

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'H': NEW DELHI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER
AND
SHRI AVDHESH KUMAR MISHRA, ACCOUNTANT MEMBER
ITA No.701/Del/2021,A.Y.2011-12**

Chander Prakash BU-265, Pitampura, New Delhi PAN: AOUPP5675E (Appellant)	Vs.	ITO, Ward-68(1), New Delhi (Respondent)
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Appellant by	Sh. Rohit Tiwari, Advocate Ms. Tanya, Advocate
Respondent by	Ms. Sapna Bhatia, CIT-DR

Date of Hearing	25/09/2024
Date of Pronouncement	29/11/2024

ORDER

PER AVDHESH KUMAR MISHRA, AM

This appeal for the Assessment Year (hereinafter, the 'AY') 2011-12 filed by the assessee is directed against the order dated 28.03.2021 passed by the Principal Commissioner of Income Tax, Delhi-15 [hereinafter, the 'PCIT'].

2. Following grounds are raised in this appeal: -

"1. That on the Facts and in the circumstances of the case, Income Tax, Delhi-15 (PCIT for short) has erred in assuming jurisdiction u/s 203 Principal Commissioner of the Income Tax Act, 1961 (hereinafter

called the Act for short) since he that singularly failed to point out that the assessment order dated 18. 12. 2018 passed by Income Tax Officer, Ward-68(1), New Delhi (AO for short) was erroneous in so far as it was prejudicial to the interest of the Revenue as contemplated u/s 263 of the Act

2. That on the facts and in the circumstance of the case, PCIT erred in assuming jurisdiction u/s 263 of the Act as all objection made by PCIT in her order has duly questioned by the Ld. AO during assessment proceedings and replies of these questions submitted during the assessment proceedings. Merely change of opinion could not be a valid ground to passes the order u/s 263.

3. That on the facts and in the circumstances of the case, PCIT erred in assuming jurisdiction u/s 263 of the Act since the assessment order dated 18.12.2018 had already been the subject matter of an appeal before CIT (Appeals) -37 New Delhi and the same had already been decided by the Ld. CIT (A)-37 on dated 16- 09-2020 by deleting the additions made by the Ld. AO.

4. That on the facts and in the circumstances of the case, the impugned order passed by PCIT on 28.03.2021 is void and illegal as it flouts the Principles of Natural Justice statutorily embedded in Section 263 of the Act.

5. That the appellant craves liberty to add, alter, vary or amend any ground of appeal.”

2.1 In nutshell, we are tasked to decide that whether the order of the PCIT passed under section 263 of the Income Tax Act, 1961 (hereinafter 'the Act') is justified.

3. Briefly, the relevant facts giving rise to this appeal are that the appellant/assessee, who was an employee of Air India, had (i) deposited cash in his bank account, (ii) made investments in property, (iii)

acquired vehicle and also involved/associated in/with the business in the relevant year, which were not in commensurate to the income disclosed in the return of income. Therefore, based on this information, the present case was reopened under section 147 r.w.s. 148 of the Act. The consequential assessment was completed at income of Rs.8,83,750/- vide order dated 18.12.2018 passed under section 147 r.w.s. 143(3) of the Act. Later on, the Ld. PCIT found the Assessing Officer (hereinafter, the 'AO') had not carried out proper enquiry and investigated the case properly as detailed in para 2 of the impugned order. The para 2 of the impugned order is reproduced hereunder:

“2. The assessment records of the case were called for and examined. It was observed that the assessment order so passed was erroneous in so far as it was prejudicial to the interests of the revenue due to the following reason(s):

- (a) On perusal of the assessment records it is seen that out of total credits of Rs. 162.55 lakhs in the bank accounts of the assessee in various years, Rs. 51.33 were cash deposits. During the relevant year, there were found Rs. 5.75 lakhs cash deposits and other credits of Rs. 16.73 lakhs (other than salary) in the bank accounts of the assessee; out of which an addition of Rs. 6.11 lakhs of cash credits are made to the total income of the assessee by the AO.*

It has also been observed that the assessee is not an authorized signatory in the bank accounts of four business entities. Moreover, there were credit entries other than cash deposits and salary credits in bank accounts of the assessee, totaling to Rs. 16.73 lakhs (as discussed above) which were not examined by

the AO. These credit entries were not verified by the AO. Further, observations from the ITS were made as below:

- 1. ITS data shown commodity transactions which were neither disclosed by the assessee nor examined by the AO.*
- 2. ITS data shows total receipts as per 26AS at Rs. 5,71,044/- whereas Income as per ITR is at Rs. 2,22,640/-, the same is not reconciled during the assessment proceedings.*
- 3. ITS data also shows two demat accounts which ID 52109897 and 16253754 held by the assessee, the same were not obtained and examined by the AO.”*

Thereafter, the Ld. PCIT provided reasonable opportunities of being heard as detailed in Para 3 to 5 of the impugned order. However, the appellant/assessee never responded. Therefore, the Ld. PCIT having no alternative except to conclude the proceedings before it getting barred by limitation passed the impugned order and held as under:

“7. The facts and circumstances of the case have been carefully examined. The assessment order and facts emerging there from were also given careful consideration in this regard. On such examination of the records of the case, it emerges that during the F.Y. 2010-11 the assessee has deposited cash amounting of Rs. 5.75 lakhs in his bank account and there were other credits of Rs. 16.73 lakhs (other than salary) in the bank account of the assessee out of which an addition of Rs. 1.11 lakhs being cash credit was made by the AO. It was further observed that there were commodity transactions with two demat accounts with ID 52109897 and 16253754 which were not neither disclosed by the assessee nor was examined by the Assessing Officer during the assessment proceedings. Further, it is observed that there were credits entries other than cash deposits and salary credits in the bank account of the assessee totaling to Rs. 16.73 Lakhs which were not examined by the assessing officer. Further, it is observed that as per 26AS the

assessee has total receipts of Rs.5,71,044/- whereas the assessee has declared income in the ITR of Rs.2,22,640/- which were not examined by the Assessing Officer.

8. *In this regard, it would also be of particular relevance to look into Explanation 2 to section 263 of the Act inserted in section 263(1) w.e.f. 01.06.2015, which provides that an order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal commissioner or commissioner, (a) made; (b) the order is passed allowing any relief without inquiring into the claim. Facts emerging from this case make it abundantly clear that the assessing officer has passed assessment order without making proper enquiry in respect of cash deposits and credit receipts in the bank account of the assessee and without making enquiries in respect of commodity transaction made by the assessee and total receipts received by the assessee as per 26AS.*

Therefore, the assessment order passed u/s 143(3) of the Act, dated 18.12.2018 in this case is being annulled being erroneous in so far as it is prejudicial to the interests of revenue.”

[Emphasis supplied]

The Ld. PCIT, vide impugned order, directed the AO to examine the case afresh especially with regard to the cash deposits/credit receipts, commodity transactions and receipts as per 26AS in accordance with the discussions made in the impugned order.

4. Before us, the Ld. Counsel submitted that the issues for which the Ld. PCIT invoked the provisions of section 263 of the Act had already been examined/investigated/inquired by the Ld. AO. Hence, it

was case of change of opinion only and not a case of lack of inquiries. To substantiate his arguments, the Ld. Counsel filed a Paper-Book containing the copy of ITR, submissions filed before the Ld. CIT(A), copies of notices issued under section 250 and 263 of the Act, copy of salary receipt from the AIR India and Copies of three bank accounts.

5. The Ld. CIT-DR, placing reliance on para 7 and 8 of the impugned order submitted that the Paper-Book did not demonstrate that whether the issues raised by the Ld. PCIT were examined/investigated/inquired by the AO during the reopened assessment proceedings. The notices issued under section 142(1) detailed in the assessment order did not reveal that the demat account and credits in the bank accounts were properly examined/investigated/inquired. Further, she contended that it was not a case of change of opinion as the issues flagged by the Ld. PCIT were not properly examined/investigated/inquired at confronted to the appellant/assessee, which got evident from the assessment order passed in consequence to the impugned order wherein the assessment was completed at income of Rs.29,05,154/- vide order dated 31.3.2022 passed under section 144 r.w.s. 263 of the Act. She, therefore, requested for dismissal of appeal.

6. We have heard both the parties and have perused the material available on the record. We also perused the above referred case laws. The relevant part of the section 263 of the Act is extracted hereunder: -

“Explanation 2—For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal Commissioner or Commissioner, —

- (a) the order is passed without making inquiries 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 under section 119; or*
- (d) the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person.”*

[Emphasis supplied]

7. The case was reopened under section 147 of the Act and consequential assessment was completed at income of Rs.8,83,750/-. The Ld. Counsel was not able to demonstrate and establish with the help of any statutory notice or order sheet noting that the issues raised by the Ld. PCIT in the impugned order were examined /investigated

/inquired during the reopened assessment proceedings. There is no categorical mentioned of the issues raised by the Ld. PCIT in the reopened assessment order. This shows completely lack of examination/investigation/inquiry and also non-application of mind on the part of the AO at the time of passing of the reopened assessment order. The AO, after having reopened the case under section 147 of the Act, was required to carry out detailed enquiry and verification, not only on the reasons for reopening the case but also about other issues emerged during the reopened assessment proceedings. In the order dated 18.12.2018 passed under section 147 r.w.s. 143(3) of the Act, there is no whisper in the impugned order of the issues raised by the Ld. PCIT that these were examined/enquired/investigated by the AO.

8. Revision of orders prejudicial to revenue by the PCIT is very important mechanism built in the scheme of the Act, which have to be used with checks and balances. The insertion of Explanation 2 of section 263 of the Act declares four specific situations to hold the AO's order erroneous with certainty in the revision of order under section 263 of the Act. The memorandum explaining the provisions states as under

“The existing provisions contained in sub-section (1) of section 263 of the Income-tax Act provides that if the Principal Commissioner or Commissioner considers that any order passed by the assessing

officer is erroneous in so far as it is prejudicial to the interests of the Revenue, he may, after giving the assessee an opportunity of being heard and after making an enquiry pass an order modifying the assessment made by the assessing officer or cancelling the assessment and directing fresh assessment. The interpretation of expression “erroneous in so far as it is prejudicial to the interests of the revenue” has been a contentious one. In order to provide clarity on the issue it is proposed to provide that an order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal Commissioner or Commissioner,—

(a) the order is passed without making inquiries or verification which, should have been made;

.....”

9. A plain reading of the above amendment implies that the said Explanation has been added for clarifying the scope of the words ‘erroneous so far as prejudicial to the interest of the revenue.’ While clarifying the position, four different situations have been contemplated so as to call an order to be ‘erroneous so far as prejudicial to the interest of the revenue.’ The Explanation 2 of section 263 of the Act is a fiction. The provision further creates a fiction as to order being erroneous in so far as prejudicial to the interest of revenue if the Commissioner or Principal Commissioner forms an opinion about the existence of four situations stated therein.

10. The words used in provision to section 263 of the Act are ‘if the order is passed with making inquiries or verification which should have been done’. The expression ‘which should have been done’ suggests an

objective test to be applied so as to highlight necessity of making appropriate inquiry for assessing the correct income and absence of which may cause prejudice to the revenue. The impugned order passed by the Ld. PCIT demonstrates that he has examined the record and has found certain issues as detailed in the impugned order that the AO has not examined/enquired/investigated certain issues which should have been made. In the present case the Ld. PCIT has clearly mentioned that the 26AS of the appellant/assessee showed receipt of Rs.5,71,044/- from National Aviation Company of India Ltd. and Air India Ltd. whereas the ITR showed Rs.2,22,540/-. Further, the Ld. PCIT has also held that transactions of demat accounts and bank account were not examined/enquired/investigated and consequentially dealt in the assessment order. This finding of the Ld. PCIT has not been categorically rebutted by the appellant/assessee though the factum of inquiry is always verifiable with reference to record.

11. The Ld. PCIT has amply demonstrated in the impugned order that three issues; transactions in the demat account, transactions in the bank account and receipts as per 26AS vis-à-vis receipts as per the ITR were not examined/enquired/investigated by the AO though he should have carried out adequate examinations /enquiries/ investigations to come to a logical conclusion. Further, neither any

reply/document nor any notice under section 142(1) of the Act demonstrating the fact that these issues had been examined by the AO was brought on the record, which may substantiate the claim of the appellant/assessee that it is a case of change in opinion. In view of the facts in entirety and above discussions/observations, we are of the considered opinion that the Ld. PCIT has rightly exercised her jurisdiction under section 263 of the Act in setting aside the assessment order of the AO being erroneous in so far it is prejudicial to the interest of the Revenue and remanding the matter back to the AO to examine the case afresh especially with regard to the cash deposits/credit receipts, commodity transactions and receipts as per 26AS in accordance with the discussions made in the impugned order. Accordingly, we uphold the order of the Ld. PCIT and dismiss the appeal of the assessee.

12. In the result, appeal of the assessee is dismissed.

Order pronounced in open Court on 29th November, 2024

Sd/-
(VIKAS AWASTHY)
JUDICIAL MEMBER

Sd/-
(AVDHESH KUMAR MISHRA)
ACCOUNTANT MEMBER

Dated:29/11/2024

Binita, Sr. PS

Copy forwarded to:

1. Appellant

2. Respondent
3. PCIT
4. Sr. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI