

**IN THE INCOME TAX APPELLATE TRIBUNAL
AMRITSAR BENCH, AMRITSAR**

**BEFORE DR. M. L. MEENA, ACCOUNTANT MEMBER
AND SH. ANIKESH BANERJEE, JUDICIAL MEMBER**

I.T.A. No. 98/Asr/2023
Assessment Year: 2018-19

Itfaq Educational Trust,
1, Delina, Baramulla,
Kashmir (J&K)
[PAN: AAATI 7594K]
(Appellant)

**V. Income Tax Officer (E)(W),
Jammu/National E-Assessment
Centre, Delhi**
(Respondent)

Appellant by Written Submission
Respondent by Sh. Girish Bali, CIT- DR

Date of Hearing : 16.05.2023
Date of Pronouncement : 07.06.2023

ORDER

Per Dr. M. L. Meena, AM:

This appeal has been filed by the assessee against the order of the Ld. Pr. Commissioner of Income Tax (Exemptions), Chandigarh passed u/s 263 of the Act, dated 22.03.2023 in respect of Assessment Year 2018-19.

2. The assessee has raised the following ground of appeal:

- “1. *On the circumstances and facts of the case and in law, the worthy CIT was not justified to hold the order of Assessing officer u/s 143(3) as erroneous and prejudicial to the interests of revenue.*
2. *On the circumstances and facts of the case and in law, the Worthy CIT has erred in holding the fact of non-filing of income tax returns by third parties as ground for setting aside the order of Ld. AO u/s 263.*
3. *On the circumstances and facts of the case and in law, the Worthy CIT has erred in holding that the Ld. ITO did not make necessary enquiries/verification regarding some payments, made by the appellant as the reason for rendering the order erroneous and prejudicial to the interests of revenue. For the record, such payments made by appellant have been made through bank with all supporting documents & evidences furnished to Ld. AO.*
4. *On the circumstances and facts of the case and in law, the Worthy CIT has also erred in holding that the appellant assessee has not proved the genuineness of the payments made to two parties, otherwise through proper banking channels after deducting TDS wherever applicable.*
5. *On the circumstances & facts of the case and in law, the Worthy CIT has totally erred in holding that the payments made through cheques hasn't been confirmed by the banks. This observation by the CIT has been made without looking at records made available from time to time during the course of assessment proceedings by the appellant assessee.*
6. *On the circumstances & facts of the case and in law, the Worthy CIT was not justified in holding the order of AO as erroneous & prejudicial to interests of revenue without himself making any enquiry to satisfy himself that the order of Ld. AO is erroneous and prejudicial to the interests of revenue warranting an action u/s 263 of IT Act.*
7. *The appellant craves leave to add, amend, alter or substitute any other ground necessary to meet ends of justice.”*

3. Briefly the facts as per the records are that the Pr. CIT has raised quarries vide show cause notice issued to the assessee that the Assessing Officer (in short "the AO") has accepted the version of the assessee without making any enquiry/verification whereas the AO was required to examine the genuineness of the expenses regarding the payments made by the assessee trust to M/s Aijaz Transport and M/s Max Consultancy Engineers during the FY 2017-18. In the absence of proper verification, the genuineness of the expenses has not been proved beyond doubt. Therefore, the expenses should have been treated as unexplained expenditure which is deemed to be the income of the assessee trust. Accordingly, he concluded that the AO has failed to examine and decide on the above said facts and the order u/s 143(3) r.w.s. 143(3A) & 143(3B) of the Act has been passed without making the necessary inquiries or verifications that should have been made. Hence, this issue remains unverified and unexamined by the Assessing Officer (AO) in respect of assessment proceedings for Assessment Year 2018-19.

3.1 The Pr. CIT has stated that Show Cause Notice and Reminder have been issued to the assessee through Department's. However, the assessee has either chosen to remain mute or has nothing to say/submit in its defence on the issues mentioned in the Show Cause Notices issued in

the proceedings u/s 263 of the Income-tax Act. Therefore, he has considered the facts available on record and the partial submissions made by the assessee to decide the Matter as under:

4. **HELD:** *I have carefully considered the submissions of the assessee, fact & circumstances of the case and material available on records. The scrutiny assessment in the case of the assessee was completed u/s 143(3) r.w.s. 143(3A) & 143(3B) of the Act on 25/02/2021 by the National e-Assessment Centre, Delhi accepting the returned income.*

4.1 *The issue in the instant case is that the instant case was selected for limited scrutiny assessment for AY 2018-19 under the E-assessment Scheme on the issue of 'Verification of Genuineness of Expenses'. However, it has been gathered from the assessment record that the AO is completely oblivious of the fact that the following payments made by the assessee trust to M/s Aijaz Transport and M/s Max Consultancy Engineers during the FY 2017-18 have not been confirmed by the bank despite the fact the assessee trust has itself admitted that the following payments to parties namely M/s Aijaz Transport & Max consultancy Engineers have been made through A/c payee cheques.*

Payments made to M/s AijaTransport				
<i>Date</i>	<i>Particulars</i>	<i>Voucher Type</i>	<i>Voucher No.</i>	<i>Amount (in Rs.)</i>
10.08.2017	JK Bank SB 6418	Payment	Ch. No. 706076	3,52,900/-
15.09.2017	JK Bank SB 6418	Payment	Ch. No. 472618	4,56,550/-
Total				8,09,450/-
Payments made to M/s Max Consultancy Engineers				
06.12.2017	HDFC Bank (IET A/c)	Payment	Ch. No. 000037	50,000/-
15.12.2017	HDFC Bank (IET A/c)	Payment	Ch. No. 000038	40,000/-

Total	90,000/-
Grand Total	8,99,450/-

However, neither the assessee trust has produced the evidence with regard to the above said payments nor has the AO verified during the course of impugned assessment proceedings. Hence, this aspect has remained unexplained on the part of the assessee as well as has remained unverified on the part of the AO during the course of assessment proceedings for AY 2018-19 **on this aspect of the case.**

4.2.1 As far as Section 263 is concerned, the same section has been enacted to empower the CIT to exercise power of revision and revise any order passed by the Assessing Officer, if two cumulative conditions are satisfied. Firstly, the order sought to be revised should be erroneous and secondly, it should be prejudicial to the interest of the Revenue. The expression "prejudicial to the interest of the Revenue" is of wide import and is not confined to merely loss of tax. **The term "erroneous" means a wrong/incorrect decision deviating from law.** This expression postulates an error which makes an order unsustainable in law. The Assessing Officer is both an investigator and an adjudicator. If the Assessing Officer as an adjudicator decides a question or aspect and makes a wrong assessment which is unsustainable in law, it can be corrected by the Commissioner in exercise of revisionary power. **As an investigator, it is incumbent upon the Assessing Officer to investigate the facts required to be examined and verified to compute the taxable income.**

4.2.2 Further, explanation (2) introduced w.e.f. 1/6/2015 squarely applies in the instant case. It is important to revisit the Clause (a) of Explanation 2 of section 263 of the Act here which provides that an order shall be deemed to be erroneous if, in the opinion of the Pr. CIT/CIT **"the order is passed without making inquiries or verification which should have been made"**.

4.2.3 The words "which should have been made" in clause (a) are very subjective and even if the AO has made some inquiries while passing the order, however, if in the opinion of Pr. CIT/CIT, the AO has not made such inquiries which should have been made, still such an order could be treated as erroneous.

5.1 The Hon'ble Apex Court in the case of **Malabar Industrial Co. Ltd V/s CIT in 243 ITR 83(SC)** has held that a bare reading of section 263 of the Act

makes it clear that the pre-requisite to exercise of jurisdiction by the CIT suo motu under it is that the order of the ITO is erroneous in so far as it is prejudicial to the interest of revenue. The CIT has to be satisfied of twin conditions, namely, (i) the order of AO sought to be revised is erroneous and (ii) it is prejudicial to the interest of revenue. If one of them is absent i.e. if the order of the ITO is erroneous but is not prejudicial to the interest of the revenue or if it is not erroneous but is prejudicial to the interest of revenue, recourse cannot be taken u/s 263 of the Act. It has also held that there can be no doubt that the provision cannot be invoked to correct each and every type of mistake or error committed by the AO; it is only when an order is erroneous that the section shall be attracted. **An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous.** In the same category fall orders passed without applying the principles of natural justice or **without application of mind.** It has also held that the phrase "prejudicial to the interest of revenue" is not an expression of art and is not defined in the Act. Understood in its ordinary meaning it is of wide import and is not confined to loss of tax. The scheme of the Act is to levy and collect tax in accordance with the provisions of the Act and this task is entrusted to the revenue. If **due to an erroneous order of the ITO, the revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to the interests of the revenue.** 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 an order of the Assessing Officer cannot be treated as prejudicial to the interests of the revenue, for example, when an ITO adopts one of the course permissible in law and it has resulted in loss of revenue; or where two views are possible and the ITO has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the revenue unless the view taken by the ITO is unsustainable in law.

5.2 In the instant case, from the perusal of assessment record of AY 2018-19, it is reiterated that the assessee has shown payment of Rs. 8,09,450/- and Rs. 90,000/- made to M/s Aijaz Transport and M/s Max Consultancy Engineers respectively during the year under consideration through account payee cheques but the same has not been confirmed by the banks.

5.3 It is noted that the assessing officer did not make any enquiry/verification with respect to the observations made above. Therefore, it is clear that **these issues remained unexplained on the part of the assessee and unexamined on the part of the assessing officer.** There is incorrect assumption of facts, as

*well as an incorrect application of law that too **without application of mind** which dearly satisfies the requirement of the order being erroneous. The order is prejudicial to Revenue, this is because in the light of these facts, the revenue has lost taxes lawfully payable by the person, hence the AO's order certainly falls in the mischief of being prejudicial to the interest of the revenue."*

4. The appellant contended in the grounds that on the facts and circumstances of the case and in law, the worthy CIT was not justified to hold the order of Assessing officer u/s 143(3) as erroneous and prejudicial to the interests of revenue; that the fact of non-filing of income tax returns by third parties cannot be ground for setting aside the order of Ld. AO u/s 263; that he erred in observing that the Ld. ITO did make necessary enquiries/verification regarding some payments, made by the appellant as the reason for rendering the order erroneous and prejudicial to the interests of revenue as the payments made by appellant have been made through bank as per record and supported with all supporting documents & evidences furnished to Ld. AO; that the Worthy CIT has also erred in holding that the appellant assessee has not proved the genuineness of the payments made to two parties, otherwise through proper banking channels after deducting TDS wherever applicable and that the payments made through cheques hasn't been confirmed by the banks ignoring the facts verifiable from records made available from time to time during the course of assessment proceedings before the AO by the appellant assessee.

Thus, the appellant pleaded that the Worthy CIT was not justified in holding the order of AO as erroneous & prejudicial to interests of revenue without making any enquiry to satisfy himself that the order of Ld. AO is erroneous and prejudicial to the interests of revenue warranting an action u/s 263 of IT Act, with the support of the written arguments filed on record which reads as under:

“Your honour, in view of what has been stated above, setting aside assessee’s assessment u/s 263 will amount to an assault on the principle of finality of assessment’ achieved after he has been assessed u/s 143(3) und will be a travesty of justice. It is accordingly prayed that the proceedings of section 263 initiated against the assessee may please be dropped.

Rejecting the above replies, the worthy CIT(E) has proceeded to issue an order u/s 263 setting aside the order of Ld. AO u/s 143(3). It is this order which the appellant assessee has assailed through this appeal.

Your honors. Brief arguments in support of the appeal are:

1) *That initially the case was selected on the limited issue of ‘Genuineness of expenses’ & two notices u/s 142(1) dated 02-12-2020 & 28-12-2020 along with questionnaires were issued to the appellant assessee. In both these questionnaires, detailed information about payments made to two parties namely Aijaz Ahmad Khan Prop: M/s Aijaz Transport (PAN DBLPK9851E) & M/s Max consultancy Engineers (PAN AAZFM7767K) have been sought for & furnished to Ld. AO (Please refer to notices u/s 142(1) enclosed as Annexure B/2 & C/2 of paper book.). In fact the last notice u/s 142(1) dated 28-12- 2020(Annexure c/2) alludes only to information about payment to these two parties. This means that a detailed & thread bare discussion about payments made to such persons was made & Ld. AO after satisfying himself passed the order u/s 143(3). Now merely because AO, after calling for explanation and satisfying himself, has not mentioned the same in his assessment order would not mean that he had not applied his mind on the specific submissions so as to render his order liable to be*

set-aside u/s 263. Reliance is placed on Vipul Modi v Pr. CIT(2022) 139 Taxmann.com 89 (Mum. Tribunal)-

2) *In the show cause notice issued prior to order u/s 263 (Annexure A of Paper book), it has been alleged by the CIT(E) that the above two parties have not filed their returns of income, (see Annexure A/i-PARA 2) It is respectfully submitted that the law doesn't cast any duty on an assessee to ensure that the parties with whom he has business dealings, file their returns. His only duty is to identify the parties by their address & PAN, pay them by A/c payee cheque (That payments are by cheques is itself acknowledged by worthy CIT(E) by listing bank details against each cheque) & deduct & deposit TDS wherever applicable. All these legal requirements have been complied with. In view of this, it is humbly submitted that the worthy CIT(E) has wrongly assumed the jurisdiction u/s 263 by relying on misplaced notion of law.*

3) *That another point raised by worthy CIT(A) is that the assessee hasn't proved the genuineness of few payments made to these parties through cheques. Your honor, Bills from above parties with their PANs & addresses have been furnished to Ld. AO. Payments have been made through cheques which are duly reflected in bank statements. TDS, wherever applicable has been deducted & deposited with exchequer. In view of this it is beyond comprehension that genuineness of the payments made to parties remains untested.*

4) *Your Honor, on page 2, para 4 of show-cause notice u/s 263(Annexure A/2 of paper book), the worthy CIT(E) has stated that in absence of proper verification of genuineness of above expenses, the Ld. AO should have treated these expenses as unexplained expenditure & added to the income of the trust. This is a bizarre logic to say the least because the expenditures are duly recorded in the books of accounts & by no stretch of imagination can be treated as unexplained expenditure even if for argument sake, it is accepted for a moment that their genuineness was in doubt.*

5) *Your honor, it is well settled that an order can be set-aside u/s 263 only if it is erroneous & prejudicial to the interest of revenue. In the instant case no such thing has been established by worthy CIT(E). She only wants further enquiries by authorities below to dig-out something, which is not permitted in absence of establishment of any error causing prejudice to interests of revenue in the jurisdictional AO's order.*

6) *Last but not least, the ground on which the case of the assessee is selected for scrutiny is limited to 'verification of genuineness of expenses'. Expenses as usually understood mean the revenue expenses debited to P&L /Income & Expenditure A/c. In this category, payment to M/s Max consultancy Engineers (PAN AAZFM7767K) who has been engaged for constructing school building is excluded because any payment to him is not a expense but a capital expenditure. So worthy CIT(E) has no jurisdiction to set aside an assessment order u/s 263 which itself has travelled beyond the mandate of scope of scrutiny.*

To sum up the arguments-

1. *That the issue of payments to two parties was discussed threadbare with Ld. AO- See (Argument N0.1)*
2. *It isn't the duty of assessee to know that payees file their returns (Argument No.2)*
3. *All relevant details of payments to parties submitted to Ld. AO(Arument N0.3)*
4. *Expenses recorded in books of accounts cannot be as unexplained expenditure. (Argument N0.4)*
5. *The twin conditions of the order being erroneous & prejudicial to interest of revenue not established (Argument N0.5)*
6. *Order set-aside includes a point which wasn't covered under grounds of scrutiny. (Argument N0.6)*

In view of above facts & legal position, it is submitted that the order of the worthy CIT(E) u/s 263 may be quashed.

The appellant begs that the appeal may be disposed off accordingly on the basis of the above written arguments."

5. The Ld. DR supported the impugned order. He contended that Pr.CIT has categorically stated that the assessee has either chosen to remain mute or has nothing to say/submitted in its defense on the issues mentioned in the Show Cause Notices issued in the proceedings u/s 263 of the Income-tax Act. Therefore, after considering the facts available on

record, the PCIT hold that the assessing officer did not make any enquiry/verification with respect to expenses claimed and hence, the issues remained unexplained on the part of the assessee and unexamined on the part of the assessing officer. Thus, the Pr. CIT was justified in holding that there was incorrect assumption of facts, and incorrect application of law without application of mind which clearly satisfies the requirement of the section 263 to hold the Assessment order erroneous and prejudicial to the interest of Revenue. He pleaded that the impugned order may be sustained.

6. Heard rival contentions, perused the material on record, impugned order, written submission and case law cited before us. Admittedly, the assessee has not submitted any reply in its defense on the issues mentioned in the Show Cause Notices in the proceedings u/s 263 of the Income-tax Act. Thus, the Pr. CIT was left with the only option to consider the facts available on record, and pass appropriate order. It is seen that the PCIT has observed that the assessing officer did not make any enquiry/verification with respect to expenses and in absence of any compliance from the appellant, to the show cause notice during the proceeding u/s 263 of the act, the Pr. CIT hold the assessment order erroneous and prejudicial to the interest of revenue on account of lack of

enquiry, examination and incorrect application of mind by the AO to the expenses claimed by the appellant.

7. The appellant contended that the Ld. ITO did make necessary enquiries/verification regarding disputed payments, made by the appellant, the reason rendering the order erroneous and prejudicial to the interests of revenue as the payments made by appellant have been made through bank after deducting TDS wherever applicable and that the payments made through cheques has been confirmed by the banks as per record, duly supported with all supporting documents & evidences during the assessment proceedings. However, the facts of furnishing details of expenses claimed after deducting TDS and through banking channel is not discernable either from the Assessment Order or the office records. In our view, the appellant claim that the facts of furnishing information and evidences as regards to payment of expenses by cheque after deducting TDS and duly confirmed by the bank are vital evidences which goes to the root of the matter. In our view, the Worthy CIT was not justified in holding the order of AO as erroneous & prejudicial to interests of revenue without making any enquiry from the bank to bring corroborative evidence on

record to satisfy himself that the order of Ld. AO is erroneous and prejudicial to the interests of revenue u/s 263 of IT Act,

8. Under the facts and circumstances of the case, we consider it deem fit to restore the matter back to the file of the Pr. CIT to adjudicate the matter afresh u/s 263 of the Act, on the issued raised in the show cause notice to hold the Assessment Order erroneous and prejudicial to the interests of revenue, on account of lack of enquiry and examination by the AO, after considering the written submission and evidences filed by the assessee and may be filed before him during the fresh proceedings, after granting sufficient opportunity of being heard to the assessee. No doubt, the appellant assessee shall cooperate in the fresh proceeding by furnishing the required details before the Pr. CIT.

9. Accordingly, the case is restored to the file of the Pr. CIT to adjudicate the matter afresh u/s 263 of the act.

10. In the result, the appeal of the assessee is allowed for statistical purpose.

Order pronounced in the open court on 07.06.2023

Sd/-
(Anikesh Banerjee)
Judicial Member

Sd/-
(Dr. M. L. Meena)
Accountant Member

GP/Sr./P.S.

Copy of the order forwarded to:

- (1) The Appellant
- (2) The Respondent
- (3) The CIT
- (4) The CIT (Appeals)
- (5) The DR, I.T.A.T.

True Copy

By Order