

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "D" MUMBAI**

**BEFORE SHRI SAKTIJIT DEY (JUDICIAL MEMBER) AND  
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 2943/MUM/2018  
Assessment Year: 2013-14**

Motilal Salecha HUF,  
44/2, Ground Floor, Suresh  
Bhavan, Road No. 6,  
Jawahar Nagar, Goregaon  
(E), Mumbai-400062.

**PAN No. AAKHM0433P**  
**Appellant**

Pr. CIT-31, Room No. 301, C-13  
Pratyakshakar Bahvan, Bandra  
Vs. Kurla Complex, Mumbai-400051.

**Respondent**

Assessee by : Mr. P.J. Pardiwalla, Sr. Advocate  
& Mr. Sashank Dundu, AR  
Revenue by : Mr. Rajesh Kumar & Mr. V.Vinod Kumar, DRs

Last Date of Hearing : 18/10/2019  
Date of Pronouncement : 13/01/2020

**ORDER**

**PER N.K. PRADHAN, A.M.**

This is an appeal filed by the assessee. The relevant assessment year is 2013-14. The appeal is directed against the order u/s 263 of the Income Tax Act 1961, (the 'Act') passed by the Pr. Commissioner of Income Tax-31 Mumbai [in short 'Pr. CIT'].

2. The grounds of appeal filed by the assessee read as under :

1. Under the facts and the circumstance of the case and in law, Ld. Pr. CIT' erred in passing Order u/s 263 of the Income Tax Act, 1961.

2. The appellant submits that order passed by Ld. Pr. CIT u/s 263 of the Income Tax Act, 1961 is without complying jurisdictional conditions necessary to invoke the power of the said section.
3. The Ld. Pr. CIT has made following observations in Order (Pg. 5 of Order), without having on record any fact which will support the inference drawn as under in the case of the appellant :-
  - a These transactions were pre-planned by the operators as discovered and stated in the report submitted by the investigation wing Kolkata. The modus operandi is the same as found during the various search conducted at Kolkata, Mumbai and Ahmadabad.
  - b The rise in price of the shares of Luminaire technologies Ltd was not in accordance with the performance/credentials of the company. This shows that the prices were artificially rigged up.
  - c It is observed that during the rally of rise in the price, the shares were thinly traded but the price of share increased many fold,
  - d Many of the persons claiming such exemption have accepted of having obtained LTCG by way of pre-arranged transactions through market operators and availed the benefit of IDS, 2016 and claimed the same during the pending scrutiny proceedings.
  - e M/s Luminaire Technology is actually a shell company as seen from the financials of the company. The company has no business activity or any other future prospects which leads to rise in the price of its shares.
  - f As verified from the website of moneycontrol.com, M/s Luminaire Technology Ltd has submitted the last Annual Report, Audit report, Annual Accounts only upto year ending March 2014. This shows that the company has curtailed its affairs after the intervention by BSE/SEBI on penny stock companies.
  - g The assessee has also sold his shares during the period of Nov 2012 to April 2013 where maximum off-loading was done by the beneficiaries of bogus LTCG and the price of shares was at peak.

- h Analysis of the brokers bill shows that assessee has sold the shares of M/s Luminaire Technologies Ltd. in various lots during the day. In many cases, it is found that the shares are sold at different time during the day but the rate at which the shares are sold is constant. This is another impossibility that the rates of shares are without any movement during the day.
- i No genuine investor would invest in a company which is consistently making losses, which has no future prospects and not having any credentials unless he is in contact with the insider/ operator engaged in the price control of the shares.
- j The investment made was with a malafide intention to get the funds introduced through misuse of the share market mechanism by claiming arranged exempt LTCG.

3. Briefly stated, the facts are that the assessee filed its return of income for the assessment year (AY) 2013-14 on 10.09.2013 declaring total income of Rs.13,64,810/-. The Assessing Officer (AO) completed the assessment u/s 143(3) on 17.12.2015 accepting the above income.

The Pr. CIT on going through the assessment records observed that the assessee has claimed as exempt long term capital gains (LTCG) of Rs.8,94,51,920/- by trading in shares of M/s Luminaire Technologies Ltd. ('LTL'). As per the report of the Investigation Wing of the Department, the scrip of LTL was included in the list of penny stock and the assessee was one of the beneficiaries. He found that the AO has not made inquiries into the details furnished by the assessee. Therefore, it is observed by him that the order passed by the AO is erroneous and prejudicial to the interest of revenue in view of clause (a) to Explanation 2 of section (1) of section 263 of the Act. In response to a query raised by the Pr. CIT during the course of proceedings u/s

263, the assessee filed a reply which has been extracted at para 3 and 4 (page 1-4) of the impugned order.

The Pr. CIT was not convinced with the said reply of the assessee for the reason that the AO could not suspect from the documents filed by the assessee during the course of assessment proceedings that there could be a conspiracy in generating any bogus LTCG; the material fact was further detected through search action undertaken by the Investigation Wing of the Department that these types of LTCG were not general/regular transactions but were carried out by a chain of brokers/intermediaries/operators in the share market to convert the money held by various entities into white by way of misuse of provisions of section 10(38) of the Act.

Examining the financials of LTL, the Pr. CIT observed that it had no operating income and no profit/dividend was declared since FY 2007-08. Further, he found that the shares of LTL were thinly traded upto June 2012 wherein the price of the shares is rigged upto around Rs.40/- and thereafter, profit booking started and suddenly the volume of trade arose to accommodate the beneficiaries of bogus LTCG. Further, it is noted by him that the funds provided by the beneficiaries are infused through series of bogus entities (exit providers) maintained by the operators and finally brought to the account of the bogus buyer who buys the shares at exorbitant high price, thus realizing gains to the beneficiary in the form of LTCG. Further it is observed by him that as verified from the website of moneycontrol.com, LTL has submitted the last annual report, audit report, annual accounts only upto the year ending March 2014 and this shows that the company has curtailed its affairs after the intervention of BSE/SEBI on penny stock companies.

In view of the above fact, the Pr. CIT held that LTL is a shell company.

Thus the Pr. CIT set aside the order dated 17.12.2015 passed by the AO and directed him to redo the assessment so that abuse of provision of section 10(38) is prevented and income is brought to tax in light of recent court judgments in penny stock cases.

4. Before us, the Ld. counsels for the assessee file a Paper Book (*P/B*) containing the documents which were submitted before the AO and Pr. CIT. We summarize below the submissions made by the assessee before the Pr. CIT and the contentions before us.

It is explained that there is no bogus or entry providers involved and the AO, after due application of mind, considering the past history of the assessee has completed the assessment. It is argued that the assessment order may not be held to be erroneous or prejudicial to the interest of revenue merely because further inquiry was not made as per the alleged report, which was never confronted to the assessee nor was on record of the AO at the time of assessment. It is thus explained that since the inquiry was specifically held with reference to the LTCG by the AO in original assessment, therefore, invoking revisionary jurisdiction u/s 263 is not justified. Further, it is stated that Explanation 2, clause (a) of section 263 of the Act has been brought on the statute *vide* Finance Act 2015 w.e.f. 01.06.2015 and *prima facie* the said Explanation is not applicable to AY 2013-14. It is explained that in the instant case, the AO had made necessary inquiry and verification in the matter and once inquiry is conducted and decision is reached by the AO, the order cannot be held to be erroneous and prejudicial to the interest of the revenue.

Further, reliance is placed by the Ld. counsels on the decision in *Narayan Tatu Rane* (2016) 70 taxmann.com 227 (Mumbai-Trib), *Nisha Jain v. ITO* (ITA No. 368/JP/2017 for AY 2013-14) by ITAT Jaipur; *CIT v. Nirav Modi* (2017) 390 ITR 0292 (Bom).

During the course of clarification on 18.10.2019, the attention of the Ld. counsel was drawn to the decision in *Rampyari Devi Saraogi v. CIT* (1968) 67 ITR 84 (SC). The Ld. counsel submits that the following facts in the above case do not exist in the case of the assessee :

- a. Enquiries made have revealed that assessee neither resided nor carried on any business from the address declared in the returns, whereas in the case of the present appellant, address and the description of the business has been correctly done and there are no discrepancies pointed out by the AO or the PCIT;
- b. The ITO was not justified in accepting the initial capital, the gift received and sale of jewellery, the income from business etc. without any inquiry or evidence whatsoever, whereas in the case of the present appellant proper inquiry was made by issuing notice u/s 142(1) and adequate evidences were produced where the relevant details in response to the same were submitted during the original assessment proceedings;
- c. The name of the assessee is Rampyari Devi Saraogi and as the Income Tax Officer, D Ward, Howrah, who has made the assessments, had only jurisdiction over cases of new assessees, whose names began with the alphabetical letters from 'S' to 'Z', with a view to camouflage the name and make it appear to fall within the jurisdiction of the Income Tax Officer, the name has been given in the reverse order by putting the surname first and her own name afterwards, as will be apparent from the returns filed, whereas in the case of the present appellant no such attempt to camouflage any name has been made;
- d. No bank account or any proper books of account were maintained by the assessee or produced before the ITO, whereas in the case of the present appellant the bank account has been filed during the original assessment proceedings; further proper

and complete books of accounts have been maintained by the appellant and the same has not been disputed by the AO during the original assessment proceedings;

e.No evidence whatsoever was produced in respect of the money-lending business done and interest income shown to have been received by the assessee, no names were given as to the parties to whom the loans were advanced, with amounts and rate of interest and as to when the interest income was received, whereas in the case of the present appellant all supporting evidences as required by the AO had been produced during the original assessment proceedings as well as during the proceedings before the PCIT, the only cause for making the addition is due to the alleged information received, however, no cause or reason could be shown for making the addition, due to any incriminating material or inadequacy or material from the end of the appellant.

Thus the Ld. counsel submits that the instant case is distinguishable from the decision in *Rampyari Devi Saraogi* (supra). Explaining further, it is stated by him that in the present case specific information with regard to shares of luminaire Technologies Ltd. has been provided along with chart of share purchase and share after merger, ledger of Indianivesh Securities Pvt. Ltd., share certificate and allotment advice of Paridhi Properties, scheme of arrangement as sanctioned by the High Court.

5. On the other hand, the Ld. Departmental Representative (DR) relies on the decision in *CIT v. Rippen Ahuja* (2014) 49 taxmann.com 261 (P&H), *Anuj Jayendra Shah v. Pr. CIT* (2016) 67 taxmann.com 38 (Mumbai-Trib) and *Bisakha Sales (P.) Ltd. v. CIT* (2014) 52 taxmann.com 305 (Kolkata-Trib).

Referring to page 21, 22 and 23 of the Paper Book, the Ld. DR submits that no inquiry has been done by the AO in the instant case.

6. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below.

At this moment, we discuss the case laws relied on by both sides. We begin with the cases relied on by the Ld. counsel. In the case of *Narayan Tatu Rane* (supra), information was received from Bangalore Office of the Income Tax Department that they had carried out search and seizure operations in the case of R.N.S. and during the course of the search, certain documents indicating payments made to persons holding public office were seized. One of the said documents contained certain payment details under the heading 'Rane CM'. Based on this information, the AO reopened the assessment of the assessee of both the years under consideration by issuing notices u/s 148 of the Act. The AO had asked the assessee to clarify about the impugned incriminating document and also to give explanations as to why the amounts mentioned therein should not be added back to the total income of the assessee. In response to it the assessee denied any connection with the incriminating document. The AO was satisfied with the said explanations and accordingly, did not make any addition to the total income for the assessment years 2007-08 and 2008-09. Taking support from Explanation 2, however, the Commissioner took the view that the AO had completed the assessments without making proper inquiries with regard to the incriminating documents. Accordingly, the Commissioner passed the revision order u/s 263 of the Act. In appeal, the Tribunal held that "newly inserted Explanation 2(a) to section 263 does not authorize or give unfettered powers to Commissioner to revise each and every order, if in his opinion, same has been passed without making inquiries or verification which should have been made".

In the case of *Nisha Jain* (supra), the assessee is an individual and Director of ARL Infratech Ltd. and filed return of income for AY 2013-14 on 20.09.2013 declaring total income of Rs.1,58,70,180/-. During the course of scrutiny assessment, the AO noticed that the assessee has earned income from long term capital gains (LTCG) from sale of shares of M/s Luminaire Technologies Ltd. and M/s Oasis Cine Communications Ltd. amounting to Rs.2,64,04,191/-. This income from LTCG was claimed as exempt u/s 10(38) of the Act. The AO doubted the genuineness of the transaction in view of the fact that the Investigation Wing of Kolkata had carried out search u/s 132 on some entry providers including one Shri Deepak Patwari. The AO made an addition of Rs.2,64,04,191/- u/s 69 of the Act by treating the LTCG claimed as exempt u/s 10(38). In appeal, the CIT(A) confirmed the above addition. In further appeal by the assessee, the Tribunal observed in the case of M/s Luminaire Technologies Ltd. that the assessee purchased 50,000 shares of M/s Paridhi Properties Ltd. having face value of Rs.10/- each on 26.03.2011. The share application of money of Rs.5,00,000/- was paid and debited in the bank account of the assessee on 28.03.2011. The shares were allotted to the assessee on 31.03.2011 which was subsequently de-materialized and credited in the demat account of the assessee on 21.10.2011. Thereafter, M/s Paridhi Properties Ltd. got merged with M/s Luminaire Technologies Ltd. as per the scheme of merger approved by the Hon'ble Bombay High Court vide order dated 27.07.2012. The assessee was allotted one equity share of Rs.1/- each in the swap ratio of 1:1. Reference was made to the allotment of shares as communicated by M/s Luminaire Technologies Ltd. vide letter dated 04.09.2012. Accordingly, the assessee was allotted 5 lacs equity share of Rs.1/- each of M/s Luminaire Technologies Ltd. which is credit in the demat

account of the assessee. These shares were sold by the assessee between period 01.11.2012 to 14.12.2012 as per contract notes for a consideration of Rs.2,12,34,671/-. The sale proceeds were credited in the bank account of the assessee. Considering the fact that the assessee had produced all evidence to prove the transactions of purchase of shares, payment of purchase consideration, amalgamation and merger of the companies subsequent to the purchase of shares, allotment of shares of the merged entity, dematerialization of in the demat account and subsequent sale of shares from the demat account of the assessee, the Tribunal allowed the appeal filed by the assessee.

In *Nirav Modi* (supra), it is held :

“12. In the present facts, the Assessing Officer was satisfied, consequent to making an enquiry and examining the evidence produced by the Assessing Officer, establishing the identity and creditworthiness of the donor as also the genuineness of the gift. The CIT in his order of revision, does not indicate any doubts in respect of the genuineness of the evidence produced by the Assessee. The satisfaction of the Assessing Officer on the basis of the documents produced is not shown to be erroneous in the absence of making a further enquiry. It is made clear that our above observations should not be inferred to mean that it is open to the Assessing Officer to enquire into the source of source for the purpose of the present facts. This is a case where a view has been taken by the Assessing Officer on enquiry. Even if this view, in the opinion of the CIT is not correct, it would not permit him to exercise power under Section 263 of the Act. In fact, the Apex Court in *Amitabh Bachchan* (supra) has observed that there can be no doubt that where the view taken by the Assessing Officer is a possible view, interference under Section 263 of the Act, is not permissible.”

In the instant case, the AO has completed the assessment in undue haste or without inquiry. Thus the instant case is distinguishable from the above decisions relied on by the Ld. counsels.

6.1 Then we turn to the case laws relied on by the Ld. DR. In the case of Rippen Ahuja (supra), the assessee filed return of income for the AY 2000-01 on 05.01.2001 declaring a total income of Rs.4,24,100/-. The AO completed the assessment on 28.11.2003 after making an addition of Rs.54,688/-. Subsequently, the CIT issued notice u/s 263 to the assessee, calling for his explanation in respect of gifts of Rs.21,00,000/-. on the reason that the assessment order was found prejudicial to the interest of revenue. Thereafter, the CIT passed an order u/s 263. In appeal, the Tribunal set aside the order of the CIT passed u/s 263. In appeal filed by the Revenue, the Hon'ble Punjab & Haryana High Court held that where claim of gift is made by the assessee, onus lies on him not only to establish the identity of person making gift but also his capacity to make a gift and that it has actually been received as a gift ; mere identification of donor and showing movement of gift amount through banking channels is not enough to prove the genuineness of gift and where assessee, except averring in his reply that donors were his family friends and had abundant source of income did not produce any evidence to prove genuineness of gift, commissioner had rightly set aside the assessment.

In the case of *Anuj Jayendra Shah* (supra), assessee had made investment in mutual funds which was stated to be made out of gift received from maternal uncle. Assessee filed an affidavit executed by his maternal uncle stating that he had made such gift to the assessee out of natural law. The AO accepted said gift and completed assessment without making an addition.

Thereafter, the Commissioner initiated proceedings u/s 263 on the ground that the AO had not examined gift with regard to identity, genuineness or creditworthiness of donor. The Tribunal held that as the Assessing Officer had not made an inquiry or verification before accepting gift received by the assessee and merely accepted submission of assessee, Commissioner had rightly invoked provisions of section 263 of the Act.

In the case of *Bisakha Sales (P.) Ltd.* (supra), during the AY 2008-09, the assessee-company received share application money with huge and unjustified share premium from corporate entities. The AO passed an assessment order accepting the genuineness of deposits received by the assessee. The Commissioner, however, passed a revisional order setting aside the assessment order. In appeal, the Tribunal held that where the assessee-company received share application money with huge and unjustified share premium from corporate entities, merely because said amount was received through banking channel, the AO was not justified in accepting said transactions as genuine without making proper inquiries and, therefore, impugned a revisional order passed by the Commissioner setting aside the assessment order was to be upheld.

6.2 As mentioned earlier, the AO has passed an order u/s 143(3) dated 27.12.2015 accepting the return income of Rs.13,64,810/-. The assessment order speaks of itself. The said assessment order is produced below :

“1. The Return of income for A.Y. 2013-14 has been filed by the assessee on 10.09.2013 declaring total income of Rs.13,64,810/-. The return was processed u/s 143(1) of the Act. Subsequently, the case was selected for scrutiny under CASS accordingly statutory notice u/s 143(2) was issued on 02.09.2014 which was duly

served on the assessee. Further, notice u/s 142(1) was issued on 16.09.2015 and served on the assessee.

2. In response to notices Shri Gautam Saleeha C.A. and authorized representative of the assessee attended from time to time and furnished details called for and the same are kept on record. The case was discussed with him.

3. During the financial year relevant to A.Y. 2013-14, the assessee has derived income from Business and Income from Other Sources being Bank interest & Dividend.

4. The relevant details in respect of AIR data have been called for and examined.

5. Subject to above remarks and discussion the total income of the assessee is computed as under:-

1.	Total Income	Rs.13,64,810/-
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5. Assessed accordingly u/s.143(3) of IT Act, 1961. Give credit for TDS, advance tax and regular taxes paid after verification. Interest is charged u/s. 234A, 234B, 234C and 234D is being charged, as applicable. Demand notice along with challan is being issued.”

6.3 The revisional power of the Commissioner u/s 263 of the Act is of wide amplitude. In *CIT v. Shree Manjunathesware Packing Products & Camphor Works*, (1998) 231 ITR 53, 63 (SC), it is held that “in view of the clear words used in clause (b) of the Explanation to section 263(1) it has to be held that while calling for an examining the record of any proceeding u/s 263(1), it is and it was open to the Commissioner not only to consider the record of that proceeding which was available to the officer at the time of passing of the order by him but also the record to that proceeding available to him at the time of examination”.

6.4 Indisputably, the assessee has claimed exempt LTCG of Rs.8,94,51,920/- by trading in shares of LTL. The details filed by the assessee during the course of assessment proceedings have not been examined and inquired into by the AO. This is evident from the assessment order produced above and also from the documents available on record. One cannot miss the proposition that assessment made without inquiry is prejudicial to the interest of revenue. In *Rampyari Devi Saraogi* (supra), it is held in order that the Commissioner may consider an order to be “erroneous” for the purposes of section 263, the error of law may not be apparent on the face of the order, the Commissioner may consider an order of the Assessing Officer to be erroneous not only if it contains some apparent error of reasoning or of law or of fact on the face of it but also because it is a stereo-typed order which simply accepts what the assessee has stated in his return and fails to make inquiries which are called for in the circumstances of the case.

In view of the above position of law enunciated in *Rampyari Devi Saraogi* (supra) and because the AO has completed the assessment in undue haste or without inquiry, the Pr. CIT has rightly exercised his power u/s 263 by holding that the order of the AO is erroneous and prejudicial to the interest of revenue.

However, it is too early on the part of the Pr. CIT to direct the AO to redo the assessment so that abuse of provision of section 10(38) is prevented and income is brought to tax in light of recent judgments in penny stock cases.

We modify the above direction of the Pr. CIT and direct the AO to frame an order as per the provisions of the Act, after providing reasonable

opportunity of being heard to the assessee. We direct the assessee to file the relevant documents/evidence before the AO.

7. In the result, the appeal is partly allowed.

**Order pronounced in the open Court on 13/01/2020.**

Sd/-  
(SAKTIJIT DEY)  
JUDICIAL MEMBER

Sd/-  
(N.K. PRADHAN)  
ACCOUNTANT MEMBER

Mumbai;

Dated: 13/01/2020

*Rahul Sharma, Sr. P.S.*

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Dy./Assistant Registrar)  
**ITAT, Mumbai**