

IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "A" NEW DELHI  
BEFORE SHRI S.V. MEHROTRA : ACCOUNTANT MEMBER  
AND  
SHRI SUDHANSHU SRIVASTAVA: JUDICIAL MEMBER

ITA no. 2500/Del/2014  
A.Y. 2007-08

Bhupinder Singh  
10/3, Old Rajinder Nagar,  
New Delhi.  
PAN: AAUPS 9406 N  
( Appellant )

Vs. Income-tax Officer,  
Ward-33(4), New Delhi.

(Respondent)

Appellant by : Shri Salil Agarwal Adv. &  
Shri Shailesh Gupta CA  
Respondent by : Shri Ravi Jain CIT(DR).

Date of hearing: 20.10.2016  
Date of order: 11.11.2016.

**ORDER**

**PER S.V. MEHROTRA, A.M:**

This is an appeal filed by the department against the order dated 26.03.2014 passed by the Commissioner of Income-tax, Delhi-XI, New Delhi, u/s 263 of the Income-tax Act, 1961, relating to A.Y. 2007-08.

2. Brief facts culminating to the proceedings u/s 263 are that in this case original assessment order was passed u/s 144 of the Income-tax Act dated 18.12.2009 contained at pages 13 & 14 of the PB. As against the returned income of Rs. 1,11,998/-, the assessment was completed at a total income of

Rs.14,11,848/- after making addition of Rs. 12,99,850/- u/s 68 of the Income-tax Act. The total cash of Rs. 10,99,850/- deposited by the assessee in his saving bank account, maintained with Centurion Bank of Punjab Ltd., East Patel Nagar Market, New Delhi, during the period relevant to assessment year under consideration, was treated as unexplained as assessee did not attend the proceedings. Assessee preferred appeal before the Id. CIT(A), who, vide his order dated 14.11.2011, contained at pages 40 to 52 of the PB, dismissed the assessee's appeal. The assessee preferred appeal before the ITAT, which vide its order dated 15.10.2012, contained at pages 53 to 59 of the PB, restored the matter to the file of the AO with the direction to allow one final opportunity to the assessee to establish the nexus of his business receipts with cash deposited in the bank as also to explain the nature of transaction in the said account and, thereafter, pass appropriate orders in accordance with law. Consequent to these directions, the AO, inter alia, issued notice dated 2.9.2013 contained at pages 73 to 75 of PB, wherein the AO, inter alia, observed as under:

*“The Ld. ITAT has too issued directions for the assessee to place best evidence before the A.O, so that matter could be disposed or expeditiously . It has also specifically been ordered that " In (the event the assessee does not avail the opportunity provided by the A.O, or does not establish the nexus of his business receipts with the cash deposited in the bank a/c, the addition shall stand confirmed", {para- 6 at page, 12).*

*Vide your reply dated 12-04-20 13, submitted through your A. R in response to my predecessor's letter/notice dated 20-03-2013 for 28-03-2013, you have only furnished copy of your bank a/c, computation of income. Neither narration of bank entries nor any supporting documentary evidence to prove the nexus of each deposits with business receipts, as pointed out by the appellate authorities, have now been furnished.*

*Your attention is further drawn to para 6 at page 11 & 12 of the Ld. ITAT's order, wherein attention has been drawn that the cash deposited in bank a/c are almost 40% higher than the business receipts declared at Rs. 9,56,780/- on which provisions of section 44AF have been applied. It has also been observed that "Whether the entire cash was deposited in the bank, has not been established by the assessee. We find from the copy of bank statement that cash of Rs. 18,800/- .... there are number of entries of deposit of cash and payments in cash, including to one Kirpal Singh. Not even one entry has been explained before the AO or the Ld. CIT(A) and even before us. The Ld. AR on behalf of the assessee, though relied upon number of judgments, did not even attempt to correlate the deposits in cash in the bank account of the assessee with his business receipts. The onus is upon the assessee to establish that the cash deposited in the bank originated from his turnover of the business".*

*In view of the above referred observations of the Appellate authorities, you are hereby given an opportunity to furnish and produce the following:-*

