

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'G', NEW DELHI**
Before Sh. G. C. Gupta, Hon'ble Vice President
And
Sh. O.P.Kant, Accountant Member

ITA No.1491/Del./2011
Asstt. Year : 2005-06

Sanjay Kumar Keshary, N-2/8, DLF Phase-II, Gurgaon PAN:AGIPK6086E	Vs	CIT Delhi-III, New Delhi
(APPELLANT)		(RESPONDENT)

Appellant by : Sh. R.S. Singhvi, Adv
Respondent by : Smt. Sunita Kejriwal, CIT DR

Date of Hearing : 29.09.2015	Date of Pronouncement :14.10.2015
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ORDER

PER O.P.KANT, AM.

This appeal of the assessee is directed against the order dated 08.03.2010 of the Commissioner of Income-tax , Delhi-III, New Delhi under section 263 of the Income tax Act, 1961 raising grounds of appeal as under:-

- “1(i) *That on the facts and circumstances of the case, CIT was not justified in invoking provision of section 263 on the alleged ground that that assessment order passed u/s 143(3) is erroneous and prejudicial on the interest of the revenue.*
- (ii) *That action of the CIT is without appreciating the fact that the Assessing Officer has considered all the relevant facts and passed speaking order on the basis of facts and provisions of the law.*

- (iii) *That in any case, the Assessing Officer has taken a reasonable and possible view after appreciating the facts of the case and Cit cannot assume jurisdiction merely on the basis of change of opinion and as such the whole basis of proceeding u/s 263 are illegal, bad in law and without jurisdiction.*
2. *That impugned order is not sustainable on facts and under the law.”*

2. There is a delay of 277 days in filing the present appeal. The assessee has filed an application for condonation of delay along with an affidavit of a Chartered Accountant, Shri Satish Chander, explaining the reasons for delay in filing the present appeal. We have heard the rival submissions of both the parties and have perused the material on record in respect of condonation of delay. In the affidavit enclosed with the application for condonation of delay, Shri Satish Chander, CA has submitted that the order under section 263 of the Income-tax Act passed by the learned Commissioner of Income-tax (Appeals) for the concerned assessment year, was sent to him by the assessee, but said order got misplaced with other records from his office, so he could not advise the assessee. As a result, there was delay in filing the present appeal before Tribunal. Further, he submitted in the affidavit that delay was genuine and bona fide. On the other hand, the learned Commissioner of Income-tax (Departmental Representative), objected to the condonation of delay stating that there was no sufficient cause for not filing the appeal on time.

3. After considering the rival submissions and carefully gone through the affidavit filed by the Chartered Accountant, we are of the view that the assessee has not acted in the mala fide manner and reasons are explained as well as also not for ulterior purpose. It is settled position of law that court should take lenient view on the issue of condonation of delay but the

reasons for delay must be bona fide and not merely a device for camouflaging the ulterior purpose or an attempt to save the limitation in an underhand way. The law of limitation prescribed in the provision of section 253(5) envisages that there should be a sufficient cause for not presenting the appeal within the prescribed period. Further the Courts have held that while construing the 'sufficient cause', the court should be liberal and lean in favour of such party. In the case of Shri Y P Trivedi Vs. the Joint Commissioner of Income Tax Range, in ITA No.5994/Del/2010, the order of the learned Commissioner of Income-tax mixed up with the other papers by the office of the Chartered Accountant of the assessee and therefore the appeal could not be filed within the period of limitation. In that case, the ITAT Mumbai 'G' Bench has condoned the delay of 496 days in filing the appeal. Further, in the case of Vinay Extraction Pvt. Ltd. Vs. Vijay Kumar (2004) 271 ITR 450 (Gujarat), the Hon'ble High Court has observed as under:

"It is true that the Apex Court has held that the Court should adopt a liberal approach in considering the application for condonation of delay and that substantial justice deserves to be preferred over technical considerations."

4. We have heard the rival submissions and have perused the record. We observe that in the present case in hand, the reasons explained by the assessee are found to be not mala fide in any manner or attempt to camouflage any ulterior motive, therefore, we are of the opinion that while considering the sufficiency of the cause liberal approach should be adopted. We are satisfied with the reasons explained by the assessee for delay in filing the appeal beyond the prescribed period. Accordingly, in the interest of justice, we condone the delay of 277 days in filing the present appeal.

5. The effective ground of appeal of the assessee is that the learned Commissioner of Income-tax was not justified in invoking provisions of section 263 on the alleged ground that assessment order passed u/s 143(3) is erroneous and prejudicial to the interest of the revenue, in view of the fact that the learned Assessing Officer considered all the relevant facts and has taken a reasonable and possible view after appreciating all the facts of the case.

6.1 Facts in brief are that assessee filed return of income declaring total income of Rs.4,50,000/- on 31.11.2005. The case was selected for scrutiny and notice u/s 143(3) was issued. From the database of the Income-tax Department, the learned Assessing Officer noticed that the assessee deposited cash amounting to Rs.32,72,480/- in his one of the saving bank account. The assessee explained that the said deposit as under:

- (i) Rs.4,80,000/- was deposited out of salary received by him from M/s. Sandy Machinery & Tools Pvt. Ltd. ,
- (ii) Rs.9,50,000/- was deposited out of gift received from his father and
- (iii) Rs.4,75,000/- was deposited out of withdrawal made from the bank account on 23.10.2004.

6.2 The balance amount of Rs.13,67,480/- was held to be unexplained and added to the total income of the assessee by the learned Assessing Officer in the assessment order passed under section 143(3) of the Act on 27-09-2007.

7. The learned Commissioner of Income-tax called for and examined the records of the assessee and found that the learned Assessing Officer has not made any enquiry while considering the amount of Rs.9,50,000/-

received from the father of the assessee as gift. He was also of the view that the learned Assessing Officer had committed error in treating the cash withdrawal of Rs.4,75,000/- as unexplained cash credits. In view of the above observations, learned Commissioner of Income-tax issued a show-cause notice to the assessee proposing to revise the order under section 263 of the Act. In response to the notice, the learned Authorised Representative filed a detailed reply explaining that the father of the assessee, Shri Shankar Prasad Keshav Ray, was confronted by the learned Assessing officer regarding his creditworthiness, and during which he explained that he was running a proprietary ship firm namely 'Laxmi Ram Bishan' in the year 2004. The learned Authorised Representative further stated that gift was received by the assessee on 01.11.2004 and the same amount was found credited in the assessee's bank account on various dates starting from 01.11.2004 and therefore, in view of the learned Authorised Representative creditworthiness and genuineness of the transaction was proved. As regards to the cash withdrawals of Rs.4,75,000/-, the learned Authorised Representative stated that the assessee had already submitted cash flow statement in order to explain the cash deposit of Rs.32,72,480/- incorporating the cash withdrawals of on 29.03.2004 from the Bank of Rajasthan. However, not satisfied with the submission of the learned Authorised Representative, the learned Commissioner of Income-tax in order passed under section 263 of the Act held, the order of the learned Assessing officer as erroneous and prejudicial to the interest of Revenue. The relevant findings of his order are reproduced as under:-

“6.2 The assessing officer, before passing the impugn order, has not investigated the genuineness and creditworthiness of the transaction as claimed by the assessee in respect of gift received from his father. The AO has simply relied on the statement of the father of the assessee. The AO should have made independent enquiries into the source of the gift claimed to have been given by the father of the assessee as well as the veracity of his statement. In fact the AO hardly asked 2-3 questions 10 assessee's father and accepted his statement on the face value without asking, probing questions or making any verification. No enquiry was made nor the AO collected or called for the basic details like size, location, Khasra No. of agricultural land, nature of agricultural produce, when the shop was started, whether the father of the assessee is assessed to tax & if so whether he has shown agricultural income/ business income in his return and the extent of such income

6.3 Secondly, as per cash flow statement of the assessee, filed during the assessment proceedings which is made part of this order as annexure 'B', the amount of gift has been received on 01.11.2004. But, the amount of Rs.9,50,000/- has not been deposited in to the bank account of the assessee on one single day on or after this date. Perusal of the bank account of the assessee which is made part of this order as annexure 'C' reveals that there is no single credit entry of Rs.9,50,000/- in the bank account of the assessee. Rather, there are small as well as huge cash deposits in to the account after this date which have been withdrawn either on the same day or on the next day. If we presume that the assessee had kept the cash gift with him at home and deposited the same in to bank account in installments, the AO should have asked the assessee to explain the need of frequent deposits and withdrawals into/ from the bank account. Therefore, the contention of the assessee that the amount of Rs.9,50,000/- was received as gift from the father of the assessee and deposited in to bank account could not be accepted.

6.4 As regards the contention of the assessee that an amount of Rs.4,75,000/- withdrawn from the bank account explains the credits in the bank account of the same extent, perusal of the bank account reveals that this withdrawal of Rs.4,75,000/- is made on 23.10.2004 and immediately before this entry, on the same day i.e. 23.10.2004 there is credit entry of Rs.4,75,000/- by way of clearing of cheque No.50050 This means that the cheque in respect of which amount of

Rs.4,75,000/- has been credited on 23.10.2004 was deposited before the withdrawal. The assessee could not withdraw the amount of Rs.4,75,000/- before the credit of the questioned cheque because before the credit of this cheque, there was credit balance of Rs.407/- only in the bank account of the assessee. Therefore, it is clear that there is no explanation for the amount of Rs.4,75,000/- credited to the bank, account of the assessee on 23.10.2004 .

7. In view of above discussion I hold that the order passed by the Assistant Commissioner of Income Tax, Circle 7(1). New Delhi on 27.09.2007 under section 143(3) of the Income Tax Act 1961 for the Assessment Year 2003-06 in case of the assessee is erroneous and prejudicial to the interest of revenue.”

8. Aggrieved with the above findings of the learned Commissioner of Income-tax, the assessee is before us.

9. At the time of hearing, the learned Authorised Representative of the assessee submitted that the learned Assessing Officer had made sufficient enquiry in respect of amount of Rs.9.5 lacs received as gift from the father of the assessee. He further submitted that the statement of his father was recorded by the learned Assessing Officer and after satisfying himself about the source of the credit, he held that the amount deposited of Rs.9.5 lacs as explained. As regards to the other amount of Rs.4.7 lacs, also the learned Assessing Officer has duly verified the cash flow statement of the assessee and thereafter accepted the source thereof. The learned Authorised Representative further relied on the judgement of the Hon'ble Delhi High Court in the case of CIT Vs. Product Limited reported in 340 ITR 547 and in other order the Hon'ble Delhi High Court in the case of CIT Vs. Sunbeam Auto Limited [2010] 189 Taxman 436 (Del). Whereas, on the other hand, the learned Commissioner of Income-tax (Departmental Representative) relied on the order of the Hon'ble Supreme Court in the case Malabar Industrial Co. Ltd. Vs. CIT (2000) 243 ITR 83 and submitted

that the order of the Assessing Officer was erroneous and also prejudicial to the interest of the Revenue and therefore the learned Commissioner of Income-tax has rightly invoked the jurisdiction u/s 263 of the Act. Further, the learned Commissioner of Income-tax (Departmental Representative) submitted that the learned Assessing Officer has not made any enquiry from the father of the assessee in respect of source of deposit of Rs.9.5 lacks.

10. We have heard the rival submissions and perused the material on record including the paper book submitted by the assessee. Before we advert to the facts of the case, we may like to look at the finding of the Hon'ble High Court of Delhi in the case of CIT Vs. Sunbeam Auto Ltd. (supra) wherein the Hon'ble High Court has held as under:-

13. When we examine the matter in the light of the aforesaid principle, we find that the Assessing Office]- had called for explanation on this very items, from the assessee and the assessee had furnished his explanation vide letter dated 26-9-2002. This fact is even taken note of by the Commissioner himself in Para 3 of his order dated 3-11-2004. This order also reproduces the reply of the respondent in Para 3 of the order in the following manner:

"The tools and dies have a very short life and can produce up to maximum 1 lakh permissible shorts and have to be replaced thereafter to retain the accuracy. Most of the parts manufactured are for the automobile industries which have to work on complete accuracy at high speed for a longer period, Since it is an ongoing procedure, a company had produced 10,75,000 .sets whose selling rates is inclusive of the reimbursement of the dies cost. The purchase orders indicating the costing includes the reimbursement of dies cost are being produced before your honour. Since the sale rate includes the reimbursement of dies cost and to have the matching effect the cost of the dies has been claimed as a revenue expenditure."

14. This clearly shows that the Assessing Officer had undertaken the exercise of examining as to whether the expenditure incurred by the assessee in the replacement of dyes and tools is to be treated as revenue expenditure or not. It appears that since the Assessing Officer was satisfied with the aforesaid explanation, he accepted the same. The CIT in his impugned order even accepts this in the following words :

"Assessing Officer accepted the explanation without raising any further questions, and as stated earlier, completed the assessment at the returned income."

15. Thus, even the Commissioner conceded the position that the Assessing Officer made the inquiries, elicited replies and thereafter passed the assessment order. The grievance of the Commissioner was that the Assessing Officer should have made further inquiries rather than accepting the explanation. Therefore, it cannot be said that it is a case of 'lack of inquiry'."

11. In view of the above findings, it is apparent that learned Commissioner of Income-tax (Appeals) cannot invoke the jurisdiction u/s 263 of the Act, merely on the ground that no adequate enquiry has been made by the Assessing Officer. In the instant case, the learned Assessing Officer has not only recorded the statement of the father of the assessee, but also satisfied himself that the source of money was duly explained, as he was running a 'Kirana Shop' and money was earned out of his activity of running of that shop. The learned Commissioner of Income-tax in para 6.2 of his order has himself admitted that the learned Assessing Officer had hardly asked 2 to 3 questions from the assessee and assessee's father explained in his statement on the face value and no enquiry was made or the called for recording of the basic details like size, location, Khasra No. of agricultural land, nature of agricultural produce, when the shop was started etc. The learned Assessing Officer has also examined cash deposit of Rs.

4.70 lakhs from the cash flow statement and after satisfying thereon, has admitted the explanation of the assessee. In our considered opinion, this may be a case of inadequate inquiry, but certainly, it is not a case of lack of enquiry. The learned Assessing Officer has made certain opinion on the basis of enquiry conducted and satisfied himself. The learned Commissioner of Income-tax cannot revise the assessment merely due to the reason that he holds a different opinion on that issue. Respectfully, following the judgement of Hon'ble jurisdictional High Court in case of CIT Vs. Sunbeam Auto Ltd. (supra), we hold that the findings of the learned Commissioner of Income-tax (Appeals) in holding the order of the learned Assessing Officer passed under section 143(3) of the Act as erroneous and prejudicial to interest of the Revenue are not correct and bad in law and therefore, we set aside the impugned order of the learned Commissioner of Income-tax (Appeals) passed under section 263 of the Act .

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

Order Pronounced in the Court on 14/10/2015.

-Sd/-

(G.C. Gupta)
VICE PRESIDENT

Dated: 14/10/2015

-Sd/-

(O.P.Kant)
ACCOUNTANT MEMBER

Ajay

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR