

आयकर अपीलीय अधिकरण  
कोलकाता 'ए' पीठ, कोलकाता में  
IN THE INCOME TAX APPELLATE TRIBUNAL  
KOLKATA 'A' BENCH, KOLKATA

श्री राजपाल यादव, उपाध्यक्ष (कोलकाता क्षेत्र)

एवं

श्री संजय अवरुथी, लेखा सदस्य

के समक्ष

Before

SRI RAJPAL YADAV, VICE-PRESIDENT

&

SRI SANJAY AWASTHI, ACCOUNTANT MEMBER

I.T.A. No.: 927/KOL/2024

Assessment Year: 2017-18

***Bengal General Trading Co. Pvt. Ltd.....Appellant***  
***[PAN: AABCB 0956 A]***

***Vs.***

***PCIT (Cen.), Kolkata-2, Kolkata.....Respondent***

**Appearances:**

***Assessee represented by:*** N.S. Saini, A/R & Priyanka Salarpuria, A/R.

***Department represented by:*** Subhendu Datta, CIT D/R.

Date of concluding the hearing : June 3<sup>rd</sup>, 2024

Date of pronouncing the order : June 10<sup>th</sup>, 2024

**ORDER**

**Per Sanjay Awasthi, Accountant Member:**

The present appeal arises from the order passed u/s 263 of the Income Tax Act, 1961 (in short the 'Act') dated 27.03.2024 by the Pr. Commissioner of Income Tax (Central), Kolkata-2 [in short ld. Pr. CIT], pertaining to AY 2017-18.

2. In this case, the facts in brief are that the assessee filed return of income for AY 2017-18 on 27.10.2017 disclosing a loss of Rs. 31,41,266/-. There was admittedly no assessment u/s 143(3) of the Act. Thereafter in the instant case

a search and seizure operation took place on 03.01.2019. Following the search action, the assessment order u/s 153A of the Act was passed on 13.04.2021 at the returned loss of Rs. 31,41,266/-, presumably because no incriminating material was found for this particular year, during the search.

2.1. It is seen from the records that subsequently a notice u/s 263 of the Act was issued by Id. Pr. CIT on 02.08.2023, seeking to reopen the assessment order passed u/s 153A of the Act dated 13.04.2021. It is seen from the notice dated 02.08.2023 issued u/s 263 of the Act that the assessee was asked to respond to the following alleged underassessment of income:

*“Loss on sales of Long-Term Equity Shares: On perusal of the Profit & Loss A/c for the period ended 31-03-2017 (FY 2016-17), it is observed that an amount of Rs. 30,84,167/- was shown as loss on Sales of Investment in its profit & loss A/c. It is revealed that the loss occurred due to sales of Long-Term Equity Shares of 1,00,000 Equity Shares of Jai Balaji Industries Ltd. The Equity Shares of Jai Balaji Industries Ltd. has been treated as long term equity shares, which has been sold now by the assessee company.*

*In terms and light of section 10(38) of the Income Tax Act, gain from sale of long term equity shares is exempt from payment of income tax and losses incurred on account of those transactions are not allowable expenses at the time of calculation of taxable income of the assessee. Therefore, the claim of Rs. 30,84,167/- on account of sales of Long-Term Equity Shares as allowable expenses in the profit and loss A/c is not allowed during the computation of taxable income. Thus, the claim of Rs. 30,84,167/- on loss on sales of investment should have been disallowed which was not done in the assessment order dt. 13-04-2021, therefore, this has led to under assessment of income to the tune of Rs. 30,84,167/-.*

*In light of the above, it is evident that the AO had failed to disallow claim of loss on sales on investment amounting to Rs. 30,84,167/- as described in the above paragraphs. The failure of the Assessing Officer to disallow the above claim of loss on sales on investment during the year under consideration, as it appears, rendered the assessment order u/s 153A/143(3) of the Act, dt. 13-04-2021 erroneous and prejudicial to the interest of revenue, within the meaning of section 263 of the Act.”*

2.1. Thereafter, the Id. Pr. CIT proceeded to pass an order u/s 263 of the Act (impugned order dated 27.03.2024) setting aside the order dated 13.04.2021 passed u/s 153A/143(3) of the Act and directed the Assessing Officer (in short Id. 'AO') to add an amount of Rs. 30,84,167/-, representing

loss on sales of investments in long term equity shares, considering that as per Section 10(38) of the Act gain from long term equity shares is exempt from tax and as a consequence, any loss from such shares are not allowed as expense in calculating taxable income. The ld. Pr. CIT also found that ld. AO had not carried out any enquiry whatsoever in this regard.

2.2. Aggrieved with this action of ld. Pr. CIT, the appellant is before us through the following grounds of appeal:

*“1. That on the facts and in the circumstances of the case and law, the order passed by the Ld. Pr. CIT under section 263 of the Income-tax Act, 1961 (IT Act) is illegal, invalid and not sustainable in law*

*2. For that on the facts and in the circumstances of the case, the assessment for the AY 2017-18 had not abated and since there was no incriminating material found during the search, the assessment order was completed u/s 153A on 13.04.2021 as per the returned income. The action u/s 263 can only be taken if a valid assessment order existed. Once the foundation has extinguished, there cannot be any order on the basis of assessment proceedings. Therefore the order passed by the Pr. CIT u/s 263 against the order passed u/s 153A dated 13.04.2021 is unsustainable in law.*

*3. For that on the facts and in the circumstances of the case and law, even otherwise, no order u/s 263(1) of the Act can be made after the expiry of 2 years from the end of the Financial Year in which the order sought to be revised was passed. In the instant case, only intimation was issued u/s 143(1) of the Act on 02.03.2018 and the limitation period for revising the same u/s 263(1) of the Act expired on 31.03.2020. Hence the proceedings initiated u/s 263 of the Act by the issue of impugned notice on 02.08.2023 are bad in law and the consequential order passed u/s 263 of the Act dated 27.03.2024 is bad in law and the same is liable to be quashed.*

*4. The Appellant craves leave to add, alter, amend and/or withdraw any of the grounds or grounds of appeal either before or at the time of the appeal hearing.”*

3. It is evident from the grounds that the action of ld. Pr. CIT has been challenged mainly on two substantive issues viz firstly, action u/s 263 of the Act is non-maintainable once an order has been passed u/s 153A of the Act and secondly, it has been averred that the original intimation u/s 143(1) of the Act dated 02.03.2018 needs to be considered for deciding limitation u/s

263 of the Act. For the sake of convenience, the first issue as per ground no. 2 is being dealt with to begin with.

3.1. The ld. A/R has basically taken us through the submissions filed before ld. Pr. CIT and has also pointed out that he has placed before us the same in the shape of written submissions as under:

*“It is submitted that the assessment for the AY 2017-18 had not abated and since there was no incriminating material found during the search, therefore the order passed u/s 153A dated 13.04.2021 accepting the return income. The action under section 263 can only be taken if a valid assessment order exists. Once the foundation has been extinguished, there cannot be any order based on the assessment proceeding. Hence the proceeding initiated u/s 263 is bad in law. We rely on the decision of the Kolkata Bench of the ITAT in the case of Salarpuria Properties Pvt Ltd Vs. PCIT reported in [2022] 143 taxmann.com 396 (Koi Trib.) and Hon'ble Patna High Court in the case of ACIT V. Satish Kumar Keshri in Misc. Appeal no 823 of 2017 dated 21.07.2023.*

*Even otherwise it is submitted that as per provisions of Sec. 263(2) of the Act, no order u/s 263(1) of the Act shall be made after the expiry of 2 years from the end of the Financial Year in which the order sought to be revised was passed. In the instant case, only intimation was issued u/s 143(1) of the Act on 02.03.2018 and the limitation period for revising the same u/s 263(1) of the Act expired on 31.03.2020. Hence the proceedings initiated u/s 263 of the Act by the issue of impugned notice on 02.08.2023 are bad in law and the consequential order passed u/s 263 of the Act dated 27.03.2024 is bad in law and the same is liable to be quashed. We rely on the decision of the Hon'ble Supreme Court in the case of CIT V. Alagendran Finance Ltd reported in [2007] 293 ITR 1 (SC).”*

3.2. The ld. D/R relied on the order of the ld. Pr. CIT.

4. We have carefully examined the contention of ld. A/R, the documents placed before us and the case laws relied upon. It has been argued with respect to ground no. 2 that since there was no incriminating material found during the course of search and seizure operation, the assessment had to be performed completed on the returned income/loss. On a careful consideration of the issue on the basis of facts of this case and the authorities relied upon, it is felt that through action u/s 263 of the Act new issues which were not emanating from any seized material cannot be brought into the picture at this

stage. In this regard, the findings of this Tribunal in the case of *M/s. Salarpuria Properties Pvt. Limited vs. PCIT* in ITA No. 130/KOL/2021 order dated 03.08.2022 were on somewhat similar facts. The critical findings deserve to be reproduced as under:

*“11. In the light of above, let us examine the facts of the present case. The assessment order passed under section 143(3) dated 26.03.2013 attained finality. No seized material was found during the course of search with respect to 2010-11. Hence, ITAT has held that in the absence of any seized material, the assessment order passed on 26.03.2013 would not abate. The income of the assessee could be re-examined qua those aspects for which incriminating material was found and seized. Since there was no material with respect to this year, the same item of income cannot be re-appreciated. The ITAT has quashed the assessment. We have reproduced the finding recorded by the Tribunal in the appeal against the assessment order passed under section 153A read with section 143(3). The action under section 263 can only be taken if a valid assessment order is existed. Once the foundation has extinguished, there cannot be any order on the basis of assessment proceeding. Therefore, we allow this appeal and quash the impugned order passed by the ld. Commissioner.”*

4.1. Our attention has also been drawn to the case of *Commissioner of Income-tax (Central), Nagpur vs. Murli Agro Products Ltd.* Reported in [2014] 49taxmann.com172 (Bombay). Further, strength is also drawn from the order of the Hon'ble Apex Court in the case of *Commissioner of Income-tax, Chennai vs. Alagendran Finance Ltd.* reported in [2007] 293 ITR 1 (SC) to hold that in the absence of incriminating material found during search and seizure an unabated assessment, as in this case, would perforce have to be accepted on the basis of returned income/loss. In the absence of any incriminating seized material, there is no scope for any extrapolation of income escaping assessment through the mechanism of any action u/s 263 of the Act. It is felt that the Department had an option to explore the alleged escapement of income through proceedings u/s 147/148 of the Act, but certainly not through the mechanism of seeking to revise the order u/s 153A/143(3) of the Act through Section 263 of the Act. Accordingly, the impugned order deserves to be quashed and the appellant gets relief with regard to ground no. 2.

5. Since the impugned order has been quashed, in any case it is not felt necessary to adjudicate on ground no. 3.

6. In the result, the appeal filed by the assessee is allowed.

**Order pronounced in the open Court on 10<sup>th</sup> June, 2024.**

Sd/-

**[Rajpal Yadav]**  
Vice President

Dated: 10.06.2024

*Bidhan (P.S.)*

*Copy of the order forwarded to:*

1. **Bengal General Trading Co. Pvt. Ltd., 8/1, Middleton Row, 3<sup>rd</sup> Floor, Kolkata, West Bengal, 700071.**
2. **PCIT (Cen.), Kolkata-2, Kolkata.**
3. CIT(A)-
4. CIT-
5. CIT(DR), Kolkata Benches, Kolkata.

*// True copy //*

Sd/-

**[Sanjay Awasthi]**  
Accountant Member

By order

Assistant Registrar  
ITAT, Kolkata Benches  
Kolkata