* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ ITA No. 176 of 2009

% *Reserved on : September 04, 2009*
Pronounced on : October 09, 2009

Commissioner of Income Tax, Delhi-IV . . . Appellant

through : Mr. N.P. Sahni with
Mr. P.C. Yadav, Advocates

VERSUS

DLF Power Ltd. . . . Respondent

through : Mr. Ajay Vohra with
Ms. Kavita Jha and Ms. Aakansha
Aggarwal, Advocates

CORAM :-
THE HON'BLE MR. JUSTICE A.K. SIKRI
THE HON'BLE MR. JUSTICE VALMIKI J. 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? Yes

A.K. SIKRI, J.

1. The return of income for the assessment year 2002-03 was filed by the respondent/assessee on 30.10.2002 declaring a loss of Rs.4,70,68,429/-. The assessment order under Section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as the 'Act') was passed on 28.2.2005 and the income was assessed at Rs.11,03,91,000/- under Section 115JB of the Act. Thereafter, the Commissioner of Income Tax (CIT) exercised jurisdiction under Section 263 of the Act and issued a notice to the respondent on 8.3.2007. The CIT was of

the opinion that the assessment order was erroneous and prejudicial to the interest of Revenue on the following grounds :-

(a) The deduction under Section 80-IA was allowed at Rs.2427.79 lacs as against admissible deduction of Rs.1962.55 lacs, i.e. to the extent of gross total income calculated under the normal provisions of the Act, meaning thereby, excess deduction to the extent of Rs.465.24 lacs. The mistake resulted into over assessment of loss to the extent of Rs.465.24 lacs.

(b) The provision for doubtful debts at Rs.818.03 lacs debited in the Profit and Loss account was not added back for calculating the book profit under Section 115JB. The mistake resulted into underassessment of income to the extent of Rs.818.03 lacs.

After considering the reply of the assessee, he passed orders dated 22.3.2007, thereby cancelling the assessment order passed under Section 143(3) of the Act with directions to frame the assessment order afresh. Few days before this order of the CIT (A), the Assessing Officer (AO) had passed the order under Section 154 of the Act on 13.2.2007. By this order, the purported mistake in regard to deduction under Section 80-IA of the Act had been corrected by the AO and in this rectification order, deduction under the said provision was restricted to Rs.1962.55 lacs, i.e. to the extent of gross total income calculated under the provisions of the Act, as provided under Section 80A(2) of the Act.

2. The assessee challenged the order of the CIT passed under Section 263 of the Act by filing appeal before the Income Tax Appellate Tribunal (for short, the 'Tribunal'). The Tribunal has allowed the appeal thereby setting aside the order of the CIT. The Tribunal has, *inter alia*, held that the CIT could not have exercised jurisdiction to cancel the assessment order made under Section 143(3) of the Act more particular when the AO had already passed orders on 13.2.2007 under Section 154 of the Act rectifying the mistake. The validity of this order of the Tribunal is questioned in the present appeal filed by the Revenue.

3. In nutshell, the submission of the Revenue is that the order passed by the Tribunal is against the provisions of law as the scope of Section 154 is very limited to the extent of error apparent on record, whereas the CIT can exercise powers under Section 263 to set aside an assessment order if it is erroneous and prejudicial to the interest of the Revenue. According to the department, for exercising powers under Section 263 of the Act, only these twin conditions are required to be satisfied and passing of an order under Section 154 of the Act is of no consequence.

4. In this backdrop, arguments were addressed by learned counsel for the parties before us on the following questions of law :-

   1) Whether the ITAT was correct in law in cancelling/ setting aside the order passed by the CIT under Section 263 of the Income Tax Act, 1961?

   2) Whether the ITAT was correct in law in holding that after passing of order under Section 154 of the Act, the CIT could not have exercised jurisdiction to cancel the assessment order under Section 143(3) of the Act?

3) Whether the ITAT was correct in law in holding that the assessment order was neither erroneous nor prejudicial to the interest of Revenue.

5. As is clear from the narration of facts recapitulated above, insofar as deduction under Section 80-IA is concerned, it was allowed at Rs.2427.79 lacs. However, vide rectification order dated 13.2.2007 the AO himself corrected the same to Rs.1962.55 lacs. The revisional order under Section 263 of the Act came to be passed by the CIT subsequently, i.e. on 8.3.2007. In this revisional order, the CIT opined that admissible deduction under Section 80-IA was Rs.1962.55 lacs as against Rs.2427.79 lacs originally granted by the AO in the assessment order. However, before the CIT could point out this error, the same was corrected by the AO himself in the rectification order. Therefore, even if on this aspect revisional order is treated as correct, on the basis of which the CIT directed the AO to pass fresh orders, that exercise had already been done by the AO. 5We may point out at this stage that while holding that the CIT lacked jurisdiction under Section 263 of the Act to modify the assessment order after the rectification thereof under Section 154 of the Act by the AO, the Tribunal has limited the discussion relating to deduction under Section 80-IA alone. In taking this opinion, the Tribunal has held that it was because of the reason that original assessment order was no longer in existence as it got merged with the order under Section 154 of the Act passed by the AO and for this purpose the Tribunal relied upon the judgment of the Madhya Pradesh High Court in the case of *CIT* v. ***Ralson Industries Ltd.***, 276

ITR 368, and particulars the following observations contained therein

:-

"5. We have heard Mr. Rohit Arya, learned senior counsel for the appellant, and Mr. L.L. Sharma, learned counsel for the assessee. It is submitted by Mr. Arya that the Tribunal has erred by not taking into consideration s. 263(1)(c) of the Act and hence, refusal by the Tribunal to refer the questions of law to this court is absolutely erroneous.

6. Mr. Sharma, ld. counsel appearing for the respondent, per contra, has contended that after the order of assessment was passed by the AO s. 154 of the Act was in vogue in rectification of the mistake and after such an order came into force the doctrine of merger would come into play and, therefore, there cannot be invocation of power under s. 263 of the Act in respect of the order which is not in existence. To buttress his submission he has placed reliance on the decisions rendered in the case of Chunnilal Inkarmal (P) Ltd. v/s. CIT (1996) 135 (M_ 1: (1997) 224 ITR 233 (MP) and CIT vs. Vippy Solvex Products (P) Ltd. (supra).

7. To appreciate the aforesaid submission, it is relevant to reproduce s. 263(1)(c) of the Act. The said provision reads as under :-

"263(1)(c). Where any order referred to in this sub-section and passed by the AO, had been the subject matter of any appeal filed on or before or after the 1st day of June, 1988, the powers of the CIT under the sub-section shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal."

8. It is not disputed that the revision proceeding was initiated after the rectification. In the case of Chunnilal Onkarmal (P) Ltd. (supra), a Division Bench of this Court held as under :-

"In view of the aforesaid admitted position of the facts, we find that the Tribunal was not justified in holding that the CIT had jurisdiction to initiate the proceedings under s. 263 of the Act and to revise the original assessment order when such an order was not in existence at the time of initiation of the proceedings. Consequently, we have no option but to answer the question in the negative, i.e. in favour of the assessee and against the Department. However, law and justice are not distant neighbors. We, therefore, deem it proper to part with this case with the observation that as the order of rectification is no longer in existence, the appropriate authority shall be at liberty to resort to appropriate proceedings with reference to the

order dated 30.3.1982, if otherwise not forbidden under the law."

6. *Prima facie*, this approach of the Tribunal seems to be correct. In any case, in the facts of the present appeal, it is not even necessary to into this question inasmuch as even as per the revisional order passed by the CIT under Section 263 of the Act, the benefit under Section 80-IA should have been restricted to Rs.1962.55 lacs, which had been done by the AO by passing rectification order under Section 154 of the Act.

In the facts of this case, therefore, the question of law No. (2) does not arise for consideration.

