IN THE HIGH COURT OF KARNATAKA, DHARWAD BENCH

DATED THIS THE 20TH DAY OF JULY, 2022

PRESENT

THE HON'BLE MR JUSTICE KRISHNA S.DIXIT

AND

THE HON'BLE MR JUSTICE P.KRISHNA BHAT

INCOME TAX APPEAL NO. 383 OF 2016

BETWEEN:

1. PR. COMMISSIONER OF INCOME TAX,
   CENTRAL BMTC COMPLEX,
   KORMANGALA, BANGALORE.

2. THE DEPUTY COMMISSIONER OF
   INCOME TAX
   CIRCLE-1(3), BANGALORE

...APPELLANTS

(BY SRI. SANMATHI E.I. & Y.V.RAVIRAJ, ADVOCATES)

AND:

M/S ENNOBLE CONSTRUCTION
NO.6/4, ENNOBLE HOUSE,
RAGHAVACHARI ROAD,
BELARY-583101
PAN: AFJPA5974P

...RESPONDENT

(BY SRI. MAYANK JAIN, ADVOCATE)

THIS ITA IS FILED UNDER SECTION 260-A OF THE INCOME TAX ACT, 1961 ARISING OUT OF ORDER DATED 27.11.2015 PASSED IN ITA NO.449/BANG/2014, FOR THE ASSESSMENT YEAR 2009-2010 PRAYING TO DECIDE THE FOREGOING QUESTION OF LAW AND/OR SUCH OTHER QUESTIONS OF LAW AS MAY BE FORMULATED BY THE HON'BLE COURT AS DEEMED FIT AND ETC.

THIS ITA HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 14.07.2022, COMING ONF OR PRONOUNCEMENT THIS DAY, **KRISHNA S.DIXIT, J**, DELIVERED THE FOLLOWING.

JUDGMENT

This appeal by the Revenue seeks to lay a challenge to the order dated 27.11.2015 made by the Income Tax Appellate Tribunal, 'B' Bench, Bangalore (hereinafter 'ITAT'), whereby the statutory appeal of the Assessee in ITA No.449/BANG/2014 having been favoured the addition made by the Assessment Officer on account of transport creditors, is set at naught, and to that extent the Assessee has been relieved of tax liability.

2. The Revenue in its Memorandum of Appeal filed under Section 260A of the Income Tax Act, 1961 (hereinafter '1961 Act') had framed the following question, as the substantial question of law:

> *"Whether on the facts and in the circumstances of the case, the Tribunal is justified in law in setting aside the disallowance of Rs.5,89,49,503/- claimed as Transport Creditors by following decisions in cases of CIT V/s Usha Stud Agricultural Farms (301 ITR page 384) and CIT V/s Prameshwar Bohra decided by Rajasthan*

High Court though credit worthiness of the transport creditors was not established by the assessee and not appreciating that the assessee had not provided even the identity of the Transport Creditors in the absence of which the assessing authority was not in a position to conduct further enquiries"?

Subsequently, vide memo dated 22.03.2019, it had proposed the following "Redrafted Substantial Question of Law":

"Whether in the facts and circumstances of the case, the Tribunal is justified in setting aside the addition made by the assessing authority towards the unsubstantiated transport creditors by holding that these pertain to earlier years accepted by the assessing authority as genuine, which is incorrect and as such order of the Tribunal perverse?"

A Co-ordinate Bench of this Court vide order dated 22.03.2019 admitted the appeal on the redrafted substantial question of law.

3. After service of notice, the Assessee having entered appearance through its counsel opposed the appeal making submissions in justification of the impugned order and the reasons on which it has been constructed:

that, the addition could not have been made by the AO without rejecting the books of accounts and sans making a best judgment assessment even in the failure to produce the material evidencing the business expenditure; that the question re-framed by the Revenue on which the appeal has been admitted lacks characteristics of a 'question of law' and much less a 'substantial question of law'; that when all the records & documents having been seized were in the custody of CBI, the AO ought to have summoned the same & examined, if they could support the claim of Assessee; this having not been done, the appeal is liable to be dismissed; lastly, that in any circumstance, the AO could not have made use of proceedings for the preceding Assessment Year. So arguing, he seeks dismissal of the appeal.

