

**THE INCOME TAX APPELLATE TRIBUNAL
DELHIBENCH 'E', NEW DELHI**

Before Dr. B. R. R. Kumar, Accountant Member

Sh. Yogesh Kumar US, Judicial Member

ITA No.974/Del/2022 : Asstt. Year: 2017-18

Madaan Associates, B-09/901, ITL Twin Towers, Pitampura, Netaji Subhash Place, New Delhi-110034	Vs.	Pr. CIT, Delhi-15, New Delhi
(APPELLANT)		(RESPONDENT)
PAN No. ABAFM4820D		

Assessee by : Ms. Rano Jain, Adv

Ms. Mansi Jain, CA

Revenue by : Ms. Sarita Kumar, CIT DR

Date of Hearing: 06.12.2022

Date of Pronouncement: 02.03.2023
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ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal has been filed by the assessee against the order of the Id. Pr. CIT, Delhi-15 dated 30.03.2022 for Assessment Year 2017-18.

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 Commissioner of Income Tax (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 CIT assuming jurisdiction under section 263 is bad in law in the absence of twin conditions of the order passed by the A.O. being erroneous as well as prejudicial to the interest of the Revenue having been satisfied.

3(1). *On the facts and circumstances of the case, the learned CIT has erred both on facts and in law in ignoring the fact that the issues raised by him in notice under Section 263 were before the A.O. and as such the jurisdiction on these issues under Section 263 cannot be assumed by him.*

(ii). *On the facts and circumstances of the case, the learned CIT has erred both on facts and in law in ignoring the contention of the appellant that the proceeding under Section 263 cannot be used for substituting opinion of the A.O. by that of the CIT.*

4. *On the facts and circumstances of the case, the learned CIT has erred both on facts and in law in invoking the provisions of Explanation 2 to section 263(1) of the Act, despite the fact that the conditions prescribed therein are not satisfied in the present case.*

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

6. *On the facts and circumstances of the case, Id. CIT(A) has erred both on facts and in law, in rejecting the contention of the assessee that the mining expenses having been incurred wholly and exclusively for the purposes of business only, as such are an allowable expenditure.*

7. *On the facts and circumstances of the case, Id. CIT(A) has erred both on facts and in law, in rejecting the contention of the assessee that the RR expenses having been incurred wholly and exclusively for the purposes of business only, as such are an allowable expenditure.*

8. *On the facts and circumstances of the case, Id. CIT(A) has erred both on facts and in law, in rejecting the contention of the assessee that the unsecured loans having been given out of interest free funds, the*

interest on the same is not to be disallowed under section 36(1)(iii) of the Act.”

3. The assessee filed return of income on 29.10.2017 declaring total income of Rs.NIL. The same has been assessed u/s 143(3) determining total income at Rs.1,55,00,000/- and subsequently order u/s 263 has been passed by the Id. PCIT. For the sake of ready reference and completeness, the entire notice of the Id. PCIT is reproduced as under:

“Assessment, was completed u/s 143(3) of the I.T. Act, 1961 for the A.Y. 2017- 18 by erstwhile ACIT, Circle 43(1), New Delhi on 23.12.2019 after making addition of Rs. 1,55,00,000/- on account of unexplained cash deposit made during demonetization period. Subsequent, to the assessment, it was noticed that the assessment order was erroneous and prejudicial to the interest of revenue for the following reason.

“On perusal of the record it is found that the AO has obtained the details of unsecured loans received during the year. Assessee has filed confirmations copy of bank account, ITR etc. in support of loan received during the year. It is observed that assessee has not paid any interest to the persons whom it has procured loan during the year and amounts deposited in the bank accounts of the lending parties before advancing loan to the assessee. This issue requires deep scrutiny.

The assessee has filed confirmation of accounts in which no PAN details of the party is there. AO is required to verify this issue.

The assessee has filed the copy of ledger account of expenses. The not made any verification to whom mining installment paid, what is the nature contract and terms and conditions of contract.

The AO has not made any verification of RR expenses. The assessee has filed the copy of ledger account but not filed any supporting documents in support of expenses.

The assessee has paid loans and advances to various persons including partners of the firm. No interest is charged on loan and advances and assessee has not explained the purpose for which loan and advances were given.

In view of the above observation, you are required to file reply with supporting evidence explaining as to why the assessment framed by erstwhile ACIT, Circle 43(1), New Delhi may not be modified or enhanced or cancelled."

4. Later, the Id. PCIT passed order nullifying the order of the Assessing Officer. The Id. PCIT held that the Assessing Officer did not carry out necessary investigations which are *per se* required to verify the correctness of the claim of the assessee.

5. The Id. AR argued that the action of the Id. PCIT cannot be upheld owing to the provisions of the Act and various established judicial pronouncements.

6. On the other hand, the Id. DR submitted her arguments in writing which are as under:

"Sub: Written Submission in the above case- reg.

In this regard, it is humbly submitted that Explanation 2 has been inserted in Section 263 of I.T. Act by Finance Act 2015 w.e.f. 01.06.2015 which is reproduced below:

Explanation 2.—For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer shall be

deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal Commissioner or Commissioner,—

- a) the order is passed without making inquiries or verification which should have been made;*
- b) the order is passed allowing any relief without inquiring into the claim;*
- c) the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or*
- d) the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person.*

In the above case, it is humbly submitted that the following decision may kindly be considered with regard to validity of proceedings u/s 263 of I.T. Act:

1. Surya Jyoti Software Pvt. Ltd. Vs PCIT (I.T.A. No.2158/DEL/2017) ITAT Delhi

Hon'ble ITAT Delhi held that the Pr. CIT has amply demonstrated in his impugned order that this issue was neither enquired into nor was verified by the Assessing Officer once the information and the material in hard copy and in form of CD was made available to him. Hence, assessment order is not only erroneous but also prejudicial to the interest of revenue

2. CIT Vs Ashok Logani (11 taxmann.com 208, 202 Taxman 201, 347 ITR 22)

Hon'ble Delhi High Court held that whether when, on facts, it was found that there was no proper consideration by Assessing Officer to

issue at hand and he left many loose ends, that too in a case where huge cash was found during search most of which was surrendered by giving statement at time of search, though retracted and sought to be explained afterward, it was necessary for Assessing Officer to properly adjudicate upon that issue and assessment order should have at least reflected that he was satisfied with explanation disclosing source of cash found; and that there was a proper and valid retraction.

3. [2022] 143 taxmann.com 173 (Calcutta)- Principal Commissioner of Income-tax vs. Mrs. Premlata Tekriwal- *PCIT invoked revision on ground that once it was established that expenditure was unexplained/bogus, entire amount of bogus expenditure was to be added to income of assessee - It was noted that when Assessing Officer gave an opportunity to assessee to explain transaction, assessee did not produce any document but rather stated that 2 per cent of purported bogus purchase might be added to its income - Thus, it would mean that assessee had accepted allegations against it - Whether since it was established that expenditure was unexplained/bogus, entire amount of bogus expenditure was to be added to income of assessee - Held, yes - Whether, therefore, PCIT was fully justified in exercising revision jurisdiction under section 263 - Held, yes [Para 4] [In favour of revenue]*

4. [2008] 169 Taxman 117 (Punjab 6b Haryana)- Mahavir Prasad vs. Income- tax Officer- *Unexplained investments - Assessment year 1997-98 - Assessee had deposited a sum of Rs. 4 lakhs with a firm and source of such deposit was not verifiable from original return of assessee - In response to notice under section 148, assessee stated that he had received credits from four persons and produced evidence in that regard - Assessing Officer found that credit of Rs. 3.08 lakhs was received from two totally different*

persons 'S' and 'D' and said money was advanced by assessee to said firm along with an amount of Rs. 68,000, which was deposited by him in cash - Therefore, Assessing Officer made addition of Rs. 68,000 to assessee's income under section 69 - Commissioner, acting under section 263, took view that Assessing Officer had wrongly accepted that said amount was received by assessee from 'S' and 'D' because said fact was totally contrary to stand taken by assessee and evidence and material produced by assessee himself to show that said credits were received by him from four persons - Therefore, Commissioner directed Assessing Officer to add a sum of Rs. 3.08 lakhs to income of assessee in respect of credits - Tribunal confirmed order of Commissioner - Whether Tribunal was justified in its action - Held, yes

5. [2016] 69 taxmann.com 170 (SC)- Commissioner of Income-tax, Mumbai vs. Amitabh Bachchan- Section 263 does not require any specific show cause notice detailing specific grounds on which revision of assessment order is tentatively being proposed affecting initiation of exercise in absence thereof or to require commissioner to confine himself to terms of notice and foreclosing consideration of any other issue or question of fact; Commissioner is free to exercise his jurisdiction on consideration of all relevant facts, provided an opportunity of hearing is afforded to assessee to contest facts on basis of which he had exercised revisional jurisdiction."

(Sarita Kumari)

Commissioner of Income Tax(DR)

E Bench, ITAT

7. Heard the arguments of both the parties and perused the material available on record. The issues raised by the Id. PCIT and as examined by the AO during the assessment proceedings are as under:

S. No.	Issue flagged by Id. PCIT	Action of the AO
1.	Loan & Advances - Not examined - held that not even PAN on record	Confirmations filed, ITR, Bank accounts examined, PAN numbers on record
2.	Mining contract charges - Not examined	Paid by the assessee to Director General, Mines & Geology, Haryana Government
3.	RR Charges	Contributed by the assessee to Mines & Minerals Development Restoration and Rehabilitation Fund. Received by Government of Haryana
4.	Reconciliation of TCS	Examined by the Assessing Officer.

8. Thus, we find that due enquiries having been made and adequate replies having been given by the assessee, as explained hereinabove, it is not a case where the AO did not conduct any enquiries, hence the Explanation-2 to Section 263 is not applicable. We also find that Id. PCIT has not detailed as

to how the Assessment Order is erroneous so far as it is prejudicial to the interest of the revenue.

9. With regard to applicability to Explanation-2 to Section 263, reliance is being placed on the following judgments:

"1. Pr. CIT vs. Harikrishan S. Virwani, R/Tax Appeal No. 164 of 2019, dt. 24.06.2019 (Guj-HC)

"4. The CIT (Appeals) invoked Section 263 of the Act on the premise that clause (a) of the Explanation 2 of Section 263 of the Act is applicable and the Assessing Officer had passed the assessment order without making inquiries / verification of the survey report forwarded by the DDIT(Inv), which ought to have been made in this case. The CIT(A) ultimately, took the view that the assessment order for Assessment Year 2013-14 passed under Section 143(3) of the Act dated 28.10.2016 by the Assessing Officer was erroneous in so far as it was prejudicial to the interest of the Revenue. The CIT(A) in exercise of its power under Section 263 of the Act set aside the assessment order with a direction to frame the assessment de-novo.

5. The assessee being dissatisfied with the order passed by the CIT(A) preferred an appeal before the Appellate Tribunal. The Tribunal took the view that the CIT(A) while holding that the assessment order was erroneous in exercise of its power under Section 263 of the Act, ought to have indicated that the conclusion or findings recorded by the Assessing Officer were either not based on correct

facts or the order had been passed in breach of the provisions of the Act or revision made thereunder. The Tribunal took the view that the CIT(A) had not undertaken any such exercise reaching to the conclusion that the assessment order was erroneous and prejudicial to the interest of the Revenue. In short, on the facts and materials on record, the Appellate Tribunal recorded a finding that the PCIT was not correct and justified in issuing notice under Section 263 of the Act and also was not justified in passing the order revising the assessment order. "

2. Narayan Tatu Rane vs. ITO, ITA 2690/Mum/2016, I.T.A. No. 2691/Mum/2016, dt.06.05.2016

"19. The law interpreted by the High Courts makes it clear that the Ld Pr. CIT, before holding an order to be erroneous, should have conducted necessary enquiries or verification in order to show that the finding given by the assessing officer is erroneous, the Ld Pr. CIT should have shown that the view taken by the AO is unsustainable in law. In the instant case, the Ld Pr. CIT has failed to do so and has simply expressed the view that the assessing officer should have conducted enquiry in a particular manner as desired by him. Such a course of action of the Ld Pr. CIT is not in accordance with the mandate of the provisions of sec. 263 of the Act. The Ld Pr. CIT has taken support of the newly inserted Explanation 2(a) to sec. 263 of the Act. Even though there is a doubt as to whether the said explanation, which was inserted by Finance Act 2015 w.e.f. 1.4.2015, would be applicable to the year under

consideration, yet we are of the view that the said Explanation cannot be said to have overridden the law interpreted by Hon'ble Delhi High Court, referred above. If that be the case, then the Ld Pr. CIT can find fault with each and every assessment order, without conducting any enquiry or verification in order to establish that the assessment order is not sustainable in law and order for revision. He can also force the AO to conduct the enquiries in the manner preferred by Ld Pr. CIT, thus prejudicing the independent application of mind of the AO. Definitely, that could not be the intention of the legislature in inserting Explanation 2 to sec. 263 of the Act, since it would lead to unending litigations and there would not be any point of finality in the legal proceedings. The Hon'ble Supreme Court has held in the case of Parashuram Pottery Works Co. Ltd Vs. ITO (1977)(106 ITR 1) that there must be a point of finality in all legal proceedings and the stale issues should not be re-activated beyond a particular stage and the 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.

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 scrutinizing the nature of enquiry or verification carried out by the AO vis-a-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 authorize 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."

10. Reliance is also being placed on the following judgments with regard to absence of finding by the Id. PCIT as to how the order of the Assessing Officer is erroneous so far as it is prejudicial to the interest of the revenue.

1. CIT vs. Kohinoor Foods Ltd., ITA 757/2005, 771/2005, 785/2005, Dt. 16.04. 2019 (Del-HC)
2. Indian Explosives Pvt. Ltd. Vs. PCIT, ITAT/ 85/2022, dt. 03.11.2022 (CAL-HC)

3. CIT vs. Sandeep Kumar Aggarwal, ITA 750/2018, dt. 22.05.2019 (Del-HC)

“7. The Court has heard learned counsel for the parties. Learned counsel for the Revenue has taken the Court through the order of the Pr. CIT in some detail. The Court finds that it only contains the conclusion arrived at by the Pr. CIT that the order of the AO is erroneous but gives no indication that the Pr. CIT undertook any enquiry before arriving at such conclusion. Indeed the jurisdictional requirement of Section 263 of the Act does not appear to have been kept in mind in the present case by the Pr. CIT.”

11. Hence, after considering the entire factum, we hold that the order passed u/s 263 cannot be held to be valid in the eyes of law.

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

Order Pronounced in the Open Court on 02/03/2023.

Sd/-

(Yogesh Kumar US)
Judicial Member

Sd/-

(Dr. B. R. R. Kumar)
Accountant Member

Dated: 02/03/2023

Subodh Kumar, Sr. PS

Copy forwarded to:

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

ASSISTANT REGISTRAR