

आयकर अपीलीय अधिकरण न्यायपीठ रायपुर में ।
**IN THE INCOME TAX APPELLATE TRIBUNAL,
RAIPUR BENCH, RAIPUR**

**BEFORE SHRI PARTHA SARATHI CHAUDHURY, JUDICIAL MEMBER
AND
DR. MITHA LAL MEENA, ACCOUNTANT MEMBER**

**आयकर अपील सं. / ITA No. 59/RPR/2018
निर्धारण वर्ष / Assessment Year : 2008-09**

M/s. Sarda Energy & Minerals Limited,
73-A, Central Avenue,
Nagpur (MH)-440018
PAN : AAACR6149L

.....अपीलार्थी / Appellant

बनाम / V/s.

The Pr. Commissioner of Income Tax (Central),
Bhopal (MP)

.....प्रत्यर्थी / Respondent

Assessee by : Shri Nikhilesh Begani

Revenue by : Shri P.K. Mishra

सुनवाई की तारीख / Date of Hearing : 15.05.2019

घोषणा की तारीख / Date of Pronouncement : 16.05.2019

आदेश / ORDER

PER PARTHA SARATHI CHAUDHURY, JM :

This appeal preferred by the assessee emanates from the order of the Ld. Pr. Commissioner of Income Tax (Central), Bhopal dated 20.03.2018 for the assessment year 2008-09 as per the grounds of appeal on record.

2. The crux of the grievance of the assessee in this appeal is assumption of revisionary jurisdiction by the Ld. Principal Commissioner of Income Tax and passing order u/s.263 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').

3. The facts in this case are that the assessee company (formerly known as M/s. Raipur Alloys and Steel Ltd.) has received USD 12,386,202 (Rs.50,00,00,010/- after conversion into Indian Rupees at the prevailing exchange rate) on 3rd August, 2007 in pursuance to issuance of equity shares to L.B. India Holdings Mauritius-II Limited. The Company had issued 26,21,579/- equity shares at the rate of Rs.190/- per share (including premium of Rs.180/- per share (on 4th August, 2007). The name of M/s. Raipur Alloys and Steel Ltd. has been changed to M/s. Sarda Energy and Minerals Ltd. with effect from 2nd August, 2007 pursuant to the approval received from the Registrar of Companies. A search and seizure operation was carried out at the premises of the assessee and its various concerns. During the search operation, the amount received in the form of share capital and premium from L.B. India Holding Mauritius-II Limited Hong Kong was examined and the documents related to issuance of the shares to above mentioned foreign company were seized and marked as LPS 41 of Vanijya Bhawan Premises. In this respect the Statements of Shri Kamal Kishore Sarda, Managing Director of the assessee-company

and Shri Ghanshyam Das Mundra, Director of the assessee company were recorded in the course of Search operation. Thereafter, it is observed by the Ld. Pr. Commissioner of Income Tax (Central) that no documents relating to payment of dividend, approval thereon or intimation letter to RBI regarding dividend payments were produced. No documents/evidences, on the basis of which the rate of issue of shares was determined, were produced. Neither details/evidences of meetings of officers of L.B. India Holding Mauritius-II Limited and the officers of SEML were given nor found during the search operation.

4. The Assessing Officer after recording reasons and obtaining necessary approval reopened the assessee's case for the assessment year under consideration. Assessment order u/s 147 r.w.s. 143(3) was passed on 29.03.2016. In this assessment order the AO accepted the assessee's documentary evidence and did not make any addition with regard to the issue under consideration. On perusal of records it is seen that the AO accepted the assessee's documentary evidence without making any enquiries/verification.

5. At the time of hearing the Ld. AR of the assessee submitted that the only reason for passing order u/s.263 of the Act is with regard to L.B. India Holding Mauritius-II Limited. The Ld. AR further submitted that the

order passed by the Assessing Officer is neither erroneous nor prejudicial to the interest of the Revenue since all the enquiries with respect to L.B. India Holding Mauritius-II Limited has been conducted by the Assessing Officer. The Ld. AR of the assessee invites our attention to Page 42 of the paper book wherein the copy of questionnaire along with notice u/s.142(1) of the Act is placed therein and point No.3 states that "please submit documentary evidence in respect of share application received from M/s. L.B. India Holding Mauritius-II Limited and also state why provision of Section 68 of the Income Tax Act, 1961 should not be invoked in respect of the said company for A.Y.2008-09." The page No.42 of the paper book is made part of this order:

Annexure - 1

Office of the Asstt. Commissioner of Income Tax Central
Circle-1, Raipur (C.G.)

Date :-08.02.2016

M/s Sarda Energy & Minerals Ltd.
73-A, Central Avenue,
Nagpur (Maharashtra) - 440018.

Sir/ Madam

In connection with the assessment (or the Assessment Year 2008-09, you are required to:

~~(a) Prepare a true and correct return of your income/ the firms income/ the local authority's income/ the company's income/ the income of the AOP/ income of the body of individual income of In respect of which you are assessable under the Income Tax Act, 1961 during the previous year relevant to the assessment year mentioned above. The return should in appropriate form as prescribed in Rule 12 of the Income Tax Rules, 1962. A blank return for is enclosed. It should be duly verified and signed in accordance with the provisions of section 140 of the said~~

~~Act and delivered at my office at Central Revenue Building, Civil Lines, Raipur (C.G.) on or before.~~

(b) Produce or cause to be produced before me at my office , Central Revenue Building, Civil Lines , Raipur (C.G.) on 22.02.2016 at 11.30 AM the accounts and/ or documents specified below:

~~(c) Furnish in writing and verified in the prescribed manner information called for as mentioned below and on the points and matter specified therein before me at my office at Central Revenue Building, Civil Lines, Raipur (C.G.) on or before 08.09.2015 at 3.30PM.~~

Accounts/ documents/ information to be filed/produced

1. Computation of income for A.Y.2008-09
2. Copy of Audit Report, Balance Sheet, Profit & Loss Account for A.Y.2008-09
3. please submit documentary evidence in respect of share application received from M/s. L.B. India Holding Mauritius-II Limited and also state why provision of Section 68 of the Income Tax Act, 1961 should not be invoked in respect of the said company for A.Y.2008-09.
4. Books of accounts and relevant documents.

Further, as required by you copy of reasons for issue of notice u/s.148 is also being sent herewith. This notice is issued due to change of incumbent in cases where assessment proceedings have already been initiated.

Encl: As stated

Yours faithfully

Sd/-

(Piyush Tripathi)

Asstt. Commissioner of Income Tax,
Central Circle-1, Raipur (C.G.)”

6. That with regard to this enquiry, the assessee filed reply. The first reply which is placed at page 44 of the paper book and it states that “All the details about the applicant (M/s. L.B. India Holding Mauritius-II Limited) along with documentary evidence were provided to the Income Tax

Investigation team in the course of search and file related to the applicant, seized vide ID mark LPS-41 containing page No.1 to 74 from the Corporate office situated at Vanijya Bhawan, Raipur. Just because the applicant was a non-resident based out of Mauritius and money had come from a foreign country the transaction was suspected as not genuine, without any enquiry/investigation.”. The Ld. AR further submitted that regarding point No.3 for documentary evidence in respect of share application money received and shares allotted to M/s. L.B. India Holding Mauritius-II Limited, they are enclosing herewith following documents which is placed at Page 45 of the paper book and the same is made part of this order:

Annexure-2

OP Singhania & Co. Chartered Accounts

“2. Regarding Point No.2, we are enclosing herewith copy of audited financial statement.

3. Regarding Point No.3 for documentary evidence in respect of Share Application Money received and shares allotted to M/s L.B. India Holdings Mauritius-II Limited, we are enclosing herewith following documents for your kind verification :-

(i) Copy of agreement with ICICI Securities Limited for Financial Advisory Services for analyzing and identification of potential investors etc.

(ii) Issue of consent by M/s L.B. India Holdings Mauritius-II Limited for investment in the company.

(iii) Copy of Extra Ordinary General Meeting for Share Application and Allotment made by Sarda Energy and Minerals Limited (previously known as Raipur Alloys and Steel Limited).

(iv) Copy of certificate from the Statutory Auditor of the Company indicating the manner of arriving the issue price of the equity shares.

(v) Certificate of Foreign Inward Remittance made by M/s L.B. India Holdings Mauritius-II Limited.

(vi) Copy of In-Principle approval received from Bombay Stock Exchange ' (BSE) for issue of shares.

(vii) Copy of Filing of Form- FC-GPR and other documents with Reserve Bank India (RBI) through Union Bank of India (UBI).

(viii) Copy of filing of Form- FC-GPR and other documents by UBI to RBI.

(ix) Copy of certificate of KYC of M/s L.B. India Holdings Mauritius-II Limited ' received from the Hongkong and Shanghai Banking Corporation Limited (HSBC).

(x) Copy of listing confirmation of the private placement of shares received from BSE.”

7. Page 48 of the Paper book is the second reply of the assessee. With regard to the query raised by the Assessing Officer, the assessee has filed detailed written submissions. The page 48 of the paper book is made part of this order:

Annexure-3

Raipur, 09th March, 2016

To
The Assistant Commissioner of Income-Tax, Central Circle -1 Central Revenue Building,
Civil Lines,
Raipur-492001 (Chhattisgarh)

Assessee : Sarda Energy & Minerals Limited
PAN No : AAACR6149L
A.Y. : 2008-09

Subject : Reply against Notice U/s 148 of the Income Tax Act, 1961 - request regarding.

Reference Notice U/s 148 dated 25.03.2015 and Notice dated 08.02.2016 received on 10.02.2016.

Respected Sir,

In continuation of our earlier reply filed with your honour on 22.02.2016, as we have already filed our objection that “the action u/s 147 of Income Tax Act, 1961 is based on suspicion and not on reasonable ground the reopening is void ab initio”, we would like to further request to your honour to before going for assessment proceeding first decide the validity of Notice issued u/s 147 of the Income Tax Act, 1961 by a speaking order and oblige.

Further to our submission dated 22.02.2016 we would submit as follows:

Submission: 1

*The settled position in law is that reassessment proceedings can commence only after the reasons for re-opening are communicated to the assessee and the objections of the assessee, if any, are duly disposed. In this context, the Apex Court in the case of **GKN Driveshaft (I) ltd-Vs- ITO (2003); 259 ITR 19 (SC)** held that on a request made by the assessee for supply of reasons, the A.O. is bound to furnish the reasons within a reasonable time. Further, on the receipt of reasons, the assessee is entitled to file objections to the issuance of such a notice, and the A.O. is bound to dispose of the same by passing a speaking order before proceeding with the reassessment proceedings.”*

Thereafter, at Page 50 of the paper book, additional documentary evidences with regard to M/s. L.B. India Holding Mauritius-II Limited are also provided by the assessee.

8. The Ld. AR of the assessee further submitted that the Assessing Officer has not just accepted the version of the assessee with regard to M/s. L.B. India Holding Mauritius-II Limited and related transactions. But on contrary, he has issued notice u/s.142(1) of the Act along with questionnaire specifically seeking query and details about the said M/s.

L.B. India Holding Mauritius-II Limited. The assessee has also furnished detailed reply along with submissions and necessary evidences in support its submission before the Assessing Officer. Therefore, it cannot be said that the Assessing Officer has not conducted any enquiry with regard to M/s. L.B. India Holding Mauritius-II Limited. In effect, therefore, the order passed by the Assessing Officer after taking into account various details filed by the assessee and after specific enquiry, such order of the Assessing Officer is not erroneous and prejudicial to the interest of the Revenue. It may be that the Assessing Officer has conducted his enquiry which is evident from facts on records but that enquiry may not be upto the satisfaction of the Ld. Commissioner of Income Tax. Therefore, in effect, it amounts to a plausible view emerging for which revisionary jurisdiction u/s.263 of the Act cannot be resorted to.

9. The Ld. AR of the assessee has referred to the decision of the Hon'ble Supreme Court of India in the case of **Commissioner of Income Tax Vs. Max India Ltd. 295 ITR 282(SC)** wherein it has been held that "the phrase "prejudicial to the interests of the Revenue" in section 263 of the Income- tax Act, 1961,has to be read in conjunction with the expression "erroneous" order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the Revenue. For example, when the Assessing Officer adopts one of two courses permissible in law and it has

resulted in loss of revenue, or where two views are possible and the Assessing Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the Revenue, unless the view taken by the Assessing Officer is unsustainable in law.”

10. The Ld. AR further placed reliance on the decision of the Hon'ble Supreme Court of India in the case of **Malabar Industrial Co. Ltd. Vs. Commissioner of Income Tax, 109 Taxman 66 (SC)** wherein it has been held that “a bare reading of section 263(1) makes it clear that the prerequisite to exercise of jurisdiction by the Commissioner suo-motu under it, is that the order of the ITO is erroneous insofar as it is prejudicial to the interests of the revenue. The Commissioner has to be satisfied of twin conditions, namely, (i) the order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the revenue. If one of them is absent - if the order of the ITO is erroneous but is not prejudicial to the revenue or if it is not erroneous but is prejudicial to the revenue - recourse cannot be had to section 263(1). There can be no doubt that the provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer; it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders

passed without applying the principles of natural justice or without application of mind.”

11. Per contra, the Ld. DR has placed reliance on the order of the Ld. Pr. Commissioner of Income tax u/s.263 of the Act.

12. We have perused the case records and heard the rival contentions. We have also analyzed the facts and circumstances in this case. We observe that order u/s.263 was passed by the Ld Pr. Commissioner of Income Tax with regard to M/s. L.B. India Holding Mauritius-II Limited and its respective transactions vis-à-vis the assessee. The Ld. Pr. Commissioner of Income Tax was of the opinion that the order passed by the Assessing Officer without conducting any enquiry and just taking documents of the assessee and therefore, the order of the Assessing Officer is erroneous so as to prejudicial to the interest of the Revenue.

The Ld. AR demonstrated before us that on the same issue i.e. with regard to M/s. L.B. India Holding Mauritius-II Limited and its transactions, specific documentary evidences and details have been filed by the assessee before Assessing Officer along with detailed written submissions. This was done by the assessee since the Assessing Officer had specifically enquired from the assessee regarding transactions from the company. This is evident from the various documents placed before us and annexed in the paper book. The Assessing Officer had conducted

enquiry and after various rounds of hearing and deliberation with the assessee and scrutinizing the documents filed before him as well as submissions of the assessee, the Assessing Officer had passed an order. Such assessment order is neither erroneous nor prejudicial to the interest of the Revenue.

We further take guidance from the ratio laid down by the Hon'ble Supreme Court of India in the case **Commissioner of Income Tax Vs. Max India Ltd (supra.)** wherein it has been held that every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the Revenue. For example, when the Assessing Officer adopts one of two courses permissible in law and it has resulted in loss of revenue, or where two views are possible and the Assessing Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the Revenue.

The Hon'ble Supreme Court of India in the case **Malabar Industrial Co. Ltd. Vs. Commissioner of Income Tax (supra.)** wherein it has been held that The Commissioner has to be satisfied of twin conditions, namely, (i) the order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the revenue. If one of them is absent - if the order of the ITO is erroneous but is not prejudicial to the revenue or

if it is not erroneous but is prejudicial to the revenue - recourse cannot be taken to section 263 of the Act. Further, the facts demonstrate that necessary enquiry have been conducted by the Assessing Officer and relevant documents regarding the issue was received by the Assessing Officer still the Ld. Commissioner of the Income Tax may be of the opinion that it is erroneous but in no way it can be prejudicial to the interest of the Revenue since there is always a difference between any enquiry conducted or no enquiry conducted. Therefore, section 263 gets triggered only when the order is erroneous and also prejudicial to the interest of the Revenue.

13. In view of the matter and on the basis of binding principles as laid down by the Hon'ble Supreme Court of India, we set aside the order of the Ld. Pr. Commissioner of Income Tax passed u/s.263 of the Act and allow the appeal of the assessee.

14. In the result, appeal of the assessee is allowed.

Order pronounced on 16th day of May, 2019.

Sd/-
MITHA LAL MEENA
ACCOUNTANT MEMBER

Sd/-
PARTHA SARATHI CHAUDHURY
JUDICIAL MEMBER

रायपुर/ RAIPUR ; दिनांक / Dated : 16th May, 2019.
SB

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The Pr. Commissioner of Income Tax (Central), Bhopal.
4. The Joint Commissioner of Income Tax (Central), Raipur.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, रायपुर बेंच,
रायपुर / DR, ITAT, Raipur Bench, Raipur.
6. गार्ड फ़ाइल / Guard File.

// True Copy //

आदेशानुसार / BY ORDER,

निजी सचिव / Private Secretary
आयकर अपीलीय अधिकरण, रायपुर / ITAT, Raipur.

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