

आयकर अपीलीय अधिकरण, इन्दौर न्यायपीठ, इन्दौर

**IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE**

**BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER
AND
SHRI MANISH BORAD, ACCOUNTANT MEMBER**

**ITA No.511/Ind/2019
Assessment Year: 2014-15**

Smt. Deepti Gupta 91, New Agrawal Nagar Sapna Sangeeta Road Indore	बनाम/ Vs.	Pr. CIT-2 Indore
(Appellant)		(Revenue)
P.A. No.AITPB9751B		

Appellant by	Shri Ram Gilda, A.R.
Respondent by	Smt. Ashima Gupta, D.R.
Date of Hearing:	19.11.2019
Date of Pronouncement:	29.11.2019

आदेश / O R D E R

PER KUL BHARAT, J.M:

This appeal by the assessee is directed against order of the Ld. Pr. CIT-2, Indore dated 29.3.2019 pertaining to the assessment year 2014-15. The assessee has raised following grounds of appeal:

1. *That the learned PCIT-2 has passed the order u/s 263 of the Act without considering the facts and circumstances of the case properly.*
2. *That the order passed u/s 263 of the Act is illegal, wrong, and bad in law.*
3. *That setting aside of assessment order u/s 263 of the Act for re-enquiry and re-verification of the claim of long term capital gain is illegal, wrong and bad in law.*
4. *That the appellant craves leave to add, amend and/or withdraw any grounds of appeal on or before the hearing of appeal.*

2. The only effective ground is against invoking the provisions of section 263 of the Act, thereby revising the concluded assessment. The facts in brief are that case of the assessee was picked up for scrutiny assessment under the CASS and assessment was framed u/s 143(3) of the Income Tax Act, 1961 (hereinafter called as 'the Act') vide order dated 20.12.2016. The A.O. while framing the assessment made addition of Rs.9,57,454/- on account of surrender by the assessee its claim of exemption u/s 10(38) of the Act. Subsequently, Ld. Pr. CIT issued a notice u/s 263 of the Act dated 18.7.2018 calling upon the assessee as to why the assessment should not be revised. The basis of the issue of notice as stated in the impugned order was that as per the information available on records, it was noted that the assessee had claimed exemption u/s 10(38) of the Act. The A.O. only disallowed the exemption

claimed u/s 10(38) of the Act but did not treat income from other sources as undisclosed income u/s 68 of the Act and chargeable to tax u/s 115BBE of the Act. It was observed by the Ld. CIT that the A.O. ought to have investigated and examined this aspect before making the assessment and no enquiry about the company whose shares have been purchased and sold, no investigation was made regarding broker or method of purchase and sale. In response to the notice, the assessee filed a detailed reply, however, the reply of the assessee was not accepted by the Ld. Pr. CIT and he proceeded to revise the assessment order. Thus, the Ld. CIT after considering the material on record came to the conclusion that the assessment dated 20.12.2016 for the assessment year 2014-15 is erroneous in so far as it is also prejudicial to the interest of the revenue on account of passing the order without making required enquiries/investigations.

3. Aggrieved against this, the assessee is in present appeal. Ld. Counsel for the assessee reiterated the submissions as made in the written submissions. For the sake of clarify, submissions of the assessee are reproduced as under:

1. That the show cause notice dt: 05/03/2018 for launching prosecution u/s 276C and 277 was issued as per page no. 1 of paper book.
2. That the reply to the above referred notice was filed requesting to drop the prosecution as penalty u/s 271(1)(c) was dropped by assessing officer on 30/06/2017.
3. On the basis of the above reply, the prosecution proceeding was dropped.
4. Thereafter the show-cause notice u/s 263 dt 18/07/2018 was issued.
5. That the show-cause notice dt: 18/07/2018 u/s 263 was issued for the following reasons (para no. 1 of order u/s 263 on page no. 3&4 of appeal filed).
 - a. Order passed without making proper enquirer and investigations.
 - b. Disallowance should be treated as income from other sources u/s 68 of the Act.
 - c. A.O. has not done any enquiry about the company whose shares have been purchases and sold and no investigation regarding the broker or method of purchase and sale has been done.

That all the above issues have been properly enquired and investigated by the assessing officer and discussed thoroughly in the para no. 4, 4.1,4.2,4.4,4.5,4.7,4.8, 4.9 and 4.10 of the assessment order.

6. No show-cause notice u/s 263 was issued for taxing the purchase price of shares of Rs. 22,110/- paid by account payee cheque on 06/06/2013 as per para no. 4.10 of assessment order.

But in the order u/s 263, the amount of Rs. 22,110/- was ordered to be taxed as per second part of para no. 3 of the order (Page no. 4 of appeal.)

7. No show-cause notice u/s 263 was issued for penalty proceeding u/s 271(1)(c) of the Act but specific finding regarding dropping of penalty proceeding u/s 271(1)(c) has been made in para no. 3 and 4 of the order. No such action is permissible u/s 263 of the Act.

8. That the long-term capital gain u/s 10 (38) of the Act on shares of Turbo Tech Engineering was held to be genuine in the following cases.

a. Ms. Asha Luthra Vs. ITO in ITA No. 0483/Del/2017 (copy enclosed on page no. 1 to 23).

b. Smt. Shikha Dhawan Vs. ITO in ITA No. 3035/Del/2018 (copy enclosed on page no. 24 to 39).

c. Lalit Kumar Aggarwal Vs. ACIT In ITA No. 3509/De;/2018. (copy enclosed on page no. 40 to 52).

It submitted that it is settled law that section 263 cannot be invoked on account that the view of A.O. is different from that of Principal CIT .

The Assessing Officer has taken a view which may be different from the view of the Id. Commissioner and assuming that the view taken by the Assessing Officer is a loss to the revenue, but the Hon'ble Supreme Court in the case of Malabar Industrial Co. Ltd. 243 ITR 83 has held that **“every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the Revenue”**. Copy of decision is enclosed on page no. 53 to 58). Appellant also relies upon the decision of DCIT Vs. Garden Silk Mills (320 ITR 720) (Copy enclosed on page no. 59).

10. **It is also settled position of law that section 263 cannot be invoked in cases of “Inadequate enquiry, even after the insertion of explanation 2 of section 263 of the Act.**

It is a settled position of law that powers u/s 263 of the Act can be exercised by the Commissioner on satisfaction of twin conditions, i.e., the assessment order should be erroneous and prejudicial to the interest of the Revenue. By 'erroneous' is meant contrary to law. Thus, this power cannot be exercised unless the Commissioner is able to establish that the order of the Assessing Officer is erroneous and prejudicial to the interest of the Revenue. Thus, where there are two possible views and the Assessing Officer has taken one of the possible views, no action to exercise powers of revision can arise, nor can revisional power be exercised for directing a fuller enquiry to find out if the view taken is erroneous, when a view has already been taken after enquiry. This power of revision can be exercised only where no enquiry, as required under the law, is done. It is not open to enquire in case of inadequate inquiry. This is fortified by the decision of Hon'ble High Court of Bombay in the case of CIT vs. Nirav Modi, [2016] . (copy enclosed on page no 60 to 65.) This view is further supported by the decision of the Hon'ble Gujrat High Court in the case of Shri Prakash Bhagchand Khatri in Tax Appeal No. 177 with Tax Appeal No.178 of 2016, wherein the Gujrat High Court was seized with the following substantial question of law:-

"Whether the Tribunal is right in law and on facts in upholding the order passed by the CIT under section 263 of the Act on merits and still storing the issue of allowability of deduction under section 54 of the Act to the file of Assessing Officer even though the working of allowability of deduction under section 54F is available in the order under section 263 which is not disputed by the assessee before ITAT."

And the Hon'ble High Court, after considering the facts, held as under:-

"6. It can thus be seen that though final order of assessment was silent on this aspect, the Assessing Officer had carried out inquiries about the nature of sale of land and about the validity of the assessee's claim of deduction under section 54F of the Act. Learned counsel for the Revenue however submitted that these inquiries were confined to the claim of deduction under section 54F of the Act in the context of fulfilling conditions contained therein and may possibly have no relevance to the question whether the sale of land gave rise to a long term capital gain. Looking to the tenor of queries by the Assessing Office and details supplied by the assessee, we are unable to accept such a condition. In that view of the matter, the observation of the Tribunal that the Assessing Officer having made inquiries and when two views are possible, revisional powers could not be exercised, called for no interference. Since with respect to computation and assertions of other aspects of deduction under section 54F of the Act, the Tribunal has remanded the proceedings, nothing stated in this order would affect either side in considerations of such claim.

No question of law arises. Tax Appeals are dismissed."

The Hon'ble Supreme Court in Malabar Industrial Co. Ltd., 243 ITR 83, has laid down the following ratio:- (copy enclosed on page no. 53 to 59.).

"A bare reading of section 263 of the Income-tax Act, 1961, makes it clear that the prerequisite for the exercise of jurisdiction by the Commissioner suo motu under it, is that the order of the Income-tax

Officer is erroneous in so far as it is prejudicial to the interests of the Revenue. The Commissioner has to be satisfied of twin conditions, namely, (i) the order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. If one of them is absent—if the order of the Income-tax Officer is erroneous but is not prejudicial to the Revenue or if it is not erroneous but is prejudicial to the Revenue—recourse cannot be had to section 263(1) of the Act. The provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer, it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous

11. **It is also settled law, that assessment order and assessment records cannot contain each and every details of assessment.**

Since the A.O. has not made any mention about the verification of these documents; the assessment order does not becomes erroneous and prejudicial to the interest of the revenue. The Hon'ble Bombay High Court in the case of CIT vs. Gabriel India Ltd. 203 ITR 108 (enclosed herewith on page no. 66 to 72.) has held that “ the decision of the ITO cannot be held to be erroneous simply because in his order he did not made an elaborate discussion in this regard.....”.

12. The Hon'ble High Court of Gujarat in CIT vs. Nirma Chemical Works Ltd. 309 ITR 67 has observed that if assessment order were to incorporate the reasons for upholding the claim made by an assessee, the result would be an epitome and not an assessment order.

13. The Explanation 2 was inserted by Finance Act, 2015 with effect from 01.06.2015. This issue has been earlier considered by the Tribunal

Ahmedabad Bench in the case of Jayant Murthy in ITA NO. 870 & 1234/Ahd/2014 and the relevant part reads as under:-

Suffice to say that these findings, whatever be their worth and legal sustainability, cannot be reason enough to hold that the assessment for other assessment years, in which these detailed investigations- which are surely more of an exception rather than rule, were not carried out, are required to be treated as erroneous and prejudicial to the interest of the revenue. There is, however, nothing more than these findings for the assessment years 2011-12 which are foundational for the impugned revision order. In any case, as held by Hon'ble jurisdictional High Court, in the case of CIT Vs Amit Corp [(2012) 21 taxmann.64 (Guj)], "When, during the course of framing of the assessment, the Assessing Officer had access to all the records of the assessee, after pursuing such record the Assessing Officer framed the assessment, such assessment could not have been reopened in exercise of revision power under Section 263 of the Act for making further inquiries". That precisely is the situation before us. As regards the decision of the coordinate bench relied upon by the learned Departmental Representative, i.e. in the case of Crompton Greaves Ltd Vs CIT [ITA Nos. 1994/Mum/13 and 2836/Mum/14; order dated 1st February 2016], wherein it is held that the amendments to Section 263, by insertion of Explanation 2, by the Finance Act 2015 are retrospective in effect, we may point out that the Explanation 2 to Section 263, which provides that even when an order is passed without making inquiries and verifications which should have been, in the opinion of revisional authority, will be "deemed to be erroneous in so far as prejudicial to the interest of the revenue", is specifically stated to be effective from 1st June 2015. It is clearly a provision adverse to the interests of the assessee and is specifically stated to be prospective in effect.....

Judicial precedent ceases to be a binding precedent when it is passed per incuriam i.e. "in ignorance of a previous decision of its own or of a co-ordinate jurisdiction" which covered the issue. The amendments made to Section 263 by the Finance Act 2015 will, therefore, hold good only in respect of the revision orders on or after 1st June 2015, whereas the impugned revision order was passed on 11th March 2014. As for the law in force at the relevant point of time, for the detailed reasons set out earlier, **the cases of inadequate inquiry, even if that be so, will continue to be outside the ambit of scope of section 263.**

14. The Id. Principal Commissioner has relied upon various judicial decisions.

It is submitted that that decisions relied upon by the Id. Principal Commissioner relates to the cases where no enquiry was made or enquiry was made without application of mind by the A.O. during the course of the assessment proceedings but that is not the facts of the case in hand. In the case in hand, as mentioned elsewhere, the A.O. examined all books of accounts bills and vouchers to confirm see the geniuses of purchase and sales. After the receipt of report of investigation wing.

Under the circumstances, and in view of the legal position, we request to set aside the order passed u/s 263 of the Act.

4. Ld. Counsel for the assessee vehemently argued that the Ld. Pr. CIT is not justified in invoking the provisions of section 263 of the Act as the A.O. has made requisite

enquiries. He further submitted that specific query has been raised as reply by the assessee. He drew our attention to the assessment order to buttress his contention. Further, he relied upon the decision of the coordinate bench rendered in the case of Miss Asha Luthra Vs. ITO in ITA No.6483/Del/2017 dated 28.6.2019. The Ld. Counsel for the assessee placed reliance on the decision of SMC Bench of the Tribunal in ITA No.3835/Del/2018. Ld. Counsel also placed reliance on the judgement of the Hon'ble Supreme Court rendered in the case of Malabar Industrial Company Ltd. Vs. CIT. In support of this written synopsis and submissions made at bar, Ld. D.R. opposed these submissions and supported the order of the Ld. Pr. CIT. Ld. CIT(DR) vehemently argued that the A.O. has not made any enquiry regarding the companies of which the shares were transacted and also the broker.

5. We have heard the rival submissions, perused the materials available on record and gone through the orders of the authorities below. Ld. Counsel for the assessee vehemently argued that exercise of powers u/s 263 of the Act by the Ld. Pr. CIT is undisputed, illegal and contrary to the settled principles of law. In the present case, undisputed fact remains that the assessee had claimed exemption u/s 10(38) of the Act. It is stated that during the assessment proceedings, claim of exemption was withdrawn and the A.O. taxed the surplus arising out of the transaction as long term capital gain. Hence, he made addition to the declared income in respect of the long term capital gains. However, the Ld. CIT revised the assessment order on the ground that the A.O. did not make necessary enquiry to verify the genuineness of the transaction. In the opinion of the Ld. Pr. CIT, the investment made in the transaction would have been taxed as unexplained

investment, which was required to be added u/s 68 of the Act and chargeable to tax u/s 115BBE of the Act. It is contended by the Ld. Counsel for the assessee that the A.O. has taken one of the plausible view. Therefore, Ld. Pr. CIT is not justified in exercising jurisdiction u/s 263 of the Act. Ld. Counsel for the assessee has relied upon various case laws in support of his contention to buttress the argument that the investment made in the share of company namely Turbo Tek Engineering Ltd. has been treated as the genuine transaction by the coordinate bench of the Tribunal in the case of Miss Asha Luthra Vs. ITO in ITA No.6483/Del/2017. Ld. Counsel for the assessee also placed reliance on the decision of the SMC bench of this Tribunal in the case of Sikha Dhawan Vs. ITO and Sri Lali Kumar Agrawal Vs. ACIT. It is stated that under these facts, the A.O. was justified in treating the transaction as long term capital gains. The law is well settled that power

conferred u/s 263 of the Act can be exercised where the order is erroneous, so far it is prejudicial to the interest of the revenue. Therefore, there has to be satisfaction of two conditions, firstly, the assessment order sought to be revised should be erroneous and secondly, it should be prejudicial to the interest of the revenue. In the present case, Ld. Pr. CIT revised assessment on the ground that the A.O. has not carried out any investigation regarding the transactions of sale and purchase of shares of company namely M/s. Turba Tek Engineers. The case of the assessee that the transaction is effected through stock exchange, all related evidences have been filed. There is no adverse material regarding transactions carried out by the assessee. There is no specific finding/statement of any third party against the assessee. It is also stated that name of the assessee nowhere figures in any of the statement. Under these facts, Ld. Pr. CIT was not justified

in invoking the provisions of section 263 of the Act. We have given our thoughtful consideration to the facts of the case.

9. The Hon'ble Delhi High Court in the case of ITO Vs. DG Housing Projects Ltd. (2012) 20 Taxmann.com 587 (Delhi) has examined the law on the issue of initiation of proceedings u/s 263 of the Act. The Hon'ble High Court observed in paras 17 & 18 as under:

“17. This distinction must be kept in mind by the CIT while exercising jurisdiction under Section 263 of the Act and in the absence of the finding that the order is erroneous and prejudicial to the interest of Revenue, exercise of jurisdiction under the said section is not sustainable. In most cases of alleged “inadequate investigation”, it will be difficult to hold that the order of the Assessing Officer, who had conducted enquiries and had acted as an investigator, is erroneous, without CIT conducting verification/inquiry. The order the Assessing Officer may be or may not be wrong. CIT cannot direct reconsideration on this ground but only when the order is erroneous. An order of remit cannot be passed by the CIT to ask the Assessing Officer to decide whether the order was erroneous. This is not permissible. An order is not erroneous, unless the CIT hold and records reasons why it is erroneous. An order will not become erroneous because on remit, the Assessing Officer may decide that the order is erroneous. Therefore CIT must after recording reasons hold that the order is erroneous. The jurisdictional precondition stipulated is that the CIT must come to the conclusion that the order is erroneous and is unsustainable in law. We may notice that the material which the CIT can rely includes not only the record as it stands at the time when the order in question was passed by the Assessing Officer but also the record as it stands at the time of examination by the CIT [see CIT v. Shree Manjunathesware Packing & Products Camphor

Works [1998] 231 ITR 53 / 98 Taxman 1 (SC). Nothing bars/prohibits the CIT from collecting and relying upon new/additional material/evidence to show and state that the order of the Assessing Officer is erroneous.

18. It is in this context that the Supreme Court in Malabar Industrial Co. Ltd. V. Commissioner of Income Tax, [2000] 243 ITR 83/109 Taxman 66 (SC), had observed that the phrase 'prejudicial to the interest of Revenue' has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of Revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interest of Revenue. Thus, when the Assessing Officer had adopted one of the courses permissible and available to him, and this has resulted in loss to Revenue; or two views were possible and the Assessing Officer has taken one view with which the CIT may not agree; the said orders cannot be treated as an erroneous order prejudicial to the interest of Revenue unless the view taken by the Assessing Officer is unsustainable in law. In such matters, the CIT must give a finding that the view taken by the Assessing Officer is unsustainable in law and, therefore, the order is erroneous. He must also show that prejudice is caused to the interest of the Revenue."

10. Since the A.O. has treated the transaction as long term capital gain, therefore, in light of the judgement of the Hon'ble Delhi High Court, Ld. Pr. CIT should have brought some material rebutting the view adopted by the A.O., which has not been done. The issue is simply restored to the A.O. for making enquiry. For this reason, action of the Ld. CIT cannot be sustained. Hence, grounds raised in the appeal are allowed. The impugned order is quashed.

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

Order was pronounced in the open court on 29.11.2019.

Sd/-

(MANISH BORAD)
ACCOUNTANT MEMBER

Sd/-

(KUL BHARAT)
JUDICIAL MEMBER

Indore; दिनांक Dated : 29/11/2019
VG/SPS

Copy to: Assessee/AO/Pr. CIT/ CIT (A)/ITAT (DR)/Guard file.

By order

Assistant Registrar, Indore