

**IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "A", HYDERABAD**

**BEFORE SHRI D. MANMOHAN, VICE PRESIDENT
AND
SHRI B. RAMAKOTAIAH, ACCOUNTANT MEMBER**

I.T.A. No. 1149/HYD/2015

Assessment Year: 2008-09

Sri Nama Krishnaiah,
HYDERABAD
[PAN: AAXPN3260A]

Vs

Dy. Commissioner of
Income Tax,
Central Circle-2(1),
HYDERABAD

(Appellant)

(Respondent)

For Assessee : Shri P. Murali Mohan Rao, AR
For Revenue : Shri P. Chandra Sekhar, DR

Date of Hearing : 16-11-2016
Date of Pronouncement : 23-11-2016

ORDER

PER B. RAMAKOTAIAH, A.M. :

This appeal by assessee against the order of the Pr. Commissioner of Income Tax, Central, Hyderabad, u/s. 263 of the Income Tax Act [Act] dated 11-03-2015 for the AY. 2008-09.

2. Briefly stated, there were search and seizure operations conducted u/s. 132 of the Act in the group cases of M/s. Madhucon Projects Ltd., on 04-02-2011. Consequent to that, proceedings u/s. 153A in the case of Shri Krishnaiah were initiated in the group cases. Assessing Officer in the scrutiny assessment have examined the issues and completed the assessments on 28-03-2013. On the reason that AO has not examined the issues

in the correct perspective, Ld. CIT initiated the proceedings u/s. 263 and issued show cause letter. Assessee objected but CIT rejected the contentions and set aside the assessments for making detailed enquiries and investigation on the issues specified therein. Assessee is aggrieved and preferred the present appeal.

3. Assessee has raised various grounds in appeal which include that the proceedings completed by the AO u/s. 153A are not valid. That issue does not arise out of the present proceedings, therefore, grounds questioning the very assessment are not considered and accordingly they are dismissed. The main issue to be considered is whether Ld. CIT is correct in invoking jurisdiction u/s. 263 to set aside the assessments completed by the AO?

4. The CIT invoked the jurisdiction u/s. 263 for the following reason:

“(a) It was found from the records that the assessee declared salary of Rs. 3,60,000/- and income from other sources of Rs. 4,88,207/-. The Form No. 16 filed along with the return shows that the assessee has received salary of Rs. 2,40,000/- from Madhucon Granites Ltd., Rs. 1,20,000/- from Varalaxmi Granites Pvt. Ltd., at the same time the Form No. 26AS shows that the assessee was paid Rs. 3 lakhs salary Madhucon Sugars Ltd., on which TDS of Rs. 39,000/- u/s. 192 was made. The income reflected in Form No. 26AS was not shown in the return of income under the head ‘salary’. The Assessing Officer while completing the assessment has accepted the returned income of Rs. 7,45,710/-. Thus, the income reflected in Form No. 26AS appears to have escaped taxation. Since the Assessing Officer has failed to examine this issue while completing the assessment the order passed by the Assessing Officer u/s. 143(3) r.w.s. 153A of the IT Act, 1961, dated 27-03-2013 for the assessment year 2008-09 is erroneous in so far as it is prejudicial to the interest of Revenue”.

4.1. Assessee explained that it has claimed credit of TDS to the extent of Forms No. 16 issued to him and there were no services rendered to that company nor any salary was receivable from M/s.

Madhucon Sugars Ltd., on which TDS of Rs. 39,000/- was made by that company. It was submitted that they have wrongly made the provision in the books and deducted tax but no such amount was receivable by assessee nor any credit was taken for the TDS made in the name of assessee and reflected in 26AS. It was submitted that there is no error in the order passed by the AO. It was further submitted that this is a search case and notice u/s. 153A was issued and AO has enquired all the facts before completing the assessment u/s. 143(3) r.w.s. 153A on 27-03-2013. Ld. CIT, however, did not agree with the contentions of assessee and by stating as under, he set aside the assessment:

“5. I have gone through the facts of the case and the submission of the assessee. It is a fact on record that there were discrepancies regarding receipt of salary! Income from Madhucon Sugars Ltd. The Form No.16 filed by the assessee clearly shows receipt of salary income of Rs.3,60,000/- from Madhucon Granites and Varalaxmi Granites Ltd. and it is not disputed that the said income has been offered to tax by the assessee. However, Form No.26AS which is filed by the assessee clearly Indicates payment of Rs.3,00,000/- by Madhucon sugars Ltd. on which TDS of Rs.39,000/- was made. The assessee has not been able to clarify the discrepancies in the Form No.26AS and in the Form No.16 and as to why the income reflected in Form No.26AS has not been offered to tax. The only contention of the assessee that the income returned is more than the income reflected in form No.26AS cannot justify the reason why the income from Madhucon Sugars Ltd was not offered to tax. The Assessing Officer has not examined the issue in detail while framing the assessment. To that extent the order passed by the Assessing Officer is certainly erroneous in so far as it is prejudicial to the interest of the revenue. It has been judicially held that an assessment made without necessary enquiry can be held to be erroneous and can be revised u/s.263 of the I.T. Act 1961. Reference in this regard can be made to the decision of special Bench, ITAT, Chennai reported in 313 ITR (AT) 182. Chennai SB wherein it was observed that it is not necessary for the commissioner of Income-tax in revision to make further enquiries before cancelling the Assessment Order of the A.O. The Commissioner of Income-tax can regard the order as erroneous on the ground that in the circumstances of the case, the A.O. should have made further enquiries before accepting the statements made by the assessee in his return. It is incumbent on the A.O. to

investigate the facts stated in the return when circumstances would make such an enquiry prudent. The word erroneous in Sec.263 of Income tax Act, 1961 includes cases where there has been failure to make necessary enquiries”.

5. It was the contention of Ld. Counsel that AO has examined all the aspects as it is a search case and proceedings were initiated u/s. 153A. It was further submitted that assessee has furnished all the information before the AO and AO examined the issues including the issue of receipt of salary. Therefore, the order cannot be considered as 'erroneous'. The action of the CIT tantamount to 'change of opinion'. It was further submitted that assessee was not in receipt of any amount of Rs. 3 Lakhs from Madhucon Sugars Ltd. Assessee neither received this amount during the FY. 2007-08 nor received in the later year. Since assessee is following Cash System of Accounting, he is not aware about salary being credited to his account by the said company. Since no TDS credit was claimed in any of the years, it cannot be considered that assessee has received the amount. It was further submitted that M/s. Madhucon Sugar Ltd., reversed the entries later on. Since TDS was already made, they are not able to recover the amount from the department but assessee neither rendered any services to them nor was due to get any amount from that company. In view of that, it was submitted that there is no error on the part of the AO in accepting assessee's submissions. Ld. Counsel relied on the decision of the Hon'ble Supreme Court in the case of Malabar Industries Co. Limited Vs. CIT [243 ITR 83] (SC). He also relied on the following cases:

- i. Spectra Shares & Scrips (P) Limited [354 ITR 35] [36 taxmann.com 348] (AP High Court);

- ii. Saaiwala Agro Refinneries Ltd., ITA Nos. 224 & 225/Hyd/15;
- iii. Ch. Krishna Murthy, ITA No. 766/Hyd/12;
- iv. Trinity Infra Ventures Ltd., ITA Nos. 584-89/Hyd/15;
- v. Continental Warehousing Corporation (Nhaa Shea) Ltd.,
[58 Taxmann.com 78] (High Court of Bombay);

6. Ld. DR however, submitted that Form No. 26AS gives credit of the TDS of Rs. 39,000/- from Madhucon sugars Ltd and since AO has not examined the issue at all, CIT is correct in invoking the jurisdiction u/s. 263.

7. We have examined the rival contentions and perused the documents placed on record. There is no dispute that assessee has claimed salary income only from two companies i.e, M/s. Madhucon Granites Ltd., to an extent of Rs. 2,40,000/- and M/s. Varalaxmi Granites Pvt. Ltd., to an extent of Rs. 1,20,000/-, total being Rs. 3,60,000/-. TDS was also accordingly claimed as per the Form No. 16 furnished by the above two companies. Form 26AS may show a credit of Rs. 39,000/- TDS made by M/s. Madhucon Sugars Ltd., but assessee contention that he has neither received the amount nor obtained any Form 16 has been ignored. Even in the intimation u/s. 143(1) passed as early as 15-09-2009, the credit for TDS was given only to an extent of Rs. 62,830/- which pertains to above two salary incomes and no credit for Rs. 39,000/- was taken/given. Even subsequently also in the scrutiny assessment, no further credit for the amount of Rs. 39,000/- was given. Once the credit of the amount is not given, the issue of bringing to tax the corresponding income does not arise. In what

circumstances M/s. Madhucon Sugars Ltd. claimed salary income to assessee is not on record. But the fact is that periodically, there were search and seizure operations in the group of Madhucon Group of Companies and Madhucon Sugars Ltd., is also part of the group companies. Nothing was brought on record by the CIT whether the said Rs. 3 Lakhs paid/claimed to assessee was given as a deduction in the hands of Madhucon Sugars Ltd., Just because Form 26AS reflect a TDS amount, it cannot be considered that the relevant amount was receivable by assessee. Being the search case, it can be presumed that AO examined the issues. The Hon'ble AP High Court in the case of Spectra Shares & Scrips (P) Limited [354 ITR 35] [36 taxmann.com 348] has held that AO in the assessment order is not required to give detailed reasons and once it is clear that there was application of mind by an enquiry, the Commissioner merely because he entertains a different opinion in the matter, cannot invoke his powers u/s. 263. He has also not given any finding that such income is receivable by assessee. Since assessee has not claimed any credit of such TDS, bringing to tax the amount involved does not arise when assessee submits that the amount is not receivable by him as no services were rendered. There is also no prejudice caused as the amount of TDS is was already remitted to government. At best what Revenue can do is to give credit to that amount, when assessee offers the same as income in case the said amount is salary received or receivable. Since it is a search and seizure case, we are of the opinion that the issue raised by CIT does not warrant invoking the powers u/s. 263. The proceedings completed by CIT are not according to the law or facts. Therefore, we have no hesitation in setting aside the order of CIT and restore the AO's order.

8. Before parting we would like to note that assessee has furnished a statement that the said Madhucon Sugars Ltd., has not claimed but reversed the entries subsequently. This aspect can be examined by the AO and in case the said Madhucon Sugars Ltd., has indeed claimed the amount as payable to assessee or deduction in their accounts, then necessary proceedings for reopening the assessment for escapement of income can be considered by the AO in the year of receipt and credit for TDS can be given. We would also place on record the fact that AO has not even given credit for the tax which was already given in the earlier proceedings in the consequential proceedings. Basically if CIT/AO feels that amount of Rs. 3,00,000/- was taxable as income, at best the TDS on that amount also could have been given credit. Even the amount of TDS, on offered incomes, given credit in the order u/s 153A was denied, leave alone the credit of Rs. 39,000 in Form 26AS, on the basis of which present proceedings were initiated. This shows lack of application on the part of authorities in completing assessments. With these observations, the grounds raised by assessee are allowed.

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

Order pronounced in the Open Court on 23rd November, 2016

Sd/-
(D. MANMOHAN)
VICE PRESIDENT

Sd/-
(B. RAMAKOTIAH)
ACCOUNTANT MEMBER

Hyderabad, Dated 23rd November, 2016

Copy to :

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- 2. The Dy. Commissioner of Income Tax, Central Circle-2(1), Hyderabad.*
- 3. The Pr. Commissioner of Income Tax, Central, Hyderabad.*
- 4. D.R. ITAT, Hyderabad.*
- 5. Guard File.*