

4 SCOB [2015] HCD 4**HIGH COURT DIVISION
(SPECIAL STATUTORY JURISDICTION)***Income Tax Ref: Application No. 651 of 2003.**With**Income Tax Ref: Application No. 652 of 2003**With**Income Tax Ref. Application No. 504 of 2004**With**Income Tax Ref. Application No. 209 of 2005**With**Income Tax Ref. Application No. 93 of 2006**With**Income Tax Ref. Application No. 403 of 2007**With**Income Tax Ref. application No. 109 of 2008*

Karnaphuli Industries Limited,
represented by its Chairman Hedayet
Hossain Chowdhury, 94, Agrabad C/A,
P.S. Doublemooring, District-Chittagong.
...Assessee-applicant.

-Vs-

Mr. Mosharaf Hossain, Adv.

... For the Assessee-applicant.

Mr. S. Rashed Jahangir, D.A.G. with

Mr. Saikat Basu, A.A.G. with

Ms. Nasrin Parvin Shefali, AAG

...for the tax department.

The Commissioner of Taxes,
Tax Zone-3, C.G.O. Building-2 (2nd floor),
Agrabad, Chittagong.

...Respondent.

Heard On: 22.10.2014 & 23.10.2014

And

Judgment On: 18.11.2014 & 19.11.2014

Present**Justice A.F.M. Abdur Rahman****And****Justice Md. Emdadul Haque Azad****Section 83(2) of the Income Tax Ordinance 1984:**

The DCT concern did not comply the provision of section 83(2) before opining that the claimed expenditure has not been adequately evidenced by the assessee applicant. Therefore it appears that the disallowance of expenditure has not only violated the provision of section 83(2) of the Income Tax Ordinance 1984, but also violated the time honored maxim *Audi Alterm Partem* which obliged a adjudicator to allow adequate opportunity of being heard or to submit adequate representation. Accordingly this court finds merit in these seven Income Tax Reference Applications. ... (Para 22)

It appears that due to fixation of target by the Finance Ministry as to collection of income tax to a certain amount, the tax executives either deliberately ignore the provision of law or twist the same in order to attain the target by realizing the more and more tax upon whims and caprice which is deplorable and hereby deprecated by this court. This tendency of the tax executives to realize tax by any means is required to be

changed by fixing supervision of the National Board of Revenue in this respect. Therefore a copy of the judgment is required to be sent to the National Board of Revenue for the perusal of its Chairman. ... (Para 25)

Judgment

A. F. M. Abdur Rahman, J:

1. The Assessee applicant Karnaphuli Industries Ltd., preferred the instant seven income tax reference applications under the provision of section 160(1) of the Income Tax Ordinance 1984 with the re-formulated questions of law mentioned in the supplementary affidavit.

2. Income Tax Reference Application No. 651 of 2003 is related to assessment year 1999-2000, Income Tax Reference Application No. 652 of 2003 is related to assessment year 2000-2001, Income Tax Reference Application No. 504 of 2004 is related to assessment year 2001-2002, Income Tax Reference Application No. 209 of 2005 is related to assessment year 2002-2003, Income Tax Reference Application No. 403 of 2006 is related to assessment year 2003-2004, Income Tax Reference Application No. 93 of 2007 is related to assessment year 2004-2005, Income Tax Reference Application No. 109 of 2008 is related to assessment year 2005-2006.

Facts of the Case.

3. It has been asserted in these seven income tax reference applications that the Assessee-applicant is a private limited company incorporated under the Companies Act 1913, on 1st January, 1963, who is engaged in the business of assembling motor cycle and derives income from the sales of those motor cycles, motor cycle spare parts and service charges, which is a regular income tax assessee under the Tax Identification Number (TIN): 377-200-1090. The Assessee-applicant company maintains its accounts in accordance with the provision of the Companies law and provision of section 75(2)(d)(iii) of the Income Tax Ordinance 1984, which was regularly audited and certified by the chartered accountant. The assessee-applicant submitted its income tax return for these seven assessment year from 1999-2000 up to 2005-2006 in due time, along with the required documents attached to it, pursuant to the provision of section 75(2)(d)(III) and section 35(3) of the Income Tax Ordinance 1984. Later pursuant to receipt of the notice under section 83(1) and 79 of the Income Tax Ordinance 1984, issued by the DCT concerned, the authorized representative of the assessee-applicant company further submitted all the documents supporting the accounts audited and certified by the Chartered accountant. But the DCT concern upon his whim and caprice disallowed the claimed expenditure which were allowable under the provision of section 29 of the Income Tax Ordinance 1984 and most arbitrarily estimated the gross profit at an exaggerated rate and re-estimated the sales to add back the amount with the income.

4. This having prejudiced the Assessee-applicant in respect of its tax liability, the Assessee-applicant preferred two unsuccessful appeal firstly before the Commissioner of Taxes (Appeal) and then to the Taxes Appellate Tribunal and thereafter upon formulating the questions of law as to the legality and propriety of the order passed by the Taxes Appellate Tribunal, preferred the instant income tax reference applications, seven in number for seven separate assessment years from 1999-2000 up to 2005-2006 with the formulated identical questions which appears from the supplementary affidavit:-

- I. *In the circumstances and on the facts whether the Taxes Appellate Tribunal was justified maintaining “estimation of sales” from Motor Cycle Section, three wheeler section & workshop section & non-operating income of the Company and addition of income with disclosed sales of those sections discarding trading version of the Company as audited in accordance with law.*
- II. *In the circumstances and on the facts whether the Taxes Appellate Tribunal was justified maintaining disallowances of expense from profit & loss accounts and other establishment expenses without complying the provision of section 83(2) & 30A of the Income Tax Ordinance 1984.*

Claim of Taxes Department.

5. Pursuant to the service of the notice, the learned Assistant Attorney General Ms. Nasrin Parvin and Mr. Saikat Basu appeared on behalf of the taxes department and submitted affidavit-in-reply, wherein it has been stated that the taxes appellate tribunal having correctly apprised the basic assessment order and the order passed by the First Appellate Authority did not commit any error of law and as such this court has no reason to answer the question raised by the Assessee applicant in negative and in favour of the Assessee applicant.

6. Further it has been sated that the Assessee-applicant failed to produce relevant documents in support of the audited accounts of the seven assessment years, which were elaborately discussed in the assessment order by the DCT concern and as such the two Appellate Authority did not set aside the order of assessment, although they have reduced the amount of disallowance substantially.

7. It has been further asserted that the Taxes Appellate Tribunal was legally justified in directing the DCT concern to adopt rate of gross profit of the applicant company in the Motor cycle section at the rate of 12.5%, Workshop section at the rate of 31%, Fan section at the rate of 16% and Automobile section at the rate of 22.5% respectively relying on the past record of Assessee- Applicant. The applicant company having failed to produce relevant evidence in support of trading expense under different section, the tribunal as well as Commissioner of Taxes (Appeal) and the DCT concern was legal and fair in adopting the fair gross profit and therefore the question as has been formulated in this Income Tax Reference Applications are not required to be answered in negative and in favour of the Assessee-applicant.

8. The learned Advocate Mr. Mosharaf Hossain appeared on behalf of the Assessee applicant, while the learned Assistant Attorney General Ms. Nasrin Parvin and Mr. Saikat Basu argued on behalf of the taxes department.

Argument of the Assessee-applicant.

9. The learned Advocate Mr. Mosharaf Hossain at the very outset has drawn the attention of this court to the facts that the DCT concern has disallowed the claimed expenditure on his whims and caprice without assigning any dissatisfaction as to the method of accounting regularly employed by the Assessee-applicant as required under section 35(4) of the Income

Tax Ordinance 1984 and without pin pointing the defect in the account and also erroneously opined that the Assessee-applicant could not prove the sales expenditure by adequate evidence, without complying the provision of section 83(2) of the Income Tax Ordinance 1984.

10. The learned Advocate Mr. Mosharaf Hossain contends that this issue has already been decided in several cases by this court out of which, the cases of Titas Gas (T&D) –Vs- The Commissioner of Taxes, reported in 53 DLR 209, Mark Builder Limited –Vs- The Commissioner of Taxes, reported in 59 DLR 463, Eastern Hardware Store –Vs- The Commissioner of Taxes, reported in 28BTD(2000)20, the case of T.K. Chemical Complex Ltd. –Vs- The Commissioner of Taxes in ITRA No. 13 of 2008 heard along with ITRA No. 345 of 2010 passed by this court on 24.02.2014, the case of Godrej Sara Lee (Bangladesh) Pvt. Ltd., in ITRA No. 353 of 2007 along with ITRA No. 354 of 2007 passed by this court on 28.01.2014, which may be profitably examined, wherein their lordships in this bench differently constituted, and also by this bench and the apex court of the country, decided that prior to discarding the book version of account, the DCT concern is liable to raise dissatisfaction as to the method of accounting and also has to pin point any defect in the accounts submitted before the DCT concern which was audited by the Chartered Accountant.

11. The learned Advocate Mr. Mosharaf Hossain vigorously argued that a tendency has grown up in the taxes department that the DCT concern firstly discard the book version of the accounts, submitted along with the return and thereafter the DCT concern used to fix the gross profit at an exaggerated rate and then either disallows the allowable expenditure or re-estimates the sales of the company in order to enhance the rate of gross profit. This tendency not only violates the provision of income tax ordinance 1984 but also liable the assessee applicant to face a ‘Açøeuj j;jm;’ by the VAT authority, since after such a whimsical assessment, the VAT authority raises objection that the assessee applicant has evaded the VAT which he has paid on its actual sales. Therefore such a tendency is required to be taken into notice by this court and to make an observation as to such illegality committed by the taxes department.

Argument by the Taxes department.

12. The learned Assistant Attorney General Ms. Nasrin Parvin while relying upon the paragraph No. 6 of the affidavit-in-reply strenuously argued that when the Assessee-applicant failed to substantiate its accounts before the DCT concern by filing adequate evidential documents, the DCT concern has got no alternative but to estimate the allowable expenditure and the sale. That being the power coming out from the provision of section 35(4) of the Income Tax Ordinance 1984, the two appellate authority correctly apprised the action taken by the DCT concern in these seven income tax assessment years, although the two appellate authority reduced the amount of disallowances, but they did not set aside the order of assessment which is otherwise lawful.

13. The learned Assistant Attorney General Ms. Nasrin Parvin next argued that admittedly the DCT concern has served notice under section 79 and also under section 83(1) of the Income Tax Ordinance 1984 which implies that the Assessee applicant has obliged to submit all its adequate evidences supporting the accounts certified by the Chartered Accountant. But since it failed to submit all the document the DCT concern is not obliged to serve a further notice under the provision of section 83(2) of the Income Tax Ordinance 1984, which will be a futile exercise of the provision of law. Therefore the questions as has been

formulated by the Assessee-applicant in these seven income tax reference applications, are not required to be answered in negative and in favour of the Assessee-applicant.

Deliberation of the Court.

14. We have heard the learned Advocate and perused the materials on record.

15. Upon apprising the seven basic assessment orders, made by the DCT concern, it appears that the claimed amount of expenditure has been disallowed by the DCT concern in several heads, but nowhere from the basic assessment order it appears that the DCT concern has raised any dissatisfaction as to the method of accounting or the fact that the DCT concern has pin pointed any defect in the account, which was audited by the Chartered Accountant and submitted with the return as per the requirement of section 75(2)(d)(III) and section 35(3) respectively of the Income Tax Ordinance 1984.

16. But it appears from the provision of section 35(4) of the Income Tax Ordinance 1984 that the DCT concern has to raise dissatisfaction as to the method of accounting, regularly employed by the Assessee-applicant, prior to invoke the power available under the said provision to disallow the claimed expenditure, allowable under the provision of section 29 of the Income Tax Ordinance 1984. The provision of section 35(4) is reproduced below for better appreciation;-

Income Tax Ordinance 1984

Section 35(4). Method of accounting.-

- 1)
- 2)
- 3)
- 4) *Where-*
 - a) *no method of accounting has been regularly employed, or if the method is such that, in the opinion of the Deputy Commissioner of Taxes, the income of the assessee cannot be properly deduced therefrom; or*
 - b) *in any case to which sub-section (20 applies, the assessee fails to maintain accounts, make payments or record transactions in the manner directed under that sub-section; or*
 - c) *a company [or a registered firm] has not complied with the requirements of sub-section (3); the income of the assessee shall be computed on such basis and in such manner as the Deputy Commissioner of Taxes may think fit.*

17. The issue of invocation of power under the provision of section 35(4) of the Income Tax Ordinance 1984 has already been decided in so many cases in this bench and also by the apex court of the country, some of them referred by the learned Advocate Mr. Mosharaf Hossain is examined profitably for the purpose of this judgment.

18. The aforesaid provision was taken for consideration in the case of Titas Gas (T&D) Ltd. –Vs- The Commissioner of Taxes, reported in 53 DLR 209, wherein their Lordship in this Bench, differently constituted, held as under:

The legal position is that in the computation of income profit and gains of company the DCT is entitled to reject the books of accounts if he is of the opinion that no method of accounting has been regularly employed by the assessee or if the method employed is such that the income of the assessee cannot be properly deducted therefrom or that a company has not complied with the requirement of sub-section (3) of section 35 of the Ordinance.

19. Similarly in the case of Mark Builders Ltd.–Vs–The Commissioner of Taxes, reported in 59 DLR 463 their Lordship in this Bench, differently constituted, further held as follows:

The latitude available to the Deputy Commissioner of Taxes under section 35 is no doubt very wide but cannot be thought to be without any restraint in the process of assessment of the total income of an assessee under sub-section (2) of section 83 of the Ordinance. Discretion of statutory authority in the exercise of statutory power, particularly in taxation matter if though to be unlimited then exercise of such discretion may result in arbitrariness and selectivity.

After close examination of the power of the Deputy Commissioner of Taxes under section 83 of the Ordinance to assess the total income of an assessee, we find that after submission of a return or revised return by the assessee, if the Deputy Commissioner of Taxes is not satisfied with the return, he shall serve a notice under sub-section (1), requiring the assessee to appear either in person or through a representative or produce the evidence that the return is correct and complete. After hearing the person or his representative and/or considering the evidence produced pursuant to the notice, he may under sub-section (2) require further evidence on specified points before he could complete the assessment. That could only be done by asking again in writing the assessee to produce evidence upon such points as he should specify, the Deputy Commissioner of Taxes appears to be acquainted with.

20. In the case of Eastern Hardware Store Ltd.–Vs–The Commissioner of Taxes, reported in 54 DLR (2002) 125 their Lordship in this Bench on the provision of section 35(4) of the Income Tax Ordinance 1984 held as under:

As the Appellate Additional Commissioner of Taxes did not find any defect either with the method of accounting or in the accounts neither of them can resort to estimation under section 35(4) of the Ordinance and thereby both of them acted illegally and that illegal order has been mechanically affirmed by the Appellate Tribunal which cannot be sustained in law.

21. From the basic assessment orders it appears that the expenditures were disallowed on the ground of verifiability that adequate evidence were not produced before the DCT concern against which the learned Advocate Mr. Mosharaf Hossain drawn the attention of this court to the fact that in that case the DCT concern has to comply the provision of section 83(2) of the Income Tax Ordinance 1984, which mandates the DCT concern to issue a further notice, directing the assessee concern to submit further evidence as to any issue which was treated by the DCT concern as not to have been adequately evidenced. The provision of section 83(2) read as follows:

Income Tax Ordinance 1984**Section 83(2) Assessment after hearing.**

- (1) *Where a return or revised return has been filed under Chapter VIII and the Deputy Commissioner of Taxes is not satisfied without requiring the presence of the person who filed the return or the production of evidence that the return is correct and complete, he shall serve on such person a notice requiring him, on a date to be therein specified, to appear before the Deputy Commissioner of Taxes, or to produce or cause to be produced before him or at his office, any evidence in support of the return.*
- (2) *The Deputy commissioner of Taxes shall, after hearing the person appearing, or considering the evidence produced in pursuance of the notice under subsection (1) and also considering such other evidence, if any, as he may require on specified points, by an order in writing assess, within thirty days after the completion of the hearing or consideration, as the case may be, the total income of the hearing or the assessee and determine the sum payable by him on the basis of such assessment, and communicate the order to the assessee within thirty days next following.*

22. It appears that the DCT concern did not comply the provision of section 83(2) before opining that the claimed expenditure has not been adequately evidenced by the assessee applicant. Therefore it appears that the disallowance of expenditure has not only violated the provision of section 83(2) of the Income Tax Ordinance 1984, but also violated the time honored maxim *Audi Alterm Partem* which obliged a adjudicator to allow adequate opportunity of being heard or to submit adequate representation. Accordingly this court finds merit in these seven Income Tax Reference Applications.

23. Before parting with the judgment an observation is required to be given as to a very pertinent question of public importance which has been raised by the learned Advocate Mr. Mosharaf Hossain as to the tendency of the taxes department in order realize more and more tax from the citizen of the country by any means and to make an assessment with exaggerate amount of income.

24. In the recent past this court has found in several disputed tax cases that the tax executives are very eager to realize tax by any means in order to fulfill the target as has been fixed by the higher authority. With that end in view, the assessing officers are making the assessment with an object to realize more and more tax. In this manner the assessing officers are assessing any return, filed by the company, by discarding the book version of the accounts, submitted along with the return, complying the provision of section 35(3) of the Income Tax Ordinance 1984. Companies Act 1994 mandates the company to maintain the account in certain method and to audit the same by the chartered accountant firm and to submit those accounts before the meeting of Board of Director and thereafter to submit the account to the Register of Joint Stock companies & firms. This exercise of the provisions of the Companies Act becomes a futile exercise when the same account is submitted before the assessing officer who almost in all the cases disbelieves the genuintiy of the accounts. Further those companies which are engaged in production job has to comply the compulsory provision of the VAT Act 1991 and to pay the VAT, penny to penny, the concerned authority, which is also under the control and management of the National Board of Revenue. The VAT authority regularly examines the accounts of the assessee company by way of

inspecting the day to day production and sale of the relevant company on the spot and no sells could be escaped from their eyes as the VAT executive upon remaining present at the assessee premises inspects day to day production to realize the correct amount of VAT. Therefore the company which is engaged in production job has no scope to conceal any income from the eyes of VAT authority. But this aspect is being ignored by the income tax executives, although under section 30AA of the Income Tax Ordinance 1984. It has been provided that if the VAT is not deducted in accordance with the *জমা সংযোজন কর আইন ১৯৯১* (১৯৯১ সনের ২২ নং আইন) from the bill paid to 3rd party then the amount of expenditure in respect of payment of such bill to a 3rd party, cannot be taken as a allowable expenditure. Therefore by implication although the provision of VAT is required to be taken into consideration, but the tax executive never take the same into consideration, although whenever the VAT has not been deducted from the bill paid to 3rd party that is immediately added with the income, under the provision of section 19(1) and 30g of the Income Tax Ordinance 1984.

25. It appears that due to fixation of target by the Finance Ministry as to collection of income tax to a certain amount, the tax executives either deliberately ignore the provision of law or twist the same in order to attain the target by realizing the more and more tax upon whims and caprice which is deplorable and hereby deprecated by this court. This tendency of the tax executives to realize tax by any means is required to be changed by fixing supervision of the National Board of Revenue in this respect. Therefore a copy of the judgment is required to be sent to the National Board of Revenue for the perusal of its Chairman

26. It appears in the instant case that the DCT concern first fixed the gross profit of the assessee company for the relevant year and then adjusted the amount befitting to the said gross profit, for which the DCT concern enhanced the income by discarding the book version of the account and ignored some of the allowable expense to be allowed, although the expense are adequately evidence by papers and documents, submitted along with the return.

Result of the Case.

27. In the result, this court finds merit in these seven income tax reference application and accordingly the questions as have been formulated in these income tax reference applications are answered in negative and in favour of the assessee applicant.

28. The connected Rules being No. 11(ref:)/09, 26(ref:)/2006, 13(ref:)/2009, 27(ref:)/2006, 6(ref:)/2009, 10(ref:)/2009 and 4(ref:)/2009 are hereby disposed off.

29. However, there shall be no order as to cost.

30. The office is directed to send a copy of this judgment to the Chairman of the National Board of Revenue.