

**IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH : BANGALORE**

**BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER**

ITA No.163/Bang/2021
Assessment Year : 2016-17

M/s. Marougen Edu Foundation, No.17/1, Campbell Road, Austin Town, Bengaluru – 560 047. PAN : AABTM 0820 F	Vs.	The Principal Commissioner of Income Tax (Central), Bengaluru.
APPELLANT		RESPONDENT

Appellant by	:	Smt. Suman Lunkar, CA
Respondent by	:	Shri. Muzaffar Hussain, CIT(DR)(ITAT), Bengaluru

Date of hearing	:	13.09.2021
Date of Pronouncement	:	14.09.2021

ORDER

Per N. V. Vasudevan, Vice President:

This is an appeal by the assessee against the order dated 15.03.2021 of the Pr.CIT (Central), Bengaluru, relating to AY 2016-17.

2. The assessee is a society registered under the Karnataka Societies Registration Act, 1960. For Assessment Year 2016-17, the assessee filed return of income declaring Nil income. In the course of assessment proceedings, the AO issued a notice dated 03.12.2018 in which the AO pointed out that there was a survey under section 133A of the Income Tax Act, 1961 (Act) conducted in the premises of the assessee on 03.11.2016. The AO has also mentioned in the said notice that the documents impounded at the time of survey show that the assessee which claims exemption under

sections 11 to 13 of the Act had made certain payments out of trust money which were in violation of provisions of sections 11 to 13 of the Act. The AO has listed out the impounded documents and also has made reference to the fact that the impounded documents pertain to Assessment Years 2012-13 to 2016-17.

3. The assessee filed a reply to the said notice dated 10.12.2019 taking a stand that the seized material does not pertain to the assessee and was a record of transactions of third party and that the third party has offered income arising out of the impounded documents in the return of income filed by them.

4. The AO passed an Assessment Order dated 31.12.2018 observing as follows:

“After verification of the CASS reasons, the assessment is completed accepting the return of income”.

5. The CIT in exercise of his powers under section 263 of the Act was of the view that the aforesaid order of the AO was erroneous and prejudicial to the interest of the Revenue because a Survey was conducted in assessee's premises on 03.11.2016. During the course of the Survey, documents called NR Vouchers (Not Recorded Vouchers) were impounded. On analysis of the documents, it transpired that the assessee was paying commission to the agents for getting students admitted into the colleges run by the assessee as 'Marketing Charges'. It was also noticed in various instances that the salary of the college staff was paid in cash and not accounted in regular books of accounts. The assessee has been generating cash which has not been

recorded in books and Sri Thomas P John, the Trustee has admitted these cash transactions as his income which has been protectively assessed in his hands for A.Y.2014-15 to 2017-18. Since the Trust has deviated from its core objective from promoting the education and has made it a commercial business by paying commission to agents by diverting the Trust funds for personal benefits of the Trustees. Still the sum of Rs.10,34,900/- was not brought to tax in the assessment order on substantive basis which was offered as income in the hands of Thomas P. John and the same was assessed protectively in his hands which is prejudicial to the interest of the Revenue. The CIT was of the view that assessment order dated 31.12.2018 for A.Y.2016-17 was passed without making proper verification which is erroneous and prejudicial to the interest of Revenue.

6. In reply of the aforesaid show cause notice, the assessee submitted that the NR vouchers that were impounded at the time of survey do not belong to the trust and that one Mr. Thomas P John has owned the NR vouchers. The assessee also submitted that the AO made enquiries by issue of a notice dated 03.12.2018 and the assessee had given a reply to the said notice and the AO after taking cognizance of the reply has accepted the stand of the assessee and therefore the order of the AO cannot be said to be erroneous and prejudicial to the interest of the Revenue as the AO had made proper enquiries before concluding the assessment.

7. The CIT however did not accept the claim of the assessee and he set aside the order of the AO for passing a fresh Assessment Order for the following reasons:

“5. I have considered the assessee's submissions. I have also gone through the assessment records. It is true that the A.O. had issued a Show Cause Notice on the basis of incriminating, impounded materials, but it is also a fact that the A.O. did not take into consideration these impounded materials at the time of passing of assessment order for A.Y.2016-17. This Show Cause Notice had been issued for both the A.Ys.2016-17 and 2017-18. It is seen that the A.O. has taken these impounded materials into consideration while passing Assessment Order for A.Y.2017-18 and has made an addition of Rs.63,00,376/- to the income of the assessee Trust u/s.13(1)(c)(ii) of the Income-tax Act, 1961. The very action of completely ignoring the materials while passing the assessment order for A.Y.2016-17 and relying upon the same materials while passing the Assessment Order for A.Y.2017-18 by making the additions/disallowance on the basis of them itself makes the assessment order for A.Y.2016-17 erroneous so far as it is prejudicial to the interest of Revenue.

6. As discussed in the assessment order for A.Y.2017-18, the nature of this impounded materials clearly evidence the violation of the provisions of Section 13(1)(c)(ii) of the Income-tax Act, 1961. Since the A.O. failed to discuss these impounded materials in the assessment order for A.Y.2016-17, hence, it is held that the assessment order passed for A.Y.2016-17 is erroneous so far as it is prejudicial to the interest of the Revenue and the same has been passed without making inquiries into the violations of the Statutory Provisions as evidenced by impounded material. Accordingly, this order is set aside to the file of A.O. for passing a fresh assessment order after duly considering these impounded materials and after giving proper opportunity of being heard to the assessee.”

8. Aggrieved by the order of the CIT, the assessee is in appeal before the Tribunal. The main submission of the learned Counsel for the assessee was that the AO made proper enquiries before concluding the assessment and just because the order does not make any specific reference to the submissions, it cannot be said that the order passed is erroneous. In this regard, learned Counsel for the assessee placed reliance on the decision of

the Hon'ble Bombay High Court in the case of CIT Vs. Reliance Communications Ltd., (2016) 69 taxmann.com 103 (Bombay) wherein the Hon'ble Court held as follows:

“10. In the case before us, the concession of the assessee's authorized representative apart, what the Tribunal found and on all the three items highlighted by Mr. Tejveer Singh is that there were materials before the Assessing Officer. The Assessing Officer made enquiries about the above referred aspects and which have been noted by the Commissioner. The assessee made submissions by placing all relevant documents before the Assessing Officer. Thus the case does not fall within the parameters laid down in the decision of the Hon'ble Supreme Court and other High Courts. The Mere fact that the Assessing Officer did not make any reference to these three issues in the assessment order cannot make the order erroneous when the issues were indeed looked into. The entire details were filed and the order itself indicates that it can be inferred that the Assessing Officer not only made enquiries, but satisfied himself with the assessee's replies furnished from time to time in support of its stand. When the Tribunal concludes in this manner and finally in paragraph 16 holds that the Assessing Officer took a perfectly corrector a possible view, then, the order passed by him cannot be termed as erroneous insofar as it is prejudicial to the interest of the Revenue The Commissioner of Income Tax was not, therefore, justified in invoking section 263 of the Act.”

9. Learned DR relied on the order of the CIT(A) and the reasons given in the impugned order.

10. We have given a careful consideration to the rival submissions. From the reply given to the show cause notice under section 263 of the Act by the assessee dated 01.03.2021, it is clear that some of the impounded documents related to Assessment Year 2016-17. This is clear from the following paragraph of the said reply:

“25. In any case and without prejudice, we submit that Sri. T John a Trustee of our foundation had in order to buy peace and to avoid protracted proceedings offered this sum of Rs.10,34,000/- as his income for AY 2016-17 and has paid taxes thereon. A copy of the computation of his income for AY 2016-17 is enclosed. The income which has suffered the tax in the hands of the trustee, same cannot be again taxed in the hands of our foundation.”

11. The order passed by the AO accepting the return of income does not make any reference to any of the arguments put forward on behalf of the assessee and has merely accepted the return of income filed by the assessee. In fact, the assessment of the sum of Rs.10,34,000/- was on protective basis in the hands of Thomas P. John and therefore why substantive addition was not made on the assessee ought to have been set out by the AO in his Order of Assessment. The learned Counsel for the assessee has placed reliance on the decision of the Hon'ble Bombay High Court in the case of Reliance Communications Ltd., (supra). However, we find that the Hon'ble Karnataka High Court in the case of CIT Vs. Infosys Technologies Ltd., in ITA No.588/2006 judgment dated 04.01.2012 has taken a contrary view. The Hon'ble Karnataka High Court had to deal with the following question of law:

- “1. Whether the Tribunal was correct in holding that the commissioner exercising Jurisdiction under Section 263 of the Act by holding that the Assessing Officer should rework the credit in respect of Canadian and Thailand Tax claimed under Double Taxation Avoidance Agreement (DTAA) without specifying the error in the original order sought to be revised and how it was erroneous and prejudicial to the interest of the revenue.*
- 2. Whether the Tribunal committed an error in failing to appreciate that in accordance with the DTAA Clause 23 entered into by the Indian Government with the Canadian Government as well as the Thailand Government the income which fall part of total turnover and the consequential TDS claimed in Canada and Thailand cannot be allowed in India when computing the total deduction.*

3. Whether the Tribunal committed an error in holding that the judgment of the Hon'ble Supreme Court in the case of Hind Wire Industrial Ltd cannot be made applicable when jurisdiction under Section 263 of the Act is invoked."

12. The Hon'ble Court held as follows:

"26. We are also not in a position to accept the submission that the materials had been placed before the assessing authority and therefore there should be a conclusion that the authority has applied his mind to the same and there was no question of the commissioner interfering by taking a different view etc.

27. Assessing authority performs a quasi-judicial function and the reasons for his conclusions and findings should be forthcoming in the assessment order. Though it is urged on behalf of the assessee by its learned counsel that reasons should be spelt out only in a situation where the assessing authority passes an order against the assessee or adverse to the interest of the assessee and no need for the assessing authority to spell out reasons when the order is accepting the claim of the assessee and the learned counsel submit that this is the legal position on authority, we are afraid that to accept a submission of this nature would be to give a free hand to the assessing authority, just to pass orders without reasoning and to spell out reasons only in a situation where the finding is to be against the assessee or any claim put forth by the assessee is denied.

28. We are of the clear opinion that there cannot be any dichotomy of this nature, as every conclusion and finding by the assessing authority should be supported by reasons, however brief it may be, and in a situation where it is only a question of computation in accordance with relevant articles of a double taxation avoidance agreements and that should be clearly indicated in the order of the assessing authority, whether or not the assessee had given particulars or details of it. It is the duty of the assessing authority to do that and if the assessing authority had failed in that, more so in extending a tax relief to the assessee, the order definitely constitutes an order not merely erroneous but also prejudicial to the interest of the revenue and therefore while the commissioner was justified in exercising the jurisdiction under Section 263 of the Act, the tribunal was definitely not justified in interfering with this order of the commissioner in its appellate jurisdiction.

29. Therefore, we answer the question posed for our answer in the negative and against the assessee. Both appeal are allowed. Parties to bear their respective cost."

13. In short, the Hon'ble Karnataka High Court took the view that if the order of the AO does not disclose the basis of his conclusion, then jurisdiction u/s 263 of the Act can be ignored. Therefore, the CIT was justified in directing the AO to examine the allowability of these items of expenditure. The assessee is always at liberty to show as to how the

material found in the survey was not sufficient to make any additions in the hands of the assessee. We, therefore, confirm the order of the CIT.

14. In the result, appeal of the assessee is dismissed.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-
(CHANDRA POOJARI)
ACCOUNTANT MEMBER

Sd/-
(N. V. VASUDEVAN)
VICE PRESIDENT

Bangalore,
Dated : 14.09.2021.
/NS/*

Copy to:

1. Appellant 2. Respondent 3. CIT 4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.