

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

**Before Dr. B. R. R. Kumar, Accountant Member
Ms. Astha Chandra, Judicial Member**

ITA No. 1179/Del/2023 : Asstt. Year: 2017-18

S D Educational Society, 659, Sector-13, Hisar, Haryana-125001	Vs	Pr. CIT (Exemption), Chandigarh-160017
(APPELLANT)		(RESPONDENT)
PAN No. AAGTS9626Q		

**Assessee by : Sh. S. Krishanan, Adv.
Sh. V. Rajkumar, Adv.
Revenue by : Ms. Monika Dhami, CIT-DR**

Date of Hearing: 15.02.2024	Date of Pronouncement: 15.03.2024
------------------------------------	--

ORDER

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

The present appeal has been filed by the assessee against the order of Id. CIT(Exemptions), Chandigarh dated 23.03.2022.

2. Following grounds have been raised by the assessee:

"That on the facts and in the circumstances of the case and in law the Pr. Commissioner of Income Tax, Chandigarh erred in passing order under section 263 of the Income Tax Act, 1961 ('the Act' for short) holding the order passed by the National e-Assessment Centre, Delhi to be erroneous and prejudicial to the interest of revenue and directing the Assessing Officer to make a fresh assessment de novo."

3. The assessee society is an educational society running two Colleges at Hisar, one for Nursing and another for Ayurveda. The assessee filed return of income on 31.03.2018 declaring income of Rs. Nil. After a complete scrutiny u/s 143(3) of the Income Tax Act, 1961 by the Income-tax Officer (Exemptions) Ward Rohtak, the assessment u/s 143(3) of the Act was completed on 20.11.2019 at an income of Rs. 2 lacs. The Assessing Officer taxed the income u/s 115BBE of the Act. The Assessing Officer alleging misreporting of income also initiated penalty proceedings u/s. 270A of the Act.

4. The Id. CIT (Exemptions), Chandigarh called for and examined the records of the case. After so doing he put the assessee to notice u/s. 263 of the Act on 10.03.2022. Vide para 5 of that notice invited the assessee to answer as to why the income as assessed should not be enhanced or modified or the assessment itself be cancelled.

5. Aggrieved, the assessee filed appeal before the Tribunal against the order of the Id. CIT(E) passed u/s 263 of the Income Tax Act, 1961.

6. The Id. AR argued referring to the enquiries, questionnaire and the answers of the assessee submitted before the Assessing Officer. It was argued that the Assessment Order has been passed after conducting due enquiries and deliberations.

7. The Id. DR argued at length and submitted the arguments in writing which are as under:

"With the reference to this case, it is held that Explanation 2 has been inserted by the Finance Act 2015, w.e.f. 01/06/2015 and the assessee's case is squarely covered by that explanation.

To reproduce from the Income Tax act, 1961,-

"Explanation 2- For the purpose of this section , it is hereby declared that an order passed by the Assessing Officer [or the Transfer Pricing Officer, as the case maybe,] shall be deemed to be erroneous in so far as it is prejudicial to the interests of revenue, if , in the opinion of Principal [Chief Commissioner or Chief Commissioner or Principal] Commissioner or Commissioner,-

- (a) the order is passed without making inquires 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 U/s 119.*

2. Here in the order u/s 263 dated 23/03/2022 Cit Exemption Chandigarh has clearly written that the AO did not conduct inquiry into the creditworthiness of the parties and the case of assessee is covered by clause 'a' of Explanation 2.

3. Secondly, it is contended that Explanation 2 clearly refers to opinion of the Principal Commissioner. Here he is

not required to do an independent inquiry to establish his contention. It is only the opinion that is being emphasized here.

4. *Thirdly to quote from the order u/s 263 dated 23/03/2022 where in page 13 CIT Exemption Chandigarh has clearly mentioned "An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous."*

This clearly establishes the validity of order u/s 263 passed by CIT Exemption whose mandate to do so is clearly covered by Explanation 2 inserted by the Finance Act 2015. The case of the Assessee belongs to A.Y. 2017-2018.

5. *The essence of an assessment order is to arrive at the right amount of taxable income on the basis of relevant facts and legal positions. It is needless to say that any order that is passed without gathering relevant facts including necessary enquiries/ investigation is erroneous. The courts have unanimously held this view in several cases. For instance in the cases of Ramapriya Devi Saraogi Vs CIT(SC) 67 ITR 84, Malabar Industries Co. Ltd. Vs CIT(SC) 243 ITR 83, Gee VEE Enterprises Vs Addl. CIT(Del) 99 ITR 375 etc, the courts have held that unlike civil court which is neutral to give a decision on the basis of evidence produced before it, an Assessing Officer is not only an adjudicator but is also an investigator. He cannot remain passive on the facts of a return which is apparently in order but calls for further enquiry. It is his duty to ascertain the truth of the facts stated in the return when the circumstance of the case is*

such to provoke inquiry. If there is a failure to make such inquiry, order is erroneous and prejudicial to revenue.

An order is erroneous on Assessing Officer's failure to make inquiries. In Tara Devi Aggarwal Vs. CIT, 88 ITR 323 (SC), the supreme court observed that where an income has not been earned, it is not assessable merely because the assessee wants it to be assessed in his/her hands in order to assist someone else who would have been assessed to a larger amount and rate of tax and the assessment so made will erroneous and prejudicial to the interests of the revenue and that the Commissioner of Income-Tax has jurisdiction to cancel that assessment and direct the Assessing Officer to make the assessment afresh according to law after making proper enquiries. An assessment order which is erroneous and prejudicial to the revenue can be revised by the Commissioner. It has been held that the Commissioner of Income tax can also regards an assessment order to the erroneous where, on the circumstances of the case, he finds that it has been made in undue haste and without proper enquiry, It is incumbent on the Assessing Officer to investigate the facts stated in Income tax return particularly when the circumstances suggest that the enquiry would have been necessary or prudent. Hence the word "erroneous" would also include a failure to make such an enquiry."

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

9. In the Revision proceedings u/s. 263 of the Act, the Ld. CIT(E) was provided with comprehensive and complete answers to his various queries. Thereafter the Ld. CIT(E) being of the opinion, that the genuineness of the corpus donations remained unverified and unexamined by the AO and further that the unsecured loans had not been properly verified and after holding "that the replies provided by the assessee are shallow, unsubstantiated, incomplete, unsatisfactory and violate factual and logical consistency and applicable statutory provisions and standards" and further noting "that these issues remained unexplained on the part of the assessee and unexamined on the part of the AO" observed that the assessment order passed by the AO was without application of mind and so it was erroneous and prejudicial to the interest of the Revenue.

10. The Ld. CIT(E) invoked Explanation 2 to Section 263 of the Act for that purpose and directed the AO "to pass order afresh in accordance with law keeping the view above observations and after affording reasonable opportunity of being heard to the assessee".

11. The Ld. CIT(E) has invoked Explanation-2 to the Section 263 of the Act to propose the re-examination of the case by the AO.

12. So far Section 263 of the Act as the main part of the Act is concerned, the same can be invoked only if there is definitely an error in the order of the Authority under review and that error has to be identified by the Commissioner. On the alibi that the Assessing Authority does not seem to have made enquiries

the jurisdiction for Revision cannot be assumed by the Ld. CIT(E). The Authority to revise would be available to the Ld. CIT(E) only if he is able to locate a definite error in the order arising out of the Authority omitting to make the requisite enquiry.

13. The first observation of the Ld. CIT(E) is that the corpus donations have not been verified by the AO and that he has failed to make the requisite enquiries in that behalf during assessment. That is not quite so in this case. For the purpose of making enquiries the AO had indeed, during the course of the assessment proceedings, issued specific notices to the assessee to explain and to prove the corpus donations. Those solicitations of the AO and the answers thereto provided by the assessee are placed at pages 10, 18, 20, 29, 84, 86-100 etc. of the Paper Book. Of specific importance is the material placed by the assessee before the Assessing Officer, Rohtak with the following explanation:

"Sir, As regarding donation received during year it is submitted that the society was undergoing to establish BAMS College and for the same if needed funds and donation was received with specific direction that the same is for purpose of establishing colleges and to form part of corpus only. We took a letter from each and every donor confirming the facts. The above letter as well as affidavit confirming the above facts were submitted in physical form with ITO Rohtak receiving of the same is attached. So the onus on us to prove the fact that donation was towards corpus fully established.

Kindly drop the objection relating to donation towards corpus and oblige."(at Paper Book 4)

14. In this background, the opinion of the Ld. CIT(E) that corpus donations were not enquired of by the AO and so they remained unverified is palpably wrong. No mistake of any nature has been identified by the Ld. CIT(E) on this issue in his entire order. The Ld. CIT(E) has detailed what according to him should be the method for verification of corpus donations but as pointed out above the AO's discretion and judgment cannot be vetoed by the Ld. CIT(E) without citing a mistake in the action of the AO.

15. As to the unsecured loans specific query was raised by the AO. After examining of the material and evidence as provided by the Assessee, the AO came to the conclusion that Rs. 2 lacs of loans remained unexplained. The Ld. CIT(E) in his order does not point out any error or defect in the assessment order so far as it concerns unsecured loans. The Ld. CIT(E) only alleges lack of enquiry. That impression of the Ld. CIT(E) was insufficient to invoke proceedings u/s. 263 of the Act. The said proceedings would get ignited only when there is an error in the order of assessment.

16. The Hon'ble Delhi High Court has held in ITO vs. D.G. Housing Projects Ltd. (2012) 343 ITR 329 in the context of the power and authority of a Commissioner in a Section 263 of the Act exercise. One cannot better than to quote the Court's order verbatim in this context:

"Para 16: Thus, in cases of wrong opinion or finding on merits, the CIT has to come to the conclusion and himself decide that the order is erroneous, by conducting necessary enquiry, if required and necessary, before the order under Section 263 is passed. In such cases, the order of the Assessing Officer will be erroneous because the order passed is not sustainable in law and the said finding must be recorded. CIT cannot remand the matter to the Assessing Officer to decide whether the findings recorded are erroneous. In cases where there is inadequate enquiry but not lack of enquiry, again the CIT must give and record a finding that the order/inquiry made is erroneous."

"Para 19. The CIT in the order has recorded that the consideration receivable was examined by the Assessing Officer but was not properly examined and therefore the assessment order is "erroneous". The said finding will be correct, if the CIT had examined and verified the said transaction himself and given a finding on merits. As held above, a distinction must be drawn in the cases where the Assessing Officer does not conduct an enquiry; as lack of enquiry by itself renders the order being erroneous and prejudicial to the interest of the Revenue and cases where the Assessing Officer conducts enquiry but finding recorded is erroneous and which is also prejudicial to the interest of the Revenue. In latter cases, the CIT has to examine the order of the Assessing Officer on merits or the decision taken by the Assessing Officer on merits and then

hold and form an opinion on merits that the order passed by the Assessing Officer is erroneous and prejudicial to the interest of the Revenue. In the second set of cases, CIT cannot direct the Assessing Officer to conduct further enquiry to verify and find out whether the order passed is erroneous or not."

17. Since, the order has been passed by the Assessing Officer after conducting due enquiries, we hold that the Id. Commissioner of Income Tax(E), Chandigarh erred in passing order under section 263 of the Income Tax Act, 1961.

18. In the result, the appeal of the assessee is allowed.
Order Pronounced in the Open Court on 15/03/2024.

Sd/-
(Astha Chandra)
Judicial Member

Dated: 15/03/2024

Subodh Kumar, Sr. PS

Copy forwarded to:

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

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

ASSISTANT REGISTRAR