



**IN THE INCOME TAX APPELLATE TRIBUNAL,
CUTTACK BENCH, CUTTACK**

**BEFORE SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER
AND LAXMI PRASAD SAHU, ACCOUNTANT MEMBER**

ITA No.165/CTK/2019

Assessment Year : 2014-15

Shailesh Kumar Gandhi, Prop. M/s. Gandhi Agencies, Alamchand Bazar, Cuttack	Vs.	Pr. CIT, Cuttack
PAN/GIR No.AAZPG 8268 R		
(Appellant)	..	(Respondent)

Assessee by : Shri D.K.Sheth, AR
Revenue by : Shri Subhendu Dutta, DR

Date of Hearing : 20/02/ 2020
Date of Pronouncement : 15 /06/2020

ORDER

Per C.M.Garg,JM

This is an appeal filed by the assessee against the order dated 30.3.2019 of the Pr. CIT, Cuttack under section 263 of the Act for the assessment year 2014-15.

2. The effective grievance of the assessee is that Id Pr. CIT, Cuttack is not justified in holding that the order of the AO is erroneous and prejudicial to the interest of revenue.

3. The facts of the case are that the assessee derives business income from a proprietorship concern, M/s. Gandhi Agencies, dealing in pharmaceutical items. The Assessing Officer completed the assessment

u/s.143(3) of the Act on 27.12.2016, determining the total income at Rs.23,43,160/-.

4. Later on, Ld. Pr. CIT in exercise his power under section 263(1) of the Act, called for the assessment records for his perusal and examination. On verification of audited profit and loss account, he noticed that the assessee had claimed expenditure of Rs.5,87,407/- towards incentive "to nine persons of Rs.5.87,407/- in procuring orders from Government Hospital and Muncipial offices. Ld. Pr. CIT observed that payment to above persons as incentive is not correct as they are not the employees of the assessee. Even otherwise, the DTD was not deducted from the said payment under section 194H of the Act.

5. Furthermore, Ld. Pr CIT noticed that the assessee had claimed Rs.49,96,750/- towards commission and out of the said payment, Rs.40,50,000/- was paid to persons (relatives) specified under section 40A(2)(b) of the Act. The Assessing Officer has accepted the payment of commission without verifying the nature of work done by the relatives. In respect of balance amount of Rs.9,46,150/- paid to persons other than those covered under section 40A(2)(b) of the Act, the AO ought to have verified about the nature of work done by the related persons for the assessee and whether they are qualified to do such work. Hence, the AO has mechanically accepted the claim of the assessee.

6. Further, the Ld. Pr. CIT noticed that the assessee had introduced capital of Rs.28,00,000/- during the relevant financial year. The assessee stated that Rs.15,00,000/- had been received by cheque and balance Rs.13,00,000/- by way of cash. The source of cash of Rs.13,00,000/- by way of cash was explained to be cash availability for the preceding year by way of withdrawals from own savings and from receipts of gifts. From the gift deeds, Id. Pr. CIT observed that the gifts received from three persons, which was not enquired by the AO during the assessment proceedings. Since, the AO has not verified the claim of the assessee, Pr. CIT in exercising of his powers u/s.263 of the Act, set aside the assessment order for limited purpose of adjudication of above three issues afresh.

7. We have considered the arguments of both the sides carefully and gone through the material placed on the record of the Tribunal, inter alia, revisional order passed by Pr. CIT u/s.263 of the Act dated 30.3.2019, paper book filed by the assessee.

8. Ld counsel for the assessee submitted that Pr. CIT has issued show cause notice dated 16.11.2018 without any basis and against the mandate of section 263 of the Act. Ld counsel submitted that regarding issue of incentive as picked up by Pr. CIT for revision, from para 3 of the assessment order, it is very much clear that the AO has considered details furnished by the assessee during the assessment proceedings and same was partly accepted after examination and verification. Ld counsel

submitted that the AO applied his mind on this issue and went into deep enquiry and came up with the disallowance of Rs.53,964/- out of total claim of Rs.5,87,407/- towards incentive as the assessee could not be able to produce bills and vouchers pertaining to payment of incentive to Shri Prabin Kumar Samanta. Therefore, it cannot be alleged that the AO has not made any enquiry on the issue of incentive.

9. Ld counsel further submitted that from relevant paras 11 & 12 of the impugned revisional order of Pr. CIT, it is clear that Pr. CIT show caused the assessee to clear his doubt arose in his mind regarding five employees and in violation of principles of natural justice without show causing the assessee neither by show cause notice or note sheet entry, he proceed to hold that the incentive paid to these persons is nothing but a calculated attempt on the part of the assessee to substantiate his claim by furnishing distorted facts. Ld counsel vehemently pointed out that such kind of remark should not be made against any sincere and honest taxpayer, when he is ready to cooperate to the revenue authorities by way of submitting detailed facts and relevant documentary evidence. Ld counsel drew our attention towards assessment proceedings and also revisional proceedings on the issue of notice u/s.142(1) of the Act alongwith questionnaires vide dated 26.5.2016, which was replied by the assessee vide letter dated 7.7.2016 and the assessee submitted entire details regarding payment of commission to the related and unrelated persons and

showing that it was payment of commission and TDS @ 2% as applicable, was also deducted by the payer-assessee and replying to Q. No.31, the assessee submitted that detailed reply alongwith details of commission deducted thereto was submitted before the AO, was also verified and examined before allowing the claim of the assessee regarding payment of commission. Therefore, it cannot be alleged that the AO has not made enquiry in this regard.

10. Ld counsel also drew our attention towards top para at page 2 of the assessment order and submitted that during assessment proceedings, the assessee's case was represented by Shri Mohit Sheth, Advocate and he submitted that all details and explanations required to be filed before the AO and the same were properly taken on record after due verification and consideration during the course of hearing and issue raised during the course of assessment proceedings by way of questionnaire dated 26.5.2016, the AO offered reasonable opportunity of hearing and reply of the assessee alongwith relevant papers were also taken on record. Therefore, it is not a case of no enquiry also on the second issue of payment of commission to related & unrelated persons.

11. Ld counsel for the assessee further submitted that on the third issue picked up by Ld Pr. CIT regarding introduction of capital of Rs.28 lakhs by the assessee, the Assessing Officer issued notice vide dated 19.12.2016 show causing the assessee as to why total eight amounts, including the

amount of said capital should not be added to his income for the assessment year 2014-15, in absence of evidence/documents, which was replied by the assessee vide written submission dated 23.12.2016 and this fact has been acknowledged by Pr. CIT in his notice u/s.263 of the Act Para 8, which make it clear that the AO has made thorough enquiry of eight issues by way of issuing notice dated 19.12.2016, which was also properly replied by the assessee with cogent and self-speaking

explanation supported by relevant documentary evidences such as copies of bank statement, etc. Ld counsel also drew our attention towards balance sheet as on 31.3.2013 and submitted that at the beginning of the year, there was cash in hand of Rs.8,00,036.90 has been shown in the hands of the assessee, which was brought forward from financial year 2013-14 relevant to assessment year 2014-15. In addition to this cash in hand, the family members i.e. mother and daughter gifted an amount of Rs.21,51,000/- to the assessee on his birthday in cash. Ld counsel submitted that the AO found himself satisfied regarding the explanation of the assessee which substantiated the introduction of capital by way of cheque of Rs.15 lakhs, which is discernible from the copy of the bank statement of the assessee maintained with Bank of India A/c No.5100101000095882, wherein, capital of Rs.3 lakhs on 27.3.2014, and Rs.12 lakhs on 15.11.2013 has been credited from the account of the assessee firm Gandhi Agencies, which clearly establish the fact of banking

channel capital transfer. Ld counsel submitted that from entry on 31.12.2013 in the bank statement, it is clear that the assessee withdrew Rs.1 lakh in cash, Rs.8,00,036.90 was the opening capital brought from financial year 2012-13 and amount of gift of Rs.4,00,000/- from the daughter and Rs.17,51,000/- from the mother totalling to Rs.21,51,000/- is more than the amount of Rs.13 lakhs which was introduced in the capital account of the assessee in cash. Therefore, after examining and verifying the above details, the AO was right in accepting the claim of the assessee regarding introduction of capital to the firm. Ld counsel vehemently pointed out that the AO also went into deep while examining the issue of introduction of capital during the relevant financial period by way of issuing show cause notice and receiving reply and relevant materials in support of the receiving of gifts. Therefore, it is not a case of insufficient or inadequate enquiry, hence, the impugned assessment order cannot be alleged as erroneous and prejudicial to the interest of the revenue.

