

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ - अहमदाबाद /

**IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD - BENCH 'D'**

**BEFORE SHRI AMARJIT SINGH, ACCOUNTANT
AND
MS.MADHUMITA ROY, JUDICIAL MEMBER**

आयकर अपील सं./ ITA No.1454/Ahd/2017

निर्धारण वर्ष/Asstt. Year: 2009-10

Dilip Hiralal Mehta-HUF Prop. of Ispat Incorporate B-208, Nirman Complex Opp: Havmor Restaurant Navrangpura, Ahmedabad PAN : AAHEM 4045 F	Vs.	ITO, Ward-5(2)(2) Ahmedabad.
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अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)
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Assessee by :	Shri T.P. Hemani, and Shri Parimal B. Parmar, AR
Revenue by :	Shri Santosh Karnani, Sr.DR

सुनवाई की तारीख/Date of Hearing : 22/11/2019

घोषणा की तारीख/Date of Pronouncement: 30/01/2020

आदेश/ORDER

PER Ms.MADHUMITA ROY, JUDICIAL MEMEBR:

Present appeal at the instance of the assessee is directed against order dated 20.3.2017 passed by the Ld.Commissioner of Income-tax (Appeals)-5, Ahmedabad arising out of order dated 13.3.2015 passed by the Ld.Assessing Officer-5(2)(2), Ahmedabad under section 143(3) r.w.s. 263 of the Income Tax Act, 1961 (hereinafter referred to as "the Act") for the assessment year 2009-10 with the following grounds:

"1. The learned CIT(A) has erred both in law and on the facts of the case in confirming the action of AO in passing an order u/s

143(3) rws 263 of the Act which was beyond the directions of the revision and thus illegal and without jurisdiction.

2. The learned CIT(A) has erred both in law and on the facts of the case in confirming the action of AO in disallowing Rs.4,73,852/- u/s.40A(3) of the Act.

3. The learned CIT(A) has erred both in law and on the facts of the case in confirming the disallowance of expenses to the extent of Rs.23,894/- u/s.40(a)(ia) r.w.s. 194C of the Act.

4. Both the lower authorities have passed the orders without properly appreciating the facts and they further erred in grossly ignoring various submissions, explanations and information submitted by the appellant from time to time which ought to have been considered before passing the impugned order. This action of the lower authorities is in clear breach of law and Principles of Natural Justice and therefore deserves to be quashed.

5. The learned CIT(A) has erred in law and on facts of the case in confirming action of the Id. AO in levying interest u/s.234A/B/C of the Act.”

2. Technically, the first ground relates to the jurisdictional error of the Ld.CIT(A) in passing the order under section 143(3) r.w.s. 263 of the Act, which ultimately touches the merit of the matter. We therefore think it proper to deal with the merit on the issue as raised before us by the assessee.

3. First ground on merit relates to disallowance of Rs.4,73,852/- under section 40A(2) of the Act.

4. The brief facts leading to the case is this that the assessee, an individual filed his return of income on 15.9.2009 declaring total income at Rs.7,48,860/- which was finalized under section 143(3) of the Act on 25.11.2011 upon determining total income at Rs.8,01,160/-; and addition of Rs.52,3000/- was also made. Subsequently an objection on

behalf of the audit party has been raised, and ultimately by and under an order dated 25.3.2014 passed by the Ld.CIT-III, Ahmedabad, the matter has been restored to the file of the Ld.AO with a direction to re-examine the issues raised by the internal audit party regarding disallowance under section 40A(3) of the Act.

5. Pursuant to such direction, notice under section 142(1) of the Act was issued to the assessee with direction upon him to produce original documents in respect of cash payments made and the details of TDS made on freight, *dalali*, commission and cartage expenses. Upon verification of these documents, it came to the knowledge of the Ld.AO that there were sixteen payments in cash exceeding Rs.20,000/- for an aggregate amount to the tune of Rs.4,73,852/- which was ultimately added to the total income of the assessee under section 40A(3) of the Act which was, in turn, confirmed by the Ld.CIT(A).

6. At the time of hearing of the appeal, the Ld.Advocate appearing for the assessee submitted before us that the order passed by the Ld.AO, subsequently confirmed in appeal, was not in terms of order passed by the Ld.Commissioner under section 263 of the Act dated 25.3.2014 whereby and wherein the Ld.AO has been directed to examine the entire issue afresh and to allow the expenses after thorough verification, and upon being satisfied that the expenses were genuinely incurred for the purpose of the assessee's business. Furthermore, there was no violation of provisions of section 40A(3) of the Act. Moreover, the Ld.AO has considered the labour payment made by the assessee, which is not subject matter of consideration by the revisional authority during the revisional proceedings. It was further argued by the Ld.Advocate for the assessee that the Ld.AO ought to have been exercised his jurisdiction and power in relation to items forming part of the notice issued by the Commissioner, nor the items which were not considered by the Ld.CIT during the proceedings under section 263 of

the Act. According to him since disallowance made under section 40A(3) r.w.s. 263 is beyond jurisdiction of the Ld.AO, it deserves to be deleted. In support of his contentions, he relied upon the judgments passed by the Hon'ble jurisdictional High Court in the case of CIT vs. D.N. Dosani, 280 ITR 275 (Guj). A copy thereof has also been submitted before us.

7. On the contrary, the Ld.DR relied upon the orders passed by the authorities below.

8. Heard parties. We have also carefully considered the relevant documents available on record. At the very outset, we would like to refer the order passed by the Ld.CIT dated 25.3.2014 under section 263 of the Act. The relevant direction therein is reproduced hereinbelow:

“5.4 Therefore, this issue is set-aside to the file of the Assessing Officer to examine the same afresh. He is directed to verify the vouchers to be produced in original and also identify the persons to whom the payments are made and whether they were employees of the assessee-HUF and authorized to incur such expenses. Though, prima facie, the provisions of section 40A(3) are attracted on the face of these details, but the A.O. is directed to examine the entire issue afresh and allow the expenses after thorough verification and satisfy himself that the expenses were genuinely incurred for the purpose of assessee's business and no violation of provisions of section 40A(3) of the Act is made.”

9. It appears from the above that the Ld.AO was directed to re-examine the issue of office expenses paid in excess of Rs.20,000/- and not the labour payments paid in excess of Rs.20,000/-. Thus, the labour payments, whether paid in excess of Rs.20,000/- or not, could not be subject matter of adjudication by the revisional authority during the revisional proceeding. However, taking into consideration this particular aspect of the matter, the Ld.AO proceeded to make addition of the amount aggregated to Rs.473,852/- on the basis of cash payment made in excess of Rs.20,000/- on sixteen occasions; whereas from the documents as submitted by the Ld.Advocate for the assessee,

it appears that all the payments were made through banking channels starting from Rs.25,000/- to Rs.43,200/- commencing from 9.4.2008 to 6.3.2009. In fact, in our considered opinion, jurisdiction, which has been vested upon the Ld.AO has not been taken care of; rather the Ld.AO has acted beyond jurisdiction, as conferred by the Ld.CIT under the order dated 25.3.2014 under section 263 of the Act. In this regard, we have also considered judgment relied upon by the Ld.Advocate appearing for the assessee in the case of D.N. Dosani (supra). The relevant portion whereof is as follow:

"11. Considering the issue from a slightly different angle, the assessee was called upon by the Commissioner of Income-tax to tender explanation qua two items mentioned in the show-cause notice. On a plain reading of section 263(1) of the Act, it is apparent that the Commissioner of Income-tax could not have treated any further item or part of the assessment order as being erroneous and prejudicial to the interests of the Revenue without giving the assessee an opportunity of being heard. Therefore, what the Commissioner of Income-tax himself could not have done, cannot be permitted to be done by the Assessing Officer while giving effect to the order under section 263 of the Act. It is necessary to bear in mind that the powers of revision can be exercised only by the Commissioner of Income-tax and, therefore, the Assessing Officer cannot, under the guise of framing fresh assessment, exercise the said powers in relation to other items forming part of the assessment record. The provision which permits exercise of jurisdiction under section 263 of the Act in the first instance requires the Commissioner of Income-tax to call for and examine the record of any proceeding under the Act. The logical presumption is, therefore, that before issuance of show-cause notice under section 263 of the Act, the Commissioner of Income-tax has examined the record, and found prima facie that the assessment order is erroneous and prejudicial to the interests of the Revenue only in relation to the items mentioned in the show-cause notice. For the Assessing Officer to substitute his opinion in place of the opinion of the Commissioner of Income-tax is not envisaged by the provision and, therefore, also, the action of the Assessing Officer in expanding scope of consequential assessments cannot be upheld.