II. BRIEF FACTS OF THE CASE:

(a) The Assessee, a partnership firm was engaged in the business of construction & transport operations during the relevant period. It had filed IT Return for the Assessment Year 2009-10 claiming an expenditure of

Rupees 70,68,28,574/- allegedly paid to 'Transport Creditors'. During the course of Scrutiny Assessment Proceedings, the Assessment Officer (hereinafter 'AO') had asked the Assessee to furnish details of Transport Creditors to whom the payment was made. The Assessee expressed his inability to produce any documents contending that his entire business office having been raided all books files, registers, etc have been seized by the CBI.

(b) The AO rejected the explanation offered by the Assessee as above observing that for the Assessment Year 2008 -- 2009, a similar addition was made based on the declaration of excessive trade liability by the Assessee which worked out to 8.39% and therefore, the same should be taken as the ratio for the Assessment Year in question as well; on that basis, he worked out the sum at Rupees 5,89,49,503/- and added it to the income of the Assessee, for the purpose of levy.

(c) The Assessee had called in question the said addition in the subject appeal inter alia contending that unless the books of accounts were rejected under Section 145 of the 1961 Act, the AO acting under Section 143(3) could not have made the ad hoc disallowance; the fact that for the Assessment Year 2008 – 09 some addition was made under the said head, cannot be the sole basis for making such an addition for the subsequent Assessment Year, each assessment being an independent compact. He also pleaded about CBI raid & seizure of all documents, not even a piece of paper being in his custody or power.

(d) The ITAT substantially upheld the version of Assessee and granted relief by setting aside the addition made by the AO. Aggrieved thereby, the Revenue has preferred this appeal under the provisions of the 260A of the 1961 Act with the substantial questions of law hereinabove mentioned.

III. Having heard the learned counsel for the parties and having perused the appeal paper–book, we decline indulgence in the matter for the following reasons:

A. <u>THE RIGHT OF APPEAL U/S 260A; ITS SCOPE & CONTENT:</u>

(i) The Kerala High Court in *CIT vs. WOONDUR JUPITAR CHITS (P) LIMITED*[1] had pointed out that the provisions of 1961 Act providing for reference on a question of law arising out of an order of the Tribunal were 'Archaic' and therefore there was an eminent need for rationalisation of the same. Accordingly, the Parliament vide Finance (2) Act, 1998 inserted inter alia Sections 260A & 260B in Chapter – XX of the 1961 Act to provide for an appeal against the orders of Tribunal directly to the High Court, within whose jurisdiction, Office of the AO is situate. Sub-section (1) of Section 260A reads as under:

> *"S. 260A. (1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal [before the date of establishment of the National*

[1] 213 ITR 73

Tax Tribunal], if the High Court is satisfied that the case involves a substantial question of law."

(Other sub-sections not being much relevant are not reproduced)

Appeal lies only if the case involves a substantial question of law, which the memorandum of appeal, ideally speaking, has to precisely state. However, if the High Court is satisfied that a substantial question of law is otherwise involved, it may itself formulate such question and admit the appeal. Appeal shall be ordinarily heard on the question so formulated. However, there is nothing, in the Act which would abridge the power of Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, in addition to or substitution of the one framed in the appeal memo, if it is satisfied that the case involves such other question.

(ii) The appeal, be it of the Revenue or the Assessee, lies only "… if the High Court is satisfied that the case involves a substantial question of law …" Sub-Section

(7) of Section 260A states that the provisions of Code of Civil Procedure, 1908 relating to appeals to the High Court, as far as may be, apply to these appeals. This Section is analogous to Section 100 of CPC. Noticeably, both these Sections i.e., Section 260A of 1961 Act and Section 100 of CPC do not define the expression 'substantial question of law'. The Apex Court vide *SANTOSH HAZARI vs. PURUSHOTTAM*[2] is of the view that the word 'substantial' qualifies the term 'question of law'; it means a question having substance, essential, real, of sound worth, important or considerable. The substantial question of law on which an appeal shall be heard need not necessarily be a question of law of general importance. To be 'substantial', a question of law must be debatable and it must have a material bearing on the decision of the case in the sense that if answered either way insofar as the rights of the parties are concerned.

[2] 251 ITR 84

(iii) It is profitable to see what Kanga & Palkhivala's 'Law and Practice of Income Tax', Vol. II, Eleventh Edn., Lexis Nexus at pages 3316 – 17 states:

> *"…A question is a substantial question of law if: (i) it directly or indirectly affects substantial rights of the parties; or (ii) it is of general importance; (iii) it is an open question in the sense that the issue has not been settled by a pronouncement of the Supreme Court; (iv) it is not free from difficulty; or (v) it calls for a discussion for alternative view… The findings are based on no evidence; (vii) relevant admissible evidence has not been taken into consideration; (viii) inadmissible evidence has been taken into consideration; (ix) legal principles have not been applied in appreciating the evidence; or (x) the evidence has been misread…"*

These tests are stated to be illustrative and in no way exhaustive of the powers of the High Court to entertain an appeal, if there is other substantive ground of law. It hardly needs to be stated that a provision for appeal should be liberally construed and read in a reasonable & practical manner.

B. AS TO SUBSTANTIAL QUESTION OF LAW IN THIS CASE:

(i) A Co-ordinate Bench of this Court vide order dated 22.03.2019 has admitted this appeal on the question as 'Redrafted' vide Memo dated 22.03.2019 filed by the Revenue. The said question needs to be construed keeping in view sub-section (1) of Section 37 of the Act. This provision apparently is the residuary section extending the allowance to the items of expenditure not covered by other sections. 'Expenditure' inter alia in the text & context of Section 37 primarily denotes the idea of spending or paying out or paying away. It is something that has gone irretrievably. Expenditure is not necessarily confined to the money which has been actually paid out, but it covers a liability which has accrued due or incurred, although it may have to be discharged at a future date.

(ii) The AO appears to have proceeded on the premise that the payment made towards transport has not

been established by producing the evidentiary material. What he failed to see that the business premises of the assessee having been admittedly raided by the CBI, all books of accounts, registers & files were not in his custody or power. The question of failing to produce evidence would have arisen only if the assessee with due diligence could produce some evidence that was in his custody or power and still failed to, sans any plausible explanation therefor; in a case where, he is disabled from producing any such evidentiary material because of raid & seizure by the statutory body like CBI, no blame can be laid at his door step. There is another related aspect touching the duty of the AO, which we would advert to, a bit later.

(iii) Now, let us examine the nature of 'substantial question of law' as redrafted by the Revenue on which the Co-ordinate Bench admitted this appeal. The said question which is already reproduced above, has been framed keeping in view the provisions of

sub section (1) section 37, which has the following text:

> *"Any expenditure (not being expenditure of the nature described in section 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee) laid out or expended wholly and exclusively for the purpose of the business or profession shall be allowed in computing the income chargeable under the head "Profits and gains of business or profession…".*

The text of this sub section shows its building blocks such as: 'expenditure', 'wholly and exclusively' and 'incurred for the business'. The burden of proving that the expenditure is incurred 'wholly and exclusively for the purpose of business is on the Assessee' vide *JASWANT vs. CIT*[3]. The question whether an item of expenditure was wholly and exclusively laid out for the purpose of Assessee's business has to be decided on the basis of evidentiary material that prima facie establishes these 'building blocks'.

[3] 212 ITR 24

(iv) The question on which the appeal is admitted involves, in the first place, the ascertainment of facts as to the business expenditure in question, and in the second, the application of the correct principle of law to the fact so ascertained. Therefore, essentially such a question is only a mixed question of fact & law as observed by the Apex Court in *COMMISSIONER OF INCOME TAX vs. GREAVES COTTON*[4]. Therefore, we are not sure if the Revenue could maintain this appeal on the subject question. Added, there is a certain difference between an ordinary question of law on the one hand and a mixed question of fact & law, on the other vide *JANARDHANA RAO vs. JCIT*[5]. Ordinarily, to answer a question of law of the kind, there is no need to consult the statute book; such a question can be answered just by turning the pages of evidentiary record of the Assessment Proceedings concerned. Therefore, the said question is miles away

[4] 68 ITR 200 (207)
[5] 273 ITR 50

from the precincts of Section 260A which employs the expression 'substantial question of law'.

C. AS TO BURDEN OF PROOF AND IMPOSSIBILITY OF ITS DISCHARGE:

(i) As already mentioned above, the burden of proving the expenditure incurred 'wholly and exclusively' for the purpose of business, is on the Assessee. This burden needs to be discharged by the preponderance of probability. What should be the quantum & quality of evidentiary material to discharge such a burden is a matter lieing in the discretion of AO and that the said discretion, as any, has to be exercised in accordance with the rules of reason & justice. It was the specific case of Assessee that his business premises having been raided, the CBI had seized & taken into custody all the registers, files, record & documents concerning the business in question and therefore he was disabled from producing any material to prove the payment towards transport credit. The factum of CBI raid & seizure are not in

dispute. Even proceedings of the preceding Assessment Year mention that. When all the documents are in the custody of CBI Police, asking the Assessee to produce the same, virtually amounts to asking him to do the near impossible. Broom's Legal Maxims, Tenth Edn., (Universal) at page 162 says:

> "***Lex Non Cogit Ad Impossibilia***. (Co. Litt. 231 b.) – The law does not compel a man to do that which he cannot possibly perform…"

Sir Walter Scott (1771 - 1832) said: "*…the law in its most positive and peremptory injunctions is understood to disclaim as it does in its general aphorisms, all intention of compelling to impossibilities…*"

(ii) Section 131 of the 1961 Act vests powers of Civil Court in the AO inter alia for compelling the production of books of account & other documents; for this purpose the section, in so, many words equates him with the Civil Court. The arguable

enormity of this power can be seen in the observations of a learned Single Judge of this Court in *SAI RAMAKRISHNA KATURIA vs. UNION OF INDIA*[6] that it avails even against a Consular Head of a foreign country who otherwise enjoys diplomatic immunity under the Diplomatic Relations (Vienna Convention) Act, 1962. Exercising the powers of a Civil Court under the provisions of O. XIII of CPC, the AO can send for the books of accounts & documents that are seized (by a Magistrate) in other proceedings vide *UNION OF INDIA vs. STATE*[7]. Courts have held that this power is coupled with a public duty, to call for the Assessee's books of accounts which are in the custody of a public authority vide *EMC vs. INCOME TAX OFFICER*[8]. There is absolutely no explanation as to why the AO did not choose to invoke this provision in the fitness of things. Nothing prevented him from summoning the

[6] 402 ITR 7 KAR

[7] 42 ITR 753

[8] 49 ITR 650

books of accounts/documents or at least copies thereof from the custody of CBI. The AO having not done his duty, could not have recorded a finding that the claim of Assessee as to transport expenditure was not substantiated.

(iii) There is yet another aspect, which merits a bit deliberation. The books of accounts & documents being in the exclusive custody of the CBI Police, the Assessee except pleading this could not have done anything beyond. Arguably, in a sense, the case of Assessee was one of lack of evidence for proving the expenditure. Absence of evidence at hands is not the evidence of absence. If the Assessee fails to produce cogent evidence to prove the entirety of the claim, it is the duty of the AO to assess the allowable part of the expenditure to the best of his judgment vide *CIT vs. S.P. NAIK*[9]. It is more so because the Assessment Order was made under Section 143(3) without rejecting the books of account under Section 145 of

[9] 235 ITR 94

the Act. The ITAT at paragraph 10 of the impugned order has rightly observed as under:

> *"10. In the case in hand, except excess trade liability addition made for the assessment year 2008-09, there was no other basis to arrive at the conclusion that 8.39% of the transport creditors are not genuine and the same are added by the AO to the income of the assessee. This is no doubt an ad hoc addition and based on estimate but without any basis. …. In case the creditors are brought forward balance from the earlier year, then there is no question of treating the same as non-genuine simply because the said creditors were subject to the scrutiny of the AO for the assessment year 2008-09 and after making a disallowance of Rs.15 crores, the AO accepted the rest of the creditors as genuine. Having accepted the balance creditors as genuine, if carried forward to the subsequent assessment year, cannot be treated as non-genuine. … Therefore, where the creditors are carried forward to the next year, the genuineness of the same cannot be doubted having been subject to scrutiny in the earlier assessment year and once the AO accepted the creditors as genuine in the earlier year, the same cannot be treated as non-genuine in the subsequent assessment year."*

In the above circumstances, this Appeal being devoid of merits, is liable to be rejected and accordingly it is, costs having been made easy.

Before parting with this case, this court places on record, its deep appreciation for the able assistance and research rendered by its official Law Clerk Cum Research Assistant, Mr. Faiz Afsar Sait.

Sd/-
JUDGE

SD/-
JUDGE

KMS