

IN THE INCOME TAX APPELLATE TRIBUNAL "B", BENCH KOLKATA

BEFORE SHRI S.S.GODARA, JM & DR. A.L.SAINI, AM

आयकरअपीलसं./ITA No.1161/Kol/2019

(निर्धारणवर्ष / Assessment Year:2015-16)

Manish Chirania	Vs.	Pr. CIT-15, Kolkata
Balajee Bhawan, 23, Swagat Palace, Opp. Swagat Bungalows BRTS Stop, Ambli Bopal Road, Ahmedabad-380058		
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: ACMPC 1866 E		
(Assessee)	..	(Revenue)

Assesseeby : Shri A.K. Tibrewal, FCA & Shri Amit Agarwal, Advocate

Respondent by :Shri Radhey Shyam, CIT DR

सुनवाईकीतारीख/ Date of Hearing : 12/09/2019

घोषणाकीतारीख/Date of Pronouncement : 08/11/2019

आदेश / O R D E R

Per Dr. A. L. Saini:

The captioned appeal filed by the Assessee, pertaining to assessment year 2015-16, is directed against the order passed by the Pr. Commissioner of Income Tax, Kolkata, under section 263 of the Income Tax Act, 1961 (in short the 'Act') dated 18.03.2019.

2. Grounds of appeal raised by the assessee are as follows:

1. That the order passed by Ld. Principal Commissioner of Income Tax - 15, Kolkata under section 263 of the Income Tax Act, 1961 setting aside the

assessment order dated 27th November, 2017 passed by the Income Tax Officer, Ward- 45(3), Kolkata under section 143(3) of the Income Tax Act, 1961 is without jurisdiction, against law and facts of the case and therefore illegal and is liable to be quashed.

2. That the Ld. Principal Commissioner of Income Tax - 15, Kolkata erred in assuming jurisdiction under section 263 of the Income Tax Act, 1961 to issue the Notice under section 263 of the Act without personally examining the assessment records but on the basis of suggestions by the Assessing Officer who completed the assessment under section 143(3) of the Act on 27th November, 2017.

3. That the impugned order dated 18.03.2019 passed by Ld. Principal Commissioner of Income Tax in pursuance to the aforesaid Notice issued under section 263 of the Act is without jurisdiction, against the law and facts of this case and is therefore liable to be quashed.

4. That the assessment order dated 27th November, 2017 passed by the Income Tax Officer, Ward - 45(3), Kolkata under section 143(3) of the Income Tax Act, 1961 was neither erroneous nor prejudicial to the interest of Revenue within the meaning of section 263 of the Act and therefore Ld. Principal Commissioner of Income Tax-1, Kolkata erred in assuming jurisdiction under section 263 of the Act setting aside the aforesaid order dated 27th November, 2017 passed under section 143(3) of the Act.

5. That, on the facts and in the circumstances of the case, the impugned order passed by the Ld. Principal Commissioner of Income Tax -15, Kolkata is perverse and is liable to be quashed.

3. Brief facts qua the issue are that assessee filed his Return of Income for assessment Year 2015-16 on 28/08/2015 declaring a total income of Rs.3,09,050/. The assessee`s case was elected for scrutiny and the assessment was completed u/s. 143(3) on 27/11/2017 on an assessed income of Rs. 4,54,090/-.

Later on, a proposal for revision of the Assessment Order u/s. 263 has been received from Assessing Officer(i.e., ITO. Wd-45(3) Kolkata). On perusal of assessment order and the assessment records it was noticed by the Id Principal Commissioner of Income Tax (PCIT) that in course of assessment proceedings the following statutory additions and disallowances were not examined properly by the AO:

(i).Addition u/s 40(a)(ia) for non deduction of TDS out of interest payment Rs.6,20,916/-

- (ii).Proportionate interest on borrowed fund for Investment in property of Rs.4,62,650/-
- (iii).Undisclosed Interest on Loan advance of Rs.2,12,575/-
- (iv).Preliminary expenses written off Rs.28,070/-
- (v).Proportionate interest on advances for flat & withdrawn by Proprietor of Rs. 1,46,306/-
- (vi). Interest on Income Tax Refund of Rs.2,250/-

The Id PCIT observed that the above mentioned expenses and non-deduction of TDS were not verified at the time of assessment u/s 143(3) of the I.T. Act, 1961, therefore, it was considered by the Id PCIT that the assessment order u/s. 143(3) of the IT Act, 1961 dated 27/11/2017 is erroneous in so far as it is prejudicial to the interest of revenue. Accordingly, a show cause notice dated 10/09/2018 was issued to the assessee.

4. In response, the assessee had submitted a written submission before Id PCIT, along with enclosures on 05/11/2018, which is reproduced below:

*"In this case the return of income filed by me was selected for scrutiny to examine the alleged profit allegedly shown by me. During the course of Assessment Proceedings the assessing officer notice under section 142(1) of the Act and made specific query to submit explanation for alleged low profit in the business. I had furnished detailed explanation supported by documents and evidences to the assessing officer vide my letter dated 12.09.2017. This fact has been admitted by the assessing officer in 2nd Para of the 2nd Page of the assessment order dated 27.11.2017 passed under section 143(3) of the Act The copy of the explanation given by me along with all annexures thereto is being enclosed with this submission for your ready reference. After going through my explanations as well as all the documents and evidences furnished by me, the assessing officer had formed an opinion on the said issue and was pleased to pass the aforesaid assessment order. In these circumstances it cannot be said that the assessing officer failed and / or did not examine the said issue as well as the issues at Sl. No. I to VI of the show cause notice issued by you. We submit that when there was an enquiry by the AO, the Commissioner could not exercise jurisdiction under section 263 of the Act. We refer to the judgment of the jurisdictional High Court in the case of **CIT vs. JL Morrison (India) Ltd.** (2014) 366 ITR 593 (Cal). The Hon'ble High Court in the aforesaid case held that where the Assessing Officer issued notice under section 142(1) calling for information on the subject, it cannot be said that the order was passed without application of mind. Without prejudice I do hereby submit that the issues, referred to by you at clauses I to VI of your show cause letter dated 10.09.2018, were also examined by the assessing officer in as much as during the course of assessment proceedings, I had*

submitted the copies of the cash book and the bank book which contained all transactions of income and expenditure as well as assets and liabilities. I once again rely on the aforesaid judgment of J. L. Morrison (supra) in support of my submission that when all* details and evidences were furnished which inter alia included the cash book and the bank book it cannot be said that the issue was not examined.

With regard to section 40(a)(ia) of the Act in respect of alleged non deduction of TDS on interest payment of Rs.6,20,916/-, I have to state that in view of the fact that the recipient of interest had furnished form no,15G / 15 H, I was not required to deduct TDS on payment of interest to those parties. In 2 cases the amount of interest paid to 2 parties were below the threshold limit of Rs.5,000 and therefore I was not required to deduct TDS thereon. The details of such payment of interest is given hereunder:-

Sl.	Loan Creditors	Interest	TDS	Remarks
1	Hira Devi Kejriwal	9,095	Nil	15G/15H Filed
2	Kailash Prasad Ghiriya	1,69,928	Nil	15G/15H Filed
3	Krishna Devi Ghiriya	1,89,284	Nil	15G/15H Filed
4	Ramesh Kumar Munka	2,28,828	Nil	15G/15H Filed
5	Ujjwaj Kejriwal	19,575	Nil	15G/15H Filed
6	Mohit Kejriwal	1,250	Nil	Below threshold limit of Rs.5,000
IL	Manish Chirania HUF	2,956	Nil	Below threshold limit of Rs.5,000
Total	6,20,916			

I enclose the evidence of submitting the Form No. 15G / 15H in your office on 06.04.2015 in support of my claim that no addition could be made under section 40(a) (ia) of the Act.

4. With regard to the issues relating to interest on loans and advances as specified by you at clauses ii, iii, and v of your show cause notice dated 10.09.2018; I have to submit that this issue was also examined by the AO. I refer to the notice dated 26.07.2017 issued by the AO under section 142(1) of the Act wherein at clause 9 the AO sought details of unsecured / secured loans taken/given, any advances taken / given and to explain the purpose of such loan taken or given. I had submitted my reply to the queries / issued raised in the notice issued under section 142(1) of the Act, which inter alia included the details of loans / advances taken / given and the interest on such loans, vide letter dated 30.08.2017. The copy of notice issued under section 142(1) of the Act as well the reply dated 30.08.2017 is enclosed for your ready reference. I also submit that these were examined by the AO with reference to the cash book and the bank book submitted with the AO in the course of assessment proceedings. I once again rely on the judgment of the Hon'ble jurisdictional High Court in the case of the J. L Morrison (supra) and submit that it would be improper to say that the issues were not examined by the Assessing Officer.

5. I now refer to clause IV of your show cause letter dated 10.09,2018 wherein you had raised an issue of preliminary expenses. This issue was also examined

by the AO during the course of assessment proceedings. I refer to the letter dated 20.11.2017 whereby I had submitted complete details of preliminary expenses of Rs.1,40,349 incurred in the FY 2013-14, It was explained that 1/5th of the same has been claimed in each of the five Assessment Years commencing from the AY 2014-15. Thus, this issue was also examined by the AO before passing the assessment order under section 143(3) of the Act.

6. The last issue with regard to the alleged interest on income tax refund of Rs.2,250, I have to submit that I did not receive any income tax refund which could include the said amount of alleged interest of Rs.2,250. I had submitted the statement in form 26AS in the course of assessment proceedings and on perusal thereof it would be found that no income tax refund was issued to me, I also enclose now the 26AS statement downloaded on 03.11.2018 and it would be noticed that no income tax refund was issued to me. Thus, it is improper to say that the AO failed to examine the issue of interest on income tax refund of Rs.2,250.

7. In sum and substance I would like to submit that the AO, during the assessment proceedings made extensive enquiry by issue of notice under section 142(1) of the Act and / or various issues / queries raised verbally and / or through order sheet noting. The assessee submitted voluminous details, evidences, documents and explanation vide letters dated 09/10.08.2017, 30.08.2017, 12.09.2017 and 15.09.2017. In such circumstances it cannot be said that the assessment order passed by the AO was erroneous and prejudicial to the interest of revenue within the meaning of section 263 of the Act. Without prejudice to the above submissions it is submitted that it is a case where enquiry was made by the AO. It is submitted that where enquiry on the issue was made by the AO, the CIT could not assume jurisdiction under section 263 of the Act. Reference is made to the judgment of Jurisdictional High Court in the case of **CIT vs. Mulchand Bagri** in (1992) 108 CTR206 (Cal). The facts in that case were that the assessee claimed exemption of the sum of Rs.16,237 received by him on sale of silver utensils on the ground that the same were 'personal effects'. The ld. CIT passed an order u/s 263 on the ground that no enquiry was made in the course of assessment proceedings on the following vital points before accepting the contention of the assessee—

a) There is nothing to show that silver sold constituted items of silver utensils. No details and description of the various articles were furnished, it was not even enquired as to whom the sale was made.

b) Presuming that the articles sold constituted silver utensils, no enquiry was made before giving the finding that those alleged silver utensils were articles which were intimately, normally, commonly or ordinarily intended for household use so as to justify them to be included within the expression 'personal effects' as held by the Supreme Court in the case of **H. M. Maharaja Nana Hemant Singji vs, CIT 1976 CTR (SC) 188: (1976) 103 ITR 61 (SC)**.

c) No enquiry was made to show that the assessee was a person of such high status that the alleged silver utensils in question were held by him for domestic use.

d) Nothing was shown to the effect that the alleged silver utensils when sold had suffered loss of weight which is a normal incident if the utensils are intimately, normally, commonly or ordinarily used for household purposes.

On the facts of this case, the Hon'ble Jurisdictional High Court held that.....“but in the present case before us, the ITO appears to have made enquiry from the assessee as can be seen from his letter dt. 29th December. 1980 which is a page 23 of the Paper Book placed us to which the assessee sent a reply, which is at page 21, The Court held that the order under sec, 263 is unsustainable in law.....

Therefore the said assessment order dated 27.11.2017 passed by the Assessing Officer under section 143(3) of the Act cannot be held to be erroneous in law and prejudicial to the interest of revenue within the meaning of sec. 263 of the Income Tax Act, 1961. I, therefore most humbly request, that the proposed proceedings may kindly be dropped."

5. The Id PCIT noticed that the assessee did not reply on the factual aspect on the issues of the show cause notice dated 10/09/2018, therefore, Id PCIT issued another show cause notice dated 16/11/2018. However, the assessee did not reply the second show cause notice. Therefore, Id PCIT having regard to the facts and circumstances of the case held that the impugned assessment order dt. 27/11/2017 passed by the AO is erroneous in so far as it is prejudicial to the interest of revenue. Therefore, Id PCIT set aside the Assessment Order u/s. 143(3) dated 27/11/2017 made by AO and directed AO to make fresh assessment.

6. Aggrieved by the order of the PCIT, the assessee is in appeal before us.

7. Shri A.K. Tibrewal, Id Counsel for the assessee submitted before us that the AO has examined the issues raised in the show cause notice u/s, 263 of the I.T. Act and the AO had verified the various expenses from the books of accounts produced by assessee during the assessment stage. The Id Counsel submits that that the assessment order was passed by the Assessing Officer after making inquiries u/s 142 (1) of the Act and in conformity of law and judicial pronouncements. Therefore, on the facts and in the circumstances of the case there is no justification to hold that the order passed by the Assessing Officer u/s 143(3) of the Act was erroneous and prejudicial to the interest of the revenue.

8. On the other hand, Id. DR for the Revenue has primarily reiterated the stand taken by the Assessing Officer which we have already noted in our earlier para and the same is not being repeated for the sake of brevity.

9. We heard both the parties and carefully gone through the submission put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and the fact of the case including the findings of the Id CIT(A) and other materials available on record. We note that Id Principal Commissioner of Income Tax (Id. PCIT) has exercised his revision jurisdiction under section 263 of the Act on the basis of the proposal for revision made by the assessing officer. At this juncture, it is relevant to quote para No.2 of the order of Id PCIT(to the extent applicable for our discussion) under section 263 of the Act, which reads as follows:

“A proposal for revision of the Assessment Order u/s. 263 has been received from Assessing Officer i.e., ITO. Wd-45(3) Kolkata. On perusal of assessment order and the assessment records it is seen that in course of assessment proceedings, the following statutory additions and disallowances were not examined properly-.....”

First of all, let us examine whether Id PCIT has independently applied his mind to exercise his jurisdiction under section 263 of the Act. It is abundantly clear from para No.2 of the Id PCIT`s order that Id PCIT exercised his jurisdiction under section 263 of the Act based on the proposal received from Assessing Officer for revision of the Assessment Order. It means, the Id PCIT is using the mind of the assessing officer to revise the order of AO under section 263 of the Act, which according to us is not the scheme of section 263 of the Act. The Id PCIT ought to apply his own mind to examine whether order passed by the assessing officer is erroneous and prejudicial to the interest of revenue. That is, Id PCIT should examine the assessment records and assessment order made by AO to find out the error in the assessment order, as the power under section 263 is given to Id PCIT and not to Id AO. The Id PCIT need not to take guidance from AO to revise the assessment order. That is, the revisional jurisdiction vested with the Id PCIT as per the scheme of the Act. The Act gives various powers to various authorities to exercise powers and they have to exercise powers in their respective given sphere which is clearly ear-marked and spelled out by the statute. Thus, the revisional jurisdiction exercised by the Id PCIT is not in accordance to law therefore, order passed by the Id PCIT under section 263 of the Act is not sustainable in law.

10. Based on the facts and circumstances, as narrated above, we note that order passed by the Id PCIT is not sustainable in law, therefore, we quash the order under section 263 passed by the Id PCIT.

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

Order pronounced in the Court on 08.11.2019

Sd/-
(S.S.GODARA)
न्यायिकसदस्य / JUDICIAL MEMBER

Sd/-
(A.L.SAINI)
लेखासदस्य / ACCOUNTANT MEMBER

दिनांक/ Date: 08/11/2019
(SB, Sr.PS)

Copy of the order forwarded to:

1. Manish Chirania.
2. Pr. CIT-15, Kolkata
3. C.I.T(A)-
5. CIT(DR), Kolkata Benches, Kolkata.
6. Guard File.
4. C.I.T.- Kolkata.

True copy

By Order

Assistant Registrar
ITAT, Kolkata Benches