

**IN THE INCOME TAX APPELLATE TRIBUNAL,
'A' BENCH, KOLKATA**

**Before Shri Rajpal Yadav, Vice-President (KZ)
&
Shri Girish Agrawal, Accountant Member**

**I.T.A. No. 198/KOL/2022
Assessment Year: 2017-2018**

***Monika Mondal,.....Appellant
C/o. RSVPC & Company,
41A, A.J.C. Bose Road,
Diamond Prestige Nirman,
6th Floor, Suite no. 613,
Kolkata-700017
[PAN: AIHPM6528N]***

-Vs.-

***Principal Commissioner of Income Tax,....Respondent
Asansol,
Aayakar Bhawan,
116, Vivekananda Sarani, Kanyapur,
Asansol-713341, West Bengal***

Appearances by:

*Shri Binod Jain, A.R., appeared on behalf of the assessee
N o n e, appeared on behalf of the Revenue*

Date of concluding the hearing : January 09, 2023

Date of pronouncing the order : January 13, 2023

O R D E R

Per Rajpal Yadav, Vice-President (KZ):-

The assessee is in appeal before the Tribunal against the order of Id. Principal Commissioner of Income Tax,

Asansol dated 01.03.2022 passed under section 263 of the Income Tax Act, 1961 in A.Y. 2017-18.

2. The assessee has raised seven grounds of appeal. However, her main grievance is that ld. Principal CIT has erred in taking action under section 263 of the Income Tax Act by ignoring clause (c) of sub-section (i) of section 263. The pleadings in other grounds of appeal are peripheral arguments in support of this ground or consequential issue pursuant taking cognizance under section 263 of the Income Tax Act.

3. Brief facts of the case are that the assessee has filed her return of income on 01.11.2017 declaring total income at Rs.3,63,990/-. The case of the assessee was selected for scrutiny assessment and a notice under section 143(2) was issued and served. After hearing the assessee, the ld. Assessing Officer has passed an assessment order under section 143(3) of the Income Tax Act. One of the additions made by the ld. Assessing Officer relates to undisclosed sundry debtors. He recorded the following finding:-

“Undisclosed sundry debtors:- As per the statement filed by the assessee to the Bank, it had Sundry Debtors of Rs.2,33,15.660/-. However, as per the Audit Report, its Sundry Debtors was only Rs,74,59,224/- as on 31.03.2017. Thus there was a prima facie excess of Sundry Debtor is of Rs.1,58,56,436/- - The undisclosed sales of Rs.1,30,55,022/-(Stock Rs. 1,23,41,673/- + Plus Profit

Rs. 7,13,349/- to be included), is assumed to be part of excess Sundry Debtors reported by the assessee to the Bank (Giving benefit of doubt to assessee) Thus the excess Sundry Debtors of Rs. 1,30,55,022/- only is treated as explained, against undisclosed sales. However, remaining unexplained Sundry Debtors of Rs.1,02,60,638/- (2,33,15,660 - 1,30,55,022) is treated as Undisclosed Investments of the assessee and earned from undisclosed sources.

Under the above discussion and circumstances, un-explained Sundry Debtors shown by the assessee during the F.Y.2016-17 relevant to the assessment year 2017-18 of Rs.1,02,60,638/- added to the assessee's total income of the assessee as Undisclosed Investments of the assessee.

Penalty proceeding u/s 270A of Income Tax Act 1961, is initiated for under reporting of income in consequence of misreporting of income on the above issue”.

4. On perusal of the assessment order, ld. PCIT took cognizance under section 263 of the Income Tax Act. The copy of the show-cause notice /letter dated 01.02.2022 has been placed on pages no. 106 & 107 of the paper book. The show-cause notice reads as under:-



GOVERNMENT OF INDIA
MINISTRY OF FINANCE
INCOME TAX DEPARTMENT
OFFICE OF THE PRINCIPAL COMMISSIONER OF INCOME TAX
PCIT, Asansol

To,
MONIKA MONDAL
A/11, J.P. AVENUE ZONAL CENTRE
DURGAPUR, BURDWAN 713211, West
Bengal
India

| | | | |
|------------------------|----------------|--|----------------------|
| PAN/TAN: AIHPM6528N | AY: 2017-18 | DIN & Notice No : ITBA/REV/F/REV1/2021- 22/1039272485(1) | Dated: 01/02/2022 |
|------------------------|----------------|--|----------------------|

NOTICE FOR THE HEARING

M/s/Mr/Ms

Subject: Notice for Hearing in respect of Revision proceedings u/s 263 of the **THE INCOME TAX ACT, 1961** – Assessment Year **2017-18**.

In this regard, a hearing in the matter is fixed on **15/02/2022** at **12:30 PM**. You are requested to attend in person or through an authorized representative to submit your representation, if any alongwith supporting documents/information in support of the issues involved (as mentioned below). If you wish that the Revision proceeding be concluded on the basis of your written submissions/representations filed in this office, on or before the said due date, then your personal attendance is not required. You also have the option to file your submission from the e-filing portal using the link: incometaxindiaefiling.gov.in

Please refer to the above. The assessment record was called for and examined by the undersigned.

2. In the instant case, the assessment for A.Y. 2017-18 was completed u/s 143(3) of the I.T. Act, 1961 on 29/11/2019 determining total income of Rs. 1,13,37,980/-.

3. On scrutiny of the assessment records, it is found that an amount of Rs. 7,13,349/- (undisclosed income) and Rs. 1,02,60,638/- unexplained sundry debtors was disallowed as undisclosed investment of the assessee earned from the undisclosed source. Further, it was observed that while computing the Net tax liability of Rs. 38,14,379/- the tax was computed on the unexplained sundry debtors (undisclosed investment) amounting to Rs. 1,02,60,638/- at normal rate. However, undisclosed income of Rs. 1,02,60,638/- being unexplained was required to be taxed at the special rate of 60 Per cent during the A.Y. 2017-18 under section 115BBE of the I.T. Act, 1961.

Further, it is also observed that the assessee had claimed TCS credit of Rs. 20,46,801/- against purchase of Rs. 69,64,677/- and the same was allowed in the assessment order. Purchase amounting to Rs. 69,64,677/- against TCS of Rs. 69,647/- being 1% of Rs. 69,64,677/- was debited in the P&L account for the F.Y. 2016-17 relevant to the A.Y. 2017-18. So, the amount of TCS of only Rs. 69,647/- relating to purchases of Rs. 69,64,677/- should have been allowed while passing the assessment order for A.Y. 2017-18. In view of the above, claim of TCS credit of Rs. 19,77,154/- (Rs. 20,46,801 minus Rs. 69,647) was required to be disallowed which was not done in the assessment order. But omission to do so resulted in under assessment of income of Rs. 19,77,154/-. Considering the above the assessment order is erroneous so far as it is prejudicial to the interest of Revenue. Accordingly, the assessment order is required to be revised.

4. In view of the above, you are requested to explain as to why the assessment order in your case (PANAIHPM6528N) for A.Y-2017-18 should not be revised u/s 263 of the Income Tax Act, 1961 as the assessment order passed in the aforesaid case is erroneous so far as it is prejudicial to the interest of revenue. Accordingly, your case is fixed for hearing on **15.02.2022** at **12.30 P.M.** and you may appear in the chamber of Pr. Commissioner of Income Tax-5, Kolkata & holding the additional charge of Pr. CIT, Asansol at Aayakar Bhawan Purba, 110, SHANTIPALLY E.M. BY PASS, KOLKATA-700107, 6th Floor, Room No 601, Kolkata -700107 either in person or through your authorized representative on the scheduled date, time, and place along with your written explanation with supporting evidences. **Due to outbreak of Pandemic COVID-19**, you are requested to kindly note that appearing in person or through authorized representative is optional and you may submit your explanation/ written submission through official **e-mail: asansol.pcit@incometax.gov.in**, instead of appearing in person or through authorized representative and it will be treated as compliance to this show cause notice. If you fail to submit your explanation to this show cause letter by **15.02.2022** the case will be decided ex-parte without making any further correspondence with you.

SAMAR BHADRA
PCIT, Asansol

5. The ld. PCIT thereafter set aside the assessment order and directed the ld. Assessing Officer to reframe the assessment order.

6. The ld. Counsel for the assessee while impugning the order of the ld. PCIT contended that against the assessment order on all the issues, the assessee is in appeal before the ld. CIT (Appeals). The appeal was filed long back and he drew our attention to pages no. 83 to 85 of the paper book, where copy of Form No. 35 is available. The assessee has challenged the very addition

of Rs.1.02 crores made out of sundry debtors. This issue is subjudice before the ld. 1st Appellate Authority and, therefore, ld. CIT is precluded to take action under section 263 in view of the clause (c) of section 263 sub-clause (1).

7. With regard to the second issue relating to TCS credit, the ld. Counsel for the assessee contended that ld. Assessing Officer has examined this aspect and after verification of the accounts has allowed the TCS credit.

8. Md. Ghayas Uddin, ld. CIT(DR) has argued this appeal on behalf of the Revenue on 03.08.2022. The Bench after conclusion of the hearing reserved the order. Somehow the order could not be dictated within 90 days because the Vice-President remained on official tour to Mumbai, Hyderabad and Tirupati Camp, because he is holding additional charge of Hyderabad and Telengana, therefore, order could not be passed within 90 days and appeal fixed for refreshing the issues. In the fresh listing, no one appeared on behalf of revenue but we have considered all material facts afresh.

9. The Revenue had contended that subject matter of rate of taxes is not available in the assessment order and, therefore, ld. Commissioner has rightly invoked the jurisdiction.

10. We have duly considered the contentions of ld. A.R. and gone through the record carefully. Before we embark upon an enquiry on the facts and issues agitated before us to find out whether the action u/s 263 of the Act, deserves to be taken against the assessee or not, it is pertinent to take note of this section. It reads as under:-

“263(1) The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interest of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.

[Explanation.- For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,-

(a) an order passed on or before or after the 1st day of June, 1988 by the Assessing Officer shall include-

(i) an order of assessment made by the Assistant Commissioner or Deputy Commissioner or the Income Tax Officer on the basis of the directions issued by the Joint Commissioner under section 144A;

(ii) an order made by the Joint Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred on, or assigned to, him under the orders or directions issued by the Board or by the Chief Commissioner or Director General or Commissioner authorized by the Board in this behalf under section 120;

(b) “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 Commissioner;

(c) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal filed on or before or after the 1st day of June, 1988, the powers of the Commissioner under this sub-section shall extend and shall be

deemed always to have extended to such matters as had not been considered and decided in such appeal.

(2) No order shall be made under sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed.

(3) Notwithstanding anything contained in sub-section (2), an order in revision under this section may be passed at any time in the case of an order which has been passed in consequence of, or to give effect to, any finding or direction contained in an order of the Appellate Tribunal, National Tax Tribunal, the High Court or the Supreme Court.

Explanation.- In computing the period of limitation for the purposes of sub-section (2), the time taken in giving an opportunity to the assessee to be reheard under the proviso to section 129 and any period during which any proceeding under this section is stayed by an order or injunction of any court shall be excluded.”

11. A bare perusal of the sub section-1 would reveal that powers of revision granted by section 263 to the learned Commissioner have four compartments. In the first place, the learned Commissioner may call for and examine the records of any proceedings under this Act. For calling of the record and examination, the learned Commissioner was not required to show any reason. It is a part of his administrative control to call for the records and examine them. The second feature would come when he will judge an order passed by an Assessing Officer on culmination of any proceedings or during the pendency of those proceedings. On an analysis of the record and of the order passed by the Assessing Officer, he formed an opinion that such an order is erroneous in so far as it is prejudicial to the interests of the Revenue. By this stage the learned Commissioner was not required the assistance of the assessee. Thereafter the third stage

would come. The learned Commissioner would issue a show cause notice pointing out the reasons for the formation of his belief that action u/s 263 is required on a particular order of the Assessing Officer. At this stage the opportunity to the assessee would be given. The learned Commissioner has to conduct an inquiry as he may deem fit. After hearing the assessee, he will pass the order. This is the 4th compartment of this section. The learned Commissioner may annul the order of the Assessing Officer. He may enhance the assessed income by modifying the order. He may set aside the order and direct the Assessing Officer to pass a fresh order. At this stage, before considering the multi-fold contentions of the Id. Representatives, we deem it pertinent to take note of the fundamental tests propounded in various judgments relevant for judging the action of the CIT taken u/s 263. The ITAT in the case of *Mrs. Khatiza S. Oomerbhoy Vs. ITO, Mumbai, 101 TTJ 1095*, analyzed in detail various authoritative pronouncements including the decision of Hon'ble Supreme Court in the case of *Malabar Industries 243 ITR 83* and has propounded the following broader principle to judge the action of CIT taken under section 263.

(i) The CIT must record satisfaction that the order of the AO is erroneous and prejudicial to the interest of the Revenue. Both the conditions must be fulfilled.

(ii) Sec. 263 cannot be invoked to correct each and every type of mistake or error committed by the AO and it was only when an order is erroneous that the section will be attracted.

(iii) An incorrect assumption of facts or an incorrect application of law will suffice the requirement of order being erroneous.

(iv) If the order is passed without application of mind, such order will fall under the category of erroneous order.

(v) Every loss of revenue cannot be treated as prejudicial to the interests of the Revenue and if the AO has adopted one of the courses permissible under law or where two views are possible and the AO has taken one view with which the CIT does not agree. If cannot be treated as an erroneous order, unless the view taken by the AO is unsustainable under law.

(vi) If while making the assessment, the AO examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determine the income, the CIT, while exercising his power under s 263 is not permitted to substitute his estimate of income in place of the income estimated by the AO.

(vii) The AO exercises quasi-judicial power vested in his and if he exercises such power in accordance with law and arrive at a conclusion, such conclusion cannot be termed to be erroneous simply because the CIT does not fee stratified with the conclusion.

(viii) The CIT, before exercising his jurisdiction under s. 263 must have material on record to arrive at a satisfaction.

(ix) If the AO has made enquiries during the course of assessment proceedings on the relevant issues and the assessee has given detailed explanation by a letter in writing and the AO allows the claim on being satisfied with the explanation of the assessee, the decision of the AO cannot be held to be erroneous simply because in his order he does not make an elaborate discussion in that regard.

12. Apart from the above principles, we deem it appropriate to make reference to the decision of the Hon'ble Delhi High Court in the case of *CIT vs. Sun Beam Auto reported in 227 CTR 113 and Gee Vee Enterprises Ltd vs. Addl. Commissioner of Income Tax (99 ITR 375)*. In the case of Sun Beam Auto, the Hon'ble High Court has pointed out a distinction between lack of inquiry and inadequate inquiry. If there is a lack of enquiry, then the assessment order can be branded as erroneous. The following observations of the Hon'ble Delhi High Court are worth to note:

“12. We have considered the rival submissions of the counsel on the other side and have gone through the records. The first issue that arises for our consideration is about the exercise of power by the Commissioner of Income-tax under section 263 of the Income-tax Act. As noted above, the submission of learned counsel for the revenue was that while passing the assessment order, the Assessing Officer did not consider this aspect specifically whether the expenditure in question was revenue or capital expenditure. This argument predicates on the assessment order which apparently does not give any reasons while allowing the entire expenditure as revenue expenditure. However, that by itself would not be indicative of the fact that the Assessing Officer had not applied his mind on the issue. There are judgments galore laying down the principle that the Assessing Officer in the assessment order is not required to give detailed reason in respect of each and every item of deduction, etc. Therefore, one has to see from the record as to whether there was application of mind before allowing the expenditure in question as revenue expenditure. Learned counsel for the assessee is right in his submission that one has to keep in mind the distinction between “lack of inquiry” and “inadequate inquiry”. If there was any inquiry, even inadequate, that would not by itself, give occasion to the Commissioner to pass orders under section 263 of the Act, merely because he has different opinion in the matter. It is only in cases of “lack of inquiry”, that such a course of action would be open”.

13. In the case of *Gee Vee Enterprise vs. Commissioner of Income Tax* reported in 99 ITR page 375, the Hon’ble court has expounded the approach of ld. Assessing Officer while passing assessment order. The observation of the Hon’ble court on pages 386 of journal read as under:-

“...it is not necessary for the Commissioner to make further inquiries before cancelling the assessment order of the Income-tax Officer. The Commissioner can regard the order as erroneous on the ground that in the circumstances of the case the Income-tax Officer should have made further inquiries before accepting the statements made by the assessee in his return.

The reason is obvious. The position and function of the Income-tax Officer is very different from that of a civil court. The statement made in a pleading proved by the minimum amount of evidence may be adopted 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 the return which is apparently in order but called 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... 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 enquiry. 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."

14. In the light of above, let us examine the facts of the present case. A perusal of sub-clause (c) of section 263 would indicate that it puts an embargo on the power of the Id. Commissioner under section 263 on the items for which an appeal is pending before the Id. CIT(Appeals). The simple reason for such embargo is that there should not be contradictory orders at the level of identical authorities. The Id. CIT(Appeals) has co-terminus power of the Id. Assessing Officer. In case it noticed any irregularity or illegality in an assessment order that can be taken care of by the Id. 1st Appellate Authority by exercising his power for enhancement of income. Therefore, on such items, no supervision at the end of the Id. Commissioner under section 263 is contemplated in the Scheme of the Act. The addition of

Rs.1,02,00,000/- is already subject matter of appeal before the ld. CIT(Appeals) and the ld. CIT(Appeals) would always look forward whether it required to be charged to tax under section 115BBE @ 60% or at normal rate. It is yet to be determined how much addition stands and what is the source of such addition to the income of the assessee. Therefore, all these subject matter can easily be looked into by the ld. 1st Appellate Authority. The ld. CIT under section 263 has no jurisdiction on such a claim.

15. As far as the second issue regarding TCS credit is concerned, the assessee has given following reply to the questionnaire of the ld. Commissioner:-

“(9) Further it is observed that the SCN has wrongly stated that the claim of TCS credit of Rs.20,46,801/- is incorrect against purchase of Rs.69,64,677/-. The Purchase of the by the assessee under her PAN was Rs. 20,85,68,595/- reported in 26As at Rs.20,46,79,657/~ {Rs 69 64 677 + Rs.19,77,14,980/-}. The purchases of Rs.38,88,938/- of the year was reported by the suppliers in the next financial year. The detailed working is given in page 27 of the paper book.

(10)To better understanding, we briny the facts of the case as narrated to the AO The assessee is a state excise licence holder in the region of Durgapur to sell the SMFL and Beer The assessee entered into a joint venture arrangement with Essbee intech Pvt Ltd to sell the beers of United Breweries Ltd in the region on the strength of her state excise licence and permissions. This arrangement was exclusive to her IMFL business conducted as sole proprietary concern. The Purchases are made under her PAN and TCs was deduced by the suppliers as per action 205C. The Purchases under the joint venture arrangement were recorded and computed to derive the income offered to tax. The assessee earned

Rs.12,00,000 form such arrangement and the same was considered in the computation of her income and offered to tax. Thus the condition of the provisions of section 206C subsection (40 read with rule 37),sub rule (2),clause(i) is fulfilled.

In view of above and on the facts and circumstances of the case, we pray for quashing of the proceeding”.

16. It is to be appreciated that this aspect has been considered by the ld. Assessing Officer before allowing the credit. There is no apparent error in the order of the ld. Assessing Officer on this point. Therefore, we are of the view that ld. Commissioner has erred in invoking jurisdiction under section 263 of the Income Tax Act.

17. In view of the above, the appeal of the assessee is allowed and order passed under section 263 is quashed.

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

Order pronounced in the open Court on 13th January, 2023.

Sd/-

(Girish Agrawal)
Accountant Member

Sd/-

(Rajpal Yadav)
Vice-President (KZ)

Kolkata, the 13th day of January, 2023

*Copies to :(1) Monika Mondal,
C/o. RSVPC & Company,
41A, A.J.C. Bose Road,
Diamond Prestige Nirman,
6th Floor, Suite no. 613, Kolkata-700017*

**(2) Principal Commissioner of Income Tax,
Asansol,
Aayakar Bhawan,
116, Vivekananda Sarani, Kanyapur,
Asansol-713341, West Bengal**

(3) Commissioner of Income Tax- ;
(4) The Departmental Representative
(5) Guard File
TRUE COPY

By order

*Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata*

Laha/Sr. P.S.