आयकर अपीलीय अधिकरण न्यायपीठ रायपुर में।
IN THE INCOME TAX APPELLATE TRIBUNAL,
RAIPUR BENCH, RAIPUR

BEFORE SHRI RAVISH SOOD, JUDICIAL MEMBER
AND
SHRI G D PADMAHSHALI, ACCOUNTANT MEMBER

आयकर अपील सं. / ITA No. 55/RPR/2022
निर्धारण वर्ष / Assessment Year : 2017-18

M/s. G.T. Homes
Rani Avanti Bai Chouk
Lodipara, Kapa,
Raipur-492 001 (C.G.)
PAN : AAFFG6266P

.....**अपीलार्थी /** Appellant

बनाम / V/s.

The Pr. Commissioner of Income Tax,
Raipur-1(C.G.)

.....**प्रत्यर्थी** / Respondent

Assessee by : Shri Ravi Agrawal, CA
Revenue by : Shri Debashish Lahiri, CIT-DR

सुनवाई की तारीख / Date of Hearing : 22.12.2022
घोषणा की तारीख / Date of Pronouncement : 23.01.2023

आदेश / ORDER

PER RAVISH SOOD, JM:

The present appeal filed by the assessee firm is directed against the order passed by the Pr. Commissioner of Income Tax, Raipur-1, (for short 'Pr. CIT) u/s.263 of the Income-tax Act, 1961 (for short 'Act') dated 24.03.2022, which in turn arises from the order passed by the A.O. u/s.143(3) of the Act dated 27.12.2019 for A.Y. 2017-18. Before us the assessee has assailed the impugned order on the following grounds of appeal:

> "1. That on the facts and circumstances of the case and in law, the order passed by the Principal Commissioner of Income Tax, Raipur-1, u/s.263 of the Income Tax Act, 1961, setting aside the assessment framed u/s.143(3) of the Act, treating it as erroneous and prejudicial to the interest of the revenue, is without jurisdiction and bad in law, and therefore, liable to be quashed.
>
> 2. That the appellant reserves the right to add, alter or modify any ground of appeal."

2. Succinctly stated, the assesee firm which is engaged in the business of builder and developer had e-filed its return of income for A.Y.2017-18 on 04.11.2017, declaring an income of Rs.23,59,850/-. Original assessment was, thereafter, framed by the A.O. vide his order passed u/s.143(3) dated 27.12.2019 determining the income of the assessee firm at Rs.23,59,850/- i.e. as returned.

3. After culmination of the assessment proceedings, the Pr. CIT called for the assessment records of the assessee firm. Observing that the order passed by the A.O u/s.143(3) dated 27.12.2019, was erroneous in so far as it was prejudicial to the interest of the revenue on two counts, viz. (i) that the unsecured loan of Rs.20 lac received by the assessee firm from M/s. Alipore Vinimay Private Limited, Kolkata, PAN : AAKCA4171F, a company whose name figured at Sr. No.9976 of the list of shell companies circulated by ITD/SEBI was to be treated as an unexplained cash credits u/s.68 of the Act; and (ii) that the repayment of unsecured loans made by the assessee company during the year to 7 companies whose names had figured in the aforesaid list of shell companies that was circulated by the ITD/SEBI was to be treated as unexplained expenditure u/s.69C of the Act, the Pr. CIT called upon the assessee to show cause as to why the assessment order passed by the A.O may not be revised u/s.263 of the Act. In reply, the assessee tried to impress upon the Pr. CIT that the assessment order could not be revised u/s.263 of the Act, for the reason, viz. (i) that the issues in question had been deliberated at length by the A.O while framing assessment u/s.143(3) dated 27.12.2019; (ii) that assessment framed by the A.O was with the approval of his superior authority; (iii) that even otherwise in the absence of any error in approach, error in computation, error in applying relevant laws and error in selecting a principle the order passed by the A.O could not be subjected

to revision u/s.263 of the Act; (iv) that the A.O had made necessary enquiries as regards the genuineness of unsecured loan of Rs.20 lac raised by the assessee from M/s. Alipore Vinimay Private Limited, Kolkata; and (v) that as the repayment of loans to 7 companies were in context of those which were raised in the earlier years, thus, the same not being in the nature of an expenditure could not be brought with the realm of addition contemplated u/s.69C of the Act. Also, it was the claim of the assessee that as they were absolutely unaware as to whether the concerns with whom they have transacted i.e. raised loans/repaid loans were shell companies, and also whether the said concerns had accepted the transactions in question as bogus, therefore, the requisite details may be made available.

4. Rebutting the aforesaid observation of the Pr. CIT that the aforementioned companies were found to be shell companies by SEBI/ITD, it was the claim of the assessee that all the said companies were carrying out necessary compliances with the registrar of companies (ROC), and names of neither of them was struck off by SEBI or any other competent authority. On the contrary, it was the claim of the assessee that the Income Tax Department had also framed assessments in the case of the aforementioned companies. However, the aforesaid claim of the assesee did not find favour with the Pr. CIT. Observing, that as the A.O had not conducted proper enquiries, the Pr. CIT was of the view that the

assessment order passed u/s.143(3) dated 27.12.2019 was rendered as erroneous in so far as it was prejudicial to the interest of the revenue u/s.263 of the Act. Accordingly, the Pr. CIT set-aside the assessment order and directed the A.O to frame assessment after examining the issues in question and affording a reasonable opportunity of being heard to the assessee.

5. The assessee being aggrieved with the order passed by the Pr. CIT u/s.263 of the Act has carried the matter in appeal before us.

6. We have heard the ld. authorized representatives of both the parties, perused the orders of the lower authorities and the material available on record, as well as considered the judicial pronouncements that have been pressed into service by the Ld. AR to drive home his contentions.

7. On a perusal of the order of the Pr. CIT, it transpires that the assessee company had during the year repaid its outstanding loans aggregating to Rs.2,07,61,437/- to 7 companies, as under:

Sl. No.	Name of payee	PAN (As per list of shell companies)	Sl. No. of list of shell companies on which listed	Amount of repayment during the year under consideration (in Rupees)
1.	Blow Agency Pvt. Ltd.,	AAECB1959J	6178	20,00,000
2.	Hoogly Vinimay Pvt. Ltd.	AAACH7761G	211	10,00,000

3.	Improve Vincom Pvt. Ltd.	AACCI0550Q	3338	15,00,000
4.	IRIS Commercial Pvt. Ltd.	AACI5557R	234	80,00,000
5.	Star Merchants Pvt. Ltd.	AAMCS9169F	10475	50,00,000
6.	Wellknown Vincom Pvt. Ltd	AABCW0649K	15878	22,08,327
7.	Macro Dealers Pvt. Ltd.	AAFCM5256N	7804	10,53,210
8.			Total	2,07,61,437

Observing, that the names of all the aforementioned companies figured in the list of shell companies that was circulated by the ITD/SEBI, the Pr. CIT was of the view that the amount of bogus repayments to such shell companies should have been assessed by the A.O as an unexplained expenditure u/s.69C of the Act. It was observed by the Pr. CIT that as the A.O had not conducted proper inquiries and accepted the aforesaid transactions on the very face of it, therefore, the order so passed by him was rendered as erroneous in so far as it was prejudicial to the interest of the revenue. Accordingly, the Pr. CIT holding a conviction that the addition of the aforementioned amount of Rs.2,07,61,437/- (supra) was called for in the hands of the assessee firm u/s.69C of the Act, therein, set-aside the order of the A.O with a direction to him to re-adjudicate the said issue after affording a reasonable opportunity of being heard to the assessee.

8. As stated by Shri Ravi Agrawal, the Ld. Authorized Representative (for short 'AR') for the assessee that without going into the justification on

the part of the Pr. CIT in holding the aforementioned 7 companies as shell companies, the simplicitor repayment of loans during the year could not have been brought within the realm of Section 69C of the Act. Elaborating on his aforesaid contention, it was submitted by the Ld. AR that as Section 69C contemplates addition of an unexplained expenditure which is incurred by the assessee during any financial year with either no explanation; or an explanation which is not in the opinion of the A.O satisfactory……., therefore, it was beyond comprehension as to on what basis the said statutory provision was triggered by the Pr. CIT. In sum and substance, it was the claim of the Ld. AR that as it was not a case that the assessee company during the year was found to have incurred any unexplained expenditure, but a case of a simplicitor repayment of loan, therefore, the provisions of Section 69C could not have been triggered.

9. Per contra, the Ld. Departmental Representative (for short 'DR') relied on the orders of the lower authorities.

10. Having given a thoughtful consideration to the issue in hand, i.e., addition of the repayment of outstanding loans by the assessee firm to 7 companies, which, as observed by the Pr. CIT were shell companies, we are unable to fathom as to how and on what basis the Pr. CIT had arrived at a conclusion that the amount of the impugned repayments was to be added

u/s.69C of the Act. Before proceeding any further, we deem it fit to cull out the provisions of Section 69C of the Act, which reads as under:

> "**69C.** Where in any financial year an assessee has incurred any expenditure and he offers no explanation about the source of such expenditure or part thereof, or the explanation, if any, offered by him is not, in the opinion of the [Assessing] Officer, satisfactory, the amount covered by such expenditure or part thereof, as the case may be, may be deemed to be the income of the assessee for such financial year :]
> [**Provided** that, notwithstanding anything contained in any other provision of this Act, such unexplained expenditure which is deemed to be the income of the assessee shall not be allowed as a deduction under any head of income.]"

As stated by the Ld. AR, and, rightly so, as it is not a case that the assessee was found to have incurred any unexplained expenditure, but admittedly a case of repayment of outstanding loans by the assessee firm to 7 companies which are stated to be shell companies, we find substance in the claim of the Ld. AR that it is beyond comprehension as to how the repayment of the said amounts could have been subjected to addition u/s.69C of the Act. We, thus, not being able to persuade ourselves to subscribe to the aforesaid observation of the Pr. CIT, i.e., to the extent he had directed to A.O to make an addition of the amount of Rs.2,07,61,437/- (supra) u/s.69C of the Act, set-aside his order and restore that of the order of the A.O passed u/s.143(3) dated 27.12.2019 to the said extent.

11. Apropos, the observation of the Pr. CIT that the order passed by the A.O u/s.143(3) dated 27.12.2019 was erroneous in so far as it was prejudicial to the interest of the revenue u/s.263 of the Act, for the reason that he had erred in not making an addition of the impugned unsecured

loan of Rs.20 lac that was claimed by the assessee to have been received during the year from M/s. Alipore Vinimay Private Limited, Kolkata, a shell company, as an unexplained cash credit u/s.68 of the Act, we find that the same was based on the information shared by ITD/SEBI that the said lender was a shell company. At this stage, we may hereinabove observe that though the aforesaid information was not there before the A.O in the course of the assessment proceedings and was subsequently received by the Pr. CIT, but the same in our considered view would form part of the record available for examination by the Pr. CIT u/s.263 of the Act. Our aforesaid view is fortified by the judgment of the Hon'ble Supreme Court in the case of the Commissioner of Income Tax, Bangalore Vs. Shree Man Junathesware, Packing Products & Camphor Works, dated 02.12.1997. The Hon'ble Apex Court in the said case was seized of the following question of law:

> "Whether, on the facts and in the circumstances of the case, the Appellate Tribunal is right in law in holding that the word 'record' used in Sec. 263 (1) of the Act would not mean the record as it stands at the time of examination by the Commissioner, but it means the record as it stands at the time the order in question was passed by the ITO?"

After exhaustive deliberation on the scope of the term "record" as contemplated in Section 263 of the Act, it was held by the Hon'ble Apex Court that it was open to the Commissioner to take into consideration all the records available at the time of examination by him. For the sake of

clarity the relevant observations of the Hon'ble Apex Court are culled out as under:

> "It, therefore, cannot be said, as contended by the learned counsel for the respondent, that the correct and settled legal position, with respect to the meaning of the word "record" till 1st June, 1988, was that it meant the record which was available to the income Tax Officer at the time of passing of the assessment order. Further, we do not think that such a narrow interpretation of the word "record' was justified, in view of the object of the provision and the nature and scope of the power conferred upon the Commissioner. The revisional power conferred on the commissioner under Section 263 is of wide amplitude. It enables the Commissioner to call for and examine the record of any proceeding under the Act. It empowers the commissioner to make or cause to be made such enquiry as he deems necessary in order to find out if any order passed by the assessing officer is erroneous insofar as it is prejudicial to the interests of the revenue. After examining the record and after making or causing to be made an enquiry if he considers the order to be erroneous then he can pass the order thereon as the circumstances of the case justify. Obviously, as a result of the enquiry he may come in possession of new material and he would be entitled to take that new material into account. If the material, which was not available to the Income-Tax Officer when he made the assessment could thus be taken into consideration by the Commissioner after holding an enquiry, there is no reason why the material which had already come on record though subsequently to the making of the assessment cannot be taken into consideration by him. Moreover, in view of the clear words used in clause (b) of the explanation to Section 263(1), it has to he held that while calling for and examining the record of any proceeding under Section 263(1) it is and it was open to the Commissioner not only consider the record of that proceeding but also the record relating to that proceeding available to him at the time of examination.
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> The view that we are taking receives support from the two decisions of this Court, though the point which is raised before us was not specifically raised in those tow cases. In Tax Reference Case No. 11 of 1983 (The Commissioner of Income-Tax, Gujarat-I vs. Shri Arbuda Mills Ltd.) this Court after considering the effect of the amendment made in Section 263(1) of the Act by the Finance Act. 1989 whereby lause (c) of the explanation was also amended with retrospective effect from 1st June, 1988, held that "the consequence of the said amendment made with retrospective effect is that the powers under Section 263 of the Commissioner shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in an appeal. Accordingly, even in respect of the aforesaid three items, the powers of the Commissioner under Section 263 shall extend and shall be deemed always to have extended to them because those items had not been considered and decided in the appeal filed by the assessee." In that case the assessment was completed o 31.3.1978 and the Income Tax Officer while computing loss and income of the assessee had accepted the claim of the assessee in respect of those three items. Obviously in the appeals filed by the assessee those items were not the subject-matter of the appeals as the decision in respect thereof

was in its favour. In respect of those three items the Commissioner had exercised his power under Section 263 of he income-Tax Act and , therefore, the question which had arisen for consideration was "whether on the facts and in the circumstances of the case, the order of assessment passed by the ITO u/s 143(3) read with section 144B on 31.7.1978 had merged with that of the Commissioner (appeals) dated 15.10.1979 in respect of the three items in dispute so as to exclude the jurisdiction of the Commissioner of Income-Tax under sec 263?" Thus the amendment made in clause @ was held applicable to the orders passed before 1st June, 1988.

In South India Steel Rolling Mills, Madras vs. Commissioner of Income Tax, Madras [1997 (9) SCC 728], the Commissioner in exercise of his power under Section 263 had withdrawn the development rebate granted for the years 1962- 63, 1963-64, 1967-68 and 1968-69 on the ground that since the partnership stood dissolved on 3.3.1968 on the death of one of the two partners, before the expiry of eight years the assessee firm was not entitled to the benefit of the development rebate under Section 33(1) (a) of the Act. The said order passed by the Commissioner was challenged before the Tribunal but the assessee's appeal had failed. At its instance the following question was referred to the Madras High Court:-

"Whether on the facts and circumstances of the case the revision of assessment under section 263 by the Commissioner for withdrawing the development rebate granted for Assessment years 1962-63, 1963-64, 1967-68 and 1968-69 is proper and justified."

The High Court also decided against the assessee. In the appeal filed by the assessee the order of Commissioner was challenged inter alia on the ground that the power under Section 263 could have been invoked on the basis of the record as it stood when the order was passed by the Income Tax Officer and that it was not open to the Commissioner to take into account dissolution of the assessee firm, which took place after passing of the assessment order because that circumstance was not disclosed by the record which was before the Income Tax Officer. Rejecting this contention this Court held "As regards his taking into consideration an event which had occurred subsequent to the passing of the order by the Income-Tax Officer, it may be stated that in Explanation (b) in Section 263 there is an express provision wherein it is prescribed that "record shall include and shall be deemed always to have included all records relating to any proceeding under this Act available at time of examination by the Commissioner". The death of one of the two partners resulting in the dissolution of the assessee firm on account of such death took place prior to the passing of the order by the commissioner and it could, therefore, be taken into consideration by him for the purpose of exercising his powers under Section 263 of the Act." In that case also the amendment was held applicable to an order passed before 1st June, 1988.

We, therefore, hold that it was open to the Commissioner to take into consideration all the records available at the time of examination by him and thus to consider the Valuation Report submitted by the Departmental Valuation Cell

subsequent to the passing of the assessment order and, so the order passed by him was legal. The High Court was wrong in taking a contrary view. We, therefore, allow this appeal, set aside the judgment and order passed by the High Court and answer the question referred to the High Court in the negative i.e. in favour of the Revenue and against the assessee. In view of the facts and circumstances of the case, there shall be no order as to costs."

Also, support is drawn from the memorandum explaining the provisions of the Finance Bill, 1988, vide which an amendment was made available on the statute as regards the meaning of the term "record" in the "Explanation" to Section 263 of the Act, as under (relevant extract) :

"48. x xxxxxxxx

(a) On the interpretation of the term 'record'. It has been held in some cases that the word 'record' in section 263 (1) could not mean the record as it stood at the time of examination by the Commissioner but it meant the record as it stood at the time of examination by the Commissioner but it meant the record as it stood at the time when the order was passed by the Assessing Officer. Such an interpretation is against the legislative intent and defeats the very objective sought to be achieved by such provisions, since the purpose is to revise the order on the basis of the record as is available to the Commissioner at the time of examination.

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To eliminate litigation and to clarify the legislative intent in respect of the provisions in the three Direct tax Acts, it is proposed to clarify the legal position in this regard the Explanation to the relevant Sections. The proposed amendments are intended to make it clear that 'record' would include all records relating to any proceedings under the concerned direct tax laws available at the time of examination by the commissioner."

The relevant part of the explanation after its substitution read as follows:

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

(a) .....

(b) "record" includes all records relating to any proceeding under this Act available at the time of examination by the Commissioner;

(b) ..... "

As certain doubts regarding the meaning of the term “record” still persisted, therefore, a further amendment was carried out by the Legislature while enacting the Finance Act, 1989. The memorandum explaining the provisions of the Finance Bill 1989 at Para 28, explained, that though a definition of the term “record” for the purpose of Section 263 was made available on the statute vide the Finance Act, 1988 w.e.f. 01.06.1988, i.e, for making it clear that the term “record” includes all records relating to any proceeding under the concerned direct tax laws available at the time of examination by the Commissioner, however, the same was only to clarify the legal position which shall be deemed to have always been in existence, and thus, was not to be confined by giving a prospective applicability to the same, i.e., only to those orders which were passed by the Commissioner after 01.06.1988. The relevant extract of the memorandum explaining the provisions of the Finance Bill, 1989, i.e Para 28 is culled out as under:

> "28. Under the existing provisions of Section 263 of the Income-tax Act and corresponding provisions of the Wealth-tax Act and the Gift-tax Act, the Commissioner of Income-tax is empowered to call for and examine the record of any proceeding and if he considers that the order passed by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of Revenue,, he may pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the same or directing a fresh assessment. By the Finance Act, 1988, an Explanation was substituted with effect from 1st June, 1988, to the relevant sections of the Income-tax Act, Wealth-tax Act and Gift-tax Act to clarify that the term "record" would include all records relating to any proceeding available at the time of examination by the Commissioner. Further, it was also clarified that the Commissioner is competent to revise an order of assessment passed by the Assessing Officer on all matters except those which have been considered and decided in an appeal. The above Explanation was incorporated in the Finance Act, 1988, to clarify this legal position to have

> always been in existence. Some Appellate Authorities have, however, decided that the Explanation will apply only prospectively, i.e., only to those orders which are passed by the Commissioner after 1.6.1988.
>
> Such an interpretation is against the legislative intent and it is, therefore, proposed to amend section 263 of the income tax Act, so as to clarify that the provisions of the explanation shall be deemed to have always been in existence.
>
> Amendments on the above lines have been proposed in section 25 of the Wealth-tax Act and section 24 of the Gift-tax Act also.""

On the basis of our aforesaid observation, we are of the considered view that though the A.O might have examined the loans transaction of the assessee with the aforementioned party, viz. M/s. Alipore Vinimay Private Limited, Kolkata, but in the backdrop of the very fact that the information circulated by the ITD/SEBI revealed that the name of the said lender party figured in the list of shell companies (Sr. No.9976), therefore, it was rightly observed by the Pr. CIT that the order of the A.O accepting the loan transaction under consideration had rendered his order passed u/s.143(3) dated 27.12.2019 as erroneous in so far as it was prejudicial to the interest of the revenue u/s.263 of the Act.

12. Admittedly, there is no denying the fact that the A.O had looked into the loan transactions under consideration, but the same was to the extent of the material which was therefore before him. Also, it is not the case of the Ld. AR that the observation of the Pr. CIT that the name of the aforementioned investor company, viz. M/s. Alipore Vinimay Pvt. Ltd., Kolkata figured in the list of the shell companies (Sr. No.9976) as was

circulated by the ITD/SEBI was ill-founded or incorrect. On the basis of the aforesaid facts, we are of the considered view that as the Pr. CIT had set-aside the matter to the file of the A.O with a direction to readjudicate the same after affording sufficient opportunity to the assessee, therefore, no infirmity could be attributed to his directions considering the totality of the facts and material as was there before him at the time of passing of the order u/s.263 of the Act, dated 24.03.2022.

13. We, thus, finding no infirmity in the view taken by the Pr. CIT who had rightly set-aside the order passed by the A.O u/s.143(3) dated 27.12.2019, i.e., to the extent he had accepted the loan transaction of Rs.20 lac received by the assessee from M/s. Alipore Vinimay Private Limited, for re-adjudication, i.e., after affording a reasonable opportunity of being heard to the assessee, therefore, uphold his order to the said extent.

14. In the result, appeal of the assessee is partly allowed in terms of our aforesaid observations.

Order pronounced under rule 34(4) of the Appellate Tribunal Rules, 1963, by placing the details on the notice board.

Sd/-	Sd/-
G D PADMAHSHALI	**RAVISH SOOD**
(ACCOUNTANT MEMBER)	**(JUDICIAL MEMBER)**

रायपुर/ RAIPUR ; **दिनांक** / Dated : 23rd January, 2023
*****SB

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. **अपीलार्थी** / The Appellant.
2. **प्रत्यर्थी** / The Respondent.
3. The CIT(Appeals)-I, Raipur (C.G)
4. The Pr. CIT, Raipur-1 (C.G)
5. **विभागीय प्रतिनिधि**, **आयकर अपीलीय अधिकरण**, **रायपुर बेंच**, **रायपुर** / DR, ITAT, Raipur Bench, Raipur.
6. **गार्ड फ़ाइल** / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

निजी सचिव / Private Secretary
आयकर अपीलीय अधिकरण, **रायपुर** / ITAT, Raipur.