

(2005) 01 RAJ CK 0051
Rajasthan High Court
Case No: IT Ref. No. 3 of 2001

Hindustan Zinc Ltd.

APPELLANT

Vs

Commissioner of
Income Tax

RESPONDENT

Date of Decision: Jan. 5, 2005

Acts Referred:

- Income Tax Act, 1961 - Section 143(1), 143(2), 143(3), 256

Citation: (2005) 196 CTR 64

Hon'ble Judges: Rajesh Balia, J; Dinesh Maheshwari, J

Bench: Division Bench

Advocate: Vineet Kothari, for the Appellant; K.K. Bissa, for the Respondent

Judgement

Rajesh Balia, J.

The Tribunal has referred the following questions of law arising out of this appellate order in ITA No. 162/Jp/1996 relating to the asst. yr. 1994-95 in the case of applicant-assessee :

1. Whether, on the facts and in the circumstances of the case, the Tribunal, in violation of the audi alteram partem rule, was right in holding that the action of the CIT(A) in upholding the adjustments made by the AO u/s 143(1)(a) was reasonable and justified ?
2. Whether, on the facts and in the circumstances of the case, the order of the Tribunal in omitting to give its finding in respect of the contentions raised, is not vitiated in law ?"
2. The applicant-assessee at the relevant time was the public sector corporation controlled by the. Central Government. It has filed a return of income for the asst. yr. 1994-95. While issuing the intimation u/s 143(1)(a) as per the provisions prevailing at the relevant time, the AO purported to make adjustment u/s 143(1)(a)

made an addition of Rs. 6,91,46,266 which has been charged by the assessee to P&L a/c as provision for payment of revision in basic pay as per charter of demand and Government instructions. The additions have been done on the basis of the opinion of the auditors in their audit report that this is contingent liability. As a result of the aforesaid additions made vide intimation u/s 143(1)(a), additional tax was also imposed.

3. The assessee has contended in appeal that the provisions for enhanced wages was an ascertained liability accrued from 1st July, 1992, with the expiry of the previous term of the operating settlement and fresh charter of demand having been raised and the matter was under negotiation to determine the extent of revision of wages, increase in liability was certain and not contingent.

At any rate, it is a highly debatable issue which cannot be determined u/s 143(1)(a) by way of adjustment for raising demand for additional tax and could have been only determined by way of regular assessment u/s 143(1)(a). This contention did not find favour either with the CIT(A) or with the Tribunal and the additions made by the AO were maintained by both the appellate authorities primarily relying on the opinion of the auditors that it was contingent liability which was not liable to be deducted under the provisions of the IT Act.

4. On an application made u/s 256 of the IT Act, 1961, the aforesaid questions of law have been referred to us for our decision.

5. The application has been made on behalf of the assessee pointing out that before the intimation u/s 143(1)(a) was issued, the AO had already issued a notice u/s 143(1)(a) for the purpose of initiating the proceedings of regular assessment. In view thereof, the stage for operating Section 143(1)(a) for raising demand of additional tax by way of issuing intimation u/s 143(1)(a) had already passed and the said provisions could not have been resorted to. It was pointed out that the notice u/s 143(1)(a) has been issued on 3rd Aug., 1995, and the intimation has been issued on 10th Oct., 1995.

6. In reply thereto, the above facts have not been denied. From the orders of the assessing authorities, it has been contended by the Revenue that this question cannot be allowed to be raised in this reference.

7. An auditor's note on accounts in discharge of his professional obligation is only his opinion and not the admission of assessee about correctness of such opinion. To this extent, the satisfaction reached by the AO suffers from apparent error inasmuch as no such admission as referred in the intimation exists. The additions made on alleged admission of assessee that reserve was made for contingent liability, stands vitiated and cannot be sustained.

8. Since it is not in dispute that regular assessment has been made since then, no order can now be made u/s 143(1)(a), by making a fresh order.

9. The contentions which have been raised before us are that the assessee has been entering into the revision of pay due with its employees from time to time. New settlement arrived at between the assessee and its employees is under the Industrial Disputes Act and it has been the regular practice which can be verified from the fact that each time the previous settlement expires, there is always time gap between the raising of demand and arrival of settlement. Whereas revision of wages takes place from time to time between the parties but the same has been made after expiry of previous settlement and that is why in view of this continuous backdrop of having revision of pay and remuneration with effect from expiry of the terms of settlement, the making of provision for the liability arising from the revision of pay in respect of which notice of demand has been served upon the assessee before the expiry of the period of current settlement in question and it could not be said to be contingent liability but the accrued liability to be discharged, but actual amount remains to be specified later on hence, provision on estimate basis has been made.

10. The contention raised by the assessee about the validity for the present purpose is suffice that such contention raised by the assessee cannot be said to be such which did not require consideration and it is apparent from the scheme of Section 143(1)(a) that the debatable claim raised in respect of any deductions cannot be subject-matter of adjustment envisaged u/s 143(1)(a) of the Act even on admitted facts; it is all the more not permissible when any adjustment is sought to be made on purported admission which has not been shown even to exist from record. The opinion of the auditor about any claim made by the assessee cannot be considered to be the admission by the assessee as has been assumed by the AO and once that opinion is excluded from the consideration, there remained no basis about admissibility or inadmissibility of the claim. That being the position, we are of the opinion that firstly, the Tribunal has erred in holding that the question that there was a prima facie material which can go into consideration for making adjustment to the return submitted by the assessee, else the very purpose of making regular assessment in the presence of the assessee would fail and it would be leaving a leeway open for raising an additional demand merely by holding opinion about highly contentious issues and in view of these contentious decisions, our opinion could not be said to be effected by the purpose including the purpose of Section 143(1)(a) as it was existing at the relevant time.

11. Apart from the aforesaid, legal effect of admitted facts to which we addressed above that notice u/s 143(1)(a) was issued by the AO before exercise of power u/s 143(1)(a) issuing intimation is no more res Integra and has been decided by the Supreme Court in [Commissioner of Income Tax Vs. Gujarat Electricity Board](#) , wherein the apex Court has said :

"Apart therefrom, the provisions of Section 143(1)(a) indicate that the intimation sent u/s 143(1)(a) shall be without prejudice to the provisions of Sub-section (2). The

legislature, therefore, intended that where the summary procedure under Sub-section (1) has been adopted, there should be scope available for the Revenue, either suo motu or at the instance of the assessee to make a regular assessment under Sub-section (2) of Section 143. The converse is not available; a regular assessment proceeding having been commenced u/s 143(1)(a), there is no need for a summary proceedings u/s 143(1)(a)."

In coming to this conclusion, the Supreme Court upheld the judgment of Gujarat High Court holding that "whether it is open to issue intimation after notice for regular assessment is issued" is not even a substantial question of law.

12. Consequently, in view of the aforesaid discussion, we answer the questions in favour of the assessee and against the Revenue and hold that in the facts and circumstances, the Tribunal was not right in upholding the orders of the authorities below on account of adjustments made u/s 143(1)(a).

There shall be no orders as to costs.