

IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'E' BENCH,  
NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND  
MS. SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA No. 2229/DEL/2016  
[A.Y 2011-12]

Dr. Balkishan Dass  
78, Mansarover Colony  
Rohtak

Vs.

The Pr. C.I.T  
Rohtak

PAN : ABMPD 8044 L

[Appellant]

[Respondent]

Date of Hearing : 29.10.2018  
Date of Pronouncement : 31.10.2018

Assessee by : Shri Naveen Kumar Goyal, CA  
Revenue by : Ms. Paramita M. Biswas, CIT-DR

**ORDER**

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

With this appeal, the assessee has challenged the validity of the order dated 23.03.2016 framed u/s 263 of the Income-tax Act, 1961 [hereinafter referred to as 'the Act'] pertaining to A.Y 2011-12.

2. The sum and substance of the grievance of the assessee is that the PCIT erred in setting aside the order framed u/s 143(3) of the Act by observing that the order so framed is without making any enquiries and, therefore, is erroneous and prejudicial to the interest of the Revenue.

3. Briefly stated, the facts of the case are that the assessee filed his return of income for the year under consideration on 06.06.2012 which was assessed u/s 143(3) of the Act vide order dated 27.01.2014.

4. Invoking the powers conferred upon him u/s 263 of the Act, the PCIT issued a show cause notice stating that the assessment order is erroneous to the interest of the Revenue as the Assessing Officer has not examined the payment of interest vis a vis disallowance to be made u/s 14A r.w.r 8D of the Rules.

5. We find that an audit objection was raised which reads as under:

*“Return declaring an Income of Rs. 13,19,410/- was filed by the assessee on 06.06.2012 and the same was processed as such u/s 143(1) of the Income Tax Act, 1961. Later on, assessment was*

made u/s 143(3) of the Income Tax Act. 1961 on 27.01.2014 at the assessed income of Rs. 13,52,030/-.

During the course of Audit, the perusal of P&L A/c reveals that assessee has paid bank charges and bank interest at Rs. 2,06,631/- on the other hand the assessee has invested Rs. 13,50,000/- in shares in V.K. Buildtech and Rs. 1,00,000/- with Mansarover health care Pvt. Ltd. but no interest have been charged/ created on the above investments/advances' given for non business purposes. Hence interest at the rate 12% i.e. Rs. 1,74,000/- is to be charged and the expenses claimed on A/c of interest paid to the extent of Rs. 1,74,000/- needs to be disallowed and added back to the taxable income of the assessee.

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Further, while completed the assessment proceeding U/s 143(3) of the I.T in this case the A.O. disallowed 20% expense claimed by the assessee on account of car running & maintenances considering the personal use of the vehicles to that extent. On perusal of P & L account and depreciation claimed reveals that the assessee has claimed depreciation on car at Rs. 49,725/-. Hence keeping in view the above the 20% of these expenses claimed i.e. Rs. 12,431/- is also should be disallowed and is required to be added back to the taxable income of the assessee. ,

Tax effect comes at Rs. 74,945/-."

6. Pursuant to the audit objection, the Assessing Officer issued the following notice:

"Dr. Bal Kishan Goyal,  
C/o Mansarovar Hospital,  
Sonepat Road, Rohtak.

**Sub:- Asst. Year 2011-12 - regarding**

*A perusal of Profit & Loss A/c for the A.Y. 2011-12 reveals that a sum of Rs. 2,06,631/- has been paid by you against bank charges and bank interest whereas on the other hand no interest has been charged against the investments made in shares with M/s V.K. Buildtech for Rs. 13,50,000/- and M/s Mansarovar Health Care Pvt Ltd for Rs. 1,00,000/- for non-business purposes. Hence, interest @ 12% p.a. on Rs. 14,50,000 (1350000+100000) which comes to Rs. 1,74,000/- needs to be charged and expenses claimed on account of interest paid to the extent of Rs. 1,74,000/- needs to be disallowed and added back to the total income.*

*Further, it has also been noticed that while framing the assessment for the A.Y. 2011-12, the A.O. has disallowed 20% of car running and maintenance expenses being personal use. But on perusal of Profit & Loss A/c for the assessment year under consideration it is revealed that a sum of Rs. 49,725/- has been claimed by you on account*

*of depreciation on car. Hence, 20% of the depreciation claimed i.e. Rs. 9945 (49725x20/100) also needs to be disallowed and added back to the total income.*

*You are requested to please explain as to why the above said disallowances should not be made and added back to your total income. Your explanation should reach to the undersigned on or before 09.06.2015 failing which it shall be presumed that you have nothing to say in the matter and the action will be taken as per law.*

*Yours faithfully,*

**(SEEMA DHANKHAR)**

*Dy. Commissioner of Income Tax,  
Rohtak Circle, Rohtak."*

7. It can be seen from the above that the audit objections raised by the audit party were subsequently considered by the Assessing Officer and after satisfying himself, the proceedings were dropped.

8. A perusal of the order framed u/s 263 of the Act shows that the PCIT has raised same issues which were raised by the audit party. In our considered opinion, mere audit objection and merely because a different view could be taken are not enough to say that the order of

the Assessing Officer was erroneous or prejudicial to the interest of the Revenue. The jurisdiction could be exercised if the Commissioner [Audit] is satisfied that the basis for exercise of jurisdiction existed. For this proposition, we draw support from the decision of the Hon'ble Punjab and Haryana High Court in the case of CIT Vs. Sohana Woollen Mills 296 ITR 238.

9. Substantial question of law admitted by the Hon'ble High Court reads as under:

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in annulling the order passed by the CIT under [Section 263](#) of the IT Act, 1961?"

10. The Hon'ble High Court held as under:

*"The assessee held certain machinery and was in possession of a permit obtained from the Textile Commr. for the working of 1200 spindles for the manufacture of woollen worsted yarn. The said 1200 spindles were a part of the machinery to be sold vide an agreement dt. 26th July, 1974. The assessee sold some machinery which was detailed in Annex. 'A' with the said agreement, besides also sold the permit in respect of 1200 spindles. The agreement as per which the said machinery and*

permit were sold, finds place in para 2 of the Tribunal's order. In the course of filing the return, the assessee worked out the profit under [Section 41\(2\)](#) amounting to Rs. 51,067 and capital gains amounting to Rs. 55,006 subject to statutory deduction and returned the same in its total income. Besides in Part III of the return, the assessee had shown a sum of Rs. 1 lakh on account of sale of permit from the Textile Commr. in respect of 1200 spindles and marked the same as the amount receivable on account of goodwill. The ITO accepted the return filed by the assessee with the following observations in the relevant assessment order pertaining to profit under [Section 41\(2\)](#) and capital gain in respect of sale of part of machinery:

...During the relevant previous year, the assessee-firm sold a part of the machinery and thereon earned profit under [Section 41\(2\)](#) as well as capital gains. After examining the accounts and discussion with the assessee, net income is assessed at Rs. 99,000.

The amount of Rs. 98,380 returned by the assessee included the computation of profit under [Section 41\(2\)](#) and capital gains on sale of machinery. The CIT on the strength of the audit note and basis of proforma for proposal under [Section 263](#) made by the ITO, extracted and placed in para 8 of the

Tribunal's order with [Section 263\(1\)](#) about the same, initiated proceedings.

When this action of the CIT came to be disputed by the assessee before the Tribunal, the Tribunal placed in its order the agreement, the fact that the assessee had disclosed in Part III of its return sale of spindles and amount of goodwill earned thereon and [Section 63\(1\)\(sic\)](#) and also the proforma and held that the CIT was in error while assuming jurisdiction under [Section 263](#) on the type of objection made by the audit and, therefore, annulled the said order under [Section 263](#) in the light of the detailed discussion available in the Tribunal's order.

3. We have heard learned Counsel for the parties and perused the record.

4. Learned Counsel for the Revenue submitted that invocation of jurisdiction under [Section 263](#) of the IT Act, 1961 (for short, 'the Act') was justified as consideration for the machinery sold was Rs. 3,50,000 and not Rs. 2,50,000. It was submitted that in the agreement, it was nowhere specified that a sum of Rs. 1 lac was consideration for the permit for 1200 spindles.

5. On the other hand, learned Counsel for the assessee submitted that as per statement of case itself, the assessee

had sold the permit in respect of 1200 spindles also and in Part III of the return, a sum of Rs. 1 lac was shown as sale of permit.

6. Learned Counsel for the assessee submitted that jurisdiction under [Section 263](#) of the Act could not be exercised by the CIT, as rightly held by the Tribunal. It was submitted that the order of the AO could not be held to be erroneous or prejudicial to the interest of the Revenue. Reliance has been placed on judgments in *Jeewanlal (1929) Ltd. v. Addl. CIT and Ors.* , to submit that CIT can exercise power under [Section 263](#) of the Act only on application of his own mind and not merely on a note of an audit party; [Indian & Eastern Newspaper Society v. CIT](#) , to submit that opinion of internal audit party on point of law did not constitute information for purposes of [Section 147\(b\)](#) of the IT Act; [CIT v. B.C. Srinvasa Setty](#) to submit that transfer of goodwill does not give rise to a capital gain; [CIT v. New Suraj Transport Co. \(P\) Ltd.](#) to submit that route permit was a self-generating asset and consideration for its transfer was not assessable as capital gains; [CIT v. V. Prakashan](#) to the same effect and [Raylon Silk Mills v. CIT](#) to submit that self-generated goodwill did not attract capital gains.

7. A reference to the provisions of [Section 263](#) of the Act shows that jurisdiction thereunder can be exercised if the CIT finds that the order of the AO was erroneous and prejudicial to the interest of Revenue. Mere audit objection and merely because a different view could be taken, were not enough to say that the order of the AO was erroneous or prejudicial to the interest of the Revenue. The jurisdiction could be exercised if the CIT was satisfied that the basis for exercise of jurisdiction existed. No rigid rule could be laid down about the situation when the jurisdiction can be exercised. Whether satisfaction of the CIT for exercising jurisdiction was called for or not, has to be decided having regard to a given fact situation.

8. In the present case, the Tribunal has held that the assessee had disclosed that out of sale consideration, a sum of Rs. 1 lac was to be received for sale of permit. If that is so, there was no error in the view taken by the AO and no case was made out for invoking jurisdiction under [Section 263](#) of the Act.

9. In view of the above, the question referred is answered against the Revenue and in favour of the assessee."

11. Finding parity in the facts, we are of the opinion that the order framed u/s 263 of the Act is bad in law and deserves to be quashed. We order accordingly and restore the assessment order framed u/s 143(3) of the Act

12 In the result, the appeal of the assessee in ITA No. 2229/DEL/2016 is allowed.

**The order is pronounced in the open court on 31.10.2018.**

**Sd/-**

**[SUCHITRA KAMBLE]  
JUDICIAL MEMBER**

**Sd/-**

**[N.K. BILLAIYA]  
ACCOUNTANT MEMBER**

Dated: 31<sup>st</sup> October, 2018

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,  
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
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Date on which the file goes to the Head Clerk	
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