

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'A' NEW DELHI**

**BEFORE SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER
AND
SHRI YOGESH KUMAR U.S., JUDICIAL MEMBER**

I.T.A. No. 8607/DEL/2019 (A.Y 2015-16)

M/s Alpha Pacific Engineers Pvt. Ltd. 515, 5 th Floor, Vishal Chamber, Sector-18, Noida Uttar Pradesh PAN No. AAECA5856D (APPELLANT)	Vs.	Pr. CIT Noida, Uttar Pradesh (RESPONDENT)
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Assessee by :	Ms. Supriya Mehta, CA
Department by:	Shri P Praveen, CIT D.R.;

Date of Hearing	25.01.2023
Date of Pronouncement	09.02.2023

ORDER

PER YOGESH KUMAR U.S., JM

This appeal is filed by the assessee for assessment year 2015-16 against the order of the ld. Commissioner of Income Tax (Appeals) Noida-24, dated 04/09/2019.

2. The assessee has raised the following grounds of appeal :-

“1. On the facts and circumstances of the case, the order passed by the learned Principal Commissioner of Income Tax (Pr. CIT) under Section 263 of the Act is bad, both in the eye of law and on facts.

2. On the facts and circumstances of the case, the order passed by the learned Pr. CIT cancelling the assessment order passed by the A.O. is untenable in the absence of order of the A.O. being erroneous as well as prejudicial to the interest of the Revenue.

3. On the facts and circumstances of the case, the learned Pr. CIT has erred both on facts and in law in ignoring the fact that all the issues raised by him in notice under Section 263 were before the A.O. and as such the jurisdiction on this issue under Section 263 cannot be assumed.

4. On the facts and circumstances of the case, the learned Pr. CIT has erred both on facts and in law in rejecting the contention of the appellant that the issues raised in the show cause notice were before the AO in proceedings under Section 143(3) and were allowed after application of mind by him as such the same cannot be the matter for reassessment under Section 263 of the Act.

5. On the facts and circumstances of the case, the learned Pr. CIT has erred both on facts and in law in ignoring the fact that the proceeding under Section 263 cannot be used for substituting option of the A.O. by that of the Pr. CIT.

6. *On the facts and circumstances of the case, the learned Pr. CIT has erred both on facts and in law in invoking revisionary power under Section 263 of the Act despite the fact that even after thorough examination, no specific findings have been given on the issue of how the order is erroneous and prejudicial to the interest of Revenue.*

7. *On the facts and circumstances of the case, the learned Pr. CIT has erred both on facts and in law in setting aside the matter to the file of the A.O. without giving a finding as to the error and prejudice caused to the revenue by the assessment order.”*

3. Brief facts of the case are that, the assessee filed return declaring taxable income of Rs. 28,27,990/- and also declared book profit of Rs. 33,70,452/- u/s 115JB. The case of the assessee was selected for scrutiny, notice u/s 143(2) of the Act was issued and the notice u/s 142(1) of the Act was also issued requiring the assessee to furnish certain details/information. The assessee participated in the assessment proceedings, the assessment order u/s 143(3) of the Act came to be passed on 21/12/2017 by making addition of Rs. 7,12,264/- by disallowing the Employees Contribution Fund u/s 36(1)(va) of the Act being Employees Contribution to ESI from April 2004 to March 15 totaling of Rs. 5,275/- which was deposited after the due date.
4. The Ld. PCIT while exercising power conferred u/s 263 of the Act, on examination of the assessment record found that (a) there was difference between the sale as admitted by the assessee and sales as reflected in form No. 26AS, [b] there was doubt regarding the identity and creditworthiness of

some purchase parties and genuineness of the transactions made with them and [c] there was doubt regarding the genuineness of salary paid to related persons, i.e., the wives of the Directors of the Company. Accordingly, the proceedings u/s 263 of the Act has been initiated against the assessee and passed order dated 04/09/2019 by setting aside the assessment order and directed the A.O. to make the assessment afresh.

5. Aggrieved by the order of the Ld. PCIT dated 04/09/2019, the assessee has preferred the present appeal on the grounds mentioned above.

6. The Ld. Counsel for the assessee submitted that, after passing of the impugned order by the Ld. PCIT, the assessment order came to be passed u/s 143(3) read with Section 263 with Section 144B of the Act on 29/09/2021, wherein, the Ld. A.O. out of three issues which was remanded to the A.O. by the PCIT only the issue regarding difference to sale receipts as per ITR and Form No. 26AS of Rs. 41,38,373/- against which the TDS have been fully claimed by the assessee has been brought to tax as 'income from business receipts' and added back to the income of the assessee. In respect of other two issues, the Ld. A.O has accepted the reply/clarification given by the assessee. Therefore submitted that the only issue to be considered in the present appeal is regarding issue of difference between the sales admitted by the assessee and sales found reflected in Form No. 26AS.

7. The Ld. Counsel for the assessee vehemently contended that during the original assessment proceedings, the notice u/s 142(1) dated 02/02/2017 for which the assessee Company filed point wise reply wherein the assessee had furnished the required documents and explained in details that all the three issues including the issue of difference between sales as per books of accounts and also as per Form No. 26AS. Considering the reply filed by the assessee, the A.O. passed the assessment order on 21/12/2017, the Ld. PCIT during the 263 proceedings issued show cause notice on all the three issues including the issue of difference between the sales as per books of accounts and as per 26AS of the assessee. The assessee had once again filed detailed reply on 16/04/2019 and submitted the reason for difference in sales as per books of assessee and as per 26AS. Further furnished copy of purchases bills confirmation from purchase parties and explained the nature of transaction with Ms. Babita and Ms. Seema. But the Ld.CIT(A) has also erroneously ignored the reply filed by the assessee and directed the A.O. to further verify the matter vide order impugned.

8. The Ld. Counsel for the assessee further submitted that, the Ld. PCIT committed an error by rejecting the contention of the assessee that the issues raised in the show cause notice were also dealt in detail by the A.O. in proceedings u/s 143(3) and were allowed after application of mind by the A.O. as such the same cannot be matter for reassessment u/s 263 of the Act. The action of the Ld. PCIT will amounts to substitute option of the A.O. u/s 263 of

the Act. Exercising revisionary power u/s 263 of the Act is erroneous since there is no specific finding have been given by the PCIT on the issue as to how the order is erroneous and prejudicial to the interest of the Revenue. Therefore submitted that, the impugned order of the Ld. PCIT deserves to be set aside.

9. Per contra, the Ld. DR submitted that the explanation given by the assessee before the PCIT was not satisfactory, thus it is necessary to examine the issue by the A.O. Therefore, by relying on the order of the Ld. PCIT the Ld. DR prayed for dismissal of the appeal.

10. We have heard the parties, perused the material available on record and gave our thoughtful consideration. During the original assessment proceedings the Ld. A.O. has issued notice u/s 142(1) of the Act on 02/02/2017 a copy of the same has been produced by the assessee at Page No. 65 to 69 of the paper book wherein as per Query No. 7 the Ld. A.O. has specifically asked for furnishing the copy of form No. 26AS reflecting all TDS Certificate with reconciliation of receipt as per the certificates with those shown in the income of the A.Y 2015-16 and also called the assessee to furnish explanation for any mismatch if evident. In reply, the assessee has filed point wise reply which has been placed at page No. 70 to 94 of the paper book wherein, regarding difference between sales as per books of accounts as per 26AS, the assessee has replied as under:-

“In reply to Point No, 7: We are enclosing herewith copy of Form 26AS and reconciliation statement as per 26AS and as per books as PB Page NO. 292 to 300. The assessee has claimed only Rs. 51,05,466/- as TPS during the financial year 2014-15. However the IDS deducted as form 26AS was Rs. 51,74,694/- which was extra given by the following parties and assessee has neither taken in books of account nor claimed in its income tax return. Amount of IDS are as follows:-

<i>S. No</i>	<i>Detail of Party</i>	<i>TDS</i>	<i>Nature</i>
<i>1</i>	<i>Logix Infrastructure Pvt. Ltd.</i>	<i>23588</i>	<i>Do not belong to assessee</i>
<i>2</i>	<i>Shaporji Pallonji & company Pvt. Ltd.</i>	<i>35640</i>	<i>Advance</i>
<i>3</i>	<i>Sankalp Advisory Services Pvt. Ltd.</i>	<i>10000</i>	<i>Advance</i>

As amount of Rs. 23,588/- from Logix Infrastructure Pvt., Ltd. has wrongly entered in 26AS. We have neither receipt any amount nor we have raised any bill. So, we have not claimed in the ITR as well as not entered in the books of account. In case of Shapoorji Pailonji & company private Ltd it was for advance received and assessee has not claimed TDS on the same and not in income tax return, In case of Sankaip Advisory Services Pvt. Ltd. it was also received as an advance and assessee has not taken this amount of TDS in the income tax return. Further the TDS not taken during the relevant financial year will be taken in the next year when the income shall arise. Since the accounting being done on mercantile basis.”

The above said explanation given by the assessee has been verified by the Ld. A.O. and been accepted and no addition has been made on that regard.

11. During the proceedings before the Ld. PCIT, the assessee has been show caused u/s 263 wherein following issues were raised by the Ld. PCIT:

“ a) Difference between sales as per books of accounts and as per 26AS

b) Identity, creditworthiness and genuineness of certain purchase parties

(c) Salary paid to related parties namely-Ms. Babita and Ms. Seema.”

12. The assessee had filed reply before the Ld. PCIT on 16/04/2019. In so far as difference in sales as per books of assessee and as per 26AS concerned, the assessee had furnished copy of the purchase bills confirmation from purchase parties and also explained the nature of the transaction with Ms. Babita and Ms. Seema. The copy of the reply filed before the PCIT is placed in the paper book at Page No. 111 to 114 of the paper book. The relevant portion of the reply regarding the difference between sales as per the books of accounts as per 26AS is as under:-

“2.0. As you have mentioned in your notice that you have pointed out the difference of Form 26AS total sale receipt of Rs.25,75,90,255/- and as per balance sheet sales amounting Rs 24,68,40,105/- difference Rs.1,07,50,150/- was due to service tax

differences of Rs.66,11,777/- and balance amount Rs.41,38,373/- as advance from customers. As per the balance sheet of 31/03/2015 the assessee has shown service tax of Rs. 66,11,477/- in profit and loss account.

In case of mobilization advance of Rs.41,38,373/- which was received from M/s Alpha Crop Development Pvt. Ltd. (As formally known as Alpha G Corp Development Pvt. Ltd.) and also submitted the confirmation of TDS deduction from the said company As you have-asked that no such name is reflecting neither in Form 26AS nor in” reconciliation submitted by assessee.

M/s alpha G Corp Development Pvt.. Ltd. has taken over the company M/s Epitom Realtech Pvt. Ltd. Hence M/s Epitom Realtech Pvt. Ltd. has been merged with Alpha G Corp Development Pvt. Ltd. and later on M/s Alpha G Corp Development Pvt. Ltd. has changed its name M/s Alpha Corp Development Pvt. Ltd.

In this case ne would like to inform you that assessee had an agreement with M/s Ec tome Rea Tech Pvt. Ltd. dated 21st October 2013. We are enclosing herewith copy of agreement as per page no,1 to 3.This company has been taken over by M/s Alpha G Corp Development Private Limited as per the order of Delhi High Court New Delhi order dated 04.04.2016.We are enclosing herewith as per page no. 4 to 14.

Further Alpha G Corp. Development Pvt. Ltd, has changed its name to M/s Alpha Corp Development Pvt. Ltd. They have removed the word "G" from the name, in this regard we are enclosing herewith copy of Board resolution and certificate of incorporation pursuant to change of name of company date 27.01.2016 as per page no. 15 to 17,Hence the assessee has shown in its books in the new name of company M/s Alpha Corp. Deveiooper Pvt. Ltd.

So this is the case of taken over of company M/s Epitome Real Tech Pvt. Ltd. by M/s Alpha G Corp Development Pvt. Ltd. and later on change its name to M/s Alpha Corp, Development Ltd.

So it is clear it is the same company which assessee has shown in its books of account IDS deducted.

13. It is found that the Ld. PCIT even after providing the said reply by the assessee, set aside the assessment order dated 21/12/2017 and directed to re-examine the same issue. The only reason assigned by the Ld. PCIT was that the "explanation of the assessee seems to be plausible and it is not conclusive" the relevant portion of the reasoning by the Ld. PCIT is as under:-

"5.2.On examination of the matter, though the explanation of the assesses seems- plausible, it is not conclusive and I am of the opinion that the matter can be resolved, only after further verification by the Assessing Officer , I hold that the action of the Assessing Officer in allowing this claim of the assesses in his order under section 143 (3) dated.21.12.2017 to be erroneous in so far as it is prejudicial to the interest of the Revenue."

14. It is observed that the Ld. PCTI is of the opinion that the Ld. A.O. has not verified details in respect of the issues pointed out by the Ld. PCIT. On the other hand, the Ld. PCIT was of the opinion that the issues require further verification by the A.O. It is undisputed fact that all the three issues pointed out by the Ld. PCIT in the show cause notice dated 02/02/2017 have been replied by the assessee and the Ld. A.O. has satisfied on verifying the reply and passed the assessment order. Thus, in our opinion, invoking revisionary power u/s 263 of the Act is merely on suspicions is untenable. Further, the Ld. PCIT has not made any discussion on the issues pointed out by him and exercised the power conferred u/s 263 of the Act on the ground that the "explanation of the assessee seems to be plausible and it is not conclusive" which is not permissible u/s 263 of the Act. The said view of ours are supported by the Hon'ble Bombay High Court in the case of CIT Vs. Gabriel India Ltd., wherein it is held as under:-

"14. We may now examine the facts of the present case in the light of the powers of the Commissioner set out above. The Income-tax Officer in this case had made enquiries in regard to the nature of the expenditure incurred by the assessee. The assessee had given detailed explanation in that regard by a letter in writing. All these are part of the record of the case. Evidently, the claim was allowed by the Income-tax Officer on being satisfied with the explanation of the assessee. Such decision of the Income-tax Officer cannot be held to be "erroneous" simply because in his order he did not make an elaborate discussion in that regard. Moreover, in the instant case, the Commissioner himself, even after initiating proceedings for

revision and hearing the assessee, could not say that the allowance of the claim of the assessee was erroneous and that the expenditure was not revenue expenditure but an expenditure of capital nature. He simply asked the Income-tax Officer to re-examine the matter. That, in our opinion, is not permissible. Further inquiry and/or fresh determination can be directed by the Commissioner only after coming to the conclusion that the earlier finding of the Income-tax Officer was erroneous and prejudicial to the interests of the Revenue. Without doing so, he does not get the power to set aside the assessment. In the instant case, the Commissioner did so and it is for that reason that the Tribunal did not approve his action and set aside his order. We do not find any infirmity in the above conclusion of the Tribunal.

15. In view of the above, we are of the opinion that the impugned order passed by the Ld. PCIT dated 04/09/2019 liable to be quashed. Accordingly, the Grounds of appeal of the assessee are allowed.

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

Order pronounced in the open court on 09th February, **2023**.

Sd/-
(PRADIP KUMAR KEDIA)
ACCOUNTANT MEMBER

Sd/-
(YOGESH KUMAR U.S.)
JUDICIAL MEMBER

Dated : 09/02/2023

R.N, Sr. PS*

Copy forwarded to :

1. Appellant
2. Respondent
3. CIT
4. CIT (Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI