

**IN THE INCOME TAX APPELLATE TRIBUNAL  
RAJKOT BENCH, RAJKOT**

**BEFORE SHRI PRAMOD M JAGTAP, VICE PRESIDENT &  
Ms. MADHUMITA ROY, JUDICIAL MEMBER**

I.T.A. No. 107/Rjt/2022  
(Assessment Year: 2012-13)

Manishbhai Laljibhai Vekaria C/o M/s Veko Electroplators, Veko House 80 Feet Road, Rajkot-360003	Vs.	The Principal Commissioner of Income Tax-1, Aayakar Bhawan, Race Course Ring Road, Rajkot-360001
[PAN No. AAUPV9181H]		
<b>(Appellant)</b>	..	<b>(Respondent)</b>

<b>Appellant by :</b>	Shri D. M. Rindani, A.R.
<b>Respondent by :</b>	Shri Sanjeev Jain, CIT D.R.

<b>Date of Hearing</b>	06.06.2022
<b>Date of Pronouncement</b>	31.08.2022

ORDER

**PER MADHUMITA ROY, JM:-**

The instant appeal filed by the assessee is directed against the order dated 14.02.2022 passed by the Principal Commissioner of Income Tax-1, Rajkot under Section 263 of the Income Tax Act, 1961 arising out of the order dated 02.12.2019 passed by the ITO, Ward-2(1)(3), Rajkot under Section 143(3) r.w.s. 147 of the Income Tax Act, 1961 (hereinafter referred to as “the Act”) for A.Y. 2012-13.

2. The brief facts leading to the case is this that the assessee filed its return of income for the year under consideration on 07.01.2013 declaring total income of Rs. 2,89,450/-.

3. The case of the assessee was reopened by issuing notice under Section 148 of the Act on 18.02.2019 on the basis of the assessee entering into the financial transactions amounting to Rs. 1,70,27,660/- during the

year under consideration. The assessee accordingly filed its return on 17.04.2019 declaring total income at Rs. 3,74,870/-. The said assessment was completed under Section 143(3) r.w.s. 147 of the Income Tax Act, 02.12.2019 determining total assessed income at Rs. 8,00,560/-. The allegation leveled against the assessee is receiving cash of Rs. 1,70,27,660/-. In the absence of proper explanation the same was treated as unexplained income and added 2.5% of the cash transactions i.e. Rs. 4,25,691/- by the Ld. AO to the total income of the assessee. According to the Ld. PCIT the whole cash transaction of Rs. 1,70,27,660/- was required to be added to the total income of the assessee which particular fact was not examined by the Ld. AO rendering the order erroneous as well as prejudicial to the interest of revenue and proceedings under Section 263 was initiated. The same was culminated into the final order dated 14.02.2022 directing the Ld. AO to make fresh assessment after conducting necessary verifications and enquiries and after providing proper opportunity of being heard to the assessee.

4. At the time of hearing of the instant appeal the Ld. Counsel appearing for the assessee submitted before us that an appeal is pending before the Ld. CIT(A) against the order passed by the Ld. AO dated 02.12.2019 whereby and whereunder an estimated addition of Rs. 4,25,691/- i.e. 2.5% of the total out of book sales of Rs. 1,70,27,660/- was made. It is the case of the assessee that the Ld. AO considered the very same issue in the reassessment proceeding under Section 147 of the Act and all the documents relating to the issue has duly been furnished by the assessee before him. Since the larger issue was pending before the Commissioner of Appeal the PCIT

cannot invoke jurisdiction under Section 263 against the said order of AO on account of statutory bar. On this count he has relied upon the judgment passed by the Hon'ble Madras High Court in the case of Smt. Renuka Philip vs. ITO, Business Ward-XV(2), Chennai, reported in (2019) 101 taxmann.com 119 (Madras). He has further relied upon the judgment passed by the Allahabad High Court in the case of CIT, Meerut vs. Vam Resorts & Hotels Pvt. Ltd., reported in (2019) 111 taxmann.com 62 (Allahabad).

5. On the other hand, the Ld. DR relied upon the order passed by the authorities below.

6. It appears from the records that Ld. AO has examined each and every aspect of the matter after analyzing the entire set of documents submitted by the assessee as demanded by Revenue which is reflecting in the order passed by the Ld. AO. In that view of the matter we do not justify the remand order to be sustainable particularly when the appeal has been preferred by the assessee against the said order passed by the Ld. AO. We further note that the Ld. CIT(A) is yet to decide the order either way and therefore, we do not find any reason to initiate and proceed against the said order passed by the Ld. AO under Section 147 of the Act taking recourse of the provision of law under Section 263 of the Act by holding the order passed by the Ld. AO erroneous and prejudicial to the interest of Revenue. In our considered opinion, the same is premature. We have carefully considered the judgment relied upon by the Ld. A.R. in the matter of Smt. Renuka Philip (supra). While dealing with the issue the Hon'ble Court was pleased to observe as follows:

“22. The above explanation makes it clear that when the appeal is pending before the Commissioner, the exercise of jurisdiction under Section 263 of the Act is barred. The Commissioner in the order dated 14.03.2012 states that the appeal pertains to the claim made by the assessee under Section 54 of the Act and it has got nothing to do with the order passed by the Assessing Officer under Section 54F of the Act. The said finding rendered by the Commissioner is wholly unsustainable, since the assessee went on appeal against the reassessment order dated 31.12.2009 stating that his claim for deduction under Section 54 of the Act should be accepted.

23. Therefore, in the process of considering as to what relief the assessee is entitled to, the Assessing Officer held that the assessee is entitled to claim deduction under Section 54F of the Act and assigned certain reasons for that. Therefore, the larger issue was pending before the Commissioner of Appeals, and in such circumstances, the Commissioner could not exercise power under Section 263 of the Act on account of the statutory bar. Therefore, on this ground also, the assumption of jurisdiction under Section 263 of the Act was wholly erroneous.”

Apart from that we have further considered the judgment passed by the Hon’ble Allahabad High Court in the case of Vam Resorts & Hotels Pvt. Ltd. (supra). We find that on the identical situation the Hon’ble Court was pleased to quash the order passed under Section 263 of the Act during the pendency of the appeal preferred by the assessee under Section 250 of the Act. While upholding the order passed by the Tribunal in holding the order exercising power under Section 263 was barred by Clause (c) of Explanation 1 of Section 263 of the Act was the Hon’ble Court observed as follows:

“25. As, Clause (c) of Explanation 1 to Section 263 of the Act provides that when an appeal is pending before the Commissioner, the exercise of jurisdiction under Section 263 of the Act by CIT is barred. Thus, in the present case, the CIT wrongly exercised jurisdiction under Section 263 of the Act by remanding back the matter to assessing authority on 25.3.2013, while the appeal was decided by CIT (A) on 5.6.2013. Thus, the order passed by the ITAT does not suffer from any irregularity and needs no interference.

26. As far as the word "record" appearing in Clause (b) of Explanation-1 to Section 263 is concerned, it means the record available at the time of examination by the Commissioner of Income Tax and not any material or record available subsequent to his examination or exercise of power under Section 263. Thus, any order passed by the AO in the assessment proceedings after the remand by the CIT cannot be

*looked upon and the argument made by the counsel for the revenue for relying upon the fresh assessment order made on 7.3.2004 under Section 263/143(3) of the Act cannot be accepted in view of the above provision of law.*

*27. In the present case, the Tribunal had recorded specific finding of fact that the assessing authority had examined each and every aspect of the case on which the remand order hinges, as such the remand order was not sustainable in the eyes of law.*

*28. Considering the facts and circumstances of the case, we are of the considered opinion, that the revenue has failed to make any case for interference in the order of the ITAT, as the CIT had proceeded to remand the matter back to the assessing authority while the appeal of the assessee was pending under Section 250 and the power of exercise under Section 263 was barred by Clause (c) to Explanation 1 of Section 263 of the Act. Further, the remand order by the CIT was based merely on suspicion and presumption.*

*29. The appeal is devoid of merit and is hereby dismissed. The question of law is, therefore, answered against the revenue and in favour of the assessee.”*

Hence, respectfully relying upon the same we do not find any reason/basis of the impugned proceeding under Section 263 of the Act when the appeal preferred by the assessee under Section 250 of the Act before the CIT(A) is pending against the order passed by the Ld. AO under Section 147 of the Act which has been sought to be revised by the Ld. PCIT in the garb of the provision of Clause (c) of Explanation 1 of Section 263 of the Act. The same is, thus, found to be unsustainable and therefore, quashed. Assessee's appeal is, therefore, allowed.

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

<b>This Order pronounced in Open Court on</b>	<b>31/08/2022</b>
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Sd/-  
(PRAMOD M JAGTAP)  
**VICE PRESIDENT**

Ahmedabad; Dated 31/08/2022  
TANMAY, Sr. PS

Sd/-  
(Ms. MADHUMITA ROY)  
**JUDICIAL MEMBER**

**TRUE COPY**

**आदेश की प्रतिलिपि अद्योषित/Copy of the Order forwarded to :**

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

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)  
आयकर अपीलीय अधिकरण, राजकोट / ITAT, Rajkot