12. Ld counsel also placed reliance on the decision of Hon'ble Delhi High Court in the case of ITO vs. D.G.Housing Projects reported at 343 ITR 329(Del) and submitted that a distinction must be drawn in the cases where the Assessing Officer does not conduct an enquiry; as lack of enquiry by itself renders the order erroneous and prejudicial to the interests of the Revenue and cases where the Assessing Officer conducts an enquiry but the finding recorded is erroneous and which is also prejudicial to the interests of

the Revenue. In the later type of cases, the Commissioner has to examine the order or the decision taken by the Assessing Officer on the merits and then form an opinion on the merits that the order passed by the Assessing Officer is erroneous and prejudicial to the interests of the Revenue. In the second set of cases, the Commissioner cannot direct the Assessing Officer to conduct further enquiry to verify and find out whether the order passed is erroneous or not."

13. Replying to above, Id CIT DR drew our attention towards para 3 of the assessment order and submitted that the AO has not made sufficient enquiry on the issue on payment of incentives. Further, Ld CIT DR submitted regarding issue of commission that the AO only call for information, details and documents and same was placed on record without any enquiry and deliberation in the assessment order, therefore, it has to be held that there was no enquiry on this issue. Placing reliance on the decision of Hon'ble Apex Court in the case of Smt. Tara Devi Aggarwal vs. CIT, 88 ITR 323 (SC), para -8, Ld CIT DR submitted that lack of proper enquiry on the part of Assessing Officer would result assessment order to be erroneous and prejudicial to the interest of the Revenue.

14. Ld CIT DR drew our attention to paras 11& 15 of impugned revisional order of Pr. CIT and submitted that while holding the assessment order erroneous and prejudicial to the interest of the revenue, Pr. CIT has made detailed enquiry and deliberations. Therefore, same cannot be disturbed or

dismissed. Ld CIT DR also submitted that on the above facts, when the AO has not made proper and sufficient enquiry on the issue of payment of commission, the assessment order has to be held as prejudicial to the interest of the revenue and in these circumstances, Ld Pr. CIT is empowered and entitled to invoke revisional power available u/s.263 of the Act.

15. Ld CIT DR also relied on the judgment of Hon'ble Gauhati High Court in the case of CIT vs Jawahar Bhattacharjee, 342 ITR 74 (Gau) in support of his contention.

16. Placing rejoinder to above submission of Id CIT DR, Ld counsel submitted that in the case of D.G. Housing Project (supra), Hon'ble High Court has made distinction in para 18 between the two types of cases and Their Lordships have held that where the AO conduct enquiry, the Commissioner cannot direct the AO to conduct further enquiry to verify and find out whether the assessment order is erroneous or not. In the case no enquiry or inadequate enquiry, the Commissioner is required to make himself required to enquiry the allegedly assessment order as alleged, which has not been done by Pr. CIT, therefore, impugned order has to be held as bad in law and all consequential proceedings should be quashed.

17. On careful consideration of the rival submissions, from the copy of the show cause notice available at pages 1 to 5 of assessee's paper book, it

is ample clear that Ld Pr. CIT has shown his intention to invoke provisions of section 263 of the Act on three issues viz; payment of incentives, payment of commission and introduction of capital during the relevant financial year.

18. From the relevant part of the assessment order para 3, it is clearly discernible that the AO has made enquiry on the issue of incentive and has also made part disallowance of Rs.58,570/- as the assessee could not be able to produce self-supporting bills and vouchers against Shri Pravin Kumar Samant. At the same time, from the relevant part of the impugned order of Ld Pr. CIT paras 3 & 4, we clearly observe that Pr. CIT firstly verified the audited profit and loss and account and noticed that the factum of payment of incentives of Rs.5,87,407/- to nine persons and, thereafter, from paras 9 to 14, we observe that Pr. CIT personally examined and verified the issue of payment of incentives but did not show cause the assessee to explain as to whether the persons listed at Sl. No.1 to 5 were his employees. Only because these persons have not been included in Annexure-1, the revenue authorities cannot safely presume that actually incentive has not been paid to them and it is a calculative attempt of the Pr. CIT to make addition of incentive without show causing the assessee. When any doubt arose in the mind of the revenue authorities, then they are empowered to call upon the assessee or to show cause the assessee to explain the facts and only a valid presumption and conclusive fact can be extorted from the record

otherwise it would amount to violation of natural justice. We are satisfied that the AO has made enquiry on the issue of payment of incentive and he has also made partial disallowance on this issue. Therefore, the action of the Id CIT(A) in this regard cannot be held as sustainable and tenable.

19. So far as issue of payment of commission is concerned, from the copy of notice u/s.142(1) of the Act dated 26.5.2016, which was issued alongwith questionnaire and reply filed by the assessee vide dated 7.7.2013, it is clear that the AO asked the assessee to submit various details totalling to 33 numbers including the issue of payments made by way of interest, commission or brokerage, rent, royalty, fees for professional services or fees for technical service to which section 40(a)(ia) applies. This notice alongwith questionnaire was replied by the assessee regarding payment of commission alongwith required confirmations which shows that the commission payment has been made after deducting TDS @ 10% and it is not a case of Pr. CIT that payment of commission has been made by the assessee without making any TDS. This show cause notice and questionnaire issued by the AO and replied filed by the assessee alongwith relevant documents shows that the AO also made enquiry on the issue on payment of commission and TDS thereon and thereafter allowed the claim of the assessee pertaining to payment of commission. Therefore, it cannot be alleged that the AO has not made any enquiry before allowing payment of commission to the related and unrelated parties.

20. In reply to show cause notice u/s.263 of the Act, the assessee categorically explained that the assessee earns commission from different companies on procuring order from Government Health Departments & Hospital & Municipal Corporation and the assessee being individual cannot move from one place to another place for enhancement of business. Therefore, the assessee appoints different middlepersons to represent him and gets the business for him. These different persons received commission against work brought by them and these commission agents against receipt of commission provides services not only to procure orders but also see that proper delivery of goods are made in time and also look after that payments are received from the consignee in time. These facts have not been negated by the Id. Pr. CIT in any manner, thus, we hold that the payment of commission has direct nexus with the services rendered by the recipient of commission and it was paid against their contribution in the enhancement of business of assessee. Thus, it was to be held that the commission has been paid for the business purpose and the AO was right in allowing the same after due verification and examination through proper enquiry.

21. On the issue of introduction of capital, from the copy of notice dated 19.12.2016, and reply to the same by the assessee before the AO vide dated 23.12.2016, it is discernible that the AO show caused the assessee regarding eight amounts including amount of Rs.28 lakhs i.e. introduction

of capital by the assessee and from the copy of bank statements, which shows that the assessee introduced capital of Rs.15 lakhs by way of transfer through cheques on 27.3.2014 amounting to Rs.3 lakhs on 15.11.2013, Rs.12 lakhs to the firm Gandhi Agencies, which shows that Rs.15 lakhs was introduced through banking channels. So far as Rs.13 lakhs which was introduced in cash is concerned, from the copy of balance sheet of the assessee as on 31.3.2013, it is clear that the assessee has cash in hand more than Rs.8 lakhs, which was brought forward from financial year 2013-14 and apart from this, the assessee also received gifts from his daughter and mother. From the copy of saving bank statement, we also notice that the assessee also withdrew Rs.1 lakh on 31.12.2013 and the amount of cash in hand was amount withdrawn from the bank and amount of gifts is more than Rs.13 lakhs which self-explained the source of Rs.13 lakhs introduced in cash to the \capital account by the assessee during the relevant period. Therefore, acceptance of explanation of the assessee by the AO in this regard is also justified, proper and reasonable, which cannot be held as erroneous and prejudicial to the interest of the revenue in absence of any other adverse materials brought on record during proceedings u/s.263 of the Act.

