

**IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH : BANGALORE**

**BEFORE SHRI N.V. VASUDEVAN, VICE PRESEIDENT
AND
SHRI PADMAVATHY S, ACCOUNTANT MEMBER**

ITA No.691/Bang/2021
Assessment year : 2015-16

Dr. R. Sridhar, No.1660, N.S. Road, Mysuru – 570 004. PAN : ATVPS 1808G	Vs.	The Principal Commissioner of Income Tax [Central], Bengaluru.
APPELLANT		RESPONDENT

Appellant by	:	Shri V. Srinivasan, Advocate
Respondent by	:	Shri T. Roumuan Paite, CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	30.06.2022
Date of Pronouncement	:	18.07.2022

ORDER

Per Padmavathy S., Accountant Member

This appeal is directed against the order of the Principal Commissioner of Income-Tax, Bengaluru-3, Bengaluru [PCIT] passed u/s. 263 of the Income-tax Act, 1961 [the Act] dated 29.03.2021 the assessment year 2015-16.

2. The only issue arising out of the various grounds raised by the assessee (9 grounds) is whether the PCIT is justified in setting aside the order passed by the AO by assuming jurisdiction u/s.263of the Act.

3. The assessee is an individual, a medical Doctor and derives income from profession, business, house property and other sources. The assessee was one of the promoter shareholders of M/s. Rangsons Electronics Pvt. Ltd. [REPL] holding about 54,680 equity shares in the said company. During the year under consideration, the assessee sold 40,463 equity shares in the said company to one M/s. Cyient Ltd. for a consideration of Rs.11,39,99,437.

4. The assessee had originally filed return of income for the year under consideration on 30.9.2015 reporting a taxable income of Rs.1,06,96,790. Subsequently, he filed a revised return on 31.3.2016 declaring taxable income of Rs.7,15,69,470. In the revised return, the assessee computed long term capital gain of Rs.10,51,21,658 and claimed exemption u/s. 50EC for Rs.50 lakhs and offer the balance for taxation.

5. The case was selected for scrutiny under CASS and notice u/s. 143(2) dated 21.9.2016 was issued calling for various details. The assessing Officer (AO) concluded the assessment u/s. 143(3) accepting the returned income by the assessee.

6. The PCIT issued a show cause notice u/s. 263 of the Act dated 9.3.2021 proposing to revise the assessment order passed u/s. 143(3) of the Act. According to the PCIT, the deduction of Rs.27.03 lakhs towards indemnity claim and Rs.11.67 lakhs towards ex gratia claim of employees are not allowable deduction while computing long term capital gain arising out of sale of shares. The assessee submitted that

the AO had accepted the same after examination of documentary evidence adduced and there was proper application of mind by the AO. The amount deducted from the sale consideration was part of existing liability that had reduced the consideration received by the assessee. The PCIT, however, was of the view that the assessment order was erroneous and prejudicial to the interests of the revenue and he set aside the assessment order and directed the AO to make a fresh assessment with the following observations:-

“12.2. The assessment records show that the Assessing Officer has not examined the evidences available on record. If these were analyzed, the Assessing Officer who is aware of the provisions of the Income-tax Act. would have disallowed the deductions from the sale consideration. This non-application of mind has resulted 'n loss of revenue. The records reveal that this is not a case where the reviewing officer has a different opinion. The Assessing Officer should have noticed the glaring differences in the two returns of income, in the balance sheet and the P&L account. The Assessing Officer failed to analyze the capital gains claim w.r.t. the law and the documents available on record. If the Assessing Officer had appreciated that these returns are verified as true and correct, she would have appreciated that leaving out Rs.1.40,00,000/- of advance tax in the original return cannot be a simple error. The difference in the balance sheet and P&L account should have prompted the Assessing Officer to consider prosecution proceedings, if she had assessed the evidences available on record. It is clear that the Assessing Officer has not diligently examined the evidences on record. The assessment has been completed without any discussion on these points but by simply stating that the returned income is accepted. The operating part of the assessment order states as follows:-

"Complying with the issued notice. Shri Ravikumar B S, Chartered Accountant. authorized representative of the assessee appeared, during hearings thereafter and provided the information sought for. After discussion with the assessee and examining the information furnished. the

assessment is concluded by accepting the returned income.”

The conclusion drawn by the Assessing Officer is erroneous on the face of the records available in the file. It is observed that unallowable expenses were allowed to be deducted from the Long Term Capital Gain, which resulted in short computation of income to the extent of Rs.38,70,561/- and resultant short levy of tax of Rs.17,49,753/- (tax 13,15,604 234B interest – 434149). If the Assessing Officer had examined the information furnished, she would have noticed the infirmities pointed out in this order and would have disallowed the wrong claim of deduction from the sale consideration.

