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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Decision: 13.02.2023

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ITA 557/2022

PR. COMMISSIONER OF INCOME TAX -7 Appellant
Through: Mr Puneet Rai, Sr. Standing Counsel.

versus

R.K JAIN INFRA PROJECTS PVT. LTD. Respondent
Through: Mr Kapil Goel, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

HON'BLE MS. JUSTICE TARA VITASTA GANJU

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J. (ORAL):

1. This appeal is directed against the order dated 30.11.2021 passed by the Income Tax Appellate Tribunal [in short "Tribunal"].
2. The record shows, that the respondent/assessee had filed its return on 01.10.2015, declaring an income of Rs.7,19,24,790/-.
3. The Assessing Officer (AO) carried out a limited scrutiny under the Computer Aided Scrutiny Selection (CASS). Consequently, a statutory notice under Section 143(2) of the Income Tax Act, 1961 [in short, "Act"] was issued on 11.04.2016, which was followed by another notice dated 27.09.2016.
4. The record also shows, that on 18.01.2017, a notice under Section 142(1) of the Act was issued, to which a questionnaire was appended.
5. The record shows that in response to these notices, the respondent/assessee furnished the details sought by the Assessing Officer

(AO).

6. The AO, having satisfied himself with regard to the various queries raised by him, framed an assessment order under Section 143(3) of the Act on 12.10.2017.

7. The Principal Commissioner of Income Tax [“PCIT”], however, took umbrage to the assessment order dated 12.10.2017 passed under Section 143(3) of the Act. Consequently, queries were raised in the matter, with regard to the following heads:

- (i) Large ‘other expenses’ claimed in profit and loss account;
- (ii) Payments made to related parties under Section 40(A)(2)(b) of the Act;
- (iii) Current liabilities;
- (iv) Payments made to the contractors; and
- (v) Payment made towards stamp duty.

8. What is not in dispute, and something which emerges from the record, is that out of the five heads, only two heads, ultimately, became the subject matter of the PCIT’s order passed under Section 143(3) of the Act. These two heads were: “large other expenses claimed in profit and loss account”, and “payment made to contractors”.

9. It is common ground, that even these two heads overlapped, and hence the ultimate focus of the PCIT was on to the payment towards job work amounting to Rs.10.87 crores.

10. The PCIT, thus, in the operative part of its order dated 25.03.2021 made the following observations:

“10. From the above discussion, it is clear that the Assessing officer failed to enquire into and verify Job work charges claimed by the assessee which was one of the main reasons viz ‘Large other expenses claimed in

the P&L Account' on the basis of which the case of the assessee was selected.

11. Accordingly the assessment order u/s 143(3) of the Act passed by the A.O. on 12.10.2017 is set aside with a specific direction to make the assessment afresh after taking into the facts mentioned above and after allowing opportunity to the assessee of being heard..."

11. Being aggrieved, the respondent/assessee carried the matter in appeal to the Tribunal.

12. The Tribunal, *via* the impugned order dated 30.11.2021 set aside the order passed by the PCIT.

13. Mr Puneet Rai, learned standing counsel, who appears on behalf of the appellant/revenue, says that the PCIT exercised his powers, in accordance with the law.

13.1 It is Mr Rai's contention, that the PCIT took into account, the scope and ambit of the power available to him under Section 263 of the Act, and that the order passed by the AO was erroneous and prejudicial to the interest of the revenue.

14. Mr Rai contends, that one of the aspects, which had emerged during the enquiry made by the PCIT, was that the bills which had been submitted by the AO were not dated, and that the same were submitted by sub-contractors.

15 In support of his submission, Mr Rai has relied upon the following judgments:

- (i) ***Malabar Industrial Co. Ltd. vs. Commissioner of Income-tax***, (2000) 109 Taxman 66 (SC);
- (ii) ***Commissioner of Income-tax vs. Ashok Logani***, (2011) 11 Taxman.com 208 (Delhi); and
- (iii) ***Commissioner of Income-tax, Central-I, Kolkata vs. Maithan***

International, (2015) 56 Taxman.com 283 (Calcutta).

16. Mr Kapil Goel, who appears on behalf of the respondent/assessee, on the other hand, has drawn our attention to the record, in particular, the response filed by the respondent/assessee, which was extracted in para 4 of the order dated 25.03.2021 passed by the PCIT.

17. Mr Goel, *inter alia*, submitted that each and every query was replied to. The payments were made through cheque, and withholding tax was deducted in each case.

18. Mr Goel also contended, that the expenses incurred on job work were in percentage terms, lower than what had been accepted by the respondent/revenue with regard to the job work executed in the preceding year. In the period in issue, Mr Goel pointed out, that the expenses towards job work were equivalent to 7.66% of the total contract value, whereas in the preceding year, the expenses incurred were in the range of 8.61%.

19. We have heard the counsel for the parties at some length, and also perused the record.

20. According to us, what clearly emerges from the record is as follows:

- (i) One, limited scrutiny under CASS was conducted.
- (ii) Two, queries were raised by the AO concerning job work charges.
- (iii) Three, ultimately, the entire focus of the PCIT was on job work charges, although five heads had been taken up initially for examination.
- (iv) Four, towards job work charges, the respondent had claimed as expenses, Rs.10.87 cr.

21. Given these broad facts, the Tribunal examined the issue at some

length, bearing in mind the material on record. The Tribunal, thereupon, returned *inter alia* the following findings of fact:

- (i) Firstly, as noted above, the AO had raised a specific query with regard to the job work charges, and also asked for details, including bills as well as the withholding tax deducted on the payments made.
- (ii) Secondly, the assessee had filed party-wise details concerning the relevant bills and vouchers.
- (iii) Thirdly, the payments had been made through account payee cheques.
- (iv) Fourthly, withholding tax had been deducted with regard to each and every payment made towards job work charges.
- (v) Lastly, confirmation(s) had been received from the concerned parties.

22. The Tribunal noted, that the only reason which persuaded the PCIT to exercise his powers under Section 263 of the Act, veered around the absence of inquiry and the failure on the part of the AO to exercise his powers under Section 133(6) of the Act.

22.1 In this context, the Tribunal made the following observations, which are, to our minds, pertinent:

“17. As regards the observation of Ld. CIT that no inquiry was made u/s 133(6), we find the explanation given in the assessee’s reply in response to show cause notice u/s 263 is quite plausible and we are in tandem with the reasons given that in the case of job workers which are mostly migrant labour force, notice under Section 133(6) for the work done in 2014 and 2015, would have been too difficult and also impractical especially when the assessment scrutiny proceedings started after the gap of 3 years. In the assessee’s line of business such who is a main contractor having undertaken construction work at various places, has to get it executed through job workers who are kind of petty sub contactors who get the job work done through various labourers. The job work in the form of labour are done on the different locations and once

the project is completed, the workers move out to different places or migrate back their homes and, therefore, it is impossible to get their current addresses so as to enable the Assessing Officer to issue notice under Section 133(6) of the Act, which actually would have been completely futile exercise. Mere saying that failure to issue notice under Section 133(6) by the Assessing Officer to the labourers, the assessment order is erroneous and prejudicial to the interest of revenue de-hors the nature of business activity carried out by the assessee cannot render the assessment order erroneous and prejudicial to the interest of revenue. Nowhere Ld. CIT has, stated that how can notice under Section 133(6) can be served on the labour force who are mobile and having no permanent address. If the payments had been made through cheques after deduction of tax under Section 194C of the Act and is in consonance with the percentage of payment made in the earlier years stands accepted, then there is no reason to doubt the payments and we do not find any reason as to why such payments can be said to be non-genuine. The ld. PCIT has not brought any record or himself conducted any enquiry that such a payment of job work charges are bogus and non-genuine, or are inflated expenditure debited in the profit and loss account. Accordingly, the reasons given by the ld. PCIT for setting aside the assessment order cannot be upheld and the same is set aside and assessment order accepting the said job work charges is upheld. Accordingly, the appeal of the assessee is allowed...”

[Emphasis is ours]

23. Having perused the reasons furnished by the Tribunal with regard to inquiry not being held by the AO under Section 133(6) of the Act, we are of the opinion, that the Tribunal was right, for two reasons.

23.1 Firstly, this was the most pragmatic view, given the fact that in the construction industry, labourers do move from one worksite to another, quite frequently.

23.2 Secondly, and this is in our view a more important aspect, the job work was carried out in 2014-15, and therefore, to commence an inquiry after nearly three years would have not led to any fruitful results.

24. In our view, if the facts obtaining in the case are juxtaposed with the admitted fact, that the total value of contract receipts was Rs.141.89 crores,

against which the expenses incurred towards job work was only Rs.10.87 crores, the absence of inquiry *vis-a-vis* job works would not render the assessment order passed by the AO, in these facts, erroneous.

25. For the PCIT to exercise jurisdiction under Section 263 of the Act, twin conditions have to be fulfilled, that is, not only should the order be erroneous, but it should also be prejudicial to the interest of the revenue. Clearly, some expenses which were deleted, their reversal would cause prejudice to the revenue. However, in this case, to our minds, the first condition was not fulfilled, which is that the order was erroneous, as has been categorized by the PCIT.

26. The expense incurred on job work was only 7.6% of the total contract value. It is not disputed, that in the preceding period, the expenditure towards job work as percentage of the contract value worked to 8.61%.

27. The PCIT, in our view, has in a sense attempted a reappraisal of the material placed before the AO and concluded that the examination of issue at hand should have been conducted in a particular manner. Having regard to the factors referred to hereinabove i.e., the manner in which the payments were made, production of bills, deduction of withholding tax, the amount which was claimed as expenditure when compared with the contract receipts, in our view, the AO's approach could not have been found flawed with by the PCIT, while exercising powers under Section 263 of the Act.

28. Insofar as the judgments relied upon by Mr Rai are concerned, a close perusal of the same would show, that they arose in a different fact situation. The judgment of the Division Bench of this Court in *Commissioner of Income-tax vs. Ashok Logani* (2011) 11 Taxman.com 208 (Delhi) was concerned with a situation, where in a search action conducted against the

assessee, Rs.62,30,300/- was found at his residence. At that juncture, the assessee had offered for tax, out of the total amount recorded, Rs.61.30 lakhs as undisclosed income. However, when the return was filed for the period in issue, the same was not offered for tax. The AO overlooked this fact, and accepted the return filed by the assessee. It is in these circumstances, that the proceedings under Section 263 of the Act were initiated.

29. According to us, the facts in the said case are, as noted above, clearly distinguishable from those obtaining in the instant case.

30. Likewise, in the case of *Commissioner of Income-tax, Central-I, Kolkata vs. Maithan International* (2015) 56 Taxman.com 283 (Calcutta), the situation that arose was starkly different. This was a case, where it was found that there were credit and debit entries in the bank account of various entities, purportedly who had advanced loans to the assessee. The allegation was that the assessee was a beneficiary of the accommodation entries. It is in these circumstances, that the power exercised under Section 263 of the Act was sustained.

31. Thus, having regard to the foregoing discussion, we are of the view that no interference is called for with the impugned order passed by the Tribunal.

32. The appeal is, accordingly, dismissed.

RAJIV SHAKDHER, J

TARA VITASTA GANJU, J

FEBRUARY 13, 2023

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