आयकर अपीलीय अधिकरण,चण्डीगढ़ न्यायपीठ "ए" , चण्डीगढ़
IN THE INCOME TAX APPELLATE TRIBUNAL, CHANDIGARH
BENCH "A", CHANDIGARH

श्री एन.के.सैनी, उपाध्यक्ष एवं श्री राजपाल यादव, न्यायिक सदस्य
BEFORE: SHRI N.K.SAINI, VP & SHRI RAJPAL YADAV, JM

आयकर अपील सं./ ITA NO. 774/CHD/2018
निर्धारण वर्ष / Assessment Year : 2011-12

Dev Raj Garg Aggarwal Bhavan Shahabad (M) Dist.Kurukshetra PAN : ABWPG 5939 R	बनाम Vs.	Pr.CIT Karnal.
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

निर्धारिती की ओर से/Assessee by	:	Shri K.R. Chhabra, Adv
राजस्व की ओर से/ Revenue by :	:	Shri Chandrajit Singh, CIT-DR

सुनवाई की तारीख/Date of Hearing : 06/11/2019
उदघोषणा की तारीख/Date of Pronouncement : 07 /11/2019

आदेश/ORDER

PER RAJPAL YADAV, JUDICIAL MEMBER : Present appeal is directed at the instance of the assessee against order of ld.Pr.Commissioner, Karnal passed under section 263(1) of the Income Tax Act, 1961 dated 26.3.2018 for the Asstt.Year 2011-12.

2. The assessee has taken five grounds of appeal, but his grievance is that the ld.CIT has erred in taking cognizance under section 263 of the Act and setting aside the assessment order.

3. Brief facts of the case are that the assessee has filed his return of income on 9.3.2012 electronically declaring total income at Rs.11,48,620/- .This return was scrutinized, and assessment order was passed on 13.3.2014 under section 143(3) of the Act, whereby the returned income was accepted. The assessment was reopened for the reason that the assessee has received a gift of Rs.4,25,000/- from Satish Garg HUF, which is the HUF of his brother and it was harboured that HUF of his brother does not fall within the ambit of "relative" provided under section 56(2) of the Act. Since gift was exceeding Rs.50,000/- therefore it was to be assessed as income of the assessee. Accordingly, the assessment order was reopened. The ld.AO has conducted inquiry and thereafter passed the assessment order on 24.12.2015 under section 143(3) r.w.s. 147 of the Act. The ld.AO has again accepted the returned income by putting reliance upon the order of the ITAT, Rajkot Bench in ITA No.583/Rjt/2007 holding that gift from his real brother's HUF is to be treated as received from a relative. Brief finding of the Assessing Officer reads as under:

> *"2.2 During the course of assessment proceedings, it has been submitted through written replies that the assessee has received the gift from his real brother's HUF and that, thus, it is exempt having been received from the group of relatives as all the members of HUF fall within definition of relatives falling within the provisions of section 56(2)(vii). A copy of the ITAT, Rajkot Bench, Rajkot's order passed in ITA No. 583/Rjt/2007 in the case of Vineet KumarRaghavjibhai Halodia Vs. ITO has also been filed in support of this claim."*

4. On perusal of this finding, the ld.CIT harboured a belief that the assessment order is erroneous and prejudicial to the interest of the Revenue because ITAT, Rajkot Bench has not laid down that gift

received by a person from non-HUF would still be considered as received from a relative under section 56(2) of the Act. The ld.CIT recorded reasons and issued a show cause notice on 27.2.2018 which has also been reproduced in the impugned order. During the pendency of the proceedings under section 263, it came to the notice of the ld.CIT that a gift ofRs.6 lakhs was also received by the assessee from his own HUF and in the understanding of the CIT, even own HUF will also not be treated as relative within the meaning of definition "relative" provided in section 56(2). Therefore, the ld.CIT issued an additional show cause notice under section 263 on 21.3.2018. The ld.CIT thereafter gone through submissions of the assessee and held that order of the Assessing Officer is erroneous as well as prejudicial to the interest of the Revenue. Hence, he set aside the assessment order, and remitted the issue to the file of the Assessing Officer for fresh examination and re-adjudication.

5. Before us, the ld.counsel for the assessee contended that both the HUFs ought to be treated as relative and gift received from members of HUF is to be treated as received from relative under section 56(2) and no addition should be made. He further contended that the Assessing Officer has conducted an inquiry and took a view based on the order of the ITAT, Rajkot in favour of the assessee. The ld.CIT is not justified in taking action against the assessee.

6. On the other hand, the ld.DR relied upon orders of the CIT and contended that ITAT, Rajkot Bench has only considered the HUF in which the assessee is one of the members. It was not HUF as stranger even if it is HUF of the brother.

7. We have considered rival submissions and gone through the record carefully. At this stage, before considering contentions of the ld. Representatives, we deem it pertinent to take note of the fundamental tests propounded in various judgments relevant for judging the action of the CIT taken u/s 263. The ITAT in the case of Mrs. Khatiza S. Oomerbhoy Vs. ITO, Mumbai, 101 TTJ 1095, analyzed in detail various authoritative pronouncements including the decision of Hon'ble Supreme Court in the case of Malabar Industries 243 ITR 83 and has propounded the following broader principle to judge the action of CIT taken under section 263.

(i) The CIT must record satisfaction that the order of the AO is erroneous and prejudicial to the interest of the Revenue. Both the conditions must be fulfilled.

(ii) Sec. 263 cannot be invoked to correct each and every type of mistake or error committed by the AO and it was only when an order is erroneous that the section will be attracted.

(iii) An incorrect assumption of facts or an incorrect application of law will suffice the requirement of order being erroneous.

(iv) If the order is passed without application of mind, such order will fall under the category of erroneous order.

(v) Every loss of revenue cannot be treated as prejudicial to the interests of the Revenue and if the AO has adopted one of the courses permissible under law or where two views are possible and the AO has taken one view with which the CIT does not agree. If cannot be treated as an erroneous order, unless the view taken by the AO is unsustainable under law

(vi) If while making the assessment, the AO examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determine the income, the CIT, while exercising his power under s 263 is not permitted to substitute his estimate of income in place of the income estimated by the AO.

(vii) The AO exercises quasi-judicial power vested in his and if he exercises such power in accordance with law and arrive at a conclusion, such conclusion cannot be termed to be erroneous simply because the CIT does not fee stratified with the conclusion.

(viii) The CIT, before exercising his jurisdiction under s. 263 must have material on record to arrive at a satisfaction.

(ix) If the AO has made enquiries during the course of assessment proceedings on the relevant issues and the assessee has given detailed explanation by a letter in writing and the AO allows the claim on being satisfied with the explanation of the assessee, the decision of the AO cannot be held to be erroneous simply because in his order he does not make an elaborate discussion in that regard.

8. Apart from the above principles, we deem it appropriate to make reference to the decision of the Hon'ble Delhi High Court in the case of CIT vs. Sun Beam Auto reported in 227 CTR 113 and Gee Vee Enterprises Ltd vs. Addl. Commissioner of Income Tax (99 ITR 375). In the case of Sun Beam Auto, the Hon'ble High Court has pointed out a distinction between lack of inquiry and inadequate inquiry. If there is a lack of enquiry, then the assessment order can be branded as erroneous. The following observations of the Hon'ble Delhi High Court are worth to note:

> "*12. We have considered the rival submissions of the counsel on the other side and have gone through the*

records. The first issue that arises for our consideration is about the exercise of power by the Commissioner of Income-tax under section 263 of the Income-tax Act. As noted above, the submission of learned counsel for the revenue was that while passing the assessment order, the Assessing Officer did not consider this aspect specifically whether the expenditure in question was revenue or capital expenditure. This argument predicates on the assessment order which apparently does not give any reasons 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 on the issue. There are judgments galore laying down the principle that the Assessing Officer in the assessment order is not required to give detailed reason 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. Learned counsel for the assessee is right in his submission that 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 of the Act, 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".

9. In the case of Gee Vee Enterprise vs. Commissioner of Income Tax reported in 99 ITR page 375, the Hon'ble court has expounded the approach of ld. Assessing Officer while passing assessment order. The observation of the Hon'ble court on pages 386 of journal read as under:-

"… it is not necessary for the Commissioner to make further inquiries before cancelling the assessment order of the Income-tax Officer. The Commissioner can regard the order as erroneous on the ground that in the circumstances of the case the Income-tax Officer should have made further inquiries before accepting the statements made by the assessee in his return.

The reason is obvious. The position and function of the Income-tax Officer is very diffident from that of a civil court. The statement made in

a pleading proved by the minimum amount of evidence may be adopted by a civil court in the absence of any rebuttal. The civil court is neutral. It simply gives decision on the basis of the pleading and evidence which comes before it. The Income-tax Officer is not only on adjudicator but also an investigator. He cannot remain passive in the face of the return which is apparently in order but called for further inquiry. It is his duty to ascertain the truth of the facts stated in the return when the circumstances of the case are such as to provoke an inquiry… It is because it is incumbent on the Income-tax Officer to further investigate the facts stated in the return when circumstances would made such an inquiry prudent that the word 'erroneous' in section 263 includes the failure to make such an enquiry. The order becomes erroneous because such an inquiry has not been made and not because there is anything wrong with the order if all the facts stated therein are assumed to be correct."

10. In the light of the above, let us examine facts of the present case. The ld.counsel for the assessee has placed on record copy of order of the ITAT, Rajkot Bench cited (supra). It is available on page no.24 of the paper book. In para-10, the ITAT, Rajkot has formulated two questions for consideration, which reads as under:

"1. Whether gift received from HUF by a member of HUF falls under the definition of "relative" as provided in the Explanation to clause (vi) of sub-section (2) of section 56 of the Act ?

2. Whether amount received by the assessee from his HUF is covered by section 10(2) of the Act."

11. A perusal of these questions, would indicate that gift received by the assessee in that case was from his HUF. In other words, the assessee was the member of HUF from where gift came to the assessee. The assessment was reopened for conducting an inquiry about the gifts received from Satish Garg HUF. The assessee is not member of Satish Garg HUF. Therefore, the Assessing Officer has erred in construing position of law while accepting the stand of the assessee. A perusal of the assessment order would indicate that no proper inquiry has been

made by the Assessing Officer with regard to construing the meaning of expression "relative" employed in section 56(2) of the Act. The Assessing Officer has based his finding on a decision where HUF has given gifts to its members, and not stranger HUF, therefore, order of the Assessing Officer is erroneous to this extent.

12. Without going into the larger aspect, whether HUF can be considered as a relative or not, we examine the aspect, whether the Assessing Officer has conducted an inquiry and formed an opinion on the basis of record available before him. He has misread the judgment and applied on the given facts without elaborate discussion. Therefore, to this extent, we are of the view that the ld.Commissioner has rightly taken cognizance under section 263, and has rightly set aside the assessment order.

13. As far as additional show cause notice issued under section 263 on 21.3.2018 is concerned, by way of this notice, the ld.Comissioner wish to inquire the gift received by the assessee for Rs.6 lakhs from his HUF. We find that this issue was not subject matter of reassessment. The assessment was not reopened for conducting an inquiry on this issue, and therefore the ld.Commissioner cannot take cognizance of an issue which has already attained finality in the regular assessment order passed under section 143(3) on 13.3.2014. The Assessing Officer has nowhere inquired this issue in the assessment order; nor it was subject matter of re-assessment. Therefore, it could not be taken up by the ld.Commissioner for taking up this issue. He should have questioned the original assessment order passed under section 143(3) on 13.3.2014,

which has not been done by him. Therefore, the finding of the Commissioner recorded *qua* additional show cause notice is concerned, is not sustainable. We quash this finding and part of that order is vacated.

14. In the result, appeal of the assessee is partly allowed.

Pronounced in the Open Court on 7th November, 2019.

Sd/-	**Sd/-**
(N.K. SAINI)	**(RAJPAL YADAV)**
VICE-PRESIDENT	**JUDICIAL MEMBER**

Chandigarh; Dated, 07/11/2019