13. This error of the Assessing Officer has caused loss of revenue of at least Rs.17,49,753/- attributable to wrong computation of capital gains. Therefore, this is a fit case for revision u/s 263 of the Income-tax Act, 1961. The assessment order for the assessment year 2015-16 dated 01.12.2017 is cancelled and the Assessing Officer is directed to make a fresh assessment.”

7. Aggrieved by the order of the PCIT, the assessee is in appeal before the Tribunal.

8. The Id. AR submitted that one of the reasons for taking up the case for scrutiny was to verify the large long term capital gain of the assessee. Therefore, it cannot be said that the AO has not made any enquiries into the issue during the scrutiny proceedings. In the impugned order, the PCIT has mentioned the various details and evidence submitted by the assessee during the course of assessment which proves the fact that the AO has examined these details. The PCIT has acknowledged that the assessee filed the confirmation from Shri R. Guru on the payment of indemnity claim to Cyient Ltd. and payment to employees of REPL and a copy of Memorandum of

Adjustment dated 14.3.2016 in support of the deduction claimed. The observations mentioned in the order of the PCIT in this regard shows that the required details in relation to long term capital gain and the ex gratia to employees of REPL was submitted by the assessee before the AO and after examination of the same, the AO had passed the order after due application of mind on the impugned issues. Hence, it could not be said that the order of the AO was erroneous insofar as it was prejudicial to the interests of the revenue. He therefore prayed that the impugned order is opposed to law and deserves to be vacated. Reliance was placed on the following decisions:-

- Malabar Industrial Co. Ltd. v. CIT, 243 ITR 83 [SC]
- Max India Ltd., 295 ITR 295 [SC]
- CIT v. Cyber Park Development And Const. Ltd., 430 ITR 55 [Karn]

9. The Id. DR relied on the orders of the PCIT and further submitted that the above decisions relied on by the Id. AR are prior to insertion of Explanation 2 to section 263 of the Act and hence not relevant to this appeal.

10. We have considered the rival submissions and perused the material on record. Explanation (2) to section 263 provides as follows:-

“Explanation 2.—For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer [or the Transfer Pricing Officer, as the case may be,] shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue,

if, in the opinion of the Principal ⁹⁵[Chief Commissioner or Chief Commissioner or Principal] Commissioner or Commissioner,—

- (a) the order is passed without making inquiries or verification which should have been made;
- (b) the order is passed allowing any relief without inquiring into the claim;
- (c) the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or
- (d) the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person.”

11. Sub-clause (a) of the Explanation 2 talks about the order passed by the AO without making enquiries and verification is deemed to have been erroneous and prejudicial to the interests of revenue. We notice that the Delhi High Court in the case of *Gee Vee Enterprises v .ACIT [1975] 99 ITR 375 (Del)* considered a similar issue and held as under:-

“In *Tara Devi Aggarwal v. Commissioner of Income-tax [1973] 88 ITR 323 (SC)* also the Income-tax Officer, Howrah, while remarking that the source of income of the assessee was income from speculation and interest on investments stated that neither the assessee was able to produce the details and vouchers of the speculative transactions made during the accounting year nor was there evidence regarding the interest received by the assessee from different parties on her investments. Notwithstanding these defects the Income-tax Officer did not investigate into the various sources but assessed the assessee on a total income of Rs. 9,037. The inquiries made by the Commissioner revealed that the assessee did not reside or carry on business at the address given in the return. The Commissioner was also of the view that the Income-tax Officer was not justified in accepting the initial capital, the sale of ornaments, the income from business, the investments, etc., without any inquiry or evidence whatsoever and that the order of assessment was erroneous and prejudicial to

the interests of the revenue. The High Court held that there were materials to justify the Commissioner's finding that the order of assessment was erroneous in so far as it was prejudicial to the interests of the revenue. Shri Sharma tried to distinguish this decision on the ground that the address of the assessee in that case was given incorrectly. The decision of the High Court and that of the Supreme Court were not, however, based on that ground at all. On the contrary, the Supreme Court followed their previous decision in Rampyari Devi's case (supra), and upheld the decision of the High Court precisely on the same grounds. These two decisions show that it is not necessary for the Commissioner to make further inquiries before cancelling the assessment order of the Income-tax Officer. The Commissioner can regard the order as erroneous on the ground that in the circumstances of the case the Income-tax Officer should have made further inquiries before accepting the statements made by the assessee in his return.

