

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH "C" KOLKATA**

Before **Shri N.V.Vasudevan, Judicial Member** and
Shri Waseem Ahmed, Accountant Member

ITA No.1361/Kol/2016
Assessment Year :2011-12

Sanjeev Kr. Khemka P.K. Himmatsinghka, 41, B.B. Ganguly Street, 22 nd Floor, Kolkata-12 [PAN No.AEZPK 6219 C]	V/s.	Pr. Commissioner of Income-Tax-15, 3, Govt. Place (West), Kolkata-700 001
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर से/By Appellant	Shri Pamod Kr. Himmatsinghka, AR
प्रत्यर्थी की ओर से/By Respondent	Shri Gouten Hangshing, CIT-DR
सुनवाई की तारीख/Date of Hearing	24-04-2017
घोषणा की तारीख/Date of Pronouncement	02-06-2017

आदेश /O R D E R

PER Waseem Ahmed, Accountant Member:-

This appeal of the assessee is for the assessment year 2011-12. The assessee is directed against the order of Commissioner of Income Tax-15, Kolkata dated 29.02.2016 passed u/s 263 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').

Shri Promod Kumar Himmatsinghka, Ld. Authorized Representative appeared on behalf of assessee and Shri Gouten Hangshing, Ld. Departmental Representative represented on behalf of Revenue.

2. At the outset, we find that there was a delay of 36 days in filing the appeal of assessee and therefore the petition for condonation of delay was filed which is on record. It was explained that the old counsel was not well versed with the tribunal work and therefore the assessee had to find out new counsel, as a result the delay in filing the appeal on time occurred. We have heard Ld. Counsel for the assessee and Ld. DR for the Revenue. We find that there was sufficient cause which prevented the assessee in filing the appeal within the stipulated time therefore we condone the delay and admit the same. We accordingly decided to proceed for hearing the appeal of assessee.

3. The assessee in this appeal has challenged the impugned order passed by Ld. CIT u/s 263 of the Act by holding the order of AO as erroneous in so far as prejudicial to the interest of Revenue.

The Ld. AR at the outset brought to our notice that case was selected for scrutiny under CASS Module (Computer Assisted Scrutiny System.) Under CASS module the cases are selected for scrutiny on the basis of either AIR data or CIB information or for non reconciliation with 26AS Data. The scope of enquiry was limited to verification of these particular aspects only. Therefore, in such cases an Assessing Officer shall confine the questionnaire and subsequent enquiry **or verification** only to the specific point(s) on the basis of which the particular return has been selected under scrutiny. Thus, it was a case on limited scrutiny which was selected on the basis of the information received through the AIR returns. Therefore, the scrutiny notice can be issued u/s 143(3) of the Act by Assessing Officer limited only to these aspects of information received through AIR returns. In the instant case the relevant extract of the AIR on the basis of which the instant case was selected under scrutiny stands as under:-

Txn Code	Txn Desc.	Party Name	RRR Date	Txn Date	Txn Amount	Joint party
1	DEPOSITED CASH OF Rs 1000000 OR MORE IN A SAVING BANK A/C	SANJEEV KUMAR KHEMKA	29-Aug-11	31-Mar-11	1756000	SINGLE
1	DEPOSITED CAH OF Rs.100000 OR MORE IN SAVING BANK A/C	SANJEEV KUMAR KHEMKA	27-Aug-11	31-Mr-11	1931750	SINGLE
2	PAID RS 200000 OR MORE GAINST CREDIT CARD BILLS	SANJEEV KUMAR KHEMKA	29-Aug-11	31-Mar-11	376225	SINGLE

7	SOLD IMMOVABLE PROPERTY VALUED AT RS 3000000 OR MORE	SANDEEP RAKESH SANJEEV KUMAR	24-Aug-11	26-Jul-10	3600000	SINGLE
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Ld. AR further submitted that the scrutiny in the instant case should have been limited only to the information emanating from AIR. However, the Assessing Officer while passing assessment order u/s. 143(3) of the Act has exceeded his jurisdiction and conducted scrutiny of those items as well which were not emanating from the AIR. Ld. AR also further submitted that CBDT has clarified in its instruction F.No. 225/26/2006-ITA (Pt) vide dated 08.09.2010 that the case selected on the basis of AIR should be subject-matter of scrutiny to the extent of the information of AIR. The relevant instruction of CBDT reads as under:-

Subject:- Selection of cases for scrutiny on the basis of data in AIR returns and subsequent assessment proceeding-regarding.