7. The second ground for passing revisional order by the CIT under Section 263 of the Act relates to the provision for doubtful debts. As per the CIT, the provision for doubtful debts at Rs.818.03 lacs debited in the Profit and Loss account was not added back for calculating book profit under Section 115JB of the Act, which resulted into underassessment of income to that extent. In forming this opinion, the CIT has governed itself by the judgment of the Madras High Court in the case of ***Deputy Commissioner of Income Tax*** v. ***Beardsell Ltd.***, 244 ITR 256, wherein the Madras High Court held that where there is a statutory provision contained in explanation to sub-section (2) of Section 115JB of the Act, the provision made for uncertain liabilities are to be disallowed for calculating the book profits under Section 115JB of the Act.

8. Section 115JB was inserted by the Finance Act, 2000 with effect from 1.4.2001. It is a special provision for payment of tax by certain companies. Since we are concerned with the assessment year 2002-03, the provisions which were applicable as on that date (as there is an amendment with effect from 1.4.2007) provided that where in the case of an assessee, being a company, the income tax payable on the total income, as computed under the Act in respect of any previous year, is less than 7.5% (which stands amended to 10% with effect from 1.4.2007) of its book profits, such book profits shall be deemed to be the total income of the assessee and the tax payable by the assessee on such total income shall be the amount of income tax @ 7.5% (amended to 10% with effect from 1.4.2007). It is, thus, a MAT provision and the tax is payable on the aforesaid basis calculating notional profits as against the actual book profits. The provision was applicable, at the relevant time, in those cases where total income, as computed under the Act as per normal provisions, is less than 7.5% of its book profits. Explanation to this section defines *'book profit'* to mean the net profit as shown in the Profit and Loss account for the relevant previous year prepared under sub-section (2) and it is to be increased by certain amounts stipulated in clauses (a) to (h) appended to this explanation. Clause (c) of the said explanation, with which we are concerned, reads as under :-

> "The amount or amounts set aside to provisions made for meeting liabilities, other than ascertained liabilities."

9. The question in this case is as to whether the provision for doubtful debt made in the books was required to be added back under clause (5) of the aforesaid explanation to Section 115JB(2)

10. Before the CIT it was argued by the assessee that their advocates had examined the issue in detail with reference to the various decisions of the Supreme Court and the High Courts and opined that since this was not a provision for any unascertained liability, but it was merely a provision for diminution into the value of the assets and, therefore, it was not to be added back for calculating book profits under Section 115JB of the Act. It was also submitted before the CIT that the AO had decided not to add back this provision made for bad debts for calculating book profit under Section 115JB of the Act after due application of mind and after taking note of the decision of the Supreme Court in the case of ***Apollo Tyres Ltd.*** v. ***Commissioner of Income Tax, Kochi,*** 255 ITR 273 and, therefore, when such an opinion of the AO was plausible, merely because the CIT was of different opinion could not be a ground to pass an order under Section 263 of the Act. This contention of the assessee was brushed aside by the CIT in the following manner :-

> "It has been argued that no doubt there are divergent opinions of the High Courts on this issue. In the decision of the Madras High Court reported in 244 ITR 256, it was held that the provision made for liabilities other than ascertained liabilities is to be included in the book profit for calculating the tax liability u/s 155JB whereas there are several decisions holding otherwise. It is further argued that the decision of the Hon'ble Supreme Court in the Apollo Tyres case, supra, the position is now clear that the profit & loss account prepared under the Companies Act cannot be modified in order to calculate the liability u/s 155JB. From a perusal of the judgment of the Hon'ble Supreme Court in the Apollo Tyres case, it emerges

that it has nowhere been said that the provisions of the Explanation to sub-section (2) of section 115JB should be ignored for calculating the book profit for the purpose of section 115JB. When there are statutory provisions contained in the said Explanation to section 115JB(2) that the provisions made for unascertained liabilities are to be disallowed for calculating the book profits u/s 155JB, it does not appeal to reason that a different view could be taken on this point. Be as it may, the Assessing Officer has not examined this issue in the assessment order which again as rendered the assessment order in question erroneous and prejudicial to the interests of revenue inasmuch as the book profit to the extent of Rs.818.03 lacs has been calculated less resulting into reduction in the liability to be discharged by the assessee company under that section. The ratio of the various decisions relied upon by the assessee company as mentioned in its written submissions is not applicable to the assessee's case as the facts of this case are distinguishable. In view of the above facts, the assessment order dated 28.2.2005 u/s 143(3) of the IT Act, 1961, for the A.Y. 2002-03, is held to be erroneous and prejudicial to the interests of revenue. However, in order to take a final view on these issues, further enquiries will be necessary which can be conducted only by the Assessing Officer and, therefore, it is not possible for me to record conclusive findings on these issues at this stage. In the circumstances, it is considered fair and reasonable to set aside the assessment on these issues for fresh adjudication and decision. The Assessing Officer is directed to decide these issues afresh as per law and after giving reasonable opportunity to the assessee company of being heard."

11. The Tribunal, however, has accepted the submission of the assessee and reversed the order of the CIT on the aforesaid issue taking note of various case laws. It is pointed out by the Tribunal that the judgment of the Madras High Court in ***Beardbell Ltd.*** (supra) was considered by the Special Bench of the Tribunal (Kolkata) in the case of ***JCIT*** v. ***Usha Martin Industries Ltd.,*** 288 ITR (AT) 64, holding that the provision for bad and doubtful debts is made when the assessee is of the opinion that its entire debt may not be realized and part of the debt may become irrecoverable. Therefore, the question whether it is an ascertained or unascertained liability does not arise as clause (c) of explanation to Section 115JA would not be applicable.

The Tribunal also relied upon the judgment of this Court in the case of *CIT* v. *El Dupont India Ltd.* (ITA No. 599/2007), holding that the issue relating to provision made for doubtful debts while computing the book profits under Section 115JA are not required to be added back as per clause (c) of explanation to Section 115JA. Thus, according to the Tribunal, view taken by the AO could not be called erroneous in view of the aforesaid decisions and, therefore, the order under Section 263 of the Act could not be passed by the Commissioner, as is clear from the following :-

> "19. From the decision (supra) it is clear that the order of the AO while deciding the issue is supported by the decisions (supra) therefore the view taken by the AO cannot be called erroneous even if contrary view has been taken by the CIT. It has also been held in erroneous even if contrary view has been taken by the CIT *(sic)*. It has also been held in the case of M/s. Malabar Industries, 243 ITR 83(SC) and 295 ITR 282 (SC) that in case the view taken by the AO was one of the possible view supported by case law or if the resolving of the issue is debatable then CIT is not justified in canceling the assessment order by assuming provisional jurisdiction u/s 263 of the IT Act."

2. Mr. Sahni, learned counsel appearing for the Revenue, argued that the aforesaid two judgments, namely, that of Special Bench of the Tribunal as well as of this Court, discussed the provisions of Section 115JA of the Act, whereas the present case related to calculation of book profits under Section 115JB of the Act. He further submitted that the Tribunal did not appreciate the scope of Section 263 of the Act and the extent of powers conferred upon the CIT to revise the orders of the AO under the said provision. To highlight this, learned counsel referred to the following discussion contained in the

judgment of the Court in *Gee Vee Enterprises* v. *Addl. Commissioner of Income Tax, Delhi I, and Others*, 99 ITR 375 :-

> "(ii) On the other hand, the condition for the assumption of jurisdiction under the old section 33B and the new section 263 is easier to fulfil. The reason is that it is not the Income Tax Officer but a superior officer like the Commissioner who is exercising a revisional jurisdiction suo motu thereunder. The superior officer could be trusted with a larger power. The only requirement for the exercise of this power is that the Commissioner should consider that the order passed by the Income Tax Officer is "erroneous in so far as it is prejudicial to the interests of the revenue". What is the meaning of "erroneous" in this context? It was argued for the assessees by Shri G.C. Sharma that the word "erroneous" means that the order must appear to be wrong on the face of it. In other words, he equated the "error" with "error of law apparent on the face of record" which is a well known ground for the review of a quasi judicial order by this court under article 226. We are unable to agree with this interpretation. The intention of the legislature was to give a wide power to the Commissioner. He may consider the order of the Income Tax Officer as erroneous not only because it contains some apparent error of reasoning or of law or of fact on the face of it but also because it is a stereo typed order which simply accepts what the assessee has stated in his return and fails to make inquiries which are called for in the circumstances of the case."

He submitted that the view taken in the aforesaid judgment was reaffirmed by this Court in *Duggal & Co.* v. *CIT*, 220 ITR 456.

3. Mr. Ajay Vohra, learned counsel appearing for the respondent, on the other hand, submitted that Section 115JB of the Act was *pari materia* with Section 115JA and insofar as calculation of book profits under both these provisions are concerned., he submitted that clause (c) appended to explanation to Section 115JB(2) was identical to clause(c) of explanation to Section 115JA(2). He further pointed out that vide Finance Act, 2009, there was an amendment in the explanation. One more explanation was added as explanation No.(2) and existing explanation was re-numbered as explanation No.

(1). Clause (i) is added thereof, which is in the following terms – *"the amount or amounts set aside as provision for diminution in the value of any asset"*. Justifying the order of the Tribunal, he submitted that the legal position as appearing before this amendment was that on the aforesaid clause (c) to the explanation, there were divergent views of the various High Courts and, therefore, the AO rightly allowed/held that the provision of bad debt was not to be added back, following the decision of the jurisdictional court, i.e. this Court. He also referred to a recent judgment of the Supreme Court in the case of ***Commissioner of Income Tax*** v. ***HCL Comnet Systems and Services Ltd.,*** (2008) 305 ITR 40, wherein the legal position is stated as under :-

> "10. As stated above, the said Explanation has provided six items, i.e., Item Nos. (a) to (f) which if debited to the profit and loss account can be added back to the net profit for computing the book profit. In this case, we are concerned with Item No. (c) which refers to the provision for bad and doubtful debt. The provision for bad and doubtful debt can be added back to the net profit only if Item (c) stands attracted. Item (c) deals with amount(s) set aside as provision made for meeting liabilities, other than ascertained liabilities. The assessee's case would, therefore, fall within the ambit of Item (c) only if the amount is set aside as provision; the provision is made for meeting a liability; and the provision should be for other than ascertained liability, i.e., it should be for an unascertained liability. In other words, all the ingredients should be satisfied to attract Item (c) of the Explanation to Section 115JA. In our view, Item (c) is not attracted. There are two types of "debt". A debt payable by the assessee is different from a debt receivable by the assessee. A debt is payable by the assessee where the assessee has to pay the amount to others whereas the debt receivable by the assessee is an amount which the assessee has to receive from others. In the present case "debt" under consideration is "debt receivable" by the assessee. The provision for bad and doubtful debt, therefore, is made to cover up the probable diminution in the value of asset, i.e., debt which is an amount receivable by the assessee. Therefore, such a provision cannot be said to be a provision for liability, because even if a debt is not recoverable no liability could be fastened upon the assessee. In the present case, the debt is the amount receivable

by the assessee and not any liability payable by the assessee and, therefore, any provision made towards recoverability of the debt cannot be said to be a provision for liability. Therefore, in our view Item (c) of the Explanation is not attracted to the facts of the present case. In the circumstances, the AO was not justified in adding back the provision for doubtful debts of Rs. 92,15,187/- under Clause (c) of the Explanation to Section 115JA of the 1961 Act."

14. He further submitted that the AO was to only examine whether books of accounts are certified by the authorities under the Companies Act. He reinforced the submission that where two views are possible, the order of the AO could not be treated as erroneous, giving power to the CIT to pass orders under Section 263 of the Act, as held in *Malabar Industrial Co.* v. *CIT,* 243 ITR 83, *Max India Ltd.* v. *CIT,* 295 ITR 282 and *Commissioner of Income Tax* v. *Vimgi Investment (P) Ltd.,* 290 ITR 505.

15. After considering the respective submissions, we are of the opinion that the order of the Tribunal does not call for any interference.

16. It is clear that the explanations to Section 115JB is identically worded as explanation to Section 115JA. Both these explanations relate to calculation of book profits, i.e. they give power to the AO to increase net profit determined as per the Profit and Loss account to the extent permissible under the said explanation. For this purpose, even clause (c) under both these provisions is identically worded. In *HCL Comnet* (supra), the Supreme Court has explained that the said provision refers to bad and doubtful debts and provision for bad and doubtful debts can be added back to the net profits only if the

amount is set aside for meeting a liability and not when the provision is made in respect of debts receivable by the assessee. For such a provision for bad and doubtful debts, which are to be received and not where provision is made for meeting a liability, the Supreme Court categorically opined that clause (c) was not attracted. This judgment amounts to affirmation of the view taken by the Special Bench of the Tribunal (Kolkata) in *Usha Martin Industries Ltd.* (supra). In these circumstances, the view taken by the AO could not be called erroneous.

17. In fact, having regard to the law on the point, as clarified by the Supreme Court in *HCL Comnet* (supra), it seems that only one view is possible. In a situation like this, under no circumstance, order under Section 263 could be passed to revise the order passed by the AO, as observed by this Court in *Vimgi Investment (P) Ltd.* (supra) in the following words :-

> "We find that in so far as the present case is concerned, only one view is possible and that was taken by the Assessing Officer and that view was valid with reference to the assessment year 2001-02. thereforee, there was no occasion for the Commissioner to exercise his powers under Section 263 of the Act to revise the order passed by the Assessing Officer and tax the assessed on the ground that the transaction was an attempt to avoid tax. The purchase and sale of units by the assessed was undoubtedly bona fide and this was accepted by the Assessing Officer. Under these circumstances, the question of the Commissioner invoking his powers under Section 263 of the Act would not arise. Following the decision of this court in Vikram Aditya and Associates P. Ltd. [2006] 287 ITR268(Delhi), we find no substance on the merits of the case.
>
> In any event, in view of the decision of the Supreme Court in Malabar Industrial Co. Ltd. [2000] 243 ITR 83 the exercise of power by the Commissioner under Section 263 of the Act is not warranted, if it is assumed that two views are possible on the issue."

18. Further, even if two views were possible, and the view taken by the AO was plausible one, it by the CIT, that would not provide sufficient ground for the CIT to assume jurisdiction under Section 263 of the Act merely because he had a different view in *Malabar Industrial Co.* (supra), the Supreme Court gave the following interpretation to this provision :-

> "A bare reading of this provision makes it clear that the prerequisite to exercise of jurisdiction by the Commissioner suo moto under it, is that the order of the Income Tax Officer is erroneous insofar as it is prejudicial to the interests of the revenue. The Commissioner has to be satisfied of twin conditions, namely, (i) the order of the assessing officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the revenue. If one of them is absent - if the order of the Income Tax Officer is erroneous but is not prejudicial to the revenue or if it is not erroneous but is prejudicial to the revenue - recourse cannot be had to section 263(1) of the Act. The provision cannot be invoked to correct each and every type of mistake or error committed by the assessing officer, it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind. The phrase 'prejudicial to the interests of the revenue' is not an expression of art and is not defined in the Act. Understood in its ordinary meaning it is of wide import and is not conferred to loss of tax. The scheme of the Act is to levy and collect tax in accordance with the provisions of the Act and this task is entrusted to the revenue. If due to an erroneous order of the Income Tax Officer, the revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to the interests of the revenue. The phrase 'prejudicial to the interests of the revenue' has to be read in conjunction with an erroneous order passed by the assessing officer. Every loss of revenue as a consequence of an order of assessing officer cannot be treated as prejudicial to the interests of the revenue, for example, when an Income Tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the Income Tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the revenue unless the view taken by the Income Tax Officer is unsustainable in law."

19. Question of law Nos. (1) and (3), thus, stand answered in favour of the assessee and against the Revenue, which would result in dismissal of the present appeal. We, accordingly, dismiss the appeal with costs quantified at Rs.25,000/-.

(A.K. SIKRI)
JUDGE

(VALMIKI J. MEHTA)
JUDGE

October 09, 2009
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