

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH “E”, MUMBAI**

**BEFORE MS. PADMAVATHY S. (ACCOUNTANT MEMBER)
AND
SHRI RAHUL CHAUDHARY (JUDICIAL MEMBER)**

**I.T.A. No.1218/Mum/2022
(Assessment year 2011-12)**

M/s T C Software Consultancy Pvt Ltd, 30, 2 nd Floor, Nawab Building D.N. Road, Fort, Mumbai-400 001 PAN : AACCT1356K	vs	PCIT-1, Mumbai Room No.330, 3 rd Floor Aayakar Bhawan, M.K. Road Mumbai
APPELLANT		RESPONDENT

Assessee represented by	Shri Akash Kumar
Department represented by	Shri Rakesh Garg – CIT DR

Date of hearing	08-06-2023
Date of pronouncement	21-07-2023

ORDER

PER : MS PADMAVATHY S. (AM)

This appeal of the assessee is against the order of the Principal Commissioner of Income-tax-1, Mumbai (in short, ‘PCIT’) passed under section 263 of the Income-tax Act, 1961 (“the Act”) dated 16/03/2022 for A.Y. 2011-12.

2. The assessee raised the following grounds of appeal:-

“1 . That the Ld. PCIT grossly erred in law and in facts of the case in holding the order passed by Ld. AO u/s 143(3) r.w.s. 254 of the Act to be erroneous and prejudicial to the interest of revenue.

2. That the Ld. PCIT grossly erred in law and in facts of the case in holding that the Ld. AO has not conducted proper enquiries before passing the orders u/s 143(3) r.w.s. 254 of the Act.

3. That the Ld. PCIT grossly erred in facts of the case in holding that the appellent company has not furnished necessary evidence required to substantiate its case.

4. That the order passed by Ld. PCIT u/s 263 of the Act is further illegal and not tenable under the law because of mechanically holding it to be prejudicial to the interest of revenue because the Ld. AO has accepted one of the two possible legal views.”

3. The assessee is a company and filed the return of income for A.Y. 2011-12 declaring a loss of Rs.563/-. The case was selected for scrutiny and the statutory notices were duly served on the assessee. During the proceedings the AO noticed that the assessee has issued 262250 equity shares of face value of Rs.490/- aggregating to Rs.12,99,72,500/-. The assessee out of the amount received has advanced loan of Rs.6,45,03,125/- to one M/s Empower Industries India Ltd. The AO further noticed that the assessee and the Empower group are part of entry provider group i.e. Shirish Chandrakant Shah group. The Assessing Officer called on the assessee to provide the basis for the share premium. The Assessing Officer also issued notice under section 133(6) to parties who have subscribed to the shares of the assessee company. The Assessing Officer concluded the assessment by making an addition under section 68 treating the entire share capital subscribed for rs.13,26,25,000/- as unexplained cash credit. Without prejudice, the Assessing Officer held that even otherwise, the share premium which is not substantiated by the assessee should be brought to tax under section 56(1) of the Act.

4. Aggrieved, the assessee filed appeal before the CIT(A). Before the CIT(A), the assessee submitted that assessee is merely a conduit in the hands of entry provider

Shrirish C Shah and that its accounts along with another 212 companies are used by Shirish C Shah for providing accommodation entries. The assessee also submitted that the amount received towards share premium is subsequently transferred to M/s Empower India Limited which again is controlled by Shirish C Shah and therefore, the assessee is only a conduit company. Accordingly, the assessee prayed that no addition could be made in the hands of assessee. The CIT(A) did not accept the submissions of the assessee and upheld the addition on the ground that the assessee has not discharged the onus of providing proper explanation and substantiation of the claim made.

5. The assessee preferred further appeal before the Tribunal. The assessee prayed before the Tribunal for restoration of the case back to the Assessing Officer for the reason that the co-ordinate bench in the case of Shirish C Shah has restored the issue back to Assessing Officer to look into the matter and assess the income in the right hand. The ITAT remanded the matter back to the Assessing Officer with the following observations where the Tribunal relied on the decision of co-ordinate bench in the case of M/s Nishottam Traders Pvt Ltd in ITA No.6874/Mum/2004:-

“5. It is clear from the above that, the Bench has observed that it has to be ascertained in whose hand the income is to be assessed whether in the hands of Shirish Chandrakant Shah or the assessee and it was also observed that the assessee company is only providing the accommodation entries whereas the real beneficiary of the of the income from the said transactions was Shirish Chandrakant Shah. We, therefore, respectfully following the ratio laid down by the co-ordinate bench of the Tribunal, restore the issue back to the file of the AO with the direction to decide the same for denovo after affording a reasonable opportunity to the assessee.”

6. During the remanded proceedings, the Assessing Officer called on the assessee to furnish the details by issue of notice under section 142(1) which is extracted below:-

“The Hon'ble ITAT vide order dated 28.01.2018 set aside the order of the Ld. CIT(A) and restored the matter to the file of the AC) with the direction to decide the issue after affording a reasonable opportunity of being heard. In this regard you are requested to furnish the following details:-

a) In your case the Hon'ble ITAT has set aside the issue observing that the co-ordinate bench of the Tribunal in the case of the M/s. Nishottam Traders Pvt. Ltd. has observed that it has to be ascertained in whose hand the income is to be assessed, whether in the hands of Shri Shirish Chandrakant Shah or the assessee. Since you have claimed before the Hon'ble ITAT that your case is similar to the issue involved in the case of M/s. Nishottam Traders Pvt. Ltd You are requested to provide the evidences to prove that you were used as a conduit for providing accommodation entries and the real beneficial' }" of income from the transaction was Shri Shirish Chandrakant Shah.

b) If the funds received by as share capital/share application money and routed through you to the beneficiaries, please provide the name of the ultimate beneficiaries.

c) Without prejudice, if your contention is that you have been used as a conduit, please explain as to why a commission of 1% of the entry provided by you should not be added to the total income.”

7. In response, the assessee filed the details by submitting that –

- (i) The assessee is being used for routing of funds to M/s Empower India Ltd by Mr. Shirish Shah;
- (ii) Out of the share capital received Rs.6,45,03,125/- is advanced as loan to M/s Empower India Ltd at the instruction of Shirish Shah;
- (iii) The assessee and M/s Empower India Ltd operated out o the same premises and have same directors.
- (iv) Copies of letters issued by DDIT(Inv) Unit IV(4), Mumbai to various banks to prohibit transactions in a particular group of companies;
- (v) The CIT(A)-48, Mumbai, in the case of M/s Empower India Ltd has given a finding that the share capital & premium are part of layering process of entries through bank account of different companies;
- (vi) The CIT in M/s Empower India Ltd has held that the amount received as part of accommodation entries cannot be taxed under section 68.
- (vii) Reconciliation between the amount credited to the bank account of the assessee and the seized material by Shirish C Shah.

- (viii) The list of ultimate beneficiaries as furnished before the DCIT Central Circle-2(2), by M/s Empower India Ltd;
- (ix) The assessment of commission is already taxed on estimation basis in the hands of Shirish C Shah and that taxing again in assessee's hands would amount to double taxation.

8. The assessing Officer concluded the assessment under section 143(3) read with section 254 in which he has estimated the commission @1% on the entire amount of share capital and accordingly made an addition of Rs.13,06,255/-. The relevant observations of the Assessing Officer are extracted below:-

“4. From the details filed by the assessee, it is seen that the money received by the assessee company towards issue of share capital was immediately transferred to M/s. Empower India Limited. Also, it is pertinent to note that the assessee company is the group company of M/s. Empower Industries Limited. As the entire share capital received by the assessee company was deployed in M/s. Empower India Limited, the Ld. CIT(A) in the case of M/s. Empower India Limited has treated the assessee company as the conduit company and he further held that M/s. Empower India Limited was being used by Sh. Shirish C Shah for providing accommodation entries. Also from the reconciliation sheet submitted by the assessee of the amounts credited to its bank account and seized material of Sh. Shirish Shah during the search proceedings, it becomes evident that the assessee company is a conduit company monitored by Sh. Shirish C. Shah with the help of Sh. Devang Master who is the director in the said company.

5. On going through the details filed by the assessee, it is noticed that the assessee stated that as a part of layering process, the amount received by the assessee company was first transferred to M/s. Empower India Limited and thereafter transferred to the beneficiaries. Also, the assessee contended that the estimated commission income for such layering of funds has already been assessed as income of Shri Shirish C. Shah on actual basis.

From the above, it is apparent that the assessee company was a participant of the pernicious practice of layering of funds for providing accommodation entries undertaken by Sh. Shirish C Shah. Also, it is widely known that in this stated practice of providing accommodation entries, the commission ranges between

1% to 2% and since several stakeholders/layerings are involved, I therefore, estimate the commission income at Rs.13,26,255/-, being 1% of the money routed through the assessee company's account and add the same to the assessee's total income. Penalty proceedings under section 271(1)(c) r.w. Explanation 1 thereto of the Income tax Act, 1961 are hereby initiated on this issue of concealing the particulars of the income."

9. Subsequently the PCIT has observed that the Assessing Officer has computed the assessment without proper verification of facts & without correct appreciation of law and accordingly invoked the revisionary provisions by issuing a show cause notice under section 263. The assessee submitted before the PCIT that the assessee has furnished all the relevant details before the Assessing Officer to substantiate that the assessee was only a conduit company and that the Assessing Officer has after considering the submissions has applied his mind while deciding to tax 1% towards commission on the accommodation entries. Accordingly, the assessee submitted that there is no error in the order of the Assessing Officer which is prejudicial to the interest of the revenue.

10. The PCIT after considering the submissions of the Assessing Officer held that –

6. I have carefully considered the submissions made by the assessee and have also gone through the facts of the case. I have also perused the relevant assessment records. The main contention of the assessee is that the cash credits received by the assessee in its books of account should not be added to the Total Income since it is a conduit company. In order to establish itself as a conduit company, the assessee during assessment proceedings u/s 143(3) read with section 254, had relied on the order of Ld. CIT(A)-48 in the case of M/s Empower India Pvt. Ltd. The assessee has further stated that all the necessary enquires had been conducted by the AO during assessment proceedings based on which it was decided by the AO that the assessee is in fact a conduit company.

7. *However, it is observed that assessee has made no independent submissions to support its claim of conduit company and has relied on the order of Ld. CIT(AJ-48 in the case of Empower India Pvt. Ltd. to prove itself as a conduit company. The AO also during assessment proceedings has merely accepted the claim of the assessee without conducting any independent enquiry and verification regarding how the assessee is a conduit company and if it is a conduit company then who is the ultimate beneficiary of the transactions being effected by the assessee. The assessee has stated that such cash credits have already been taxed in the hands of Shri Shirish C. Shah. But no such evidence is submitted and also no enquiry has been made by the AO to verify the claims of the assessee that whether such cash credits to the tune of Rs. 13,26,25,000/- have actually been assessed in the hands of the beneficiary of accommodation entries.*

7.1 *By claiming itself to be a conduit company, assessee admits that it has no explanation for the identity of creditors, genuineness of the transactions and creditworthiness of the creditors. Unless the sum of Rs. 13,26,25,000/- is assessed in the hands of the beneficiary^ cannot be allowed to remain unassessed in the hands of the assessee by merely claiming itself to be a conduit company and without admission of benefits by the ultimate beneficiary. The failure on the part of the enquiries is erroneous and prejudicial to the interests of Revenue.*

8. *Without prejudice to the above, it is observed that in the Assessment Order, the Assessing Officer has taxed the receipts in the hands of the assessee at the rate of 1%. The Assessing Officer in his order dated 24-10-3019, has stated that generally the commission ranges between 1% to 2% for pass-through entities as his rationale for estimating the Total Income of the assessee. However, the Assessing Officer should have conducted enquiry to verify the commission income received by the assessee instead of estimating the same without any enquiry. The failure on the part of the Assessing Officer to carry out the necessary enquiries is erroneous and prejudicial to the interests of Revenue.*

9. *As per the amended law, Explanation 2 clause (a) below section 263(1) of the Act, any assessment made without conducting requisite enquiry and verification by the AO is erroneous in so far as it is prejudicial to the interests of Revenue. Even under pre-amended law, the Honourable Supreme Court in the case of Smt. Tara Devi Agarwal [88 ITR 0323] and also Rampyari Devi Saraogi [67 ITR 0084] have held that any assessment completed without necessary enquiries as warranted on facts of the case is erroneous in so far as it is prejudicial to the interests of Revenue.*

9.1 *Hence, considering the facts in totality, I am of the considered opinion that the AO in the instant case has failed to conduct all the necessary enquiries*

as warranted on facts of the case ad as discussed in the order supra. Hence the assessment order is erroneous in so far as it is prejudicial to the interests of Revenue. Accordingly, the same is set aside.

9.2 The AO is hereby directed to reframe the assessment order denovo after conducting all the necessary enquiries and verifications as warranted on the facts of the case and also after giving due opportunity of being heard to the assessee before passing the assessment order.”

11. The Ld.AR reiterated the submission made before the lower authorities. The Ld.AR drew our attention to the details submitted before the AO to submit that the assessee has clearly established the fact that assessee conduit company for providing accommodation entries. The Ld.AR also submitted that the list of ultimate beneficiaries to whom funds are transferred from M/s. Empower India Limited was also submitted which the Assessing Officer has recorded in his order as a finding to state that the assessee is a conduit of layering of funds. The Ld.AR also argued that the reconciliation statement submitted before the AO clearly explains the source of receiving funds by the assessee. Thus, the Ld.AR summarized that the Assessing Officer has applied his mind and took a conscious call to assess only the commission income in the hands of the assessee. The ld AR further relied on many judgments in this regard.

12. The Ld.DR, on the other hand, submitted that the direction of the Tribunal has not been properly followed by the Assessing Officer whereby the Tribunal remitted the issue with a direction to verify in whose hands the income is to be assessed whether in the hands of the assessee or Shirish C Shah. The Ld.DR also submitted that it is important for the assessee to explain the source which the assessee did not do. The Ld.DR further submitted that Assessing Officer did not conduct any enquiry but has

simply accepted the submissions of the assessee and, therefore, the PCIT has rightly invoked the provisions of Explanation 2 to section 263.

13. We heard the parties and perused the material on record. In the remand proceedings, the Assessing Officer called on the assessee to furnish relevant details to prove that the assessee is being used as a conduit and the real beneficiary of the income from the transaction is Shri Shirish C Shah and also the name of the ultimate beneficiary. The Assessing Officer based on the details submitted, accepted the contention of the assessee that it is a conduit for layering of funds and accordingly added 1% of impugned accommodation entry as income of the assessee. From the perusal of the details submitted by the assessee it is noticed that the assessee has submitted a reconciliation linking the amount received as share capital to an excel sheet (of party .xls) seized during the search of Shri Shirish C Shah. The extract of the reconciliation is given below:-

Dat	Bank	Amount received	File	Sheet	Row
27/11/2010	ING Vysya Bank – 561011013909	50,00,000	otparty.xls	Satish Saraf	3638
27/11/2010	ING Vysya Bank – 561011013909	50,00,000	otparty.xls	Satish Saraf	3639
27/11/2010	ING Vysya Bank – 561011013909	50,00,000	otparty.xls	Satish Saraf	3640
29/11/2010	ING Vysya Bank – 561011013909	50,00,000	otparty.xls	Satish Saraf	3641
30/11/2010	ING Vysya Bank – 561011013909	3,00,00,000	Ac3.xls	Aurash Bora	200
30/11/2010	ING Vysya Bank – 561011013909	50,00,000	otparty.xls	Satish Saraf	3689
30/11/2010	ING Vysya Bank – 561011013909	50,00,000	otparty.xls	Satish Saraf	3690
30/11/2010	ING Vysya Bank – 561011013909	50,00,000	otparty.xls	Satish Saraf	3692
30/11/2010	ING Vysya Bank –	31,25,000	otparty.xls	Satish Saraf	3691

	561011013909					
30/11/2010	ING Vysya Bank – 561011013909	2,15,00,000	otparty.xls	Shirish Shah		

14. The Assessing Officer from the perusal of above statement has concluded that the assessee is a conduit company monitored by Shirish C Shah. It is noticed that how the Assessing Officer has come to such conclusion by the mere submission of above table is not coming out clearly from the assessment order. The assessee in the above table is referring to the various dates in the bank statement and also certain lines in the excel sheet seized. However, there is no evidence to show that the Assessing Officer had called for any further details such as bank statement or there is no explanation as to how the same reconciles to the excel sheet seized. It is relevant here to mention that the Assessing Officer in the original proceedings under section 143(3) had issued notices under section 133(6) to check the source of the capital contribution and had received a reply from the parties that they had not made any capital contribution [para 4.3.1, page 2 of AO's order under section 143(3)]. Given this, in our considered view, the Assessing Officer in the remanded proceedings ought to have looked into further details based on the reconciliation to verify how each line in the bank statement relates to the seized material of Shirish C Shah. The reconciliation statement as it is does not establish the fact that the source for the capital contribution is from material seized without further enquiry or verification of details. Therefore we are inclined to agree with the finding of the PCIT that there is lack of enquiry on the part of the Assessing Officer as far as one leg of the transaction is concerned where assessee is claimed to be the conduit.

15. Now coming to the other leg of the transaction i.e. the share capital received transferred to M/s Empower India Ltd from where it is transferred to the ultimate beneficiary. In this regard we notice that the assessee has provided a list of names as

has been submitted during the appellate proceedings of M/s Empower India Ltd. In this regard, it is pertinent to note that the list has names and amounts of various parties without any details as to how the same is funded by Empower India Ltd. The assessee has in his submissions before the Assessing Officer submitted that out of the share capital received an amount of Rs.6,45,03,125/- is given as loan to M/s Empower India Ltd. However it is noticed that the amount mentioned against the list of beneficiaries submitted by the assessee before the Assessing officer totals to much more than what is claimed to be lent as loan by the assessee and there is nothing in the list that establishes the fact that the amount given is out of funds sourced from the assessee in the form of loan to M/s Empower India Ltd. The assessment order is also not clear as to how the assessing officer got convinced that the money given as loan is used by M/s Empower India Ltd to give it to the ultimate beneficiary without verifying any further details but only with the list of beneficiaries. Therefore we see merit in the findings of the PCIT which is extracted in the earlier part of this order where he has observed that the Assessing Officer has merely relied on the submissions of the assessee and the assessment done in the hands of M/s Empower India Ltd without conducting any independent enquiry of any of the facts.

16. The PCIT in the given case has exercised the revisionary powers by invoking Explanation (2) to section 263. The said explanation was inserted by way of the Finance Act, 2015 with effect from June 01, 2015 and reads as follows:-

“Explanation 2.—For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer [or the Transfer Pricing Officer, as the case may be,] shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal 95[Chief Commissioner or Chief Commissioner or Principal] Commissioner or Commissioner,—

(a) the order is passed without making inquiries or verification which should have been made;

- (b) the order is passed allowing any relief without inquiring into the claim;*
- (c) the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or*
- (d) the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person.”*

17. The phrase ‘should have been done’ as provided in the newly inserted Explanation means the verification/ enquiry which ought to have been done. In other words, as per clause (a) to Explanation to section 263, the order passed without making enquiries or verification **which should have been made** is erroneous insofar as it is prejudicial to the interests of the revenue. It may be said that the Income Tax Act nowhere provides the exact modalities to be followed to verify a specific claim made by the assessee and it is the prerogative of the Assessing Officer to decide the extent of verification. However, it is necessary for the Assessing Officer to record the extent of verification carried out by him and to record that he has taken a considered view on the matter by proper application of mind while allowing the claim of the assessee in the matter. The ld AR argued that it is not necessary for the assessing officer to state explicitly so long as he is satisfied on the strength of the details furnished by the assessee. However we are unable to agree with this contention. It is important to bear in mind that a relief which is required to be given to any litigant in any given case should be commensurate to the gravity of the situation, to the needs and necessity of the situation and warranting such relief and with reference to the governing statutory provisions. We are also unable to appreciate the submission that the details as called for had been placed before the assessing officer should lead to the conclusion that he has applied his mind merely for the reason that Assessing Officer has stated in the assessment order that the submissions of the assessee have been verified. The Assessing Officer performs a quasi-judicial function and the reasons for his conclusions and

findings should be forthcoming in the assessment order and every conclusion and finding by the Assessing officer should be supported by reasons. It is the duty of the Assessing Officer to ascertain the truth of the facts stated / submitted by the assessee especially when the circumstances of the case are such as to provoke an inquiry and the word "erroneous" in section 263 includes the failure to make such an inquiry. The decisions relied on by the Id AR cannot be directly applied to assessee's case since the findings are based on facts specific to each case. Further the PCIT while invoking the explanation has given a clear finding with regard to the lack of enquiry on the part of the assessing officer and has accordingly held the order to erroneous and prejudicial to the interest of the revenue. We therefore see no infirmity in the action of the PCIT.

18. It is an admitted fact that Shirish Shah has been using more than one entity to do the layering by routing the transaction through these entities and assessee has been part of the whole scam. Therefore the Hon'ble Tribunal remitted the issue in order to ascertain in whose hands the income needs to be assessed i.e. whether in the hands of Shirish Chandrakant Shah or the assessee. There was no direction given by the Tribunal to assess only the commission as income in case the assessee is found to be only a conduit. Therefore, without prejudice to our earlier findings that the Assessing Officer has not made proper enquiry before concluding that the assessee is only a conduit entity, we are of the view that the Assessing Officer has not followed the directions of the Tribunal correctly. From the perusal of records, it is noticed that the Assessing Officer has issued only one notice under section 142(1) calling for details and based on the details submitted (which is elaborately discussed herein above) concluded the assessment accepting that the assessee is only a conduit without calling for any other documents or evidences. The Assessing Officer has not carried out any enquiry with regard to in whose hands the income is to be assessed and no finding recorded as per the

directions of the Tribunal to hold in whose hands the income is to be assessed. The Assessing Officer has recorded that the estimated commission is already taxed as income in the hands of Shirish Shah based on the submissions of the assessee whereas the direction was to decide in whose hands the entire income is to be assessed not just commission. Even in the decision relied on by the Tribunal i.e.M/s.Nishottam Traders Pvt Ltd (supra) while remitting the case, the issue was sent back to the Assessing Officer to decide in whose hands income is to be assessed and there is no direction about taxing only the commission income. This would mean that the Assessing Officer has travelled beyond the directions of the Tribunal and proceeded to assess 1% of the entire transaction value as commission income in the hands of the assessee. Therefore from this perspective also, we are of the considered view that the order of the Assessing Officer is erroneous and prejudicial to the interest of the revenue.

19. In view of the above discussion and considering the facts of the present case we hold that the PCIT was justified in assuming the jurisdiction by invoking explanation (2) to section/s 263 of the Act and setting aside the assessment order.

20. In the result, the appeal filed by the assessee is dismissed.

Order pronounced in the open court on 21/07/2023.

(RAHUL CHAUDHARY)	(PADMAVATHY S)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dt : 21st July, 2023

Pavanan

प्रतिलिपि अग्रेषित Copy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त CIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT,
Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

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**Asstt. Registrar / Senior Private Secretary
ITAT, Mumbai**