

आयकर अपीलिय अधीकरण, न्यायपीठ – “B” कोलकाता,  
*IN THE INCOME TAX APPELLATE TRIBUNAL  
KOLKATA BENCH “B” KOLKATA*

Before **Shri N.V.Vasudevan, Judicial Member** and  
**Shri Waseem Ahmed, Accountant Member**

**ITA No.665/Kol/2017**  
Assessment Year :2012-13

Poonam Bhotika 161/1 M.G. Road, Rom No.26, Kolkata-700 007 <b>[PAN No.AQSPS 2982 D]</b>	<b>V/s.</b>	Income Tax Officer, Wrd-43(1), 3, Govt. Place (W), Kolkata-700 001
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर से/By Appellant	Shri S.M. Surana, Advocate
प्रत्यर्थी की ओर से/By Respondent	Shri G. Hangshing, CIT-DR
सुनवाई की तारीख/Date of Hearing	25-01-2018
घोषणा की तारीख/Date of Pronouncement	04-04-2018

**आदेश /O R D E R**

**PER Waseem Ahmed, Accountant Member:-**

The assessee has filed this appeal disputing the order of Pr. Commissioner of Income Tax-15, Kolkata passed u/s 263 of the Income Tax Act, 1961 (hereinafter referred to as ‘the Act’) dated 22.03.2017 by which the Ld. Pr. CIT set aside the assessment order dated 02.03.2015 passed u/s 143(3) of the Act for Assessment Year 2012-13 with a direction to re-do the assessment in respect of issue therein.

The ground raised by the assessee in the memo of appeal filed with the Tribunal read as under:-

*“1. That the Commissioner of Income-tax, Kolkata-15 is not justified set aside the assessment order for the assessment year 2012-13 dated 02.03.2015 passed by the ITO Ward-43(1), Kolkata is found to be erroneous and prejudicial to the interest of revenue on the ground that the allowability of loss in future option as an admissible business expenditure remained to be seen by the AO during the assessment proceedings although prime facie evidence against its allowability was*

*there on record and AO has not made proper enquiry before completing assessment regarding this issue. By not checking the above issue and by not making adequate enquiry the Assessing Officer has not assessed the proper income and the order has become erroneous and prejudicial to the interest of the revenue hence set aside the order. 2. That any other grounds of appeal may kindly be allowed at the time of hearing.”*

Shri S.M. Surana, Ld. Advocate appeared on behalf of assessee and Shri G. Hangshing, Ld. Departmental Representative appeared on behalf of Revenue.

2. Briefly stated facts are that assessee in the present case is an individual and deriving her income from interest, director's remuneration and dividend. The assessee for the year under consideration filed her return of income declaring at nil, which was processed u/s 143(1) of the Act. Subsequently the case was selected under scrutiny and accordingly the notice u/s 143(3)/142(1) of the Act was served upon the assessee. The assessment was completed u/s 143(3) of the Act vide order dated 02.03.2015 after making the disallowance u/s 14A of the Act. Finally, the assessment was framed at a total loss of ₹22,94,539/- only.

2.1 Subsequently, Ld. Pr. CIT observed that assessee has debited her profit and loss account for ₹22,16,317/- on account of loss in future and options. As per Ld. Pr. CIT the impugned loss was speculative in nature. Therefore, the same is not eligible for deduction other than the speculation income. Accordingly, Ld. Pr. CIT issued show-cause notice upon assessee dated 14.02.2017 for revising the order passed by the Assessing Officer u/s 143(3) of the Act. In compliance thereto, assessee submitted that the amount of loss was duly verified by the AO during assessment proceedings. The AO also verified the same from National Stock Exchange (for short NSC) by issuing notice u/s 133(6) of the Act. The NSC duly confirmed the said loss. Thus, the amount of loss was allowed by the AO after due verification and getting satisfied. Subsequent to the scrutiny assessment, the Audit Wing of Income Tax also raised the objection against the allowability of impugned loss. But the same was allowed by the Audit Wing of the Income Tax Department

after getting satisfied about the loss. Thus, the proceedings initiated in the audit objection were dropped.

The assessee also submitted that as per the provisions of Section 43(5)(d) of the Act, the transactions in future & option if carried out in recognizing stock exchange cannot be treated as speculative transactions. Therefore, the impugned loss cannot be treated as speculative loss and thus eligible for set off against income.

However, Ld. Pr. CIT disregarded the contention of assessee and held the order of AO as erroneous in so far as prejudicial to the interest of revenue by observing as under:-

*"I have carefully considered the issue with specific reference to the relevant assessment records and proposal u/s. 263 of the AO. The facts narrated above indicate that some aspects relating to allowability of loss in future option as an admissible business expenditure remained to be seen by the AO during the assessment proceeding although prima facie evidence against its allowability was there on record. The Assessing Officer has not made proper enquiry before completing assessment regarding this issue. By not checking the above issue and by not making adequate enquiry the Assessing Officer has not assessed the proper income and the order has become erroneous and prejudicial to the interest of the revenue.*

*In view of the above, the order dated 02/03/2015 passed by ITO, Ward-43(1), Kolkata is found to be erroneous and prejudicial to the interest of revenue and hence set aside on the above limited issue with the direction to pass fresh assessment order after examining the evidence and documents in respect of the above issue raised after giving opportunity to the assessee and in accordance with law."*

Against the order of Ld. Pr. CIT the assessee is in appeal before us.

3. Ld. AR before us filed paper book which is running pages from 1 to 28 and reiterated the submissions that were made before Ld. Pr. CIT. He also submitted that Ld. Pr. CIT was not confident enough in holding the assessment order as erroneous which is causing prejudice to the interest of Revenue as he has given a finding that **some aspects** have not been seen by the AO during the assessment proceedings.

Similarly, Ld. Pr. CIT has also observed in his impugned order that *prima facie* evidences for the allowability of impugned loss are available on record. Thus,

from the above it can be inferred that Ld. PR. CIT himself was not confident / sure about the error in the order of AO. In this regard, Ld. AR also submitted that the order cannot be held erroneous in so far as prejudicial to the interest of revenue, if two views are possible in respect of any transactions/issue. Ld. AR in support of assessee's claim has relied on the order of the Co-ordinate Bench of this Tribunal in the case of *Ritech Kumar Boyed vs. CIT* in **ITA No.2299/Kol/2013** dated 15.01.2016 wherein the Tribunal has held as under:-

*"13. We have given a careful consideration to the rival submissions. It is seen from the order of the AO that the AO rejected the claim of the Assessee that the unrecorded sales were goods given to customers and the customers may approve or may return such goods. It is only on approval sales are recorded in the books of accounts. Therefore, there were no suppressed sales, whatsoever. This was rejected by the AO and he made an addition on account of gross profit on unrecorded sales It 17% of unrecorded sales. The crucial words in the order of assessment read as follows:-*

*"Considering the facts and circumstances of the case the G.P. rate on undisclosed sale is calculated @ 17%. And the same is added back to the total income of the assessee. No further expenses are allowed as assessee has already debited huge expenses (**Addition Rs.38,4701/-**)"*

*14. It is clear from the above observations of the AO and the observations in para-3 of the order of assessment that he had taken due cognizance of all debit items in the profit and loss account, the tax audit report, the impounded documents, statement recorded during Survey and during assessment proceedings, books and accounts and other documents, bills, vouchers etc.*

*15. The CIT has exercised jurisdiction u/s.263 of the Act on the ground that the AO failed to make proper enquiry which he ought to have made before completing the assessment. There is a distinction between "**lack of enquiry**" and "**inadequate enquiry**". If there is an enquiry, even inadequate, that would not by itself give occasion to the CIT to pass order under s. 263, merely because he has a different opinion in the matter. Such a course of action is open only in cases of "**lack of enquiry**". Although apparently the assessment does not give any reasons why purchased were not being added as income, that by itself would not be indicative of the fact that the AO has not applied his mind to the issue. AO is not required to give detailed reason in respect of each and every item of deduction in the assessment order. AO had called for explanation regarding suppressed sales and the assessee had furnished his explanation. Thus, it cannot be said that it is a case of '**lack enquiry**'. Further, even the CIT is not clear as to whether entire purchases has to b. added or peak purchases has to be added or the entire sales has to be added as income. Therefore, the view taken by the AO was one of the possible views and the assessment order passed by the AO could not be held to be prejudicial to the Revenue. Even the CIT conceded the position that the AO made the inquiries, elicited replies on Gross Profit and thereafter passed the*

