

आयकर अपीलीय अधिकरण, 'डी' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL, 'D' BENCH, CHENNAI
श्री वी. दुर्गा राव, न्यायिक सदस्य एवं श्री जी.मंजुनाथ, लेखा सदस्य के समक्ष
BEFORE SHRI V.DURGA RAO, JUDICIAL MEMBER
AND SHRI G. MANJUNATHA, ACCOUNTANT MEMBER

आयकरअपीलसं./I.T.A.No.1320/Chny/2017

(निर्धारणवर्ष / Assessment Year: 2008-09)

M/s.Sun Direct TV Private Ltd. Murasoli Maran Towers, 73, MRC Nagar Main Road, MRC Nagar, Chennai-600 028.	Vs	Assistant Commissioner of Income Tax, Non-Corporate Circle-20, Chennai.
PAN: AAICS 7671L		
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थीकीओरसे/ Appellant by	:	Mr. K.Ramkrishnan, C.A.
प्रत्यर्थीकीओरसे/Respondent by	:	Dr. S.Palani Kumar, CIT

सुनवाईकीतारीख/Date of hearing	:	15.03.2022
घोषणाकीतारीख /Date of Pronouncement	:	25.05.2022

आदेश / ORDER

PER G. MANJUNATHA, AM:

This appeal filed by the assessee is directed against order of the Principal CIT-10, Chennai dated 24.03.2017 passed under section 263 of the Income Tax Act, 1961 for the assessment year 2008-09.

2. The assessee has raised following grounds of appeal:-

"1. The order of the learned Principal Commissioner is contrary to law, facts and circumstances of the case.

2. The learned Principal Commissioner of Income tax ought not to have invoked his revisional powers of sec.263, in the facts and circumstances of the case.

3. The learned Principal CIT erred in holding that the re-assessment completed without adding the share subscription by South Asia Entertainment Holdings Limited, is erroneous and prejudicial to the revenue, without clearly recording his finding in the order that how the order of the AC is erroneous

and also prejudicial to the Revenue which are pre-requisite for initiation action u/s.263.

4. The assessment having been completed twice in 2010 u/s.143(3) and again in 2015 u/s.143(3) r.w.147, both under scrutiny, never suspecting, that the share application money was in fact bogus. What all the AO has considered in the reassessment order which is the subject matter of invocation of sec.263, is the allotment of premium, which was considered by him was a very unusual commercial transaction. In his own words in the reassessment order:

5. Without prejudice to the above, it is to be pointed out that the addition of share premium by the AO was made u/s.68, allegedly as unexplained credit ignoring the decision of the Supreme Court in the case of Lovely Exports. Now the learned Principal CIT wants to extend the applicability of the provisions of sec.68 to the share capital (subscription) also, in complete disregard to the decision of the Apex Court in the case of Lovely Exports — 317 ITR 218.

6. Without prejudice to the above, the learned Principal CIT failed to understand that the entire re-assessment of share premium from the foreign entity under FDI was assessed that too on a protective basis solely because of the allegations received from the CBI after a charge sheet filed by it in a Special Court and that too in an altogether in an unconnected case of Shri Dayanidhi Maran under different enactment. This stand of the AO is made very crystal clear in the re-assessment order itself. However, in its elaborate judgment the Special Court by its order 02/02/2017 held the share capital investment which is under consideration is genuine. Therefore, even the re-assessment of share premium does not subsist in the eye of law and hence, there could never be further assessment of share capital, as envisaged by the learned Principal CIT.

7. The learned Principal CIT erred in passing the order u/s.263 based on the limitation of time without establishing that the Special Court order has not become final.

8. For these and other grounds that may be adduced at the time of hearing it is prayed that the order of the Principal CIT u/s.263 be cancelled and justice rendered.”

3. Brief facts of the case are that the assessee company is engaged in the business of broadcasting of movies and related programmes filed its return of income for the assessment year 2008-09 on 23.09.2008 declaring total loss of Rs.59,50,21,350/-. The original assessment has been completed u/s.143(3) of the Income Tax Act, 1961, on 31.12.2010 and determined total loss of Rs.36,64,29,887/-. The assessment has been subsequently reopened u/s.147 of the Income Tax Act, 1961, and during the course of reassessment proceedings, the Assessing Officer noticed that the assessee had received share capital and share premium from M/s. South Asia Entertainment Holdings Ltd., Mauritius, amounting to Rs.315,71,32,309/- and after considering relevant submissions of the assessee has made additions of Rs.2,76,03,58,109/- on protective basis u/s.68 of the Income Tax Act, 1961 towards share premium received from M/s. South Asia Entertainment Holdings Ltd., Mauritius.

4. The Principal CIT-10, had taken up the case for revision proceedings u/s.263 of the Income Tax Act, 1961, and hence, a show cause notice u/s.263 of the Act, dated 10.02.2017 was

served on the assessee and asked as to why the assessment order passed by the Assessing Officer u/s.143(3) r.w.s. 147 of the Act, dated 31.03.2015, shall not be revised. The Principal CIT, in the said show-cause notice observed that the assessment order passed by the Assessing Officer dated 31.03.2015 is erroneous, insofar as it is prejudicial to the interests of the revenue on the issue of assessment of share capital received by the assessee from M/s. South Asia Entertainment Holdings Ltd., Mauritius, because although, the Assessing Officer had made addition for share premium received from said company, but failed to make addition towards share capital u/s.68 of the Income Tax Act, 1961, even though, the Assessing Officer has clearly held that amount received by the assessee from M/s. South Asia Entertainment Holdings Ltd., Mauritius, is *quid pro quo*. Thus, the PCIT opined that the assessment order is erroneous, insofar as it is prejudicial to the interests of the revenue.

5. In response to said show-cause notice, the assessee submitted that the assessment order passed by the Assessing Officer is neither erroneous nor prejudicial to the interests of the revenue, because very purpose of reopening of assessment

u/s.147 of the Act, is to consider the issue of share capital and share premium received by the assessee from M/s. South Asia Entertainment Holdings Ltd., Mauritius. The Assessing Officer during the course of reassessment proceedings has considered the issue and has taken one possible view and has made addition towards share premium on protective basis, even though, the Assessing Officer opined that said share capital cannot be taxed in the hands of the assessee. From the above, it is very clear that the issue had been considered by the Assessing Officer and has taken a view, therefore, on very same view, the Principal CIT cannot assume his jurisdiction and revise the assessment order. The assessee had also filed detailed written submissions in light of the order passed by the CBI Special Court, New Delhi, and in light of observations of the court and argued that sole basis for the Assessing Officer to make additions towards share premium and share capital as unexplained cash credit is charge sheet filed by the CBI before the CBI Special Court. However, the CBI Special Court, after apprising relevant evidences has held that transaction between the assessee and shareholder is genuine business transaction and thus, acquitted all accused in the case. Since, the very

basis for making addition itself is wrong, the Assessing Officer cannot make any addition on share capital received by the assessee and thus, the Principal CIT cannot invoke his jurisdiction to revise the assessment order.

6. The Principal CIT, after considering relevant submissions of the assessee and also by taking note of various facts brought out by the Assessing Officer held that the assessment order passed by the Assessing Officer is erroneous, insofar as it is prejudicial to the interests of revenue and thus, set aside the assessment order and direct the Assessing Officer to redo the assessment and add share capital amount received by the assessee from M/s. South Asia Entertainment Holdings Ltd., Mauritius u/s.68 of the Income Tax Act, 1961. The relevant findings of the learned PCIT are as under:-

“6. I have gone through the assessee’s submissions. It is a fact that the Assessing Officer made a conclusion that the amount received as a Share Capital from SAEHL is in lieu of the consideration received for services rendered towards allocation of 2G Spectrum and it was added u/s. 68 of the Income tax Act. But in the assessment order, the AO has added only the Premium but not the face value of the shares subscription. Certainly this view of the AO in the assessment

order is not only erroneous but also prejudicial to the interest of revenue.

7. The assessee's submission during the proceedings u/s. 263 of the Act that Hon' ble Special Court has quashed the charge sheet filed by e CBI could not be taken into account in this proceedings as it is not known that the Hon'ble Special Court's decision has become final. As the proceedings u/s. 263 of the IT Act has to be completed before 31.3.2017, t cannot be delayed further to see whether the Hon'ble Special Courts decision is final or not.

8. In these circumstances, I hold that order passed by the Assessing Officer dated 31.3.2015 is erroneous and prejudicial to the interest of revenue and therefore the assessment order dated 31015 is hereby set aside and direct the AO to do fresh assessment and add the share - amount collected of Rs 39,67,74,200i768 of the Income tax Act The AO also directed to take note of the decision of the Government or the Courts on the decision of the Hon'ble Special Court referred by me above while finalizing the fresh assessment."

7. The learned A.R for the assessee submitted that the learned PCIT has erred in revising the assessment order passed by the Assessing Officer u/s.143(3) r.w.s. 147 of the Act, dated 31.03.2015 by holding that the assessment order passed by the Assessing Officer is erroneous, insofar as it is prejudicial to the interests of the revenue, without appreciating fact that the Assessing Officer had considered issue of share capital and share premium received from M/s. South Asia Entertainment Holdings Ltd., Mauritius, and after considering

relevant facts has taken one possible view and thus, on very same issue the PCIT cannot assume jurisdiction u/s.263 of the Income Tax Act, 1961. The learned A.R for the assessee referring to various judicial precedents, including decision of the Hon'ble Supreme Court in the case of M/s. Malabar Industrial Company Pvt. Ltd. Vs. CIT (2000) 243 ITR 83, submitted that in order to invoke jurisdiction u/s.263 of the Act, the PCIT must satisfy himself about the assessment order passed by the Assessing Officer that assessment order is erroneous, and insofar as it is prejudicial to the interests of the revenue. In this case, the PCIT has assumed jurisdiction u/s.263 of the Act, without making any observation as to how the assessment order passed by the Assessing Officer is erroneous and prejudicial to the interests of the revenue. Therefore, the learned A.R for the assessee submitted that the order passed by the learned PCIT should be quashed.

8. The learned DR, on the other hand, supporting order of the learned PCIT submitted that the assessment order passed by the Assessing Officer is erroneous, insofar as it is prejudicial to the interests of the revenue, because the Assessing Officer has failed to consider the issue in right perspective of law in

light of provisions of section 68 of the Act, which is evident from fact that although, the Assessing Officer had made additions towards share premium received by the shareholder, but failed to make additions towards share capital, even though the Assessing Officer had made clear observation in light of facts that transactions between the assessee and shareholder is *quid pro quo* for getting some benefits. The DR further submitted that the powers of PCIT are wide, where the PCIT can revise assessment order, if he satisfies that the assessment order passed by the Assessing Officer is erroneous and it is prejudicial to the interests of the revenue. The PCIT had given very elaborate reasons to reach a conclusion as to how the assessment order passed by the Assessing Officer is erroneous and it is prejudicial to the interests of the revenue. Therefore, the learned DR submitted that there is no merit in the arguments of the assessee and thus, order passed by the learned PCIT should be upheld.

9. We have heard both the parties, perused material available on record and gone through orders of the authorities below. The learned PCIT had revised the assessment order

passed by the Assessing Officer u/s.143(3) r.w.s.147 of the Income Tax Act, 1961, dated 31.03.2015 on the issue of share capital received by the assessee from M/s. South Asia Entertainment Holdings Ltd., Mauritius, u/s.68 of the Income Tax Act, 1961. According to the PCIT, order passed by the Assessing Officer is erroneous and prejudicial to the interests of revenue, because although, the Assessing Officer had made additions towards share premium received by the assessee from M/s. South Asia Entertainment Holdings Ltd., Mauritius, but failed to make additions towards share capital u/s.68 of the Income Tax Act, 1961, even though, the Assessing Officer had clearly observed that transactions between the assessee and the said company is *quid pro quo* for some benefits. The PCIT had discussed the issue in light of various facts brought out by the Assessing Officer and also charge sheet filed by the CBI, before the Special Court for alleged kickback received for allocation of 2G spectrum to certain companies. As per the PCIT, although, the Assessing Officer had verified the issue and has made additions towards share premium, but failed to made additions towards share

capital which rendered the assessment order to be erroneous and prejudicial to interests of revenue.

10. The provisions of section 263 empowers the Commissioner to revise assessment order, if he satisfies that the assessment order passed by the Assessing Officer is erroneous and prejudicial to the interests of the revenue. In order to invoke jurisdiction u/s.263 of the Act, the PCIT should ascertain from records that twin conditions prescribed therein must be satisfied, i.e., the order passed by the Assessing Officer is erroneous and it is prejudicial to the interests of the revenue. The words 'prejudicial to the interests of revenue' have not been defined, but it must mean that order of assessment challenged are as such are not in accordance with law, in consequence thereof, lawful revenue due to State has not been realized or cannot be realized. Therefore, in order to assume his jurisdiction, the PCIT should spell out how and why the assessment order passed by the Assessing Officer is erroneous and prejudicial to the interests of the revenue. Unless, twin conditions embedded therein are not satisfied, the PCIT cannot assume his jurisdiction to revise the assessment order. This is fortified from the decision of the Hon'ble Supreme

Court in the case of **CIT Vs. M/s.Malabar Industrial Co.Ltd.** (supra) where it has been clearly held that in order to assume jurisdiction u/s.263 of the Act, the PCIT must satisfy himself that the assessment order passed by the Assessing Officer is erroneous, insofar as it is prejudicial to the interests of the revenue .

11. In light of above legal position, if you examine facts of the present case, one has to understand whether assessment order passed by the Assessing Officer is erroneous, insofar as it is prejudicial to the interests of the revenue. The PCIT has questioned the issue of share capital received by the assessee from certain shareholders u/s.68 of the Act. We find that subject matter of reassessment proceedings u/s.147 of the Act, is share capital received by the assessee from M/s. South Asia Entertainment Holdings Ltd., Mauritius. The Assessing Officer had considered share capital received by the assessee, including share premium, from the said company, in light of CBI charge sheet filed before the CBI Special Court in connection with 2G Spectrum auction case, where it has been alleged that the assessee has received *quid pro quo* for benefitting certain parties in 2G spectrum allocation case. The sole basis for the

Assessing Officer to make additions towards share premium received from M/s. South Asia Entertainment Holdings Ltd., Mauritius, is charge sheet filed by the CBI in the Special Court. Except this, no other observation in the assessment order with regard to identity of the parties, genuineness of transaction and creditworthiness of parties. In fact, the Assessing Officer had accepted fact that parties are identified and transaction is through banking channel, however, the Assessing Officer had made additions towards share premium on protective basis only on the basis of CBI case filed before Special Court. From the above, what is clear is that the Assessing Officer had considered the issue of share capital received by the assessee from M/s. South Asia Entertainment Holdings Ltd., Mauritius, and after considering relevant facts has chosen not to make any addition towards share capital. In other words, the Assessing Officer has considered the issue and satisfied about explanation furnished by the assessee with regard to share capital received by the assessee from M/s. South Asia Entertainment Holdings Ltd., Mauritius, and after considering relevant facts has accepted explanation furnished by the assessee. Therefore, we are of the considered view that once

the Assessing Officer has considered the issue on which the learned PCIT wants to exercise his jurisdiction u/s.263 of the Act, then there is no scope for the learned PCIT to assume jurisdiction and revise assessment order on very same issue by holding that the Assessing Officer had not carried out necessary enquiries required to be made on the issue.

12. We further noted that it is not a case of the learned PCIT that the Assessing Officer had not verified the issue at all. In fact, the learned PCIT candidly admitted that the issue was subject matter of verification from the Assessing Officer, however, the PCIT was of the opinion that enquiries conducted by the Assessing Officer is insufficient. In our considered view, the PCIT cannot assume his jurisdiction and revise the assessment order for inadequate enquiry, because once the Assessing Officer has taken a view, and considered the issue, then the PCIT cannot substitute his view on the very same issue and observed that view taken by the Assessing Officer is incorrect. It may be case of the PCIT that view taken by the Assessing Officer may not be a correct view, but, unless the PCIT brings out with necessary evidences to the fact that view taken by the Assessing Officer is unsustainable in law, the PCIT

cannot revise assessment order passed by the Assessing Officer on the ground that enquiries conducted by the Assessing Officer is inadequate. This legal principle is supported by the decision of the Hon'ble Bombay High Court in the case of CIT Vs. Gabriel India Ltd (1993) 203 ITR 108 and the decision of the Hon'ble Delhi High Court in the case of CIT Vs. Sunbeam Auto Ltd. (2011) 332 ITR 167 (Del). Therefore, we are of the considered view that the PCIT has erred in revising the assessment order passed by the Assessing Officer u/s.263 of the Act on the ground that assessment order passed by the Assessing Officer is erroneous, insofar as it is prejudicial to the interests of the revenue.

13. In this case, assessment order passed by the Assessing Officer is neither erroneous nor prejudicial to the interests of revenue. The issue of share capital and share premium received by the assessee from M/s. South Asia Entertainment Holdings Ltd., Mauritius, had been considered by the Assessing Officer and after considering relevant facts, the Assessing Officer had made additions on protective basis towards share premium received by the assessee. From the findings of the

Assessing Officer, we are of the considered view that the Assessing Officer himself is not sure about taxability of said share capital in the hands of the assessee, which is evident from the fact that the Assessing Officer himself had made additions on protective basis, which means the Assessing Officer himself is doubtful about taxation of said sum in the hands of the assessee. Therefore, on very same issue, the learned PCIT cannot assume his jurisdiction and revise the assessment order.

14. Coming back to Explanation 2 to provisions of section 263 of the Act, inserted by the Finance Act, 2015, w.e.f. 01.06.2015. The Finance Act, 2015 has inserted Explanation 2, as per which an order passed by the Assessing Officer shall be deemed to be erroneous, insofar as it is prejudicial to the interests of the revenue, if in the opinion of the Commissioner, order is passed without making inquiries or verification which should have been made and order is passed allowing any relief without enquiring into claim etc. As per Explanation 2, if an order passed by the Assessing Officer without making inquiries or verification which should have been made, then the PCIT shall deem that said order passed by the Assessing Officer is erroneous, insofar as

it is prejudicial to the interests of the revenue. The law does not specify what inquiries required to be made by the Assessing Officer. It is the Assessing Officer, who can decide what inquiries are required to be made when the proceedings are pending before him. Therefore, even after Explanation 2, if an order passed by the Assessing Officer had considered the issue and has taken one view, then the PCIT cannot invoke his jurisdiction by considering Explanation 2 and term the assessment order passed by the Assessing Officer as erroneous, insofar as it is prejudicial to the interests of the revenue, unless the PCIT brings out clear facts in his order for such reasons the assessment order passed by the Assessing Officer is erroneous, insofar as it is prejudicial to the interests of the revenue. In other words, even after Explanation 2, legal position remains same, inasmuch as to invoke jurisdiction u/s.263 of the Act, twin conditions embedded therein must be satisfied i.e., order passed by the Assessing Officer is erroneous and further, it must be prejudicial to the interests of the revenue. In this case, the learned PCIT does not bring on record any reason as to how and why assessment order passed by the Assessing Officer is erroneous and prejudicial

to the interests of the revenue. Therefore, we are of the considered view that the learned PCIT has erred in assuming jurisdiction u/s.263 of the Act and revised the assessment order. Hence, we quash order passed by the PCIT u/s.263 of the Income Tax Act, 1961.

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

Order pronounced in the open court on 25th May, 2022

Sd/-
(वी.दुर्गा राव)
(V.Durga Rao)
न्यायिक सदस्य /Judicial Member

Sd/-
(जी.मंजुनाथ)
(G.Manjunatha)
लेखा सदस्य / Accountant Member

चेन्नई/Chennai,

दिनांक/Dated 25th May, 2022

DS

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. Appellant
2. Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF.