

6 SCOB [2016] HCD 5**High Court Division
(Special Original Jurisdiction)**

I.T. Ref: Application No. 461of 2007

With

I.T. Ref: Application No. 462of 2007

With

I.T. Ref: Application No. 463 of 2007

And

I.T. Ref: Application No. 464of 2007

Mr. Sarder Jinnat Ali, Adv. with

Mr. Umbar Ali, Adv.

...For the Assessee-applicant.

Mr. Saikat Basu, AAG. with

Ms. Nasrin Parvin Shefali, AAG

...For I.T. Department.

Heard on: 19.10.2014 & 27.10.2014

And

Judgment on: The 19th November, 2014**Bright Textile Industries (Pvt.) Limited**

...Assessee-Applicant.

Versus

The Commissioner of Taxes

...Respondent.

Present:**Justice A.F.M. Abdur Rahman****And****Justice Md. Emdadul Haque Azad****Income Tax Ordinance, 1984****Section 35:**

The DCT concern, prior to discarding the book versions of the accounts has to raise dissatisfaction as to the method of accounting as to its cumbersomeness that the true and correct income of the Assessee-applicant cannot be deduced therefrom or to pin point the defect in the accounts; else the DCT concern has to accept the book version of the accounts as submitted by the Assessee-applicant and audited and certified by the chartered accountant.

...(Para 21)

Income Tax Ordinance, 1984**Section 83:**

It has been provided under the provision of section 83(2) of the Income Tax Ordinance 1984 that while the DCT concern desires to rely upon the non-verifiability of any expenditure claimed to have been incurred by the Assessee-applicant and shown in the accounts, has to serve a further notice upon the assessee concern directing him to produce adequate evidence as to the said point.

...(Para 22)

Judgment**A.F.M. Abdur Rahman, J:**

1. With the following formulated question made in the supplementary-affidavit in all these 4(four) Income Tax Reference Applications, the Assessee-applicant, Bright Textile Industries (Pvt.) Limited, preferred the instant Income Tax Reference Applications under section 160(1) of the Income Tax Ordinance 1984, which having been involved similar and

identical question of law have been heard analogously and now disposed off by this single judgment.

1. *Whether, in the facts and on the circumstances of the case, the Tribunal under section 159(2)/29 was justified in maintaining the disallowances that had been made by the DCT without affording an opportunity to cause it to be verified and that it had been done in breach of section 35 read with sections 29 and 83(2) of Income Tax Ordinance 1984.*
2. *Whether, in the facts and on the circumstances of the case, the Tribunal under section 159(2)/35(3)/35(4)(c) was justified in maintaining excess estimate over the disclosed receipt of processing income in violation of section 35(4) in as much as the applicant had complied with the provisions of sections 35(3) and 75(2)(d)(iii) of the Income Tax Ordinance 1984.*

2. Facts of the Cases:

It has been asserted in the Income Tax Reference Application No. 461 of 2007, relating to assessment year 2001-2002, that the Assessee-applicant is a private limited company, incorporated under the Companies Act 1913 and engaged in textile production, Cloth Making, Sales, Cloth Dyeing, Sizing, printing, Finishing and processing, from where the Assessee-applicant derives income. The Assessee-applicant company maintained its accounts under the mercantile system of accounting as per the requirements of section 75(2)(d)(iii) of the Income Tax Ordinance 1984 and the same is regularly audited by the chartered accountant firm which was submitted and recommended by the Board of directors in its general meeting and the same is later submitted before the registrar of Joint Stock Companies, complying the provision of Companies Act 1995. The Assessee-applicant company is a income tax assessee under the TIN. 248-200-4475/Sha-86 and enjoying the tax holiday period from its inception for five years.

3. It has been further asserted in the instant Income Tax Reference Application No. 461 of 2007, that the assessment year 2001-2002, is the last year of tax exemption and the Assessee-applicant, pursuant to the notice served by the DCT concern under section 93 of the Income Tax Ordinance 1984, disclosed a net loss of Tk. 19,04,656.00 and submitted all the supporting documents and evidence as to the book version of account as per the requirements of section 35(3) of the Income Tax Ordinance 1984. Later, pursuant to the notice served under section 79 and 83(1) of the Income Tax Ordinance 1984, the authorized representative of the Assessee-applicant conducted hearing before the DCT concern who upon discarding the book version of the accounts disallowed the incurred expenses and estimated the trading accounts of the Assessee-applicant and ultimately ascertained the income of the Assessee-applicant at an exorbitant amount of Tk. 18,23,67,825.00.

4. In Income Tax Reference Application No. 462 of 2007 relating to assessment year 2002-2003, it has been asserted that the Assessee-applicant submitted its income tax return pursuant to the notice under section 93 of the Income Tax Ordinance 1984, disclosing a net loss of Tk. 50,17,785.00 and the DCT concern upon hearing the authorized representative of the Assessee-applicant disallowed the book version of the account of the Assessee-applicant as to the incurred expenditure and the trading account and ascertained the income of the Assessee-applicant at an exorbitant amount of Tk. 15,51,97,862.00.

5. In Income Tax Reference Application No. 463 of 2007, relating to assessment year 2003-2004, it has been asserted that the Assessee-applicant submitted its income tax return pursuant to the notice under section 77 of the Income Tax Ordinance 1984, disclosing a net loss of Tk. 28,71,667.00 and the DCT concern upon hearing the authorized representative of the Assessee-applicant, discarded the book version of the account as to the incurred expenditures and also the trading accounts and ascertained the income of the Assessee-applicant at an exorbitant amount of Tk. 23,28,21,620.00.

6. In Income Tax Reference Application No. 464 of 2007 relating to assessment year 2004-2005 it has been asserted that the Assessee-applicant submitted its income tax return pursuant to the notice served under section 77 of the Income Tax Ordinance 1984, disclosing a net loss of Tk. 7,89,589.00 and the DCT concern upon hearing the authorized representative of the Assessee-applicant discarded the book version of the account of the Assessee-applicant as to the incurred expenditures and also the trading accounts and ascertained the income of the Assessee-applicant at an exorbitant amount of Tk. 30,00,29,524.00.

7. Being aggrieved with and highly dissatisfied by the said assessment orders, the Assessee-applicant preferred three appeals before the first appellate authority, the Commissioner of Taxes (Appeal), being BuLl A;f£mfœ ew- 200,201,202/p;86/LxAx-8/05-06 relating to assessment year 2001-2002, 2002-2003 and 2003-2004 and also preferred BuLl Bf£mfœ ew- 450/p;86/LxAx-8/05-06 relating to assessment year 2004-2005. All those first appeals having being disposed off allowing either partly or disallowing the grounds of appeal the Assessee-applicant preferred further preferred appeal before the Taxes Appellate Tribunal, being ITA No. 799 of 2006-2007 relating to assessment year 2001-2002, I.T.A. No. 800 of 2006-2007 relating to assessment year 2002-2003, ITA No. 801 of 2006-2007 relating to assessment year 2003-2004, which were heard analogously by the Division Bench-1, Dhaka of the Taxes Appellate Tribunal. The Assessee-applicant further appeal before the Taxes Appellate Tribunal, being I.T.A. No. 2159 of 2006-2007 relating to assessment year 2004-2005, which was also heard by the Division Bench-1, Dhaka, of the Taxes Appellate Tribunal, separately. But all these appeals before the Taxes Appellate Tribunal also having been failed, the Assessee-applicant preferred the instant Income Tax Reference Applications with the formulated question in the substantive application and further reformulated in the supplementary-affidavit as aforementioned.

8. Claim of the Taxes department:

Upon service of the notice of the instant Income Tax Reference Application, the learned Assistant Attorney General Ms. Nasrin Parvin along with the learned Assistant Attorney General Mr. Saikat Basu, appeared on behalf of the Taxes Department and filed affidavit-in-reply wherein it has been claimed that the DCT concern has correctly made his assessment order enhancing the income of the Assessee-applicant by disallowing the claimed incurred expenditure and also estimated the trading account since the Assessee-applicant failed to substantiate the book version of the accounts for which the true and correct income could not be deduced from the said account. The DCT concern upon expressing its reasoning in the assessment order since disallowed the expenditure and estimated the trading account in accordance with the power available to under section 35(4) of the Income Tax Ordinance 1984, the two lower appellate authorities correctly and lawfully considered the entire aspect of the assessment order and confirmed the same and as such the instant questions, as have been formulated in the Income Tax Reference Applications, are not required to be answered in negative and in favour of the Assessee-applicant.

9. The learned Advocate Mr. Sarder Jinnat Ali, represented the Assessee-applicant, while the learned Assistant Attorney General Ms. Nasrin Parvin, argued on behalf of the Taxes Department at the time of hearing of the Income Tax Reference Application.

