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SURINDER KAUR BRAR & ANR. vs. INCOME TAX OFFICER

IN THE ITAT AMRITSAR

Laliet Kumar, JM & Dr. Mitha Lal Meena, AM.

ITA Nos. 204 to 205/Asr/2017, 206/Asr/2017, 207/Asr/2017

Aug 16, 2021

(2021) 62 CCH 0441 AsrTrib

Legislation Referred to

Section 142(1), 143(2), 132, 153A

Case pertains to

Asst. Year 2010-11

Decision in favour of:

Assessee

Revision—Order erroneous or prejudicial to revenue— A search and seizure was conducted at premises of G — During course of search, certain documents pertaining to Assessee were found — Case of Assessee reopened under Section 153C read with Section 153A — Assessing Officer after making adequate enquiry have accepted return of income filed by Assessee by passing assessment order — Principal Commissioner of Income Tax passed an order u/s 263 by holding that assessment order is erroneous in as much as prejudicial to interest of Revenue — Held, PCIT is of opinion that Assessing Officer despite having possession of (1) Agreement to Sell and Minutes of Board Meeting of G and not made additions in hands of Assessee — Perusal of order passed by Assessing Officer clearly shows that Assessing Officer has sought reply of Assessee on both points — Assessing Officer has made enquiries and thereafter come to conclusion that no addition can be made on basis of photocopy of Agreement to Sell allegedly executed by A — Present case is not a case of no enquiry rather it is a case of adequate enquiry PCIT, in Show Cause Notice also mentioned that enquiries were made by Assessing Officer — However, he has mentioned that more enquiries were required to be made — Explanation 2 Section 263 provide that order would be erroneous and prejudicial in interest of Revenue if order was passed without making

enquiries or verification which should have been done — However, in present case, enquiries and verification were made by Assessing Officer Assessee mentioned hereinabove — However, despite that PCIT had mentioned that enquiry should have been made from A as well as from purchaser of property regarding monitoring consideration involved in sale purchase of property — Conclusion of PCIT was erroneous as no addition can be made on basis of dumb document namely photocopy of Agreement to Sell which did not bear signature of Assessee — PCIT should himself have conducted enquiry or causing to make such enquiries have passed order under Section 263 — In present case, despite material available on record, no further enquiry were made by PCIT and had simply relied upon finding recorded by CIT Appeal in hands of co-owners —S ufficient enquiries were made and in absence of original document, which was not signed by Assessee, in absence of GPA in favour of A and any other evidence proving receipt of on- money at time of registration of sale deed, it will not be possible for Assessing Officer to make additions in hands of Assessee — PCIT has failed to prove how order passed by Assessing Officer was erroneous in absence of any incriminating to prove receipt of on-money — Order passed by PCIT under Section 263 was without any jurisdiction and accordingly quashed — Assessee’s appeals allowed.

Held

PCIT of opinion that the Assessing Officer despite having the possession of (1) Agreement to Sell and Minutes of the Board Meeting of G and not made the additions in the hands of the Assessee.

(para 6.1)

Perusal of the order passed by the Assessing Officer clearly shows that the Assessing Officer has sought the reply of the Assessee on both the points. Assessing Officer has made the enquiries and thereafter come to the conclusion that no addition can be made on the basis of the photocopy of the Agreement to Sell allegedly executed by A. Present case is not a case of no enquiry rather it is a case of adequate enquiry the PCIT, in the Show Cause Notice also mentioned that the enquiries were made by the Assessing Officer. However, he has mentioned that more enquiries were required to be made. The explanation 2 Section 263 provide that the order would be erroneous and prejudicial in the interest of Revenue if the order was passed without making enquiries or verification which should have been done.

(para 6.3)

However, in the present case, the enquiries and verification were made by the Assessing Officer Assessee mentioned hereinabove. However, despite that the PCIT had mentioned that the enquiry should have been made from A as well as from the purchaser of the property regarding the monitoring consideration involved in the sale purchase of the property. Conclusion of the PCIT was erroneous as no addition can be made on the basis of dumb document namely the photocopy of the Agreement to Sell which did not bear the signature of the Assessee.

(para 6.4)

PCIT should himself have conducted the enquiry or causing to make such enquiries have passed the order under Section 263. In the present case, despite the material available on record, no further enquiry were made by the PCIT and had simply relied upon the finding recorded by the CIT Appeal in the hands of co-owners. Sufficient enquiries were made and in the absence of the original document, which was not signed by the Assessee, in the absence of the GPA in favour of A and any other evidence proving the receipt of on- money at the time of registration of sale deed, it will not be possible for the Assessing Officer to make additions in the hands of the Assessee. PCIT has failed to prove how the order passed by the Assessing Officer was erroneous in the absence of any incriminating to prove the receipt of on-money. Order passed by the PCIT under Section 263 was without any jurisdiction and accordingly quashed. Assessee's Appeals allowed .

(para 6.6)

Conclusion

Sufficient enquiries were made and in the absence of the original document, PCIT has failed to prove how the order passed by the Assessing Officer was erroneous in the absence of any incriminating to prove the receipt of on-money.

