



IN THE INCOME TAX APPELLATE TRIBUNAL
LUCKNOW BENCH "A", LUCKNOW

BEFORE SHRI. A. D. JAIN, VICE PRESIDENT
AND SHRI T. S. KAPOOR, ACCOUNTANT MEMBER

ITA No.701 & 702/LKW/2017
Assessment Year: 2010-11 & 2011-12

M/s Model Tanners (India) Pvt. Ltd. C/o Sultan Tanners, Jajmau Kanpur	v.	ACIT Central Circle II Kanpur
TAN/PAN:AAACM9319D		
(Appellant)		(Respondent)

Appellant by:	Shri Rakesh Garg, Advocate		
Respondent by:	Shri A. K. Bar, CIT (DR)		
Date of hearing:	11	01	2019
Date of pronouncement:	18	01	2019

ORDER

PER A. D. JAIN, V.P.:

These are assessee's appeals for assessment years 2010-11 and 2011-12 involving common issues. Both these appeals are being disposed of by this composite order. The facts, for convenience, are being taken from ITA No.701/LKW/2017.

2. The following grounds of appeal have been raised:-

01. Because the CIT(A) as well as the AO have exceeded and transgressed over the order passed under section 263 of the Act, as such, the additions made are bad in law and be deleted.

02. Because the authorities below should have confined themselves while framing the assessment to the directions as contained in the order passed under section 263, they have travelled beyond the order passed under section 263, which is in violation of the principles of natural justice.

03. Because the order passed under section 263 being partially set aside, the assessment framed under section 143(3) and the appeal therefrom should have been confined only to the issues on which it was set aside, the CIT(A) has erred on facts and in law in holding otherwise.

04. Because the entire assessment framed pursuant to order passed under section 263/143(3) of the Act, 1961 is contrary to facts, bad in law and be quashed,

05. Because the CIT(A) has erred on facts and in law in upholding the addition of Rs.1,699/- being interest paid for late deposit of IDS, the addition be deleted.

06. Because the CIT(A) has erred on facts and in law in upholding the addition of Rs.26,24,573/- being disallowance made by the AO in respect of claim made under section 80IB of the Act, the disallowance made be deleted.

07. Because the CIT(A) has erred on facts and in law in upholding the addition of Rs.36,310/- made under section 14A of the Act, which addition is contrary to facts, bad in law and be deleted.

3. The following notice (ABP:12-16) dated 24/10/2013 was issued to the assessee under section 263 of the Act:-

"F. No.CIT(C)/KNP/Notice u/s 263/Tech/Model Tanners/20i3-14/2479 Dated: 24 .10.2013

The Principal Officer,

M/s Model Tanners (India) Pvt, Ltd.,

C/o Sultan Tanners, Jajmau,

Kanpur-208010

Sub; Show cause notice u/s 263(1) of the I.T. Act 1961 in the case of M/s Model Tanners (India) Pvt. Ltd., C/o Sultan Tanners, Jajmau, Kanpur for A. Y. 2010-11 - Regarding

On perusal of assessment record relating to the Assessment Year 2010-11 in your case has been examined. On examination of assessment record, it is found that assessment order dated 31.03.2013 for the Assessment Year 2010-11 passed by the Asstt.

Commissioner of Income Tax, Central Circle-2, Kanpur under section 143(3) of the Income Tax Act, 1961 on total income of Rs.1,21,56,043/- is erroneous and prejudicial to the interests of revenue for the following facts and reasons:

Applicability of Section 195 of the Income Tax Act, 1961 on Commission paid to foreign agents (sales commission)

The assessee company has paid a sum of Rs.91,31,915/- (Rs.38,58,862/- from Unit -1 & Rs. 52,73,053/- from Unit -2) to the Overseas entities and debited in the Profit & Loss Account under head sales promotion without deduction of income tax at source u/s 195 of the I.T. Act. As per. provisions of section 195 of the Income Tax, 1961 read with section 9(1) (vii), it is mandatory to deduct tax at source. The applicable provisions contained under section 9 and 195 of the Income Tax Act, 1961 which define the term " income deemed to accrue or arise in India" and liability of the assessee to deduct income tax at source on "other sums".

"Section 9(1)(vii) of the Income Tax, 1961 read as under:

The following income deemed to accrue or arise in India:

(vii) income by way of fees for technical services payable by

(a) the Government; or

(b) a person who is a resident, except where the fees are payable in respect of services utilized in a business or profession carried on by such person outside India or for the purpose of making or earning any income from any source outside India; or

(c) a person who is a non-resident, where the fees are payable in respect of services utilized in a business or profession carried on by such person in India or for the purposes of, making or earning any income from any source in India:

[Provided that nothing contained in this clause shall apply in relation to any income by way of fees for technical services payable in pursuance of an agreement made before the 1st day of April 1976, and approved by the Central Government,]

[Explanation 1. For the purposes of the foregoing proviso, an agreement made on or after the 1st day of April 1976, shall be deemed to have been made before the date if the agreement is made in accordance with proposals approved by the Central Government before that date.]

Explanation [2] - For the purposes of this clause, " fee for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries. "]

A subsequent amendment has also been introduced by Finance Act, 2010 with retrospective effect from 01.6.1976 which reads as under:-

"In section 9 of the Income -tax Act, for the Explanation occurring after sub-section (2), the following Explanation shall be substituted and shall be deemed to have been substituted with effect from the 1st day of June, 1976, namely;-

"Explanation- For the removal of doubts, it is hereby declared that for the purposes of this section, income of a non-resident shall be deemed to accrue or arise in India under clause (v) or clause (vi) or clause (vii) of sub-section (1) and shall be included in the total income of the nonresident, whether or not,-

(iii) The non-resident has a residence or place of business or business connection in India; or

(iv) The non-resident has rendered services in India

A perusal of these statutory provisions makes it clear that these classify and cover all income as accruing and arising in India which partake the character of payment on account of "fee for technical services" which is very precisely defined in Explanation (2) to include any

payment for rendering of any managerial or consultancy services rendered by the

Non-Resident agent. In the case of the assessee since he was not able to sell his goods on his own to the foreign buyers, he had to avail the managerial acumen and the expertise of the non-resident M. U. U., of the consideration debited by the assessee in his book of accounts as Commission.. It makes it clear that the payment by the assessee in connection with his business expediencies in India to a person outside Indian territory for availing his expertise in sale of his goods is nothing but a fee paid by the assessee to the non-resident against the technical services rendered by him.

Section 195 of the Income Tax Act, 1961 read as under;-

"Other sums".

195. [(1) Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest [***] or any other sum chargeable under the provision of this Act (not being income chargeable under the head "Salaries" [***) shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force:

[Provided that in case of interest payable by the Government or a public sector bank within the meaning of clause (23D) of section JO or a public financial institution within the meaning of that clause, deduction of tax shall be made only at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode:]

{Provided further that no such deduction shall be made in respect of any dividends referred to in section 115-O]

Explanation - For the purpose of this section, where any interest or other sum as aforesaid is credited to any account, whether called "Interest payable account" or "Suspense account" or by any other name, in the book of

account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provision of this section shall apply.]

(2) Where the person responsible for paying any such sum chargeable under this act (other, than salary) to a non resident considers that the whole of such sum would not be income chargeable in the case of recipient, he may make an application to the [Assessing] Officer to determine, [by general or special order], the appropriate proportion of such sum so chargeable and upon Such determination ,tax shall be deducted under sub - section (10) only on that proportion of the sum which is so chargeable.

[(3), Subject to rules made under sub -section (5), any person entitled to receive any interest or other sum on which income-tax has to be deducted under sub-section (1) may make an application in the prescribed form to the [Assessing] Officer for the grant of a certificate authorizing him to receive such tax interest or other sum without deduction of tax under sub -section , and where any such certificate is granted .every person responsible for paying such interest or other sum to the person to -whom such certificate is granted shall, so long as the, certificate is in force, make payment of such interest or than sum without deduction tax thereon under sub-section (1).

From the above facts , which have been brought on record that there was mandatory, liability on your part under section 195 of the Income Tax act 1961 read with section 9(1) (vii) thereof to deduct income tax at source from the sum of Rs.91,311,915/-which you have debited in Profit & Loss Account as Sales promotion. Therefore, there was a clear cut liability to deduct tax at source and having failed in deducting the same amount was liable to be disallowed as per provisions of section 40(a)(i) of the Income Tax ,1961 .The A.O. while passing the order u/s 143(3) of foe Act in this case has not examined the above facts , Accordingly the assessment order on this point is erroneous as well as prejudicial to the interests of Revenue.

In addition to the above, it is also seen that in the following issues requisite enquires have not been made:

1. During the year the assessee has sold following assets:

-Plant and Machinery	Rs. 41,80,346.63
-Vehicles	Rs. 84,175.00

The assessee shown profit on sale of above assets only Rs.1,11,623/-. The AO has not examined the above issue. The assessee has also made in addition in Fixed Assets at Rs.2,63,01,478.92, no complete details/bills/ vouchers are available on the record,

2. Following amounts of unsecured loan, which are above Rs. one crore, which have neither been examined nor any enquiry has been made while completing the assessment order:

(a)Badre Alam	Rs.1,86,71,757
(b) Diamond Consultancy Services Pvt. Ltd.	Rs.2,27,00,000
(c) Ganga Jamuna Commtrade Pvt. Ltd.	Rs.2,00,00,000
(d) Hooghly Consultancy Services Pvt. Ltd.	Rs.3,42,00,000
(e) Mahmood Alam	Rs.1,02,05,466
(f) Mahtab Alam	Rs.1,91,62,036
(g)Maqsood Alam	Rs.1,60,92,013
(h) Marhoob Alam	Rs.1,12,21,969.34
(i)Mohd Alam	Rs.1,19,01,000

3. The assessee made new investment on account of FD No.867202 and FOR Account amounting to Rs. 50,000/- and Rs. 1,45,00,632.50 respectively, no details are available on record.

4. The Assessee has paid an amount of Rs.29,97,182.30 on account of Job work. Evidence of deducting of TDS is not available on the record.

5. On perusal of return , it was found that the assessee has shown "any other income" at Rs.4,50,55,996/-, details are not available on record.

6. Assessee purchased following Raw Hide:

- Raw Hide & Leather Purchase Rs. 25,87,62,509.40
- Raw Hide Leather Purchase Rs. 38,01,30,343.06

However, no verification of these purchases has been made and no enquiries have been made to ensure that these are included exclusively for the purpose of assessee's business.

It is further seen that there are loans & advances for Rs.27,55,38,015.93 & Rs.17,99,61,609.20 in unit 1 & 2 respectively, stating that all treated to be business advances, mainly to the staff and supply of goods. It has not been examined whether, the advances are wholly and exclusively for the purpose of business of the assessee.

It is thus seen that the order for Assessment Year 2010-11 is erroneous as the items of income indicated above have not been included in the total income as well as enquiries which should have been made by the A.O., have not been made. The order, due to this reason, has resulted in determination of incorrect total income at a lower figure and, therefore, prejudicial to the interests of Revenue.

You are, therefore, required to furnish show cause why the amounts not be modified as provided in section 263 of the IT Act 1961. You are, accordingly given an opportunity of being heard and to furnish objection, if any, by 12.11.2013 at 11.30 A.M before the undersigned, either in person or through your authorized representative duly authorized by you, failing which it shall be presumed that you do not have to say anything in this regard and the matter shall be decided on the basis-of records, facts of the case as per law,

Sd/-

(Davendra Shanker}

Commissioner of Income Tax, (Central), Kanpur"

4. Vide order dated 30/3/2015, the assessment order framed under section 153C of the Act was set aside by the Id. Pr. CIT, under section 263 of the Act. The Assessing Officer was given specific directions, as contained in the ultimate paragraph of the order. These directions are now the subject matter of interpretation and they will be presently discussed.

5. In pursuance of the aforesaid order dated 30/3/2015, the Assessing Officer passed the order dated 30/3/2016, under section 143(3) of the Act. This assessment order was partly affirmed, for statistical purposes, by the Id. CIT(A) by virtue of order dated 19/9/2017. It is this last order which is the subject matter of appeal before us.

6. The grievance of the assessee, in sum and substance, is that the Id. CIT(A) has erred in confirming the assessment order which was passed in contravention of the specific directions given by the Id. Pr. CIT in the order dated 30/3/2015, passed under section 263 of the Act. The Department, on the other hand, firmly relies on the Id. CIT(A)'s order, contending that the order passed under section 263 of the Act clearly set aside the original assessment order for the same to be framed afresh de novo.

7. Heard. The Assessing Officer, in the assessment order dated 30/3/2016, passed in pursuance of the revisional order dated 30/3/2015, made the following additions/disallowances:-

- | | |
|---|------------------|
| (i) Disallowance under section 80-IB of the Act | : Rs.26,24,573/- |
| (ii) Disallowance of job charges | : Rs.1,66,700/- |
| (iii) Addition on account of TDS | : Rs.1,699/- |
| (iv) Addition under section 14A of the Act | : Rs.36,310/- |

8. A perusal of the show cause notice dated 24/10/2013 issued under section 263 of the Act, as reproduced hereinabove, shows that there is nothing contained therein with regard to the above additions or disallowances, but for the issue of disallowance of job charges, the addition on which, incidentally, has been deleted by the Id. CIT(A). To reiterate, the assessee had been asked to show cause with regard to the following items:-

- (i) Applicability of the provisions of section 195 of the Act on commission paid to foreign agents.
- (ii) Enquiries required to be made in respect of assets sold, i.e.
 - (a) Plant and machinery.
 - (b) Vehicles
 - (c) Unsecured loans above Rs.1 crore having not been examined.
 - (d) Investment in new fixed deposits – Rs.29,97,182.30 paid on account of job work.
 - (e) Details of any other income nor on file.
 - (f) Purchase of raw hides and leather, which remained not verified.
 - (g) Loans and advances in Unit Nos.1 & 2, respectively, having remained unexamined.

9. A perusal of the order dated 30/3/2015, passed under section 263 of the Act makes it evidently clear that the Pr. CIT held that the Assessing Officer had not carried out any enquiry to verify the purchase of raw material by the assessee from the parties and also whether the parties were genuine and that the submissions made by the assessee had been accepted by the Assessing Officer without verification,

disallowing only a partial amount of Rs.1.25 lakhs. It was also held that no enquiry had been made with regard to the generation of cash of Rs.2 crores found in the possession of the Directors of the company. It was with regard to these issues only that the assessment order was set aside and the assessment was directed to be framed afresh. In fact, the relevant portions of the order passed under section 263 of the Act, when juxtaposed with each other, would read as follows:-

".....It can be seen that the reply of the assessee centres around the fact that the details are produced before the A.O. and that he had examined it. A perusal of the records indicate that the A.O. has not carried out any enquiry what so ever to verify the purchases of raw material from the parties and also whether the parties are genuine. Moreover an important fact to be seen is that in this case proceedings u/s 153C were initiated when the directors of company M/s Mehtab Alam were searched by the Income Tax Authorities and a sum of Rs. 2 crore was seized from his possession which could not be explained by him. His statement, however, was that he was taking this money to Kolkatta to buy raw hide. This was enough evidence which should have required by the A.O. to make verification of the purchase of raw leather from various suppliers. It is surprising that even though the A.O. has mentioned this fact in para 2 of the assessment order, there was even a finding that the assessee company is buying leather /raw hides from various concerns, but no enquiry were made to verily the purchases and the submissions of the assessee were accepted without verification.

In fact, it is very clearly seen that in para 6, 7 and 8 that there is only a reference to inventory of closing stock being filed and that the sales are verifiable. But actually they have not been verified. Thereafter the A.O. has, without any clear verification disallowed a partial amount of Rs.1,25,000/-only.

In view of the above facts, perusal of proceedings of the assessment as recorded on the note sheet and the documents available indicate that though some information was furnished by the assessee during the course of proceedings, the Assessing Officer did not make adequate enquiries nor carried out any

investigation to verify the purchases specially in the backdrop of a search and seizure operation carried out by the I.T. Department. In the operation cash was found which was not explained and was said to be for purchase of raw hides from Kolkatta. The case was centralized with the A.O. CC-1 by the CIT-1, Kanpur in order to carry out coordinated investigation with the other cases of the group namely Shri Mehtab Alam and others. The f.T. Department has a well laid out organizations and that provides for centralization of a group of cases with a single officer in Central Circle for coordinated investigation. Under this arrangement, the AO, Central Circle-11 with whom this case was centralized. However, there is total absence of any enquiries from any third party and no verification of accounts has been carried out. The assessment order has been passed without application of mind and in total disregards of the findings of the authorized officer as a result of search and seizure operation carried out. In normal course any prudent person would have made enquiry about the fact of generation of cash which was found in the possession of the partners of the firm as indicated earlier.

.....In view of the above factual position and legal precedents and after having considered all the facts, arguments of the assessee, it is an unescapable conclusion that the order passed by the AO is erroneous as indicated above as well as prejudicial to the interest of the Revenue since the Assessing Officer did not verify several issues' and facts and did not carry out necessary investigations to come to a conclusion before passing the assessment order. Therefore, the assessment orders for A.Y. 2010-11 passed by the AO is hereby set aside under section 263 of the I.T. Act, 1961 to be framed afresh after taking into account the points made above on the merits of the case as well as the documents submitted by the assessee during the course of assessment proceedings, documents and other information found, during the course of search, after verifying issues and facts, carrying out necessary investigations and after giving the assessee due opportunity of being heard. The issue of disallowance u/s 44 (a)(i) for failure to deduct tax at source u/s 195 on commission paid to non-resident agents, which was mentioned in the show cause notice would not, however, be open

to Assessing Officer for adjudication as in the appellate stage the issue has already been decided in favour of the assessee. Accordingly in term of clause (c) to explanation to section 263 this issue is not covered by this order.

It is also seen that the order u/s 153C of the A.O, has been passed after obtaining approval from the Joint Commissioner of Income Tax, Central Range, Kanpur in terms of provisions of section 153D of the IT Act. Since the order is erroneous as well as prejudicial to the interest of revenue, the approval has been granted by the Joint Commissioner of Income Tax, Central Range, Kanpur without application of mind, the same is also set aside to be granted afresh as provided u/s 153D of the Income Tax Act. 1961."

10. Specifically, in the last paragraph at page 2 of the order passed under section 263 of the Act, it has been observed that ".....it is thus seen that the order for assessment year 2010-11 is erroneous as the *items of income indicated above* have not been included in the total income as well as enquiries which should have been made by the Assessing Officer, have not been made. The order, due to this reason, has resulted in determination of incorrect total income at a lower figure and, therefore, prejudicial to the interest of the Revenue" (Emphasis supplied).

11. Thus, the notice issued as well as the order passed under section 263 of the Act referred to the '*items of income*' indicated. These items, to reiterate, are the following:-

1. Commission paid to foreign agents (sales commission).
2. Assets sold (plant and machinery and vehicles).
3. Unsecured loans.
4. New investment in fixed deposits.
5. Amount paid on account of job work.

6. Any other income not disclosed.
7. Purchase of raw hides and leather.
8. Loans and advances in Unit Nos. 1 & 2.

12. The Assessing Officer did not make any addition with respect to the above items, but for job work charges, which addition was deleted by the Id. CIT(A).

13. The Assessing Officer made the following disallowances/additions:-

- i) Disallowance under section 80-IB of the Act : Rs.26,24,573/-
- ii) Interest on TDS : Rs.1,699/-
- iii) Addition under section 14A of the Act : Rs.36,310/-

14. The Id. CIT(A) confirmed these three additions/disallowances. The grievance of the assessee is that the Id. CIT(A) has erred in confirming these three additions made by the Assessing Officer over and above subject matter of the order passed under section 263 of the Act.

15. The Id. CIT(A), in para 5.1 (page 4) of his order, has observed as under:-

"The view of the appellant that, as the order under appeal does not stem out from order u/s 263 hence the order itself is invalid and bad in law, cannot be accepted because order u/s 263 clearly mentions in the concluding paragraph that the order passed by the AO BS set aside to be framed afresh after taking into account all the documents and the information found during the course of search proceeding and after verifying issues and facts and carrying out necessary investigations after giving the assessee the due opportunity of being heard. As order u/s 263 clearly mentions .to frame the assessment de novo i.e. afresh, hence the order of the AO which is consequential to the order u/s 263 is perfectly justified in law. Further, the decision in the case of CIT Vs D.N.

Dosani 280 ITR 275 [Guj] is distinguishable with the facts of the present case, as in the present case the direction u/s 263 is to frame the assessment afresh."

16. It is trite law that an order requires to be read in its entirety. That being so, there is no escape from the position that what was not the subject matter of notice issued and the order passed under section 263 of the Act, cannot be made subject matter of assessment in pursuance to an order passed under section 263 of the Act. It cannot be disputed, as has also not been done, that the items of additions/disallowances now made by the Assessing Officer, i.e., disallowance of Rs.26,24,573/- under section 80-IB of the Act; interest of Rs.1,699/- on TDS and addition of Rs.36,310/- under section 14A of the Act, were not the subject matter of either the notice issued, or the order passed under section 263 of the Act.

17. In "CIT vs. D.N. Dosani", 280 ITR 275 (Guj.), it has been held that where the assessee was called upon by the Id. Pr. CIT to tender an explanation qua two items mentioned in the show cause notice, the Id. Pr. CIT could not have treated any further item or part of the assessment order as being erroneous and prejudicial to the interests of the Revenue without giving the assessee an opportunity of being heard; and that, therefore, what the Commissioner himself could not have done, could not be permitted to be done by the Assessing Officer while giving effect to the order under section 263 of the Act. It was held that the Tribunal was right in holding that in the fresh assessment order passed in pursuance of the consolidated order under section 263 of the Act, the Assessing Officer was entitled to consider only two items which had been considered by the Commissioner and was not entitled to consider any other item afresh for making addition.

18. In ITA No.702/LKW/2017, for assessment year 2011-12, this position is not applicable qua the addition of Rs.45,725/- made under section 14A of the Act. This issue was the subject matter of revision, as available from the revisional order (APB:34-36) for assessment year 2011-12, at page 7 (APB:40) thereof. The assessee has raised an additional ground in this regard, contending that this addition has wrongly been confirmed, as it does not come out of the revisional order. This ground is rejected.

19. In view of the above, the grievance of the assessee for both the years is partly accepted. The orders passed by the Id. CIT(A) for both the years are, thus, reversed, except:-

(i) the Id. CIT(A)'s action in directing the Assessing Officer, for assessment year 2010-11, to verify whether M/s Pool Services has disclosed the contract job work charges of Rs.1,66,700/- in its profit & loss account and paid the income tax thereon, on the fulfillment of such verification, the addition would stand deleted;

(ii) the action of the Id. CIT(A) in confirming the addition of Rs.45,725/- made under section 14A of the Act, for assessment year 2011-12, as this issue does arise from the order issued under section 263 and was correctly made the subject matter of assessment pursuant to the revisional order.

20. No other argument was raised.

21. In the result, both the appeals are partly allowed.

Order pronounced in the open Court on 18/01/2019.

Sd/-
[T. S. KAPOOR]
ACCOUNTANT MEMBER

Sd/-
[A. D. JAIN]
VICE PRESIDENT

DATED:18th January, 2019
JJ:1601

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

By order

Assistant Registrar