

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'F' : NEW DELHI)**

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
and
DR. B.R.R. KUMAR, ACCOUNTANT MEMBER**

**ITA No.939/Del./2021
(ASSESSMENT YEAR : 2015-16)**

**ITA No.940/Del./2021
(ASSESSMENT YEAR : 2016-17)**

Shri Vijay Kumar Aggarwal, vs. Pr. CIT,
C/o Shri Akhilesh Kumar, Advocate Ghaziabad.
206 – 207, Ansal Satyam, RDC,
Ghaziabad – 201 002.

(PAN : ABFPK9611B)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri Akhilesh Kumar, Advocate
Shri R.K. Govil, Advocate
REVENUE BY : Shri T. Kipgen, CIT DR

Date of Hearing : 03.12.2021
Date of Order : 13.12.2021

ORDER

PER AMIT SHUKLA, JM :

Aforesaid appeals have been filed by the assessee against the impugned orders, both dated 29.03.2021 passed by the Id. Pr. CIT, Ghaziabad in his revisionary jurisdiction under section 263 of the Income-tax Act, 1961 (for short 'the Act') for Assessment Years 2015-16 & 2016-17.

2. In the grounds of appeal, the assessee has taken the following grounds:-

“1. That on the facts and circumstances of the case and in law, the order passed by the Pr. Commissioner of Income-tax (PCIT), 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 the revenue is without jurisdiction, bad in law and void ab-initio.

2. That on the facts and circumstances of the case and in law, notice/order of ld. Pr. CIT is manifestly in violation of provisions of section 263 of Act in as much as even if for argument sake, sole allegation that loss Rs.93,23,384/- is speculation loss (though not admitting) not eligible to set off against normal income is accepted, than also taxable income, tax payable will be same due to set off against huge C/f assessed losses, and as such still there is no loss to revenue, hence order set aside is not erroneous being not prejudicial to interest of revenue.

3. That on the facts and circumstances of the case and In law, ld. Pro CIT completely misdirected himself in invoking provisions of S.263 because:

i) objection that loss Rs. 93,23,384/- day trading is a speculating loss is not correct being against the law & principle of consistency being admitted itself by revenue in earlier years.

ii) Alternatively notice/ order is violating the settled principle that "where the AO adopted one of the courses possible in law or where two views are possible and he has taken one view with which the Pro Commissioner does not agree, it cannot be treated that the assessment order is erroneous so as to be prejudicial to the interest of revenue unless the view taken by AO is unsustainable in law".

iii) Order is set aside hurriedly without providing proper opportunity of being heard in violation of provisions of natural justice.

4 That on the facts and circumstances of the case and in law, notice/order of ld. Pr. CIT is completely against the provisions of section 263 of Act in as much as if for argument sake even if loss Rs.93,23,384/-is held as speculation loss than also taxable income, tax payable etc. will be same and hence there is no loss to revenue, hence

order set aside is not erroneous being not prejudicial to interest of revenue.

5 That, without prejudice to above, as admittedly it is not a case of no enquiry, hence even if it was a case of inadequate enquiries for argument sake despite detailed enquiries made by AO, than Id. Pr. CIT erred In cancelling the order to conduct enquiries instead of arriving at definite conclusion after conducting inquiries, beside S. 263 can't be invoked merely because Id. Pr. CIT desired enquiries in a specific way by the AO who passed the order after due application of mind.

6 That order of Id. Pr. CIT is non speaking, cryptic and is without any application of mind where only some observations relating to loss Rs.93,23,384/- is made basis to set aside order without any clear finding/direction only for further verification which is beyond the scope of provision.”

3. Since common questions of facts and law have been raised in both the aforesaid appeals, therefore same are being disposed off by way of consolidated order to avoid repetition of discussion.

4. Facts in brief are that, the assessee was enjoying income from salary, dealing in antique items and is in business of shares mainly F&O segment besides day trading. He has filed his return of income on 29.09.2015 declaring total income of Rs.59,80,000/-. Assessee's case was selected through CASS under "Limited" scrutiny which, as per the notice dated 29.07.2016 u/s 143(2) mentioned the following issues, needs to be identified for examination

:-

- (i) Interest expenses**
- (ii) Stock valuation**
- (iii) Income from heads of income other than business/profession mismatch**
- (iv) Custom Duty Payment Mismatch**
- (v) Sales Turnover Mismatch**
- (vi) Securities Transaction**

5. The notice under section 143(2) of the Act consisting of the queries on the points on which the case was selected for scrutiny was served and in response to the same, the assessee filed all the details. Thereafter, various notices and queries were raised from time to time vide notices dated 24.01.2017 & 15.06.2017 u/s 142 (1) of the Act. Again in response, the assessee filed its detailed reply before the AO. Copies of notices and replies filed by the assessee during the course of assessment proceedings along with copy of audited report and other details have been placed in the paper book. After examining the entire details and detailed scrutiny of the information as was required during the course of hearing, the AO completed the assessment on the returned income vide order dated 25.09.2017 passed 143 (3) of the Act.

6. Thereafter, ld. PCIT in his revisionary jurisdiction issued a show-cause notice dated 20.03.2021 u/s 263 of the Act mainly on the ground that, from the analysis of trade details of shares, it is seen that majority of trades undertaken were of the nature of speculative transaction through day jobbing in which sale and purchase of scrips on same day are matched without taking the delivery of the scrips. Ld. Pr.CIT further observed in his impugned order u/s 263 that one of the reasons for selecting the case for scrutiny was large value sale of share which were settled otherwise than by actual delivery or transfer of STT. Thus, according to him, the mandate for scrutiny was to investigate, whether assessee is indulged in speculative transactions or not. However, as noted above, the limited scrutiny was for security transactions and not whether it is a business gain/loss or speculative gain/loss.

7. In response, the assessee submitted that total loss in F&O segment during the relevant assessment year was Rs.18,31,158/- and the total loss in day jobbing is Rs.93,23,384/-. It was further submitted that the assessee is undertaking the business of purchase and sale of shares

and day jobbing as his regular business and also produced account of the broker and month-wise detail of profit & loss account of the date-wise transaction. Thus, it was submitted that it was a business loss.

8. Ld. Pr.CIT however observed that the loss on day jobbing of Rs.93,23,384/- was in the nature of speculative loss. Assessee's replies furnished from time to time before the ld. Pr.CIT have been incorporated in the impugned order. However, he rejected all the contentions raised by the assessee and observed that assessee has not given a reconciliation of the trades of F&O and equity segment as per information received from the BSE which consisted of 261 transactions relating to equity and 1438 transactions relating to F&O. Even if, losses claimed to be non-speculative out of the equity trades, then no bifurcation of trades which were intraday and pure speculative and other which are non-speculative have been furnished by the assessee. He observed that the email received from BSE categorically stated that no trades were observed under the said PAN under the equity derivative. He thus held that day jobbing is nothing else but speculative loss. Accordingly, he

directed the Assessing Officer that he should bifurcate the transactions which were speculative or non-speculative based on status of trade and, therefore, to this extent, AO has not carried out any proper enquiry. After detailed discussion, he held that AO has not applied his mind for the facts of the case and has completed the assessment without applying his mind and making necessary inquiries or verification, which makes the assessment erroneous.

9. As regards other limb of exercising the power u/s 263, that it is prejudicial to the interest of Revenue, Ld. PCIT held that, assessee has wrongly filed inaccurate particulars of share transactions which were adjusted against the speculative loss after trading to the business loss. Accordingly, he set aside the assessment after observing and holding as under:-

“4.7 It is incumbent on the officer to investigate the facts stated in the return, when circumstances would make an enquiry prudent and the word “erroneous” in section 263 includes failure to make such an enquiry. The order becomes erroneous because such an inquiry has not been made and not because there is anything wrong with the order if all the facts stated therein as assumed to be correct.

