
(2003) 05 P&H CK 0151
In the Punjab And Haryana At Chandigarh
Case No : IT Appeal No. 69 of 2002

Hari Iron Trading Co.

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 23-05-2003

Acts Referred:

Income Tax Act, 1961 — Section 133A, 263, 263(1)

Citation : (2003) 183 CTR 228 : (2003) 263 ITR 437 : (2003) 131 TAXMAN 535

Hon'ble Judges : N.K. Sud, J;G.S. Singhvi, J

Bench : Division Bench

Advocate : P.C. Jain, for the Appellant; A.S. Tewatia, for the Respondent

Final Decision : Allowed

Judgement

N.K. Sud, J.—The assessee has filed this appeal u/s 260A of the IT Act, 1961 (for short "the Act") against the order of the Tribunal, Delhi Bench, Delhi, dt. 20th July, 2001, whereby its appeal against the order of the CIT, Rohtak, dt. 31st Oct., 2000, has been dismissed.

2. The assessee-firm is engaged in the business of trading of "Saria" on wholesale basis. For the asst. yr. 1998-99, the assessee filed its return on 29th Oct., 1998, declaring a loss of Rs. 1,97,707. This return was initially processed u/s 143(1)(a) of the Act on 16th March, 2000, and, thereafter, notices under Sections 143(2) and 142(1) of the Act were issued for making regular assessment. Ultimately, assessment u/s 143(3) of the Act was framed by the AO on 31st March, 2000, who determined the total loss at Rs. 1,27,011.

3. Subsequently, the assessee received a notice dt. 12th Oct., 2000, u/s 263(1) of the Act to show cause as to why remedial steps may not be taken as the assessment order, dt. 31st March, 2000, in the opinion of the CIT, was erroneous and prejudicial to the interest of the Revenue This opinion had been formed by the CIT on the ground that the AO, while framing the assessment, had not examined the following points :

"(1) During the course of survey operation u/s 133A an amount of Rs. 10,50,000 was surrendered by you but in the return of income the surrendered amount was not shown. The AO failed to examine this issue properly while framing the assessment.

(ii) Proper enquiries/investigation from the parties concerned were not made to ascertain the genuineness of the purchases."

The assessee furnished a detailed reply to the show-cause notice in which it was explained that the AO had made detailed inquiry on both the issues before completing the assessment. On receipt of this reply, the CIT passed order dt. 31st Oct., 2000, which reads as under:

"1. Assessment in this case was completed by the Dy. CIT (Investigation Circle), Gurgaon, u/s 143(3) of the IT Act, 1961, on 31st March, 2000, on a loss of Rs. 1,27,011 as per details given in the assessment order.

2. The assessee-firm is engaged in the business of trading of Saria on wholesale basis. A survey u/s 133A was carried out on the business premises of the assessee-firm on 27th Nov., 1997. At the time of survey the assessee-firm made a surrender of Rs. 50,000 on account of excess cash found and Rs. 10 lakhs on account of excess stock found. The assessee-firm in the return of income did not show the amount of Rs. 10,50,000 so surrendered at the time of survey for the assessment year under consideration. The AO failed to examine this issue while framing the assessment. The AO also failed to make enquiries/investigation from the parties concerned to ascertain and examine the genuineness of the purchases made by the assessee-firm. The difference in stock as per inventories prepared at the time of survey operation was not properly examined and tallied with the books of accounts of the assessee-firm at time of assessment proceedings. Thus, the assessment order, dt. 31st March, 2000, of the AO appears to be erroneous and prejudicial to the interests of the Revenue.

3. On the date fixed for hearing i.e., on 31st Oct., 2000, Shri Ram Krishan Gupta, manager of the assessee-firm, attended the proceedings and filed a written reply. I have gone through the reply filed by the assessee and do not agree with the same. The order passed by the AO without application of mind is held to be erroneous and prejudicial to the interests of the Revenue and is hereby cancelled u/s 263 of the IT Act, 1961. The AO, is, therefore, directed to frame the assessment afresh as per law after allowing reasonable opportunity of being heard to the assessee."

[Emphasis, italicised in print, supplied]

The assessee preferred an appeal before the Tribunal challenging the order of the CIT on legal grounds as well as on merits. The Tribunal has rejected all the contentions of the assessee and dismissed the appeal vide the impugned order dt. 20th July, 2001.

4. Shri P.C. Jain, learned counsel for the appellant, contended that the order of

the CIT was based on an erroneous premise that the AO had not properly examined the issue about surrender of Rs. 10,50,000 by the assessee at the time of survey or that proper investigations from the parties concerned were not made to ascertain the genuineness of the purchases. He contended that a detailed reply had been filed before the CIT in which the detail of inquiries conducted by the AO had been given. He also referred to the order-sheet entries made from time to time and also to various notices issued by the AO and the replies filed in response thereto by the assessee to support his contention that the assessment had been framed after making full inquiries and verification. Copies of the relevant documents as per assessment records have been filed with appeal as Annexures A-1 to A-12.

5. Shri A.S. Tewatia, learned counsel for the Revenue, on the other hand, supported the orders of the CIT and the Tribunal and maintained that no proper inquiry had been made by the AO about the surrendered amount of Rs. 10,50,000 and about the genuineness of the purchases.

6. Since the controversy revolves around the determination of the fact as to whether the AO had made proper inquiries during the assessment proceedings or not, the Department was directed to produce the relevant record.

7. We have heard the counsel for the parties and have perused the record.

8. During the course of survey u/s 133A of the Act in the business premises of the assessee on 27th Nov., 1997, stock lying in the shop was physically verified and the value of the same was worked out at Rs. 54,25,483. The stock as per books on the basis of the bills were calculated at Rs. 44,43,378. Thus, according to the survey team, there was excess stock to the extent of Rs. 9,82,105 outside the books of accounts. Similarly, the cash actually available was also found to be in excess of cash as per books by an amount of Rs. 74,328. Faced with this situation, the assessee surrendered Rs. 50,000 on account of discrepancy in cash and Rs. 10 lacs on account of discrepancy in stock. While filing the return of income on 29th Oct., 1998, the assessee had not included the aforesaid amounts of Rs. 10 lacs and Rs. 50,000 in the returned income. However, while framing the assessment u/s 143(3) of the Act, this fact had duly been noticed by the AO and was raised by him in the various notices issued to the assessee. The assessee had explained that actually there was no discrepancy either in cash or in the stock. It also produced necessary evidence in support of its explanation. The AO, while framing the assessment, did not accept the assessee's explanation in respect of cash and added the same to its total income in the order dt. 31st March, 2000. However, in respect of difference in stock, he accepted the explanation of the assessee that there were mistakes in the calculation of stock as per books inasmuch as stock worth Rs. 9,78,742 which had been received prior to the date of survey had not been taken into consideration while working out the stock as per books. The AO had duly raised this issue in the notices, dt. 6th Oct., 1999, and 10th Jan., 2000, whereby he had required the assessee to produce the relevant books and bills for his verification. The record also shows

that the contention of the assessee was found to be correct on verification and, therefore, the AO had accepted the contention of the assessee that surrender of Rs. 10 lacs had been made due to a bona fide mistake in calculation of stock as per books and that in fact there was no discrepancy in stock. In fact, in the assessment order itself, the AO has given the following office note to explain as to why the addition of Rs. 10 lacs was not being made :

"In this case survey u/s 133A was carried on 27th Nov., 1997, and physical verification of the stock was made. The total value of the stock at the business premises was worked out at Rs. 52,25,483 as per physical verification as against stock of Rs. 43,21,882 as per books. Against this excess stock of Rs. 9,03,601, Shri Ram Kishan Gupta, husband of partner had surrendered an amount of Rs. 10,00,000 at the time of survey. This surrendered income of Rs. 10,00,000 has not been shown in the return filed. Now the assessee has stated that at the time of survey following three bills had been left to be taken in totalling though these bills were duly entered in the account books. The bills are as under:

M/s Aggarwal Enterprises :

Rs.

Bill dt. 29th Oct., 1997

2,83,850

Bill dt. 26th Dec., 1997

2,21,475

Bill dt. 27th Nov., 1997

2,01,447

7,06,781

This claim of the assessee is found to be correct as the same have been found entered above the signatures of the Inspector on the purchase account made at the time of survey u/s 133A.

It has further been claimed that the goods in respect of the following bills had also been received prior to survey and these goods were present in the shop at the time of survey. These were purchased from :

Rs.

(i)

M/s Ashiana Ispat Ltd.

Bill dt Rs. 26-11-1997

1,31,642

(ii)

M/s J.H. Ispat (India) Govindgarh Freight expenses

Bill dt. 26-11-1997

1,06,838 33,482

2,71,961

Copy of the bills and Chungi receipts in respect of the above have been furnished. The excess stock found at the time of survey has therefore, been properly explained.

Sd/-

Dy. CIT"

Record also shows that purchases from various parties had duly been verified as the AO who has placed on record certified copies from such parties.

9. In the light of the above factual background, we have not been able to appreciate as to how the CIT has recorded a finding that the assessment had been framed without application of mind or that difference in stock has not been properly examined. Unfortunately, his order is totally non-speaking and it does not convey as to what according to him should have been the proper examination by the AO. The assessee had filed a detailed reply to his notice u/s 263(1) of the Act which has been rejected without giving any reasons whatsoever. The CIT does not appear to have either perused the records or applied his mind to the detailed reply filed by the assessee. He has not discussed even a single contention raised therein. We have referred to the assessment record and find that the AO had issued various notices on these points and had satisfied himself that the addition of Rs. 10 lacs on account of discrepancy in stock was not called for as there was no discrepancy in stock. The Tribunal has done no better. The case of the assessee on merits has been dealt with in para. 12, which reads as under:

"12. On the merits of the case as to whether the surrender was improperly made and the same could be retracted at the assessment stage on the basis of evidence. I need not say anything at this stage since the matter is now before the AO pursuant to set aside by the CIT u/s 263. All that I would like to observe is that the AO did raise some queries and the assessee filed replies, but not a single sentence is mentioned in the assessment order. The AO chooses to deal with the surrender of cash amounting to Rs. 50,000, but does not say anything about the excess stock of Rs. 10,00,000."

[Emphasis, italicised in print, supplied]

A perusal of the above shows that the Tribunal has based its findings entirely on the fact that there is no mention in the assessment order about the inquiries made by the AO about the discrepancy in stock. This in our view is not the

correct approach as is evident from the provisions of Sub-section (1) of Section 263 of the Act, which reads as under :

"263.--(1) The CIT may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the AO is erroneous insofar as it is prejudicial to the interests of the Revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an "order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.

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 AO shall include :

(i) an order of assessment made by the Asstt. CIT or the ITO on the basis of the directions issued by the Dy. CIT u/s 144A;

(ii) an order made by the Jt. CIT in exercise of the powers or in the performance of the functions of an AO conferred on, or assigned to, him under the orders or directions issued by the Board or by the Chief CIT or Director General or CIT authorised by the Board in this behalf u/s 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 CIT;

(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 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."

A bare perusal of the aforesaid provisions shows that the CIT can exercise powers under Sub-section (1) of Section 263 of the Act only after examining "the record of any proceedings under the Act". The expression "record" has also been defined in Clause (b) of the Explanation so as to include all records relating to any proceedings available at the time of examination by the CIT. Thus, it is not only the assessment order but the entire record which has to be examined before arriving at a conclusion as to whether the AO had examined any issue or not. The assessee has no control over the way an assessment order is drafted. The assessee on its part had produced enough material on record to show that the matter had been discussed in detail by the AO. The least that the Tribunal could have done was to refer to the assessment record to verify the contentions of the assessee. Instead of doing that, the Tribunal has merely been swayed by the fact that the AO has not mentioned anything in the assessment order. During the course of assessment proceedings, the AO examines numerous issues. Generally,

the issues which are accepted do not find mention in the assessment order and only such points are taken note of on which the assessee's explanations" are rejected and additions/disallowances are made. As already observed, we have examined the records of the case and find that the AO had made full inquiries before accepting the claim of the AO (sic- assessee) qua the amount of Rs. 10 lacs on account of discrepancy in stock. Not only this, he has even gone a step further and appended an office note with the assessment order to explain why the addition for allegation discrepancy in stock was not being made. In the absence of any suggestion by the CIT as to how the inquiry was not proper, we are unable to uphold the action taken by him u/s 263 of the Act.

10. Another fact which deserves mention in this case is that in response to the show-cause notice, the assessee had raised a legal issue pointing out that the assessment in its case had been made under effective monitoring of the CIT and had been finalised with his approval. As already observed, the CIT has not bothered to examine the specific objections raised by the assessee in its reply in the impugned order and the Tribunal has rejected the same summarily by observing that the objections were not supported by any material. Both the authorities have failed to take the trouble of even referring to the assessment record. There is a letter No. 180, dt. 23rd April, 2001, by the AO to the CIT, Rohtak, which reads as under :

"No. 810 Office of the Dy. CIT, (Inv.) Circle, Gurgaon. Dt. 23rd April, 2001 To
The CIT, Rohtak. Sir,

Sub : Action u/s 263 in the case of M/s Hari Iron & Trading Co., Gurgaon, for asst. yr. 1998-99--Completion of assessment regarding--request for return of survey file.

Kindly refer to your office letter F. No. CIT/RTK/2000-01/11392, dt. 16th Jan., 2001, on the subject.

The above case was selected for CIT's monitoring as per CIT, Rohtak, letter F. No. CIT/Tech/CIT's/Monitor/Dy. CIT/GGN/1999-2000/8266, dt. 4th/5th Oct., 1999. The case was discussed with the then CIT, Rohtak, from time to time. On 28th March, 2000, the draft order in the above case along with the other cases was submitted vide this office letter No. Dy. CIT/6/12451, dt. 28th March, 2000. The case was discussed with the then CIT and the file of survey u/s 133A conducted on 27th Nov., 1997, was retained by him for going through the same and the CIT said that the same shall be returned along with the approval draft orders, but the same has not been returned so far. Since the assessment for asst. yr. 1998-99 completed u/s 143(3) on 31st March, 2000, has been set aside by the CIT, Rohtak, vide order, dt. 31st Oct., 2000, which is pending. It is requested that the same may kindly be returned at the earliest.

Yours faithfully, Sd/- (RANJIT SINGH) Dy. CIT (Inv.) Circle, Gurgaon.

Ends : As above."

Similarly, in para. 2 of his letter No. Dy. CIT/GGN/1583, dt. 30th May, 2001, to the CIT, the AO has observed as under :

"2. As already submitted from time to time, the above case was selected for CIT's monitoring as per CIT, Rohtak's letter F. No. CIT/Tech/CIT's monitor/Dy. CIT/GGN 1999-2000/8266, dt. 4th/5th Oct., 1999. The case was discussed with the then CIT, Rohtak, from time to time and after his approval, the order was passed on 31st March, 2000, u/s 143(3). Thereafter assessment was cancelled u/s 263 on 31st Oct., 2000, by the CIT, Rohtak. The said assessment is pending."

11. These letters fully support the contention of the petitioner that the case was being monitored by the CIT, Rohtak, from time to time and the assessment order had been passed after a draft order along with the survey file had been forwarded to the CIT for his approval. Once the assessment order had been passed with the approval of the CIT, we are afraid that the successor CIT could not possibly say that the matter had been decided without application of mind by the AO.

12. Consequently, the appeal is allowed, findings of the Tribunal are reversed and the order of the CIT, dt. 31st Oct., 2000, set aside. However, in the circumstances of the case, there shall be no order as to costs.