

IN THE INCOME TAX APPELLATE TRIBUNAL
“E” Bench, Mumbai
Before Shri Shamim Yahya (AM) & Shri C.N.Prasad (JM)

I.T.A. No.524/Mum/2021 (Assessment Year 2015-16)

Top Notch Buildcon LLP 808, Krushal Commercial Complex, GM Road Above Shoppers Stop,Chembur(W), Mumbai-400 089 PAN : AAUFM8300R (Appellant)	Vs.	PCIT-27 Room No.401, Vashi Railway Station Commercial Complex, Vashi, Navi Mumbai-400 703 (Respondent)
--	-----	--

Assessee by	Ms. Ritu Kanal Kishor
Department by	Shri Ajit Kumar Shrivastava
Date of Hearing	27.10.2021
Date of Pronouncement	17 .11.2021

O R D E R

Per Shamim Yahya (AM) :-

This appeal by the assessee is directed against the order of the Principal Commissioner of Income Tax-27, Mumbai (‘Pr.CIT for short) dated 26.03.2021 order passed u/s. 263 of the Act and pertains to the assessment year (A.Y.) 2015-16.

2. Grounds of appeal read as under:-

1. On the facts and in the circumstances of the appellant's case and in law the order passed by the Ld. Pr. CIT u/s 263 of the Income Tax Act ,1961 (the Act) setting aside the assessment framed u/s 143(3) of the Act as erroneous and prejudicial to the interest of revenue is illegal, bad-in-law or otherwise void for want of jurisdiction.
2. On the facts and in the circumstances of the appellant's case and in law the Ld. Pr. CIT erred in holding that the issue of short-term capital loss on sale of shares of esteem Bio Organic, Channel and EFPL remained unverified despite the fact the AO had examined the issue and after duly scrutinising the working of short-term capital loss on account of sale of shares as submitted and on being satisfied with the details of short-term capital loss on sale of shares of these companies, the AO

had restricted his examination only to the limited issues for which the case was selected for scrutiny under CASS.

3. That on the facts and in the circumstances of the appellant's case, the Ld. PCIT erred in using the power of revision u/s263 of the Act to expand the scope of limited scrutiny to look into other issues which were not within the purview of limited scrutiny.

3. Brief facts of the case are that assessee has filed his return of income for AY 2015-16 on 20.08.2015 showing total income of Rs. 270,07,940/-. The return of income was processed u/s. 143(1) of the I.T.Act, 1961. Subsequently, the assessment was taken up under limited scrutiny vide notice u/s. 143(2) for limited scrutiny dated 05/08/2016. It was noted that following issues have been identified for examination in the said notice.

- (i) Amount disallowable u/s. 40A mismatch
- (ii) Increasing in share capital.

4. Subsequently, the AO passed an order making no addition and accepted the income returned of Rs. 2,70,07,940/-. Ld.CIT in his order u/s. 263 observed that on going through the records, it is seen that assessee has computed Short term capital gain of Rs.2,70,07,940/- after adjusting short term capital loss of Rs.(-)12,26,80,206/-. That this loss arrived at Rs.48,26,085/-, Rs.33,76,278/- and Rs.66,57,970/- on account of sale of esteem Bio Organic (Scrip code 534927), Channel (Scrip code 535142) and EFPL (Scrip code 534839) respectively which are in the list of bogus strips of the aforesaid bogus entries. That hence, the losses adjusted amounting to Rs.1,48,60,333/- is through bogus entries and would have been disallowed while computing total taxable income. That however, this issue was remained unverified at the time of completion of assessment proceedings u/s 143(3) of the Act.

5. Hence, Ld.CIT considered that AO's order is erroneous and prejudicial to the interest of the revenue and issued show-cause notice to the assessee. The show-cause notice issued by the Ld.CIT(A) is as under:-

“On perusal of records, it is seen that the assessment in your case was completed u/s 143(3) of the Income Tax Act, 1961 (the "Act") on 26.12.2017 by accepting the returned income of Rs.2,70,07,940/-. You had computed STCG of Rs.2,70,07,294/- after adjusting STC Loss of Rs.12,26,80,206/-. This losses arrived at Rs.48,26,085/-, Rs.33,76,278/- and Rs.66,57.970/- on account of sale of esteem Bio Organic, Channel and EFPL respectively which are in the list of bogus strips of the aforesaid bogus entries. Hence, losses adjusted for Rs.1.48,60,333/- is through bogus entries and would have been disallowed while computing total taxable income. The issue remained unverified”.

6. The Ld.CIT reproduced submissions of the assessee in this regard, which is as under:-

"In the show cause notice issued by your honour, your honour has stated that on perusal of records, it is seen that the assessment in our case was completed u/s 143(3) of the income Tax Act, 1961 on 26.12.2014 by accepting the returned income. However, it is proposed to disallow losses as adjusted amounting to Rs.1,48,60,333/- on the ground that the said loss has arisen from trading in bogus entities and hence not allowable. It is stated in the notice that "the issue remained unverified". In that view of matter, your honour has considered that the order passed is erroneous in so far as it is prejudicial to the interest of revenue within the meaning of section 263 of the income Tax Act, 1961.

In this regard, it is submitted that during the course of regular assessment proceedings, the Ld.AO had called for and in compliance thereof the assessee has submitted the working of short-term capital loss on account of sale of shares which included the details of sale of shares of esteem Bio Oranix, Channel and EEPL. These, workings being Annexure A to computation of total income was filed before the Ld.A.O vide letter 02.12.2017. The Ld.AO, being satisfied with the details of short term capital loss on sale of shares of these companies, restricted his examination only to the extent of limited issues for which the case was selected or scrutiny under CASS. In fact, had the Ld.AO not been satisfied, it was open to him to extend his jurisdiction by converting the limited scrutiny to completed scrutiny after obtaining the necessary approval from appropriate authority. However, in the present case, the A.O confined himself/f to limited issues for which the case was selected for scrutiny in the true letter and spirit of the Board Circular dated 29,12.2015.

It is submitted that in order to assume jurisdiction u/s 263, two preliminary conditions needs to be satisfied viz, the order must be erroneous and it must be prejudicial to the interest of revenue. In the present case, the A.O passed the order after carrying out extensive enquiry about the issues for which the case was selected for scrutiny. He passed the order in accordance with the provisions of the Act and in accordance with the CBDT circular and thus, the assumption of jurisdiction u/s 263 to pass revisionary order is untenable in law. The Hon'ble Supreme Court held that "in order to assume the revisionary jurisdiction u/s 263, the order of the assessing officer must be erroneous so far as if is prejudicial to the interest of the Revenue."

Further, it is submitted that the issue of short term capital loss was not emanating from the assessment order as the same was not covered in limited scrutiny and thus, your honour cannot exercise the revisionary powers over the issues which were never the part of original assessment u/s 143(3) of the Act, completed based on limited scrutiny, is not as per law.

Similar observation that the Ld. PCIT cannot exceed his jurisdiction by invoking revisionary power u/s 263 of the Act by holding the order of A.O as erroneous in so far as prejudicial to the interest of revenue on those items which are not emanating from the AIR, was made by the Hon'ble Mumbai Tribunal in the case of Mrs. Sunali Hemant Bhavskar vs Pr.CIT-29, ITA No.742/M/2019.

On the basis of the above, it is humbly submitted that what the Hon'ble PCIT now seeks to do is to expand the scope of limited scrutiny under the guise of revisionary proceedings. The same is not permissible now since the scope of limited scrutiny cannot be enlarged unless the A.O had converted the case to complete scrutiny before the completion of assessment proceedings.

In the instant case it can be seen that A.O had called for details of the losses as adjusted and after having considered the same and being satisfied had accepted the claim of loss. Under the circumstances the PCIT cannot hold that the order is erroneous in so far as it is prejudicial to the interest of revenue on the ground that the A. O had not verified the claim. In other words, the Id.PCIT is not enabled to expand the scope of limited scrutiny through revisionary proceedings.

Further, it is submitted that in the show cause notice, your honour has stated it has not been verified whether short term capital loss has been held as bogus or not in the assessment order. In the present case, the AO has accepted the loss as genuine and therefore there is no question of not allowing the said loss to be set off against profit. The set off of loss cannot be disallowed without being held that such loss is a bogus loss.

In a nutshell it is submitted that:-

- The order passed by AO is neither erroneous nor prejudicial to the interest of revenue.

- The powers of revision u/s 263 of the Act cannot be invoked over an issue where the assessing officer himself did not have the power to examine such issue.
- When such loss has been accepted as genuine in assessment order, there is no question of not allowing the set off of such loss against profit.

In view of the above, we request before your honour to drop the proceedings initiated u/s 263 of the Income Tax Act, 1961 and oblige."

7. However, Ld.CIT did not accept the contentions. He mentioned that contention of the assessee was not acceptable. He noted that on verification of the facts from the records, it is observed that the short term loss derived by the assessee is from entities, which are bogus strips. Hence, the short term adjustment thereof against short term capital gain is not allowable. He referred to Hon'ble Supreme Court in the case of Malabar Industrial Co.Ltd. However, Ld.CIT did not address the issue as to how he can expand the scope of scrutiny by the assessee, wherein the scrutiny was only the specific purpose and this issue of share transaction loss was not even in the notice of scrutiny.

8. Against the above order assessee is in appeal before us. We have heard both the parties and perused the records.

9. The Ld. Counsel of the assessee submitted that the issue in the limited scrutiny was for a limited purpose. On those impugned issues, no addition was made by the AO and Ld.CIT(A) cannot expand the scope of scrutiny. He submitted that when there was no issue raised in the notice on this aspect, how it can be said that AO has passed an order, which is erroneous and prejudicial in the interest of the revenue. She further submitted that assessee has already given the details to the AO, who has duly examine the same. She submitted that , these aspects were duly submitted before the Ld.CIT and he has not commented upon the submission that details were submitted before the AO and the same was allowed after due examination thereof. She further submitted that the only reason mentioned by the Ld.CIT for exercises the jurisdiction

is that adjustment has been done through bogus entries. There is no reason mentioned whatsoever, how these entries are bogus, from what source the Ld.CIT has got information that these are bogus entries is not mentioned. Nothing has been detailed in this regard. Hence, she submitted that Ld.CIT has no jurisdiction to pass an order u/s 263 of the I.T.Act. Further, Ld. Counsel for the assessee relied upon the order of ITAT in the case of Balvinder Kumar vs. PCIT 125 taxmann.com 83 (Delhi-Trib), for the proposition that the Ld.CIT cannot go beyond the reasons for selection of matter/dispute.

10. Per contra Ld. DR relied upon the orders of the AO. He submitted that Ld.CIT was perfectly justified in expanding the scope of scrutiny and he has all the powers in this regard. He referred to the provisions of section 263 of the Act in this regard. He submitted that it is well known that the scrips belonged to bogus entities.

11. Upon careful consideration, we note that Ld.CIT has exercised his jurisdiction u/s. 263 by noting that the assessee has adjusted loss through bogus entries on account of sale of certain scrips. There is nothing mentioned in the order of section 263 or in the notice to the assessee, as to how Ld.CIT has come to the conclusion that these are bogus entries. Ld.CIT-DR in this regard submitted that it is well known that these scrips had been noted in some investigation and these are bogus purchases. This submission of Ld.CIT-DR is liable to be dismissed as such. It was incumbent upon the Ld.CIT to give notice to the assessee, as to how these entries are being treated as bogus entries. The Ld.CIT has neither mentioned the same in his notice to the assessee nor in his order u/s. 263 as to on what basis he has come to the conclusion that these scrips and entries are bogus. In absence of any such findings by the Ld.CIT, his order u/s. 263 is vitiated and not at all legally sustainable.

12. Further, we note that it is also emanating that that this was a case for limited scrutiny before the AO. The AO was mandated under the limited scrutiny to examine the issue of amount disallowable u/s. 40A mismatch and increase in share capital. Hence, when an issue was not at all subject matter of limited scrutiny, how can Ld.CIT assume jurisdiction is not understandable. It is settled law that what cannot be done directly, cannot be done indirectly. If the matter was to be a subject matter of reopening that was to be done by way of reopening notice and the same cannot be done indirectly through revision order u/s. 263. In this regard, we may gainfully refer to the decision of ITAT in the case of Shri Balvinder Kumar (supra) for the following exposition.

“8. We have gone through the record in the light of the submissions made on either side. There is no dispute that the case of the assessee was picked up for scrutiny under the category of limited scrutiny. This fact is established from the assessment order and also the notice issued under [section 143\(2\)](#) of the Act. It is also not in dispute that the CBDT issued the instructions relied upon by the assessee and for the sake of convenience we extract the relevant portions thereof hereunder: -

"CBDT Instruction No. 7/2014 The reason(s) for selection of cases under CASS are displayed to the Assessing Officer in AST application and notice u/s 143(2), after generation from AST, is issued to the taxpayer with the remark ".Selected under Computer Aided Scrutiny Selection (CASS)". The functionality in AST is being modified suitably to flag the reasons for scrutiny selection in AIR/CIB/26AS cases. This functionality is expected to be operationalized by 15th October, 2014. Further, the Assessing Officer while issuing notice under [section 142\(1\)](#) of the Act which is enclosed with the first questionnaire would proceed to verify only the specific aspects requiring examination/verification. In such cases, all efforts would be made to ensure that assessment proceedings are completed expeditiously in minimum possible number of hearings without unnecessarily dragging the case till the time-barring date. CBDT Instruction No. 20/2015

3. As far as the returns selected for scrutiny through CASS-2015 are concerned, two type of cases have been selected for scrutiny in the current Financial Year- one is 'Limited Scrutiny' and other is Complete Scrutiny'. The assessee concerned have duly been intimated about their cases falling either in 'Limited Scrutiny' or 'Complete Scrutiny' through notices issued under [section 143\(2\)](#) of the Income-tax Act, 1961 ('Act'). The procedure for handling 'Limited Scrutiny' cases shall be as under:

(a)

(b) The Questionnaire under [section 142\(1\)](#) of the Act in Limited Scrutiny * cases shall be confined only to the specific reasons/issues for which case has been

picked up for scrutiny. Further, the scope of enquiry shall be restricted to the Limited Scrutiny' issues.

CBDT Instruction No. 5/2016 "4. It is further clarified that in cases under 'Limited Scrutiny \ the scrutiny assessment proceedings would initially be confined only to issues under 'Limited Scrutiny' and Questionnaires, enquiry, investigation etc. would be restricted to such issues. Only upon conversion of case to ITA No. 485/Del/2020 Balvinder Kumar 'Complete Scrutiny' after following the procedure outlined above, the AO may examine the additional issues besides the issue(s) involved in 'Limited Scrutiny'. The AO shall also expeditiously intimate the taxpayer concerned regarding conducting 'Complete Scrutiny' in such cases."

CBDT Letter dated 30.11.2017 J Instances have come to notice of CDBT where some Assessing Officers are travelling beyond their jurisdiction while making assessments in Limited scrutiny cases by initiating inquiries on new issues without complying with mandatory requirements of the relevant CDBT Instructions dated 26-9-2014, 29-12-2015 and 14-7-2016. These instances have been viewed very seriously by the CDBT and in one case the Central Inspection Team of the CDBT was tasked with examination of assessment records on receipt of a file at instances of several irregularities. Amongst other irregularities, it was found that no reasons had been recorded for expanding the scope of limited scrutiny, no approval was taken from the PCIT for the conversion of the limited scrutiny case to a complete scrutiny case and the order sheet was maintained very perfunctorily. This gave rise to a very strong suspicion of mala fide intentions."

9. The above CDBT instructions and the letter clearly establish that it's not open for the learned Assessing Officer to travel beyond the reason for selection of the matter for limited scrutiny and on that aspect the assessment order in this case is in accordance with the instructions governing the field. In such circumstances it has to be seen whether the Ld. PCIT is justified in holding the assessment order to be erroneous insofar as it is prejudicial to the interest of the Revenue for the learned Assessing Officer not considering the aspects which are beyond the purview of limited scrutiny.

10. *In the Deccan Paper Mills Co. Ltd. vs. CIT* in ITA 1013 AND 1635/PUN/2015, Pune Bench of the Tribunal held, that, "40. Now, coming to the aspect of book profits which was considered by the Commissioner and the order of the Assessing Officer was held to be erroneous and prejudicial to the interest of revenue. In this regard, it may be pointed out that the case of assessee was picked up for scrutiny under CASS for the limited purpose of verifying the Chapter VI-A deduction. Once the case is picked up for specific purpose under CASS, then it is outside the purview of the Assessing Officer to look into any other aspect other than the aspect for which it is picked up. Hence, the Assessing Officer has not formed any opinion in respect of computation of book profits in the hands of assessee. Once, no such opinion has been formed by the Assessing Officer, the Commissioner has erred in holding the order of the Assessing Officer to be erroneous and prejudicial to the interest of revenue in this regard. Accordingly, we reverse the findings of the Commissioner.

ITA No. 485/Del/2020 Balvinder Kumar Accordingly, we hold that the order passed by the Commissioner under [section 263](#) of the Act is invalid and the same is quashed for both the assessment years."

In M/s R.H. Property vs. PCIT, ITA No. 1906/Mum/2019 it was held that,-
"As a matter of fact, what cannot be done directly cannot be done indirectly. Accordingly, in terms of our aforesaid observations, we are of the considered view that as the A. O had aptly confined himself to the issue for which the case of the assessee was selected for limited scrutiny, therefore, no infirmity can be attributed to his order for the reason. that he had failed to dwell upon certain other issues which were clearly beyond the realm of the reason for which the case of the assessee was selected for limited scrutiny as per the AIR information. We thus not being able to concur with the view taken by the Pr. CIT that the order passed by the A.O under Sec. 143(3), dated 10.10.2016 is erroneous, therefore, set aside his order and restore the order passed by the A.O. As we have quashed the order passed by the Pr. CIT under Sec. 263 on the ground of invalid assumption of jurisdiction by him, therefore, we refrain from advertent to and therein adjudicating the contentions advanced by the Id. A. On the merits of the case, which thus are left open."

11. Similarly, is the view taken consistently by the benches of this Tribunal in the other two cases also, relied upon by the assessee. In the circumstances, in view of the consistent view taken in similar matters we are of the considered opinion that when the assessing officer is bound to follow the CBDT instructions and while following such instructions and after verification of the material furnished by the assessee on the aspect covered by the limited scrutiny, is not open for the Ld. PCIT to say that not advertent to the other aspects of the competition would render the assessment order erroneous and prejudicial to the interest of the Revenue. With this view of the matter we find that the impugned order cannot be sustained and, therefore, the same is liable to be quashed. We accordingly quash the same.

12. In the result, appeal of the assessee is allowed."

13. From the above discussion, it is amply clear that Ld.CIT has erred in initiating section 263 jurisdiction without specifying, as to how the transactions entered into by the assessee are bogus. Further, we note that it is further a non sustainable order on the touchstone of above said decisions, circulars and principles of law that what cannot be done directly cannot be done indirectly inasmuch as, the issue was limited scrutiny by the AO and the issue of share capital gain/loss was not subject matter of limited scrutiny. Hence, Ld.CIT exercising his jurisdiction under section 263 is not sustainable in law.

14. Hence, we set aside the order of Ld.CIT and decide the issue in favour of the assessee.

15. In the result, assessee appeal is allowed.

Pronounced in the open court on 17.11.2021.

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

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 17 /11/2021
Thirumalesh, Sr.PS

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,

(Assistant Registrar)
ITAT, Mumbai