10. Argument of the Assessee applicant:

The learned Advocate Mr. Sarder Jinnat Ali, while taken this court through the four assessment orders, made by the DCT concern for the relevant assessment year, has drawn the attention of this court as to the latitude of power available under the provision of section 35(4) of the Income Tax Ordinance 1984 and vigorously argued that these four cases are the burning example of whim and caprice employed by the DCT concern, since the DCT concern while disallowing the incurred expenditure and estimating the trading account, ascertained so exorbitant income of the Assessee-applicant that cannot be believed under the facts and circumstances of the cases. The DCT concern estimated the income of the Assessee-applicant at an amount of Tk. 40,00,00,000.00 for the assessment year 2001-2002, which was disclosed by the Assessee-applicant at a loss of Tk. 19,04,656.00, wherein the DCT concern disbelieved the disclosed income from processing of textile at an amount of Tk. 40,00,00,000.00, disbelieving the disclosed amount at Tk. 2,36,34,728.00. Similarly, the DCT concern enhanced the income of the Assessee-applicant for the assessment year 2002-2003 at an amount of Tk. 20,69,30,482.00, which was disclosed at a loss of Tk. 50,17,785.00 by the Assessee-applicant, while the DCT concern disbelieved the amount of income from the textile processing at an amount of Tk. 1,78,86,138.00 and estimated the same at an amount of Tk. 45,00,00,000.00. The DCT concern similarly ascertained the income of the Assessee-applicant for the assessment year 2003-2004 at an amount of Tk. 23,28,21,620.00 which was shown as loss of Tk. 28,71,667.00, while the DCT concern disbelieved the income of the Assessee-applicant from the textile processing at an amount of Tk. 1,98,15,546.00 and ascertained the same at an amount of Tk. 50,00,00,000.00. The DCT concern further similarly enhanced the income of the Assessee-applicant for the assessment year 2004-2005 at an amount of Tk. 30,00,29,524.00 which was shown as a loss of Tk. 7,89,589.00 while the DCT concern disbelieved the income from the textile processing at an amount of Tk. 2,49,04,288.00 which the DCT concern estimated the income of the Assessee-applicant at an amount of Tk. 60,00,00,000.00. These being a whimsical and non-believable estimation of income of the Assessee-applicant by the DCT concern, the two lower appellate authorities were required to consider the evidence as have been produced in support of the book version of the accounts, which were audited and certified by the chartered accountant and to set aside the assessment order and to direct the DCT concern to accept the return as have been filed by the Assessee-applicant, which was audited and certified by the chartered accountant complying the provision of Companies Act 1995 and filed return as per the provision of section 75(2)(d)(iii) and section 35(3) of the Income Tax Ordinance 1984. But that being not done the question as have been formulated by the Assessee-applicant are required to be answered in negative and in favour of the Assessee-applicant.

11. The learned Advocate Mr. Sarder Jinnat Ali further argued that two of the pertinent question have already been decided by this court and the apex court of this country, that the DCT concern in order to invoke its power under section 35(4) of the Income Tax Ordinance 1984 in respect of discarding the book version of the accounts of Assessee-applicant, has to raise dissatisfaction as to the method of accounting with a farm reasoning that the method regularly employed by the Assessee-applicant is so cumbersome that the actual and true income cannot be deduced therefrom and further if the DCT concern finds that any of the expenditure claimed to have been incurred by the Assessee-applicant was not adequately evidenced, the DCT concern was mandated under the provision of section 83(2) of the

Income Tax Ordinance 1984 to direct the Assessee-applicant by way of issuing notice to furnish further evidence on any point. But that has not been done in the instant four Income Tax Reference Applications, the questions as have been formulated by the Assessee-applicant is required to be answered in negative and in favour of the Assessee-applicant.

12. In this respect the learned Advocate Mr. Sarder Jinnat Ali relied upon the cases of Titas Gas (T&D) Limited-Vs-The Commissioner of Taxes, reported in 53 DLR, the case of Mark Builder Limited-Vs-The Commissioner of Taxes, reported in 59 DLR 463 and the case of M/S. Easter Hardware Stores-Vs-The Commissioner of Taxes, reported in 54 DLR 125, respectively.

13. Arguments of the Taxes department

The learned Assistant Attorney General Ms. Nasrin Parvin relying upon the assertion made in the affidavit-in-opposition argued that the DCT concern had no other alternative but to estimate the income of the Assessee-applicant since the Assessee-applicant failed to substantiate the claimed expenditure made in the book version of the accounts and since the Assessee-applicant claimed the expenditure to have been incurred by it, it is the duty of the Assessee-applicant to substantiate the same by filing adequate evidence before the DCT concern, since admittedly the DCT concern has issued and served the notice under section 79 of the Income Tax Ordinance 1984 and further also issued notice under section 83(1) of the Income Tax Ordinance 1984, which obliged the Assessee-applicant to submit all the evidence before the DCT concern for his consideration. In the instant four cases the DCT concern has categorically expressed his opinion that nothing of the evidence as to substantiate the claimed incurred expenditure have been submitted before the DCT concern and as such the DCT concern has lawfully and correctly estimated the income of the Assessee-applicant. This being the lawful act of the DCT concern, the two appellate authorities did not set aside the assessment order and as such the questions formulated by the Assessee-applicant in these four Income Tax Reference Applications are not required to be answered in negative and in favour of the Assessee-applicant.

14. Deliberation of the court:

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

15. The power for disbelieving the genuinity of incurred expenditure by the DCT concern emerges from the provision of section 35(4) of the Income Tax Ordinance 1984 which reads as follows;

Income Tax Ordinance 1984

Section 35(4): Method of accounting—

(1) —(3).....

(4) Where—

(a) no method of accounting has been regularly employed, or if the method employed 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 (2) applies, the Assessee fails to maintain accounts, make payments or record transactions in the manner directed under that sub-Section; or

(c) a company has not complied with the requirements of sub-Section (3); the income of the Assessee shall be computed on such basis and in such ner as the Deputy Commissioner of Taxes may think fit.

16. Under the aforesaid provision the DCT concern may discard the book version of the accounts maintained and submitted by the Assessee-applicant under the following pre-condition;

(i) where the Assessee-applicant did not employ a method of accounting regularly or (ii) the method of accounting employed regularly is so cumbersome that the true and correct income of the Assessee-applicant cannot be deduced therefrom (iii) the provision of sub-section (2) of section 35 of the Income Tax Ordinance 1984 for not complied with (iv) the company has not comply with the requirement of sub-section (3) of section 35 of the Income Tax Ordinance 1984.

17. Unless theses four pre-conditions are fulfilled the DCT concern is not empowered to disbelieve or discard the book version of the accounts submitted by the Assessee-applicant, which has been categorically decided in so many cases disposed off by this court and the apex court of this country, out of which some of them are profitably examined herein;

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 deduced 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. The *ratio decidendy* as appears from the aforesaid cases that the DCT concern, prior to discarding the book versions of the accounts has to raise dissatisfaction as to the method of accounting as to its cumbersomeness that the true and correct income of the Assessee-applicant cannot be deduced therefrom or to pin point the defect in the accounts; else the DCT concern has to accept the book version of the accounts as submitted by the Assessee-applicant and audited and certified by the chartered accountant.

22. Further to such obligation of the DCT concern it has been provided under the provision of section 83(2) of the Income Tax Ordinance 1984 that while the DCT concern desires to rely upon the non-verifiability of any expenditure claimed to have been incurred by the Assessee-applicant and shown in the accounts, has to serve a further notice upon the assessee concern directing him to produce adequate evidence as to the said point. This provision of section 83(2) of the Income Tax Ordinance 1984 reads as follows;

Income Tax Ordinance 1984

Section 83(2): Assessment after hearing.—

(1).....

(2) *The Deputy Commissioner of Taxes shall, after hearing the person appearing, or considering the evidence produced in pursuance of the notice under sub-section (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 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.*

23. This being the decision of this court, that the DCT concern cannot rely upon his so called finding that no evidence has been submitted in support of the incurred expenditure, without complying the provision of section 83(2) of the Income Tax Ordinance 1984 the same is required to be complied with by the DCT concern and in its default the two lower appellate authorities. In the instant four cases the DCT concern committed the same error but the two appellate authorities remain oblivious of the same. Therefore, the question as have been formulated in this respect in these four Income Tax Reference Applications are also required to be answered in negative and in favour of the Assessee-applicant.

24. Under the reasoning and discussion as above, this court finds merit in these four Income Tax Reference Applications which are required to be allowed.

25. In the result, the instant four Income Tax Reference Applications are allowed.

26. The questions formulated in the supplementary-affidavit filed the instant Income Tax Reference Applications are hereby answered in negative and in favour of the Assessee-applicant.

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

28. The connected rules being No 70(Ref:)/2011, 71(Ref:)/2011, 72(Ref:)/2011 and 73(Ref:)/2011 are disposed off accordingly.