

IN THE INCOME TAX APPELLATE TRIBUNAL  
“H” BENCH, MUMBAI  
BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER &  
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No. 1441/Mum/2022  
(A.Y: 2017-18)

Hasu Exporters Room No. 39, 1 <sup>st</sup> Floor 94, Kansara Chawl, kalbadevi Road, Mumbai – 400002.	Vs.	Pr. CIT-17 Room No. 120, 1 <sup>st</sup> Floor, kautilya Bhavan, C-41 to 43, G Block, BKC, Bandra (E), Mumbai – 400051.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABFH7119J		
Appellant	..	Respondent

Appellant by :	Shri. Himanshu Gandhi.AR
Respondent by :	Smt.Madhumalti Ghosh.CIT DR

Date of Hearing	14.11.2022
Date of Pronouncement	24.11.2022

आदेश / O R D E R

**PER PAVAN KUMAR GADALE JM:**

The assessee has filed the appeal against the order passed by the Pr. Commissioner of Income Tax(Pr.CIT) -17, Mumbai passed u/s 263 of the Act.

At the time of hearing, the Ld.Counsel for the assessee submitted that there is a delay in filing the appeal before the Hon’ble Tribunal and filed an affidavit for condonation of delay and relied on the

decision of Hon'ble Supreme Court. We found the facts mentioned in the affidavit are reasonable and the Ld. DR has no specific objections. Accordingly, we condone the delay and admit the appeal.

The assessee has raised the following grounds of appeal:

*1. The Ld. CIT erred in passing the order under section 263 of the Act, in spite of the fact that the assessment order was neither erroneous nor prejudicial to the interest of the revenue.*

*2. The appellant craves leave to add, alter, amend, modify or delete any of the aforesaid grounds of appeal.*

2. The brief facts of the case are that the assessee is engaged in the business of trading and export of imitation jewellery and filed the return of income for the A.Y 2017-18 on 07.11.2017 disclosing a total income of Rs.16,85,910/-. Subsequently the case was selected for scrutiny and the Assessing Officer (AO) has passed the order u/s 143(3) of the Act dated 14.12.2019 determining a total income of Rs.16,85,910/-.

3. Subsequently, the Pr.CIT on perusal of the facts and the assessment record and Audit objection query

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raised observed that the A.O has not made any enquiry/ nor verified the facts and is of the opinion that the assessment order passed u/s 143(3) of the Act is erroneous and prejudicial to the interest of revenue and issued notice u/s 263 of the Act is read as under:

*2. On perusal of the assessment records for the assessment year under consideration, the following infirmities were noticed:*

*A. It was seen from assessment records for the A.Y. 2017-18 that vide notice u/s 142(1) of the Act, dated 24.10.2019, the assessee was asked to furnish the copy of stock registers/stock statement. However, it was observed that the said details were not furnished by the assessee and the AO completed the assessment without verifying the above details called for. Therefore,*

*B. From the details submitted during assessment proceedings, it was observed that the cash sales of the assessee during F.Y. 2016-17 was Rs. 227.24 Lakhs while the cash sales during F.Y. 2015-16 was Rs. 19.32 Lakhs only which was highly incomparable and the reason for sale remained unexamined during the assessment proceedings as the AO did not raise any query in this regard. The AO was expected to verify the reason for increase in cash sales during the year under consideration as it was incomparable from the previous year.*

*C. From the details of quarterly VAT return from 01.04.2016 to 31.03.2017 submitted by the assessee during assessment proceedings, it is seen that the assessee had revised all its VAT returns and the AO did*

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*not raise any query regarding the reason for revising the VAT returns and thereby any variation in pre demonetization period of sales figures could not be verified.*

*3. The above issues were not considered by the AO while framing the assessment order in this case. Thus, the AO had passed the assessment order without making the necessary enquiries and due verification on these aspects which should have been made to ascertain the relevant facts for the purpose of deciding the issues at hand. The assessment order therefore suffers from this infirmity and the same is erroneous in so far as it is prejudicial to the interests of the revenue in the light of Explanation 2 to sub section 1 of section 263 of the Act.*

4. The assessee has filed the submissions electronically on 15.03.2022 referred at Para 6 with the details of month wise summary statement containing opening stock, purchase and sale of goods and cash sales comparable to current and previous year and VAT returns filed belatedly during the demonetization. The Pr. CIT has considered the facts and submissions and relied on the judicial decisions and finally observed at Para 11 of the order read as under:

*11. Therefore, the provisions of Section 263 of the Act are invoked in respect of the Officer assessment order u/s 143(3) of the Act, 1961 dated 14.12.2019 passed by . The Assessing Officer is directed to frame the assessment de novo. He is directed to make due verification of source*

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*of cash deposited during demonetization period by examining specifically these issues:*

*(a) Examine the details of month wise stock summary containing stock, purchase and sales to identify the source of cash in hand as on 08.11.2016.*

*(b) Examine the figures of cash sales for F.Y. 2016-17 with corresponding figure of F.Y. 2015-16 to find out the reason for huge variation. (c) Examine the reason for revising MVAT returns keeping in mind the backdrop of demonetization and pass the assessment order de-novo after due verifications.*

*Needless to say that the Assessing Officer shall give the assessee reasonable opportunity of being heard and pass a speaking order after taking into consideration the explanation and supporting evidence submitted by the assessee.*

5. Aggrieved by order of the Pr.CIT, the assessee has filed an appeal with the Hon'ble Tribunal. At the time of hearing the Ld. AR submitted that the Pr. CIT has erred in passing the revision order based on findings of the proposal of the AO and relied on the paper book and judicial decisions. Contra, the Ld. DR supported the order of the Pr. CIT.

6. We heard the rival submissions and perused the material on record. The Ld.AR submitted that the

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Pr.CIT has erred in passing the order based on the proposal of the Assessing officer. We find the assessee has made a submissions before the Pr. CIT on the facts and Pr.CIT has observed at Para 7 of the order as under:

*7. The submissions of the assessee have been considered. The point wise submission of assessee is as follows:*

*i. With regard to month wise stock summary containing opening stock, purchases and sales, the assessee submitted that these details were submitted on 12.12.2019. However, the AO proposing the revision u/s 263 has stated that the details submitted by the assessee on 12.12.2019 were not examined during the assessment proceedings before completion of the assessment.*

*ii. With regard to comparison of cash sales for the F.Y. 2016-17 with the corresponding figure of F.Y. 2015-16, the assessee submitted that the details of month wise cash sales and purchases for F.Y. 2015-16 and F.Y. 2016-17/ were submitted on 12.12.2019. However, the AO proposing the revision u/s 263 has stated that the details submitted by the assessee on 12.12.2019 were not examined during the assessment proceedings before completion of the assessment.*

*iii. With regard to revision of VAT returns, the assessee submitted that the AO had verified the VAT return with sales, stock statement and purchases details. However, the AO proposing the revision u/s 263 has stated that the VAT returns for all the four quarters very revised by the*

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*assessee belatedly and the same were not examined during the assessment proceedings before completion of the assessment.*

*Here, it is pertinent to mention that the AO who submitted proposal dated 25.09.2020 for revision u/s 263 in this case is the same who completed the assessment and passed assessment order on 14.12.2019.*

The Ld. AR relied on the following judicial decisions that the order passed by the Pr.CIT cannot be sustained.

i. ITA No. 1287/Pun/2017 dated 2-11-21 in the case of Alfa Laval Lund AB Vs. CIT (Pune Trib) has held at page 5 para5 read as under:

*5. It is trite that a power which vests exclusively in one authority, can't be invoked or cause to be invoked by another, either directly or indirectly. Section 263 of the Act confers power on the CIT to revise an assessment order, subject to certain conditions. Instantly, we are confronted with a situation in which the revision was initiated on the basis of the AO sending a proposal to the CIT and not on the CIT suo motu calling for and examining the record of the assessment proceedings and thereafter considering the assessment order erroneous and prejudicial to the interests of the revenue. The AO recommending a revision to the CIT has no statutory sanction and is a course of action unknown to the law. If AO, after passing an assessment order, finds something*

*amiss in it to the detriment of the Revenue, he has ample power to either reassess the earlier assessment in terms of section 147 or carry out rectification u/s 154 of the Act. He can't usurp the power of the CIT and recommend a revision. No overlapping of powers of the authorities under the Act can be permitted. As the revision proceedings in this case have triggered with the AO sending a proposal to the ld. CIT and then the latter passing the order u/s 263 of the Act on the basis of such a proposal, we hold that it became a case of jurisdiction deficit resulting into vitiating the impugned order. Without going into the merits of the case, we quash the impugned order on this legal issue itself.*

*6. In the result, the appeal is allowed.*

- ii. ITA No. 204/JP/2022 dated 29-08-22 in the case of Om Prakash Agarwal Vs. Pr. CIT (Jaipur Trib) at page 30 Para 11.3 as under:

*11.3 The bench notes that the prerequisite exercise of jurisdiction by the learned Principal CIT under section 263 of the Act is that the order of the AO is established to be erroneous in so far as it is prejudicial to the interest of the Revenue. The Principal CIT has to be satisfied of twin conditions, namely (i) the order of the AO sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. If any one of them is absent i.e., if the assessment order is not erroneous but it is prejudicial to the Revenue, provision of section 263 cannot be invoked. This provision cannot be invoked to correct each and every type of mistake or error committed by the AO; it is only when an order is erroneous as also prejudicial to Revenue's interest, that the provision will be*

*attracted. An incorrect assumption of the fact or an incorrect application of law will satisfy the requirement of the order being erroneous. The phrase 'prejudicial to the interest of the Revenue has to be read in conjunction with an erroneous order passed by the AO. Every loss of revenue as a consequence of the order of the AO cannot be treated as prejudicial to the interest of the Revenue. It is pertinent to mention that if the AO has adopted one of the two or more courses permissible in law and it has resulted in loss of revenue, or where two views are possible and AO has taken one view with which the Pr. CIT does not agree, it cannot be treated as an erroneous order and it is prejudicial to the interest of the Revenue, unless the view taken by the AO is totally unsustainable in law. In this process even the AO has no power to revise his own order taking the route of proceeding under section 263 of the Act. In this regard, we draw strength from the decision of the Hon'ble Supreme Court in the case of Malabar Industrial Co. Ltd. vs. CIT (2000) 159 CTR (SC) 1: (2000) 243 ITR 83 (SC). We also draw strength from the decision of the Hon'ble Supreme Court in the case of CIT vs. Max India Ltd. (2007) 213 CTR (SC) 266: (2007) 295 ITR 282 (SC) wherein it was held that:*

*"The phrase 'prejudicial to the interests of the Revenue' in s. 263 of the IT Act, 1961, has to be read in conjunction with the expression 'erroneous' order passed by the AO. Every loss of revenue as a consequence of an order of the AO cannot be treated as prejudicial to the interests of the Revenue. For example, when the AO adopts one of two courses permissible in law and it has resulted in loss of revenue, or where two views are possible and the AO has taken one view with which the CIT does not agree, it cannot be treated as an erroneous order prejudicial to the Revenue, unless the view taken by the AO is unsustainable in law."*

11.4 Thus, based on this decision it is also noteworthy to mention that one of the pre-requisite before invoking S. 263 and the allegation of the Ld. Pr. CIT is that there has been incorrect assumption of fact and law by the Assessing Officer. However, despite our deep and careful consideration of the material on record including the finding recorded in the subjected Assessment order dated 03.07.2019 and in the findings recorded in the order under challenge, we do not find any incorrectness and incompleteness in the appreciation of facts made by the AO. In the light of these observations, we do not agree on this aspect to this extent with Ld. Pr. CIT. However, we now proceed to consider whether the AO has also incorrectly appreciated and assumed the law while making the subjected assessment to be termed, as erroneous and prejudicial to the interest of the revenue. The facts are not disputed that the assessee has submitted the books of accounts and documents related there upon and has been verified by the AO. The AO has recorded his satisfaction in the assessment order that he has verified the books of account and other records produced before him and the same is verified in the light of the reasons for selection of the case under CASS. This itself shows that the AO has applied his mind on the reasons and has verified the records produced before him by the assessee and the assessee has filed a detailed submission in this proceeding that the AO has verified each and every aspect of the issue on hand and looking the facts of the case on hand the exercise of the power under section 263 via AO is nothing but a change of opinion which is not permitted in the eyes of the law. We have precisely gone through the para of the judgement relied upon by the ld. DR that the AO has power to refer the matter to PCIT where he establishes that there is an error apparent on record where in this case merely the AO

*has agreed to review the order in his proposal which is not permitted under the law and therefore, the facts relied upon by the ld. DR are factually different and with the fact of this case and thus, based on our detailed observations and relying on the decision of co ordinate bench of Pune ITAT in the case of Alfa Laval Lund AB in ITA no. 1287/PUN/2017 where in the bench in para 5 observed as under:-*

*“5. It is trite that a power which vests exclusively in one authority, can't be invoked or cause to be invoked by another, either directly or indirectly. Section 263 of the Act confers power on the CIT to revise an assessment order, subject to certain conditions. Instantly, we are confronted with a situation in which the revision was initiated on the basis of the AO sending a proposal to the CIT and not on the CIT suo motu calling for and examining the record of the assessment proceedings and thereafter considering the assessment order erroneous and prejudicial to the interests of the revenue. The AO recommending a revision to the CIT has no statutory sanction and is a course of action unknown to the law. If AO, after passing an assessment order, finds something amiss in it to the detriment of the Revenue, he has ample power to either reassess the earlier assessment in terms of section 147 or carry out rectification u/s 154 of the Act. He can't usurp the power of the CIT and recommend a revision. No overlapping of powers of the authorities under the Act can be permitted. As the revision proceedings in this case have triggered with the AO sending a proposal to the ld. CIT and then the latter passing the order u/s 263 of the Act on the basis of such a proposal, we hold that it became a case of jurisdiction deficit resulting into vitiating the impugned order. Without going into the merits of the case, we quash the impugned*

*order on this legal issue itself. 6. In the result, the appeal is allowed.”*

*11.5 Being consistent with the finding given by a coordinate bench and the detailed finding given by us we allow the additional ground raised by the assessee. Since we have allowed the appeal of the assessee on technical ground the other grounds need not to be adjudicated upon..*

iii.M/s Bina Indrakumar Vs. ITO, [2012] 24 taxmann.com 15 (Mum Trib) dated 15-06-12 held as under:

*It is found that the Assessing Officer, in the regular assessment proceedings had called for all the details with regard to the transaction and had incorporated his decision in the assessment order. Therefore, the issue is, whether still, the assessment order is erroneous and prejudicial to the revenue. From the facts, it is held that the issue has been dealt with and an opinion has been formed over that by the Assessing Officer. It is therefore, a clear case of change of opinion, because even the revenue could not get out of the fact that the entire material and evidence was not before the Assessing Officer. Therefore, it was to be held that this was a clear case of change of opinion. [Para 9]*

*In the instant case, during the regular assessment proceedings, the Assessing Officer had already made the enquiry, as he thought fit. In these circumstances, it can never be held that there was a lack of enquiry by the authority under the Act. It can also not be held that the enquiry was inadequate because complete details were provided to the Assessing Officer, therefore, it is held that this was a clear case of change of opinion, that too, on a*

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*proposal sent by the Assessing Officer, meaning whereby it was not the case of suo moto action of the Commissioner. This is important to note because the words used in section 263 are, 'he may'. In the instant case, the impugned order itself specifies that the proposal was received from the Assessing Officer, which means, that the Commissioner himself did not apply his mind. In these circumstances, taking into account all the facts emerging from the orders of the revenue authorities, the action to invoke revision proceedings under section 263 is bad in law and cannot be sustained. [Para 10]*

*As a consequence, the order passed under section 143(3) by the Assessing Officer on the issue of capital gains is upheld. [Para 11]*

*In the result, it is held that the initiation of proceedings under section 263 on the issue of LTCG is bad and uncalled for.*

7. The fact which remains highlighted by the Ld. AR that the Pr. CIT cannot pass the revision order based on the proposal of the AO and he has to make independent enquiry/ verification of facts and record and shall find the order passed by the AO is erroneous and prejudicial to the interest of the revenue. On perusal of the facts and the information submitted before the Pr. CIT as referred in the above paragraph, we found that the AO has called for the information and has accepted the details submitted

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and passed the assessment order and further there cannot be any basis for AO to make a proposal for revision proceedings to the Pr. CIT and the Pr. CIT cannot act on the proposal of the AO and he has to make independent observations and make an order. Accordingly we rely on the ratio of the judicial decisions on the proposal of the A.O. and we found that the order passed by the AO does not satisfy the twin conditions of erroneous and prejudicial to the interest of the revenue and accordingly the revision order is quashed and allow the grounds of appeal in favour of the assessee.

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

Order pronounced in the open court on 24.11.2022.

Sd/-  
(PRASHANT MAHARISHI)  
**ACCOUNTANT MEMBER**

Sd/-  
(PAVAN KUMAR GADALE)  
**JUDICIAL MEMBER**

Mumbai, Dated 24.11.2022

KRK, PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.

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3. संबंधित आयकर आयुक्त / The CIT(A)
4. आयकर आयुक्त(अपील) / Concerned CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार / BY ORDER,

सत्यापित प्रति //True Copy//

1.

( Asst. Registrar)  
ITAT, Mumbai