IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL NO. 238 OF 2018

Pr. Commissioner of Income Tax - 16]
Aayakar Bhawan, M.K. Road,]
Mumbai – 400 020.] … Appellant

Versus

M/s. Universal Music India Pvt. Ltd.]
Samir Complex, St. Andrews Road,]
Bandra (W), Mumbai – 400 050.] … Respondent

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Mr. Suresh Kumar for the Appellant.
Mr. Mihir C. Naniwadekar alongwith Mr. Ruturaj H. Gurjar for the Respondent.

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CORAM : K.R. SHRIRAM AND
N.R. BORKAR, JJ.

DATED : APRIL 19, 2022

ORAL JUDGMENT (PER K.R. SHRIRAM, J.) :

1. Heard counsel and considered the appeal memo. Following two substantial questions of law have been proposed in the Appeal :

> "(a) Whether on the facts, in the circumstances of the case and as per law, the Hon'ble ITAT has erred in holding that in the revision proceedings the CIT cannot travel beyond the reasons given by him for revision in the show-cause notice without appreciating that the power of revision under Section 263 of the I.T. Act is not contingent on the giving of a notice to show cause ?
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> (b) Whether on the facts, in the circumstances of the case and as per law, the Hon'ble ITAT has erred in holding that in

> the revision proceedings the CIT cannot travel beyond the reasons given by him for revision in the show-cause notice without appreciating the ratio laid down by Hon'ble Supreme Court in the case of CIT vs. Amitabh Bachchan (384 ITR 200) (2016) wherein it was clearly held by the Apex Court that there is nothing in Section 263 to make the CIT confine himself to the terms of show cause notice ?"

2. Respondent had filed return of income on 27th October, 2010 declaring income of 'Nil' for A.Y. 2009-2010. Subsequently, assessment was completed by an Order dated 20th December, 2011 under Section 143(3) of the Income Tax, 1961 (the Act).

3. Thereafter, notice under Section 263 was issued by CIT on two issues, namely, (a) disallowance of Fringe Benefit Tax (FBT) paid of Rs.10,72,532/- included in miscellaneous expenses and not allowed by the Assessing Officer and (b) provision of Rs.1,40,98,685/- in respect of slow moving and absolete inventories. The CIT directed Assessing Officer by an Order dated 20th March, 2013 to make enquiry and examine the two issues and a third issue being particulars of payments made to persons specified under Section 40A(2)(b) of the Act of Rs.7,00,22,680/- allowed in the assessment order. The assessment order was set aside on this issue and to be examined afresh.

4. Aggrieved by the order dated 20th March, 2013 passed by CIT,

Respondent filed an Appeal before ITAT. ITAT by an order dated 27th April, 2016 allowed the Appeal.

5. On the issue of payments made to persons specified under Section 40A(2)(b) of the Act, the ITAT gave a finding of fact that no such issue was ever raised by CIT in the notice served upon the assessee and the assessee was not even confronted by the CIT before passing the Order dated 20th March, 2013. ITAT concluded that the said ground therefore cannot form the basis for revision of assessment order under Section 263 of the Act. It is only this finding of ITAT which is impugned in this Appeal. On the other two points, revenue has accepted the findings of ITAT that the Order under Section 263 was not warranted.

6. Mr. Suresh Kumar submitted that Apex Court in its Judgment dated 11th May, 2016 (after the impugned order was pronounced by ITAT) in ***Commissioner of Income-Tax, Mumbai v. Amitabh Bachchan***[1], has held that the provisions of Section 263 does not warrant any notice to be issued and what is required is only to give the assessee an opportunity of being heard before reaching his decision and not before commencing the enquiry. Mr. Suresh Kumar submitted that therefore, the ITAT has erred in setting aside the Order of CIT on this issue.

7. It is true that the Apex Court in *Amitabh Bacchan (supra)* has

1 2016(69) taxmann.com 170 (SC)

held, all that CIT is required to do before reaching his decision and not before commencing the enquiry, CIT must give the assessee an opportunity of being heard. It is true that the Judgment also says no notice is required to be issued. But in the case at hand, there is a finding of fact by the ITAT that no show cause notice was issued and no issue was ever raised by the CIT regarding payments made to persons specified under Section 40A(2)(b) of the Act before reaching his decision in the Order dated 20th March, 2013. If that was not correct certainly the order of the CIT would have mentioned that an opportunity was given and in any case, if there were any minutes or notings in the file, revenue would have produced those details before the ITAT.

8. In *Amitabh Bachchan (supra)*, the Apex Court came to a finding that ITAT had not even recorded any findings that in the course of the suo motu revisional proceedings opportunity of hearing was not offered to the assessee and that the assessee was denied an opportunity to contest the facts on the basis of which the CIT had come to its conclusions as recorded in his order under Section 263 of the Act. It will be useful to reproduce paragraphs 10, 11 and 13 of *Amitabh Bachchan (supra)* and the same read as under :

> *"10. 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. CIT [1970] 76 ITR 496 and in CIT v. Electro House [1971] 82 ITR 824 (SC). Paragraph 4 of the decision in 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. It is unfortunate that the High Court failed to notice the difference in language between Sections 33-B and 34. For the assumption of jurisdiction to proceed under Section 34, the notice as prescribed in that section is a condition precedent. But no such*

notice is contemplated by Section 33-B. The jurisdiction of the Commissioner to proceed under Section 33-B is not dependent on the fulfilment of any condition precedent. All that he is required to do before reaching his decision and not before commencing the enquiry, he must give the assessee an opportunity of being heard and make or cause to make such enquiry as he deems necessary. Those requirements have nothing to do with the jurisdiction of the Commissioner. They pertain to the region of natural justice. Breach of the principles of natural justice may affect the legality of the order made but that does not affect the jurisdiction of the Commissioner. At present we are not called upon to consider whether the order made by the Commissioner is vitiated because of the contravention of any of the principles of natural justice. The scope of these appeals is very narrow. All that we have to see is whether before assuming jurisdiction the Commissioner was required to issue a notice and if he was so required what that notice should have contained? Our answer to that question has already been made clear. In our judgment no notice was required to be issued by the Commissioner before assuming jurisdiction to proceed under Section 33-B. Therefore the question what that notice should contain does not arise for consideration. It is not necessary nor proper for us in this case to consider as to the nature of the enquiry to be held under Section 33-B. Therefore, we refrain from spelling out what principles of natural justice should be observed in an enquiry under Section 33-B. This Court in Gita Devi v. CIT, West Bengal ruled that Section 33-B does not in express terms require a notice to be served on the assessee as in the case of Section 34. Section 33-B merely requires that an opportunity of being heard should be given to the

assessee and the stringent requirement of service of notice under Section 34 cannot, therefore, be applied to a proceeding under Section 33-B." (Page 827-828).

[Note: Section 33-B and Section 34 of the Income Tax Act, 1922 corresponds to Section 263 and Section 147 of the Income Tax Act, 1961]

11. It may be that in a given case and in most cases it is so done a notice proposing the revisional exercise is given to the assessee indicating therein broadly or even specifically the grounds on which the exercise is felt necessary. But there is nothing in the section (Section 263) to raise the said notice to the status of a mandatory show cause notice affecting the initiation of the exercise in the absence thereof or to require the C.I.T. to confine himself to the terms of the notice and foreclosing consideration of any other issue or question of fact. This is not the purport of Section 263. Of course, there can be no dispute that while the C.I.T. is free to exercise his jurisdiction on consideration of all relevant facts, a full opportunity to controvert the same and to explain the circumstances surrounding such facts, as may be considered relevant by the assessee, must be afforded to him by the C.I.T. prior to the finalization of the decision.

13. The above ground which had led the learned Tribunal to interfere with the order of the learned C.I.T. seems to be contrary to the settled position in law, as indicated above and the two decisions of this Court in Gita Devi Aggarwal (supra) and M/s Electro House (supra). The learned Tribunal in its order dated 28th August, 2007 had not recorded any finding that in course of the suo motu revisional proceedings, hearing of which was spread over many days and attended to by the authorized representative of the assessee, opportunity of hearing was not afforded to the assessee and that the assessee was denied an opportunity to contest the facts on the basis of which the learned C.I.T. had come to his conclusions as recorded in the order dated 20th March, 2006.

> *Despite the absence of any such finding in the order of the learned Tribunal, before holding the same to be legally unsustainable the Court will have to be satisfied that in the course of the revisional proceeding the assessee, actually and really, did not have the opportunity to contest the facts on the basis of which the learned C.I.T. had concluded that the order of the Assessing Officer is erroneous and prejudicial to the interests of the Revenue. The above is the question to which the Court, therefore, will have to turn to."*

9. In the case at hand, there is a finding by the Tribunal, as noted earlier, that no issue was raised by the CIT in respect of particulars of payment made to persons specified under Section 40A(2)(b) of the Act and even the show cause notice is silent about that.

10. In our view, the Tribunal has not committed any perversity or applied incorrect principles to the given facts and when the facts and circumstances are properly analysed and correct test is applied to decide the issue at hand, then, we do not think that question as pressed raises any substantial question of law.

11. The appeal is devoid of merits and it is dismissed with no order as to costs.

(N.R. BORKAR, J.) **(K.R. SHRIRAM, J.)**