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IN THE INCOME TAX APPELLATE TRIBUNAL
RAJKOT BENCH, RAJKOT

[CONDUCTED THROUGH VIRTUAL COURT]

Before: Ms. Annapurna Gupta, Accountant Member
And Shri T.R. Senthil Kumar, Judicial Member

ITA No. 105/Rjt/2022
Assessment Year 2017-18

Shri Vijubha Jitubha Jadeja, Prop. Of Shree Raj Security Service, Near: Lakh Bunglows, Gandhigram, Rajkot-360007 PAN: AFJPJ7566C (Appellant)	Vs	The Principal Commissioner of Income Tax-1, Rajkot (Respondent)

Assessee by: **Shri Vimal Desai, Ld. A.R.**
Revenue by: **Shri Shramdeep Sinha, Ld. CIT-D.R.**

Date of hearing : 18-05-2023
Date of pronouncement : 02-08-2023

आदेश/ORDER

PER : ANNAPURNA GUPTA, ACCOUNTANT MEMBER:-

This assessee's appeal for A.Y. 2017-18, arises from order of the Principal Commissioner of Income Tax, PCIT, Rajkot-1 dated 07-03-2022, in proceedings under section 263 of the Income Tax Act, 1961; in short "the Act".

2. Grounds raised by the assessee are as under:-

"1. The order u/s. 263 of the Act is bad in law.

2. The learned Pr. CIT has erred in law as well as on facts in not considering the submissions of the appellant on the strength of which the assessment order was neither erroneous nor prejudicial to the interest of revenue and therefore, the provisions of Section 263 of the Act were not applicable to the case of the appellant.

3. The learned Pr. CIT has erred in law as well as on facts in setting aside the assessment order passed by the ld. A.O. u/s. 147 r.w.s. 144 of the Act and directing de-novo assessment regarding the verification of issue of treating the alleged unexplained sundry creditors of Rs. 3,49,306/- as cash credits u/s. 68 of the Act and charging the tax liability thereon u/s. 115BBE of the Act.

4. The learned Pr. CIT has erred in law as well as on facts in setting aside the assessment order passed by the ld. A.O. u/s. 147 r.w.s. 144 of the Act and directing de-novo assessment regarding the verification of issue of treating the alleged bogus salary, wages and vehicle expenses of Rs. 3,58,53,211/- as unexplained expenditures u/s. 69C of the Act and charging the tax liability thereon u/s. 115BBE of the Act.

The appellant craves leave to add, alter, amend, delete or withdraw one or more grounds of appeal."

3. The error noted by the ld. PCIT in the assessment order leading to the exercise of revisionary jurisdiction u/s. 263 of the Act was that the addition made by the Assessing Officer in the assessment order of unexplained sundry creditors and bogus salary and wages expenses ought to have been made u/s. 68 and section 69C of the Act respectively and subjected to tax at the rate prescribed u/s. 115BBE of the Act i.e. @ 77.25% (Income Tax @ 60% plus surcharge @ 25% plus cess @ 3%) ,as opposed to the Assessing

Officer having subjected the same to tax on the normal rate (Income Tax @ 30% plus surcharge @15% plus cess @ 3%). Para 2 of the Ld.PCIT's order reveals the above facts as under:-

> *"2. On perusal of records, it is seen that during the previous year 2016-17 relevant to A.Y 2017-18, the AO had made an addition of Rs.3,49,306/- as Unexplained Sundry Creditors and Rs. 58,53,211/- as Bogus Salary and Wages Expenses. The above disallowances/additions were required to be made under section 68 being unexplained sundry creditors and 69C being unexplained/bogus expenditure respectively. Therefore, the provisions of section 115BBE on the above addition / disallowance were applicable with the effective tax @ 77.25% (Income Tax @ 60% plus Surcharge @ 25% plus Cess @ 3%). However, the AO had calculated the same at normal tax rate i.e. (Income Tax @ 30% plus Surcharge @ 15% plus Cess @ 3%). The AO has not verified this issue and properly not applied the correct provisions of law while finalizing the assessment u/s 144 r.w.s. 147 of the I. T. Act on 10-12-2019. This has rendered the order erroneous as well as prejudicial to the interest of the revenue."*

4. During revisonary proceedings, due opportunity was given to the assessee to submit its contentions in this regard. The assessee submitted that the additions/disallowances did not qualify to be made u/s. 68/69C of the Act and therefore the provisions of section 115BBE of the Act were not attracted. The contention was to the effect that the unexplained sundry creditors, relating to trade liabilities, their addition could have been made only u/s. 41(1) or u/s 28 of the Act and not u/s. 68 of the Act as contended by the ld. PCIT. So also for the disallowance of bogus expenses, the contentions of the ld. counsel for the assessee was that the provisions of section 69C were not attracted and the disallowance could be made only u/s. 37(1) of the Act. The ld. PCIT however was not convinced with the

contention of the assessee stating that with respect to both the issues, the Assessing Officer had made no examination as to under which section the additions/disallowances qualified and therefore he held the assessment order was erroneous causing prejudice to the Revenue and directed the Assessing Officer to make fresh assessment considering the observations made by him after taking necessary verification and inquiries and providing due opportunity of hearing to the assessee.

5. Before us, the ld. counsel for the assessee challenged the order of the Ld. PCIT raising the following contentions:-

(i) The disallowance of sundry creditors and of bogus expenditure made by the Assessing Officer could not have been made u/s. 68 or section 69C of the Act respectively as contended before the Ld. PCIT and therefore the provisions of section 115BBE of the Act were not attracted.

(ii) Even otherwise, the case of the ld. PCIT was only with respect to the aspect of tax being levied on the additions/disallowances made, which ought to have been as per the rates prescribed under section 115BBE of the Act. That this aspect therefore is limited only to the computation of income and computation of income not being part of the order passed by the Assessing Officer, there could not be said to be any error in the order of Assessing Officer for non-invocation of section 115BBE of the Act to the additions/disallowances made.

(iii) That the assessee had preferred appeal to the ld. CIT(A) against the very same additions/disallowances made and the issue therefore pending before the ld. CIT(A), the exercise of revisionary jurisdiction by the ld. PCIT was not in accordance with law.

6. The ld. Departmental Representative however supported the order of the ld. PCIT.

7. We have heard both the parties carefully. As noted above the error in the assessment order causing prejudice to the Revenue, as per the Ld. PCIT, was with respect to the addition/disallowance made by the AO of unexplained sundry creditors and bogus expenses not having been made u/s. 68 and section 69C of the Act respectively and as a consequence not being taxed at the much higher rate prescribed for such additions/disallowances u/s. 115BBE of the Act .

7.1 For the sake of clarity, it is noted that section 115BBE of the Act prescribes a specific rate at which additions made to incomes u/s 68,69,69A/B/C are to be taxed. This rate being much higher than the normal rate of tax.

7.2 We shall first deal with the contention of the ld. counsel for the assessee that these additions/disallowance of sundry creditors and bogus expenses made in the assessment framed u/s 143(3) of the Act were in challenge before the ld. CIT(A) and therefore revisionary jurisdiction u/s 263 of the Act could not have been exercised by the Ld. PCIT. Decision of

the ITAT, Rajkot Bench in the case of M/s Meet Build Con Partnership Firm vs Pr.CIT 64/Rjt/2022 dated 22-02-23 was relied upon and copy of the order was placed before us.

7.3 We have considered the contention made by the Ld. Counsel for the assessee. However we do not find any merit in the same .Hon'ble apex court in the case of CIT vs. Amritlal Bogilal 34 ITR 130 (SC), the Hon'ble Supreme Court has categorically held that it would be open to the Commissioner to revise an assessment order while an appeal against it is till pending before the CIT(A).In the facts of the said case ,rendered in the backdrop of the Income Tax Act of 1922, the assessee had been granted registration as a firm u/s 26A of the 1922 Act by the AO and thereafter assessment was framed making additions to its income. The assessee challenged the additions before the first appellate authority and in the meanwhile the Commissioner exercised his revisionary power over the order granting registration to the firm finding it erroneous causing prejudice to the Revenue. One of the questions before the Hon'ble apex court was whether, pending appeal before the appellate authority revisionary powers could be validly exercised. The Hon'ble apex court answered in the affirmative holding that till the passing of the appellate order, the original orders survives and the principle of merger of appellate order in the original order does not apply. The relevant findings are as under:

> "*The case in regard to the subsequent year 1949-50 presents no difficulty. The appeal preferred by the respondent against the Income-tax Officer's assessment order in respect of this year was pending at the material time before the Appellate*

> *Assistant Commissioner; and so no question of merger arose in respect of the order granting renewal of registration for this period. There can be no doubt that even on the theory of merger the pendency of an appeal may put the order under appeal in jeopardy but until the appeal is finally disposed of the said order subsists and is effective in law. It cannot be urged that the mere pendency of an appeal has the effect of suspending the operation of the order under appeal."*

7.4 This proposition of law has been reiterated by the Hon'ble Apex Court in EIMCO vs. CIT vs. 244 ITR 659(SC) where answering the question whether the Commissioner could interfere on a point u/s 263 of the Act which was directly in appeal before the first appellate authority, the Hon'ble Court referred to its earlier decision in Amritlal Bhogilal (supra) and answered in the affirmative.

7.5 The law therefore is settled in this regard and therefore the contention of the ld. counsel for the assessee that pending appeal before the Ld.CIT(A) revisionary powers u/s 263 of the Act cannot be exercised, is dismissed.

8. Now taking up the aspect of the additions/disallowances in the present case not being eligible u/s. 68/69C of the Act and therefore not liable to tax at the rate prescribed u/s 115BBE of the Act, taking up first the addition of unexplained sundry creditors made by the AO, a perusal of the order of the Assessing Officer reveals that he had made the addition of the same u/s. 68 of the Act itself. The AO having made the addition u/s 68 of the Act, the assessee's plea that it could not have been made under the said section cannot be entertained in revisionary proceedings. The scope of proceedings u/s 263 of the Act is limited to revision of orders which found erroneous

causing prejudice to the Revenue. Any finding prejudicial to the assessee cannot be dealt with by the Revenue authorities in revisionary proceedings u/s 263 of the Act. The assessee has remedy by way of right to appeal against orders prejudicial to it and the same can be dealt with in appeal only. The PCIT in revisionary proceedings u/s 263 of the Act cannot adjudicate/deal with issues decided by AO to the prejudice of the assessee.

8.1 Further the AO having made addition u/s 68 of the Act, taxing it at the rate prescribed u/s 155BBE of the Act was a natural corollary. Admittedly the law itself prescribes a special rate of tax for additions made u/s 68, 69 ,69A/B/C of the Act u/s 115BBE of the Act. Even the Ld. Counsel for the assessee does not dispute this position of law. The AO, therefore having not taxed the addition made on account of unexplained creditors u/s 68 of the Act, as per the rate prescribed u/s 115BBE of the Act, is clearly an error causing prejudice to the Revenue.

8.2 The contention of the ld. counsel for the assessee that the computation of tax is not part of the assessment order is incorrect. The sheet of computation of tax has been held by the Hon'ble apex court in the case of Kalyan Kumar Ray vs CIT 191 ITR 634(SC) as being part of the assessment order in terms of section 143(3) of the Act. Any error in the same, we hold, would undoubtedly constitute an error in the assessment order.

8.3 In view of the same, we confirm the order of the Ld. PCIT holding the non-invocation of section 115BBE of the Act on the addition made on

account of unexplained sundry creditors u/s. 68 of the Act as an error in the order of the Assessing Officer causing prejudice to the Revenue.

8.4 As for the disallowance of bogus expenses made, we are in agreement with the ld. counsel for the assessee that bogus expenditure could have been disallowed only u/s. 37(1) of the Act and not u/s. 69C of the Act. Section 69C of the Act, we have noted, is for making additions on account of unexplained expenditure. It deals with cases where expenditure incurred by the assessee, source of which remains unexplained. Bogus expenses are actually no expenses incurred by the assessee. The same is therefore beyond the scope of unexplained expenses covered u/s 69C of the Act.

8.5 Therefore, with regards to disallowance of expenses, the invocation of section 69C by the Ld. PCIT, we hold is not correct and the provisions of section 115BBE of the Act could not have been applied to this disallowance made. We therefore hold that the ld. PCIT has erred in holding that the assessment order was erroneous on account of the disallowance of expenses not being made u/s. 69C of the Act and 115BBE of the Act not invoked as a consequence.

8.6 In view of the above, we uphold the order of the ld. PCIT finding the assessment order erroneous causing prejudice to the Revenue only with respect to the aspect of non-invocation of section 115BBE on the addition made on account of unexplained sundry creditors u/s. 68 of the Act. With respect to the other aspect of bogus expenses disallowed, we hold there is no error in the order of the AO.

9. The appeal of the assessee is partly allowed as above.

Order pronounced in the open court on 02-08-2023

Sd/-	**Sd/-**
(T.R. SENTHIL KUMAR)	**(ANNAPURNA GUPTA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Ahmedabad : Dated 02/08/2023

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

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order,

Assistant Registrar,
Income Tax Appellate Tribunal,
Rajkot