

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर

IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री कुल भारत, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI KUL BHARAT, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ ITA No.251/JP/2016

निर्धारण वर्ष / Assessment Year : 2010-11

M/s Padam Prakash Khandaka HUF 180, Kishanpole Bazar, Jaipur	बनाम Vs.	Asstt. Commissioner of Income Tax Circle-1, Jaipur
स्थायी लेखा सं./ जीआईआर सं./ PAN No. AADHP4932R		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Anil Goyal (CA)
राजस्व की ओर से / Revenue by : Shri Varindar Mehta (CIT)

सुनवाई की तारीख / Date of Hearing : 27.03.2017
घोषणा की तारीख / Date of Pronouncement : 31. 03.2017.

आदेश / ORDER

PER SHRI VIKRAM SINGH YADAV, A.M.

This is an appeal filed by the assessee against the order of Id Pr. CIT, Jaipur dated 25.02.2016 wherein the assessee has taken following grounds of appeal:

- "1. That the orders of the learned CIT passed under section 263 of Income Tax is bad in law and against facts of the case.*
- 2. That the learned CIT has erred in passing order under section 263 solely on the basis of assessment order passed by the AO in the case of the assessee for AY 2009-10 in which appeal was pending before CIT(A) and the matter had not attained finality.*
- 3. The learned CIT has erred in nor appreciating that assessment of every assessment year is separate and depends on the facts for that year only."*

2. The brief facts of the case are that scrutiny assessment in this case was completed u/s 143(3) r.w.s 148 of the Act on 23.01.2014 at a total income of Rs. 15,50,240/-. Thereafter, Id. Pr. CIT issued a show cause notice u/s 263 of the Act on 16.7.2015 stating the following:

- “1. In this case, the assessment for AY 2009-10 was completed u/s 143(3) on 7.12.2011, wherein after making relevant enquiries, the AO held that the assessee did not carry out any business activity in the relevant year but only to evade tax, false claim of having carried out business activity was made. The assessee declared sale of Rs. 35,000/- against which huge expenses of Rs. 12,49,746/- were claimed. Accordingly, the AO disallowed business loss claimed by the assessee after making detailed discussion in his order.
2. In A.Y. 2010-11, the facts are more or less same. In this year, the assessee declared the sale of Rs. 40,000/- and against this sale, many huge expenses such repair & maintenance charge Rs. 203887/-, salary Rs. 4,41,600/-, teen repairing expenses Rs. 396730/- and many other expenses have been claimed. Finally business loss of Rs. 13,00,821/- was claimed by the assessee and same was allowed by the AO in assessment order dated 23-01-2014 passed u/s 148/143(3) of IT Act 1961.
3. In view of the findings recorded by the AO in AY 2009-10, that no business activity was being carried out by the assessee and claim of business activity was bogus, the AO was required to make enquiry to verify the genuineness of claim of carrying out business activity in AY 2010-11. It was also necessary for him to verify claim

of business loss of Rs. 13,00,821/- made by the assessee. Further, he should have made proper enquiry and investigation to verify claim of alleged sale and alleged expenses. But the AO did not make any such enquiry/investigation. He simply obtained the copy of sale bill of Rs. 40,000/-, but did not verify genuineness of this claim of sale. Regarding claim of expenses, he simply obtained copy of ledger accounts of expenses but did not make any efforts to verify genuineness of these expenses.

4. It is observed that in the audit report in form 3CD, in para 28 'NIL' is mentioned by the auditor regarding quantitative details of principal items of goods traded/items manufactured. But, in the audited P&L accounts, sale of Rs. 40000/- has been shown. These two facts are contradictory, but the AO did not seek any explanation from the assessee in this regard neither he made any field enquiry to ascertain correct facts.

Thus, the AO allowed business loss of Rs. 1300821/- without making enquiry/investigation to verify genuineness of the claim of business activity carried out by the assessee and to verify genuineness of business expenses claimed by the assessee."

3. After considering the submissions of the assessee to the show cause notice, Id. Pr. CIT has passed the order and his relevant findings are as under:

"8. I have considered facts of the case and have gone through the records. In the A.Y 2009-10, negative inferences were drawn against the assessee and the AO categorically concluded that

bogus sale and purchases along with bogus expenditures were claimed by the assessee with the sole purpose of evading tax. The books of accounts of the assessee also reveal contradictory figures. In the audit report, the auditor has quantified also reveal contradictory figures. In the audit report, the auditor has quantified items of goods traded/manufactured as Nil whereas sale of items is claimed in P&L A/c. If there was no item traded during the year, how the sale of Rs. 40000/- was effected? This was not verified by the AO during assessment proceedings. However in response to show-cause notice u/s 263, assessee replied that 'Nil' was mentioned in the audit report as sales were made out of opening stock only and no items were purchased during the year. Even if this is considered to be true, Auditor could have mentioned the quantitative details of opening stock and sales made during the year. The claim of the assessee of carrying out business activity was not accepted in preceding year which included the closing stock also, which assessee claimed to have sold during the year. Thus the opening stock of this year itself became disputed. Further, the huge expenses have been claimed towards salary, repair & maintenance etc. which resulted in business loss of Rs. 13,00,821/- that too without any purchases during the year. The expenses claimed in the profit & loss account, prima facie, appear to be unreasonable in view of the turnover of Rs. 40,000/- and also in view of the inference drawn in A.Y. 2009-10.

9. *Considering the above circumstances and discrepancies, the AO ought to have conducted detailed enquiries before finalising*

assessment. However, it is seen from the records that the AO did not make any enquiry into the genuineness of the claim of the assessee. AO did not make any independent enquiries from buyers of the assessee and third parties in this regard during assessment proceedings. 'Explanation 2' appended to section 263 of the Income Tax Act prescribes that "the order passed by the AO shall be deemed to be erroneous in so far as it is prejudicial to the interest of the revenue, if, in the opinion of the Principal Commissioner the order is passed without making enquiries or verification which should have been made. In the circumstances discussed above, the AO ought to have made independent enquiries to ascertain the genuineness of the claim of the assessee rather than solely relying on the sales bill submitted by the assessee. The AO failed to make such enquiries and accepted the claim of the assessee without obtaining proper details in this regard.

10. *Considering all the facts and circumstances of the case, the assessment for A.Y 2010-11 passed by AO, is held erroneous in so far as it is prejudicial to the interests of the revenue for the purpose of section 263 of the IT Act. The assessment order is, accordingly, set aside on this limited issue with the direction that the A.O. shall complete the assessment after ascertaining the genuineness of the claim of the assessee as mentioned in para 9 above. The AO shall give proper opportunity of being heard to the assessee before passing the order on this issue. "*

4. Now, the assessee is in appeal against the said order passed by the Id. Pr. CIT and has submitted as under:

1. That the order passed by the learned AO was neither erroneous nor prejudicial to the interest of revenue. Therefore provisions of section 263 were wrongly invoked.
2. Learned CIT has erred in acting solely on the basis of assessment order passed by AO for AY 2009-10:
 - a. The learned CIT has erred in invoking revisionary jurisdiction u/s 263 of the Income Tax Act, solely on the basis of assessment order passed by the AO in immediately preceding assessment year i.e. AY 2009-10.
 - b. In AY 2009-10 the AO had passed the order as per his whims and fancies and the assessee had preferred an appeal against the order of AO before CIT (A). Therefore, the finding of AO for that year was not subjected to review and scrutiny by even the first appellate authority. Therefore the findings given by the AO in that year were not trust worthy and no having sufficient force so as to enable the CIT to pass order u/s 263 for the next Assessment year.
 - c. The Assessee filed detailed reply against notice u/s 263, vide his letter dt. 30.7.15.
 - d. The assessee had also informed the CIT vide letter dt. 11 Feb 2016 that appeal of the assessee for AY 2009-10 was heard by the CIT(A) on 17.12.15 and his final order was awaited. Assessee requested the learned CIT to withhold his order u/s 263 since as per provisions of Sec. 263, learned CIT could have passed the final order upto 31st March 2016.

- e. But the learned CIT passed the order u/s 263 on 25.2.16 without waiting for the order of first appellate authority in the case of the assessee for AY 2009-10.
- f. For AY 2009-10, The learned CIT(A) passed his order dt. 1.1.16 in favour of the assessee. But this order was received by the assessee only on 1.3.16. In this order the learned CIT(A) has accepted all the major submissions of the assessee. The assessee produced the customer Shri Ram Phool Meena before CIT(A). Therefore, cash sale of Rs. 35000 made to him has been accepted as genuine and addition made on this account has been deleted. Major relief has been given in the expenses claimed by the assessee in Profit and Loss account. The department has also not filed any appeal against the order of CIT(A).
- g. As per order u/s 250, out of total addition of Rs. 21,64,750 made by the AO, the learned CIT(A) deleted additions to the tune of Rs. 17,79,722.

The position of AY 2009-10 is as under:

Income as per return filed	13,71,410
Additions made in the income by AO	21,64,750
Income as per assessment order	35,36,160
Relief given by CIT(A)	17,79,722
Assessed Income after order of CIT(A)	17,56,438

3. The learned CIT has erred in observing in his order that AO ought to have conducted detailed enquiries before finalizing assessment. As a matter of fact, the case of the assessee was scrutinized in detail by two assessing officers, initially by ITO ward 1(3), Jaipur,

and subsequently the file was transferred to Asstt. Commissioner of Income Tax, circle 1 Jaipur who also examined the case of the assessee in detail. The complete sequence of assessment proceedings for the above year is as under:

- a. On 7.3.2013: ITO ward 1(3) Jaipur issued notice u/s 143(2) dt. 7.3.13 along with a detailed questionnaire.
- b. On 25.3.2013: Shri Anand Pareek AR of the assessee appeared and filed a letter dt. 25.3.15 before AO giving many details as required by the AO.
- c. On 11.4.13: Shri Anil Goyal AR of the assessee appeared before AO and filed detailed letter dt. 11.4.13 along with copy of all the ledger accounts of expenses claimed in the Profit and Loss account of the assessee. The assessee also enclosed the copy of sale bill dt. 17.9.2009 for Rs. 40,000 which was accepted by the AO. Vouchers for payment of salary were produced. On this day books of accounts were also produced before the AO.
- d. On 18.11.13: ACIT Circle 1 Jaipur issued notice u/s 142(1) dt. 18.11.13 to the assessee fixing the date of hearing on 25.11.13.
- e. 25.11.13: On this date, Shri Anand Pareek A/R of the assessee appeared before him and case was discussed and adjourned to 6.12.13.
- f. On 6.12.13: Shri Anand Pareek A/R again appeared before AO and the case was again discussed with him.
- g. On 20.1.14: Shri Anil Goyal AR again attended before AO and the case was again discussed with him.

4. On 23.1.14: AO passed the assessment order u/s 148/143. The learned AO has passed the order after fully satisfying himself about the correctness of the details of income filed and bills and vouchers and he has observed in the assessment order as under:
'In compliance to this notice Sh. Anand Pareek, A/R of the assessee attended the proceedings from time to time. Details in response to query letter have been filed which are placed on record. The case was discussed with him.
The learned AO passed the final order adding a sum of Rs. 37,059/- in the income of the assessee.
5. The accounts of the assessee were also audited u/s 44AB of income tax act and Auditors have also certified that the assessee was in business of cement pipes and they have examined the ledger, journal, cash book, purchase and sales books, expenses and vouchers and bank statement as per report given in Form CD. They have also not given any adverse comments in their report.
6. That every Assessment Year is separate Assessment Year. Assessment for each year is to be completed on merits of the case of each year.
7. Whatever enquiry the AO wanted to do in respect of sale of Rs. 40,000/- in AY 2010-11, was done by him. There may be difference of opinion between CIT and the AO with regard to extent of checking but it will not give an occasion to invoke provision to section 263.

It is submitted that every loss of revenue cannot be treated as prejudicial to the interest of the Revenue. If the AO has adopted one of the courses permissible under law or where two views are

possible and the AO has taken one view with which CIT does not agree, it cannot be treated as an erroneous order. Reliance is placed on the following decisions:

- CIT V Mangilal Didwania (2006) 286 ITR 126 (Raj)
- Ganesh Builders V CIT (2013) 158 TTJ 801 (ITAT Jodhpur)

8. All the expenses claimed by the assessee were backed by the books of accounts and vouchers which were produced before AO and which were also examined by the Auditors of the assessee. These expenses were incurred to keep the business of the assessee in running condition.

5. Further during the course of hearing, the Id. AR drawn our reference to the order passed by the Assessing Officer pursuant to directions of the Pr. CIT u/s 263 and submitted that the AO accepted the sale of Rs. 40,000/- made to Sh. Dev Bux Gurjar, however, expenses amounting to Rs. 942,110/- have been disallowed by the Assessing Officer, thus causing a great prejudice to the assessee.

6. The Id. DR is heard who has relied on the order of the Id Pr. CIT and submitted that the order has been duly passed by the Id Pr. CIT exercising his jurisdiction u/s 263 as the order of AO is erroneous as well as prejudicial to the interest of the Revenue.

7. We have heard the rival contentions and perused the materials available on record. Regarding the first contention of the Id. AR that the Id. CIT(A) has erroneously relied on the assessment order passed by the AO for A.Y 2009-10 as the said order has been subject matter of appeal before the Id. CIT(A) and

the cash sales of Rs. 35000/- has been accepted as genuine and additions made in this account has been deleted. In our view, what needs to be looked by the Id Pr. CIT is the records relating to any proceedings under this Act that are available at the time of examination by the Id Pr. CIT. The same is made explicit by way of explanation 1(b) to section 263 of the Act. In light of the that, we do not see any infirmity in the order of Id Pr. CIT wherein he has referred to and relied upon the order passed by the Assessing Officer for immediately preceding assessment year 2009-10 which is available on record, wherein after making relevant inquiries, the AO held that the assessee did not carry out any business activities in that year but falsely claimed carrying out business activities. The fact that no business activities were held to be carried on by the appellant in the previous assessment year and the AO, though ceased of the matter in terms of assessment year for A.Y 2009-10, at the same time, he has not made any enquiry regarding the business activities carrying on by the assessee during the year under consideration is good enough basis for Id Pr. CIT to hold lack of enquiry which should have been made by the AO for the year under consideration and hence, the exercise of powers under section 263 of the Act. We therefore, donot find any infirmity in the order of Id. Pr. CIT wherein he has assailed the order of the AO who has not made proper enquiry and investigation to ascertain the genuineness of the claim of the assessee in respect of business activities carried on by the assessee.

8. Now coming to the next contention raised by the Id. AR that the AO has done the necessary enquiry in respect of sale of Rs. 40,000/- and there may be differences between CIT(A) and AO with regard to the extent of checking but it will not be a matter authorising exercising of powers under section 263 of the Act. In this regard, it is not disputed that the assessee vide its letter dated

11.4.2013 has submitted copy of the sale bill dated 17.9.2009 showing sales of Rs. 40,000/- to Mr. Dev Bux Gurjar. The AO was ceased of the matter that in the immediately preceding year, under similar facts, his predecessor has given a finding wherein a similar solitary sale of Rs. 35,000/- was shown and it was held that the assessee did not carry out any business activity in the relevant year but only to evade tax, false claim of having carried out business activity was made. In that background and peculiar facts of the case, the AO is expected to carry out further independent investigation in terms of examining the said claim of the assessee by way of examining the buyer of the goods and whether the sale have been actually carried out or not. In our view, it is not a question about degree or level of investigation and the difference of opinion in respect thereof. Where on the facts of a particular case, certain basic and elementary investigation is required to be carried on by the AO and when the same has not been done, the Pr CIT is well in his jurisdiction to exercise powers under section 263 of the Act. However, no such basic and elementary investigation has been carried on by the AO in the instant case especially in light of the past history and the claim of the assessee was simply accepted on face value without any further enquiry and verification. In our view, merely raising a query and taking the assessee submission on face value is not sufficient enough to dislodge the jurisdiction u/s 263 of the Act. What is essential is that relevant questions are asked and relevant enquiries are made to examine about a particular transaction, explanation of the assessee is sought and then a final view is formed by the AO taken into consideration of the relevant facts and surrounding circumstances of the case including the past history. In the instant case, we do not see any such investigation/examination that has been carried on by the AO. The Id. Pr. CIT has therefore rightly invoked the explanation 2 to 263 of the Act which provides that wherein the

Assessing Officer fails to make any enquiry or verification which should have been made. The fact that subsequent to the order under section 263, the AO has carried out the necessary investigation and found the sales made by the assessee as genuine cannot be a basis to hold that the powers under section 263 has been wrongly exercised as we needs to be seen is the records available at the time of exercise of jurisdiction under section 263 and not subsequent thereto.

11. In light of above discussions and taking into consideration the entirety of the facts and circumstances of the case, we are of the considered view that Pr. CIT has rightly exercised his powers u/s 263 of the Act. The grounds of appeal taken by the assessee are thus dismissed.

In the result the appeal filed by the assessee is dismissed.

Order pronounced in the open court on 31/03/2017.

Sd/-
(KUL BHARAT)
न्यायिक सदस्य / Judicial Member

Sd/-
(VIKRAM SINGH YADAV)
लेखा सदस्य / Accountant Member

Jaipur

Dated:- 31/03 /2017

*Ganesh

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- M/s Padam Prakash Khandaka
2. प्रत्यर्थी / The Respondent- Asstt. Commissioner of Income Tax
3. आयकर आयुक्त / CIT –TDS, Jaipur
4. आयकर आयुक्त(अपील) / The CIT(A)-III, Jaipur
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No.251 /JP/2016)

आदेशानुसार / By order,

सहायक पंजीकार / Assistant. Registrar