

रआयकर अपीलीय अधिकरण 'सी' न्यायपीठ चेन्नई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH, CHENNAI

माननीय श्री वी. दुर्गा राव, न्यायिक सदस्य एवं
माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।
BEFORE HON'BLE SHRI V. DURGA RAO, JUDICIAL MEMBER AND
HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं./ ITA No.350/Chny/2022
(निर्धारण वर्ष / Assessment Year: 2017-18)

Prabhu Kanimozhi 228, Vasavi corner, Mysore Trunk Road, Sathyamangalam, Erode – 638 402.	बनाम/ Vs.	Pr. CIT Coimbatore-1.
स्थायी लेखा सं./जीआइ आर सं./PAN/GIR No. ASWPK-8744-K		
(□ पीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओरसे/ Appellant by	:	Shri S. Sridhar (Advocate-Erode) – Ld. AR
प्रत्यर्थी की ओरसे/ Respondent by	:	Shri M. Rajan (CIT) –Ld. DR
सुनवाई की तारीख/ Date of Hearing	:	13-04-2023
घोषणा की तारीख / Date of Pronouncement	:	21-04-2023

आदेश / O R D E R

Manoj Kumar Aggarwal (Accountant Member)

1. By way of this appeal, the assessee assails the validity of revisional jurisdiction u/s. 263 as exercised by Ld. Principal Commissioner of Income Tax, Coimbatore-1 (Pr.CIT) vide order dated 23-03-2022 against the assessment framed by Ld. Assessing Officer (AO) u/s.143(3) of the Act on 30-12-2019. The grounds raised by the assessee read as under:

- 1) The order of the PCIT is bad and erroneous in law and facts and is absolutely against the principles of Natural Justice.
- 2) The PCIT failed to consider the replies/explanations filed by the appellant in proper perspective.
- 3) The PCIT grossly erred in passing the revisionary order u/s.263 even though he was made aware of the fact that the same issues were the subject matter of

appeal before the CIT(A), that the same was heard and that the order was awaited, making the revisionary order void ab initio in view of sec.263 (1)(c) of the Act. [Relying on the jurisdictional Madras High Court decision cited in 409 ITR 567(Mad) and also on 418 ITR 723 (All)].

4) When the Assessing Officer takes one of the two views permissible in law (i.e.,) taxing the stock difference u/s.28, it cannot be treated as erroneous only for the reason that PCIT does not agree with that view. [Reliance is placed on ITA No.204/Ind/2019; 189 Taxman 436 (Del); 194 Taxman 504 (Del); 295 ITR 282 (SC); 243 ITR 83 (SC).]

5) The order of the PCIT is liable to be quashed, for the order passed u/s.263 was to rectify the errors of the Assessing Officer, as mentioned in para 6 of the order and in para 2.2 of the notice dt.07/03/2022, which is not possible under the said section.

6) The PCIT misconstrued the provisions of Explanation 2(a) to sec. 263 of the Act, wherein it is stated that "the order is passed without making inquiries or verification" which is contrary to the findings of the Assessing Officer, where he had stated in his order dt.30/12/2019 that "the submissions of the assessee is considered" which makes the revision order illegal.

7) The order of the PCIT is liable to be cancelled, for the order of the Assessing Officer was neither prima facie erroneous nor prejudicial to the interest of the Revenue. [Reliance is placed on ITA No.204/Ind/2019.]

2. The Ld. AR advanced arguments and submitted that the issues flagged in the revisionary order were already subject matter of adjudication before first appellate authority at the time of revision and therefore, doctrine of merger would apply. Considering the same, the revision would be bad in law.

The Ld. CIT-DR, on the other hand, controverted the arguments of Ld. AR and submitted that full disallowance should have been made by Ld. AO u/s 40A(3). The Ld. AO invoked the provisions wrongly and therefore, the revision was justified. Having heard rival submissions and after perusal of case records, our adjudication would be as under.

Assessment and Revisionary Proceedings

3.1 From the records, it emerges that the assessee was subjected to survey u/s 133A on 03-01-2017 and an assessment was framed for the year u/s 143(3) on 30-12-2019. In the assessment order, Ld. AO made

addition of Rs.202.97 Lacs for discrepancies in stock. The same was considered under the head business income. It was also noted that the assessee purchased old jewellery in cash above prescribed statutory limit of Rs.20,000/- in violation of the provisions of Sec.40A(3) of the Act. The assessee explained that the purchases were nothing but old jewellery acquired by the assessee on exchange basis from the customers. Considering the same, Ld. AO estimated disallowance of 10%. The Ld. AO made another addition u/s 68 on account of chit money received. Finally, the income was assessed at Rs.336.77 Lacs which was subjected to assessee's further appeal before first appellate authority.

3.2 Subsequently upon perusal of cash records, Ld. Pr. CIT invoked revisionary jurisdiction u/s 263 and put the assessee to show-cause notice on 07-03-2022. It was alleged that unaccounted stock found in the survey was to be taxed u/s 69B r.w.s. 115BBE of the Act and the same was erroneously assessed u/s 28. Further, entire disallowance should have been made u/s 40A(3) as against 10% estimated by Ld. AO. Therefore, there was shortfall in the disallowance.

3.3 The assessee assailed the proposed revision, inter-alia, on the ground that the assessee was in further appeal on impugned issues and appeal was filed against the same before first appellate authority on 12-01-2020 and the order was awaited. Accordingly, jurisdiction u/s 263 would be bad in law in terms of clause (c) of Explanation 1 to Sec.263. Reliance was placed on the decision of Hon'ble Madras High Court in the case of **Smt. Renuka Philip vs. ITO (409 ITR 567)** as well as the decision of Hon'ble Allahabad High Court in **CIT vs. VAM Resorts and Hotels Pvt. Ltd. (418 ITR 723)**. However, rejecting the

same, Ld. AO was directed to redo the assessment afresh after verification of the facts pertaining to both the issues. Aggrieved, the assessee is in further appeal before us.

Our findings and Adjudication

4. From the stated facts, it emerges that an assessment was framed based on survey findings. The discrepancy in stock was added under the head business income whereas disallowance u/s 40A(3) for jewellery acquired in cash through exchange was estimated at 10%. It is quite clear that there was clear application of mind on the issues as flagged in the revisionary order. Proceeding further, it could also be seen that the assessee preferred further appeal against both the issues which was pending for adjudication at the time of revision. This being so, the case of the assessee would be covered under Clause (c) of Sec.263(1) which puts a bar on initiation of revision u/s 263 when an appeal is pending before Ld. CIT(A). The cited decision of Hon'ble High Courts clearly supports the case of the assessee.

5. The Hon'ble Madras High Court in the case of **Smt. Renuka Philip vs. ITO (409 ITR 567)** held as under: -

22. The above explanation makes it clear that when the appeal is pending before the Commissioner, the exercise of jurisdiction under Section 263 of the Act is barred. The Commissioner in the order dated 14.03.2012 states that the appeal pertains to the claim made by the assessee under Section 54 of the Act and it has got nothing to do with the order passed by the Assessing Officer under Section 54F of the Act. The said finding rendered by the Commissioner is wholly unsustainable, since the assessee went on appeal against the re-assessment order dated 31.12.2009 stating that his claim for deduction under Section 54 of the Act should be accepted.

23. Therefore, in the process of considering as to what relief the assessee is entitled to, the Assessing Officer held that the assessee is entitled to claim deduction under Section 54F of the Act and assigned certain reasons for that. Therefore, the larger issue was pending before the Commissioner of Appeals, and in such circumstances, the Commissioner could not exercise power under Section 263 of the Act on account of the statutory bar. Therefore, on this ground also, the assumption of jurisdiction under Section 263 of the Act was wholly erroneous.

24. As noticed above, the Assessing Officer while completing the re-assessment proceedings has assigned certain reasons for coming to a conclusion that the assessee is entitled for deduction under Section 54F and not under Section 54 of the Act. This reason assigned by the Assessing Officer has been found by us to show due application of mind. As observed, we cannot expect an Assessing Officer to write a judgment. In such circumstances, the view taken by the Commissioner in his order under Section 263 of the Act has to be termed as a change of opinion, or in other words, the Assessing Officer adopted one of the two views possible and in such circumstances, it cannot be stated that the order is prejudicial to the interest of the Revenue as well as erroneous. For the purpose of exercise of jurisdiction under Section 263 of the Act, the twin tests are to be satisfied and even assuming, the re-assessment order is to be held as erroneous, it cannot be stated to be prejudicial to the interest of Revenue as every erroneous order cannot be subject matter of Revision under Section 263 of the Act. Further more, if the order passed by the Commissioner under Section 263 of the Act as confirmed by the Tribunal is allowed to stand, then the very purpose of the remand order against the original re-assessment proceedings would become a fait accompli.

25. Thus, for the above reasons we are fully satisfied that the assumption of jurisdiction by the Commissioner under Section 263 of the Act was wholly without jurisdiction as the twin tests have not been satisfied and consequently, the order dated 14.03.2012 as confirmed by the Tribunal by order dated 13.07.2012 calls for interference.

26. In the result, the appeal filed by the assessee is allowed and the order passed by the Commissioner dated 14.03.2012, under Section 263 of the Act as confirmed by the Tribunal by order dated 13.07.2012 are set aside, and it is left open to the assessee to pursue her claim before the Assessing Officer. Accordingly, the Substantial Questions of Law are answered in favour of the assessee. Since, the matter has been pending for a quite long number of years and there has been repeated orders of assessment, we direct the Assessing Officer to give effect to the re-assessment order dated 31.12.2009, wherein the Assessing Officer had granted the benefit of Section 54F of the Act to the assessee. No costs.

Following the same, similar ratio has been laid down by Hon'ble Allahabad High Court in **CIT vs. VAM Resorts and Hotels Pvt. Ltd. (418 ITR 723)**. Respectfully following the binding judicial precedent, we would hold that the revision u/s 263 was bad-in-law and the same is therefore, liable to be quashed. We order so.

6. The appeal stand allowed in terms of our above order.

Order pronounced on 21st April, 2023.

Sd/-

(V. DURGA RAO)

न्यायिक सदस्य / JUDICIAL MEMBER

चेन्नई / Chennai; दिनांक / Dated : 21-04-2023

EDN/-

Sd/-

(MANOJ KUMAR AGGARWAL)

लेखक सदस्य / ACCOUNTANT MEMBER

आदेश की प्रतिलिपि □ प्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त/CIT
4. विभागीय प्रतिनिधि/DR
5. गार्ड फाईल/GF