

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES: 'E', NEW DELHI**

**BEFORE SMT. BEENA A PILLAI, JUDICIAL MEMBER
AND SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER**

ITA Nos. 5211/Del/2015

AY: 2008-09

DCIT, Central Circle-31 Room No.319 E-2, ARA Centre Jhandewalan Extn New Delhi	vs.	Pingal Sales Pvt.Ltd. 9, Prince Gulam Mohamed Road Golf Tower Kolkata 700 095 PAN: AACEP2206Q
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ITA Nos. 5212/Del/2015

AY: 2008-09

DCIT, Central Circle-31 Jhandewalan Extn New Delhi	vs.	Vishakha Technologies Pvt.Ltd. 9, Prince Gulam Mohamed Road Golf Tower Kolkata 700 095 PAN: AACCV4538P
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(Appellant)

(Respondent)

Department by: Sh. JK Mishra, CIT, DR

Assessee by : None.

Date of Hearing : 31.01.2019

Date of Pronouncement: 25.02.2019

ORDER

PER BEENA A PILLAI, JUDICIAL MEMBER

Present appeals have been filed by revenue against orders dated 22/05/2015 passed by Ld.CIT(A)-30, New Delhi for Assessment Year 2008-09, on following grounds of appeal:

ITA No. 5211/Del/2015

1. *On the facts and in the circumstances of the case, The CIT(A) has erred in law and on facts in cancelling the order u/s 143(3) r.w.s 263 of the I.T. Act, 1961 on the jurisdictional ground. This issue was never raised by the assessee during assessment proceedings before the AO. which is wrong and bad in law.*
2. *On the facts and in the circumstances of the case, the CIT(A) has erred in law and on fact in not keeping the appeal in abeyance when the appeal of the assessee against the order 143(3) read with section 263 of IT Act, 1961 of the CIT Kolkata-II was still pending before the ITAT.*
3. *On the facts and in the circumstances of the case, the CIT(A) has erred in law and on facts in allowing the appeal of the assessee without going into the merits of the case.*
4. *The order of the CIT(A) is erroneous and is not tenable on facts and in law.*
5. *That the appellant craves leave to add, alter or amend any/all of the grounds of appeal either before or during the course of the hearing of the appeal."*

ITA No. 5212/Del/2015

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2. *On the facts and in the circumstances of the case, the CIT(A) has erred in law and on fact in not keeping the appeal in abeyance when the appeal of the assessee against the order 143(3) read with section 263 of IT Act, 1961 of the CIT Kolkata-II was still pending before the ITAT.*
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4. *The order of the CIT(A) is erroneous and is not tenable on facts and in law.*

5. That the appellant craves leave to add, alter or amend any/all of the grounds of appeal either before or during the course of the hearing of the appeal."

2. Brief facts of case are as under:

At the outset both parties submitted that facts and circumstances involved in these two cases are identical and similar. It is also submitted by Ld. CIT DR that impugned order in case of both assessees are also being passed on the same date being 22/05/2015. Looking into similarity of case, we are disposing of both these appeals by way of common order as under.

2.1. It has been submitted that both assessees before us, were originally assessed with Income Tax Officer, Ward 4 (2) Kolkata.

It has been submitted that assessee had filed return of income for year under consideration on 30/09/2008. Case was selected for reassessment under section 148 of the I.T.Act, 1961 (the Act) and order was passed on 28/05/2010. Subsequently cases were transferred to CIT (Central)- III, New Delhi, vide order dated 18/12/2012, passed under section 127 of the Act, vide F No. CIT (Central)-III/2013-14/1660.

2.2. It has been submitted that, in the meantime, order under Section 263 of the Act was passed in case of both assesses by Commissioner of Income Tax, Kolkata-II vide order dated 30/03/2013, and that Ld.CIT, Kolkata in his order under Section 263, after recording satisfaction, set aside order passed by ITO Kolkata, under Section 148 dated 28/05/2010. It has been submitted that pursuant to order passed under section 263 of the Act, Income Tax Officer Ward 4 (2) Kolkata issued notice

under section 142 (1) of the Act along with questionnaire dated 10/05/2013 which was issued and served upon assessee. In response to notice assessee vide letter dated 24/06/2013 stated that assessee has preferred appeal before Hon'ble ITAT, Kolkata against order under section 263 of the Act.

2.3. It has been submitted that order passed u/s 263 by Ld. CIT, Kolkata-II on 30/03/2013 was an ex parte order, holding assessment order dated 28/05/2010 under section 143 (3)/148 by ITO, Ward 4(2), Kolkata to be erroneous and prejudicial to the interest of revenue. It was submitted by assessee before Ld.CIT (A) that order passed u/s.263 by Ld.CIT Kolkata, was without affording opportunity of being heard, and that Ld.CIT Kolkata had no jurisdiction over the case as same was transferred long before the said date to Delhi under Section 127 of the Act.

2.4. It was submitted by assessee before Ld.CIT (A) that, order passed giving effect to order under Section 263 by ACIT, Central Circle (19), Delhi was without jurisdiction. It has further been submitted that, unaware about transfer of case to Delhi jurisdiction, assessee had filed letter dated 24/06/2013 stating that appeal against order u/s.263 has been filed before ITAT Kolkata.

2.5. On aforesaid facts, Ld.CIT (A) held as under, vide order dated 22/05/2015, being the impugned order before us:

"Main arguments of Ld. AR is that the CIT-II, Kolkata having jurisdiction over the case then vide order F.No.CIT/Kol-II/Centralization/2012-13/6617-6624 dt.18.12.2012 has transferred the case u/s 127 to ACIT/DCIT, Central Circle-23, New Delhi & said order was made to take immediate effect i.e. 18.12.2012 itself. Subsequently. CIT, Kolkata-II passed order u/s 263 of I.T. Act. on 30.03.2013. holding assessment made u/s

143(3) / 148 dt.28.05.2010 erroneous & prejudicial to the interest of revenue. Ld. AR argued that CIT-II, Kolkata does not have jurisdiction to pass order u/s 263 subsequent to passing order u/s 127 of I.T. Act. It was CIT(C)-III, New Delhi who has jurisdiction over the case after 18.12.2012 when the case was transferred to DCIT/ACIT, Central Circle -23, New Delhi.

The assessing officer was sought clarification on this issued vide letter F.No.CIT (Appeal)-XXXIII/2014-15/174 dt. 17.09.2014 reproduced as under:-

To,
The Assistant Commissioner of Income Tax,
Central Circle -19,
Jhandewalan,
New Delhi,

Sub: - Clarification of assessment order u/s 143(3) r.w.s 263 in the case of M/s Pingal Sales Pvt. Ltd., A. Y. 2008-09, Appeal no. 186/14-15/1764 Reg:-

The assessee has filed appeal against the assessment order passed u/s 143(3) read with section 263 of the Act by ACIT, CC-19, New Delhi.

During appellate proceedings, Ld. AR of the assessee has filed written submission, one of the argument is on jurisdiction. His main arguments on the jurisdiction is that the impugned order is passed in consequence of the order u/s 263 of the Act passed by the Commissioner of Income Tax, Kolkata-11 u/s 263 by order dated 30-03-2013. As per para 3 of the assessment order itself it is mentioned then the case of the assessee was transferred vide order u/s 127 passed by CIT-11, Kolkata by the order no. CIT/Kol- II/Centralization/2012-13/6617-6624 dated 18.12.2012 transferring the case from Kolkata to Delhi. He, Therefore, argued that after passing the order u/s 127 by CIT-II, Kolkata, CIT-II, Kolkata was no longer having jurisdiction to pass the order u/s 263 of IT. Act. Therefore, the order passed u/s 263 by CIT-II, Kolkata is illegal and without jurisdiction and the present impugned order passed consequent to said order, therefore, he argued that impugned order has also been passed without jurisdiction.

You are requested to verify the facts and submit the report

whether jurisdiction assumed by you is proper in the light of facts argued by the Ld. AR of the assessee. Your report should reach to the undersigned on or before 24 October, 2014.

The assessing officer vide letter no. F.No. CC-19/2014-15/563 dated. 16.10.2014 has written a letter to CIT-II, Kolkata with a copy marked to the undersigned. The contents of the letter are reproduced as under

To,

*The Commissioner of Income Tax Kolkata-11,
Kolkata Aayakar Bhawan, 3 Floor,
Chowringee Square Kolkata - 700069*

Sir,

Subject: Order under section 127 of the 1. T. Act, in the case of M/s Pingal Sales Pvt. Ltd, 9, Prince Gulam Mohamed Road. Golf Tower, Kolkata - PAN: AAACP22060.

Most respectfully it is submitted that assessment of the above mentioned assessee for the assessment year 2008-09 was set-aside by your honour vide order under section 263 of the Act dated 30.03.2013.

- 2. The assessment record to the above mentioned assessee was transferred by ITO, Ward-4(2), Kolkata to AC1T. Central Circle -23. New Delhi under his office letter No. ITO. WD-4(2)/Kol/Centralization'2013-14/336 dated 16.08.2013. The ' Income Tax Officer, Ward 4(2), Kolkata in his letter has mentioned that an order u/s 127 for centralization of this case was passed by CIT-11. Kolkata vide order F.No.CIT/Kol-II/Centralization/2012-13/6617-6624 dated 18.12.2012.*
- 3. In view of the above facts it is submitted that order u/s 127 transferring this case of AC IT. Central Circle, New Delhi was passed on 18.12.2012 whereas the order u/s 263 was passed on a later date i.e. on 30.03.2013, therefore, it appears that another order cancelling the order u/s 127 dated 18.12.2012 was passed. Therefore, your honour is requested to kindly send a copy of such order, if any, as a report is to be submitted to CIT(A), New Delhi in connection with the assessee's appeal pending before him.*

Subsequently, during the appellate proceedings, Ld. AR has filed copy of order passed by CIT-II, Kolkata u/s 127 no. 35/2012-13

dt. 18.12.2012 assigning this case to ACIT/DCIT, Central Circle - 23, New Delhi and order u/s 263 passed by CIT-II, Kolkata dt.30.3.2013.

Decision: -

I have considered the assessment order, written submission, paper book and arguments of Ld. AR and the correspondences made by the assessing officer, order passed u/s 127 & 263 by CIT-II, Kolkata.

It is undisputed fact that the order was passed by CIT-II, Kolkata u/s 127 on 18.12.2012 transferring the case from ITO ward 4(2), Kolkata to ACIT / DCIT, Central Circle -23, New Delhi. This fact is mentioned in the assessment order as well as confirmed by the assessing officer in this letter dt. 16.10.2014 addressed to CIT-II, Kolkata. The assessing officer has also mentioned in his letter dt. 16.10.2014 that the case record was transferred by ITO ward 4(1), Kolkata vide his letter dated 16.08.2013 & in his letter ITO ward 4(1), Kolkata has mentioned order u/s 127 dt.18.12.2012. It is surprising that how ITO ward 4(1) Kolkata has issued notice u/s 142(1) pursuant to order u/s 263 on 10.05.2013 as per paragraph 2 of the assessment order when order u/s 127 was passed by CIT-II, Kolkata on 18.12.2012 & a copy was served on the assessing officer. Even order u/s 263 was marked to ITO ward 4(2), Kolkata ITO ward 4(2), Kolkata has not informed this fact to the then jurisdictional CIT-II, Kolkata. After transfer of case record, the present assessing officer has also not brought this discrepancy to the CIT-II, Kolkata or present jurisdictional CIT-Central -III, New Delhi. In the assessment order these facts are mentioned. Therefore, the assessing officer before initiating the action pursuant to order u/s 263 should have brought these jurisdictional issues to their administrative CIT, to take corrective steps.

The present assessing officer vide letter dt. 16.10.2014 has written to CIT-II, Kolkata that it appears that another order might have been passed cancelling order u/s 127 dt. 18.12.2012. In that case, the jurisdiction will not rest with ACIT /DCIT, Central Circle - 23, New Delhi, who have passed the present impugned order as the same is not on record & not mentioned in assessment order.

Even the ITO ward 4(2), Kolkata while transferring such record has not mentioned such order.

In view of the above facts, the assessing officer i.e. ACIT/ DCIT, Central Circle- 23, New Delhi was not supposed to have passed present impugned assessment order pursuant to order u/s 263 passed by CIT-II, Kolkata subsequent to passing of order u/s 127. Accordingly, the present impugned order is ab-initio void & therefore cancelled."

3. Aggrieved by aforesaid reasoning of Ld.CIT (A), revenue has preferred appeal for Assessment Year 2008-09 in case of both assessees before us raising identical issues.

4. None appeared on behalf of assessee before us.

5. Ld.CIT DR submitted as under:

" MAY IT PLEASE YOUR HONOURS Sub: Written Submission in the above case- reg.

This is the case of an accommodation entry provider company which was previously assessed in Kolkata. As regards share capital and share premium of Rs.37.98 crores, the CIT-II Kolkata passed an order u/s 263. As recorded by the A.O and the CIT(A), the assessee is in a separate appeal against the said order. Further, this case was centralized with the present A.O vide order dated 18.12.2012 passed u/s 127 by the CIT-II, Kolkata transferring the case to Delhi. Consequent to the order u/s 127, the case records were transferred by the erstwhile A.O. i.e. ITO Ward 4(2), Kolkata to the ACIT CC -19, New Delhi on 16.08.2013. Consequent to the order u/s 263, the A.O passed an order u/s 143 r.w.s 263. The assessee did not challenge the jurisdiction before the A.O. The order passed u/s 127 was also not challenged.

2. *The CIT(A) has held the assessment order as void ab initio observing that after order u/s 127 dated 18.12.2012 , the CIT-II, Kolkata did not have jurisdiction to pass order u/s 263 on 30.03.2013 and therefore, the A.O. did not have correct jurisdiction to pass order consequent to the said order u/s 263. The Ld CIT(A)*

*has failed to appreciate that he has no jurisdiction to adjudicate the matter in respect of order passed u/s 127 and 263. Moreover, in various judicial pronouncements it has been held that jurisdiction order is a procedural matter and any mistake regarding jurisdiction is curable and can be rectified as early as possible and it cannot be the basis of annulment of entire assessment proceedings. As observed by Hon'ble Delhi High Court in the case of *Abhishek Jain v ITO 405 ITR 1*, in para 18 of the order that Section 127 speaks of transfer of case and not of transfer of jurisdiction. Further, Part-B of Chapter XIII contains the provisions regarding jurisdiction of Income -tax authorities. Further, the jurisdiction can be challenged under writ jurisdiction before the Court as under Section 251 and 253, appeal against order u/s 127 does not lie before the CIT(A) and ITAT .*

3. In this regard, the Revenue relies on the following decisions

CIT v S S Ahluwalia [2014] 225 Taxman 131 (Delhi)

Abhishek Jain v ITO [2018] 405 ITR 1 (Delhi)

Kanji Mai & Sons v CIT 138 ITR 391 (Delhi)

Hindustan Transport Co. V Inspecting Asst Commissioner of Income Tax 189 ITR 326(Allahabad)Rai Bahadur Seth Teomal v In the case of Abhishek Jain(supra) and S S Ahluwalia(supra),Court has examined various issues pertaining to jurisdiction in detail and the Revenue strongly relies on the said orders. Kind attention of the Honours is drawn to Para 17-21 of the order in the case of Abhishek Jain(supra). It is also to submit that even the ratio of decisions in respect of Sec 120 are applicable with regard to Sec 127 also.

5. In view of the above, the matter may be remanded back to the CIT(A) for adjudication on merits."

6. We have perused impugned order passed by Ld.CIT (A), as well as written submissions filed by Ld.CIT DR.

6.1. In the present case the Ld.CIT(A) has held that order passed by the Ld.CIT(A), Kolkata did not have jurisdiction to pass an order u/s 263 of the Act pursuant to which impugned order passed u/s 143(3) r.w.s. 263 was in appeal before us. Validity of

order passed u/s 263 of the Act can be tested only before the Tribunal u/s 253(1)(c) of the Act. The Ld.CIT(A) does not have any power to comment on validity or otherwise of the order u/s 263 of the Act. Further it is submitted by assessee before him that appeal against the order u/s 263 of the Act is pending before Tribunal. In view of this, the order of Ld.CIT(A) is not sustainable and hence, same is set aside back to file of Ld.CIT(A) with direction to decide the issues involved in impugned order u/s 143(3) r.w.s.263 of the Act.

7. Accordingly grounds raised by revenue in case of both assesses stand allowed for statistical purposes.

9. In the result appeals filed by revenue in both the cases stand allowed for statistical purposes.

Order pronounced in Open Court on 25th February, 2019.

Sd/-

(PRASHANT MAHARISHI)
Accountant Member

Sd/-

(BEENA A PILLAI)
Judicial Member

Dated: the 25th February, 2019.

- Gmv

Copy of the Order forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR
6. Guard File

By Order

Asst. Registrar
ITAT, Delhi Benches, New Delhi

S.No.	Details	Date
1.	Draft dictated on	18.02.2019
2.	Draft placed before author	19.02.19
3.	Draft proposed & placed before the Second Member	20.02.19
4.	Draft discussed/approved by Second Member	
5.	Approved Draft comes to the Sr. PS/PS	
6.	Kept for pronouncement	25.02.19
7.	Order uploaded on	
8.	File sent to Bench Clerk	
9.	Date on which the file goes to Head Clerk	
10.	Date on which file goes to A.R.	
11.	Date of Dispatch of order	