assessment order. The grievance of the CIT was that the AO should have made further inquiries as to whether any addition has to be made on account of unrecorded purchases or whether the entire suppressed sales and to be regarded as income of the Assessee rather than accepting the explanation. Therefore, it cannot be said that it is a case of '**lack of inquiry**'. The decision of the Hon'ble Bombay High Court in the case of Ganbriel India Ltd. (supra) clearly supports the stand taken by the Assessee in this regard. We also derive support for our c- Inclusions as above from the decision of the Hon'ble Delhi High Court in the case CIT Vs. Sunbeam Auto Ltd. 332 ITR 167 (Del.).

16. For reasons stated above, we are of the view that the jurisdiction u/s. 263 of the Act was not properly exercised by the CIT as the condition precedent for invoking the same viz., that the order of the AO is erroneous and prejudicial to the interest of the revenue is not shown to be present in the present case. We therefore quasi. the order u/s.263 of the Act and allow the appeal by the Assessee."

Ld. AR also relied on the order of the Co-ordinate Bench of this Tribunal in the case of *Smt.Juthika Kar vs. ITO* in ITA No.1128/Kol/2009 dated 16.05.2012, wherein the Tribunal has held as under:-

"5. What is adequate enquiry is a subjective issue. Admittedly the Assessing Officer is not just a tax collector. He has to do the duty as an officer, who is responsible for assessing the correct income. An opinion has been formed by the Assessing Officer on the basis of evidences called for and examined. Such opinion cannot be said to be wrong or such inquiry cannot be said to be inadequate inquiry. There is a difference between no enquiry and inadequate enquiry. In the case of no enquiry the Id. CIT would be right in involving his powers u/s. 263. But to Assessment Year an enquiry is inadequate enquiry the Id. CIT would have to show that the enquiry and the opinion formed on the basis of such enquiry is fallacious. This has not been done by the Id. CIT. under these circumstances, we are of the considered view that the inquiries done by the Assessing Officer cannot be said to be erroneous or specifically inadequate. The decision relied upon by the Id. DR in the case of *Gee Vee Enterprises*, a passed by the Hon'ble Delhi High Court, categorically held that 'the order becomes erroneous because such an inquiry has not been made and not because there is anything wrong with the order if all the facts stated therein are assumed to be correct.' In the present case, it shows that inquiry was made, documents were called for examination and opinion had been formed by the Assessing Officer while passing the original assessment order on 30.06.2006. This has not been shown to be fallacious. In this situation, we are of the considered view that the order passed under section 263 is unsustainable in law in so far as inquiry has been done by the Assessing Officer when passing the original assessment order. In such circumstances, the order passed by the Id. CIT under section 263 dated 24.03.2009 for the assessment year 1999-2000 stands quashed."



Ld. AR for the assessee further relied on the order of the co-ordinate Bench of this Tribunal in the case of *M/s Damodar Developers P. Ltd. vs. CIT* in ITA No.1216/Kol/2014 for A.Y 2009-10 dated 16.12.2014, wherein the Tribunal has held:-

*“7. Now, we examine the present order of the Id. CIT on the anvil of aforesaid provisions and case law. In this case, the Id. CIT has observed that the assessee had made certain payments of rent, consultancy charges, professional charges and sales promotion charges. The Id. CIT has opined that this sum has to be disallowed u/s. 40(a)(ia) of the Act, as the assessee had not deducted the TDS thereon. Now, we find that the Id. CIT’s order is totally silent as to why the TDs was to be deducted on the aforesaid payments. There is no law that whenever above payments re made invariably the TDS has to be deducted. The TDs is deductible only if the conditions specified for deduction of TDS are exiting. Hence, the Id. CIT’s observation in the order that the Assessing Officer’s order is erroneous and prejudicial to the interest of the revenue has no basis whatsoever. Further, we find that the observation of the Id. CIT that the Assessing Officer’s order being erroneous and prejudicial to the interest of the revenue is emanating from the show cause notice. In the operative part of the order passed u/s. 263 of the Act the Id. CIT has held that he was of the view that the issue needs re-consideration, therefore, he was setting aside the issue for re-consideration. We find that the section 263 of the Act does not give any power whatsoever to the Id. CIT to remit the issue to the file of the AO without his finding that the order of the AO is erroneous insofar as it is prejudicial to the interest of the revenue. Accordingly, we re of the opinion that the Id. CIT’s order passed u/s. 263 of the Act is not sustainable s the Id. CIT has not given a finding that the order of the AO passed u/s. 143(3) of the Act is erroneous insofar as it is prejudicial to the interest of the revenue. The Id. CIT has simply set aside the matter and referred back to the table of the AO for re-consideration. In our view this is not at all permissible u/s. 263 of the Act. accordingly, we set aside the order passed by the Id. CIT u/s. 263 of the Act and decide the issue in favour of the assessee.”*

On the other hand, Ld. DR vehemently relied on the order of Ld. Pr. CIT.

4. We have heard the rival contentions of both the parties and perused and carefully considered the material on record; including the judicial pronouncements cited and placed reliance upon. In the present case, the order of AO was held as erroneous in so far as prejudicial to the interest of

Revenue on the ground that proper enquiry with regard to loss claimed by assessee in future & option was not carried out by the AO. However, from the assessment order, we observe that necessary details for the loss in future & option were duly supplied by assessee. The relevant extract of the assessment order is reproduced below:-

*“... .. During the year under consideration the assessee derived income from interest, director’s remuneration & dividend whereas suffered loss in future option and sale of shares. Details filed have been test checked. Fresh loans during the year have been verified. In regard to loss from currency futures transactions reference u/s. 133(6) of the Act made to National Stock Exchange and verified from the reply received.”*

Besides the above, we also observed that Ld. Pr. CIT in his impugned order has duly admitted the fact that necessary documents explaining the loss in future & option were available on record. Yet the Ld. Pr. CIT was of the view that proper enquiry has not been made during the assessment proceedings. Accordingly, the order was held erroneous in so far as prejudicial to the interest of Revenue.

From the above finding of AO we observe that the assessment was framed after necessary verification. We also note that Ld. Pr. CIT himself was also not clear about the error which is causing prejudice to the interest of Revenue. We further observe that provision of Section 263 of the Act does not give any power whatsoever to the Ld. CIT to remit the issue to the file of AO without finding that the order of AO is erroneous in so far as prejudicial to the interest of revenue. Therefore, the impugned order passed by Ld. Pr. CIT u/s 263 of the Act is not sustainable. We also find guidance and support from the judgment of Hon'ble Delhi High Court in the case of *CIT vs. Sunbeam Auto Limited* reported in 332 ITR 167 (Del) wherein it was held as under:-

*“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 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.”*

As there is no doubt that the necessary enquiry, was conducted by the AO and all the relevant documents were available on record as evident from the order of AO as well as Ld. Pr. CIT, we are of the view that there is no error in the order passed by AO and accordingly revisionary proceedings initiated by Ld. PR. CIT u/s. 263 of the Act is not sustainable. Accordingly, we set aside the order passed by Ld. Pr. CIT u/s 263 of the Act and decide the issue in favour of the assessee.

**5. In the result, assessee's appeal stands allowed.**

Order pronounced in the open court 04/04/2018

Sd/-  
(न्यायिक सदस्य)  
(N.V.Vasudevan)  
(Judicial Member)  
Kolkata,  
\*Dkp, Sr.P.S

Sd/-  
(लेखा सदस्य)  
(Waseem Ahmed)  
(Accountant Member)

दिनांक:- 04/04/2018 कोलकाता ।

**आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-**

1. अपीलार्थी/Appellant-Poonam Bhotika, 161/1 M.G.Road, Room No.26, Kolkata-007
2. प्रत्यर्थी/Respondent-ITO Ward, Ward-43(1), 3, Govt. Place (W), Kolkata-001
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,

Sr. Private Secretary, Head of  
Office/DDO  
आयकर अपीलीय अधिकरण,  
कोलकाता ।