IN THE ITAT DELHI BENCH 'A'

B.S. Sangwan

v.

Income-tax Officer, Ward -2, Sonipat

PRAMOD KUMAR, ACCOUNTANT MEMBER
AND C.M. GARG, JUDICIAL MEMBER
IT APPEAL NO. 2680 (DELHI) OF 2011
[ASSESSMENT YEAR 2007-08]
JANUARY 21, 2015

Naveen C. Gupta *for the Appellant.* **A. Mishra** *for the Respondent.*

ORDER

Pramod Kumar, Accountant Member - By way of this appeal, the assessee appellant has challenged correctness of the order dated 18th March 2011 passed by the Commissioner of Income Tax, Rohtak, under section 263 r.w.s. 143(3) of the Income Tax Act, 1961, for the assessment year 2007-08.

2. One of the grievances raised in this appeal, as set out in the first ground of appeal, is that the impugned order is contrary to the scheme of the law and the facts of this case. As it is a fundamental jurisdictional issue, we will take it up first.

3. To adjudicate on this grievance, only a few material facts need to be taken of. The assessee before us is a railway contractor and had filed his return of income, for the assessment year before us, on 30th April 2007 disclosing a taxable income of Rs 4,92,380. This income tax return was subjected to the scrutiny assessment proceedings, and, vide order dated 28th November, 2008 passed under section 143(3) of the Act, the Assessing Officer assessed the at Rs 5,82,380. The matter, however, did not rest there. On 14th February 2011, learned Commissioner issued a show cause notice to the assessee which, inter alia, pointed out following issues with respect to the assessment so completed under section 143(3):

i. The assessee in his balance sheet has shown an amount of Rs 12,48,500 as work in progress whereas, in the profit and loss account, this figure has been taken at Rs 8,85,000. Therefore, the difference of these two figures, i.e. Rs 3,63,000, was not added back by the AO.

ii. On perusal of the records, it is noticed that one of the partners Shri Manoj Gupta has purchased a car in his name whereas depreciation amounting to Rs 99,000 relating to this car has been claimed as expenses of the firm. As the assessee firm is not the owner of the vehicle, depreciation claimed at Rs 99,000 was not admissible, but was allowed by the AO.

iii. As per the P&L account, the assessee has incurred the following expenses, which are liable to deduction of tax at source, but no tax has been deducted:

(*a*) Hire charges for vehicles/machines	Rs 15,78,500
(*b*) Professional charges	Rs 36,000
(*c*) Legal fees	Rs 36,850
(*d*) Loading of material	Rs 62,82,650
Total	Rs 79,37,250

Therefore, these expenses are not admissible as provided in section 40(a)(ia)

of the Income Tax Act, but the AO has allowed the same.

iv. The assessee firm, as per balance sheet, has shown FDR and securities receivable worth Rs 32,65,650 under the head 'Current Assets'. The amount of FDR and security is to be bifurcated as to interest on FDR and security amount for closing balance/work in progress may be verified but the same was not done by the AO.

v. An amount of Rs 2,65,650 has been recorded as unsecured loan from Shri N K Singhal in the balance sheet. Necessary verification regarding identity, creditworthiness of Shri N K Singhal and genuineness of transaction was not made by the AO.

4. Having so set out the infirmities in the assessment order dated 28th November, 2008, learned Commissioner proceeded to issue the show cause notice to the assessee requiring the assessee to show cause as to why the above assessment order not be cancelled/modified. On this aspect, he stated as follows:

> 4. Keeping in view the above, the order passed under section 143(3) of the Income Tax Act, 1961, is considered to be erroneous in so far as it is prejudicial to the interest of the revenue. Had the said additions/disallowances been made, there would have been substantial tax effect and thus the cause of revenue has suffered. Further, the order of the AO is in clear violation of the legal provisions as enumerated in the Income Tax Act, 1961. Thus, the very sanctity of the Act has been eroded and may serve as a very bad precedent. The same, therefore, needs to be cancelled/modified.

5. With these observations, learned Commissioner required the assessee "to show cause as to why an appropriate order under section 263 of the Income Tax Act, 1961, be not passed". The hearing on this show cause notice was fixed for 24th February 2011 which, after a couple of adjournments, finally took place on 11th March 2011. Learned counsel for the assessee elaborate arguments on merits on each of the point set out in learned Commissioners show cause notice. So far point no. 1, with respect to work in progress, was concerned, learned Commissioner rejected the explanation of the assessee "in the absence of the corroborative evidence". On point no. 2, learned Commissioner dropped the proceedings. On point no. 3, i.e. with respect to disallowance on account of not deducting TDS, learned Commissioner held that "these expenses are not verifiable" and that "in the absence of complete details, it is held that the assessee was liable to deduct tax at source but failed to do so", and, therefore, these expenses are disallowable under section 40(a)(ia). On point no. 4, learned Commissioner held that in the absence of bifurcation of details of FDR and security, the interest income could not be brought to tax but proceeded to hold that an amount of Rs 2,60,150, which was deducted by the railway authorities, was a penal payment in nature and, as such, did not constitute an admissible expenditure. Finally, in respect of point no. 5, learned Commissioner held that since onus in respect of identity and creditworthiness of Shri N K Singhal is not discharged and since genuineness is not proved, "the assessment order is considered to be erroneous in so far as it is prejudicial to the interest of the revenue to the extent of the amount of addition of Rs 2,65,000". Yet, when it came to operative part of the impugned order, learned Commissioner had a different tone altogether and he simply restored the assessment order to the file of the Assessing Officer for fresh adjudication after making "**proper enquiries**" as was evident from the following concluding paragraph:

> In view of the above, it is clear that the AO has passed the order without proper consideration of facts and without following the law laid down by the legislature and without making requisite and proper enquiries. As such the order passed by the AO is erroneous and prejudicial to the interest of the revenue and is set aside to be framed afresh after making proper enquiries. The AO is directed to make fresh assessment in accordance with the law.

6. What thus started with a disapproval of the stand taken by the Assessing Officer on merits, resulted in

the assessment order being restored to the file of the Assessing Officer for "fresh assessment in accordance with the law" and "after making proper inquiries". Be that as it may, the assessee is aggrieved with the stand so taken by the Commissioner in the impugned order, and is in appeal before us.

7. The fundamental question that really arises for our consideration is whether such a change of heart is permissible under the scheme of law, and whether a revision proceedings, which started with a show cause notice condemning the action of the Assessing Officer on merits, can lawfully culminate in the direction that the subject matter of revision proceedings be decided afresh in accordance with law and after making proper inquiries.

8. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

9. A co-ordinate bench of this Tribunal, in the case of *Synergy Entrepreneur Solutions Pvt Ltd.* v. *DCIT* [(2011) 13 ITR Tribunal 377 (Mum)], had an occasion to deal with a somewhat similar situation. That case a case in which in the show cause notice, learned Commissioner held that the loss brought forward could not be set off against profits of the current year, but when the Commissioner was to pass the final revision order, he simply held that the matter is required to be examined afresh in accordance with the law. As to whether such a shift in the stand was permissible, the coordinate bench, speaking through one of us and following the esteemed views of Delhi F bench of this Tribunal in the case of *Maxpak Investments Ltd*. v. *ACIT* [(2007) 13 SOT 67 (Del)] articulated through legendary Hon'ble Vice President Easwar (as he then was; later Hon'ble Justice Easwar), held as follows:

> ……. A plain reading of the impugned revision order clearly shows that the conclusions drawn in the revision proceedings are different from the reasons for revision proceedings set out in the show-cause notice - extracts from which are set out in the revision order itself. It is important to note the shifting stand of the CIT so far as reasons for subjecting the assessment order to revision proceedings. At p. 1, in fifth sentence of the impugned revision order, learned CIT notes that that "on perusal of assessment record, it was noticed that assessment order was erroneous in as much as it was prejudicial to the interest of the Revenue as the details of purchase and sale of share transactions in futures were not verified as to whether the profit or loss from the futures trading amounts to speculation gain or loss". The extracts from show-cause notice, which have been reproduced in the impugned revision order at pp. 1 and 2, do not, however, even remotely support that stand. The stand taken in the show-cause notice is that, on merits, set off is not permissible in as much as show-cause notice states that "as per the provisions of s. 73 of the IT Act, any loss computed in respect of speculation business carried on by the assessee shall not be set off except against profits and gains of another speculation business", and, "therefore you (the assessee) are not allowed to adjust the speculation loss". The show-cause notice, therefore, clearly refers to declining what the CIT perceives as a set off of speculation loss against business profits. That is a categorical disentitlement of set off. In the final conclusions in the impugned revision order, however, the CIT once again deviates from the stand so taken and concludes as follows:
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> "In view of the foregoing, the assessment order dt. 27th Dec, 2007 passed by the AO is considered to be erroneous and prejudicial to the interests of the Revenue. Since the AO has not taken the necessary details to verify whether the profits and loss from futures trading amounts to speculation profits or loss, the assessment order is set aside with a direction to obtain complete details and conduct necessary enquiries and examine the same for the assessment year under consideration. The AO shall provide adequate opportunity to the assessee before passing the assessment order."
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> 5. It is thus clear that there has been shift in the stand of the CIT on whether it was a fit case for revision on the ground that the assessee was not eligible for set off of losses on speculative transactions or whether it was a case for revision on the ground that the AO did not make necessary

verifications about the transactions. The reason given in the show-cause notice is former, while the reason for which revision powers are finally exercised in the impugned order are latter. As to whether such an exercise of revisional powers, on the grounds other than the grounds of revision as set out in the show-cause notice, could be held to be sustainable in law, we find guidance from the decisions of a Co-ordinate Bench in the case of *Maxpak Investment Ltd.* v. *Asstt. CIT* [2006] 104 TTJ (Del) 881 : (2007) 13 SOT 67 (Del) which, inter alia, observes as follows:

"…….In *CIT* v. *G.K. Kabra* [1995] 125 CTR (AP) 55 : (1995) 211 ITR 336 (AP) the Andhra Pradesh High Court was dealing with an application seeking reference under s. 256(2), inter alia of the following question :

'Whether, on the facts and in the circumstances of the case, the Tribunal was correct in holding that the CIT lacks initial jurisdiction, particularly when the conclusion made by the CIT in the order under s. 263 was on the basis of the information furnished in response to the initial notice ?'

While declining to refer the above question, the High Court held as under (pp. 339-340) :

'The necessary implication in the expression 'after giving opportunity of being heard' relates to the point on which the CIT considers the order to be erroneous and prejudicial to the interests of the Revenue. In other words, it is necessary for the Commissioner to point out the exact error in the order which he proposes to revise so that the assessee would have an adequate opportunity of meeting the error before the final order is made.'

(Emphasis, italicsed in print, supplied)

In the case before the High Court, the show-cause notice referred to two issues to which the assessee had given satisfactory replies. No action was taken under s. 263 in respect of these two issues. However, in the said order the CIT mentioned the hire charges as the ground for revising the assessment. This point had not been mentioned as a ground in the show-cause notice. The High Court held that 'in as much as the CIT had not chosen to show these two points as the errors in making the final order and the final order under s. 263 refers only to the inference of hire charges being exigible to tax which was not mentioned at all in the show-cause, obviously the assessee had no opportunity to meet that point."

(Emphasis, italicsed in print, supplied)

10. The ratio of the decision, clear from the above observation, is that if a ground of revision is not mentioned in the show-cause notice issued under s. 263, that ground cannot be made the basis of the order passed under the section, for the simple reason that the assessee would have had no opportunity to meet the point. …….

11. The other judgment which supports the case of the assessee is that of the Punjab & Haryana High Court in *CIT* v. *Jagadhri Electric Supply & Industrial Co.* [1983] 140 ITR 490 (P&H). The nature of the jurisdiction of the CIT under s. 263 and the powers of the Tribunal while dealing with an appeal against the order passed under that section were explained in that decision. The CIT had found the order of the AO allowing continuation of registration to the assessee-firm to be erroneous on the ground that the actual distribution of the profits was different from the ratio mentioned in the deed of partnership. The Tribunal set aside the order of the CIT but while doing so observed that there was a change in the number of partners from 10 to 11 which fact had not been taken into account by the AO when he granted registration for the firm for the asst. yr. 1966-67 and thus the grant of registration was erroneous. On the basis of this observation it was argued before the High Court on behalf of the Revenue that the Tribunal ought to have sustained the order of the CIT on that ground. Repelling the contention, it was held by the High Court as under (pp. 502-3):

'The jurisdiction vested in the CIT under s. 263(1) of the Act is of a special nature or, in other words, the CIT has the exclusive jurisdiction under the Act to revise the order of the ITO if he considers that any order passed by him was erroneous insofar as it was prejudicial to the interests of the Revenue. Before doing so, he is also required to give an opportunity of being heard to the assessee. If after hearing the assessee in pursuance of the notice issued by him under s. 263(1) of the Act, he is not satisfied, he may pass the necessary orders. Of course, the order thus passed will contain the grounds for holding the order of the ITO to be erroneous, as contemplated under s. 263(1) of the Act.... The Tribunal cannot uphold the order of the CIT on any other ground which, in its opinion, was available to the CIT as well. If the Tribunal is allowed to find out the ground available to the CIT to pass an order under s. 263(1) of the Act, then it will amount to a sharing of the exclusive jurisdiction vested in the CIT, which is not warranted under the Act. It is all the more so, because the Revenue has not been given any right of appeal under the Act against an order of the CIT under s. 263(1) of the Act.... Under s. 263 of the Act it is only the CIT who has been authorized to proceed in the matter and, therefore, it is his satisfaction according to which he may pass necessary orders thereunder in accordance with law. If the grounds which were available to him at the time of the passing of the order do not find a mention in his order appealed against, then it will be deemed that he rejected those grounds for the purpose of any action under s. 263(1) of the Act. In this situation, the Tribunal, while hearing an appeal filed by the assessee, cannot substitute the grounds which the CIT himself did not think proper to form the basis of his order.'

We respectfully understand this judgment as holding, by necessary implication, that if the CIT has not mentioned the ground on which action is proposed to be taken under s. 263 in the show-cause notice, it is deemed that he was not satisfied that it was a fit ground for taking action under the section, with the result that the final order, if based on the ground which he had earlier considered not fit for taking action under the section, will have to be set aside as not based on any ground which may justify his belief that the order passed by the AO was erroneous insofar as it is prejudicial to the interests of the Revenue. ……."

10. We are in considered agreement with the views so expressed by the coordinate benches and we adopt these views. When we examine the facts of this case in the light of the legal position so set out, we find that in the impugned revision proceedings, learned Commissioner started by pointing out, what he saw as, glaring illegalities in the assessment order, which was subjected to revision proceedings, but what he concluded was that the said assessment order was passed without making "proper requisite and desired inquires". What the assessee was required to demonstrate the incorrectness of the learned Commissioner's stand to the effect that, because of the five additions/disallowances, as set out in paragraph 3, not having been made, the order is erroneous and prejudicial to the interest of the assessee. Learned Commissioner proceeded to observe that "Had the said additions/disallowances been made, there would have been substantial tax effect and thus the cause of revenue has suffered. Further, the order of the AO is in clear violation of the legal provisions as enumerated in the Income Tax Act, 1961. Thus, the very sanctity of the Act has been eroded and may serve as a very bad precedent". Yet, finally he revised the order for want of "proper requisite and desired inquires" and thus shifted the goalpost. That's not permissible under the scheme of the law, as a revision order can only be passed on the ground on which the assessee has been given reasonable opportunity of being heard, and as it is not open to Commissioner to set out one reason for revising the order but actually revise the order on some other ground. In our humble understanding, lack of proper inquiries, which an Assessing Officer ought to have conducted on the facts of the said case, is altogether a different reason from inadmissibility of a claim of deduction or an income which ought to have been brought to tax. In view of the above discussions, as also bearing in mind entirety of the case, we are of the considered view that the impugned revision order is contrary to the scheme of law, and should be quashed for this reason alone. As we have quashed the impugned revision order, on this technical ground, we see no reasons to address ourselves to the merits of the case as raised in the other ground of appeal. All

those issues are academic in present context.

11. In the result, the appeal is allowed in the terms, and for the reasons, set out above.

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