In favour of

Assessee

Cases Referred to

*Malabar Industrial company Ltd. Vs. CIT reported at 243 ITR 83 (SC)
Further in the case of Gee Vee Enterprises Vs. Addl. CIT & Ors 99 ITR 375 (Del)
K.A. Ramswamy Chettiar & Anr Vs. CIT 220 ITR 657 (Mad.)
Pepsico India Holdings Private Limited vs ACIT 370 ITR page 285 (Delhi)
CIT vs Sidhu Rice and General Mills 281 ITR page 428 (P&H)
Principal Commissioner of Income Tax Vs. Gabriel India Ltd. reported at [1993] 203 ITR 108 (Bombay)
CIT vs. Sunbeam Auto Ltd, 332 ITR 167
Nagesh knitwear Pvt. Ltd., 355 ITR 135*

Counsel appeared:

Ashwani Kumar, CA & Bhavesh Jindal, CA for the Appellant.: Anupam Kant Garg for the Respondent

LALIET KUMAR, JM.

1. The present group of Appeals were filed by the Assesse feeling aggrieved by the order passed on 23.03.2017 for the assessment year 2010-2011 on the following grounds:-

I. That order passed u/s 263(1) of the Income Tax Act, 1961 by the Ld.Principal CIT- III, Ludhiana is against law and facts on the file in as much as he was not justified to hold that the assessment order dated 30-03-2015 passed u/s 153C r.w.s. 153A of the Income Tax Act, 1961 was erroneous in as much as prejudicial to the interests of revenue.

II. That he was not justified to hold that the Ld. Assessing Officer framed the assessment without making any further inquiry, whereas the Ld. Assessing Officer had made specific query regarding the alleged paper found from the possession of a third party.

III. That the Ld. Principal CIT was not justified to hold that the Ld. Assessing Officer failed to verify the genuineness of sundry creditors, whereas no such issue was raised in the Show Cause Notice.

2. The grounds in all the four Appeals are common. Therefore, we are taking the file of Santok Singh Brar I.T. No.206 of 2017 as a lead case.

3. **Brief facts:**

3.1. A search and seizure under Section 132 of the Income Tax Act was conducted at the premises of M/s Godwin Group of Cases on 09.09.2010. During the course of search, certain documents pertaining to Assesse were found and the said documents were passed on to the Assessing Officer of the Assesse. On the basis of the information and after recording the satisfaction note, the case of the Assesse reopened under Section 153C read with Section 153A of the Income Tax Act.

3.2. Notice under Section 153C was issued to the Assesse on 28.10.2013 calling upon the Assesse to file the return of income for the assessment year 2010-11. In pursuant to the notice the return of income was filed by the Assesse through AR and it was submitted that the return were filed on 27.02.2010 be treated as return filed pursuant to the notice.

3.3. The Assessing Officer had issued the notice under Section 143(2)/142(1) along with the questionnaire dated 28.01.2015 on 02.02.2015. A Show Cause Notice dated 19.03.2015 was issued to the Assesse calling upon the various information from the Assesse. At page 3 of the assessment order, the Assessing Officer mentioned as under:

"However, as per information available with this office in shape of an Agreement to Sell dated 28.03.2009 entered into Shri Amarjeet Singh Randhawa for himself and GPA of others with the abovesaid property through M/s Delhi Pb. Real Estate Private Limited, Sector-22 Chandigarh and Lali Associate of Mohali and the above-mentioned property was sold for a consideration of Rs.11,25,00,000/- (Rupees Eleven Crore Twenty Five Lakhs only). Further, Shri Amarjeet Singh Randhawa has admitted that the copy of the receipt cum agreement to sell was with Bajwa Brothers and the same was found and seized from the office of Godwin Group at Greenwood City Meerut and hence these papers cannot be forged "

3.4. The Assesse filed Reply to the Show Cause Notice and denied the execution of any Agreement to Sell and the Power of Attorney in favour of Shri Amarjeet Singh Randhawa. In paragraphs (iv) to (vi) of the Reply, it was mentioned as under:-

"iv) Further in your notice, you have alleged that a Receipt cum Agreement to sell was executed by sh. Amarjit Singh Randhwa Acting for himself and GPA of other co-owner. It is submitted that assesses mentioned above have never appointed Sh. Amrjitsingh Randhawa as their GPA. The assesses never, executed any agreement to appointed Sh. Amarjit Singh Randhawa as their GPA. Thus, alleged Receipt cum agreement to sell cannot be used against the assesses on that basis. The assesses never executed any agreement to sell dated 28.03.2009 as alleged in your show cause notice. If you have such document which contained the signatures of the assesses, the same may kindly be also provided. However it is brought to your kind notice that the assesses have themselves executed the sale deed in the capacity of themselves which proves that no such GPA was ever given.

v) Your show cause notice has referred to a statement of Sh. Amarjit Singh Randhawa from perusal of the copy the document officially received from your office as per the request, it is submitted that Mr. Amarjit Singh Randhawa was admitted that he is holder of any Power of Attorney on behalf of assesses or has executed any agreement to sell on their behalf. Without prejudice to, above Mr. Amarjit Singh Randhawa has denied the execution of any alleged receipt-cum- agreement to sell dated 28.03.2009.

vi) From the inspection of the documents in your possession officially allowed by you as per the request of the assesses, we have not found any document either in original or a photocopy signed by the assesses or any GPA document relating to the. assesses, which are being relied upon by you for framing the assessments in the case of the assessee.

