



**HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR**

D.B. Income Tax Appeal No. 172/2018

Commissioner Of Income Tax Exemptions , 3Rd Floor, Kailash Heights, Lal Kothi, Tonk Road, Jaipur Rajasthan

----Appellant

Versus

Modern School Society, C/o Kapil Goel Adv , F-26/124 Sector-7, Rohini, Delhi 110085

----Respondent



For Appellant(s) : Mr. Daksh Pareek for Mr. Sameer Jain
For Respondent(s) :

HON'BLE MR. JUSTICE KALPESH SATYENDRA JHAVERI
HON'BLE MR. JUSTICE ASHOK KUMAR GAUR
Judgment

31/07/2018

1. By way of this appeal, the appellant has assailed the judgment and order of the tribunal whereby tribunal has allowed the appeal of the assessee.
2. Counsel for the appellant has framed following substantial question of law arises.

(i) Whether on the facts and in the circumstances of the case and in law the Hon'ble ITAT is right in not appreciating the facts that the assessee has violated the condition No.2 mentioned in the order of approval granted u/s 10(23C)(vi) of the Act according to which "the assessee will not invest or deposit its funds (other than voluntary contribution received and maintained in the form of jewellery, furniture etc.) for any period during the previous year relevant to the assessment years mentioned specified in sub-section (5) of section 11 of the Act"?

(ii) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT is right in setting aside the order passed by CIT(E) inspite of the fact that the assessee has



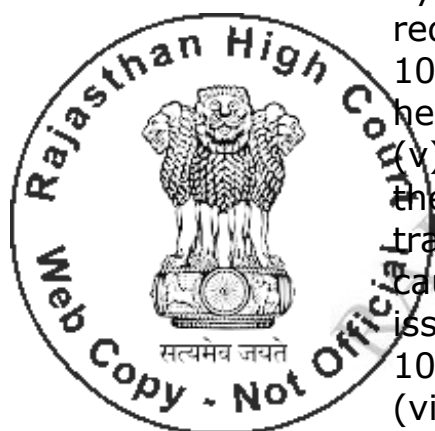
not invested its funds in the modes specified u/s 11(5) of the IT Act, 1961?

(iii) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT is right in setting aside the order passed by the CIT(E) inspite of the fact that the assessee has provided undue benefit to the specified person covered u/s 13(3) of the IT Act, 1961?

(iv) Whether on the facts and in circumstances of the case and in law, the Hon'ble ITAT is right in deciding that show cause notice should be signed by CIT(E) inspite of the fact that only requirement under 13th proviso to the section 10(23C) has complied by conducting personal hearing?

(v) Whether on the facts and in circumstances of the case and in law, the Hon'ble ITAT is right in travelling beyond law in pointing defect in show cause notice, when there is no requirement of issuing notice under the 13th proviso to section 10(23C)?

(vi) Whether on the fact and in circumstances of the case and in law, the Hon'ble ITAT is right in not appreciating the fact that the ITO(Hq.)/AC/DC(Hq.) does not have any independent power to issue such notices and they act on behalf of CIT(E) while issuing these notices?



3. Counsel for the appellant has firstly taken us to the order of the tribunal and contended that the tribunal has committed an error in holding that the person who has produced in evidence has no jurisdiction and has wrongly considered the provisions of Section 10(23C) and has given the benefit to the assessee.

4. In our considered opinion, in view of the observations made by the tribunal, which reads as under:-

10. We have considered the rival submissions as well relevant material on record. The first objection of the assessee is regarding the validity of show cause notice that it was not signed by the competent authority and therefore, it is invalid. The power and jurisdiction to withdraw the approval granted u/s 10(23C)(vi) of the Act is provided under 13th proviso to the said section which reads as under:-

"Provided also that where the fund or institution referred to in sub-clause (iv) or trust or institution referred to in sub-clause (v) is notified



by the Central Government 7 [or is approved by the prescribed authority, as the case may be,] or any university or other educational institution referred to in sub-clause (vi) or any hospital or other medical institution referred to in sub-clause (via), is approved by the prescribed authority and subsequently that Government or the prescribed authority is satisfied that—

(i) such fund or institution or trust or any university or other educational institution or any hospital or other medical institution has not—

(A) applied its income in accordance with the provisions contained in clause (a) of the third proviso; or

(B) invested or deposited its funds in accordance with the provisions contained in clause (b) of the third proviso; or

(ii) the activities of such fund or institution or trust or any university or other educational institution or any hospital or other medical institution—

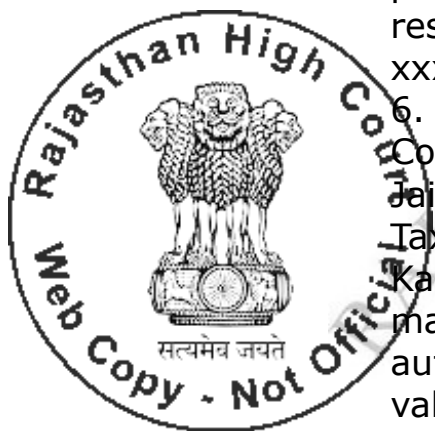
(A) are not genuine; or

(B) are not being carried out in accordance with all or any of the conditions subject to which it was notified or approved,

it may, at any time after giving a reasonable opportunity of showing cause against the proposed action to the concerned fund or institution or trust or any university or other educational institution or any hospital or other medical institution, rescind the notification or, by order, withdraw the approval, as the case may be, and forward a copy of the order rescinding the notification or withdrawing the approval to such fund or institution or trust or any university or other educational institution or any hospital or other medical institution and to the Assessing Officer”

The 13th proviso to section 10(23C)(vi) confers the power/ jurisdiction to withdraw the approval to the Government or the prescribed authority. It further postulates that the prescribed authority, if satisfied that such fund or institution has not complied with the conditions as provided thereunder, can withdraw the approval. For Initiation of proceedings to withdraw the approval the mandatory pre-condition is the satisfaction of the prescribed authority. Undisputedly the prescribed authority is the Id. CIT(E) and the satisfaction of the prescribed authority is a must before issuing the show cause notice for withdrawal of the approval granted u/s 10(23C)





"2. In this regard, I am directed to state that your institution/society has violated the provisions of Section 10(23C)(vi) of the Act in respect of following issues:-

The language and tenor of the show cause notice do not exhibit any thought process of Id. CIT(E) but it reveals it was issued and signed by DCIT(Hqr.) as per instructions and directions of Id. CIT(E). The matter would have been different if the show cause notice brings out the thought process and application of mind by the Id. CIT(E) but was only signed by the DCIT (Hqr.). In case in hand it is apparent that the Id. CIT(E) delegated its powers to DCIT (Hqr.) to issue show cause notice and therefore, it is based on the satisfaction of the DCIT (Hqr.) and not of Id. CIT(E). para 2 and 6 of the impugned show cause notice clearly manifest that it was issued by the DCIT (Hqr.) and not by the CIT(E). The language of the show cause notice does not give any impression or inference that it is an expression of the satisfaction of Id. CIT(E). The Kolkata Bench of this Tribunal in case of Arun Kanti vs. CIT (supra) while considering the issue of validity of show cause notice issued u/s 263 of the Act not signed by the Id. CIT has observed in para 5 and 5.1 as under:-

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under section 11(5) of the Act. However, it is noticed that the society has made advances which is neither as per the objects nor in the modes prescribed u/s 11(5) of the Act. In the Balance Sheet as on 31.03.2013, it is noticed that the society has shown loans and advances in the following names:-

S.No.	Name	Amount
1	Trumurti Colonisers & Builders Pvt. Ltd.	1,38,00,000/-
2	A.K. Education Welfare Society	1,00,00,000/-
3	Ambience Land Developer	60,07,953/-
4	Surendra Kumar Meena	3,00,00,000/-



5.1 M/s Trimurti Colonizers & Builders Pvt. Ltd.:

On perusal of ledger accounts of M/s Trimurti Colonizers & Builders Pvt. Ltd produced during the course of assessment proceedings, it has been revealed that the balance as on 31.03.2013 was of Rs. 1,38,00,000/-. The balance advances as on 31.03.2014 in the name of aforesaid company is also shown as Rs. 1,38,00,000/-. The society has submitted that it has given advances to aforesaid company for purchasing of land and society has not charged any interest on such advances. Perusal of 'Application Form' submitted by the assessee in respect of allotment of plot, it has been revealed that date, amount and place etc. are not mentioned on the said form. As per submission of the society, even till today any land/immovable property was not purchased out of these advances.

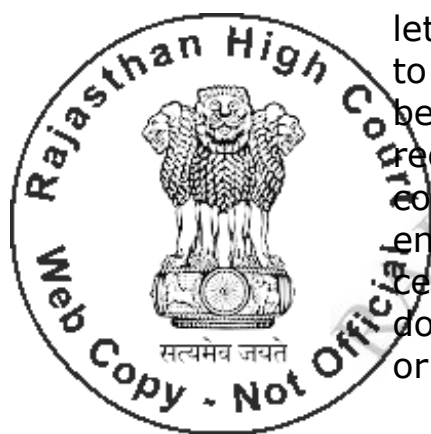
On giving show cause in this regard vide its reply dated 25.07.2016, the A/R of the assessee submitted as under:

i) Advance given to Trimurti Colonizers & Builders Pvt. Ltd- The society has given advances to Trimurti Colonizers & Builders Pvt. Ltd. for purchasing of land at The Future city at phagi Jaipur. The advance was given for setting up an educational institution at Jaipur. M/s Trimurti Colonizers & Builders could not give us converted land because they could not get land converted. Your good self has mentioned that this advance given cannot be said for charitable activities and there is violation of section 11(5) of the IT Act, 1961. Sir, this advance is given for acquisition of land for opening of school and in accordance with the sole object of the society. Further clause (x) of the section 11(5) permits "investment in immovable property" as one of the modes of investment of funds, so there is no violation of section 11(5) of the Act.



Further vide reply dated 10.08.2015 submitted as under: "The above party has informed us the final hearing of Gutab Kothari V/s State has completed and they are waiting for decision, however we have informed them that either they should give us land by end of this month or return our money. Please note that they are no way connected to us or neither we have any business relation with them except for this particular deal." Further vide reply dated 02.09.2016 submitted as under:-

Regarding outstanding amount as informed in our letter dated 10.08.2016 that we had given time to party either to give land or refund the money before the end of August, 2016, now they have requested that the present time is very bad for construction industries and they wanted time till end of this year. They assured us that they will certainly fulfill their commitment. In fact we also do not have any other option to wait till year end, or to file a case against them."

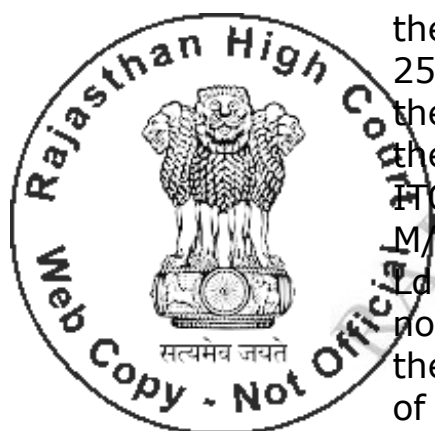


A similar view was taken by the Kolkata Bench of this Tribunal in case of M/s Assam Bangal Carriers vs. CIT (supra) in paras 7 and 8 as under:-

"7. We have considered the rival submissions. A perusal of the records shows that the show cause notice u/s 263 of the Act dated 26.02.2013 was signed by A.C.I.T.(HQ)-XXI, Kolkata and not by C.I.T. The question regarding validity of the order passed u/s 263 of the Act when the show cause notice u/s 263 of the Act is not signed and issued by C.I.T. and had come for consideration before this Tribunal in the case of Bardhman Co-op Milk Producers' Union Ltd. Vs CIT, Burdwan (supra). This Tribunal on identical facts as in the present case has held as follows :- "4. We have carefully considered the submissions and perused the record and we find that delay of 290 days in filing in these cases has been attributed to mistake on the part of assessee's counsel. The counsel has clearly admitted the mistake on his part. When the delay in filing of these appeals is attributed to the mistake of the consultant, in our considered opinion, assessee should not be penalized on this count. The case law referred by the Ld. counsel for the assessee also supports this proposition. Accordingly, we condone the delay. 5. As regards the matter in appeal, we note that the same is against order passed by the Ld. CIT u/s. 263 of the Act. At the outset, in this case, Ld. counsel for the assessee pointed out that the notice to the assessee u/s. 263 of the Act in these case, was issued by letter dated 06-03-2007. The said



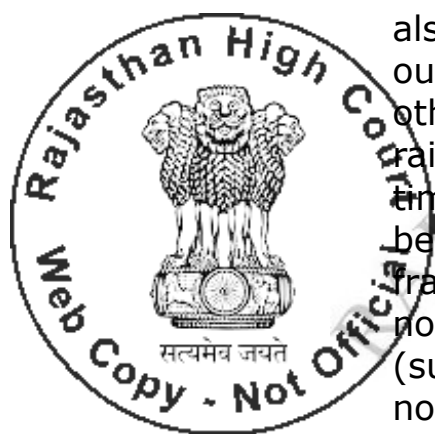
notice was signed by ACIT, Hqrs., Burdwan for Commissioner. Referring to this aspect, the Ld. counsel for the assessee pleaded that Section 263 of the Act provides for notice and adjudication by the Ld. CIT. Ld. counsel for the assessee claimed that since notice u/s. 263 of the Act has not been signed by the Ld. Commissioner. The jurisdiction assumed is defective and the order u/s 263 of the Act, is liable to be quashed on this ground itself. In this regard, Ld. counsel for the assessee referred to the decision of Hon'ble Allahabad High Court in the course of cit v. Rajesh Kumar Pandey (2012) 25 taxmann.com 242 (All.). The Ld. counsel for the assessee further referred to the decision of the Tribunal in the case of Satish Kumar Kashri v. MO 104 ITD 382 (Pat). ITA No.706/Kol/2013 M/s. Assam Bengal Carriers. A.Yr.2008-09 4 6. Ld. DR on the other hand submitted that above is not the material defect and he submitted that there is no reason to set aside the order u/s. 263 of the Act, on this account. 7. We have carefully considered the submissions and perused the record. We find that Section 263(1) of the Act provides as under:- "The CIT may call for and examine the record of any proceeding under this Act, and if he considers that any order passed by the AO is erroneous insofar as it is prejudicial to the interest of Revenue he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing fresh assessment." Now we can also refer to the notice u/s. 263 of the Act issued to the assessee. This notice was signed as under:- " Yours faithfully Sd/- Vikramaditya (Vikramaditdya) ACIT, Hqrs., Burdwan, For Commissioner." From the above, it is clear that the said notice u/s. 263 of the Act has not been signed by the "Commissioner of Income Tax" rather it has been signed by ACIT, Hqrs., Burdwan. The Hon'ble Allahabad High Court in the case of Rajesh Kumar Pandey (supra) has expounded that when the Ld. CIT has not recorded his satisfaction, but it was the satisfaction of the Income Tax Officer (Technical) who is not competent to revise his order u/s. 263 of the Act, the order passed was liable to be set aside. The relevant portion of the order of Hon'ble Allahabad High Court reads as under:- "6. On perusal of the aforesaid provisions, it will be abundantly clear that the provisions of Section 299-BB deals with the procedure for service of





notice and in case, there is a defective service of notice, it provides that if the assessee has cooperated, it will not be open for him to raise the plea, whereas in the instant case, it is not the case of the service of notice, but the initial issuance of notice, which has not been signed by the competent authority as a finding has been recorded by the Tribunal that the notice has been issued under the signature of Income-tax (technical), whereas in view of the provisions of powers under Section 263(1), it is only the Commissioner of Income-tax to issue notice. It is also relevant to add that pleas can be raised only out of the judgment passed by the Tribunal or other authorities, but the plea, which was not raised at any stage, cannot be raised for the first time before this Court. No other arguments have been advanced in respect of other questions framed in the memo of appeal.” 8. Similarly, we note that in the case of Satish Kr. Keshari (supra), the Tribunal had held that when the notice u/s. 263 of the Act was not under the seal and signature of Ld. CIT and suffered for want of details on the basis of which Ld. CIT came into conclusion that the order of Assessing Officer is erroneous and prejudicial to the interest of Revenue, assumption of jurisdiction u/s. 263 of the Act by the Ld. CIT was invalid. ITA No.706/Kol/2013 M/s. Assam Bengal Carriers. A.Yr.2008-09 5 9. From the above discussion regarding the provision of law and the case law in this regard, it is clear that for a valid assumption of the jurisdiction u/s. 263 of the Act, the notice issued u/s. 263 of the Act should be issued by the Ld. CIT. In this case, it is undisputed that notice was issued by ACIT, Hqrs, Burdwan who is not competent to assume jurisdiction u/s. 263 of the Act. Hence, the notice was not under the seal and signature of Ld. CIT. Hence, as per the precedents referred to above, the assumption of jurisdiction u/s. 263 of the Act in this case is not valid. Accordingly, the order u/s. 263 of the Act passed in these cases are quashed.” 8. Facts of the present case being identical to the case referred to above, respectfully following the aforesaid decision we hold that the assumption of jurisdiction u/s 263 of the Act in the present case is not valid. Order u/s 263 of the Act is accordingly quashed and the appeal of the assessee is allowed. In view of the above conclusion, the other grounds of appeal are not taken into consideration.”

The Hon’ble Allahabad High Court in case of CIT vs. Rajesh Kumar Pandey (supra) while dealing

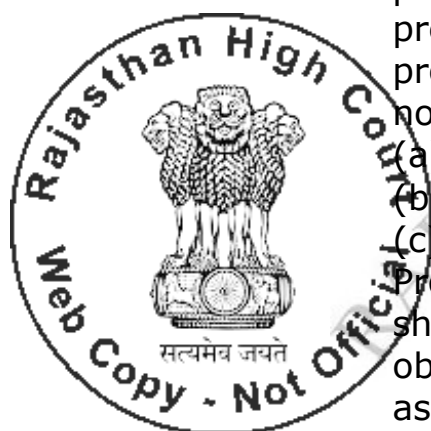




with the validity of notice and applicable of the provisions of section 299BB has observed as under:-

"299BB Notice deemed to be valid in certain circumstances— Where as assessee has appeared in any proceeding or cooperated in any inquiry relating to an assessment or reassessment, it shall be deemed that any notice under any provision of this Act, which is required to be served upon him, has been duly served upon him in time in accordance with the provisions of this Act and such assessee shall be precluded from taking any objection in any proceeding or inquiry under the Act that the notice was--

(a) not served upon him; or
 (b) not served upon time in time; or
 (c) served upon him in an improper manner;
 Provided that nothing contained in this section shall apply where the assessee has raised such objection before the completion of such assessment or reassessment."



Thus, it is settled proposition of law that the notice issued by the authority other than the prescribed authority is not valid and consequential order passed by the Id. CIT(E) is without jurisdiction. The show cause notice confers the jurisdiction to proceed and to pass the order. In case the notice itself is not valid then the jurisdiction assumed by the prescribed authority based on the invalid notice become invalid and consequential order passed by the authority is invalid and void abinitio for want of jurisdiction. Further, invalid show cause notice vitiates the proceeding and consequential order. Hence, we are of the considered opinion that the impugned order passed by the Id. CIT(E) is invalid and liable to quash on this ground.

5. Even on merits, the trip which was conducted was an educational trip and only the Director was picked up. In that view of the matter, no substantial question of law arises.

6. The appeal stands dismissed.

(ASHOK KUMAR GAUR),J

(K.S. JHAVERI),J

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