IN THE INCOME TAX APPELLATE TRIBUNAL

"G" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.822/Mum./2019

(Assessment Year : 2010–11)

Gautam Investments
415, Grohitam Building
Sector–19C, Opp. Grain Market ……. Appellant
Vashi, Mumbai 400 703
PAN – AAHFG0804D

v/s

Principal Commissioner of Income Tax–28
Mumbai .....Respondent

Assessee by : None
Revenue by : Shri Prabhat Kumar Gupta

Date of Hearing – 05/09/2022	Date of Order – 02/12/2022

O R D E R

PER SANDEEP SINGH KARHAIL, J.M.

The present appeal has been filed by the assessee challenging the impugned order dated 20/03/2018, passed under section 263, of the Income Tax Act, 1961 (*"the Act"*) by the learned Principal Commissioner of Income Tax–28, Mumbai, [*"learned PCIT"*], for the assessment year 2010–11.

2. When these appeals were called for hearing, neither anyone appeared on behalf of the assessee nor was any application seeking adjournment filed. From the perusal of the record, we find that since the previous 7 occasions no one has appeared on behalf of the assessee. Therefore, we proceed to dispose

off this appeal ex–parte, qua the assessee after hearing the learned Departmental Representative (*"learned DR"*) and based on material available on record.

3. The assessee has also filed an application seeking condonation of delay in filing the present appeal. In the aforesaid application, the assessee submitted that it was under the honest impression that an appeal against the order passed under section 263 can be filed only after the assessment proceedings are completed and therefore the assessee did not file the appeal against the impugned order passed under section 263 of the Act within the statutory time limit of 60 days. The assessee has also filed an affidavit sworn by the partner of the assessee firm, stating as under:

> *"1. Principal CIT-28, Mumbai passed an order u/s 263 of Income Tax Act, 1961 dated 20.03.2018 in case of our firm M/s Gautam Investments for A.Y. 2010-11, setting aside the assessment order dated 10.03.2016, passed u/s 143(3) r.ws 147 and issued directions to conduct fresh assessment.*
>
> *2. We were under the honest impression that appeal against order u/s 263 can be filed only after fresh assessment proceedings are completed and so we did not file the appeal against the order u/s 263 within the statutory time limit of 60 days.*
>
> *3. We could not receive proper professional guidance at that stage.*
>
> *4. The fresh assessment proceedings were completed by assessing officer and order u/s 143(3) rows 263 was passed dated 27.12.2018.*
>
> *5. Hence, this affidavit is being made in support of our application to the Hon'ble Income Tax Appellate Tribunal, Mumbai to condone the delay in filing of appeal.*
>
> *Whatever is stated hereinabove is true to the best of my knowledge, information and belief."*

4. On the contrary, the learned DR opposed the prayer for condonation of delay and submitted that the assessee should be vigilant as to its statutory right.

5. Having considered the application seeking condonation of delay in filing the present appeal and the affidavit sworn by the partner of the assessee firm, we find that the assessee was under a *bona fide* belief that the impugned order was not appealable before the Tribunal. The assessee also claimed to have not received proper professional guidance regarding the same. The assessment order under section 143(3) read with section 263 of the Act was passed on 27/12/2018, and the present appeal was filed thereafter on 14/02/2019. Since the impugned order is an appealable order before the Tribunal, it appears to be a case where due to improper professional guidance the assessee failed to file the appeal within the limitation period. It is well established that rules of procedure are handmaid of justice. When substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred. In the present case, the assessee did not stand to benefit by the late filing of the appeal. Thus, we are of the view that there was sufficient cause for not presenting the appeal within the prescribed limitation period. Accordingly, we condone the delay in filing the present appeal.

6. The sole ground raised by the assessee in the present appeal is as follows:–

> *"1. In the facts and circumstances of the case and in law, the Learned Principal CIT has erred in assuming jurisdiction under section 263 and holding that the*

order passed by the learned, assessing officer dated 10.03.2016 is erroneous and prejudicial to the interest of Revenue.

2. The appellant craves leave to add, alter, delete or modify all or any of the above grounds of appeal."

7. The brief facts of the case as emanating from the record are: The assessee is engaged in trading of shares, future and option transactions in shares and securities, commodity trading, speculation shares, and commodities, etc. For the year under consideration, the assessee filed its return of income on 25/09/2010 declaring a total income of Rs. nil. Based on information received from the Department of Investigation that the assessee has made transaction in share/F&O and taken benefit illegally by modifying the client code of the person with the client code of its own or vice versa, proceedings under section 147 of the Act were initiated in the case of the assessee and notice dated 31/03/2015, under section 148 of the Act was issued. In response to the notice issued under section 148 of the Act, the assessee filed a letter requesting that its original return filed on 25/09/2010, may be treated as a return filed in response to notice issued under section 148 of the Act. During the reassessment proceedings, the assessee was asked to explain the transaction with Mr. Samta C. Thakkar and Mr. Vipul Deepak Shah. In reply, the assessee submitted that whatever gain the assessee has received has been offered for taxation and in any case, the assessee is a dealer engaged in trading of shares, future and options. Hence the transaction made through client code modification is out of the purview of the assessee, as the stockbroker is authorised to do so and the assessee is not a stockbroker. However, in order to buy peace of mind and to avoid litigation, the assessee voluntary accepted the addition at 2% of Rs. 35,47,820, which was alleged to

be the profit earned artificially/fictitiously from the transaction of client code modification. Vide order dated 10/03/2016, passed under section 143(3) read with section 147 of the Act, the Assessing Officer (*'AO'*) made an addition of Rs. 70,956, being 2% of Rs. 35,47,820, to the total income of the assessee under section 69C of the Act.

8. Subsequently, vide notice dated 10/01/2017, issued under section 263 of the Act revision proceedings were initiated in the case of the assessee on the basis that the assessee is one of the beneficiaries who had taken profit of Rs. 35,47,821, through client code modification facility as provided by NSE, which is not a genuine transaction. It was further alleged that the assessee has booked this accommodation entry to bring its undisclosed income into its books of accounts and generate a profit of Rs. 35,47,821. On the basis that the AO has failed to examine and verify the source of investment for such profit as also the genuineness of profit of Rs. 35,47,821, the assessment order is erroneous insofar as it is prejudicial to the interest of the Revenue. Vide aforesaid notice issued under section 263 of the Act it was also alleged that the assessee has credited an amount of Rs. 2,20,879, under the head dividend income, however, the AO has not examined the applicability of section 14A read with rule 8D while passing the assessment order.

9. In response, the assessee objected to the initiation of revision proceedings under section 263 of the Act and submitted that reassessment proceedings under section 147 of the Act were initiated based on the transaction made through client code modification, and during the said proceedings assessee had submitted all the details with respect to the client

code modification issue to the satisfaction of the AO and accordingly the assessment order was passed after verification of assessee's submission. Thus, the assessment order is not erroneous and not prejudicial to the interest of the Revenue. The learned PCIT vide impugned order dated 20/03/2018, passed under section 263 of the Act did not agree with the submissions of the assessee and set aside the assessment order with a direction to the AO to tax the amount of Rs. 35,47,821, as assessee's income from undisclosed sources under the head 'income from other sources' and not to allow set off of same against the earlier years brought forward losses. The learned PCIT also directed the AO to verify the applicability of section 14A read with rule 8D, in the case of assessee, after conducting proper inquiries. Being aggrieved, the assessee is in appeal before us.

10. During the hearing, learned DR explained the facts of the case and vehemently relied upon the impugned order.

11. We have considered the submission of the learned DR and perused the material available on record. In the present case, it is undisputed that reassessment proceedings were initiated under section 147 of the Act on the very same issue of alleged fictitious profits earned by the assessee through the process of client code modification. In the reasons recorded for reopening the assessment, it was alleged that the assessee is a beneficiary of transaction in shares/F & O and has taken benefit illegally by modifying the client code of another person with its client code. During the reassessment proceedings, as is evident from the submission dated 24/12/2015, forming part of the paper book on page 11, the assessee merely provided the contract notes of the 2

brokers viz. J.L. Shah Securities Pvt. Ltd and Ashvin M Shah to substantiate its submission that the said transaction in shares/F&O belongs to the assessee. It is evident from the record that the AO has made no enquiry to examine the source of investment or the genuineness of the profit earned by the assessee. The AO also did not examine the original clients whose codes were alleged to have been modified to show the fictitious profit in the hands of the assessee. The AO merely proceeded to accept the contract notes of 2 brokers submitted by the assessee without appreciating the fact that in the alleged transaction of client code modification these brokers would have been actively involved and their statement cannot be treated as the gospel truth. Thus, in the present case, it cannot be said that the AO has carried out the enquiry/verification that would have been carried out by a prudent officer. The lack of investigation/enquiry by the AO, particularly when the assessment has been reopened on the very same issue and the information was received in this regard from the Investigation Department, would render the assessment order amenable to revision under section 263 of the Act, in the peculiar facts of the present case. We are of the considered view that this case is also covered under Explanation 2 to section 263 of the Act. Therefore, the assumption of jurisdiction under section 263 of the Act is upheld. We further find that the learned PCIT has straight away directed the AO to tax the amount of Rs. 35,47,821 as assessee's income from undisclosed sources under the head 'income from other sources'. However, since the assessment order has been set aside, we are of the considered view that the AO should conduct a proper investigation/enquiry and pass a fresh order on this issue as per law. Further, as regards the direction to not allow the set off of income against the earlier

years brought forward business losses, we are of the considered view that the allowability of claim of set-off of losses should be decided in terms of the law applicable during the year under consideration. To this extent, the directions in the impugned order are modified. We order accordingly.

12. As regards the direction vide impugned order to examine the applicability of section 14A read with rule 8D, we find that this issue was not examined by the AO, therefore, assumption of jurisdiction under section 263 of the Act on this issue and the direction in the impugned order is upheld.

13. Since the assumption of jurisdiction under section 263 of the Act on both issues is upheld, the sole ground raised by the assessee is dismissed in terms of our aforesaid findings.

14. In the result, the appeal by the assessee is dismissed.

Order pronounced in the open Court on 02/12/2022

Sd/-	**Sd/-**
PRASHANT MAHARISHI	**SANDEEP SINGH KARHAIL**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MUMBAI, DATED: 02/12/2022
Copy of the order forwarded to:

(1) The Assessee;
(2) The Revenue;
(3) The CIT(A);
(4) The CIT, Mumbai City concerned;
(5) The DR, ITAT, Mumbai;
(6) Guard file.

By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar
ITAT, Mumbai