

IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B", PUNE

BEFORE SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER
AND
SHRI S. S. VISWANETHRA RAVI, JUDICIAL MEMBER

आयकर अपील सं. / ITA Nos.1274, 1275 & 1276/PUN/2017
निर्धारण वर्ष / Assessment Years: 2008-09, 2009-10 & 2010-11

Priya Kishor Jagtiani, Shop No.1, Shalimar Towers, Shivaji Road, Nashik- 422001. PAN : ADEPJ7743C	Vs.	Pr.CIT-1, Nashik.
Appellant		Respondent

Assessee by : Shri C. H. Naniwadeker
Revenue by : Shri J. P. Chadraker
Date of hearing : 15.03.2022
Date of pronouncement : 20.04.2022

आदेश / ORDER

PER INTURI RAMA RAO, AM:

These are the appeals filed by the assessee directed against the common orders of the ld. Pr. Commissioner of Income Tax-1, Nashik ('PCIT') dated 17.03.2017 for the assessment years 2008-09, 2009-10 and 2010-11 passed u/s 263 of the Income Tax Act, 1961 ('the Act').

2. Since the identical facts and issues are involved in all above captioned appeals, we proceed to dispose of the same by this common order.

3. Briefly, the facts of the case are that the appellant is an individual engaged in the business of builders. No returns of income under the provisions of section 139 of the Act were filed for the years under consideration. Therefore, the Assessing Officer had issued notice u/s 148 on 17.01.2014 calling upon the assessee to file the return of income as the income escaped assessment to tax. In response to notice u/s 148, the appellant had filed the return of income on 20.02.2014 disclosing returned income of Rs.18,18,938/- for A.Y. 2008-09, Rs.16,92,579/- for A.Y. 2009-10 and Rs.84,443/- for A.Y. 2010-11 respectively. Against the said returns of income, the assessment was completed by the Dy. Commissioner of Income Tax, Circle-1, Nashik ('the Assessing Officer') vide order dated 09.03.2015 passed u/s 143(3) r.w.s. 147 of the Act at total income of Rs.25,68,938/-, Rs.23,12,492/- and Rs.4,78,043/- for assessment years 2008-09, 2009-10 and 2010-11 respectively.

4. Subsequently, on verification of the assessment records, Id. PCIT had noticed that the appellant had deposited huge cash in the

bank accounts. The assessee had itself shown unsecured loans which remain unverified by the Assessing Officer during the course of assessment proceedings. The ld. PCIT also found that the appellant had sold shop at Gurudev Tower, Canada Corner of Rs.1,59,97,500/- for A.Y. 2008-09 and Rs.45,00,000/- for A.Y. 2009-10. The ld. PCIT was of the opinion that the said shops were not forming part of the stock-in-trade which means the gains arising on sale of such shops should be assessed under head 'capital gains'. Therefore, the ld. PCIT formed an opinion that the assessment order passed by the Assessing Officer u/s 143(3) r.w.s. 147 dated 09.03.2015 is erroneous and prejudicial to the interest of the revenue. Accordingly, the ld. PCIT issued a show cause notice u/s 263 on 07.09.2016 calling upon the appellant to show cause as to why the assessment order should not be set-aside to the Assessing Officer in exercise of power vested with him u/s 263 for the reasons that the Assessing Officer had failed to enquire into the sources of huge cash deposits in the bank account as well as failed to enquire into the genuineness of the same.

In response to the same, the appellant filed detailed submissions showing that the cash deposits have been made out of

the accumulated cash balances and withdrawals from bank from time to time etc.

As regards to the unsecured loans, it is submitted that the details of unsecured credits were submitted during the course of assessment proceedings. Even the confirmation letters were also filed before the Assessing Officer. On the issue of assessment of gains arising from the sale of shops, it is submitted that it is subject-matter of appeal before the CIT(A) who vide order dated 15.12.2015 for assessment year 2011-12 had allowed. However, the Id. PCIT held that opening of cash balances and huge cash deposits have been remain unverified and as regards to the unsecured loans, the Id. PCIT held that the Assessing Officer had accepted the unsecured loans without verification of the same. On the issue of assessment of gains arising on sale of shops, the Id. PCIT held that the submissions of the assessee were merely accepted by the Assessing Officer without looking into the issue whether the shops formed part of stock-in-trade or investments. Finally, the Id. PCIT held that the Assessing Officer had passed the assessment order without application of mind and, accordingly, held that the assessment order is erroneous and prejudicial to the interest of the

Revenue and set-aside the assessment order for assessment years 2008-09, 2009-10 and 2010-11 with direction to pass assessment order *de-novo* after giving a proper opportunity of being heard to the assessee.

5. Being aggrieved by the order of the ld. PCIT passed u/s 263, the appellant is in appeal before us.

6. Ground of appeal no.1 had not pressed during the course of hearing of the appeal and the same is dismissed as not pressed.

7. Ground of appeal no.2 and 3 challenges the order of revision passed by the ld. PCIT u/s 263 on the ground that the assessment order cannot be termed as “erroneous and prejudicial to the interests of the Revenue” as the issues sought to be revised by the ld. PCIT were examined by the Assessing Officer during the course of original assessment proceedings. It is submitted that the Assessing Officer had examined the source of cash deposits during the course of assessment proceedings. The ld. PCIT has reproduced the images of cash flow statements furnished to the Assessing Officer during the course assessment proceedings for the assessment years 2008-09, 2009-10 and 2010-11. The ld. Counsel for the assessee taking us through the cash flow statements submitted that the cash

withdrawals are mistaken to be cash deposits. As regards to allegation of the ld. PCIT that during the previous year relevant to the assessment year 2008-09, an amount of Rs.40,08,175/- was deposited in the bank accounts, the ld. Counsel for the assessee taking us through the cash flow statements' images which is reproduced by the ld. PCIT at page no.4 of the impugned order submitted that the said amount of Rs.40,08,175/- was arrived at by the ld. PCIT by reducing the total receipt of Rs.62,88,402/- from opening balance of Rs.22,72,227/-. It is submitted that in the cash flow statements, receipts reflects the amount of withdrawals from the respective bank account, the said withdrawals have been mistakenly assumed to be the cash deposits by the ld. PCIT. Thus, it is submitted that the revision proceedings were initiated in respect of these items on wrong assumption of facts. Further, ld. Counsel submitted that the opening cash balance shown in the cash flow statements can be enquired into on the last day of the previous year. He further submitted that the facts situation remain same in respect of the assessment years 2009-10 and 2010-11.

8. As regards to the unsecured loans, the ld. Counsel taken us through the Paper Book at page no.51 to 60 filed before us

submitted that the issues of genuineness of the unsecured loans was examined by the Assessing Officer during the course of assessment proceedings, on examination of evidence the Assessing Officer took a plausible view that credits are genuine accordingly accepted genuineness of unsecured loans. Thus, it was submitted that when the Assessing Officer had examined the issues and took a plausible view, no revision is maintainable.

9. With regard to the issue of assessment of gains on sale of shops, he submitted that this issue was subject-matter of appeal for the assessment year 2011-12 wherein, the CIT(A) had confirmed that the assessment of gains on sale of shops under the head “business” which came to be affirmed by the Tribunal in ITA No.336/PUN/2016 for A.Y. 2011-12 order dated 18.12.2018 in assessee’s own case. Therefore, the same cannot be subject matter of revision under 263.

10. On the other hand, ld. CIT-DR placing reliance on the order of the ld. PCIT passed u/s 263 submits that the assessment order was passed without enquiring into the sources of cash deposits and also into the genuineness of the unsecured loans, an assessment order was passed by the Assessing Officer without application of mind is

erroneous and prejudicial to the interests of the Revenue. Thus, it is prayed that the order of revision passed u/s 263 should be upheld.

11. We heard the rival submissions and perused the material on record. The Parliament had conferred the power of revision on the Commissioner of Income Tax u/s 263 of the Act in case the assessment order passed is erroneous and prejudicial to the interests of revenue. In order to invoke the power of revision, the above two conditions are required to be satisfied cumulatively. References in this regard can be made to the decision of the Hon'ble Supreme Court in the case of *Malabar Industrial Co. Ltd. vs. CIT*, 243 ITR 83 (SC) and in the case of *CIT vs. Max India Ltd.*, 295 ITR 282 (SC). The error in the assessment order should be one that it is not debatable or plausible view. In a case where the Assessing Officer examined the claim took one of the plausible views, the assessment order cannot be termed as an "erroneous". Therefore, the issue i.e. required to be examined by us is whether or not the Assessing Officer carried out any enquiry and verification on the issue of source of cash deposits as well as genuineness of the loans creditors and the assessment of gains arising on sale of shops should be under the head of "business" or "capital gains".

12. Now, we shall deal issue regarding the source of cash deposits. The fact that the Assessing Officer had examined the source of cash deposits is evident from the very impugned order as the ld. PCIT has reproduced the cash flow statements furnished before the Assessing Officer. Further, it is an admitted position that the ld. PCIT had mistaken the cash withdrawals from banks as the cash deposits. Thus, the ld. PCIT had initiated the revision proceedings on wrong assumption of facts. Therefore, we hold that the ld. PCIT was justified in exercising the powers of revision on the issue of source of cash deposits. Thus, the revision is not maintainable on the issue of sources of cash deposits into bank.

13. As regards, the unsecured loan creditors, the Assessing Officer during the course of assessment proceedings had called for the details of loan creditors in order to satisfy himself as to the genuineness of the loan creditors. The appellant also furnished the full details before the Assessing Officer by filing the ledger extract, particular of PAN of the loan creditors in whose names the loan is outstanding in the books of account. The said ledger extract was certified to be true by respective sundry creditors. The Assessing Officer having considered the information filed before him chosen

not to make any addition. No doubt, the assessment order is silent on this issue. Merely because the assessment order is silent on this issue, it cannot be said that the Assessing Officer had not examined the issue. Once a query has been raised by the Assessing Officer during the assessment proceedings and the assessee has responded to that query, it would necessarily follow, that the Assessing Officer has accepted the assessee's submissions, so as to not deal with that issue in the assessment order. In fact, the Hon'ble Bombay High Court in the case of GKN Sinter Metals Ltd. vs. Ms. Ramapriya Raghavan, Asstt. CIT, 371 ITR 225 (Bom.) had occasion to deal with the identical situations, wherein, after referring to its earlier decision in the case of Idea Cellular Ltd. v. Deputy Commissioner of Income Tax, 301 ITR 407 (Bom.) and in the case of Aroni Commercials Ltd. v. Assistant Commissioner of Income Tax, 367 ITR 405 (Bom.) held as follows :-

“According to the Revenue, it could only be when the assessment order contains discussion with regard to particular claim can it be said that the Assessing Officer had formed an opinion with regard to the claim made by the assessee. This Court in Idea Cellular Ltd. v. Deputy Commissioner of Income Tax 301 ITR 407 has expressly negated on identical contention on behalf of the Revenue. The Court held that once all the material was placed before the Assessing Officer and he chose not to refer to the deduction/claim which was being allowed in the assessment order, it could not be contended that the Assessing Officer had not applied his mind while passing the assessment order. Moreover in this case, it is evident from the letter dated 6th August, 2007,

addressed by the Assessing Officer to the Petitioner containing the reasons recorded for issuing the impugned notice also record the fact that during the regular assessment proceedings, the Petitioner has been asked to furnish details in support of the claim for exemption under Section 80-IA/IB of the Act. The letter further records that the details sought for were furnished and it is now observed that there has been a disproportionate distribution of expenses between various units belonging to the Petitioner for claiming deduction under Section 80-IA/IB of the Act. This is a further indication of the fact that the Assessing Officer had during the regular assessment proceedings for Assessment Year 2002-03 sought information in respect of the allocation of expenses and the explanation offered by the Petitioner was found to be satisfactory. This is evident from query dated 27th December, 2004, and the Petitioner's response to the same on 25th January, 2005, explaining the manner of distribution of common expenses for delaying the process of claiming deduction under Section 80-IA/IB of the Act. All this would indicate that Assessing Officer had formed an opinion while passing the order dated 9th March, 2005, This Court in Aroni Commercials Ltd. v. Assistant Commissioner of Income Tax 367 ITR 405 had occasion to consider somewhat similar submission made by the Revenue and negatived the same by holding that when a query has been raised with regard to a particular issue during the regular assessment proceedings, it must follow that the Assessing Officer had applied his mind and taken a view in the matter as is reflected in the Assessment Order. Besides, the manner in which an Assessing Officer would draft/frame his order is not within the control of an assessee. Moreover, if every contention raised by the assessee which even if accepted is to be reflected in the assessment order, then as observed by the Gujarat High Court in CIT v. Nirma Chemicals Ltd. 305 ITR 607, the order would result into an epic tomb. Besides, it would be impossible for the Assessing Officer to complete all the assessments which have to undergone scrutiny at its hand. In the above view, it is clear that once a query has been raised during the assessment proceedings and the Petitioner has responded to the query to the satisfaction of the Assessing Officer as is evident from the fact that the Assessment Order dated 9th March, 2005, accepts the Petitioner's claim for deduction under Section 80-IA/IB of the Act. It must follow that there is due application of mind by the Assessing Officer to the issue raised.”

14. Subsequently, the above said decision was followed by the Hon'ble Bombay High Court in the case of Marico Ltd. vs. ACIT,

425 ITR 177 (Bom.). Therefore, it cannot be said that there is total lack of enquiry on the part of the Assessing Officer, nor was it the case of the Id. PCIT that the Assessing Officer should have conducted further enquiry. It is trite law that the power of revision can be exercised only in case of a total lack of enquiry as held by the Jurisdictional High Court in the case of CIT vs. Nirav Modi, 390 ITR 292 (Bom.) :-

“9. Once the Assessing Officer is satisfied with the explanation offered on inquiry, it is not open to the CIT in exercise of his revisional powers direct that further enquiry has to be done. At the very highest, the case of the Revenue is that this is a case of inadequate inquiry and not of "no enquiry." It is well settled that the jurisdiction under Section 263 of the Act can be exercised by the CIT only when it is a case of lack of enquiry and not one of inadequate enquiry. This view has been taken by this Court in the matter of CIT v. Shreepati Holdings & Finance (P.) Ltd. [ITA 1879 of 2013 dated 5th October, 2013], by the Delhi High Court in CIT v. Vikas Polymers [2012] 341 ITR 537/194 Taxman 57 and in D.G. Housing Projects (supra). In fact the Delhi High Court in D.G. Housing Projects (supra) while so holding placed reliance upon the decision of this Court in Gabriel (India) Ltd. (supra). It is very important to note that the CIT in his order under Section 263 of the Act has recorded the fact that there has been no adequate inquiry. Thus, this is not a case of no inquiry, warranting order under Section 263 of the Act. Thus, this objection on the part of the Revenue, is also not sustainable.”

15. In the light of above facts and law, we are of the considered opinion that the power of revision cannot be exercised in respect of credits of loan creditors.

16. As regards to the issue of assessment of gains arising on sale of shops. This issue was subject-matter of appeal before the CIT(A)

as well as before the ITAT in assessment year 2011-12 in assessee's own case wherein, both the CIT(A) as well as the Tribunal had concurrently held that the gains arising from sale of shops should be assessable under the head of "business". The fact that this issue was subject-matter of appeal before the CIT(A) who confirmed the stand of appellant. On further appeal before the ITAT stand of appellant was upheld it goes to prove that the issue is debatable. It can thus be seen that the view taken by Assessing Officer that gains arising on sale of shops can be assessed under the head "business" is plausible view. Therefore, it is not open to ld. PCIT to exercise the power of revision on this, in view of settled position of law, if after proper enquiries, the Assessing Officer adopted a view which is a plausible view, such view could not be open to revision by Commissioner.

17. In the light forgoing discussion, we are of the considered opinion that the ld. PCIT was not justified in exercising the power of revision u/s 263 in respect of above three items. Therefore, we hereby quash the order passed u/s 263 of the Act dated 17.03.2017. Thus, the grounds of appeal raised by the assessee in all the above three appeals stand allowed.

18. In the result, all the above three appeals filed by the assessee are allowed.

Order pronounced on this 20th day of April, 2022.

Sd/-
(S. S. VISWANETHRA RAVI)
JUDICIAL MEMBER

Sd/-
(INTURI RAMA RAO)
ACCOUNTANT MEMBER

पुणे / Pune; दिनांक / Dated : 20th April, 2022.

Sujeet

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The Pr.CIT-1, Nashik.
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "B" बेंच, पुणे / DR, ITAT, "B" Bench, Pune.
5. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

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Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.