आयकर अपीलीय अधीकरण, न्यायपीठ – "B" कोलकाता,

IN THE INCOME TAX APPELLATE TRIBUNAL
*KOLKATA BENCH "**B**" KOLKATA*

Before **Shri S.S.Godara, Judicial Member** and
Dr. A.L. Saini, Accountant Member

ITA No.1214/Kol/2013 Assessment Year :2008-09

M/s D.D. Deposits & Advances Pvt. Ltd., 16, G.C. Avenue, 7th Floor, Kolkata-72 [**PAN No.AAACD 5388 H**]	**V/s**.	Commissioner of Income Tax, Kolkata-1, P-7, Chowringhee Square, Kolkata-69
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर से/By Appellant	Shri S.M Surana, Advocate
प्रत्यर्थी की ओर से/By Respondent	Md. Usman, CIT-DR
सुनवाई की तारीख/Date of Hearing	08-05-2018
घोषणा की तारीख/Date of Pronouncement	11-05-2018

आदश /O R D E R

PER S.S.Godara, Judicial Member:-

This assessee's appeal for assessment year 2008-09, is directed against the Commissioner of Income Tax-I, Kolkata's order dated 04.03.2013, revising the re-assessment in question dated 28.12.2010 thereby terming the same to be erroneous causing prejudice to the interest of the Revenue, exercising revision jurisdiction lis proceedings u/s 263 of the Income Tax Act, 1961 (in short 'the Act').

Heard both the parties. Case file perused.

2. We deem it appropriate first of all to reproduce assessee's pleadings reading as under:-

"1) For that the order of Ld. CIT is arbitrary, illegal and bad in law.
2)For that the order passed u/s 263 by the Ld. CIT is without jurisdiction, hence invalid.

3) For that as per order u/s. 263 no notices u/s 143(2)/142(1) were issued by the Assessing Officer as such the assessment order itself was null and void and therefore the same cannot be set aside u/s. 263.
4) For that there was no valid service of notice u/s. 263 as the same is stated to be served through affixation whereas even the order u/s. 263 sent through speed post was duly served upon the assessee.
*5) For that Ld. CIT erred in stating that Notice u/s. 263 of the IT Act was issued for the said reason (*i.e reason stated in para 5 of the order u/s. 263*) on 21.12.2012, whereas the said notice did not contain any reasons for initiating proceedings u/s 263. Since the notice did not contain any reason, the proceedings u/s. 263 is bad in law.*
6) For that the Ld. CIT erred in not considering the written submission of the assessee sent through speed post asking for reason for initiation of proceeding u/s. 263, which demonstrate that the Ld. CIT was predetermined to set aside the assessment order, hence the entire proceedings u/s. 263 are bad in law.
7) For that the Ld. CIT erred in not considering the reply filed by the assessee in response to notice u/s. 264 dated 21.12.2012.
8) For that no notice dated 15.01.2013 issue by the Ld. CIT as ever served upon the assessee.
9) For that the Ld. CIT erred in invoking the provisions of section 263 on the ground that the order passed u/s. 147/143(3) was erroneous and prejudicial to the interest of revenue when the assessment u/s. 148 was reopened on the specific issue and the assessment completed u/s. 147 was not erroneous and prejudicial to the interest of revenue.
10) For that the Ld. CIT erred in applying the provisions of sec. 263 when the order passed by the AO was not erroneous and therefore not prejudicial to the interest of Revenue, the assessment order having been passed after making proper enquiry in accordance with law.
11) For that the Ld. CIT erred in applying the provisions of sec. 263 when there was nothing on record that no enquiry was made with regard to the identity and creditworthiness of the shareholders when all the shareholders were assessed to tax, their PAN were submitted and there was nothing on record to doubt the identity and creditworthiness of the said applicants.
12) For that the Ld. CIT erred in applying the provisions of sec. 263 by holding the view that the AO did not pursue the enquiry to their logical end and as such on that ground alone the order was erroneous and prejudicial to the interest of Revenue when in fact no other reason was found to consider the order as erroneous and prejudicial to the interest of revenue.
13) For that the direction of the Ld. CIT to the AO to verify various layers is bad in law since the AO has no power to seek details of source of source since the assessee has nothing to do with the source of source.

14) For that on the facts and circumstances of the case the order of the CIT be modified and the assessee be given the relief prayed for.
15) For that the assessee craves leave to add, alter or amend any ground before or at the time of hearing."

3. It transpires from the case records that this is second round of proceedings in the instant appeal. The case had come up earlier before a co-ordinate bench along with many other similar cases. The said co-ordinate bench's order dated 10.08.2015 dismissed the main appeal in with the following detailed discussion:-

"3. We have heard the rival submissions and perused the relevant material on record. It is relevant to mention that more than 400 cases involving same issue were fixed before us, which have been heard. All the Id. ARs were given opportunity to argue their-matters to full extent. Some of the Id. ARs argued the matter on merits and all other ARs including Sh.S.M.Surana, Advocate, who is the Id. AR in this batch of appeals, admitted that facts and circumstances of all the cases were mutatis mutandis similar to those argued. Thereafter, the remaining case specific issues were argued by all the Id. ARs, pertaining to their respective cases. We have passed a separate lead order in the case of M/s Subhlakshmi Vanijya Pvt. Ltd., vs. CIT (ITA No. 1104/Kol/2014 A.Y. 2009-10) also covering other eighteen cases dealing with all the issues raised before us in more than 400 appeals, including the instant batch, for which we are passing separate orders. Following conclusions have been drawn in the lead order: -
A. Contention of the assessee that since the AO of the assessee- company was not empowered to examine or make any addition on account of receipt of share capital with or without premium before amendment to section 68 by the Finance Act, 2012 w.e.f A.Y. 2013-14 and hence the CIT by means of impugned order u/s 263 could not have directed the AO to do so, is unsustainable.
B. Failure of the AO to give a logical conclusion to the enquiry conducted by him gives power to the CIT to revise such assessment order, by holding that :-

i) the enquiry conducted by the AO in such cases can't be construed as a proper enquiry;
ii) CIT u/s 263 can set aside the assessment order and direct the AO to conduct a thorough enquiry, notwithstanding the jurisdiction of the AO in making enquiries on the issues or matters as he considers fit in, terms of section 142(1) and 143(2) of the Act, which is relevant only up to the completion of assessment;
iii) Inadequate inquiry conducted by the AO in the given circumstances is as good as no enquiry and as such, the CIT was empowered to revise the assessment order ;
iv) The order of the CIT is not based on irrelevant considerations and further in the present circumstances, he was not obliged to positively indicate the deficiencies in the assessment order on merits on the question of issue of share capital at a huge premium; and

v) the AO in the given circumstances can't be said to have taken a possible view as the revision is sought to be done on the premise that the AO did not make enquiry thereby rendering the assessment order erroneous and prejudicial to the interest of the revenue on that score itself.

C. In the given facts and circumstances of all such cases, the notices u/s 263 were properly served through affixture or otherwise. Further the law does not require the service of notice u/s 263 strictly as per the terms of section 282 of the Act. The only requirement enshrined in the provision is to give an opportunity of hearing to the assessee, which has been complied with in all such cases.

D. Limitation period for passing order is to be counted from the date of passing the order u/s 147 read with sec. 143(3) and not the date of Intimation issued u/s 143(1) of the Act, which is not an order for the purposes of section 263. In all the cases, the orders have been passed within the time limit.

E. The CIT having jurisdiction over the AO who passed order u/s 147 read with section 143(3), has the territorial jurisdiction to pass the order u/s 263 and not other CIT.

F. Addition in the hands of a company can be made u/s 68 in its first year of incorporation.

G. After amalgamation, no order can be passed u/s 263 in the name of the amalgamating company. But, where the intention of the assessee is to defraud the Revenue by either: filing returns, after amalgamation, in the old name or otherwise, then the order passed in the old name is valid.

