

IN THE INCOME TAX APPELLATE TRIBUNAL
GAUHATI 'E' COURT, ATKOLKATA

BEFORE SHRI A. T. VARKEY, JM & DR. A.L.SAINI, AM

आयकरअपीलसं./ITA Nos.46 /Gau/2019

(निर्धारणवर्ष / Assessment Year:2014-15)

Shri Abdul Hamid C/o M/s Nehar Enterprise, New Market, Near Hawker Market, Daily Bazar, Tinsukia, Assam-786125	Vs.	ITO, Ward-3, Tinsukia
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: AAHPH 8890 C		
(Appellant)	..	(Respondent)

आयकरअपीलसं./ITA No.47 /Gau/2019

(निर्धारणवर्ष / Assessment Year:2014-15)

Shri Abdul Hannan C/o M/s Abadul Rouf & Co, Daily Bazar, Tinsukia, Assam-786125	Vs.	ITO, Ward-3, Tinsukia
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: AAWPH 6910 J		
(Appellant)	..	(Respondent)

Appellant by :Shri Sanjay Modi, FCA

Respondent by :Shri Rockcin Saikia, JCIT, Sr. DR

सुनवाईकीतारीख/ Date of Hearing : 03/06/2020

घोषणाकीतारीख/Date of Pronouncement : 17/07/2020

आदेश / ORDER

Per Dr. A. L. Saini:

By way of these two appeals, the assesseees have challenged the correctness of the orders passed by the Principal Commissioner of Income Tax (for short "PCIT") under section 263 of the Income Tax Act 1961 (hereinafter referred to as the "Act").

2. Since, the issues involved in these appeals are common and identical; therefore, these appeals have been heard together and are being disposed of by this consolidated order. For the sake of convenience, the grounds as well as the facts narrated in ITA No. 46/Gau/2019 for assessment Year 2014-15 (in case of Shri Abdul Hamid, Tinsukia) have been taken into consideration for deciding the above appeals *en masse*.

3. Grievances raised by the assessee in ITA No. 46/Gau/2019, for A.Y. 2014-15 are as follows:

1. For that the order of the learned Principal Commissioner of Income Tax (PCIT) passed under section 263 of the I.T. Act, 1961 (the 'Act') is bad in law, facts and procedure.

2. For that on the facts and circumstances of the case, the Id. PCIT erred in considering that undisclosed business income of Rs. 3,65,933/- assessed by the Id. AO ought to have been treated and taxed by the Id. AO as per provisions of section 115BBE of the Act and assuming jurisdiction u/s 263 of the Act on that basis.

3. For that on the facts and circumstances of the case, the Id. PCIT has erred in arbitrarily and whimsically considering that the Net Profit estimated by the Id. AO on the undisclosed business turnover was without any verification and proper analysis and assuming jurisdiction u/s 263 of the Act on that basis.

4. For that the assumption of jurisdiction by the Id. PCIT in the instant case being without satisfaction of pre-requisite twin conditions of the law, the same is bad in law and consequently, the impugned order passed in pursuance thereto is liable to be cancelled.

5. For that the impugned order passed is vague, non-speaking, unreasoned and without dealing with the submissions of the appellant and hence, the impugned order is bad in law and liable to be quashed.

6. For that on the impugned order passed under section 263 of the Act is without jurisdiction and is bad in law and is liable to be quashed.

7. For that your appellant craves leave of your honours to take additional ground or grounds and/or to modify any ground(s) of appeal at or before the time of hearing.

4. The appeal arises this way. During the assessment year 2014-15, the assessee was engaged in supply of eggs and also received salary and interest on capital from partnership firm M/s Niher Enterprises. The assessment, in the assessee's case, was completed by the Assessing Officer under section 143(3) of the Income-Tax Act, 1961 on 30-12-2016 with addition of Rs. 3,65,933/-, in the total income of the assessee as undisclosed income after taking margin of profit @ 4% on the undisclosed turnover of Rs. 91,48,326/-, (that is, 4% of Rs. 91,48,326/- which comes to Rs. 3,65,933/-).

5. Later on, Learned Principal Commissioner of Income Tax (PCIT) has exercised his jurisdiction under section 263 of the Act. The ld PCIT was of the view that a very low rate of net profit was considered by assessing officer on undisclosed business turnover of the assessee and the undisclosed income of Rs. 3,65,933/- (that is, 4% of Rs. 91,48,326/- which comes to Rs. 3,65,933/-), so added by the AO to the total income of the assessee, should have been treated and taxed as per provisions of section 115BBE of the Income-tax Act, 1961.

6. Accordingly, a show cause notice u/s 263 of the Act was issued by ld PCIT, on the assessee, seeking explanation as to why the Assessment Order u/s 143(3) of the Act dated 30-12-2016 should not be revised u/s 263 of the Act on the following grounds.

“3(i).The Assessing officer has failed to treat and tax the undisclosed income of Rs. 3,65,933/- as per provisions of section 115BBE of the Income-tax Act, 1961.

(ii).The net profit considered by the Assessing officer on the undisclosed business turnover is without any verification and proper analysis that needs to be examined properly.”

7. In response, the assessee submitted a letter dated 24-04-2018 raising objection that the Assessing officer after making detailed enquiry and examination of books of account and other records took a possible view and completed the assessment. Now, since the opinion formed by the AO was a possible view, therefore, any action invoking the provisions of section 263 of the Act shall tantamount to change of opinion which is not permissible under the provisions of section 263 of the Act .

8. Having gone through the above reply of the assessee, Id PCIT held that the Assessing officer had '**made some partial application of mind**' relating to point no. 3(ii) mentioned above/and regarding point no. 3(i) mentioned above, the assessment order passed on 30.12.2016 u/s 143(3) of the Act was erroneous in so far as prejudicial to the interests of the revenue. Therefore, Id PCIT restored the matter back to the file of the Assessing Officer to tax the undisclosed income of Rs. 3,95,933/- as per provisions of Section 115BBE of the Income tax Act, 1961.

9. Aggrieved by the order of the Id. PCIT, the assessee is in appeal before us.

10. Shri Sanjoy Modi, learned counsel for the assessee, has contended that Assessing Officer has examined the issue relating to undisclosed bank account during the scrutiny assessment. The Id assessing officer had worked out undisclosed business turnover to the tune of Rs. 91,48,326/- and on the said undisclosed business turnover, he worked out business income @ 4% of undisclosed business turnover which comes to Rs. 3,65,933/- (4% of Rs. 91,48,326/-). Therefore, the Assessing Officer has taken one of possible views and made assessment on the undisclosed business turnover. Hence, order passed by the assessing officer under section 143(3) of the Act dated 30.12.2016 is neither erroneous nor prejudicial to the interest of Revenue.

11. On the other hand, the Id. DR for the Revenue relied on the order passed by the Id. PCIT u/s 263 of the Act and contends that Assessing Officer had failed to

tax the undisclosed income of Rs. 3,65,933/- as per provision of section 115BBE of the Act. The Id assessing officer had worked out undisclosed business turnover to the tune of Rs. 91,48,326/-but he applied a very low rate of profit, that is @ 4% of undisclosed business turnover and which was treated by him as income of the assessee, which is not acceptable. The Ld DR further contends that Assessing Officer has not applied his mind properly while making the assessment therefore the order passed by the Assessing Officer is erroneous.

12. We heard both the parties and carefully gone through the submission put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the fact of the case including the findings of the Id PCIT and other material available on record. It is abundantly clear that the department (Revenue) had no right to appeal to the Commissioner of Income Tax (Appeals) against any order passed by the Income-tax Officer. Therefore, the provision of section 263 of the Act, was enacted by the parliament to arm the Commissioner of Income Tax with powers of revision whenever there is any erroneous order prejudicial to the revenue. There must be an error in the order, and it must be "prejudicial to the revenue". Just because if an error in the assessment order is advantageous to the revenue, the Commissioner should not invoke jurisdiction under section 263 of the Act, the Commissioner should see other essential condition, which is prejudicial to the interest of Revenue, hence the Commissioner has to satisfy twin conditions that is, there must be an **“error”** in the assessment order, and it must be **“prejudicial”** to the interest of Revenue. We note that the proceedings under section 263 of the Act are *quasi-judicial* character. The statute requires the Commissioner of Income-Tax to make such enquiries as he deems necessary, to give the assessee an opportunity of being heard and then to pass such orders as the circumstances of the case justify. This introduces the principle of natural justice. It is open to the assessee, inter alia, to question the validity of the revision proceedings initiated by the Commissioner. It is also clear from various judicial precedents that when the order of the Assessing

Officer is not erroneous, section 263 cannot be invoked to direct the Assessing Officer to hold another investigation [Infosys Technology Ltd. vs. JCIT 286 ITR (AT) 211 (Bang)] The law with regard to exercise of jurisdiction u/s.263 of the Act on the ground that the AO failed to make enquiries which he ought to have made in the given circumstances of a case is well settled. 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 Income-tax Officer is not only an adjudicator but also an investigator. He cannot remain passive in the face of a return which is apparently in order but calls 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 make 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. We derive support for the proposition as stated above from the decision of the Hon'ble Delhi High Court in the case of Gee Vee Enterprises 99 ITR 375 (Del).

13. Taking note of the aforesaid dictum of law laid down by the Hon'ble Delhi High Court, let us examine whether the order passed by the Assessing Officer u/s 143(3) dated 30.12.2016 is erroneous as well as prejudicial to the interest of the revenue. Since in the present case, the Id PCIT has exercised jurisdiction u/s.263 of the Act on the ground that the AO while completing the assessment proceeding did not make enquiries which he ought to have made. Therefore, it is necessary for us to look into what enquiries the AO made on the issues raised in the order u/s.263 of the Act? Therefore, in order to know that what enquiries the AO made on the issues raised in the order u/s.263 of the Act, first of all, we should go

through the relevant para of the assessment order wherein the assessing officer has examined each any every documents submitted by assessee during scrutiny proceedings, which is reproduced below:

“4. The assessee’s case was selected for limited scrutiny on the ground that cash deposits in savings bank accounts is more than turnover. During the course of proceedings u/s 143(2), it has been detected that the assessee maintains the following two accounts:

Account No.	Bank Name	Branch
1. 2195697434 BRANCH, TINSUKIA	CENTRAL BANK OF INDIA	TINSUKIA MAHARAJA BR. CODE 3
2. 3230057000	CENTRAL BANK OF INDIA	
3. 3228067513	CENTRAL BANK OF INDIA	
4. 2195698018	-do-	

However, it is seen from the details collected that the assessee didn’t disclose the transactions reflected in the bank account no. 2195697434 maintained in the bank CENTRAL BANK OF INDIA. The assessee was asked vide this office letter dated 08/12/2016 to explain as to why the cash deposits made in the said account shall not be treated as undisclosed sale of the assessee.

On being confronted the assessee made submission on 27/12/2016 stating that out of aggregate deposits of Rs. 95,33,717/- made in the said bank account A/c No. 2195697434 Rs.91,48,326/- was his business receipt, Rs.3,73,870/- are maturity proceeds of daily deposit accounts and Rs 11,521/- was interest Income on savings account. After his father’s death, the assessee was started doing business using the above bank account in question, which was not reflected in his Return of income.

5. The above explanation of the assessee has been given due consideration. The assessee’s contention that the amount deposited in the bank A/c is their business income which were not reflected in their return of income. Hence, the authorized representative of the assessee was asked to submit the details of transaction made along with ledger copy of said Bank account in question and was also asked to produce original bills/ vouchers of Purchases and sales in support of it. Accordingly, the authorised representative of the assessee submitted the details called for and produced original bills/ vouchers which were verified on test check basis and returned.

6. On perusal of the details of transaction, it is observed that the transaction made are in the nature of sales and purchases of goods i.e. eggs of the business during the financial 2013-14 relevant to the A.Y.2014-15 in the bank account No. 2195697434. Accordingly, the amount of Rs.91,48,326/-, which was not accounted for gross turnover in the profit & loss account in the Return of Income of the assessee, has been considered as undisclosed business receipt or turnover of the assessee for the financial year 2013-14 relevant to the assessment year 2014-15 over & above the gross turnover declared

by him. The margin of net profit has been taken @ 4% on audited gross turnover in the Return of Income filed by the assessee. Accordingly, margin of profit has been taken @ 4% on undisclosed turnover of Rs.91,48,326/- which comes to Rs.3,65,933/- and added back as undisclosed business income to the returned income. Interest on savings A/c of Rs.11,521/- received from bank is also added back to the returned income under the head 'Income from other sources.'

We note that Assessing Officer has duly assessed the deposits in the bank account No.2195697434 of Central Bank of India, to the tune of Rs.95,33,717/-, treating Rs. 91,48,326/- as undisclosed business receipts/undisclosed turnover. Thereafter the assessing officer computed the margin of profit @4% of undisclosed business receipts at Rs. 3,65,933/- (that is 4%Rs.95,33,717). The AO also made addition on account of interest on saving bank account at Rs.11,521/-.Therefore, the bank account A/c No. 2195697434 has been verified by the assessing officer and on being confronted, during the assessment proceedings, the assessee made submission on 27/12/2016 before the assessing officer stating that out of aggregate deposits of Rs. 95,33,717/- made in the said bank account A/c No. 2195697434, Rs.91,48,326/-was his business receipts, and Rs.3,73,870/- was maturity proceeds of daily deposit accounts and Rs 11,521/- was interest income on savings account. The assessee also informed to the assessing officer that after his father's death, the assessee had started doing business and using the above said bank account in question, which was not reflected in his Return of income.

Therefore, one of the grounds on which the Id PCIT had exercised jurisdiction (that the net profit of Rs.3,65,933/- considered by the Assessing officer on the undisclosed business turnover of Rs.91,48,326/-was without any verification and proper analysis which needs to be examined properly), has been examined by the assessing officer properly. Therefore, when the order of the Assessing Officer is not erroneous, section 263 cannot be invoked to direct the Assessing Officer to hold another investigation [Infosys Technology Ltd. vs. JCIT 286 ITR (AT) 211

(Bang)]. Therefore, so far this first ground is concerned, the Id PCIT was not right in exercising the jurisdiction under section 263 of the Act.

14. Next ground on which Id PCIT has exercised jurisdiction under section 263 of the Act was that the Assessing officer had failed to tax the undisclosed income of Rs. 3,65,933/- as per provisions of section 115BBE of the Income-tax Act, 1961.

In order to understand whether the provisions of section 115BBE are applicable to the assessee or not, let us first go through the provisions of section 115BBE of the Act, which reads as follows:

“115BBE. Tax on income referred to in section 68 or section 69 or section 69A or section 69B or section 69C or section 69D.

1. *Where the total income of an assessee includes any income, referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D, the income-tax payable shall be the aggregate of—*
 - a) *the amount of income-tax calculated on income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D, at the rate of thirty per cent; and*
 - b) *the amount of income-tax with which the assessee would have been chargeable had his total income been reduced by the amount of income referred to in clause (a).*
2. *Notwithstanding anything contained in this Act, no deduction in respect of any expenditure or allowance shall be allowed to the assessee under any provision of this Act in computing his income referred to in clause (a) of sub-section (1).”*

Before us, the limited question is that whether business receipts/business turnover is taxable under section 115BBE of the Act? As per the intention of legislature, the burden to apply section 115BBE and section 68 to section 69D of the Act rest on revenue shoulder. That burden cannot be discharged on the basis of assumption and presumption made by the assessing officer. Having gone through the section 115BBE, as noted above, we are of the view that business activity related income may not ordinarily get placed u/s 68 to section 69D of the Act. In the assessee's case under consideration, the assessee submitted before the assessing officer that deposits of Rs.91,48,326/- in bank account No.

21956697434, were business receipts. The relevant para of the assessment order is reproduced below:

“On being confronted the assessee made submission on 27/12/2016 stating that out of aggregate deposits of Rs. 95,33,717/- made in the said bank account A/c No. 21956697434 Rs.91,48,326/-was his business receipt, Rs.3,73,870/- are maturity proceeds of daily deposit accounts and Rs 11,521/- was interest Income on savings account. After his father’s death, the assessee was started doing business using the above bank account in question, which was not reflected in his Return of income.”

15. We note that assessing officer in his assessment order has also treated the undisclosed amount in bank account as **undisclosed business receipts/turnover**. We reproduce the relevant para of assessment order where assessing officer treated the undisclosed amount as **undisclosed business receipts/turnover**:

*“Accordingly, the amount of Rs.91,48,326/-, which was not accounted for gross turnover in the profit & loss account in the Return of Income of the assessee, has been considered as **undisclosed business receipt or turnover of the assessee** for the financial year 2013-14 relevant to the assessment year 2014-15 over & above the gross turnover declared by him. The margin of net profit has been taken @ 4% on audited gross turnover in the Return of Income filed by the assessee. Accordingly, margin of profit has been taken @ 4% on undisclosed turnover of Rs.91,48,326/- which comes to Rs.3,65,933/- and added back as undisclosed business income to the returned income.”*

Since, the assessing officer has applied his mind and treated the undisclosed amount in bank account as **undisclosed business receipt or turnover of the assessee**, therefore provisions of section 115BBE does not apply to the assessee.

16. Even, Id PCIT while exercising his jurisdiction under section 263 of the Act treated the undisclosed amount in bank account as **undisclosed business receipts/turnover**, vide para No. 2 of the order of Id PCIT, which is reproduced below for ready reference:

“2.Proposal for revision u/s 263 of the Income Tax Act, 1961 was received on the issue (a) low rate of net profit was considered on undisclosed business turnover and.....”

Since, Id PCIT has himself treated the amount of undisclosed bank account as **undisclosed business receipts/turnover**, therefore the question of application of the provisions of section 115BBE does not apply to the assessee under consideration.

17. Furthermore, the assessing officer while giving appeal effect to the order of Id PCIT under section 263 of the Act, had shown the undisclosed amount of bank account under the head business income, vide order of assessing officer under section 143(3)/263 of the Act dated 28.11.2019.

18. Our view is further fortified by the Judgment of the Coordinate Bench of Mumbai in the case of ACT Central Circle -13 Mumbai Vs. Rahil Agencies, order dated 23 November, 2016 wherein it was held that section 115BBE does not apply to business receipts/business turnover. The findings of the Coordinate Bench are given below:

“19. We have considered rival contentions and found that by applying provisions of Section 115BBE the AO has declined set off of business loss against income declared during the course of survey/search. The provisions of Section 115BE are applicable on the income taxable under section 68, 69, 69A, 69B, 69C or 69D of the Act. The income declared by the assessee is unrecorded stock of diamond found during the course of search. The assessee is in the business of diamond trade and such stock was part of the business affair of the company. Therefore, since income declared is in the nature of business income, the same is not taxable under any of the section referred above and accordingly section 115BBE has no application in case.”

At the cost of repetition we state that while making the original assessment under section 143(3) dated 30.12.2016, the assessing officer has treated undisclosed amount in bank account as **undisclosed business receipts/turnover**. The Id PCIT while exercising jurisdiction under section 263, vide his order dated

11.12.2018, treated undisclosed amount in bank account as **undisclosed business receipts / turnover**. The assessing officer while giving appeal effect of the order of Id PCIT under section 263 of the Act, vide order under section 143(3)/263 of the Act dated 28.11.2019, treated undisclosed amount as **undisclosed business receipts/turnover**. Since the Department itself accepting the undisclosed amount of assessee in his bank account as **undisclosed business receipts/turnover**, therefore, section 115BBE does not attract here and hence order passed by the assessing officer, after application of mind, under section 143(3) dated 30.12.2016 is neither erroneous or prejudicial to the interest of revenue.

19.We also note that Id PCIT in his order u/s 263 of the Act, vide para 5 of his order, has stated that *“the Assessing officer made some partial application of mind”*. We note that there is no concept of *“partial application of mind”*, it should be either application of mind or non-application of mind. The relevant para no.5 of his order is reproduced below:

“5.Considering the submission of the assessee, facts and circumstances of the case as discussed above, I am of the opinion that the Assessing officer made some partial application of mind relating to point no.3(ii) mentioned above/and regarding point no. 3(i) mentioned above, the assessment order passed on 30.12.2016 u/s 143(3) of the Act was erroneous in so far as prejudicial to the interests of the revenue. In the facts and circumstances of the case, I am of the considered view that the matter should be restored back to the file of the Assessing Officer to treat and tax the undisclosed income of Rs. 3,95,933/- as per provisions of Section 115BBE of the Income tax Act, 1961.”

From the above concluding para of the order of Id PCIT under section 263 of the Act, it is abundantly clear that Id PCIT is using the probability, likelihood and chances that assessing officer might or might not have applied his mind. It means, Id PCIT has failed to point out the specific error or mistake in the order of AO as he is using probability and guess work which is not permitted under the

Income Tax proceedings. The Id PCIT is a senior officer and plays a supervisory role on the Income Tax officer working below him therefore, it is expected from him that he should find specific error in the assessment order and let it know, to the Income Tax officer rather than to use probability and guess work. It is necessary for the Id PCIT to point out exact error in the assessment order proposed to be revised by him as held in CIT v. GK Kabra, Co-operative Industrial Estate [1994] 75 Taxman 503 (AP).

Thus, we note that since the Id PCIT has used only probability and likelihood to find the error in the assessment order which is not permitted, he ought to find out specific error in the assessment order, and guide the assessing officer, since he has failed to do so in the assessee`s case under consideration, therefore order passed by the assessing officer is neither erroneous nor prejudicial to the interest of the revenue. Since the order of the Assessing Officer cannot be held to be erroneous as well as prejudicial to the interest of Revenue in the facts and circumstances narrated above, the usurpation of jurisdiction exercising revisional jurisdiction by the Principal CIT is “null” in the eye of law and therefore we are inclined to quash the very assumption of jurisdiction to invoke revisional jurisdiction u/s 263 by the PCIT. Therefore, we quash the order of Ld. PCIT dated 11.12.2018 being ab initio void.

20.In the result, both the appeals of the assesseees(ITA No.46 and 47) are allowed.

Order pronounced in the Court on 17.07.2020

Sd/-
(A.T. VARKEY)
न्यायिकसदस्य / JUDICIAL MEMBER

Sd/-
(A.L.SAINI)
लेखासदस्य / ACCOUNTANT MEMBER

दिनांक/ Date: 17/07/2020
(SB, Sr.PS)

Copy of the order forwarded to:

1. Shri Abdul Hamid, Tinsukia& Shri Abdul Hannan.
2. ITO, Ward-3, Tinsukia
3. C.I.T(A)-
4. C.I.T.- Guwahati.
5. CIT(DR), GauhatiBench, Guwahati.
6. Guard File.

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By Order

Senior Private Secretary / DDO/ H.O.O
ITAT, Gauhati Bench