

**IN THE INCOME-TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER &
SHRI BIJAYANANDA PRUSETH, ACCOUNTANT MEMBER
आयकर अपील सं./ITA No.30/SRT/2024**

Assessment Year: (2015-16)

(Physical Hearing)

J.R. Dyeing & Printing Mills Pvt. Ltd., Shed No. 176/177, A-2, G.I.D.C, Pandesara, Surat - 394221	Vs.	The PCIT – 1, Surat
स्थायी लेखासं./जीआइआरसं./PAN/GIR No: AAACJ5474G		
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

निर्धारिती की ओर से /Appellant by	Shri Ramesh Malpani, CA
राजस्व की ओर से /Respondent by	Shri Ravi Kant Gupta, CIT(DR)
सुनवाई की तारीख/Date of Hearing	14/08/2024
उद्घोषणा की तारीख/Date of Pronouncement	27/08/2024

आदेश / ORDER

PER BIJAYANANDA PRUSETH, AM:

This appeal by the appellant emanates from the order passed under section 263 of the Income-tax Act, 1961 (in short, 'the Act') dated 05.02.2024 by the Learned Principal Commissioner of Income Tax, Surat – 1, [in short 'Ld. PCIT'] for the Assessment Year (AY) 2015-16. Grounds of appeal raised by the assessee are as under:

"1. That on the facts and in the circumstances of the case as well as in law, the order passed Id. PCIT-1, Surat, u/s 263 of the Act is invalid, bad in law and beyond the law. Appellant prays for quashing the same.

2. That on the facts and in circumstances of the case as well as in law, the Id.PCIT-1, Surat, has erred in holding that the assessment order passed by the FAO u/s 143(3) r.w.s. 263 r.w.s.144B is erroneous and prejudicial to the interest of revenue and thereby erred in setting aside the same for passing the same afresh.

3. *That on the facts and in the circumstances of the case as well as in law, the order passed Id. PCIT-1, Surat, u/s 263 of the Act is wrong, bad in law and beyond the law in view of clause (c) of Explanation-1 below S.263(1) of the Act as the relevant matter has been subject matter of appeal before the CIT(A) [doctrine of merger]. Appellant, therefore prays for quashing the order passed by Id. PCIT us 263 of the Act.”*

2. Facts of the case in brief are that assessee company filed its return of income on 29.09.2015 declaring 'nil' income. The case was selected for scrutiny under CASS and assessment was completed u/s 143(3) of the Act on 28.12.2017 determining total income at Rs.1,50,00,000/- after making addition on account of unexplained unsecured loans u/s 68 of the Act. Thereafter, the Ld. PCIT, Surat-1 exercised his jurisdictional power u/s 263 of the Act on 17.03.2020 setting aside the assessment order u/s 143(3) and directing the AO to make a de novo assessment to the extent of examining the issue of interest expenses of Rs.5,25,205/- incurred corresponding to addition of Rs.1,50,00,000/-. Consequently fresh assessment was made u/s 143(3) r.w.s 263 and 144B of the Act by NAFC on 28.09.2021 without making any further addition and determining the same total income at Rs.1,50,00,000/-/. The assessee preferred appeal before the CIT(A) against the above order. Subsequently, assessee opted for Direct Tax Vivad-se-Viswas Scheme, 2020 and withdrew the appeal filed before CIT(A). Form No.5 under DTVSV was issued from the office of Ld. PCIT on 06.12.2020 vide acknowledgement no.988579321061221. However, the Ld. PCIT verified the case record and found that the Faceless Assessing Officer (FAO) has not made addition of the interest of Rs.5,25,205/-. He observed that the FAO has not inquired into the issue of interest expenses and passed the order without

application of mind. Accordingly, the order was erroneous in so far as prejudicial to the interests of revenue u/s 263 of the Act. The Ld. PCIT thereafter issued show cause notice u/s 263 on 08.09.2023, which is at para 4 of the 263 order. The assessee, in reply, stated that it had filed appeal before the CIT(A) and since CIT(A) had the power to enhance the assessment and make the addition of interest on unexplained loans, the issue was subject matter of appeal before CIT(A) and, therefore, provisions of section 263 of the Act cannot be invoked. The assessee also stated that it had opted to settle the disputed addition u/s 68 under DTVSVA. The Ld. PCIT did not accept the submission of the assessee. He stated that the impugned issue was neither under consideration before CIT(A) nor decided by CIT(A). Since the issue was not sub-judice before CIT(A), the Ld. PCIT could exercise the jurisdiction u/s 263 of the Act. The Ld. PCIT also observed that offering of interest income in ITRs by lenders do not make such expenses allowable in the hands of the assessee. Thereafter, the Ld. PCIT extracted provision of 263 and relied on various decisions namely, CIT vs. Mohhamed Meeran Sahul Hameed, in Civil Appeal No.6204 of 2021, dated 07.10.2021 (SC), Malabar Industries Ltd. vs. CIT, 243 ITR 83 (SC), CIT vs. Paville Projects Pvt. Ltd. (2023) 149 taxmann.com 15 (SC), PCIT vs. Padma Kumar Jain, (2022) 145 taxmann.com 113 (Jharkhand), CIT vs. Nagesh Knitwears P. Ltd. & Ors., (2012) 345 ITR 135 (Delhi), ITO vs. D. G. Housing Projects Ltd., in ITA No.179/2021, dated 01.03.2012 (Delhi) and Gee Vee Enterprise vs. Addl. CIT, (1975) 99 ITR 375 (Delhi). In the result, assessment order passed u/s 143(3) r.w.s. 263 r.w.s. 144B

dated 28.09.2021 was set aside with direction to the AO to pass fresh assessment order after granting reasonable and sufficient opportunity being heard to the assessee.

3. Aggrieved by the order of Ld. PCIT, assessee has filed present appeal before the Tribunal. The Learned Authorised Representative (Ld. AR) of the assessee strongly contested the order passed by the Ld. PCIT u/s 263 of the Act. He has filed paper book containing 35 pages including the assessment order, Form No.35, VSVA for the disputed tax arrears along with certificate issued by Ld. PCIT in Form No.5, DTVSVA, 2020. He submitted that since the addition of loans u/s 68 has been subject matter of appeal before CIT(A), allowability or interest on the same was inextricably linked with the issue under the appeal and hence, the impugned issue was subject matter of appeal in view of the power of enhancement by the CIT(A). He stated that the second assessment order passed u/s 143(3) r.w.s. 263 assessing the same total income by not disallowing interest on the loans added u/s 68 was a subject matter of appeal before CIT(A) and reached finality by declaration under DTVSVA. He also enclosed copy of notice issued u/s 142(1) dated 10.02.2024 during the second assessment proceedings after the 263 order. He also relied on the following decisions against the order passed u/s 263 on doctrine of merger viz. (i) Haryana Paper Distributors (P.) Ltd. vs. PCIT, (2019) 412 ITR 515 (Guj – HC) and (ii) CIT v s. Nirma Cemicals Works (P.) Ltd., (2009) 309 ITR 67 (Guj – HC). The Ld. AR also relied on the decisions in case of (i) Indian Bank vs. K. S. Nair & Ors, (2004) 13 SCC 697 (SC) and (ii)

Govrammani & Ors. vs. V. V. Patil (D) by legal heirs & Ors., Civil Appeal No.5748 of 2008 (SC) against setting aside assessment order, where entire material was on record. The Ld. AR also relied on the decision of Hon'ble jurisdictional High Court in the case of PCIT vs. Mrs. Swatiben Biharilal Parekh, (2023) 156 taxman.com 267 (Guj.) that after VSVS, dispute is closed and it cannot be revised u/s 263 of the Act.

4. On the other hand, Learned Commissioner of Income-tax – Departmental Representative (Ld. CIT-DR) has strongly relied on the order passed by Ld. PCIT. He has stated that Ld. PCIT has duly called for the records and examined it including the assessment order passed/s 143(3) r.w.s.263 of the Act. There is no dispute regarding the interest of Rs.5,25,205/- paid on the unsecured loans. He stated that the present case is covered by the scope and ambit of section 263 of the Act because the AO has not made any further inquiry and added the interest of Rs.5,25,205/-.

5. We have heard rival submissions and perused materials on record. We have also deliberated upon the decisions relied upon by both parties. We have also gone through the provisions of Section 263 of the Act. We find that in the original assessment order u/s 143(3) dated 28.12.2017, addition of Rs.1,50,00,000/- was made on account of unexplained cash credit u/s 68 of the Act. The assessee filed appeal before CIT(A) in Form No.35 on 24.01.2018. Thereafter, assessee filed declaration under DTVSVA on 16.12.2020. Form No.3, Form No.4 and Form No.5 were issued / submitted on 04.01.2021, 05.02.2021

and 06.06.2021. The CIT(A) has passed order u/s 250 dismissing the appeal for statistical purpose because the appellant opted for DTVSVA vide application dated 16.12.2020. The Ld. PCIT had passed the first after u/s 263 of the Act on 17.03.2020 with direction to frame assessment order *de novo* to the extent of examining the issue of interest. The FAO passed the order u/s 143(3) r.w.s. 263 on 28.09.2021 wherein no addition of the interest expenses was made. We find that the AO had issued a notice u/s 142(1) wherein he has called for copy of account of interest along with name, address, ledger copy, confirmation of all person / concerns to whom interest in excess of Rs.5,000/- was paid during the year which is evident from page 25 of the paper book. Therefore, it cannot be said that AO has not enquired about the issue of interest expenditure. We also find that the assessee had filed appeal against the original 263 order dated 17.03.2020 which was not pressed because no addition was made. Accordingly, the appeal of assessee was dismissed by the ITAT.

6. With the above factual background, let us now examine the issue in view of the decisions relied upon by the Ld. AR. As the addition of loans of Rs.1,50,00,000/- u/s 68 of the Act contested before CIT(A), allowability or otherwise of interest on the same was inextricably linked with the issue under appeal and, therefore, it was subject matter of appeal in view of the inherent power of enhancement by CIT(A) u/s 251(1)(b) of the Act. The decisions relied upon by the Ld. AR in the cases of Haryana Paper Distributors (*supra*) and Nirma Chemical (*supra*) support such a view. The Ld. AR has also relied on the decision

of Hon'ble jurisdictional High Court in the case of Swatiben Biharailal Parekh (supra) which did not approve revision u/s 263 after opting VSV Scheme. In the above case, the department has filed appeal challenging the order of the ITAT, Rajkot. The Tribunal in the said case referred to the decision of Hon'ble Madras High Court in the case of Gopalakrishnan Rajakumar vs. PCIT, 445 ITR 577 (Mad.) and allowed relief to the assessee by quashing order u/s 263 of the Act. The Hon'ble Gujarat High Court did not find any fault in allowing the appeal of assessee as it was not open for the authorities to initiate proceedings u/s 263 of the Act, when they were barred. It is therefore clear that opting VSV Scheme and finalizing thereof is nothing but closure of disputes in respect of tax arrears which cannot be subsequently reopened by issuing notice u/s 263 for revising assessment order. In view of the above facts and the decisions cited supra, the impugned order of Ld. PCIT cannot be sustained and is, accordingly, quashed.

7. In the result, appeal of the assessee is allowed.

Order is pronounced on 27/08/2024 in the open court.

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

सुरत /Surat

दिनांक/ Date: 27/08/2024

SAMANTA

Copy of the Order forwarded to

1. The Assessee
2. The Respondent
3. The CIT(A)
4. CIT
5. DR/AR, ITAT, Surat
6. Guard File

Sd/-
(BIJAYANANDA PRUSETH)
ACCOUNTANT MEMBER

By Order

// TRUE COPY //

Assistant Registrar/Sr. PS/PS
ITAT, Surat