

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'E', NEW DELHI**

Before Dr. B. R. R. Kumar, Accountant Member

Sh. Yogesh Kumar US, Judicial Member

ITA No. 198/Del/2020 : Asstt. Year: 2015-16

M.R Apparels P Ltd., S-222, School Block, Shakarpur, New Delhi 110092 (ASSEESSEE)	Vs	The PCIT-6, Delhi (RESPONDENT)
PAN No. AAFCM 6003 M		

Assessee by : Sh. Nitin Goyal, CA

Revenue by : Sh. Subhra Jyoti Chakraborty, CIT-DR

Date of Hearing: 09.11.2023

Date of Pronouncement: 06.02.2024

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal has been filed by the assessee against the order of Ld. PCIT-6, New Delhi dated 18.11.2019.

2. Following grounds have been raised by the assessee:

"1. That on the facts and circumstances of the case and in law, the Ld. Pr. CIT has erred in initiating the proceedings under section 263 of the Act and that the order passed by the Ld. Pr. CIT is bad in law and uncalled for.

2. That the Ld. PR. CIT has erred in passing the order without giving due opportunity of being heard to the appellant,

- Because, the appellant had not received any alleged email for re-fixing the matter;*

- Because the appellant has made a request to Pr. CIT -6 to allow to take copy of assessment records but the said application was pending for disposal at the end of*

the office of Pr. CIT-6 Delhi which is against the principal of natural justice and bad in law.

3. That on the facts and circumstances of the case and in law, the Ld. Pr. CIT has erred in holding that "the original assessment order passed u/s 143(3) is erroneous in so far as it is prejudicial to the interest of the revenue".

4. That on the facts and circumstances of the case and in law, the Ld. Pr.CIT has erred in holding that the Ld. AO has "failed to verify the issue", without adequately perusing the process followed and information/documents asked by the Ld. AO, during the assessment proceedings.

5. That on the facts and circumstances of the case and in law, the Ld. Pr.CIT has erred in directing the Ld. AO to re-verify and tax the particular transaction just because of "difference of opinion" framed on same set of documents as reviewed by the Ld. AO during the assessment proceedings."

3. For the sake of brevity and ready reference the order of the Id. PCIT passed u/s. 263 is reproduced below:

The assessee filed original ITR on 30/3/2016 declaring returned income of Rs. 14,000/- The case was selected for limited scrutiny through CASS, wherein verification of sale consideration of property was one of the scrutiny reasons. The assessing officer (AO) completed scrutiny assessment u/s 143(3) of the Income Tax Act on 4/5/2017, wherein income was assessed at Rs. 14,000/- as per the ITR filed by assessee.

2. The assessment record of assessee was called for and on examination of the same; it was noticed that during assessment, the assessee submitted registered sale deed of the property. The sale deed was registered on 17/3/2015 for a consideration of Rs. 6,50,00,000/- and stamp duty of Rs. 32,50,000/- was paid by the purchaser, M/s VTS IT Solutions LLP. Further TDS @1% amounting to Rs. 6,50,000/- on total sale consideration was also paid by the purchaser on 18/3/2015.

The issue of property transfer being one of the scrutiny reasons/ was before the AO for verification. The AO during scrutiny assessment, accepted the submission of assessee that full payment was not made by M/s VTS IT Solutions LLP, as cheque for an amount of Rs. 1,45,00,000/- was not honoured by bank. Accordingly the assessee did not show this as transfer of property, and as amount of Rs. 5,05,00,000/- already received

by assessee was shown as advance and no capital gain was calculated by them.

The AO in his assessment order, failed to appreciate the fact that, in the page 4 of said registered deed it was clearly mentioned and duly acknowledged by both the parties under their signature that -

'the Transferor further transfers all the rights of whatsoever in the nature they may be on the Industrial Property No.D-247/1, Sector-63, NOIDA, Distt. Gautam Budh Nagar-U.P. in favour of the Transferee. The aforesaid Transferee, their heirs, executors and assigns shall be entitled to hold the said plot of land for the remaining period of 90 years subject to payment of lease rent hereinafter served.

And was further mentioned that -

'That the Transferor aforesaid has handed over the vacant, actual physical and peaceful possession of the said industrial property to the Transferee on the spot alongwith all documents in original related to the said property.'

And was further mentioned that ---

'That the Transferee is at liberty to get it's name mutated In the records of the NOIDA AUTHORITY or any other competent authority against the said property for which the Transferor has got no objection.'

From the above declaration in registered deed, it is clear that the right of leasehold property was physically transferred by the assessee in the name of M/s VTS IT Solutions LLP.

The Section 45(1) of the Income Tax Act, 1961, provides that' any profit or gains arising from the transfer of a capital asset effected in the previous year shall, save as provided in /sections 54, 54B, 54D, 54E, 54BA, 54EB, 54F, 54G and 54H / be chargeable to income-tax under the head 'Capital gains', and shall be deemed to be the income of previous year in which the transfer took place. '

Further, the argument of assessee that a certain part of sale consideration was not received by them, is not supported by registered sale deed. As in page 4 of the said deed, it was also mentioned that ---

'there is now no balance due towards the Transferee to be paid to the Transferor in respect of the said property'.

The assessee is following mercantile system of accounting, wherein the transactions are recognised as and when they take place. Hence the assessee was required to recognise the revenue on the above mentioned transaction and should have offered the capital gain arising out of such transfer, for taxation purpose.

Further, while verifying the authenticity of the claim of assessee regarding non-receipt of balance amount of Rs. 1,45,00,000/- by cheque, from the transferee, it was noticed that auditors of the company in their audit report dated 4/9/2015, mentioned about cheques of Rs. 1,45,00,000/- being dishonoured. But the fact remains that cheques for the amount Rs. 1,45,00,000/- were dated at 15/9/2015 and 15/3/2016, which clearly comes after the submission of audit report and as such the auditor was not in a position to comment about dishonor of cheques. This fact clearly indicates that assessee has come up with a pre-planned cooked up story to avoid payment of tax arising out of capital gain on transfer of property rights to the transferee.

5. The Assessing officer failed to verify these facts in his assessment order dated 4/5/2017 passed u/s 143(3) of I T Act, 1961 for A.Y. 2015-16. By not considering the physical transfer of leasehold property right registered by a sale deed during the year under consideration and consequently by not determining the undisclosed income arising from capital gain of assessee, the scrutiny assessment order apparently has become erroneous in so far as it is prejudicial to the interest of revenue, in terms of explanation 2 of section 263 of the Income Tax Act, 1961, which is reiterated as under :

"Explanation 2: For the purposes of this section, it is declared that order passed by the Assessing Officer shall be deemed to be erroneous in so as it is prejudicial to the interests of the revenue, if in the opinion of the 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: of (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."

In view of the facts of the instant case and provisions of the Income Tax Act, 1961, as discussed above, a detail show cause notice dated 19/9/2019, u/s 263 of the Income Tax Act was issued to the assessee, directed them to show cause as to why the provision of section 263 of the

Income Tax Act shall not be invoked for A.Y. 2015-16 and the order passed u/s 143(3) of the Act should not be revised and the case should not be set aside to the Assessing Officer, for determination of taxable income under the head capital gain on a/c of transfer of property by the assessee, against a consideration received by them.

The said notice was duly served on the assessee.

Submission on behalf of the Assessee :

The assessee company filed a letter dated 27/9/2019, wherein they requested for adjournment of the case for 15 days, citing the reason that the counsel of assessee is out of city and it is not possible for item to present the case on hearing date, i.e. 27/9/2019.

The request of assessee was accepted and hearing was re-fixed for 23/10/2019 and same was communicated to the assessee on 15/10/2019 by the official e-mail id. delhi.cit6@incometax.gov.in.

The assessee did not comply and as on date no reply received from the assessee, with regard to show cause notice served upon them.

Determination:

I have carefully considered and examined the case records and assessment order of the AO u/s 143(3) dated 4/5/2017. The registered sale deed, which is part of assessment record, clearly shows that there was physical transfer of property by the assessee and payment in lieu of the same was received by them.

The assessee has not come up with any reply to the show cause notice issued and served upon them. However, even if the arguments given by assessee during assessment stage before the AO is considered, the explanation given by them with regard to not considering capital gain arising from transfer of property, have no merit, as has been discussed threadbare in the foregoing paras.

The non-compliance of assessee in response to show cause notice also indicates the fact that they have no proper explanation to offer in this regard.

The AO while framing the assessment order, should have considered the full sale consideration of Rs. 6,50,00,000/- as receipt of assessee and indexed cost of the property value (Rs. 1,20,48,311/-) acquired in the year 2007-08 should have been adjusted against the same to arrive at the undisclosed capital gain of assessee.

In view of the above, it is held that the assessment order passed by the ITO, Ward-16(1), New Delhi, u/s 143(3) of the I T Act, 1961, on 4/5/2017 for the A.Y. 2015-16 is erroneous in so far as it is prejudicial to the interest of the revenue, in terms of explanation 2(a) of section 263 of the Income Tax Act, 1961, owing to the failure of the Assessing Officer to verify the issue related to capital gain arising out of transfer of property by the assessee.

Accordingly the AO is directed to make proper verification of the issue, determine the capital gain income generated out of this transaction and to bring the same under tax net, as per the provisions of the i. T. Act.

Effect to this order may be given forthwith.

4. The arguments of the Id. AR and the written submissions are as under:

1. Background of the case

a. The assessee company has filed its income tax return for AY2015-16 declaring income of Rs 14,000/-

b. The return of income picked up for the limited scrutiny through CASS and one of the reasons was sale of property reported in form 26QB (i.e. Tax deducted by buyer from sale consideration)

c. The Ld. AO during assessment proceedings asked for the details pertaining to that such as

- i. Documents pertaining to transaction;*
- ii. Reason for not considering the transaction as "sale";*
- iii. Got affidavit and Indemnity bond from the assessee company relating to considering the transaction as "sale" or "otherwise" as per the decision of the court.*

d. Post making due enquiry, the Ld. AO concluded that the transaction is not taxable in the year under consideration and passed the order accordingly on 04th May 2017.

e. The Ld. Pr. CIT has picked up the case u/s 263 and issued a show notice on 19th Sept 2019 stating that "assessing officer failed to verify these facts in his assessment order dated 4.5.2017 passed u/s 143(3) of the I T Act 1961..."

f. Unfortunately assessment records were misplaced by the appellant and the appellant has filed an application before

jurisdictional AO and with PR. CIT asking for the permission to inspect the assessment records and to take copy of the same.

g. The Ld. PR. CIT, without disposing of our application and giving us chance to inspect the assessment records, has allegedly issued a notice through email fixing the date of hearing and then passed the order ex-parte in hurry.

2. Ground no 2

"That the Ld. PR. CIT has erred in passing the order without giving due opportunity of being heard to the appellant,

- Because, the appellant had not received any alleged email for re-fixing the matter;*
- Because the appellant has made a request to Pr. CIT -6 to allow to take copy of assessment records but the said application was pending for disposal at the end of the office of Pr. CIT-6 Delhi which is against the principal of natural justice and bad in law.*

2.1 Here is the details pertaining to notices of hearing issued and appellant's response to that

<i>S.No</i>	<i>Date</i>	<i>Particulars</i>	<i>Remarks</i>
<i>1.</i>	<i>19/09/2019</i>	<i>Shaw cause notice issued by Pr. CIT fixing the date of hearing on 27/09/2019</i>	<i>Appellant Filed adjournment Application seeking 15 days time</i>
<i>2.</i>	<i>03/10/2019</i>	<i>Appellant filed an application for inspection of assessment records and its copy with the Ld. AO</i>	<i>AO informed that the file is with the office of Pr. CIT</i>
<i>3.</i>	<i>04/10/2019</i>	<i>Appellant filed an application for inspection of assessment records and its copy with the Ld. Pr. CIT-6</i>	<i>No revert and no disposal of the application</i>
<i>4.</i>	<i>15/10/2019</i>	<i>Communication</i>	<i>No email received.</i>

		<i>for fixing the matter of hearing on 23/10/2019- issued through email.</i>	<i>The order does not contain reference to the email id of the recipient where the notice was sent</i>
5.	18/11/2019	<i>Order u/s. 263 passed.</i>	<i>Ex-Parte order passed</i>

2.2 *The Ld. Pr. CIT has passed the order u/s 263 without giving proper opportunity of being heard. The alleged notice dated 15/10/2019, was not received by the appellant and Ld. Pr. CIT did not issue any further notice. It may please be appreciated that the as per subsection 2 of section 263 of the Act, the order u/s 263 could have been passed by 31/03/2020 and there is no time barring pressure. Further, the appellant has submitted before La. Pr.CIT that its assessment records are missing and requested him to please allow inspection of file and take copy of that - Ld. Pr. CIT has chosen to pass the order rather than allow to inspect the file and present its case. Ld. Pr. CIT has failed to give a due opportunity of being heard to the appellant which is in violation of the principles of natural justice.*

2.3 *The Ld. Pr. CIT has breached the principal of natural justice and has not allowed due opportunity of being heard. It is well settled principle of law that where the power is given to do certain things in certain way, the thing has to be done in that way alone and no any other manner which is otherwise not provided under the law. - The Hon'ble Supreme Court in the case of Chandra Kishore Jha Vs. Mahaveer and others (1999 8 SCC 266) in paragraph No.17 laying down the aforesaid principle held as under "it is well settled solitary principle that if statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner. The said principle of law was further reiterated in the case of Cherrukurimani Vs. Chief Secretary Government of Andhra Pradesh and others (3 2015 13 SCC 722), wherein, again in paragraph No.14, the aforesaid principle has been reinforced by the Hon'ble Supreme Court holding that "where law prescribe a thing to be done in a particular manner following a particular procedure, it shall have to be done in the same manner following the provisions of law without deviating from the prescribed procedure.*

2.4 *Opportunity of being heard is to granted before passing any order u/s 263 of the Act, which the Ld. Pr. CIT failed to grant.*

3.0 For Ground no 1

That on the facts and circumstances of the case and in law, the Ld. Pr. CIT has erred in initiating the proceedings under section 263 of the Act and that the order passed by the Ld. Pr. CIT is bad in law and uncalled for.

3.1 The Ld. PR. CIT has initiated the proceedings under section 263 stating that the AO has "failed to verify" the facts in his assessment order dated 4.5.2017, where the Ld. AO has obtained all the relevant information/documents as mentioned herein under

- Specific submission by the appellant dated 27/04/2017 stating the entire transaction of sale (Page 8 of PB)*
- Copy of sale deed (Page - 10/PB)*
- Specific submission by the appellant dated 21/04/2017 stating the fact that the appellant has neither claimed TDS nor offered transaction as sale in books of account (Page 23 of PB)*
- Copy of audited financial statements (Page 28 of PB)*
- Affidavit and Indemnity bond (Page 5 to 7 of PB)*

3.2 The case was selected for limited scrutiny for verification of sale of capital assets only.(Page 62 of PB)

3.3 Acceptance of claim by the Ld. AO was based on his considered opinion after verification of all the relevant papers.

3.4 What could be termed as erroneous - can be referred from explanation 2 to section 263 of the Act. The Ld. PR. CIT has invoked clause (a) to explanation 2 of the section 263.

*"Explanation 2.—For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer 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 Commissioner or Commissioner,—
(a) the order is passed without making inquiries or verification which should have been made;"*

All the above details/facts/documents were on the file and accordingly the view formed by Ld. PR. CIT that the Ld. AO has passed the order without making in inquiries or verification which should have been made, is not called for and bad in law.

4.0 For Ground no 3 to 5

1. That on the facts and circumstances of the case and in law, the Ld. Pr. CIT has erred in holding that "the

original assessment order passed u/s 143(3) is erroneous in so far as it is prejudicial to the interest of the revenue".

2. *That on the facts and circumstances of the case and in law, the Ld. Pr. CIT has erred in holding that the Ld. AO has "failed to verify the issue", without adequately perusing the process followed and information/documents asked by the Ld. AO, during the assessment proceedings.*

3. *That on the facts and circumstances of the case and in law, the Ld. Pr. CIT has erred in directing the Ld. AO to re-verify and tax the particular transaction just because of "difference of opinion" framed on same set of documents as reviewed by the Ld. AO during the assessment proceedings.*

The current order by Ld. AO is not erroneous as much as the Ld. AO has asked for all the relevant details and documents and have formed an opinion based on the documents before him. In the current case, the Ld. Pr. CIT has framed an opinion on similar set of documents and information that the transaction should be liable for taxed during the year under consideration rather the decision of Ld. AO who has taken affidavit and Indemnity Bond and decided to tax postpone the taxability at the time of finalization of matter.

While Ld. Pr. CIT is of the opinion that the 100% of the amount has been received, a substantial portion of sale consideration (23% approx.) was pending for payment. The sale deed contains the amount and cheque number but not the date of those cheques. Further, it is an undisputed fact that Rs. 1.45 crore is not received by the appellant company.

Delhi High Court - Commissioner of Income Tax vs Sundeam Auto - 332 ITR 167 (2009)

5. Heard the arguments of both the parties and perused the material available on record.

6. Provisions of section 263 of the Income Tax Act 1961 are as under:

Revision of orders prejudicial to revenue.

263. (1) The ⁹⁹[Principal Chief Commissioner or Chief Commissioner or Principal Commissioner] or Commissioner may call for and examine the record of any

proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer ¹[or the Transfer Pricing Officer, as the case may be,] is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, ²[including,—

- (i) an order enhancing or modifying the assessment or cancelling the assessment and directing a fresh assessment; or
- (ii) an order modifying the order under [section 92CA](#); or
- (iii) an order cancelling the order under [section 92CA](#) and directing a fresh order under the said section].

Explanation 1.—For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,—

- (a) an order passed on or before or after the 1st day of June, 1988 by the Assessing Officer ¹[or the Transfer Pricing Officer, as the case may be,] shall include—
 - (i) an order of assessment made by the Assistant Commissioner or Deputy Commissioner or the Income-tax Officer on the basis of the directions issued by the Joint Commissioner under [section 144A](#);
 - (ii) an order made by the Joint Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer ³[or the Transfer Pricing Officer, as the case may be,] conferred on, or assigned to, him under the orders or directions issued by the Board or by the Principal Chief Commissioner or Chief Commissioner or Principal Director General or Director General or Principal Commissioner or Commissioner authorised by the Board in this behalf under [section 120](#);
 - ³[(iii) an order under [section 92CA](#) by the Transfer Pricing Officer;]
- (b) "record" shall include and shall be deemed always to have included all records relating to any proceeding under this Act available at the time of examination by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner;
- (c) where any order referred to in this sub-section and passed by the Assessing Officer ³[or the Transfer Pricing Officer, as the case may be,] had been the subject matter of any appeal filed on or before or after the 1st day of June, 1988, the powers of the Principal Commissioner or Commissioner under this sub-section shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal.

Explanation 2.—For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer ³[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 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.

³[Explanation 3.—For the purposes of this section, "Transfer Pricing Officer" shall have the same meaning as assigned to it in the Explanation to [section 92CA](#).]

(2) No order shall be made under sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed.

(3) Notwithstanding anything contained in sub-section (2), an order in revision under this section may be passed at any time in the case of an order which has been passed in consequence of, or to give effect to, any finding or direction contained in an order of the Appellate Tribunal, the High Court or the Supreme Court.

Explanation.—In computing the period of limitation for the purposes of sub-section (2), the time taken in giving an opportunity to the assessee to be reheard under the proviso to [section 129](#) and any period during which any proceeding under this section is stayed by an order or injunction of any court shall be excluded.

7. From the record, we find that the assessee was quite aware of the proceeding before the Id. PCIT with reference to the dates 27.09.2019 and also 23.10.2019. The explanation(2) to section 263 provides that an order passed by the Assessing Officer 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 Chief 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.

8. The above explanation squarely applicable to the facts of the case and hence, we decline to interfere with the order of the Id. PCIT passed u/s. 263.

9. In the result, the appeal of the assessee is dismissed.
Order Pronounced in the Open Court on 06/02/2024.

Sd/-
(Yogesh Kumar US)
Judicial Member

Dated: 06/02/2024

NV, Sr. PS

Sd/-
(Dr. B. R. R. Kumar)
Accountant Member

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT, DELHI