

आयकर अपीलीय अधिकरण, पुणे न्यायपीठ "ए" पुणे में  
IN THE INCOME TAX APPELLATE TRIBUNAL  
PUNE BENCH "A", PUNE

BEFORE MS. SUSHMA CHOWLA, JM AND SHRI ANIL CHATURVEDI, AM

आयकर अपील सं. / ITA No.479/PUN/2017

निर्धारण वर्ष / Assessment Year : 2010-11

Pioneer Distilleries Limited,  
Balapur, Tq. Dharmabad,  
Dist. Nanded – 431 809

.... अपीलार्थी/Appellant

PAN: AABCP9376J

Vs.

The Principal Commissioner of Income Tax-1,  
Aurangabad

.... प्रत्यर्थी / Respondent

Assessee by : Shri Ketan Ved  
Revenue by : Shri S.B. Prasad

सुनवाई की तारीख / Date of Hearing :15.05.2019	घोषणा की तारीख / Date of Pronouncement: 10.06.2019
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आदेश / ORDER

PER SUSHMA CHOWLA, JM :

The appeal filed by the assessee is against the order of Principal Commissioner of Income Tax – 1, Aurangabad dated 22.12.2016 relating to assessment year 2010-11 against order passed u/s 143(3) r.w.s.147 of the Income Tax Act 1961 (in short 'the Act').

2. The issue raised in the present appeal is against exercise of jurisdiction by the Commissioner of Income Tax under section 263 of the Act.

3. Briefly, in the facts of the case, the assessee had furnished return of income declaring total income of Rs.1,99,07,894/-. The assessment in the case of the assessee was completed under section 143(3) of the Act on total assessed

income of Rs.7,01,62,300/-. A search and seizure action under section 132 of the Act was carried out in the case of M/s. Praj Industries Ltd., Pune and its associated concern and directors. During the course of search, certain incriminating documents were found from the office cabin of one Mr. Anirudhha Phadke. When he was confronted, it transpired that the company had given accommodation entries for inflation of the expenses to its clients. As per the details available, the assessee had received back certain amount which was to be assessed in the hands of the assessee and consequently reasons were recorded for reopening the assessment under section 147 of the Act and notice under section 148 of the Act was issued on 07-03-2014. The assessee did not initially respond to the notice issued by the Assessing Officer but on a later date, it was pointed out that due to certain reasons the return of income in response to notice under section 148 could not be filed. However, the assessee asked for the reasons recorded for reopening the assessment. The assessee was made aware that unless return of income is filed in response to notice under section 148 of the Act, it could not ask the reasons for issue of the said notice. The assessee in response furnished the return of income declaring income at Nil. The Assessing Officer vide Para No.11 notes that notice under section 143(2) of the Act was served upon them and issue involved was discussed. The Assessing Officer further observed that since the assessee was made aware of the reasons recorded for issue of notice under section 148 of the Act and the assessee also made submissions on the issue involved; it was considered that the requisites of natural justice and opportunity have been complied. Thereafter, the assessment was completed under section 143(3) r.w.s. 147 of the Act vide assessment order dated 21-03-2015 on a total income of Rs.9.03 crore.

4. The Commissioner, on verification of the case record notes that vide letter dated 07-04-2014, the assessee had insisted for supply of reasons for reopening the assessment in response to the notice issued under section 148 dated 07-03-2014. The Commissioner noted that, in reply, the assessee had submitted “*since the system is not allowing us to file the revised e-return, we request you to treat the return of income already filed for the above assessment year as filed in response to the above notice*”. The Commissioner observed that the Assessing Officer did not furnish the reasons and issued notice under section 142(1) dated 17-12-2014 calling for return by 07-01-2015 and communicated the reasons on which addition was proposed. However, the assessee did not attend in response and the Assessing Officer issued notice under section 143(2) on 19-02-2015. Thereafter, the Assessing Officer issued letter dated 03-03-2015 communicating the reasons on which addition was proposed. In the case, hearing was fixed on 09-03-2015. The assessee filed return of income on 19-03-2015 along with written submissions wherein it raised objection for issuance of notice under section 148. The assessment order under section 143(3) r.w.s.147 was passed on 21-03-2015. The Commissioner further notes that the Assessing Officer dealt with the objection in the body of the order itself and completed the scrutiny assessment by making addition of Rs.2.18 crore. The Commissioner further observed as under :

*“It has been objected by the assessee that he was not in receipt of reasons recorded u/s.148. On verification of the record, no such communication or order sheet noting is found on record. Moreover, in view of decision of the Hon’ble Supreme Court in the case of GKN Drives Shaft (259 ITR 19 (SC)) and of the Hon’ble Bombay High Court in the cases of CIT Vs. VSNL (2012) 340 ITR 66 (Bom.) and CIT Vs. Fomento Resorts and Hotels Ltd. – ITA No.71 of 2006, the reasons should have been supplied and the objections of the assessee should have been dealt with by a separate order before passing the assessment order u/s.143(3) read with sec.147. However, this has not been done by the A.O.”*

5. In view of the same, the Commissioner holds that lacuna had occurred while finalizing the assessment and failure on the part of the Assessing Officer to pass a speaking order dealing with the objections of the assessee to the re-

opening proceedings was required. Hence, it requires intervention of the Commissioner as necessary under section 263 of the Act as the order was both erroneous and prejudicial to the interest of the Revenue. Consequently, show cause notice under section 263 was issued. The assessee filed a reply to the same. However, in view of the decisions of the jurisdictional High Court in the case of CIT Vs. VSNL (supra) and CIT Vs. Fomento Resorts and Hotels Ltd. (supra), the Commissioner holds that the re-assessment order passed was not legally sustainable and was liable to be quashed. Hence, it became necessary to annul it under section 263 of the Act and order for re-framing of the assessment order. By invoking the provisions of section 263 of the Act, the Assessing Officer was directed to make proper enquiries and confront the assessee with evidence and then redo the assessment after following the proper procedure as laid down in series of decisions.

6. The assessee is in appeal against the exercise of jurisdiction by the Commissioner under section 263 of the Act.

7. The learned Authorized Representative for the assessee points out that as per the reasoning of the Commissioner, the order passed by the Assessing Officer was void, so in other words, the order does not exist. If that be so, then how can the Commissioner exercise the jurisdiction under section 263 of the Act. He placed reliance on the judgment of Hon'ble Calcutta High Court in the case of Keshab Narayan Banerjee Vs. CIT, judgment dated 28-08-1998 and the decision of Pune Bench of the Tribunal in the case of Manisha Construction Co. Vs. CIT in ITA Nos. 1522 to 1526/PUN/2017, order dated 30-07-2018 for the assessment years 2004-05 to 2008-09.

8. The learned Authorized Representative for the assessee pointed out that the order passed by the Assessing Officer was void since the objections of the

assessee on the reasons recorded for reopening the assessment were not separately decided. Hence, the exercise of jurisdiction by the Commissioner under section 263 of the Act was not correct.

9. The learned Departmental Representative for the Revenue placed reliance on order of Commissioner.

10. We have heard the rival contentions and perused the record. The issue which arises in the present appeal is that where the assessment order passed by the Assessing Officer is admittedly void, can there be any exercise of jurisdiction by the Commissioner under section 263 of the Act against such void order which in fact did not exist in law. As referred in the facts narrated above, the original assessment in the case of the assessee was completed under section 143(3) of the Act on 26-03-2013. During the course of search on M/s. Praj Industries Ltd., certain documents were found relating to assessee and the reasons were recorded for reopening the assessment under section 147 of the Act against the assessee. The said reasons were recorded on 07-03-2014. The assessee in reply vide letter dated 07-04-2014 submitted that since the system was not allowing it to file the revised e-return then the return of the income originally filed be treated as filed in response to the notice under section 148 of the Act. The assessee sought the reasons for reopening the assessment from the Assessing Officer. The Assessing Officer did not take cognizance of the same and issued notice under section 142(1) of the Act. On a later date, the assessee filed return of income at Nil and the Assessing Officer issued notice under section 143(2) of the Act on 19-02-2015. On 03-03-2015, the reasons recorded for reopening the assessment were communicated to the assessee against which the assessee filed the objections. The said objections were not dealt with by the Assessing Officer

by a speaking order. While finalizing the assessment order, the objections were dealt with in the body of the assessment order itself and simultaneously the Assessing Officer completed the assessment in the hands of the assessee.

11. In view of the ratio laid down by the Hon'ble Supreme Court in GKN Drive Shafts (supra), Hon'ble Bombay High Court in CIT Vs. VSNL (supra) and CIT Vs. Fomento Resorts and Hotels Ltd. (supra), wherein it is held that it is incumbent upon the Assessing Officer to furnish the reasons recorded for reopening the assessment to the assessee and in case, the assessee raises any objection, then the said objections are to be disposed off by separate speaking order. The Assessing Officer is to provide sufficient time to the assessee to seek remedy against such dismissal of the objections raised against the reopening of the assessment. Thereafter, the assessment order has to be passed in the hands of the assessee. The Assessing Officer in the present set of facts has not followed the said procedure but has disposed of the objections raised by the assessee against the reasons recorded for reopening the assessment, in the assessment order itself. Such inaction of the Assessing Officer makes the assessment order void and not sustainable in law. When the assessment order is void and did not exist in law, the question which arises is whether the Commissioner can exercise his revisionary jurisdiction under section 263 of the Act against the same. The answer to the same is No. The Commissioner can exercise the jurisdiction under section 263 of the Act where the assessment order is live. In case the order is void, then the same cannot be held to be erroneous and prejudicial to the interest of revenue. We find no merit in the exercise of jurisdiction by the Commissioner in this regard, where he himself admits that the assessment order was void.

12. The Hon'ble Calcutta High Court in Keshab Narayan Banerjee Vs. CIT (supra) in similar situation of exercise of power by the Commissioner under section

263 of the Act against the order passed under section 147 of the Act, wherein the condition precedent of service of notice was not fulfilled, held that such orders were bad in law and therefore, the proceedings under section 263 of the Act, admittedly, originating from such orders could not be initiated against the appellants.

13. The Pune Bench of the Tribunal in similar situation of exercise of jurisdiction by the Commissioner under section 263 of the Act, in Manisha Construction Co. Vs. CIT (supra) held that in a case where while initiating the penalty proceedings for concealment observed that where from the assessment order is not clear as to which limb of section 271(1)(c) of the Act has not been fulfilled by the assessee, then the said order suffers from infirmity. It was further held that the Commissioner cannot exercise his jurisdiction under section 263 of the Act in respect of such null and void assessment order. Relevant findings are in Para No.19 which reads as under :

*“19. Now, coming to the exercise of jurisdiction by the Commissioner under section 263 of the Act. In case where the assessment order, which is the basis of initiating penalty proceedings for concealment is null and void, then the Commissioner cannot exercise his jurisdiction under section 263 of the Act in respect of such null and void assessment order. The Commissioner in the present case has though exercised his jurisdiction in respect of the order dropping penalty proceedings under section 271(1)(c) of the Act. However, where the Assessing Officer had not initiated the penalty proceedings within framework of law then, the Assessing Officer having dropped penalty proceedings by passing an order, then such an order dropping penalty proceedings cannot be said to be erroneous. Accordingly, we hold so. The learned Departmental Representative for the Revenue has placed reliance on different decisions vis-à-vis non-application of mind by the Assessing Officer and consequent order passed by the Commissioner revising such an order of non-application of mind by the Assessing Officer. In the present set of facts, the order dropping penalty proceedings, which were not validly initiated cannot be said to be erroneous order i.e. passed without application of mind by the Assessing Officer and in the absence of the same, the Commissioner is precluded from exercising his jurisdiction under section 263 of the Act. Accordingly, we hold so and we reverse the order of revision passed by the Commissioner under section 263 of the Act. The grounds of appeal raised by the assessee are thus, allowed.”*

14. Following the said precedents, we hold that in the present set of facts where the Commissioner himself has given a finding that the re-assessment proceedings have not been correctly carried out against the assessee and the Assessing Officer has failed to fulfill his obligation, then under such circumstances where, he has also held that “since, the copy of reasons recorded for re-opening of the assessment were not furnished to assessee till date of completion of assessment, the order of the AO is void”, then revisionary jurisdiction cannot be exercised against such order. When the said order is void and did not stand in law, it cannot be held to be erroneous and prejudicial to the interest of revenue by the Commissioner. Consequently, the exercise of jurisdiction under section 263 of the Act in the present case, is not justified and is bad in law. We cancel the same.

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

Order pronounced on this 10<sup>th</sup> day of June, 2019.

Sd/-  
**(ANIL CHATURVEDI)**  
लेखा सदस्य / ACCOUNTANT MEMBER

Sd/-  
**(SUSHMA CHOWLA)**  
न्यायिक सदस्य / JUDICIAL MEMBER

पुणे Pune; दिनांक Dated : 10<sup>th</sup> June, 2019  
सतीश/GCVSR

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण,  
“ A” Bench” Pune;
4. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

Senior Private Secretary  
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune