

आयकर अपीलिय अधिकरण] पुणे न्यायपीठ "ए" पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE

BEFORE MS. SUSHMA CHOWLA, JM AND
SHRI ANIL CHATURVEDI, AM

आयकर अपील सं / ITA No.1334/PUN/2015

निर्धारण वर्ष / Assessment Year : 2011-12

Mahesh Ramkisan Rathi,
Rathi Sadan, Subhash
Road, Nashik Road,
Nashik - 422 101.

..... अपीलार्थी /
Appellant

PAN : AKEPR4102N.

बनाम v/s

The Commissioner of Income Tax,
Nashik.

..... प्रत्यर्थी /
Respondent

Assessee by : Shri Pramod Shingte.

Revenue by : Shri Rajeev Kumar, CIT.

सुनवाई की तारीख / Date of Hearing : 24.04.2018	घोषणा की तारीख / Date of Pronouncement: 06.06.2018
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आदेश / **ORDER**

PER ANIL CHATURVEDI, AM :

1. This appeal filed by the assessee is emanating out of the order of the Commissioner of Income Tax-II, Nashik dt.20.10.2014 for the assessment year 2011-12.

2. The perusal of the file reveals that there is delay of 267 days in filing the present appeal. Assessee has filed a sworn affidavit wherein the reasons for delay has been stated and further prayed that the delay be condoned. Before us, on the issue of condoning delay, Ld.A.R. took us through the contents of affidavit and submitted that the delay was not intentional and in the interests of

justice the delay be condoned. Ld.D.R. on the other hand, opposed the prayer for condonation of delay.

3. We have heard the rival submissions on condonation of delay. After considering the reasons stated in the affidavit, we are of the view that the delay in filing the appeal has been satisfactorily explained. We therefore in the interests of justice, condone the delay and admit the appeal for hearing.

4. The relevant facts as culled out from the material on record are as under :-

Assessee is an individual stated to be partner in M/s. Rathi Estates which is engaged in the business of dealing in real estate. Assessee electronically filed its return of income for A.Y. 2011-12 on 29.09.2011 declaring total taxable income at Rs. Nil. The case was selected for scrutiny and thereafter assessment was framed u/s 143(3) of the Act vide order dt.12.12.2013 and the total taxable income was determined at Rs.Nil. Subsequently, Ld.CIT called for assessment records of assessee. On examination of assessment records, he was of the view that the order passed by the AO was erroneous and prejudicial to the interest of the Revenue. According to Ld.CIT the order passed by the AO u/s 143(3) of the Act was erroneous and prejudicial to the interest of Revenue. Ld.CIT(A) noted that during the assessment year assessee had sold land at Sy.No.46/1/2 along with two others on 18.06.2010 for Rs. 10 crores and assessee had received 50% share. Assessee had shown net profit of Rs.2,96,36,384/- which was shown as business income and was set off with the brought

forward business losses. He noticed that assessee had not shown any land trading activity before A.Y. 2011-12 and had entered into only one sale transaction of land. Ld.CIT was of the view that since assessee did not carry any trading activity in earlier years, the set off brought forward business loss was wrongly calculated by the AO. The 2nd reason noted by the Ld.CIT for the order being erroneous was that the assessee has debited delayed charges of Rs.42,27,450/- in trading account which pertains to share trading activity which according to him could only be adjusted against income from share trading activities and AO had not verified the nature of expenditure. He was therefore of the view that the order passed by the AO u/s 143(3) of the Act on 12.12.2013 was erroneous and prejudicial to the interest of Revenue. He therefore asked the assessee to show cause as to why the order u/s 263 of the Act not be passed. In response to the show cause notice, assessee inter-alia objected to the initiation of proceedings u/s 263 of the Act and on the merits submitted that during the assessment proceedings various questions were raised by the AO regarding the proper disclosures from the trading activity of real estate, for which the necessaries replies were furnished. AO after having satisfaction with the explanation passed order u/s 143(3) of the Act had also allowed the brought forward losses u/s 72 of the Act. With respect to delayed payment charges, it was submitted that after examination of the issue, the delayed payment charges was allowed by AO. Assessee therefore submitted that the provisions of Sec.263 are not applicable in the present case. The submissions of the assessee were not found acceptable to Ld.CIT. He held that the assessment order passed by the AO was

erroneous and prejudicial to the interest of Revenue and thereafter directed the AO as under :

“4. Decision

I have gone through the submission of the assessee as above. The submission of the assessee is not satisfactory and thereby not acceptable to the following reasons :

- i) The assessee is claiming set off business loss for the A.Y. 2011-12 and has never shown land trading as his business activity before the A.Y. 2011-12. In this regard, the AO is required to go through the returns of income filed by the assessee for the earlier assessment years so as to verify how the loss has generated. The A.O. is also required to verify whether the assessee has shown any land trading in the earlier years and claimed loss from the said activity.*
- ii) The A.O. is also required to verify whether the assessee has filed returns of his income for earlier years in time as per the provisions of Section 139(1) of the Income-Tax Act, 1961 so as to claim carry forward of loss, if any.*
- iii) Whether the assessee has shown an asset i.e., agricultural land / plot of land in his Balance Sheet for the earlier years.*
- iv) Whether the assessee is having 7/12 Extract in his own name in respect of such land / plot of land etc.*
- v) Regarding expenditure on account of delayed charges paid to share broker, the assessee has submitted that he was not having enough liquidity to make payments towards the same. The said explanation of the assessee is also not prima facie acceptable. Thus, the nature of this expenditure has remained to be verified.”*

Aggrieved by the order of Ld.CIT, assessee is now in appeal before us and has raised the following grounds :

“1. On the facts and in the circumstances of the case and in law the Learned CIT-II, Nashik has erred in invoking provisions of section 263 of the Income Tax Act, and thereby issuing a notice merely on the basis of proposal received from assessing officer, as there is no application of mind from CIT to reach to the conclusion that order u/s 143(3) is erroneous and prejudicial to the interest of the revenue. Therefore entire action is bad in law.

“1. On the facts and in the circumstances of the case and in law the Learned CIT-II, Nashik has erred in passing order under section 263 and thereby setting aside the assessment order passed by assessing officer and giving the direction to compute income fresh by distinguishing appellants in this regard.”

5. Before us, the ld. A.R. submitted that in the present case the pre-requisite conditions specified u/s 263 of the Act were not satisfied and therefore the proceedings initiated u/s 263 of the Act lacks jurisdiction and are bad in law. He submitted that u/s 263 of the Act, the Ld. CIT can revise an order passed by the AO only on the satisfaction of twin conditions namely (i) the order is erroneous and (ii) it is prejudicial to the interest of Revenue. If one of them is absent i.e. if either the order of the Revenue is erroneous but is not prejudicial to the interest of the Revenue or if it is not erroneous but is prejudicial to the interest of Revenue – recourse cannot be had to Sec.263(1). He further submitted that the error envisaged by Sec.263 is not one which depends on possibility or guesswork but it should be an actual error either of facts or of law. He further submitted that when two views are possible and the AO has taken one view with which the Ld. CIT does not agree, the order of the AO cannot be treated as an erroneous order prejudicial to the interests of the Revenue unless the view taken by the AO is unsustainable in law and for the aforesaid proposition, he relied on the decision in the case of Malabar Industrial Co., Ltd., Vs. CIT (2000) 243 ITR 83 (SC). He further submitted that Ld.CIT erred in invoking the revisionary proceedings u/s 263 of the Act and therefore the order of Ld.CIT be set aside. Ld.D.R. on the other hand, supported the order of Ld.CIT and further submitted that while framing the assessment order no enquiry is made with respect to the sale of land by the assessee at S.No.46/1/2 along with two other at Rs.10 crores and assessee receiving 50% share and claiming set off business losses for A.Y.2011-12 and also

with respect to details of delayed charges of Rs.42,27,450/- paid to share broker and in such a situation, the Ld.CIT was fully justified in resorting to provisions of Sec.263 of the Act.

6. We have heard the rival submissions and perused the material on record. The issue in the present case is about the invoking of provisions of Section 263 by Ld CIT. Sec. 263(1) of the Act, the powers under which Ld CIT has assumed power for revision reads as under :

“The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the ITO is erroneous in so far as it is prejudicial to the interests of the Revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.”

7. The reading of the above provision makes it very clear that the power of suo motu revision u/s 263(1) is in the nature of supervisory jurisdiction and the same can be exercised only if the circumstances specified therein exist. Two circumstances must exist to enable the Commissioner to exercise power of revision u/s 263, namely (i) the order is erroneous (ii) by virtue of being erroneous, prejudice has been caused to the interests of the Revenue.

8. Hon'ble Apex Court in the case of Malabar Industrial Co., Ltd., Vs CIT reported in (2000) 243 ITR 83 (SC) has held that CIT has to be satisfied of twin conditions, namely, (i) the order of the AO sought to be revised is erroneous; and (ii) it is prejudicial to the

interests of the Revenue. If one of them is absent—if the order of the ITO is erroneous but is not prejudicial to the Revenue or if it is not erroneous but is prejudicial to the Revenue—recourse cannot be had to Sec.263(1). It was further held that the provision cannot be invoked to correct each and every type of mistake or error committed by the AO; when an ITO adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the ITO has taken one view with which the CIT does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue unless the view taken by the ITO is unsustainable in law.

9. In the present case find that during the course of assessment proceedings, AO vide questionnaire dt.21.05.2013 asked the assessee to give details of sale of land at Sy.No.46/1/2 along with two others for Rs.10 crore and also the details of debited delayed charges of Rs.42,27,450/-. The assessee vide reply dt.06.06.2013 which is placed at page Nos.73 to 79 of the Paper Book, had given the details of purchase of sale of land and also the details with respect to explanation of delayed payment charges vide letter dt.09.12.2013 which is placed at page 24 of the Paper Book. We thus find that the AO had raised the relevant queries and which were also replied by the assessee and on being satisfied by the reply of the assessee, no addition was made to that effect. Further the order passed u/s 263 of the Act dt.20.10.2014 reveals that Ld.CIT has not given a conclusive finding as to what are the errors in the order of AO so as to call the order passed by the AO u/s 143(3) of the Act to be erroneous and prejudicial to the

interest of Revenue. He has set aside the issue and given certain directions for necessary verifications. He has directed the AO for necessary verifications. The relevant directions of Ld.CIT has noted in the order are as under :

- i) *AO is required to go through the returns of income filed by the assessee for the earlier assessment years so as to verify how the loss has generated. The A.O. is also required to verify whether the assessee has shown any land trading in the earlier years and claimed loss from the said activity.*
- ii) *The A.O. is also required to verify whether the assessee has filed returns of his income for earlier years in time as per the provisions of Section 139(1) of the Income-Tax Act, 1961 so as to claim carry forward of loss, if any.*
- iii) *The AO is also required to verify whether the assessee has shown an asset i.e., agricultural land / plot of land in his Balance Sheet for the earlier years.*
- iv) *The AO is also required to verify whether the assessee is having 7/12 Extract in his own name in respect of such land / plot of land etc.*
- v) *The AO is also required to verify the nature of expenditure on account of delayed charges paid to share broker.*

10. Here it would be relevant to refer to the observations of Hon'ble Bombay High Court in the case of CIT Vs. Nirav Modi (2017) 390 ITR 292 (Bom) wherein the Hon'ble has observed that powers u/s 263 cannot be exercised unless the Ld.CIT is able to establish that the order of the AO is erroneous and prejudicial to the interest of Revenue. It has further held that revisionary powers cannot be exercised for directing a fuller inquiry to find out if the view taken is erroneous, when a view has already been taken after inquiry and the powers of revision can be exercised only where no inquiry as required under the law is done and that it is not open to enquire in cases of inadequate inquiry. It has further held that once the AO is satisfied with the explanation offered on inquiry, it

is not open to the Ld.CIT in exercise of his revisional powers to direct that further inquiry has to be done.

11. On the issue of no inquiry / inadequate inquiry for invoking the provisions of Sec.263 of the Act, we find that Hon'ble Delhi High Court in the case of ITO Vs. D.G. Housing Projects Limited reported in (2012) 343 ITR 329 (Del) has observed as under :

“10.....the power of Revision under Section 263 of the Act would normally be exercised in case of no enquiry and not in cases of inadequate enquiry. However, even in case of inadequate enquiry by the Assessing Officer, the order of the Assessing Officer could be erroneous in two classes of situation. The first class would be where orders passed by the Assessing Officer are ex facie erroneous i.e. a decision rendered ignoring a binding decision in favour of the Revenue or where enquiry is per se mandated on the basis of the record available before the Assessing Officer and that is not done. In the second class of cases, where the order is not ex facie erroneous, then the CIT must himself conduct an enquiry and determine it to be so. The Court held that it is not permissible to the CIT while exercising power under Section 263 of the Act to remit the issue to the Assessing Officer to re-examine the same and find out whether earlier order of Assessment is erroneous. It is the CIT who must hold that the order is erroneous, duly supported by reasons.”

12. In the present case, it is not the case of Ld.CIT that it was a case of no inquiry but was a case of inadequate inquiry. In such a situation, as per the decision of Hon'ble Delhi High Court in the case of D.G. Housing Projects Limited (supra) Ld.CIT must have conducted an enquiry and should have come to a definite conclusion that the order is erroneous and supported by reasons which has not been done by Ld.CIT. Further no material has been placed by the Revenue to demonstrate that the view taken by the AO while passing the order u/s 143(3) of the Act was unsustainable in law. In view of the aforesaid facts and the decision cited hereinabove, we are of the view that in the present case, Ld.CIT was not justified in invoking the provisions of Sec.263

of the Act. We, therefore, set aside the order of Ld.CIT, whereby he has set aside the assessment order passed by the AO u/s 143(3) of the Act. **Thus, the grounds of the assessee are allowed.**

13. **In the result, the appeal of the assessee is allowed.**

Order pronounced on 6th day of June, 2018.

Sd/-	Sd/-
(SUSHMA CHOWLA)	(ANIL CHATURVEDI)
न्यायिक सदस्य / JUDICIAL MEMBER	लेखा सदस्य / ACCOUNTANT MEMBER

पुणे Pune; दिनांक Dated : 6th June, 2018.

Yamini

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. The CIT-I – Nashik.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, “ए” / DR, ITAT, “A” Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER

// True Copy //

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune.