IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCHES :D : KOLKATA

BEFORE SHRI R.S. SYAL, AM & SHRI N.V. VASUDEVAN, JM

ITA No.1825/Kol/2013 Assessment Year:2008-09		
M/s Khazana Mercahandise Pvt. Ltd., 2A, G.C.Avenue, Commerce House, 7th floor, Room No.3, Kolkata – 700013. PAN : AADCK 2111 J	Vs.	Commissioner of Income Tax, Kolkata-II, AayakarBhawan, P-7, Chowringhee Square, Kolkata – 700 069.
(Appellant)		(Respondent)

Assessee By	:	A.K.Tibrewal
Department By	:	S.Srivastava, CIT DR

Date of Hearing	:	4.11.2015
Date of Pronouncement	:	05.11.2015

ORDER

Per Bench

Through this appeal, the assessee assails the correctness of the order passed by the Commissioners of Income-tax (CIT) on 28.3.2013

u/s 263 of the Income-tax Act, 1961 (hereinafter also called 'the Act') in relation to the assessment year 2008-09.

2. Briefly stated the facts of the case are that the return was filed by the assessee with a loss of Rs.1,400; intimation was issued u/s 143(1); thereafter notice u/s 148 was issued; assessment order was passed u/s 143(3) read with section 147 after making nominal disallowance of Preliminary expenses of Rs.11,900; and the AO, during the course of such assessment proceedings, made some formal enquiries about shares issued by the assessee company at huge premium by issuing notices u/s 133(6) to some of the shareholders and getting satisfied without any further investigation. The jurisdictional CIT has passed order u/s 263 in this case, which has been assailed before the Tribunal.

3. We have heard the rival submissions and perused the relevant material on record after considering the written submissions filed on behalf of the assessee. It is relevant to mention that we have disposed of more than 500 cases involving same issue through certain orders with the main order having been passed in a group of cases led by

Subhlakshmi Vanijya Pvt. Ltd. vs. CIT (ITA No.1104/Kol/2014) dated 30.7.2015 for the A.Y. 2009-10.

4. Both the sides have fairly admitted that facts and circumstances of the instant case are *mutatis mutandis* similar to those decided earlier except with some additional arguments, which we will deal with hereinafter. In our aforesaid order in *Subhlakshmi Vanijya Pvt. Ltd., vs. CIT (ITA No. 1104/Kol/2014 A.Y. 2009-10)*, we have drawn the following conclusions: -

> **A.** Contention of the assessee that since the AO of the assessee-company was not empowered to examine or make any addition on account of receipt of share capital with or without premium before amendment to section 68 by the Finance Act, 2012 w.e.f. A.Y. 2013-14 and hence the CIT by means of impugned order u/s 263 could not have directed the AO to do so, is unsustainable.
>
> **B.** Failure of the AO to give a logical conclusion to the enquiry conducted by him gives power to the CIT to revise such assessment order, by holding that :-
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> > i) the enquiry conducted by the AO in such cases can't be construed as a proper enquiry;
> >
> > ii) CIT u/s 263 can set aside the assessment order and direct the AO to conduct a thorough enquiry, notwithstanding the jurisdiction of the AO in making enquiries on the issues or matters as he considers fit in terms of section 142(1) and

143(2) of the Act, which is relevant only up to the completion of assessment ;

iii) Inadequate inquiry conducted by the AO in the given circumstances is as good as no enquiry and as such, the CIT was empowered to revise the assessment order ;

iv) The order of the CIT is not based on irrelevant considerations and further in the present circumstances, he was not obliged to positively indicate the deficiencies in the assessment order on merits on the question of issue of share capital at a huge premium ; and

v) the AO in the given circumstances can't be said to have taken a possible view as the revision is sought to be done on the premise that the AO did not make enquiry thereby rendering the assessment order erroneous and prejudicial to the interest of the revenue on that score itself.

C. In the given facts and circumstances of all such cases, the notices u/s 263 were properly served through affixture or otherwise. Further the law does not require the service of notice u/s 263 strictly as per the terms of section 282 of the Act. The only requirement enshrined in the provision is to give an opportunity of hearing to the assessee, which has been complied with in all such cases.

D. Limitation period for passing order is to be counted from the date of passing the order u/s 147 read with sec. 143(3) and not the date of Intimation issued u/s 143(1) of the Act, which is not an order for the purposes of section 263. In all the cases, the orders have been passed within the time limit.

E. The CIT having jurisdiction over the AO who passed order u/s 147 read with section 143(3), has the territorial jurisdiction to pass the order u/s 263 andnot other CIT.

F. Addition in the hands of a company can be made u/s 68 in its first year of incorporation.

G. After amalgamation, no order can be passed u/s 263 in the name of the amalgamating company. But, where the intention of the assessee is to defraud the Revenue by either filing returns, after amalgamation, in the old name or otherwise, then the order passed in the old name is valid.

H. Order passed u/s 263 on a non-working day does not become invalid, when the proceedings involving the participation of the assessee were completed on an earlier working day.

I. Order u/s 263 cannot be declared as a nullity for the notice having not been signed by the CIT, when opportunity of hearing was otherwise given by the CIT.

J. Refusal by the Revenue to accept the written submissions of the assessee sent after the conclusion of hearing cannot render the order void *ab initio*. At any rate, it is an irregularity.

K. Search proceedings do not debar the CIT from revising order u/s passed u/s 147 of the Act.

5. It is noticed that some of the above conclusions are applicable to the instant appeal.

6. The ld. AR raised fresh twin objections on the applicability of section 68 of the Act. His first objection was that section 68 can be taken recourse to by the AO alone and the ld. CIT was not justified in invoking it in the revision proceedings. We do not find any substance in the

argument. The obvious reason is that the ld. CIT, while revising the assessment order noticed that the AO had not considered the issue correctly in the context of section 68, which he ought to have. It is but natural for CIT to resort to revision of the assessment order, if any of the relevant issues of the assessment are not properly considered by the AO, which manifestly include the correct application of section 68. The ld. CIT in the instant case has rightly noticed this aspect of the matter, which falls within his domain in revision proceedings. Arguing that the CIT in revision proceedings u/s 263 cannot examine the correctness of the action of the AO in applying section 68, amounts to denying the authority from discharging his statutory obligation, which he is lawfully bound to do. It is further relevant to note that the ld. CIT has not applied section 68 by making an addition. He simply set aside the assessment order and directed the AO to consider the applicability of this section in correct perspective. This objection, therefore, fails.

7. The second objection of the ld. AR was that the proviso to section 68 cannot be considered as retrospective in view of several judgments

including *CIT VS. Vatika Township P. Ltd. (2014) 367 ITR 466 (SC),* in which the levy of surcharge on income tax in case of block assessment has been held as prospective. We do not find any substance in the argument for two reasons. First reason is that this judgment does not deal with proviso to section 68 but with the levy of surcharge on income tax in case of block assessment. There is a lot of difference between the two provisions. There is no universal unimpeached rule that no amendment can be construed as retrospective. It depends upon the nature of provision and the amendment as to whether it is retrospective or prospective. The second reason for our not sounding a concurring note to the argument of the ld. AR is that this issue has already been discussed threadbare in our order in *Subhlakshmi Vanijya Pvt. Ltd. (supra).* Relevant discussion has been made in paras 13.u. to 13.ae. After making an elaborate analysis of the nature of amendment, memorandum explaining the provisions of the Finance Bill, 2012, and legal position as emanating from various judgments from the Hon'ble Summit Court governing the retrospective or prospective effect of an amendment, it has been held that insertion of proviso to section 68 is

retrospective. As such, this argument, being devoid of any merit, deserves to meet the fate of dismissal. We order accordingly.

8. In view of the foregoing discussion and following the view taken in *Subhlakshmi Vanijya Pvt. Ltd. (supra)*, we uphold the impugned order.

9. In the result, the appeal is dismissed.

The order pronounced in the open court on 05.11.2015.

Sd/-	Sd/-
[N.V. VASUDEVAN]	[R.S. SYAL]
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated, November, 2015.

RG

Copy forwarded to:

- Appellant
- Respondent
- CIT
- CIT (A)
- DR, ITAT

AR, ITAT, Kolkata.