

आयकर अपीलिय अधिकरण, जयपुर न्यायपीठ, जयपुर  
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री संदीप गोसाई, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष  
BEFORE: SHRI SANDEEP GOSAIN, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 301/JP/2020  
निर्धारण वर्ष/Assessment Year :2015-16

Sh. Ashok Kumar Mittal 2224 2224, Fula Ganj Nasirabad	बनाम Vs.	The PCIT, Ajmer
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AVBPM9529N		
अपीलार्थी/ Appellant		प्रत्यर्थी/ Respondent

निर्धारिती की ओर से/ Assessee by : Sh. Mukesh Khandelwal  
राजस्व की ओर से/ Revenue by : Sh. A. S. Mehra (Addl. CIT)

सुनवाई की तारीख/ Date of Hearing : 11/11/2020  
उदघोषणा की तारीख/ Date of Pronouncement: 07/12/2020

आदेश / ORDER

PER: VIKRAM SINGH YADAV, A.M.

This is an appeal filed by the assessee against the order passed by the Id. Pr.CIT, Ajmer u/s 263 dated 28.02.2020 pertaining to A.Y 2015-16 wherein the modified grounds of appeal taken by the assessee reads as under:-

"1. That the order passed by the Id. Pr. CIT is bad in law as the same has been passed without verifying the vital fact that the Id. AO had passed the order after due application of mind and there was no ground to consider the order of the Id. AO to be erroneous and prejudicial to the interest of Revenue.

2 That the order passed by the Id. Pr. CIT is bad in law also on the score that the appellant was in appeal against the order of the Id. AO before the Id. CIT(Appeals), Ajmer to whom coterminus powers of AO was lying and the Pr. CIT was incompetent to pass order u/s 263 on a matter which was pending with another officer of the same rank.

3 *That the Id. Pr. CIT has passed the instant order in violation to the provisions of clause (c) of Explanation 1 to sub section 1 of section 263 of the Income Tax Act, 1961 even after having information that the appellant was in appeal before the Id. CIT(Appeals) on the issue for which the Id. Pr. CIT initiated action u/s 263 of the Income Tax Act, 1961."*

2. At the outset, it is noted that there is a delay in filing the present appeal by 143 days. In this regard, the Id. AR has submitted as under:-

*"The order u/s 263 of the Income tax Act, 1961 was passed by the Id. CIT on 28.02.2020 and same was received by the appellant on 04.03.2020. As per provisions of section 253(3) the appeal against such order was to be submitted before the Hon'ble Bench on or before 03.05.2020. However due to lockdown in the country imposed on 25.03.2020 which remained upto 03.05.2020 the appeal could not be filed. Further the Hon'ble Ministry of Law and Justice, Govt. of India vide The Taxation and other Laws (Relaxation of Certain Provisions) Ordinance 2020 dated 31.03.2020 allowed time up till 30.06.2020 for filing of appeal. Further the Hon'ble Ministry of Finance, Govt. of India vide its notification dated 24.06.2020 issued vide no. S.O. 2033(E) allowed time up till 31st March, 2021 for filing the appeal as per powers vested as per section 3(1) of the above referred Ordinance. Therefore the appeal filed by the appellant is within time so allowed and hence delay of 143 days as alleged may kindly be condoned."*

3. After hearing both the parties and considering the prevailing situation in the condition on account of covid-19 pandemic and the relaxation so provided in filing the appeal, the delay in filing the present appeal is condoned and the appeal is admitted for adjudication.

4. During the course of hearing, the Id. AR submitted that the appellant is an agent for providing various types of services to interested parties connected with Transport Department of the Government of the state, which inter alia includes getting Road Permits, Route Permits, Driving Licenses, Fitness Certificates etc. for the vehicles. In this process, he gets cash/ cheques from parties out of which major part pertains to payment of fees to the transport department. The appellant deposits such cash/ cheque in his account and makes payment of such fees to the department through cheque/ online payments. Some part of the receipts from parties is retained by the appellant as his service charges. In the return, the appellant had shown his nature of business as "Trading - Others" and had declared that he had received gross income of Rs. 6,40,800/- and had offered a sum of Rs. 1,40,300/- as net income. The case was selected for scrutiny and various notices were issued by the Id. AO but same were not complied with due to one or the other reason. The Id. AO for completing the assessment collected bank statements of the appellant from respective bank and found that the appellant had deposited cash of Rs. 84,47,450/- in his bank accounts during the year under consideration. Based on non compliances, the Id. AO opined that such cash deposit entries are treated as unexplained. However, he recorded a very categorical finding that the assessee made various debit entries through cheques or transfer and based on this fact, he assessed a sum of Rs. 8,44,745/- being 10% of cash deposits as net income of the assessee. The said order of the Id. AO passed u/s 144 r.w.s. 143(3) of the Act was challenged in appeal before the Id. CIT (Appeals), Ajmer and is pending as of now. The Id. Pr, CIT, Ajmer examined the assessment records and alleged that as per opinion of the Id. AO, the whole amount of cash deposit was to be treated as unexplained u/s 68 whereas he had assessed the income only at 10% of the cash so deposited and hence the order has been held to be erroneous and prejudicial to the interest of Revenue. Hence

by the impugned order, he has set aside the order of the Id. AO and instructed for making fresh order in the manner prescribed by him.

5. It was submitted by the Id AR that it is quite apparent from the order of the Id. AO that there were various withdrawals also in the various bank accounts of the appellant and hence he arrived at a satisfaction that whole amount of cash deposit cannot be treated as income and he applied 10% of such cash deposit for assessing the net income of the appellant. Under these circumstances, it cannot be presumed that the order passed by the Id. AO was erroneous so far as prejudicial to the interest of Revenue. It seems that the Id. Pr. CIT has only gone on the wordings of the Id. AO which he has mentioned on page 2 (Last para) and page 3 (Top Line) but did not care to see that in the bank accounts various debits are also appearing and therefore whole cash deposit cannot be assessed as undisclosed income. The AO has passed the order after careful examination of the bank accounts. Further the Id. Pr. CIT did not consider the details furnished by the appellant in the return. In the return the appellant had disclosed a sum of Rs. 6,40,800/- as his gross receipts which was his gross commission and after deducting expenses for running his business, he has offered Rs. 1,40,300 as his income from this business, against which the Id. AO has estimated the income at Rs. 8,44,745/-. Hence the order passed by the Id. Pr. CIT is bad in law and is required to be quashed. Reliance in this regard is placed on the judgment of the Hon'ble Mumbai High Court in the case of Pr. CIT v/s Cartier Leafin P. Ltd. (268 Taxman 222) (2020) wherein the Id. Pr. CIT passed order u/s 263 on account of lack of enquiry by the Id. AO on account of claim of operating loss of Rs. 8.80 Crores. The Hon'ble Mumbai High Court quashed the order by holding that from the order of the Id. AO, it was quite verifiable that the Id. AO had examined the documents available with him before passing the order. In the instant case also, it is discernible from the order of the Id. AO that he had bank statements of the appellant wherefrom he

verified that there were various debit entries also in the bank account and hence it cannot be said that the Id. AO had passed the order without application of mind. It is therefore requested that the present order of the Id. Pr. CIT may please be quashed.

6. It was further submitted that the main issue in the assessment order passed by the Id. AO was about cash deposit in the bank accounts of the appellant and the estimation of income has been challenged before the Id. CIT(Appeals). After preferring such appeal, the Id. CIT (Appeals) is vested with coterminous powers of AO and he is having powers to reduce and enhance the assessment. Therefore exercise of powers by Pr. CIT under section 263 of the Income Tax Act, 1961 on the issue which is subject matter of appeal before an officer of equal rank is not correct. It is therefore sincerely requested that the order passed by the Id. Pr. CIT is illegal and may kindly be quashed.

7. Per contra, the Id. DR submitted that during the course of assessment proceedings, the assessee neither attended to the various notices issued by the Assessing Officer nor any written submissions were filed and even the assessee failed to respond to the final show-cause notice issued by the Assessing Officer dated 30.11.2017. It was submitted that the Assessing Officer accordingly completed the assessment u/s 144 read with section 143(3) considering that the cash deposits totaling to Rs. 84,47,450/- as unexplained income from undisclosed sources. It was submitted that once the Assessing Officer has reached such a conclusion then the entire amount of cash deposit should have been brought to tax u/s 68 of the Act. However, the Assessing officer has made the addition only to the extent of 10% of such cash deposits which has rendered the assessment order erroneous in so far as prejudicial to the interest of the Revenue. It was further submitted that the tax was also calculated at normal rate instead of 30% as per section 115BBE of the Act.

8. It was further submitted by the Id DR that during the revisionary proceedings, the assessee was issued a show cause and he submitted that his main source of income of the assessee was from Services/Commission in respect of RTO services to transporters. However, no documentary evidence has been filed in support of his contention in terms of receipt and payment in relation to such services. Regarding the contention of the assessee that the assessee had preferred in appeal before the Id. Pr. CIT, it was submitted that no supporting evidence was furnished before the Id. Pr. CIT and even if the appeal has been filed by the assessee, the Id Pr. CIT continue to enjoy the jurisdiction u/s 263 so long as the matter had not been considered and decided in such appeal. He accordingly supported the order of the Id. Pr. CIT and submitted that there is no infirmity in the exercise of his jurisdiction u/s 263 and passing of the necessary directions wherein the matter has been set aside to the file of the Assessing Officer for passing a fresh order after carrying out necessary enquiry and providing reasonable opportunity to the assessee.

9. We have heard the rival contentions and perused the material available on record. We refer to the relevant findings of the Assessing officer and the same reads as under:

*"9. During the assessment proceedings, on the perusal of bank account statements and ITS detail of the assessee, it was observed that assessee has made various cash deposit transaction in his bank accounts totaling to Rs. 84,47,450/- and made various debit entries to various persons/entities through cheques or transfer. In the absence of any reply/detail and verification, such cash deposit entries are treated as unexplained. Hence, I hold that assessee had deposited cash of Rs. 84,47,450/- in his bank account out of his income from undisclosed sources.*

*In view of the above discussion and taking a reasonable view, I made an addition of Rs. 8,44,745/- (10% of total cash deposit i.e. Rs. 84,47,450/) to the total income of the assessee under the head income from other sources.*

*Penalty proceedings u/s 271(1)(c) are being initiated separately for concealing and furnishing inaccurate particulars of income."*

10. We find that the Assessing officer has recorded a finding that cash deposit in the assessee's bank account is out of income from undisclosed sources and thereafter, he has held that taking a reasonable view, 10% of such deposits are to be brought to tax as income from other sources. Once he has arrived at a finding that the whole of the deposits are from undisclosed sources and remain unexplained and then instead of bringing the whole of such deposits to tax and bringing only 10% of such deposits to tax is clearly erroneous. Further, the basis of arriving at 10% of such deposits as income has not been spelt out and therefore, there is clearly an inconsistency between these findings and arriving at the taxable income and the order so passed is clearly erroneous and prejudicial to the interest of the Revenue. Given that the assessee has failed to respond to the show-cause issued by the AO and there was no explanation/submissions filed by the assessee before the AO, it would be wrong to assume that the AO had considered the nature and impact of the debit entries so reflected in the bank statements while arriving at the taxable income. At the same time, considering the contention of the Id AR that main source of income of the assessee was from Services/Commission in respect of RTO services to transporters and in the bank accounts, there are various debit entries in terms of payments in relation to such services which can be duly explained and therefore whole cash deposit cannot be assessed as undisclosed income, we direct the AO to verify such debit entries and consider the explanation of the assessee as may be submitted besides the credit entries in

the bank accounts, and taking into consideration the income already disclosed in the return of income, arrive at the taxable income afresh as per law after providing reasonable opportunity to the assessee. Accordingly, the order so passed by the Id Pr CIT is modified to this extent.

11. Regarding the contention of the Id AR that an appeal has been preferred against the assessment order before the Id CIT(A) and therefore, the matter is beyond the jurisdiction of the Id Pr CIT u/s 263, we find that though there is no dispute that the assessee has preferred an appeal before the Id CIT(A), however, such an appeal has been delayed filed and there is nothing on record that the delay has been condoned and the appeal has been admitted for adjudication and in such a situation, it cannot be held that mere filing an appeal where such appeal has not even been admitted for adjudication act as an estoppel in exercise of jurisdiction by the Pr. CIT u/s 263 of the Act. In any case, the Id AR has stated at the Bar that the assessee didn't wish to press ground no. 3 relating to clause (c) to explanation 1 to section 263 where it has been clearly spelt out that powers of the Pr CIT shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in an appeal. In the instant case, where the appeal has not even been admitted for adjudication by the Id CIT(A), the question of subject matter of appeal been considered and decided in such appeal doesn't arise and therefore, the doctrine of merger of the assessment order with that of the appellate order doesn't arise for consideration and thus, in the instant case, there is no bar on exercise of jurisdiction of Id. Pr CIT u/s 263 of the Act. The ground no. 2 and 3 are thus dismissed.

In the result, appeal of the assessee is disposed off in light of aforesaid directions.

Order pronounced in the open Court on 07/12/2020.

Sd/-  
( संदीप गोसाई )  
(Sandeep Gosain)  
न्यायिक सदस्य / Judicial Member

Sd/-  
(विक्रम सिंह यादव)  
(Vikram Singh Yadav)  
लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 07/12/2020

\*Ganesh Kr.

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

1. अपीलार्थी / The Appellant- Sh. Ashok Kumar Mittal, Nasirabad
2. प्रत्यर्थी / The Respondent- The PCIT, Ajmer
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File {ITA No. 301/JP/2020}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar

