

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ
IN THE INCOME TAX APPELLATE TRIBUNAL,
(Conducted through E-Court, Rajkot)

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER,
And
Ms. MADHUMITA ROY, JUDICIAL MEMBER

आयकर अपील सं./ITA No. 163/Rjt/2021
निर्धारण वर्ष/Asstt. Years: 2011-2012

Praful Gautamlal Kothari, "VEER DARSHAN", 32A Panchvati Society, Rajkot 360005. PAN: ACTPK7377H	Vs.	Pr.C.I.T, Rakot-1, Rajkot.
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Assessee by :	Shri Gaurang Khakhar, A.R
Revenue by :	Shri Shramdeep Sinha, CIT. D.R

सुनवाई की तारीख/**Date of Hearing** : **01/11/2022**
घोषणा की तारीख/**Date of Pronouncement**: **31/01/2023**

आदेश/ORDER

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Assessee against the order of the Learned Principal Commissioner of Income Tax, Rajkot-1, Rajkot dated 31/03/2021 arising in the matter of assessment order passed under s. 143(3)/147 of the Income Tax Act, 1961 (here-in-after referred to as "the Act") relevant to the Assessment Year 2011-12.

2. The only interconnected issue raised by the assessee is that the learned Principal CIT erred in holding the assessment framed under section 143(3)/147 of the Act as erroneous insofar as prejudicial to the interest of Revenue under the provisions of section 263 of the Act.

3. The brief facts are that the assessee is an individual retired bank employee. He has filed his return of income on 13-09-2011 declaring income at Rs. 4,22,240/- only. The case of the assessee was reopened u/s 147 of the Act on the basis of information received that he has deposited cash amounting to Rs. 21,57,400/- in his saving bank account maintained with Kotak Mahindra Bank wherein assessee is joint holder along with his son Shri Saral Kothari. Finally, The AO framed the assessment u/s 143(3) read with section 147 of the Act and admitted the return income as assessed income.

3.1 However, the Id. PCIT on examination of the case records of the assessee, found that there was cash deposit in the bank account of the assessee during the year amounting to ₹ 21,57, 400.00 only. According to the learned PCIT, the amount of cash deposit was not verified during the assessment proceedings by the AO. Accordingly, the PCIT initiated the proceedings under section 263 of the Act vide show cause notice dated 27 January 2021.

3.1 The assessee in response to such show cause notice submitted that he is the second account holder of the bank account and his son is the 1st account holder. During the year under consideration, his son has deposited cash in joint bank account. Such bank account was duly reflected in balance sheet of his Son (Saral Kothari).

3.2 Further, assessee explained the source of cash deposit as detailed under:

Particular	Amount
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Cash withdrawal	17,30,360/-
Opening cash balance	2,69,742/-
Misc cash receipt	1,57,298/-
Total	21,57,400/-

3.3 Assessee also submitted that the AO has properly verified the cash deposit in bank by calling information through notice u/s 142(1) of the Act. Therefore, the AO has made appropriate inquiries regarding the cash deposit. The AO based on such enquiry admitted the genuineness of cash deposit in the assessment order. Therefore, the assessment order cannot be said to be suffering by any error on account of non-enquiry which is also prejudicial to the interest of the Revenue.

4. However, the Id. PCIT after considering the assessment records and submission of the assessee held that the assessment has been framed without necessary verification. Therefore, the same is erroneous insofar prejudicial to the interest of revenue by observing as under:

10. The above discussion makes it clear that the assessment order is passed without making inquiries or verification which should have been made by the AO during the course of scrutiny assessment proceeding. Resultantly, the order passed by the Assessing Officer is left erroneous in so far as it is prejudicial to the interests of the revenue. Thus, the order deserves to be revised as per the provisions of section 263 of the Income-tax Act, 1961. There are various judicial decisions in

- 1. Rampyari Devi Sarog ITO. CIT (SC) 67 ITR 84*
- 2. Malabar Industrial Co. Ltd. Vs. CIT(SC) 243 ITR 83*
- 3. Swarup Vegetable Products Industries Ltd. Vs. CIT (ALL) 187 ITR 412*
- 4. Gee Vee Enterprises Vs. Addl.CIT&Ors (Del.) 99 ITR 375*
- 5. Rajalakshmi Mills Ltd. Vs. ITO (ITAT, SB-Chennai) 121 ITD 343, 313 ITR(AT) 182*
- 6. SRM Systems & Software Pvt. Ltd. Vs. ACIT 2010-TIOL-646-HC- MAD-IT.*
- 7. Shakti Credits Ltd Vs. CIT 2015 Tax Pub (DT) 3058 (Luck. 'A' Trib)*
- 8. Shoreline Hotel Pvt Ltd. Vs. CIT 2015 Tax Pub (DT) 2982 (Mum. 'E' Trib.)*
- 9. Kapil Ratan Associates Vs CIT 2015 Tax Pub (DT) 2931 (Mum. 'A' Trib) 69 SOT 188 (Mum.) -*
- 10. Swadeshi Vilas Private Ltd Vs. ACIT ITA No.599/Hyd/2013 dt:25-09-2013*

11. It is the bounded duty of an Assessing Officer to collect and appreciate the facts and to properly apply the law while making the assessment. It can be seen from the above, that the assessment made by the Assessing Officer is in a very casual and mechanical manner.

Under these circumstances, it would be appropriate to set aside the assessment order so far as the issues of verification of source of cash deposit in savings bank account.

12. *Thus, in the interest of justice and since the twin conditions namely, (i) the order of the Assessing Officer sought to be revised is erroneous: and (ii) it is prejudicial to the interests of the revenue are satisfied, **the impugned assessment order is set aside for fresh assessment only to the extent of the issues discussed supra.***

*13. In view of the above facts, I consider that the assessment order passed by the AO u/s. 143(3) r.w.s. 147 on 23-10-2018 as erroneous in so far as it is prejudicial to the interests of revenue and therefore, by virtue of section 263 of the I. T. Act 1961, the same is hereby set-aside. The AO is directed to make a fresh assessment only to the extent **of the** issues discussed supra, considering the observation and **findings** given above, making necessary interpretations and inquires and after allowing adequate opportunity of being heard **to the assessee.** The **AO** shall verify the issues as discussed above and **pass a** reasoned order accordingly.*

5. Being aggrieved by the order of the learned PCIT, the assessee is in appeal before us.

6. The learned AR before us filed two paper books running from pages 1 to 29 and pages 1 to 150 and contended that all the necessary details about the source of deposits in cash were filed during the assessment proceedings. The learned AR in support of his contention drew our attention on pages 16 of paper book no. 1 where the balance sheet of Shri Saral Kothari (son) is placed wherein the impugned Bank account bearing no. 08310110006741 was reflected. Further, the Ld. AR invited our attention on page no. 27 of the paper book where the last page of ITR form of Shri Saral Praful Kothari was placed in which he declared alleged bank account as his saving account. Further, Shri Saral Kothari has also filed an affidavit in which he declared that such cash amounting to Rs. 21,57,400 is belonging to him.

6.1 The learned AR further contended that the assessment was framed by the AO after considering the necessary details and verification and application of mind. The learned AR in support of his contention drew our attention on pages 9 & 10 where copy of the notice under section 142(1) of the Act dated 11-09-2018 was placed where the assessee was asked about the source of cash deposits during the year. Likewise, the learned AR also drew our attention on pages 11 & 12 of the

paper book where the reply of the assessee in response to the notice issued under section 142(1) of the Act as mentioned above was placed. Thus, the learned AR contended that there cannot be said that the assessment order is erroneous and causing prejudice to the interest of Revenue in the given facts and circumstances.

7. On the contrary, the learned DR vehemently supported the order of the authorities below.

8. We have heard the rival contentions of both the parties and perused the materials available on record. The issue in the present case relates whether the assessment order has been passed by Ld. AO without making inquiries or verification with respect to the cash deposited in the assessee's bank account as discussed above. Hence, the assessment is erroneous insofar as it is prejudicial to the interest of the Revenue and thus requiring revision by Pr. CIT u/s 263 of the Act.

8.1 An inquiry made by the Assessing Officer, considered inadequate by the Commissioner of Income Tax, cannot make the order of the Assessing Officer erroneous. In our view, the order can be erroneous if the Assessing Officer fails to apply the law rightly on the facts of the case. As far as adequacy of inquiry is considered, there is no law which provides the extent of inquiries to be made by the Assessing Officer. It is Assessing Officer's prerogative to make inquiry to the extent he feels proper. The Commissioner of Income Tax by invoking revisionary powers under section 263 of the Act cannot impose his own understanding of the extent of inquiry. There were a number of judgments by various Hon'ble High Courts in this regard.

8.2 Delhi High Court in the case of **CIT Vs. Sunbeam Auto 332 ITR 167 (Del.)**, made a distinction between lack of inquiry and inadequate inquiry. The Hon'ble court held that where the AO has made inquiry prior to the completion of assessment, the same cannot be set aside u/s 263 of the Act on the ground of

inadequate inquiry. The relevant observation of Hon'ble Delhi High Court reads as under:

"12. 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. ———

*From the aforesaid definitions it is clear that an order cannot be termed as erroneous unless it is not in accordance with law. If an Income-tax Officer acting in accordance with law makes a certain assessment, the same cannot be branded as erroneous by the Commissioner simply because, according to him, the order should have been written more elaborately. This section does not visualise a case of substitution of the judgment of the Commissioner for that of the Income-tax Officer, who passed the order unless the decision is held to be erroneous. Cases may be visualised where the Income-tax Officer while making an assessment examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determines the income either by accepting the accounts or by making some estimate himself. **The Commissioner, on perusal of the records, may be of the opinion that the estimate made by the officer concerned was on the lower side and left to the Commissioner he would have estimated the income at a figure higher than the one determined by the Income-tax Officer. That would not vest the Commissioner with power to re-examine the accounts and determine the income himself at a higher figure.** It is because the Income-tax Officer has exercised the quasi-judicial power vested in him in accordance with law and arrived at conclusion and such a conclusion cannot be termed to be erroneous simply because the Commissioner does not feel satisfied with the conclusion. There must be some prima facie material on record to show that tax which was lawfully exigible has not been imposed or that by the application of the relevant statute on an incorrect or incomplete interpretation a lesser tax than what was just has been imposed.*

15. Thus, even the Commissioner conceded the position that the Assessing Officer made the inquiries, elicited replies and thereafter passed the assessment order. The grievance of the Commissioner was that the Assessing Officer should have made further inquiries rather than accepting the explanation. Therefore, it cannot be said that it is a case of 'lack of inquiry'.

8.3 The Hon'ble Bombay High Court in case of **Gabriel India Ltd. [1993] 203 ITR 108 (Bom)**, discussed the law on this aspect in length in the following manner:

*"The consideration of the Commissioner as to whether an order is erroneous in so far as it is prejudicial to the interests of the Revenue, must be based on materials on the record of the proceedings called for by him. If there are no materials on record on the basis of which it can be said that the Commissioner acting in a reasonable manner could have come to such a conclusion, the very initiation of proceedings by him will be illegal and without jurisdiction. **The Commissioner cannot initiate proceedings with a view to starting fishing and roving enquiries in matters or orders which are already concluded. Such action will be against the well-accepted policy of law that there must be a point of finality in all legal proceedings, that stale issues***

should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity.

8.4 The Mumbai ITAT in the case of **Sh. Narayan Tatu Rane Vs. ITO, I.T.A. No. 2690/2691/Mum/2016, dt. 06.05.2016** examined the scope of enquiry under Explanation 2(a) to section 263 in the following words:-

*"20. Further clause (a) of Explanation states that an order shall be deemed to be erroneous, if it has been passed without making enquiries or verification, which should have been made. In our considered view, this provision shall apply, if the order has been passed without making enquiries or verification which a reasonable and prudent officer shall have carried out in such cases, which means that the opinion formed by Ld Pr. CIT cannot be taken as final one, without scrutinising the nature of enquiry or verification carried out by the AO vis-à-vis its reasonableness in the facts and circumstances of the case. **Hence, in our considered view, what is relevant for clause (a) of Explanation 2 to sec. 263 is whether the AO has passed the order after carrying our enquiries or verification, which a reasonable and prudent officer would have carried out or not. It does not authorise or give unfettered powers to the Ld Pr. CIT to revise each and every order, if in his opinion, the same has been passed without making enquiries or verification which should have been made. In our view, it is the responsibility of the Ld Pr. CIT to show that the enquiries or verification conducted by the AO was not in accordance with the enquiries or verification that would have been carried out by a prudent officer.** Hence, in our view, the question as to whether the amendment brought in by way of Explanation 2(a) shall have retrospective or prospective application shall not be relevant."*

8.5 The Hon'ble Supreme Court in recent case of **Principal Commissioner of Income-tax 2 v. Shree Gayatri Associates*[2019] 106 taxmann.com 31 (SC)**, held that where Pr. CIT passed a revised order after making addition to assessee's income under section 69A in respect of on-money receipts, however, said order was set aside by Tribunal holding that AO had made detailed enquiries in respect of such on-money receipts and said view was also confirmed by High Court, SLP filed against decision of High Court was liable to be dismissed. The facts of this case were that pursuant to search proceedings, assessee filed its return declaring certain unaccounted income. The Assessing Officer completed assessment by making addition of said amount to assessee's income. The Principal Commissioner passed a revised order under section 263 on ground that Assessing Officer had failed to carry out proper inquiries with respect to assessee's on money receipt. In appeal, the Tribunal took a view that Assessing Officer had carried out detailed inquiries which included assessee's on-money transactions and Tribunal, thus, set

aside the revised order passed by Commissioner. The Hon'ble High Court upheld Tribunal's order. The Hon'ble Supreme Court while dismissing the SLP filed by the Department held as under:-

"We have heard learned counsel for the Revenue and perused the documents on record. In particular, the Tribunal has in the impugned judgment referred to the detailed correspondence between Assessing Officer and the assessee during the course of assessment proceedings to come to a conclusion that the Assessing Officer had carried out detailed inquiries which includes assessee's on-money transactions. It was on account of these findings that the Tribunal was prompted to reverse the order of revision. No question of law arises. Tax Appeal is dismissed"

8.6 The Supreme Court in the another recent case of **Principal Commissioner of Income-tax-2, Meerut v. Canara Bank Securities Ltd[2020] 114 taxmann.com 545 (SC)**, dismissed the Revenue's SLP holding that 263 proceedings are invalid when AO had made enquiries and taken a plausible view in law, with the following observations:

"Having heard learned counsel for the parties and having perused the documents on record, we see no reason to interfere with the view of the Tribunal. The question whether the income should be taxed as business income or as arising from the other source was a debatable issue. The Assessing Officer has taken a plausible view. More importantly, if the Commissioner was of the opinion that on the available facts from record it could be conclusively held that income arose from other sources, he could and ought to have so held in the order of revision. There was simply no necessity to remand the proceedings to the Assessing Officer when no further inquiries were called for or directed"

8.7 From an analysis of the above judicial precedents, the principle which emerges is that the phrase 'prejudicial to the interests of the revenue' has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the revenue, for example, when an Assessing Officer adopts one of the course permissible in law and it has resulted in loss of revenue; or where two views are possible and the Assessing Officer has taken one view with which the Commissioner of Income-tax does not agree, it cannot be treated as an erroneous order causing prejudice to the interests of the Revenue unless the view taken by the Assessing Officer is unsustainable in law, or the AO has completely omitted to make any enquiry altogether or the order demonstrates non-application of mind.

8.8 Now in the facts before us, in the case of the assessee, the AO during the course of assessment proceedings, made enquiries on this issue and after consideration of written submissions filed by the assessee and documents / evidence placed on record, and then framed the assessment under section 143(3)/147 of the Act accepting the return of income. This fact can be verified from the notices issued under section 142(1)/148 of the Act by the AO and reply submitted by the assessee against such notice.

i. Notice u/s 148 of the Act dated 05-09-2018:

On verification of information received, it is found that cash deposit amounting to Rs.21,57,400/- was deposited by the assessee in his savings bank account with Kotak Mahindra Bank wherein the assessee is a joint holder with his son Saral Kothari. The assessee has informed that his son has deposited cash of Rs.21,57,400/- in Kotak Mahindra Bank savings bank account wherein the assessee is joint holder. He has further submitted that the source of cash deposited in savings bank account with Kotak Mahindra Bank are cash withdrawals of Rs.2,69,742/- and other cash receipts of Rs.1,57,298/- The Plea of the assessee that the amount of Rs.17,30,360/- withdrawn from Kotak Mahindra Bank of various dates, was again deposited in Kotak Mahindra Bank seems to be after cook story. The assessee has not given any valid reason for said withdrawal and then depositing the same in the savings bank account again. It cannot be accepted that on various dates money is withdrawn and then the same is deposited again in the bank account. Hence, the cash amounting to Rs.21,57,400/- deposited by the assessee in his savings bank with Kotak Mahindra Bank remains unexplained.

In view of the above, I have reason to believe that the amount of Rs.21,57,400/- in the case of the above named assessee has escaped assessment to that extent for A.Y. 2011-12 within the meaning of Section 147 of the I.T. Act, 1961.

ii. Notice u/s 142(1) of the Act dated 11-09-2018:

You are requested to furnish complete details regarding cash deposited during the year along with supporting documentary evidences. You are also requested to explain the source of cash deposit along with supporting documentary evidences.

iii. Reply dated 18-09-2018

Source of Cash Deposit during the year FY 2010-11

During the FY 1-11 my son Saral Kothari has deposited Rs.21,57,400/- in Kotak Mahindra Bank Saving bank account no.08310110006741 wherein I am the joint Holder. Details of cash withdrawal made from Kotak Mahindra Bank my son Saral Kothari are as under: (PAN of Saral Kothari: ALZPK2887M) Copy of Bank statement and cash book of my son Saral Kothari are already submitted vide my earlier submission.

Month	Cash Withdrawal from Kotak Mahindra Bank
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<i>April</i>	<i>7,500</i>
<i>May</i>	<i>3,16,800</i>
<i>June</i>	<i>1,54,500</i>
<i>July</i>	<i>60,800</i>
<i>August</i>	<i>21,000</i>
<i>September</i>	<i>2,93,300</i>
<i>October</i>	<i>1,70,960</i>
<i>November</i>	<i>4,53,500</i>
<i>December</i>	<i>89,800</i>
<i>January</i>	<i>46,600</i>
<i>February</i>	<i>54,200</i>
<i>March</i>	<i>59,400</i>
<i>Total</i>	<i>1,730,360</i>

Source of Cash Deposit are as under:

<i>Particular</i>	<i>Amt.</i>
<i>Cash Withdrawal</i>	<i>1,730,360</i>
<i>Opening Cash Balance</i>	<i>2,69,742</i>
<i>Other cash Receipt</i>	<i>1,57,298</i>
<i>Total Cash Deposit</i>	<i>2,157,400</i>

8.9 From the above, it is revealed that it is not the case that the AO has not made any enquiry. Indeed, the Id. Pr. CIT initiated proceedings under section 263 of the Act on the ground that the AO has not made enquiries or verification which should have been made in respect of cash deposited during the year under consideration. It is not the case of the Id. Pr. CIT that the Ld. AO did not apply his mind to the issue on hand or he had omitted to make enquiries altogether. In the instant set of facts, the AO had made enquiries and after consideration of materials placed on record accepted the genuineness of the claim of the assessee.

8.10 At this juncture, it is also important to note that the learned PCIT in his order passed under section 263 of the Act has made reference to the explanation 2 of section 263 of the Act. It was attempted by the learned PCIT to hold that there were certain necessary enquiries which should have been made by the AO during the assessment proceedings but not conducted by him. Therefore, on this reasoning the order of the AO is also erroneous insofar prejudicial to the interest of revenue. In this regard, we note that the learned PCIT has not invoked the explanation 2 of section 263 of the Act in the show cause notice dated 24 February 2021 about the

same. Therefore, the opportunity with respect to the explanation 2 of section 263 of the Act was not afforded to the assessee. Thus, on this count the learned PCIT erred in taking the course of such provisions while deciding the issue against the assessee. In this regard, we draw support and guidance from the judgment of Hon'ble Gujarat High Court in case of PCIT vs. Shreeji Prints (P.) Ltd. reported in 130 taxmann.com 293 where it was held as under:

5 The Tribunal has found that in the order passed by the PCIT, Explanation 2 of section 263 of the Act, 1961 is made applicable. The Tribunal observed that the PCIT has not mentioned in the show cause notice to invoke the Explanation 2 of section 263 of the Act 1961. Therefore, by invocation of Explanation in the order without confronting the assessee and giving an opportunity of being heard to the assessee is not appropriate and sustainable in law.

6 Thus, the Tribunal has considered in detail the aspect of revisional power to be exercised by the PCIT in the facts of the case and has given a finding of facts that the Assessing Officer has made inquiries in detail and after applying mind, accepted the genuineness of loans received by the respondent assessee from the aforesaid two companies and such view of the Assessing Officer is a plausible view, and therefore, the same cannot be said to be erroneous or prejudicial to the interest of the Revenue.

7 In view of such finding of facts arrived by the Tribunal, no questions of law much less of any substantial questions of law arise out of the impugned order passed by the Tribunal.

8.11 In view of the above and after considering the facts in totality, we hold that there is no error in the assessment framed by the AO under section 143(3)/147 of the Act causing prejudice to the interest of revenue. Thus, the revisional order passed by the learned PCIT is not sustainable and therefore we quash the same. Hence, the ground of appeal of the assessee is allowed.

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

Order pronounced in the Court on

31/01/2023 at Ahmedabad.

**Sd/-
(MADHUMITA ROY)
JUDICIAL MEMBER**

**Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER**

(True Copy)

Ahmedabad; Dated
Manish

31/01/2023