

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT
BEFORE SHRI PAWAN SINGH, JM & DR. A. L. SAINI, AM

आयकर अपील सं./ITA No.61/SRT/2022

Assessment Year: (2017-18)

(Physical Hearing)

Kanaiya Readymade Stores, 3/199-200, Main Bazar, Opp. Laliya Lake, Olpad, Surat – 394540.	Vs.	The PCIT-1, Surat.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: AALFK1700E		
(Appellant)		(Respondent)
Appellant by	Shri Rasesh Shah, CA	
Respondent by	Shri Ritesh Mishra, CIT(DR)	
Date of Hearing	02/02/2023	
Date of Pronouncement	17/04/2023	

आदेश / ORDER

PER DR. A. L. SAINI, AM:

By way of this appeal, the assessee has challenged the correctness of the order dated 03.03.2022 passed by the Learned Principal Commissioner of Income-Tax (in short “Ld. PCIT”) under section 263 of the Income-Tax Act, 1961 (hereinafter referred to as 'the Act'), for the assessment year 2017-18. Grievances raised by the assessee, which being interconnected, will be taken up together, are as follows:

“1. On the facts and circumstances of the case as well as law on the subject, the learned Pr. CIT has erred in passing the order u/s 263, although the assessment order passed u/s 143(3) of the I.T. Act, 1961 was neither erroneous nor prejudicial to the interest of Revenue.

2. It is therefore prayed that above order passed by Pr. CIT u/s 263 may please be quashed or modified as your honours deem it proper.

3. Appellant craves leave to add, alter or delete any ground(s) either before or in the course of hearing of the appeal.”

2. The relevant material facts, as culled out from the material on record, are as follows. The assessee before us is a Firm and filed its return of income for assessment year (A.Y.) 2017-18 on 12-10-2017, declaring total income of

Rs.30,68,290/-. Thereafter, the case was selected for complete scrutiny for the reason of large cash deposit during demonetization period. The scrutiny assessment under section 143(3) of the Income Tax Act was finalized on 19.12.2019 accepting the returned income.

3. Later on, Ld. PCIT exercised his jurisdiction under section 263 of the Act. On perusal of records, it was noticed by Ld. PCIT that during the year, the assessee firm has made cash deposit of Rs.3,76,00,000/- during the demonetization period in various accounts of the Banks. During the assessment proceeding, the assessee firm contended that source of cash deposited during demonetization period is out of its cash sale made till the Month of October, 2016. Ongoing through the documents submitted by the assessee firm, it was observed by Ld. PCIT that there is inordinate increase in sale in the Month of October, 2016. During the Month of October 2016, the assessee firm claimed total sale of Rs.4,50,29,540/- as against total sales made of Rs.1,08,61,891/- in the Month of October, 2015. During the Month of October, 2016, sale of the assessee firm had increased by 314.56% as against sales made in October, 2015 without adding any other instruments and facilities. As per the submission made during the assessment proceedings, the assessee firm claimed that a new 4 storied air-conditioned show room was opened whereas it was a small shop till year 2015. However, on perusal of the balance sheet for the year under consideration, it was noticed that there is no addition in fixed assets under the head of Building.

4. Further, from the records available, it was noted by Ld. PCIT that there are total sales of Rs.4,50,29 540/- in the Month of October, 2016 as against the total sale of Rs.1,08,61,891/- in the Month of October, 2015. Therefore, Ld. PCIT noted that cash sale in the Months of July and October, 2016 has been increased astronomically @ 128% and 315%, whereas in the other Months either a reasonable growth or a negative growth has been shown. This unusual pattern indicates towards the manipulation of books of accounts and phenomenal rise in cash sale for these Months. Thus, it is clear that the assessee had inflated sales before the demonetization period which was required to be enquired in to depth

but prima facie the Assessing Officer had not carried out the detailed investigation in this matter. Therefore, in view of the above facts, assessee's claim with respect to cash deposit out of cash sales during the demonetization period does not seem tenable.

5. The Ld. PCIT noticed that the assessee firm has incurred salary expenses of Rs.80,44,000/- during the year under consideration, whereas in the immediately preceding assessment year, the salary expenses incurred by the assessee of Rs.29,15,934/-. Therefore, salary expenses increased by 276%, but the AO has not verified the said huge salary expenses made by assessee. It was further noticed that during the course of assessment proceedings, assessee firm has submitted two sets of VAT return, one is filed with registration No.24223100026 and PAN-AALFK1700E dated 04.12.2019 and another is filed with same registration No. 24223100026 and PAN -ABAPB3206G dated 27-09-2017. The VAT return declaration date is just before passing of the assessment order. Thus, how the assessee firm could have filed two VAT returns with different PANs which should have also been enquired by the Assessing Officer. As discussed above, the Assessing Officer passed the order u/s 143(3) of the Act dated 19.12.2019 without making inquiries which should have been made and without application of mind. This makes the order erroneous in so far as it is prejudicial to the interest of the Revenue. Therefore, Ld. PCIT issued a show cause notice bearing DIN ITBA/REV/F/REV1/2021-22/1038639070(1) dated 11.01.2022. In response to the show-cause notice issued dated 11.01.2022, the assessee submitted his reply electronically as well as through TAPAL to the Ld. PCIT on 03.02.2021. Another reply was filed on 28.02.2022 on the issue of two sets of VAT return.

6. After going through the reply of the assessee, the Ld. PCIT observed that assessment order u/s 143(3) of the Income-Tax Act, 1961 dated 19.12.2019 for A.Y. 2017-18 is erroneous in so far it is prejudicial to the interest of revenue. Therefore, Ld. PCIT directed the A.O. to re-frame the assessment after examining the issue discussed above and after making proper enquiries.

7. Aggrieved by the order of the Ld. PCIT, the assessee is in appeal before us.

8. Shri Rasesh Shah, Learned Counsel for the assessee, pleaded that at assessment stage, the Assessing Officer has issued the notice under section 142(1) of the Act and did the sufficient inquiry, about the issue raised by Id PCIT. In response to notice under section 142(1) of the Act, the assessee submitted its reply. The Id PCIT has raised issue stating that there is increase in sales without increase in fixed assets, and there is increase in salary expenses also, which the assessing officer has not verified properly. The Id PCIT has also raised issue that there were two VAT returns filed by the assessee, and the assessing officer did not apply his mind as to why the assessee has filed two VAT returns. The Id Counsel stated that due to Dewali festival the sales has increased in October and November Months. The assessee has recruited more workers to handle the business activity, hence salary expenses have increased. Besides, he also stated that there is no mistake in filing the VAT returns. The assessee has submitted details and documents in respect of these issues before the assessing officer. The assessing officer, after getting all details and evidences in respect of these issues, has applied his mind and then framed the assessment order, therefore, such assessment order framed by the assessing officer should not be erroneous and prejudicial to the interest of Revenue.

9. On the other hand, Learned Departmental Representative (Ld. DR) for the Revenue submitted that it is a matter of cash deposits in the bank. The assessee has not demonstrated and has not explained the reasons that why the sale has increased in a particular month. The assessee has opened new shop but there is no increase in fixed asset in the balance sheet. The salary and electricity expenses have not increased proportionately. Apart from this, there were no proper reply of assessee to substantiate its increase in sale amount without increase in fixed assets. Therefore, assessment order passed by the Assessing Officer is erroneous and prejudicial to the interest of Revenue.

10. We have heard both the parties and carefully gone through the submissions put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the facts of the case including the findings of

the Id. PCIT and other material brought on record. We note that assessee submitted its reply before Assessing Officer in response to show cause notice dated 27.11.2019, which is placed at paper book page nos.38 to 39. The notice issued under section 142(1) of the Act by the AO is placed at paper book page nos.40-42. The other show cause notice, dated 27.11.2019, issued by the Assessing Officer, to conduct enquiry, during assessment proceedings, is placed at paper book page nos.43 to 45. The assessee furnished its reply before the Assessing Officer dated 27.09.2019, in respect of the issues raised by Id PCIT, vide paper book page nos.46 to 51. The other notice issued under section 142(1) of the Act, by the Assessing Officer dated 18.08.2019 is placed at paper book page nos.52 to 58. The assessee submitted its reply in respect of cash transactions and justification of cash deposited in the bank account. The assessee submitted detail of VAT returns filed during the F.Y.2016-17 which is placed at paper book page nos.70 to 71. The Monthly VAT returns for the Month of July and October, filed by the assessee, is placed at paper book page nos.72 to 79. The annual VAT return filed by assessee for F.Y.2016-17, is placed at paper book page nos.80 to 83. The assessee also submitted the acknowledgement of Return of Income and Computation of total income vide paper book page nos.84 to 87. The tax audit report along with audited financial statements were submitted before assessing officer, which is placed at paper book page nos.88 to 107. The ledger account of advertisement expenses for the period 01.04.2016 to 31.03.2017 was furnished by the assessee, before the assessing officer, which is placed at paper book page no.108.

11. The factual position, as narrated above, clearly states that during the assessment proceedings, the assessee has submitted justification of increase in sale, and increase in salary expenses. The assessee also submitted the justification of VAT returns and explanation about fixed assets. The assessee submitted before the assessing officer , the Monthly VAT returns for the Month of July and October, the annual VAT return, the acknowledgement of Return of Income and Computation of total income, tax audit report along with audited Balance Sheet and Profit and Loss account, the ledger account of advertisement expenses, the

justification for increased sale due to Dewali festival etc. Therefore, we note that assessing officer made sufficient enquiry and applied his mind also. Hence, assessment order passed by the assessing officer should not be erroneous and prejudicial to the interest of Revenue.

12. We note that revisional power under section 263 is a *quasi-judicial* power hedged in with limitation and has to be exercised subject to the same and within its scope and ambit. So far as calling from the records and examining the same is concerned, undoubtedly, it is an administrative act, but one examination ‘**to consider**’ or in other words, to form an opinion that the particular order is erroneous in so far as it is prejudicial to the interests of the Revenue, is a quasi-judicial act because on this consideration or opinion the whole-machinery of re-examination and reconsideration of an order of assessment, which has already been concluded and controversy which has been set at rest, is set again in motion. It is an important decision and the same cannot be based upon the whims or caprice of the revising authority. There must be materials available from the records called for by the Id PCIT. This is so because it is well-settled that when exercise of statutory power is depended upon the existence of certain objective facts, the authority before exercising such power must have materials on record to satisfy it in that regard. If the action of the authority is challenged before the court it would be open to the court to examine whether the relevant objective factors were available from the records called for and examined by such authority [CIT v. Gabriel India Ltd., (1993) 203 ITR 108, 116 (Bom)]. We note that in assessee’s case under consideration, the assessing officer not only made initial enquiry but also conducted further enquiry and applied his mind and then after took a plausible view. Thus, the various issues raised by Id PCIT in his revision order under section 263 of the Act, have been thoroughly examined by the assessing officer during the assessment stage. Hence, order passed by the assessing officer should not be erroneous.

13. As per the provisions of section 263(1), the Commissioner may call for and examine the record of any proceedings under the Income-tax Act, and if he

considers that any order passed therein by the AO is erroneous in so far as it is prejudicial to the interest of the revenue, he may pass an order u/s 263. Hon`ble Supreme Court in the case of Malabar Industrial Co. Ltd. v. CIT 243 ITR 83 (SC) has held that if the order is erroneous but it is not prejudicial to the interests of the revenue, the Commissioner cannot exercise the revisional jurisdiction u/s 263(1). Similarly, if the order is not erroneous but is prejudicial to the revenue, the PCIT cannot exercise the revisional jurisdiction. There can be no doubt that the provision cannot be invoked to correct each and every type of mistake or error committed by the assessing officer. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. The phrase 'prejudicial to the interests of the revenue' has to be read in conjunction with an erroneous order passed by the assessing officer. Every loss of revenue as a consequence of the order of the assessing officer cannot be treated as prejudicial to the interests of the revenue. For example, if the A.O. has adopted one of the courses permissible in law and it has resulted in loss of revenue, or where two views are possible and the AO has taken one view with which the PCIT does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the revenue, unless the view taken by the A.O. is unsustainable in law.

14. In the assessee`s case under consideration, the Assessing Officer was satisfied, after making an enquiry and examining the evidence produced by the assessee. The PCIT in his order of Revision does not indicate any doubts in respect of the examination of evidences and documents and to conduct further enquiry by the assessing officer. The satisfaction of the Assessing Officer on the basis of the documents produced is not shown to be erroneous. This is a case where a view has been taken by the Assessing Officer on enquiry. Even if this view, in the opinion of the PCIT is not correct, it would not permit him to exercise power under section 263 of the Act. We note that the Ld. Pr. C.I.T. by invoking his jurisdiction u/s. 263 of the Act is giving another opportunity to the Ld. A.O., which is not permissible. Hon`ble Bombay High Court in the case of Ranka **Jewellers vs. Addl. CIT (328 ITR 148)** relying on the decisions of Hon`ble Supreme Court in the cases of Malabar Industrial Co. Ltd. vs. CIT (supra) and CIT

vs. Max India Ltd. [(2007) 295 ITR 282 (SC)], has held that once the issue was considered by the A.O., the remedy of the revenue could not lie in invoking of the jurisdiction u/s. 263 of the Act. Therefore, the order of the Ld. PCIT was definitely outside the purview of section 263 of the Act. As noted above, the exercise aimed at ascertaining the correct income of the assessee has been fulfilled by the Ld. A.O. by exercising his quasi-judicial functions vis-a-vis passing the assessment order u/s.143(3) of the Act. Therefore, certainly it is not a case wherein adequate enquiries at the assessment stage were not carried out or assessment was made in haste. However, what is an opinion formed as a result of these enquiries and verification of the materials is something which is in exclusive domain of the Assessing Officer, and even if Ld. Pr. Commissioner does not agree with the results of such enquiries, the resultant order cannot be subjected to revision proceedings. For that we rely on the decision of the Coordinate Bench of I.T.A.T., Kolkata in the case of Smt. Juthika Kar vs. ITO [I.T.A. No.1128/Kol/ 2009, dated 16.5.2012], wherein it has been held as under (relevant portion):

“8.....However, what is opinion formed as a result of these enquiries is something which is in exclusive domain of the Assessing Officer, and even if Commissioner has such results of enquiries, the resultant order cannot be subjected to revision proceedings. The conclusions arrived at as a result of enquiries cannot be tinkered with in the revision proceedings. The conclusions being drawn up as a result of enquiry is a highly subjective exercise and as to what is appropriate conclusion is something on which perceptions vary from person to persons. These variations in the perceptions of the Assessing Officer vis-a-vis that of the Commissioner, cannot render an order erroneous and prejudicial to the interest of the revenue.”

15. The aforesaid position gets further strength from the decision of Hon'ble jurisdictional High Court in the case of **CIT vs. J.L. Morrison (India) Ltd. (2014) 366 ITR 593 (Cal)**, the relevant finding of which is applicable to the facts of the present assessee is quoted below :

“85. Whether the assessment order dated March 28, 2008, was passed without application of mind is basically a question of fact. The learned Tribunal has held that the assessment order was not passed without application of mind. The records of the assessment including the order-sheets go to show that heard from time to time. In deciding the question the court has to bear in mind the presumption in law laid down in Section 114 clause (e) of the Evidence Act: “that judicial and official acts have been regularly performed.”

86. Therefore, the court has to start with the presumption that the assessment order dated March 28, 2008, was regularly passed. There is evidence to show that the Assessing Officer had required the assessee to answer 17 questions and to file documents in regard thereto. If the Assessing Officer cannot be shown to have violated any form prescribed for writing an assessment order, it would not be correct to hold that he acted illegally or without applying his mind. ” [Emphasis given] ”

16. It is a settled position in law that provisions of section 263 of the Act do not permit substituting one opinion by another opinion. Therefore, the order of the Ld. Pr. C.I.T. cannot be sustained on the principle of ‘erroneous’ nature of the order of the A.O., as it is not erroneous. Therefore, the impugned order of the PCIT has to be quashed for the reason that order of the AO sought to be revised in the impugned order was neither erroneous nor prejudicial to the interest of the revenue for the reason of any lack of inquiry that the AO ought to have made in the given facts and circumstances of the case. We accordingly quash the order u/s 263 of the Act and allow the appeal of the assessee.

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

Order is pronounced on 17/04/2023 by placing the result on the Notice Board.

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Sd/-
(Dr. A.L. SAINI)
ACCOUNTANT MEMBER

सुरत /Surat

दिनांक/ Date: 17/04/2023

SAMANTA

Copy of the Order forwarded to

1. The Assessee
2. The Respondent
3. The CIT(A)
4. CIT
5. DR/AR, ITAT, Surat
6. Guard File

// True Copy //

By Order

Assistant Registrar/Sr. PS/PS
ITAT, Surat