

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : F : NEW DELHI

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA No.1781/Del/2016
Assessment Year: 2011-12

Sanjeev Singh,
861, Sector-9 U.E,
Karnal.

Vs Pr. CIT,
Karnal.

PAN: CHKPS0618H

(Appellant)

(Respondent)

Assessee by	:	Dr. Rakesh Gupta, Shri Somil Aggarwal & Sobhit
Revenue by	:	Shri Kanwaljit Singh, CIT, DR
Date of Hearing	:	13.02.2019
Date of Pronouncement	:	24.04.2019

ORDER

PER R.K. PANDA, AM:

This appeal filed by the assessee is directed against the order dated 3rd February, 2016 passed u/s 263(1) of the IT Act, 1961 by the PCIT, Karnal, relating to assessment year 2011-12.

2. Facts of the case, in brief, are that the assessee is an individual and filed his return of income on 6th July, 2011 declaring total income of Rs.1,58,105/- and agricultural income of Rs.5 lakhs. The Assessing Officer completed the assessment

u/s 143(3) on 10th January, 2014 determining the total income of the assessee at Rs.6,30,545/- and agricultural income of Rs.5 lakhs. Subsequently, the Id.CIT issued a show cause notice u/s 263 of the IT act the contents of which reads as under:-

“F.No.Pr.CIT/KNL/2015-16/2459

Office of the
Pr. Commissioner of Income Tax
Karnal

Dated: 21/23.09,2015

To
Sh.Sanjeev Singh,
H.No.861 Sector-9, U.E.,
Karnal.

Sir,

**Sub: Show cause Notice u/s 263 of the Income Tax Act,
1961 for the A.Y. 2011-12 - Regarding -**

This is with reference to the assessment order passed in your case u/s 143(3) of the Act on 10.01.2014 at an income of Rs.6,30,545/- + agriculture income Rs.5,00,000/-.

A perusal of assessment record for the AY 2011-12 reveals that your case was selected for scrutiny through CASS to examine the source of cash deposit of Rs.1,00,81,585/- in your saving bank account maintained with IndusInd Bank and PNB, Karnal.

On being inquired by the AO with regard to source of the cash deposits of Rs.1,00,81,585/-, you have furnished a reply dated 21.11 2013 contending that “Cash deposits to the tune of Rs.14 Lacs was from agricultural produce sale, Rs.4.02 Lacs from lease money, Rs.27,38,922/- contra entries and Rs.8 Lacs from gifts from your brother, totaling Rs.53,40,922/-. The remaining cash deposits are out of sale proceeds of the bananas.” Thus, the amount of Rs.53,40,922/- remained unexplained and unverified on the following reasons:-

(a) Agriculture income has been declared by you in your return of income at Rs.5 Lacs only which has also been assessed as such by the AO. During assessment proceedings, you have claimed credit of Rs.14 Lacs of agriculture produce but you have failed to produce any details of agriculture expenses incurred. Apparently, the source of cash deposits of Rs.9 Lacs remained unexplained and unverified.

(b) Further, you could not explain genuineness of the cash gift of Rs.8 Lacs as you failed to establish its genuineness with supporting documentary evidence, as there is no bank transfer involved in the gifted amount. In this way, addition of Rs.8 Lacs was required to be made instead of partly

addition made at Rs.2 Lacs at the time of assessment. You have also failed to file any gift deed on this account alongwith other supporting documents. Thus, genuineness of cash gift of Rs.8 Lacs remained unexplained and unverified.

(a) Further, out of cash deposit of Rs.1,00,81,585/-, you have stated that the balance Rs.47.41 lacs represent the sale of bananas, which is not supported by the requisite details and the AO has merely added Rs.1,72,440/- on account of presumptive profit i.e. 8.06% GP on Rs. 21,39,513/- (23,39,513 - 2,00,000). The AO has not made addition on account of unexplained investment made for the purchases for the corresponding sales.

In view of above, the assessment order passed by the AO has become erroneous in as much as it is prejudicial to the interest of revenue and calls for consideration u/s 263 of the Income Tax Act.

You are, therefore, requested to furnish reply / submission alongwith documentary evidence, if any, on the above issues raised in the notice and attend the office of the undersigned at Aayakar Bhawan, Sector-12, Karnal on 07.10.2015 at 11:30 AM personally / through your authorized representative.

Sd/-
(Pawan Singh Tomar)
**Pr. Commissioner of Income Tax,
Karnal.**

3. The assessee filed the requisite details before the Id.CIT explaining each and every aspect. The Id.CIT accepted the first two issues raised in the notice and held that no interference is called for. However, so far as the third issue is concerned, he held that the assessee was not able to submit/explain the source of an amount of Rs.15,39,513/- and the Assessing Officer instead of making the entire addition, estimated profit on the same. Since the amount remained unexplained and the assessee never admitted that this amount is on account of unaccounted sales therefore, the Assessing Officer is not correct in doing so. Apart from the above issue, the Id.CIT also directed the Assessing Officer to tax the interest income that was not declared in the return of income. He also directed the Assessing Officer to treat the amount of

Rs.14.28 lakhs as unexplained contra entries (withdrawals from PNB and cash deposits in PNB).

3.1 Aggrieved with such order of the Id.CIT, the assessee is in appeal before the Tribunal raising the following grounds:-

“1. That the order of the learned Pr. Commissioner of Income Tax is bad in law.

2. That the learned Pr. Commissioner of Income Tax has erred in reopening the case of assessee U/s 263(1) of the Income Tax Act, 1961.

3. That the applicant may be allowed to add, alter, amend and vary any grounds of appeal before or at the time of hearing.”

4. The Id. counsel for the assessee strongly challenged the order of the CIT invoking the jurisdiction u/s 263 of the IT Act. He submitted that the Id.CIT had issued notice u/s 263 for three issues out of which he has accepted the two issues and the only issue that remained for adjudication was the treatment of Rs.15,39,513/- as unexplained deposit. However, in gross violation of the provisions, the Id.CIT held the order to be erroneous and prejudicial to the interests of the Revenue on account of two new issues i.e., treatment of Rs.14.28 lakhs as unexplained contra entries and non-declaration of interest income in the return of income. Referring to various decisions, he submitted that revision of the order on a ground which was not proposed in the notice u/s 263 is invalid because such a course of action deprives the assessee of the opportunity of hearing as contemplated u/s 263. He submitted that the proceedings u/s 263 has to be strictly confined to the notice issued for invoking the jurisdiction under that section for the reasons stated therein. The law does not permit extending the

proceedings u/s 263 after its initiation beyond what is stated in the notice itself. For the above proposition, the ld. counsel for the assessee relied on the following decisions:-

- (i) CIT vs. Contimeters Electricals (P) Ltd. (2009) 317 ITR 0249 (Del);
- (ii) Maxpak Investment Ltd. vs. ACIT (2006) 104 TTJ 0881 (Del);
- (iii) Anil Aggarwal vs. DCIT (2004) 90 TTJ 0946 (Chd.);
- (iv) Ganesh Builders vs. CIT (2013) 158 TTJ 0801 (Jodhpur);
- (v) Colourcraft vs. ITO (2007) 107 TTJ 0800 (Mum); and
- (vi) SSI vs. DCIT (2004) 85 TTJ 1049 (Chennai).

5. The ld. counsel for the assessee also relied on the decision of the Tribunal in the case of Shri Gaurav Bhatia vs. CIT, ITA No.1730/Del/2013, order dated 13.04.2017.

6. He submitted that the Assessing Officer in the order passed u/s 143(3)/263 vide order dated 9th December, 2016 has already accepted the issue of contra entry and no addition has been made. Further, this issue was also examined by the Assessing Officer in the original assessment order and after considering the detailed reply given by the assessee, vide letter dated 14th October, 2013, the Assessing Officer had not made any addition on this issue.

7. So far as the cash deposit of Rs.15,39,513/- on which the ld.CIT has invoked jurisdiction u/s 263 is concerned, he submitted that the Assessing Officer in the original assessment proceedings has accepted the explanation that out of Rs.1,00,81,585/-, explanation to the tune of Rs.53,40,922/- was accepted and only

balance of Rs.47,40,763/- was not verified according to the CIT. However, the contention of the CIT is not correct since the assessee has explained to the Assessing Officer that the cash deposit of Rs.47,40,763/- i.e., Rs.32,01,250/- + Rs.15,39,513/- was out of the sale proceeds of banana. Referring to page 36 of the paper book, he drew the attention of the Bench to the explanation filed before the Assessing Officer regarding Rs.32,01,250/-. Referring to the copy of the assessment order he drew the attention of the bench to the fact that the Assessing Officer has also considered the amount of Rs.15,39,513/- as income earned out of banana sales. Accordingly, the Assessing Officer has applied the profit rate of 8.06%. Referring to various pages of the paper book, he submitted that the assessee has correlated each and every entry including the cash deposit of Rs.15,39,903/-. He submitted that the view taken by the Assessing Officer is a possible view and, therefore, the jurisdiction u/s 263 is not maintainable.

8. Referring to the decision of the Hon'ble Delhi High Court in the case *PCIT vs. Lakshya Seth vide ITA No.398/2016, order dated 21st April, 2017*, he submitted that the Hon'ble High Court in the said decision has held that in cases where there is inadequate inquiry, but, lack of inquiry, the CIT may give and record a finding that the order/inquiry is erroneous. This can happen if an inquiry and verification is conducted by the CIT and is able to establish and show the error or mistake made by the Assessing Officer making the order unsustainable in law. Relying on various other decisions placed in the paper book, he submitted that when the Assessing Officer has

accepted the claim of the assessee by applying his mind though the CIT has different opinion on the same, it would certainly fall in the category of inadequate inquiry. In case of inadequate inquiry, the commissioner is not empowered to invoke the provisions contained u/s 263. It has further been held in various decisions that before reaching the conclusion that the order of the Assessing Officer was erroneous and prejudicial to the interests of the Revenue, the Commissioner himself has to undertake some inquiry to establish that the assessment order was erroneous and prejudicial to the interests of the Revenue. Since, in the instant case, out of the three issues he himself has dropped two issues and has added two new issues out of which the Assessing Officer in the subsequent proceedings has accepted the issue on account of contra entry, therefore, this shows that the Id.CIT has not undertaken proper inquiry to establish that the assessment order is erroneous and prejudicial to the interests of the Revenue. He accordingly submitted that the order passed u/s 263 by the CIT should be set aside and the grounds raised by the assessee should be allowed.

9. The Id. DR, on the other hand, strongly supported the order of the CIT. Relying on the following decisions, the Id. DR submitted that the order passed by the CIT, under the facts and circumstances of the case is fully justified:-

- (i) Deniel Merchants Pvt. Ltd. vs. ITO (Appeal No.2396/2017, order dated 29.11.2017) (SC);
- (ii) Malabar Industrial Co. Ltd. vs. CIT (2000) 243 ITR 83(SC);
- (iii) Rajmandir Estates (P) Ltd. vs. PCIT (2016) 386 ITR 162 (Calcutta);

- (iv) Rajmandir Estates (P) Ltd. vs. PCIT (2017) 77 taxmann.com 285 (SC);
- (v) Shree Manjunathesware Packing Products & Camphor Works vs. CIT (1998) 231 ITR 53 (SC);
- (vi) CIT vs. Amitabh Bachchan, 384 ITR 200 (SC); and
- (vii) PTC Impex (India) Pvt. Ltd vs. CIT (ITA No.2860/Del/2010, order dated 03.04.2018) (ITAT Delhi).

10. Referring to the explanation 2 that has been inserted in section 263 of the IT Act by the Finance Act, 2015, w.e.f. 01.06.2015, he submitted that the order passed by the Assessing Officer 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 PCIT or CIT –

- (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.

10.1 He accordingly submitted that the grounds raised by the assessee be dismissed.

11. We have considered the rival arguments made by both the sides and perused the relevant material available on record. We have also considered the various decision cited before us. We find the assessment in the instant case was completed u/s 143(3) on 10th January, 2014 determining the total income at Rs.6,30,545/- and agricultural income of Rs.5 lakhs against the returned income of Rs.1,58,105/- and agricultural income of Rs.5 lacs. We find the Id.CIT issued notice u/s 263 of the IT Act the contents of which have already been reproduced in the preceding paragraph. We find, out of the three issues on which the Id.CIT invoked jurisdiction u/s 263, he has accepted two issues and the only issue that survived for adjudication as per notice u/s 263 is relating to the treatment of Rs.15,39,513/- as unexplained cash deposits. A perusal of the assessment order shows that the Assessing Officer has discussed this issue in the body of the assessment order and has adopted a net profit rate of 8.06% on the deposit of Rs.15,39,513/-. The relevant observations of the Assessing Officer read as under:-

2.v. Cash deposits out of sale of bananas:-

The assessee has claimed that he has made total sales of bananas in cash at Rs.32,01,250/- and deposited the same in his bank account and claimed total purchases of Rs.25,61,000/-. The profit on the above sales have been shown on presumptive basis at Rs.2,58,105/- giving profit percentage about 8.06%. Accordingly, contention of the assessee with respect to cash deposit of Rs.32,01,250/-, is also accepted.

2.vi. Further, the assessee has claimed that he has no other business except trading of bananas. Total credits in the above two bank a/c of the assessee -has been noticed at Rs. 1,00,81,585/- out of which cash deposits/credits aggregating to Rs.77,42,072/-(14 lacs + 4.02 lacs + 27,38,822 + 32,01,250) are accepted on the basis of discussion made in above paras but the remaining amount of Rs.23,39,513/- is still remained unexplained. Out of this, addition of Rs.2 lacs has already been made in para 2.iv, treating undisclosed income of the assessee. Accordingly, the remaining unexplained deposits/credits in the bank a/c of

Rs.15,39,513/-(2339513-200000) is also treated as income earned out of bananas sales. By applying the rate of profit as applied by the assessee, himself, i.e. @8.06%, profit out of the above sales is worked out at Rs. 1,72,440/- and accordingly an addition of Rs.1,72,440/- is made on a/c presumptive profit.”

12. Thus, a perusal of the assessment order on this issue shows that the Assessing Officer has applied his mind and taken a possible view on the basis of the various details filed by the assessee. No doubt, the Id.CIT may not agree with the view of the Assessing Officer. However, it cannot be said that it is a case of no inquiry or that the view taken by the Assessing Officer is not a possible view. It has been held in various decisions that only absence of an inquiry empowers jurisdiction to the CIT to invoke the revisional power u/s 263. However, when there is some inquiry and the Id.CIT does not agree with the extent of inquiry conducted by the Assessing Officer as sufficient, he cannot invoke the jurisdiction u/s 263 of the IT Act.

13. We find the Hon'ble Delhi High Court in the case of *CIT vs. Leisure Wear Export reported in 341 ITR 166*, has observed as under:-

“The power of revision is not meant to be exercised for the purpose of directing the Assessing Officer to hold another investigation without describing as to how the order of the Assessing Officer is erroneous. From this it also follows that where the assessment order has been passed by the Assessing Officer after taking into account the assessee's submissions and documents furnished by him and no material whatsoever has been brought on record by the Commissioner which showed that there was any discrepancy or falsity in evidence furnished by the assessee, the order of the Assessing Officer cannot be set aside for making deep inquiry only on the presumption and assumption that something new may come out.

For making a valid order under section 263 it is essential that the Commissioner has to record an express finding to the effect that the order passed by the Assessing Officer is erroneous which has caused loss to the Revenue. Furthermore, where acting in accordance with law the Assessing Officer frames

certain assessment order, the same cannot be branded as erroneous simply because, according to the Commissioner, the order should be written more elaborately. All these principles are highlighted in the judgments noted hereinafter.”

14. The various other decisions relied on by the Id. counsel for the assessee also support his case. Since, in the instant case, the Assessing Officer has taken a possible view on the issue relating to the deposits/credits in the bank account of Rs.15,39,513/- by treating the same on account of sale of banana and has applied the profit rate of 8.06%, therefore, the view taken by the Assessing Officer cannot be termed as not a possible view. Since the same has been determined on the basis of various replies given by the assessee, therefore, the Id.CIT, in our opinion, is not justified in invoking the jurisdiction u/s 263 on the issue of bank deposits/credits in the bank account of Rs.15,39,513/-.

15. Now, coming to the other two issues on which the Id.CIT has directed the Assessing Officer to make necessary verification and pass appropriate order is concerned, it is an admitted fact that these two issues were not there in the notice issued u/s 263 of the IT Act. The Hon'ble Delhi High Court in the case of *CIT vs. Contimeters Electricals (P) Ltd. (2009) 317 ITR 0249 (Del)*, has held that revision of an issue not mentioned in the show cause notice is not permissible. The Delhi Bench of the Tribunal in the case of *Maxpak Investment Ltd. vs. ACIT (2006)* reported in 104 TTJ 0881, has held that revision on a ground not proposed in the notice u/s 263 is invalid because such a course of action deprives the assessee of the opportunity of hearing as contemplated in section 263. The Chennai Bench of the Tribunal in the

case of SSI Limited vs. DCIT (2004) 85 TTJ 1049 has held that the proceedings u/s 263 has to be strictly confined to the notice issued for invoking the jurisdiction under that section for the reasons stated therein. The law does not permit extending the proceedings u/s 263 after its initiation beyond what is stated in the notice itself. The various other decisions relied on by the ld. counsel for the assessee also support his case.

16. It may be pertinent to mention here that after the order passed u/s 263, the Assessing Officer, in the order passed u/s 143(3)/147 of the Act passed on 9th December, 2016, has accepted the explanation of the assessee regarding the cash deposits of contra entries to the tune of Rs.14.28 lakhs as explained. In view of the above discussion, the order passed u/s 263 by the ld.CIT is not sustainable in law. We, therefore, set aside the order of the CIT and the grounds raised by the assessee are allowed.

17. In the result, the appeal filed by the assessee is allowed.

The decision was pronounced in the open court on 24.04.2019.

Sd/-

(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Sd/-

(R.K. PANDA)
ACCOUNTANT MEMFBER

Dated: 24th April, 2019

dk

Copy forwarded to

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

Asstt. Registrar, ITAT, New Delhi