

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

**BEFORE SHRI C.N. PRASAD (JUDICIAL MEMBER) AND
SHRI S. RIFAUR RAHMAN (ACCOUNTANT MEMBER)**

**ITA No. 3418/MUM/2019
Assessment Year: 2015-16**

R.S. Diamonds Private Limited,
1402, A Wing, Naman Midtown, Dr.
Ambedkar Nagar, Senapati Bapat
Marg, Elphinston West,
Mumbai-400013.
PAN No. AADCR 2142 J
Appellant

Vs. Principle Commissioner of Income
Tax,
Room No. 501, 5th floor, Aayakar
Bhavan, M.K. Road,
Mumbai-400020.
Respondent

Assessee by : Mr. Madhur Agrawal, AR
Revenue by : Mr. Ajay Kumar &
Mr. Bharat Andhale, DRs

Date of Hearing : 07/06/2021
Date of pronouncement : 03/09/2021

ORDER

PER S. RIFAUR RAHMAN, A.M.

This is an appeal filed by the assessee. The relevant assessment year is 2015-16. The appeal is directed against the order passed by the Pr. Commissioner of Income Tax-5, Mumbai (in short 'Pr. CIT') u/s 263 of the Income Tax Act 1961, (the 'Act').

2. Brief facts of the case are, the assessee filed its return of income for assessment year (AY) 2015-16 on 30.09.2015 declaring loss of

Rs.2,78,97,977/-. The case was selected for scrutiny under CASS and statutory notices u/s 143(2) and 142(1) were served on the assessee. The assessment was completed u/s 143(3) of the Act on 27.12.2017. The assessee is engaged in the business of trading including import and export of rough and polished diamonds gems and jewellery.

3. Ld. Pr. CIT-5, Mumbai during verification of the assessment records, he observed that the case was selected for complete scrutiny through CASS. One of the reasons for selection was the larger specific domestic transaction. He observed that the Assessing Officer did not refer T.P. Authority for determination of arm's length price (ALP) of domestic transactions and assessment was completed without the same. Further, he observed that the AO has not verified stock details of sales and purchases of diamond. The Ld. Pr. CIT observed that in his order that notice u/s 263 was issued on 05.03.2019 and in response to the above notice the assessee attended and filed reply vide letter dated 11.03.2019 with the enclosures. He observed that with regard to stock details of sales and purchases of diamond it is stated that details of purchases submitted includes purchase of diamonds as well as jewellery thus total quantity 2006.82 carats as referred in the captioned notice is wrongly construed as total quantity of purchase of diamonds only and compared with the actual quantity reported in the financial/tax audit report related to purchase of diamond. Similarly, on sale side, sale of diamond has not been suppressed. The diamond studded in jewellery sold. Hence, total sale includes sale of diamonds also.

4. Further, considering the submissions of the assessee, the Ld. Pr. CIT concluded that there was a *prima facie* no verification relating to the excess

purchases on diamond sales suppression of sale as shown by the assessee. He observed that this needs verification. Further he observed that Assessing Officer passed the assessment order u/s 143(3) of the Act without proper verification of the issue and without referring case to the T.P. Authority for determination of ALP. Accordingly, the assessment order passed by the Assessing Officer was cancelled/set aside and Assessing Officer was directed to verify the stock register and refer the matter to T.P. Authorities that determination of ALP.

5. Aggrieved with the above order the assessee is in appeal before us raising following grounds of appeal :

1. *On the facts and in the circumstances of the case and in law, the Pr. CIT has erred in cancelling / setting aside the assessment order passed by The Assessing Officer (AO) u/s. 143(3) of The Income-tax Act, 1961 ("the Act") by invoking the provisions of section 263 of the Act.*
2. *On the facts and in the circumstances of the case and in law the Pr. CIT erred in holding That the assessment order is erroneous as the AO has not verified The stock details during the course of the assessment proceedings under section 263 of the Act.*
3. *On the facts and in the circumstances of The case and in law the Pr. CIT erred in holding that the assessment order is erroneous as the AO has not refer the case to Transfer Pricing Authority for determination of arm's length price of The alleged specified domestic transaction, without appreciating that clause (i) of Section 92BA of the Act has been omitted by the Finance Act, 2017.*

6. Before us, the Ld. AR submitted that during the original assessment proceedings, the assessee has filed all the information asked by the Assessing Officer vide notice u/s 142(1) of the Act. He brought to our notice page 16-17 of the Paper Book (P/B) in which the assessee has filed details of business activity, the details of purchases and sales. Further, he submitted that the assessment was completed after complete verification of the details submitted by the assessee before the Assessing Officer.