4.8 Reliance if also placed on the following case laws:

- i. **Duggal & Co. vs. CIT, (1996) 220 ITR 456, 459 (Del.)**
- ii. **Shri Virendra Kumar Gupta vs. CIT in ITA 2595/D/2009 dated 21.01.2011 (ITAT) , Delhi**

5. It is evident from facts of the present cases, as mentioned in the foregoing paragraphs that the AO accepted the version of the assessee without making any proper independent enquiry or verification whereas it is very well settled law that mere failure to make enquiries makes an order erroneous and prejudicial to tile interest of the Revenue. Further it is not necessary for the Commissioner to make further enquiries before cancelling the assessment order of the AO. The Commissioner can regard the order as erroneous on the ground that in the circumstances of the case, the AO should have made further enquiries before accepting the statements made by the assessee in the return of income. The reasons are obvious. Unlike the Civil Court which is neutral to give decision on the basis of evidence produced before it, an AO is not only an adjudicator but is also an investigator. He cannot remain passive in the face of a return which is apparently in order but calls for further inquiry. It is his duty to ascertain the truth of the facts stated in the return, when the circumstances of the cases are such as to provoke inquiry. The meaning to be given to the word 'erroneous' in section 263 of the IT Act, 1961 emerges out of this context. The word 'erroneous' in that section includes cases where there has been a failure to make the necessary inquiries.

6. Thus, in view of the various pronouncements discussed in paras 4.1 to 4.8 as well in terms of section 263. of LT. Act, 1961, the Commissioner does have the power to set aside, enhance or modify or cancelling the assessment and directing a fresh assessment, if he is so satisfied in the present case. In the present case, I am satisfied that for the reasons mentioned in foregoing paras, the Assessing Officer has passed the assessment order without applying his mind and making necessary inquiries or verification which should have been made, and therefore, the order passed by the AO is not only erroneous, but also prejudicial to the interest of revenue.

7. In view of observations made in foregoing paragraphs, I am of the opinion that the various issues involved in this case and as mentioned in paras 3.1(i) to 3.1(v) and 3.2, require examination, and further verification so as to arrive at correct and true income of the assessee. Therefore, the assessment order passed under section 143(3) of the Act on 25.09.2017 by the Addl.CIT, Special Range, Ghaziabad is set aside with direction to pass a fresh assessment order in accordance with the provisions of the Income-tax Act, 1961 after necessary examination and verification as directed above. Needless to say, that while completing a fresh assessment, the assessee may be provided adequate opportunities.”

10. Before us, the ld. counsel for the assessee submitted that first of all, here in this case, as per the documents

available on record, the notice u/s 263 was issued only on the basis of audit objection; that the loss claimed by the assessee was speculative loss and capital gain was computed without considering F&O loss. In support, he also filed the copy of letter dated 11.10.2021 written by the Addl.CIT, Special Range, Ghaziabad to Senior Audit Officer. He also placed copy of the audit observations. Thus, he submitted that action under section 263 was initiated on the basis of audit objection and without any application of mind; therefore, same is not sustainable in law.

11. Apart from that, he mentioned that issue of set off of loss is beyond the scope of limited scrutiny for which the case was under scrutiny and ld. Pr.CIT has enlarged the scope in respect of security transaction to change the head of income. He further submitted that on all the issues raised otherwise, AO has raised specific queries and the assessee has submitted all the replies giving entire details of shares transactions including under F&O and day trading. Thus, the AO has passed the order after duly applying his mind and it cannot be a case of not carrying out under enquiry. Ld. Pr. CIT cannot extend the scope of scrutiny by changing

the head of income of some share dealing to apply set off rules to recompute income.

12. Lastly, he submitted that even otherwise also, if loss of Rs.93,23,384/- is ultimately held to be speculation loss then also the declared gross as well as taxable income will remain same, i.e. Rs.60,00,000/- and Rs.59,80,000/- for the ASSESSMENT YEAR 2015-16 AND 2016-17 respectively. Thus, there is no loss to revenue and hence it is not prejudicial to the interest of revenue within the scope of S.263. The reason being, assessee has huge b/f losses from earlier years and if amount under question is not allowed to set off than it will be adjusted against the b/f losses. This he demonstrated with original & alternative computation with statement of profit/losses and their set off and c/f losses for clarity. As per actual/accepted computation, business loss of Rs.1,19,81,580/- was set off against income from house property Rs.20,52,542/-, against income from other sources Rs.5,40,403/- and against STCG of Rs.93,88,635/- thereby balance short term capital loss of Rs.2,91,58,924/- was set off against c/f loss of under the same head of STCG (against available c/f STCG

Rs.4,41,05,508/-). In case it is considered that Rs.93,23,384/- is speculation loss, then business loss of Rs.26,58,196/- will be set off against income from house property Rs.20,52,542/-, against income from other sources Rs.5,40,403/- and against STCG Rs.65,251/- thereby balance STCG of Rs.3,84,82,308/- will be set off against c/f loss under the same head of STCG (against applicable c/f STCG Rs.4,41,05,508/-) so that speculative loss is c/f. Similarly in AY 2016-17, after considering Rs.2,92,861/- as speculation loss instead of business loss, taxable income will remain same i.e. Rs.59,70,000/-. Therefore, in the absence of any loss to Revenue order is not prejudicial to revenue and section 263 is not applicable. In support, he relieved upon the following decisions :-

- (i) CIT vs. NTPC Ltd. (2017) 88 taxman.com 561 (SC)**
- (ii) Kwality Steel Suppliers Complex (2017) 84 taxmann.com 234 (SC)**
- (iii) Malabar Industrial Co. Ltd. (2000) 243 ITR 83 (SC)**

13. Ld. Counsel further submitted that the assessee is being engaged in F&O and day trading since long and in all the earlier years, resultant profit & loss account was always accepted as business income/loss by the department. In support, he also filed statement of assessment proceedings

for last four years wherein most of the assessments have been completed u/s 143(3) of the Act. For the sake of ready reference, the chart is reproduced as under :-

Assessment Year	Business - Gross Day Trading / F&O (as per P&L A/c)		Other Business - (As per P&L A/c)	Total business income - As per ITR/computation	Salary + HP + Capital Gain + Other sources	Net Income (as per ITR)	Remark
2011-12	-622,726,906		689,595	39,524,006	75,272,162	29,912,933	Accepted u/s 143(3)
2012-13	-5,944,124		5,179,665	702,259	19,026,805	17,806,210	Accepted u/s 143(3)
2013-14	-9,532,168		1,624,814	-1,413,614	18,013,164	17,386,912	Accepted as per return
2014-15	14,237,415		1,055,947	-35,163	18,553,242	20,495,640	Accepted u/s 143(3)
2015-16	-9,323,384	-1,831,158	90,757	-11,981,580	43,070,999	5,980,000	Accepted u/s 143(3) originally
2016-17	-292,861	-78,786,053	-200,430	-5,311,050	11,311,050	5,970,00	Accepted u/s 143(3) originally

Thus, the impugned order u/s 263 is not sustainable.

14. On the other hand, ld. CIT DR for the Revenue strongly relied upon the order of the ld. Pr.CIT and submitted that ld. Pr.CIT had carried out due verification and enquiry to come to a conclusion that the AO had not examined the details whether there was actual delivery of shares in the equity segment and whether any such transaction was speculative in nature specifically with regard to the day trading. Ld. Pr.CIT also sought information from the BSE which clearly shows that there was no actual delivery of

shares; therefore, he rightly concluded that order of the AO was erroneous. Insofar as the contention raised by the ld. counsel for the assessee that it is not prejudicial to the interest of the Revenue because there was no revenue loss, he submitted that it is not necessary that there should be revenue loss during the year. Otherwise also, ld. Pr.CIT has dealt this issue in his order that assessee has wrongly claimed speculation loss as business loss. Therefore, the order was rightly set aside by the ld. Pr.CIT.

15. We have considered the rival contentions and also perused the relevant findings given in the impugned orders as well as the material placed on record. Now, it is well settled law by the judgments of the Hon'ble Apex Court starting from Malabar Industrial Co. Ltd. reported in 243 ITR 83 (SC) that for exercising revisionary jurisdiction u//s 263 of the Act, assessment order should not only be erroneous but also prejudicial to the interest of the Revenue. Both the conditions should be satisfied simultaneously and even if one of the conditions is lacking, then assessment order cannot be set aside. Here, in this case, one very important fact which has been brought on

record by the ld. counsel is that, even if the loss of Rs.93,23,384/- is treated to be speculation loss then also declared loss as well as taxable income will remain the same i.e. Rs.60,00,000/- and Rs.59,80,000/- respectively for AYs 2015-16 & 2016-17. Thus, there is no loss to the Revenue. The reason being that the assessee has huge brought forward losses from earlier years and if the amount under consideration is not allowed to set off then it will be adjusted against the brought forward losses which has been demonstrated before us by filing original and alternative computation of income with statement of profit/losses and their set off and carry forward losses. The said computation has been placed on pages 64 to 79 for the AY 2015-16 and similarly for AY 2016-17 at pages 80 to 86 of the paper book. From the perusal of the said document, it is seen that as per the actual computation, the business loss of Rs.1,91,81,580/- was set off against the income of; a) house property of Rs.20,52,542/-, b) against income from other sources of Rs.5,40,403/-;and c) against short term capital gain of Rs.93,88,635/-. Thus, balance short term capital loss was Rs.2,91,58,924/- was set off against carry forward

loss under the same head 'short term capital gain' against available carried forward short term capital gain of Rs.4,41,05,508/-. If the amount of Rs.93,23,384/- is treated as speculation loss then business loss of Rs.26,58,196/- will get set off against the income from house property of Rs.20,52,542/-, against income from other sources of Rs.5,40,403/- and against short term capital gain of Rs.65,251/-. This will result in balance short term capital gain of Rs.3,84,32,308/- to be set off against carry forward loss under the same head 'short term capital gain' against available carry forward short term capital gain of Rs.4,41,05,508/-. There is no impact of any revenue loss in this year nor in the subsequent year. Similar is the fact in AY 2016-17 wherein if Rs.2,92,861/- is treated as speculation loss instead of business loss, taxable income will remain the same of Rs.59,70,000/-. This fact has not been denied by the ld. Pr.CIT or ld. CIT DR. Thus, if there is no loss of revenue in this year or in subsequent year nor will it impact the taxable income, then the assessment order cannot be held to be prejudicial to the interest of revenue and accordingly, in view of the principle laid down by

Hon'ble Apex Court in the case of Malabar Industrial Co. Ltd. (supra), the assessment order cannot be set aside.

16. Otherwise also, it is purely a case of change of opinion for the reason that similar nature of transaction of day trading of shares and F&O has been held to be business income/business loss in all the earlier years wherein assessment has been completed u/s 143(3) of the Act. Thus, if rule of consistency is applicable on the same facts and circumstances in these years, then merely changing the head of income from business to speculation, then it cannot be held that the assessment order is erroneous and prejudicial to the interest of revenue. More so, here in this case, section 263 has been done only on the basis of audit objection which was only for the purpose of verification and which has already been examined by the AO during the course of assessment proceedings. Accordingly, the impugned orders u/s 263 are set aside and assessment orders passed u/s 143(3) of the Act are restored.

17. In the result, both the appeals filed by the assessee are allowed.

Order pronounced in open court on this 13th day of December, 2021.

Sd/-
(DR. B.R.R. KUMAR)
ACCOUNTANT MEMBER

sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

Dated the 13th day of December, 2021
TS

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.Pr.CIT, Ghaziabad.
- 5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.