

आयकर अपीलीय अधिकरण "ए" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, PUNE

श्री डी. करुणाकरा राव, लेखा सदस्य एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष
BEFORE SHRI D. KARUNAKARA RAO, AM AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA Nos.684 to 690/PUN/2019
निर्धारण वर्ष / Assessment Years : 2009-10 to 2015-16

Chandukaka Saraf and Sons Pvt. Ltd.,
Survey No.31/1/B/5, Gunawadi Road,
Baramati, Pune-413102.

PAN : AADCC0012C

.....अपीलार्थी / Appellant

बनाम / V/s.

Pr. CIT (Central),
Pune.

.....प्रत्यर्थी / Respondent

Assessee by : Shri Nikhil Pathak
Revenue by : Shri S. B. Prasad

सुनवाई की तारीख / Date of Hearing : 19.11.2019
घोषणा की तारीख / Date of Pronouncement : 21.11.2019

आदेश / ORDER

PER D. KARUNAKARA RAO, AM:

There are **seven appeals** under consideration involving the same assessee for the respective assessment years starting from A.Y. 2009-10 to 2015-16. All the seven appeals are filed against the respective revision orders of the Pr. CIT-(Central), Pune (Pr.CIT) u/s 263 of the Act commonly dated 11.03.2019. Since the grounds and issues are common in all these appeals, therefore, all these appeals were heard together and are being disposed of by this composite order.

2. Since the common grounds involved in all these appeals, therefore, for the sake of completeness, the grounds for the assessment year 2009-10 are extracted hereunder :-

“1] *The learned Pr. CIT erred in holding that the asst. order passed u/s 143(3) r.w.s. 153A was erroneous and prejudicial to the interest of the revenue and thereby erred in setting aside the said asst. order for verification of the following issues -*

- a. *Genuineness of total URD purchase and determine the quantum of such purchase which is non verifiable.*
- b. *The genuineness of the corresponding sales shown by the assessee against such purchases.*
- c. *Reasonable estimation of net profit on bogus purchases.*

2] *The learned Pr. CIT failed to appreciate that the asst. order passed by the learned A.O. was neither erroneous nor prejudicial to the interest of the revenue and hence, the **revision order passed u/s 263 is bad in law.***

3] *The learned Pr. CIT erred in holding that in the course of search, evidences were found of bogus purchases made by the assessee without appreciating that no such evidence was found in the course of search proceedings and therefore, no addition on account of URD purchases was warranted in the absence of any incriminating evidence found as a result of search.*

4] *The learned Pr. CIT failed to appreciate that since no incriminating evidence was found in the course of search in respect of the purchases made by the assessee, no addition was warranted and hence, there was no reason to revise the asst. order directing the learned A.O. to frame a fresh asst. and estimate reasonable percentage of net profit on bogus purchases.*

5] *The learned Pr. CIT erred in not appreciating that the learned A.O. had completed the asst. after due application of mind and verification of all the issues relating to URD purchases made by the assessee company and therefore, there was no reason to revise the asst. order on the ground that there was complete lack of application of mind and incorrect assumption of facts on the part of the learned A.O.*

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

3. From the above extracted grounds, it is evident that the legal issue raised by the assessee in ground no.1 relates to the correctness of the

jurisdiction of Pr.CIT u/s 263 of the Act and the other grounds relate to the merits of the addition made on account of URD purchases.

4. **Facts:** Briefly stated the relevant facts include that the assessee is a company. A search and seizure action u/s 132 of the Act was conducted on 26.11.2014 and the orders u/s 153A r.w.s. 143(3) of the Act were passed by the Assessing Officer on commonly dated 30/12/2016. The “income returned” by the assessee and the “total income determined” by the Assessing Officer in the respective assessment years are detailed as follows :-

A.Y.	Returned income by the assessee (In Rs.)	Total income determined by the Assessing Officer (In Rs.)
2009-10	5,23,01,980/-	5,99,17,282/-
2010-11	17,10,27,590/-	17,71,45,898/-
2011-12	27,93,42,510/-	30,10,06,850/-
2012-13	38,07,60,350/-	39,90,45,579/-
2013-14	41,37,49,940/-	42,01,65,659/-
2014-15	37,36,46,197/-	37,92,68,944/-
2015-16	27,54,93,430/-	28,04,03,784/-

5. From the above table, it is evident that the Assessing Officer made certain additions (i.e. Rs.42,24,481/- for A.Y. 2009-10) on account of bogus purchases calculating at the rate of 2% of URD purchases made in cash on ad-hoc basis. This is common addition made by the Assessing Officer in all these appeals.

6. Further, the Pr.CIT assumed jurisdiction u/s 263 of the Act merely on examination of the records by issuing of a show cause notice dated 11.01.2019. The said show cause notice was extracted in para 2 of the revision order and the core issue relates to the incorrectness of ad-hoc

additions applying the flat rate of 2% of the URD purchases. In the revision order, the Pr.CIT refers to the allegation of bogus purchases (of course, not spoken in the language of VAT defaulter short listed by the Maharashtra Sales Tax Department and mentioned about the estimation of profit @ 12.5% to 25%. At the end of the proceedings, the Pr.CIT discussed these facts in para 13 and its sub-paragraphs. For the sake of completeness, the said para 13 and its subparagraphs are extracted hereunder :-

“13. I have carefully considered the facts of the case and submission of the assessee. The point raised by the Ld. A.R that since it is a closed assessment no addition on account of URD purchase can be made by the A.O has no merit. As stated above during the course of search proceeding evidence of bogus purchase in the form of URD purchase was found. Accordingly during post search in-depth investigation of the URD purchases were made and found that the self generated purchase vouchers of URD purchase debited in the books of the company were not verifiable. Hence, the Self generated purchase vouchers were prima facie found to be bogus and incriminating material for the purpose of section 153A of the Income Tax Act.

13.1 The submission of the assessee that there was only few discrepancies in the URD purchase and in the majority of the cases it was verifiable is not supported by the evidence available on record. As stated above in para 3 to 5 of the show cause notice verification of the genuineness of the URD purchase, could not be made in absence of proper identification of the so called sellers from whom the assessee had purchased gold in cash. Neither any identity proof of such person nor the proper address was made available. Further in the cases where payment were stated to have been made by cheque, no cross verification was made by the A.O from the bank, to verify the genuineness of the payments.

13.2 Further during the course of the 263 proceeding, the assessee has taken stand that the figure of the URD purchase shown in the books is not correct as large number of persons had purchased gold in exchange of old gold. However the detail of such sale in correlation of the URD purchase was not made available. It has been further stated that the disallowance @ 2% by the A.O was reasonable and after due application of mind. However examination of the record does not support the case of the assessee. There is nothing on record to suggest the basis and reasoning of making disallowance of only 2% of URD purchase made in cash.

13.3 Considering above and as per detailed reasons mentioned in para 6 to 10 of the show cause^ notice it is apparent that there was complete lack of application of mind and incorrect assumption of facts by the Assessing Officer. Though it was concluded by the Assessing Officer that the URD purchases are non-verifiable, only 2% was disallowed and that also out of

only of URD purchases made in cash. Further, neither any reasoning nor any basis for such conclusion is apparent from the record. Moreover as stated above, even if the assessing officer had not doubted sales declared by the assessee, then a reasonable inference can be drawn that the assessee has purchased goods from the grey market and has shown URD purchase in the name of various parties to cover up the purchases. Under these circumstances also, what needs to be taxed was the profit element embedded in such bogus purchases. Various Courts and Tribunals had upheld estimation of net profit on bogus purchase ranging from 12.5% to 25% depending upon facts and circumstances of each case.

13.4 *In Malabar Industrial Co. Ltd. v. Commissioner of Income Tax, (2000) 243 ITR 83 (SC), it was held as under: by the Hon Tale supreme Court -*

"An incorrect assumption of facts or an application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind....

The scheme of the Act is to levy and collect tax in accordance with the provisions of the Act and this task is entrusted to the Revenue. If due to an erroneous order of the Income Tax Officer, the revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to the interests of the revenue.....

The phrase 'prejudicial to the interests of the revenue' has to be read in conjunction with an erroneous order passed by the Assessing Officer.

On the facts of that case, the matter was decided by Hon'ble Supreme Court in favour of the revenue observing as under:-

"The Commissioner noted that the ITO passed the order of nil assessment without application of mind. Indeed, the High Court recorded the finding that the ITO failed to apply his mind to the case in all perspective and the order passed by him was erroneous. It appears that the resolution passed by the board of the appellant-company was not placed before the Assessing Officer. Thus, there was no material to support the claim of the appellant that the said amount represented compensation for loss of agricultural income. He accepted the entry in the statement of the account filed by the appellant in the absence of any supporting material and without making any inquiry. On these facts, the conclusion that the order of the ITO was erroneous is irresistible. We are, therefore, of the opinion that the High Court has rightly held that the exercise of the jurisdiction by the Commissioner under section 263(1) was justified.

13.5 *Considering above, it is apparent that the A.O has failed to apply his mind to the case in all perspectives and the order passed by him was erroneous and in result prejudicial to the interest of the revenue. In the case of CIT v. Jawahar Bhattacharjee [2012] 341 ITR 434 (Gauhati) (HC) (FB) it has been held that Non application of mind to relevant material or an incorrect assumption of facts or an incorrect application of law will satisfy the requirement of order being erroneous .*

13.6 *It is now a settled law that an order passed by the A.O become erroneous and prejudice to the interest of Revenue as per the provision of section 263 of the Income Tax Act in following cases –*

- a) *The order sought to be revised contains error of reasoning or of law or of fact on the face of it,*
- b) *The order sought to be revised proceeds on incorrect assumption of facts or incorrect application of law or without application of mind,*
- c) *The order passed by the A.O is a stereotype order or where he has failed to make the requisite enquiries and examine the genuineness of the claim, which is called for in the circumstances of the case.*

13.7 *The facts of the case under consideration is duly covered under the yardstick discussed above. Hence in the light of the discussions that have preceded and for the reasons alluded in the show cause notice, I am of the opinion that this is a fit case for exercise of the suo-motu revisional powers of the CIT under Section 263 of the (IT) Act. Accordingly after considering the totality of facts & circumstances of the case and for the detailed reasons discussed herein above, I hold that the assessment order u/s. 143(3) read with section 153A dtd. 30/12/2016 for AY 2009- 10, passed by the Assessing Officer as erroneous & prejudicial to the interest of revenue.*

14. *Accordingly, the assessment order u/s. 143(3) read with section 153A dtd. 30/12/2016 for AY 2009-10, is hereby set aside to the file of assessing officer to be framed de-novo. While making fresh assessment order the Assessing officer shall take into account the issues already considered/additions made in the order dated 30/12/2016 and complete the assessment after making necessary verification of following issues after giving reasonable opportunity to the assessee-*

- (a) *The genuineness of the total URD purchase and determine the quantum of such purchase which are non verifiable.*
- (b) *The genuineness of the corresponding sales shown by the assessee company against such purchases.*
- (c) *Reasonable estimation of net profit on bogus purchase taking into account the facts and circumstances of case and finding and also in view of the decisions of the various Courts and Tribunals on the issue.”*

7. From the above extract, it is evident that, in the opinion of the Pr.CIT(C), the order passed by the Assessing Officer u/s 153A r.w.s. 143(3) of the Act constitutes an order with “complete lack of application of mind” and “incorrect assumption of facts” by the Assessing Officer. However, the said incorrect facts so assumed were not enlisted in the revision order. Further, how it is a case of “complete lack of application of mind” of the Assessing Officer, the Pr.CIT was casual in holding that the order of the Assessing Officer is erroneous and prejudicial to the

interest of the Revenue. Otherwise, the Assessing Officer actually made addition after due examination and after taking a view of applying flat rate 2% of the entire URD purchases made in cash.

8. Aggrieved with the above order of the Pr.CIT, the assessee is in appeals before the Tribunal.

9. Before us, at the outset, ld. Counsel for the assessee brought our attention to the above extracted operational para 13 onwards of the revision order and submitted that this is a case where the Pr.CIT set-aside Assessing Officer's order on two grounds i.e. (i) complete lack of application of mind by the Assessing Officer; and (ii) incorrect assumption of facts.

10. Referring to the allegation of incorrect assumption of facts, ld. Counsel submitted that Pr.CIT did not specify what facts are incorrectly assumed by the Assessing Officer when the assessments were made u/s 153A r.w.s. 143(3) of the Act.

11. Further, referring to the allegation of complete lack of application of mind, ld. Counsel submitted that this issue of bogus purchases/URD purchases was examined repeatedly by using letters at various dates and months. The ld. Counsel brought our attention to the following data relating to the dates of the notices issued by the Assessing Officer and the copies of the such letter placed in the Paper Book :-

<i>Sl. No.</i>	<i>Date of Notice</i>	<i>Paper Book's pages</i>	<i>Remarks</i>
1.	24.10.2016	129 to 147 – PB No.1	Assessing Officer issued notice wherein the copies of the statement recorded by DDIT were provided to the assessee and comments of the assessee were asked on the said statements.
2.	02.11.2016	149 to 225 – PB No.1	The assessee replied to the above notice and clarified its stands on the statement recorded of the concerned person.
3.	07.11.2016	227 to 233 – PB No.1	Subsequently, the Assessing Officer issued notice and clarified to the assessee that she had issued summons to 79 parties and the assessee was asked to explain the the transactions entered into with the said persons.
4.	10.11.2016	421 to 679 – PB No.1	The assessee submitted additional details in respect of the persons from whom URD purchases were made and included in the list of 232 persons.
5.	14.11.2016	681 to 939 – PB	The assessee submitted detailed reply clarifying its case stating that the notices sent to most of the customers had been returned, there was no reason to hold that the purchases were made are bogus.
6.	10.11.2016	941 to 958 = BP No.2	The Assessing Officer issued further notice asking the assessee to clarify on certain issues.
7.	03.12.2016	1435 to 1569 – PB No.2	The assessee submitted confirmations of a view customers and also details of the URD purchases made.
8.	14.12.2016	1571 to 1731 – PB No.3	The assessee submitted additional details to the Assessing Officer.
9.	16.12.2016	1733 to 1735 – PB No.3	The Assessing Officer again issued notice asking the assessee to clarify certain issues regarding the URD purchases.
10.	22.12.2016	1743 to 1783 – PB No.3	The assessee gave a chart of the total URD purchases made from 79 customers to whom summons were issued in the course of assessment

			<i>proceedings, the total amount of URD purchases were to the tune of Rs.4.11 crs. and the assessee had given details of URD purchases amounting to Rs.4.08 crs. which were either backed by acknowledgement from customer/ payments through banking channel/ exchange sales.</i>
11.	23.12.2016	1785 to 1883 – PB No.3	<i>The assessee clarified that it had produced competitive details for verification. The assessee had also submitted copies of bank statements and URD purchase vouchers.</i>

12. Further, ld. AR argued that the decision to make addition at the rate of 2% of such purchases was taken after due application of mind and after definite view is taken by the Assessing Officer. In making the assessments u/s 153A r.w.s. 143(3) of the Act, the Assessing Officer taken such view after due deliberation and after conducting series of hearings before Assessing Officer with the assessee, after issuing number of letters/notices, after examining the thousands of pages of the Paper Books furnished before him. As per the ld. Counsel for the assessee, it cannot be assumed that the Assessing Officer has not applied his mind. As per the ld. Counsel, the orders so passed by the Assessing Officer, cannot be described as “complete lack of application of mind”. Further, referring to the Statute, ld. Counsel submitted that this language of complete lack of application of mind does not appear anywhere in section 263 of the Act. Referring to the said provisions of section 263 of the Act, in general, and newly inserted Explanation 2 of section 263 of the Act, in particular (Inserted by the Finance Act, 2015 w.e.f. 1.6.2015), ld. Counsel for the assessee submitted that none of this provision refers to

the expression "Complete lack of application of mind". In the regard, ld. Counsel read out the said Explanation 2 of section 263 of the Act and submitted the Pr.CIT/CIT can assume jurisdiction only if, in the opinion of the Principal Commissioner or Commissioner, – the order is passed (i) without making inquiries or verification which should have been made or (ii) the order is passed allowing any relief without inquiring into the claim etc. Applying the said law to the facts of the present case, ld. Counsel for the assessee submitted that there is no such violation by the Assessing Officer in the present case. The Assessing Officer verified this issue of URD purchases deeply and invoked all the available provisions of the Act before took a view in favour of making addition @ 2% of the URD Purchases made in cash. Further, ld. Counsel for the assessee filed a written submission in this regard to consolidate his stands on the issue.

13. *Per contra*, ld. DR for the Revenue relied heavily on the order of the Pr.CIT. Brining our attention to the provisions of Explanation 2 of section 263 of the Act, ld. DR submitted that it is the case of making order by the Assessing Officer allowing certain reliefs without enquiring into the claims of the assessee. He also submitted fairly that it is the case of inadequate enquiry. In a way, ld. DR appreciated the facts that it is not a case of complete lack of application of mind. Further, he also agreed to the facts that the said expression do not find place in the provisions of section 263 of the Act.

Decision on Validity of Order u/s 263 of the Act

14. We heard both the sides on this limited issue relating to the validity of the jurisdiction of the Pr.CIT. We have analyzed the show cause notice issued by the Pr.CIT and order passed by him. It is an undisputed fact that the entire correspondence of the Pr.CIT revolves around the URD purchases only. We shall now take up each of the allegation of the Pr.CIT before deciding the validity of the jurisdiction.

14(A). **Assumption of inaccurate particulars/facts:** In this regard, we examined the revision order of the Pr.CIT and search for the details of entire facts, which were correctly assumed by the Assessing Officer while making the reassessment u/s 153A r.w.s. 143(3) of the Act. We find that the allegation of the Pr.CIT is unspecific and vague. Therefore, such allegations are now stand rejected. Accordingly, the same is decided in favour of the assessee.

(B). **Complete lack of application of mind:** On perusal of the provisions of section 263 of the Act read with newly inserted Explanation 2 thereto with reference to no such expression find place in the said provisions of the Act, we find the Pr.CIT can assume jurisdiction under this provision of section 263 of the Act only, if there is incorrect assumption of fact, lack of enquiry, other conditions specified in Explanation 2 of section 263 of the Act. The catch words of the new inserted provisions of the said Explanation 2 of section 263 of the Act is (i) without making enquiries or (ii) verification which should have been made and (iii) allowing any relief without enquiring into the claim. On

examination of each of these expressions, we find the core issue of URD purchases were repeatedly examined over a period of months/years and issued number of letters/notices after carefully examining three sets of Paper Books containing 1000 and above pages. Further, we find that it is not a case of granting of relief at all but it is a case of making a disallowance out of the URD purchases. Therefore, the provisions of clause (b) of Explanation 2 to section 263 of the Act do not apply to the facts of the present case.

15. Further, relating to the DR's claim that inadequate enquiry or verification which should have been made, we find the revision order of the Pr.CIT does not contain the list of enquiries which are left unattended to by the Assessing Officer before the assessment is made. From this point of view, we find that the allegations in the order of the Pr.CIT are general in nature and unspecific to the indirect assumption of facts and uncertain of the left over enquiries has to be conducted. The Pr.CIT has not made out a case to allege that the Assessing Officer is of complete lack of application of mind. Further, contrary to the same, we find the Assessing Officer and his team invoked the provisions of section 131 of the Act regarding the statement of the URD purchases and examining the Paper Books filed by the assessee on this issue etc before a view is taken about the requirement of making disallowance at the rate of 2% of such URD purchases in cash. Para 11 of this order contains the chronology of events and the Assessing Officer's effects in scrutinizing the same issue relating to URD purchases. Thus, it is a case of taking a view on the matter by the Assessing Officer. Pr.CIT decision to take another possible

view, which is not permitted in law. Therefore, from the above, it is not a case for assumption of jurisdiction u/s 263 of the Act in all the appeals under consideration. Accordingly, the relevant grounds raised by the assessee on legal issue in all the seven appeals are allowed.

16. Considering the relief granted to the assessee on legal issue, the adjudication of other merits related grounds becomes academic exercise only. Therefore, the other grounds raised by the assessee in all the seven appeals are dismissed as academic.

17. In the result, all the seven appeals of the assessee are partly allowed.

Order pronounced on 21st day of November, 2019.

Sd/-
(विकास अवस्थी /**VIKAS AWASTHY**)
न्यायिक सदस्य/**JUDICIAL MEMBER**

Sd/-
(डी. करुणाकरा राव/**D. KARUNAKARA RAO**)
लेखा सदस्य/**ACCOUNTANT MEMBER**

पुणे / Pune; दिनांक / Dated : 21st November, 2019.
Sujeet

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The Pr. CIT-(Central), Pune.
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "ए" बेंच, पुणे / DR, ITAT, "A" Bench, Pune.
5. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

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Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.