22. We also peruse the decision of Hon'ble Gauhati High Court in the case of Jawahar Bhattacharjee (supra) relied upon by Id CIT DR, which is rendered in respect of section 54F of the Act. In this case, it was held that

not applying mind to the relevant material would certainly be 'erroneous' assessment warranting exercise and revisional jurisdiction. But in the present case, on the basis of foregoing discussion, we are compelled to hold that the AO had conducted sufficient and adequate enquiry on all three issues and it is not a case of no enquiry or insufficient enquiry. Thus, we respectfully hold that the benefit of the ratio of judgment of Hon'ble High Court of Gauhati in the case of Jawahar Bhattacharejee (supra) is not available for the revenue in the present case having distinct and distinguishable facts and circumstances. Therefore, this decision will not help to the revenue in the present case.

23. In view of the aforesaid facts, we are of the view that the revisionary order passed by the Ld. Pr. CIT(A) is without jurisdiction and has to be quashed on merit. Accordingly, we quash the revisionary order passed under [section 263](#) of the Act by Ld. Pr. CIT.

24 Before parting, we may herein deal with a procedural issue that though the hearing of the captioned appeal was concluded on 7.2.2020, however, this order is being pronounced much after the expiry of 90 days from the date of conclusion of hearing. We find that Rule 34(5) of the Income tax Appellate Tribunal Rules, 1962, which envisages the procedure for pronouncement orders, provides as follows: (5) The pronouncement may be in any of the following manners: -(a) The Bench may pronounce the

order immediately upon the conclusion of hearing (b) in case where the order is not pronounced immediately on the conclusion of the hearing, the Bench shall give a date of pronouncement. In a case where no date of pronouncement is given by the Bench, every endeavour shall be made by the Bench to pronounce the order within 60 days from the date on which the hearing of the case was concluded but, where it is not practicable so to do on the ground of exceptional and extraordinary circumstances of the case, the Bench shall fix a future day for pronouncement of the order, and such date shall not ordinarily be a day beyond a further period of 30 days and due notice of the day so fixed shall be given on the notice board. As such, "ordinarily", the order on an appeal should be pronounced by the Bench within no more than 90 days from the date of concluding the hearing. It is, however, important to note that the expression "ordinarily" has been used in the said rule itself. This rule was inserted as a result of directions of Hon'ble High Court in the case of Shivsagar Veg Restaurant vs ACIT (2009) 319 ITR 433 (Bom), wherein, it was, inter alia, observed as under:

" We, therefore, direct the President of the Appellate Tribunal to frame and lay down the guidelines in the similar lines as are laid down by the Apex Court in the case of Anil Rai (supra) and to issue appropriate administrative directions to all the benches of the Tribunal in that behalf. We hope and trust that suitable guidelines shall be framed and issued by the President of the Appellate Tribunal within shortest reasonable time and followed strictly by all the Benches of the Tribunal. In the meanwhile (emphasis, by underlining, supplied by us now), all the revisional and appellate

authorities under the Income-tax Act are directed to decide matters heard by them within a period of three months from the date case is closed for judgment”.

In the ruled so framed, as a result of these directions, the expression “ordinarily” has been inserted in the requirement to pronounce the order within a period of 90 days. The question then arises whether the passing of this order, beyond ninety days, was necessitated by any “extraordinary” circumstances.

25. We find that the aforesaid issue after exhaustive deliberations had been answered by a coordinate Bench of the Tribunal viz; ITAT, Mumbai ‘F’ Bench in DCIT, Central Circle-3(2), Mumbai vs JSW Limited & ors (ITA No.6264/Mum/18 dated 14.5.2020, wherein, it was observed as under:

“ 9. Let us in this light revert to the prevailing situation in the country. On 24th March, 2020, Hon’ble Prime Minister of India took the bold step of imposing a nationwide lockdown, for 21 days, to prevent the spread of Covid 19 epidemic, and this lockdown was extended from time to time. As a matter of fact, even before this formal nationwide lockdown, the functioning of the Income Tax Appellate Tribunal at Mumbai was severely restricted on account of lockdown by the Maharashtra Government, and on account of strict enforcement of health advisories with a view of checking spread of Covid 19. The epidemic situation in Mumbai being grave, there was not much of a relaxation in subsequent lockdowns also. In any case, there was unprecedented disruption of judicial wok all over the country. As a matter of fact, it has been such an unprecedented situation, causing disruption in the functioning of judicial machinery, that Hon’ble Supreme Court of India, in an unprecedented order in the history of India and vide order dated 6.5.2020 read with order dated 23.3.2020, extended the limitation to exclude not only this lockdown period but also a few more days prior to, and after, the lockdown by observing that “In case the limitation has expired after 15.03.2020 then the period from 15.03.2020 till the date on which the lockdown is lifted in the jurisdictional area where the dispute lies or where the cause of action arises shall be extended for a period of 15 days after the lifting of lockdown”. Hon’ble Bombay High Court, in an order dated 15th April 2020, has, besides extending the validity of

all interim orders, has also observed that, "It is also clarified that while calculating time for disposal of matters made time-bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly", and also observed that "arrangement continued by an order dated 26th March 2020 till 30th April 2020 shall continue further till 15th June 2020". It has been an unprecedented situation not only in India but all over the world. Government of India has, vide notification dated 19th February 2020, taken the stand that, the coronavirus "should be considered a case of natural calamity and FMC (i.e. force majeure clause) maybe invoked, wherever considered appropriate, following the due procedure...". The term 'force majeure' has been defined in Black's Law Dictionary, as 'an event or effect that can be neither anticipated nor controlled' When such is the position, and it is officially so notified by the Government of India and the Covid-19 epidemic has been notified as a disaster under the National Disaster Management Act, 2005, and also in the light of the discussions above, the period during which lockdown was in force can be anything but an "ordinary" period.

10. In the light of the above discussions, we are of the considered view that rather than taking a pedantic view of the rule requiring pronouncement of orders within 90 days, disregarding the important fact that the entire country was in lockdown, we should compute the period of 90 days by excluding at least the period during which the lockdown was in force. We must factor ground realities in mind while interpreting the time limit for the pronouncement of the order. Law is not brooding omnipotence in the sky. It is a pragmatic tool of the social order. The tenets of law being enacted on the basis of pragmatism, and that is how the law is required to be interpreted. The interpretation so assigned by us is not only in consonance with the letter and spirit of rule 34(5) but is also a pragmatic approach at a time when a disaster, notified under the Disaster Management Act 2005, is causing unprecedented disruption in the functioning of our justice delivery system. Undoubtedly, in the case of *Otters Club Vs DIT* [(2017) 392 ITR 244 (Bom)], Hon'ble Bombay High Court did not approve an order being passed by the Tribunal beyond a period of 90 days, but then in the present situation Hon'ble Bombay High Court itself has, vide judgment dated 15th April 2020, held that directed "while calculating the time for disposal of matters made time-bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly". The extraordinary steps taken suo motu by Hon'ble jurisdictional High Court and Hon'ble Supreme Court also indicate

that this period of lockdown cannot be treated as an ordinary period during which the normal time limits are to remain in force. In our considered view, even without the words "ordinarily", in the light of the above analysis of the legal position, the period during which lockout was in force is to be excluded for the purpose of time limits set out in rule 34(5) of the Appellate Tribunal Rules, 1963. Viewed thus, the exception, to 90-day time-limit for pronouncement of orders, inherent in rule 34(5)(c), with respect to the pronouncement of orders within ninety days, clearly comes into play in the present case. "

26. We have given a thoughtful consideration to the aforesaid observations of the Tribunal and finding ourselves to be in agreement with the same, therein respectfully follow the same. As such, we are of the considered view that the period during which the lockout was in force shall stand excluded for the purpose of working out the time limit for pronouncement of orders, as envisaged in Rule 34(5) of the Appellate Tribunal Rules, 1963."

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

Order pronounced on 15 /06/2020.

Sd/-
(Laxmi Prasad Sahu)
ACCOUNTANT MEMBER

sd
(Chandra Mohan Garg)
JUDICIAL MEMBER

Cuttack; Dated 15 /06/2020
B.K.Parida, SPS

Copy of the Order forwarded to :

1. The Appellant : Shailesh Kumar Gandhi, Prop.
M/s. Gandhi Agencies, Alamchand Bazar, Cuttack
2. The Respondent. Pr. CIT, Cuttack
3. The CIT(A)-, Cuttack
4. DR, ITAT, Cuttack
5. Guard file.
//True Copy//

By order

Sr.Pvt.secretary
ITAT, Cuttack