

आयकर अपीलीय अधिकरण, राजकोट न्यायपीठ, राजकोट ।
**IN THE INCOME TAX APPELLATE TRIBUNAL
RAJKOT BENCH, RAJKOT**

सर्वश्री वसीम अहमद, लेखा सदस्य एवं मधुमिता रॉय, न्यायिक सदस्य के समक्ष ।
**BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
And SMT MADHUMITA ROY, JUDICIAL MEMBER**

ITA Nos. 177, 178, 179 & 180/Rjt/2017

(निर्धारण वर्ष/ Assessment Years : 2009-10, 2010-11, 2012-13 & 2013-14)

Shri Khodidas Premjibhai Bhagiya, Sahyog Society, Ravapar Road, Morbi	Vs.	ITO, Ward – 2(3)(1), Rajkot.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : ACBPB 3732 H		

अपीलार्थी/ (Appellant)	(प्रत्यर्थी / Respondent)
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Assessee by :	Shri Kalpesh Doshi, A.R.
Revenue by :	Shri Jitendra Kumar, CIT-D.R.

सुनवाई की तारीख / **Date of Hearing** : **29/08/2018**
घोषणा की तारीख / **Date of Pronouncement**: **03/10/2018**

आदेश / O R D E R

PER BENCH:

These four appeals by the assessee are directed against the separate orders of the Commissioner of Income-Tax -3, Rajkot, dated 23.03.2017 for Assessment Years 2009-10, 2010-11, 2012-13 & 2013-14.

The issue involve in all these appeals raised by the same assessee are common. Therefore these have been clubbed together for the purpose of brevity, convenience and adjudication

2. We take up assessee's appeal in ITA No.177/Rjt/2017 for Asst. Year 2009-10 as the lead case. The assessee has raised the following grounds of appeal:

- “1. *That the learned Principal CIT has wrongly held that the order passed u/s.143(3) r.w.s. 147 is erroneous and prejudicial to the interest of the Revenue and wrongly passed order u/s263 of the I.T. Act.*
2. *That the learned Principal CIT has wrongly applied the Explanation 2 to Section 263(1) of the I.T. Act for the year under consideration.*
3. *That the Revision u/s263 is made on incorrect facts and also on the basis incorrect legal provisions and therefore the order u/s.263 is bad in law.*
4. *That the findings of the Principal CIT(A) are not finished and are bad-in-law.*

The appellant craves to add, alter, amend or delete any of the above grounds of appeal.”

3. The only issue raised by the assessee is that Id CIT erred in holding the order of the AO passed u/s 143(3) r.w.s. 147 of the Act as erroneous and prejudicial to the interest of Revenue.

4. Briefly stated facts are that the assessee in the present case is an individual and filed its return of income dated 27-05-2009 declaring total

gross income of Rs. 5,65,324/- under the head salary. Subsequently, the case was selected under re-assessment proceedings and accordingly a notice u/s 148 of the Act was served upon the assessee. The reassessment was completed u/s 143(3) r.w.s. 147 of the Act determining gross total at Rs. 6,25,615/- only vide order dated 24-03-2015.

4.1 Subsequently, the Id. CIT on verification of the assessment records observed that the order passed by the AO u/s 143(3) r.w.s. 147 of the Act suffers from certain defects as detailed under:

- i. The assessee being a salaried employee has deposited cash amounting to Rs. 5,24,700/- and Rs. 99,500/- in his bank accounts bearing no. 14003 & 1807 maintained with Rajkot District Co-operative Bank. The Id CIT also observed that the assessee during the assessment proceedings has filed cash flow statement without giving the details of cash in hand as on 01-04-2008. The assessee in its cash flow statement has also shown a sum of Rs. 27,50,000/- as reserved for investment.
- ii. The assessee being a salaried class employee has not shown opening cash in hand in its cash flow statement. As per the Id. CIT the cash flow statement was not verified by the AO during the proceedings.
- iii. The assessee during the year has accepted money from his son through banking channel but the AO has not verified the creditworthiness of the son of the assessee.

In view of above, the Id CIT issued a notice u/s 263 of the Act vide letter no. CIT.R.-3/HQ-TECH/263/KPB/2016-17 dated 9-3-2017 for seeking the explanation of the facts discussed above.

4.2 The assessee in compliance to it submitted that there was no cash deposit in the bank account bearing no.14003 for Rs.5,24,700/-. As such there was cash deposit only for Rs.300/- as on 25-02-2009.

4.3 The amount of cash deposit for Rs.99,500/- in the bank account bearing no.1807 was duly explained during the assessment proceedings which was accepted by the AO.

4.4 There is an error in the notice issued u/s 263 of the Act which mentions the deposits of cash in the bank account no.1807 with Rajkot Cooperative Bank, whereas such bank account is maintained with Rajkot District Cooperative Bank.

4.5 The reopening u/s 147 of the Act was made on account of the deposit of cash in the bank accounts on different dates. Thus, it is clear that all the facts regarding the deposit of cash in the bank accounts have been duly explained and verified by the AO during the assessment proceedings u/s 147 of the Act. The assessee during the assessment proceedings u/s 147 of the Act has filed the cash flow statement justifying all the deposits made in the bank accounts and no defect of whatsoever was pointed out by the AO.

4.6 There was no requirement to mention the opening balance as on 01-04-2008 in the cash flow statement. In fact, there was sufficient withdrawals from the bank account during the year which are sufficient

enough to justify the excess cash shown as reserved for investment. As such there were certain fixed deposits matured during the year. Thus, the fixed deposits were withdrawn from the bank and shown as reserve for investment.

4.7 The assessee has taken money through banking channel from his son namely Sumit K. Bhagiya who is maintaining NRE account with HDFC bank and residing in USA.

4.8 All the bank statements were furnished to the AO during the assessment proceedings.

4.9 As the case was reopened u/s 147 of the Act on account of deposit of cash in the bank accounts, therefore, the source of cash was duly enquired by the AO during the reassessment proceedings which was sufficiently explained to the AO.

However, the Id CIT disregarded the contention of the assessee and held the order of the AO as erroneous and prejudicial to the interest of the Revenue by observing as under:

“5.3 The arguments of the assessee have been duly considered and the same cannot be accepted. It is pertinent to mention here that during the course of assessment proceedings for A.Y.2011-12, the assessee could not explain the source of cash deposits and addition of Rs.18,91,300/- was made by treating the same as unexplained. But during the reassessment proceedings for the current year, the assessee has made an attempt to explain the source by way of a cash-flow statement which has been exhaustively scrutinized by the AO even though the same

suffered from certain inherent defects as discussed below. In addition to the cash deposits, the assessee did not disclose rental income as well as interest income from fixed deposits in his original return filed. The assessee has however included and admitted these incomes in the return of income filed in response to notice u/s.148 of the I.T Act, 1961. On perusal of the cash flow statement submitted for A.Y. 2009-10, the following discrepancies have been noticed:

(i) In A.Y. 2009-10, the A.O. has accepted the cash flow statement furnished by the assessee without proper verification. The assessee has shown 'reserves for investment & fixed deposit amounting to Rs.27,50,000/-' which is nothing but a balancing figure. The assessee being a salaried employee, it is difficult to believe and accept that such a huge amount was kept as a reserve. The AO has not verified the source of cheque deposits made by the assessee. Only a hand-written noting saying the cheques were given by his son i.e. Sumit Kumar K. Bhagiya is available on record. This non-verification also resulted in apparent under assessment. There is no confirmation along with supporting proof available on record from assessee's son Shri Sumit Kumar K. Bhagiya. No effort has been made to ascertain the AO of Shri Sumit Bhagiya and also to intimate him about the funds having been transferred to the assessee from his account. Also in the current year i.e. A.Y. 2009-10, the assessee has shown donation payment in cash of Rs.31,100/-. It is also seen from the cash flow statement furnished for A.Y. 2009-10 that no opening cash balance was shown by the assessee. Further, no penalty proceedings u/s.271(1)(c) of the Act have been initiated. This is a clear case prejudicial to the interest of the revenue.

5.4 *Coming to the legal*

5.5 *The above arguments of the assessee have also been duly considered. The same cannot be accepted on the following grounds. The assessee relied on the decision of Hon'ble Supreme Court of India in the case of Malabar Industrial Co. Ltd. v/s CIT (2000) 14 DTC 146(SC), (2000) 243 ITR 831 and decision of Gujarat High Court in the case of CIT v/s Arvind Jewellers 124 Taxmann 615(Guj.) (supra). It is pertinent to mention here that in the instant case the assessment order passed by the Assessing Officer is erroneous and prejudicial to the interest of the revenue as discussed in para 7.3 above. The power under section 263*

can be exercised where the order of the Assessing Officer is erroneous and prejudicial to the interest of the revenue. When an order is erroneous, then the order is also deficient and in order to remedy the situation, power under section 263 has been given. Therefore, the view that the power could not have been exercised to allow the Assessing Officer to make up the deficiency is altogether an incorrect interpretation of law. It is not the law that the Assessing Officer occupying the position of an investigator and adjudicator can discharge his function by perfunctory or inadequate investigation. Such a course is to result in erroneous and prejudicial orders. Where the relevant enquiry was not undertaken, as in this case, the order is erroneous and prejudicial too and therefore, revisable. Investigation should always be faithful and fruitful. Unless all fruitful areas of enquiry are pursued the enquiry cannot be said to have been faithfully conducted. Reliance is placed on the decision of Hon'ble Calcutta High Court in the case of CIT, Central-1, Kolkata v/s Maithan International (2015) 56 taxmann.com 283(Calcutta). Reliance is also placed on the decision of the Hon'ble Supreme Court of India in the case of CIT v/s Amitabh Bachchan dated 16.05.2016 wherein it has been held as under:

"However, the above is not the situation in the present case in view of the reasons stated by the learned C.I.T. on the basis of which the said authority felt that the matter needed further investigation, a view with which we wholly agree. Making a claim which would prima facie disclose that the expenses in respect of which deduction has been claimed has been incurred and thereafter abandoning/withdrawing the same gives rise to the necessity of further enquiry in the interest of Revenue. The notice issued under section 69-C of the Act could not have been simply dropped on the ground that the claim has been withdrawn. We, therefore, are of the opinion that the learned C.I.T. was perfectly justified in coming to his conclusions insofar as the issue No. (iii) is concerned and in passing the impugned order on that basis. The learned Tribunal as well as the High Court, therefore, ought not to have interfered with the said conclusion."

6. Considering the totality of the facts and the circumstances as narrated above, the assessment framed by the assessing officer is treated to be erroneous and prejudicial to the interests of the revenue to that extent. Hence, the same is set-aside with a direction to the AO to examine and reframe the assessment order as per following directions:

1. *To verify source of cash deposits in the various bank accounts*
2. *To verify source of cheques deposited in the bank accounts.*
3. *To verify genuineness of the cash-flow statement submitted during the course of assessment.*
4. *To initiate penalty proceedings u/s.271(1)(c) of the I.T. Act, 1961 for concealment of income and furnishing inaccurate particulars of income.*

7. *In the result, the proceedings u/s.263 of the IT Act for A.Y. 2009-10 are decided accordingly with the directions as above given to the AO, to recomputed the taxable income of the assessee as well as the tax, interest & surcharge payable by him.”*

Being aggrieved by the order of Id. CIT(A) assessee is in appeal before us.

5. The Id AR before us filed a paper book which is running from pages 1-56 and submitted that the Id CIT(A) has held the order of the AO erroneous and prejudicial to the interest of the revenue on account of non-verification of the cash deposit by the assessee during the year. However, the Id. AR for the assessee submitted that the fact of cash deposit was duly verified by the AO during the assessment proceedings. The Id. AR in support of his claim drew our attention on the reasons recorded by the AO for the reopening of the case in his assessment order which are detailed as under:

“During the course of assessment proceedings for A.Y.2011-12, it has been discovered that the assessee has earned interest of saving bank a/c held in Rajkot District Co.op. Bank, Cooperative Bank of Rajkot at Rajkot and Morbi as also interest on fixed deposit receipts held in this bank. It is also seen that the assessee has also received leave and license rent on property owned by him at Ahmedabad which has been let out. Also, it is seen that assessee has deposited cash on various dated to the tune of Rs.15,48,500/- in Rajkot District Co.op. Bank in a/c

no.14003 and Rs.1,28,003/- in a/c No.1807. The assessee has not been able to explain similar cash deposit and same has been assessed as undisclosed income in A.Y.2011-12. These cash deposits are over and above the credits in the bank a/c arising out of salary and therefore constitute income from undisclosed source.”

5.1 The Id. AR further drew our attention on the notice issued during the reassessment proceedings requiring the assessee to furnish the copies of the bank statements. The copy of the notice is placed on page 18 of the paper book and relevant extract of the notice reads as under:

*“Sub: Assessment Proceedings for A.Y.2009-10.
Please refer to the above. You are required to furnish the following details and information with supporting evidence on or before 05.12.2014.*

- 1. Please furnish your all sources of your income and statement of income of the year under consideration.*
- 2. The copy of statements of all bank accounts/Pass book maintain by you, either jointly or in individual capacity.*
- 3. Complete details of your bank interest and fixed deposit interest and other interest, if any.”*

5.2 The Id AR for the assessee also drew our attention on the reply given to the AO in response to the notice issued by the AO during the reassessment proceedings which is placed on pages 19 to 21 of the paper book.

5.3 Ld AR also drew our attention on the copies of the bank statement filed during the course of reassessment proceedings which is placed on pages 22-31 of the paper book.

5.4 The Id AR for the assessee also drew our attention on the cash flow statement placed on pages 32 and 33 of the paper book.

5.5 The Id AR also drew our attention on the details of the loan taken by the assessee from his son namely Sumit kumar K. Bhagiya along with copy of bank statement which are placed on pages 34 to 38 of the paper book.

5.6 The Id AR for the assessee also submitted that in the identical facts and circumstances the Id CIT(A) for the assessment year 2011-12 has deleted the addition made by the AO amounting to Rs. 7,33,900/- on account of cash deposit. The copy of the CIT(A) order for the assessment year 2011-12 is placed on pages 39 to 48 of the paper book.

6. On the other hand, the Id DR submitted that the order of the AO is considered erroneous and prejudicial to the interest of revenue if the Id. CIT considers that the order has been passed without making enquires for verification which should have been made during the assessment proceedings.

6.1 The Id DR also submitted that the AO during the assessment proceedings has not verified the creditworthiness of the son of the assessee from whom the assessee has taken loan during the year.

6.2 In view of above, the Id DR claimed that the reassessment order needs to be set aside and should be examined in pursuance to the direction of Id CIT passed u/s 263 of the Act.

7. The Id. AR in his rejoinder submitted that the explanation to section 263 of the Act is not applicable. The Id. CIT(A) u/s 263 of the Act has not pointed out any defect in the assessment order passed by the AO u/s 143(3) r.w.s. 147 of the Act.

8. We have heard the rival contentions and perused the materials available on record. In the instant case, the order of the AO was set aside by the Id CIT u/s 263 of the Act with the direction to frame the assessment afresh after verification of source of cash/cheque deposited in the bank account of the assessee.

From the preceding discussion, we note that the AO during the assessment proceedings has verified all the necessary details with regard to the deposit of cash/cheque in the bank account of the assessee. Therefore, in our considered view, the order of the AO cannot be held as erroneous in so far prejudicial to the interest of revenue on account of non-verification of the cash/cheque deposit in the bank account of the assessee. In this regard, we draw our support and guidance from the judgment of Delhi High Court in the case of sunbeam auto ltd. reported in 189 taxman 436 wherein it was held as under:

“The submission of the revenue was that while passing the assessment order, the Assessing Officer did not consider the aspect specifically whether the expenditure in question was revenue or capital expenditure. That argument predicated on the assessment order, which apparently did not give any reason while allowing the entire expenditure as revenue expenditure. However, that, by itself, would not be indicative of the fact that the Assessing Officer had not applied his mind to the issue. There are judgments galore laying down the principle that the Assessing Officer in the assessment order is not required to give

detailed reasons in respect of each and every item of deduction, etc. Therefore, one has to see from the record as to whether there was application of mind before allowing the expenditure in question as revenue expenditure. One has to keep in mind the distinction between 'lack of inquiry' and 'inadequate inquiry'. If there was any inquiry, even inadequate, that would not, by itself, give occasion to the Commissioner to pass orders under section 263 merely because he has different opinion in the matter. It is only in cases of 'lack of inquiry' that such a course of action would be open”

8.1 We also find support and guidance from the order of Hon’ble Gujarat High Court in the case of CIT vs. Arvind Jewellers reported in 124 taxman 615, wherein it was held as under:

“It is clear that the provisions of section 263 cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer, it is only when an order is erroneous, that section will be attracted and incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the instant case, it was the finding of fact given by the Tribunal that the assessee had produced relevant material and offered explanation in pursuance of the notices issued under section 142(1) as well as section 143(2) and after considering those materials and explanation, the ITO had come to a definite conclusion. The Commissioner did not agree with the conclusion reached by the ITO. Section 263 did not empower him to take action on these facts to arrive at the conclusion that the order passed by the ITO was erroneous and prejudicial to the interest of the revenue. Since the material was there on record and the said material was considered by the ITO and a particular view was taken, the mere fact that different view could be taken, should not be the basis for an action under section 263 and it could not be held to be justified.”

8.2 We also note that the Id. DR has placed his reliance on explanation to section 263 of the Act, which reads as under:

“[Explanation 2.—For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the

revenue, if, in the opinion of the Principal Commissioner or Commissioner,—

- (a) *the order is passed without making inquiries or verification which should have been made;*
- (b) *the order is passed allowing any relief without inquiring into the claim;*
- (c) *the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or*
- (d) *the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person.]”*

8.3 First of all, we note that this explanation is applicable with the effect from 01-06-2015 and the year before us pertaining to the assessment year 2009-10. Therefore, in our considered view, the same cannot be applied to the instant case. In addition to the above, we also note that the order of the AO shall be considered as erroneous if he fails to make enquiry on verification which should have been made by the AO. However, on perusal of the order of Id. CIT we find that there was no mention of any defect in the order passed by the AO. Therefore the same cannot be held as erroneous without pointing out the defects in the manner in which the AO has conducted enquiries. In this regard, we place our reliance on the order of Mumbai Tribunal in the case of Anil L Taodarwal, Mumbai vs Pr Cit 19, in ITA No.3498/Mum/2017 vide order dated 02-01-2018, wherein it was held as under:

“We are not oblivious of the fact that the legislature, vide the [Finance Act, 2015](#), by making available Explanation 2 to Sec. 263 on the statute w.e.f 01.06.2015, had therein provided certain circumstances, under which the order passed by the A.O, if, it is in the opinion of the Principal Commissioner or Commissioner so, shall be deemed to be

erroneous in so far as it is prejudicial to the interest of the revenue. However, exercise of such deemed powers conferred on the revisional authority as per Explanation 2 have to be construed by strictly confining and subject to satisfaction of the conditions contemplated therein. We are of the considered view that to the extent making of inquiries and verification which in the opinion of the CIT the A.O should have made, as contemplated in Clause (a) of Explanation 2, though gives an edge to the opinion of the CIT as regards the inquiries and verifications which the A.O should have made, but then, such inquiries and verifications are not only required to be relevant for adjudication of the issue, but also should point out as to how the view arrived at by the A.O by not taking recourse to such inquiries and verification, can be faulted with and held to be wrong.”

8.4 In view of above and after having regard to the entire facts of the case, we are of the view that the Id. CIT has not pointed out any defect in the order of AO except non-verification of the deposit of cash/cheque in the bank account of the assessee. We also find that the order was passed by the AO after due verification during the assessment proceedings. Therefore in our considered view the order passed by the Id CIT u/s 263 of the Act is not sustainable. Hence, we quash the order of Id. CIT and restore the order of AO. Hence the ground of appeal of the assessee is allowed.

9. **Coming to the other appeals filed by the assessee:**

At the outset of the hearing the Id AR before submitted that the issue involved in these appeals are identical to disputes raised in ITA No.177/Rjt/2017. Accordingly, both Id AR and DR before us agreed that whatever, view will be taken in ITA No.177/Rjt/2017 would be applicable to the other appeals of the assessee in full strength. As we

have allowed the assessee's appeal in ITA No.177/R/2017, we are inclined to allow the other appeals of the assessee also. Hence, all the grounds of the appeals of the assessee are allowed.

10. In the result, all the appeals of the assessee are **allowed**.

This Order pronounced in Open Court on	03/10/2018
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Sd/-
(मधुमिता रॉय)
न्यायिक सदस्य
(MADHUMITA ROY)
JUDICIAL MEMBER

Sd/-
(वसीम अहमद)
लेखा सदस्य
(WASEEM AHMED)
ACCOUNTANT MEMBER

Ahmedabad; Dated 03/10/2018

Priti Yadav, Sr.PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-3, Rajkot.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad.
6. गार्ड फाईल / Guard file.

आदेशानुसार/BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad