IN THE INCOME TAX APPELLATE TRIBUNAL "G" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, AM
AND
MS. KAVITHA RAJAGOPAL, JM

ITA No. 1217/Mum/2021

(Assessment Year 2011-12)

Gautam Enterprises Office No. 1B, 1st Floor, Shiv Krupa CHS Ltd, Charai, Thane, Mumbai-400 601	Vs.	Pr. Commissioner of Income Tax-1, 'B' Wing, 6th Floor, Ashar IT Park Road 16Z, Wagle IND Estate, Thane 400 604
(Appellant)		**(Respondent)**

PAN No. AABFG0439L

Assessee by	:	Shri Subodh Ratnaparkhi, AR
Revenue by	:	Ms. Dr. Pallavi Darade, CIT DR

Date of hearing: 31.05.2022
Date of pronouncement : 21.06.2022

O R D E R

PER PRASHANT MAHARISHI, AM:

01. This appeal is filed by the assessee against the order passed by the Principal Commissioner Of Income Tax, Thane- 1 (PCIT) for assessment year 2011–12 passed on 23rd March, 2021 under Section 263 of the Income Tax Act, 1961 (the Act) holding that order passed by the learned Assessing Officer under Section 147 read with Section 143(3) of the Income Tax Act, 1961 (the Act) dated 25th September, 2018, is erroneous so far as it is prejudicial to the interest of the revenue.

02. The assessee aggrieved has raised following grounds of appeal:-

> *"1. The learned Pr. CIT erred in holding the order framed by the assessing officer u/s 147 r.w.s. 143(3) of the I. Tax Act on 25.09.2018 to be erroneous and prejudicial to the interest of revenue as per section 263 of the I.T Act, 1961 and accordingly the assumption of jurisdiction by the Pr. CIT u/s 263 of the I.T Act, 1961 was not valid and justified.*
>
> *2. The learned Pr. CIT erred in setting aside to the file of the assessing officer, the order u/s 147 r.w.s. 143 (3) of the I. Tax Act, 1961 dt. 25.09.2018, which action of the Hon. Pr. CIT being not justified, the order u/s 263 dt.23.03.2021 be held to be invalid, bad in law and be quashed.*
>
> *3. The appellant craves leave to add, alter, amend and/or vary any of the grounds at any time before the decision of the appeal."*

03. Brief facts of the case shows that assessee filed its return of income on 25th September, 2011, for Assessment Year 2011–12 declaring a total income of ₹ 7,221,720/– and same was processed under Section 143 (1) of the Act on 28th January, 2012. Subsequently, the case was selected in scrutiny through CASS, the assessment was completed under Section 143 (3) of the Act, on 28th February, 2014 assessing the total income of the assessee at ₹7,322,700/–.

04. Subsequently, the case of the assessee was reopened by issue of notice under Section 148 of the Act, on 27th March, 2018. On 25th September, 2018 the Assessing Officer passed an order dropping the proceedings initiated under Section 147 of the Act.

05. Subsequently, the learned PCIT verified the records and it was found that assessee has claimed depreciation of ₹ 27,97,871/– on building, however, the same was on rent and income there from was assessed under the head 'income from house property'. Therefore, the learned assessing officer should have disallowed the depreciation. He further found that assessee has received share of profit from another firm and the learned Assessing Officer failed to invoke the disallowance u/s 14A of the Act.

06. The learned PCIT was of the view that in the reassessment order passed by the learned assessing officer he should have made the above two additions disallowance.

07. Therefore, PCIT held that the order passed by the learned that assessing officer on 25/9/2018 u/s 147 read with Section 143 (3) of the act is erroneous and prejudicial to the interest of the revenue for not making the above two additions. Hence, he set-aside the assessment with a direction to examine these issues and redo the same. Such order was passed u/s 263 of the act on 23/3/2021.

08. Assessee is aggrieved with that order and has preferred this appeal before us.

09. Assessee contested that the order passed by the learned principal Commissioner of income tax to revise the assessment order passed u/s 147 read with Section 143 (3) of the act dated 25/9/2018 wherein the proceedings initiated u/s 147 vide issue of notice u/s 148 dated 27/3/2018 were dropped. He therefore stated that when the assessing officer did not find anything to make an addition based on the reasons recorded for reopening of the assessment, if the learned principal Commissioner of income tax wanted to revise the order, the time limit would run from the original assessment order completed u/s 143 (3) of the act on 28/2/2014. Therefore it was stated that the time limit has been taken by the learned principal Commissioner of income tax from the date of order passed on 25/9/2018 and, therefore, order u/s 263 of the Act dated 23/3/2021 is barred by limitation.

010. The learned CIT DR vehemently supported the order of the learned PCIT it was stated that the order dropping the proceedings u/s 147 read with section 143 (3) of the Act dated 25/9/2018 is the order which is sought to be revised and such order was passed on 25/9/2018, the order passed u/s 263 of the income tax act by the PCIT on 23/3/2021 is in time.

011. The learned authorized representative stated that issue is squarely covered in favour of the assessee by the order of the coordinate bench in case of R.K. steel Syndicate Vs. Income Tax Officer reported in (2007) 14

SOT 158 (Mum) wherein it has been held that that when the order passed by the assessing officer was only an order dropping reassessment proceedings, time limit for exercise of commissioner's power under section 263 must be computed with reference to original assessment order passed. He therefore stated that this decision of the coordinate bench covers the issue in favour of the assessee.

012. We have carefully considered the rival contentions and perused the orders of the lower authorities. We find that originally the income of the assessee was assessed under section 143 (3) of the act on 28/2/2014. Subsequently another order was passed u/s 147 read with Section 143 (3) of the Act on 25/9/2018 wherein the learned assessing officer passed following order:-

> *"Proceedings initiated u/s 147 vide issue of notice u/s 148 dated 27/3/2018 are hereby dropped."*

013. The principal Commissioner of income tax has been bestowed upon with a power under section 263 of the Act that he may call for and examine the records of any proceedings under this act. On such examination, if he considers that any 'order' passed in those proceedings by the AO is erroneous in so far as it is prejudicial to the interest of the revenue, he may revise such order as the circumstances of the case justify. He may enhance, modify or cancel the assessment order and may also direct the AO to cause examination of the details and further pass an

order. But he can do so only after granting assessee an opportunity of hearing. However according to the provisions of subsection (2), such order could be passed only within the period of two years from the end of the financial year in which the order sought to be revised was passed.

014. Similar issue is considered by the coordinate bench in case of R K Steel Syndicate Vs. Income Tax Officer in ITA number 316/M/2005 dated 2nd April 2007. The facts and in that case was that assessment u/s 143 (3) of the Act was completed on 14th February, 2000. This assessment was reopened by issue of notice under section 148 of the Act on 15th of March 2002. Subsequently the reassessment proceedings, no addition was made and returned income was assessed. Subsequently, the Commissioner of income tax exercised power under Section 263 of the Act on 6th January, 2003, which culminated into an order passed under Section 263 of the Act. Therefore, the coordinate Bench was concerned that whether the order dated 28th of August, 2002 passed by the assessing officer is to be viewed as a 'reassessment order' or is to be viewed as an order dropping the reassessment proceedings. And further from which date the time limit of 2 years should be reckoned with for passing an order under Section 263 of the Act. In that particular decision the coordinate Bench considered that in case no additions are considered necessary by the assessing officer on the issues on which reassessment proceedings are resorted to, it cannot be

open to him to make any other additions also. Therefore by allowing PCIT extended time limit of 2 years will amount to allow revenue to do something indirectly which act prohibits directly. It held so.

> ***"7.*** *We do not think it is permissible for us to take this order, which is nothing more than an order dropping the assessment proceedings, for computing time-limit available to the Commissioner to revise the assessment framed by the Assessing Officer on the points which are not even touched by this order. It is incorrect to plead that such an order can be viewed as anything but an order dropping the reassessment proceedings. It cannot be viewed as an assessment order, though termed so, in the eyes of the law. Let us also not lose sight of the scheme and spirit of section 292B of the Act. This section, inter alia, provides that no proceedings purported to have been taken in pursuance of any of the provisions of the Income-tax Act shall be invalid, or shall be deemed to be invalid, merely by the reason of any mistake, defect or omission in the proceedings if such proceeding is "in substance and effect in conformity with or according to the intent and purpose of this Act". It would thus follow that what is to be really looked at is the 'substance' and not the 'form' alone, and that legal rights of the parties are to be settled as per substance of the proceedings irrespective of whatever nomenclature is assigned to the proceedings. This approach to interpretation of the Income-tax Act, which is embedded in the Act itself*

by the virtue of a specific provision to that effect, cannot be a one way traffic and merely operate in favour of the revenue. A fair and reasonable approach to interpretation of the Act requires the same equity to be read into provisions of the Act, in favour of the assessee. Seen in this right, what is termed as a reassessment order is really required to be viewed as an order dropping the reassessment proceedings. The assessee could not have been aggrieved of this order per se because it did not prejudice the assessee at that stage as it did not actually assess any income which was not already assessed in the original assessment order. As there was no enhancement of income or tax liability, it was an academic question whether or not the Assessing Officer resorted to reassessment proceedings. The assessee could not have raised an academic question in an appellate proceeding; it is well-settled in law that it is only an aggrieved party which appeal against the order. The assessee could not have had the clairvoyance to know that this order can cause prejudice to him. The prejudice was caused to the assessee by the reassessment proceedings only when the impugned revision order was passed because it was admittedly as a result of this reassessment order that the Commissioner claimed to have a right to exercise his revisionary powers even beyond 31st March, 2002; but for the fact of the reassessment order, the Commissioner could not have even claimed the existence a lawful right to do so. Undoubtedly, section 254(1) of the Act provides that the Tribunal

shall, after giving both the parties to an appeal opportunity of being heard, "pass such orders thereon as it thinks fit" and Hon'ble Supreme Court, in the case of Hukumchand Mills Ltd. v. CIT [1967] 63 ITR 232, viewed this provision as restricting "the jurisdiction of the Tribunal to the subject-matter of appeal", but the question then is what is 'subject-matter of appeal' in the case before us. The subject-matter of appeal before us is validity of the revision order passed by the Commissioner on 16th March, 2005. This legal validity is to be examined, inter alia, on the touchstone of time-limits set out for exercise of these powers under section 263 of the Act. And to decide this controversy, it is also important to decide whether or not the order dated 22nd August, 2002 is to be viewed as an order dropping the reassessment proceedings or as an reassessment order per se. That is how, in our considered view, we have powers to decide whether or not what is termed as reassessment order can indeed be viewed as an assessment order or is to be viewed as an order dropping the reassessment proceedings. In case we are to view this order as an assessment order, and compute the time-limit on that basis, we will end up upholding the prejudice caused to the assessee on account of his not doing something which he is not permitted to do anyway, i.e., raise an academic question about validity of reassessment proceedings when no additions are made to his income in the course of such reassessment proceedings. The time-limit for exercise of Commissioner's powers,

therefore, must be computed with reference to the assessment order passed on 14th February, 2000.

8. *We would arrive at this very destination even if we were to traverse along a different dialectic. Let us analyze these facts from another perspective. In order to exercise powers under section 263, two conditions are to be satisfied - first, the order sought to be revised should be erroneous; and - second, that the order sought to be revised should be prejudicial to the interest of the revenue. An order in accordance with the law can obviously not be said to be erroneous. Now, the fundamental question then arises whether the Assessing Officer could have, during the course of reassessment proceedings, made an addition for lower gross profit at all. If he could not have done so under the reassessment proceedings in question, and has not therefore done so, his action cannot be said to be erroneous - which is the fundamental condition for assume-ption of jurisdiction under section 263 of the Act. Let us not forget that on both the issues, admittedly on which reopening was sought, no additions were made. Learned Commissioner also does not dispute this action of the Assessing Officer and, therefore, he agrees that additions could not have been made in respect of the issues on which reopening was done. The question then arises whether it was open to the Assessing Officer to make in respect of any other income, in a situation in which he does not consider it necessary to make any additions in respect of the*

incomes which were said to have escaped assessment and for which reason reassessment proceedings were resorted to. The answer is firmly in negative. It is by now well-settled in law that in case no additions are considered necessary by the Assessing Officer on the issues on which reassessment proceedings are resorted to, it cannot be open to him to make any other additions also. The question of other additions can only arise when additions are made in respect to at least one of the issues on which reassessment proceedings are initiated. For this reason, it is not the reassessment order passed by the Assessing Officer which can be said to be erroneous for not having made on account of lower gross profit, but that error, even if that be so, can be said to exist in the original order, i.e., order dated 14th February, 2000, passed by the Assessing Officer.

9. *It is also difficult to comprehend as to how can a Commissioner, in the garb of exercising his powers under section 263, direct an Assessing Officer to do what the Assessing Officer did not have power to do at the time when the order sought to be revised was being passed. If the Assessing Officer could not have made, on the given facts, an addition on account of lower gross profit rate at the time of passing the reassessment order, he cannot also make such an addition on the reassessment order being set aside by the Commissioner under section 263 - particularly when no fault is found with the Assessing Officer in not making the additions on the points on which the*

assessment was reopened. That matter has now attained finality and cannot be touched at all. The Commissioner was clearly acting beyond the time frame permitted to him under the scheme of the Act for reviewing the order passed by the Assessing Officer. What the Assessing Officer could not have done on his own at the time of passing the so-called reassessment order, the Assessing Officer cannot do in the garb of following the revisionary directions of the Commissioner either. The law is well-settled. What a statutory authority cannot do directly, it cannot indirectly do either. An order in exercise of revision authority of the Commissioner cannot confer any more powers on the Assessing Officer than the powers the Assessing Officer had at the time of passing the order subjected to such revision proceedings.

10. *In view of the above discussions, and for the detailed reasons set out above, we are of the considered view that the impugned order passed by the CIT(A) was time-barred. Whichever way one looks at it, it is clear that the order sought to be passed by the Commissioner was vitiated in law on the ground that it was barred by the period of limitation. The impugned order is, accordingly, set aside as time-barred."*

015. Therefore, respectfully following the decision of coordinate bench, the order under Section 263 of the Act dated 23rd

March, 2021 is held barred by limitation and hence, quashed.

016. In the order, appeal filed by the assessee is allowed.

Order pronounced in the open court on 21.06.2022.

Sd/-	Sd/-
(KAVITHA RAJAGOPAL)	(PRASHANT MAHARISHI)
(JUDICIAL MEMBER)	(ACCOUNTANT MEMBER)

Mumbai, Dated: 21.06.2022
Sudip Sarkar, Sr.PS
Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai