

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

**BEFORE SHRI R.C.SHARMA, ACCOUNTANT MEMBER AND
SHRI SANDEEP GOSAIN, JUDICIAL MEMBER**

ITA No. 156/Jodh/2018
(ASSESSMENT YEAR-2008-09)

M/s Prateek Metals Pvt. Ltd. E-74, Marudhar Ind. Area, Basni-II, Jodhpur.	Vs	Pr. Commissioner of Income Tax-1, Jodhpur.
(Appellant)		(Respondent)
PAN: AABCP 2383 B		

Assessee By	Shri Amit Kothari (CA) & Shri Abhinav Kothari (CA)
Revenue By	Shri K.C. Badhok CIT-DR
Date of hearing	17/03/2020
Date of Pronouncement	19/03/2020

ORDER

PER SANDEEP GOSAIN, J.M.

The present appeal has been filed by the assessee against the order of Ld. Pr. CIT-I, Jodhpur dated 26.03.2018 passed U/s 263 of the Income Tax Act, 1961 (in short, the Act) for the assessment year 2008-09.

Following grounds have been taken by the assessee:

- "1. The order passed by the Id. CIT, Jodhpur U/s 263 is bad in law and bad on facts.*
- 2. The Id. CIT had erred in observing that original assessment made U/s 143(3)/148 on 31st March, 2016 was erroneous so far as prejudicial to the interest of revenue.*

3. *The Id. Pr. CIT has erred in observing that the share capital money received during the year under consideration was not fully explained and needs to be re-examined. The same is bad in law and bad on facts.*
4. *The Id. Pr. CIT has erred in observing that the Id. AO had erred in observing that the amendment in Section 68 and Section 56(2)(viib) were applicable only from A.Y. 2013-14. Such a view cannot be said to be erroneous or prejudicial to the interest of Revenue.*
5. *The impugned order U/s 263 is illegal and most unjustified, as the same is not based on any valid material or legal evidence whatsoever on records, but the same is merely based on wrong suspicions and baseless presumptions. The impugned order deserves to be quashed.*
6. *The Id. Pr. CIT has erred in setting aside the order, particularly when the view of the Id. AO was based on judicial decision of Hon'ble Supreme Court and Hon'ble Rajasthan High Court. The contrary view taken by the Id. Pr. CIT was bad in law and bad on facts and setting aside the order was not justified.*
7. *The appellant pray for suitable costs.*
8. *The appellant pray for stay of impugned order.*
9. *The appellant craves liberty to add, amend, alter, and modify any of the ground of appeal on or before its hearing before your honour."*

2. The facts of the case are that the assessee submitted return of income for A.Y. 2008-09 at NIL income which was assessed as such. The AO initiated proceedings U/s 148 of the Act vide notice dated 30.03.2015 and assessment was completed. The assessment U/s 143(3)/148 of the Act was completed vide order dated 31.03.2017 in which the income as originally assessed was accepted.

3. Initially the assessment proceedings for A.Y. 2009-10 was initiated by the AO by taking action U/s 148 of the Act as according to him there was

increase in share capital of the company, which was not genuine and he passed order U/s 143(3)/148 of the Act making addition of the said amount. The addition was deleted in appeal before the Id. CIT(A) and the said order was also confirmed by Jodhpur Bench of the ITAT in their order dated 09.08.2017 in ITA No. 207/Jodh/2017. One of the reasons for deleting the said addition in the said year was that the amount of share capital was received in AY 2008-09 and only allotment of shares was made in AY 2009-10, and therefore on these grounds the addition cannot be sustained.

4. From the records, it appears that from the said finding for AY 2009-10 given in the appellate proceedings action U/s 148 was taken for the year under consideration. Even from the reasons recorded it is seen that the action was taken on the basis of proceedings for AY 2009-10.

5. The contention of the assessee is that the proceedings for the year under consideration for initiated for verification of the share capital which are the same grounds as taken for the A.Y. 2009-10, and complete details which were submitted in A.Y. 2009-10 were also submitted in the year under consideration also. The AO while completing the said assessment had examined these details and after complete verification of the same and also considering the fact that the amount of share capital cannot be assessed in the hands of the assessee for the year under consideration as the

amendment in Section 2(24), Section 56(2)(viib) and Section 68 were made applicable from A.Y. 2013-14 in relation to share capital and premium and therefore, no addition was made. This decision of the AO was examining the complete details and this was precisely the reason for which the action U/s 148 was taken. Such a view according to the appellant cannot be said to be erroneous view and there was no justification for initiation of action U/s 263 by the CIT.

6. It was also contended that in the various judicial decisions and it is held that when the identity of the share holder is established no addition can be made in the hands of the assessee. The amendments made in the law in Section 68 of the Act as well as in Section 56 of the Act were applicable only from assessment year 2013-14 and were not applicable in the year under consideration. Even on merits of the case it was submitted that the assessee had submitted that voluminous details with regard to the issue of share capital. The assessee company received a total sum of Rs. 1,50,00,000/- (One crore and fifty lacs) from 5 limited companies as Share Application money alongwith Share Premium in A.Y. 2008-09. The shares were allotted to all those companies in A.Y. 2009-10. It was contended that the assessee submitted interalia the Copies of accounts of all the companies pertaining to A.Y. 2008-09 and A.Y. 2009-10 indicating the amount was received towards share application, copy of bank statement, confirmations, copy of PAN card, and annual reports.

7. The assessee also contended that that no addition U/s 68 of the Act can be made in respect of share capital and share premium in the hands of the assessee company, where the assessee company had furnished evidence to prove the identity, of the shareholders and the issue is covered in favour of the appellant by the decision of Honble Supreme Court in the case of CIT V/s Lovely Exports (P.) Ltd. (2008) 6 DTR (SC) 308 in which it was held that If the share application money is received by the assessee company from alleged bogus shareholders, whose names are given to the AO, then the Department is free to proceed to reopen their individual assessments in accordance with law, but it cannot be regarded as undisclosed income of assessee company. Similar view was given by the Hon'ble Supreme Court in the case of CIT v. Steller Investment Ltd. (2000) 164 CTR (SC) 287: 251 ITR 263 (SC) in which it was held that even if it be assumed that the subscribers to the increase share capital were not genuine, nevertheless, under no circumstances can the amount of share capital be regarded as undisclosed income of the assessee. Reference was also made to the judgment of Hon'ble Rajasthan High Court in the case of CIT v. Shree Barkha Synthetic Ltd. 182 CTR (Raj) L75, in which High Court has followed the judgement of Hon'ble Supreme Court in the case of CIT V/s Steller Investments Ltd.

8. In order U/s 263 of the Act the CIT, Jodhpur had referred to the allotment of share to the companies and observed that enquiry letter were

issued to them in AY 2009-10 U/s 133(6) which were returned back. During A.Y. 2009-10 the appellant could not prove the source and creditworthiness of the share capital received. The shares of the company in the subsequent years had been transferred to certain related persons which also indicates that the share capital received was not genuine. The crux of the order is that the AO was not justified in accepting the contention of the assessee and the order so passed is erroneous and prejudicial to the interest of Revenue and therefore, the order was set aside to make fresh examination of the genuineness of the share application money U/s 68 of the Act.

9. On the other hand, the Id CIT-DR has relied on the orders of the authorities below.

10. We have heard the Id. counsels for both the parties and have also considered the material placed on record, order passed by the Revenue Authorities as well as judgements relied upon by the parties. From the record, we notice that main issue in the present controversy is as to whether the order passed by the A.O. can be said to be erroneous or prejudicial to the interest of revenue. In case the order passed U/s 143(3)/148 of the Act, the A.O. is not erroneous then eventuality the power U/s 263 of the Act cannot be exercised. From the facts, we notice that in the reassessment order passed, the issue had been duly examined and on the basis of the examination of the relevant records and the application of

law, one of the possible opinion had been drawn by the A.O., which cannot be said to be erroneous so far as prejudicial to the interest of revenue. In this regard, we drawn interest from the decision of the Hon'ble Supreme Court in the case of Malabar Industrial Co. Ld. Vs CIT (2000) 243 ITR 83 (SC) wherein the Hon'ble Supreme Court had observed that "Section 263 of the Income Tax Act, 1961, makes it clear that the prerequisite for the exercise of jurisdiction by the Commission suo moto under it, is that the order of the Income Tax Officer is erroneous in so far as it is prejudicial to the interests of the revenue. Even if one of them recourse cannot be held to Section 263(1) of the Act. The A.O. after going through the material on record and after considering the explanation of the assessee, had applied his mind. His view was that the amendment are not applicable in the case of the assessee for the year under consideration which is a possible view. The CIT did not agree with the conclusion reached by the ITO. However, Section 263 of the Act does not empower him to take action on these facts to arrive at the conclusion that the order passed by the ITO is erroneous and prejudicial to the interest of the revenue. Since the material was there on record and the said material was considered by the ITO and a particular view was taken, the mere fact that different view can be taken, should not be the basis for an action U/s 263 of the Ac and it cannot be held to be justified.

11. The basis for an action U/s 263 of the Act and it cannot be held to be justified. The order can be said to be erroneous assessment only if it deviates from the law and if the AO acting in accordance with law makes a assessment, the same cannot be branded as erroneous by the Commissioner. The AO has exercised the quasi-judicial power vested in him accordance with law and arrived at a conclusion and such a conclusion cannot be termed to be erroneous simply because the Commissioner does not feel satisfied with the conclusion. In the present case it cannot be said that there is an incorrect application of law so that the order being erroneous. The amendments were from A.Y. 2013-14 and the judicial decisions were also to the effect that it cannot be made in relation to share capital where identity is proved. The phrase "prejudicial to the interests of the Revenue" has to be read in conjunction with an erroneous order passed by the Assessing Officer. The view of the AO that the amendments were not retrospective is also one of the possible view and such a view cannot be said to be erroneous. The Hon'ble Supreme Court in the case of CIT v. Vatika Township Private Limited reported (2014) 367 ITR 466 (SC) held that when the amendment was made from a particular date the intention of the legislature was to treat it prospective and it could not be treated as declaratory/statutory or curative in nature. Similarly in the case of Zile Singh Vs State of Haryana & Ors. 2004(8) SCC 1, it was observed as follows the cardinal principle of construction that every statute is prima facie

prospective unless it is expressly or by necessary implication made to have a retrospective. Unless there are words in the statute sufficient to show the intention of the legislature to affect existing rights, it is deemed to be prospective only." In view of above we find that there is no error in the conclusion drawn by the AO while passing the order and therefore, the impugned order U/s 263 of the Act is not justified and the same is hereby quashed.

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

Order pronounced in the open court on 19/03/2020.

Sd/-
(R.C.SHARMA)
Accountant Member

Sd/-
(SANDEEP GOSAIN)
Judicial Member

Dated :. 19/03/2020

*Ranjan

Copy of the order forwarded to :

1. The Appellant
2. The Respondent
3. CIT
4. The CIT(A)
5. DR, ITAT, Jodhpur
6. Guard File (ITA No. 156/Jodh/2018)

Assistant Registrar
Jodhpur Bench