**(2016) 09 GUJ CK 0055**

**In the Gujarat High Court**

**Case No :** Special Civil Application Nos. 5813 with 5815 of 2004

Synbiotics Ltd APPELLANT

Vs

Union of India RESPONDENT

**Date of Decision :** 26-09-2016

**Acts Referred:**
Income Tax Act, 1961 — Section 143(3), Section 147, Section 263

**Citation :** (2017) 394 ITR 179

**Hon'ble Judges :** Akil Kureshi and A.J. Shastri, JJ.

**Bench :** Division Bench

**Advocate :** Mr B.S. Soparkar, Advocate, for the Petitioner No. 1; Mr K.M. Parikh, Advocate, for the Respondent No. 1 - 3

**Final Decision :** Disposed Off

# Judgement

Akil Kureshi, J. (Oral)—These petitions arise in common background and involve the same assessee. We may notice the facts from Special Civil Application No.5813/2004.

2. The petitioner is a limited company registered under the Companies Act and is engaged in the business of manufacturing and marketing of bulk drugs, formulations etc. For the assessment year 19931994, the petitioner filed the return of income on 29.12.1993 declaring a total loss of Rs.1.29 crores (rounded off). The Assessing Officer confirmed the assessment under section 143(3) of the Income Tax Act ("the Act" for short) on 29.3.1995 and assessed loss at Rs.22 lacs (rounded off). The assessee filed appeal against such order. CIT(Appeals) by an order dated 24.3.1999 assessed the loss at Rs.1.26 crores and thereby substantially allowing the appeal of the assessee. While these assessment proceedings thus achieved finality, the department in December 1999 carried out search operations on one F.H. Rizvi of Mumbai. During search operations, the Revenue collected documents and statements suggesting that said F.H. Rizvi was engaged in bogus sales billing activities. He had admitted to have given sale bills without actual sales for a commission of 1% to 2%. The assessee is also one of

 

the major purchasers of raw materials from F.H. Rizvi. The Assessing Officer therefore, issued a notice of reopening of the assessment on 29.11.2000. In such reasons, he had recorded at considerable length the materials at the command of the department to prima facie suggest that the purchases made by the assessee from F.H. Rizvi were bogus. During the assessment, pursuant to such notice, the Assessing Officer confronted the assessee with various purchases made from F.H. Rizvi and also fluctuations in Gross Profit ratio of the company from year to year. Despite opposition from the assessee, the Assessing Officer held that the entire purchases were bogus and that such expenditure should therefore, be disallowed. The Assessing Officer therefore, added back a sum of Rs.62.75 lacs (rounded off) on account of bogus purchases by the assessee from F.H. Rizvi. In the order of assessment dated 26.3.2002 that the Assessing Officer passed under section 147 read with section 143(3) of the Act, he brought down the loss to Rs.63.38 lacs (rounded off) by adding back the amount of Rs.62.75 lacs towards bogus purchases. The Commissioner desired to take such order of assessment in revision, for which purpose, he issued the impugned notice dated 22.1.2004. In the notice itself, he had recorded his reasons for revising the order, relevant portion of which reads as under :

"On going through the records of the income-tax assessment proceedings in your case for assessment year 19931994 and 19951996 it is noticed that the assessment order passed by the Assessing Officer under section 143(3) r.w.s. 147 of the IT Act dated 26.3.2002 for the AY 9394 & 9596 is erroneous in so far as it is prejudicial to the interest of the revenue on the following ground :

Since bogus purchases from Shri F.H. Rizvi and h is associates, a bogus concerns in the nature of non-existing agencies, were disallowed and added to total income, G.P. should invariably be increased and hence the difference of percentage of G.P. is required to be added to the total income computed under section 143(3) r.w.s. 147 dated 26.3.2002.

2. I therefore intend to make an order under section 263 of the IT Act either setting aside the AO''s order under section 143(3) read with section 147 dated 26.3.2002 or modifying the said order so as to rectify the aforesaid error for both assessment yeas."

3. Pursuant to such notice, the Commissioner passed order dated 1.3.2004 in which he directed the Assessing Officer to investigate the angle of increase in Gross Profit ratio.

4. The petitioner has challenged such notice on multiple grounds. Facts in both the petitions being identical, may not be separately recorded.

5. Learned counsel for the petitioner raised the following contentions :

1) The Assessing Officer had made suitable additions whenever he was of the opinion that purchases made by the petitioner were bogus. There was thereafter, no further scope for making any addition.

 

2) The Assessing Officer had made full inquiries. The order of assessment was neither wrong nor prejudicial to the interest of the Revenue. The Commissioner therefore, could not have invoked the powers under section 263 of the Act.

3) The reasons recorded by the Commissioner were totally incorrect that once the Assessing Officer had disallowed the entire expenditure, the question of thereafter increasing the Gross Profit ratio would not arise. The addition would have automatic impact on the Gross Profit ratio.

6. Mr. Parikh for the Revenue, on the other hand, opposed the petition contending that the Commissioner had recorded proper reasons. The Assessing Officer had not ascertained the impact of fluctuating Gross Profit ratio. The purchases made by the assessee from F.H. Rizvi were found to be bogus. The Commissioner should therefore, be permitted to proceed further with the impugned notice.

7. As noted, once the assessment of the petitioner for the assessment year 19931994 was completed and even the appellate order was passed, the department came upon certain materials during survey at the premises of one F.H. Rizvi from which it could be gathered that the purchases made by the petitioner from the said person were bogus. On such basis, the notice for reopening was issued. In the reasons recorded, the Assessing Officer referred to such search in case of F.H. Rizvi and the materials collected by the department during such search operations. Allegedly, the assessee had made purchases from three concerns i.e. F.F. Pharmaceuticals, R.K. Agencies and R.V. Chem and all these purchases, according to the Assessing Officer, were bogus. During the year under consideration 19931994, such total purchases came to Rs.62.75 lacs.

8. During the assessment, the Assessing Officer confronted the assessee with such materials and also called upon the assessee to explain such purchases. The assessee contended that the statement of F.H. Rizvi was confined only to the purchases made by Sun Pharma and other purchases were not tainted. The assessee also contended that the transaction in question actually took place through movement of goods. Both these defences of the assessee were rejected by the Assessing Officer. He held that the statement of F.H. Rizvi included sales other than those made to Sun Pharma and that the assessee failed to establish that purchases from concerns of F.H. Rizvi were genuine. Interalia on such grounds, the Assessing Officer disallowed the entire expenditure and added back the entire sum of Rs.62.75 lacs. The contention of the assessee that if at all the purchases were bogus even the sales should be discarded, was rejected.

9. It can thus be seen that on the available materials, the Assessing Officer disallowed the entire expenditure and added back the full sum of Rs.62.75 lacs shown to have been expended by the assessee for purchases from F.H. Rizvi concerns. There was no further material with the Assessing Officer or even possible avenue for inquiring whether remaining purchases of assessee were genuine or not. There was thereafter, no further scope of making addition in the

 

guise of adjusting the Gross Profit ratio. The disallowance itself would automatically reflect in increasing the Gross Profit from one claimed by the assessee in the original return. Only on this ground, the order of assessment can be stated to be neither erroneous nor prejudicial to the Revenue. If the Commissioner had an angle of further inquiry to be made with respect to purchases from party unconnected to F.H. Rizvi, such angle has not come on record. The notice issued by the Commissioner does not suggest that since it was found that all purchases from F.H. Rizvi by the petitioner were bogus, the Assessing Officer could have inquired into the genuineness of the remaining purchases also. All that the Commissioner conveyed by way of reasons in the impugned notice was that the Assessing Officer did not bear in mind the Gross Profit ratio element. It is true that increasing the Gross Profit is one of the modes adopted by the assessing authority while adjusting the claim by the assessee. This can be so on the basis of materials on record suggesting that the current rate of Gross Profit does not reflect the true financial picture. Nevertheless, the same methodology cannot be applied arbitrarily without at least some materials suggesting that the Gross Profit presented by an assessee was inaccurate. When the entire block of purchases made by the assessee is disallowed, the same would have automatic and direct impact on bringing up the Gross Profit ratio of the assessee during such year. Without there being any further material suggesting that other purchases were also not genuine, further increase of the Gross Profit ratio, was an option simply not available with the Assessing Officer.

10. On such grounds, impugned notice is set aside. The final order of revision is also set aside. The petitions are allowed and disposed of accordingly. Rule made absolute.