

IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH KOLKATA

आयकर अपीलीय अधीकरण, न्यायपीठ “B” कोलकाता,

**BEFORE SHRI RAJPAL YADAV, VICE PRESIDENT
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER**

**ITA No.165/Kol/2021
Assessment Year: 2011-12**

Sethi Finmart (P) Ltd. C/o Subash Agarwal & Associates, Advocates, Siddha Gibson, 1, Gibson Lane, Suite 213, 2 nd Floor, Kolkata-700 069. (PAN:AAECS0188E)	Vs.	Pr. Commissioner of Income- tax, Kolkata-1
(Appellant)		(Respondent)

Present for:

Appellant by : Shri Siddarth Agarwal, Advocate
Respondent by : Shri Sudipta Guha, CIT, DR

Date of Hearing : 25.08.2022
Date of Pronouncement : 18.10.2022

ORDER

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

This appeal filed by the assessee is against the order of Ld. Pr. CIT, Kolkata-1 vide Order No. ITBA/REV/F/REV5/2020-21/1031726795(1) dated 24.03.2021 passed against the assessment order by the ITO, Ward-8(4), Kolkata u/s.147/143(3) of the Income-tax Act, 1961 (hereinafter referred to as the “Act”) dated 30.11.2018.

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

“1. a) For that on the facts and in the circumstances of the case, the order passed by the Ld. Pr. CIT u/s 263 of the Act is bad in law and is liable to be quashed.

(b) For that on the facts and in the circumstances of the case, the Ld. Pr. CIT was not justified in initiating proceedings u/s 263.

2. (a) For that the Ld. Pr. CIT, Kolkata-I was not justified in holding that the amount of commodity profit of Rs.83,76,790/- and that the same was not added back by the A.O. while computing the total taxable income of the assessee, thereby resulting in an under assessment of income to be added back u/s 68.

(b) For that the Ld. Pr. CIT, Kolkata - 1 failed to appreciate that while computing the total income of the assessee, the A.O. had not added back the aforesaid amount of Rs.83,76,790/- since the said income was already shown in the Profit and Loss Account and offered in the computation of total income.”

3. Brief facts of the case are that assessee is engaged in the business of share broking and trading and F&O transactions. Assessee filed its original return of income on 24.09.2011 reporting total income as Nil. However, it claimed business loss of ₹19,32,076/-. Case of the assessee was reopened under section 147 of the Act by issuing notice under section 148 of the Act on 26.03.2018. Assessee filed its return in response to notice under section 148 of the Act on 20.04.2018 reporting total income as nil and claimed business loss of ₹19,32,076/-.

3.1 Ld. AO noted that information had come from Investigation Wing about systematic evasion of taxes by clients/members of the National Multicommodity Exchange (NMCE) during the different financial years by misuse of the NMCE platform on the basis of which, the reassessment proceedings were initiated after taking due approval from the competent authority. In this case, Ld. AO noted from the accounts of the assessee that it had derived profits of ₹83,76,790/- from commodities transaction through the client code – 1153 by trading through MEMBER/broker of NMCE namely Ratna Kamal Holdings Pvt. Ltd., Broker code number –CL0263. Ld. AO stated that during the course of assessment, assessee furnished the details of investments, bank account statements, contract notes etc. in support of the said transactions. Ld. AO issued notice under section 133(6) of the Act to Unishire Urban Infra Ltd (formerly known as Ratna Kamal Holdings Pvt Ltd) who in response filed copies of contract notes and detailed ledger

copy for the year under consideration. He noted that the details of contract notes issued by the said broker show that net income of ₹83,76,790/- became receivable by the assessee after the deduction of brokerage of ₹34,620/-. Ld. AO also made customary verification of the above facts with NMCE, Ahmedabad who forwarded a letter dated 25.07.2018 with annexure giving details of the transaction which is tabulated as under: –

MTM Date	Product Name	Series Cd	Member Cd	Member Cd	Group Id	Client Cd	Debit	Credit	Net MTM
2/2/2011	ALUMINIUM 5 TON FUTURES	ALUFE B2011	CL0263	CL0263	1	1153	0	485750	485750
2/3/2011	ZINC FUTURES	ZINFE B2011	CL0263	CL0263	1	1153	0	100200 0	1002000
2/5/2011	LEAD FUTURES	LEDFE B2011	CL0263	CL0263	1	1153	0	965500	965500
2/7/2011	ISABGULSEE D FUTURES	ISBAP R2011	CL0263	CL0263	1	1153	0	438860	438860
2/7/2011	ISABGULSEE D FUTURES	ISBFE B2011	CL0263	CL0263	1	1153	0	852550	852550
2/8/2011	NICKEL FUTURES	NIKM AR201 1	CL0263	CL0263	1	1153	0	986875	986875
2/14/2011	NICKEL FUTURES	NIKFE B2011	CL0263	CL0263	1	1153	0	128977 5	1289775
2/18/2011	NICKEL FUTURES	NIKM AR201 1	CL0263	CL0263	1	1153	0	108660 0	1086600
2/19/2011	SACK FUTURES	SCKAP R2011	CL0263	CL0263	1	1153	0	130350 0	1303500
									8411410

3.2 Ld. AO had issued notices under section 133(6) of the Act to the counter party clients namely Avenue Dealers Pvt Ltd and Pinnacle Commodities who did not respond to the same. Before proceeding to treat the amount of ₹83,76,790/- as income under section 68 of the Act as unexplained cash credit and also the brokerage of ₹34,620/- as unexplained expenditure under section 69C of the Act, Ld. AO issued a show cause notice dated 26.11.2018 to the assessee. Assessee filed its reply on 29.11.2018 and submitted that –

“In response to your reason of reopening by citing the above details that the assessee has incurred loss of ₹1,18,42,315/- on the platform of NMCE to the broker Ratna Kamal Holdings Pvt Ltd assessee has submitted complete details

of commodity transaction that has been done on the platform of NMCE along with ledger of broker and all copies of contract notes during the course of scrutiny hearing. All the payments were received through the channel of bank. **The assessee also submitted that the assessee has earned profit of ₹83,76,790/- through commodity transaction and the same has been disclosed in the Profit & Loss account and offered for taxation and there is no such loss of ₹1,18,42,315/- as stated by your good self. Moreover your good self has issued notice under section 133(6) of the IT Act, 1961 to both the broker Ratna Kamal Holdings Pvt Ltd as well stock exchange NMCE. Reply of both the party has been received by your good self which has been mentioned by your good self in this show cause notice.**”
[emphasis supplied by us by underline and bold]

3.3 Ld. AO did not accept the submission made by the assessee and noted that all was shown as apparent by the assessee is not real and even if the documents produced suggest that the income was earned through genuine trade, it was actually a concocted arrangement to show that a trade has taken place. He observed that this clearly indicates the pre-arranged nature of said trading and that there was a meeting of minds between the trading entities while conducting the said trade through NMCE. He thus noted that the platform of NMCE was used by the assessee through the broker Ratna Kamal Holdings Pvt Ltd, broker code no. – CL0263 and other paper/bogus entities controlled by entry operators to book pre-arranged profits. With these observations, Ld. AO treated the amount of ₹83,76,790/- as income under section 68 of the Act as unexplained cash credit. In respect of expense claimed in the accounts as commodity transaction charges which included brokerage for ₹34,620/-, it was also treated as unexplained expenditure under section 69C of the Act. The assessed total income was computed by the Ld. AO as under: –

Total income as per Return of Income	(-)₹19,32,076/-
Add: unexplained expenditure under section 69C of the Act as per para no. 4	₹34,620/-
Total income	(-)₹18,97,316/-
Tax payable	Nil

4. Subsequent to the above assessment, Ld. PCIT in para 2 observed from the perusal of the assessment records of the assessee that, in the assessment order, the AO stated that an amount of ₹83,76,790/- was treated as income under section 68 of the Act as unexplained cash credit, but while computing total taxable income, the same was not added, resulting in under-assessment of income. A show cause notice under section 263 of the Act was issued dated 02.03.2021.

5. Assessee reiterated the submissions made before the Ld. AO, relevant extract of which is reproduced as under: –

“In this connection we would like to submit that amount of ₹83,76,790/- is related to commodity profit which was earned by the assessee during the year under consideration and the same has been disclosed in the profit and loss account and offered for taxation. The assessee has shown this income under the head income from operations (profit in securities/ derivatives dealing for the year ended 31.03.2011, which we had already submitted during the course of scrutiny hearing for your ready reference and kind perusal. In this details your good self will find that income earned from commodity trading of ₹83,76,790/- has already been disclosed and shown in the audited profit and loss account, and the same is offered for taxation.

..... However while computing the total income the Ld. has not added this income again because this income is already been shown in the profit and loss account by the assessee and the same has already been offered for taxation.

So the presumption made by your good self that there was failure on the part of the Assessing officer to assess the income correctly is not correct. Also treating the said assessment order erroneous insofar as it is prejudicial to the interests of the Revenue within ambit of section 260 of the Act is not correct.”

6. Ld. PCIT arrived at his consideration after taking into account the facts of the case and submissions made by the assessee to hold that *“though in the assessment order the AO has stated that an amount of ₹83,76,790/- was treated as income under section 68 of the Act as unexplained cash credit, but while computing the total taxable income the same was not added resulting in under-assessment of income. Accordingly, it is held that the assessment order is erroneous insofar as it is prejudicial to the interest of revenue.”* Therefore, he set aside the said

assessment order, directing the AO to frame the assessment afresh after considering the aforesaid observations.

Aggrieved, assessee is in appeal before the Tribunal.

7. Before us, Shri Siddharth Agrawal, Advocate represented the assessee and Shri Sudipta Guha, CIT DR represented the Department. Ld. Counsel for the assessee placed on record paper book in two volumes containing total 88 pages.

8. Ld. Counsel for the assessee reiterated the submissions made before the authorities below. To corroborate the submissions made, he referred to the audited profit and loss account for the year under consideration placed at page 9 of the paper book. He pointed to the 'income from operations' reported at ₹3,27,01,007/-, details of which were given in schedule 11 placed at page 13. He referred to the amount of ₹2,59,79,863/- reported as 'profit in securities/derivatives dealing', forming part of income from operations. The breakup of profit in securities/derivatives dealing given in schedule 11 is placed at page 60, which is as under:-

1. Commodity trading	₹2,33,32,191/-
2. F&O profit in shares	₹26,57,016/-
3. Currency loss out of derivative trading	<u>(-)₹9,344/-</u>
Total	<u>₹2,59,98,551/-</u>

8.1 He submitted that commodity trading of ₹2,33,32,191/-forming part of the breakup of profit in securities/derivatives dealing included the amount of ₹83,76,790/- as depicted in the ledger detail placed at page 61 of the paper book.

8.2 Based on this verifiable data already placed on record by the assessee before the authorities below, Ld. Counsel strongly submitted that income earned from commodity trading of ₹83,76,790/- has already been disclosed and shown in the audited profit and loss account and the same has been offered for taxation. According to him, the consideration arrived at by the Ld. PCIT in assuming the jurisdiction of invoking the revisionary proceedings under section 263 of the Act and passing the impugned order is devoid of any merit and is based on incorrect factual observations. He submitted that there is no prejudice to the Revenue within the meaning of section 263 of the Act since the income of ₹83,76,790/- which the Ld. AO has treated as income under section 68 of the Act as unexplained cash credit, has already been offered to tax by inclusion of the same in the audited profit and loss account of the assessee. Ld. AO has added back the expense towards brokerage of ₹34,620/- in this respect and reduced the business loss by this amount in the assessment completed by him under section 147 rws 143(3) of the Act.

9. Per contra, ld. CIT, DR placed reliance on the order of the ld. PCIT and stated that there should not be any prejudice to the assessee if the matter is examined by the ld. AO in terms of directions given by the ld. PCIT in the impugned order.

10. We have heard the rival contentions and perused the material on record. Admittedly, it is an undisputed fact that assessee has disclosed the income earned from commodity trading of ₹83,76,790/- in its audited profit and loss account and had offered it for taxation. This verifiable fact was placed before the Ld. AO in the assessment proceedings who treated the said income as unexplained cash credit under section 68 of the Act and disallowed the related expenses towards

brokerage of ₹34,620/-. Since this income was already disclosed in the audited profit and loss account of the assessee and formed part of the business loss reported in the return, Ld. AO did not make a separate addition while computing the assessed income of the assessee except for reducing the business loss by making the addition towards disallowance of brokerage expenses claimed in the audited profit and loss account. Assessee had reiterated these facts before the Ld. PCIT in the revisionary proceedings also. Before us also, Ld. Counsel demonstrated the factual position by corroborative documentary evidences placed on record in the paper book as referred in the discussion above.

11. From the above factual matrix of the issue raised by the ld. PCIT, we find that he has not applied his mind to arrive at a consideration which is erroneous in so far as prejudicial to the interest of the revenue, for passing the impugned order u/s 263 of the Act. We observe that in the course of proceedings u/s 263 of the Act before the Ld. PCIT, assessee had furnished the relevant details and explained the issues raised through the show cause notice by the Ld. PCIT, supporting its contentions by corroborative documentary evidences. It is well settled law that for invoking the provisions of section 263 of the Act, both the conditions that the order must be erroneous and prejudicial to the interest of revenue needs to be satisfied. This ratio stands laid down by various Hon'ble Courts.

12. For this, let us take the guidance of judicial precedence laid down by the Hon'ble Apex Court in the case of Malabar Industries Ltd. vs. CIT [2000] 243 ITR 83(SC) wherein their Lordships have held that *twin* conditions needs to be satisfied before exercising revisional jurisdiction u/s 263 of the Act by the CIT. The twin conditions are that the order of the Assessing Officer *must be erroneous and so far as prejudicial to the*

interest of the Revenue. In the following circumstances, the order of the AO can be held to be erroneous order, that is (i) if the Assessing Officer's order was passed *on incorrect assumption of fact*; or (ii) *incorrect application of law*; or (iii) Assessing Officer's order is in *violation of the principle of natural justice*; or (iv) if the order is passed by the Assessing Officer *without application of mind*; (v) if the AO *has not investigated the issue* before him; [*because AO has to discharge dual role of an investigator as well as that of an adjudicator*] then in aforesaid any of the events, the order passed by the AO can be termed as erroneous order. Looking at the second limb as to whether the actions of the AO can be termed as prejudicial to the interest of Revenue, one has to understand what is prejudicial to the interest of the revenue. The Hon'ble Supreme Court in the case of Malabar Industries (*supra*) held that this phrase i.e. "*prejudicial to the interest of the revenue*" has to be read in conjunction with an *erroneous order* passed by the AO. Their Lordships held that every loss of revenue as a consequence of an order of Assessing Officer cannot be treated as prejudicial to the interest of the revenue. When the Assessing Officer adopted one of the courses permissible in law and it has resulted in loss to the revenue, or where two views are possible and the Assessing Officer has taken one view with which the CIT does not agree, it cannot be treated as an erroneous order prejudicial to the interest of the revenue unless the view taken by the Assessing Officer is unsustainable in law.

13. We find that the issue in the present case is purely on facts which are verifiable from the records of the assessee. Examination and verification of the audited financial statements i.e. Balance Sheet and Profit & Loss account of the assessee reveals the correct state of its affairs in respect of the issue raised in the impugned revisionary proceedings for which both, ld. PCIT and the ld. CIT, DR could not bring any material on record to controvert the verifiable factual position.

14. Accordingly, on the issue raised by the Ld. PCIT in the revisionary proceedings, no action u/s 263 of the Act is justifiable which in our considered view cannot be sustained under the facts and circumstances of the present case and judicial precedents dealt herein above. We, therefore, quash the impugned order u/s 263 of the Act and allow the grounds raised by the assessee.

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

Order is pronounced in the open court on 18th October, 2022.

Sd/-

Sd/-

(RAJPAL YADAV)
VICE PRESIDENT

(GIRISH AGRAWAL)
ACCOUNTANT MEMBER

Dated: 18.10.2022

JD, Sr. P.S.

Copy to:

1. The Appellant:
2. The Respondent:.
3. ITO, Ward-8(4), Kolkata
4. The DR, ITAT, Kolkata Bench, Kolkata

//True Copy//

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata