

IN THE INCOME TAX APPELLATE TRIBUNAL
“B” BENCH, MUMBAI
BEFORE SHRI S RIFAUR RAHMAN, ACCOUNTANT MEMBER &
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No. 516/Mum/2021
(A.Y: 2013-14)

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| Mr. Bhavesh Kantilal Kubadia 7, 2 nd Floor, Neminath Bldg, SK Bole, Dadar (W), Mumbai – 400028 | Vs. | PCIT-20 Room No. 418, 4 th Floor, Piramal Chamber Lalbaug, Parel, Mumbai - 400012 |
| स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AGRPK2377D | | |
| Appellant | .. | Respondent |

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| Appellant by : | Mr.Neelkanth Khandelwal.AR |
| Respondent by : | Mr.Rakesh Garg, CIT DR |

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| Date of Hearing | 24.01.2022 |
| Date of Pronouncement | 24.02.2022 |

आदेश / O R D E R

PER PAVAN KUMAR GADALE JM:

The assessee has filed an appeal against the order of the Principle Commissioner of Income Tax(PCIT)-20, Mumbai passed u/s 263 of the Act. The assessee has raised the following grounds of appeal:

1. *The Principal Commissioner of Income Tax -20, Murnbai [hereinafter referred to as the Pr. CIT] erred in framing an order dated 23/03/2021 under section 263 of the Income Tax Act, 1961 to set aside the order of the Income Tax Officer -21[1][2], Mumbai [hereinafter referred to as the*

Assessing Officer] by holding that the assessment order dated 14/12/2017 passed by the Assessing Officer under section 143[3] r.w.s.147 of Income Tax Act, 1961 is erroneous and prejudicial to the interest of the Revenue and consequently, directing the Assessing Officer to frame the order of assessment de novo.

2. 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.

3. The Appellant further, contends that the Pr.CIT ought not to have reached the aforesaid conclusion inasmuch as her 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.

4. The PCIT has erred in directing the Assessing Officer to add a sum of Rs.12,51,250/- as undisclosed income under section 68 of income Tax Act, 1961, representing the purchase price of shares incurred in the earlier year.

5. The Appellant further, contends that on the facts and in the circumstances of the case and in law, the Pr.CIT lacks jurisdiction to pass the impugned order inasmuch as the Assessing Officer on the basis of same material has made addition, which is a subject matter of appeal to the CIT[A] , and thus, the order of the Assessing Officer will merge with the order of the CIT[A] on the same subject matter.

6. The Appellant craves leave to add to, alter and/or amend the afore stated ground of appeal.

2. The brief facts of the case are that the assessee is engaged in the business of trading of shares. The assessee has filed the return of income for the A.Y 2013-14 on 31.08.2013 disclosing a total income of

Rs.6,58,290/- and the return of income was processed u/s 143(1) of the Act. The A.O found that the assessee has claimed exemption of long term capital gains on penny stock shares u/sec 10(38) of the Act. The A.O. has reason to believe that income has escaped the Assessement and issued notice u/s 148 of the Act. In response to the notice, the assessee has filed a letter dated 08.08.2017 to treat the return of income filed on 31.08.2013 as due compliance. Subsequently, notice u/s 143(2) and 142(1) of the Act are issued. Whereas the A.O. has dealt on the facts, trading in shares, reports of the investigation wing and the submissions of the assessee in response to show cause notice and determined the total income with the denial of exemption of Long Term Capital gains u/sec10(38) of the act and made addition of sale proceeds u/s 68 of the Act of Rs.77,02,597/- and disallowance of commission expenses u/s 69 of the Act of Rs.2,31,078/- and assessed the total income of Rs. 85,91,970/- and passed the order u/s 143(3) r.w.s 147 of the Act dated 14.12.2017.

3. Subsequently, the PCIT on perusal of the record found that the A.O has not made any enquiry on the submissions and made addition of sale proceeds U/sec 68 of the Act and the commission expenses u/s 69 of the Act. The PCIT is of the view that the A.O should have considered the entire transaction of sale proceeds taxable u/sec68 of the Act and therefore the order passed u/s 143(3) r.w.s 147 of the Act is erroneous and prejudicial to the interest of the revenue and issued notice u/s 263 of the Act. In compliance to the notice, the assessee has filed the details referred at Para 4 of the PCIT order. The PCIT considered the reply filed by the assessee in compliance to the show cause notices issued. The PCIT is of the opinion that the A.O has not dealt on the transactions of purchase of shares and has not conduct any enquiry on the disputed issue. Therefore the entire sale proceeds on transactions of shares should be treated as part of sale consideration and commission transactions has to be verified and set aside the assessment order and directed the assessing officer to frame fresh assessement and passed the order u/sec263 of the Act dated 23-03-2021.

Aggrieved by the revision order, the assessee has filed an appeal before the Honble Tribunal.

4. At the time of hearing, the Ld. AR submitted that the A.O. has considered the facts and after verification and examination of dispute has denied the exemption 10(38) of the Act and treated the proceeds from share transactions u/sec68 of the Act. The Ld. AR emphasized that the disputed issue was considered by the A.O and after verifying the facts has passed the assessee order and further the assessee has filed the appeal with the CIT(A) and the same is pending. The Ld. AR supported the submissions with the decision of the Honble Tribunal on similar and identical issue and prayed for allowing the assessee appeal. Contra, the Ld. DR supported the order of the PCIT.

5. We heard the rival submissions and perused the material available on record. Prima-facie, the sole crux of the disputed issue is with respect to directions of the PCIT to consider the purchase price as the part of the long term capital gains and the whole sale proceeds amounting to Rs. 89,53,847/-

has to be treated as income u/sec68 of the Act. The Ld. AR submitted that the Assessement order set aside by the PCIT does not satisfy the twin conditions being erroneous and prejudicial to the interest of the revenue. The assessee has diligently complied with the notice u/s 148 and u/sec142(1) of the Act. Whereas the A.O has verified the facts of sale of shares and was not satisfied with the submissions and made addition u/sec68 of the Act. We find that the Hon'ble Tribunal in the similar issue in the case of Akshy Ramprasad Agarwal VS ITO in ITA No. 153/Mum/2021 dated 08.10.2021 has dealt on the issue of validity of revision order u/sec 263 of the Act at page3 Para 5.1 of the order, which is read as under:

5.1. Thereafter, the Assessing Officer completed the assessment in view of provision u/s.143(3) r.w.s. 147 of the Act raising the addition on account of long term capital gain in sum of Rs.47,37,582/-. It is argued by the ld. representative of the assessee that once the issue has already been raised by the Assessing Officer and thereafter, the claim of the assessee was denied then, in the said circumstances, the assessment could not be revised in view of provision u/s.263 of the Act. In support of this contention, the ld. representative of the assessee has placed reliance on the case based upon similar circumstances titled as Mrs. Manisha Ajay Shah vs. Pr. CIT-30 in ITA No.3001/Mum/2019 dated 14/10/2020. The copy of this order is placed in the file and relevant finding is hereby reproduced as under:-

“4. We have heard the submissions made by Id. 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 ITA NO. 3001/MUM/2019 (A.Y.2015-16) 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.

5.2. In view of the above facts and circumstances, it is quite clear that the fact of the present case is quite similar to the fact of the case under consideration. Taking into all these facts, we are of the view that the revision of assessment u/s.263 is not liable to be sustainable in the eyes of law. Therefore, we set aside the same and allowed the appeal of the assessee.

6. We find that the facts of the present case are identical and similar to the ratio of the judicial decision. We find that the assessee has complied with the statutory notice u/sec148 and 142(1) of the Act and the show cause notice. The submissions of the Ld. AR are realistic duly supported with the material information and judicial decisions. We Considering

the overall facts, circumstances, ratio of the judicial decision and the details submitted in the course of hearing are of the view that the if any query is raised in the assesment proceedings and it was responded by the assessee, mere fact that it is not dealt within by the A.O. in the order cannot implied that there is no application of mind. Hence, the PCIT action cannot be acceptable as the order passed by the A.O. does not satisfy the twin conditions of erroneous and prejudicial to the interest of the revenue. Accordingly we do not find any merits in the order and we set aside the order u/s 263 passed by the Pr.CIT and allow the grounds of appeal of in favour of the assessee.

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

Order pronounced in the open court on 24.02.2022.

Sd/-

(S RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Sd/-

(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Mumbai, Dated 24.02.2022

KRK, PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / The CIT(A)
4. आयकर आयुक्त(अपील) / Concerned CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

1.

(Asst. Registrar)
ITAT, Mumbai