12. The scheme of the Act has provided different powers to different authorities and these are required to be exercised after satisfying the pre-requisite conditions and jurisdictional facts. The Assessing Officer can disturb/reopen a finalised assessment by invoking his powers either under section 154 or under section 147 of the Act, provided he can show that the necessary requirements are fulfilled. If, what the Revenue contends today is accepted, these and other such provisions which

empower different authorities to exercise jurisdiction at different points of time in distinct settings would be rendered otiose and that can never be the legislative intent. It is almost akin to providing separate keys for separate locked doors and the person wanting to open a particular door is required to apply the correct key which matches the concerned lock. Therefore, in proceedings to give effect to an order under section 263 of the Act, the Assessing Officer cannot be permitted to undertake an exercise not warranted by the legislative scheme.

13. The Tribunal was, therefore, right in holding that the operative part of the order under section 263 of the Act has to be read in the context of what had preceded, namely, the discussion in the revisional order, and both the notice and the order under section 263 of the Act, have to be read as a whole. That the direction to the Assessing Officer to redo the assessments is after looking into the aspects discussed by the Commissioner of Income-tax in his order and the directions made in the body of the order. The sentence recorded in paragraph No. 7 of the revisional order cannot be read in isolation, nor can it be read by omitting a certain portion of the sentence so as to mean that the Assessing Officer was entitled to process further items while giving effect to the order under section 263 of the Act. The Tribunal was, therefore, justified in holding that the Assessing Officer had travelled beyond his jurisdiction.

14. The decision in the case of Geo Industries and Insecticides (I.) (P.)Ltd. (supra) is not an authority for the proposition that the Revenue is canvassing in the present case. In fact, the observations made by the Hon'ble High Court of Madras at page 545 accord with the view that this Court has expressed. What is stated thereafter does not appear to be a correct expression of the legal position and this Court is in respectful disagreement with the opinion expressed by the Hon'ble High Court of Madras.

15. Thus, on the facts and circumstances of the case, the Tribunal was right in law in holding that, in the fresh assessment orders passed in pursuance of the consolidated order under section 263 of the Act, the Assessing Officer was entitled to consider only those two items which had been considered by the Commissioner of Income-tax and was not entitled to consider any other item afresh for making additions. The question referred at the instance of the Commissioner is, therefore, answered in the affirmative, i.e., in favour of the assessee and against the Revenue."

10. In that particular case, the Ld.AO since exercised his jurisdiction beyond two items, which has been considered by the Ld.CIT, deletion of addition made by the authorities below, has been upheld by the Hon'ble

jurisdictional High Court. Similarly, since nowhere in the order dated 25.3.2014, the Ld.CIT utters about the items relates to the labour expenses, and thus, considering the same, we find that the Ld.AO travelled beyond jurisdiction conferred upon him, which has been wrongly been upheld by the Ld.First Appellate Authority. Hence, the same is liable to be deleted. Therefore, we delete the same, we allow this ground of appeal in favour of the assessee, and against the Revenue.

11. The next ground of appeal is confirmation of disallowance of Rs.23,894/- under section 40(a)(ia) r.w.s. 194C of the Act.

12. Heard parties. It appears from the record that the Ld.AO has made disallowance of Rs.8,51,239/- under section 40(a)(ia) of the Act on the ground of non-deduction of TDS. The Ld.CIT(A) in appeal partly confirmed the addition of Rs.23,894/- in respect of payment made to one Hindustan Roadways. This was added only on the ground that a single payment exceeding Rs.20,000/- was paid. However, it appears from the page no.87 of the paper book that an amount of Rs.18,000/- was paid to the said concern by the assessee on 27.6.2008 and subsequently on 1.7.2008 another amount of Rs.5,894/- was paid. Therefore, the finding of the Revenue that payment has been exceeded Rs.20,000/- in a single mode is factually incorrect.

The assessee's case is that since payments did not exceed Rs.20,000/- question of paying TDS under section 194 does not arise, and thus, disallowance is not called under section 40(a)(ia) of the Act, which was argued by the Ld.AR which in our considered view is having real force, and thus the addition is not sustainable. We therefore find no merit in

such addition made by the authorities below. The same is, therefore, deleted and this ground of appeal is allowed.

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

Order pronounced in the Court on 30th January, 2020 at Ahmedabad.

Sd/-
(AMARJIT SINGH)
ACCOUNTANT MEMBER

Sd/-
(Ms.MADHUMITA ROY)
JUDICIAL MEMBER