7. He brought to our notice, the findings of the Pr. CIT in his order and submitted that Ld. CIT has raised the issue of non-verification by the AO but he did not give any findings. Further, he submitted that the assessee has submitted complete details of purchases and sales before the Assessing Officer and relevant details are filed on page 61 of the P/B. Further, he brought to our notice page 77 of the P/B where the assessee has explained the jewellery sales which includes diamonds. He also brought to our notice page 134 of the P/B which is tax audit report submitted by the auditor of the company. It clearly indicates the books were audited by the independent auditor further he brought to our notice page 144 of the P/B in which the tax audit report has given quantity details relating to cut and polished diamonds and separate details of jewellery, which is exactly same details which was submitted before the Pr. CIT on 11.03.2019. The relevant letter is placed at page 6 of the P/B. Further, he brought to our notice at page 7 of the P/B, the reconciliation of quantity purchase and sale are filed before Pr. CIT. Therefore, he submitted that the Assessing Officer has verified all these details and the query raised by the Pr. CIT is clearly explained before him. Even though, the Pr. CIT has cancelled the order without giving any finding. For this proposition, he relied on the case of *Commissioner of Income-tax, Mumbai v. Amitabh Bachchan* [2016] 69 taxmann.com 170 (SC). The order passed u/s 263 be set aside.

8. On the other hand, the Ld. DR relied on the findings of Pr. CIT and submitted that the main reasons for cancelling the assessment order is for not reference to the TPO. In this regard, he relied on the *Ranbaxy Laboratories Ltd. vs. The Commissioner of Income Tax* (ITA No. 504 of 2008) dated 18.11.2011.

In response, the Ld. AR of submitted that non-reference to the TPO was never raised the issue by the Pr. CIT in notice issued u/s 263 of the Act. Therefore, the Pr. CIT has not issued any notice on this particular issue before hand.

9. Considered the rival submissions and material on record. We notice that the Ld. Pr. CIT has issued notice u/s 263 of the Act by raising non-verification of the purchases and sales and he observed that there is difference in stock details of purchases and sales of diamonds based on the detail submitted by the assessee which also includes jewellery. Based on the information filed before us, we notice that this particular issue was submitted before the Assessing Officer and quantity details were also audited by an independent auditor. The Assessing Officer deemed to have verified the information which was submitted before him and the same information was also submitted before Pr. CIT. We noticed from the 263 order that Pr. CIT has not verified the information submitted before him and also not given any findings. The Hon'ble Supreme Court in the case of *Amitabh Bachchan* (supra) has held as below:

“The power of appeal and revision is contained in Chapter XX of the Act which includes section 263 that confers suo motu power of revision in the Commissioner. The different shades of power conferred on different authorities under the Act has to be exercised within the areas specifically delineated by the Act and the exercise of power under one provision cannot trench upon the powers available under another provision of the Act. In this regard, it must be specifically noticed that against an order of assessment, so far as the revenue is concerned, the power conferred under the Act is to reopen the concluded assessment under section 147 and/or to revise the assessment order under section 263. The scope of the power/jurisdiction under the different provisions of the Act would naturally be different. The power and jurisdiction of the revenue to deal with a concluded assessment, therefore, must be understood in the context of the provisions of the relevant sections. While doing so, it must also be borne in mind that the legislature had not vested in the revenue any specific power to question an order of assessment by means of an appeal. [Para 9]

Reverting to the specific provisions of section 263 what has to be seen is that a satisfaction that an order passed by the Authority under the Act is erroneous and prejudicial to the interest of the

revenue is the basic pre-condition for exercise of jurisdiction under section 263. Both are twin conditions that have to be conjointly present. Once such satisfaction is reached, jurisdiction to exercise the power would be available subject to observance of the principles of natural justice which is implicit in the requirement cast by the section to give the assessee an opportunity of being heard. It is in the context of the above position that this Court has repeatedly held that unlike the power of reopening an assessment under section 147, the power of revision under section 263 is not contingent on the giving of a notice to show cause. In fact, section 263 has been understood not to require any specific show-cause notice to be served on the assessee. Rather, what is required under the said provision is an opportunity of hearing to the assessee. The two requirements are different; the first would comprehend a prior notice detailing the specific grounds on which revision of the assessment order is tentatively being proposed. Such a notice is not required. What is contemplated by section 263, is an opportunity of hearing to be afforded to the assessee. Failure to give such an opportunity would render the revisional order legally fragile not on the ground of lack of jurisdiction but on the ground of violation of principles of natural justice. [Para 10]

It may be that in a given case and in most cases it is so done that a notice proposing the revisional exercise is given to the assessee indicating therein broadly or even specifically the grounds on which the exercise is felt necessary. But there is nothing in the section to raise the said notice to the status of a mandatory show-cause notice affecting the initiation of the exercise in the absence thereof or to require the Commissioner to confine himself to the terms of the notice and foreclosing consideration of any other issue or question of fact. This is not the purport of section 263. Of course, there can be no dispute that while the Commissioner is free to exercise his jurisdiction on consideration of all relevant facts, a full opportunity to controvert the same and to explain the circumstances surrounding such facts, as may be considered relevant by the assessee, must be afforded to him by the Commissioner prior to the finalization of the decision. [Para 11]

In the instant case, there is no dispute that in the order passed by the Commissioner under section 263 findings have been recorded on issues that are not specifically mentioned in the show-cause notice though there are three issues mentioned in the show-cause notice which had specifically been dealt with in the order passed under section 263. [Para 12]

Insofar as findings contained in the order of the Commissioner beyond the issues mentioned in the showcause notice is concerned, the Tribunal taking note of the aforesaid admitted position held that the order under section 263 was violative of principles of natural justice as far as the reasons, which formed the basis for the revision but were not part of the show-cause notice issued under section 263 were concerned. [Para 12]

The above ground which had led the Tribunal to interfere with the order of the Commissioner seems to be contrary to the settled position in law, as indicated above and the two decisions of this Court in Gita Devi Aggarwal v. CIT [1970] 76 ITR 496 and CIT v. Electro House [1971] 82 ITR 824. The Tribunal in its order had not recorded any finding that in course of the suo motu revisional proceedings, hearing of which was spread over many days and attended to by the authorized representative of the assessee, opportunity of hearing was not afforded to the assessee and that the assessee was denied an opportunity to contest the facts on the basis of which the Commissioner had come to his conclusions as recorded in the order passed under section 263. Despite the absence of any such finding in the order of the Tribunal, before holding the same to be legally unsustainable, the Court will have to be satisfied that in the course of the revisional

proceeding the assessee, actually and really, did not have the opportunity to contest the facts on the basis of which the Commissioner had concluded that the order of the Assessing Officer is erroneous and prejudicial to the interests of the revenue. The above is the question to which the Court, therefore, will have to turn to. [Para 13]

On consideration of the order of the Assessing Officer as well as the order of the Commissioner it appears that the Commissioner, in the course of the revisional proceedings, had scrutinized the record of the proceedings before the Assessing Officer and noted the various dates on which opportunities to produce the books of account and other relevant documents were afforded to the assessee which requirement was not complied with by the assessee. In these circumstances, the revisional authority took the view that the Assessing Officer, after being compelled to adjourn the matter from time to time, had to hurriedly complete the assessment proceedings to avoid the same from becoming time barred. In the course of the revisional exercise, relevant facts, documents, and books of account which were overlooked in the assessment proceedings were considered. On such re-scrutiny it was revealed that the original assessment order on several heads was erroneous and had the potential of causing loss of revenue to the State. It is on the aforesaid basis that the necessary satisfaction that the assessment order was erroneous and prejudicial to the interests of the revenue was recorded by the Commissioner. At each stage of the revisional proceeding the authorized representative of the assessee had appeared and had full opportunity to contest the basis on which the revisional authority was proceeding/had proceeded in the matter. If the revisional authority had come to its conclusions in the matter on the basis of the record of the assessment proceedings which was open for scrutiny by the assessee and available to his authorized representative at all times, it is difficult to see as to how the requirement of giving of a reasonable opportunity of being heard as contemplated by section 263 had been breached in the present case. The order of the Tribunal insofar as the first issue, i.e., the revisional order going beyond the show-cause notice is concerned, therefore, cannot have acceptance. The High Court having failed to fully deal with the matter in its cryptic order, the said order is not tenable and is liable to be interfered with. [Para 14]"

Respectfully following the same, we reject the contention of the Ld. Pr. CIT that the AO has not verified the stock details. The assessee supplied all the information before him. The Ld. Pr. CIT has no jurisdiction u/s 263 to verify the same.

With regard to other issue of non-reference to TPO for determination the ALP. It is brought to our notice that Pr. CIT has not issued any notice before invoking this new issue. Further, we observe that Pr. CIT has not clearly brought on record how the case of assessee is falling under T.P. adjustment. We notice that provisions of section 92BA is applicable only to the cases of assessees, who

claim deduction u/s 40A sub-section (2)(b), transaction falling u/s 80IA sub-section (10) and transactions falling u/s 115AB.

On verification of the return of income filed by the assessee we notice that the assessee has not claimed any benefit in any of the above sections. Therefore, in our considered view, without issuing any notice to assessee on this issue and without giving a chance of being heard to the assessee. The Pr. CIT cannot invoke transfer pricing provisions and without giving reasons, how the TP provision is attracted. Therefore, with the above observations, we are inclined to set aside the order passed u/s 263. Accordingly, the grounds raised by the assessee are allowed.

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

Order pronounced in the open Court on 03/09/2021.

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Mumbai;
Dated: 03/09/2021
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