The reason is obvious. The position and function of the Income-tax Officer is very different from that of a civil court. The statements made in a pleading proved by the minimum amount of evidence may be accepted by a civil court in the absence of any rebuttal. The civil court is neutral. It simply gives decision on the basis of the pleading and evidence which comes before it. The Income-tax Officer is not only an adjudicator but also an investigator. He cannot remain passive in the face of a return which is apparently in order but calls for further inquiry. It is his duty to ascertain the truth of the facts stated in the return when the circumstances of the case are such as to provoke an inquiry. The meaning to be given to the word "erroneous" in section 263 emerges out of this context. It is because it is incumbent on the Income-tax Officer to further investigate the facts stated in the return when circumstances would make such an inquiry prudent that the word "erroneous" in section 263 includes the failure to make such an inquiry. The order becomes erroneous because such an inquiry has not been made and not because there is anything wrong with the order if all the facts stated therein are assumed to be correct.

The company and the partnership in this case were formed in the same year with many members common in both. The fact that the

company purchased the land but handed over construction work to the partnership even though the object of the company was to make such construction should naturally provoke a query as to why this was done. The partnership was required to be in existence as a genuine firm in the previous year before it could be registered under section 185 of the Act. Such registration gives a substantial advantage to it for the purpose of taxation. In the very first assessment of the company and the firm, the advantage of the registration was given to the firm. The question would naturally arise whether the firm was formed merely for the purpose of getting a tax advantage. Shri Sharma argued that there is nothing wrong if a legitimate advantage is sought by these means. But it was precisely for that reason that the Income-tax Officer had to be satisfied that the firm had existed in the previous year genuinely. It cannot be said that the Commissioner could not be reasonably of the opinion that the order of the Income-tax Officer was erroneous because previous inquiries were not made by the Income-tax Officer. Nor can it be said that it was necessary for the Commissioner himself to make such inquiry before cancelling the order of assessment. In view of the decisions of the Supreme Court in Rampyari Devi's case (supra) and Tara Devi Agawam's case (supra), the challenge of the petitioners to the jurisdiction of the Commissioner exercised under section 263 fails and the writ petitions do not qualify for admission on the ground of the impugned orders being without jurisdiction."

12. In the present case, we notice that the assessee has submitted the various details relating to the capital gains before the AO in response to the notice u/s.143(2) (**page 10 & 15 of Paper book**). However the order passed by the AO does not speak of the examination of various documents submitted by the assessee with regard to the capital gain transaction. The AO is a quasi judicial authority who is required to investigate and conduct further enquiries with regard to the details submitted before him. It is the duty of the AO to ascertain the truth of the facts stated in the return and the details furnished more so when the

circumstances of the case where large amount of capital gain is returned by the assessee to provoke an inquiry. In the case of *Gee Vee Enterprises* (supra) the Hon'ble High Court has clearly laid down that the word "erroneous" in section 263 emerges because it is incumbent on the Income-tax Officer to further investigate the facts stated in the return when circumstances would make such an inquiry prudent that the word "erroneous" in section 263 includes the failure to make such an inquiry. The order becomes erroneous because such an inquiry has not been made and not because there is anything wrong with the order if all the facts stated therein are assumed to be correct. As mentioned already there is nothing mentioned in the assessment order of the AO to substantiate that the AO has conducted further enquiries with regard to the details pertaining to capital gains submitted by the assessee. In view of these discussions and considering the decision of the Delhi High Court in the case of *Gee Vee Enterprises* (supra) we are of the considered opinion that the PCIT was justified in assuming the jurisdiction u/s 263 of the Act by setting aside the assessment order.

13. The PCIT in the impugned order has made certain observations on the merits of the case with regard to the impugned deductions from the capital gain as claimed by the assessee. In our view these observations are superfluous. By virtue of not making proper enquiries that are required to be made the order of AO is erroneous and prejudicial to the interest of the revenue and that alone is reason enough for revision u/s.263. Therefore we of the view that the AO will have to examine the claim made by the assessee based on merits afresh

uninfluenced by any of the observations of the PCIT. It is ordered accordingly.

14. In the result, the appeal by the assessee is dismissed

Pronounced in the open court on this 18th day of July, 2022.

Sd/-

Sd/-

(N V VASUDEVAN)
VICE PRESIDENT

(PADMAVATHY S)
ACCOUNTANT MEMBER

Bangalore,
Dated, the 18th July, 2022.

/Desai S Murthy /

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.