$~

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 28th March, 2019
Decided on: 16th April, 2019

\+ **ITA 757/2005**

THE COMMISSIONER OF INCOME TAX. ..... Appellant

Through: Mr Asheesh Jain, Senior Standing Counsel and Mr. Sanjay Kumar, Junior Standing counsel for Revenue with Mr. Adarsh Kr. Gupta and Mr. Manish Sharma, Advocates.

versus

KOHINOOR FOODS LIMITED ..... Respondent

Through: Mr Salil Kapoor and Mr. Sumit Lanchandwani, Advocates

\+ **ITA 771/2005**

THE COMMISSIONER OF INCOME TAX. ..... Appellant

Through: Mr Asheesh Jain, Senior Standing Counsel and Mr. Sanjay Kumar, Junior Standing counsel for Revenue with Mr. Adarsh Kr. Gupta and Mr. Manish Sharma, Advocates.

versus

KOHINOOR FOODS LIMITED ..... Respondent

Through: Mr Salil Kapoor and Mr. Sumit Lanchandwani, Advocates

\+ **ITA 785/2005**

THE COMMISSIONER OF INCOME TAX. ..... Appellant

Through: Mr Asheesh Jain, Senior Standing Counsel and Mr. Sanjay Kumar,

Junior Standing counsel for Revenue with Mr. Adarsh Kr. Gupta and Mr. Manish Sharma, Advocates.

versus

KOHINOOR FOODS LIMITED ..... Respondent

Through: Mr Salil Kapoor and Mr. Sumit Lanchandwani, Advocates

CORAM: JUSTICE S. MURALIDHAR
JUSTICE I.S.MEHTA

J U D G M E N T

Dr. S. Muralidhar, J.:

1. These are three appeals by the Revenue, under Section 260-A of the Income tax Act, 1961 ('Act') against the common order dated 31st January 2005 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA Nos.2442, 2443 and 2444/Del/2004 for the Assessment Years (AYs) 1999-2000, 2000-2001 and 2001-2002.

2. By an order dated 28th March 2019 of this Court, the name of Assessee was permitted to be corrected from 'Satnam Overseas Ltd.' to its present name i.e. Kohinoor Foods Ltd.

Question of law

3. The question of law framed by this Court while admitting these appeals on 21st November 2008 reads as under:

> "Whether the Commissioner of Income Tax correctly exercised his powers under Section 263 of the Income Tax Act, 1961 in cancelling the assessment order passed under Section 143(3) of

the said Act and in directing the assessing officer to pass a fresh assessment order on all issues, except those, decided by the Commissioner of Income Tax (Appeals)?"

Background facts

4. The background facts are that the Respondent Assessee is engaged in manufacturing and trading of rice. For each of the AYs in question its return was picked up for scrutiny and an assessment order was passed by the Assessing Officer (AO) under Section 143 (3) of the Act. The assessment order for AY 1999-2000 dealt with two of the issues viz., (i) claim of reduction by the Assessee under Section 80 HHC and (ii) deferred revenue expenditure. For AY 2000-2001 four issues were dealt with viz., (i) claim under Section 80 HHC, (ii) claim under Section 80 IA, (iii) issue relating to Section 43B of the Act and (iv) issue relating to Section 40A (7) of the Act. As far as AY 2001-02 is concerned the assessment order under Section 143(3) of the Act dealt with the issues of (i) claim under Section 80 HHC, (ii) depreciation and (iii) claim under Section 80 IA.

5. By the common order dated 23rd November 2004 the Commissioner of Income Tax (Appeals) disposed of the assessee's appeals confirming the assessment orders for the two AYs 1999-2000 and 2000-2001 and issued necessary directions in relation to the assessment order for AY 2001-02.

Show Cause Notices

6. The Commissioner of Income Tax ('CIT') invoked the revisional jurisdiction under Section 263 of the Act and issued a show cause notice (SCN) dated 8th March 2004 to the Assessee as regards AYs 1999-2000. For

AY 2000-2001 a separate SCN dated 16th February 2004 was issued. In the said SCNs the following issues were referred to: given the average rate of Rs.2887 per quintal of rice, the figures of the closing stock of rice as end of the previous financial year (FY) relevant to the AY in question would be much more than the figure arrived at in terms of the actual sales of rice. This indicated a suppression of sales. This got further confirmed by the packing expenses which were much more than the claim for the preceding year by 83%. The corresponding increase in the sales as compared to the immediately previous AYs was only 33%. The AO had failed to take note of the serious discrepancies and rushed to complete the assessment.

7. Another issue raised by the CIT was that the AO had failed to examine the substantial revenue expenses claimed by the assessee under several heads though *prima facie* some of these expenses appeared to be personal or capital in nature. For example, the detail of the foreign travel expenses pertaining to the travel by the relatives of the assessee's directors. Further a portion of the advertisement expenditure and business promotion expenditure appeared to be towards land and building which may have brought an advantage of agreeable nature of the assessee. Therefore, these were to be treated not as revenue expenses and ought to be disallowed.

8. It was further noted that brokerage and commission expenses had been allowed by the AO without examination and verification. Likewise he also accepted the assessee's computation of the deduction under Section 80 HHC. Lastly, the requisite proof of payment of bonus and sales tax was not furnished and, therefore, these ought to have been disallowed under Section

43B of the Act.

Order of the CIT under Section 263

9. After considering the reply of the Assessee to the above SCNs, orders were passed by the CIT under Section 22 of the Act on 25th March 2004 (in respect of AYs 1999-2000 and 2000-2001) and 29th March 2004 (in respect of AY 2001-2002). The CIT held that the Assessee's contention that it had furnished complete details of purchase and sales was only partly correct. The quality-wise breakup of rice purchased and sold i.e. Basmati, Tibar, Dubar and Kinki etc. was not furnished. It was noted that out of the Assessee's total sales for all products aggregating to Rs.340 crores, sale of rice constituted Rs.244 crores i.e. over 70% for which no item-wise or quality-wise breakup was furnished.

10. As regards closing stock, the CIT observed that their full particulars were not furnished. The Assessee produced its stock register but it was found that they did not contain the record of different qualities of rice. Only the aggregate quantity of rice received and dispatched was recorded therein. However, the sales receipts showed that the different quality of rice was mentioned therein. Consequently, the CIT held that it was not correct to apply the average rate of rice in the closing stock to the total quantity of rice sold since the product mix of the rice in the closing stock was significantly different from the product mix of the rice sold. According to the CIT the Assessee was unable to reconcile the sale of different qualities of rice vis-a-vis the availability of the respective quality of rice.

11. The CIT noted that there was no explanation for the inventory being taken only once a year and that too close to the end of the year. These contained predominantly high quality higher priced products whereas sales made throughout the year were of medium or low price rice. Referring to the decision of the Supreme Court in ***Rampyari Devi Saraogi v. Commissioner of Income Tax 67 ITR 84*** and ***Tara Devi Aggarwal v. Commissioner of Income Tax 88 ITR 323*** the CIT concluded that:

> "the Assessing Officer's failure to make the inquiries which were called for in the circumstances of the case make the assessment order erroneous in as much as it is prejudicial to the interests of the revenue."

12. Reference was also made to the decision in ***Malabar Industrial Co. Ltd. v. CIT 243 ITR 83, Duggal & Co. v. CIT 220 ITR 456 and Gee Vee Enterprises v. Addl. CIT 99 ITR 375.*** The decision of the Guwahati High Court in ***Tarajan Tea Co. Pvt. Ltd. v. CIT 205 ITR 45*** was also referred to**.** The matter was remanded to the AO to consider the issues afresh. Detailed directions were issued as to how the AO should proceed in the matter.

13. The conclusions in the impugned order of the CIT read as under:

> "16. While making inquiries in respect of the issue of possible suppression of sales by the assessee, the Assessing Officer will particularly look into the following and record his findings on each of the issues before completing the assessments:-
>
> (i) genuineness and correctness of purchases made by the assessee;
>
> (ii) genuineness and correctness of sales made by the assessee;

(iii) quantitative analysis in respect of purchase, production and sale of rice and other products dealt by the assessee;

(iv) the production process of the assessee and the yield, shortages, wastages etc. and whether these are line with the industry trends;

(v) whether the assessee's contention that quality-wise stock registers are not maintained in the industry is correct and whether in the absence of such record, it is possible to determine the assessee's income correctly;

(vi) quantitative analysis in respect of packing material and whether the assessee's explanation regarding the steep increase in packing expenses is justified.

17. If considered necessary, the provisions of section 142(2A) may also be invoked."

14. The above order of the CIT was challenged by the Assessee by filing three appeals being ITA Nos.2442, 2443 and 2444/Del/2004 in the ITAT. It was *inter alia* contended by the Assessee before the ITAT that the CIT had erred on facts and law in assuming that the AO had not made proper quantitative analysis or conducted necessary examination of the assessee's manufacturing and trading results. It was further submitted that the CIT was in error in examining the foreign travel expenses of the relatives of the directors.

Impugned order of the ITAT

15. The ITAT framed the following issue which arose for consideration:

"whether the assessments had been framed after making proper enquiries, as contended by the assessee both before the CIT and

during the course of instant proceedings."

16. The ITAT disagreed with CIT that sales had been suppressed by the Assessee. It was held that:

> "No sales made have been found to be suppressed. Sales are fully verifiable and are all through cheques, which are locally made and export sales are also fully verifiable. There is also no finding that any sales made were found not having been account ted for. There is also no basis to even suspect that what was sold as superior quality was sold at the rate of inferior quality, since all the sales are verifiable. In fact as stated above no record either of production of superior quality or sale thereof is being maintained."

17. It was held that if a uniform rate of closing stock of rice was applied it would give a misleading result since rice is of different qualities and on different rates have been sold to parties and it is bound, therefore, to give a misleading result. The ITAT then enquired into the merits of the claims and held that the order of the AO cannot be held to be erroneous.

18. This Court has heard the submissions of Mr Asheesh Jain, learned Senior Standing Counsel for the Revenue and Mr. Salil Kapoor and Sumit Lanchandwani, learned counsel for the Assessee.

Analysis and reasons

19. The scope of the power of the CIT under Section 263 of the Act has been explained in several decisions. Two essential requirements are that the CIT must find the order of the AO to be both erroneous and prejudicial to the interests of the Revenue. This conclusion has to be reached by the CIT after

undertaking some basic inquiry into the issues which are considered to have been either not inquired into at all by the AO or in regard to which the conclusions are found to be erroneous. Illustratively, in ***Income Tax Officer v. DG Housing Projects Limited (2012) 343 ITR 329 (Del)***, this Court observed as under:

> "..... An order of remit cannot be passed by the Commissioner to ask the Assessing Officer to decide whether the order was erroneous. This is not permissible. An order is not erroneous, unless the Commissioner hold and records reasons why it is erroneous. An order will not become erroneous because on remit, the Assessing Officer may decide that the order is erroneous. Therefore, the Commissioner must after recording reasons hold that the order is erroneous. The jurisdictional precondition stipulated is that the Commissioner must come to the conclusion that the order is erroneous and is unsustainable in law. It may be noticed that the material which the Commissioner can rely includes not only the record as it stands at the time when the order in question was passed by the Assessing Officer but also the record. Nothing bars/prohibits the Commissioner for collecting and relying upon new/additional material/evidence to show and state that the order of the Assessing Officer is erroneous."

20. In the present case, the inquiry undertaken by the AO has been referred to by the ITAT in paras 15 and 16 of its impugned order. The ITAT noted that the AO did examine the Assessee's production record and books of account. The ITAT noted that the nature of the business "remains the same as in the past" as does, "the method of accounting production". It was noted that Assessee had "duly furnished the details of opening stock, closing stock, sales and production i.e. consumption of paddy etc." The ITAT observed:

> "The Assessing Officer has examined the production records and Books of Accounts. We also notice from the order of assessment

> that AO has recorded a finding that the nature of business continues as in the past. It is a matter of record that the assessee has been maintaining statutory production records and the production and sale of rice has been reflected on the basis of such registers. The sales made are all verifiable and accounts are duly audited. It is also not in dispute that the assessee is engaged in the production of agro based products and as such the production percentage cannot remain uniform from year to year or month to month, more particularly because the production of Rice depends upon the supplies received of paddy and the variety and quality of production of rice achieved from such paddy. Thus, if the quality of supplies of paddy is superior, production percentage of fine quality i.e. wand goes up. However, in case the quality supplied of paddy is inferior, the fine quality of production percentage goes down. The supplies received of paddy, depends upon nature and in case the rains in a particular paddy season is excessive or less, the quality of paddy cultivation deteriorates and as such the production percentage of superior quality of Rice cannot remain uniform. The assessee in fact does not maintain quality wise any separate record of production, as it is neither possible nor was statutorily required."

21. It cannot therefore be said that this was a case of 'no inquiry' by the AO. Added to this is the fact that the CIT has himself not undertaken any independent inquiry to contradict the conclusions reached by the AO and to demonstrate that the order of the AO was erroneous and prejudicial to the interest of the revenue. It is interesting that the CIT, while giving a direction to the AO to make an inquiry, observed in para 23:

> "23. While making inquiries in respect of the issue of possible suppression of sales by the assessee, the Assessing Officer will particularly..."

22. In ***Globus Infocom Ltd. v. CIT [2014] 369 ITR 14 (Del)*** this Court

observed as under:

> "....The use of the word "possible" would indicate that there was no finding and adjudication by the Commissioner and his observations were based on mere suspicion and certainly uncertain… Thus the Commissioner was unsure; whether or not the bifurcation was right or wrong. This does not show and establish that the finding of the assessing officer was erroneous."

23. There were other issues that arose from the order of the AO apart from the valuation closing stock. These included the disproportionate increase in the packaging expenses and suppression of sales. The CIT has in its impugned order dated 29th March, 2014 refrained from giving a finding on the said issues and therefore failed to come to any conclusion that the order of the AO on these issues was erroneous and prejudicial to the interest of the revenue. This again was not in compliance with the mandate of Section 263 of the Act.

24. Mr. Kapoor, learned counsel for the Assessee, pointed out that an identical issue has been adjudicated by this Court, in the case of this very Assessee for AYs. In ***CIT vs. Kohinoor Foods Limited (2015) 373 ITR 682 (Del)*** the issue of suppression of sale was dealt with and decided in favour of the Assessee. No Special Leave Petition was preferred against the said judgment which thus attained finality. A consolidated order was passed by the ITAT for AYs 2002-03 and 2007-08 and in doing it followed the earlier order passed by it for AYs 1999-2000 to 2001-02 which is impugned in the present appeal.

25. Turning to the period prior to AYs 1999-2000 to 2001-02 (which form

the subject matter of the present appeals) it is seen that the case of the Assessee was reopened for AYs 1997-98 and 1998-99 by notices dated 25th March, 2004 and 30th March, 2005 and for AYs 1999-2000 and 2000-01 by the notice dated 8th March, 2004. The writ petitions filed by the Assessee challenging the re-opening was allowed by this Court by the judgment dated 11th December, 2009 for the following reasons:

> "We feel that the Writ Petitions have to succeed because the contentions as raised on behalf of the counsel for the petitioner are well founded. The only reason which has been given seeking re-opening of the assessment for the years 1997-98 and 1998-99 is that suppression of sales have taken place on account of the fact that when average price of the closing stock is multiplied with the quantity of the sales in the year then the value of the sales would be at a higher figure than that as declared by the assessee. Clearly, there is no new material which is alleged to have come to the notice of the Assessing Officer which has caused him to seek re-opening of the assessment. Admittedly, the reasons given for seeking re-opening of the assessment contains the expression "perusal of the case record reveals" clearly showing that it is on the basis of the same assessment record as was filed by the assessee, during the relevant assessment years and also scrutinized by the Assessing Officer before passing the orders under Section 143(3) is the basis for seeking re-opening of the assessment."
>
> "....Not only this, the rationale/logic/reasons given that sale price of stocks during the entire assessment year would remain constant is something which indeed confounds us. It cannot stand to reason that the price of sale of paddy/rice/pulses remained constant throughout the year so that on the basis of an average price of the closing stock the sale price for the entire year comprising of 12 months. 48 weeks and 365 days can be ascertained in that the same would have remained fixed throughout this period"

26. It is further pointed out by the learned counsel for the Assessee, without being contradicted by learned counsel for the Revenue, that from AY 2011-12 onwards, no addition was made on account of discrepancy in closing stock. There is merit in the contention therefore of the Assessee that since the issue in the previous and subsequent years stands adjudicated in its favour by the ITAT and this Court, it would be futile to reopen the issue only for three AYs in between viz., 1999-2000 to 2001-02. It is no longer a 'live issue'. In this context, reference may be made to the following observation of the Supreme Court in ***CIT vs. NTPC Ltd. (2017) 392 ITR 426 (SC)***:

> "We do not consider it necessary to go into the question whether at the relevant point of time the exercise of jurisdiction under Section 263 of the Income Tax Act, 1961 by the Commissioner of Income Tax (Appeals) was justified in view of the fact that the subsequent events have clearly demonstrated that there has been no leakage of revenue and the matter has become academic."

27. It is sought to be contended by the Revenue that each AY is a separate year and that the principle of *res judicata* has no application in tax law. It is contended that the mere fact that the issues stands decided in favour of the Assessee for the earlier and subsequent AYs should not matter.

28. The Court cannot be unmindful of the fact that for a number of AYs from 1997-1998 till 2014-15, barring the three AYs in question, the issues have been decided ultimately in favour of the Assessee. In each of these AYs it was a scrutiny assessment under Section 143 (3) of the Act. Surely, the rule of consistency would apply in such a scenario. Accordingly, the

Court sees no reason why only for the three AYs in question, the matter should be reopened.

29. Accordingly, the Court answers the question of law in the affirmative i.e. in favour of the Assessee and against the Revenue.

30. The appeals are accordingly dismissed.

S. MURALIDHAR, J.

I.S. MEHTA, J.

APRIL 16, 2019
tr/mw