

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ ।
IN THE INCOME TAX APPELLATE TRIBUNAL, RAJKOT
[Conducted through "E" Court at Ahmedabad]

BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER
AND
SHRI WASEEM AHMED, ACCOUNTANT MEMBER

आयकर अपील सं./ ITA No. 283 and 284/RJT/2017

निर्धारण वर्ष/Assessment Year: 2009-10 and 2010-11

Adhyakshya Lok Mela Amlikaran Sammittee C/o. A.D.Vyas & Co. Kotecha Nagar Main Road Opp: Kotechha Girls High School Rajkot 360 001.	Vs	ITO (Exemption) Ward-1, Rajkot.
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अपीलार्थी/ (Appellant)	प्रत्यर्थी/ (Respondent)
Assessee by :	Smt.Ashaben Vyas, AD
Revenue by :	Shri Praveen Verma, Sr.DR

सुनवाई की तारीख/Date of Hearing : 27/08/2018

घोषणा की तारीख /Date of Pronouncement : 05/10/2018

ORDER

PER RAJPAL YADAV, JUDICIAL MEMBER : Present two appeals are directed at the instance of the assessee against separate orders of the ld.CIT(A)-3, Rajkot dated 3.7.2017 passed for the Assessment Years 2009-10 and 2010-11.

2. Grounds of appeal taken by the assessee are argumentative in nature. In brief, its grievance is that the ld.CIT(A) has erred in confirming additions of Rs.66,77,879/- and Rs.1,55,800/- without considering proviso to section 12AA(2) incorporated by the Finance Act

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(No.2) Act, 2014 w.e.f. 1-10-2014 in the Asstt.Year 2009-10 and 2010-11 respectively.

3. With the assistance of the ld.representatives, we have gone through the record carefully. Assessee-trust has filed its return of income for both the assessment years on 6.7.2010 declaring NIL income. The cases of the assessee in both the years were selected for scrutiny assessment and assessment orders were passed under section 143(2) on 28.11.2011. The ld.AO has determined taxable income of the assessee at 14,67,850/- and Rs.14,17,273/- in the Asstt.Years 2009-10 and 2010-11 respectively. It was observed by the AO that registration under section 12A was granted to the assessee w.e.f. 25.6.2010, therefore, benefit of sections 11 and 12 for claiming exemption was available for the Asstt.Year 2011-12. The ld.AO has confronted the assessee about the exemption claimed by it of Rs.14,67,850/- in the Asstt.Year 2009-10 and Rs.14,17,273/- in the Asstt.Year 2010-11. The assessee admitted that it has wrongly made the claim. It is ready to pay tax on these amounts. After recording of this contention of the assessee, the ld.AO has passed the assessment order in both the years.

4. On perusal of the record, the ld.Commissioner formed an opinion that the assessment orders passed by the AO in both the years are erroneous and prejudicial to the interest of the Revenue. Therefore, he took cognizance under section 263 of the Income Tax Act. Issued notice to the assessee inviting its explanation as to why assessment orders in the both years should not be set aside. The ld.Commissioner found that the assessee has made investments in FDR of Rs.66,77,879/- in the

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Asstt.Year 2010-11. It has claimed deduction of this amount. Since it was not entitled for grant of exemption, hence, on account of application of income, this deduction was not admissible to the assessee. Similarly, in the Asstt.Year 2009-10, the assessee appears to have organized some exhibition and collected rent from the stall. It has claimed deduction of TDS on such rent. The Id.Commissioner was of the view that this deduction was not admissible to the assessee. After hearing the assessee, he passed orders under section 263 in both the years on 24.3.2014. He set aside assessments on this issue and directed the AO to enhance the income of the assessee by these amounts. The conclusion drawn by the Id.CIT under section 263 in the last paragraph of the order reads as under:

"4.2 However, assessee could not explain the claim of deduction of Rs. 1,33,983/- as TDS on stall rent and Rs. 21,817/- as TDS from its income. Therefore, the assessment order passed under section 143(3) on 28.11.2011 for Assessment Year 2009-10 is erroneous and prejudicial to the interest of Revenue. By the powers vested in CIT-I, Rajkot u/s. 263 of the I T Act, the Assessing Officer is directed to enhance the total income of the assessee by Rs.1,55,800/-.

Sd/-(YOGESH PANDE)

Commissioner of Income Tax, Rajkot-1, Rajkot.

No. CIT/R-I/Tech/263/ALAS/2013-14

Date: 24-03-2014."

4.2 However, assessee could not explain the claim of deduction of Rs.66,77,879/- from its income on account of investment in Fixed Deposit. Therefore, the assessment order passed u/s. 143(3) on 28-11-2011 for Assessment Year 2010-11 is erroneous and prejudicial to the interest of Revenue. By the powers vested in CIT-I, Rajkot u/s. 263 of the I T Act, the Assessing Officer is directed to enhance the total income of the assessee by Rs.66,77,879/-.

Sd/-

(YOGESH PANDE)

Commissioner of Income Tax, Rajkot-1, Rajkot.

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No. CIT/R-I/Tech/263/ALA5/2013-14 Date: 24-03-2014.

5. The Id.AO gave effect to the above directions vide order dated 11.3.2015.

6. Dissatisfied with the assessment order, the assessee carried the matter in appeal before the Id.CIT(A). It has raised number of objections and also contended that proviso to section 12AA(2) has been added w.e.f. 1.10.2014, hence, it is entitled for the benefit of sections 11 and 12 by virtue of this proviso. The Id.Commissioner did not entertain of these arguments. He observed that Id.CIT while exercising power under section 263 did not remit any issue to the file of the AO. He himself has directed the AO to enhance the income, hence giving effect to this order is not maintainable before the Id.CIT(A) in the present proceedings. Accordingly, the Id.First Appellate Authority dismissed both the assessee. At this stage, it is pertinent to take note of section 263, which reads as under:

"263(1) The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interest of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.

[Explanation.- For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,-

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(a) an order passed on or before or after the 1st day of June, 1988 by the Assessing Officer shall include-

(i) an order of assessment made by the Assistant Commissioner or Deputy Commissioner or the Income-tax Officer on the basis of the directions issued by the Joint Commissioner under section 144A;

(ii) an order made by the Joint Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred on, or assigned to, him under the orders or directions issued by the Board or by the Chief Commissioner or Director General or Commissioner authorized by the Board in this behalf under section 120;

(b) "record shall include and shall be deemed always to have included all records relating to any proceeding under this Act available at the time of examination by the Commissioner;

(c) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal filed on or before or after the 1st day of June, 1988, the powers of the Commissioner under this sub-section shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal.

(2) No order shall be made under sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed.

(3) Notwithstanding anything contained in sub-section (2), an order in revision under this section may be passed at any time in the case of an order which has been passed in consequence of, or to give effect to, any finding or direction contained in an order of the Appellate Tribunal, National Tax Tribunal, the High Court or the Supreme Court.

Explanation.- In computing the period of limitation for the purposes of sub-section (2), the time taken in giving an opportunity to the assessee to be reheard under the proviso to section 129 and any period during which any proceeding

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under this section is stayed by an order or injunction of any court shall be excluded."

7. Though, we are not basically concerned with construction and interpretation of this section, a bare perusal of this section, as observed earlier, would show that it empower the Commissioner to set aside order passed by the Assessing Officer. Thus, Commissioner on his satisfaction that order is erroneous and prejudicial to the interest of the Revenue, then he can remit the issue to the file of the AO for fresh adjudication. He can himself enhance the income by modifying the assessment order. If he remits the issue to the file of the AO for re-adjudication after cancelling the earlier order, then the issue will be re-determined at the level of the AO. Against that re-determination, appeal would lie to the Id.CIT(A), and the Id.CIT(A) could entertain all possible arguments raised from the side of the assessee. But in the present case, the Id.Commissioner while exercising power under section 263 did not set aside the issue for adjudication to the AO, rather he himself enhanced the income and gave a direction to the AO for inclusion of these amounts. Unless his order is being challenged in both the years before the Tribunal, and directions are being modified and given effect by the AO in pursuance of the directions, cannot be agitated before the Id.CIT(A). The Id.CIT(A) has rightly drawn the above conclusion. In the present proceedings, we also cannot entertain the arguments raised by the Id.counsel from the assessee. Remedy of the assessee lies to challenge 263-order passed by the Id.Commissioner. Assessee will be at liberty to challenge the order of the Commissioner before the

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appropriate forum, if so advised. In the present appeals no relief can be granted to the assessee. Hence, both the appeals are dismissed.

8. In the result, both appeals of the assessee are dismissed.

Pronounced in the Open Court on 5th October, 2018.

**Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER**

**Sd/-
(RAJPAL YADAV)
JUDICIAL MEMBER**