

आयकर अपीलिय अधिकरण, पुणे न्यायपीठ "बी" पुणे में
**IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B", PUNE**

श्री आर. के. पांडा, लेखा सदस्य
एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष

**BEFORE SHRI R.K. PANDA, AM
AND SHRI VIKAS AWASTHY, JM**

आयकर अपील सं. / ITA No.837/PN/2012
निर्धारण वर्ष / Assessment Year : 2007-08

Shri M.D. Wadhokar,
Legal Heir Smt. Pushpa Wadhokar,
Prop. of S.M. Rolling Works,
Plot No.12/1, D-1 Block,
MIDC, Chinchwad, Pune - 411 019
PAN No.AABPW3022H

..... अपीलार्थी /
Appellant

बनाम v/s

CIT-V, Pune

..... प्रत्यर्थी /
Respondent

निर्धारिती की ओर से / Assessee by : Shri Kishor Phadke

प्रत्यर्थी की ओर से / Respondent by : Smt. Harshavardhini Buty

सुनवाई की तारीख / Date of Hearing :14.09.2015	घोषणा की तारीख / Date of Pronouncement:28.10.2015
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आदेश / ORDER

PER R.K. PANDA, AM :

This appeal filed by the assessee is directed against the order dated 08-03-2012 passed u/s.263 of the I.T. Act by the CIT-V, Pune relating to Assessment Year 2007-08.

2. This appeal was earlier dismissed by the Tribunal vide order dated 10-07-2013. Subsequently vide M.A. No.52/PN/2014 order dated 13-06-2014 the Tribunal recalled the order. Hence, this is a recalled matter.

3. Facts of the case, in brief, are that the assessee is an individual and is engaged in the business of Engineering works under the name and style of proprietary concern S.M. Rolling Mills. The assessee filed his return of income on 31-08-2007 declaring total income of Rs.5,99,90,726/-. The AO completed the assessment u/s.143(3) on 27-11-2009 determining the taxable income of Rs.6,02,81,921/- by making various additions, the details of which are as under :

Sl.No.	Particulars	Amount (Rs.)
1	Telephone expenses	71,078
2	Credit card payments	47,655
3	Employee welfare	82,700
4	Vehicle expense	42,747
5	Depreciation	8,930
6	Sundry Creditors	38,075

4. Subsequently, the Ld.CIT called for the records and noted that the order passed u/s.143(3) was erroneous in so far as it is prejudicial to the interest of the revenue within the meaning of section 263 of the I.T. Act for the following reasons :

(i) On verification of records, it is noticed that a sum of Rs.35,12,316/- is debited under the head Donation and the same has been accepted by the Assessing Officer without any verification.

(ii) On verification of audit report, it is seen that particulars of payments made to persons specified u/s. 40A(2)(b) are not verified by the Assessing Officer and accordingly accepted in the assessment order passed u/s 143(3) with verification.

(iii) The Assessing Officer has not verified the Tax deducted and paid to the Government account, where as certain payments like Machining charges, freight and octroi and consultancy expenses are prima-facie liable for TDS. The Assessing Officer failed to examine the issue with regard to disallowance u/s 40a(ia).

(iv) The expenses claimed under the head Building repair and computers repair are allowed by the Assessing Officer without verifying whether the same are revenue or capital in nature.

(v) The depreciation claimed on vehicle purchased on 30/3/2007 has been allowed by the Assessing Officer without verification.”

He therefore issued a show cause notice u/s.263 of the I.T. Act asking the assessee as to why the order passed u/s.143(3) should not be set aside u/s.263 of the I.T. Act.

5. So far as the issue No.1 regarding donation of Rs.35,12,216/- is concerned the assessee filed ledger extracts of donation of Rs.35,12,316/-. It was submitted that the assessee had paid Rs.31 lakhs to M/s.Jnana Prabodhini Samshodhan Sanstha, Pune, an institution notified u/s.35(1)(iii) of the I.T. Act. It was submitted that there was nothing erroneous in claiming the said payment as deduction. However, for the other payments it was submitted that they are allowable u/s.37 of the I.T. Act.

6. So far as payments made to persons specified u/s.40A(2)(b) is concerned it was submitted that the payments were made to the same parties in A.Yrs. 2005-06 and 2006-07. It was submitted that the assessee maintained Arms Length distance while dealing with these parties. The information was duly disclosed in the tax audit report and therefore there was no apparent reason to believe that the payments to the parties covered u/s.40A(2)(b) were excessive and unreasonable.

7. So far as issue No.3 regarding payment of machinery hire charges etc. and TDS thereof is concerned, the assessee agreed that the AO failed to make necessary verification with respect to the TDS deducted on various payments.

8. So far as issue No.4, i.e. building repairs and computer repairs is concerned it was submitted that the buildings repairs were for year to year maintenance of factory building in the form of

painting, roofing repairs, floor damaged due to handling of heavy materials etc. as the building was 25 years old. It was submitted that the expenses amounting to Rs.41.15 lakhs which qualified for capital addition has already been capitalized in the books of account. So far as computer repairs is concerned, it was submitted that the amount was on account of current repairs and maintenance expenses. An amount of Rs.69.80 lakhs has already been stated to be capitalized in the current year.

9. As regards depreciation on vehicles purchased on 30-03-2007 is concerned it was submitted that the 4 vehicles purchased during the year under consideration were purchased on various dates prior to March 2007 except Tata Indigo which was purchased on 08-03-2007. It was submitted that since the motor vehicles were purchased on various dates prior to March 2007 the notice on this issue does not survive. It was accordingly submitted that the 263 proceedings initiated should be dropped.

10. Based on the arguments advanced by the assessee the Ld.CIT dropped the issue regarding depreciation on vehicles. So far as other issues are concerned he did not agree with the contentions of the assessee. So far as the issue regarding donation is concerned, he observed that the AO has not at all applied his mind to the claim of deduction claimed under the head 'donation' amounting to Rs.35,12,316/-. No details were filed by the assessee. This amount of donation which was otherwise clearly disallowable has not been added back by the assessee in the computation of income filed along with the return of income. Only during the course of 263 proceedings the assessee has claimed that the amount of Rs.31 lakhs paid to M/s. Jnana Prabodhini Samshodhan Sanstha, Pune

was allowable u/s. 35(1)(iii) of the I.T. Act. No details were produced before the AO nor had an occasion for the AO to verify that amount was given/paid to the above institution which has now been stated to be notified u/s.35(1).

11. As regards the claim of the assessee that the balance amount was allowable for deduction u/s.37 of the I.T. Act the Ld.CIT noted that if the same was allowable u/s.37, then there was no reason for the assessee to claim the same under the head 'donation'. The assessee had not substantiated as to how the amount of donation which has been claimed as business expenditure in the profit and loss account has been spent wholly and exclusively for the purpose of business of the assessee. While the deduction u/s.35(1)(iii) amounting to Rs.31 lakhs might have been correctly claimed, however, the amount of Rs.4,12,316/- appears to have been claimed incorrectly. Since the AO has failed to apply his mind, he restored the issue to the file of the AO with a direction to verify the same and pass appropriate order as per law.

12. So far as payments made to persons specified u/s.40A(2)(b) is concerned he noted that the assessee has not shown the reasonableness of the amount paid along with services rendered and the functions performed. The claim of the assessee that mark-up of only 5% has been given to the sister concern was never made before the AO nor the same was verified by the AO. Therefore, he restored this issue also to the file of the AO with a direction to verify the payments made in the light of the decision of the Hon'ble Supreme Court in the case of CIT Vs. Glaxosmithkline Asia Pvt. Ltd. reported in 236 CTR 113.

13. So far as the issue relating to building repairs and computer repairs is concerned he noted that the AO has allowed the entire expenses as current repairs without making any enquiry. The computer repair expenses of Rs.8.44 lakhs have not been verified by the AO as to whether such expenditure was on account of current repairs or capital expenditure. He therefore restored this issue also to the file of the AO with a direction to verify the expenses. He noted that while current repair expenses are to be allowed any expenditure in the nature of capital expenditure should be disallowed.

14. Aggrieved with such order of the CIT the assessee is in appeal before us with the following grounds :

"1. The learned CIT-V, Akurdi, Pune erred in law and on facts in passing an order u/s. 263 without appreciating that the scrutiny assessment order dated 27/11/2009 can't be treated as erroneous and prejudicial to the interest of the revenue with respect to the following deductions allowed to the assessee -

- a) Donation of Rs. 31,00,000 paid to Jnana Prabodhini, an institution covered u/s 35(1)(iii)
- b) Donations of Rs. 4,12,316 paid to various associations considering business exigency
- c) Amount of Rs. 45.45 lacs paid related parties covered u/s. 40A(2)(b)
- d) Machining charges, freight, octroi & consultancy charges eligible for TDS
- e) Building Repairs expenses amounting to Rs. 49.32 lacs

2. The learned CIT-V, Akurdi, Pune erred in law and on facts in not appreciating that any assessment order ought not to be held as eligible for 263 review merely for non-application of mind since action u/s 263 is dependent on twin conditions or erroneous order as well as prejudice to the interest of revenue.

3. The learned CIT-V, Akurdi Pune erred in law and on facts in directing the learned AO to verify the facts afresh without pointing out to any actual/ real error and prejudice in the 143(3) order passed by the AO.

4. The appellant craves leave to add/ modify/ delete/alter all / any of the grounds of appeal."

15. The Ld. Counsel for the assessee submitted that out of 5 points raised by Ld.CIT in the notice issued u/s.263 of the I.T. Act he has dropped the issue relating to depreciation on vehicles purchased on 30-03-2007. So far as the issue relating to verification of TDS is concerned the AO in the order passed u/s.143(3) r.w.s. 263 has not made any addition. Therefore, he is not pressing the ground on that issue. Therefore, the order of the CIT setting aside the order passed u/s.143(3) is confined to only 3 issues, i.e. donation, payments to related parties and expenses claimed under the head building repairs and computer repairs.

16. So far as the issue relating to donation is concerned he submitted that the assessee before the CIT had enclosed the details of donation debited to the profit and loss account according to which an amount of Rs.31 lakhs was paid to M/s. Jnana Prabodhini Samshodhan Sanstha, Pune, an institution notified u/s.35(1)(iii) of the I.T. Act. Therefore, there is nothing erroneous in claiming said payment as deduction by the assessee. The other payments are made out of business exigency and hence are eligible for deduction u/s.37(1) of the I.T. Act. Therefore, these deductions did not make the claim of the assessee as an erroneous claim.

17. So far as payments to related parties are concerned he submitted that the payments made to these parties in the preceding 2 years, i.e. A.Yrs. 2005-06 and 2006-07 were also submitted before the AO. Referring to the reply given to the AO during the course of assessment proceedings the Ld. Counsel for the assessee submitted that apart from giving comparative statement of profit and loss account for the last 3 years and details of outstanding liabilities as on 31-03-2007 the assessee had also enclosed the list

of sundry debtors, details of new FDD, details of addition to fixed assets, note on nature of business and assessment order copies of last 2 years. The particulars of payments made to the persons specified u/s.40A(2)(b) was given in the tax audit report. Therefore, it cannot be said that AO has not applied his mind on this issue.

18. Referring to the order passed u/s.143(3) r.w.s. 263 he submitted that the AO in the order has disallowed an amount of Rs.22,75,000/- out of the total payment of Rs.45,50,500/- being salary to Shri J.D. Wadhokar. This indicates that even in the order passed u/s.143(3) r.w.s. 263 the AO has allowed 50% of the claim. Therefore, when the AO in the original assessment order allowed the claim on the basis of the submissions made before him it cannot be said that there is non-application of mind.

19. So far as the issue of building repair expenses is concerned he submitted that the AO in the order passed u/s.143(3) r.w.s. 263 has already given an observation that an amount of Rs.41,15,297/- has been capitalized on which depreciation has been claimed and allowed. He only disallowed an amount of Rs.8,16,882/- on account of non production of details of expenditure. He submitted that in the original assessment proceedings whatever details were called for were submitted before the AO. Further, the repair and expenditure amount is not substantial considering the volume of business and the age of the building. Relying on various decisions he submitted that for invoking the provisions of section 263, the twin conditions, namely, (i) the order is erroneous and (ii) the order is prejudicial to the interest of the revenue must be satisfied. If one of them is absent then the CIT lacks jurisdiction to set aside the order u/s.163 of the I.T. Act. Further, for making a valid order

u/s.263 it is essential that the CIT has to record an express finding to the effect that the order passed by the AO is erroneous which has caused loss to the revenue. Power of revision is not meant to exercise for the purpose of directing the AO to hold another investigation without describing as to how the order of the AO is erroneous. Where the assessment order has been passed by the AO after taking into account assessee's submissions and documents furnished by him and no material is brought on record by the CIT which shows that there has been any discrepancy or falsity in the evidences furnished by the assessee the order of the AO cannot be set aside for making deep enquiry only on the presumption that something new may come out. For the above proposition, the Ld. Counsel for the assessee relied on the decision of the Hon'ble Delhi High Court in the case of CIT Vs. Leisure Wear Exports Ltd. reported in 341 ITR 166. He also relied on the following decisions :

1. Jewel of India Vs. ACIT & Another reported in 77 CCH 0517 (Mumbai High Court)
2. Globus Infocom Ltd. Vs. CIT reported in 369 ITR 014 (Delhi)

He accordingly submitted that the order passed u/s.263 by the Ld.CIT be set aside and the grounds raised by the assessee be allowed.

20. The Ld. Departmental Representative on the other hand strongly relied on the order of the CIT. She submitted that the AO has not at all applied his mind on the various issues raised by the Ld.CIT in the notice issued u/s.263. Whether the donation is an allowable deduction or not has not at all been considered by the AO. The assessee has also not furnished the details regarding such claim. Only during 263 proceedings he has submitted that out of

the total amount of Rs.35,12,316/- an amount of Rs.31 lakhs is eligible for deduction u/s.35(1)(iii). Further, no details were given for the balance amount as to how the expenditure incurred is wholly and exclusively for the business of the assessee. Similarly, the amount of Rs.45.45 lakhs paid to related parties covered u/s.40A(2)(b) has not been considered by the AO. The building repair expenses amounting to Rs.49.32 lakhs also was not considered by the AO during the assessment proceedings. No details were furnished by the assessee. She accordingly submitted that the order passed by the Ld.CIT u/s.263 is fully justified and therefore the appeal filed by the assessee should be dismissed.

21. We have considered the rival arguments made by both the sides, perused the orders of the AO and Ld. CIT and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find in the instant case the Ld.CIT issued notice u/s.263 of the I.T. Act on 5 issues out of which he dropped one issue during the 263 proceedings, i.e. depreciation claimed on vehicles purchased on 30-03-2007. Similarly, the issue relating to TDS and disallowance u/s.40A(2)(b) has been considered by the AO in the subsequent proceedings after the order was set aside u/s.263 and there is no addition. Therefore, the issues that survive for our adjudication is regarding the validity of the 263 proceedings on account of donation of Rs.35,12,316/-, payment of Rs.45.45 lakhs to related parties and building repair expenses amounting to Rs.49.32 lakhs.

22. So far as donation of Rs.35,12,316/- is concerned it is an admitted fact that neither any details were called for by the AO nor

the assessee has given the breakup of such details during the course of assessment proceedings. Only during 263 proceedings the assessee has stated that an amount of Rs.31 lakhs has been paid to M/s. Jnana Prabodhini Samshodhan Sanstha, Pune, an institution notified u/s.35(1)(iii) of the I.T. Act and the balance amounts were made out of business exigencies. Whether the part of the donation is for business exigency or not has not at all been examined. Since the AO has not at all applied his mind on this issue, we are of the considered opinion that the CIT was justified in invoking the jurisdiction under section 263 of the I.T. Act, 1961 on the issue of donation.

23. So far as the issue relating to payment of Rs.45.45 lakhs to related parties is concerned, we find the assessee during the course of assessment proceedings had filed the profit and loss account for the preceding years. The AO after verification of the various items in the profit and loss account has accepted the payment to the related persons. Even the tax audit report also specifically mentions the name of the related persons. Therefore, it cannot be said that there is non-application of mind. Even the AO in the subsequent proceedings has accepted 50% of the salary paid to the related parties as allowable expenditure on adhoc basis. We, therefore, hold that the Ld.CIT is not justified in assuming jurisdiction u/s.263 on the issue of payment made to related parties covered u/s.40A(2)(b) merely because the AO has not passed an elaborate order on this issue.

24. So far as the issue relating to building repair expenses at R.49.32 lakhs is concerned, admittedly there was no query raised

by the AO during assessment proceedings nor any reply given by the assessee on this issue. When the gross block of the building as on 01-04-2006 was shown at Rs.25,57,697.39 the AO should have given attention to the huge amount of repair and maintenance claimed in the profit and loss account. Although we find the assessee in the profit and loss account has claimed expenditure of Rs.49,32,179, the assessee has also claimed addition to gross block at Rs.41,15,297.26. The AO in the order passed u/s.143(3) has disallowed only Rs.8,16,882/- out of the total debit of Rs.49,32,179/- observing that the balance amount has been capitalized. However, from the computation statement, we find the assessee has not disallowed any repair and maintenance expenditure out of the expenditure debited to the profit and loss account. Since the order of the AO is completely silent on this vital issue, we are of the considered opinion that the Ld.CIT was fully justified in assuming jurisdiction u/s.263 on this issue. Since the AO in the instant case has not applied his mind on these 2 vital issues, therefore, the order has become erroneous as well as prejudicial to the interest of the revenue to this extent. Therefore, the Ld.CIT, in our opinion, was fully justified in invoking jurisdiction u/s.263 of the I.T. Act on these two issues. The various decisions relied on by the Ld. Counsel for the assessee are not applicable to the facts of the present case.

25. In the case of Jewel of India (Supra) the order passed by the CIT u/s.263 was held to be erroneous on the ground that there was no finding recorded by the CIT that the order passed by the AO is prejudicial to the interest of the revenue. In the absence of positive finding that the order was not in the interest of the

revenue, it was held to be not open for the revisional authority to assume jurisdiction u/s.263 of the I.T. Act.

26. In the case of Leisure Wear Exports Ltd. (Supra) it was held that power of revision is not meant to be exercised for the purpose of directing the AO to hold another investigation without describing as to how the order of the AO is erroneous. In that case the assessment order was passed by the AO after taking into account assessee's submissions and documents furnished and no material was brought on record by the CIT to show that there was any discrepancy or falsity in the evidences furnished by the assessee. Accordingly, it was held that the order of the AO cannot be set aside for making deep enquiry only on the presumption that something new may come out. However, in the instant case, there is no enquiry at all. The assessee has also not furnished any details on the 2 issues. Therefore, the above decision is not applicable to the facts of the present case.

27. Similarly, in the case of Globus Infocom Ltd. (Supra) specific query was raised by the AO on the issue on which notice u/s.263 was issued. Under such circumstances, it was held that CIT in exercise of power u/s.263 could not direct a fresh adjudication unless for cogent and good reasons a clear cut and specific finding was made that the assessment made by the AO on the said aspect was erroneous and was prejudicial to the interest of the revenue. Thus, the 3 decisions relied on by the Ld. Counsel for the assessee are distinguishable on facts and not applicable to the facts of the present case. In this view of the matter, we hold that the order of the CIT assuming jurisdiction u/s.263 is valid only on the 2

issues, i.e. donation of Rs.35,12,316/- and the building repairs of Rs.49.32 lakhs. We hold and direct accordingly. The grounds raised by the assessee are accordingly partly allowed.

28. In the result, the appeal filed by the assessee is partly allowed.

Order pronounced in the open court on 28-10-2015.

Sd/-
(VIKAS AWASTHY)
JUDICIAL MEMBER

Sd/-
(R.K. PANDA)
ACCOUNTANT MEMBER

पुणे Pune; दिनांक Dated : 28th October, 2015.
सतीश

आदेश की प्रतिलिपि अद्येषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. CIT-V, Pune
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "बी" पुणे /
DR, ITAT, "B" Pune;
5. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune