

| आयकर अपीलिय अधिकरण न्यायपीठ, कोलकाता |
IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH, KOLKATA

BEFORE SHRI RAJESH KUMAR, HON'BLE ACCOUNTANT MEMBER
&
SHRI SONJOY SARMA, HON'BLE JUDICIAL MEMBER

I.T.A. No. 318/Kol/2021
Assessment Year: 2013-14

M/s. Anjaniputra Nirman Pvt. Ltd. 68, Jessore road Diamond Arcade 2 nd Floor, Unit 216 Kolkata - 700055 [PAN : AACCE8659E]	Vs	Pr. Commissioner of Income Tax - 4, Kolkata
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अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)
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Assessee by :	Shri Soumitra Choudhury, A/R
Revenue by :	Shri S. Datta, CIT, Sr. D/R

सुनवाई की तारीख /Date of Hearing : 08/12/2023
घोषणा की तारीख /Date of Pronouncement: 08/12/2023

आदेश/ORDER

PER SHRI RAJESH KUMAR, ACCOUNTANT MEMBER :

The captioned appeal has been preferred by the assessee against the order of Learned Principal Commissioner of Income Tax, Kolkata - 4, (hereinafter referred to as "the Id. Pr. CIT"), passed u/s 263 of the Income Tax Act, 1961 (hereinafter 'the Act') dated 12/03/2019, for Assessment Year 2012-13.

2. The Registry has pointed out that there is a delay of 147 days in filing the present appeal by the assessee. Petition for condonation of delay is placed on record by the assessee explaining the reasons for late filing of appeal. On perusing the same, we are convinced that the assessee was prevented by sufficient cause from filing this appeal in time. Accordingly, we condone the delay and proceed to admit the appeal for hearing.

3. The assessee has challenged the revisionary order passed by the ld. Pr. CIT u/s 263 of the Act on the ground of invalid exercise of jurisdiction for the reason that by the impugned revisionary order, the ld. Pr. CIT directed the Assessing Officer to hold another investigation when the Assessing Officer has already complied with the directions of the predecessor Pr. CIT by passing the order u/s 263 of the Act dt. 09/09/2016 in the first set aside revisionary proceedings.

4. The facts in brief are that the assessee filed the return of income on 24/09/2012 declaring total income at Rs.1240/-. Case of the assessee was selected for scrutiny through CASS and assessment was accordingly framed u/s 143(3) of the Act vide order dt.16/03/2015 assessing total income at Rs.6,21,01,240/- after making addition in respect of share capital/share premium. Thereafter the predecessor ld. Pr. CIT, exercised revisionary jurisdiction u/s 263 of the Act and vide order dt. 09/09/2016 setting aside the assessment framed vide order dt. 16/03/2015 directing the Assessing Officer to frame the assessment *de novo*. The Assessing Officer in the set aside proceedings accordingly gave effect to the order passed u/s 263 vide order dt. 04/10/2016 passed u/s 143(3) r.w.s. 263 of the Act determining the total income at Rs. 1,240/-. The ld. Pr. CIT, after calling for the assessment records and perusing the same, came to a conclusion that the order passed by the Assessing Officer is erroneous so far as it is prejudicial to the interest of the revenue, for the following reasons:-

“(i) The A.O. passed the order without carrying out detailed investigation/verification/independent enquiry regarding identity, creditworthiness of the shareholders & also the genuineness of transactions relating to share capital

that was intended to be carried out and merely accepted the submission of the assessee in this regard.

(ii) That A.O. has also failed to carryout detailed investigation of the shareholders on the very issue that how they decided to invest in such a company which was never known for its line of business and also they invested at huge premium without verifying the financial position.

(iii) The A.O. further failed to examine the rationale behind raising the said share premium and also did not verify the method adopted by assessee for determining such abnormally huge premium specially keeping in view that prima facie there was no material in the balance sheet of the assessee warranting/justifying such huge premium.

(iv) The A.O. failed to collect the relevant evidence in order to reach a logical conclusion regarding the genuineness of controlling interest.

(v) The A.O. failed to examine all the bank accounts for the entire period in the course of verification to find out the money trail of the share capital.

(vi) The A.O. failed to adequately trace out the money trail to ascertain the genuineness of source of fund invested by the share holder in the assessee company.

(vii) On the whole impugned order dated 21/10/2016 passed u/s 263/143(3) of the Income Tax Act, 1961 prima facie suffers from lack of independent and adequate enquiry on the aforesaid issues."

4.1. Accordingly, a showcause notice u/s 263 of the Act was issued on 16/01/2019 calling upon the assessee to explain as to why the assessment framed u/s 143(3) / 263 of the Act dt. 21/10/2016 should not be revised on the ground of being erroneous and prejudicial to the interest of the revenue. The assessee did not respond to the said show cause notice despite the Id. Pr. CIT giving several opportunities and, therefore, the Id. Pr. CIT presumed that the assessee was not interested in pursuing the matter. Finally the assessment was revised by the Id. Pr. CIT on the ground that there was complete lack of enquiry as the Assessing Officer has failed to collect the full facts/information and thus the AO failed to take the case to a logical end. Accordingly, the Id. Pr. CIT directed the Assessing Officer to re-adjudicate the issue *de novo* and pass a fresh assessment in accordance with the provisions of the

Act as the earlier order passed by the Assessing Officer is erroneous and prejudicial to the interest of the revenue in accordance with provisions 2(c) of 263 of the Act.

5. The Id. Counsel for the assessee vehemently submitted before us that this is the second round of revision under section 263 of the Act on the ground that the Assessing Officer has not conducted any enquiry into the issues as pointed out by the Id. Pr. CIT. The Id. A/R contended that the said conclusion of Id. Pr. CIT is wrong and contrary to the facts on record as the Assessing Officer in the first set aside proceedings has conducted a detailed enquiry into the issue of share capital and share premium and thus the issue of share capital/share premium was thoroughly examined and discussed in the assessment order with reasons and justifications as to why the amount of share capital/share premium received to the tune of Rs. 6,21,00,000/- was not required to be added to the income of the assessee as was done in the first round of assessment. The Id. Assessing Officer vehemently argued that the second round of 263 on the same issue which stands adjudicated by the Assessing Officer in the first round of set aside proceedings u/s 263 of the Act is wrong as the same runs contrary to the ratio laid down by the Hon'ble Jurisdictional High Court in the case of *PCIT Vs Bhagwati Vintrade Pvt Ltd. ITAT/ 184/2022 IA No. GA/2/2022 and PCIT Vs M/S Intent Dealers Pvt Ltd. ITAT/92/2022 IA No. GA/2/2022 and by the decisions of the Coordinate Benches in Goodpoint Stockist Pvt Ltd Vs PCIT ITA No. 263/Kol/2021 dated 11.03.2011, Bhupati Dealmark Pvt Ltd VS PCIT ITA No. 2405/Kol/2019 dated 22.12.2021 and Starpoint Constructions (P) Ltd Vs PCIT ITA No.2472/Kol/2019 dated 22.12.2021.*

5.1. The Id Counsel further argued that where the PCIT was of the view that AO has not conducted any enquiry, he himself is duty bound to conduct an enquiry to reach a conclusion as to how the assessment is erroneous and prejudicial to the interest of the revenue. The Ld. A.R relied on the decision of Hon'ble Delhi High Court in the case of *ITO vs. D G Housing Projects Ltd. in 343 ITR 329 (Del)*. The Ld A.R also submitted that the order passed by the AO is neither erroneous nor prejudicial to the interest of the revenue and therefore squarely covered by the decision of Hon'ble Supreme Court in the case of *Malabar Industrial Co. vs. CIT in [2000] 243 ITR 83 (SC)*. The Ld. Counsel finally prayed that in view of aforesaid decisions, the jurisdiction assumed u/s 263 of the Act is invalid and so is the order passed u/s 263 of the Act which may kindly be quashed.

5.1.1. The Id. Counsel for the assessee while drawing attention of the Bench to the documents examined by the Assessing Officer in the first round of set aside proceedings submitted that the assessee has filed all the evidences before the Assessing Officer besides obtaining evidences by issuing notice u/s 133(6) of the Act to the subscribers which were replied by all the subscribers details whereof are filed in the paper book in respect of the 15 share subscribers/investors. The Id. Counsel for the assessee, therefore, prayed that the Assessing Officer, after examining all these issues and evidences, came to a conclusion that identity and creditworthiness of the investors and genuineness of the transactions were adequately proved and thus came to a reasoned conclusion to reduce the said amount from income of the assessee which stood added

in the first round of assessment framed u/s 143(3) of the Act dt. 16/03/2015.

6. The Id. D/R, on the other hand, strongly opposed the arguments proposed by the Id. Counsel for the assessee on the ground that there was a huge scam which occurred in Kolkata involving of giving accommodations in the form of unsecured loans, share capital/share premium and LTCG etc and assessee was beneficiary of such accommodation entries. The Id DR submitted that huge additions was made in the first round of assessment proceedings which culminated in the framing of assessment vide order dated 16/03/2015 which were deleted by the AO in the set aside proceedings pursuant to first revisionary order dated 09/09/2016. The Id. D/R submitted that the purpose enshrined in the provisions of sub-section 2(c) of Section 263 of the Act is to correct the erroneous order which is prejudicial to the interest of the revenue as the Department/revenue has no right to appeal against the said order of the Assessing Officer. However, in the present case, in the first round of 263, the jurisdiction was invalidly exercised as the predecessor Id. Pr. CIT in the order passed u/s 263 of the Act, though pointed out the error in the order of the Assessing Officer, did not highlight any instance of prejudice caused to the revenue simply because of issue of equity shares and premium. The Id. D/R submitted that though the predecessor Id. Pr. CIT wanted an enquiry on the issues but the same effectively ended up in deleting the addition which is against the provisions of the Act and was in fact illegal.

6.1. The Id. D/R submitted that the predecessor Id. Pr. CIT should have exercised the powers as contained in Section 264 of the Act. Therefore, the order passed u/s 263 of the Act was a wrong order and any assessment pursuant to the said order is also illegal and *void ab initio*. The Id DR therefore submitted that the first revisionary order passed by the Id. P CIT dated 09/09/2016 as well as the consequent assessment order dated 04/10/2016 are void ab- initio and contrary to the provisions of the Act.

6.2. The Id. D/R contended that the assessment framed by the Assessing Officer dt. 26/10/2016 giving effect to the first 263 was cryptic and sans reasons and justification for deleting the addition whereas the second revisionary order passed by the Id. Pr. CIT was a valid order as the Assessing Officer has failed in discharging the obligations/duties cast upon him by the statute by wrongfully deleting the addition on account of share capital and share premium which was made in the first assessment order dated 16/03/2016.

7. The Id. D/R submitted that the second jurisdiction u/s 263 was invoked to correct the dilution caused by the first order u/s 263 dt. 09/09/2016. The said order directed proper investigation into the mode of raising share capital especially having regard to the directions given u/s 263 of the Act to be retrospective in nature and the enquiry not being confined to the first layer of investigation. The Id DR argued that the PCIT should have invoked the jurisdiction u/s 264 of the Act to correct the anomaly whereas the Id PCIT invoked jurisdiction u/s 263 of the Act.

7.1. The Id. D/R in support of his arguments relied on the order in the case of *Subhalaxmi ITA No. 1104/Kol/2014 and ITA No. 764 to 766/Kol/2014*. The Id. D/R also submitted that the Id. Pr. CIT in the concluding paragraph has mentioned explanation 2(c) to Section 263 (1), which was a typographical mistake and it shall be read as 2(a) to Section 263 (1) of the Act.

8. The Id. D/R also referred to the decision of the co-ordinate bench in the case of *Amritrashi Infra (P) Ltd. v. Pr. CIT [ITA No. 838/Kol/2019, dt. 12-8-2020]*, wherein the issue of first order u/s 263 of the Act being illegal and *void ab initio* was considered and it was held that subsequent orders were invalid and were not taken up for consideration. Finally, the Id. D/R prayed that the second revisionary proceedings may kindly be upheld by dismissing the appeal of the assessee as the same was exercised to examine the relief granted to the assessee in a wrongful manner.

9. We have heard the rival contentions and perused the records as placed before us. Undisputedly the facts are that in the first round of proceedings u/s 263 of the Act the, Id. Pr. CIT vide order dated 09.09.2016 set aside the assessment framed u/s 143(3) of the Act vide order dated 16.03.2015 wherein the AO had assessed the income at Rs. 6,21,01,240/-. The assessee had filed the return of income on 24.09.2012 declaring income at Rs. 1,240/-. In the said assessment the AO had made the addition of Rs. 6,20,00,000/- as unexplained cash credit u/s 68 of the Act in respect of share capital/share premium by holding that these transactions were sham and bogus.

10. The Assessing Officer in the set aside assessment proceedings completed the assessment vide order dated 21.10.2016 passed u/s 143(3)/263 of the Act wherein the addition already made u/s 68 of the Act in respect of share capital/share premium was deleted and income was assessed at Rs. 1,240/-. Before deleting the addition, the AO called for the necessary details from the assessee and also from the shareholders u/s 133(6) of the Act which were fully replied by filing the details as requisitioned. The Id AO gave a detailed finding in the assessment order dated 21.10.2016 for deleting the addition after carrying out detailed examination and enquiry into the matter.

11. The Id. Pr. CIT again on perusal of the assessment records observed that order passed by the AO dated 21.10.2016 is erroneous and prejudicial to the interest of the revenue as the AO passed the order without carrying out detailed investigation/verification/independent enquiry regarding identity, creditworthiness of the shareholders and also genuineness of the transactions relating to share capital/share premium and summarily merely accepted the submissions of the assessee. Accordingly a show cause notice u/s 263 of the Act was issued on 16.01.2019 to show cause as to why the remedial action should not be taken against the order passed u/s 143(3)/263 of the Act dated 21.10.2016 which was not responded by the assessee. Thereafter one more opportunity was given but remained non-complied. The Id. Pr. CIT finally set aside the assessment order dated 21.10.2016 on the ground of lack of enquiry on the part of the AO which rendered the order erroneous and prejudicial to the interest of the revenue in accordance with Explanation 2(c) to section 263 of the Act and directed

the AO to frame the assessment de novo in accordance with the provisions of the Act.

12. In nutshell, the position is that in the first round of revision u/s 263 the AO deleted the addition already made in the original assessment order after making detailed enquiries and investigation and also after calling details from subscribers u/s 263 of the Act. Now the issue before us whether the revisionary jurisdiction exercised by the Id. Pr. CIT to set aside the assessment framed u/s 143(3)/263 of the Act on the same issue on the ground of lack of enquiry into share capital/share premium which was examined in detail by the AO after calling for information/details from the assessee as well as from the subscribers u/s 133(6) of the Act and taking a plausible and plausible view thereby deleting the addition of Rs. 6,20,00,000/-. In our opinion this is not a case of no enquiry or lack of enquiry as the AO has made in enquiry and taken a view on the basis of examination of the evidences furnished by the assessee as well as by the subscribers. In our opinion, the PCIT cannot exercise the revisionary jurisdiction to set aside the assessment where the AO has conducted enquiries and taken a plausible view accepting the contentions of the assessee. In our opinion where the PCIT was of the view that AO has not conducted enquiry to come to the conclusion on the issue, then the Id. PCIT is duty bound to make an enquiry and reach a conclusion that order is erroneous and prejudicial to the interest of the revenue. The case of the assessee is squarely covered by the decision of Hon'ble Delhi High Court in the case of *D G Housing Projects Ltd. (Supra)*. Besides, the twin conditions have to be satisfied as envisaged in section 263 of the Act in absence of which the

revisionary jurisdiction is not available to the Pr. CIT . Even if one of the two condition is satisfied the jurisdiction is not available. However in the present case the twin conditions were not satisfied as the order is neither erroneous nor prejudicial to the interest of the revenue as all the facts were examined by the AO on the basis of details and explanation of the assessee before the AO and he has taken a correct view based on his examination of records furnished by the assessee as well as by the subscribers. The case of the assessee squarely covered by the decision of Hon'ble Supreme Court in the case of *Malabar Industrial Co. Ltd. (supra)*, wherein it has been held that the jurisdiction is not available to the Pr. CIT where the twin conditions as envisaged by section 263 of the Act were not satisfied. The Hon'ble Court has even held that where one of the two conditions are satisfied, the provisions of section 263 of the Act cannot be invoked.

13. We also find merit in the second plea of the assessee that revisionary jurisdiction u/s 263 of the Act is not available on the same issue for the second time and this has been held in a series of decisions of the Hon'ble Calcutta High Court in the case of *PCIT Vs Bhagwati Vintrade Pvt Ltd. (supra)* and *PCIT Vs M/S Intent Dealers Pvt Ltd. (supra)*. In both the above decisions the Hon'ble Calcutta High Court has held that the second round of revision u/s 263 of the Act on the same issue, on which the first revisions u/s 263 of the Act was done, is invalid and not maintainable.

14. Considering the ratio laid down in the above decisions, we are inclined to hold that the revisionary jurisdiction has been exercised by

the ld. Pr. CIT invalidly and accordingly we quash the same as well as the revisionary order and the appeal of the assessee is allowed.

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

Order pronounced in the Court on 8th December, 2023 at Kolkata.

Sd/-

**(SONJOY SARMA)
JUDICIAL MEMBER**

Sd/-

**(RAJESH KUMAR)
ACCOUNTANT MEMBER**

Kolkata, Dated 08/12/2023

Sd/-

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

1. अपीलार्थी / The Assessee
2. प्रत्यर्थी / The Respondent
3. संबंधित आयकर आयुक्त / Concerned Pr. CIT
4. आयकर आयुक्त (अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि , आयकर अपीलीय अधिकरण, कोलकाता/DR,ITAT, Kolkata,
6. गार्ड फाई/ Guard file.

आदेशानुसार/ BY ORDER
TRUE COPY

Assistant Registrar
आयकर अपीलीय अधिकरण
ITAT, Kolkata