IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, AM
AND
SHRI PAVAN KUMAR GADALE, JM

ITA No.1297/MUM/2022
(Assessment Year 2010-11)

Bhuvneshwari Vyapaar Private Limited 710/A Wing Dattani Plaza Commercial Premises, safed pool, Andheri Kurla Road, Andheri East, Mumbai- 400 072	Vs.	PCIT,Mumbai-1 Room No. 330, 3rd Floor, Aayakar Bhavan, M.K.Road, Mumbai-400 020
(Appellant)		**(Respondent)**

PAN No. AADCB4386N

Assessee by	:	Shri. Prakash G. Jhunjhunwala, CA & Abhishek Jhunjhunwala
Revenue by	:	Dr. Mahesh Akhade, CIT DR.

Date of hearing:	16.11.2022
Date of pronouncement :	14.02.2022

O R D E R

PER PRASHANT MAHARISHI, AM:

01. This appeal is filed by Bhuvneshwari Vyapaar private limited (the appellant/assessee) for assessment year 2010 – 11 against the order of the principal Commissioner of income tax, Mumbai – 1 (the learned PCIT) passed under section 263 of the income tax act, 1961 (the act) wherein it has been held that the order passed by the income tax officer Ward 9 (2) (1), Mumbai (the learned AO) passed under section 143 (3) read with section 263 of the income tax act dated 21/12/2016 was held to be an order which is erroneous for as prejudicial to the interest of the revenue and therefore the learned AO was directed to reframe the assessment order de novo after conducting all necessary enquiries and verification as warranted on facts of the case and also

after giving due opportunity of being heard to the assessee before passing the assessment order.

02. Assessee is aggrieved with the revisionary order and therefore has raised following grounds of appeal: –

"On the facts and circumstances of the case and in law:-

1. The Ld PCIT-1, Mumbai erred in holding that the assessment order passed by the AO on 21.12.2016 was erroneous in so far as prejudicial to the interest of revenue.

2. The Ld PCIT failed to appreciate that the AO has passed the order following the specific direction of PCIT-4, Kolkata and the PCIT nowhere could found that the AO has failed to follow any direction given by the PCIT-4, Kolkata.

3. The Ld. PCIT-1, Mumbai grossly erred and inter alia reviewing the order of his predecessor PCIT-4, Kolkata in garb of section 263 order which is illegal & beyond his jurisdiction.

4. The Ld. PCIT failed to appreciate that AO has not only carried out detailed inquiries as per law but also carried our verification by obtaining reply of 133(6) notice and recording statement u/s 131 and verifying the identity, genuineness and creditworthiness of the investor companies and the satisfaction of the AO is also apparently appearing in the assessment order itself.

5. The Ld. PCIT failed to appreciate that clause (a) of explanation 2 of section 263(1) is prospective in nature and cannot apply for the year under consideration Le A.Y 2010-11.

6. The Ld. PCIT has her made any inquiry himself was demonstrated that how and which particular alleged inquiry verification carried out by the AO was false deficient erroneous to invoke 263 again to impugned review the instant of order dated 21.12.2016 the Assessing Officer.

7. The Ld. PCIT ought to have appreciated that so long the view taken and opinion formed by the AO is a possible view the same cannot be interfered us 263 because merely there can be another view that is held by him.

8. The Ld. PCIT failed to follow binding judgment of the jurisdictional Bombay High Court quoted before him; he ought to have explained in his order that how those judgments were not applicable to the present case of the appellant company.

9. The Ld. PCIT grossly erred on facts & circumstances in holding that the AO has not examined all the evidences that were furnished before the PCIT in the act proceedings, where the assessment was completed five year prior to the PCIT's order.

10. The Ld. PCIT failed to appreciate that the assessee has discharged his initial burden by proving the identity of the investor companies, genuineness of the transaction and creditworthiness of the investor companies and there is nothing to disprove the assessee's submission. So, the assessment made by the AO should not have been held as erroneous and so far as prejudicial to the interest of the revenue.

11. Without prejudice to the earlier grounds the PCIT erred in law & facts in stating that creditworthiness of the investor companies has not been established whereas he ignored the finding of fact that all material collected by the AO to base his satisfaction and form opinion."

03. Briefly, facts noted from the orders of the lower authorities shows that

i. Original return of income was filed by the assessee for assessment year 2010 – 11 on 9/10/2010 at a total income of ₹ 31,898/–.

ii. Subsequently, on 11/11/2011 the case of the assessee was reopened by issue of notice under section 148 of the act. On issue of notice under section 148 of the act assessee reiterated the original return filed. Subsequently the respective notices under section 143 (2) and notice under section 142 (1) of the act was issued and 16/11/2011. Thereafter the hearing took place on several dates. On 28/11/2011 the assessment order under section 147 read with section 143 (3) of the act was passed. In the above order, the total income offered in the return of income of ₹ 31,898/– was assessed at ₹ 101,900.

iii. Thereafter, on examination of the records of the assessee, the Commissioner of income tax Kolkata- II, Calcutta issued notice under section 263 of the income tax act on 3/2/2014 questioning that why the order passed under section 148 of the act dated 28/11/2011 be not held to be an order erroneous and prejudicial to the interest of the revenue because the balance sheet of the assessee company shows a share capital of ₹ 45.34 crores in the result of ₹ 44.43 crores and the learned assessing officer has not carried out requisite and proper enquiries regarding the identity, creditworthiness of the shareholders and genuineness of the transaction and therefore the impugned order was passed mechanically, without application of mind which rendered the assessment order erroneous and prejudicial to the interest of revenue.

iv. In response to this, the assessee submitted various submissions. However the learned Commissioner of income tax, Calcutta – II passed an order under section 263 of The Income Tax Act on 11/3/2014 **(revisionary order - 1)** holding that the order passed by the learned assessing officer is erroneous and prejudicial to the interest of the revenue and therefore deserves to be set-aside under section 263 of the act directing the learned assessing officer to examine the genuineness and source of cell capital not on a tested basis but in respect of each and every shareholder by conducting independent enquiry not through the assessee. The bank account of the entire

period should be examined in the course of verification to find out the money trail of the share capital. Further, the assessing officer should examine the directors as well as examine the circumstances, which necessitated the change in directorship if applicable. He should examine them on oath to verify the credentials as director and reach logical conclusion regarding the controlling interest. The AO was further directed to examine the source of realization from the liquidation of assets shown in the balance sheet after the change of directors, if any.

v. Based on the above revisionary order, the learned assessing officer passed an assessment order under section 144 read with section 263 read with section 143 (3) and read with section 147 of the act on 2 – 3 – 2015 assessing the total income of the assessee at ₹ 474,760,117/– wherein the learned assessing officer made an addition of ₹ 47.35 crores on account of share application money in the books of accounts holding that the assessee has failed to prove the identity and creditworthiness of the subscriber companies and genuineness of the transaction. The learned assessing officer further made an addition of ₹ 30,000 which was originally made on account of consultancy fees. The learned AO further made disallowance under section 14 A of ₹ 1,179,875/–.

vi. Thereafter the learned Commissioner of income tax, Calcutta – 4, Calcutta once again examined the record and found that the assessment order passed on 2 – 03 – 2015 is erroneous and prejudicial to the interest of the revenue for the reason that (1) the learned assessing officer issued notices under section 133 (6) to all the shareholders companies and most of the notices were answered but after known service of the notice issued to the shareholders, AO did not make any further attempt to serve those notices upon the shareholders. The notices were replied in some of the case is under section 133 (6) but the AO did not bother to examine those notices or to mention these in assessment order. (2) the AO issued summons

under section 131 to the directors of the assessee company, some of the summons were unserved and returned back, the learned assessing officer did not make mention in the assessment order about the replies received in response of two summons. (3) The learned assessing officer has completed the assessment proceedings without examining the details and documents available in the record the AO did not look into the site of the Ministry of corporate affairs to obtain the latest address of the assessee company and its directors. The AO did not serve any notices under section 133 (6) of the act to the shareholders of the assessee company or the entity was served. The learned AO also did not look at the replies received. The assessment order reveals that the confirmations from the various parties were received which are available in the assessment order but no verification of these documents appears to have been made. Accordingly, show cause notice was issued holding that the direction given by the learned CIT wide order under section 263 dated 11/3/2014 is required to be complied with and therefore notice under section 263 was issued on 25/8/2016.

vii. On examination of reply of the assessee, the learned CIT held that the AO has jumped to the conclusion without consideration of the submissions made by the assessee. Accordingly the order passed under section 144 read with section 263 read with section 143 (3) read with section 147 of the income tax act dated 2/3/2015 is erroneous insofar as prejudicial to the interest of the revenue.

viii. The learned CIT also mentioned that assessing officer has framed which assessments without proper basis continue to attract adverse attention. The central board of direct taxes wide Om dated 7/11/2014 days that that the Rangers are required to ensure that frivolous additions or high-pitched assessments are not made without proper basis. Accordingly by this order it was held that the assessment order was passed without making enquiries and verification which would have

been made and therefore the order passed onto/3/2015 stands erroneous insofar as prejudicial to the interest of revenue and is set aside with a direction to the AO to carry out proper examination of books of accounts, bank accounts of the assessee as well as investor. AO is also directed to examine the source of sale application, identity of investor and its genuineness. The assessment order was directed to be made De novo. Such revisionary order (**revisionary order number 2)** was passed on 19/10/2016 by the Commissioner of income tax, Calcutta – 4, Kolkata.

ix. Consequent to that an assessment order was passed by the income tax officer, Ward 12 (2) Kolkata on 21/12/2016 determining the total income of the assessee at ₹ 524,270/-. Surprisingly in the same assessment order the learned assessing officer after carrying out detailed inquiries, verified the books of accounts, bank statements of the assessee company. The summons under section 131 of the act were issued to the directors of the investor companies as per the direction of the learned PCIT – 4 Calcutta according to the revisionary order passed under section 263 of the act dated 19/10/2016. It was also mentioned that directors of the investor companies appeared, the statement were recorded under section 131 of the act along with the books of accounts and other relevant documents of the investor companies. The notices under section 133 (6) were also issued to the investor companies, the submissions were received which was verified and checked. The source of fund, identity, genuineness and creditworthiness were found in order after verification. The source of fund was also verified and found an order. Accordingly the assessment order under section 143 (3)/263/144/263/147/143 (3) was passed on 21/12/2016 in which the original addition made of ₹ 473,550,000/– made in the assessment order dated 2/3/2015 was not made.

x. Subsequently on examination of the record, the learned principal Commissioner of income tax – 4, Calcutta issued

notice under section 263 of the act on 19/2/2019 stating that assessment order passed under section 143 (3)/263/144/263/147/143 (3) dated 21/12/2016 for the impugned assessment year i.e. 2010 – 11 is erroneous and prejudicial to the interest of the revenue for vii reasons and therefore the show cause notice was issued.

xi. On 13/3/2019 passed the order under section 263 of the income tax act 1961 **(revisionary order number 3)** holding that the assessment order passed on 21/12/2016 at and assessed income of ₹ 524,270 is erroneous and prejudicial to the interest of the revenue for the reason that the learned assessing officer has not carried out proper inquiries and accordingly the learned assessing officer was directed to adjudicate the issues mentioned in the show cause notice dated 19/2/2019 and pass a fresh assessment order in accordance with the relevant provisions of the law. The learned PCIT held the order to be erroneous on following counts:-

i. The AO passed the order without carrying out detailed investigation/verification/independent enquiry regarding identity, creditworthiness of the shareholders and the genuineness of the transactions relating to sell capital that was intended to be carried out and merely accepted the submission of the assessee in this regard.

ii. The AO has failed to carry out detailed investigation of the shareholders on the very issue that how they decided to invest in such a company, which was never known for its line of business, and they invested to use premium without verifying the financial position.

iii. The AO further failed to examine the rationale behind raising the same share premium and also did not verify the method adopted by the assessee for

determining such abnormally huge premium especially for keeping in view that prima facie there was no material in the balance sheet of the assessee warranting/justifying such a huge premium.

iv. The AO failed to collect the relevant evidences in order to reach a logical conclusion regarding the genuineness of controlling interest.

v. The AO failed to examine all the bank accounts for the entire period in the course of verification to find out the money trail of the share capital.

vi. AO failed to adequately trace out the money trail to ascertain the genuineness of source of fund invested by shareholders in the assessee company

vii. on the whole of the impugned order dated 21/12/2016 passed under section 263/143 (3) of the income tax act, 1961 prima facie suffers from lack of independent and adequate enquiry on the aforesaid issues.

xii. Against the revisionary order number 3, the assessee preferred appeal before the coordinate bench in ITA number 2311/Kol/2019 wherein the coordinate bench held that the learned principal Commissioner of income tax issued notices on the assessee only on 19/2/2018 and 1/3/2018 and more this notices were not served on the assessee. Therefore, the learned PCIT passed an order without giving adequate opportunity to the assessee. The coordinate bench by order dated 24/12/2019 restored the matter back to the file of the learned PCIT for de novo adjudication after giving sufficient opportunity of being heard to the assessee.

xiii. Therefore, pursuant to the order of the coordinate bench, the assessee was issued notice under section 263 of the income tax act, which was replied by letter dated 25/2/2022. The assessee

submitted several details before the learned PCIT. It was stated that the proceedings may be dropped in view of the earlier order of assessment, revisionary order, the details submitted by the assessee, summons issued by the learned assessing officer, reply given by the investor, statement given by the directors of the investor company, exhaustive detail submitted before the learned assessing officer with respect to the identity, creditworthiness of the investor as well as the genuineness of the transaction. Therefore, there is a complete verification of the details several times by the lower authorities. It was further submitted that when the assessing officer has made the addition even then there is a revisionary order and when learned assessing officer has not made the addition even then the revisionary orders have been passed by the respective principal Commissioner of income tax, it itself shows that there are two opinions on the facts available and therefore the revisionary proceedings are not valid.

xiv. The learned PCIT after relying on several judicial precedents and analyzing the details filed by the assessee passed once again revisionary order **(revisionary order number 4)** on 26/3/2022 holding that:-

1. However, regarding creditworthiness, the evidence given is miserably poor. All the investor companies are similar to the web of name lending companies prevalent in money laundering and channelizing the unaccounted income. The assessing officer has not conducted any enquiry to verify the creditworthiness. Hence, the order is erroneous and prejudicial to the interest of revenue.

2. As per and in law, explanation 2 clause (a) below section 263 (1) of the act, any assessment made without conducting requisite enquiry and verification by the AO is erroneous in so it is prejudicial to the interest of revenue. Even under pre-amended law, the assessee in the case of Tara Devi Agrawal 88 ITR 323 and also Ram Pyari Devi

saraogi 67 ITR 84 have held that any assessment completed without necessary enquiries is warranted on facts of the case is erroneous insofar as it is prejudicial to the interest of revenue.

3. Hence, considering the facts in totality, I am of the considered opinion that the AO in the instant case has failed to conduct all necessary enquiries as warranted on facts of the case and as discussed in this order stop hence the assessment order is erroneous insofar as it is prejudicial to the interest of revenue. Accordingly, the same is hereby set-aside stop

4. Hence, based on evidence submitted and submission made, the AO is hereby directed to examine the evidence, conduct inquiries and verify the facts of the case in the light of judgments discussed in this order super and all other related judgments dealing with identity of creditors, genuineness of transactions and creditworthiness of the creditors and complete the assessment accordingly.

04. This order passed under section 263 of the income tax act on 26/3/2022 (revisionary order number 4) is under challenge before us.

05. The learned authorized representative submitted

i. Written submission made before the learned principal Commissioner of income tax on 11/3/2022. He further referred the chart showing the name of the subscriber of share capital, number of shares subscribed, total amount of contribution of share capital and networks of the subscriber of the share capital to prove that the subscriber of the share capital were having sufficient creditworthiness. He further referred to the name of the subscribers of the share capital along with the list of shell companies notified by the government to prove that none of the subscriber of the share capital has ever been termed as a shell company. He further submitted

that the summons issued under section 131 by the learned assessing officer obtained from the respective subscriber during the course of assessment proceedings following the direction of the earlier revisionary orders stating that all those summons were responded to by their respective investor. He further referred to the copies of replies filed by the subscribers in response to notice issued under section 133 (6) during the course of assessment proceedings on several occasions. He further referred to the copies of the balance sheet of all the subscribers of said capital's which were also submitted earlier at the time of reassessment proceedings, He further submitted the list of cheques and the dates with the amount of share capital subscription money received by the assessee. He further referred to the copies of the bank statement of the assessee with Axis bank, Bank of India, in the said bank to show that all the consideration has been received through banking channel. He further referred to the annual return filed with the Ministry of corporate affairs to show the status of the directors of the company, investors et cetera. He further referred to share application money of the all the subscriber to the share capital submitted before the learned assessing officer along with the return of income filed by all the companies and coupled with the copy of the said certificate of incorporation of all the subscribers. He further obtained a printout from the Ministry of corporate affairs website showing Master data about the status of all the subscribers showing that none of the subscribers are neither defunct, nor their name is cancelled. In the case of amalgamation, also he pointed out our attention with respect to the order of the honourable Calcutta High Court of throwing amalgamation and respective notification on the website of Ministry of corporate affairs. He therefore submitted that nothing was left out to be shown to the

assessing officer on several occasions. The enquiries could have possibly done by any officer was made by all the officers assessing the company. Therefore, the allegation of the learned principal Commissioner of income tax that the enquiries made by the learned assessing officer are inadequate is not correct. He further stated that on the basis of the assessment order passed by the learned that assessing officer once making the addition and another time deleting the addition, were both made at the instances of the learned principal Commissioner of income tax stated in the order under section 263 of the income tax act. Therefore, any order passed pursuance to the direction of the learned principal Commissioner of income tax cannot be held to be erroneous and prejudicial to the interest of revenue.

ii. He referred to his 879 pages paper book to show that all the information with respect to the investors were submitted before the lower authorities, they were properly investigated, those parties are properly replied, based on this the learned assessing officer once made the assessment and did not make the addition, itself shows that there is nothing left out to be enquired by the learned assessing officer.

iii. He further submitted that if the learned PCIT was so sure on all four occasions that the addition should have been made, there are empowered under section 263 of the income tax act to make the addition itself. However, on all four occasions no additions were made by the learned PCIT.

iv. He further stated that once the learned assessing officer has made the addition of ₹ 45 crores in the hence of the assessee. That order cannot be held to be erroneous or prejudicial to the interest of the revenue.

When the addition has been made completely of the share capital receipt by the assessee is nothing else was required to be made. Therefore holding that order where the learned assessing officer has made the complete addition cannot be held to be prejudicial to the interest of revenue. For making a revision, the learned PCIT is required to satisfy that when condition of the order is erroneous and the order being prejudicial to the interest of revenue. When the addition itself is been made, there is no prejudice caused to the revenue. Therefore, the revisionary order passed by the CIT – 4 Calcutta dated 19/10/2016 is not sustainable.

v. He further referred to the order sheet entries of the assessment and respective notices issued by the learned assessing officer. He submitted that on 15/11/2016 the notice issued under section 142 (1) of the learned assessing officer has asked for the name, address, PAN and IT jurisdiction of all the directors of the assessee company as well as the complete details of increase of share capital during the year with the names, addresses, PAN and also the respective shareholdings along with the bank accounts. He further referred to the notice dated 8/5/2014 and replies submitted by the assessee with respect to that. He submitted that in this details of the details of the investors were called for and were submitted. He further referred to the notice dated 17/11/2011 under section 142 (1) of the act where there was a show cause notice was issued to the assessee that why the amount increased on account of share application should not be added under section 68 of the income tax act 1961. He further referred to the several summons issued by the assessing officer to the investor and as well as the replies submitted. He further referred to several notices issued under section

133 (six) issued to the various investors which have been replied. Accordingly his submission was that that the complete enquiry has been made by the learned assessing officer with respect to making the addition as well as with respect to deleting the addition and therefore now the order passed by the learned principal Commissioner of income tax which does not show that what further enquiries the assessing officer should have carried out is merely not acceptable.

vi. The order cannot be said to be erroneous if the learned assessing officer adopted one of the possible views. He submitted that the assessing officer has made the addition once and did not make the addition once and therefore invoking of the provisions under section 263 of the act on both the occasions clearly shows that there are to views possible onset of the facts available.

vii. It was further submitted that the order could not be revised under section 263 of the income tax if active the learned assessing officer had made reasonable enquiries. He further submitted that the order under section 263 of the act could not be passed to conduct further enquiries.

viii. In the end he relied upon the decision of the coordinate bench in case of Narayanan Rane 70 taxmann.com 227 to support that the explanation 2 (A) to section 263 does not authorize or give unfettered powers to the Commissioner to revise each and every order, if in his opinion, same has not been passed without making inquiries verification which should have been made.

ix. He further referred to the decision of the coordinate bench in case of JRD Tata trust versus deputy Commissioner of income tax (2020) 122 taxmann.com

275 wherein it has been held that test for finding out whether the explanation 2 to section 263 has been rightly invoked or not is not simply existence of the view professed by the Commissioner about lack of necessary enquiries and verification but an objective finding that assessing officer has not conducted, at stage of passing order which is subject to revision proceedings, inquiries and verification is expected, in ordinary course of performance of duties of a prudent, judicious and responsible public servant that assessing officer is expected to be. He therefore submitted that when the assessing officer has made the addition, the learned PCIT has revised the order. When the assessing officer has not made the addition, even then the learned PCIT has revised the order. On both the occasions, it has been held that the order is erroneous and so far as prejudicial to the interest of revenue. He submitted that in this situation, one of the orders is definitely incorrect, and therefore, the assessment order in which the addition has been made of ₹ 45 crores cannot be held to be erroneous and prejudicial to the interest of revenue. Therefore, all subsequent proceedings are invalid.

x. He further referred to the decision of Calcutta bench in Khetawat properties Ltd 180 ITD 535 dated 22/11/2019 wherein para number 15 it has been held that it has to be kept in mind that while the Commissioner is exercising a revision of jurisdiction over the assessment order, he has to exercises power in an objective manner and not arbitrarily or subjectively since he's discharging quasi-judicial powers vested in him by doing so. Thus according to ask, explanation (2) inserted by the Parliament under section 263 cannot overwrite the main section i.e. section 263 (1) of the act. The learned principal Commissioner of income tax can exercises

revision of jurisdiction in the average the assessment order is erroneous, well as prejudicial to the interest of the revenue, and not otherwise. He submitted that when learned assessing officer has made the addition, twin conditions are not satisfied as one of the conditions fails, therefore, the revisionary order is not sustainable.

xi. He further referred to the decision of the coordinate bench in case of Shri Doreabji Tata Trust 122 taxmann.com 274 on identical issues.

xii. In the end, he submitted a 20 pages written synopsis challenging the revision orders.

xiii. In the end, he submitted that ROI was filed on 09/10/2010. No Assessment u/s 143 (3) was made. First Assessment was passed on 28/11/2011 u/s 143 (3) rws 147 of The Act. In reasons recorded for reopening of assessment only issue was wrt non-taxability of income to the extent of RS 30,000/-. Ultimately, in the reassessment order dated 28/11/2011, only disallowance of Rs 40,000/- u/s 14 A of the Act and addition of RS 30,000/- of consultancy fees was made. Order us/ 263 of The Act can be passed within two years from the end of the financial year in which order sought to be revised is passed. Therefore the LD PCIT has powers only to revises those issues on which the order u/s 147 is passed. For the other income there is no assessment made. If any other view is taken that will give powers to LD PCIT to revises any income in case of reassessment cases, which is even, not part of reassessment. Therefore firstly in this case there is no assessment as the ROI was accepted u/s 143 (1) as case was not picked up for scrutiny and ROI was accepted as it is. Therefore, in such cases there is no assessment. Further, in case of reassessment, PCIT has only power

to revise those issues based on which reassessment is made. In this case the issues of share capital was neither in reason recorded or assessed, and nor the original assessment is made. Therefore, not all revisionary orders passed are sustainable. He relied up on CIT V Lakshmi Vilas Bank Ltd.* [2023] 146 taxmann.com 227 (Madras) and CIT v. Alagendran Finance Ltd. [2007] 162 Taxman 465/293 ITR 1 (SC).

06. The learned departmental representative vehemently supported the orders of the lower authorities. It was stated that the learned assessing officer has deleted the addition as per order dated 21/12/2016 in cryptic manner. Further in earlier assessment order passed by same income tax authority has made the addition, therefore the deletion of the addition by the learned assessing officer makes the order erroneous so far as prejudicial to the interest of revenue and therefore the learned PCIT exercising the jurisdiction is correct in directing the learned assessing officer to pass the order afresh.

07. We have carefully considered the orders of the lower authorities, facts of the case, various judicial precedents relied upon. The facts of already been stated hereinabove and therefore to avoid duplicity same may not be once again referred to here.

08. The interesting aspect of the case is that assessee filed return of income on 28/11/2011. The return was not assessed. However, it was reassessed under section 147. Further, the reassessment order was subject to revision by the CIT -II, Kolkata as per order dated 11/3/2014. The revision was for the reason that the learned AO did not examine the increased share capital including share premium amounting to ₹ 45 crores. Though, the issue of examination of taxability of otherwise of the share premium and share capital of ₹ 45 crores was not the reason of reassessment but during the course of reassessment proceedings the learned AO touched upon that issue and therefore it became subject matter of revision before the learned CIT. The learned CIT as per order dated 11/3/2014 directed the AO to examine, identity, creditworthiness of the new shareholder and genuineness of the transaction.

In pursuance of above, revisionary order (first order) the AO passed an assessment order dated 2/3/2015 and the total income was determined at ₹ 474,760,170. In that assessment order the share capital was added under section 68 of ₹ 47,35,50,000/-. Therefore, in the assessment order dated 2/3/2015 the complete addition was made by the learned assessing officer after making the complete enquiry, rejecting all submissions of the assessee. In the assessment proceedings, the AO considered the modus operandi of the accommodation entry providers, summonses were issued under section 131 to the directors of the shareholder company of the assessee, none of them appeared. The assessee was informed about that and asked to produce them. The show cause notice was issued that why the above amount of share application money is/share capital/sale premium should not be added under section 68 of the act. The assessee did not comply with that. The AO identified the directors of each of the company analyzed their financial worth, looked at the capacity of the company to invest, the income stream of the investor company and thereafter reached at a conclusion that (1) there is no business activity of the company, (2) almost entire amount of share application money received by the assessee has been invested into the shares of other companies, (3) assessee company do not have any worth except the investment in shares of other companies, (4) assessee company do not have any reputation in the market which could fetch such huge share premium at such a high rate, (5) assessee company do not have any future prospects for which one could invest in the shares of the assessee company or such a high share premium. Accordingly, the addition of ₹ 473,550,000 was made under section 68 of the income tax act.

09. The most surprising aspect of the case is the order passed under section 263 of the income tax act dated 19/10/2016 which says that the order of the learned AO passed on 2/3/2015 wherein the addition of ₹ 47 crores is made in the hands of the assessee is erroneous and prejudicial to the interest of the revenue for the reason that (1) merely making an addition to the share capital and premium under section 68 of the act without examination/enquiry is never a pro revenue and judicious approach and therefore the order needs revisions holding that prejudice caused to the revenue administration, (2) as held by the honourable Bombay High Court in case of Vodafone India services private limited that premium on share issue was on account of capital

account transaction and does not give rise to income, instruction number 2/2015 was invoked to show that that Vodafone decision is required to be followed by all the field officers where the issues involved, (3) high-pitched assessment without proper basis continue to attend adverse attention of civility as per instruction dated 7/11/2014 and it is the duty of the range had to ensure that frivolous additions or high-pitched assessments are not made without proper basis, (4) assessment has been completed in gross violation of norms which have been propounded by the honourable finance Minister on the need for furthering and nonadversarial tax regime which cannot be achieved without concentrated and never at all levels, especially at the level where public interaction is high. On these grounds, the order passed by the learned assessing officer which is made an addition of ₹ 47 crores was held to be erroneous and prejudicial to the interest of the revenue. The learned principal Commissioner of income tax in that order has given a clear-cut direction to the assessing officer that the assessment proceedings must be initiated at the earliest and to be completed without waiting time barring date. AO must provide sufficient opportunity of being heard to the assessee in order to meet natural justice, equity and fairness. At this stage, it is very important to note that assessment where the addition of ₹ 47 crores was made was passed on 2/3/2015. This order has not been challenged by the assessee before CIT – A. Despite this addition, the learned principal Commissioner of income tax revised the order passed by the AO holding that it is erroneous and prejudicial to the interest of the revenue. Reasons provided for invoking the provisions of section 263 of the act are self-evident.

010. Another interesting part of the case is that the order under section 263 of the act was passed on 19/10/2016; the AO completed the assessment order in pursuance to that order on 21/12/2016. He issues notices under section 142 (1) on 15/11/2016. In between this that is almost within a period of one month, the summons were issued under section 131 of the act of all the parties, notices under section 133 (6) were also issued to the investor companies. Summons were responded to by the investors and notices under section 133 (6) were also responded to favourably. The AO takes a view that there is no addition under section 68 could be made in the hence of the assessee with respect to the share capital and premium of ₹ 47 crores. Thereafter the learned AO held by the order passed under section 143 (3)

read with section 263 read with section 144 read with section 263 read with section 147 and read with section 143 (3) of the act that the addition of ₹ 47 crores made by the learned assessing officer in the earlier order is not correct. Therefore, in this order he deleted the addition completely. With alarming speed, the assessment was completed at the direction of the learned principal Commissioner of income tax deleting the addition of ₹ 47 crores. It is also rarest of rare case, where PCIT, invoked the provisions of section 263 of the act where the learned assessing officer has made the addition and still it is held by that order that order passed by the AO is erroneous as far as prejudicial to the interest of revenue.

011. This order is subject to 3rd revision holding that the assessment order where the addition is deleted of ₹ 47 crores is erroneous and prejudicial to the interest of revenue, which also came back from ITAT and finally passed on 26/3/2022 as 4th revision order holding that assessment order passed on 21/12/2016 is erroneous and prejudicial to the interest of revenue.

012. We hold that the first revision order passed by the learned principal Commissioner of income tax on 11/3/2014 by Commissioner of income tax Calcutta –II Calcutta is perfectly in order also supported by the decision of the honourable jurisdictional High Court in case of [2016] 70 taxmann.com 124 (Calcutta) Rajmandir Estates (P.) Ltd. However subsequent revision of the order by the same authority on two different occasions have made the whole issue debatable and having two views even after making the detailed enquiry.

013. On all these orders of revision, all the inquiries were made by the learned assessing officer when assessment order pursuant to the first revision was made on//3/2015 wherein the addition of ₹ 47 crores was made. Therefore, none of the revisionary order states that what is the further enquiry that AO should have made after making the addition. Therefore, the invocation of explanation (2) to section 263 of the act is not proper. It can only be invoked where the order is passed without making enquiries and verification, which should have been made by the learned assessing officer. At the whims and fancies of the principal Commissioner of income tax provisions of explanation (2) (a) of section 263 cannot be invoked. In this case there is no reference that what are the further enquiries which would have been made what are

the further verification which should have been made by the learned assessing officer even after making the addition of ₹ 47 crores.

014. In Principal Commissioner of Income tax, Surat-2 V Shreeji Prints (P.) Ltd.* [2021] 130 taxmann.com 294 (SC)/[2021] 282 Taxman 464 (SC) [2021] 130 taxmann.com 293 (Guj.) It is held that

> "**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."

015. The assessee is also supported by the decision of the coordinate bench in case of 70 taxmann.com 227 wherein it has been held that to invoke the provisions of section 263 of the income tax act the Commissioner had to bring any material on record to substantiate his inference of inadequate enquiry, he is not authorized to direct the learned assessing officer to carry out facing and rowing enquiries. In 85 ITR (T) 431, coordinate bench has also held that test for finding out whether the explanation 2 to section 263 has been rightly invoked or not is not simply existence of you professed by the Commissioner, about lack of necessary enquiries and verification but an objective finding that assessing officer has not conducted, at stage of passing such order which is subjected to revision proceedings, inquiries and verification is expected, in ordinary course of performance of duties of a prudent/judicious and responsible public servant that assessing officer is expected to be.

016. Further whether where there are to views, the provisions of section 263 cannot be invoked. In this case there are for orders under section 263 of the act, three order is completely say that the addition should have been made, one order under section 263 completely direct the learned assessing officer despite making the usual addition of ₹ 47 crores to make further verification and after further verification the AO deleted it. Therefore, it is not the case where there are two judicial views available; it is the case wherein two administrative and quasi-judicial orders under section 263 are available which are taking exactly opposite view. In such circumstances, the order under section 263 challenge before us is not sustainable. The honourable Supreme Court in 243 ITR 83 Malabar industrial Co Ltd versus CIT has categorically held that the phrase 'prejudicial to the interest of revenue' has to be read in conjunction with the 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 interest of revenue, for example, when ITR adopts one of the courses permissible in law and it has resulted in loss of revenue, or to views possible and the ITO has taken one view which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interest of the revenue, unless the view taken by the ITO is unsustainable in law. In the present case, the AO has taken a view once a making an addition and second time deleting the addition on the same set of facts. Thus, it cannot be said that the view taken by the AO is not sustainable. Thus, the revision is barred in such cases.

017. With respect to the limitation period, we reject the argument of the assessee in view of the decision of the honourable Calcutta High Court on identical facts and circumstances of the case in [2017] 80 taxmann.com 262 (Calcutta) as under :-

> "**8.** On the first question suggested by him, submission of Mr. Agarwal is that the Commissioner ought to have confined his decision, while exercising power under Section 263 of the Act, only to the issue on which reassessment was made under Section 147/143(3) of the Act. The Commissioner, Mr. Agarwal has asserted, could not have had travelled beyond the grounds which triggered off the reassessment process. Mr. Agarwal's case is that in the

earlier judgments of this Court, this question was not addressed to. The authorities relied upon by him on this point are (*i*) *CIT* v. *Alagendran Finance Ltd.* [2007] 293 ITR 1/162 Taxman 465 (SC) and *Ranbaxy Laboratories Ltd.* v. *CIT* [2011] 336 ITR 136/200 Taxman 242/12 taxmann.com 74 (Delhi). In the latter case, the assessing officer had issued notice under Section 148 of the 1961 on the ground that certain items from the assessee's accounts had escaped assessment. The assessing officer was satisfied with assessee's explanation over these heads and no disallowance was made by the assessing officer in respect of these items. In the reassessment proceeding, however, the assessing officer found certain other deductions to have had been wrongly claimed and reduced the claim of deduction. This was found to be impermissible by the Delhi High Court. It was held that an assessing officer had the jurisdiction to reassess issues other than the issues in respect of which proceedings were initiated but he was not justified to undertake such exercise when the reasons for initiation of the proceeding did not survive.

In the case of *Alagendran Finance Ltd.* (*supra*), the revisional power of the Commissioner was in issue before the Supreme Court, but it was in relation to the question of limitation. In that case also, reassessment was made under certain specific heads. The Commissioner thereafter exercised his revisional jurisdiction in relation to part of the assessment order involving certain other items not involved in the reassessment proceeding. These items did not form the basis of reassessment proceeding. The jurisdiction of the Commissioner to invoke his revisional power was questioned on the ground of limitation, as provided for in sub-section (2) of Section 263 of the 1961 Act. In the factual context of that case, the Commissioner's power to exercise his revisional jurisdiction could be retained if the date of reassessment was treated to be the starting point for computing the period of limitation. But such revisional

power became incapable of being exercised because of limitation provisions if the date of initial assessment under Section 143(3) of the Act was taken to be the starting point. The Supreme Court's opinion in that case was that if revisional power was sought to be exercised in relation to items which did not form the basis of reassessment proceeding, then the Commissioner's jurisdiction could not be exercised because of the limitation provision contained in Section 263(2) of the 1961 Act.

9. The ratio of these two authorities does not apply in the facts of the case out of which this appeal arises. It is apparent from the reassessment order, a copy of which has been made Annexure "A" to the stay petition, that the issue of share capital at premium was examined by the assessing officer in the reassessment proceeding. There is specific reference to that aspect of the appellant's account in that order passed on 9th April 2010. The said order also records that detail with respect to increase of share capital submitted by the assessee was examined through issue of notice under Section 133(6) of the Act. Though the question of issue of share capital was not a factor which prompted the proceeding for reassessment, the triggering factor, being consultancy fees which had escaped assessment, was accepted by the assessing officer for undertaking the exercise of reassessment. Thus, it was permissible for the reassessing authority to widen the scope of reassessment. The judgment of the Delhi High Court in the case of *Ranbaxy Laboratories Ltd.* (*supra*) does not aid the appellant in its endeavour to invalidate the revisional proceeding. The principles enunciated in the case of *Alagendran Finance Ltd.* (*supra*) also cannot rescue the appellant, as infusion of share capital formed part of the reassessment procedure. The revisional proceeding was thus commenced within the limitation period prescribed under Section 263(2) of the Act. The Tribunal has rightly held in the order impugned that limitation period for passing the order is to be

counted from the date of passing the order under Section 147 read with Section 143(3) of the Act and not the date of intimation issued under Section 143(1) of the Act.

We, as such, do not find the first suggested question to contain any substantial question of law."

018. Therefore, in view of the above facts, the revisionary order passed by the learned principal Commissioner of income tax on 26 March 2022 is not sustainable and hence quashed.

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

Order pronounced in the open court on 14.02.2023.

Sd/-
(PAVAN KUMAR GADALE)
(JUDICIAL MEMBER)

Sd/-
(PRASHANT MAHARISHI)
(ACCOUNTANT MEMBER)

Mumbai, Dated: 14.02.2023
Dragon
Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai