

(2012) 11 DEL CK 0050
In the Delhi High Court
Case No : ITA No. 119 of 2012

CIT

APPELLANT

Vs

Vodafone Essar South Ltd.

RESPONDENT

Date of Decision : 20-11-2012

Acts Referred:

Income Tax Act, 1961 — Section 143(3), 263, 35ABB, 37

Citation : (2013) 212 TAXMAN 184

Hon'ble Judges : S. Ravindra Bhat, J; R.V. Easwar, J

Bench : Division Bench

Advocate : Rashmi Chopra, for the Appellant; N. Venkatraman with Mr. Kavim Gulati, Raunak Dhillon, Varun Kumar and Mr. Aseem Mewar, for the Respondent

Judgement

Mr. Justice S. Ravindra Bhat

1. The Revenue is aggrieved by an order of the Income Tax Appellate Tribunal (ITAT) dated 24.06.2011 in ITA 3238/Del/2009. The question of law sought to be urged by it is whether the impugned order is in error in setting aside the assessment made by the CIT, after invoking jurisdiction u/s 263 of the Income Tax Act. Briefly, the facts are that the respondent assessee, in its return for assessment year 2004-05, declared loss of Rs. . 234,75,55,861/-; the assessed loss was Rs. 229,92,11,019/- u/s 143 (3) of the Act. The Assessing Officer had allowed a claim for Rs. 35,81,30,408 on account of regulatory fee and Rs. 34,92,168/- towards stamp duty, by the assessment order dated 22.12.2006. The Commissioner of Income Tax sought to exercise his jurisdiction u/s 263 of the Act and issued notice on 10.02.2009, stating that the license fee was, in fact, capital expenditure. The CIT also formed the opinion that loan arrangement charges and stamp duty under the bank guarantee were capital expenditure. The assessee's contentions were rejected and an order was made by the CIT on 30.03.2009. The assessee carried the matter in appeal to the ITAT; that Tribunal by the impugned order allowed the appeal.

2. Counsel for the Revenue contended that the impugned order is in error, over-

looking that regulatory charges were one-time fee and conferred a capital advantage without which the assessee could not start and continue the business. The mere circumstance that the A.O. had enquired into the matter meant nothing because his order made u/s 143(3) did not reflect any application of mind in that regard. The very nature of the expenditure and the stamp duty paid was, conclusively pointed out to the fact but for such down payment the assessee could not continue the telecom business. This constituted a valid and legitimate ground for assumption of jurisdiction u/s 263; the Tribunal consequently fell into an error in setting aside the order of the CIT.

3. Counsel for assessee on the other hand relied upon the notices issued by the A.O. in the first instance during the assessment proceedings u/s 143(3), specifically enquiring into the expense and the amortization of the amounts. Counsel also referred to the assessee's reply dated 06.11.2006, explaining the nature and character of the expenditure. It was argued further that the CIT (Appeal) was made aware after issuance of notice u/s 263 through the assessee's representative's letter dated 24.03.2009 that in fact the decision of the Tribunal in Comsat Max Ltd. Vs. DCIT, ITA 728-701/Del/2005, had also been brought to the notice of the Commissioner. That ruling had considered the question of payment of one time regulatory fee which was held to be revenue expenditure u/s 37 of the Act. Learned counsel emphasized that once this Tribunal ruling as well as the ruling of the another Delhi Bench of the Tribunal in MTNL Vs. CIT (100 TTJ 1) decided on 25th June, 2007 existed and was available, the CIT ought to have dropped the proceedings.

4. Learned counsel next relied on the judgment of the Supreme Court in MALABAR INDUSTRIAL CO. LTD. Vs. COMMISSIONER OF INCOME TAX, , where it was held that where two views are possible, the power u/s 263 cannot be exercised. To the same effect, the judgment reported as Commissioner of Income Tax Vs. G.M. Mittal Stainless Steel (P) Ltd., was relied upon.

5. This Court has considered the submissions as well as the record. The assessee during the course of the original assessment proceedings had been issued a questionnaire by the Assessing Officer which specifically contained enquiries as to the circle wise details of the regulatory fee paid, particulars with regard to bank charges for entries above Rs. 2 lakhs and information about bank guarantee commission paid and lastly details of allowability of amortization of licence fee claimed u/s 35-ABB and the basis thereof. In response to this, it appears that the assessee's representative furnished the details under a cover of letter dated 06.11.2006. The details of regulatory fees paid, bank charges etc. were disclosed. It was after considering all this that the Assessing Officer framed the order u/s 143(3) on 29.12.2006.

6. It is argued that one time entry fee paid by the assessee was in terms of the new Telecom Policy of 1999 which required that if the telecom operator wished to migrate from the existing regulatory regime, it had to pay a revenue based licence fee. It is urged that neither the variable revenue based licence fee

conferred an enduring benefit to the operator nor could it be termed as payment for obtaining licence. The Appellate Commissioner while invoking jurisdiction u/s 263 was of the opinion that the Assessing Officer's order was erroneous and prejudicial to the revenue.

7. It would be apparent from the above narrative that the assessment original framed on 22.12.2006 was after a full enquiry into the nature and effect of the one-time regulatory fee. This fee had to be paid because of a change in the Telecom policy. The Revenue's contention is that the lack of any discussion in Assessing Officer's order is an obvious error, justifying invocation of the power and jurisdiction u/s 263. This clearly amounted to lapse on the part of the Assessing Officer authorizing the Commissioner to re-open/exercise his revisional power.

8. Section 263 authorizes the Commissioner to look into an order or complete the assessment provided the jurisdictional conditions are satisfied i.e. the order in question is erroneous and it is prejudicial to the interest of revenue. The decision in *Gee Vee Enterprise Vs. Additional Commissioner of Income Tax*, is an authority for stating that the expression erroneous "would extend to cases where the assessment order is silent and does not mention any facts relating to the necessary enquiry." This view was later followed in *Duggal & Co. Vs. CIT 1996 (220) ITR 456 (Del)*. In this case, however, the assessee contended that the view taken by the Commissioner was not the only possible one and that even before finalization of his order, the decision in *Comsat (supra)* rendered by the Delhi Tribunal by order dated 30.01.2009 was specifically brought to the notice. It specifically mentions that such a licence fee does not confer an enduring benefit or advantage and that it would fall in the Revenue field. The relevant extract of the citation too was reproduced in the letter dated 24.03.2009. However, the Commissioner in his order u/s 263 did not even advert to it. In these circumstances, this Court is of the opinion that the view adopted by the Assessing Officer was clearly one among the two plausible views that could have been taken which clearly dis-entitled the CIT (Appeal) to exercise his jurisdiction u/s 263, in terms of the decision of the Supreme Court in *Malabar Industrial Co. Ltd. (supra)*.

9. This Court is conscious that an earlier bench of this Court in *Commissioner of Income Tax Vs. Sunbeam Auto Ltd.*, had held that if there is some enquiry by the A.O. in the original proceedings even if inadequate that cannot clothe the Commissioner with jurisdiction u/s 263 merely because he can form another opinion. It was emphasized here that the notice and questionnaire given to the assessee which were duly replied, were evidence of full and due enquiry about this expenditure. After satisfying himself that they were in fact revenue expenditure, the assessee's claim was upheld u/s 37. The Court in *Sunbeam Auto (supra)* held as follows :

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 u/s 263 of the Act, merely because he has a different opinion in the matter. It is only in cases of "lack of inquiry.

10. In the present case, the records reveal that the assessee was specifically queried regarding the nature and character of the one-time regulatory fee paid by it as well as the bank and stamp duty charges. A detailed explanation in the form of statements and other documents required of by the Assessing Officer were produced at the stage of original assessment. Clearly this was not a case of "No Enquiry". The lack of any discussion on this cannot lead to the assumption that the Assessing Officer did not apply his mind. The proceeding in fact shows that Assessing Officer directed his mind specifically on this aspect and then concluded that the expenditure was in the revenue field. Moreover the decision in Comsat Max Ltd. (supra) has ruled that the expenditure was revenue; it constituted one plausible or reasonable view. Under these circumstances, the Commissioner could not have validly exercised his supervisory or revisionary power u/s 263. As far as the other issues i.e. bank guarantee charges and stamp duty are concerned, this Court is of the opinion that the decision in India Cements Ltd. Vs. Commissioner of Income Tax, Madras, and G. Annamalai Chettiar and Another Vs. Controller of Estate Duty, , conclude the issue. These expenses had to be regarded as falling properly in revenue field. Report further notices that CIT (Appeals) did not specifically furnish any reasons to say why the original assessment order was unsupportable in law, in the final order made by him on 30.03.2009. As a result of the above discussion, this Court is of the opinion that the question of law framed has to be answered in favour of the assessee and against the Revenue. The appeal, being meritless, has to fail and is therefore dismissed.