

IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'C' BENCH,
NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No. 1279/DEL/2020
[Assessment Year: 2010-11]

Shri Jagdeep Bhargava
Anand Bhawan, Opp. Jat College
Hisar, Haryana

Vs.

The Pr. C.I.T.
Hisar

PAN : AAEPB 2423 N

[Appellant]

[Respondent]

Date of Hearing : 06.06.2023
Date of Pronouncement : 09.06.2023

Assessee by : Shri Niraj Jain, CA
Shri P.K. Misra, CA

Revenue by : Mohd. Gaysuddin Ansari, CIT-DR

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

This appeal by the assessee is directed towards the order of the PCIT, Hisar dated 12.03.2020 framed u/s 263 of the Income-tax Act, 1961 [hereinafter referred to as 'The Act'].

2. The sum and substance of the grievance of the assessee is that the PCIT erred in assuming jurisdiction under section 263 of the Act and further erred in holding that the assessment order dated 29.12.2017 framed under section 143(3) r.w.s 147 of the Act is erroneous and prejudicial to the interest of the revenue.

3. Representatives of both the sides were heard at length. Case records carefully perused. Judicial decisions relied upon by the rival representatives duly considered.

4. Briefly stated, the facts of the case are that the assessee filed return of income electronically on 27.07.2010 declaring total income of Rs. 41,93,390/- which was processed u/s 143(1) of the Act. Later on, the case of the assessee was reopened u/s 147 of the Act. Reasons for reopening the assessment read as under:

" ... The case was reopened U/s 147 as A.D.LT. (Itw.), Unit2(l), New Delhi has shared information of beneficiaries of accommodation entries received from Sh. Pardeep Kumar Jindal, (Entry Provider). During the post search in the case of Sh. Pardeep Kumar Jindal, New Delhi the entry provider, it has been found that the assessee is among the beneficiaries of the accommodation entries. The assessee has received the following accommodation entries:-

S.No.	Amount	Date Of Entry	Entry provided by
1	35,00,000	26.09.09	Lord Shiva: Investment Trading & Co. Pvt. Ltd.
2	30,00,000	27.09.2009	Euphoria Capital Pvt. Ltd.
3.	30,00,	25.09.2009	At All Times Securities Pvt. Ltd.
4.	30,00,000	29.09.2009	At All Times Securities Pvt. Ltd.

Thus assessee has got accommodation entries amounting to Rs. 1,25,00,000/- and also paid commission @2.5% upon these entries i.e. Rs.3,12,500/- during the F.Y 2009-10 relevant to A.Y. 2010-11. In view of these facts the assessee had total income of Rs.1,28,12,500/- (1,25,00,000+3,12,500) which remained undisclosed to the department....

5. Notice u/s 148 of the Act was issued and served upon the assessee. Reassessment proceedings were initiated, queries were raised and replies were taken on record by the Assessing Officer and after considering the submissions qua the issue, the Assessing Officer concluded as under:

“3.13 In the present case the assessee sold the shares of the companies M/s Quality Foils [India] Pvt. Ltd and M/s Quality Stainless Pvt Ltd, Hisar for Rs. 500/- and Rs. 25/-per share respectively. But the actual fair market value worked out to be Rs. 674/- per share for share of M/s Quality Foils (India) Pvt. Ltd. and Rs. 42.37/- per share for share of M/s Quality Stainless Pvt. Ltd., Hisar as per rule 11UA. Further, the assessee has sold the shares to the companies operated by the accommodation entries provider,

who has admitted in his statement, that he has provided the accommodation entries on commission basis. Hence, the assessee has used the colorable device to evade the tax on the actual long term capital gain which would have been generated on the actual fair market value calculated as per rule 11UA.

3.14 The Hon'ble Apex Court in his decision in the McDowell & Co. Ltd Vs CTO, reported in 1985(3)SCC 230 (SC 5 Members Bench), has held as under:

“ Tax planning may be legitimate if it is within the framework of law , but colorable devices cannot be part of tax planning. It is wrong to say that it is honourable to avoid payment of tax by dubious methods. It is obligation of every citizen to pay tax honestly without resorting to subterfuges”

3.15 In view of the above, it is very much clear that the assessee has used the colorable device to avoid the payment of tax by dubious method, which is also taken under the purview of taxation by inserting section 50CA in the Act by the Finance Act, 2017. Therefore, Long term capital gain on the sale of shares in the present case needs to work out at the actual fair market value of the shares as per rule 11UA, which will increase the capital gain by an amount of Rs. 57,11,481/-. Therefore, said amount of Rs. 57,11,481/- is added to the taxable income of the assessee. Further, I am satisfied that, the assessee has concealed his income, therefore penalty proceedings u/s 271(l)(c) is initiated separately.

[Addition: 57,11,481]”

6. Vide notice dated 31.08.2018, the PCIT assumed jurisdiction conferred upon him by provisions of section 263 of the Act and issued the following notice:

“ To

**Sh. Jagdeep Bhargava,
M/s Argentum Fashion Pvt. Ltd.
Anand Bhawan, Hisar**

**Sub : Notice u/s 263(1) of the Income Tax Act, 1961 for the A.Y
2010-11 Regarding**

Return for the A.Y. 2010-11 was filed by you electronically on 27.07.2010 declaring an income of 41,93,390/-. Subsequently, the case was reopened on the basis of information that you got accommodation entries amounting to Rs. 1,25,00,000/- at commission of 2.5% during the F.Y. 2009-10 relevant to A.Y. 2010-11. The assessment for the year under consideration was completed by the Dy. Commissioner of Income-tax, Circle- Hisar vide order dated 29.12.2017 passed u/s 143(3) of the I.T.Act, 1961 at total income of Rs. 1,00,37,176/-by making an addition of Rs.57,11,418/- u/s 56(2)(vii)(c) of the Act on a/c ofLTCG from sale of shares being higher than the Fair Market Value. Another addition of Rs. 1,32,305/- has also been made by negating the benefit of indexation claimed in respect of short term capital loss.

2. The assessment record has been called for examination. From the perusal of assessment records, it is noticed that the reason for recourse to the proceedings u/s 147 of the Act was that you took an accommodation entry of Rs. 1,25,00,000/-from one Shri Pardeep Kumar Jindal, an entry provider at commission of 2.5%. During the assessment proceedings you admitted to have taken an amount of Rs.35 lakhs and 30 lakhs on 26.09.2009 and 29.09.2009 respectively from M/s Lord Shiv Investment & Trading Co. Pvt. Ltd. And At All

Time Your Security Pvt. Ltd., yet it was explained to be sale proceeds of the shares of Quality Stainless Pvt Ltd. and Quality Foils Pvt (India) Ltd. However, you negated to have taken the balance amount of Rs.60 lakhs out of the aforementioned Rs. 1.25 Crore) contending that you have not taken any sum of Rs.30 lakhs on 25.09.2009 from At All Time Your Security Pvt. Ltd. and Rs. 30 lakhs from Euphoria Capital Pvt. Ltd. on 27.09.2009 and also requested that the position may be got rechecked / verified.'

3. During the assessment proceedings, the AO enquired the position from the ADIT(lnv.)-2(1), New Delhi vide letter No.8012 dated 07.12.2017 and ADIT((lnv.), New Delhi, vide his letter dated 12.12.2017 provided the evidence in respect of the entries of Rs.30 lakhs from M/s Euphoria Capital Pvt. Ltd. on 27.09.2009. However, the AO did not confront the same to you and finalized the assessment proceedings without verification of the issue. The AO should also have obtained the Vijaya Bank A/c statement of M/s Euphoria Capital Pvt. Ltd. / At All Time Your Security Pvt. Ltd. to verify the above entries.

4. In view of the above facts, failure on the part of the Assessing Officer to examine the issues discussed hereinabove have prima facie rendered the assessment order erroneous in so far as it is prejudicial to the interest of revenue. The same is, therefore, required to be suitably amended/modified u/s 263 of the I.T. Act, 1961. You are, therefore, required to show cause as to why an appropriate order u/s 263(1) of the Act should not be passed. In this connection, hearing in your case has been fixed in the office of undersigned at Hisar on 10.10.2018 at 01:00 PM. You may send your written reply so as to reach this office before the stipulated date. In case you wish to avail of the opportunity of being heard in person, you may do so by attending the office of the undersigned personally or through duly authorized representative on the above said date

and time. In case of no reply / non-attendance as per above, it shall be assumed that you do not wish to say anything in the matter and the matter would be decided as per material on record without any further notice / intimation to you

*[Niranjan Kouli]
Pr. Commissioner of Income Tax,
Hisar*

7. The assessee responded to the notice of the PCIT and filed detailed reply explaining the alleged transactions. The detailed reply of the assessee is placed at pages 17 to 20 of the Paper Book.

8. The PCIT being not convinced with the reply of the assessee concluded as under:

"I have carefully considered the submission of the AR of the assessee. The assessee took an accommodation entry of Rs. 1,25,00,000/- from one Shri Pardeep Kumar Jindal, an entry provider at commission of 2.5%. During the assessment proceedings the assessee admitted to have taken an amount of Rs.35 lakhs and 30 lakhs on 26.09.2009 and 29.09.2009 respectively from M/s Lord Shiv Investment & Trading Co. Pvt. Ltd. and At All Time Your Security Pvt. Ltd., yet it was explained to be sale proceeds of the shares of Quality Stainless Pvt. Ltd. and Quality Foils (India) Ltd. However, the assessee negated to have taken the balance amount of Rs.60 lakhs (out of the aforementioned Rs.1.25 Crore) contending that the assessee has not taken any sum of Rs.30 lakhs on 25.09.2009 from At All Time Your Security Pvt. Ltd. and Rs.30 lakhs from Euphoria Capital Pvt. Ltd. on 27.09.2009 and also requested that the 'position may he got rechecked/verified.

During the assessment proceedings, the AO enquired the position from the ADIT(Invt.)-2(I), New Delhi vide letter No.8012 dated 07.12.2017 and ADIT(Invt.), New Delhi, vide his letter dated 12.12.2017 provided the evidence in respect of the entries of Rs.30 lakhs from M/s Euphoria Capital Pvt. Ltd. on 27.09.2009. However, the AO did not confront the same to the assessee and finalized the assessment proceedings without verification of the issue. The AO should also have obtained the Vijaya Bank A/c statement of M/s Euphoria Capital Pvt. Ltd. I At All Time Your Security Pvt. Ltd. to verify the above entries.

From the above discussion, it is apparent that the Assessing Officer passed the assessment order without conducting proper inquiry I verifying the facts of the above said issue. In view of above, I am of the opinion that the AO has not applied his mind and passed the order in mechanical fashion which has resulted into non-appreciation of correct position of law as well as facts. Therefore, the assessment order is held to be erroneous and prejudicial to the interest of revenue in respect of aforesaid issue.

8. The assessment order is, therefore, set aside u/s 263(1) of the Income Tax Act, 1961 to the extent of above discussed issues and restored back to the file of AO for making fresh assessment on the issues discussed above. The AO is directed to make a judicious and logical order as per law after verifying I examining the facts of the case and after providing due opportunity of being heard to the assessee. Of course, any adverse inference made would require recomputation of income and tax thereon.”

9. The above conclusion drawn by the PCIT is in itself against the settled position of law in so far as assumption of jurisdiction u/s 263 of the Act is concerned. As mentioned elsewhere, assessment was reopened and reasons for reopening the assessment mentioned elsewhere were thoroughly scrutinised and examined by the Assessing Officer while framing the impugned assessment order. Therefore, the observations of the PCIT that the Assessing Officer passed assessment order without conducting proper enquiry/verifying the facts is baseless and deserves to be set aside.

10. Specific queries were raised by the Assessing Officer to which specific reply alongwith documentary evidences were furnished by the assessee.

11. We have heard the rival submissions and have perused the relevant material on record. The Hon'ble Supreme Court in Malabar Industrial Co. Ltd., 243 ITR 83, has laid down the following ratio:

"A bare reading of [section 263](#) of the Income-tax Act, 1961, makes it clear that the prerequisite for the exercise of jurisdiction by the Commissioner suo motu under it, is that the order of the Income-tax Officer is erroneous in so far as it is prejudicial to the

interests of the Revenue. The Commissioner has to be satisfied of twin conditions, namely, (i) the order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. If one of them is absent--if the order of the Income-tax Officer is erroneous but is not prejudicial to the Revenue or if it is not erroneous but is prejudicial to the Revenue--recourse cannot be had to [section 263\(1\)](#) of the Act. The provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer, it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous".

12. The Hon'ble Bombay High Court in the case of Gabriel India Ltd 203 ITR 108 has held as under:

"The power of suo motu revision under subsection (1) is in the nature of supervisory jurisdiction and the same can be exercised only if the circumstances specified therein exist. Two circumstances must exist to enable the Commissioner to exercise power of revision under this sub-section, viz., (i) the order is erroneous; (ii) by virtue of the order being erroneous prejudice has been caused to the interests of the Revenue. It has, therefore, to be considered firstly as to when an order can be said to be erroneous. We find that the expressions "erroneous", "erroneous assessment" and "erroneous judgment" have been defined in Black's Law Dictionary. According to the definition, "erroneous"

means "involving error; deviating from the law". "Erroneous assessment" refers to an assessment that deviates from the law and is, therefore, invalid, and is a defect that is jurisdictional in its nature, and does not refer to the judgment of the Assessing Officer in fixing the amount of valuation of the property. Similarly, "erroneous judgment" means "one rendered according to course and practice of court, but contrary to law, upon mistaken view of law; or upon erroneous application of legal principles".

12. From the aforesaid definitions it is clear that an order cannot be termed as erroneous unless it is not in accordance with law. If an Income-tax Officer acting in accordance with law makes a certain assessment, the same cannot be branded as erroneous by the Commissioner simply because, according to him, the order should have been written more elaborately. This section does not visualise a case of substitution of the judgment of the Commissioner for that of the Income-tax Officer, who passed the order unless the decision is held to be erroneous. Cases may be visualised where the Income-tax Officer while making an assessment examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determines the income either by accepting the accounts or by making some estimate himself. The Commissioner, on perusal of the records, may be of the opinion that the estimate made by the officer concerned was on the lower side and left to the Commissioner he would have estimated the income at a figure higher than the one determined by the Income-tax Officer. That would not vest the Commissioner with power to re-examine the accounts and determine the income

himself at a higher figure. It is because the Income-tax Officer has exercised the quasi-judicial power vested in him in accordance with law and arrived at conclusion and such a conclusion cannot be termed to be erroneous simply because the Commissioner does not feel satisfied with the conclusion. It may be said in such a case that in the opinion of the Commissioner the order in question is prejudicial to the interests of the Revenue. But that by itself will not be enough to vest the Commissioner with the power of suo motu revision because the first requirement, viz., that the order is erroneous, is absent. Similarly, if an order is erroneous but not prejudicial to the interests of the Revenue, then also the power of suo motu revision cannot be exercised. Any and every erroneous order cannot be the subject-matter of revision because the second requirement also must be fulfilled. There must be some prima facie material on record to show that tax which was lawfully exigible has not been imposed or that by the application of the relevant statute on an incorrect or incomplete interpretation a lesser tax than what was just has been imposed. We, therefore, hold that in order to exercise power under sub-section (1) of [section 263](#) of the Act there must be material before the Commissioner to consider that the order passed by the Income-tax Officer was erroneous in so far as it is prejudicial to the interests of the Revenue. We have already held what is erroneous. It must be an order which is not in accordance with the law or which has been passed by the Income-tax Officer without making any enquiry in undue haste. We have also held as to what is prejudicial to the interests of the Revenue. An order can be said to be prejudicial to the interests of the Revenue if it is not in accordance with the law in consequence

whereof the lawful revenue due to the State has not been realised or cannot be realised. There must be material available on the record called for by the Commissioner to satisfy him prima facie that the aforesaid two requisites are present. If not, he has no authority to initiate proceedings for revision. Exercise of power of suo motu revision under such circumstances will amount to arbitrary exercise of power.

It is well-settled that when exercise of statutory power is dependent 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 courts to examine whether the relevant objective factors were available from the records called for and examined by such authority.

The Income-tax Officer in this case had made enquiries in regard to the nature of the expenditure incurred by the assessee. The assessee had given detailed explanation in that regard by a letter in writing. All these are part of the record of the case. Evidently, the claim was allowed by the Income-tax Officer on being satisfied with the explanation of the assessee. Such decision of the Income-tax Officer cannot be held to be "erroneous" simply because in his order he did not make an elaborate discussion in that regard. Moreover, in the instant case, the Commissioner himself, even after initiating proceedings for revision and hearing the assessee, could not say that the allowance of the claim of the assessee was

erroneous and that the expenditure was not revenue expenditure but an expenditure of capital nature. He simply asked the Income-tax Officer to re-examine the matter. That, in our opinion, is not permissible. Hence the provisions of section 263 of the Act were not applicable to the instant case and, therefore, the commissioner was not justified in setting aside the assessment order."

13. It is a settled position of law that powers u/s 263 of the Act can be exercised by the Commissioner on satisfaction of twin conditions, i.e., the assessment order should be erroneous and prejudicial to the interest of the Revenue. By 'erroneous' is meant contrary to law. Thus, this power cannot be exercised unless the Commissioner is able to establish that the order of the Assessing Officer is erroneous and prejudicial to the interest of the Revenue. Thus, where there are two possible views and the Assessing Officer has taken one of the possible views, no action to exercise powers of revision can arise, nor can revisional power be exercised for directing a fuller enquiry to find out if the view taken is erroneous. This power of revision can be exercised only where no enquiry, as required under the law, is done. It is not open to enquire in case of inadequate inquiry. Our view is fortified by the decision of Hon'ble High Court of Bombay in the case of CIT vs. Nirav Modi, [2016] 71 Taxmann.com 272 (Bombay).

14. The Hon'ble High Court of Gujarat in the case of [CIT vs. Nirma Chemical Works Ltd.](#) 309 ITR 67 has observed as under:

"if assessment order were to incorporate the reasons for upholding the claim made by an assessee, the result would be an epitome and not an assessment order. In this case, during the assessment proceedings for both the Assessment Years, the Assessing . A.Y. 2009-10 Officer issued a query memo to the assessee, calling upon him to justify the genuineness of the gifts. The Respondent-Assessee responded to the same by giving evidence of the communications received from his father and his sister i.e. the donors of the gifts along with the statement of their Bank accounts. On perusal, the Assessing Officer was satisfied about the creditworthiness/capacity of the donors, the source from where these funds have come and also the creditworthiness/capacity of the donor. Once the Assessing Officer was satisfied with regard to the same, there was no further requirement on the part of the Assessing Officer to disclose his satisfaction in the Assessment Order passed thereon. Thus, this objection on the part of the Revenue cannot be accepted."

29. We find that the Hon'ble Delhi High Court in the case of CIT Vs Sunbeam Auto reported in 332 ITR 167 has held as held as under:

"12. We have considered the rival submissions of the counsel on the other side and have gone through the records. The first issue that arises for our consideration is about the exercise of power by the CIT under s. 263 of the IT Act. As noted above, the submission of learned counsel for the Revenue was that while passing the assessment order, the AO did not consider this aspect specifically whether the expenditure in question was revenue or capital expenditure. This argument predicates on the assessment order, which apparently does not give any reasons while allowing the entire expenditure as revenue expenditure. However, that by itself would not be indicative of the fact that the AO had not applied his mind on the issue. There are judgments galore laying down the principle that the AO in the assessing order is not required to give detailed reason in respect of each and every item of deduction, etc. Therefore, one has to see from the record as to whether there was application of mind before allowing the expenditure in question as revenue expenditure. Learned counsel for the assessee is right in his submission that one has to keep in mind the distinction between "lack of inquiry" and "inadequate inquiry". If there was any inquiry, even inadequate that would not by itself give occasion to the CIT to pass orders under s. 263 of the Act, merely because he has different opinion in the matter. It is only in cases of "lack of inquiry" that such a course of action would be open".

30. Considering the facts of the case in totality from all possible angles, we failed to persuade ourselves to accept the contention of the Id. DR who had strongly supported the findings of the PCIT. We are of the considered view that the order framed u/s 263 of the Act deserves to be set aside and that of the Assessing Officer deserves to be restored. We order accordingly."

15. Considering the facts of the case in hand, in totality, in light of judicial decisions discussed here in above, we set aside the order of the PCIT and restore that of the Assessing Officer dated 29.12.2017 framed under section 143(3)/147 of the Act.

16. In the result, the appeal filed by the assessee in ITA No. 1279/DEL/2020 is allowed.

The order is pronounced in the open court on 09.06.2023.

Sd/-

**[ANUBHAV SHARMA]
JUDICIAL MEMBER**

Sd/-

**[N.K. BILLAIYA]
ACCOUNTANT MEMBER**

Dated: 09th JUNE, 2023.

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	