

IN THE INCOME TAX APPELLATE TRIBUNAL “F” BENCH MUMBAI

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER**

**ITA Nos. 2562 & 2563/MUM/2024
Assessment Years: 2017-18 & 2018-19**

Vinod Banwarilal Saraf, 2 nd Floor, Shiv Ashish, Andheri Kurla Road, Andheri East, Mumbai – 400072 (PAN : AAGPS5421D)	Vs.	Principal Commissioner of Income Tax (Central), Mumbai
(Appellant)		(Respondent)

Present for:

Assessee : Shri Siddharth Kothari
Revenue : Shri Ankush Kapoor, CIT, DR

Date of Hearing : 18.07.2024
Date of Pronouncement : 30.08.2024

ORDER

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

These two appeals filed by the assessee are against the orders of Ld. PCIT, Central, Mumbai-1, vide order nos. ITBA/REV/F/REV5/2023-24/1063390074(1) and ITBA/REV/F/REV5/2023-24/1063387728(1), of the Income-tax Act (hereinafter referred to as the “Act”), both dated 26.03.2024 passed against the assessment orders u/s. 153A rws 143(3) of the Act by the Assistant Commissioner of Income Tax, Central Circle 2(2), Mumbai, dated 20.04.2021 for Assessment Years 2017-18 and 2018-19, respectively.

2. Assessee has raised five grounds, all of which relate to assumption of jurisdiction by the Ld. Pr. CIT for invoking revisionary proceeding u/s. 263 of the Act and passing the impugned order thereon. Grounds are not reproduced for the sake of brevity.

2.1 Since common issues are involved, both the appeals are being disposed of by this consolidated order. We draw facts from the appeal in ITA No.2562/Mum/2024 for Assessment Year 2017-18. Our observations and findings shall apply *mutatis mutandis* to the other appeal also.

3. Brief facts of the case leading to filing of these appeals in the instant case are that assessee filed his return of income on 28.07.2017, reporting a total income at Rs. 1,32,34,500/-. Subsequently, a revised return was filed and was processed u/s. 143(1) of the Act.

3.1. A search and seizure action was conducted on M/s Vinati Organics Limited and its group concerns on 27.09.2018. Consequent to search, case of the assessee was centralized with the office of the Deputy Commissioner of Income Tax, Central Circle-2(2), Mumbai. Thereafter, the Ld. Assessing Officer issued notice u/s 153A dated 28.08.2019. In response to said notice, the assessee filed his return of income on 14.10.2019 declaring total income at Rs. 1,46,83,180/-. The additional income offered by the assessee pertained to the receipt of commission from IIFL amounting to Rs. 14,48,686/- under the head "Income from other sources". In the impugned assessment completed. Ld. Assessing Officer accepted the commission income so offered by the assessee on which due taxes were deposited as self-assessment tax, though there

were additions and disallowances on which assessee went in appeal before the Id. CIT(A). Those issues are not before the Tribunal.

3.2. Subsequent to the assessment, Id. PCIT called for the records and observed that nature of undisclosed income offered in the form of commission received calls for addition u/s 68 and taxation u/s 115BBE of the Act. According to him, records reveal that assessee had admitted unaccounted cash of Rs. 73.78 lakhs out of which Rs. 14.48 lakhs pertain to the year under consideration i.e. Assessment Year 2017-18. This additional income offered by the assessee under the head 'income from other sources', according to him ought to have been subjected to taxation u/s 68 rws 115BBE since it was offered only owing to search action.

3.3. Consequently, a show cause notice dated 20.02.2024 was issued u/s 263 of the Act, invoking the revisionary proceedings since assessment order is erroneous in so far as it is prejudicial to the interest of revenue. Assessee furnished his detailed reply on 26.02.2024, contents of which are reproduced in the order of Id. PCIT. After considering the same, Id. PCIT observed in para 6 that though the assessee offered the commission income in his return in response to notice u/s 153A yet it would come under the pretext of unexplained income as assessee would not have offered the commission income voluntarily. He taking recourse to Explanation 2(a) and 2(b) to section 263 held that assessment order falls squarely within these clauses. Thus, he set aside the assessment order holding it as erroneous and prejudicial and directed the Id. Assessing Officer to complete the assessment *de novo* by complying with the direction so given. Aggrieved, assessee is in appeal before the Tribunal.

4. We heard both the parties and perused the order and material placed before us.

5. In order to lay our hands on the issue before us, we delve in the provisions of section 263 of the Act. From the perusal of provisions of Section 263, it is apparent that there are mainly four features / stages of the power for revision to be exercised u/s 263 of the Act by the Ld. PCIT –

i. The PCIT may call for and examine the records of any proceedings under the Act and for this purpose he/she need not show any reason or record any reason to believe as it is required u/s 147 or 143(2) of the Act. It is a part of his/her administrative control to call for the records and examine them.

ii. The PCIT on an analysis of both, the records and the order passed by the Assessing Officer arrives at a consideration that such an order is erroneous in so far as it is prejudicial to the interests of the Revenue. This is exercised by calling for and examining the records relating to any proceeding under this Act available at the time of examination by the PCIT. Till this stage, assistance of the assessee is not required by the PCIT.

iii. If after calling for and examining the records and the assessment order, the PCIT considers that the order of the Assessing Officer is erroneous in so far as it is prejudicial to the interest of the Revenue, he/she is bound to give an opportunity of being heard to the assessee by issuing a show cause notice pointing out the reasons for arriving at such a consideration that action u/s 263 is required on a particular issue. The PCIT has to conduct an inquiry as he may deem fit and after hearing the assessee, he/she will pass the order as deem fit.

iv. The PCIT can annul or enhance or modify the assessment as a result of inquiry conducted and hearing the assessee by directing the Assessing Officer for a fresh assessment or to make such enquiries as he/she deem necessary.

5.1. At this stage, before considering the multi-fold contentions of the ld. Counsel for the assessee, we deem it pertinent to take note of the fundamental tests propounded in various judgments relevant for judging the action of the Ld. PCIT taken u/s 263 of the Act. The co-ordinate bench of ITAT Mumbai in the case of Khatiza S. Oomerbhoy v. ITO, Mumbai reported in [2006] 101 TTJ 1095 (Mum) analyzed in detail, various authoritative pronouncements including the decision of Hon'ble Supreme Court in the case of Malabar Industrial Co. Ltd. v. CIT [2000] 243 ITR 83 (SC) and has propounded the following broad principles to judge the action of CIT taken under section 263 –

(i) The CIT must record satisfaction that the order of the AO is erroneous and prejudicial to the interest of the Revenue. Both the conditions must be fulfilled.

(ii) Sec. 263 cannot be invoked to correct each and every type of mistake or error committed by the AO and it was only when an order is erroneous that the section will be attracted.

(iii) An incorrect assumption of facts or an incorrect application of law will suffice the requirement of order being erroneous.

(iv) If the order is passed without application of mind, such order will fall under the category of erroneous order.

(v) Every loss of revenue cannot be treated as prejudicial to the interests of the Revenue and if the AO has adopted one of the courses permissible under law or where two views are possible and the AO has taken one view with which the CIT does not agree, it cannot be treated as an erroneous order, unless the view taken by the AO is unsustainable under the law.

(vi) If while making the assessment, the AO examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determines the income, the CIT, while exercising his power under s 263 is not permitted to substitute his estimate of income in place of the income estimated by the AO.

(vii) The AO exercises quasi-judicial power vested in him and if he exercises such power in accordance with law and arrive at a conclusion, such conclusion cannot be termed to be erroneous simply because the CIT does not feel satisfied with the conclusion.

(viii) The CIT, before exercising his jurisdiction under section 263 must have material on record to arrive at a satisfaction.

(ix) If the AO has made enquiries during the course of assessment proceedings on the relevant issues and the assessee has given detailed explanation by a letter in writing and the AO allows the claim on being satisfied with the explanation of the assessee, the decision of the AO cannot be held to be erroneous simply because in his order, he does not make an elaborate discussion in that regard.

6. For this, let us also take the guidance of judicial precedence laid down by the Hon'ble Apex Court in the case of Malabar Industries Ltd. (supra) wherein their Lordships have held that *twin* conditions need to be satisfied before exercising revisional jurisdiction u/s 263 of the Act by the CIT. The twin conditions are that the order of the Assessing Officer *must be erroneous and in so far as prejudicial to the interest of the Revenue.*

6.1. In the following circumstances, the order of the AO can be held to be erroneous order, that is (i) if the Assessing Officer's order was passed *on incorrect assumption of fact*; or (ii) *incorrect application of law*; or (iii) Assessing Officer's order is in *violation of the principle of natural justice*; or (iv) if the order is passed by the Assessing Officer *without application of mind*; (v) if the AO *has not investigated the issue* before him; [*because AO has to discharge dual role of an investigator as well as that of an adjudicator*] then in aforesaid any of the events, the order passed by the AO can be termed as erroneous order.

6.2. Looking at the second limb as to whether the actions of the AO can be termed as prejudicial to the interest of Revenue, one has to understand what is prejudicial to the interest of the revenue. The Hon'ble Supreme Court in the case of Malabar Industries (supra) held

that this phrase i.e. “*prejudicial to the interest of the revenue*” has to be read in conjunction with an *erroneous order* passed by the AO. Their Lordships held that every loss of revenue as a consequence of an order of Assessing Officer cannot be treated as prejudicial to the interest of the revenue. When the Assessing Officer adopted one of the courses permissible in law and it has resulted in loss to the revenue, or where two views are possible and the Assessing Officer has taken one view with which the CIT does not agree, it cannot be treated as an erroneous order prejudicial to the interest of the revenue unless the view taken by the Assessing Officer is unsustainable in law.

7. In the light of above exposition on law enunciated in section 263 of the Act, let us examine the facts of the present case. We observe that in the course of proceedings u/s 263 of the Act before the Ld. PCIT, the assessee had furnished the relevant details and explained the issue supporting his contentions by various judicial precedents. It is well settled law that for invoking the provisions of section 263 of the Act, both the conditions that the order must be erroneous and prejudicial to the interest of revenue needs to be satisfied.

7.1. From our perusal of records, we note that ld. Assessing Officer has discussed in detail about the commission received in cash by the assessee from IIFL Wealth Management Limited in para 7 at page number 2 to 14 of the assessment order. Conclusion drawn by the ld. Assessing Officer on offer of income by the assessee is reproduced hereunder:

"xx. Thus, in the case of the assessee a total amount of Rs 73.78 Lac has been offered in total, in the respective assessment years, which is more than the amount detected by the Department. Since, Shri. Vinod Saraf has already offered an amount of Rs. 14.48 Lac as income for the current AY 2017-18, no addition is being made on this issue in this year.

xxi. However, it is stated that had it not been for the Search action, this amount of Rs. 14.48 Lac, for the AY 2017-18 would not have been disclosed by the assessee as income for the AY 2017-18, while filing the return in response to the notice issued u/s 153A. It is important to mention here that such income was not offered by the assessee while filing the Original Return of Income u/s 139(1). Thus, it is clear that the assessee has declared this amount only after the Search and as an afterthought. Thus, in spite of the fact that no addition is being made on this issue in this year, penalty proceedings are being initiated separately u/s 270A for misreporting of income, for the above mentioned reasons."

7.2. From the above, it is noted that Id. Assessing Officer accepted the nature and quantum of the offer of IIFL Commission income in the return of income filed by the assessee in response to notice u/s 153A and passed an order without making any further additions in this regard. Id. Assessing Officer, duly considering the matter, made a limited observation that the said income in question was not initially disclosed in the original return, but only surfaced as a result of the search and seizure action, to initiate penalty proceedings, notwithstanding the fact that the amount had already been included in the taxable total income. Nevertheless, with reference to nature and source of offer, Id. Assessing Officer did not feel necessity to recharacterize it as unexplained credit u/s 68 to apply a higher rate of tax u/s 115BBE of the Act.

7.3. Id. Assessing Officer, while conducting the post search assessment, did a thorough analysis of the material available on record. He analysed the books of accounts, seized materials, recorded statements dealt the issue expressly in the assessment order. All relevant facts were on record and it cannot be said that improper enquiries were done on the matter by the Id. Assessing Officer.

7.4. As regards the IIFL Commission, Id. Assessing Officer himself appreciated that the assessee had offered a sum of Rs. 73.78 lacs in total as received from M/s IIFL and Edelweiss, which is more than that detected by the Department and that no further addition is warranted in this regard. However, on altogether different note, as this offer of income was made by the assessee as a result of search, he initiated penalty proceedings u/s 270A by treating it as misreporting of income.

8. From the records, it is noted that during the course of the assessment proceedings, assessee was issued a notice u/s 142(1) and was asked to show cause as to why, in the light of the incriminating evidence found during the course of search and seizure in the case of Vinati Group, the statements recorded and confronted with Shri Vinod Saraf, the CMD of the Group and his acceptance of the fact of receiving commission in cash in his personal capacity as well as for the other family members and offering Rs. 73,78,950/- to tax in his personal capacity, the amount received by the assessee should not be added back in the hands of the assessee, being in the nature of unaccounted income received in cash.

8.1. Assessee replied to the said notice stating that he has offered a total amount of Rs. 73.78 Lakh in the returns for the relevant assessment years, the breakup of which is as follows:

Sr. No.	AY	Amount Offered (Rs.)
1	2013-14	1.87 Lac
2	2014-15	4.53 Lac
3	2015-16	8.98 Lac
4	2016-17	13.88 Lac
5	2017-18	14.48 Lac
6	2018-19	30.01 Lac
	Total	73.78 Lac

8.2. Assessment was framed on the basis of material evidence available on records, being the material seized during the course of the search, the details received during the post search proceedings and various statements and admissions available on records and after taking into consideration the submission made by the assessee. Assessee has offered an amount of Rs. 14.48 lakhs as income for the current Assessment Year 2017-18, therefore no addition was made on this issue in the said year.

8.3. With respect to reference made by the ld. PCIT on clause 2(a) and 2(b) of Explanation 2 to section 263, we note that they relate to order passed without making inquiries or verification which should have been done and allowing relief without inquiring into the claim. We have already dealt with this aspect in detail in the above narration. It is manifest that intention of the legislature could not have been to enable the ld. PCIT to find fault with each and every assessment order, without conducting any enquiry or verification in order to establish that the assessment order is not sustainable in law, since such an interpretation will lead to unending litigation and there would not be any point of finality in the legal proceedings. The opinion of the ld. PCIT referred to in section 263 of the Act has to be understood as legal and judicious opinion and not arbitrary one.

8.4. It is important to keep in mind the decision of Hon'ble Supreme Court in the case of Malabar Industrial Co. Ltd (*supra*) wherein it has observed that *“every loss of revenue cannot be treated as prejudicial to the interests of the Revenue and if the AO has adopted one of the courses permissible under law or where two views are possible and the AO has taken one view with which the CIT does not agree, it cannot be treated as*

an erroneous order, unless the view taken by the AO is unsustainable under the law.”

8.5. Now, when the ld. PCIT has prima facie conveyed an opinion that is different from that of the Ld. Assessing Officer, the same does not give him powers to invoke revisionary proceedings u/s 263 to substitute his opinion in place of one of the plausible views arrived at by the of ld. Assessing Officer.

8.6. On the issue considered by the Ld. PCIT in the impugned order, no action u/s 263 of the Act is justifiable which cannot be sustained under the facts and circumstances of the present case and judicial precedents dealt herein above. We, therefore, quash the impugned order u/s 263 of the Act and allow the grounds raised by the assessee.

9. In the result, both the appeals of the assessee are allowed.

Order is pronounced in the open court on 30th August, 2024

Sd/-
(Amit Shukla)
Judicial Member

Sd/-
(Girish Agrawal)
Accountant Member

Dated: 30th August, 2024

MP, Sr.P.S.

Copy to :

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BY ORDER,

(Dy./Asstt.Registrar)
ITAT, Mumbai