- 1. Produce sale bills to verify the correctness of sales disclosed for asstt. and verify its nexus with cash deposited in bank a/c.*
- 2. Detailed note 'as to your business activity in past 2 years and subsequent 2 years. Whether facts similar, bank a/c same. If yes, furnish copy of computation, return and bank details.*
- 3. Narration and documentary evidence for credits other than those not taken as business receipts by you, failing which*

*why these may not be treated as unexplained cash deposits as per section 68 of the IT Act.*

4. *Produce cash book to verify as to whether the entire cash sales were deposited in bank a/c and nothing remained to be deposited.*

5. *Documentary evidence with name and address of the parties for cash deposits mentioned by the Lei. ITAT in para-6 of page- 11, and for any other similar type of cash deposits in your bank, outside Delhi to verify that these represent your retail sale receipts only & as well as whether the entire sale amount having been deposited.*

6. *Random view of cash deposit & withdrawal in the beginning of the year reveal the position as under -*

<i>Date</i>	<i>Amt (deposited (Rs.))</i>	<i>Amt. Withdrawn (Rs.)</i>
04.04.2006	18800	15000
10-04-2006	20000	20000
10-04-2006	11800	10000
28.04.2006	19000	28/04(i) 7000 28/04 (ii) 10000 29/04 (iii) 2000

*As per the above transactions, it can be seen that a normal prudent business-man & more-so having small retail business receipts, as being alleged by you, will have repeated visits more than once a day to deposit and then withdraw almost the same amount for business purposes from a bank situated at a distance and will also incur, travelling expenses for no gain from banking transaction, Hence the deposits in this bank a/c cannot be known to you only”.*

3. Ld. counsel pointed out that in response to this notice assessee filed its first reply dated 9.9.2013, contained at pages 76 to 79 of the PB and further filed reply

dated 4.10.2013, contained at pages 60 & 61 of the PB. He submitted that all the queries raised by AO were duly replied and, thereafter, after considering the same, the AO passed the assessment order on 17.10.2013. Ld. counsel pointed out that this assessment order has been revised by Id. Commissioner. He referred to pages 64 & 65 of the PB, wherein the notice dated 17.2.2014 u/s 263, issued to assessee by Id. Commissioner, is contained. The assessee filed its reply dated 26.2.2014 contained at pages 66 to 72 of PB. After considering these, Id. Commissioner passed the order dated 26.3.2014.

4. Ld. counsel pointed out that in the case of Malabar Industries Co. Ltd. Vs. CIT 243 ITR 83 (SC), it has been held that an order can be revised, *inter-alia*, if there was non-application of mind. He submitted that in the present case two replies were filed, as noted earlier, by the assessee before AO and, after considering them, the AO passed order u/s 143(3)/254. He pointed out that as against the declared income of Rs. 1,11,998/-, the assessee accepted the income at Rs. 1,70,153/-. Ld. counsel further referred to the decision of Hon'ble Delhi High Court in the case of ITO Vs. D.G. Housing Projects Ltd. 343 ITR 329 (Del.), wherein it has been held that without recording the findings that the assessment order was erroneous and prejudicial to the interest of revenue, revision of order could not be allowed. He submitted that no query had been raised by

Commissioner on the detailed replies filed before him and, therefore, ld. CIT's order was contrary to the law laid down by Hon'ble Delhi High Court in the case of D.G. Housing Projects Ltd. (supra).

5. Ld. counsel referred to the decision in the case of Director of Income Tax vs. Jyoti Foundation, 357 ITR 388 and submitted that ld. Commissioner could not merely set aside the matter to AO without recording finding. He submitted that ld. Commissioner has recorded a finding that assessee was wholeseller which is completely wrong finding on misconceived facts. He submitted that there were only three sales to outsiders aggregating to Rs. 1,92,000/- and, therefore, assessee could not be branded as a wholesaler. He submitted that assessee has throughout been a small retailer and this fact has been accepted in AY 2009-10 also by AO. A copy of the order for AY 2009-10 was also filed in course of hearing.

6. Ld. counsel pointed out that assessee had filed return u/s 44AF. In this regard he referred to page 2 of PB, wherein computation of total income is contained, wherein assessee had disclosed income u/s 44AF at Rs. 1,25,250/- at a gross turnover of Rs. 9,56,760/-.

7. Ld. counsel further referred to pages 80 to 101, wherein the bank statement is contained. Further, he referred to pages 102-108 wherein the narration of the cash deposits in Centurion Bank of Punjab Ltd. is given.

8. Ld. counsel further referred to page 109 of the PB, wherein the cash flow statement is contained to demonstrate that primarily the sale receipts were from business. In support of these submissions ld. counsel also referred to pages 116-117 of the Paper Book, wherein month-wise details of cash deposits and withdrawals in Centurion Bank and reconciliation of cash deposited at bank branch outside Delhi at Police Branch at Ludhiana, is contained.

9. Ld. counsel referred to pages 118 to 126 of the PB wherein the ledger account of sales is contained. Further from pages 127 to 227 the copies of cash memos are contained. He pointed out that all these documents were filed before AO and after considering all these he accepted the assessee's contention that all the cash deposits pertained to business receipts. Ld. counsel pointed out that no error has been pointed out by ld. Commissioner in the details furnished by assessee.

10. Ld. DR referred to the Tribunal's order contained at pages 53 to 59 and read out the following specific directions given by the Tribunal:

*“In these circumstances, especially when the complete facts are not before us, we consider it fair and appropriate to vacate the findings of ld. CIT(A) and restore the matter to the file of the AO with the directions to allow one final opportunity to the assessee to establish the nexus of his business receipts with cash deposited in the bank as also to explain the nature of transactions in the aid account and thereafter pass appropriate orders in accordance with law. The assessee is also directed to place his best evidence before the AO so that matter could be*

*disposed of expeditiously. In the event the assessee does not avail the opportunity provided by the AO or does not establish nexus of his business receipts with the cash deposited in the aforesaid bank account, the addition shall stand confirmed. With these directions, ground nos. 2,4(b) and the remaining portion of ground no. 5 are disposed of.*

11. He submitted that assessee offered some additional income which was accepted by AO without carrying out the directions of ITAT. He referred to the assessment order and pointed out that the order is very cryptic. He referred to page 64 of PB, wherein the show cause notice of Id. Commissioner is contained and pointed out that Id. Commissioner primarily issued this notice, because assessee failed to establish nexus of business receipts with the cash deposit in the bank account as was specifically directed by ITAT to be established. He submitted that the observations of Id. Commissioner as regards wholeseller was not material for deciding whether AO's order was erroneous or not. He submitted that submission of details by assessee, without due application of mind on the same, could not be accepted as fulfilling the specific directions given by Tribunal. He referred to the order of the ITAT Ahmedabad Bench in the case of M/s Sonalank Investment & Trading Pvt. Ltd. Vs. CIT - ITA no. 1343/Ahd/2011 dated 3.2.2012 and relied on following observations:

*“An assessment order can be erroneous either in law or in fact. An assessment order can be an erroneous one when prima facie a claim is allowed which according to the learned CIT was against the provisions of law. An assessment order can be held as prejudicial to the interest of the revenue if in the opinion of the learned CIT the inquiry was not adequate or no inquiry at all has been made. We may like to mention that the AO is not only an adjudicator but also an investigator. The AO cannot remain a passive spectator while dealing with a return of income filed by the tax payer. If, on the face of the return it is apparent that an inquiry is required: then it is expected from the AO to conduct an investigation so as to ascertain correctness of the return filed as also the income declared therein. It is his duty to ascertain the truth of the facts stated in the return. Where the circumstances indicate to provoke an inquiry, then the same should not be withheld. In a landmark decision in the case of G.*

*V. Enterprises, 99 ITR 375, the Hon'ble Delhi High Court has held that "inadequacy of inquiry is a good reason for invoking the proceedings u/s 263 of the Act." In any case, we are not confining our decision entirely on the issue of "lack of inquiry" or "inadequate inquiry". From the side of the assessee the learned AR, Mr. Tushar P. Hlmani has argued that this is not the case of lack of inquiry by A.O. and that if the AO had made inadequate inquiry then that should not be a ground to applying the provisions of section 263 of the IT Act. Nevertheless, we are on the issue that no inquiry at -all has been made by the AO in respect of the determination of the nature of the transaction. The law is very clear that the AO has quasi-judicial powers vested on him. By exercising those powers it is necessitated to pass a reasoned order. If the reasoning is lacking in an assessment order, then also the learned CIT can invoke the revisionary powers. There must be some prima facie materials on record to show that the tax which was offered by the assessee was lawfully excisable on the assessee and, therefore, it was accepted by the AO without any change or alteration”.*

12. Ld. DR further referred to para 17 of the order of ITAT Delhi Bench 'F' in the case of PVS Multiplex (India) Ltd. in ITA no. 2370/Del/2013 dated 14.8.2015, as reproduced below:

*“In view of above, if we analyse facts and circumstances of the present case, wherein the Assessing Officer conduct the assessment proceeding and passed impugned assessment order accepting the return of income of the assessee we clearly observe that the Assessing Officer has not made inquiry on the issue of interest free advances and proportionate disallowance of interest thereon, on the issue of verification on TDS and on the claim and calculation of the assessee for the purpose of deduction u/s 80IB(7A) of the Act specially on the issue of exclusion of income/receipt on sale of shop and FDR interest. In this situation, we have no hesitation to hold that the order of the AO which is apparently very precise and cryptic, was not passed after due examination and verification of certain or issue and therefore, there was an error on the part of AO which leads to a correct conclusion of the CIT with the order of the AO is not only erroneous or also prejudicial to the interest of Revenue. We may further point out that the assessment order suffers lack of necessary enquiry on certain important issues which have been raised by the CIT in the notice issued to the assessee and impugned order u/s 263 of the Act. Therefore, we reach to a conclusion that the assessment order is not sustainable and in accordance with the provisions of the Act which is not only erroneous but also prejudicial to the interest of the Revenue.”*

13. Ld. DR pointed out that in the present case ld. Commissioner pointed out as to what the AO was required to do. He submitted that AO has not mentioned his view on the directions of ITAT. He submitted that AO was required to establish

nexus between the cash deposits with the business receipts on which there is no finding.

14. Ld. DR further referred to the decision of Hon'ble Gauhati High Court in the case of CIT Vs. Shri Jawahar Bhattacharjee rendered in ITA no. 2 of 2008 dated

7.2.2012. Para 22 of the decision reads as under:

*“22. We have already referred to judgments of this Court in Rajendra Singh and two Single Bench judgments following the said judgment in Bongaigaon Refinery and Petrochemicals Ltd. and Shyam Sundar Agarwal as also the second Division Bench judgment in Daga Entrade P. Ltd. No doubt, in Rajendra Singh, an observation was made that erroneous assessment referred to the defect which is jurisdictional in nature, as against substitution of one view for the other, merely on the ground that a different view was possible. If read as a whole, the judgment does not exclude error in assessment order, by ignoring relevant material. Not holding such inquiry as is normal and not applying mind to relevant material would certainly be 'erroneous' assessment warranting exercise of revisional jurisdiction. Judgment has to be read as a whole and an observation during the course of reasoning in the judgment should not be divorced from the context in which it was used. The judgment is neither to be interpreted as an Act of Parliament nor as a holy book. If this principle is kept in mind, we do not find any conflict in the view taken in Rajendra Singh and Daga Entrade P. Ltd. Disagreement in Daga Entrade P. Ltd. is only to the interpretation which limits the ratio of the judgment by relying only one sentence in isolation divorced from the entire judgment. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being 'erroneous' non-application of mind and omission to follow natural justice is in same category”.*

15. With reference to this decision Id. DR pointed out that if AO failed to carry out proper scrutiny of facts then order becomes erroneous.

16. Ld. DR further submitted that it is not clear whether reply dated 9.9.2013 was filed by assessee before AO or not because this reply has not at all been referred to by AO in the impugned order. AO has referred to reply dated 4.10.2013 wherein, by referring to para 3, the AO observed that assessee submitted that in order to buy peace and avoid litigation, the assessee agreed for assessment of business income at Rs. 1,70,150/- as against the declared income of Rs.1,25,250/-.

17. Ld. counsel in his rejoinder submitted that Id. Commissioner cannot direct how AO should write the order. He further pointed out that view taken by AO was plausible view. He further pointed out that the cases relied upon by Id. DR are distinguishable as they relate to cases of no inquiry.

18. We have considered the submissions of both the parties and have perused the record of the case. We have earlier reproduced the directions of ITAT wherein opportunity was required to be afforded to the assessee to establish the nexus of his business receipts with the cash deposits in the bank and also to explain the nature of transactions in the said account. In order to find out whether the assessment order is erroneous or not, we have to examine whether these directions were

carried out by AO in true spirit or not. In this regard if we refer to the assessment order, we find that AO in para 1 and 2 has observed as under:

*“Return of income for the AY 2007-08 in the case was filed vide Ack. No.3131005896 dated 04-01-2008 declaring an income of Rs.1,11,998/- after claiming deduction under chapter VI A amounting to Rs.13,252/-. The original assessment was completed u/s 144 on 18/12/2009, which has been set-aside by the Ld. ITAT. Vide order dated 15/10/2012 in ITA No.526/Del/2012 directing the AO verify the nexus of bank deposits with reference to receipts declared. Pursuant to this, notice u/s 143(2) issued. The AR of the assessee Sh. Bishan Gupta Advocate attended and furnished the details called for.*

*During the course of assessment proceedings, the AR was required to show cause that as to why the entire cash deposited in bank amounting to Rs. 12,99,873/- may not be treated as your gross receipts and profit be calculated accordingly on the basis of percentage i.e. 13.09% declared originally by the assessee while furnishing his return of income since in the business like yours it cannot be ruled out that there is always a possibility of non issue of bills and cash available due to sales deposited in bank account.”*

19. Thus, primarily AO disputed the gross receipts being Rs. 12,99,873/- as against the declared receipts of Rs. 9,56,750/-. This does not lead to the conclusion that AO carried out the directions of Tribunal of establishing nexus of business receipts vis-a-vis cash deposits in bank a/c. He has in para 1 of his order referred to the Tribunal’s decision wherein he specifically mentioned that the direction was to the AO to verify the nexus of bank deposits with reference to receipts declared and pursuant to this notice u/s 143(2) was issued. He further observed that AR of the

assessee had furnished details called for. However, he has not given any specific finding on this issue, with reference to the details filed by assessee.

20. Ld. counsel has pointed out that in the show cause notice, reproduced earlier, the AO had clearly given notice in consonance with the directions issued by Tribunal. Therefore, the assessment order has to be read along with the AO's notice and replies filed by assessee in which assessee gave all the details regarding sale bills etc.. However, this has to be considered in the light of directions of Tribunal which AO had to specifically carry out. He was required to record specific finding qua the directions of Tribunal. There is no finding in the assessment order in respect of Tribunal's directions.

21. Ld. DR has expressed his reservations about the reply dated 9.9.2013 contained from pages 76 to 79 because this reply does not find mention in the assessment order. However, there is no dispute that the reply dated 4.10.2013 contained at pages 60-61 of PB has been taken note by the AO in his order. In this reply in para 2 it was stated as under:

*“The assessee is engaged in the retail business of -car accessories on a very small scale. In support of the gross turnover of Rs.9,56,7601- and source of cash deposits of Rs.12,99,8501-, following documents / information have already been given :-*

(i) *Datewise details of sales in respect of total turnover of Rs.9,56,7601- with photocopies of some sales' bills / vouchers required.*

(ii) *Copies of bank statements in respect of SB. A/c No. 17SB 11142781 maintained by the assessee with Centurian Bank of Punjab, East Patel "Nagar, New Delhi,*

(iii) *Details of deposits and withdrawals (narration of each entry) of the said Savings Bank ale.*

(iv) *Summary of Cash Flow Statement showing opening balance of cash, total- deposits in the bank a/c, total withdrawals of cash from the bank a/c, total expenses including purchases and closing balance of cash in hand,*

(v) *Affidavit of the assessee relating to payments I withdrawals through Mr. Bobby Kumar and Mr. Kirpal Singh, who were - working as 'Salesmen and for doing the banking work etc. with the assessee. In this affidavit, the details of - withdrawals made by these employees have been given which tally with the bank statement.*

(vi) *Affidavit of the assessee containing complete explanation about cash deposit in the bank a/c from branches outside Delhi, including modus operandi of the business transaction.*

(vii) *A photocopy of the assessment order for the assessment year 2009-10 passed U/s 143(3) of the I. T. Act in the case of the assessee where business income declared U/S 44AF has been accepted and no addition I disallowances have been made”.*

22. Thus, it appears that this reply is in continuation to the reply filed earlier. Be that as it may, without going into this aspect, we are of the opinion that since AO has referred to only para 3 of the reply, therefore, it is evident that he has only considered the discrepancy regarding gross receipts but did not carry out any

inquiry in regard to the nexus between business receipts and cash deposits which was the specific direction of the Tribunal. Whether there was application of mind or not is to be examined having regard to the fact that how a person abreast of the nuances of law would proceed in the given circumstances. This is a case of not only inadequate enquiry but complete lack of enquiry. Ld. counsel has relied on the decision in the case of D. G. Housing Projects Ltd. (supra). In this case, it was, *inter-alia*, held that lack of enquiry by itself renders the order erroneous and prejudicial to the interests of Revenue. A distinction was drawn between the cases of lack of enquiry and cases when the AO conducts an enquiry but the finding recorded is erroneous and which is also prejudicial to the interests of Revenue. In the present case, since AO has not recorded any specific finding on the directions of Tribunal, therefore, this case falls in the first category of lacks of enquiry. We, therefore, are of the opinion, that this decision is of little assistance to assessee.

23. Ld. counsel also relied on the decision of Hon'ble Delhi High Court in the case of CIT vs. DLF Ltd., 350 ITR 555 for the proposition that error of AO should be 'unsustainable' and if the assessment order is otherwise sustainable in law then it cannot be held to be erroneous. We are of the opinion that this decision also is of little assistance to assessee because the observations were made in the context of the facts that AO issued notice and held proceedings on several dates before

assessment. The AO had not made any disallowance u/s 14A though assessee had earned considerable dividend income. Ld. CIT revised the assessment order. Hon'ble Delhi High Court noticed that assessee's dividend income confined to receipt from investment in sister concern and only one dividend warrant was received. There was nothing to show that assessee spent effort or resources to earn dividend. Hon'ble High Court held that whether disallowance u/s 14A was warranted or not, itself was debatable and, therefore, it could not be held that AO's order was erroneous and prejudicial to interest of Revenue. The facts of the present case are entirely different.

24. Ld. counsel also relied on the decision of Jyoti Foundation (supra). This decision is also of little assistance to assessee because in this case it was held that in cases where there is inadequate enquiry but not lack of enquiry, the Commissioner must record a finding that the order/enquiry made is erroneous. However, in the present case, AO has not recorded any finding on the decisions of Tribunal, therefore, order was erroneous.

25. The order was also prejudicial to the interest of Revenue because in the absence of assessee succeeding to establish the nexus between cash deposits and business receipts, entire deposits were to be added. We, therefore, are in agreement with the Id. Commissioner that the assessment order was erroneous in

so far as it was prejudicial to the interests of revenue. Accordingly, we decline to interfere with the order of ld. Commissioner passed u/s 263 of the Act.

26. In the result, assessee's appeal is dismissed.

Order pronounced in open court on 11-11-2016.

Sd/-  
(SUDHANSHU SRIVASTAVA)  
JUDICIAL MEMBER

Sd/-  
(S.V. MEHROTRA)  
ACCOUNTANT MEMBER

Dated: 11/11/2016.

**\*MP\*/Sujeet**

Copy of order to:

1. Assessee
2. AO
3. CIT
4. CIT(A)
5. DR, ITAT, New Delhi.