traders and Yogmaya Traders, who were involved in bogus exports. It appears that such persons are receiving funds from fictitious individuals and forwarding them to the assessee in form of loans. The genuineness of such transactions needed to be examined. The issue of inquiry into disallowance under Section 14A of the Act and the AO's failure to investigate into the matter was also stated in the CIT's order.

On account of all these reasons, the CIT held that the assessment order was erroneous and prejudicial to the Revenue's interest.

4. Similar findings were rendered for AY 2012-13 in regard to the issue of trading loss. As regards purchases (it was observed that only 37 out of 114 parties had responded to the notices, and therefore, the genuineness of the purchases could not be verified). It was held that the assessee has been in the business for years, and it is highly unlikely that persons who have made sales in crores of rupees would not respond to notices issued by the department.

5. On further appeal, the Income Tax Appellate Tribunal (ITAT) set aside the orders of the CIT; it was held that the assessee had declared undisclosed income of ₹21.58 crores in his return of income which included ₹18.25 crores declared during survey proceedings on account of excess stock (for AY 2011-12). As regard the issue of loss, to the tune of ₹38 crores, the ITAT held that the assessee had placed on record its audited profit & loss account, balance sheet, statement of affairs and capital account which were duly examined by the AO. Further, during enquiry made by the CIT, no concrete findings have come on record that are adverse to the assessee. The computation of loss at ₹38 crores was incorrect, as the CIT has failed to account export incentive and fluctuation in exchange rate. Therefore, when assessment has been completed after scrutinizing all details and explanation supported with the documentary evidences filed in response to the notice issued by AO, the question of lack of enquiry on the Private Mortgage Insurance (PMI) of the AO does not arise.

6. As regards unsecured loans received by the assessee, the ITAT observed that the loan amount was duly disclosed in the audited balance

sheet. Further, when the assessee submitted the complete details of unsecured loans along with confirmation of each of the transaction, bank account of each of the person, and acknowledgement of ITR of lenders, which have been duly examined by the AO, it cannot be the case of lack of enquiry. The ITAT faulted the CIT in doubting the genuineness of those transactions without any substantive evidence. The AO at best made inadequate inquiries, and did not omit to do so. The assessee furnished details of 22 out of 80 sundry creditors, and claims to not have filed the details of the rest because they have been squared out in the subsequent years, or no further transactions took place during assessment proceedings. This established a "discreet" enquiry by the AO. On the issue of ownership of factory premises, the assessee submitted that it was his ancestral property and no rent was payable. There is no iota of doubt that the property is ancestral property of the assessee; non-payment of rent did not in any manner affect the assessee's tax liability in any manner. Lastly on disallowance under Section 14A of the Act, ITAT held that the assessee claimed that there was no exempt income and quoted the case of *Cheminvest Ltd. v. Commissioner of Income Tax* 378 ITR 33. The CIT has directed the AO to examine the issue in the light of the case law, instead of examining the issue in the light of settled principle of law. Therefore, the ITAT disagreed with the CIT that that no enquiry had been conducted by the AO. On inquiry with respect to Mr. Sahdev Gupta, the ITAT observed that the assessee had no trading transaction with the individual and the question of drawing inferences and further investigation does not arise. Merely conducting of an enquiry on Sahdev Gupta by DRI, does not confer powers

upon CIT to act under Section 263. It was held that the CIT proceeded on the basis of surmises, and, therefore, it is not a case of lack of enquiry.

7. The Revenue argues that the ITAT fell into error in quashing the CIT's order under Section 263 of the Act. It was urged that the CIT not only recorded satisfaction but also examined the materials placed before him thoroughly. Learned counsel highlighted that the assessee's statement during the survey proceedings disclosed that he dealt with diamonds for which there was no separate trading account or profit & loss account as was urged during the course of proceedings before the ITAT. Therefore, the AO ought to have conducted enquiry to ascertain the expenditure actually incurred and, therefore, ought to have sought clarifications on the trading loss incurred to the tune of ₹38.62 crores. Consequently, the CIT's order that the assessment order was erroneous in law and prejudicial to the interests of the Revenue was justified. Reliance was also placed upon the judgment of the Punjab and Haryana High Court in *CIT I v. Abhishek Industries Ltd.* 2006 (286) ITR 1, which held that when deduction of interest is claimed under Section 36(1)(iii), the assessee has to satisfy the AO as to why interest from loans had to be advanced. Furthermore, the genuineness of the amounts claimed to be loans by the assessee was never gone into by the AO. Learned counsel submitted that the law on this aspect is clear that the initial burden is upon the assessee to establish under Section 68 that the expenditure claimed or the investment or the amounts received were from authentic source. Without proving the identity of the creditor, the genuineness of the transaction or the creditworthiness of the individual or concerns, which had allegedly advanced the amounts, the assessee's claim for the entries, which it treated as loans, could not have been allowed. Learned counsel emphasized that the AO's

order was silent on most of the aspects and facially needed to be corrected for the purpose of which the powers under Section 263 were correctly invoked. Reliance is placed on *Toyota Motor Corporation v. CIT* 2008 (306) ITR 52 (SC).

8. Learned counsel for the assessee submitted that the order of the ITAT made for both years was correct given the facts and circumstances. It was submitted that the AO's order was duly made after enquiry into the question of the profit & loss statement; the AO took note of the fact that the assessee had received incentives. Learned counsel submitted that the order of the AO was not based on ignorance of facts; rather, he took into account the amounts advanced by various creditors. It was argued that the AO issued notices to the concerned parties and many of them had even turned up in the proceedings. After satisfying himself that the amounts advanced were genuine, the AO finalized the assessments. Learned counsel highlighted that the export incentives were linked to the export sales and could not have been ignored. It had earned gross profit of ₹7,19,11,427/-. In this regard, reliance was placed upon the decision in *Topman Exports v. CIT* 342 ITR 49 where the Court held that export incentives were part of business profits. With respect to the statement of credits from entries such as Mangal traders and Yogmaya Traders, learned counsel submitted that the bank account of Sh. Jaidev Gupta was duly noticed. As far as the issue of disallowance under Section 14A was concerned, the decision in *CIT v. Aman Khera* 387 ITR 33 squarely applied.

9. It was argued that the invocation of powers under Section 263 had to be for cogent reasons and on valid grounds. Given that the AO had conducted a thorough investigation into all the circumstances, the fact that

CIT(A)'s disagreement was based on surmises rather than on an appropriate appreciation of the record. It was submitted that not every error, real or cogent that can result in a lawful revision, learned counsel submitted that it is only such errors that are prejudicial to the interests of Revenue that can authorize invocation of CIT's powers under Section 263, learned counsel relied upon the judgment of the Supreme Court in *Malabar Industrial Company Ltd. v. CIT* 2000 (243) ITR.

Analysis and Conclusions

10. *Malabar Industrial Company (supra)* is a seminal authority upon the question of the circumstances that can trigger a justified recourse to Section 263. The Supreme Court pertinently observed as follows:

> *"The Commissioner noted that the ITO passed the order of nil assessment without application of mind. Indeed, the High Court recorded the finding that the ITO failed to apply his mind to the case in all perspective and the order passed by him was erroneous. It appears that the resolution passed by the board of the appellant company was not placed before the Assessing Officer. Thus, there was no material to support the claim of the appellant that the said amount represented compensation for loss of agricultural income. He accepted the duty in the statement of the account filed by the appellant in the absence of any supporting material and without making any inquiry. On these facts, the conclusion that the order of the ITO was erroneous is irresistible. We are, therefore, of the opinion that the High Court has rightly held that the exercise of the jurisdiction by the Commissioner under section 263(1) was justified"*

11. In this case, as far as the issue of drawback is concerned, the CIT spelt out why the AO had to investigate the matter further:

> *"The firms of Sh. Sahdev Gupta are under scanner of DRI. The*

raids were also conducted by DRI. This information is on record that raids were conducted in August 2015. It. appears that the assessee is also in same kind of business and duty drawback is taken from the Government. It needs to be investigated as whether the assessee obtained duty drawback. on bogus exports. As far as Income tax is concerned the assessee has offered it as its income. A survey u/s 133A was also conducted wherein the assessee has voluntarily accepted additional income of Rs. 18 crores. Complete investigation was not carried out by the AO. There was lack of inquiry as regards the modus operandi of the assessee, particularly when the assessee has declared very law income even after getting huge duty drawback."

12. On the question of failure on part of the AO to investigate the genuineness of loans, the CIT observed as follows:

"the assessee was informed that AO failed to make inquiries as regards the genuineness of the transactions of the persons who have given loans. The assessee submitted that there are only brought forward balances in respect of 8 persons and the other persons Jai Dev Gupta & Kapil Dev Gupta are brothers and Maya Gupta is wife of the assessee's brother. It is very unusual that there are a number of credits even in crores and immediately cheque is issued either on the same day or within 2 or 3 days to some persons. Even though they are family members yet it was the duty of the AO to enquire into the genuineness of the transactions because on the face of it these appears to be non-genuine particularly these persons are riot showing very high return of income.

16. It may be noted that the assessee has filed bank statement of Sh. Jai Dev Gupta who is having transactions with the assessee (copy enclosed). The perusal of the bank statement shows that there are certain credits from certain entities like Mangal Traders, Yogmaya Traders. From the newspaper reports, it is learnt that these concerns i.e. Mangal Traders and

> *Yogmaya Traders are also involved in bogus kind of exports. The assessee has received loans from Sh. Jai Dev Gupta. Similarly there are various credit in their bank accounts of persons like Kapil Dev, Maya Gupta. It appears that these persons are receiving funds from some non-genuine persons and in tum give loans to the assessee. Therefore genuineness of these transactions need to be examined. The AO at the time of assessment did not make these inquiries. The assessee has not discharge his onus to prove the genuineness of these transaction. Particularly now the other authorities are investigating these cases. This also becomes part of record as per the definition of 'record' in Section 263 of the IT Act."*

13. Interestingly, the ITAT not only went into the merits of the CIT's order, which can be considered as only indicative of what were missed out by the AO, but also recorded its findings. It proceeded to hold that amounts due to drawbacks/incentives and foreign exchange fluctuations were to be considered and had been considered, by the AO but not the CIT. As a matter of fact, the AO records no observation or findings on these issues; nor the issue of the loans, which the assessee received, or the amounts claimed by him as interest. Given these matters of record, this Court finds it difficult to validate the ITAT's approach reading into the AO's order, reasons which are simply not there. The ITAT's order itself discloses that the AO did not investigate into the question of advances given to others, (having regard to the assessee's claim for having taken loans, for which interest expenditure was claimed). This is apparent from the following observations, for AY 2011-12:

> *"the assessee has furnished copies of account of 22 parties out of 80 sundry creditors to the AO vide letter dated November 2013, available at pages 41 to 43 of the paper book, who has raised specific queries qua the creditors vide letter dated*

> *23.07.2013, available at page 38 of the paper book. The ld. AR for the assessee argued that the assessee could not furnish PAN of only those parties in whose case there was no further transactions at the time of assessment proceedings and that the account of the parties out of 17 parties stood squared off in subsequent years and details thereof was filed before ld. CIT. This fact goes to prove that a discreet enquiry has been conducted by the AO qua all the sundry creditors and the findings of the ld. CIT that the AO did not make any enquiry even on sample basis to find out the genuineness of the sundry creditors is based upon surmises. At the most, it can be a case of inadequate enquiry, in which ld. CIT has no power to intervene u/s 263 of the Act."*

14. In this Court's opinion, such findings and reasoning are clearly indefensible; they amount to putting a gloss over the AO's glaring omissions. Repeated decisions have emphasized that the AO should – at least as regards what appears from the record, and what are issues inquired into, during scrutiny assessment, indicate the briefest of reasons, accepting or rejecting any argument. In this case, the mere fact that out of 80 debtors, particulars of 22 were furnished and that PAN particulars of most of them were not provided (for AY, cannot lead to the conclusion that the doubting of genuineness of those transactions was unwarranted, under Section 263).

15. For AY 2012-13, the CIT, pertinently observed – with regard to expenditure claimed towards purchases, as follows:

> *"It was informed to the assessee that a number of parties have not responded to the notices. The assessee has admitted that only 37 parties out of 114 have responded to the notices. Other parties out of 114 have not even responded to the notices. Therefore the genuineness of these documents i.e. purchases could not be verified. At least the matter needed further examination."*

Again, the ITAT did not say how this observation was unwarranted. On the other hand, the AO's order made originally is silent about this aspect altogether.

16. The first issue is with respect to interest; on this the Revenue relied on *Abhishek Industries (supra)*, which held as follows:

> *"If in the process of examination of genuineness of such a deduction, it transpires that the assessee had advanced certain funds to sister concerns or any other person without any interest, there would be very heavy onus on the assessee to be discharged before the Assessing Officer to the effect that inspite of pending term loans ·and working capital loans on which the assessee is incurring liability to pay interest, still there was justification to advance loans to sister concerns for non-business purposes without any interest.."*

17. In this Court's opinion, the ITAT's approach was entirely faulty; it overlooked that the explanation, if any, why interest deduction was necessary, given that it had advanced substantial amounts on *interest free basis* was not reflected in the AO's order. Likewise, on the issue of purchases, the lack of any factual foundation and why despite verification only 37 out of 111 parties came forward, the expenses could be allowed, is absent. For the other years, the reasoning why 22 parties could have been taken into account, for a vast majority of others (58) is absent, for AY 2011-12.

18. In *Toyota Motor Corporation vs. Commissioner of Income Tax* (2008) 306 ITR 52 (SC) it was held by the Supreme Court as follows:

> *"We are unable to appreciate this reasoning given by the Tribunal simply because that the AO himself did not say any such thing in his order. There is no doubt that the proceedings before the AO are quasi-judicial proceedings and a decision*

> *taken by the AO in this regard must be supported by reasons. Otherwise, every order, such as the one passed by the AO, could result in a theoretical possibility that it may be revised by the CIT under Section 263 of the Act. Such a situation is clearly impermissible.*
>
> *10. It is also necessary for the parties to know the reasons that have weighed with the adjudicating authority in coming to a conclusion. The order passed by the AO should be a self-contained order giving the relevant facts and reasons for coming to the conclusion based on those facts and law.*
>
> *11. We find that the order passed by the AO is cryptic, to say the least, and it cannot be sustained. The Tribunal cannot substitute its own reasoning to justify the order passed by the AO when the AO himself did not give any reason inthe order passed by him"*

19. In the present case too, the ITAT's findings amount to supplying reasons in respect of the AO's order, on aspects, which are not expressly reflected in the assessment order. It is no doubt the duty of the CIT to record why revision is warranted; however, the ITAT's jurisdiction is not to re-write the AO's order and improve upon it, in a manner of speaking. Clearly, the orders of the ITAT cannot be sustained. They are set aside.

20. The question of law is answered in favour of the Revenue and against the assessee; the appeals are allowed.

S. RAVINDRA BHAT
(JUDGE)

A.K. CHAWLA
(JUDGE)

JULY 20, 2018