

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "F": NEW DELHI**

**BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER
AND
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER**

**ITA No. 3790/DEL/2018
Assessment Year: 2013-14**

Vishal Nagpal, S/o Sh. Ramesh Nagpal, 4/625, Jaffar Nawaz Pul Subji Mandi, Distt. Saharanpur-247001. PAN- AETPN7519J	<u>Vs</u>	Pr.CIT, Muzaffarnagar.
APPELLANT		RESPONDENT
Assessee represented by	None	
Department represented by	Sh. T. Kipgen, CIT(DR)	
Date of hearing	16.05.2023	
Date of pronouncement	19.05.2023	

ORDER

PER KUL BHARAT, JM:

This appeal, by the assessee, is directed against the order of the Principal Commissioner of Income-tax, Muzaffarnagar, dated 23.03.2018 passed u/s 263 of the Income-tax Act, 1961, pertaining to the assessment year 2013-14. The assessee has raised following grounds of appeal:

"1. The order under section 263 made by the Ld Pr.CIT is bad in law having been made without carrying out any inquiry or verification of

information.

2. The Notice issued and order made under section 263 by Ld. Pr.CIT is bad in law and on facts since the order of the Ld DCIT under section 143(3) is neither erroneous nor prejudicial to the interest of the revenue.

3. The order under section 263 made by the Ld. Pr.CIT is bad in law being cryptic, self contradictory, unreasonable and totally based on conjectures, surmises and wrong facts.

4. The order under section 263 made by the Ld Pr.CIT is bad in Law having not fully considered the submissions of the appellants.

5. The order under section 263 has been made by the Ld. Pr.CIT without proper opportunity of being heard being afforded to the appellant.

6. The appellant craves for leave to add, amend, modify or withdraw any of the grounds of appeal.”

2. Facts, in brief, are that for A.Y. 2013-14 the assessee, an individual, filed his return on 30.09.2013, declaring income at Rs. 23,69,090/-. The AO completed the assessment u/s 143(3) of the Income-tax Act, 1961 (the “Act”) at an income of Rs. 82,22,340/- by making various additions. Subsequently, on examination of records, the Ld. Pr. CIT noticed that the AO had completed the assessment without examining the case properly. Considering the assessment passed by the AO as erroneous and prejudicial to the interest of the Revenue the Ld. Pr. CIT issued notice u/s 263 of the Act to the assessee requiring him to show cause as to why an order u/s 263 of the Act be not passed in his case. Rejecting the submissions furnished on behalf of the assessee, the Ld. Pr. CIT vide impugned order u/s 263 of the Act set aside the assessment with directions to pass fresh assessment order in

accordance with law. Aggrieved, the assessee is in appeal before this Tribunal.

3. At the time of hearing no one attended the proceedings on behalf of the assessee despite issue of notice for hearing. From the record it reveals that no one is attending the proceedings on behalf of the assessee since 26.07.2021. The assessee has not furnished its current address. Under these facts, appeal is taken up for hearing in the absence of the assessee and is being decided on the basis of material available on record.

4. The learned CIT(DR) supported the order of the Ld. Pr. CIT passed u/s 263 of the Act. He submitted that the assessee failed to point out that AO had examined all the issues and the assessment order was not erroneous and prejudicial to the interest of Revenue.

5. We have heard learned DR and perused the material available on record. We find that Ld. Pr. CIT had issued notice u/s 263 of the Act as under:

"On examination of the records, it has been noticed that:

i) There is no survey report placed on file and no query in this regard was raised by the A.O. during the course of assessment proceeding. No discussion has been made by the A.O. regarding survey in the assessment order or office note.

ii) As per profit and loss account the turnover of the assessee during the year was Rs.172.22 Crore, out of which the assessee has shown net profit of Rs. 23.69 Lacs, which is mere 0.14% of total sales. In this regard no explanation has been sought by the A.O.

iii) The copy of survey report and the statements on oath was procured by this office from the A.O. During survey u/s 133A, on 22.8.2013 Sh. Ramesh

Nagpal Prop. M/s Shree Radhe Trading Company, Saharanpur stated that all the sale and purchase shewn in his P & L account were bogus as no such transactions were made by him. As per copy of bank account of HDFC bank of M/s Shree Radhe Trading Company, Saharanpur there were debit entries of Rs. 57.89 crore and credit entries of Rs. 2.36 crore in the name of M/s Shri Krishna Trading Company (assessee) during F.Y. 2012-13. The A.O. was required to go through the survey report and copy of bank account before passing the assessment order in this case. The assessment order has been passed without considering the reasons for selection of case under scrutiny, particularly the findings of the survey.

v) During the assessment proceedings the assessee filed copies of four Civil suits dated 28.4.2014 for non payment of his dues from 4 parties on account of sales of Rs. 167.39 crores. However, as per the P & L account total sales of the assessee was Rs. 172.22 crore of which Rs. 10.85 crore was reflected as debtors in the balance sheet as on 31.3.2013. Thus, the financial statement present a different picture from the one arising from the civil suits. The A. O. failed to examine these aspects.

v) Further, A.O. has made addition of only Rs. 15,000/- on account of unexplained cash deposit, though the account reveals total unexplained cash deposit of Rs. 1.50 Lacs.

3. In view of para 2 above, the assessment order passed by the DCTT, Circle-3, Saharanpur is erroneous and prejudicial to the interest of revenue since the AO has not examined the above mentioned issues and assessed the income at lower amount.

4. You are hereby called upon to show cause as to why an appropriate order u/s 263 of the Income Tax Act, 1961 may not be passed in your case. You may attend my office and furnish your explanation on 4.10.2017 at 11:00 AM either in person or through an authorized representative with documentary evidences in support of your contention alongwith complete books of accounts, bills, vouchers, registers & copies of bank statements etc. as maintained by you".

6. After taking into account the reply furnished by the assessee and the material available on record the Ld. Pr CIT vide order dated 23.03.2018 u/s 263 of the Act set aside the assessment being erroneous and prejudicial to the interest of the

Revenue, with directions to AO to pass fresh assessment order in accordance with law, by observing as under:

“4. As mentioned in notice issued u/s 263 for the year under consideration, it is obvious that during the course of survey operation u/s 133A on 22.8.2013, the statement on oath of Shri Ramesh Nagpal Prop. M/s Shree Radhe Trading Company was recorded, in which he revealed some facts about M/s Shri Krishna Trading Company (the assessee). It was observed that the A.O., during the course of assessment proceedings did not brought on record the copy of survey report and no query in this regard was raised by him. In this regard, the counsel of the assessee vide his written submission has submitted as under:

"To clarify the above position, the assessee had requested your honour to state as to whether any survey was undertaken against the assessee (Sh. Vishal Nagpal) and if yes, then provide the date of survey conducted on the assessee and a copy of survey report of the same may be furnished to the assessee. Since it has been stated that the survey report was not on the file, kindly state the source and manner through which the survey report was procured by your honour. However you honour has chosen not to provide such information or documents to the assessee on the ground that most of the documents have been submitted by him during the course of assessment proceedings. This has kept the assessee in total guess as to when did he provide a survey report in the assessment record himself."

After going through the reply of the counsel of the assessee it is observed that in para 2(iii) of the notice u/s 263 dated 20.9.2017 it is clearly mentioned that during survey u/s 133A, on 22.8.2013 Shri Ramesh Nagpal Prop. M/s Shree Radhey Trading Company has stated that all the sale and purchase shown in his P &L a/c were bogus as no such transactions were made by him. Further, from the bank account of M/s Shree Radhey Trading Company it was noticed that there were debit entries of Rs. 57.89 crore and credit entries of Rs. 2.36 crore in the name of M/s Shri Krishna Trading Company (assessee). Hence, it was observed that the A.O. should have brought on record the copy of survey report and raise the query with regard to the statement of Shri Ramesh Nagpal. The A.O. failed to do so and hence

failed to examine the case on this issue. In view of above, the order passed by the AO has been found to be erroneous in so far as it is prejudicial to the interest of the revenue.

4.1 It is further observed that as per profit and loss account submitted by the assessee, his turnover during the year under consideration was Rs. 172.22 crores, out of which he has shown net profit of Rs. 23.69 lacs, which is mere 0.14% of total sales. The A.O. has not sought any explanation regarding low net profit. In this regard the counsel of the assessee, in response to show cause notice u/s 263, has submitted as under:-

"The assessee had furnished all the books of account along with purchase and sales invoices, Vat returns and Vat audit Report and Tax Audit Report along with audited balance sheet during the course of assessment proceedings along with chart showing G.P. and N.P. ratio. All the aforesaid documents and information had been found to be in order and there was no reason for the Ld. A.O. to assume that the assessee could have earned a higher net profit from business and no such documents submitted by the assessee during the course of assessment proceedings had indicated that he could have earned a higher profit than declared".

From the above reply of the assessee it is clear that he have no explanation with regard to low net profit. The one of the reason of selection of case for scrutiny under CASS was "low net profit or loss shown from large gross receipts". In order to scrutinize the reason for selection of case under scrutiny the A.O., during the course of assessment proceedings, should have asked the assessee to submit the explanation for such a low net profit. From the case record, it is observed neither in the questionnaire issued by the A.O. nor during the course of assessment proceedings no query was raised by him with regard to the low net profit. In this way, the reason for which the case was selected under scrutiny remained unexamined.

4.2 It is further noticed that during survey u/s 133A on 22.08.2013 Sh. Ramesh Nagpal Prop. M/s Shri Radhe Trading Company has stated that all the sale and purchase shown in his P &L a/c were bogus as no such transactions were made by him. Further, from the bank account of M/s Shree Radhey Trading Company it was noticed that there were debit entries of Rs. 57.89 crore • and credit entries of Rs. 2.36 crore in the name of M/s Shri Krishna Trading Company (assessee) during F.Y. 2012-13. In this regard the counsel of the assessee, in response to the show cause notice u/s 263, has submitted as under:-

"Sh. Ramesh Nagpal is a different assessee and is assessed separately and had no authority to comment about the business of the assessee (Vishal Nagpal) therefore, the assessee had failed to understand as to how the survey report, statement of oath and the bank account of Sh. Ramesh Nagpal could have any effect or place in the assessment record of the assessee much less than being furnished by the assessee himself as mentioned by you in your letter dated 06.03.2018. The undersigned has also learnt that separate proceedings u/s 263 is also proposed by your honour in the case of Shri Ramesh Nagpal. It is very surprising to note that while the so called survey report and statement on oath of Shri Ramesh Nagpal has not been mentioned in the notice u/s 263 of Shri Ramesh Nagpal, it is proposed to be used against the assessee who has a different assessment record. When the material against Sh. Ramesh Nagpal is not being used against him, it shows that it is not worthy of being used in his case, how can it be used against a different assessee.

After going through the reply of the assessee and case records it is observed that the assessee has no explanation with regard to the statement of Shri Ramesh Nagpal. It is immaterial whether the statement of Sh. Ramesh Nagpal is being used against him. Sh. Ramesh Nagpal in his statement on oath has clearly stated that all the sale of purchase shown in his P&L account were bogus as no such transactions were made by him. Further from the copy of his bank account it was noticed that there were debit entries of Rs. 57.89 crores and credit entries of Rs. 2.36 crores in the name of M/s Shri Krishna Trading Company (assessee) during F.Y. 2012-13. The A.O. should have passed the assessment order after taking into consideration the statement of Sh. Ramesh Nagpal and after confronting the same to the assessee.

4.3 From the assessment record of the assessee it is also noticed that during the course of assessment proceedings the assessee has filed copies of four civil suits dated 28.4.2014 for nonpayment of his dues from 4 parties on account of sale of Rs. 167.39 crores. However, as the P&L account total sales of the assessee was Rs. 172.22 crore, out of which Rs. 10.85 crore was reflected as debtors in the Balance Sheet as on 31.3.2013. Thus, the financial statement presents a different picture from the one arising from the civil suits. In this regard the counsel of the assessee has submitted as under :-

"It has to be stated that the assessee had filed the copies of audited balance sheet during the course of assessment proceedings. In these balance sheets the list of debtors and creditors had also been

furnished. A look at these list provide that actually sundry debtors were 10.85 crores but in the list of sundry' creditors, there was a debit balance of 157.45 crore as receivable from various parties. These were the balances that were receivables from various parties and the amount of civil suits included the amount of receivables from them. Further the civil suits were filed during the A. Y. 14.15 when the balance of various debtors had changed w.r.t. AY. 2013-14."

After going through the reply of the assessee, it is noticed that the assessee is trying to state that he has to receive Rs. 157.45 crores from his creditors in addition to the amount of Rs. 10.85 crores receivable from sundry debtors. This contention of the assessee is not acceptable as the heads 'Sundry Creditors' and 'Sundry Debtors' are self-explanatory and need not to be redefined. As per accounting principles, the trade payables are always to be shown under the head 'Sundry Creditors' and all trade receivable should be shown under the head 'Sundry debtors'. The contention of the assessee is not acceptable that he has shown trade receivable under the head 'Sundry Creditor'. The A.O., during the course of assessment proceeding, should have raised the queries with regard to such a huge outstanding dues but he failed to notice this fact and not raised any query in this regard.

4.4 It is also noticed that the assessee, during the year under consideration has cash deposited Rs. 1.50 Lacs in his bank account, however, the A.O. has made the additions of Rs. 15,000/- only under this head, In this regard, the counsel of the assessee has submitted as under:-

"The addition of Rs. 15,000/- was made by the Ld. A.O. on the ground that the assessee did not make cash sales during the period in which such cash was deposited in bank. Even if the assessee had deposited an amount of Rs. 1.50 lacs in the bank account all such deposits were duly reflected in the cash book and the cash book does not show any negative balance on a single day."

In this regard, it is observed that the A.O., during the course of the assessment proceedings, observed that the assessee has made cash sale only in the period from 01.01.2013 to 30.01.2013. The A.O. has further observed that the assessee has cash deposited Rs. 15,000/- during the Financial Year and added this amount to the income of the assessee as there was no cash sales during this period. However, as per copy of bank

account, the assessee has cash deposited Rs. 1.50 lacs during the Financial Year. It seems that due to oversight the A.O. has made the additions of Rs. 15,000/- in place of Rs. 1,50,000/-. Therefore, the A.O. is directed to re-examine the quantum of addition during the course of re-assessment proceedings.

In view of above, the order passed by the AO has been found to be erroneous in so far as it is prejudicial to the interest of the revenue.

5.1 It is beyond dispute that, under section **263**, the Commissioner does have the power to set aside the assessment order and send the matter for a fresh assessment if he is satisfied that further enquiry is necessary, and that the order of the AO is prejudicial to the interest of the Revenue [Swarup Vegetable Products Industries Ltd. vs. CIT, (1991) 187 ITR 412, 415-416(AU.)]. In that case, in exercise of its power under section **263**, the Commissioner set aside the assessment order as the same was erroneous and prejudicial to the interests of the revenue because the claim of the assessee was accepted without proper enquiries. The action of the Commissioner was upheld by the High Court. In the facts of Umashankar Rice Mill vs. CIT (1991) 187 ITR 638-39 (Ori), the Tribunal was held justified in upholding the revision order of the Commissioner which was passed by the Commissioner who felt that there should be a further enquiry. Reliance is further placed on the following judgments:

i. *Jagdish Kumar Gulati vs. CIT, 269 ITR 71 (AH.)* in which it is held that while framing the assessment under section 143(3), it is expected from the AO that he will make a detailed inquiry to find out correct income of the assessee and not blindly rely upon the facts placed by the assessee on their face value.

ii. *Gee Vee Enterprises vs. Addl.CIT, 99 ITR 375 (Del.)* in which it was held that it is not necessary for the Commissioner to make further inquiries before canceling the assessment order of the Income Tax Officer. The Commissioner can regard the order as erroneous on the ground that it: the circumstances of the case the Income Tax Officer should have made further inquiries before accepting the statements made by the assessed in his return.

5.2 The Hon'ble Court has further observed as under:-

"The reason is obvious. The position and function of the Income Tax

Officer is very different from that of a civil court. The statements made in a pleading proved by the minimum amount of evidence may be accepted by a civil court in the absence of any rebuttal. The civil court is neutral. It simply gives decision on the basis of the pleading and evidence which comes before it. The Income Tax Officer is not only an adjudicator but also an investigator. He cannot remain passive in the face of a return, which is apparently in order but calls for further inquiry. It is his duty to ascertain the truth of the facts stated in the return when the circumstances of the case are such as to provoke an inquiry. The meaning to be given to the word "erroneous" in section 263 emerges out of this contract. It is because it is incumbent on the Income Tax Officer to further investigate the facts stated in the return when circumstances would make such an inquiry prudent that the word "erroneous" in section 263 includes the failure to make such an inquiry. The order becomes erroneous because such an inquiry has not been made and not because there is anything wrong with the order if all the facts stated therein are assumed to be correct."

6. *On the facts of the present case, it is evident that the AO accepted the version of the assessee without making any inquiry or verification, whereas it is a well settled law that mere **failure** to make inquiries makes an order erroneous. In order that the Commissioner may consider an order to be "erroneous" for the purposes of section 263, the error of law may not be apparent on the fact of the order. The Commissioner may consider an order of the AO to be erroneous not only if it contains some apparent error of reasoning or of law or of fact on the face of it but also because it is a stereotyped order which simply accepts what the assessee has stated in his return and fails to make enquiries which are called for in the circumstances of the case [Rampyari Devi Saraogi vs. CIT (1968) 67 ITR 84 (SC) and Tara Devi Aggarwal vs. CIT, (1973), 88 ITR 323*

6.1. *Reliance is also placed on the following case laws:*

(i) *Duggal & Co. vs. CI 1, (1996) 220 H R 456, 459 (Del.)*

(ii) *Shri Virendra Kumar Gupta Vs CIT in ITA No 2595/D/2009 dated 21/01/2011 (IT AT, Delhi)*

7. *Thus, after careful consideration of material available on records and in view of the abovediscussions, I am of the view that the AO failed to examine the case properly on the issues as discussed above and other issues also which renders the assessment order erroneous in so far as it is prejudicial to the interest of the revenue. Therefore, assessment order passed by the Dy. Commissioner of Income Tax, Circle-3, Saharanpur is set-aside with directions to pass fresh assessment order in accordance with provisions of law.”*

7. A perusal of the above order would reveal that the learned Pr. CIT has categorically pointed out errors in the assessment order. The finding of the learned Pr. CIT is not rebutted by the assessee by placing any contrary evidence. Therefore, in the absence of any material rebutting the finding of the Pr. CIT, we do not see any reason to interfere in the finding of the learned Pr. CIT. Order passed u/s 263 stands affirmed accordingly. Grounds of appeal are rejected.

8. Appeal of the assessee is dismissed.

Order pronounced in open court on 19th May, 2023.

Sd/-
(PRADIP KUMAR KEDIA)
ACCOUNTANT MEMBER
MP

Sd/-
(KUL BHARAT)
JUDICIAL MEMBER

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT, NEW DELHI

