

**IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH : BANGALORE**

**BEFORE SHRI GEORGE GEORGE K, JUDICIAL MEMBER
AND
MS. PADMAVATHY S, ACCOUNTANT MEMBER**

ITA No. 380/Bang/2022
Assessment Year : 2012-13

M/s. Shiva Ferric Pvt. Ltd., No. 193, 4 th Floor, Shiv Sadan Outer Ring Road, B. Narayanapura, Bangalore – 560 016. PAN: AAICS4564L	Vs.	The Principal Commissioner of Income-tax [Central], Bengaluru.
APPELLANT		RESPONDENT

Assessee by	:	Ms. Sunaina Bhatia, CA
Revenue by	:	Ms. Neera Malhotra, CIT-DR

Date of Hearing	:	17-01-2023
Date of Pronouncement	:	24-01-2023

ORDER

PER PADMAVATHY S, ACCOUNTANT MEMBER

This appeal is filed against the order of the Principal Commissioner of Income Tax, Bangalore passed u/s. 263 of the Income Tax Act (“the Act”) dated 22.03.2022 for the A.Y. 2012-13.

2. The assessee raised the following grounds of appeal:

“1. The order of the learned PCIT in so far as it is against the assessee is opposed to law, equity, weight of evidence, probabilities, facts and circumstances of the case.

2. The learned PCIT is not justified in law and on facts in exercising his revisional jurisdiction u/s. 263 of the Income Tax Act, for partly setting aside the

assessment order passed u/s. 143[3] rws 147 of the Act, dated 27/12/2019 with regard to the amount representing the face value of shares issued by the assessee without appreciating that in terms of section 5[3] of the Direct Tax Vivad se Vishwas Act, 2020, the assessment could not be reopened in respect of matters that were settled under the scheme and that the receipt of the share premium was not an independent transaction but part of the amounts received by the assessee for issue of shares at premium for which an addition of Rs. 9,71,04,000/- representing share premium was made u/s. 68 of the Act in the order of assessment and thus, the matter stood settled under the VSV scheme.

3. Without prejudice to the above, the learned PCIT erred in holding that the assessment order passed u/s. 143[3] rws 147 of the Act, dated 27/12/2019 was erroneous in so far it is prejudicial to the interest of revenue on account of the failure of the A.O. to make enquiries in course of assessment.

4. The learned PCIT failed to appreciate that the learned A.O. had passed the order u/s 143(3) rws 147 of the Act after making sufficient inquiries with regard to the receipt of amounts towards issue of shares and there was proper application of mind, and thus the same could not be held as erroneous in order to warrant revision u/s 263 of the Act under the facts and in the circumstances of the assessee's case.

5. For the above and other grounds that may be urged at the time of hearing of the appeal, your assessee humbly prays that the appeal may be allowed and Justice rendered.”

3. The assessee is a private limited company that carries on the business of trading in Iron and Steel. For the assessment year 2012-13, the assessee company had originally filed its return of income on 29/09/2012, declaring an income of Rs. 1,64,14,213/- and thereafter, a revised return of income was filed on 03/12/2012 declaring the very same income that was declared in the original return of income. The assessee's case was selected for scrutiny and an order of assessment u/s 143(3) of the Act was passed on 03/01/2014 by making certain additions as a result of which, the assessee was assessed on a total income of Rs. 1,79,29,075/-. The said order of assessment has been accepted by the assessee company and the demand raised in the assessment has since been paid. On the basis of information received from Kolkata Investigation Directorate, the case was re-

opened by issue of notice u/s 148 of the Act on 29/03/2019. Thereafter, a Survey U/s 133A was also conducted in the assessee's case on 29/08/2019. During the course of survey, a statement of Shri Lalit Kumar Purva one of the Directors of the assessee Company was recorded u/s 133A of the Act in which the he has stated that the total share premium of Rs.9,71,04,000/- was received by the assessee for the assessment year 201213 for the year under appeal. Considering the aforesaid findings of survey, the reassessment proceedings were completed by the order passed u/s.143[3] r.w.s. 147 of the Act dated 27/12/2019 assessing the assessee on a total income of Rs. 11,35,18,210/- by making a solitary addition of Rs. 9,71,04,000/- in respect of Share Premium regarded as Unexplained cash credit u/s 68 of the Act.

4. Aggrieved by the aforesaid order of assessment passed u/s. 143[3] r.w.s. 147 of the Act, the assessee had filed an appeal before the Commissioner of Income-tax[Appeals], Bengaluru on 07/01/2020. During the pendency of the above appeal before the CIT[A], the assessee opted for setting the taxes disputed in appeal under the Vivad Se Vishwas Scheme, 2020 that was introduced by the Government. The assessee has filed the prescribed application for settlement in Form 1 and 2 and thereafter the assessee had received Form No.3 from the Designated Authority accepting the application. Accordingly, the assessee has withdrawn the appeal filed by the assessee before the CIT[A] and has paid the taxes due and filed Form 4. Thereafter, the assessee has also received Form 5 from the Designated Authority and the matter has since become final.

5. The assessee received a notice u/s. 263of the Act, dated 05/01/2022 fixing the case for hearing on 19/01/2022from the P.C.I.T. It was stated in

the said notice that the revision proceedings had been initiated for the following reasons:

“On a perusal of the records, the following discrepancy is found:-

3.1 It was found that only the share premium was added back without adding back the share capital relating to the share premium. The assessee company had reportedly issued shares at Rs. 250 per share (Rs. 10+ Rs.240) to the paper companies and the share capital received by the company was at Rs. 40,46,000/- (9,71,04,000/240'10) which should also have been added back. Failure to do so resulted in short computation of Rs. 40,46,000/- with a consequent short levy of tax amounting to Rs. 25,33,557/- including interest u/s 234B at Rs. 12,20,8333/- . Further, there is also a short levy of interest u/s 234B of the Act amounting to Rs. 25,69,9914/- . The aggregate short levy of tax works out to Rs. 51,03,548/-.

3.2 Considering the fact that the share capital received by the company to the tune of Rs. 40,46,000/- during FY 2011-12 are liable to be treated as undisclosed income u/s 68 of the Income-tax Act, 1961 and the same has not been considered at the time of assessment, the assessment order is rendered erroneous and prejudicial to the interest of Revenue as per Explanation 2 to Section 263 of IT Act.

6. The assessee submitted that Recourse to the provisions of section 263 of the Act cannot be taken for the year under appeal light of the provisions of section 5[3] Direct Tax Vivad Se Viswas (DTVSV) Act 2020, that states that no matter covered under the scheme shall be reopened in any other proceedings. Without prejudice to the above the assessee submitted that there was no error prejudicial to the interest of revenue as the learned A.O. has examined the entire transaction and had applied his mind while making the addition of Rs. 9,71,04,000/- in respect of share premium and therefore, none of the conditions of Explanation 2 to section 263 of the Act was attracted to consider the order passed as erroneous. The P.C.I.T. has proceeded to pass the impugned order u/s. 263 of the Act, rejecting the objections raised by the assessee with the following observations:

"7. I have considered the assessee's submissions and have gone through the assessment records. It is a fact apparent from record and submission made by the

assessee that an amount of Rs. 10,11,50,000/- was claimed to be received by the assessee for issue of 404600 shares of face value of Rs. 10 each at a premium of Rs. 2401- per share. It is also a fact that the AO made an addition of Rs. 9,71,04,000/- to the total income of the assessee on account of share premium received from shell companies the genuineness of which was not proved by the assessee, however the AO did not make any addition of the amount of Rs. 40,46,000/- claimed to be received on account of share capital for issue of 404600 shares of face value of Rs10each. **During assessment proceedings, the Assessing Officer didnot make any enquiry or verification on the receipt of Rs.40,46,000/-in the books of accounts, which should have been done. Hence, it is held that the assessment order passed by theAssessing Officer is erroneous so far as it is pre-judicial to theinterest of the Revenue as per the provisions of Clause (a) ofExplanation (2) to the Section 263 of the Income-tax Act, 1961.**

8. The assessee in its submission during current proceedings has submitted that addition on account of receipt of Share premium of Rs. 9,71,04,000/- was disputed before CIT(A) and is settled subsequently under VSV scheme. Hence it is claimed that once the issue is settled under VSV it should not be revised under 263 of I T Act. Further, it is also claimed that order passed by AO cannot be deemed to be erroneous as the conditions of explanation 2 to section 263 are not satisfied.

9. The claim made by assessee are thoroughly considered. The addition made by the assessing officer in the reassessment order on account of unexplained share premium received is settled by the assessee under DT VSV Scheme, however the issue of unexplained share capital of Rs. 40,46,000/- was not considered by the assessing officer during assessment proceedings and no addition was made, eventhough the information of the same was available with the AO during assessment proceedings. Regarding settlement of issue under DNSV Act, it is found that the disputed issue regarding addition of share premium is settled under DNSV Act, however the issue of receipt of share capital of Rs. 40,46,000/- remained to be examined during assessment proceedings and no addition was made on this count. The issue of unexplained share capital of Rs. 40,46,000/- was not disputed during any appellate authority hence it cannot be claimed that this issue is settled under VSV Act.

10. As per explanation 2(a) of section 263 of IT Act,

"For the purpose of this section, it is hereby declared that an order passed by the AO shall be deemed to be erroneous in so far as it is prejudicial to the interests of revenue, if in the opinion of the Principal Commissioner of Income-tax[A]. The order is passed without making enquiries or verification which should have been made."

During assessment proceedings, the Assessing Officer did not make any enquiry or verification on the receipt of Rs. 40,46,000/- in the books of accounts, which should have been made.

11. In view of the above facts, I, the Principal CIT [Central], Bengaluru, by virtue of powers conferred on me U/s 263 of the Act, am satisfied that the assessment order passed by the Assessing Officer is erroneous in so far as it is prejudicial to the interest of revenue within the meaning of the clause (a) of Explanation 2 to the section 263 of the Income Tax Act, 1961, as the AO failed to examine the genuineness of receipt of share capital of Rs. 40,46,000/- as discussed above. Therefore, the assessment order passed u/s 143[3] rws 147 of I T Act dated 27/12/2019 is hereby partly set-aside to the file of the Assessing Officer for passing a fresh assessment order after making verification and enquiry with regard to receipt of share capital of Rs.40,46,000/- in the books of accounts and after making indepth enquiry of genuineness and creditworthiness of the investors.

7. Being aggrieved by the order so passed u/s. 263 of the Act, the assessee is instituting this appeal before the Hon'ble Tribunal.

8. The Ld.AR reiterated the submissions made before the lower authorities. The contention of the Ld.AR is that the impugned issue of shares allotted to the shell companies by the assessee is the subject matter of appeal before the CIT(A) which arose out of the order of the AO u/s. 143(3) r.w.s. 147. The assessee has opted for DTVSV for this issue and filed the relevant forms in this regard [Page 113 to 126 of the paper book]. The Ld.AR submitted that the same issue cannot be a subject matter of proceedings u/s. 263 of the Act. The Ld.AR in this regard relied on the decision of Hon'ble Madras High Court in the case of Gopalakrishnan Rajkumar vs. PCIT (2022) 445 ITR 557 (Mad). The Ld.AR drew our attention to the decision of the Coordinate Bench in the case of Shri Pavan Kandkur vs. PCIT in ITA No. 522/Bang/2022 dated 17.11.2022 in which case the Hon'ble Tribunal has followed the decision of the Hon'ble Madras High Court in the case of Gopalakrishnan Rajkumar (supra). On merits, the Ld.AR submitted the impugned issue has been thoroughly verified by the AO which is evident from the detailed findings given in the order of assessment

by the AO. The Ld.AR therefore submitted that the ground on which the revisionary proceedings i.e. lack of enquiry by the AO about the genuineness of the face value of the shares is not correct and clause(a) of explanation(2) to section 263 cannot be applied in assessee's case.

9. The Ld.DR submitted that the disputed amount for which the assessee opted for DTVSV pertains to the share premium only and the face value of the shares is not a subject matter in the proceedings. Therefore the Ld.DR argued that the issue of non-verification of the genuineness of the face value of shares by the AO is not part of DTVSV and accordingly, the jurisdiction of the PCIT cannot be question on this ground. The Ld.DR also submitted that though the AO has verified the share premium, the impugned amount towards face value was not verified by the AO and therefore the PCIT has correctly involved the provisions of clause(c) of explanation(2) to section 263.

10. We heard the rival submissions and perused the material on record. We notice that the Coordinate Bench in the case of Pavan Kandkur (supra) has considered a similar issue and held that

9. We have heard the rival contentions and perused the material on record. We will consider the issue of whether revision proceedings can be initiated when the assessee has opted for DTVSV. We notice that the Hon'ble Madras High Court while considering a similar issue in the case of Gopalakrishnan Rajkumar (supra) has held that –

“39. The question therefore that arises for consideration is whether the impugned proceedings initiated after the petitioners opted to settle the dispute under the Direct Tax Vivad Se Vishwas Act, 2020 are sustainable or not?

40. The expression disputed tax has been defined in Section 27 of the Direct Tax Vivad Se Vishwas Act, 2020 reads as under:

(j) "disputed tax", in relation to an assessment year or financial year, as the case may be, means the income-tax, including surcharge and cess (hereafter in this clause referred to as the amount of tax) payable by the assessee under the provisions of the Income-tax Act, 1961, as computed hereunder:—

(A) in a case where any appeal, writ petition or special leave petition is pending before the appellate forum as on the specified date, the amount of tax that is payable by the assessee if such appeal or writ petition or special leave petition was to be decided against him;

(B) in a case where an order in an appeal or in writ petition has been passed by the appellate forum on or before the specified date, and the time for filing appeal or special leave petition against such order has not expired as on that date, the amount of tax payable by the assessee after giving effect to the order so passed;

(C) in a case where the order has been passed by the Assessing Officer on or before the specified date, and the time for filing appeal against such order has not expired as on that date, the amount of tax payable by the assessee in accordance with such order;

(D) in a case where objection filed by the assessee is pending before the Dispute Resolution Panel under section 144C of the Income-tax Act as on the specified date, the amount of tax payable by the assessee if the Dispute Resolution Panel was to confirm the variation proposed in the draft order;

(E) in a case where Dispute Resolution Panel has issued any direction under sub-section (5) of section 144C of the Income-tax Act and the Assessing Officer has not passed the order under sub-section (13) of that section on or before the specified date, the amount of tax payable by the assessee as per the assessment order to be passed by the Assessing Officer under subsection (13) thereof;

(F) in a case where an application for revision under section 264 of the Income-tax Act is pending as on the specified date, the amount of tax payable by the assessee if such application for revision was not to be accepted:

Provided that in a case where Commissioner (Appeals) has issued notice of enhancement under section 251 of the Income-tax Act on or before the specified date, the disputed tax shall be increased by the amount of tax pertaining to issues for which notice of enhancement has been issued:

Provided further that in a case where the dispute in relation to an assessment year relates to reduction of tax credit under section 115JAA or section 115D of the Income-tax Act or any loss or depreciation computed thereunder, the assessee shall have an option either to include the amount of tax related to such tax credit or loss or depreciation in the amount of disputed tax, or to carry forward the reduced tax credit or loss or depreciation, in such manner as may be prescribed.

(k) "Income-tax Act" means the Income-tax Act, 1961;

(a) "last date" means such date as may be notified by the Central Government in the Official Gazette;

(b) "prescribed" means prescribed by rules made under this Act;

(c) "specified date" means the 31st day of January, 2020;

(d) "tax arrear" means,—

- (i) the aggregate amount of disputed tax, interest chargeable or charged on such disputed tax, and penalty leviable or levied on such disputed tax; or
- (ii) disputed interest; or
- (iii) disputed penalty; or
- (iv) disputed fee,

as determined under the provisions of the Income-tax Act.

41. As per section 3 of the the Direct Tax Vivad Se Vishwas Act, 2020, notwithstanding anything contained in the Income-tax Act or any other law for the time inforce the amount payable by a declarant shall be as specified in the table to the said section.

42. As per section 4(6) of the Direct Tax Vivad Se Vishwas Act, 2020, the declarations filed under Section(1) shall be presumed to have never been made if:-

"(a) Any material particular furnished in the declaration is found to be false at any stage;

(b) The declarant violates any of the conditions referred to in this Act;

(e) The declarant acts in any manner which is not in accordance with the undertaking given by him under sub-section(5)

And in such cases, all the proceedings and claims which were withdrawn under section 4 and all the consequences under the Income-Tax Act against the declarant shall be deemed to have been revived."

43. Section 6 of the Direct Tax Vivad Se Vishwas Act, 2020, makes it very clear that once there is a compliance with the timeliness specified under section (5), the designated authority shall not institute any proceedings in respect of an offence or aims or levy any penalty or charge any interest under the Income-tax in respect of the tax arrears.

44. Section 5 of the Direct Tax Vivad Se Vishwas Act, 2020, also makes it clear that save as otherwise expressly provided in sub-section (3) of section 5 or section 6, nothing contained in this Act shall be construed as conferring any benefit, concession or immunity on the declarant in any proceedings other than those in relation to which the declaration has been made.

45. The intention of the parliament enacting the of the Direct Tax Vivad Se Vishwas Act, 2020, is to bring a closure of disputes in respect of tax arrears. Whether the petitioner had correctly or wrongly availed the benefit of section 57(F) of the Income-tax Act or not cannot be re-opened once again under section 263 of the Income-tax Act, 1961.

46. Once the petitioners had opted to settle the dispute under the Direct Tax Vivad Se Vishwas Act, 2020, the proceedings initiated under section 263 have to go. If on the other hand the respective petitioners had not filed Form 1 and 2 or not accepted with the issue of Form 3, the Impugned Notice seeking to re-open the assessment under section 263 of the Income-tax Act, 1961 could be justified.

47. The Finance Minister in her speech on 1-2-2020 announced the the Direct Tax Vivad Se Vishwas Scheme to bring down the litigation. The

Government intended to reduce the litigation, so that the taxpayers can buy peace with the department. The aforesaid scheme was to be implemented on 30-6-2020.

48. The taxpayers whose appeals were pending at any level were entitled to avail benefit of the scheme. Therefore, there is no justification in proceeding further with the impugned proceedings initiated by the first respondent under section 263 of the Income-tax Act, 1961.

49. Therefore, I am inclined to allow these writ petitions. Accordingly these writ petitions are allowed. No costs. Consequently, connected miscellaneous petitions are closed.”

10. We notice that in assessee's case the issue of cash deposits during the demonetisation period have been considered by the AO in original assessment proceedings under Section 143(3) of the Act and the assessee has opted for DTVSV scheme for the additions made in this regard. Section 8 of DTVSV Act as quoted by the PCIT, clearly mentions that the immunity is not available for any proceedings **other than those in relation to which the declaration has been made**. In the given case however the PCIT has initiated the revision proceedings u/s.263 on the same issue for which the assessee has already opted for DTVSV. It is also noticed the assessee has filed the necessary forms under the DTVSV scheme which have been accepted and therefore in our considered view the decision of the Hon'ble Madras High Court is clearly applicable to the assessee's case. Accordingly we hold that the PCIT is not justified in initiating the impugned proceedings under Section 263 of the Act when the assessee has opted to settle the dispute under DTVSV scheme. We therefore quash the order of PCIT and allow the appeal in favour of the assessee.”

11. It is also noticed that the decision of the Hon'ble Madras High Court which is followed in the above decision of the Tribunal has clearly laid down the ratio that the revisionary proceedings could be justified only in case where the assessee has not filed the required forms under DTVSV with respect to the disputed proceedings. It is further noticed that section 8 of DTVSV scheme, states that the immunity is not available to the declarant in any proceedings other than those in relation to which the declaration has been made.

12. In assessee's case the declaration under DTVSV is made for the proceedings in which disputed amount pertaining to the allotment of shares to shell company on premium. The assessee has filed the necessary forms under

DTVSV and the Form 5 confirming the settlement under the scheme issue by the PCIT. Therefore the impugned transaction in our view has been part of the proceedings declared under DTVSV. We see merit in the argument of the Ld.AR that without verification of the face value, the AO would not have assessed the premium amount and that the amount towards face value of the shares is part and parcel of the entire proceedings for which the assessee has opted DTVSV. Therefore we are of the considered view that the assessee's case is covered by the ratio laid down by the Hon'ble Madras High Court in Gopalakrishnan Rajkumar (supra) as followed by the decision of the Coordinate Bench in the case of Shri Pavan Kandkur (supra). Respectfully following these decisions, we hold that the PCIT is not justified in initiating the proceedings u/s. 263 when the impugned proceedings are already declared under DTVSV scheme. Accordingly, the order of the PCIT is quashed.

In result, the appeal is allowed.

Order pronounced in the open court on 24th January, 2023.

Sd/-
(GEORGE GEORGE K)
Judicial Member

Sd/-
(PADMAVATHY S)
Accountant Member

Bangalore,
Dated, the 24th January, 2023.
/MS /

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|---------------|------------------------|
| 1. Appellant | 4. CIT(A) |
| 2. Respondent | 5. DR, ITAT, Bangalore |
| 3. CIT | 6. Guard file |

By order

Assistant Registrar,
ITAT, Bangalore