

आयकर अपीलीय अधिकरण न्यायपीठ रायपुर में।
IN THE INCOME TAX APPELLATE TRIBUNAL,
RAIPUR BENCH, RAIPUR

BEFORE SHRI RAVISH SOOD, JUDICIAL MEMBER
AND
SHRI ARUN KHODPIA, ACCOUNTANT MEMBER

आयकर अपील सं. / ITA No. 177/RPR/2019
निर्धारण वर्ष / Assessment Year : 2009-10

Prakash Davara,
08, Gitanjali Nagar, Shankar Nagar,
Raipur (C.G.)-492 001
PAN : ACUPD0169K

.....अपीलार्थी / Appellant

बनाम / V/s.

The Assistant Commissioner of Income Tax-4(1),
Raipur (C.G.)

.....प्रत्यर्थी / Respondent

Assessee by : Shri Praveen Jain, CA

Revenue by : S/shri V.K Singh, CIT-DR &
Satya Prakash Sharma, Sr. DR

सुनवाई की तारीख / Date of Hearing : 17.08.2023

घोषणा की तारीख / Date of Pronouncement : 02.11.2023

आदेश / ORDER**PER RAVISH SOOD, JM:**

The present appeal filed by the assessee is directed against the order passed by the Commissioner of Income-Tax (Appeals)-II, Raipur, dated 21.06.2019, which in turn arises from the order passed by the A.O under Sec.143(3) r.w.s. 263 of the Income-tax Act, 1961 (in short 'the Act') dated 22.12.2016 for the assessment year 2009-10. The assessee has assailed the impugned order on the following grounds of appeal:

“1. Ground 1: That on the facts and on the circumstances of the case Ld. CIT (A) erred in dismissing the case contending that there is no addition and thus no appeal lies before him when the assessee appealed for incorrect reopening of the case and incorrect initiation of Penalty.

2. Ground 2: That on the facts and on the circumstances of the case, Ld. Assessing Officer erred in passing the order u/s 143(3) r.w.s. 263 of the I.T. Act, on the premise that there is escapement of income & concealment of income whereas no income has escaped assessment u/s 143(3) r.w order u/s 147 dt. 21.02.2014 as same is upheld vide order u/s 143(3) r.w.s 263. Thus order passed by AO is bad in law, erroneous and may kindly be quashed.

3. Ground 3: That having regard to the facts and circumstances of the case, Ld. Principal CIT- 2 has erred in law and on facts in passing ex-party order u/s 263 without properly serving notice u/s 263. Thus order passed by Ld. Principal CIT- 2 is bad in law, erroneous and may kindly be quashed.

4. Ground 4: That on the facts and on the circumstances of the case, Ld. Principal CIT-2 erred in passing ex party order u/s 263 without disputing income assessed vide order u/s 143(3) r.w order u/s 147 dt. 21.02.2014.

5. Ground 5: on the facts and circumstances of the case and in law, the Ld. Principal CIT-2 erred in exercising jurisdiction u/s 263 by directing reopening of the case for error in computation of demand by department at the time of issuing notice of demand u/s 156 w.r.t. order u/s 143(3) r.w order u/s 147 dt. 21.02.2014 which is mistake apparent from record and liable to be rectified u/s 154 of the IT Act. Thus order passed by Ld. Principal CIT- 2 is bad in law erroneous and may kindly be quashed.

6. Ground 6: That on the facts and in the circumstances of the case, the order appealed against is opposed to facts and law on several grounds and hence the same may very kindly be quashed.

7. The assessee craves leave to add, urge, alter or withdraw any ground/s before or at the time of hearing of this appeal.

III. RELIEF SOUGHT The order passed u/s 263 and 143(3) r.w.s. 263 may kindly be annulled and Order passed u/s 143(3) r.w Sec 147 21.02.2014 be restored.”

2. Succinctly stated, the assessee had filed his return of income for A.Y.2009-10 on 31.03.2010, declaring an income of Rs.3,11,080/- a/w. agricultural income of Rs.4,51,375/-. The return of income filed by the assessee was processed as such u/s. 143(1) of the Act on 08.10.2010.

3. As the assessee had failed to disclose cash deposit of Rs.30 lacs in his saving bank account with State Bank of India, Branch: New Shanti Nagar, Raipur, the A.O initiated proceedings u/s.147 of the Act. Notice u/s.148 of the Act dated 06.08.2012 was issued to the assessee. In compliance, the assessee filed his return of income u/s.148 of the Act on 06.08.2012, disclosing an income of Rs.33,11,080/- (including undisclosed income of Rs.30 lacs).

4. Original assessment in the case of the assessee was, thereafter, framed by the A.O vide order u/s. 143(3) r.w.s. 147 of the Act dated 21.02.2014, determining his total income at Rs.33,11,080/-, i.e., after accepting his return of income that was filed on 18.03.2013.

5. After culmination of the assessment proceedings, the Pr. CIT-2, Raipur called for the assessment records of the assessee. Observing, that the order

passed by the A.O u/s. 143(3) r.w.s. 147, dated 21.02.2014 was erroneous in so far it was prejudicial to the interest of the revenue for two-fold reasons, viz. (i) that the A.O while framing assessment had failed to initiate penalty proceedings u/s. 271(1)(c) of the Act; and (ii) that there was a short levy of tax of Rs.26,530/- while computing the liability of the assessee, the Pr. CIT vide his order passed u/s. 263 of the Act directed the A.O to pass a fresh assessment order after affording a reasonable opportunity of being heard to the assessee. Thereafter, the A.O vide his order passed u/s. 143(3) r.w.s. 263 of the Act, dated 22.12.2016 giving effect to the order passed by the Pr. CIT u/s. 263 of the Act, dated 30.03.2016 determined the income of the assessee at Rs.33,11,080/- a/w. agricultural income of Rs.4,51,375/- and initiated penalty proceedings u/s. 271(1)(c) of the Act for the reason that he had concealed particulars of his income by furnishing incorrect particulars.

6. Aggrieved the assessee carried the matter in appeal before the CIT(Appeals) but without success. Ostensibly, the CIT(Appeals) holding a conviction that the A.O in the assessment framed u/s. 143(3) r.w.s. 263 of the Act, dated 22.12.2016 had not made any addition to the income that was originally assessed by him vide order passed u/s. 143(3) r.w.s. 147 of the Act, dated 24.12.2014, dismissed the appeal as not maintainable.

7. The assessee being aggrieved with the order of the CIT(Appeals) has carried the matter in appeal before us.

8. We have heard the Id. Authorized Representatives of both the parties, perused the orders of the lower authorities and the material available on record, as well as considered the judicial pronouncements that have been pressed into service by the Ld. AR to drive home his contentions.

9. Shri Praveen Jain, Ld. Authorized Representative (for short 'AR') for the assessee at the threshold of hearing of the appeal submitted that as the assessee had remained unaware about the order passed by the Pr. CIT u/s. 263 of the Act dated 30.03.2016, therefore, he had no occasion to assail the same any further in appeal before the Tribunal. It was submitted by the Ld. AR that the order passed by the A.O u/s. 143(3) r.w.s. 263 of the Act dated 22.12.2016 in absence of valid assumption of jurisdiction, could not be sustained and was liable to be struck down. Elaborating on his aforesaid contention, the Ld. AR submitted that as the Pr. CIT had erroneously assumed jurisdiction and set-aside the order passed by the A.O u/s. 143(3) r.w.s. 147, dated 24.12.2014, therefore, the consequential assessment framed giving effect to the same vide order passed by the A.O u/s. 143(3) r.w.s. 263 would stand on no better footing. Carrying his contention further, the Ld. AR submitted that the Pr. CIT had assumed jurisdiction u/s. 263 of the Act for directing the A.O to initiate penalty proceedings u/s. 271(1)(c) of the Act, which, however, was not permissible as per the mandate of law. The Ld. AR submitted that as the Pr. CIT could not have assumed jurisdiction u/s.263 of the Act for divesting the A.O of his exclusive discretion of not initiating penalty proceedings u/s. 271(1)(c) of the Act while framing the assessment in the case of the assessee, therefore, the very

basis for setting-aside of his order by the Pr. CIT was devoid and bereft of any force of law. The Ld. AR in support of his aforesaid contention had relied on the following judicial pronouncements:

- (i) CIT Vs. Rakesh Nain Trivedi, ITA No.290 of 2014 dated 29.10.2015 (P & H)
- (ii) Easy Transcription & Software (P) Ltd. Vs. CIT, 185 TTJ (Ahd) 504
- (iii) CIT Vs. Subhash Kumar Jain (2011) 335 ITR 364 (P & H)
- (iv) Addl. CIT Vs. J.K D.' Costa (1982) 133 ITR 7 (Del)
- (v) CIT Vs. Sudershan Talkies (1993) 201 ITR 289 (Del)
- (vi) CIT Vs. Nihal Chand Rekyan (2000) 242 ITR 45 (Del)
- (vii) CIT Vs. Keshrimal Parasmal (1986) 157 ITR 484 (Raj)
- (viii) CIT Vs. Linotype & Machinery (1991) 192 ITR 337 (Cal.)
- (ix) Surendra Prasad Singh and Ors Vs. CIT (1988) 173 ITR 510 (Guj.)

Referring to the aforesaid judicial pronouncements, it was submitted by the Ld. AR that the Hon'ble Courts had held that where the A.O had not initiated penalty proceedings u/s. 271(1)(c) in the assessment order, the Pr. CIT could not direct him to initiate the same in exercise of his revisionary powers u/s. 263 of the Act.

10. Elaborating further, the Ld. AR submitted that now when the order u/s. 263 of the Act has been passed by the Pr. CIT based on erroneous assumption of jurisdiction, the consequential assessment framed by the A.O giving effect to his direction vide order u/s. 143 (3) r.w.s. 263 dated 22.12.2016 could not be sustained and was liable to be quashed. In support of his aforesaid contention, the Ld. AR relied on the order of the ITAT, Nagpur in the case of Pradeep Dattraya Banginwar Vs. Pr. CIT, 36 NYPTJJ 428 (Nag.).

11. On a specific query by the Bench that now when it was an admitted fact that the order passed by the Pr. CIT u/s. 263 of the Act, dated 30.03.2016 had not been assailed any further in appeal by the assessee, therefore, on what basis the assumption of jurisdiction by the Pr. CIT could be challenged in the present appeal which in turn found its genesis in the consequential assessment u/s. 143(3) r.w.s. 263 of the Act, dated 22.12.2016, the Ld. AR submitted that illegality and invalidity of an order passed in the primary proceedings could validly be challenged in the course of the collateral proceedings. The Ld. AR in support of his aforesaid contention had relied on the following judicial pronouncements:

(i) Westlife Development Ltd. Vs. Pr. Commissioner of Income Tax-5, Mumbai (2017) 88 taxmann.com 439 (Mumbai)

(ii) Hari Mohan Das Tandon (HUF) Vs. Pr. Commissioner of Income Tax (2018) 91 taxmann.com 199 (Allahabad-Trib.)

(iii) Krishan Kumar Saraf Vs. Commissioner of Income Tax, ITA No.4562/Del/2011

12. The Ld. AR also assailed the penalty imposed by the A.O u/s. 271(1)(c) of the Act on the ground that now when the assessee had voluntarily offered an amount of Rs.30 lacs (supra) in his return of income that was filed in compliance to the notice u/s. 148 of the Act, dated 06.08.2012 there was no justification for the A.O to have imposed penalty as regards the said amount. The Ld. AR in support of his aforesaid contention had relied on the order of ITAT, Lucknow in the case of ITO Vs. India Overseas Trading Co., ITA No.195/LKW/2011 dated 25.08.2014.

13. Apropos the taking of recourse to the proceedings u/s. 263 of the Act by the Pr. CIT w.r.t. a computational error, i.e., impugned shortfall in levy of tax by the A.O, the Ld. AR submitted that when the remedy for rectifying the same was available u/s. 154 of the Act, the provisions of Section 263 of the Act could not have been invoked by the Pr. CIT. The Ld. AR in order to buttress his aforesaid claim had relied on the following judicial pronouncements:

(i) Manoj Singhal Vs. Pr. CIT, ITA No.1731/Del/2020 dated 28.05.2021

(ii) M/s. J.P Construction Vs. Commissioner of Income Tax, ITA No.1304/Ahd/2009 dated 24.07.2009

On the basis of his aforesaid contentions, it was the claim of the Ld. AR that as the impugned order u/s. 143(3) r.w.s. 263, dated 22.12.2016 was passed on the basis of invalid assumption of jurisdiction by the Pr. CIT u/s. 263 of the Act, therefore, the same could not be sustained and was liable to be quashed.

14. Per contra, the Ld. Departmental Representative (for short 'DR') relied on the orders of the lower authorities.

15. We have thoughtfully considered the contentions of the Id. authorized representatives of both the parties in the backdrop of the orders of the lower authorities. Admittedly, it is a matter of fact borne from record that the assessee, inter alia, being aggrieved with the initiation of penalty u/s. 271(1)(c) of the Act by the A.O vide order u/s. 143(3) r.w.s. 263 of the Act, dated 22.12.2016, which in turn, was passed to give effect to the order passed by the Pr. CIT u/s. 263 of the

Act dated 30.03.2016, had carried the matter in appeal before the CIT(Appeals). As is discernible from the grounds of appeal raised by the assessee before the CIT(Appeals), it transpires that the assessee had specifically assailed the initiation of penalty u/s. 271(1)(c) of the Act by the A.O while giving effect to the order passed by the Pr. CIT u/s. 263 of the Act, i.e., vide his order passed u/s. 143(3) r.w.s. 263 dated 22.12.2016, specifically for the reason that no such penalty was initiated in the course of the original assessment that was framed u/s. 143(3) r.w.s. 147 dated 21.02.2014. For the sake of clarity, the grounds of appeal raised by the assessee before the CIT(Appeals) are culled out as under:

“1. That on the facts and circumstances of the case, the Id. AO has erred in law and on facts in reopening of the case and passing the impugned order u/s. 143(3) r.w.s 263 when there is no escapement of income or concealment of income. Hence, order u/s. 143(3) r.w.s. 263 is bad in law, against law of natural justice and uncalled for and may kindly be annulled.

2. That on the facts and circumstances of the case, the Id. AO erred in passing the order u/s. 143(3) r.w.s. 263 of the IT Act when there is no addition of income in order u/s. 143(3) r.w.s. 263. Hence, order u/s. 143(3) r.w.s. 263 is bad in law, against law of natural justice and uncalled for and may kindly be annulled.

3. That on the facts and on the circumstances of the case, Id. AO erred in reopening of the case on the basis of order u/s. 263 stating under mentioned reasons:

- Ld. AO failed to initiate penalty proceedings u/s. 271(1)(c) of the Act and

- Short levy of tax of Rs.26,530/- while computing of tax, reopening of the case on the above presumptions is bad in law against law of natural justice and uncalled for.

4. That on the facts and on the circumstances of the case, Id. AO erred in reopening of the case initiating penalty u/s. 271(1)(c) when assessee had voluntarily surrendered the same in his return of

income in response to notice u/s.148. Levy of penalty is bad in law, against law of natural justice and uncalled for and may kindly be annulled.

5. That on the facts and on the circumstances of the case, Id. AO erred in reopening of the case and initiating penalty u/s. 271(1)(c) when the same was not levied in assessment order u/s. 143(3) r.w.s.147, 21.02.2014. Reopening of case just for the sake of initiation of penalty is bad in law, against law of natural justice.

6. That on the facts and on the circumstances of the case, Id. AO erred in reopening of the case for mis-calculation of tax in computing demand u/s. 156 for which only recourse is rectification u/s. 154. Reopening of case for the mistake in computation by the department which is apparent from record is bad in law, against law of natural justice and uncalled for and may kindly be deleted.

7. The appellant craves leave to add, alter, amend, omit, grounds of appeal at the time of hearing the appeal.”

16. In our considered view, the assessee by challenging the initiation of penalty by the A.O u/s. 271(1)(c) while passing the impugned order, i.e., u/s. 143(3) r.w.s. 263 dated 22.12.2016, had assailed the very assumption of jurisdiction by the A.O to initiate the said penalty proceedings on the basis of the direction of the Pr. CIT u/s. 263 of the Act. Apart from that, the assessee had, inter alia, assailed the fresh initiation of penalty u/s. 271(1)(c) by the A.O vide his order passed u/s. 143(3) r.w.s. 263, dated 22.12.2016 for the reason that income which was returned u/s. 148 of the Act and was assessed by the A.O vide order u/s. 143(3) r.w.s. 147, dated 24.12.2014 had remained the same as was determined by the A.O in the impugned order passed by him u/s. 143(3) r.w.s. 263 of the Act, dated 22.12.2016. As the assessee had on the basis of the aforesaid reasons specifically assailed the validity/maintainability of the initiation of penalty proceedings by the A.O in the

impugned order, which, in turn, was based on the directions of the Pr. CIT u/s. 263 of the Act, therefore, there was no justification for the CIT(Appeals) to have summarily brushed-aside the said grievance of the assessee as was raised before him, on the basis of his observation that as the income assessed in the original assessment order u/s. 143(3) r.w.s. 147, dated 24.12.2014 had remained the same as that determined vide order passed u/s. 143(3) r.w.s. 263, dated 22.12.2016, therefore, the appeal was not maintainable. For the sake of clarity, the relevant observations of the CIT(Appeals) are culled out as under:

“2.3 I have gone through the facts of the case and the submissions of the appellant. From the above facts it is seen that after reopening of the case there is no addition to the income assessed in the original assessment order. Income assessed in the original assessment order is Rs.33,11,080/- and income as per order u/s. 143(3)/263 is also Rs. 33,11,080/-. The demand as per demand notice is also same. Therefore, no appeal lies in this case. The same is dismissed.

3.0 The appeal is dismissed.”

17. As the assessee while exercising the statutory right that was vested with him u/s. 246A(1)(a) of the Act had validly assailed the initiation of penalty u/s. 271(1)(c) of the Act by the A.O vide order passed u/s. 143(3) r.w.s. 263 of the Act, dated 22.12.2016, therefore, the CIT(Appeals) ought to have dealt the said specific grounds and adjudicated the same on the basis of a speaking order. As the CIT(Appeals) had erred in not disposing of the specific grounds of appeal that were raised by the assessee before him, therefore, in all fairness, we restore the matter to his file with a direction to re-adjudicate the same and dispose off the appeal after considering the specific issues which were raised by the assessee before him, on

the basis of a speaking order. Needless to say, the CIT(Appeals) shall in the course of set-aside proceedings afford a reasonable opportunity of being heard to the assessee who shall remain at a liberty to substantiate his claim based on the contentions which have been raised before us. Thus, the **Ground of appeal No.1** raised by the assessee is allowed for statistical purposes in terms of our aforesaid observations.

18. As we have restored the matter to the file of the CIT(Appeals) for fresh adjudication in terms of our aforesaid observations, therefore, we refrain from dealing with the other contentions, on the basis of which, the impugned order has been assailed before us, which, the assessee would remain at a liberty to raise before the CIT(Appeals). Thus, the **Grounds of appeal No. 2 to 4** raised by the assessee are disposed off in terms of our aforesaid observations.

19. The **Grounds of appeal No. 6 & 7** being general in nature are dismissed as not pressed.

20. In the result, appeal of the assessee is allowed for statistical purposes in terms of our aforesaid observations.

Order pronounced in open court on 02nd day of November, 2023.

Sd/-
ARUN KHODPIA
(ACCOUNTANT MEMBER)

Sd/-
RAVISH SOOD
(JUDICIAL MEMBER)

रायपुर/ RAIPUR ; दिनांक / Dated : 02nd November, 2023
**#SB

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(Appeals)-1, Raipur (C.G.)
4. The Pr. CIT, Raipur-1 (C.G)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, रायपुर बेंच,
रायपुर / DR, ITAT, Raipur Bench, Raipur.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

निजी सचिव / Private Secretary

आयकर अपीलीय अधिकरण, रायपुर / ITAT, Raipur.