

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "A" NEW DELHI**

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
Dr. B.R.R. KUMAR, ACCOUNTANT MEMBER**

I.T.A. No.1104/DEL/2020
Assessment Year: 2015-2016

Auto Engineers Services Centre, Petrol Pump, Opp. Alpana Cinema Mall Road, Model Town, New Delhi.	vs.	Pr.CIT, New Delhi.
TAN/PAN: AAHFA8720C		
(Appellant)		(Respondent)

Appellant by:	Shri P. Roy Chauduri, Adv.		
Respondent by:	Shri Satpal Gulati, CIT-D.R.		
Date of hearing:	14	07	2021
Date of pronouncement:	11	10	2021

ORDER

PER AMIT SHUKLA, JM

The aforesaid appeal has been filed by the assessee against the impugned order dated 07.02.2020, passed by Ld. Principal Commissioner of Income Tax-XII, Delhi in his revisionary jurisdiction u/s.263 for the Assessment Year 2015-16. In the grounds of appeal, the assessee has raised following grounds:-

- 1. That on facts and in the circumstances of the case, the learned Principal CIT erred in issuing notice u/s.263 and subsequently passing the impugned order dated 07.02.2020 u/s.263 in the name of the appellant assessee.*

2. That on facts and in the circumstances of the case, the learned Principal CIT erred in assuming his jurisdiction u/s.263 of the I.T. Act, whereas the mandatory conditions for assuming such jurisdiction were totally absent, with the result that the impugned order passed u/s. 263 is bad in law.

3. That on the facts and in the circumstances of the case, the learned Principal CIT erred in arriving at a conclusion without any basis whatsoever to the effect that the assessment order passed by the Assessing Officer was erroneous as well as prejudicial to the interest of the revenue.

4. That on the facts and circumstances of the present case the learned Principal CIT failed to appreciate that there is no error apparent from the record within the meaning of section 263 of the I.T. Act, 1961.

5. That on the facts and in the circumstances of the case, the learned Principal CIT erred in setting aside the assessment order passed by the Assessing Officer on 09.10.2017 u/s 143(3) of I.T. Act and further in directing the Assessing Officer to examine the issue in a particular manner.

6. That on the facts and in the circumstances of the case and in law, the learned Principal CIT erred in not himself conducting necessary/proper enquiry and verification of issues mentioned in the notice issued u/s. 263 of the Act and setting aside the assessment order for a de-novo adjudication which is wrong and contrary to the provisions of the Act, and the Rules made thereunder.

7. That on the facts and in the circumstances of the case and in law, the learned Principal CIT passed an Order which borders on

perversity because the explanation/reply furnished by the Appellant/Assessee was simply brushed aside without passing a speaking Order as to how the explanation/case laws furnished by the Appellant/Assessee are not applicable in the facts of the present case.”

2. The facts in brief are that the assessee is doing business as a petrol pump dealer of Indian Oil Corporation, whereby it purchases petrol and diesel from Indian Oil Corporation after making advance payments and selling the same on retail basis. For the year under consideration, the assessee had filed its return of income on 13.09.2015 at an income of Rs.25,84,760/-. Thereafter, the case was selected for limited scrutiny through CASS on the following reasons:

- *Low income shown by large contractors. The Appellant filed reply before the Ld. AO.*
- *Mismatch in amount paid to related persons u/s 40(A)(2)(b) reported in Audit Report and ITR. The Appellant filed reply before the Ld. AO.*
- *Higher turnover reported in Service Tax Return compared to ITR and assessee deposited large amount of cash in savings bank account. The Appellant filed reply before the Ld. AO.”*

3. Thereafter, the ld. Assessing Officer issued questionnaires and notices on the above mentioned issues and also called for books of account and agreements from Indian Oil Corporation which were duly produced and examined by the Assessing Officer. Thereafter, the Assessing Officer after perusing the relevant purchase and sale bills and

vouchers in respect of expenses etc, completed the assessment at an income of Rs. 26,56,570/- vide order dated 09.10.2017, after making certain additions on account of expenses debited to the P&L account.

4. Thereafter, the ld. Pr.CIT in his revisionary jurisdiction u/s 263 has made following observations regarding assessment order:

“3. On examination of case records, it has been found that the assessee has shown sale of petrol/diesel/other products of Rs.41,86,33,405/- and the purchases were of Rs. 40,56,74,431/-, The AO has not called for any details of the purchase of goods. Hence, enquires were not conducted from the parties from whom purchases were made so that genuineness of purchases have not been verify by the AO. Hence AO has not made adequate enquiry and verification to verify the purchases.

4. Further, on perusal of column no 35(b) of 3CD form of audit report, it has been found that there was shortage of goods namely M.S of 24356 liter and H.S.D of 5528 I liters. The AO has also not made any enquiry about huge shortage of products. The shortage of products should be verified with the records/ documents duly certified by oil company.

5. Further, it has also been found that there is fall in GP ratio. AO has also not made any enquiry about fall in GP rate.

6 The above facts clearly indicate that the trading results of the assessee has not been properly enquired, examined and verified by the A.O. Thus, the order passed u/s 143(3) of the Act on 9.10.2017 by the assessing officer is erroneous in so far as it is prejudicial to the interests of the revenue.”

5. In response, the assessee had filed a very detailed reply which has been incorporated from pages 4 to 8 of the impugned order. It has also objected that, since the case was selected for limited scrutiny on the three points which have been duly examined, then there was no occasion to go for other roving and fishing inquiry as per the instruction of the CBDT with regard to limited scrutiny assessments. However, the Id. Pr.CIT has set aside the assessment order, holding to be erroneous and prejudicial to the interest revenue on the following reasons:

8. The reply has stated that the reply on low income shown by large contractor has been filed during the assessment. It has also been stated that the purchases were made from Indian Oil Corporation.

But there is no evidence on the case record which shows that the purchases and trading results were enquired and verified by the AO.

9. In regard to the case law cited by the assessee, it is submitted that the facts of the case are not identical to the case law cited by the assessee. The reply of the assessee is not found satisfactory and therefore rejected.

10. Thus, the assessment order dated 9.10.2017 passed u/s 143(3) is both erroneous and prejudicial to the interest of revenue. It is absolutely clear that during the assessment proceedings for AY 2015-16, neither relevant details about low income were called for nor any relevant inquiries were conducted by the AO. There was no application of mind on issues in hand as narrated above. This has rendered assessment order

“erroneous”. If due to an erroneous order of the AO the revenue is losing tax lawfully payable by a person, it would be certainly prejudicial to the interest of revenue, as held in the case of CIT Vs Leisure Wear Exports Ltd. (2012) 341 ITR 166 (Del.). In case of Malabar Industrial Co. Ltd. Vs CIT (2000) 243 ITR 87 (SC) Hon’ble Apex Court held that there was no material to support the claim of appellant and yet AO accepted the entry in the statement of account in absence of any supporting material and without making any inquiry. It is incumbent on the officer to investigate the facts stated in the return. The order becomes erroneous if such as enquiry has not been made as held in case of Duggal & Co. V/s CIT (1996) 220 ITR 456 (Del.).

11. Where the Assessing Officer keeps a letter on record and does not carry out necessary investigations which are per se required to verify the correctness of the averments, there being an error in the sense that he has failed to carry out the requisite enquiry which can be rectified in a revision. Thus the Commissioner was to pass a fresh order under Section 263 after hearing the assessee [CIT v. DLF Power Ltd. (2012) 345 ITR 446(Del).

Thereafter, he referred to Explanation 2 to Section 263 and observed that Assessing Officer has not made inquiry and verification which he should have done.

6. Before us, ld. counsel submitted that, in so far as reply for low income shown by large contractor, assessee has filed all details of purchase and sale and expenses including books of account which was duly examined and verified by the Assessing Officer during the assessment proceedings. Apart

from that, in the case of the assessee the entire purchases are verifiable as the same is made from Indian Oil Corporation and sale was duly supported by sales register which was produced before the Assessing Officer. Thus, the observation and the finding of the ld. PCIT is incorrect on the facts and in law. He further submitted that finding of the ld. Pr. CIT is unsustainable in law for the following reasons:

(i) Recourse can be taken under section 263 only when the Order is erroneous and prejudicial to the interest of Revenue. In this case, the PCIT in his Order has failed to demonstrate that any error was committed by the Ld. AO.

(ii) The main thrust of the PCIT's Order was that the Ld. AO has not made adequate enquiry and verification to verify the purchases. This is factually incorrect. The Appellant only purchases goods from M/s. Indian Oil Corporation after making advance payment for the same. Books of accounts along with vouchers were produced before the Ld. AO (**Page 29 of PB**) which also finds mentioned in the Assessment Order. (**Page 30 of PB**). It is not the case of the PCIT that there was lack of enquiry. According to the PCIT, the enquiry made was not adequate. There is a difference between lack of enquiry and inadequate enquiry. 263 can be invoked for lack of enquiry but not for inadequate enquiry. Even explanation 2 to section 263 states that the section can be invoked when the '*Order is passed without making inquiries or verification*'. Thus, if inquiry or verification is done at the level of the AO but the PCIT is not satisfied with the level of inquiry or verification, then section 263 cannot be invoked. The explanation can be invoked only

when there is no inquiry. In the present case, the matter was duly inquired which is apparent from the reply filed by the Appellant and the Order passed by the Ld. AO.

(iii) Moreover, it is for the Assessing Officer to decide the extent of inquiry to be made and it is his satisfaction which is required under the law. The Hon'ble Delhi High Court in the case of Commissioner of Income Tax vs. Sunbeam Auto Ltd reported in (2010) reported in 332 ITR 167 (Delhi) has held that if there was any inquiry, even inadequate, that would by itself not give occasion to the Commissioner to pass order u/s 263 of the Act merely because the Commissioner had a different opinion in the matter. It is a settled law that the Ld. Pr.CIT cannot pass the order u/s 263 on the ground that thorough inquiry should have been made by the Assessing Officer.

(iv) The Hon'ble High Court had made a similar observation in Commissioner of Income-tax vs. Anil Kumar Sharma, (2010) 194 taxman 504.

(v) The PCIT ignoring the inquiries conducted by the Assessing Officer during the course of assessment proceedings and the submissions made by the assessee in response to notice u/s 263 of the Act, has merely observed that the assessment order was passed without making proper inquiries and it is a matter of record that the Ld. Pr.CIT has himself not undertaken any inquiry to reach a conclusion that the order is erroneous and prejudicial to the interest of the revenue.

(vi) Ld. Pr.CIT had not made any inquiries on his own but had directed the Assessing Officer to conduct inquiries which was against the law laid down by the Hon'ble Delhi High Court in

the case of CIT vs. Goetze India Ltd. reported in 361 ITR 505 (Del).

(vii) Moreover, merely because the Ld. Pr. CIT felt that further inquiry should have been made does not make the order of the Assessing Officer erroneous and prejudicial to the interest of the revenue.

(viii) The Hon'ble Delhi High Court in the case of Pr.CIT vs. Modicare Ltd. in ITA 759/2016 has held that the exercise of jurisdiction u/s 263 of the Act cannot be outsourced by the Ld. Pr.CIT to the Assessing Officer and therefore, the Ld. Pr.CIT cannot direct the Assessing Officer to provide details of the facts on the basis of which proceedings u/s 263 could have been initiated.

(ix) The Ld. Pr.CIT has ignored the replies filed by the Appellant and he has not discussed as to why he does not agree with the contentions of the assessee but has merely remitted the matter back to the Assessing Officer without making any inquiry himself. Therefore, the Order under 263 suffers from perversity.

(x) It is apparent that no independent inquiries have been made by the Ld. Pr.CIT although it was incumbent upon him to make such inquiry so as to reach the conclusion that the order of the Assessing Officer was erroneous and prejudicial to the interest of the revenue. The Hon'ble Delhi High Court in the case of Pr.CIT vs. Delhi Airport Metro Express Pvt. Ltd. in ITA No.705/2017 has categorically held that for the purpose of exercising jurisdiction u/s 263 of the Act and reaching a conclusion that the order is erroneous in so far as being prejudicial to the interest of the revenue, the CIT has to make

some minimal inquiry and where the CIT is of the view that the Assessing Officer had not undertaken any inquiry, it becomes incumbent upon the CIT to conduct such inquiry.

(xi) Although, there has been an amendment in the provisions of section 263 of the Act by which Explanation 2 has been inserted w.e.f. 01.06.2015 but the same does not give unfettered powers to the Commissioner to assume jurisdiction under section 263 to revise every order of the Assessing Officer to re-examine the issues already examined during the course of assessment proceedings. Reliance is placed upon the Mumbai ITAT Bench Order in the case of Narayan Tatu Rane vs. ITO reported in (2016) 70 taxman.com 227 wherein it was held that the said Explanation cannot be said to have overridden the liability as interpreted by Hon'ble Delhi High Court, according to which the Commissioner has to conduct the inquiry and verification to establish and show that the assessment order was unsustainable in law. The ITAT Mumbai Bench has further held that the intention of the legislature could not have been to enable the CIT to find fault with each and every assessment order without conducting any inquiry or verification in order to establish that the assessment order is not sustainable in law, since such an interpretation will lead to unending litigation and there would not be any point of finality in the legal proceedings.

7. Besides this, he also relied upon the following judgments.

(i) Commissioner of Income Tax vs. Sunbeam Auto Ltd reported in (2010) reported in 332 ITR 167 (Delhi). (Delhi High Court).

(ii) Commissioner of Income-tax vs. Anil Kumar Sharma, (2010) 194 taxman 504. (Delhi High Court)

- (iii) Pr.CIT vs. Modicare Ltd. in ITA 759/2016 (Delhi High Court)*
- (iv) CIT vs. Goetze India Ltd. reported in 361 ITR 505 (Del). (Delhi High Court)*
- (v) Pr.CIT vs. Delhi Airport Metro Express Pvt. Ltd. in ITA No.705/2017 (Delhi High Court)*
- (vi) Narayan Tatu Rane vs. ITO reported in (2016) 70 taxman.com 227 (ITAT, Mumbai).*

8. On the other hand, ld. CIT-DR submitted that nowhere the Assessing Officer has mentioned, in his assessment order, the reasons for low income shown by the assessee nor he was able to explain the points raised by the ld. Pr. CIT in his order. There has been no enlargement of limited scrutiny proceedings by the ld. PCIT, because Assessing Officer was required to examine the fall in GP ratio and the trading result including the points noted by him. Thus, there is no infirmity in the order of the Pr. CIT and has rightly set aside the order to be examined afresh on the points raised in the impugned order.

9. We have heard the rival submissions and also perused the relevant findings given in the impugned order as well as material referred to before us at the time of hearing. First of all, as stated above and also noted by the ld. Pr.CIT, the assessee's case was selected for limited scrutiny on the ground that; i) low income shown by large contractors; ii) mismatch in amount paid to related persons reported in ITR; and iii) higher turnover reported in service tax return compared to ITR and assessee has deposited large amount of tax in his bank account. All these points for which case was

selected for scrutiny through CASS has duly been examined and inquired by the Assessing Officer which is evident from various questionnaire issued by the Assessing Officer and also the reply submitted by the assessee. As stated by the Assessing Officer in the assessment order, that he has examined the books of account, purchase and sale bills and also the expenses debited to the P&L account. One of the allegations of the ld. Pr.CIT is that Assessing Officer has not called for any details of the purchases of goods nor conducted inquiry from the parties from whom purchases were made. First of all, assessee is having a petrol pump and dealer in petrol and diesel. Its entire purchases is from Indian Oil Corporation Ltd. after making advance payments, there cannot be any doubt about purchases or Assessing Officer was required to carry out any inquiry from Indian Oil Corporation once certificate was issued by IOC. All the quantities of petrol and diesel purchase and the payments for the purchases have been duly mentioned in audited accounts as well as in the books of accounts which has been duly supported by the invoices issued by the Indian Oil Corporation. Thus, there cannot be any doubt or any adverse inference with regard to purchases.

10. Secondly, ld. Pr.CIT has mentioned that there was shortage of goods namely M.S. of 24356 ltrs. and H.S.D of 5528 ltrs. Before us, ld. counsel has clarified that first of all nowhere the ld. Pr.CIT has brought on record that there was some extra shortage in this year because generally there is

certain percentage of loss of diesel and petrol due to evaporation and other factors which is normal in the case of petrol pumps and also acknowledged by the Indian Oil Corporation. The GP ratio also was not as low as pointed out by the Id. Pr.CIT, because assessee was entitled commission income from the sale of petrol or diesel from IOC and only very minor amount of margin. If purchases and sales are fully verifiable and there is no discrepancy in stock, then resultant GP cannot be questioned unless there is some discrepancy in purchase or sale which has not been found or pointed out even by the Id. Pr.CIT. Merely stating that there is a fall in GP ratio is not sufficient, if the Assessing Officer has examined all the purchases and sales and the regular books of accounts along with certificates and invoices issued by the Indian Oil Corporation and the agreement with IOC, then he cannot doubt the trading result. One of the factors mentioned for limited scrutiny was contract income which is only Rs. 11 lac which is from the oil tanker IOC which too has been examined by the Id. Assessing Officer. Thus, without bringing out any specific material on record or Id. Pr.CIT himself carrying out any inquiry to find out what was the inadequate inquiry carrying out by the Assessing Officer or there was any lack of inquiry, he cannot set aside the assessment order. Simply stating that Assessing Officer has not examined the purchases or GP without verifying the records, the assessment order cannot be cancelled in such a casual manner. He has also not specified what else were required to

be examined for the low income when the contractor receipt itself is only 11 lacs and assessee's main business and income is from purchase and sale of petrol and diesel of retail basis. Thus, under these circumstances and facts it cannot be held that either the assessment order is erroneous or prejudicial to the interest of revenue and therefore, the order of the ld. Pr.CIT is set aside and the impugned order u/s 263 order is quashed.

11. In the result, the appeal of the assessee is allowed.

Above decision was announced on conclusion of Virtual Hearing in the presence of both the parties on 11th October, 2021.

Sd/-
[Dr. B.R.R. KUMAR]
[ACCOUNTANT MEMBER]
DATED: 11/10/2021

Prabhat

Sd/-
[AMIT SHUKLA]
JUDICIAL MEMBER