

**In the Income-Tax Appellate Tribunal,
Delhi Bench 'E', New Delhi**

**Before : Shri Amit Shukla, Judicial Member And
Shri L.P. Sahu, Accountant Member**

**ITA No. 3139/Del/2018
Assessment Year: 2014-15**

Om Kishan Gupta, C-39, Anand Vihar, New Delhi PAN- AESPG 6326B (Appellant)	vs.	Pr. C.I.T. – 19, New Delhi (Respondent)
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Appellant by	Sh. Salil Kapoor, Advocate
Respondent by	Sh. Rajesh Kumar Gupta, CIT/DR

Date of Hearing	27.11.2018
Date of Pronouncement	17.01.2019

ORDER

Per L.P. Sahu, A.M.:

This is an appeal filed by the assessee against the order of ld. PCIT-19, New Delhi dated 26.03.2018 passed u/s. 263 of the IT Act, 1961 for the assessment year 2014-15 on the following grounds :

1. *That the notice issued u/s 263 of the Income Tax Act, 1961 ("the Act") and the order passed by the Principal Commissioner of Income Tax ("Pr. CIT") u/s 263 of the Act on the basis of suspicion, conjecture and surmises is illegal, bad in law and without jurisdiction.*

2. *The order u/s 263 passed by the Pr. CIT is illegal, bad in law and without jurisdiction as detailed replies filed before the Pr. CIT, in response*

to the notice u/s 263, have not been considered while passing the final order. Hence the order u/s 263 is liable to be quashed.

3. That the assessment order passed by the Assessing Officer ("AO") u/s 143(3) is neither erroneous nor prejudicial to the interest of Revenue to the extent that no addition on account of alleged commission has been added.

4. That in view of the facts and circumstances of the case, the Pr. CIT has erred on facts and in law in assuming jurisdiction u/s 263 when the assessment order u/s 143(3) was passed by the AO after making detailed enquiries regarding the Long Term Capital Gain on shares. The assessment order u/s 143(3) cannot be set aside merely because the CIT feels that further enquiry should have been made.

5. The Pr. CIT has failed in not appreciating that the issue of sale/purchase of shares was categorically examined by the AO during the course of assessment proceedings and that the assessee had furnished complete details regarding the same. The assessment order u/s 143(3) cannot be set revised merely because the CIT feels that the issue should have been examined from a different angle.

6. That the Pr. CIT has erred on facts and in law in holding that the AO has not properly examined the issue. The AO is not supposed to write each and every issue, which is allowed/accepted in the assessment order.

7. Without prejudice, that in view of the facts and circumstances of the case, the Pr. CIT has erred in invoking the jurisdiction u/s section 263 of the Act on issues other than those decided in limited scrutiny, during the course of regular assessment proceeding u/s 143(3) of the Act.

8. Without prejudice, that the exercise of jurisdiction by Pr. CIT u/s 263 is bad in law and without any basis as the same has been done on mere assumption of wrong facts. That Pr. CIT has erred in assuming the wrong facts and observing that "it was an accommodation entry taken by the Assessee by paying commission in cash to the entry operation for arranging the said accommodation entry". However no such observation is recorded by AO.

9. *Without prejudice, that the direction given by the Pr. CIT are illegal, bad in law and also contrary.*

10. *That without prejudice, the Pr. CIT has wrongly and illegally held that the order passed by AO is erroneous and prejudicial to the interest of the revenue, when no independent enquiry has been made by Pr. CIT. Hence the notice issued U/s 263 and the order passed u/s 263 is illegal and bad in law*

11. *That the Pr. CIT has passed the order u/s 263 ignoring the evidence, documents filed by the assessee and material available on record.*

12. *That the explanations given, evidence produced, material placed and available on record has not been properly considered and judicially interpreted and the same do not justify the order passed u/s 263.*

2. The brief facts of the case are that the assessee filed return of income on 30.09.2014. Subsequently, the return was revised. During the course of assessment proceedings, the Assessing Officer observed that the assessee has declared long-term capital gains on sale of shares of Rs.2,40,38,889/- which was claimed as exempt u/s. 10(38) of the IT Act, the details of which are as under :

Name of the scrip	Sale Price	Purchase Price (indexed)	Gain (Exempt)
Rander Corp	4433146	443110	3990036
Effingo Textiles	20282203	23350	20048853
Total			24038889

The case was taken up for complete scrutiny with main reason for selection being to examine suspicious long term capital gains on the sale of shares. The

details of purchase and shares were examined by the Assessing Officer of both the companies and their profit and loss account for last five years. After relying upon some case laws, the AO noted that it was a bogus capital gain in the garb of purchase and sale of shares. Accordingly, the Assessing Officer added Rs.2,53,51,809/- as mentioned in para 26 of the assessment order as under :

“26. From the above facts and circumstances, the trading pattern of assessee, and the way the share prices have been manipulated, it is held that the assessee in connivance with certain “entry operators” have misused the stock exchange system to generate fictitious LTCG and thereby have avoided payment of legitimate taxes. Hence, an amount of Rs.2,53,91,809 (sale cost of Rander Corp. of Rs.44,33,146/- and Effingo Textiles of Rs.2,02,82,203 + purchase cost of Rander Corp. of Rs.4,43,110/- and Efingo textiles of Rs.2,33,350/-) is held to be bogus and accordingly disallowed and added back to the income of the assessee under the head “income from other sources”. On the reasons mentioned above, I am satisfied that the assessee has concealed his income and furnished inaccurate particulars, hence, penalty proceeding u/s. 271(1)(c) is being initiated separately.

(Addition of Rs.2,53,91,809/-)

3. The ld. AR submitted that the order u/s. 263 is not justified at all. During the course of assessment proceedings, all the details were submitted before the Assessing Officer in response to notice u/s. 142(1) who examined the purchase and sales of shares. The purchase and sales of shares were made through recognized Stock Exchange and STT & brokerage charges have been paid. All the transactions have been done through banking channels. There is no any whisper regarding payment of commission to the brokers. Relevant documents were produced before the Assessing Officer and there is no

connection between the buyer and seller of the shares. No cash transactions are involved. The impugned order revising the assessment order is based on surmises and conjectures which is not sustainable in the eye of law. The Assessing Officer has passed assessment order as per Income-tax Act. The assessment order under consideration is neither erroneous nor prejudicial to the interest of Revenue. He relied on many case laws placed on the paper book containing 298 pages. He also reiterated the submissions made before the Id. PCIT.

4. On the other hand, the Id. DR relied on the order passed by the lower authorities and submitted that though the Assessing Officer has made a deep enquiry on the bogus purchase and sales of shares, last track records of the companies, who shares were transacted, their EPS which imparts important role in the hike of share price of a company, sudden down fall in the rates of shares of those companies, after completion of assessee's transactions and other attending circumstances behind the alleged transactions, but the Assessing Officer has failed to consider and examine that in the case of bogus purchase and sale of shares, the element of commission payment is always involved and therefore, the Assessing Officer was in error in not making any addition towards unexplained commission for the above arrangement of capital gains. Therefore, the Id. PCIT was justified in setting aside the assessment order being erroneous and prejudicial to the interest of Revenue.

5. We have heard the rival submissions and have gone through the entire material available on record and also the case laws cited by both the parties. From the facts narrated above, the only question to be decided by us is whether the Id. PCIT was justified in revising the assessment order u/s. 263 of the Act on the premise that the Assessing Officer did not examine and add the amount of commission to the income of the assessee for arranging bogus capital gains ? It is notable that for invoking the provisions of section 263, it is sine qua none to establish that the assessment order sought to be revised is erroneous in so far as prejudicial to the interest of Revenue. A perusal of the impugned order reveals that the Id. PCIT itself has observed that the Id. Assessing Officer has made deep examination on the bogus purchase and sales of shares. The only ground for revision is that the Assessing Officer did not make any addition towards commission paid for arranging bogus capital gains. It is worthwhile to note here that firstly no record or document is referred to by the Id. PCIT to establish that the assessee had made any cash payment towards commission and secondly, a perusal of the assessment order reveals that the AO has made addition of the entire purchase value plus sale value totaling to Rs.2,53,91,809/- to the total income of the assessee. In presence of these facts, it cannot be said that the AO has paid deaf ear to the aspect of commission which according to the Id. PCIT, might have been paid by the assessee for arranging bogus capital gains. In such circumstances, for want of any whisper of commission payment in the assessment order, the said order may at the most be termed as erroneous, but it cannot be prejudicial to the interest of revenue particularly when the Assessing Officer has added entire purchase value and sale value of shares declared to the income of the

assessee as mentioned in para 26 of the assessment order reproduced above. Unless both the conditions of assessment order being erroneous as well as prejudicial to the interest of Revenue are satisfied, the Id. PCIT was not justified to revise the said order u/s. 263 of the Act as held in several decisions cited by the assessee. We accordingly, do not find any justification to sustain the impugned order. It is however, made clear that this order will not be an exemplar for other cases having different set of facts and will not be prejudicial to any other proceedings in the case of this assessee.

6. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 17.01.2019.

Sd/-

(Amit Shukla)
Judicial member

Sd/-

(L.P. Sahu)
Accountant Member

Dated: 17.01.2019

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Copy of order forwarded to:

(1) *The appellant*

(3) *Commissioner*

(5) *Departmental Representative*

(2) *The respondent*

(4) *CIT(A)*

(6) *Guard File*

By order

Assistant Registrar
Income Tax Appellate Tribunal
Delhi Benches, New Delhi