

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT  
BEFORE SHRI PAWAN SINGH, JM & DR. A. L. SAINI, AM

आयकरअपीलसं./ITA No.21/SRT/2021

(निर्धारणवर्ष / Assessment Year: (2012-13)

(Virtual Court Hearing)

M/s Swastik Corporation A-305, Surya Co-Operative Housing Society Ltd., Plot No.61, Vapi-396195	Vs.	The Principal Commissioner of Income Tax-3, Room No.301, 3 <sup>rd</sup> Floor, Palak Arcade, Pali Hill Shanti Nagar, Tithal Road,Valsad-396001
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: ABTFS 1028 G		
अपीलार्थी/ Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से /Assessee by	Shri Hardik Vora, Advocate
राजस्व की ओर से /Respondent by	Shri S.M. Keshkamat, CIT-DR
सुनवाईकीतारीख/Date of Hearing	03.07.2023
घोषणाकीतारीख/Date of Pronouncement	31.07.2023

**आदेश / ORDER**

**PER DR. A. L. SAINI, AM:**

By way of this appeal, the assessee- appellant has called into question correctness of impugned order passed by the Learned Principal Commissioner of Income Tax under section 263 of the Income Tax Act, 1961, in the matter of assessment under section 144 r.w.s.147 of the Act for the assessment year 2012-13, on the following grounds:

*“1. On the facts and circumstances of the case as well as law on the subject, the revision order passed by the learned Principal Commissioner of Income Tax u/s 263 of the Act for assessment year 2012-13 is erroneous contrary to law, equity, facts and circumstances of the present case and the materials available on record.*

*2. On the facts and circumstances of the case as well as law on the subject, the learned Principal Commissioner of Income Tax erred in setting aside the assessment order of the Assessing Officer u/s 143(3) of the Act observing that order passed by Assessing Officer is erroneous as well as prejudicial to the interest of revenue.*

3. *It is prayed that order passed by Learned Principal Commissioner may please be quashed.”*

2. The facts of the case which can be stated quite shortly are as follows: Assessee is a partnership firm engaged in the business of builders and developers. For the assessment year 2012-13, the assessee-firm had filed its return of income on 28.07.2012, declaring total income of Rs.3,73,440/-. The assessee's case was selected for scrutiny under CASS and the assessment was completed u/s 143(3) of the Act, on 25.02.2015, determining total income assessed at Rs. 3,73,440/-. Subsequently the assessee's case has been re-opened u/s 147 of the Act, on 20.07.2016. The re-assessment u/s 144 r.w.s 147 was completed on 30.08.2017, at determining total income at Rs.4,92,940/-, after making an addition of Rs.1,19,500/-, on account of disallowance u/s 40(a)(ia) of the Act.

3. Later on, Learned Principal Commissioner of Income Tax (in brief, Ld. PCIT), has exercised his jurisdiction, under section 263 of the Income Tax Act, 1961. It was observed by Ld PCIT that re-assessment order framed by the Assessing Officer suffers from the following mistake/defects therefore rendering the order erroneous as well as prejudicial to the interest of Revenue:

*“While passing the order u/s 144 r.w.s 147 of the Act the AO i.e ITO, Ward-8 Vapi had not disallowed deduction of interest and remuneration paid to the partners in view of provision of Section 184(5) of the Act, as the assessment of firm has been finalized u/s 144 of the Act. However, the then AO has wrongly allowed the interest of Rs.11,05,769/-, which has resulted in under assessment of Rs.11,05,769/-. Further, the AO has not charged interest u/s 234A(1) of the Act from the date of issuing notice u/s 148 of the Act i.e. 20.07.20216 to the date of assessment order i.e. 30.08.2017 which has resulted into short levy of interest of Rs.19,800/-.”*

4. Therefore a notice u/s 263 of the Act, dated 17.01.2020, was issued to the assessee, fixing the hearing on 31.01.2020 and the said notice was

duly served upon the assessee personally through notice server. Such notice issued by Id PCIT dated 17.01.2020 is reproduced as under:

*“After going through the Range head and examination of the re-assessment records in this case shows that the re-assessment order framed by the then Assessing Officer i.e. ITO, Ward-8, Vapi, suffers from the following mistake/defect rendering the order erroneous as well as prejudicial to the interest of revenue:*

*(i) While passing the order u/s 144 r.w.s. 147, the AO i.e ITO, Ward-8, Vapi had not disallowed deduction of interest and remuneration paid to the partners in view of provision of Section 184(5) of the Act, as the assessment of firm has been finalized u/s 144 of the Act. However, the then AO has wrongly allowed the interest of Rs.11,05,769/-, which has resulted in under assessment of Rs.11,05,769/-*

*5. In view of the above para-4(i) you are, therefore, required to show-cause as to why the said re-assessment order be not revised by invoking the provisions of 263 of I.T. Act, 1961. The hearing in your case is being fixed on 31.01.2020 at 11.45 A.M. Please note that the required details should be submitted after numbering the documents enclosed and indexing the same in the forwarding/covering letter.”*

5. In response to the above notice, the assessee has not submitted its reply therefore Id PCIT noticed that interest of Rs.11,05,769/- was paid to the partners as per 3CD Report and Profit and Loss Account for the year under consideration. Considering the facts of the case and the provision of section 184(5) of the I.T. Act, the interest and remuneration paid to the partners of Rs.11,05,769/- was not allowable to the assessee- firm as the assessment order was passed u/s 144 of the Income Tax Act. The AO had wrongly allowed the above said interest to partners. Further, the AO has not charged interest u/s 234A(1) of the I.T. Act from the date of issuing notice u/s 148 of the I.T. Act i.e., 20.07.2016 to the date of assessment order i.e. 30.08.2017, which has resulted into short levy of interest of Rs.19,800/-. Therefore, Id PCIT held that order passed by assessing officer u/s 144 r.w.s. 147 of the Act on 30.08.2017 is erroneous and prejudicial to the interest of Revenue. Therefore, Id PCIT set aside the assessment order with a direction to the assessing officer to reframe the assessment afresh after examining the

issues regarding the interest paid to partners of Rs.11,05,769/- and charge interest u/s 234A(1) of the Act.

6. Aggrieved by the order of the Ld. PCIT, the assessee is in appeal before us.

7. At the outset, Shri Hardik Vora, Learned Counsel for the assessee, argued that after passing the original assessment order u/s 143(3) on 25.02.2015, the Department has initiated the re-assessment proceedings u/s 147 against the assessee and the re-assessment proceeding u/s 144 r.w.s. 147 were completed by the Assessing Officer on 30.08.2017. The assessing officer made part addition in respect of the issue raised by ld PCIT in his revision proceedings. The assessee, was aggrieved by the said part addition, therefore, the assessee filed the appeal against the order passed u/s 144 r.w.s. 147 dated 30.08.2017, before the ld CIT(A). The ld CIT(A), after taking into account the submission made by the assessee, has deleted the addition. The ld PCIT has exercised his jurisdiction u/s 263 of the Act in respect of part addition, which was deleted by ld CIT(A). Therefore, ld Counsel contended that for one particular addition there should not be two views. The ld CIT(A) deleted the part addition, however, for another part, the ld PCIT has exercised his jurisdiction u/s 263 of the Act, is not tenable. The Ld. Counsel further submitted that Assessing Officer has framed the assessment order u/s 144 r.w.s. 147 of the Act and assessee has filed appeal against said order before Ld. CIT(A). The Ld. CIT(A) has power to enhance, if any item remain untaxed, the ld CIT(A) may enhance the tax liability. Therefore, the matter which is subject to appeal before Ld. CIT(A) in respect of addition sustained by Assessing Officer, the ld PCIT ought not to have exercised his jurisdiction u/s 263 of the Act.

8. On the other hand, Ld. CIT-DR for the Revenue submits that Assessing Officer has disallowed proportionate interest of Rs.1,19,500/-, and disallowed TDS of Rs.19,800/- u/s 40(a)(ia) of the Act and this issue was carried in appeal before Ld. CIT(A) by assessee and for balance part amount the Assessing Officer is silent, therefore ld PCIT has exercised his jurisdiction.

9. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position. In our considered view, it was wholly erroneous on the part of the ld PCIT to exercise jurisdiction u/s 263 of the Act in respect of the part amount for which the Assessing Officer has applied his mind and made addition and on appeal by assessee before ld CIT(A), which was ultimately, deleted by ld CIT(A). We note that when addition was made by the Assessing Officer, the assessee filed the appeal before ld CIT(A) and ld CIT(A) has considered the assessee`s facts as follows:

*“Very small set of facts are required to decide the appeal. It was noticed by the assessing officer that during the year under consideration, the assessee has debited an amount of Rs.10,03,176/- towards interest expenses on unsecured loans. Further, that the assessee deducted TDS of Rs.88,226/- only instead of Rs.1,09,317/-. There was no response to the show-cause notices issued by the assessing officer and therefore, the assessment was completed under section 144 of the Income Tax Act. As there was a short deduction of tax at source by Rs.11,950/- the proportionate interest payment of Rs.1,19,500/- was disallowed under section 40(a)(ia)”*

10. From the above facts stated by ld CIT(A) it is abundantly clear that ld PCIT did not high light any other facts in his revision order under section 263 of the Act, that is, same facts noted above have been taken into account by ld PCIT. Thus, we note that assessment order passed by the assessing officer under section 144 r.w.s. 147 has been quashed by ld CIT(A), the ld PCIT should not have exercised his jurisdiction under section 263 of the Act. Moreover, the ld CIT(A) has power to enhance u/s 251 (1) of the Act,

if it looks to the Id CIT(A), that Assessing Officer has failed to make a particular addition, the Id CIT(A) can make the addition, and on the same issue, the Id PCIT should not have exercised his jurisdiction u/s 263 of the Act. We note that Coordinate Bench of ITAT-Mumbai in the case of Infinity Retail Ltd, [2022] 139 taxmann.com 156 (Mumbai - Trib.) held that where order passed by Assessing Officer u/s 201(1) working out short deduction of TDS by assessee on lease rent paid by it and further levying interest u/s 201(1A) was already annulled by Commissioner (Appeals) on ground of being barred by limitation and revenue had not filed an appeal against same before Tribunal due to low tax effect, impugned revisionary order passed by Ld.CIT(TDS) u/s 263 setting aside said very assessment order which was quashed by Ld. CIT(A) did not subsist.

11. An erroneous order does not mean a wrong order; it does not mean an order with which the Commissioner is unable to agree. An erroneous order would be an order which suffers from a patent lack of jurisdiction; the error must be with reference to jurisdiction. Prejudicial to the interest of the Revenue would mean an erroneous order which goes against the interest of Revenue collection. We note that order which has merged with appellate order cannot be revised u/s 263 of the Act. The Id PCIT has powers to revise only orders of the Assessing Authorities which were erroneous and prejudicial to the interest of the revenue. Therefore, based on this factual position, the order passed by the Id PCIT u/s 263 of the Act is bad in law.

12. In view of the facts of the case and judicial pronouncements relied upon, it is well established that the impugned order passed u/s 144 r.w.s.147 of the Act dated 30.08.2017, was passed by Assessing Officer, by making part addition on the issue which was subject matter of revision u/s 263 by Id PCIT. The Assessing Officer has passed the assessment order after

examination of debited amount of Rs.10,00,176/- and after verification of TDS of Rs.1,00,317/- and proportionate interest payment of Rs.1,19,500/-, so assessment order cannot be termed as erroneous and prejudicial to the interest of the revenue. So, the Ld. PCIT's finding fault, with the order of the Assessing Officer is erroneous as well as prejudicial to the interest of revenue, on account of lack of inquiry, has to fail. Based on these facts and circumstances, we quash the order dated 20.03.2020 passed by the ld PCIT u/s 263 of the Act.

13. In the result, appeal of the assessee is allowed.

Order is pronounced on 31/07/2023 by placing record on notice board.

Sd/-  
(PAWAN SINGH)  
JUDICIAL MEMBER

Sd/-  
(Dr. A.L. SAINI)  
ACCOUNTANT MEMBER

सूत /Surat

दिनांक/ Date: 31/07/2023

***Dkp Out sourcing Sr.P.S***

**Copy of the Order forwarded to**

1. The Assessee
2. The Respondent
3. The CIT(A)
4. CIT
5. DR/AR, ITAT, Surat
6. Guard File

By Order

// True Copy //

Assistant Registrar/Sr. PS/PS  
ITAT, Surat