

**IN THE INCOME TAX APPELLATE TRIBUNAL (VIRTUAL COURT)
"D" BENCH, MUMBAI**

**BEFORE SHRI S. RIFAUH RAHMAN, HON'BLE ACCOUNTANT MEMBER AND
SHRI PAVAN KUMAR GADALE, HON'BLE JUDICIAL MEMBER**

ITA NO. 808/MUM/2021 (A.Y: 2015-16)

Mr. Rajgopal Krishnamurari Khandelwal T-5/1501, Duplex Height CHSL Nr. Mittal Nagar, Yamuna Nagar Andheri (W), Mumbai – 400053 PAN: AEEP9779E (Appellant)	v.	ACIT – 18(3) Matru Mandir Tardev Road Mumbai – 400 007 (Respondent)
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Assessee by	:	Shri Rajiv Khandelwal
Department by	:	Shri Sunil Jha
Date of Hearing	:	07.10.2021
Date of Pronouncement	:	16.12.2021

ORDER

PER S. RIFAUH RAHMAN (AM)

1. This appeal is filed by the assessee against order of the Learned Principal Commissioner of Income Tax–19, Mumbai [hereinafter in short "Pr.CIT"] dated 24.03.2021 for the A.Y.2015-16.

2. Brief facts relevant to the case are that, assessee is an individual, deriving income from house property, income from business and

profession, income from capital gains and income from other sources. Assessee had filed its return of income for the A.Y. 2015-16 on 20.09.2015 declaring total income of ₹.45,60,850/-. The assessment u/s. 143(3) of the Income-tax Act, 1961 [hereinafter referred to as "the Act"] was completed on 18.12.2017 determining total income at ₹.7,13,47,400/-. Assessee preferred appeal before the Ld.CIT(A) and the appeal is pending before the Ld.CIT(A). On perusal of assessment records Ld. Pr.CIT observed that in the assessment made, it is noticed that assessee claimed to have purchased shares of the scrip "Aplaya Creation Ltd. (Earlier known as M/s EINS EDUTECH Ltd.)" for ₹.24,00,000/- and later sold it for a consideration of ₹.6,72,41,315/-. It was held in the assessment order that the entire transaction of purchase and sale of shares of the scrip "Aplaya Creation Ltd. (Earlier known as M/s EINS EDUTECH Ltd.)" was part of accommodation entry and represents the unexplained investment made by the assessee in cash to obtain the equivalent amount as bogus profit on sale of shares. Therefore, the long term capital gain was held as unexplained investment/income from other sources and not in the nature of capital gain as claimed by the assessee. Since it was held in the assessment made that the entire transaction was part of accommodation entry, the entire sale consideration of ₹.6,72,41,315/- ought to have been

held as unexplained investment/income from other sources and no deduction on account of purchase cost of ₹.24,00,000/- ought to have been allowed, though the Assessing Officer inadvertently allowed the purchase cost. Similarly, commission @3% on ₹.6,72,41,315/- which works out to ₹.20,17,239/ought to have been held as unexplained expenditure u/s.69C of the Act instead of ₹.19,45,240/-. Omission to do so, resulted in underassessment of income to the tune of ₹.24,79,999/- [Rs.24,00,000 + Rs.71,999/-]. Ld. Pr.CIT observed that this aspect was overlooked during the assessment proceedings and the order u/s. 143(3) of the Act dated 18.12.2017 is erroneous and prejudicial to the interest of revenue and therefore, the proposal for passing an order afresh or enhancing the assessment is proposed under the provisions of section 263 of the Act for the A.Y.2015-16. A notice u/s. 263(1) of the Act dated 18.03.2021 was issued to the assessee to provide it an opportunity to be heard. In response to the notice issued u/s. 263(1) of the Act, no reply was furnished by the assessee.

3. After careful examination of the assessment records, Ld. Pr.CIT have come to the conclusion, that the Assessing Officer failed to consider that the entire sale consideration on sale of penny stock share was of the nature of accommodation entries and hence entire amount of

₹.6,72,41,315/- ought to have been taxed and also the commission @3% amounting to ₹.20,17,239/- which is an unexplained expenditure u/s.69C of the Act was also not subject to taxation by the Assessing Officer and Assessing Officer failed to carry out necessary enquiries as warranted by the facts and circumstances of the case and apply the correct provision of Act. Thus, the assessment is found to be erroneous insofar as it is prejudicial to the interest of Revenue as envisaged in Section 263 of the Act. There is lack of enquiry by the Assessing Officer on the issue raised in the notice issued u/s. 263 of the Act. Accordingly, he set aside the order passed u/s. 143(3) of the Act for the A.Y. 2015-16 and directed the Assessing Officer to assess the same afresh after giving the assessee an opportunity of being heard and producing any evidences in this regard.

4. Aggrieved assessee is in appeal before us raising following grounds in its appeal: -

"The Principal Commissioner of Income-tax—19, Mumbai (hereinafter referred to as the Pr CIT) erred in framing an order dated 24.03.2021 under section 263 of the Act to set aside the order of the Assistant Commissioner of Income-tax Officer—18(3), Mumbai (hereinafter referred to as the Assessing Officer) by holding that the assessment order dated 18.12.2017 passed by the Assessing Officer under section 143(3) of the Act is erroneous and prejudicial to the interest of the Revenue and consequently, directing the Assessing Officer to pass the order afresh.

The appellant contends that the Pr CIT has not appreciated the facts of the case in its entirety; the impugned order under section 263 is bad in law inasmuch as the assessment order of the Assessing Officer is neither erroneous nor prejudicial to the interests of the Revenue.

The appellant further, contends that the Pr CIT ought not to have reached the aforesaid conclusion inasmuch as his conclusion is based on the same material which has been considered by the Assessing Officer to make the addition in his assessment order, and thus, the impugned order passed by the Pr CIT under section 263 is bad in law.

The appellant further, contends that on the facts and circumstances of the case and in law, the Ld. Pr.CIT lacks jurisdiction to pass the impugned order in as much as the material on the basis of which the Assessing Officer has made addition is a subject matter of appeal to the CIT(A)“

5. At the time of hearing, Ld. AR submitted that during the assessment proceedings Assessing Officer has issued a questionnaire wherein specific information was sought and the assessee furnished all the details and replied to the queries raised by the Assessing Officer. Ld. AR submitted that provisions of section 263 of the Act can be invoked if, the twin conditions mandated under the section are satisfied, i.e: (i)the order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interest of the revenue. In support of his contentions Ld. AR relied on the order of the Coordinate Bench in the case of Mrs.Manisha Ajay Shah v. Principal CIT in ITA.No. 3001/Mum/2019 dated 14.10.2020.

6. Ld. DR vehemently supported the order of the Ld. Pr.CIT.
7. Considered the rival submissions and material placed on record, we observed on identical situation when once the Assessing Officer has issued questionnaire and specific information was sought on transactions and assessee furnished the details as called for and assessee has filed all the details of purchase of shares which is through banking channel. Once the issue is addressed by the assessee to the satisfaction of the Assessing Officer, in this scenario, the Coordinate Bench of the Tribunal in the case of Mrs. Manisha Ajay Shah *v.* Principal CIT (supra) considered the facts on record and quashed the order passed by the Ld. Pr.CIT holding as under:

"4. We have heard the submissions made by Ld. Departmental Representative and have examined the material available on record. The PCIT has invoked revisional jurisdiction under section 263 of the Act on the ground that the Assessing Officer has failed to examine the transaction of purchase and sale of shares. Another reason for invoking revisional jurisdiction by the PCIT is, that the assessee in IDS 2016 has only declared long term capital gain on penny stock, whereas, the assessee should have declared gross sale receipt of the shares. The immunity is granted to the assessee to the extent declaration is made under IDS 2016 and not against the entire transaction. The PCIT invoked revisional jurisdiction to tax the difference between gross sale price of the shares Rs.34,30,000/- and Long Term Capital Gains declared by the assessee Rs.32,86,815/-. In other words, the PCIT seeks to tax even the purchase cost of the shares i.e. Rs.1,43,185/- stating it to be a bogus purchase transaction.

5. After examining the documents on record we do not concur with the view of the PCIT. The assessee has demonstrated from the bank statement that the amount has been paid for purchase of shares of GCM Securities Ltd. through cheque. This is further corroborated by share application form of GCM Securities at page 22 of the Paper Book and transaction-cum-holding statement in the case of assessee issued by Stock Holding Corporation of India Ltd. at page 19 of the Paper Book. The documents furnished by the assessee clearly indicates that the shares were indeed purchased by the assessee through banking transactions. It is not the case of the Revenue that the amount paid by the assessee for purchase of shares has travelled back to the assessee in the form of cash or any other manner.

6. The provisions of section 263 of the Act can be invoked if, the twin conditions mandated under the section are satisfied, i.e:

(i) the order of the Assessing Officer sought to be revised is erroneous; and

(ii) it is prejudicial to the interests of the revenue.

If any one of these two conditions is absent, the Commissioner of Income Tax cannot take recourse to section 263 of the Act.

7. In the present case, we find that the Assessing Officer has issued a questionnaire wherein specific information was sought on transaction of equity shares and working of short term capital gain/long term capital gain. The assessee furnished a detailed reply to the notice issued under section 142(1) of the Act, wherein the assessee while replying to the query on transaction of shares, informed that a declaration under IDS 2016 has been made in respect of long term capital gain arising on sale of shares to GCM Securities Ltd. Ostensibly, the Assessing Officer after examining the documents accepted the same and made no addition. Merely for the reason that the Assessing Officer has taken a plausible view after examining the records that is not acceptable to the PCIT, would not make the assessment order erroneous. In the present case twin conditions set out in section 263 are not satisfied and hence, the PCIT wrongly assumed revisional jurisdiction.

8. In view of our above finding, we find merit in the appeal of the assessee. The impugned order is quashed and the appeal of assessee is allowed.

8. Respectfully following the above decision, in our considered view the facts in the present case applicable mutatis mutandis to the above case. Therefore, we set aside the order passed u/s. 263 of the Act.

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

Order pronounced on 16.12.2021 as per Rule 34(4) of ITAT Rules by placing the pronouncement list in the notice board.

Sd/-
(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Mumbai / Dated 16.12.2021
Giridhar, Sr.PS

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum