

IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH, KOLKATA
[Before Shri Rajesh Kumar, Accountant Member & Shri Sonjoy Sarma, Judicial Member]**I.T.A. No. 1105/Kol/2019**
Assessment Year: 2012-13

Swasti Realinfra Pvt. Ltd. C/o Rajesh Mohan & Associates Unit No. 18, 5 th Floor, Bagati House, 34, Ganesh Chandra Avenue, Kolkata- 700013. (PAN: AAMCS0142C)	Vs.	Income Tax Officer, Ward-10(4), Kolkata.
Appellant		Respondent

Date of Hearing	21.11.2022
Date of Pronouncement	.01.2023
For the Appellant	Shri Sunil Surana, FCA
For the Respondent	Shri Biswanath Das, CIT, DR

ORDER**Per Shri Rajesh Kumar, AM**

This is an appeal preferred by the assessee against the order of Ld. Pr. CIT-4, Kolkata dated 08.03.2019 for AY 2012-13.

2. In the various grounds of appeal the assessee has challenged the jurisdiction exercised by Ld. Pr. CIT u/s. 263 of the Income Tax Act, 1961 (hereinafter referred to as the “Act”) by ignoring the order passed u/s. 143(3) read with sec. 263 of the Act by the AO, which is neither erroneous nor prejudicial to the interest of the revenue.

3. Briefly stated facts in brief are that the return of income was filed on 30.09.2012 declaring total income at NIL. The case of the assessee was selected for scrutiny and the assessment order u/s. 143(3) of the Act was framed vide order dated 13.03.2015 assessing the total income at Rs.2,23,64,110/-. Subsequently, the said order was revised by the Ld. Pr. CIT u/s. 263 of the Act vide order dated 01.06.2016 setting aside the assessment order to be framed de novo vide order dated 13.03.2015. The AO while giving effect to the order u/s. 263 of the Act passed the assessment u/s.

143(3) read with sec. 263 of the Act vide order dated 09.08.2016 assessing the total income at NIL. Subsequently, the Ld. Pr. CIT upon examination of the assessment records again observed that the order framed by the AO u/s. 143(3) read with sec. 263 of the Act dated 09.08.2016 is erroneous in so far as prejudicial to the interest of the revenue as the AO has failed to carry out detailed investigation into the investment by shareholders and also the huge share premium thereon without verifying the financial positions of the investors. Accordingly, a show cause notice was issued u/s. 263 of the Act on 31.12.2018 which is reproduced as under:

OFFICE OF THE PR. COMMISSIONER OF INCOME TAX – 4, KOLKATA
P-7, CHOWRINGHEE SQUARE, 6th Floor, Room No. – 4, Kolkata – 700069

No.- PCIT-4/Kol/W-10(4)/Kol/263/2018-19/10020 Dated:31/12/18

To
The Principal Officer,
M/s Swasti Real Infra Pvt. Ltd.
CB 10/14, Desbandhu Nagar,
Baguhati, Kolkata – 700059

Sir,

Sub : Proceedings u/s 263 of the Act in the case of M/s Swasti Real Infra Pvt. Ltd., PAN AAMCS0142C in respect of order passed u/s 263/143(3) dated 09-08-2016 for Asst. Year 2012-13-regd.

Kindly Refer to the above.

1. In the instant case, the assessee company filed its return of income for the assessment year 2012-13 on 30-09-2012 declaring total income of Rs. Nil. The case was selected scrutiny through [PASS and assessment order under section 143(3) of the Income Tax Act, 1961 (to be referred to as Act hereinafter) was passed on 13-03-2015 determining the total income at Rs. 2,23,64,100. Subsequently, order u/s 263 of the income Tax Act, 1961 was passed on 01-06-2016 setting under hereto the order passes u/s 143(3) of the Income Tax Act, 1961 on 13-03-2015. The assessing officer while giving effect in the order u/s 263 of the Income Tax Act, 1961 passed order u/s 143(3) of the Income Tax Act, 1961 on 09-08-2016 determining total income at Rs. Nil.
2. Subsequently, the assessment records of the assessee were called for & on the basis of the verification of the material available on records, it was found that the order of assessment was erroneous so far as it is prejudicial to the interest of revenue on the following grounds :-
 - (i) The A.O passed the order without carrying out detailed investigation/ verification independent enquiry regarding identity, creditworthiness of the shareholders & also the genuineness of transaction relating to share capital that was intended to be carried out and merely accepted the submission of the assessee in this regard.
 - (ii) That A.O has also failed to carryout detailed investigation of shareholders on the every issue that how they decided to invest in such a company which was never known for as line of business and also they invested at a huge premium without verifying the financial position.

- (iii) The A.O further failed to examine the rationale behind raising the said share premium and also did not verify the method adopted by assessee for determining such abnormally huge premium specially keeping in view that prima facie there was no material in the balance sheet of assessee warranting/justifying such huge premium.
- (iv) The A.O failed to examine all the bank accounts for the entire period in the course of verification to find out the money trail of the share capital.
- (v) On the whole the impugned order dated 09-08-2016 passed u/s 263/1-13(3) of the Income Tax Act, 1961 prima facie suffers from lack of independent and adequate enquiry on the aforesaid issues.
3. In light of the above, I am of the opinion that prima facie order dated 09-08-2016 passed u/s 263/143(3) of the Income Tax Act, 1961 is erroneous so far as prejudicial to the interest of representative before me at my Room 6th floor, Aayakar Bhawan, P-7, Chowringhee Square, Kolkata – 700069 on 30.01.2019 at 2:00 p.m along with your written submissions if any, to show as to why the assessment made u/s 263/143(3) of the Income Tax Act, 1961 on 09-08-2016 should not be revised u/s 263 of the Income Tax Act, 1961.
4. Please note that no further adjournment will be given unless there is a valid reason and failure to comply with the requirement of the notice will lend to decision on merit.

(Arvind Kumar)

Pr. Commissioner of Income Tax – Kol – 4. Kolkata

4. The assessee replied the said show cause notice vide written submissions dated 11.02.2019 before the PCIT by submitting that the issue of share capital and share premium were examined in detail by the AO by specifically raising queries from the assessee and also calling for information from the investors and thereafter gave a specific finding in the assessment order framed u/s. 143(3) read with sec. 263 of the Act. The Ld. Pr. CIT brushed aside the submissions of the assessee and revised the assessment as framed in the first set aside proceeding by directing the AO to frame the assessment afresh as the order passed u/s. 143(3) read with 263 of the Act is erroneous in so far as prejudicial to the interest of the revenue on the ground of lack of enquiry on the part of the AO.

5. The Ld. AR vehemently submitted before us that the Ld. Pr. CIT has failed to appreciate the facts on record especially the assessment order framed u/s. 143(3) read with 263 of the Act dated 09.08.2016 wherein the AO has appended a detailed findings that necessary details and information from the assessee as well as from the shareholder companies were called by issuing notices u/s. 133(6) of the Act and also after issuing summon u/s. 131 of the Act to the director of the assessee company which were duly complied with and statements were also recorded and the identity and creditworthiness of the investor and genuineness of the transactions were duly proved. The Ld. AR submitted that Ld. Pr. CIT has exceeded his jurisdiction by wrongly invoking the revisionary jurisdiction to prove a case which did not suffer from the vice of lack of enquiry as is apparent from the detailed findings given by the AO in the assessment order framed in the first inning. The Ld. AR emphasized his arguments by relying on the decision in the case of Omkar Infracon (P) Ltd. Vs. ITO, ITA No. 896/Kol/2019 dated 18.03.2020 wherein revisionary jurisdiction exercised for the second time recording the same reason for issuing show cause notice u/s. 263 of the Act which were verbatim same as in the case of the assessee. The coordinate bench has also held that the order framed by the AO in the first revisionary proceeding pursuant to the direction of the Ld. Pr. CIT was a valid order. The ld AR also relied on the decision of the Hon'ble Calcutta High Court in the case of PCIT Vs Bhagwati Vintrade Pvt Ltd ITAT/184/2022, IA No. GA/2/2022 dated 18.11.2022 wherein under similar facts the second round by PCIT was quashed.

6. The Ld. DR, on the other hand, relied on the order of Ld. Pr. CIT by submitting that no prejudice is going to be caused to the assessee by the said revising of assessment u/s. 263 of the Act as assessee would be given a fair and sufficient opportunity in the setting aside proceeding again and, therefore, the order of Ld. Pr. CIT may kindly be sustained.

7. We have heard rival submissions, carefully perused the material available on record, the impugned appellate order, the assessment order passed in the set aside proceeding and the decision cited before us in the case of Omkar Infracon (P) Ltd. (supra) and the decision of jurisdictional High Court in the case of PCIT Vs Bhagwati vintrade Pvt Ltd(supra). We observe on the basis of the records before us that Ld. Pr. CIT has revised the assessment on the ground lack of enquiry on the part of the AO into the issue of investment of share capital and share premium. However, we note that in the set aside assessment proceeding in the first inning the AO examined the issue in detail after calling information from the assessee as well as investors u/s 133(6) of the Act and based on that detailed enquiry on the issue accepted the investments made in the assessee company. The relevant findings of the AO in the assessment order as framed u/s 143(3) r.w.s. 263 of the Act are reproduced as under:

“And considering the facts and circumstances of case as discussed above and as per submission of assessee, the assessment order was passed without making inquiries and verification which would have been made and therefore the order was passed on 13.03.2015 stands erroneous in so far as prejudicial to the interest of revenue and is set aside de novo with direction to AO to carry out proper examination of books of accounts including bank accounts of assessee as well as investors. AO is also directed to examine of credit appearing in the books of assessee as share capital including premium and nature of transactions, identity of investor and its genuineness.

As directed by the Principal Commissioner of Income Tax-4, Kolkata in the order u/s. 263 as above notice u/s. 142(1) of the I. T. Act, 1961 was issued and served on the assessee on 12.07.2016 asking to produce relevant papers and documents. In response to notice u/s. 142(1) Sri Rajesh Kumar Agarwal, Director of the assessee company appeared time to time along with papers and documents as required to discuss the case.

To ensure genuinity of transactions of the shareholder companies further notices u/s. 133(6) of the I. T. Act, 1961 were issued on 12.07.2016 to the parties from whom funds were received to the shareholder companies as source of investment in the assessee company. Replies were received from all the parties proving identity of parties, genuinity of the transactions and again it was observed that all the transaction were made through banking channel and duly recorded in the books of accounts of the parties.

Accordingly it is inferred that

- (i) *As the shareholders are private limited companies and registered with the Ministry of Corporate Affairs they have an established identity.*

- (ii) *Details of source of funds have been submitted by all the shareholders.*
- (iii) *None of applicants have been made otherwise than by banking channels.*
- (iv) *All the investors have submitted their Annual reports and I. T. Returns.*
- (v) *In all the cases the investments is duly reflected in the Annual Accounts of the investor.*
- (vi) *Moreover, summon u/s. 131 was also issued to the director of the company. In response to the summon u/s. 131 the director of the company appeared and give statement along with relevant papers.*

In view of the above observations, the total income of the assessee is computed as per separate computation sheet attached.

Assessed u/s. 264/143(3) for a total income of Rs. NIL.”

8. We note from the above findings of the AO that while giving effect to the directions of the Ld. Pr. CIT, AO issued notice u/s. 142(1) of the Act to the assessee which was duly complied with by filing necessary documents and informations. We note that the AO also issued notices u/s. 133(6) on 12.07.2016 to the parties from whom the funds were raised by the assessee and verified the source of investments, identity and genuineness. The said investor companies duly responded to the said notice and thereafter the AO recorded his satisfaction accepting the said investments in the hands of the assessee. Considering the above facts, we are of the view that the jurisdiction u/s. 263 of the Act by Ld. Pr. CIT has not been validly exercised. The case of the assessee finds support from the decision of the coordinate bench in Omkar Infracon (P) Ltd. (supra) wherein under similar facts, wherein the show cause notice is verbatim same, the coordinate bench has held the second revision as invalid by upholding the assessment order passed in the first inning. Recently the Hon'ble Calcutta High Court has held in the case of PCIT Vs Bhagwati Vintrade Pvt. Ltd ITAT/184/2022, IA No. GA/2/2022 dated 18.11.2022 that *“the present proceeding arising out of the second round of proceedings under section 263 of the Act. The learned Tribunal has carefully considered the factual position and noted that assessing officer has followed the direction issued in the earlier order passed by the Section 263 of the Act. The Assessing Officer has issued summons under Section 131 of the Act to the directors of the Shareholding Company M/s Laxmi Timber Pvt. Ltd. in consonance with the direction issued by the Principal Commissioner of Income Tax under Section 263 of the Act. This finding would be seen from paragraphs 5 to 7 of the*

assessment order. Thus the learned Tribunal on re-verification of the facts found that this is not a case of non-application of mind nor this is a case of failure to re-appreciate the facts and concluded that the view taken by the assessing officer was a plausible view. That apart we note that the assessing officer conducted thorough enquiry and has also examined the directors of the holding company. Thus the learned Tribunal rightly dismissed the appeal filed by the revenue.”

9. Since the facts of the case before us are materially same as involved in the cases decided above, we are therefore, inclined to quash the order u/s. 263 of the Act passed by the Ld. Pr. CIT second time by upholding the order passed in the first round by the AO in terms of the direction of the Ld. Pr. CIT. Accordingly, the appeal of the assessee is allowed.

10. In the result, the appeal of assessee allowed.

Order is pronounced in the open court on 11th January, 2023

Sd/-

(Sonjoy Sarma)
Judicial Member

Sd/-

(Rajesh Kumar)
Accountant Member

Dated: 11th January, 2023

JD, Sr. PS

Copy of the order forwarded to:

1. Appellant–
2. Respondent .
3. Pr. CIT-4, Kolkata.
4. ITO, Ward-10(4), Kolkata. ,
5. DR, ITAT, Kolkata, (sent through e-mail).

True Copy

By Order

Assistant Registrar
ITAT, Kolkata Bench, Kolkata