Reference is invited to Board's letter of even number dated 23rd May, 2007 regarding scope of enquiry in the scrutiny cases selected only on the basis of information received through the AIR returns.

2. The above mentioned guidelines have been reconsidered by the Board and it has been decided that the scrutiny of such cases would be limited only to the aspect of information received through AIR. However, a case may be taken up for wider scrutiny with the approval of the administrative Commissioner, where it is felt that apart from the AIR information there is a potential escapement of income more than ₹ 10 lacs.

3. It has also been decided that in all the cases which are picked up for scrutiny only on the basis of AIR information, the notice u/s. 143(2) of Income Tax Act should clearly be stamped with "AIR Cases".

This should be immediately brought to the notice of all the officers working in your region.

In view of the above, it was submitted that the AO has exceeded his jurisdiction while framing his assessment order u/s 143(3) of the Act. The Id. AR also brought to our notice that the assessee against the order under section 143(3) has preferred appeal on the ground of jurisdiction as well.

The Id. AR on similar line submitted that the Ld. CIT in his impugned order u/s 263 of the Act has also exceeded his area of jurisdiction by holding the order of the AO as erroneous and prejudicial to the interest of Revenue on those

item not listed in AIR. Further, Ld. AR requested the Bench to limit the scope of the case in the context of the order of Ld. CIT passed under section 263 of the Act to the extent of the information emanating from the AIR.

On the contrary Ld. DR submitted that the AO was empowered to extend the scope of scrutiny from the limited scrutiny to regular scrutiny after having the permission from the Administrative Commissioner of Income Tax. Thus, there was a high possibility that the AO must have been taken the permission for expanding the scope of limited scrutiny. However, Ld. AR in his rejoinder submitted that had this been the fact that the limited scrutiny has extended then the same should have been recorded in the order of AO or in the impugned order of Ld. CIT passed u/s 263 of the Act. As there is no adverse material available on the record, therefore it can reasonably be presumed that impugned case falls under the category of limited scrutiny.

4. We have heard the rival contentions of the parties and perused the materials on record. The primary issue in the case on hand revolves whether it is a case selected under CASS for limited scrutiny or regular scrutiny. It can be seen from the grounds of appeal that the assessee wants to contend that the very initiation of proceedings u/s 143(3) of the Act on the basis of regular scrutiny under the Act was bad in law. The proceedings under section 143(3) of the Act should have been limited to the extent of the information gathered through AIR. Accordingly the proceedings u/s 263 of the Act cannot be expanded beyond the issue raised in AIR. Thus the order u/s 143(3) of the Act beyond the points of AIR is invalid in law and so the same is with the order passed u/s 263 of the Act. It is the further contention of the assessee that in the items which are not subject matter of AIR cannot subject matter of scrutiny. Such matters include salary of the assessee, loans & interest on loans, payment of LIC, Commission & brokerage income etc. It is the case of the assessee that in the assessment order passed u/s 143(3) of the Act, the AO has travelled beyond the points of the AIR on the basis of which the case of scrutiny was selected under CASS module. It is the plea of the assessee

that when no addition/disallowance can be made beyond the points mentioned in AIR in the assessment proceedings then same is the case with proceedings initiated u/s 263 of the Act.

4.1 The first aspect which needs to be examined is as to whether the assessee is entitled to challenge the validity of initiation expanded in the proceedings u/s 143(3) of the Act in the present appeals in which he has challenged the validity of expanded order passed u/s 263 of the Act covering the points which are not part of the AIR. The Id. Counsel for the assessee submitted before us that it is open to an assessee in an appeal against the order u/s 263 of the Act which seeks to revise an order passed u/s 143(3) of the Act, to challenge the validity of the expansion of order passed u/s.143(3) of the Act covering the points which are not part of the AIR. In this regard we find that Lucknow Bench of Hon'ble ITAT in the case of *Inder Kumar Bachani (HUF) vs ITO 99 ITD 621 (Luck)* and ITAT Mumbai 'G' Bench in the case of *M/s. Westlife Development Ltd. Vs Principal C.I.T.* in **ITA NO.688/Mum/2016** have taken a view that when an Assessment order passed u/s 147 of the Act was illegal the Ld.CIT cannot invoke the jurisdiction u/s 263 of the Act against such void or *non-est* order. In the second decision cited the Hon'ble Mumbai bench of the Tribunal has specifically framed the following questions :-

- “1. Whether the assessee can challenge the validity of an assessment order during the appellate proceedings pertaining to examination of validity of order passed u/s 263?*
- 2. Whether the impugned assessment order passed u/s 143(3) dated 24-10-2013 was valid in the eyes of law or a nullity as has been claimed by the assessee?*
- 3. If the impugned assessment order passed u/s 143(3) was illegal or nullity in the eyes of law, then, whether the CIT had a valid jurisdiction to pass the impugned order u/s 263 to revise the non est assessment order?”*

On question no. 1 and 3 which is relevant to the present case the Hon'ble Mumbai bench of the Tribunal has taken the view that when the original assessment proceedings are null and void in the eyes of law for want of proper assumption of jurisdiction then such validity can be challenged even in collateral proceedings. The Mumbai bench took the view that the proceedings

u/s 147 of the Act are primary proceedings and proceedings u/s 263 of the Act are collateral proceedings and in such collateral proceedings, the validity of initiation of the original proceedings u/s 147 of the Act can be challenged. The Mumbai bench of the Tribunal in this regard has placed reliance on several decisions, the principal decision being that of the Hon'ble Supreme Court in the case of *Kiran Singh & Ors. V. Chaman Paswan & Ors.* [1955] 1 SCR 117(SC) wherein the Hon'ble Supreme Court observed as follows :-

"It is a fundamental principle well-established that a decree passed by a Court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree and such a defect cannot be cured even by consent of parties."

Now coming to the facts of the instant case, we find that the instant case was selected on the basis of AIR Information as evident from the order of AO under section 143(3) of the Act. There is also no whisper in the order of the AO for expanding the scope of limited scrutiny after obtaining the permission from the Administrative CIT. The Id. DR has also failed to bring anything contrary to the argument of the Id. AR. Therefore in our considered view the scrutiny should have been limited only to the information emanating from the AIR. Admittedly, the assessee has claimed to have filed an appeal before Ld. CIT(A) challenging the jurisdiction exceeded by the AO while framing the assessment order u/s 143(3) of the Act. We find that the impugned issue being legal in nature and goes to the root of the matter therefore we are inclined to proceed with this issue first by holding that, from the above submission and after examining of the records, we find that the Ld. CIT in his impugned order u/s 263 of the Act has exceeded his jurisdiction while holding the order of AO as erroneous in so far prejudicial to the interest of Revenue. In view of the above we hold that the Id. CIT has in his order u/s. 263 of the Act exceeded the jurisdiction by holding the order of AO as erroneous in so far as prejudicial to the interest of Revenue on those items which are not emanating

from the AIR. Thus, we are inclined to adjudicate only those matters which are emanating from the AIR as discussed above.

4.2 The assessment was framed by AO for the A.Y. 2011-12 under section 143(3) of the Act vide order dated 29.03.2014 after making certain additions/disallowances to the total income of assessee. Subsequently, Ld. CIT u/s 263 of the Act observed certain errors in the order of AO, therefore, he was of the view tht the order passed by the AO is erroneous in so far as prejudicial to the interest of Revenue on account of no proper-enquiry before completing assessment as discussed below:-

(i) The assessee has deposited in its bank account in HDFC bank Goa for ₹17.56 lakh and out of that there was a withdrawal only for ₹1.50 lakh but the AO has made the addition only to the extent of ₹4 lakh on account of unexplained cash credit. Therefore, certain unexplained cash credit of the assessee has been under assessed by the AO.

(ii) There was another bank account of the assessee in HDFC bank in Goa where total deposits of Rs. ₹19,31,750/- was made by the assessee but the AO found credited amount of Rs. ₹5,76,056/- only. Thus, total deposits made in the bank were not brought to tax;

(iii) There was transactions of ₹3 76,225/- through credit card which was not explained and thus the entire amount was liable to be added to the total income of assessee but the AO has added only a sum of ₹2,98,225/- to the total income of assessee. Thus, there was under assessment of income by ₹78,000/-;

(iv) The assessee during the year has sold property for ₹36 lakh and exemption of ₹19,74,763/- was claimed by assessee u/s. 10(38) of the Act. This fact was not verified by the AO at the time of assessment proceedings.

In view of above, the Ld. CIT found the order of AO is erroneous in so far as prejudicial to the interest of Revenue and therefore show-cause notice was issued u/s. 263 of the Act vide dated 13.10.2015 for the clarification of the above transactions.

In compliance thereto, the assessee submitted as under :

- i) The deposit in HDFC bank account No. 03151930000609 was duly reflected in his IT return. Therefore, no cause has happened to the Revenue which is prejudicial to the interest of Revenue.
- ii) The deposit of ₹19,73,750/- was duly reflected in the IT return and therefore there was no error which is prejudicial to the interest of Revenue.
- iii) Regarding the credit card payment, the addition on account of undisclosed cash deposit has already been added by the AO and therefore there is no error causing prejudice to the interest of Revenue.
- iv) There was no sale of the property and therefore no exemption u/s10(38) of the Act was claimed.

However the Ld. CIT after considering the submission of assessee has held the order of AO is error and prejudicial to the interest of Revenue by observing as under:-

"I have carefully considered the issues with specific reference to the relevant assessment records as well as written submission furnished by the A/R. The AO has not taken cognizance of the following issues, despite being apparent from record:-

- (1) Addition of Rs. 4 lakhs only was made against total cash deposit of Rs.17,56,000/- without taking any explanation from the assessee.*
- (2) The balance deposits in another account with HDFC, Porvorim, Goa was not considered in assessment.*
- (3) Interest income from all savings accounts and FDRs was not considered at the time of assessment.*
- (4) Submission of assessee regarding explanation of credit card payment of Rs.3,76,225/- was partly accepted in assessment without proper verification.*
- (5) Although a salaried person, the assessee's bank account reflect huge transactions/transfer entries, which required further investigation.*
- (6) Long term capital gain of Rs.19,74,763/- was not properly verified.*
- (7) Loan transactions and interest on loans required proper verification.*
- (8) Salary was received in cash without TDS, which should have been viewed adversely.*
- (9) LIC premium was paid for a minor but assessee's capital account did not reflect the same.*
- (10) Lastly, the assessee declared income from commission/brokerage in the previous two AYs but no such income was shown in this year.*

“An incorrect assumption of facts or an incorrect application of law will always make the order passed by the Assessing Officer erroneous. The Assessing Officer has not made proper enquiry before completing assessment regarding above issues. By not checking the above issues and by not making adequate enquiry the Assessing Officer has not assessed the proper income and the order has become erroneous and prejudicial to the interest of the revenue. In view of the above, the order dated 29/03/2014 passed by ACIT, Circle-43, Kolkata is found to be erroneous and prejudicial to the interest of revenue and hence it is set aside with the direction to pass fresh assessment order after examining the evidences and documents in respect of the above issues raised after giving opportunity to the assessee and in accordance with law.”

Being aggrieved by this order of Ld. CIT assessee is in appeal before us on the following grounds:-

- “(1) For that the L'd Pr. Commissioner of Income Tax erred in exercising the power of revision for the purpose of directing the AO to hold another investigation when the order passed by the AO was neither erroneous nor prejudicial to the interest of revenue.*
- (2) For that the L'd Pr. CIT erred and exceeded jurisdiction by giving direction in respect of the matters which are subject matters of appeal before the CIT(A), therefore order passed by Pr. CIT-15 is unlawful, beyond provision of law and therefore liable to be quashed.*
- (3) For that the L'd Pr. CIT had alleged arbitrarily irrelevant matters, factual and untrue position in the show cause notice u/s. 263 and therefore order passed by Pr. CIT-15 Kolkata u/s. 263 is nullity and liable to be quashed.*
- (4) For that L'd Pr. CIT has wrongly assumed the jurisdiction u/s. 263 by wrongly mentioning that deposits in HDFC Goa A/c & HDFC Porvorim Goa A/c were under-assessed by the AO despite these two a/cs were disclosed in the balance sheet and deposits were explained, therefore allegation so made is bad in law and void ab-initio.*
- (5) For that on the facts & in the circumstances of the case L'd Pr. CIT was not justified in initiating proceeding u/s. 263.*
- (6) For that your petitioner craves the right to put additional grounds and/or to alter/amend/modify the present grounds before or at the time of hearing.”*

The Id. AR before us filed two paper books which are running from pages 1 to 27 and 28 to 31. The Id. AR before us submitted that the necessary enquiries were made by the AO at the time of assessment. Thus the order of the AO cannot be held erroneous and prejudicial to the interest of Revenue on account of non enquiry whereas the Id. DR vehemently supported the order of the Id. CIT.

5. We have heard the rival contentions & perused the materials available on record. From the foregoing discussion, we find that order of AO has been treated erroneous and prejudicial to the interest of revenue on the ground that proper enquiry was not made by the AO. Therefore, Ld. CIT held that the order of AO is erroneous and prejudicial to the interest of revenue. However, after examining the order of Authorities Below and other relevant records our observations are as follows:-

a) deposit of cash of ₹17.56 lakh in HDFC bank a/c No.03151930000609

From the order or AO, we find that the AO at the time of assessment proceedings has applied his mind while determining the undisclosed income from the said bank account for Rs. 4 lacs. Thus the AO after considering the bank statements of the assessee has consciously made the addition of ₹ 4 lakh as unexplained cash credit against which assessee claimed to have filed appeal before Ld. CIT(A). Therefore, in our considered view, the allegation of Ld. CIT that proper enquiry was not made by the AO is not true.

b) Deposit of cash ₹19,31,750/- in HDFC bank A/c 0315100006743

From the order of AO we find that AO has already made the addition of the entire amount as unexplained cash credit. Therefore, the allegation of the Id. CIT-A that the order of AO is erroneous and prejudicial to the interest of Revenue is not true.

c) Credit card payment of ₹3,76,225/-

From the order of AO, we find that the AO has made the addition of ₹2,78,225/- out of total credit card payment of ₹3,76,225/-. Therefore, it is clear that AO has applied his mind while framing the assessment proceedings u/s. 143(3) of the Act. Thus, the allegation of the AO in the impugned order or Ld. CIT u/s. 263 of the Act that there was no proper enquiry conducted by AO at the time of assessment proceedings is not true.

d) Sale of property for consideration of ₹ 36 lakh.

On perusal of AIR information which is placed on page 1 of the paper book, we find that no immovable property has been sold by assessee in the year under consideration. Besides the above, there is also no whisper in the assessment order for any addition on account of capital gains. Therefore, we find that the allegation of Ld. CIT that AO has not conducted sufficient enquiry in relation to sale of immovable property is not true.

5.1 In view of the above we find that Ld. CIT has passed impugned order u/s. 263 of the Act by holding the order of AO as erroneous in so far as prejudicial to the interest of revenue on account of inadequate enquiry made by AO while passing order u/s. 143(3) of the Act. However, we find that proper and sufficient enquiries were conducted by the AO at the time of assessment as evident from the order of AO. Therefore it cannot be concluded that no proper enquiry has been conducted by the AO at the time of assessment proceedings. The AO has taken conscious view after considering the facts and circumstances of the case and giving proper opportunity to the assessee. Thus, the view expressed by AO in the form in his assessment order cannot be replaced with the view of Ld. CIT u/s 263 of the Act. In holding so, we find support and guidance from the judgment of Hon'ble jurisdictional High Court in the case of *CIT vs. M/s. J.L. Morrison (India) Ltd.*(ITA No 168 of 2011) in GA No 1541 of 2012 dated 15.05.2014, wherein it was held as under:-

"By sections 3 and 4, the Indian Income-tax Act, 1922, imposes a general liability to tax upon all income. But the Act does not provide that whatever is received by a person must be regarded as income liable to tax. In all cases in which a receipt is sought to be taxed as income, the burden lies upon the department to prove that it is within the taxing provision."

We also rely on the judgment of the Hon'ble Supreme Court in the case of *CIT Vs. Max India Limited* reported in 295 ITR 282 wherein it was held as under :

"When the CIT passed the impugned order under s. 263, two views were inherently possible on the word "profits" occurring in the proviso to s. 80HHC(3) and therefore, subsequent amendment of s. 80HHC made in the

year 2005, though retrospective, did not render the order of the AO erroneous and prejudicial to the interest of the Revenue, and CIT could not exercise powers under s. 263."

In view of the above proposition, and respectfully following principle laid down by the Hon'ble courts and keeping in view all these discussion, as also bearing in mind entirety of the case, we deem it fit and proper to uphold the grievance of the assessee and quash the impugned revision order as devoid of jurisdiction. The assessee gets the relief, accordingly.

6. In the result, assessee's appeal stands allowed.

Order pronounced in the open court 02/06/2017

Sd/-
(न्यायिक सदस्य)
(N.V.Vasudevan)
(Judicial Member)
Kolkata,

Sd/-
(लेखा सदस्य)
(Waseem Ahmed)
(Accountant Member)

*Dkp, Sr.P.S

दिनांक:- 02/06/2017 कोलकाता ।

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant-Sanjeev Kr. Khemka, P.K. Himmatsinghka, 41, B.B.Ganguly Street
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3. संबंधित आयकर आयुक्त / Concerned ITO Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,

/True Copy/

Sr. Private Secretary, Head of
Office/DDO
आयकर अपीलीय अधिकरण,
कोलकाता ।