

IN THE INCOME-TAX APPELLATE TRIBUNAL “C” BENCH MUMBAI
BEFORE SHRI G.S. PANNU, VICE PRESIDENT
AND SHRI PAWAN SINGH JUDICIAL MEMBER
ITA No. 2446/Mum/2018 (Assessment Year 2013-14)

M/s Poseidon Shipping Agency P. Ltd. 610, Kohinoor city Mall, Off LBS Marg, Kurla(W), Mumbai-400070. PAN: AADCP7086R	Vs.	Pr. CIT-5 Room No. 501, M.K. Road, Aayakar Bhawan, Mumbai-400020.
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Appellant

Respondent

Appellant by : Shri Ajay R. Singh (AR)

Respondent by : Shri H.N. Singh (DR)

Date of Hearing : 19.09.2018

Date of Pronouncement : 14.12.2018

ORDER UNDER SECTION 254(1) OF INCOME TAX ACT

PER PAWAN SINGH, JUDICIAL MEMBER;

1. This appeal by assessee under section 253 of Income Tax Act is directed against the order of learned Pr. Commissioner of Income-tax-5, (for short the ld. PCIT), Mumbai dated 28th of February 2018, passed under section 263 of the Income tax Act (Act) dated 05.03.2016 for Assessment Year 2013-14. The assessee has raised following ground of appeal ;

1. The ld Pr.CIT erred in passing the revision order u/s 263 of the Act holding the assessment order dt 5/3/2016 as erroneous as well as prejudicial to the interest of revenue on the alleged ground that AO has not made inquiry in regards to receipt shown in service tax return of the assessee vis a vis as per P&L A/C and that the foreign Principals have paid taxes in India u/s 172 of the Act or not, without appreciating that in course

of assessment, complete details of foreign remittance, reconciliation of account vis a vis service tax return & 26AS, details of various receipt etc were filed and explained to assessing officer ; therefore the revision u/s 263 is bad in law.

2. The learned Pr.CIT failed to appreciate that, the principals had paid tax u/s 172 of the Act which is duly supported by documents details like computation of total income, acknowledgement of return and Agency agreement etc, same were furnished before Pro CIT, also the fact that same inquiry was made in AY 2012-13 also, therefore to treat the assessment order as erroneous and prejudicial to the interest of revenue is not justified, therefore the order u/s. 263 is bad in law.

2. Brief facts of the case are that the assessee-company is engaged in the business of Shipping and forwarding agent, filed its return of income for Assessment Year 2011-12 on 30.09.2013 declaring total income of Rs. 98,61,652/-. The assessment was selected for scrutiny. Statutory notice under section 143(2) dated 05.09.2014 and notice under section 142(1) dated 10.07.2014 was issued and served on the assessee. After taking the submission and explanation on record, the assessment was completed under section 143(3) on 05.03.2016. The Assessing Officer while passing the assessment order made adhoc disallowances @ 15% of total expenses of Rs. 12,75,945/- in the assessment order passed under section 143(3) of the Act. The assessment order was revised by ld. PCIT by exercising the power under section 263 on 28.02.2018. Before revising the assessment order, the ld. PCIT issued notice under

section 263 dated 05.02.2018 raising the following issues which according to him require verification:

- a. Whether TDS u/s 195 was deducted on the payments made to non-residents by the assessee? If not, whether necessary certificate was obtained for non-deduction of TDS?
 - b. Whether income of all the principals was exempt from tax in India? For instance, shipping income of the non-residents from non-DTAA countries is not exempt.
 - c. Whether all principals have got Annual exempt certificate from International taxation under section 172, if it is occasional shipping?
 - d. Whether payment is actually of the non-resident or the income of the assessee?
3. The assessee filed its reply dated 14.02.2018. In the reply, the assessee contended that during the relevant year under consideration the assessee was agent of Qatar Navigation, head officer of which is in Dubai, UAE and Asian Shipping Fright Liner (M) SDN BHD , having head officer at Malaysia. Both the principal has paid tax in India under section 172 of Income-tax under section 172 of Income-tax Act. Principals have not applied for exemption certificate as they have paid under section 172. The assessee also contended that the Payment is actually of non-resident. Nature of principle income and that of agent is defined in the Agency Agreement. The assessee also contended that similar issue was raised in A.Y. 2012-13 under section 263 and after verification it was accepted by AO.

4. The reply of assessee was not accepted by Id PCIT. The Id. PCIT concluded that the AO passed the assessment order without making enquiry that should have been made, which has rendered the assessment order erroneous and so far as prejudicial to the interest of revenue and that *Explanation 2* of section 263(1) is clearly attracted. The Id. PCIT set-aside the assessment order and directed the AO to make fresh assessment order after making the detailed enquiry. Thus, aggrieved by the order of Id. PCIT, the assessee has filed this appeal before this Tribunal.
5. We have heard the submission of Id. Authorized Representative (AR) of the assessee and Id. Departmental Representative (DR) for the Revenue and perused the material available on record. The Id. AR of the assessee submits that during the original assessment proceeding, all the details and re-conciliation statement with regard to service tax were examined and verified by the Assessing Officer. The Id. AR of the assessee submits that the Assessing Officer vide its notice under section 142(1) dated 18.12.2015 and in question no. 19 raised specific question for seeking re-conciliation that turnover reported in service tax return is more than the income tax return. The assessee vide its reply dated 29.01.2016 furnished the details of re-conciliation of income as per the service tax return and income tax return. Thus, the Assessing Officer fully verified the fact and after dissatisfaction

accepted the reply of assessee as correct. The original assessment order passed by Assessing Officer is neither erroneous nor prejudicial to the interest of revenue. The order of Assessing Officer is in accordance with law. The ld. AR of the assessee submits that proceeding under section 263 is required. Moreover, similar issue under section 263 in preceding Assessment Year for Assessment Year 2012-13 was concluded as accepted as the assessee's contention. The ld. PCIT while giving his finding has not given any finding as to how the order is erroneous or prejudicial to the interest of revenue, therefore, the order passed under section 263 is bad-in-law and liable to be quashed. The ld. PCIT failed to appreciate the provision of section 172 of the Act. The ld. PCIT instead of considering the reply of assessee, brushed it aside holding that issue required further enquiry. In support of his submission, the ld. AR of the assessee placed on record the copy of order passed under section 143(3)/263 for Assessment Year 2012-13 wherein similar contention was accepted by the revenue.

6. In support of his submission, the ld. AR of the assessee relied upon the decision of Hon'ble Bombay High Court in CIT vs. Gabriel India [1993] [203 ITR 108 (Bom)], Hon'ble Gujarat High Court in CIT vs. Arivind Jewellers [259 ITR 502 (Guj)], Hon'ble Delhi High Court in CIT vs. Ashish Rajpal [2010] [320 ITR 674(Del.).

7. The Id. AR of the assessee in his alternative submission submits that all details were filed before the Assessing Officer and the Assessing Officer has applied his mind on all facts before passing the assessment order. Thus, the order cannot be said to be erroneous. The phrase prejudicial to the interest of revenue “has to be read for consumption with erroneous order passed by Assessing Officer”. Every loss of revenue as a consequent of an order of Assessing Officer cannot be treated as prejudicial to the interest of revenue when the issue is examined by Assessing Officer and the assessing officer passed the order after full verification of the facts, the assessment order cannot be revised under section 263. The revisionary jurisdictional cannot be allowed to be exercised by Commissioner for making roving enquiry, there is no loss to revenue, no income has escaped assessment. The Id. AR of the assessee submits that order is neither prejudicial to the interest of revenue of the proposed action is uncalled for. In support of his submission, the Id. AR of the assessee relied upon the following decision:

- (i) CIT vs. Hotz Industries Ltd. 920140 [49 Taxmann.com 267 (Delhi)].
- (ii) CIT vs. Galileo India P Ltd. (2014) 220 Taxman 115 (Mag) (Delhi) (HC)].
- (iii) Rashriya Chemicals & Fertilizer Limited vs. CIT (ITA No. 3625/Mum/2017 (Mumbai Trib.).
- (iv) CIT vs. Reliance Communication Ltd. 92016) 240 Taxman 655 (Bom HC).

- (v) PCIT vs. Ginger Properties P. Ltd. 92017) 396 ITR 496 (Guj. HC).
- (vi) Narayan Tatu Rane vs. ITO (Mumbai Trib.) 970 Taxmann.com 227)
(ITA No. 2690, 2691/M/2016.
- (vii) Amira Pure Foods Pvt. Ltd. vs. PCIT (2008) 63 ITR (Trib) 355 (Delhi Trib.).
- (viii) Lack of enquiry vs. Inadequate inquiry.

8. In further alternative submission that ld. PCIT must record a finding that order is erroneous by conducting his own enquiry and give clear conclusion that the order is erroneous. The ld. AR of the assessee submits that in Hon'ble Delhi High Court in Jyoti Foundation [357 ITR 388 (Del. HC)], held that where there is an identical enquiry but no lack of enquiry, the Commissioner must record the finding that order is erroneous.
9. On the other hand, the ld. CIT-DR for the revenue relied upon the order of ld. PCIT. The ld. DR further submits that the Assessing Officer has not referred anything in the assessment order about the enquiries conducted with regard to service tax return. Thus, the present case is clearly covered by the *Explanation 2* of section 263(1) of the Act.
10. We have considered the rival submission of parties and have gone through the orders of authorities below. We have noted that in the assessment order, the Assessing Officer has not discussed the issue, which is sought to be revised by ld. PCIT. However, the Assessing Officer during the assessment vide its notice dated 18.12.2015 raised

the specific enquiry vide question no. 19, which we have reproduced below:

“19. Please file copies of service tax return along with the enclosures. It is observed that higher turnover reported in service tax return than the IT Return please reconciles.”

11. The assessee vide its reply dated 29.01.2016 furnished re-conciliation income as per income tax return as well as service tax return. The assessee also furnished the complete details of service tax return. The assessee furnished Note on return filed with service tax authority and has clearly mentioned that assessee is an agent of various foreign shipping lines. The assessee on behalf of the principle collected the charges for shipping from consumer, which are freight and terminal handling charges out of freight and terminal handling charges, no handling charges is liable to be service tax and freight is exempt from payment of service tax. The service tax is collected and paid on such income on behalf of the agent. Therefore, the income of principle is included in the service tax return of assessee. The assessee is an agent earned fixed percentage of commission on export and import on freight. The assessee also collected documentation and other charges which service is taxable income. Thus, we have seen that the assessee has furnished complete details to the Assessing Officer. The Assessing Officer after his satisfaction and without mentioning anything about the issue accepted the contention of assessee.

12. The Hon'ble jurisdictional High Court in CIT vs. Gabriel India (supra) held that when the Income Tax Officer (ITO) made enquiries with regard to the expenditure incurred by assessee. The assessee furnished detailed explanation in this regard by a letter in writing. All are part of the record of the assessee and the claim was allowed by ITO on being satisfied with the explanation of assessee. Such decision of ITO cannot be held to be erroneous in his order; he has not made elaborate discussion in this regard. Similarly, Hon'ble Gujarat High Court in CIT vs. Arivind Jewellers (supra) held that when material was on record and was considered by Assessing Officer/ITO and a particular view was taken, the mere fact that different view can be taken should not be the base of action under section 263.
13. Similarly the Hon'ble Delhi High Court in CIT vs. Ashish Rajpat (supra) held that merely because the assessment order does not refer to query raised by Assessing Officer during the scrutiny and response of the assessee thereto it cannot be said that there was no enquiry and the assessment order is erroneous and prejudicial. As we have already noted and referred that the Assessing Officer made specific enquiry with regard to service tax return and receipt of income in the original assessment and accepted the same, therefore, in our view, the order passed by assessing officer is not erroneous. Therefore, the precondition for exercise of power under section 263 is not fulfilled.

Hence, the Id PCIT was justified in revising the assessment order.

Therefore, we accept the appeal filed by the assessee and set-aside the order passed by Id. PCIT.

14. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 14/12/2018.

Sd/-
G.S. PANNU
VICE-PRESIDENT

Sd/-
PAWAN SINGH
JUDICIAL MEMBER

Mumbai, Date: 14.12.2018

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Copy of the Order forwarded to :

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| 1. Assessee | 2. Respondent |
| 3. The concerned CIT(A) | 4. The concerned CIT |
| 5. DR "C" Bench, ITAT, Mumbai | |
| 6. Guard File | |

BY ORDER,
Dy./Asst. Registrar
ITAT, Mumbai