H. Order passed u/s 263 on a non-working day does not become invalid, when the proceedings involving the participation of the assessee were completed on an earlier working day.

I. Order u/s 263 cannot be declared as a nullity for the notice having not been signed by the CIT, when opportunity of hearing was otherwise given by the CIT,

J. Refusal by the Revenue to accept the written submissions of the assessee sent after the conclusion of hearing cannot render the order void ab initio. At any rate, it is an irregularity.

K. Search proceedings -do not debar the CIT from revising order u/s passed u/s 147 of the Act. -

5. It is noticed that all or some of the above conclusions drawn are applicable to the appeals in this batch. Following the view taken in the lead orders, we uphold all the impugned orders.

6. In the result all the appeals are dismissed.

4. There is no dispute that one of the said assessee(s) filed appeal *Rajmandir Estates Private vs. Principal Commissioner of Income* preferred with ITA No.113/Kol/2016 before hon'ble jurisdictional high court. Their lordships dismissed the same in a very detailed judgment along with many other cases. The said assssees then filed Special Leave Petition(s) with the '**lead**' case No.23976 of 2017 before the hon'ble apex court which stood

dismissed on 29.11.2017. This tribunal's earlier findings affirming the CIT's jurisdiction exercised u/s. 263 of the Act stands upheld upto hono'ble apex court therefore.

5. The assessee thereafter filed its Miscellaneous Application No.111/Kol/2016 before this tribunal on 11.08.2016. Its only grievance therein was that the co-ordinate bench's order dated 10.08.2015 (supra) had not considered its third substantive ground that once the CIT's order passed u/s. 263 of the Act had recorded a categories finding that the Assessing Officer had not issued any notice u/s. 143(2) or 142(1) of the Act during the course of re-assessment, the re-assessment itself forming subject-matter of revision proceedings is null and void which could not have been set aside in revision jurisdiction under challenge. Learned co-ordinate's order dated 01.12.2017 accepted assessee's said rectification plea in its order dated 01.12.2017.It is in the above backdrop of facts that instant lis has come up before us in this second ground of adjudication.

6. Learned counsel representing assessee first of all takes us to the CIT's order dated 04.03.2013 under challenge. He invites our attention to CIT's finding in first line of page 2 that "***Even the statutory notices u/s. 143(2) and 142(1) were not issued by the AO before completion of assessment***". Learned counsel's argument therefore is that once the Assessing Officer had not issued any such notice before finalizing the re-assessment in question, the CIT has erred in law as well as on facts in subjecting the said re-assessment to his revision proceedings u/s. 263 of the Act.

7. We sought to know what is to whether the assessee could raise such a plea in the instant proceedings involving question of validity of CIT's order passed u/s. 263 of the Act. Learned counsel takes as to a co-ordinate bench's order **ITA No.764-766/Kol/2014** in M/s Classic Flour & & food Processing Pvt. Ltd. Kolkata vs. CIT-IV, Kolkata decided on 05.04.2017. Learned co-ordinate bench held that an assessment is in the nature of primary proceedings whereas revision process u/s. 263 of the Act is a collateral one wherein

validity of the former can always be challenged. This tribunal's decision in M/s Westlife Development Ltd. vs. Principal CIT in ITA No. 686/Mum/2016 places reliance upon hon'ble apex court's judgment in Kiran Singh & Ors. vs. Chaman Paswan & Ors.(1955) 1 SCR 117 (SC). Their lordships are of the view that a decree passed by a court without jurisdiction is a nullity which could be put to challenge in execution or in collateral proceedings. Their lordships conclude that any defect of jurisdiction in pecuniary or territorial or in respect of subject-matter of the action strikes at the very authority of the court to pass any decree and the same would not curable even by consent of the parties. Mr. Surana takes pains to enlighten us that hon'ble Rajasthan high court's judgment in Decp chand Kothari vs. CIT (1988) 179 ITR 381 (Raj) adopts the very reasoning in civil jurisprudence to income tax proceedings as well.

8. Learned counsel next relies upon this tribunals co-ordinate bench decision in Dr. SB Kalidhar vs. ITO Ward-4 in ITA No.1082/Del/2016 decided on 27.11.2017. Learned co-ordinate bench there is annuls similar assessment / re-assessment on the ground that non issue of notice u/s 143(2) of the Act after filing of a return renders entire assessment / re-assessment to be bad in the eyes of law. It quotes hon'ble apex court's judgment in *ACIT vs. Hotel Blue Moon* (2010) 321 ITR 362 (SC) whilst quashing the assessment in question to be non est & void.

9. MR. Surana lastly takes us to the case records as well including assessment notings. He states that there is no copy of the relevant notice in assessment records. His further contention is that neither assessee had authorized anyone nor its auditor had ever put in appearance before the Assessing Officer during the re-assessment in question. We invited learned counsel's attention to the fact that the same auditor had represented the assessee even in section 263 as well as consequential assessment framed on 26.07.2014. Mr. Surana reiterates that once the original assessment / re-assessment is non est, the above auditor's subsequent act and conduct or that of the assessee itself cannot validate the same as held in hon'ble apex

court's decision (supra). He therefore prays that the impugned re-assessment framed on 28.12.2010 is to be held non est, null and void at the threshold itself and therefore, there is no scope for the CIT to exercise his jurisdiction vested u/s. 263 of the Act.

10. Mr. Usman (CIT DR) represents the Revenue. He first of all informs us that the assessment record in Xerox is available with him. He submits during the course of hearing that since the assessing officer had not made proper enquiries during the course of re-assessment, the CIT has rightly initiated the impugned proceedings as upheld upto the apex court. There is no scope left therefore in the instant second round once the tribunal's order upholding the section 263 proceedings of the Act is affirmed upto hon'ble apex court. He pleads that it would be an anomalous situation if the instant second round disturbs tribunal's earlier finding (supra) having already concluded that CIT had rightly exercised his revision jurisdiction as re-assessment order dated 28.12.2010 is erroneous causing prejudice to the interest of the Revenue.

11. Learned CIT-DR emphasizes that relevant assessment records duly corroborate the fact that the Assessing Officer had issued u/s 143(2) notice on 16.11.2009 as followed by Section 142(1) notice. Mr. Usman states that the assessee;'s third substantive ground in question takes advantage of the CIT above crucial observation (supra) going against the assessment records. He pleads that the same are not binding on the Revenue since they are neither appealable nor rectifiable at its behest. He further invites our attention to the CIT's notice(s) initiating section 263 proceedings dated 21.12.2011 and 15.01.2013, as well as assessee's reply thereto on the latter date to the effect that it had filed all the relevant details and documents as called during the assessment from time to time. The assessee had asserted as per its reply that all of its books of account, bills, vouchers and other supporting documents had also been called by the Assessing Officer for examination as produced in the course of scrutiny followed by independent verification through notice / summons issued u/s 133(6) / 131 of the Act. Learned DR further submits in

the end that the re-assessment in question is neither *non est* nor void so as not to be revised in u/s 263 jurisdiction vested with the CIT. We posed a specific query to the Revenue as to whether the assessment records comprise of the relevant notices issued u/s 143(2) or u/s. 142 142(1) or not. The reply received is in negative. The Revenue emphasises that there is sufficient material on record indicating that said notice(s) had very much been issued but not forming part of the case records since the same has seen multiple rounds of proceedings involving movement of the case file from one authority to another. Learned DR quotes Section 292B of the Act as well that the assessee cannot plead non issuance of notice at this belated stage once it had defended the relevant assessment is revision proceedings.

12. We have given our thoughtful consideration to rival submissions. Suffice to say, we have already narrated the basic facts that our instant adjudication is confined to assessee's third substantive ground that the CIT could not have revised the re-assessment in question framed on 28.12.2010 since the latter one is a non est order n the eyes of law not exigible to revision. We quote all the relevant case law relied upon at the assessee's behest (supra) to observe first of a that it is very much open for the assessee to challenge validity of the re-assessment in section 263 proceedings on the ground that same are non est in the eyes of law. Co-ordinate bench's decision(s) (supra) have already concluded that assessment proceedings are primary proceedings whereas those u/s 263 of the Act are in the nature of collateral proceedings. The question before us in this backdrop of facts is as to whether the Assessing Officer can be held to have issued notices u/s 143(2) or 142(1) of the Act or not. In case the reply is in negative, it would render the entire re-assessment bad in the eyes of law as per hon'ble apex court's decision in *Hotel Blue Moon* (supra) followed in this tribunal's co-ordinate bench's order. We now revert back to the relevant facts of the case. It emerges from the case records that the Assessing Officer had initiated the impugned re-opening vide section 148 notice issued on 03.11.2009. These assessment file notings dated 16.11.2009 make it clear that he had issued

section 143(2) as well as section 142(1) notice(s). Learned counsel's case is that there is no such notice on record. We find no merit in the instant plea as the above narrated assessment notings make it clear that Assessing Officer had indeed issued the said two notices. We quote section 114(e) of the Indian Evidence Act to presume as a court that the Assessing Officer had performed an official act of completing re-assessment in assessee's case as per the prescribed procedure. We reiterate that although assessee has pleaded of neither it itself nor its authorized representative to have appeared during the course of scrutiny in furtherance to the said notice(s), the above narrated 'facts speak otherwise wherein it had not even filed its authorized representative affidavit to rebut the above assessment notice(s). The very auditor had been continuing to represent the assessee's right from re-assessment to section 263 proceedings as well as the consequential assessment framed on 26.07.2014. We take note of the assessee's reply filed before the CIT (supra) as well defending the above assessment to have been completed after calling necessary books, bills, vouchers as well as supporting documents for examination as produced at its behest followed by notice / summons issued u/s. 133(6) and 31 of the Act; respectively. We are of the view in these facts that the assessee could not have placed on record the required documents within any notice at all before section 133(6)/131 process. The assessee's instant substantive ground therefore appears to be as well worded one wherein it has sought to reiterate the CIT's observation only that the Assessing Officer had not issued the said statutory notice(s) before completing the assessment in question. We conclude in view of these facts that the CIT's said observation is against the assessment records. Mere on non production of the notice(s) in question; in our considered view, is not sufficient to conclude that the Assessing Officer had not issued sec. 143(2) and sec. 142(1) notices which is view of the above overwhelming supportive evidence in the nature of assessment proceedings before us. We quote sec. 136 of the Act to conclude that the legislature has indeed treated proceedings before us Income Tax authorities to be judicial proceedings as well.

13. Coming to assessee's case law (supra), we find that there is no single instance which could suggest that the assessing officer(s) concerned had recorded assessment notings to have issues the relevant notices not found in record. The Revenue's case before us stands on much stsronger footing than in the said judicial precedents. The same are accordingly distinguished. The assessee's instant third substantive ground is rejected. Needless to say, we have already affirmed the CIT's order holding the impugned assessment to be erroneous causing prejudice to interest of the Revenue as affirmed up to the hon'ble apex court (supra). No further adjudication is required therefore.

12. This assessee's appeal is dismissed accordingly.

Order pronounced in the open court 11/05/2018

Sd/-	Sd/-
(लेखा सदस्य)	(न्यायिक सदस्य)
(Dr. A.L. Saini)	(S.S.Godara)
(Accountant Member)	(Judicial Member)

Kolkata,
*Dkp, Sr.P.S
दिनांकः- 11/05/2018 **कोलकाता** ।

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

1. अपीलार्थी/Appellant-M/s D D Deposits & Advances Pvt. Ltd. 16, G.C. Avenue, 7th Kol-72
2. प्रत्यर्थी/Respondent-CIT-1, P-7, Chowringhee Square, Kolkata-69
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.

By order/आदेश से,

/True Copy/

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