

**IN THE INCOME TAX APPELLATE TRIBUNAL GAUHATI BENCH
VIRTUAL HEARING AT KOLKATA**

**BEFORE SHRI RAJPAL YADAV, VICE PRESIDENT
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER**

**ITA No.47/GTY/2021
Assessment Year: 2015-16**

Mukesh Kumar Agarwalla 4C, Vardhaman Apartment, Janki Path, Near Jain Mandir, Ganeshguri, Guwahati, Assam-781005	Vs.	Pr. Commissioner of Income- tax, Guwahati
(Appellant)		(Respondent)

Present for:

Appellant by : Shri S. P. Bhati, FCA
Respondent by : Shri I. Gyaneshori Devi, JCIT

Date of Hearing : 20.07.2023
Date of Pronouncement : 09.10.2023

ORDER

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

Appeal filed by the assessee is against the revision order of Ld. Pr.CIT, Guwahati dated 23.03.2020 passed u/s. 263 of the Income-tax Act, 1961 (hereinafter referred to as the "Act"), against the assessment order of DCIT, Circle, Tezpur u/s. 143(3) of the Act dated 08.08.2017 for AY 2015-16.

2. Assessee has raised four grounds of appeal, all of which relate to assumption of jurisdiction by the Ld. Pr. CIT for invoking the revisionary proceeding u/s. 263 of the Act and passing the impugned order thereon. Grounds are not reproduced for the sake of brevity.

3. Brief facts as culled out from records are that assessee is the owner of warehouses at Khanapara, Guwahati and has executed works contract during the period under consideration. Assessee filed his return of income on 24.09.2015, reporting total income at Rs.32,18,140/-. Case of the assessee was selected for scrutiny on the following three main reasons:

- (a) Mis-match between turnover as per GST/Service Tax return and income-tax return.
- (b) Large cash deposits in savings bank account and
- (c) Suspicious sale transaction in shares and exempt LTCG shown in the return.

3.1. In the course of assessment, assessee appeared and furnished copy of tax audit report in Form No. 3CB and 3CD, bank statement, computation of total income, Form 26AS as well as books of account including cash book and ledger with supporting bills, memos, vouchers which were test checked. Ld. AO in the impugned assessment order noted that assessee had explained the mis-match of turnover in service tax return and ITR. He also noted that assessee had explained cash deposits and sale transactions in shares. After considering the submissions and explanations furnished by the assessee, Ld. AO completed the assessment at an assessed income of Rs.35,50,070/-.

3.2. Subsequently, Ld. Pr. CIT on examination of the assessment records noticed that AO had not properly examined the issue of suspicious sale transaction in shares and exempt

LTCG claimed by the assessee. He noted that assessee had claimed LTCG of Rs.97,21,494/- and exemption sought which has been allowed by the Ld. AO without required verification which ought to have been carried out by him. Accordingly, a show cause notice u/s. 263 of the Act dated 12.03.2020 was issued on the assessee.

3.3. In the said notice in para 4, Ld. Pr. CIT observed that *“and whereas the assessment was completed by the AO without verifying the genuineness of LTCG made on sale of shares and exemption claimed thereon.”* On its said observation, ld. Pr. CIT called for explanation as to why not the assessment order be held as erroneous and prejudicial to the interest of revenue. In the course of revisionary proceeding before the Ld. Pr. CIT, assessee appeared and submitted his explanation along with corroborative documents, claiming that the entire issue was examined by the Ld. AO in the course of assessment proceedings and having satisfied, had allowed the claim of assessee.

3.4. However, ld. Pr. CIT did not find favour with the submissions made by the assessee and arrived at the consideration that assessee does not buy or trade in shares regularly and in the present transaction, according to him, it is for the first time that assessee has purchased and sold shares and is so much lucky or has so much ability that in the one and only one transaction ever made by him in shares, he multiplied his investment 49.60 times. According to him, this is unbelievable yet the Ld. AO has accepted the claim without

any verification whatsoever. According to Ld. Pr. CIT, Ld. AO has not enquired as to when and from whom assessee had purchased the shares, their date of acquisition and computation of the capital gain. Claim of the assessee has been allowed merely on the ground that assessee has duly paid the Security Transaction Tax (STT).

3.5. Thus, according to the Ld. Pr CIT, the Ld. AO has not carried out necessary enquiries which he ought to have done to verify the genuineness of LTCG claimed by the assessee, which prima facie seems unbelievable and not genuine. He thus, held that the assessment order passed u/s. 143(3) of the Act by the Ld. AO is erroneous and prejudicial to the interest of revenue and directed him to make fresh assessment after proper and thorough verification of the sale of shares and LTCG arising therefrom. Aggrieved, assessee is in appeal before the Tribunal.

4. Before us, Ld. Counsel for the assessee pointed that present case is a case where Ld. AO has made all the required examination of the records furnished before him in respect of transaction of sale of shares whereon LTCG was earned and claimed as exempt u/s. 10(38) of the Act. He submitted that assessee had duly disclosed and reported his claim of LTCG in the return and computation of income placed on record. He referred to the paper book containing 35 pages placed on record to corroborate the submissions made by him. Copy of order sheet of the assessment proceedings forms part of the paper book placed at pages 10 and 11. He referred to the order

sheet entry dated 23.06.2017 wherein Ld. AO has asked the assessee to furnish details of sale of shares. On the next entry in the order sheet dated 11.07.2017, Ld. AO has noted that assessee has furnished the details of shares which are examined and discussed with the assessee. Ld. Counsel also referred to office note forming part of the assessment order placed at page 12 wherein at point no. 4, ld. AO has categorically stated that *“transaction in shares i.e. sale of shares have been examined with reference to STT payments. STT has been paid at the time of sale of shares. LTCG calculated on sale of shares is Rs.97,21,494/-which is exempted.”*

4.1. Reference was made by the ld. Counsel to the written submission made by the assessee in the course of assessment proceedings vide submission dated 11.07.2017 wherein it is stated that *“detailed statement of share transactions claimed for LTCG along with copy of broker’s statement clearly mentioned therein the amount of STT realised, copy of form no. 10DB-F.”* Thereafter, Ld. Counsel referred to the detailed statement of transaction of shares and demonstrated the computation of LTCG. He also referred to the contract notes issued by Angel Broking Pvt. Ltd., Member of Bombay Stock Exchange Ltd. through whom assessee had sold the shares of the scrip Lifeline Drugs & Pharma Ltd. Contract note issued by another broker named Horizon Financial Consultants Pvt. Ltd. were also referred for part of sale made through this broker also.

4.2. Ld. Counsel also demonstrated that observation made by the Ld. Pr. CIT that assessee does not buy or trade in shares regularly and that it is for the first time and the only time that assessee has purchased and sold the shares of Lifeline Drugs & Pharma Ltd. is factually incorrect. He referred to the account opening form of the DEMAT account with HDFC Bank Ltd. to demonstrate that assessee had his DEMAT account opened on 27.06.2008 which is much earlier than the present year under consideration. He also referred to Schedule of Investment forming part of his audited Balance Sheet which is reproduced as under to demonstrate that assessee held investment in shares of several other companies.

Mr. Mukesh Kumar Agarwalla
S/O. Sri. Tulsi Prasad Agarwalla
4C, Vardhaman Apartment, janki Path, Near - Jain Mandir, Ganeshguri - 781006

Schedule 2 Investments

<u>Investment in Shares</u>	
Coigate	800.00
Deb & Him Sons Pvt. Ltd.	100,000.00
EAP & TW Co-Op. Society Ltd	25,000.00
MRPL	2,260.00
Narayanam Realtors	100,000.00
Nav Srinath Infratech Pvt. Ltd.	50,000.00
Nav Srinath Realtors Pvt. Ltd.	50,000.00
NEAC Assam Pvt. Ltd.	418,300.00
North East Oncology Cancer Centre Pvt. Ltd.	200,000.00
Reliance Industries Ltd.	268,326.96
Reliance Power LTD.	6,880.00
Srinath Constructions & Merchants Co. Pvt. Ltd.	900,000.00
<u>State Bank of India - Shares</u>	2,500.00
Tenements Real Estate	720,000.00
The Industrial Co-op. Bak Ltd.	5,000.00
Vintron	2,543.75
<u>Others</u>	
Axis Bank Mutual Fund	20,000.00
FDR - 50300078966461	3,030,384.00
FDR - 02644470014640	8,239.40
FDR ICBL	36,451.00
FDR SBI	19,419.00
L & T Infra Bond	20,000.00
Muual Fund	110,000.00
NSC	25,488.00
Post Office PPF Account	99,823.00
	6,221,415.11

4.3. Ld. Counsel also referred to the recent holding statement of shares with HDFC Bank Depository in his DEMAT account which is dated 13.05.2023 wherein also shares of several other companies are held by the assessee which includes shares of Colgate Palmolive India Ltd., Mangalore Refinery & Petrochemicals Ltd., Reliance Industries Ltd., Reliance Power Ltd., State Bank of India, Zee Media Corporation Ltd., Diligent Media Corporation Ltd. and Siti Net-works Ltd. Thus, Ld. Counsel emphatically submitted that the consideration arrived at by the Ld. Pr. CIT that the present transaction of sale of shares in Lifeline Drugs & Pharma Ltd. is the lone transaction executed by the assessee is baseless and devoid of any merit.

4.4 All these details and documents have been duly examined by the Ld. AO in the course of assessment proceedings which were also placed before the Ld. Pr. CIT in the revisionary proceedings. None of these documents have been controverted and disproved to taint the transaction as bogus. Ld. Counsel further submitted that in the impugned revisionary order passed by Ld. Pr. CIT, there is no reference as to scrip of Lifeline Drugs & Pharma Ltd. which has been tainted as paper/shell/bogus company so as to doubt the gains earned by the assessee. According to him, it is a genuine transaction executed on the regulated Stock Exchange and corroborated by all the relevant documentary evidence.

5. Per contra, Ld. CIT, DR placed reliance on the decision of Hon'ble High Court of Calcutta in the case of PCIT Vs. Swati Bajaj (2020) 139 taxmann.com 352 (Cal) to submit that similar

issue was dealt therein relating to penny stock transactions which was held against the assessee. To this effect, a specific query was raised by the Bench to understand if there is any such decision by the Hon'ble jurisdictional High court of Guwahati since present case before the Tribunal is at its Guwahati Bench. Ld. CIT, DR could not cite any such decision on the query.

5.1. He placed reliance on the order of Ld. Pr. CIT and submitted that no prejudice is caused to the assessee since Ld. Pr. CIT has directed the Ld. AO to examine the issue afresh and pass the assessment order accordingly.

6. We have heard the rival contentions and perused the material available on record. The moot point before us is whether the AO has carried out the required examination and verification of the transaction of sale of shares, yielding long term capital gain claimed as exempt which is one of the reasons for selection of the case of the assessee for scrutiny assessment. Before us, Ld. Counsel has evidently demonstrated the enquiry made by the Ld. AO and submissions made by the assessee thereon, supported by relevant documentary evidence, all of which are placed in the paper book.

7. From the above factual matrix of the issue raised by the ld. PCIT, we find that he has not applied his mind to arrive at a consideration which is erroneous in so far as prejudicial to the interest of the revenue, for passing the impugned order u/s 263 of the Act. We observe that in

the course of proceedings u/s 263 of the Act before the Ld. PCIT, assessee had furnished the relevant details and explained the issue raised through the show cause notice by the Ld. PCIT, supporting its contentions by corroborative documentary evidences. It is well settled law that for invoking the provisions of section 263 of the Act, both the conditions that the order must be erroneous and prejudicial to the interest of revenue, needs to be satisfied. This ratio stands laid down by various Hon'ble Courts.

8. For this, let us take the guidance of judicial precedence laid down by the Hon'ble Apex Court in the case of Malabar Industries Ltd. vs. CIT [2000] 243 ITR 83 (SC) wherein their Lordships have held that *twin* conditions need to be satisfied before exercising revisional jurisdiction u/s 263 of the Act by the CIT. The twin conditions are that the order of the Assessing Officer *must be erroneous and in so far as prejudicial to the interest of the Revenue*. In the following circumstances, the order of the AO can be held to be erroneous order, that is (i) if the Assessing Officer's order was passed *on incorrect assumption of fact*; or (ii) *incorrect application of law*; or (iii) Assessing Officer's order is in *violation of the principle of natural justice*; or (iv) if the order is passed by the Assessing Officer *without application of mind*; (v) if the AO *has not investigated the issue* before him; [*because AO has to discharge dual role of an investigator as well as that of an adjudicator*] then in aforesaid any of the events, the order passed by the AO can be termed as erroneous order. Looking at the second limb as to whether the actions of the AO can be termed as prejudicial to the interest of Revenue, one has to understand what is prejudicial to the interest of the revenue. The Hon'ble Supreme Court in the case of Malabar Industries (*supra*) held that this phrase i.e. "*prejudicial to the interest of the revenue*" has to be read in conjunction

with an *erroneous order* passed by the AO. Their Lordships held that every loss of revenue as a consequence of an order of Assessing Officer cannot be treated as prejudicial to the interest of the revenue. When the Assessing Officer adopted one of the courses permissible in law and it has resulted in loss to the revenue, or where two views are possible and the Assessing Officer has taken one view with which the CIT does not agree, it cannot be treated as an erroneous order prejudicial to the interest of the revenue unless the view taken by the Assessing Officer is unsustainable in law.

8. We find that the issue in the present case is purely on facts which are verifiable from the records of the assessee. Examination and verification of the audited financial statements i.e. Balance Sheet and Profit & Loss account of the assessee, copies of contract notes, DEMAT account and order sheet entries reveal the correct state of affairs in respect of the issue raised in the impugned revisionary proceedings for which both, ld. PCIT and the ld. CIT, DR could not bring any material on record to controvert the verifiable factual position.

8.1. In cases where there is inadequate enquiry but not lack of enquiry, again the Ld. Pr.CIT must give and record a finding that the order/enquiry made is erroneous. This can happen if an enquiry and verification is conducted by the Ld. Pr. CIT and he is able to establish and show the error or mistake made by the AO, making the order unsustainable in law.

8.2. In some cases, possibly though rarely, the Ld. Pr. CIT can also show and establish that the facts on record or inferences drawn from facts on record per se justified and mandated further enquiry or

investigation but the AO had erroneously not undertaken the same. However, the said finding must be clear, unambiguous and not debatable. The matter cannot be remitted for a fresh decision to the AO to conduct further enquiries without a finding that the order is erroneous, the condition or requirement which must be satisfied for exercise of jurisdiction u/s 263 of the Act. In such matters, to remand the matter/issue to the AO would imply and mean that the Ld. Pr. CIT has not examined and decided whether or not the order is erroneous but has simply directed the AO to decide the aspect/question.

8.2. It must also be noted that the material, which the Ld. Pr. CIT can rely up on includes not only the records as it stands at the time when the order in question was passed by the AO but also records as it stands at the time of the examination by the him. Nothing prohibits him from collecting and relying new/additional material which evidence to show and state that the order of the AO is erroneous.

8.4. In the present case before us, Ld. Pr. CIT in his order has no where recorded about any investigation report or reports of other regulators in respect of the scrip dealt by the assessee to doubt its genuineness. In these set of facts and circumstances, reliance of Ld. CIT, DR on the decision of Swati Bajaj (supra) is misplaced.

8.5. We find that the issue in the present case considered by the Ld. Pr. CIT for exercising revisionary proceedings u/s. 263 of the Act is purely on facts which are verifiable from the records of the assessee. Accordingly, on the issue raised by the Ld. Pr. CIT in the revisionary proceedings, no action u/s. 263 of the Act is justifiable which in our considered view cannot be sustained under the facts and circumstances of the present case and judicial precedents dealt hereinabove. We,

therefore, quash the impugned order u/s. 263 of the Act and allow the grounds raised by the assessee.

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

Order pronounced in the open Court on 9th October, 2023.

Sd/-
(Rajpal Yadav)
Vice President

Sd/-
(Girish Agrawal)
Accountant Member

Dated: 9th October, 2023

JD, Sr. P.S.

Copy to:

1. The Appellant:
 2. The Respondent
 3. DCIT, Circle-Tezpur
 4. DR, ITAT, Guwahati Bench, Guwahati
 5. Guard file
- //True Copy//

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata