

IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH : KOLKATA

[Before Hon’ble Sri N.V.Vasudevan, JM & Dr.Arjun Lal Saini, AM]

I.T.A No. 385/Kol/2015

Assessment Year : 2006-07

BMEL Infra India Ltd.
Kolkata
[PAN : AACCB 6325 N]
(Appellant)

-vs.-

C.I.T.-3, Kolkata
Kolkata

(Respondent)

For the Appellant : Shri Vigyaneshwar Nath Datta, Advocate
For the Respondent : Shri Bani Brata Dutta, Addl. CIT.Sr.DR

Date of Hearing : 12.04.2017.

Date of Pronouncement : 03.05.2017.

ORDER

Per N.V.Vasudevan, JM

This is an appeal by the Assessee against the order dated 25.03.2015 of C.I.T.(A)-Kolkata-3, Kolkata passed u/s 263 of the Income Tax Act, 1961 (Act).

2. The Assessee is a company which is engaged in the business of trading and exports of metals. For A.Y.2006-07 the assessee filed return of income on 29.11.2006 declaring total income of Rs.8,08,815/-. The return was processed u/s 143(1) of the Act on 03.09.2007 accepting the returned income. Thereafter an order of assessment was passed u/s 144 of the Act determining the total income of the assessee at Rs.4,66,46,815/-. Two additions were made to the total income of the assessee viz. an addition of Rs.4,00,000/- which was claimed as commission expenses in determining the business income of the assessee was disallowed for non deduction of tax at source on the payment of commission and another addition of Rs.4,54,88,000/- was made on account of unexplained cash credit u/s 68 of the Act namely money received on issue of share capital.

3. Against the aforesaid order of assessment the assessee filed an appeal before CIT(A). The CIT(A) vide order dated 28.08.2009 confirmed the order of AO. The assessee preferred further appeal before the Hon'ble ITAT in ITA No.2001/Kol/2009 against the order of CIT(A). The Tribunal by its order dated 10.01.2012 set aside the order of CIT(A) and remanded to the AO for fresh consideration of both the additions made by the AO in the order of assessment. The following were the relevant observations of the Tribunal.:

“At the outset, Ld. Counsel for the assessee stated that the assessment framed is u/s. 144 of the Act and huge additions were made on both issues without affording any opportunity to the assessee and that also ex parte. The Ld. Counsel for the assessee stated that the assessee could not cooperate during the course of assessment proceedings as the records were seized by police department and the relevant documents to support his case could not be furnished. In respect to issue of share application money, CIT(A) quoted the decision of Hon'ble Supreme Court in the case of CIT Vs. Lovely exports (P) Ltd. (2008) 216 CTR 195 (SC) but relied on some wrong quotation, which is not from Lovely Exports (P) Ltd. (supra) and that quotation reads as under:

“In the present case, the details had been furnished to the Assessing Officer much before March, 1999, but he failed to react to the shifting of the burden to investigate into the creditworthiness of the share applicants. Therefore, the appeal is dismissed.”

Hence, Ld. Counsel for assessee fairly requested that these two issues require reconsideration and for that he requested for setting aside to the file of Assessing Officer, so that proper enquiries can be made and proper representation can be made. On the other hand, the Ld. CIT DR Shri T. K. Dutta has not objected to the setting aside of both the issues to the file of Assessing Officer and he conceded the position that assessment was framed u/s. 144 of the Act and even CIT(A) has relied on some wrong conclusion.

4. In the interest of natural justice and fair play, as both issues were adjudicated by lower authorities without providing opportunity of being heard to the assessee as is evident from the orders, we set aside these issues to the file of Assessing Officer to re-adjudicate afresh. In respect to commission expenses, the assessee will file documentary evidences to substantiate its claim of expenses and Assessing Officer will decide on the basis of evidences as per law. In respect to share application money, the Assessing Officer will decide the issue afresh after taking into consideration the evidences filed by assessee in terms of law. Appeal of assessee is allowed for statistical purposes.”

4. The AO passed an order dated 14.03.2013 giving effect to the aforesaid order of the Tribunal in which he made an addition of only Rs.4 crores which was commission payment for non deduction of tax at source. The total income of the assessee was determined by the AO in the said order as follows :-

“Subject to the above discussions total income of the assessee company is computed as under :

Total income as per ITR	Rs.8,08,815.00
Addition : As discussed above in para No.3	<u>Rs.4,00,000.00</u>
Total Income	Rs.12,08,815.00”

5. The CIT in exercise of his powers u/s 263 of the Act was of the view that the aforesaid order of the AO dated 14.03.2013 was erroneous and prejudicial to the interest of the revenue in as much as the AO had not examined the disallowance of the following expenses for non deduction of tax at source u/s 194C of the Act :

“Expenditure to the tune of Rs.97,42,692/- towards Freight, Rs.39,52,2465/- towards loading and unloading and Rs.47,76,501/- towards clearing and forwarding charges respectively.”

6. In response to the show cause notice u/s 263 of the Act the assessee pointed out that the original order of assessment u/s 144 of the Act was passed by the AO on 31.12.2008 and in that order the expenses which are set out by CIT in the show cause notice u/s 263 of the Act were accepted and allowed as deduction. The show cause notice u/s 263 of the Act seeks to revise the order dated 31.12.2008 though in the show cause notice a reference has been made to the order dated 14.03.2013 passed by the AO giving effect to the directions of the Tribunal u/s 254 r.w.s.143(3) of the Act. The assessee pointed out that in the order passed u/s 144 of the Act dated 31.12.2008 only two additions were made namely disallowance of commission and addition on account of unexplained cash credit namely receipt of share capital. These were the subject matter of the appeal before CIT(A) and ultimately before the Tribunal. The AO while giving effect to the order of the tribunal is not competent to look into any other aspect,

more so the item of expenditure set out by CIT in the show cause notice u/s 263 of the Act. In other words, the assessee submitted that in the garb of revising the order dated 14.03.2013 passed by the AO u/s 254 r.w.s.143(3) of the Act the CIT virtually seeks to revise the order dated 31.12.2008 passed by the AO u/s 144 of the Act. (the original order of assessment). The assessee pointed out that the time limit for revising the said order dated 31.12.2008 had already expired i.e. the period of two years from the end of the financial year in which the orders sought to be revised are to be passed as laid down in section 263(2) of the Act. The order sought to be revised in the show cause notice was virtually the order dated 31.12.2008. The period of limitation would end in so far as the said order is concerned dated 31.03.2011.

7. The CIT firstly held that the power u/s 263 was very wide and that for lack of proper inquiry by the AO while concluding the assessment the power u/s 263 can be invoked. With regard to the contention of the proposed action was barred by limitation. The CIT held as follows :-

“The contention of the assessee that the case is barred by limitation can not be accepted because the relevant date and order for limitation purposes is 14.03.2013 and the provisions of Sec 263(3) the case of the assessee is covered. In respect of the second argument of the assessee regarding the issue having been adjudicated by the Hon'ble ITAT, it may be mentioned that the Hon'ble Tribunal has merely set aside the order of the AO and it has not decided the issues on merits. Hence, the entire case and all the issues were open before the AO and while passing the assessment order after set aside by the Hon'ble ITAT, he has failed to look into the aspect of TDS in respect of payment of freight, loading & unloading charges and clearing and forwarding charges. This makes the order of the AO dtd 14.03.2013 prejudicial to the interest of revenue as well as erroneous. The AO has not examined all facts and details, or made necessary enquiries, while allowing expenditure to the assessee which has resulted in wrong assumption of facts and incorrect application of law. The assessment order is therefore erroneous and prejudicial to the interest of revenue. I am of the opinion that the case has to go back to the A.O. for fresh assessment after examining all the facts and submissions of the assessee.”

8. Aggrieved by the order of CIT the CIT has preferred the present appeal before the Tribunal.

9. The Id. Counsel for the assessee reiterated the submissions as were made before CIT in reply to the show cause notice u/s 263 of the Act. He further placed reliance to the decision of the Hon'ble Supreme Court in the case of CIT vs Alagendran Finance Ltd. 293 ITR 1(SC). In the aforesaid decision the assessment of the assessee for A.Y.s.1994-95 to 1996-97 was completed u/s 143(3) of the Act and in such assessments the assessee claimed for deduction on account of Lease Equalisation Fund was accepted by the AO. Thereafter proceedings u/s 148 of the Act was initiated in respect to some other item of income not related to lease equalization fund and an order of assessment was made. The CIT in exercise of his powers u/s 263 of the Act revised the reassessment order u/s 148 of the Act. In that he directed the AO to verify and assess the lease equalization fund. The question before the Hon'ble Supreme Court was whether the order u/s 263 of the Act was barred by limitation in as much as it sought to revise the original order of assessment in the garb of revising the order of reassessment passed u/s 148 of the Act. The Hon'ble Supreme Court held as follows :-

“25. We, therefore, are clearly of the opinion that keeping in view the facts and circumstances of this case and, in particular, having regard to the fact that the Commissioner of Income-tax exercising his revisional jurisdiction reopened the order of assessment only in relation to lease equalisation fund which being not the subject of the reassessment proceedings, the period of limitation provided for under sub-section (2) of section 263 of the Act would begin to run from the date of the order of assessment and not from the order of reassessment. The revisional jurisdiction having, thus, been invoked by the Commissioner of Income-tax beyond the period of limitation, it was wholly without jurisdiction rendering the entire proceeding a nullity.”

10. Our attention was also drawn to the decision of the Hon'ble Bombay High Court in the case of Ashoka Buildcon Ltd. Vs ACIT 325 ITR 574 (Bom) wherein on identical facts the Hon'ble Bombay High Court held that notice u/s 263 of the Act issued on the

issues unrelated to grounds on which the assessment was reopened, the period of limitation would start from the original assessment order and not from the reassessment order. Reference was also made to the decision of ITAT Hyderabad Bench in the case of Louis Berger Group Inc. vs ADIT (International Taxation) 152 ITD 587 laying down identical proposition as was laid down in the decision of Supreme Court and Hon'ble Bombay High Court referred to earlier. The Id. DR placed reliance on the order of CIT u/s 263 of the Act.

11. We have given a very careful consideration to the rival submissions and are of the view that the scope of proceedings before the AO pursuant to the order of Tribunal dated 10.01.2012 is very limited namely considering the two additions one on account of disallowance of commission and the second one relating to receipt of share capital u/s 68 of the Act. In the impugned order, the CIT has sought to direct the AO to make enquiries in regard to disallowance of freight loading and unloading charges and clearing and forwarding charges. These items of expenditure was never the subject matter of disallowance in the original order of assessment and was therefore not the subject matter of the dispute before the Tribunal as well as in the proceedings before the AO pursuant to the order dated 10.01.2012. In the garb of revising the order of AO dated 14.03.2013 passed u/s 254 r.w.s.143(3) of the Act, the CT was virtually seeking to revise the order dated 31.12.2008 passed by the AO u/s 144 of the Act which is the original assessment order. The period of limitation for an action u/s 263 of the Act in so far as order dated 31.12.2008 would end on 31.03.2011. The impugned order has been passed by CIT on 25.03.2015 which is clearly barred by time in so far the issue sought to be revised in the impugned order is concerned. We are of the view that the decisions referred to by the Id. Counsel for the assessee are clearly applicable to the facts of the present case and following the ratio laid down therein we hold that the order u/s 263 of the act was barred by limitation and therefore non-est in law. The order u/s 263 of the Act is accordingly quashed. The appeal of the assessee is allowed.

12. In the result the appeal of the assessee is allowed.

Order pronounced in the Court on 03.05.2017.

Sd/-
[Dr.Arjun Lal Saini]
Accountant Member

Sd/-
[N.V.Vasudevan]
Judicial Member

Dated : 03.05.2017.
[RG PS]

Copy of the order forwarded to:

1. BMEL Infra India Ltd., Poddar Point, 113, Park Street, Kolkata-700016.
2. C.I.T.-3, Kolkata.
3. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Asstt.Registrar, ITAT, Kolkata Benches