

IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH KOLKATA

आयकर अपीलिय अधीकरण, न्यायपीठ - "C" कोलकाता,

**BEFORE SHRI SANJAY GARG, JUDICIAL MEMBER
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER**

**ITA No.100/Kol/2021
Assessment Year: 2015-16**

M/s. Kamlesh Trade & Agency Pvt. Ltd., 8, B.R.B Basu Road, 2nd floor, Room No. 204, Kolkata-700 001. (PAN: AABCK3338H)	Vs	Income Tax Officer, Ward-4(4), Kolkata.
(Appellant)		(Respondent)

Present for:

Appellant by : Shri Amit Agarwal, Advocate
Respondent by : Shri D. K. Sonawal, CIT, DR

Date of Hearing : 22.09.2022
Date of Pronouncement : 31.10.2022

ORDER

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

This appeal by the assessee is arising out of the order under section 263 of the Income-tax Act, 1961 (hereinafter referred to as the Act) by Pr. Commissioner of Income-tax -5, Kolkata in Order number ITBA/REV/F/REV5/2020-21/1030307831(1) dated 03.02.2021 against the assessment order passed under section 143(3) of the Act by ITO, Ward - 4(4), Kolkata, dated 25.07.2017.

2. Grounds of appeal taken by the assessee are reproduced as under:

"1. For that the Ld Pr CIT erred in invoking the provisions of section 263 when the return was taken for limited scrutiny on specific ground and the AO made the relevant enquiry therefore the assessment could not be set aside because what the AO could not have done, the Ld PCIT also cannot direct to do the same by direction under the proceedings u/s 263.

2. For that the Ld. Pr CIT erred in initiating the proceedings u/s 263 when the assessment was completed after making enquiry which was called for in the facts of the case.

3. For that the Ld. Pr CIT erred in invoking proceedings u/s 263 on the basis of assumptions without any evidence to prove the lenders as cell companies particularly when evidences to prove otherwise were on record.

4. For that the Ld. Pr. CIT erred in setting aside the order passed u/s 143(3) without making an enquiry himself when all the evidences were before him, he did not examine the same nor brought on record any material to prima facie prove his allegations.

5. For that on the facts and in the circumstance of the case the order u/s 263 is bad in law.

6. For that the Ld. Pr. CIT erred in directing the AO to re-assess the income on the on the issue discussed by him.”

3. Essentially all the grounds above relate to assumption of jurisdiction for invoking revisionary proceedings u/s. 263 of the Act by the Ld. Pr. CIT on the assessment completed u/s. 143(3) of the Act and passing the impugned order.

4. Before us, Shri Amit Agarwal, Advocate represented the assessee and Shri D. K. Sonawal, CIT represented the Department.

5. Brief facts of the case are that assessee is a Non-Banking Finance Company (NBFC) registered with Reserve Bank of India and is into the business of financial services. Assessee had filed its return on 16.09.2015 reporting total income of Rs.2,06,060/-. The case was selected for limited scrutiny on the CASS parameters “unsecured loan from persons who have not filed their returns of income”. Statutory notices were issued and served on the assessee which were complied with by filing /producing the relevant documents and details. Assessment was completed by taking the returned income as assessed income.

5.1. Subsequently, on receipt of a proposal from the Ld. AO, it appeared to the Ld. Pr. CIT *prima facie* that Ld. AO had failed to take logical action

of the information available with her. Thus, on examination of the assessment records, the revisionary proceedings were invoked by issuing a show cause notice u/s. 263 of the Act on 13.10.2020. The issue raised by the Id. Pr. CIT in the show cause notice is in respect of unsecured loans of Rs. 6.05 Cr. taken by the assessee during the previous year from various private limited companies out of which loans of Rs. 3.75 Cr. was squared off during the year.

5.2. Relevant extract from the show cause notice is reproduced hereunder:

"The case was selected for 'limited scrutiny' on the CASS parameter "Unsecured loan from persons who have not filed their Return of Income".

1]. *It is found from the assessment records that unsecured loan of Rs. 6.05 Cr was taken by the assessee company during the previous year, from multiple private limited companies (out of those few are shell companies, as listed by the Government). It is also apparent that Rs. 3.75 crore loan was squared off during the year. Further, no evidence of filing of return of income by the loan creditor was submitted by the assessee. Regarding credit-worthiness of the said party no enquiry was made. Thus the above issue was wound up without verifying the purported transactions with the creditor.*

The Assessing Officer completed assessment without considering the above aspect in this case while passing the assessment order u/s 143(3) of the Income Tax Act, 1961.

6. Assessee made its detailed submission dated 05.01.2021 and another one which is undated, all of which are placed on record. The submissions made by the assessee are reproduced in the impugned order of the Ld. Pr. CIT. From the perusal of the impugned order, it is noted that initially the case was selected for limited scrutiny on the CASS parameters "unsecured loans from persons who have not filed their return of income" which is undisputed. In the written submission by the assessee, it was stated that complete details regarding the unsecured loans were furnished

before the Ld. AO in the course of assessment proceedings which were reproduced before the Ld. Pr. CIT. Assessee submitted that it was only on examination of this limited issue and on being satisfied with the details and documents furnished by the assessee that the assessment was completed and the order was passed. Assessee thus, claimed that it is not a case of “no enquiry or lack of enquiry”.

6.1. Assessee also demonstrated before the Ld. Pr. CIT that loan creditors had filed their income tax returns which had duly reflected the loan transactions with the assessee in their respective returns and have confirmed the amount advanced to the assessee by furnishing loan confirmation letters. Also, assessee submitted that it had taken loans from parties which are regularly assessed to income tax, all the transactions are through banking channel and duly reflected in the regular books of accounts. Further, assessee submitted that all these loans have been repaid. To substantiate the claims, assessee furnished once again the copies of income tax returns filed by the loan creditors from AY 2014-15 till date. Assessee also furnished the copy of assessment orders passed in couple of loan creditors wherein these have not been adjudged as shell companies as alleged by the Ld. Pr. CIT. Their Balance Sheet for FY 2014-15 and thereafter were also placed on record to establish their creditworthiness.

7. On the submissions made by the assessee, Ld. Pr. CIT drew his consideration for the revisionary proceedings u/s. 263 of the Act noted as under:

“On perusal of the assessment record, it is seen that, the assessment was taken up for scrutiny to verify unsecured loans and these loan creditors had not filed their returns and some of them are shell companies, as listed by the Government. On the other hand, the assessee has stated that, all related documents were filed with the AO during the assessment proceedings and, therefore, there is no reason to take recourse to section 263 of the Act. On perusal of the assessment order, it is seen that, the AO had passed the order accepting the claim of the assessee,

without making any further inquiry or independent verification, despite the fact that, the case was taken up for scrutiny on specific reasons i.e. to make proper verification of loan creditors, who had not filed their return of income and some are shell companies. Therefore, the assessment order passed by the AO appears to be erroneous and prejudicial to the interest of the revenue.”
[emphasis supplied by us by underline]

7.1. Based on this consideration, Ld. Pr. CIT restored the file back to the AO with a direction to verify the issue as discussed above afresh after giving opportunity to the assessee. Aggrieved, the assessee is in appeal before the Tribunal.

8. Before us, Ld. Counsel for the assessee pointed out that the sole issue raised by the Ld. Pr. CIT for invoking the revisionary proceedings u/s. 263 of the Act is in respect of unsecured loan creditors for persons who have not filed their returns of income. He submitted that originally the case of the assessee was selected for “limited scrutiny” under CASS parameters “*unsecured loans from persons who have not filed their return of income*”. He referred to notice issued u/s. 142(1) of the Act by the Ld. AO dated 19.06.2017 placed at page 257 of the paper book to point out that at Sl. No. 6, details pertaining to the loan creditors were called for which stated “*please furnish loan confirmation papers and the ITR, Balance sheet, P&L Account of the loan givers*”. All the details along with the documentary evidences were placed before the Ld. AO in response to the said notice for which Ld. Counsel placed on record a chart giving complete details in respect of these documents forming part of the records both before the Ld. AO and the Ld. Pr. CIT by referring to the respective page numbers in the paper book. The said chart is reproduced as under:

KAMLESH TRADE & AGENCY PRIVATE LIMITED [ITA NO.100/KOL/2021]										
Paper-book Page Nos. of evidences										
Sl. No.	Loan Creditor	Loan Amount Amount (Rs.)	Own Capital & Reserves Amount (Rs.)	Audited		ITR V Page Nos.	Loan Confirmations Page Nos.	Source of Fund Page Nos.	Bank Statement Page Nos.	Portal Screenshot Page Nos.
				Page Nos.	Page Nos.					
1	Banshi Commosales Pvt.Ltd.	50,00,000.00	56,22,28,336.00	18	11-24	10	25	26	27-29	30
2	Gabriel Commercial Pvt. Ltd.	50,00,000.00	9,84,99,268.00	54	51-61	50	33	31	34-35	-
3	JJM Power Pvt. Ltd.	1,50,00,000.00	91,37,287.00	67	63-73	62	74	75	76-77	-
4	Kingston Vincom Pvt Ltd.	50,00,000.00	24,29,04,068.00	86	79-92	78	93	94	95-96	97
5	Midcity Vintrade Pvt. Ltd.*	50,00,000.00	36,10,74,925.00	101	99-112	98	113	114	115	116
6	Neelkanth Commercial Pvt Ltd.	40,00,000.00	7,28,23,641.00	125	118-131	117	132	133	134	135
7	Orchid Trexim Pvt. Ltd.	35,00,000.00	16,57,99,728.00	152	149-160	138	140	139	141-142	161
8	Overtop Impex Pvt. Ltd.	25,00,000.00	9,91,01,303.00	186	183-193	182	163	162	168-169	194
9	Prachin Vyapaar Pvt. Ltd.	25,00,000.00	9,59,78,636.00	201	197-206	195	196	-	-	-
10	Regal Barter Pvt. Ltd.	50,00,000.00	-	-	-	207	208	-	-	299
11	Speedfast Finco Pvt. Ltd.	30,00,000.00	2,60,55,880.00	214	211-223	210	224	225	226-231	-
12	Speedfast Advisory Pvt. Ltd.	23,00,000.00	1,55,34,303.00	240	233-251	232	252	253	254	-
		5,78,00,000.00								

*Note: Inadvertently the contra entry of Rs.50,00,000 towards RTGS return (see pages 116A-116B of PB) was included in the list of Loans received.

9. To demonstrate the documentary evidences placed on record, Ld. Counsel took the bench through the documents of one of the loan creditors at Sl. No. 1 i.e. Banshi Commosale Pvt. Ltd. He pointed to its audited financial statements for AY 2015-16 which are placed at page 11 to 24 of the paper book. Copy of acknowledgment for return filed on 28.09.2015 is placed at page 10 and loan confirmation letter is placed at page 25, declaration of source of fund by the loan creditor is placed at page 26 and relevant pages of the bank statement of the loan creditor with IDBI Bank Ltd. is placed at pages 27 to 29 and a screen shot from the

MCA Portal is placed at page 30 of the paper book. He thus, submitted that similar documents were placed on record for all the other loan creditors which were duly verified and examined in the assessment proceedings. Ld. Counsel stated that Ld. Pr. CIT has failed to take into consideration these verifiable documents forming part of the assessment records as well as submitted afresh in the revisionary proceedings before him who arrived at a consideration for passing the revisionary order u/s. 263 of the Act. Ld. Counsel thus submitted that Ld. Pr. CIT has failed to apply his mind on the issue raised by him in show cause notice for all the relevant details and documents were before him and, therefore, the revisionary proceedings are bad in law, void of any merit and ought to be quashed.

9.1. Ld. Counsel also placed on record a compilation of case laws containing ten citations. Per contra, Ld. CIT, DR relied upon the impugned order of Ld. Pr. CIT. He submitted that AO failed to make proper enquiry on the issue for which the case was selected for limited scrutiny and thus, Ld. Pr. CIT has rightly invoked the revisionary proceedings u/s. 263 of the Act. He merely remitted this issue to the file of the AO for fresh enquiry and examination for which no prejudice is caused to the assessee.

10. We have heard the rival contentions, perused the material available on record and gone through the documentary evidence referred by the Ld. Counsel. We note the undisputed fact that the case of the assessee was selected for limited scrutiny on the CASS parameter "*unsecured loans from persons who have not filed their return of income*". Also, assessee is a NBFC registered with RBI who has taken loan from various parties and has also advanced loans to others in the normal course of its business of financial services. It is also on record that assessee has furnished all the relevant details and documents called for by the Ld. AO in the course of

assessment proceedings on the issue for which the case was selected for limited scrutiny. We note that Ld. AO has exercised the quasi-judicial power vested in him in accordance with law and has arrived at a conclusion by accepting the transactions of unsecured loans accounted by the assessee in its regular books of accounts.

10.1. The moot point for selection for limited scrutiny is in respect of persons who have not filed their returns of income. Ld. Counsel has referred to the acknowledgment of the income tax return filed by all the loan creditors as well as copies of assessment orders in certain loan creditors all of which are placed in paper book. Ld. Counsel evidently demonstrated that all the unsecured loan creditors have filed their return of income, couple of which have been assessed by the department who have not been treated as shell companies and thus, the CASS parameters for selection of the case of assessee for limited scrutiny was adequately fulfilled and complied in the assessment proceedings as well as before the Ld. Pr. CIT in the revisionary proceedings.

11. Before adjudicating whether the action of the AO can be termed as prejudicial to the interest of revenue, the Hon'ble Supreme Court in the case of Malabar Industries Ltd. vs. CIT [2000] 243 ITR 83 (SC) has held that *"this phrase i.e. "prejudicial to the interest of the revenue" has to be read in conjunction with an erroneous order passed by the AO. Their Lordships held that every loss of revenue as a consequence of an order of Assessing Officer cannot be treated as prejudicial to the interest of the revenue. When the Assessing Officer adopted one of the courses permissible in law and it has resulted in loss to the revenue, or where two views are possible and the Assessing Officer has taken one view with which the CIT does not agree, it cannot be treated as an erroneous order prejudicial to the interest of the revenue unless the view taken by the Assessing Officer is unsustainable in law."*

11.1. We also note that Ld. Pr. CIT on analysis of both the records and the order passed by the AO ought to arrive at a consideration that such an order is erroneous insofar as it is prejudicial to the interest of the revenue. This is exercised by calling for and examining the records relating to any proceeding under this Act available at the time of examination by the Ld. Pr. CIT. The term 'record' has been explained in Explanation 1(b) to section 263 of the Act as – *'record' shall include and shall be deemed always to have included all records relating to any proceeding under this Act available at the time of examination by the Principal Commissioner or Commissioner.*

Record shall include all the documentary evidences which were submitted before Ld. AO and also those submitted before Ld. PCIT against the SCN issued to invoke the provisions of section 263. Ld. PCIT is required to examine all the documentary evidences including those which were before Ld. AO and submitted before him.

12. We find that from the chart reproduced above, assessee has submitted all the relevant details and documentary evidence to substantiate that all the unsecured loan creditors have filed their return of income. Their identity is established from the loan confirmation letters and the screen shot from the MCA portal and for their creditworthiness, audited financial statements and declaration of source of funds for bank statements are placed on record. We note that neither Ld. Pr. CIT nor Ld. CIT, DR brought any material on record to controvert this verifiable factual position. Accordingly, to our understanding, there is no material which justifies the revisionary proceedings undertaken by the Ld. Pr. CIT.

12.1. For the above finding of ours, we find force from the decision of Hon'ble Bombay High Court in the case Gabriel India Ltd. [1993] 203 ITR 108 (Bom) wherein it is observed as under (page 113) –

" . . . From a reading of sub-section (1) of section 263, it is clear that the power of suomotu revision can be exercised by the Commissioner only if, on examination of the records of any proceedings under this Act, he considers that any order passed therein by the Income-tax Officer is 'erroneous in so far as it is prejudicial to the interests of the Revenue'. It is not an arbitrary or unchartered power, it can be exercised only on fulfilment of the requirements laid down in sub-section (1). The consideration of the Commissioner as to whether an order is erroneous in so far as it is prejudicial to the interests of the Revenue, must be based on materials on the record of the proceedings called for by him. If there are no materials on record on the basis of which it can be said that the Commissioner acting in a reasonable manner could have come to such a conclusion, the very initiation of proceedings by him will be illegal and without jurisdiction."

[Emphasis supplied by us by underline]

13. Further, we find that it is not a case where there was no enquiry at all by the Ld. AO. Our perusal of the 142(1) notice dated 19.06.2017 issued by the Ld. AO and replies filed by the assessee in the course of assessment as noted in the order sheet, reveals that Ld. AO enquired into the issue of unsecured loans for which the case was selected for limited scrutiny.

13.1 Here, in support of our finding, we would like to refer the judgment of Hon'ble Delhi High Court in the case of CIT vs. Anil Kumar Sharma [2011] 335 ITR 83 (Del) wherein it has been held dismissing the appeal *"that the present case would not be one of, "lack of inquiry" even if the inquiry was termed inadequate. The Tribunal found that complete details were filed before the Assessing Officer and that he applied his mind to the relevant material and fact, although such application of mind is not discernable from the assessment order. The Tribunal held that, the Commissioner in proceedings under Section 263 also had all these details and material available before him, but not been able to point out defects conclusively in the material, for arriving at a conclusion that particular income had escaped assessment on account of non application of mind by the Assessing Officer. The Tribunal was right and the order of revision was not valid"*.

13.2. We also find that co-ordinate bench of ITAT Kolkata in the case of Satya Prakash Sharma v. Pr.CIT vide ITA No.2574 to 2576/Kol/2018 order dated 22.11.2019 on a similar issue laid down the proposition that *“wherein enquiry was conducted by the assessing officer, even if inadequate, that would not by itself give occasion to the ld. Pr. CIT to interdict and interfere by exercising his revisional jurisdiction merely because he is of the opinion that some more enquiries should have been conducted in the matter.”*

14. The issue regarding whether the assessment order is erroneous or prejudicial on the ground of insufficiency of enquiry has been dealt by the Hon'ble Delhi High Court in the judgment of ITO v. DG Housing Projects Ltd. (2012) 20 taxmann.com 587 (Del.), which has been followed by various co-ordinate benches of the ITAT in various cases. Hon'ble High Court while adverting to the issue held that in cases of wrong opinion for finding on merit, the CIT has to come to the conclusion and himself decide that order is erroneous, by conducting necessary enquiry, if required and necessary before the order u/s 263 of the Act is passed. In such cases, the order of the AO will be erroneous because the order passed is not sustainable in law and the said finding must be recorded by CIT who cannot remand the matter to the assessing officer to decide whether the findings recorded are erroneous. In cases where there is inadequate enquiry but not lack of enquiry, again the CIT must give and record a finding that the order/enquiry made is erroneous. This can happen if an enquiry and verification is conducted by the CIT and he is able to establish and show the error or mistake made by the AO, making the order unsustainable in law. In some cases, possibly though rarely, the CIT can also show and establish that the facts on record or inferences drawn from facts on record *per se* justified and mandated further enquiry or investigation but the AO had erroneously not undertaken the same. However, the said finding must be clear, unambiguous and not debatable.

The matter cannot be remitted for a fresh decision to the AO to conduct further enquiries without a finding that the order is erroneous, the condition or requirement which must be satisfied for exercise of jurisdiction u/s 263 of the Act. In such matters, to remand the matter/issue to the AO would imply and mean that the CIT has not examined and decided whether or not the order is erroneous but has directed the AO to decide the aspect/question. The Hon'ble Court further held that this distinction must be kept in mind by the CIT while exercising jurisdiction u/s 263 of the Act and in the absence of the finding that the order is erroneous and prejudicial to the interest of revenue, exercise of jurisdiction under the said section is not sustainable. In most cases of alleged "inadequate investigation", it will be difficult to hold that the order of the AO, who had conducted enquiries and had acted as an investigator, is erroneous, without CIT conducting verification/enquiry himself. The order of the AO may be or may not be wrong. CIT cannot direct reconsideration on this ground but only when the order is erroneous. An order of remit cannot be passed by the CIT to ask the AO to decide whether the order was erroneous. This is not permissible. An order is erroneous, unless the CIT holds and records reason why it is erroneous. Therefore, CIT must after recording reasons, hold that order is erroneous. The jurisdictional pre-condition stipulated is that CIT must come to the conclusion that the order is erroneous and is unsustainable in law. It was further observed by the Hon'ble High Court that the material, which the CIT can rely upon includes not only the records as it stands at the time when the order in question was passed by the AO but also records as it stands at the time of the examination by the CIT. Nothing prohibits CIT from collecting and relying new/additional material which evidence to show and state that the order of the AO is erroneous.

15. We find that Ld. PCIT in Para 18 of the impugned order has taken note of the amendment made in section 263 w.e.f. 01.06.2015. This

amendment relates to Explanation 2 inserted in section 263 of the Act. The co-ordinate bench of Mumbai ITAT has dealt with Explanation 2 as inserted by the Finance Act, 2015 in the case of Narayan Tatu Rane v. Income Tax Officer [2016] 70 taxmann.com 227 (Mum) to hold that the said Explanation cannot be said to have overridden the law as interpreted by the Hon'ble Delhi High Court in DG Housing Projects Ltd (*supra*), according to which the Ld. PCIT has to conduct an enquiry and verification to establish and show that the assessment order is unsustainable in law. The co-ordinate bench of Mumbai ITAT has further held that the intention of the legislature could not have been to enable the Ld. PCIT to find fault with each and every assessment order, without conducting any enquiry or verification in order to establish that the assessment order is not sustainable in law, since such an interpretation will lead to unending litigation and there would not be any point of finality in the legal proceedings. The opinion of the Ld. PCIT referred to in section 263 of the Act has to be understood as legal and judicious opinion and not arbitrary opinion.

16. On the issue considered by the Ld. PCIT in the impugned order, no action u/s 263 of the Act is justifiable which cannot be sustained under the facts and circumstances of the present case and judicial precedents, all of which discussed and dealt herein above. We, therefore, quash the impugned order u/s 263 of the Act and allow the grounds raised by the assessee.

17. In the result, appeal of the assessee is allowed.

Order is pronounced in the open court on 31st October, 2022

Sd/-

(SANJAY GARG)
JUDICIAL MEMBER

Sd/-

(GIRISH AGRAWAL)
ACCOUNTANT MEMBER

Dated: 31.10.2022

JD, Sr. P.S.

Copy to:

1. The Appellant:
2. The Respondent.
3. Pr. CIT, Kolkata-5
4. The ITO, Ward-4(4), Kolkata
5. The DR, ITAT, Kolkata Bench, Kolkata

//True Copy//

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata