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

Before Shri N.V. Vasudevan, Vice President
and
Ms. Padmavathy S., Accountant Member

ITA No. 508/Bang/2022 (Assessment Year: 2018-19)		
Shri Navunda Abdulla Badruddin O Thuwfeeq Manzil Maski Navunda, Kundapur Udupi 576224 PAN – AEVPA6893G	vs	PCIT, Central C.R. Building, Queen's Road Bengaluru 560001
(Appellant)		(Respondent)

Assessee by:	Shri V. Narendra Sharma, Advocate
Revenue by:	Shri Manjunath Karkihalli, CIT-DR
Date of hearing:	14/09/2022
Date of pronouncement:	20/09/2022

O R D E R

Per: Padmavathy, A.M.

This is an appeal filed by the assessee against the order of the Principal Commissioner of Income Tax(PCIT) u/s.263 of the Income Tax Act 1961 (the Act), Bangalore in appeal No. 263/Pr.CIT(C)/2001-02 dated 28.03.2022 for AY 2018-19.

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

"*1. The order of revision passed by the learned Principal Commissioner of Income tax [Central], Bengaluru, under Section 263 of the Act dated 28/03/2022, in so far as it is against the Appellant is opposed to law, weight of evidence, probabilities, facts and circumstances of the Appellant's case.*

2. The learned Principal Commissioner of Income tax is not justified in law and on facts to set aside the assessment order passed under section 143[3] r.w.s. 153D of the Act dated 19/12/2019 and direct

the assessing officer to modify the original assessment passed by the learned assessing officer, on the facts and circumstance of the case

3. *The learned Principal Commissioner of Income tax is not justified in passing an order under section 263 of the Act, as the order passed under section 143 [3] r.w.s. 153D of the Act, was pursuant to proper enquiry by the learned assessing officer on the facts and circumstances of the case.*

4. *The learned Principal Commissioner of Income tax has grossly erred in revising the order passed by the learned Assessing officer without appreciating that there is no error, much less prejudicial to the interests of the Revenue to warrant a revision and therefore the order passed by the learned PCIT is ultra vires to the scope of Section 263 and requires to be cancelled on the facts and circumstances of the Appellant's case. The direction to make thorough and detailed enquiry amounts to ordering fishingand roving enquires without any material in support thereof and consequently the impugned order passed is bad in law and is liable to be cancelled.*

5. *The learned Principal Commissioner of Income tax failed to appreciate that the very addition made by the learned assessing officer in the impugned order of assessment passed under section 143 [3] r.w.s. 153D of the Act amounting to Rs. 98,07,847/- itself is not sustainable since the appellant had recorded all the entries found during the course of search and consequently there is no unaccounted or unrecorded entries in the books of the appellant and no addition could have been made on the facts and circumstances of the case.*

6. *Without Prejudice, the learned Principal Commissioner of Income tax failed to appreciate that the said alleged declaration made by the appellant of Rs. 98,07,847/- was treated as business income by the learned assessing officer in the original order of assessment, and further failed to appreciate that the business income cannot come under the purview of the provisions of section 69C of the Act and consequently the provisions of section 115BBE of the Act is not attracted, on the facts and circumstances of the case.*

7. *The learned Principal Commissioner of Income tax failed to appreciate that once an item is considered as business income the same cannot be taxed as per the special rates under section 115BBE of the Act, on the facts and circumstances of the case.*

8. *The learned Principal Commissioner of Income tax failed to appreciate that the Assessing Officer before completing the assessment order under section 143[3] r.w.s 153D of the Act on 19/12/2019 had made detailed enquiries calling for relevant records and documents and explanation pertaining to the matter at hand, the same being produced by the appellant during various instances during the assessment proceedings and further as per the provisions*

of section 153D of the Act an approval has been sought for passing the order of assessment and having applied their mind and considering the facts the order of assessment has been passed. Hence on the very same issue no action can be taken under Section 263 of the Act as the actions of the Assessing Officer is pursuant to applying his mind to the matter and in accordance with law.

9. The learned Principal Commissioner of Income tax has passed an unsustainable order which is based purely on assumptions and presumptions. The order is arbitrary and full of surmises, without considering the relevant material and considering irrelevant materials. Consequently, the order passed is a perverse order on the facts and circumstance of the case.

10. Without further Prejudice the learned Principal Commissioner of Income-tax, failed to appreciate the fact that the impugned order of assessment passed by the learned assessing officer under section 143 [3] r.w.s 153D of the Act dated 19/12/2019 is subject matter of appeal before the learned Commissioner of Income-tax [Appeals], thus as per the Explanation [c] to sub-section [1] of section263 of the Act the powers are restricted to exercise the jurisdiction to the matter which was a subject matter of appeal, on the facts and circumstances of the case."

3. The assessee is an individual and is in the business of retail trade of sea fish and fish products. A search and seizure u/s.132 of the Act was carried out in the case of the assessee on 08.02.2018. A survey under Section 133A of the Act was also carried on in the office and factory premises 08.02.2018. The assessee filed return of income for assessment year 2018-19 on 29.03.2019 declaring total income of Rs.11,94,970/-. The case was selected for scrutiny and the notice Section 143(2) of the Act was issued and served on the assessee. During the survey proceedings statement of the assessee under Section 131 of the Act was recorded where by the assessee offered a sum of Rs.2,09,11,483/- as cash expenses unrecorded in the books of account as additional income as per details below: -

AY	**Badruddin Payments**
2015-16	8,11,208
2016-17	25,56,915
2017-18	77,35,513
2018-19	98,07,847

Total	**2,09,11,483**

4. The AO noticed that in the computation of income filed with the return of income on 10.10.2019 in response to notice under Section 153C of the Act the assessee has not declared income of Rs.98,07,847/- offered as additional income for AY 2018-19. The AO called on the as to show cause why income admitted during the survey should not be added to his income. The assessee filed a reply by stating that the said additional income was offered to buy peace and avoid unnecessary litigation at the time of offering books of account were not prepared. Subsequently the said additional income as recorded in the books of account and it was offered to tax in the return filed under Section 139 of the Act. However, the assessee agreed for the addition of the said amount during the assessment proceedings and the AO while concludeding the assessment u/s.143(3) added the said amount to the income under the head business.

5. The PCIT during the review of assessment records noticed that the AO has taxed the unexplained expenses on regular rates. The PCIT stated that the unexplained expenses are not recorded in the books of account and therefore it should not have been brought to tax under Section 69C of the Act and should be taxed under Section 115BBE of the Act. To this extent the PCIT considered the order of the AO to be erroneous and prejudicial to the interest of the revenue and in this regard issued show cause notice to the assessee u/s.263. The assessee submitted that the subject addition is contended by the assessee as per provisions of Section 246a of the Act before the CIT(A). The assessee further submitted that the AO has done proper enquiry and concluded the assessment after accepting the explanation made by the assessee.

6. The PCIT did not accept the submissions of the assessee and proceeded to set aside the order of the AO by invoking explanation (2) to section 263 of

the Act. The PCIT stated that the entries found during the survey proceedings need to be verified and enquired into as to whether the same is in the nature of unexplained cash expenditure under Section 69C of the Act and should have been taxed under Section 115BBE of the Act and since the AO is did not enquire or verify the said expenditure the order of the AO is erroneous and prejudicial to the interest of Revenue to that extent.

7. Before us the learned A.R. reiterated the submissions made before the lower authorities. The learned A.R. further submitted that the AO has done a detailed enquiry with regard to the additional income offered and accepted the submissions that the only source of income for the assessee is from the business. The learned A.R. further submitted that the additional income was offered only to buy peace and to avoid unnecessary litigation which the AO has taken into consideration while concluding the assessment under Section 143(3) of the Act. Therefore, it was the submission of the learned A.R. that the order of the AO is not erroneous or prejudicial to the interest of Revenue.

8. The learned D.R. supported the order of the PCIT.

9. We have heard the rival contentions and perused the material on record. We notice that during the survey proceedings a cash book containing cash expenses made from FY 2014-15 to FY 2017-18, which was not entered in the regular books of account, was found. The details of such cash expenses was for an amount of Rs.5,48,35,810/- and Shri Shreedhar K A, Accounts Manager in his sworn statement recorded under Section 131 of the Act during the course of survey conceded that the above cash expenditure has been incurred and the data in the excel sheet has been maintained as per the instruction of the assessee. When confronted with the statement the assessee in his statement declared as under: -

> *"I confirm that these loose sheets serially numbered from 1 to 37 marked as Bundle No-1 was found and impounded at the above mentioned premises belongs to M/s. T J Marine Products Pvt. Ltd. In this nature of*

business there are some expenses which are inevitable and should be paid to run the business smoothly. We have to incur certain expenditure for which we are unable to produce any proofs/get any receipts. To meet this expenditure purchase are shown at higher side to that extent. I have vide letter dated 23.07.2018 enclosed as Annexure the segregation/break-up of the entire payments made in cash with the remarks of it being expenses and the disallowance to be made in the hand of the company or individual. A summary of it is as given below."

10. The assessee filed before the ADIT (Inv) furnished the segregation of the above given cash payments with the remarks of it being expenses incurred on behalf of the company to the tune of Rs.3,75,24,32 and the expenses incurred by the assessee in his personal capacity for an amount of Rs.2,09,11,483. In the statement recorded u/s.131 the assessee offered the expenses incurred in personal capacity for the relevant assessment the extract of which is given in the earlier part of this order.

11. From the above sworn statement it is noticed that the assessee, in order to meet certain inevitable expenses, has cooked up the purchase which are bogus in nature. It is also noticed that the assessee during the course of assessment submitted that the said amount is already accounted in the books of accounts and that to buy peace the amount is offered as additional income. It is further noticed that the AO has accepted these submissions of the assessee and concluded the assessment without factually verifying what is submitted and without calling for any details. Though the assessee declared that the source for the expenditure is from the bogus purchases, this fact needs to be examined based of further enquiry and evidences which in our considered view the AO has not done.

12. We will look at the provisions of Explanation (2) to section 263 which reads as follows:-

"*Explanation 2*.—For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer **[***or the Transfer Pricing Officer, as the case may be*,**]** shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal [95][Chief Commissioner or Chief Commissioner or Principal] Commissioner or Commissioner,—

(*a*) the order is passed without making inquiries or verification which should have been made;

(*b*) the order is passed allowing any relief without inquiring into the claim;

(*c*) the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or

(*d*) the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person."

13. The phrase 'should have been done' as provided in the newly inserted Expanation means the verification/ enquiry which ought to have been done. In other words, as per clause (a) to Explanation to section 263, the order passed without making enquiries or verification **which should have been made** is erroneous insofar as it is prejudicial to the interests of the revenue.It may be said that the Income Tax Act nowhere provides the exact modalities to be followed to verify a specific claim made by the assessee prerogative of the AO to decide the extent of verification. However, it is necessary for the AO to record the extent of verification carried out by him and to record that he has taken a considered view on the matter by proper application of mind while allowing the claim of the assessee in the matter.

14. We notice that the Hon'ble Karnataka High Court in the case of *CIT v. Infosys Technologies Ltd. (supra)* has considered a similar issue and held that -

"21. In the present case, while there is no doubt that the assessee is entitled to claim deduction in terms of Articles 23(3)(a) and 23(4) of the agreements between India with Canada and Thailand respectively. the question is one of what exactly the entitlement? In the absence of any discussion either in the assessment order or in the computation claim, particularly as the extent of relief that can be claimed under these two articles is only after a specific exercise and though Sri Sarangan has very vehemently urged that it is not necessary for the assessing authority to make all these things explicit, so long as he is satisfied, on the strength of the authority of the Supreme Court

not only in the ease of Electro House (supra) and to more so on the basis of the observations and law as declared in the case of Malabar Industrial Co. Ltd. (supra) we are fully satisfied that a situation where a deduction of the present nature is allowed or in the sense deducted from out of the tax liability of the assessee without indicating the basis, can definitely be construed as an order both erroneous and prejudicial, has this is definitely a possibility and it is only because it is per se, not discernible in the revisional order, but definitely gives rise to a situation where the commissioner may consider the order as erroneous and prejudicial and the commissioner having remanded the matter to the assessing authority, we are of the clear opinion that it cannot be characterized as a situation beyond the realm of Section 263 of the Act, as the order being erroneous and prejudicial is a clear possibility particularly the assessing authority not disclosing the basis.

22. To test this proposition, if an order which is explicit is passed by the assessing authority and indicating that the assessee is entitled to a particular extent of relief, but if it is with reference to relevant articles of the double taxation avoidance agreements and if it is not either a proper computation or not fully in consonance with the same and if it has resulted in a situation of granting a greater relief than the assessee is otherwise entitled to under these agreements and if the commissioner can revise such an order without any hassle in the exercise of revisional jurisdiction under section 263 of the Act and can correct the order which is erroneous and prejudice to the interest of the revenue, just because the assessing authority does not spell out the reasons and therefore can avoid scrutiny under Section 263 of the Act, is an argument which is not logical or rational and not acceptable and at any rate on the authority of the Supreme Court in the case of Malabar Industries Co. (supra) is not an acceptable submission.

23. Though learned counsel for the assessee have placed strong reliance on two judgments of the Bombay High Court and the Delhi High Court in the cases of Gabriel India Ltd. and Ashish Rajpal (supra) respectively and the Delhi High Court, in fact, has made reference to the decision of the Supreme Court in the case of Max India Ltd. (supra), with great respect, we are unable to apply the ratio of these two decisions to the present circumstance and we are quite satisfied that the law declared by the Supreme Court not only in the case of Electro House (supra) and also in the case of Malabar Industries Co. (supra) fully covers the situation, no further need to discuss with any greater elaboration on the view expressed by the Bombay and the Delhi High Courts.

24. In the present situation, the Commissioner having only directed the assessing authority to compute it or re-compute it and make it explicit as to the entitlement of the assessee, an order of this nature, in fact, could not have been contended as detrimental to the interest of the assessee, as it was always open to the assessee to justify the claim in terms of the double taxation avoidance agreements. In a situation of this nature, we are also of the opinion that it was not a case which warranted interference by the tribunal,

more so for setting aside the order of the commissioner and for ensuring that the order passed by the assessing authority was left in tact.

25. One should bear in mind that a relief which is required to be given to any litigant in any given case should be commensurate to the gravity of the situation, to the needs and necessity of the situation and warranting such relief and with reference to the governing statutory provisions. Just, because the tribunal has appellate jurisdiction over the orders passed by the commissioner, it does not mean that the tribunal should interfere with each and every order of the commissioner when it is really not warranted and in a situation of the present nature, by calling in aid all legal principles, particularly questions of jurisdiction and by interpreting a statutory provision, to limit or curtail the scope and operation of the provision even when there is no need for it.

26. We are also not in a position to accept the submission that, the materials had been placed before the assessing authority and therefore there should be a conclusion that the authority has applied his mind to the same and there was no question of the commissioner interfering by taking a different view etc.

27. Assessing authority performs a quasi-judicial function and the reasons for his conclusions and findings should be forthcoming in the assessment order. Though it is urged on behalf of the assessee by its learned counsel that reasons should be spelt out only in a situation where the assessing authority passes an order against the assessee or adverse to the interest of the assessee and no need for the assessing authority to spell out reasons when the order is accepting the claim of the assessee and the learned counsel submit that, this is the legal position on authority, we are afraid that to accept a submission of this nature would be to give a free hand to the assessing authority, just to pass orders without reasoning and to spell out reasons only in a situation where the finding is to be against the assessee or any claim put forth by the assessee is denied.

28. We are of the clear opinion that, there cannot be any dichotomy of this nature, as every conclusion and finding by the assessing authority should be supported by reasons, however brief it may be, and in a situation where it is only a question of computation in accordance with relevant articles of a double taxation avoidance agreements and that should be clearly indicated in the order of the assessing authority, whether or not the assessee had given particulars or details of it. It is the duty of the assessing authority to do that and if the assessing authority had failed in that, more so in extending a tax relief to the assessee, the order definitely constitutes an order not merely erroneous but also prejudicial to the interest of the revenue and therefore while the commissioner was justified in exercising the jurisdiction under Section 263 of the Act, the tribunal was definitely not justified in interfering with this order of the commissioner in its appellate jurisdiction.

> Therefore, we answer the question posed for our answer in the negative and against the assessee. Both appeals are allowed. Parties to bear their respective cost."

15. We also notice that the Hon'ble Delhi High Court in the case of Gee Vee Enterprises v .ACIT [1975] 99 ITR 375 (Del) has held as under –

> "The reason is obvious. The position and function of the Income-tax Officer is very different from that of a civil court. The statements made in a pleading proved by the minimum amount of evidence may be accepted by a civil court in the absence of any rebuttal. The civil court is neutral. It simply gives decision on the basis of the pleading and evidence which comes before it. The Income-tax Officer is not only an adjudicator but also an investigator. He cannot remain passive in the face of a return which is apparently in order but calls for further inquiry. It is his duty to ascertain the truth of the facts stated in the return when the circumstances of the case are such as to provoke an inquiry. The meaning to be given to the word "erroneous" in section 263 emerges out of this context. It is because it is incumbent on the Income-tax Officer to further investigate the facts stated in the return when circumstances would make such an inquiry prudent that the word "erroneous" in section 263 includes the failure to make such an inquiry. The order becomes erroneous because such an inquiry has not been made and not because there is anything wrong with the order if all the facts stated therein are assumed to be correct".

16. In the case under consideration the ld. PCIT has excised the revisionary powers u/s. 263 of the Act since he has noticed that during the survey u/s. 133A of the Act there were evidences that the assessee has shown the purchases at a higher side than actual to meet certain expenses which have not been brought into the books of accounts. The AO without making further enquiry on the extent to which these purchases are hiked and to what is the amount recorded in the books accounts has merely taken the breakup of additional income offered by the assessee and has added it to the income of the assessee during the assessment proceedings under Section 143(3) of the Act.We are therefore, of the considered view that the AO has not conducted the verification that "should have been conducted" during the course of assessment proceedings.

17. In view of the above discussion and respectfully following the decision of jurisdictional High Court in the case of *Infosys Technologies Ltd. (supra)* and the Hon'ble Delhi High Court in the case of *Gee Vee Enterprises(supra)* we hold that the PCIT was justified in assuming the jurisdiction u/s 263 of the Act by setting aside the assessment order. We therefore modify the order passed u/s.263 with a direction to the AO to examine and confirm the extent to which the purchases are inflated which according to the assessee is the source for the unaccounted expenditure. It is ordered accordingly

18. In the result, the appeal filed by the assessee is dismissed.

Pronounced in the open Court on 20th September, 2022.

Sd/-	Sd/-
(N.V. Vasudevan)	**(Padmavathy S)**
Vice President	**Accountant Member**

Bengaluru, Dated: 20th September, 2022

Copy to:

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2. *The Respondent*
3. *The CIT(A) -*
4. *The CIT - Bengaluru*
5. *The DR, ITAT, Bengaluru*
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By Order

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Assistant Registrar
ITAT, Bengaluru

n.p.