

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "B": NEW DELHI
(Through Video Conferencing)**

**BEFORE SHRI O. P. KANT, ACCOUNTANT MEMBER
AND
MS. SUCHITRA KAMBLE, JUDICIAL MEMBER**

ITA No. 1168/KOL/2017
Asstt. Year 2012-13

M/s. Shree Balkrishna Commercial Co. Ltd., First Floor, 273, South Extn. Center, Masjid Moth, NDSE Part-II, New Delhi – 110 049 PAN AAECs2879J	Vs.	Principal Commissioner of Income Tax-1 P-7, Chowringhee Square, Kolkata-700 069
(Appellant)		(Respondent)

Assessee by:	Shri Subhash Singhal, CA
Department by :	Shri Sujeet Kumar, CIT, DR
Date of Hearing	09/11/2021
Date of pronouncement	25/11/2021

ORDER

PER SUCHITRA KAMBLE, JM

This appeal is filed by the assessee against the order dated 15.03.2017 passed by the Pr. CIT-1, Kolkata u/s 263 of the Income Tax Act for Assessment Year 2012-13.

2. The grounds of appeal are as under :-

1. "Audit party had raised objection on two points in assessment order and the AO responded defending his decision. Using the exact language, the show cause notice under sec 263 by Pr. CIT only on those two points in view of 296 ITR 238(P&H), 119 ITR 996 (SC) and 108 ITR 407 (Cal) is not justified. Use of section 263 in place of sec 147 or 154 is not correct. CIT has not answered this objection in order under appeal.

2. Rule of consistency be followed, if the facts are same. In earlier years in scrutiny assessments, the declared version was accepted for both the points. For no change in facts and law, it may not be disturbed.

3. The AO in his assessment order u/s 143(3) full details of shares purchase/sale/stock in value and quality with contract notes/ broker bills were filed and examined by the AO and he accepted the claim after the consideration of facts. The two views are possible to treat it as a business loss or capital loss and AO has adopted the earlier one. The CIT in his order u/s 263 has erred in deciding/ directing the AO to adopt the later view. Frequency of transactions is no criteria to decide this issue. The main objects in MOA of 1986 cover this as business of the assessee company.

4. The activity of letting out of property is independent to letting out of DG, AC, Glow Sign and maintenance services. There are separate registered agreements for them. The tenant had option to avail these facilities or not and in actual some tenants did not availed them. Separate staff for security and / or maintenance is kept, electricity expenses are incurred and lot of other activities are involved, these parties deduct TDS u/s 194C and are shown in our ITR since 1981 as business. Further either as business income or income from other sources, rules are same for deduction of direct expenses and no loss of revenue is there to justify action u/s 263. Supreme Court in Japan Airlines Co Ltd case and several others in similar circumstances have decided

*charges for other services not a: / rent but contract/
business payment.*

5. For action u/s 263, there is a necessary pre-condition of loss of revenue. Action by Pr. CIT is not justified as there is no loss of revenue in this case. The asst, ultimately was made applying provisions of sec 115 JB on fixed percentage of book profits. Even after directions u/s 263, the net income is going to be computed u/s 115 JB at same figure. Thus action u/s 263 is not justified and be cancelled. The case laws relied upon by learned Pr CIT are either not relevant on facts or general in nature which varies from case to case, the comment of non-enquiry by AO is not factually correct, as enough evidence was collected by AO at assessment stage and he had applied his mind on both the points.”

3. The assessee company is engaged in the business of renting, air processing, trading in securities and construction and development. The return of income for assessment year 2012-13 was filed on 27.9.2012 declaring total income of Rs. 78,58,058/-. The assessment u/s 143(3) was completed on 25.3.2015 at total income of Rs. 1,79,28,170/- under normal provisions of Income Tax Act 1961. The Principal Commissioner of Income Tax observed that income from other source in respect of profit and loss account under the caption “profit and loss account” in share trading of the assessee company was not properly verified by the Assessing Officer. Therefore, the Principal Commissioner of Income Tax issued show cause notice u/s 263 on 18.2.2017. The assessee replied the same show cause notice on 18.2.2017. The Principal Commissioner of Income Tax vide order dated 15.3.2017 directed the Assessing Officer to pass fresh

assessment order after considering the observations made in the order u/s 263.

4. Being aggrieved by the order u/s 263, the assessee filed present appeal before us.

5. Ld. AR submitted that soon after the assessment was made by the ACIT, the Departmental Audit Party raised two objections. These objections pertained to share trading loss and receipt of DG set/AC charges etc. collected by the assessee. The notice u/s 263 also covers these two issues only. This gives a conclusion that the audit objection has led to issuance of notice u/s 263. Thus the Ld. AR relied upon the decision of Hon'ble Punjab & Haryana High Court in case of CIT vs. Sohana Wollen Mills reported in 296 ITR 238 as well as the Hon'ble Supreme Court in case of Indian & Eastern Newspaper Society vs. CIT 119 ITR 996 (SC). Thus the Ld. AR submitted that as per Ground No. 1, the notice u/s 263 has clearly been set out in the audit objection which was later on dropped by the department. Thus the order u/s 263 be quashed and set aside. As regards share application/share trading loss, the Ld. AR submitted that at the time of proceedings u/s 143(3), the Assessing Officer has made inquiry relating to the capital loss as per the books of accounts and raised specific query at point No. 20 of the questionnaire issued by the Assessing Officer. The Ld. AR further submitted that the trading in shares was regularly done by the assessee and the same was never doubted in the past by the Revenue. As regards receipt of DG set/AC charges, the same was also clearly

set out in the profit and loss account and has been taken into account by the Assessing Officer at the time of assessment order u/s 143(3) of the Act.

6. The Ld. DR submitted that the assessee failed to demonstrate in respect of audit objection that the same was relevant or not as the copies produced are not proper copies and there was no record as such available that the audit objection was dropped at any point of time. Therefore, Ld. DR prayed that Ground No. 1 be dismissed. As regards the issue of invocation of Section 263, the Ld. DR submitted that the share trading loss has not been specifically enquired and no investigation on part of the Assessing Officer was conducted during the assessment proceedings u/s 143(3). The questionnaire which was pointed out by the Ld. AR, are general in nature and hence the Ld. DR submitted that the Principal Commissioner of Income Tax has rightly invoked the provisions of Section 263 of the Act.

7. We have heard both the parties and perused all the relevant material available on record. As regards Ground No. 1, there is no co-relation between audit objection and the show cause notice issued u/s 263 by Principal CIT. In fact, there is no record which shows that the said audit objection was dropped later on. The notice issued u/s 263 has clearly mentioned the two issues upon which the Assessing Officer has been directed to pass fresh assessment. Hence Ground No. 1 is dismissed. As regards to merit of invocation of Section 263 by the Principal CIT, the Pr. CIT observed that the profit and loss account reveal that “profit

and loss in share trading” was debited for Rs. 6,49,429.32 under the head revenue from operation vide Note 15. The Pr. CIT observed that the loss shown was capital in nature and required to be adjusted with the capital gains only and thus, it should be allowed to be carried forward for future set off instead of adjusting with other heads of income. It was further observed that during the relevant previous year the assessee company derived income mostly from rent of the house property and some allied service receipts like AC Charges, DG set charges, glow sign board income, maintenance charges etc. The Pr. CIT concluded that the rent portion should have been taxed as income from house property as laid down in Section 22 & 23 after due allowance of deduction u/s 24 of the Income Tax Act. The Pr. CIT held that as regards share trading business the Assessing Officer has passed the impugned assessment order without making relevant enquiries which were called for. The Pr. CIT further held that the Assessing officer failed to make relevant enquiry in this case and this is a case of non enquiry with reference to treatment of capital loss, taxation of lease rental income under the head income from house property and service receipt under the head income from other sources. Thus, the Pr. CIT set aside the assessment order in light of the decision of the Hon’ble Supreme Court in case of CIT Vs. Sh. Manjunatheshwar Packing Products and Camphor Works 231 ITR 53 where the Assessing Officer has not made any enquiry on a particular issue, such order is construed as erroneous and prejudicial to the interest of the Revenue. Firstly, we must look into the explanation 2 to Section 263 which was inserted by Finance Act

2015 w.e.f. 1/6/2015. The said explanation regarding order passed without making enquiry or verification, order passed allowing any relief without enquiring into the claim has been applicable from AY 2016-17 and will not be applicable in the present Assessment Year i.e. 2012-13. As regards merit of invocation of Section 263, the assessee at the time of assessment proceedings u/s 143(3) has given the details relating to share trading loss as questionnaire No. 20 and 47 were in respect of asking details of transaction in shares as well as investment in shares as on 31.3.2011. Therefore, the assessee has given the details accordingly. In fact the assessee demonstrated that the assessee is dealing in share trading and the said income was offered as business income. Thus, at the time of assessment proceedings u/s 143(3) proper inquiry was conducted by the Assessing Officer. The Principal CIT has changed the nomenclature of the transactions in share from business income to income from other sources which is a second opinion and, further held that no inquiry was done. But the proper inquiry was conducted. In-fact the CIT has mentioned in Para 6 & 7 of the order that the nature of the transaction period of investment, source of funds, involvement of the assessee in the share trading business and other essential parameters has resulted in loss. Thus, the Pr. CIT was very well aware that the assessee is dealing in share trading as business. While invoking Section 263(1) of the Income Tax Act, 1961, the Pr. CIT has not made out the case that the Assessment Order is passed without making inquiries or verifications which should have been made. In respect of receipt of DG sets/AC charges the Assessing Officer has raised a query

vide letter dated 5/5/2014 i.e. notice under sub Section 1 of Section 142 and notice dated 21/1/2015 wherein the specific query at Question No. 23 and Question No. 13 was asked in respect of whether any rental receipts was received by the assessee and why the said income should not be treated as income from house property and income from other sources as well as called for details of names of the tenants along with agreements and complete postal address and PAN. The assessee vide reply dated 19/2/2015 has given a detail regarding share transactions about 2 lacs as well as all these share transaction which are reflected in books of accounts along with 13 contract notes. The assessee also submitted entire income details along with TDS for AC Charges/DG set and further submitted that these amounts are properly reflected in books of accounts. The assessee also submitted earlier reply in wherein the agreements along with the other details were submitted before the Assessing Officer. Thus, the Assessing Officer has not only raised the objections/queries related to these incomes but has also taken cognizance of the evidences produced by the assessee. The Pr. CIT has also taken note that assessee has revealed composite rent from its clients for letting out houses and also for some allied services. But the Pr. CIT has not commented on the nature of the business and the offer of the assessee of the rental income as the business income and totally ignored the assessee's submission before the Assessing officer at the time of assessment proceedings u/s 143(3). Thus, the Pr. CIT cannot say that there was inadequate enquiry or no enquiry at all. The decision of the Hon'ble Apex Court relied by the Pr. CIT is not applicable in the

present case. The Pr. CIT while passing the order under Section 263 of the Act has not shown any new material or has not come to the conclusion that there is escapement of income during the assessment proceedings. The order passed by the Pr. CIT in capacity of Section 263 is merely a second opinion and does not fall in the category of prejudicial to the interest of Revenue. In the present case the Assessing Officer has taken cognizance of all the material provided by the Assessee during the Assessment Proceedings and after verifying the same has passed just and proper order. Thus, the Pr. CIT's observation that no inquiry/insufficient enquiry made by Assessing Officer, is incorrect and does not sustain. Thus, merely having a different opinion upon the treatment of any receipt cannot be the reason of invocation of section 263. Thus the appeal of the assessee is allowed.

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

Order pronounced in the open court in presence of both the parties on 25th November, 2021.

**Sd/-
(O.P. KANT)
ACCOUNTANT MEMBER**

**Sd/-
(SUCHITRA KAMBLE)
JUDICIAL MEMBER**

Dated: 25/11/2021

Veena /R.N

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi