

**IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA 'B' BENCH, KOLKATA**

**Before Shri P.M. Jagtap, Accountant Member
and Shri S.S. Viswanethra Ravi, Judicial Member**

**I.T.A. No. 712/KOL/ 2012
Assessment Year: 2008-2009**

Sri Niranjanlal Agarwal,.....Appellant
48A, Park Street,
Kolkata-700 016
[PAN: ADCPA 9883 E]

-Vs.-

Deputy Commissioner of Income Tax,.....Respondent
Central Circle-III, Kolkata,
Poddar Court,
18, Rabindra Sarani,
Kolkata-700 001

Appearances by:

Shri Manish Tiwari, FCA, for the assessee

Shri Sachchidananda Srivastava, CIT, D.R., for the Department

Date of concluding the hearing : February 22, 2016

Date of pronouncing the order : March 04, 2016

O R D E R

Per Shri P.M. Jagtap :-

This appeal filed by the assessee is directed against the order of Id. Commissioner of Income Tax, Central-1, Kolkata dated 27.03.2012 for the assessment year 2008-09 passed under section 263 of the Income Tax Act, 1961.

2. The assessee in the present case is an individual, who derives income from house property, business, capital gain and other sources. The return of income for the year under consideration was originally filed by him on 24.12.2008 declaring total income of Rs.6,07,214/-. Subsequently a revised return was filed by the assessee on 23.09.2009 declaring total income of Rs.7,78,709/-. In the assessment completed under section 143(3) vide an order dated 30.12.2010, the total income of

the assessee was determined by the Assessing Officer at Rs.39,73,124/- after making certain additions/disallowances. The record of the said assessment came to be examined by the Id. CIT and on such examination, he was of the view that the order passed by the Assessing Officer under section 143(3) suffered from the following errors, which were prejudicial to the interest of the revenue:-

“(1) On verification of the assessment records, it was noticed that the assessee has not directly debited Securities Transaction Tax in the profit & loss account. But in a submission made on 27.12.2010 before the Assessing Officer the assessee had admitted that STT payment amounting to Rs.17,42,353/- had been adjusted through share trading loss. In the accounts the assessee has shown share trading loss in 4 parts and netted the entire gain/loss of all the four parts. But STT payments are required to be grossed up separately for each of the four parts and to be examined as per 5th proviso to section 48 of the Income Tax Act, 1961 and the section 40(a)(b) of the Income Tax Act, 1961, short term capital loss had been allowed to be carried forward although there was belated return.

(2) On examination of the two accounts submitted by the assessee it is seen that in the second/revised accounts the assessee has reduced total sale of saree and has included a new source of business profit as sale of office space. But sufficient enquiries were not made at the time of assessment to verify the two items.

(3) Examination of record reveals that the assessee had done some jobbing profit. Since the assessee is not a broker, the income should be taken as speculation profit instead of profit from normal business as shown by the assessee.

The Id. CIT, therefore, issued a notice under section 263 to the assessee pointing out the above errors and since the explanation offered by the assessee in reply to the said notice was not found acceptable by him, the Id. CIT held that the order passed by the Assessing Officer under section 143(3) was erroneous as well as prejudicial to the interest of the revenue in as much as the Assessing Officer did not conduct necessary enquiry regarding treatment of Security Transaction Tax (STT) payment

and variation in accounts submitted by the assessee and also failed to give proper treatment to short-term capital loss and to tax jobbing profit under proper head. Accordingly, the order passed by the Assessing Officer under section 143(3) was set aside by the Id. CIT by exercising the powers conferred upon him under section 263 with a direction to the Assessing Officer to pass a fresh assessment order as per law after giving proper opportunity of being heard to the assessee. Aggrieved by the order of the Id. CIT passed under section 263, the assessee has preferred this appeal before the Tribunal.

3. We have heard the arguments of both the sides and also perused the relevant material available on record. As submitted by the Id. Counsel for the assessee, the issue raised by the Id. CIT in error no. 1 allegedly committed by the Assessing Officer was already involved in the appeal filed by the assessee before the Id. CIT(Appeals) against the order of the Assessing Officer passed under section 143(3) and the same having been considered and decided by the Id. CIT(Appeals) vide his appellate order dated 07.07.2011, the same was beyond the scope of revision under section 263 as per Clause (c) of Explanation 1 below sub-section 1 of Section 263. He has also filed a copy of the said order of the Id. CIT(Appeals) and invited our attention to para 3.1 thereof, wherein this issue is discussed by the Id. CIT(Appeals) as under:-

"3.1. I have carefully considered the submission of the Id. AR. While computing the income under the head 'business income', the AO has disallowed the Securities Transaction Tax of Rs.17,42,354/-. However, considering the fact that the said expenditure had not been claimed against business income, there is no basis and reason for making disallowance by invoking the provisions of section 40(a)(ib) of the Income Tax Act, 1961. Accordingly the addition of Rs.17,42,354/- made by the AO under section 40(a)(ib) of the Act is deleted. However considering the fact that the expenditure in question has been claimed against the income/loss computed under the head capital gain, the AO is directed to disallow the same as per fifth proviso of section 48 of the Income Tax Act, 1961 which reads as 'provided also that no deduction shall be allowed in computing the income chargeable under the head

'capital gains' in respect of any sum paid on account of securities transaction tax under Chapter VII of the Finance (No. 2) Act, 2004. The appellant will get necessary relief accordingly".

4. A perusal of the relevant portion of the Id. CIT(Appeals)'s order dated 07.07.2011 reproduced above clearly shows that the issue raised by the Id. CIT in his impugned order passed under section 263 while pointing out the first error in the order of the Assessing Officer was already considered and decided by the Id. CIT(Appeals) on 07.07.2011 itself that is before passing of the impugned order by the Id. CIT on 27.03.2012 and this position has not been disputed even by the Id. D.R. As per Clause (c) of Explanation (1) to Section 263(1), wherein an order referred to in section 263(1) and passed by the Assessing Officer had been the subject matter of any appeal, the powers of the Commissioner under the said sub-section shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal. Since the issue raised by the Id. CIT while pointing out the error no.1 in the order of the Assessing Officer had already been considered and decided by the Id. CIT(Appeals), the same, in our opinion, was beyond the scope of revisionary powers conferred upon the Id. CIT under section 263 and he, therefore, was not justified in revising the order of the Assessing Officer on this issue by exercising such powers.

5. As regards the second error pointed out by the Id. CIT that the revised figures furnished by the assessee were accepted by the Assessing Officer without proper and sufficient inquiries, the Id. Counsel for the assessee at the time of hearing before us has not been able to show that any such enquiry was actually made by the Assessing Officer to verify these revised figures while completing the assessment under section 143(3). The error no. 2 as pointed out by the Id. CIT thus was there in the order passed by the Assessing Officer under section 143(3) calling of revision by the Id. CIT under section 263.

6. As regards the error no. 3 pointed out by the Id. CIT(Appeals), the Id. Counsel for the assessee has contended that since the speculation profit as well as normal business income is chargeable to tax at the same rate, the error, if any, in bringing to tax the relevant income either as speculation profit or normal business profit cannot be said to have caused any prejudice to the interests of the revenue calling for revision under section 263 on this issue. We find merit in this contention of the Id. Counsel for the assessee and since the Id. D.R. has also not been able to controvert the stand taken by the Id. counsel for the assessee on this issue, we hold that there being no prejudice caused to the interest of revenue as a result of error no. 3 pointed out by the Id. CIT, no revision under section 263 on this issue was called for.

7. Keeping in view the above discussion, we set aside the impugned order of the Id. CIT under section 263 on the issue of treatment of STT payment as well as determination of head of income under which the jobbing profit is chargeable to tax but uphold the same on the issue of lack of inquiry made by the Assessing Officer to verify the revised figures furnished by the assessee.

8. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open Court on March 04, 2016.

Sd/-

Sd/-

(S.S. Viswanethra Ravi)
Judicial Member

(P.M. Jagtap)
Accountant Member

Kolkata, the 4th day of March, 2016

Copies to : (1) ***Sri Niranjnlal Agarwal,***
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Kolkata-700 016

(2) ***Deputy Commissioner of Income Tax,***
Central Circle-III, Kolkata,
Poddar Court,
18, Rabindra Sarani,
Kolkata-700 001

- (3) Commissioner of Income-Tax (Central-1), Kolkata*
- (4) Commissioner of Income Tax, Kolkata*
- (5) The Departmental Representative*
- (6) Guard File*

By order

*Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata*

Laha/Sr. P.S.