

IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'E' : NEW DELHI)
BEFORE SH. M. BALAGANESH, ACCOUNTANT MEMBER
AND
SH.ANUBHAV SHARMA, JUDICIAL MEMBER
ITA No. 1097/Del/2023, A.Y. 2017-18

M/s. Orient Craft Ltd. 7-D, Maruti Industrial Complex, Sector-18, Gurgaon PAN : AAACO0068M	Vs.	DCIT Central Circle-2 Gurgaon
Appellant		Respondent

Assessee by	Sh. Amit Kumar Gupta, Adv.
Revenue by	Shri Subhra Jyoti Chakraborty, CIT DR

Date of hearing:	11.10.2023
Date of Pronouncement:	31.10.2023

ORDER

Per Anubhav Sharma, JM :

The appeal is preferred by the Assessee against the order dated 27.12.2022 of Commissioner of Income Tax (Appeals)-3, Gurgaon (hereinafter referred as Ld. First Appellate Authority or in short Ld. 'FAA') in appeal no. 11587/2021-22 arising out of an appeal before it against the order dated 31.03.2021 passed u/s 154 of the Income Tax Act, 1961 (hereinafter referred as 'the Act') by the DCIT-CC-II, Gurgaon (hereinafter referred as the Ld. AO).

2. The facts in brief are that the assessee has filed return of Income for AY 2017-18 on 30.11.2017 declaring an income of Rs. 18,10,42,260/- from Business and Profession, House property and other Sources. Intimation/order under section 143(1) was issued from the Centralized Processing Centre on 28.03.2019 computing an income of Rs 30,93,07,020/- as against the income of Rs 18,10,42,260/- declared by the assessee thus making an addition of Rs 12,82,64,760/- in the total Income declared by the assessee on account of disallowance under section 36(1)(va) for delay in depositing employee contribution of PF/ESI (Rs 12,82,40,760/-) and on account on income of House property (Rs 24,000/-)

3. That aggrieved by the Intimation/Order under section 143(1), the assessee filed an appeal to the CIT (Appeals) on 24.04.2019. The appeal was subsequently withdrawn as the assessee's case was selected for scrutiny under CASS. Assessment order u/s 143(3) dated 29.12.2019 was passed assessing income of Rs 59,88,23,897/-. The assessee filed appeal against the order u/s 143(3) to the CIT(Appeals) on 13.01.2020. Assessee has claimed that since the assessing officer did not make the addition on the subject of order u/s 143(1) for which the assessee had filed the appeal, so the assessee thought that the subject of 143(1) order has been merged and duly considered by the assessing officer in the assessment u/s 143(3). So the assessee withdrew the appeal on 17.03.2021 against the order u/s 143(1). But the department after passing the order u/s 143(3), rectified the order under section 154 on 31.03.2021. Rectification was made relating to the additions of Rs 12,82,64,760/- by giving reason that addition was missed by the assessing officer while passing order u/s 143(3).

4. It is submitted for assessee by Ld. AR that while passing assessment order u/s 143(3), all the issues pending at the time of assessment for that year have been considered. Once additions were not made on the subject of section 143(1) order, it is understood that the matter has been considered in the

assessment u/s 143(3). It was submitted that addition u/s 36(1)(va) cannot be made u/s 143(1) or 154 because it is not a prima facie adjustment.

5. That the assessee filed his Grounds of appeal stating that all the PF and ESI dues have been deposited before the due date of filing of return of income and although PF/ESI dues have been paid after the due dates prescribed under the respective acts in some of the cases but the interest and penalties if any leviable have been paid wherever applicable.

6. The Commissioner of Income Tax (Appeals)-3, Gurgaon, disposed off the Appeal filed u/s 154 vide its order under dated 27.12.2022, which Ld. AR submits was unjustified. It was submitted that Ld. CIT(A) erred to uphold impugned additions/disallowance u/s 36(1)(va) through section 143(1) and thereby dismissed the Appeal of the Appellant stating that appeal filed in regard to section 143(1) was withdrawn whereas the fact is the appeal was withdrawn as the case of the assessee was selected in CASS and assessment was done u/s 143(3). The matter under section 143(1) was merged with section 143(3) hence the assessee filed application for withdrawal of appeal on 17.03.2021. He submitted that the assessee has withdrawn appeal filed for order u/s 143(1) only after scrutiny assessment under section, 143(3) was completed. It can also be seen that the assessing officer rectified the original order u/s 143(3) on 31.03.2021 only after receiving the withdrawal letter of appeal filed u/s 143(1) filed on 17.03.2021. Hence the stand of the CIT(Appeals) for dismissing the appeal i.e the assessee has withdrawn appeal filed u/s 143(1), is completely unjustified.

7. It was pointed out, that the addition of Rs 24,000/- made under the head house property by the assessing officer has been already included in other sources income in the ITR filed by the assessee.

8. Assessee has come in appeal raising following grounds ;

“1. Because the learned CIT(A) erred in upholding the order of the AO u/s 154 r.w.s 143(3) and 143(1) disallowing a sum of Rs.12,82,40,760/- being Employees Contribution to PF and ESI, which were deposited before the due date of filing the return of income for the mere reason that appeal filed in regard to section 143(1) was withdrawn by the assessee. The appeal was withdrawn by the assessee against the order of section 143(1) because order u/s 143(1) was practically merged with the assessment u/s 143(3).

2. Because the learned CIT(A) has misunderstood the purpose of withdrawal of Appeal filed against order u/s 143(1). The assessee has withdrawn the appeal filed against order u/s 143(1) because the order u/s 143(1) was merged with assessment u/s 143(3). The learned CIT(A) has misunderstood that the assessee has not disputed the addition /disallowance in order u/s 143(1).

3. Because the learned CIT(A) erred in upholding the order of the AO u/s 154 r.w.s. 143(3) and 143(1) in disallowing a sum of Rs.12,82,40,760/- being Employees Contribution to PF and ESI, as disallowance of employees contribution is not within the ambit of section 143(1)(a)(iv).

4. Because the learned CIT(A) erred in upholding the order of the AO u/s 154 r.w.s. 143(3) and 143(1) in disallowing a sum of Rs.12,82,40,760/- being Employees Contribution to PF and ESI, as disallowance of employees contribution is not reported by the tax auditor which is the mandate of section 143(1)(a)(iv),

5. Because the learned CIT(A) erred in upholding the order of the AO u/s 154 r.w.s. 143(3) and 143(1) in disallowing a sum of Rs.12,82,40,760/- being Employees Contribution to PF and ESI, as the case of assessee is not covered by Supreme Court decision in *checkmate services Private Limited vCIT [2022] 448 ITR 518*.

6. Because the assessing officer has erred in making rectification u/s 154 to order u/s 143(3) by making additions u/s 36(1)(va) which was not the subject matter of the assessment u/s 143(3) being a limited scrutiny not covering the point of discussion u/s 36(1)(va).

7. Because the assessing officer has erred in making rectification u/s 154 to order u/s 143(3) by making additions u/s 36(1)(va) since it is not a mistake apparent from record. Date of order of section 154 is 31.03.2021 and date of supreme Court

order in checkmate services Private Limited v CIT [2022] 448 ITR 518 is 12.10.2022.

8. *Because the learned CIT(A) erred in upholding the order of the AO u/s 154 r.w.s. 143(3) and 143(1) making additions of Rs. 24,000/- in the house property income of the assessee when the same has been included under the head other sources as rent from machinery.*

9. *Because the learned CIT(A) erred in upholding the order of the AO u/s 154 r.w.s. 143(3) and 143(1) making additions of Rs. 24,000/- in the house property income of the assessee without giving standard deduction of 30 percent and without deducting from income from other sources, when the same has been included under the head income from other sources as rent from machinery.*

10. *Because the learned CIT(A) erred in upholding the order of the AO by passing ex parte order when all the facts were available with the CIT(Appeals).*

11. *Because the learned CIT(A) has erred in disposing the appeal by wrongly presuming that the assessee is not interested in the appeal and not passing the assessment order on merits.*

12. *Because the learned CIT(A) has erred in disposing the appeal by ignoring the settled law that the act does not postulate multiple assessments by different assessing officers or assessment or part or portion of an income. (Kanjimal & Sons v CIT [1982] 138 ITR 391 (Del)).*

13. *That the appellant craves, leave to add, alter, amend or vary and or withdraw any or all of the aforesaid grounds of Appeal or at time of hearing of the above appeal."*

9. Heard and perused the record. The grounds indicate composite controversy as to if intimation u/s 143(1) of the Act got merged with assessment order u/s 143(3) of the Act and consequently Ld. AO was not justified to make addition by way of rectification u/s 154 of the Act, on the basis of facts which have been considered during assessment.

10. Having considered the submissions and the record it comes up that in the intimation u/s 143(1) of the Act an adjustment was done in regard to delay in depositing Employees Contribution of PE/ESI and on account of income of house property and thereby the returned income of Rs. 18,10,42,260/- was recomputed at Rs. 30,93,07,020/-. Admittedly, assessee had preferred an appeal

against this intimation and the same was withdrawn for which assessee claims. The reason for withdrawal was that regular scrutiny assessment u/s 143(3) was initiated.

10.1 Now if we look at the assessment order dated 29.12.2019 u/s 143(3) of the Act it mentions that return was processed u/s 143(1) of the Act and the case of assessee was selected under CASS for the following reasons ;

- “i. Large deduction under chapter VI-A from total income.*
- ii. Opening written Down Value of fixed assets as per ITR of current year is greater than closing written down Value of fixed assets as per ITR of preceding year.*
- iii. Sale consideration of property in ITR is less than sale consideration reported in FORM 26QB.*
- iv. Large Loss from currency fluctuations.*
- v. Expenses debited to P & L A/c for earning exempt income as per schedule BP of ITR is significantly lower as compared to investments made to earn exempt income.*
- vi. Lower amount disallowed u/s 40(a)(ia) in ITR in comparison to tax audit report.*
- vii. Large any other amount allowable as deduction claimed in Schedule BP of return.*
- viii. Large value cash deposit during demonetization period reported.*
- ix. Custom duty paid as shown in the ITR is less than the duty paid as per Export Import Data.”*

10.2 Consequently, the additions were made in assessment u/s 143(3) of the Act and income was recomputed on returned income of 181,042,260/- by making additions on the issues open to scrutiny and the assessed income was computed at Rs. 1,59,88,23,897/-.

11. However, Ld. AO had then exercised powers u/s 154 of the Act. Here to determine the controversy, it will be appropriate to reproduce that impugned order dated 31.03.2021 u/s 154 ;

“RECTIFICATION ORDER

In this case, while passing assessment order u/s 143(3) dated: 29.12.2019, the additions were made in the returned income filed u/s 139(1) which was

18,10,42,260/- . However additions were to be made in the assessed income determined u/s 143(1) which was 30,93,07,020/- resulting in under assessment of income by Rs. 12,82,64,760/- . Since the mistake is apparent from record hence requires to be rectified. Accordingly the same is rectified. The revised total income will be as under: -

Retuned income U/s 139(1): 18,10,42,260/-

Assessed Income u/s 143(1): 30,93,07,020/-

Difference:- 12,82,64,760/- (it is required to be added in the assessed income u/s 143(3)

Income Assessed u/s 143(3):- 598823900/-+ 12,82,64,760=72,70,88,660

(Revised Total Income)”

12. Thus on appreciating above, what comes up is that while exercising power u/s 154 r.w.s. 143(3) of the Act, Ld. AO has not gone back to reconsider the issues examined u/s 143(3) and make an addition thereupon. It is not a case where rectification power was exercised consequent to any change of law or applying a different proposition of law than one considered while framing assessment u/s 143(3) of the Act. The rectification order as reproduced above makes it apparent that the income determined vide intimation u/s 143(1) was taken as income for making further additions u/s 143(3) assessment. Certainly that was a mistake apparent from record as the intimation u/s 139(1) stood final after withdrawal of the appeal by the assessee. Accordingly, the difference between the returned income Rs. 18,10,42,260/- and the assessed income u/s 143(1) of Rs. 309,307,020/-, was erroneously ignored while passing order u/s 143(3). Therefore we are of view Ld. AO had committed no error in exercising the rectification powers u/s 154.

13. As with regard to applicability of the doctrine of merger of intimation u/s 143(1) and the assessment order u/s 143(3) the proposition of law as discussed by the Bangalore Bench of the Tribunal in ITA No. 433/Bang./2023 in case Title **M/s. Areca Trust Vs CIT (Appeals) (ITAT Bangalore) order** dated

26/07/2023 for A.Y. 2018-19, is relevant and para 8 and 9 are reproduced below for further convenience of discussion :

“8. Section 246A specifically provides for an appeal as against intimation issued under section 143(1) of the Act. In the instant case, total income has been assessed at Rs.23,29,62,420/- as per the intimation passed under section 143(1) of the Act. Therefore, the cause of action for the assessee arises from the intimation issued under section 143(1) of the Act and appeal ought to have been filed as against the same. The assessment completed under section 143(3) of the Act merely adopts the assessed figures in the intimation order passed under section 143(3) of the Act. Therefore, no cause of action arises from the order passed under section 143(3) of the Act.

9. Section 143(4) of the Act only mentions that on completion of regular assessment under section 143(3) or 144 of the Act, the tax paid by assessee under section 143(1) of the Act shall be deemed to have been paid toward such regular assessment. That by itself does not mean there is merger of intimation under section 143(1) with that of regular assessment under section 143(3) / 144 (unless issue has been discussed and adjudicated in regular assessment under section 143(3) / 144 of the Act). Assessee, against the intimation under section 143(1) of the Act, has filed a rectification application under section 154 of the Act (vide application dated 16.06.2020) and the same is pending disposal. The CIT(A) in the impugned order has directed the AO to dispose off the said rectification application dated 16.06.2020. Moreover, if assessee is advised to file an appeal as against the intimation under section 143(1) of the Act, a liberal approach may be taken for condonation of delay since assessee's application for rectification of the intimation under section 143(1) of the Act has been filed within time and same is pending disposal. With the above said observation, the grounds of the assessee are rejected.”

14. Thus where the additions made under intimidation u/s 143(1) and 143(3) are on different issues and heads and intimation u/s 143(1) of the Act stood final after withdrawal of appeal by assessee, on what so ever erroneous belief, there was no merger of two orders.

15. We are of considered view that the reliance of Ld. AR on the order of co-ordinate bench in **Sanjay Kumar vs. ITO [2023] 152 taxmann.com 594 (Delhi-Trib.)**, in which one of us (Judicial Member) was on the quorum, is not of any aid to the appellant. In that case the issue involved was whether addition could be made by learned AO by exercising powers u/s 154 of the Act where learned AO had accepted the return filed u/s 139 of the Act vide intimation u/s 143(1) of the Act. There in the question of delay in deposit of the employees' contribution was very much in the assessment records upon which the intimation u/s 143(1) was served upon the assessee and no disallowance was made. However, here in the case in hand the addition was made in intimation u/s 143(1) of the Act with regard to disallowances on account of delayed contribution of PF and ESI and the house property income, in intimation u/s 143(1) of the Act. In scrutiny assessment these issues were not under examination so as to say that while exercising powers rectification the Ld. AO has made rectification due to any change in opinion of law or fact.

16. Consequently we are not inclined to allow the grounds as raised. The order of Ld. CIT(A) is sustained. **The appeal of assessee is dismissed.**

Order pronounced in the open court on 31st October, 2023.

Sd/-

**(M. BALAGANESH)
ACCOUNTANT MEMBER**

Sd/-

**(ANUBHAV SHARMA)
JUDICIAL MEMBER**

Date:-31.10.2023

Binita, SR.P.S

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI