IN THE INCOME TAX APPELLATE TRIBUNAL
JODHPUR BENCH, JODHPUR

BEFORE SHRI B. R. BASKARAN, ACCOUNTANT MEMBER
AND
SHRI SANDEEP GOSAIN, JUDICIAL MEMBER

ITA No. 61/Jodh/22
(ASSESSMENT YEAR- 2016-17)

Hitkari And Swaraj Enterprises Pvt. Ltd. Shop No. 3, Ray Colony Barmer (Raj)	Vs	The Pr.CIT-1 Jodhpur
(Appellant)		**(Respondent)**
PAN NO. AADCH 3173 R		

Assessee By	Shri Goutam Chand Baid, CA
Revenue By	Smt. Alka Rajvanshi Jain CIT-DR
Date of hearing	04/11/2022
Date of Pronouncement	24 /01/2023

ORDER

PER: SANDEEP GOSAIN, JM

This is an appeal filed by the assessee against the order of the ld. Pr.CIT-1, Jodhpur dated 29-03-2022 for the assessment year 2016-17 in the matter of Section 263 of the Act and raising therein following grounds of appeal.

''1. That on the facts and in the circumstances of the case, order framed by ld. Pr. CIT, invoking provisions of Section 263 is bad on facts and bad in law.

2. That on the facts and in the circumstances of the case, the ld. Pr.CIT erred in holding that the assessment order framed by ld. AO is erroneous in so far as it is prejudicial to the interest of the revenue as:

1. Even though assessment order was framed by the AO after conducting requisite enquiries and verification, Ld. PCIT held that assessment order framed without conducting requisite enquiries and verification.

2. Order u/s 263 has been framed in autocratic manner without considering submission of the assessee, therefore amount to framed without giving opportunity of being heard. Merely typing the sentence that ''7. The reply filed by the assessee and information/details available on record has been carefully examined and duly considered.'' without assigning any reason as to why submission of the assessee not tenable, did not amount to consideration of the submission of the assessee.

3. Incorrect factual finding has been recorded or presumption about factual finding made contrary to the documentary evidence on record.

4. Without assigning any reason as to why transaction under consideration amount to tax evasion transaction executed merely because the buyer of property is the director of the company as well. Direction for revision of assessment order on such observation amount to enhancement of the scope of assessment proceeding from limited to complete, which is not permissible.

5. Even though Hon'ble ITAT set aside the original order u/s 263 dated 25-03-2021 to decide the matter afresh specific finding in fresh order that4 ''Further the first orde3r passed the then, Pr. CIT-1 Jodhpur u/s 263 dated 25-03-2021 is also reiterated for necessary action by the Assessing Officer.'' is amount to contempt the direction of the Hon'ble ITAT.

Requisite direction to set aside such order may kindly be issued.''

2.1 Brief facts of the case are that the return of income for A.Y. 2016-17 was e-filed by the assessee on 06-10-2016 at an income of Rs.85,51,730/. The case of the assessee was subsequently selected for limited scrutiny through CASS and notice u/s 143(2) was issued from the Office of the ITO, Ward-1, Barmer to the assessee on 10-07-2017 and duly served upon the assessee through e-proceedings. From the assessment order dated 16-12-2018, it is noted that the assessee during the year under consideration is earning rental income on property, income from sale of service and real estate business etc. The case of the assesee was selected for limited scrutiny for the verification of the following issues.

1. Whether capital gains/loss on sale of property has been correctly shown the return of income.

For verifying the above issues necessary queries were raised by notices u/s 142(1) for which assessee complied and submitted the necessary document.

The reply of the assesseee had been considered and placed on record by the AO who after considering the submissions and necessary verification of the documents of the assessee accepted the returned income of Rs.85,71,930/- .

2.2 In first appeal, the ld. Pr. CIT had set aside the assessment order with following direction to the AO.

‘’ 7. The reply filed by the assessee and information/details available on record has been carefully examined and duly considered. The Assessing Officer while passing the assessment order in this case has failed to examine the short term capital loss of Rs.1,64,93,128/- as claimed by the assessee in the return of income. Though, the AO was specifically required to do so, being a limited scrutiny case picked up for examination on the ground of claim of short term capital loss. During the course of the assessment proceedings, the Assessing Officer has not properly examined the very reason viz. "large short term capital loss sale of property" on which the case was selected for scrutiny by the Risk Management System of the Income Tax Department.

8. As per the material available on record, during the year under consideration, the assessee company has sold land to Sh. Ajad Singh Rathore through it's Director, Sh. Ajad Singh Rathore for a consideration of Rs.1,40,26,690/- on 19.06.2015. The land were purchased as detailed under: -

S.N.	Particulars of land	Date of purchase	Purchased from	Total purchase cost including stamps and other charges.
1.	Land Khasra No. 1957/817	23.12.2014	Prakash Jain	Rs.58,00,020/-
2.	Land Khasra No. 1954/817	23.12.2014	Prakash Jain	Rs. 7,24,790/-
3.	Land Khasra No. 1959/817	23.12.2014	Prakash Jain	Rs.11,00,000/-

9. In the computation of total income, the assessee company has claimed short term capital loss of Rs.1,64,93,128/- on the sale of the above mentioned properties details of which is as under:-

Sale Considerat4ion u/s 50C	1,40,26,690
Cost of land:	
1. 58,00.020 (cost of land) +1,74,20,000 (cost of improvement)	
1. 7,24,790 (cost of land) +24,00,000 (cost of improvement)	
1. 11,00,000 (cost of land) +30,75,000 (cost of improvement)	3,05,19,810
Short term capital loss	1,64,93,128

10. As per the registered sale deed dated 19.06.2015 of the properties sold during the year, it is found that assessee company has sold all the above mentioned three properties on DLC rate after taking into account cost of the land and boundary wall constructed thereon and this is also mentioned in the registered deed. This clearlyshows that there was only boundary wall constructed on the lands sold during the year.

11. Further, in the balance sheet filed with the computation of total income, the assessee has declared value of Rs. 3,29,52,450/- under the head "free hold land" and out of which deduction of Rs. 3,05,19,810/- has been claimed. It shows that I during the year no addition has been made on the land so purchased. Further, in the balance sheet under the head building account the assessee has shown addition of Rs. 72,38,736/- and no deduction has been claimed. The AO while completing the assessment had failed to examine and verify these vital facts and completed the assessment at returned income without making proper inquiry

12. I have noted that the assessee had purchased 3 pieces of land, whose cost of acquisition is shown as Rs. 76,24,790/- (Rs. 58,00,020/- plus Rs. 7,24,790/- plus Rs. 11,00,000/-) in the A.Y. 2015-16. For the purpose of discussion, only one registered sale deed of Rs. 11,00,000/- dated 02.12.2014 is taken up for discussion. During the course of the assessment proceedings, the details of the construction expenses has been furnished and the same are reproduced hereunder for ready reference:

Land Purchase	Rs. 10,50,000/-
Stamp & Other Charges	Rs. 50,000/-
Mahadev Enterprises	Rs. 10,00,000/-
Shri Karni Hitkari Enterprises	Rs. 14,75,000/-
Tanot Construction	Rs. 6,00,000/-
	Rs. 41,75,000/-

13. A perusal of the various bills of Mahadev Enterprises amounting to Rs.10,00,000/-, Shri Karni Hitkari Enterprises of Rs. 14,75,000/- and Tanot Construction of Rs. 6,00,000/-reveals that they are dated 13.11.2014, 20.11.2014 and 14.11.2014 respectively. This clearly implies that the said expenses had been incurred by the sellers before the said immovable property was purchased by the assessee company. However, a perusal of all the bills reveal that they have been drawn in the name of the assessee company namely, "Hitkari & Swaraj Enterprises Pvt. Ltd." On the other hand, the registered sale deed dated 02.12.2014 refers to only land and doesn't refer to any construction.

14. Further, it is not clear from the material on record that even if it is presumed that the construction expenses were duly incurred by the sellers of the property, then why only land value amounting to Rs. 10,00,000/- had been paid by the assessee company to the seller. The assessee company should have paid at least Rs. 41,25,000/- for the said property.

15. Exactly similar is the situation, regarding the other 2 pieces of land purchased by the assessee company, whose cost of acquisition is Rs. 7,24,790/- and Rs. 11,00,000/-. However, for the sake of brevity the same are not discussed in details. and the Assessing Officer is directed to thoroughly investigate the

construction expenses incurred on the property and also make relevant field enquiries. A perusal of the bills submitted during the course of the assessment proceedings reveals that most of them actually pertains to period prior to the date of purchase of land by the assessee company.

16. In view of the above discussion, a big question mark appears on the genuineness of the various construction bills filed by the assessee company, during the course of the assessment proceedings. It is pertinent to note that the construction expenses bills are amounting to Rs. 3,05,19,810/-. The AO has failed to examine the genuineness of these construction expenses during the course of the assessment proceedings. It is also not clear as to who has incurred these expenses, if any. whether the seller or the purchaser ?

17. The combined sale deed of the said three properties dated 19.06.2015, valuing Rs. 1,40,25,000/- had also been examined. The sale deed clearly says that the land is surrounded by only a wall area of 766.46 sq. mt. having a height of 5 ft. This sale deed also doesn't referto the construction of any warehouse on the said land.

18. It is absolutely not clear, as to why any prudent person owning immovable property consisting of land worth Rs. 76,24,790/- and construction worth Rs. 2,28,95,000/- totaling to Rs. 3,05,19,790/- will sell it for just an amount of Rs. 1,40,25,000/- and incur a huge loss in the process. It is again pertinent to note that the transaction of purchase and sale had been carried out in a short period of 7 months only and hence the time gap is also not very large. Such tax evasion agreements / arrangements are possible only when the seller and purchaser are one and the same. In this case, the land has been sold by Shri Ajad Singh Rathore, Director to Sh. Ajad Singh Rathore, Individual. The Assessing Officer has miserably failed to examine all these tax evasion arrangements made by Shri Ajad Singh Rathore.

19. In view of all the facts narrated above and documents available on the record, I am of the firm belief that the case has not been examined properly by the AO on all the above stated issues and most importantly of the reason on which the case was selected for scrutiny.

20. A perusal of the material on record reveals that the Assessing Officer has failed to examine the above noted issues. The assessment order was passed by the AO without making the necessary enquiries and verification of these issues, which he was statutorily bound to make for ascertaining 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 interest of the revenue in terms of the provisions of section 263 of the Act.

21. At the outset, it is brought on record that there a plethora of judicial precedents that mere filing of details by the assessee on an issue is not sufficient to preclude the Commissioner of Income Tax from assuming jurisdiction under section 263 of the Act. In the case of Mahalakshmi Liquor Promoters (P) Ltd vs.

Commissioner of Income Tax [2013] 29 taxmann.com 70, the Id. Tribunal, found that there was no enquiry by the Assessing Officer on the issues raised by the CIT. It was held that the lack of enquiry or inadequate enquiry by the Assessing Officer was a valid reason for revision of the assessment order. The Id. Tribunal further held that it can safely be said that an order passed by the Assessing Officer becomes erroneous and prejudicial to the interests of the Revenue under section 263 if it is a stereotype order which simply accepts what the assessee has stated in his return or where he fails to make the requisite enquiries or examine the genuineness of claimed called for.

Para 22 to 68 case laws quoted by the ld. Pr. CIT

69. It is abundantly clear from the above judgement of Hon'ble Delhi High Court that if the Assessing Officer fails to make a disallowance as per the provisions of Section 14A of the Act, the said assessment order will be an erroneous one and prejudicial to the interest of the Revenue, as envisaged under the provisions of Section 263 of the Act.

70. In the case of CIT vs Amitabh Bachchan (2016) 384 ITR 200 (SC), the Hon'ble Supreme Court has held that what Section 263 prescribes is an opportunity of hearing to the assessee, and not a notice to show cause. The two are distinct since in a show cause notice, the grounds on which the AO is to proceed are disclosed in the notice while an opportunity of hearing is done before taking a decision in the matter. That a formal show cause notice is not necessary for invocation of jurisdiction under section 263 of the Act.

71. It is also brought on record, the undersigned is only restoring the issue to the file of the Assessing Officer and the issues raised by the assesse could always be gone into by Assessing Officer after granting full opportunity to assessee. In the case of Vedanta Ltd. vs CIT (2021) 279 Taxman 358 : 124 Taxmann.com 435 (Bom.), it has been held as under:-

Assessment was completed without proper enquiries, Commissioner was competent to invoke revisional jurisdiction and direct Assessing Officer for fresh assessment. Subsequent, to passing of final assessment order, Commissioner issued revision notice based on reports of Serious Fraud Investigation Office (SFIO) and Justice Shah Commission after noting that there was under-invoicing which was not considered while issuing assessment order. After hearing assessee's objections, revisional order was passed setting aside assessment order and Assessing Officer was directed to pass fresh assessment order- On appeal, Tribunal held that since only direction was issued for passing fresh assessment, issues raised by assessee could always be gone into by Assessing Officer after granting full opportunity to assessee. Since assessment was completed without proper inquiries, it was competent for Commissioner to invoke revisional jurisdiction and direct fresh assessment.

72. The ratio of above noted judgments is clearly attracted on the facts of the present case at hand. Also, it is apparent that the relevant issues, as discussed

above were not properly examined during the course of assessment proceeding by the Assessing Officer. Thus, the assessment order passed by the Assessing Officer in this case is found to be erroneous in so far as it is prejudicial to the interests of revenue, as I am of the considered opinion that the assessment order was passed by the Assessing Officer without making proper inquiries and relevant verifications, which he was statutorily required to do so.

73. Accordingly, the assessment order is set aside to the extent stated in this revision order and restored to the file of the Assessing Officer for conducting necessary enquiries and to determine the veracity of the claims made by the assessee. On this basis, he will arrive at the correct conclusion as per law, keeping in mind the observations made in the foregoing paragraphs. Further, the first order passed the then, Pr. CIT-1, Jodhpur u/s 263 dated 25.03.2021 is also re-iterated for necessary action by the Assessing Officer. Needless to add, adequate opportunity of being heard shall be afforded to the assessee prior to the passing of the resulting order.''

2.3 During the course of hearing, the ld. AR of the assessee prayed that the ld. Pr. CIT(A) has wrongly invoked the provisions of Section 263 of the Act. It is a case of limited scrutiny wherein the AO has made all the necessary enquires and relevant submissions had been supplied to the AO who after considering all the relevant informations/ materials accepted the returned income of the assessee at Rs.85,71,730/-.

2.4 On the other hand, the ld. DR supported the order of the ld Pr. CIT.

2.5 We have heard both the parties and perused the materials available on record. It is noticed that the return of income of for A.Y. 2016-17 was e-filed by the assessee at an income of Rs.85,51,730/- and the assessee is earning rental income on property, income from sale of service and real estate business etc . The

case of the assessee was selected for limited scrutiny for the verification of the following issues.

> 1. Whether capital gains/loss on sale of property has been correctly shown the return of income.
>
> For verifying the above issues necessary queries were raised by notices u/s 142(1) for which assessee complied and submitted the necessary document.

The reply of the assesseee had been considered and placed on record by the AO who after considering the submissions and necessary verification of the documents of the assessee accepted the returned income of Rs.85,71,930/- . It is also noted from the ld. Pr. CIT order who has observed that *''I am of the considered opinion that the assessment order was passed by the Assessing Officer without making proper inquiries and relevant verifications which he was statutorily required to do so. Accordingly the assessment order is set aside to the extent stated in this revision order and restored to the file of the Assessing Officer for conducting necessary enquiry and to determine the veracity of the claims made by the assessee.* In this case, the AO accepted the contentions of the assessee and adopted a view that he did not find any adverse observations in the details/ documents filed by the ld. AR of the assessee. Now Pr. CIT-1 does not agree with the view adopted by the AO then the law does not permit him to replace the view. It is worthwhile to mention that Hon'ble Apex court in the case of CIT v. Max India Ltd., 295 ITR 282 (SC) has held that 'every loss of revenue cannot be said to be

prejudicial to the interests of revenue'. As observed above in the present case , there has been no loss to the revenue and it cannot be said that the order passed by the AO was prejudicial to the interest of revenue. For this proposition reliance is also placed on the following decisions of the jurisdictional High court:

1. CIT Vs. M/s Chambal Fertilizers & Chemicals Ltd. (Raj HC) (2014) 51 TW 157
2. CIT Vs. M/s Deepak Real Estate Developers P. Ltd. (Raj HC) (2014) 51 TW 186

It is also imperative to mention that the similar issue is squarely covered by the decision of ITAT Jaipur Bench in the case of Mahendra Singh Dhankar HUF vs ACIT (ITA No. 265/JP/2020 dated 30-06-2021) wherein the Bench has observed as under:-

> "21. Now, coming back to reasoning adopted by the ld PCIT to invoke his jurisdiction u/s 263 in the instant case. As per ld PCIT, the reason for which the matter was selected for limited scrutiny i.e, mis-match of the sales turnover vis-à-vis ITR, CIB & AIR has a direct bearing on opening and closing stock of cost of construction and W.I.P and in turn, on taxable income, therefore, the AO was duty bound to examine these issues and the AO having failed to examine these issues, the AO has effectively failed to examine the issues for which matter was selected for limited scrutiny. In our view, the transactions reflected in the financial statements are sum total of various independent transactions undertaken during the year, and the balance sheet represent a consolidated picture of the financial position of the assessee at the end of the year and similarly, the profit/loss account represent the consolidated position of revenues and costs and net profit during the financial year. It is likely that some of the transactions are directed connected and some are indirectly connected, however, they all have a common thread in terms of impacting the financial position of the assessee and for tax purposes, in determination of net taxable income. Therefore, the reasoning adopted by the ld PCIT that transactions of cost of construction will have an effect on closing work in progress and taking sales turnover and closing WIP into account, all these transactions taken together will effect the determination of net taxable

income is no doubt correct but as far as determination of correct sales turnover is concerned for which the matter was selected for limited scrutiny, the same can be determined on a standalone basis on examination of sale deeds and related documents for sale of flats and is not connected with determination and examination of cost of construction and work in progress.

22. As we have discussed above, in case of limited scrutiny, the AO is duty bound to restrict himself to examine the matters for which matter was selected for limited scrutiny and where the AO takes a view and forms a reasonable belief that some other matters are required to be examined, the same will in effect be traversing beyond the scope of limited scrutiny which is not permissible unless the matter is converted into complete scrutiny and which has not happened during the course of present assessment proceedings. Therefore, the issue of valuation of closing work-in-progress as well as matter relating to agriculture income, which are held by the ld PCIT as matters not been examined by the AO, are matters which are not part of the reasons for which the case was selected for limited scrutiny and are not even remotely connected, therefore, no fault lie on the part of the AO resulting in order being held as erroneous and prejudicial to the interest of revenue. As far as matters for which case was selected for limited scrutiny in terms of mis-match of sales turnover, the same has been duly examined by the AO and even the ld PCIT has not recorded any adverse findings in terms of lack of enquiry or inadequate enquiry on part of the AO. In light of aforesaid discussions, we hereby set-aside the order passed by the ld PCIT u/s 263 and the order of the AO is sustained. ''

With the above observations, we are setting aside the revision order passed by the ld. Pr.CIT-1, Jodhpur and restore the assessment order dated 16-12-2018 passed by the AO u/s 143(3) of the Act . Accordingly the appeal of the assessee is allowed.

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

Order pronounced under Rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1963 by placing the details on the notice board.

Sd/-	**Sd/-**
(B. R. BASKARAN)	(SANDEEP GOSAIN)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Dated : 24 /01/2023

**Mishra*

Copy to:

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2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR
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Asstt. Registrar

Jodhpur Bench