4. Keeping in view the submissions made above, it is clear, that no addition/ assessments can be made on account of purported alleged document referred by you in your show cause notice. As there is no document in the possession of IT. Department /your office, which can conclusively proved at the above referred assesses have received a sum more than Rs. 5.5 crores i.e. registered deed value against the sale of the said property. The notice issued U/s. 153C of the I.T. act, 1961 is merely on presumptive basis without any legally acceptable documentary evidence against the assesses. "

3.5. The Assessing Officer had thereafter issued another Show Cause Notice on 25.03.2015 seeking the comments of the Assesse on the deal paper entered into Gurbachan Singh Brar with Great Value Infra.

3.6. The Assesse filed the reply on 26.03.2015 and submitted that the document given to the Assesse along with Show Cause Notice on 25.03.2015 was the minutes of Board of Director or M/s Great Value Infra Promoters Private Limited which was an internal matter of the company. Further, it was submitted that there was no sale purchase price mentioned on the said document.

3.7. In this AR had submitted that, appellant, during the course of assessment proceedings, denied the charge of the Learned Assessing Officer that the said property was actually sold for Rs. 11.25 crores on the following grounds:

i) The assessee does not know the source of the purported alleged documents in the possession of the Department. However, it is submitted that the same has not been found or seized from the personal possession of the assessee or from any place owned by the assessee by any income tax authority or any other authority under the law. Thus, the alleged document and its contents do not have any relation to the assessee.

ii) The alleged document is a photocopy only and as per various judicial decision, photocopy unless it is duly signed in original has no value in the eyes of law. Reliance is placed on Pepsi Co India Holdings Private Limited vs. ACIT of Income Tax 270 CTR 467 (Delhi) and also of Hon'ble Punjab and Haryana High Court in the case of CIT vs Sidhu Rice and General Mills reported in 281 ITR page 428.

iii) Further, the alleged document does not contain the signatures of any of the assessee referred above. Hence, no action against the assessee can be taken on such document, which do not pertain to them.

iv) Further, it has been alleged that a Receipt cum Agreement to Sell was executed by Sh. Amarjit Singh Randhawa acting for himself and GPA of other co-owner. It is submitted that assesses mentioned above have never appointed Sh. Amarjit Singh Randhawa as their GPA. The assesses never executed any agreement to appoint Sh. Amarjit Singh Randhawa as their GPA. Thus, alleged Receipt cum Agreement to Sell cannot be used against the assesses on that basis. The assesses never executed any agreement to sell dated 28.03.2009 as alleged in

your show cause notice. If you have such document which contained the signatures of the assesses, the same may kindly be also provided. However, it is brought to your kind notice that the assesses have themselves executed the sale deed in the capacity of themselves which proves that no such GPA was ever given.

v) Your Show Cause Notice has referred to a statement of Sh. Amarjit Singh Randhawa. From perusal of the copy of the document officially received from the Assessing Officer, it is submitted that nowhere Mr. Amarjit Singh Randhawa was admitted that he is holder of any Power of Attorney on behalf of the assesses or has executed any agreement to sell on their behalf. Without prejudice to above, Mr. Amarjit Singh Randhawa has denied the execution of any alleged receipt cum agreement to sell dated 28.03.2009.

vi) From the inspection of the documents in the possession of the Ld. Assessing Officer, officially allowed by him as per the request of the assesses, we have not found any document either in original or a photocopy signed by the assesses or any GPA document relating to the assesses, which is now also being relied upon by Your Honour for framing the assessments in the case of the assesses.

vii) After appreciating the contentions of the petitioner assessee during the course of original assessment proceedings, the Ld. Assessing Officer had framed the assessment after obtaining the approval of the Ld. Joint Commissioner of Income Tax u/s 153D of the Income Tax Act, 1961. It will be wrong to observe that the Ld. Assessing Officer did not conduct any enquiry whatsoever before accepting the returned income. It can clearly be observed from submissions made above that the Ld. Assessing Officer did conduct enquiries and after having felt satisfied with the reply of the petitioner assessee, assessment was framed by him.

3.8. The Assessing Officer after making the adequate enquiry have accepted the return of income filed by the Assesse by passing the assessment order on 30.03.2015. In the penultimate paragraph, the Assessing Officer had mentioned that "It is quite possible that Shri Amarjeet Singh Randhawa might have received the money over and above in entirety and without the knowledge of the Assesse. As per the document it appears that the entire money is over and above the amount mentioned in the Sale Deed has been received by Shri Amarjeet Singh Randhawa individually. In my opinion, the entire amount should be assessed in the case of Shri Amarjeet Singh Randhawa in his individual capacity unless he produce GPA in original and/or other documents evidence to the contrary."

3.9. The Principal CIT had issued the Show Cause Notice on 14.02.2017 and in the Show Cause Notice it was mentioned in paragraphs 4 to 7 as under: -

4. The Assessing Officer was also in possession of the information that an agreement dated 28.03.2009, to sell the above-referred immovable property, entered into by Sh. Amarjeet Singh Randhawa (Who is one of the co-owners in purchase as well as sale of above property) for himself and GPA of others (which includes yourself along with other co-owners) with S. Bhupinder Singh Bajwa, Sia Late Sh. Gurbachan Singh, A-134, Defence Colony, Merrut, UP through M/s Delhi /Pb. Real Estate Pvt. Ltd., Sec-22, Chandigarh and Lally Associates of Phase- 5, Mohali. As per this agreement, this property was to be sold/or a consideration of Rs.11,25,00,000/-. Documentary evidence of this agreement to sell is placed on record which has been signed by the sellers/purchasers alongwith witnesses. Further, there is another document which is minutes of meeting of Board Directors of Great Value infrapromoters Pvt. Ltd wherein the purchasers have authorized their representative to finalize the deal.

The Assessing Officer has vide notice under section 142(1) of the Act has asked you to file the details of immovable properties acquired by you. On 16.03.2015, the Assessing Officer confronted you with the information available in his possession i.e. receipt-cum-agreement to

sell dated 28.03.2009 and showed his intention to treat sum of Rs 5.75 Crore (11.25 crore - 5.50 crore) as unexplained receipts.

5. Thereafter, on 25.03.2015, the Assessing Officer again sent to you a copy of deal entered by Sh. Gurbachan Singh Brar with the Great Value Infrapromoters Pvt. Ltd for sale/purchase of above-referred property for Rs.11.25 crore.

6. Finally, the Assessing Officer completed the assessment on 30.03.2015 and accepted the income returned by you. With regard to the issue of receipt of amount of Rs.5.75 crore over and above the amount of Rs.5.50 crore received on the sale of above-referred property, the Assessing Officer has accepted the submissions made by you and held that Sh. Amarjit Singh Randhawa might have received the money over and above in entirety and without the knowledge of the assessee.

7. A perusal of the record shows that the Assessing Officer has accepted the submissions made by you without making any further enquiry whatsoever before accepting the returned income and before coming to the conclusion that you have not received any amount, apart from your share in Rs.5.50 crore. Assessing Officer has simply relied upon whatever has been said by the assessee. The Assessing Officer should have made independent enquiries from Sh. Amarjit Singh Randhawa as well as from the purchasers of the property i.e. Great Value Infrapromoters Pvt. Ltd regarding the monetary consideration involved in sale/purchase of the property. If proper enquiries would have been conducted then the position could have resulted into substantial long term capital gain instead of long term capital loss shown by the assessee and accepted by the Assessing Officer. Hence, in the absence of any independent enquiry made by the Assessing Officer, the amount of Rs.95,83,333/- (112500000- 55000000) x 1/6 has remained unexplained and claim of the assessee of Long Term Capital Loss of Rs.14,30,248/-, as shown in the computation of income, has been accepted without inquiry which would have been Long Term Capital Gains of Rs.81,53,086/- instead of loss on account of transfer of long term capital asset. The Assessing Officer has not enquired even from the assessee the reasons for selling the property at a rate which would yield Long Term Capital Loss as a prudent person would not sell property the property which would yield losses. But, even if it is the case, the reasons and the genuineness of the reasons should have been examined.

3.10. The Assessee filed detailed reply to the Show Cause Notice on 07.03.2017 and had submitted that the adequate enquiry was made by the Assessing Officer in Original Assessment (153C) proceedings and therefore there was no reason to invoke the jurisdiction under Section 263 of the Income Tax Act.

3.11. The Learned Principal Commissioner of Income Tax-3, Ludhiana passed an order u/s 263 of the Income Tax Act, 1961 dated 23.03.2017 by holding that the assessment order dated 30.03.2015 is erroneous in as much as prejudicial to the interest of Revenue and set aside the order to the file of the Assessing Officer for passing a fresh order in accordance with law in respect of the issue discussed regarding verification of genuineness of sundry creditors and also raised in show cause notice u/s 263 of the act after giving sufficient opportunity of hearing to the appellant. The PCIT in paragraph 4 had concluded as under: -

"4. I have carefully considered assessee's submissions which are not acceptable on the issue that AO has excepted the submission made by the assessee without making any further enquiry whatsoever before accepting the returned income and before coming to the conclusion that assessee has not received any amount apart from his share in Rs.5.50crore. AO has simply relied upon whatever submissions have been made by the assessee. The AO should have made independent enquiries from Sh. Amarjit Singh Randhawa as well as from the purchasers of the property regarding the monetary consideration involved in sale/purchase of the property. Proper enquiries conducted would have been resulted into substantial long term capital gain

instead of long term capital loss shown by the assessee and accepted by the AO. The AO has not enquired even from the assessee, the reasons for selling the property at a rate which would yield long term capital loss as a prudent person would not sell property, the property which would yield. But, even if it is the case, the reasons and genuineness of the reasons should have been examined. It is also pertinent to note that two cases were assessed at Chandigarh and 1/6 share of this amount was added back which is also confirmed by CIT(A). It further strengthens the view that the AO has not applied his mind and passed order without verifying the facts and without any investigation.

Under the aforesaid circumstances, the order of the AO was erroneous, as held by the Hon'ble Supreme Court in the case Malabar Industrial company Ltd. Vs. CIT reported at 243 ITR 83 (SC). Further in the case of Gee Vee Enterprises Vs. Addl. CIT & Ors 99 ITR 375 (Del), the Hon'ble Delhi High Court have held in that not making an inquiry warranted on the facts of a case will make the assessment order erroneous. Similar view has been taken by the Hon'ble Madras High Court in the case of K.A. Ramswamy Chettiar & Anr Vs. CIT 220 ITR 657 (Mad.). Moreover, the facts of the case are squarely covered by Explanation 2 of Sec.263, which is inserted w.e.f. 01.06.2015. It reads as under:-

"For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the principal Commissioner or Commissioner,

- a) The order is passed without making inquiries or verification which should have been made;*
- b) The order is passed allowing any relief without inquiring into the claim;*
- c) The order has not been made in accordance with any order, direction or instruction issued by the Board under section J J9;or*
- d) The order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of assessee or any other person."*

In view of the aforesaid facts, the order of the AO is erroneous and prejudicial to the interest of the revenue as well."

3.12. Feeling aggrieved by the order passed by the PCIT, the Assesse is in appeal before us on the grounds mentioned hereinabove.

4. Submission of Assesse:

4.1 The Ld. AR had submitted that the order passed by the Learned Assessing Officer cannot be termed to be erroneous in as much as prejudicial to the interest of the Revenue as the same was passed after making detailed enquiry as will be clear from bare reading of the assessment order.

4.2 The Learned Assessing Officer has discussed in detail the queries raised and replies furnished by the appellant and after due application of mind and also approval obtained from the Learned Joint Commissioner of Income Tax u/s 153B, framed the assessment by accepting the return of the appellant.

4.3 The Ld. AR had submitted that the alleged document was not found from the possession of the appellant and it does not bear the signatures of either of the appellant. The alleged document is only a photocopy and despite the request of the appellant, original has never been made available. The Ld. AR had submitted that no addition can be made on the basis of photocopy of the document more

particularly when the document did not bear the signature of the Assesse. For the abovesaid proposition the Assesse rely upon the decision in the following matter:

370 ITR page 285 (Delhi) Pepsico India Holdings Private Limited vs ACIT .

281 ITR page 428 (P&H) CIT vs Sidhu Rice and General Mills .

4.4 The Ld. AR had submitted that the appellant never appointed Shri Amarjit Singh Randhawa as their General Power of Attorney. The sale deeds were executed by the appellants themselves. The main ground on which the Learned Principal Commissioner of Income Tax has sought to revise the assessment order is that the Learned Assessing Officer did not make enquiry with respect to such transaction which is factually incorrect as has already been demonstrated by going through the assessment order and by filing copies of letters filed before the Learned Assessing Officer during the course of assessment proceedings. The Ld. AR relied upon the decision in the matter of 341 ITR page 180 (Delhi) CIT vs Hindustan Marketing & Advertising Co. Ltd. wherein it was held that

"Whether in view of the fact that ITO had made reasonably detailed enquiries, had collected relevant material and discussed various facets of case with assessee, order of Commissioner to direct fresh assessment by going deeper into matter would not form a valid or legal basis to exercise jurisdiction under section 263 - Held, yes. Whether, therefore, impugned order to Tribunal was to be upheld - Held, yes."

335 ITR page 83 CIT vs Anil Kumar Sharma

"Whether where it was discernible from record that Assessing Officer had applied his mind to issue in question, Commissioner could invoke Section 263 merely because he had different opinion - Held, no."

203 ITR page 188 (Bombay) CIT vs Gabriel India Ltd.

"Their Lordships have held that ITO's order would not be held erroneous simply because he disagrees with the conclusion arrived at by the Assessing Officer"

4.5 The Ld. AR had submitted that the amendment to Section 263 by the Finance Act, 2015 w.e.f. 01.06.2015 wherein explanation 2 to Section 263 wherein it was provided that the order should be deemed to be erroneous in so far prejudicial to the interest of the Revenue if in the opinion of the Learned Principal Commissioner of Income Tax the order is passed without making enquiries or verification which should have been made. This explanation also came for scrutiny before different judicial forums and it has been held that the explanation 2(a) to Section 263 does not authorise to give unfettered powers to Commissioner to revise each and every order, if in his opinion same has been passed without making enquiries or verification which should have been made. The Ld. AR relied upon the following judgments:

> Judgment of the Hon'ble Income Tax Appellate Tribunal, Mumbai Bench "B" in the case of Narayan Tatu Rane Vs. Income Tax Officer, Ward 27(1)(1), Mumbai reported at [2016] 70 taxmann.com 227 (Mumbai-Trib).

> Judgment of the Hon'ble Income Tax Appellate Tribunal, Delhi "A" Bench in the case of M/s Amira Pure Foods Pvt. Ltd. Vs. the Principal Commissioner of Income Tax, Central Gurgaon bearing ITA No. 3205/Del/2017.

> Judgment of the Hon'ble Delhi High Court in the case of the Principal Commissioner of Income Tax Vs. Gabriel India Ltd. reported at [1993] 203 ITR 108 (Bombay)

> Judgment of the Hon'ble Income Tax Appellate Tribunal, Delhi Bench "C", New Delhi in the case of Indian Farmers & Fertilizers Cooperative Limited Vs. the Principal Commissioner of Income Tax-11 bearing ITA No. 2487/Del/2016.

> Principal Commissioner of Income Tax-01, New Delhi Vs. Brahma Centre Development Pvt. Ltd. in ITA Nos. 116/2021 and 118/2021 dated 05.07.2021.

4.6 Lastly it was submitted that in the case of Shri Amarjeet Singh Randhawa and Smt. Amandeep Kaur the reopening were made under Section 148 of the Income Tax Act by their Assessing Officer on the basis of the same documents (photocopies of the same documents). The Tribunal vide detailed order dated 11.11.2020 had accepted the Appeal of the Assesse and held that the reopening made by the Assessing Officer was without any independent enquiry and application of mind. On the basis of the above, it was submitted that once the additions in the hand of Shri Amarjeet Singh Randhawa were found to be unsustainable and reopening was quashed, therefore the present order of 263 is also liable to be quashed.

5. Submission of DR:

5.1 The Ld. DR for the Revenue relied upon the order passed by the PCIT and had submitted that inadequate enquiry were made by the Assessing Officer and therefore the order passed by PCIT was correct as the order passed by the Assessing Officer was erroneous and prejudicial to the interest of Revenue.

6. Finding:

6.1 We have heard the rival contentions of the parties and perused the material available on record. The basis of invocation of Section 243 was mentioned by the PCIT in paragraph 4 of the Show Cause Notice dated 14.02.2017. From the reading of paragraph 4, it appears that PCIT of the opinion that the Assessing Officer despite having the possession of (1) Agreement to Sell for Rs.11,25,00,000/- and Minutes of the Board Meeting of Great Value Infra Promoters Private Limited and not made the additions in the hands of the Assesse.

6.2 The PCIT had recorded in paragraph 7 of the Show Cause Notice that the Assessing Officer had not made further enquiry and had accepted the return of income.

6.3 The perusal of the order passed by the Assessing Officer clearly shows that the Assessing Officer has sought the reply of the Assesse on both the points namely the execution of the Agreement to Sell by Shri Amarjeet Singh Randhawa as a GPA for the Assesse as well as on the minutes of Board Meeting of Great Value Infra. The Assessing Officer has made the enquiries and thereafter come to the conclusion that no addition can be made on the basis of the photocopy of the Agreement to Sell allegedly executed by Shri Amarjeet Singh Randhawa. Further, the minutes of the Board Meeting though pertains to Great Value Infra does not reflect paying of any on money over and above the sale consideration mentioned in the Agreements. The present case before us is not a case of no enquiry rather it is a case of adequate enquiry the PCIT, in the Show Cause Notice also mentioned that the enquiries were made by the Assessing Officer. However, he has mentioned that more enquiries were required to be made. The explanation 2 Section 263 provide that the order would be erroneous and prejudicial in the interest of Revenue if the order was passed without making enquiries or verification which should have been done.

6.4 However, in the present case, the enquiries and verification were made by the Assessing Officer Assesse mentioned hereinabove. However, despite that the PCIT had mentioned that the enquiry should have been made from Shri Amarjeet Singh Randhawa as well as from the purchaser of the property regarding the monitoring consideration involved in the sale purchase of the property. In our

view, the conclusion of the PCIT was erroneous as no addition can be made on the basis of dumb document namely the photocopy of the Agreement to Sell which did not bear the signature of the Assesse.

6.5 Further, in paragraph 4 of the CIT, it is mentioned that the two cases were assessed at Chandigarh and the amount was added back which was also confirmed by CIT Appeal. In our view this finding of the PCIT is again required to be rejected as in the Appeal filed by Shri Amarjeet Singh Randhawa and Smt. Amandeep Kaur, I.T. Nos. 795 & 796 of 2017 were allowed by the Tribunal and thereby the addition made of the said amounts have been deleted by the Tribunal. In our considered opinion, once the order passed by the CIT Appeal in the hands of the co-seller namely Shri Amarjeet Singh Randhawa and Smt. Amandeep Kaur was passed by the Tribunal and the additions were deleted, then no addition can be made in the hands of the Assesse who were neither the signatory of the Agreement nor any GPA was granted in favour of Shri Amarjeet Singh Randhawa. In our view, the order passed under Section 263 would unsettle the order passed by the Tribunal in the case of Shri Amarjeet Singh Randhawa.

6.6 We are also of the view that PCIT should himself have conducted the enquiry or causing to make such enquiries have passed the order under Section 263. In the present case, despite the material available on record, no further enquiry were made by the PCIT and had simply relied upon the finding recorded by the CIT Appeal in the hands of co-owners. Lastly, we are of the view that in the present case, sufficient enquiries were made and in the absence of the original document, which was not signed by the Assesse, in the absence of the GPA in favour of Shri Amarjeet Singh Randhawa and any other evidence proving the receipt of on- money at the time of registration of sale deed, it will not be possible for the Assessing Officer to make additions in the hands of the Assesse before us. We are of the opinion that the PCIT has failed to prove how the order passed by the Assessing Officer was erroneous in the absence of any incriminating to prove the receipt of on-money.

6.7 We are supported by the decision rendered by Delhi Tribunal in the case of Brahma Centre Development Private Limited, ITA nos. 4341 & 4342/Delhi/2019 dated 18.12.2019 wherein the Tribunal in paragraphs 12, 13 & 14 has held as under:-

"12. In view of the above, we find it difficult to agree with the ld. DR that there was no enquiry conducted by the Ld. Assessing Officer by putting any specific question to the assessee as to the treatment given to the interest. As a matter of fact, the reason for the difference in the amount as per Form 26AS and ITR was due to the interest received from the banks that was duly accounted and considered in the financial statements of the company and was adjusted against the project expenditure. The very fact that pursuant to the scrutiny when the Ld. Assessing Officer proposed charging the interest amount received to tax, the very same explanation was offered by the assessee and was accepted by the Assessing Officer. We are, therefore, of the considered opinion that it is not a case of no enquiry and as a matter of fact, it was specifically brought to the notice of the Ld. Assessing Officer that the interest earned was adjusted against the project expenditure.

13. Further, it is an admitted fact that in this case, the business of the assessee was commenced in this case, unlike the facts in the case of M/s. Tuticorin Alkali Chemicals and Fertilizers Ltd.(supra). The Mumbai Bench of Tribunal while noticing the decision of jurisdictional High Court in the case of CIT vs. Sunbeam Auto Ltd, 332 ITR 167 and the case of Nagesh knitwear Pvt. Ltd., 355 ITR 135 observed that the Explanation- 2 to section 263 inserted by Finance Act, 2015 w.e.f. 01.04.2015 would not impact the assessment earlier to 2014-15 and such a decision was followed by the Delhi Bench of Tribunal in the case of Arun Kumar Garg (HUF) vs. PCIT in ITA No. 3391/Del/2018 for the assessment year 2014-15 and by order dated 08.01.2019 held that Explanation 2 to section 263 of the Act is only prospective in nature.

14. In the case on hand, the ld. PCIT while reading the provisions of section 263 of the Act and the decision of Hon'ble Apex Court in the case of M/s. Tuticorin Alkali Chemicals and Fertilizers Ltd.(supra) reached a conclusion that inasmuch as there was no specific inquiry by the Assessing Officer, the assessment order was erroneous in so far as it is prejudicial to the interest of Revenue. He does not conduct any independent enquiry to reach the conclusion that the assessment order was erroneous in so far as it is prejudicial to the interest of Revenue. If we accept the submission of the ld. DR that since all the material was available on record, there was no need for the PCIT to conduct any further inquiry, it also inures to the benefit of the assessee because all these things are available on record and the assessee specifically submitted that the difference in the ITR and 26AS occurred because of the adjustment of the interest received against the project expenditure. Admittedly, this is the only project conducted by the assessee and there is no other project. In such an event, it is not the passive submission to be recorded to the AO, but also actively pleading before him that the interest received was adjusted against the project expenditure."

6.8 From the perusal of paragraph 13 supra it is clear that the Tribunal has held that the explanation 2 section 263 is only prospective in nature.

6.9 The said decision of the Tribunal was assailed by the Revenue in ITA No.116 of 2021 and ITA No.118 of 2021 before Delhi High Court and the Hon'ble Delhi High Court had confirmed the order passed by the Tribunal. We are reproducing hereinbelow of the findings of the Delhi High Court in paragraphs 10 & 11 which are to be following effect.

Issue no. (ii):

10. The standard to be adopted while dealing with the issue as to whether or not an AO has carried out an enquiry or verification, all that the Court is required to ascertain is as to whether the AO applied his mind.

10.1. The fact that the AO has not given reasons in the assessment order is not indicative, always, of whether or not he has applied his mind. Therefore, scrutiny of the record, is necessary and while scrutinising the record the Court has to keep in mind the difference between lack of enquiry and perceived inadequacy in enquiry. Inadequacy in conduct of enquiry cannot be the reason based on which powers under Section 263 of the Act can be invoked to interdict an assessment order. The observations made in this behalf, by the Division Bench of this Court, in Commissioner of Income-tax vs. Sunbeam Auto Ltd., [2010] 189 Taxman 436 (Delhi)/[2011] 332 ITR 167 (Delhi) being apposite, are extracted hereafter.

"12. We have considered the rival submissions of the counsel on the other side and have gone through the records. The first issue that arises for our consideration is about the exercise of power by the Commissioner of Income-tax under section 263 of the Signature Not Verified Digitally Signed By:VIPIN KUMAR RAI Signing Date:06.07.2021 10:30:10 Income-tax Act. As noted above, the submission of learned counsel for the revenue was that while passing the assessment order, the Assessing Officer did not consider this aspect specifically whether the expenditure in question was revenue or capital expenditure. This argument predicates on the assessment order which apparently does not give any reasons while allowing the entire expenditure as revenue expenditure. However, that by itself would not be indicative of the fact that the Assessing Officer had not applied his mind on the issue. There are judgments galore laying down the principle that the Assessing Officer in the assessment order is not required to give detailed reason in respect of each and every item of deduction, etc. Therefore, one has to see from the record as to whether there was application of mind before allowing the expenditure in question as revenue expenditure. Learned counsel

for the assessee is right in his submission that one has to keep in mind the distinction between "lack of inquiry" and "inadequate inquiry". If there was any inquiry, even inadequate, that would not by itself, give occasion to the Commissioner to pass orders under section 263 of the Act, merely because he has different opinion in the matter. It is only in cases of "lack of inquiry", that such a course of action would be open. In Gabriel India Ltd. 's case (supra), law on this aspect was discussed in the following manner:

". . . From a reading of sub-section (1) of section, it is clear that the power of suo motu revision can be exercised by the Commissioner only if, on examination of the records of any proceedings under this Act, he considers that any order passed therein by the Income-tax Officer is 'erroneous insofar as it is prejudicial to the interests of the revenue'. It is not an arbitrary or unchartered power. It can be exercised only on fulfilment of the requirements laid down in sub-section (1). The consideration of the Commissioner as to whether an order is erroneous insofar as it is prejudicial to the interests of the revenue must be based on materials on the record of the proceedings called for by him. If there are no materials on record on the basis of which it can be said that the Commissioner acting in a reasonable manner could have come to such a conclusion, the very initiation of proceedings by him will be illegal and without jurisdiction. The Commissioner cannot initiate proceedings with a view to starting fishing and roving enquiries in matters or orders which are already concluded. Such action will be against the well-accepted policy of law that there must be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity. [See : Parashuram Pottery Works Co. Ltd. v. ITO[1977] 106 ITR 1 (SC) at page 10].

** From the aforesaid definitions it is clear that an order cannot be termed as erroneous unless it is not in accordance with law. If an Income-tax Officer acting in accordance with law makes a certain assessment, the same cannot be branded as erroneous by the Commissioner simply because, according to him, the order should have been written more elaborately. This section does not visualise a case of substitution of the judgment of the Commissioner for that of the Income-tax Officer, who passed the order unless the decision is held to be erroneous. Cases may be visualised where the Income-tax Officer while making an assessment examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determines the income Signature Not Verified Digitally Signed By:VIPIN KUMAR RAI Signing Date:06.07.2021 10:30:10 either by accepting the accounts or by making some estimate himself. The Commissioner, on perusal of the records, may be of the opinion that the estimate made by the officer concerned was on the lower side and left to the Commissioner he would have estimated the income at a figure higher than the one determined by the Income-tax Officer. That would not vest the Commissioner with power to re-examine the accounts and determine the income himself at a higher figure. It is because the Income-tax Officer has exercised the quasi-judicial power vested in him in accordance with law and arrived at conclusion and such a conclusion cannot be termed to be erroneous simply because the Commissioner does not feel satisfied with the conclusion. . . . There must be some prima facie material on record to show that tax which was lawfully exigible has not been imposed or that by the application of the relevant statute on an incorrect or incomplete interpretation a lesser tax than what was just has been imposed.*

** We may now examine the facts of the present case in the light of the powers of the Commissioner set out above. The Income-tax Officer in this case had made enquiries in regard to the nature of the expenditure incurred by the assessee. The assessee had given detailed explanation on that regard by a letter in writing. All these are part of the*

record of the case. Evidently, the claim was allowed by the Income- tax Officer on being satisfied with the explanation of the assessee. Such decision of the Income-tax Officer cannot be held to be "erroneous" simply because in his order he did not make an elaborate discussion in that regard . . ." (pp. 113-117) xxx xxxxxx

15. Thus, even the Commissioner conceded the position that the Assessing Officer made the inquiries, elicited replies and thereafter passed the assessment order. The grievance of the Commissioner was that the Assessing Officer should have made further inquiries rather than accepting the explanation. Therefore, it cannot be said that it is a case of 'lack of inquiry'."

10.2. This view was followed by another Division Bench of this Court in Commissioner of Income-tax vs. Anil Kumar Sharma, (2010) 194 taxman 504 (Delhi).

Issue no. (iii):

11. The assessment order can be interdicted under Section 263 of the Act, if two conditions are met, i.e., that the order is erroneous and is prejudicial to the interests of the revenue. [See Malabar Industrial Co. Ltd. vs. Commissioner of Income-tax, [2000] 109 Taxman 66 (SC)/[2000] 243 ITR 83 (SC) and CIT vs. Max India Ltd., (2007) 295 ITR 282 (SC)] Signature Not Verified Digitally Signed By:VIPIN KUMAR RAI Signing Date:06.07.2021 10:30:10 11.1. Therefore, the error should be one that is not debatable or a plausible view. Section 263 of the Act invests a power of revision in a superior officer and therefore, by the very nature of the power, does not allow for supplanting or substituting the view of the AO. The appreciation of material placed before the AO is, exclusively within his domain which cannot be interdicted by a superior officer while exercising powers under Section 263 of the Act only on the ground that if he had appraised the said material, he would have come to a different conclusion. [See Parashuram Pottery Works Co. Ltd. v. ITO, [1977] 106 ITR 1 (SC)] "

6.10 Respectfully following the decision of Delhi High Court in the matter of Brahma Centre Development Private Limited, ITA No.116 of 2021 be quash order passed under Section 263 in the case of the Assesse.

7. In the light of the above, the order passed by the PCIT under Section 263 was without any jurisdiction and accordingly we quashed the same. As the facts of all the appeals are similar, therefore respectfully following the our decision in lead case in ITA No.206 of 2017, all the three Appeals bearing nos.204, 205 & 207 of 2017 are allowed.

Customized Notes
