Delhi High Court
Commissioner Of Income Tax, Delhi ... vs Contimeters Electricals Privat ... on 2 December, 2008
Author: Badar Durrez Ahmed

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*               THE HIGH COURT OF DELHI AT NEW DELHI

%                              Judgment delivered on : 02.12.2008

+                        ITA No.1366/2008


COMMISSIONER OF INCOME TAX,                                      ..... Appellant
DELHI (CENTRAL) - I

                                    versus


CONTIMETERS ELECTRICALS PVT. LTD.                                ...Respondent
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Advocates who appeared in this case:

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For the Appellant           :      Mr. R.D. Jolly
For the Respondent          :      None

CORAM :-

HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE RAJIV SHAKDHER

1.     Whether the Reporters of local papers may
       be allowed to see the judgment ?          Yes
2.     To be referred to Reporters or not ?      Yes
3.     Whether the judgment should be reported
       in the Digest ?                           Yes

BADAR DURREZ AHMED, J (ORAL)
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This appeal by the revenue under Section 260A of the Income Tax Act, 1961 arises from the order dated 18.01.2008 passed by the Income Tax Appellate Tribunal in ITA No. 1870(Del)2007 relating to the assessment year 2003-04. The revenue is aggrieved by the fact that the Tribunal held that the order passed by the Commissioner of Income Tax under Section 263 of the said Act was without jurisdiction.

The Commissioner of Income Tax had issued a notice under Section 263 of the said Act, in which it was stated that the assessee was not entitled to the deduction under Section 80-IA as the assessee did not fulfill the condition laid down in Section 80IA(7). Section 80IA(7) reads as under:-

> "The deduction under sub-section (1) from profits and gains derived from an undertaking shall not be admissible unless the accounts of the undertaking for the previous year relevant to the assessment year for which the deduction is claimed have

been audited by an accountant, as defined in the explanation below sub-section(2) of Section 288, and the assessee furnishes, along with his return of income, the report of such audit in the prescribed form duly signed and verified by such accountant."

According to the Commissioner of Income Tax since no audit report, duly verified and signed in the prescribed Form no. 10CCB under Rule 18BBB had been furnished along with the return, the condition for claiming deduction had not been satisfied and, therefore, the action of the Assessing Officer in allowing rebate under Section 80-IA was erroneous and prejudicial to the interest of the revenue.

After issuance of the notice the Commissioner of Income Tax passed the order dated 29.03.2007 whereby he held that that he was fully satisfied that the assessment which had been completed by the Assessing Officer was prejudicial to the interest of the revenue and that it was erroneous in as much as the assessee had not satisfied the conditions laid down under Section 80-IA and consequently the deduction under that section for the sum of Rs 14,27,351/- had been wrongly allowed. The CIT(A), therefore, cancelled the assessment which had been earlier framed and directed the Assessing Officer to complete the assessment as per law, in terms of the directions given in the said order.

Being aggrieved by the said order, the assessee preferred an appeal before the Tribunal which was allowed by the Tribunal by virtue of the impugned order. The Tribunal took the view that the provisions of section 80-IA(7) with regard to filing of the audit report along with the return were not mandatory and were merely directory. In coming to such conclusion, the Tribunal referred to the decision of the Gujarat High Court in CIT v. Gujarat Oil & Allied Industries, 201 ITR 325 (Guj). In that decision the provisions of Section 80J(6A) were considered. The wording of Section 80J(6A) is similar to that of section 80-IA(7) which is in issue in the present appeal. The Gujarat High Court took the view that the word „shall which occurs in section 80J(6A) be read as „may and that the requirement of filing of an audit report along with the return was only to be taken as directory in nature. The Gujarat High Court took the view that in case the audit report is submitted at any time before the framing of the assessment, there would be substantial compliance with the provisions of Section 80J(6A).

The Tribunal also relied on the decision of the Madras High Court in CIT v. A.N. Arunachalam, 208 ITR 481 (Mad), which, again, while considering the provisions of Section 80J(6A), took the same view as that of the Gujarat High Court.

We notice that there are other decisions of other Courts taking the same view. The decisions being, CIT v. Shivanand Electricals (1994) 209 ITR 63 (Bombay); Zenith Processing Mills v. CIT (1996) 219 ITR 721 (Guj.); CIT v. Jayant Patel (2001) 248 ITR 199 (Mad) and CIT v. Mahalaxmi Rice Factory (2007) 294 ITR 631 (P&H).

In view of this long line on decisions of various High Courts in considering the provisions of Section 80J(6A) which are similar to the provisions of Section 80-IA(7), we feel that the Tribunal has arrived at the correct conclusion that the requirement of filing the audit report along with the return

is not mandatory but directory and that if the audit report is filed at any time before the framing of the assessment, the requirement of section 80-IA(7) would be met.

Mr R.D. Jolly, appearing on behalf of the Revenue drew our attention to another issue which was sought to be raised before the Tribunal by the revenue. The contention is that the deduction under Section 80-IA was not available because it was not of the specified nature. He referred to the order passed by the Commissioner, Income Tax and submitted that the said Commissioner held that the assessee did not fulfill the conditions mentioned in Section 80-IA to claim the deduction and that supplying of meters to electricity board/companies could not be considered as power generation, transmition or specification, renovation and moderanisation to existing distribution lines. Consequently, the learned counsel submitted that the Commissioner Income Tax had rightly held that the assessment was prejudicial to the interest of Revenue and it was also erroneous as the assessee did not fulfill the conditions laid down in section 80-IA. With regard to this contention, as noted in the impugned order, the representative of the assessee had submitted that w.e.f. 1.4.2000 the eligibility of the assessee was under Section 80-IB. It was also contended that the report of the chartered accountant in Form 10CCB also indicated the section as 80-IB and that according to section 80-IB the assessee was eligible for deduction. It was, therefore, contended that the mention of a wrong section in itself did not give rise to the jurisdiction under Section 263. It was also contended on behalf of the assessee before the Tribunal that the show cause notice issued by the Commissioner of Income Tax did not raise this issue nor was the assessee confronted with this aspect of the matter, that is, that it did not fulfill the requirement of section 80-IA. It was also contended that had the assessee been confronted with this issue it could have explained the position before the Commissioner of Income Tax that the claim had been rightly made by the assessee under Section 80-IB.

The Tribunal considered the rival contentions and referred to the Supreme Court s decision in the case of Commissioner of Customs v. Toyo Engineering India Limited (2006) 7 SCC 592 wherein the Supreme Court noted that the department cannot travel beyond the show cause notice. The Tribunal was of the view that the ground that the assessee had not fulfilled the conditions laid down under Section 80-IA did not form part of the show cause notice. The Tribunal accepted the argument of the assessee that the Commissioner of Income Tax did not even call for any explanation on this issue and, therefore, the assessee did not have any opportunity to meet this ground. The Tribunal was of the view that it would be against the principles of natural justice that a person who has not been confronted with any ground be saddled with the liability thereof. Consequently the Tribunal held that as the said issue did not form part of the show cause notice and the assessee was not even confronted with it, even before the CIT, it cannot form the basis for revision of the assessment order under Section 263.

On this aspect of the matter also, we are satisfied with the findings and the approach taken by the Income Tax Appellate Tribunal. No substantial question of law arises for our consideration.

The appeal is dismissed.

BADAR DURREZ AHMED, J RAJIV SHAKDHER, J December 02, 2008 kk