

आयकर अपीलीय अधिकरण न्यायपीठ रायपुर में।
IN THE INCOME TAX APPELLATE TRIBUNAL,
RAIPUR BENCH, RAIPUR

BEFORE SHRI RAVISH SOOD, JUDICIAL MEMBER
AND
SHRI ARUN KHODPIA, ACCOUNTANT MEMBER

आयकर अपील सं. / ITA No. 75/RPR/2022
निर्धारण वर्ष / Assessment Year : 2017-18

Anjay Surana,
Jawahar Chowk,
Durg, Chhatisgarh-491 001
PAN : AJKPS7430F

.....अपीलार्थी / Appellant

बनाम / V/s.

The Income Tax Officer,
Ward-1(1), Bhilai

.....प्रत्यर्थी / Respondent

Assessee by : Shri S.R. Rao, Advocate
Revenue by : Smt. Ila M. Parmar, CIT-DR

सुनवाई की तारीख / Date of Hearing : 13.04.2023

घोषणा की तारीख / Date of Pronouncement : 28.04.2023

आदेश / ORDER**PER RAVISH SOOD, JM:**

The present appeal filed by the assessee is directed against the order passed by the Pr. Commissioner of Income Tax, Raipur-1 (for short 'Pr. CIT') u/s.263 of the Income-tax Act, 1961 (for short 'Act'), dated 02.03.2022, which in turn arises from the order passed by the A.O. u/s.143(3) of the Act dated 18.12.2019 for A.Y. 2017-18. The assessee has assailed the impugned order on the following grounds of appeal before us:

“1) In the facts and circumstances of the case and in law the ld. Principal Commissioner of Income-tax has erred in initiating proceedings under section 263 of the Income-tax Act,1961 without fulfilling the stipulated conditions.

2) In the facts and circumstances of the case and in law the ld. Principal Commissioner of Income-tax has erred in setting aside the assessment order dated 18/12/2019 passed under section 143(3) of the Income-tax Act, 1961 without considering the fact that due enquiry was conducted by Assessing Officer at the time of original assessment.

3) The impugned order is bad in law and on facts.

4) The appellant reserves the right to addition, after or omit all or any of the grounds of appeal in the interest of justice.”

2. Succinctly stated, the original assessment in case of the assessee was framed by the A.O. vide his order passed u/s.143(3) of the Act dated 18.12.2019, wherein the income of the assessee was assessed at Rs.11,81,820/-.

3. After culmination of the assessment proceedings, the Pr. CIT called for the assessment record of the assessee. On a perusal of the record, it was observed by the Pr. CIT that the assessee who was a partner in a partnership firm, viz. M/s. Rajat Builders had a negative opening balance i.e. debit balance of Rs.98,97,438/- in his capital account on 01.04.2016. It was further observed by him that the assessee had thereafter further overdrawn an amount of Rs.34,93,751/- during the year under consideration, as a result whereof his negative/debit capital balance in the firm was increased to (-) Rs.1,29,07,588/- on 31.03.2017. The Pr. CIT considering the cash additions and withdrawals made in the "Capital a/c" of the assessee during the year, was of the view that he had as a matter of fact both raised and repaid in cash loans from/to the partnership firm in violation of the mandate of Sections 269SS and 269T of the Act. It was observed by the Pr. CIT that though the Clause 5 of the partnership deed of the aforesaid firm, i.e. M/s. Rajat Builders contemplated payment of interest @12% per annum in case of "debit balance" in the account of any partner but no such interest was paid by the assessee to the firm. Considering the aforesaid factual position, the Pr. CIT was of the view that the failure on the part of the A.O to carry out adequate enquiries on the aforesaid issue, which revealed a set of transactions carried out by the assessee in clear violation of the mandate of Sections 269SS and 269T of the Act, had rendered his order as erroneous in so far it was prejudicial to the interest of the revenue u/s.263 of the Act.

Accordingly, the Pr. CIT on the basis of his aforesaid observations held the order passed by the A.O as erroneous in so far it was prejudicial to the interest of the revenue, and set-aside the same with a direction to him to pass a fresh assessment order after affording a proper opportunity of hearing to the assessee and examining the aforesaid issue afresh.

4. The assessee being aggrieved with the order passed by the Pr. CIT u/s.263 of the Act dated 02.03.2022 has carried the matter in appeal before us.

5. We have heard the Ld. authorized representatives of both the parties, perused the orders of the lower authorities and the material available on record, as well as considered the judicial pronouncements that have been pressed into service by them to drive home their respective contentions.

6. On a perusal of the record, it transpires that the assessee during the year under consideration had over withdrawn his capital account which in itself as on 01.04.2016 reflected a negative/debit balance of (-) Rs. 98,97,438/-. As observed by the Pr. CIT, as per Clause 5 of the partnership deed of M/s. Rajat Builders in case of any debit balance in the capital account of any partner interest @12% was to be charged on the same. Admittedly, it is a matter of fact borne from record that no interest was paid by the assessee to the aforesaid firm, viz. M/s. Rajat Builders as was mandated by Clause 5 of the partnership deed. The Pr. CIT considering the

aforesaid facts was of the view that the cash over withdrawing and additions made in the capital a/c by the assessee as a partner with the aforesaid firm was in substance raising and repayment of loans in cash by him, i.e in contravention of Sections 269SS and 269T of the Act. On the basis of his aforesaid deliberations, the Pr. CIT was of the view that the assessee for having contravened the prescribed mode of receipt and repayment of loans was liable to be subjected to penalty u/ss. 271D and 271E of the Act. Accordingly, the Pr. CIT was of the view that the failure of the A.O in making necessary enquiries and recording his observations as regards the raising/repayment of loans by the assessee in violation of the prescribed modes as contemplated in Sec. 269SS and 269T of the Act, had rendered his order as erroneous in so far it was prejudicial to the interest of the revenue u/s 263 of the Act.

7. We have given a thoughtful consideration to the observations of the Pr. CIT in the backdrop of the contentions advanced by the ld. authorized representatives of both the parties. Admittedly, it is a matter of fact borne from record that the partnership deed of M/s. Rajat Builders, therein contemplates that in case of any over withdrawing of capital by any of the partner interest @12% would be charged by the firm. As such, it can safely be concluded that as per mutual agreement amongst the partners over withdrawing of capital account was permissible. In our considered view, if the partnership firm had not charged interest @12% on the amount over

withdrawn by the partner as was mandated by the partnership deed, then, it was an infirmity which was supposed to be looked into by the A.O in the hands of the aforesaid partnership firm. We are of a strong conviction that now when the partnership deed permitted over withdrawing of the capital account by a partner, though with a rider that interest @ 12% would be charged on the amount so over withdrawn, then the over withdrawing of capital by the assessee as partner during the year under consideration could not have been held as an interest free loan advanced to him by the partnership firm.

8. Be that as it may, in our considered view no infirmity emerges from the order of the A.O, wherein he in the backdrop of Clause 5 of the partnership deed of the firm, viz. M/s Rajat Builders, which as per the mutual arrangement amongst the partners permitted over withdrawing of capital account, thus, had arrived at a possible and plausible view by not recharacterizing the simpliciter cash over withdrawing/additions made by the assessee as a partner in his "capital a/c" as raising/repayment of loans in contravention of the modes prescribed u/ss. 269SS and 269T of the Act.. As the A.O had arrived at a plausible view as regards the nature of transaction entered into by the assessee with the aforesaid firm, therefore, the same in our considered view could not have been dislodged by the Pr. CIT in exercise of jurisdiction vested with him u/s.263 of the Act.

9. Although we are in agreement with the claim of the Ld. AR that the transaction in question could not have been characterized as advance/repayment of loans inter se the assessee and the partnership firm, but even otherwise we are unable to principally concur with the very basis adopted by the Pr. CIT for assuming jurisdiction u/s. 263 of the Act in the present case. In our considered view, a mere non reference or observation by the A.O about the aforesaid cash transactions entered into by the assessee, a partner with the aforementioned firm, even if the same were assumed to be in violation of Sections 269SS and 269T of the Act would by no means render the assessment order passed by him as erroneous in so far it was prejudicial to the interest of the revenue u/s.263 of the Act. We, say so, for the reason that as per sub-section (2) of both Sections 271D and 271E of the Act, the respective penalties are to be imposed by the Joint Commissioner of Income Tax and not by the A.O. In fact, it is a settled position of law that even the period of limitation for imposing the aforementioned respective penalties as provided in Clause (c) of sub section (1) of Section 275 of the Act is to be worked out by referring to the date on which proceedings for imposition of penalty are initiated by the Joint Commissioner of Income Tax. Our aforesaid view is fortified by the CBDT Circular No. 09/DV/2016, dated 26.04.2016, which in turn relying on the judgment of the Hon'ble High Court of Kerala in the case of Grihalaxmi Vision Vs. CIT, Range 1, Kozhikode, ITA Nos. 83 & 86 of 2014, had clarified

that the penalty proceedings u/ss.271D and 271E are to be initiated and imposed within the prescribed limitation u/s 275(1)(c) by the JCIT. In sum and substance, as per the mandate of law not only the aforementioned penalties are to be imposed but also, are to be initiated within the stipulated time period that is to be computed with reference to the date on which the same had been initiated by the Joint Commissioner of Income Tax. We, thus, on the basis of the aforesaid settled position of law are unable to comprehend that even if the aforementioned cash transactions were to be brought within the meaning of cash loans that were raised/repaid in contravention of the prescribed modes contemplated in Sec. 269SS and Sec.269T of the Act, then how a mere non reference of the same by the A.O in the body of the assessment order would render the assessment order so passed by him as erroneous in so far it was prejudicial to the interest of the revenue u/s.263 of the Act. In case the Pr. CIT was of the view that the aforementioned cash transactions were found to have been carried out in contravention of the provisions of Sections 269SS and 269T of the Act, then the correct recourse available with him was to intimate the same to the Joint Commissioner of Income Tax concerned who remained well within his jurisdiction to have taken proper action in the hands of the assessee. Be that as it may, we are unable to concur with the view taken by the Pr. CIT that a mere failure on the part of the A.O to report the aforesaid cash transaction as having been carried out in contravention of Sections 269SS

and 269T of the Act would render the assessment order so passed by him u/s.143(3) dated 18.12.2019 as erroneous in so far it was prejudicial to the interest of the revenue u/s.263 of the Act.

10. We, thus, in terms of our aforesaid two fold observations not being able to persuade ourselves to subscribe to the view taken by the Pr. CIT, set-aside his order and restore the order passed by the A.O u/s.143(3) dated 18.12.2019. Thus, the **Grounds of appeal No.(s) 1 and 2** raised by the assessee are allowed in terms of our aforesaid observations.

11. **Grounds of appeal No.(s) 3 and 4** being general in nature are dismissed as not pressed.

12. In the result, appeal of the assessee is allowed in terms of our aforesaid observations.

Order pronounced in open court on 28th day of April, 2023.

Sd/-
ARUN KHODPIA
(ACCOUNTANT MEMBER)

Sd/-
RAVISH SOOD
(JUDICIAL MEMBER)

रायपुर/ RAIPUR ; दिनांक / Dated : 28th April, 2023

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आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The Pr. CIT, Raipur-1 (C.G)
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, रायपुर बेंच,

रायपुर / DR, ITAT, Raipur Bench, Raipur.

5. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

निजी सचिव / Private Secretary

आयकर अपीलीय अधिकरण, रायपुर / ITAT, Raipur.