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

% RESERVED ON: 27.10.2017
PRONOUNCED ON: 08.11.2017

\+ ITA 387/2017

BSES RAJDHANI POWER LTD. .....Appellant
Through: Mr. Ajay Vohra, Sr. Advocate with Mr. Rohit Jain, Advocate.

Versus

PRINCIPAL COMMISSIONER OF INCOME TAX, DELHI-2
..... Respondents
Through: Mr. Zoheb Hossain, Sr. Standing Counsel for Revenue.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE SANJEEV SACHDEVA

S.RAVINDRA BHAT, J.

1. The following questions of law arise for consideration:

(a) Whether on facts and in the circumstances of the case, the Tribunal erred in law in not holding that order dated 31.03.2016 passed under section 263 of the Act was without jurisdiction, illegal and bad in law?

(b) Whether on facts and in the circumstances of the case, the Tribunal erred in law in not quashing order passed under section 263 of the Act, considering that the assessing officer had raised specific queries and applied his mind to the concerned issues while framing original assessment?

(c) Whether on facts and in the circumstances of the case, the Tribunal erred in law in not quashing the order passed under section 263 of the Act in respect of issues pertaining to alleged

violation in deduction of tax at source and related party transactions, which did not either form part of the show cause notice or confronted to the Appellant, instead in setting aside the same for de novo adjudication by the CIT?

2. The appellant/assessee filed its return for assessment year (AY) 2010-11, declaring Nil income, which was subsequently revised on 30.03.2012.The return was selected for scrutiny and the assessing officer (AO) initiated assessment proceedings and issued notice under Section 143(2) of the Act. During the course of assessment a special audit of the assesse's accounts was directed, under Section 142(2A) of the Act on 05.03.2013. The special auditor's report dated 30.08.2013 provided elaborate comments, *inter alia*, in connection with the terms of reference for special audit framed by the AO, concerning the following issues: (i) reconciliation of fixed assets and depreciation thereon, (ii) arm's length nature of transactions entered into with related parties, and (iii) compliance with provisions of Chapter XVII-B of the Act relating to tax deduction at source and effect of non-compliance thereof.

3. The AO, after considering the special auditor's report completed assessment by an order-dated 29.10.2013, under Section 143(3) of the Act. The total income assessed was ₹838,38,00,790 after making, *inter alia*, disallowance of ₹66, 27,782 being depreciation on ₹6,44,81,091 capitalized for re-installing fixed assets. Further, the AO also disallowed ₹94,20,842 due to related party transactions, added ₹38,58,60,000 in respect of arm's length price of transactions with related party and disallowed ₹2,58,28,863 under section 40(a)(ia) of

the Act. The assessee appealed against the AO's order; the appeal was disposed of on 30.05.2014. The CIT (A) decided the issue with respect to disallowance of depreciation of ₹66,27,782 on capitalization of reinstallation costs of fixed assets and disallowance in respect of transactions with group concerns in favour of the assesse. The CIT (A), further, granted partial relief to the assessee in respect of disallowance made under Section 40(a) (ia) of the Act.

4. A show cause notice under Section 263, on 16.03.2016, was issued by the Commissioner, alleging that there was variation in cost of fixed assets, which aspect had not been verified or examined by the AO while framing assessment under section 143(3) of the Act. In response to the show-cause notice issued under Section 263 of the Act, the assessee filed its replies, resisting the move to revise the completed assessments; the appellant also pointed that since the original order of the AO had merged with that of the CIT (A), after the disposal of appeal, the re-appraisal under Section 263 was unwarranted. Later, the CIT (A) made an order on 31.03.2016 under Section 263, setting aside the original assessment order framed under section 143(3) of the Act, holding the same to be erroneous and prejudicial to the interests of the Revenue and directing the AO to reconsider the following issues:

(i) Depreciation claimed in respect of fixed assets to the extent of ₹298.93 crores (mentioned in show cause notice) [hereinafter also referred to as "first issue"];

(ii) Applicability of TDS provisions to certain expenditure claimed by the assessee. It was urged that this issue was not mentioned in the

show cause notice nor was any opportunity of hearing allowed to the assessee.

(iii) Benchmarking of transactions with group companies under Section 40A (2). It was urged that this issue was not mentioned in the show cause notice nor was any opportunity of hearing allowed to the assessee.

5. The assessee's appeal to the ITAT was rejected by the impugned order. The Tribunal held that the assessment was concluded by the AO without making adequate enquiries with respect to variation in cost of fixed assets and accordingly, order passed by the Respondent under Section 263 of the Act was upheld. As regards issues concerning applicability of TDS provisions on expenditure claimed by the assessee and benchmarking of transactions with group concerns, the Tribunal set aside the order of the CIT, holding that no opportunity was provided to the assessee regarding those issues and accordingly, directed the Respondent to pass fresh order in respect thereof after providing reasonable opportunity to the assessee.

6. Relying on *Malabar Industrial Co. Ltd. vs Commissioner of Income Tax* 243 ITR 83 (SC) and *Commissioner of Income Tax vs Max India Ltd* 295 ITR 282 (SC) it was contended, by Mr. Ajay Vohra, learned senior counsel, that having regard to the fact that each of the issues which were sought to be re-opened, were the subject matter of scrutiny in the original assessment order, it could not be said that such an assessment order was prejudicial to the interests of the revenue and erroneous in law. It was emphasized that the process of

verification of materials, specifically included considering the special auditor's report. The AO went through the report, and made his additions in respect of all matters. The assessment was a scrutiny assessment under Section 143 (3). That order, according to learned senior counsel, merged with the appellate order of the CIT (A) on 30.05.2014.

7. Counsel submitted that the issue relating to depreciation in fact merged with the decision of the CIT (A). Thus, if there was any concern with respect to the AO's order, that stood addressed and became final upon application of mind at the appellate stage. Particular notice of the court was drawn to the following observations of the CIT (A):

> *"5.5.7. Therefore, I am of the opinion that expenditure incurred by the appellant, including inter alia, the installation cost, borrowing cost and other charges etc, were relating directly or indirectly to the installation of the transformers and are therefore, eligible to be included in the actual cost of the relevant block of fixed assets and therefore, the AO is hereby directed to allow depreciation on the cost of recapitalized assets."*

8. It was submitted that as regards addition of ₹94,20,842/- under Section 40A(2)(b) of the Act, the CIT (A) ruled on this issue too. Counsel relied on the following extract of the CIT (A)'s order:

> *"Considering the peculiar facts of the case and material on records, I am of the view that the AO has added on an ad hoc basis Rs.38.58 crores on account of lack of arms length price in appellants transaction with M/s RETL as regard power*

purchase without a valid legal and factual support as all purchases and sales of power by the distribution companies (Discoms) in Delhi require approval from Delhi Power Procurement Group (DPPG), a body constituted vide Delhi Transco Limited's order, with the objective of formulating procedure to be followed by all discoms in Delhi for sale and purchase of power and moreover, the expenditure was factually expended for the purpose of business. Therefore, the AO cannot it in the armchair of the assessee to determine what part of the expenditure is reasonable and allowable (Refer SA Builders case Supra). The expenditure on this count are held to be allowable, "including the amount disallowed by the AO of Rs. 38.58 crores."

9. As regards TDS too, it was argued that the issue had been gone into; the Commissioner could not legitimately have sought to re-open such matters, under Section 263 on a re-appreciation of the merits. Learned counsel relied on the decision of this Court in *Commissioner of Income Tax v Sunbeam Auto Ltd* 332 ITR 167 (Del) where it was observed that:

"12. We have considered the rival submissions of the counsel on the other side and have gone through the records. The first issue that arises for our consideration is about the exercise of power by the Commissioner of Income-tax under section 263 of the Income-tax Act. As noted above, the submission of learned counsel for the revenue was that while passing the assessment order, the Assessing Officer did not consider this aspect specifically whether the expenditure in question was revenue or capital expenditure. This argument predicates on the assessment order, which apparently does not give any reasons while allowing the entire expenditure as revenue expenditure. However, that by itself would not be indicative of the fact that

the Assessing Officer had not applied his mind on the issue. There are judgments galore laying down the principle that the Assessing Officer in the assessment order is not required to give detailed reason in respect of each and every item of deduction, etc. Therefore, one has to see from the record as to whether there was application of mind before allowing the expenditure in question as revenue expenditure. Learned counsel for the assessee is right in his submission that one has to keep in mind the distinction between "lack of inquiry" and "inadequate inquiry". If there was any inquiry, even inadequate, that would not by itself give occasion to the Commissioner to pass orders under section 263 of the Act, merely because he has different opinion in the matter. It is only in cases of "lack of inquiry", that such a course of action would be open."

10. Counsel argued that the order of the CIT under Section 263 could not be upheld under any circumstance and the ITAT, in refusing to set it aside, compounded the error. It was particularly stressed that the issues in addition to the one relating to depreciation were not part of the show cause notice and could not have been made the subject matter of revision; furthermore, no opportunity of hearing was granted by the Commissioner.

11. Mr. Vohra submitted that each of the three points on which revisional jurisdiction was exercised, had been inquired into during the original assessment; the appellate order had dealt with those aspects. Consequently, it could not be held that such a view was erroneous, even if another view was possible. It was argued that courts have held that once relevant details/ documents are available on record pertaining to original assessment, and if on the basis of material

available on record, a view could be formed by the assessing officer, it may not even be necessary for the AO to conduct detailed enquiry; in such circumstances, it cannot be presumed that the assessing officer had not examined the claims of the assessee. He cited *Commissioner of Income Tax v DLF Ltd* 350 ITR 555 (Del.); *Commissioner of Income Tax v. International Travel House Ltd*. 344 ITR 554 (Del.) *Commissioner of Income Tax v. Leisurewear Exports* 341 ITR 166 (Del.) *Commissioner of Income Tax v. Hero Auto Ltd.* 343 ITR 342 (Del.) and *Commissioner of Income Tax v. Vikas Polymers* 341 ITR 537 (Del). It was argued that this would be the position for all three questions framed.

12. The revenue defends its position and urges this court not to interfere with the findings of the ITAT. According to its counsel, Mr. Zoheb Hossain, the provision of second explanation to Section 263 (1) empowers Commissioners to issue notices in precisely the kind of cases as the present one. The said provision reads as follows:

> *"Explanation. - For the removal of doubts, it is hereby declared that, for the purposes of this sub-section, -*
>
> *(a) an order passed on or before or after the 1st day of June, 1988 by the Assessing Officer shall include -*
>
> *(i) an order of assessment made by the Assistant Commissioner or Deputy Commissioner or the Income-tax Officer on the basis of the directions issued by the Joint Commissioner under section 144A;*
>
> *(ii) an order made by the Joint Commissioner in exercise of the powers or in the performance of the functions of an Assessing*

Officer conferred on, or assigned to, him under the orders or directions issued by the Board or by the Chief Commissioner or Director General or Commissioner authorised by the Board in this behalf under section 120;

(b) "record" shall include and shall be deemed always to have included] all records relating to any proceeding under this Act available at the time of examination by the Commissioner;

(c) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal filed on or before or after the 1st day of June, 1988], the powers of the Commissioner under this 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."

The revenue relied on *Commissioner Of Income Tax vs Ratilal Bacharilal & Sons* (2006) 282 ITR 457; *Commissioner of Income Tax v Aruba Mills* 1998 (231) ITR 50 (SC) where the position was clarified as follows:

"The consequence of the said amendment made with retrospective effect is that the powers under Section 263 of the CIT shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in an appeal. Accordingly, even in respect of the aforesaid three items, the powers of the CIT under Section 263 shall extend and shall be deemed always to have extended to them because the same had not been considered and decided in the appeal filed by the assessee."

In *Ratilal* (supra) following *Aruba (supra),* the Bombay High Court ruled as follows:

"20. The consequence of the aforesaid Clause (c) introduced

with retrospective effect, is that the powers under Section 263 of the CIT shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in the order passed in appeal on or before or after 1st June, 1988. The very fact that Expln. (c) was given retrospective effect by using the words "on or before or after" itself denotes that the intention of legislature is to embrace all orders whether passed on or after or before 1st June, 1988. The use of the phrase "on or before or after" is no doubt little uncommon. The phrase "on or before" denotes immediately at or at any time before. The phrase "on or before or after" to our mind means either immediately at or in the past or future. It means at any time during the continuance of the Act, if it is to be understood in the context of the legislation."

It was argued that the previous decision of this Court in *Commissioner Of Income Tax vs Printers House*(1998) 233 ITR 666 was in accord with the law declared in *Aruba (supra)*, holding that those issues that were not the subject matter of appeal were capable of revision.

13. As far as the question of dealing with issues that were not the subject matter of show cause notice is concerned, counsel points out that the previous judgments of this Court and several other High Court has now been overruled in *Commissioner of Income tax v Amitabh Bacchan* 2016 SCC Online SC 484. In that judgment, the Supreme Court held that the failure to issue notice on any particular issue does not vitiate the exercise of power under Section 263, as long as the assessee is heard and given opportunity.

14. Countering the assessee's arguments, it is submitted that the lack of opportunity at the revisional stage under Section 263 does not

vitiate the entire order, or the proceedings; rather it is a curable defect. It was submitted that in the present case, however, even that situation did not arise.

15. As far as the first aspect with respect to exercise of power under Section 263 is concerned, the issue stands concluded, in the light of the amendment with effect from 1989, by insertion of Explanation (c) to Section 263 (1). The non-consideration of the larger claim for ₹298.93 crores as depreciation and the consideration of only a part of it (₹644,81,091) by the assessing officer, who did not go into the issue with respect to the whole amount, was an error, that could be corrected under Section 263. *Aruba (supra)* is decisive, in that the provision of Section 263 (1) Explanation (c) was introduced to cater to precisely this kind of mischief.

16. On the aspect of show cause notice, i.e., the second and third questions framed, the court is of the opinion that the ruling in *Amitabh Bachhan (supra)* is decisive; it upholds the power of the Commissioner to consider all aspects which were the subject matter of the AO's order, if in his opinion, they are erroneous, despite the assessee's appeal on that or some other aspect. The Court held that:

> *"Reverting to the specific provisions of Section 263 of the Act what has to be seen is that a satisfaction that an order passed by the Authority under the Act is erroneous and prejudicial to the interest of the Revenue is the basic pre-condition for exercise of jurisdiction under Section 263 of the Act. Both are twin conditions that have to be conjointly present. Once such satisfaction is reached, jurisdiction to exercise the power would be available subject to observance of the principles of natural*

justice which is implicit in the requirement cast by the Section to give the assessee an opportunity of being heard.

It is in the context of the above position that this Court has repeatedly held that unlike the power of reopening an assessment under Section 147 of the Act, the power of revision under Section 263 is not contingent on the giving of a notice to show cause. In fact, Section 263 has been understood not to require any specific show cause notice to be served on the assessee. Rather, what is required under the said provision is an opportunity of hearing to the assessee. The two requirements are different; the first would comprehend a prior notice detailing the specific grounds on which revision of the assessment order is tentatively being proposed.

Such a notice is not required. What is contemplated by Section 263, is an opportunity of hearing to be afforded to the assessee. Failure to give such an opportunity would render the revisional order legally fragile not on the ground of lack of jurisdiction but on the ground of violation of principles of natural justice. Reference in this regard may be illustratively made to the decisions of this Court in Gita Devi Aggarwal vs. Commissioner of Income Tax, West Bengal and others[1] and in The C.I.T., West Bengal, II, Calcutta vs. M/s Electro House[2]. Paragraph 4 of the decision in The C.I.T., West Bengal, II, Calcutta vs. M/s Electro House (supra) being illumination of the issue indicated above may be usefully reproduced hereunder: "This section unlike Section 34 does not prescribe any notice to be given. It only requires the Commissioner to give an opportunity to the assessee of being heard. The section does not speak of any notice."

17. This Court is of the opinion that the revisional order, to the extent that it did not provide any pre-decisional opportunity to address the issues it dealt with, could not be sustained; the ITAT has granted relief of a limited nature on that score. However, we do not agree that those issues were incapable of consideration as they were gone into by

the AO. Accordingly, the CIT, in exercise of his power under Section 263 will proceed to consider the assessee's submissions only on those two aspects, before making his order.

18. All questions framed are, therefore, answered in the negative, against the assessee.

19. For the above reasons there is no merit in the appeal; it is accordingly dismissed. No costs.

S. RAVINDRA BHAT
(JUDGE)

SANJEEV SACHDEVA
(JUDGE)

NOVEMBER 08, 2017