

आयकरअपीलीयअधिकरण, अहमदाबादन्यायपीठ
IN THE INCOME TAX APPELLATE TRIBUNAL,
"C" BENCH, AHMEDABAD

BEFORE MS. SUCHITRA KAMBLE, JUDICIAL MEMBER
And
SHRI WASEEM AHMED, ACCOUNTANT MEMBER

आयकरअपीलसं./ITA No.90/AHD/2022
(निर्धारणवर्ष/Asstt. Year: 2017-18)

Twara Diam, Plot No. 1593/A, Marine Society, B/H. Gurukul, Sardarnagar, Bhavnagar, Gujarat-364002 PAN: AAJFT3313N	Vs.	PCIT Ahmedabad-1, Ahmedabad
(Applicant)		(Respondent)

Assessee by :	Shri Tushar Hemani, Sr. Adv., Shri Parimalsinh B. Parmar, A.R.
Revenue by :	Shri Karun K Ojha, CIT D.R.

सुनवाईकीतारीख/**Date of Hearing** : **06/03/2024**
घोषणाकीतारीख/**Date of Pronouncement**: **15/05/2024**

आदेश/ORDER

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the assessee against the order of the Learned Principal Commissioner of Income Tax-1, (in short "Ld. PCIT"), Ahmedabad order dated 15.03.2022 for A.Y. 2017-18.

2. The only issue raised by the assessee is that the learned PCIT under section 263 of the Act erred in revising the assessment framed under section 143(3) of the Act by holding the same as erroneous in so far prejudicial to the interest of Revenue.

3. The facts in brief are that the assessee, a partnership firm, is engaged in the business of diamonds. The assessee firm was subject to survey proceedings under section 133A of the Act dated 20th September 2016. During the course of

survey proceedings, the excess stock of cut and polished diamonds worth of Rs. 79,99,894/- only was found. Subsequently, the assessee in the return of income filed for the year under consideration declared total income of Rs. 34,50,800/-only which was accepted by the AO in the assessment framed under section 143(3) of the Act.

4. The learned PCIT on verification of the assessment records found that the assessee firm in the survey proceeding was found with undisclosed income of Rs. 79,99,894/-on account of excess stock of cut and polished diamonds. Therefore, such undisclosed income was required to be treated as income under section 69A of the Act, and accordingly tax on the same was required to be computed as per the provisions of section 115BBE of the Act. However, the AO accepted the income offered by the assessee as per normal provision of the Act which makes the assessment order erroneous and prejudicial to the interest of the revenue. Therefore, the learned PCIT issued notice under section 263 of the Act proposing to revise the assessment order.

5. The assessee, in response to the notice issued under section 263 of the Act, submitted that a reply was furnished before the AO dated 23-12-2019 explaining the difference in stock found during the survey. As such, the assessee firm before the AO has explained that the difference in cut and polished diamond on the date of survey was found due to sale made to one party namely RS Exports vide Invoice no. 095/2016-17 dated 09-09-2016 for 293.99 crt. of diamond which was returned for tempered of seal problems. Such sales returns of cut and polished diamonds of 293.99 crt. were received but not recorded in the books on the date of survey proceedings (20-09-2016). The difference was reconciled after survey proceedings by accounting the impugned sales return in the books. The profit declared in the return was inclusive of such sales return. In the said submission filed before the AO, the assessee firm has also raised contention regarding the non-application of the provisions of section 69A of the Act. The assessee firm based on the above contended that the AO, after verification of difference in stock and considering the possibility of applicability of the provision

of section 69A of the Act, accepted the return income. Hence, there is no error in the assessment order, causing prejudice to the interest of the revenue.

6. However, the learned PCIT disagreed with the contention of the assessee by observing that the assessee firm at the time of survey accepted the excess stock found as undisclosed income. The assessee firm vide letter dated 14-09-2018 stated that excess stock found was accounted as inward stock in the books and sold thereafter. As per the supporting document submitted along with letter dated 14-09-2018, stock of 383.10 crt diamond as inward stock as on 21-09-2016 and outward stock was recorded on the same day. Thereafter, the assessee vide letter dated 23-12-2019 changed the stand stating that the excess diamond found represents sales return. As such, the AO failed to verify the acquisition of the impugned stock originally, selling of the same to party namely RS Export along with the proof of delivery of goods to the party and delivery of goods on return. The AO also failed to verify the details of resale of such stock either to the same party or other party along with payment detail etc. Further, as per the invoice provided by the assessee firm for the sale of the diamond of 293.99 crt to the impugned party stands at Rs. 72,51,580/- whereas at the time of survey excess diamond of 383.10 crt worth of Rs. 79,99,894/- was found. The AO failed to verify this fact. The AO also failed to verify the genuineness of the retraction from the fact of having admitted the income at time of survey. Accordingly, the learned PCIT held that assessment order passed by the AO suffers from errors which is prejudicial to the interest of the revenue and set aside the same for fresh assessment with following direction:

"3.4 Before making the assessment afresh in pursuant to the order u/s 263 of the Act, the Assessing Officer will make the following specific inquiries so as to ascertain as to whether the disclosed diamond of Rs.79,99,894/- was the unrecorded stock in the books of accounts or the returning back of the diamonds claimed to have been sold to M/s R.S. Exports as mentioned above:-

- (i) Verify the opening stock of diamond as per the books.**
- (ii) Verify all the purchases with the copies of all the purchase bills and delivery challans, if any.**
- (iii) Verify all the sales bills with the copies of delivery challans.**

(iv) Verify the quarterly GST return for the quarter ending on 30.09.2017 and subsequent returns so as to verify as to find out that any reversal entry in respect of the sale of the diamonds in question has been reflected so as to claim the set-off of GST paid on such sale or not?

(v) Cross verify all the transactions carried out with M/s R.S. Exports by issuing summons and confirming such sale and return of diamond with documentary proofs.

(vi) Ask the assessee as to why the event of returned goods was not immediately accounted for as and when it was returned but entered only on the date of survey?

(vii) Carry out any inquiry as deemed fit.

3.5 After carrying out these specific inquiries, the A.O. shall pass a speaking order giving his finding as to whether the amount of Rs.79,99,894/- was required to be taxed u/s 69A of the Act with charging of income-tax @ 60% with surcharge of 25% as per the provisions of section 115BBE of the Act."

7. Being aggrieved by the order of the learned PCIT, the assessee is in appeal before us.

8. The learned AR before us filed a paper book running from pages 1 to 235 and contended that the assessment has been framed by the AO after necessary verification and application of mind. The learned counsel of the assessee has also filed a detailed written note running from pages 1 to 12 demonstrating that the provisions of section 263 of the Act cannot be invoked in the given facts and circumstances.

9. On the other hand, the learned DR before us vehemently supported the order of the Id. PCIT.

10. We have heard the rival contentions of both the parties and perused the materials available on record. In the present case, the assessment framed by the AO under section 143(3) of the Act has been held as erroneous insofar prejudicial to the interest of revenue for the reasons detailed below:

- i. Non-application of mind properly for the verification of the difference in the stock found during the survey dated 20 September 2016 wherein

the assessee admitted offering such difference as its undisclosed income. But the same was not done in the income tax return.

- ii. Non-invocation of the provisions of section 69A of the Act while framing the assessment under section 143(3) of the Act.

11. On perusal of the records available before us, we find that there were inquiries raised by the AO during the assessment proceedings with respect to the difference in the stock as on the date of survey. Those inquiries were duly replied to by the assessee during the assessment proceedings. These facts can be verified from the inquiries raised by the AO and the replies made by the assessee which are available on record. The Id. PCIT also admitted the fact that inquiries were raised by the AO and the replies were also made by the assessee in response to those inquiries. Yet, the allegation of the Id. PCIT is this that the inquiries were raised and the replies were received by the AO but there was no application of mind with respect to certain facts as detailed below:

- i. The assessee firm at the time of survey accepted the excess stock found as undisclosed income. But the assessee vide letter dated 23-12-2019 changed the stand stating that the excess diamond found represents sales return.
- ii. The AO failed to verify the acquisition of the impugned stock originally, selling of the same to party namely RS Export along with the proof of delivery of goods to the party and delivery of goods on return.
- iii. The AO also failed to verify the details of resale of such stock either to the same party or other party along with payment detail etc.
- iv. Further, as per the invoice provided by the assessee firm for the sale of the diamond of 293.99 crt to the impugned party stands at Rs. 72,51,580/- whereas at the time of survey excess diamond of 383.10 crt worth of Rs. 79,99,894/- was found. The AO failed to verify this fact.
- v. The AO also failed to verify the genuineness of the retraction from the fact of having admitted the income at time of survey.

12. On perusal of the allegation of the Id. PCIT, we find that there was no proper application of mind. As such, just raising the queries and accepting the replies, does not mean that there was proper application of mind by the AO. The Hon'ble Gujarat High Court in the case of Designmate India Pvt. Ltd vs. CIT reported in 406 ITR 443 has observed as under:

"11. Thus, the mere fact that the Assessing Officer carried out inquiries with respect to a certain claim of the assessee by itself would not mean that his order cannot be taken in revision by the Commissioner if it is found that the order passed was erroneous and prejudicial to the interest of revenue."

13. Likewise, the Hon'ble Himachal Pradesh High Court in case of Virbhadra Singh HUF vs. PCIT reported in 86 taxmann.com 113/400 ITR 530 has held as under:

"69. Perusal of order dated 28.3.2013, passed by the Assessing Officer, reveals that the original return filed by the Assessee was selected for scrutiny assessment through CASS and notice under Section 143(2) of the Act issued and served upon the Assessee on 29.8.2011. On 2.3.2012, in exercise of his right under Section 139(5), Assessee filed a revised return. While assessing the same, notices under Section 142(1) and 143(2) were issued to the Assessee, to which he responded by placing on record Memorandum of Understanding (MoU) dated 15.6.2008, appointing his Agent to manage the orchard. Accounts came to be settled in September, 2011. Whereafter, Assessee filed the revised return. To verify correctness of the transaction, Agent appeared and produced on record (a) his income tax return for the relevant year, (b) copies of bills, and (c) copies of vouchers with regard to sale proceeds. Additionally, information from the Officer, assessing the return of the Agent was called, which revealed that a sum of Rs. 2,65,92,500/- was "payable to the assessee" as agricultural income. Based on the said material, Assessing Officer carried out assessment, accepting the income declared in the revised return from agricultural sources to be Rs. 2,80,92,500/-, in place of Rs. 15,00,000/- as declared in the original return.

70. In this backdrop, can it be said that the Assessing Officer conducted any inquiry, as envisaged in law. In our considered view, "no". On first brush, it appears that the Assessing Officer did conduct "some inquiry" as Mr. Chidambaram, learned Senior Counsel, wants us to believe. Whether such inquiry is "inadequate" or "no inquiry" at all, is what requires consideration.

71. "Inquiry" has to be in accordance with law and that being with proper application of mind. Also, it is not a case of "inadequate inquiry" but in fact "no inquiry" as envisaged in law. The Assessing Officer did not examine as to whether gross mismatch in the income, was on account of any bonafide omission or a mistake. The order is conspicuously silent on this aspect. He does not consider that the receipts of sale proceeds of such income, in its entirety, amounting to Rs. 2,80,92,500/- in the relevant year, were in cash. It is not that the Assessee was not in the know of the investments made in the LIC. Huge investments of a sum of Rs. 3.80 crore (approximately) were made in the names of the Assessee and his family members. Statement of the Agent that excess amount of Rs. 1 crore was routed through one Shri M.R. Sharma, was accepted as gospel truth and no inquiry with regard thereto conducted at all. The Assessing Officer does not record that the Assessee was adopting the mercantile system of accounting.

72. Also, the fact that income from agricultural source was disproportionately high, only in the year in question and neither in the preceding or succeeding years there was such huge income from the orchard. Validity of the return, fulfilling the condition prescribed under Section 139(5) was not examined, more so in the factual backdrop when the revised return came to be filed only after issuance of notice for scrutiny. Also, what took the Assessee more than six months to revise the return was not considered.

73. No doubt, views of the Officer assessing the Agent's income were solicited, but then such assessment could not be a binding precedent, for the Assessing Officer is obliged to independently inquire correctness of the returns of income declared by the Assessee. What is crucial is that in the return of the Assessee or the Agent, there is no reference of shortfall of Rs. 1 crore, which amount was routed through Shri M.R. Sharma, who also was not called during the course of inquiry.

74. Whether return filed was false or not, which fact was within the knowledge of the Assessee was not examined by the Assessing Officer. Similarly, plea of settlement of accounts after a period of three years was legally tenable or not, was not examined. Whether it was due to bonafide inadvertence or mistake, which fact never came to be disclosed in the original return was also not examined.

75. In fact, contradiction about the source of income, emanating from the order of the Assessing Officer, is writ large. On one hand, investment is accepted to have been made from the agricultural income and the money borrowed in the relevant year, whereas, on the other hand, it is sought to be justified as an agricultural income with respect to Assessment Years 2009-10 and 2010-11.

76. At this juncture, it be also observed that the Assessing Officer failed to take note of the fact that in the original return, even though there is reference of investment in LIC, but there is no disclosure of (a) the investments in question, (b) the fact that the Assessee had entered into an MoU with third party for management of the orchard, (c) there was income from the orchard, (d) agent invested the amount in LIC, (e) Assessee had been adopting the mercantile system of accounting and as such there was no settlement of accounts. All this, despite the Assessee having categorically disclosed therein, that a sum of Rs. 15 lakhs (approx.) was received as compensation for acquisition of land and that there was an income of Rs. 15 lakhs from agricultural source. Significantly, it is not the Assessee's case that such income was from another agricultural source/land. Perusal of the Return (Page-265) reveals the Assessee to have also generated income from the source of LIC.

77. Thus, the order passed by the Assessing Officer is without application of mind, resulting into loss of revenue, and as such being erroneous and prejudicial to the interest of Revenue."

14. Further, this Tribunal in the case of Babulal S. Solanki vs. ITO reported in 104 taxmann.com 155 has taken similar view, the relevant portion is extracted as under:

"The Income-tax Officer is not only an adjudicator but also an investigator. He cannot remain passive in the face of a return which is apparently in order but calls for further inquiry. It is his duty to ascertain the truth of the facts stated in the return when the circumstances of the case are such as to provoke an inquiry. The meaning to be given to the word 'erroneous' in section 263 emerges out of this context. It is because it is incumbent on the Income-tax Officer to further investigate the facts stated in the return when circumstances would make such an inquiry prudent that the word 'erroneous' in section 263 includes the failure to make such an inquiry. The order becomes erroneous because such an inquiry has not been made and not because there is anything wrong with

the order if all the facts stated therein are assumed to be correct.' Of course, if the explanation given by the assessee was of the nature as could possibly satisfy any reasonable person, even if other view was possible, the situation would have been different. The explanation given by the assessee in this case, however, was simply not a legally possible view of the matter. Even in the case of Malabar Industrial Co Ltd. v. CIT [2000] 109 Taxman 66/243 ITR 83, the Supreme Court has observed that 'when an ITO adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the ITO has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the revenue unless the view taken by the ITO is unsustainable in law'. The view canvassed by the assessee, was unsustainable in law. Therefore, even if the matter was examined by the Assessing Officer and it was a conscious call of the Assessing Officer to accept the plea of the assessee, such a situation would not take the matter outside the ambit of section 263 as the view adopted by the Assessing Officer was clearly unsustainable in law. All that the Commissioner has directed is examination of the claim on merits and, for the above reason, there is no infirmity in that direction. In view of these discussions, as also bearing in mind entirety of the case, the impugned revision order is upheld and the matter cannot be interfered with. It is made clear that expression of view on merits of the case is only a prima facie impression, and it must not, therefore, influence the decision of the Assessing Officer on merits. Uninfluenced with these observations, the Assessing Officer will take a call on merits of the matter."

15. Besides the above, we find that the AO has not made any cross verification from the party about the sales return to the assessee. It was also to be seen by the AO whether the sales made by the assessee to the party namely RS export is a regular party, or it has just been brought on papers to accommodate the excess stock found during the survey operation. Thus, prima-facie, it appears that there was not proper application of mind by the AO, qua the difference in the stock found during the survey operation which makes the order erroneous insofar prejudicial to the interest of the revenue. Hence, we hereby uphold the finding of the learned PCIT for making the fresh assessment.

16. In the result, the appeal filed by the assessee is dismissed.

Order pronounced in the Court on 15/05/2024 at Ahmedabad

Sd/-

Sd/-

**(SUCHITRA KAMBLE)
JUDICIAL MEMBER**

**(WASEEM AHMED)
ACCOUNTANT MEMBER**

Ahmedabad; Dated 15/05/2024

Tanmay

आदेशकीप्रतिलिपियेपित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent.

3. संबंधितआयकरआयुक्त/ Concerned CIT
4. आयकरआयुक्त(अपील) / The CIT(A)
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण/ DR, ITAT,
6. गार्डफाईल / Guard file.

आदेशानुसार / BY ORDER,

उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, अहमदाबाद / ITAT, Ahmedabad

1. Date of dictation :03/05/2024 (Dictated by Hon'ble Member over his dragon software)
2. Date on which the typed draft is placed before the Dictating Member 03/05/2024
3. Date on which the approved draft comes to the Sr.P.S./P.S. - /05/2024
4. Date on which the fair order is placed before the Dictating Member for Pronouncement /05/2024
5. Date on which the file goes to the Bench Clerk.. : /05/2024
6. Date on which the file goes to the Head Clerk.....
7. The date on which the file goes to the Assistant Registrar for signature on the order.....
8. Date of Dispatch of the Order.....