

IN THE INCOME TAX APPELLATE TRIBUNAL
RAJKOT BENCH, RAJKOT

[CONDUCTED THROUGH VIRTUAL COURT]

**Before: Shri Waseem Ahmed, Accountant Member
And Shri Siddhartha Nautiyal, Judicial Member**

**ITA No. 119/Rjt/2022
Assessment Year 2017-18**

Corus Vitrified Pvt. Ltd., Morbi PAN: AA ECC3548E (Appellant)	Vs	Principal Commissioner of Income Tax-1, Rajkot (Respondent)
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**Assessee by: Shri Vimal Desai, A.R.
Revenue by: Shri Shramdeep Sinha, Sr. D.R.**

Date of hearing : 31-01-2023
Date of pronouncement : 24-02-2023

आदेश/ORDER

PER : SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER:-

This assessee's appeal for A.Y. 2017-18, arises from order of the Principal Commissioner of Income Tax, PCIT, Rajkot-1 dated 18-02-2022, in proceedings under section 263 of the Income Tax Act, 1961; in short "the Act".

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

“1. The order u/s. 263 of the Act is bad in law.

2. The learned Pr. CIT has erred in law as well as on facts in not considering the submissions of the appellant on the strength of which the assessment order was neither erroneous nor prejudicial to the interest of revenue and therefore, the provisions of Section 263 of the Act were not applicable to the case of the appellant.

3. The learned Pr. CIT has erred in law as well as on facts in setting aside the assessment order passed by the Id. A.O. u/s. 143(3) of the Act and directing de-novo assessment regarding verification of repayment of unsecured loans of Rs.21,83,802/- to the alleged shell companies considering the provisions of Section 69C r.w.s. 115BBE of the Act.

4. The learned Pr. CIT has erred in law as well as on facts in not appreciating that the acceptance of the unsecured loans from the alleged shell companies has already been taxed u/s. 68 of the Act and therefore, the action of taxing the repayment of the said loans would result into double taxation which is not permissible under the law.

The appellant craves leave to add, alter, amend, delete or withdraw one or more grounds of appeal.”

3. The brief facts of the case are that the assessee filed return of income for assessment year 2017-18 declaring total income at ₹ Nil and the assessment under section 143(3) of the Act dated 31-12-2019 was finalised at an income of ₹ 41,27,020/-. The PCIT observed that the assessee had made repayment of unsecured loan of ₹ 21,83,802/- to bogus shell companies. The PCIT observed that the assessee failed to produce any verifiable evidence against repayment of unsecured loans of Rs. 21,83,802/- given to bogus shell companies. Therefore, the entire expenditure of Rs.

21,83,802/- was required to be treated as deemed income u/s. 69C of the Act and was required to be taxed u/s. 115BBE of the Act. The omission to do so resulted into under assessment of income of Rs. 21,83,802/-. Accordingly, PCIT initiated proceedings u/s. 263 of the Act against the assessee.

3.1 Before the PCIT, the contention of the assessee was that the query of the Assessing Officer was similar to what the Id. PCIT had raised in the revision proceedings. The observations of the Assessing Officer in the show cause notice issued during assessment proceedings was “ *you are required show cause as to why the repayment of unsecured loan of Rs. 21,83,802/- given to other three bogus sale companies should not be disallowed and added back to the income*”. The assessee had replied to the above query that repayment of unsecured loan has not been claimed as an expenditure and therefore there was no question of any disallowance in the hands of the assessee as unexplained expenditure u/s. 69C of the Act. Further, the assessee also had duly explained the source of repayment of such loan, which was through sale realization from Bhabha Exports on 23-06-2016 and the assessee also submitted bank statement of HDFC Bank for reference. However, the Ld. PCIT rejected the arguments of the assessee and set aside the assessment order u/s. 263 of the Act with the following observations:-

“5. *I have gone through the records and the submissions made by the assessee during the proceedings. The assessee has submitted that provisions of section 69C of I T Act or section 68 are not applicable on the facts of the case. The payments have been made through*

HDFC Bank account out of the sales realization from Bhabha Exports. It was also submitted that no expenses of the repayments of loan have been claimed hence there cannot be any disallowance. Further, it was submitted that the assessee has taken the loans from 4 parties in A Y 2013-14 of which addition u/s. 68 was also made in the assessment order of the said year. Thereafter, the assessee opted for VsVs for the year under consideration and in support copy of Form No. 5 was also enclosed. So the assessee argued that the loans taken from the parties to whom part payments have been made in the year under consideration have already been added in the total income of A Y 2013-14 and the same have also been settled under VsVs therefore no addition to the income could be made in the year under consideration with regards to the repayment to the shell companies.

6. The above facts will indicate that AO has not conducted any inquiries/verification in respect of the addition made by the AO in the A Y 2013-14 of unsecured loans taken from 4 parties to whom part repayment of loans of Rs. 21,83,802/- to bogus shell companies by the assessee during the course of assessment proceedings. Thus, there was lack of proper inquiries in the case of the assessee. It may be mentioned that two essentials condition for invoking the provisions of section 263 of I.T. Act are that the order passed by the AO is erroneous and prejudicial to the interest of revenue.

4. The assessee is in appeal before us against the order passed by PCIT u/s. 263 of the Act. Before us, the counsel for the assessee primarily

reiterated the submissions made before Id. PCIT during the 263 proceedings. In response, the Departmental Representative submitted that in the instant case, the assessee had made payments to shell companies and therefore the Assessing Officer was bound to enquire whether the payments made by the assessee to shell companies are genuine or not. Further, the Id. Departmental Representative relied on the case of Manoj Agrawala 113 ITD 377 (Delhi) SB to the effect that quoting of wrong section is not fatal to the order which has otherwise been passed correctly.

5. We have heard the rival contentions and perused the material on record. We observe that the aforesaid issue on the basis of which proceedings u/s 263 of the Act proceedings were initiated, was duly examined by the Assessing Officer at the time of assessment and specific show cause notice was issued to the assessee with respect to this issue proposing to make addition u/s. 68 r.w.s. 115BBE of the Act. This issue was raised by the Assessing Officer vide show cause notice dated 10-12-2019. In response, the assessee submitted vide submission dated 17-12-2019 that the repayment of unsecured loan was made from sale proceeds from one of the debtors M/s Bhabha Exports and the assessee also provided a copy of bank statement in support of the same. Thus, we observe that the issue under consideration was duly examined by the Assessing Officer in the assessment proceedings and conscious decision was taken after due application of mind. Accordingly, it is not a case of lack of inquiry by the Assessing Officer. Secondly, as regards applicability of section 69C of the Act, we observe that section 69C applies in case of unexplained expenditure, source of which remains unexplained. In the assessee's case, repayment of

loan does not constitute any expenditure and further, the source of such repayment was also explained by the assessee both before the Assessing Officer as well as PCIT. Accordingly, in our view section 69C of the Act cannot be invoked in the instant facts. Further, in the instant facts even if one were to invoke section 68 of the Act since repayment of loan is not “credit” in the books of accounts, the same is outside purview of section 68 of the Act. On the issue that the Id. Assessing Officer should have enquired into the transaction on the ground that the assessee had made repayment to bogus/shell companies, the assessee before us submitted that at the time when the aforesaid unsecured loans were received by the assessee from the above three parties, the receipts have already been taxed in the hands of the assessee u/s. 68 of the Act in the assessment for A.Y. 2013-14. The assessee had filed appeal against the aforesaid order and the appeal was finally closed under the Vivad Se Vishwas Scheme. Accordingly, once the unsecured loans have been taxed in the hands of the assessee at the time when they were received by the assessee in A.Y. 2013-14, the same cannot be again taxed in the hands of the assessee at the time when such loans are repaid back by the assessee to such alleged bogus companies, since the same would amount to double taxation. Further, on perusal of the order passed by Id. PCIT, it is seen that the Id. PCIT has not established as to how the repayment of loans falls u/s. 69C of the Act when the assessee has not claimed the same as expenditure and also when the source of such repayment has not been disputed by the PCIT.

5.1 Regarding the scope of proceedings u/s 263 of the Act, an inquiry made by the Assessing Officer is 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 correctly 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 High Courts in this regard.

5.2 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 on the ground of inadequate inquiry

“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'.

5.3 In **Gabriel India Ltd. [1993] 203 ITR 108 (Bom)**, law on this aspect was discussed in the following manner (page 113)

*“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.

5.4 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.

5.5 The Supreme Court of India in the case of **Principal Commissioner of Income-tax, Surat-2 v. Shreeji Prints (P.) Ltd.[2021] 130 taxmann.com 294 (SC)** dismissed SLP filed by the assessee against order passed by High Court holding that where assessee-company had received unsecured loans from two different companies and Assessing Officer had made inquiries in detail and accepted genuineness of same, such view of Assessing Officer being a plausible view could not be considered erroneous or prejudicial to interest of revenue. The facts of this case were that respondent assessee has filed its return of income showing total income of Rs. 62,55,900/- which was assessed under section 143(3) of the Act, 1961 by an assessment order dated 14th March 2016. The respondent company received unsecured loans from M/s. Georgett Tradecom Pvt Ltd and M/s. Purba Agro Food Pvt Ltd amounting to Rs. 2.49 Crore and the Assessing Officer allowed these unsecured loans. The Principal Commissioner of Income-tax invoked section 263 of the Act, 1961 for revising the assessed income of the respondent assessee. It was noticed by the PCIT that the unsecured loans obtained by the respondent assessee are shown as investment in the name of the assessee in the share application as well as in the balance sheet of the respective companies. The PCIT passed an order

under section 263 of the Act directing the Assessing Officer to pass fresh assessment order under section 143(3) of the Act, 1961 on the aspect of unsecured loans shown by the respondent assessee. The Hon'ble Supreme Court made the following observation while deciding in favour of the assessee:

“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.”

5.6 The Supreme Court in another 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 revisional order 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 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

revisional 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 revisional order passed by Commissioner. The High Court upheld Tribunal's order. The 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”

5.7 The Supreme Court in the 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”

5.8 The Supreme Court in the case of **Principal Commissioner of Income-tax--8 Mumbai v. Sumatichand Tolamal Gouti [2019] 111 taxmann.com 287 (SC)** held that where High Court upheld Tribunal's order holding that AO had made detailed enquiries while allowing assessee's claim for deduction of business expenditure and, thus, revisional order passed by Commissioner was not sustainable, SLP filed against High Court's order was liable to be dismissed. The facts of this case were that in course of assessment, Assessing Officer allowed assessee's claim for deduction of certain expenditure on purchase of CDs on Jain Religion by expending an amount of Rs. 10.4 crores, after due examination. The Commissioner passed revisional order holding that Assessing Officer had not carried out any enquiries as to nature of expenditure being capital or not. The Tribunal, however, allowed assessee's appeal holding that Assessing Officer had carried out detailed enquiries and taken a view which was a plausible view. Accordingly, Tribunal set aside revisional order passed by Commissioner. The High Court upheld order passed by Tribunal. The Supreme Court on

consideration of above facts held that SLP filed against High Court's order was to liable to be dismissed. The Supreme Court made the following observations, while passing the order:

“It is by now well settled that, the Commissioner can exercise revisional powers under Section 263 of the Act only when it is found that the order passed by the Assessing Officer is erroneous and prejudicial to the interest of Revenue. In the present case, the Tribunal noted the observations of the Assessing Officer in the order of remand to the effect that Jain munis do not advocate spread of religion through use of computers, source of electronic media is usually shunned, very small section of the community uses computer technology for religious purposes as plenty of printed literature is available in the market. All these factors led to the market value of the CDs declining dramatically. It was on account of these reasons, that the assessee had incurred substantial loss arising out of reduction in the value of stock lying at the end of the year. The Tribunal, therefore noted that the Assessing Officer had carried out detailed enquiries and taken a plausible view.”

5.9 Accordingly, in view of our observations in the preceding paragraphs, we thus find no error in the order of Ld. AO so as to justify initiation of 263 proceedings by the Ld. Pr. CIT in the instant set of facts. The Grounds of appeal raised by the assessee are thus allowed.

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

Order pronounced in the open court on 24-02-2023

Sd/-

(WASEEM AHMED)
ACCOUNTANT MEMBER
Ahmedabad : Dated 24/02/2023

Sd/-

(SIDHHARTHA NAUTIYAL)
JUDICIAL MEMBER

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order,

Assistant Registrar,
Income Tax Appellate Tribunal,
Rajkot