

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'D', NEW DELHI**

Before Sh. Shamim Yahya, Accountant Member

Ms. Astha Chandra, Judicial Member

ITA No. 2118/Del/2016 : Asstt. Year : 2011-12

Sh. Jai Parkash Garg, H.No. 889, Sector-13, Urban Estate, Karnal	Vs	Pr. CIT, Karnal
(APPELLANT)		(RESPONDENT)
PAN No. ABZPG8229K		

Assessee by : Sh. Shweta Bansal, CA

Revenue by : Sh. Kumar Hrishikesh, CIT DR

Date of Hearing: 26.05.2022

Date of Pronouncement: 14.06.2022

ORDER

Per Sh. Shamim Yahya, Accountant Member:

This appeal by the assessee is directed against the order of Id. PCIT, Karnal, dated 12.01.2016 and pertaining to Assessment Year 2011-12.

2. The grounds of appeal read as under:

"1. That on the facts and in the circumstances of the case learned CIT erred in setting aside the assessment order dated 26.09.2013 and directing for making assessment afresh.

2. That the AO has rightly and in detail made enquiries and investigated the explanations furnished by the aa from time to time and the learned CIT has not applied his mind to consider the same and wrongly directed for making a fresh assessment.

3. That the learned CIT ignored the explanations on record furnished by the aa and wrongly observed the

facts and erred in directing for making an assessment afresh.

4. That the order of learned CIT is lacking conjunction of prejudicial to the interest of revenue and erroneous in law as such order of the learned CIT is wrong and bad in law."

3. In this case, in the assessment order, Assessing Officer noted that assessee has derived his income from salary and retail business of handloom goods u/s 44AD of the Income Tax Act, 1961. The Assessing Officer observed that during the year it is noticed that assessee has deposited cash in the bank on the various dates. The assessee was called upon to explain the source of cash deposit with supporting evidence. In response thereto, the assessee explained that cash was deposited in the bank out of cash available with him out of withdrawal on earlier date, cash sales from the retail business & funds transferred from the OD a/c. For the cash available out of withdrawn amount, the assessee did not elaborate the purpose of the withdrawal & further its non-utilization. Further AO noted that mostly cash was deposited in the bank in the round figure. That there are possibilities of revenue leakages. That the assessee was confronted about these facts. That case was discussed with the counsel of the assessee who after discussion surrendered an amount of Rs.3,20,000/- subject to no penal action. Therefore, AO noted that to plug the possible leakage in revenue on a/c of cash deposited in the bank, an addition of Rs.3,20,000/- is hereby made subject to no penalty.

4. Upon the aforesaid Assessment Order, Id. PCIT proceeded to assume jurisdiction u/s 263 of the Act. He noted that the said case was selected in CASS for verifying the source of cash

deposits of Rs.43,19,000/-. However, he noted that no question has been asked on this issue. Thereafter, Id. PCIT observed that vide order sheet entry dated 10.04.2013 and 02.05.2013, the assessee was asked by the AO to explain the source of cash deposits, which were above Rs.10 Lacs, made in the saving bank account and further asked the assessee to appear before the AO on 2.5.2013 & 9.5.2013 alongwith the details relating to source of cash deposits.

5. The Id. PCIT noted that during assessment proceedings, on 25.04.2013. The assessee furnished his reply alongwith statement of Bank account bearing A/c No 675010100011394 with Bank of India, Karnal. The Id. PCIT further noted that the assessee further submitted that vide his reply dated 26.09.2013 narration of credit/debit entries exceeding Rs. 10,000/- as appearing in the bank account.

6. Thereafter, the Id. PCIT observed that from the perusal of the record, it is seen that no enquiry/verification has been done on this issue and AO simply accepted the version of the assessee. The Id. PCIT further observed as under:

"Further, it is also noticed that the assessee had made FDRs with Bank of India, Karnal on which the assessee had received interest of Rs.90,347/- during the year under consideration. It is also noticed that the assessee had given advances to following persons, but no interest has been charged:

		Amount	Date of Payment	Amount	Date of Receipt
1.	M/s Sant Ram Chand	4,00,000	07.04.2010	4,00,000	05.05.2010
2.	M/s Basmati House	2,00,000	12.04.2010	2,00,000	20.07.2010
3.	Sh. Arjun Pandit	10,00,000	12.04.2010	8,00,000	14.07.2010
4.	Mansukh Securities	1,00,000	10.02.2011		

7. From the perusal of saving bank Statement to Bank of India, it is also noticed that the assessee had made DBD of Rs. 12,00,000/- (on 29.07.2010), Rs. 10,11,000/- (on 02.12.2010), Rs.2,25,000/- (on 25.1.2011), Rs.1,00,000/- (on 27.01.2011), Rs.3,00,000/- (on 31.01.2011) and Rs.80,000/- (on 10.03.2011) by making cash deposit on the same day, for which, the AO had not raised any question about the source of deposit.

8. The Id. PCIT thereafter referred to another notice issued. He did not mention as to what was in the said notice. However, Id. Counsel of the assessee has submitted a copy of the same in the paper book before us. The same reads as under:

"This is in continuation to the show cause notice dated 14/16-09-2015 vide this office letter F No. 2385 in respect of the subject cited above in your case. 2. In this regard, you are hereby required to provide information apart from the information sought by this office letter as stated above on the issues mentioned below:-

- (a) Provide the evidence in support of the sales of Rs. 15,61,000/- admitted during the assessment proceedings.*
- (b) Provide the evidence in support of the purchases made against the sales of Rs. 15,61,000/-.*
- (c) Provide the details of debtors and creditors.*
- (d) Provide the details of account of loan from LIC.*
- (e) Copy of the bank statement of OD account and Saving Bank account of Bank of India, Kamal reveals the details upto 21.04.2010 as under:-*

Saving Bank A/c

Date	Debits	Credits	Balance
01.04.2010	-	-	14,06,208/-
03.04.2010	-	32,020	14,38,228/-
07.04.2010	4,00,000/-	-	10,38,228/-
07.04.2010	25/-	-	10,38,203/-
12.04.2010	-	2,00,000	12,38,203/-
12.04.2010	2,00,000	-	10,38,203/-
12.04.2010	25/-	-	10,38,178/-
12.04.2010	10,00,000/-	-	38,178/-
15.04.2010	30,000	-	8,178/-
17.04.2010	7,000	-	1,178/-
21.04.2010	-	6,00,000/-	6,01,178/-

O.D.

Date	Debits	Credits	Balance
01.04.2010	-	-	0.00
10.04.2010	5,00,000/-	-	5,00,000/-
12.04.2010	2,00,000/-	-	7,00,000/-
12.04.2010	2,00,000/-	-	9,00,000/-
13.04.2010	6,00,000/-	-	15,00,000/-
15.04.2010	5,00,000/-	-	20,00,000/-
15.04.2010	2,50,000/-	-	22,50,000/-
16.04.2010	,50,000/-	-	25,00,000/-
19.04.2010	-	14,00,000/-	11,00,000/-
19.04.2010	-	1,00,000/-	10,00,000/-
20.04.2010	1,00,000/-	-	11,00,000/-
20.04.2010	-	11,00,000/-	0.00

After considering the submissions filed by you on 26.09.2013 during the assessment proceedings and the comparison of both the accounts mentioned above reveals that there is short balance of Rs. 8,00,000/- on 21.04.2010 which remains unreconciled. Please file your submissions in this regard.

(f) You have filed the return of income declaring profit u/s 44AD of the Income-tax Act, 1961, wherein gross receipts of Rs. 15,61,000/- have been claimed during the assessment

proceedings as sale proceeds. The OD limit account as well as Saving Bank account transactions reveals that there are frequent deposits and withdrawals in a single day in lacs of rupees. Please also provide the detailed narration regarding purposes of such a huge deposits and withdrawals in both the OD and Saving account.

You are, therefore, requested to furnish reply/submission alongwith documentary evidence, if any, on the above issues raised in the notice and attend the office of the undersigned at Aayakar Bhawan, Sector-12, Karnal on 06 11.2015 at 11.00 A.M. personally/through your authorized representative."

9. The Id. PCIT observed that Assessment Order passed by the AO is erroneous and in so far as it is prejudicial to the interest of the revenue. For this observation, the Id. PCIT gave following reasons:

a) As discussed above, this case was selected for scrutiny to verify the sources of cash deposits in bank account as per AIR information. During assessment proceedings, the assessee had furnished narration of credit / debit entries exceeding Rs. 10,000/- as appearing in the bank account of the assessee, but no query/verification were made by the AO and he simply accepted the version of the assessee and made an addition of Rs.3,20,000/- on account of possible leakage of revenue on account of cash deposited in the bank.

b) From the statement of saving bank account maintained with Bank of India, Karnal by the assessee, it is seen that

the assessee had made DBD (FDR) on the following dates by making cash deposits on the same day:

29.07.2010	12,00,000/-
02.12.2010	10,11,000/-
25.01.2011	2,25,000/-
27.01.2011	1,00,000/-
31.01.2011	3,00,000/-
10.03.2011	80,000/-

During assessment proceedings, the AO did not raise any query/ explanation for FDRs of above amount by making cash deposit on the same date and source of deposit was not examined.

c) During proceedings u/s 263, it is also noticed that the assessee made interest free advances to various persons as discussed above for business purposes, as is evident from the name of parties i.e. M/s Sant Ram Chand, M/s Basmati House, Sh. Arjun Pandit & Mansukh Securities on the other hand, the assessee has taken OD limit of Rs.25 Lacs and LIC loan of Rs.3 Lacs for business purpose and paid interest to bank for availing the OD limit, therefore, interest should have been charged on these advances. Thus, the AO failed to enquire about the interest free advances made by the assessee for business purposes.

d) During proceedings u/s 263, the assessee was asked vide show cause notice dated 2.11.2015 to reconcile the short balance of Rs.8,00,000/- as on 21.04.2010. Only submission already filed by the assessee on 26.09.2013

during the assessment proceedings alongwith evidence in support of sales have again been filed.

During assessment proceedings, the assessee submitted that Rs.8 Lacs cash deposited in Saving Bank A/c is from withdrawals made from OD A/c. However, there is short / minus balance of Rs.8 Lacs on 21.04.2010, if both the Saving Bank A/c and OD A/c are considered together. Then during 263 proceedings, the assessee changed his stand and submitted that Rs.8 Lacs was met from the sale proceeds of his business. This explanation does not seem true, as out of Rs. 15.60 Lacs sale for 12 months, how can there be sale of Rs.8 Lacs or more in the initial 21 days only. On the so called sale bills quantity or quality of the goods is not mentioned. Further, it cannot be a one way traffic, if assessee wants to show Rs.8 Lacs sale in first three weeks then from where he had made the purchases for affecting the sales of Rs.8 Lacs. Thus, the short balance of Rs.8 Lacs on 21.04.2010 still remains unexplained.

- e) During 263 proceedings, the assessee was specifically asked about the detailed narration regarding purposes for huge deposits and withdrawals from Saving Bank A/c and OD A/c, however, the assessee did not furnish the requisite details.*
- f) Against the OD limit of Rs.25 Lacs (extended to Rs.30 Lacs), the assessee has shown turnover of Rs. 15.60 Lacs, which appears to be quite low and unreal.*

g) If the assessee had Rs.30 Lacs or so in the form of cash deposits, then even if he keeps his money invested in bank (in term deposits), he could have easily earned Rs.3 Lacs per annum, on the other hand the assessee is showing Rs.1.25 Lacs as business income and about Rs.90,000/- as interest income, which is against business sense and defies logic.

h) The assessee appears to be engaged in some business which he has not disclosed to the department for example on 21.07.2010, Rs.38 Lacs in cash and then on 23.07.2010, further cash of Rs,5 Lacs were withdrawn by the assessee. Similarly, on 16.10.2010 Rs.13 Lacs is withdrawn but the same is apparently kept idle till 02.12.2010. Unless there is some urgent business need / requirement, no sane person would withdraw that sort of money to just keep the cash idle at home even for a few days.

5. Further as per the provisions of section 263(1) explanation 2 – effective from 01.06.2015, "an order passed by the AO shall be deemed to be erroneous in so as it is prejudicial to the interest of the revenue, if in the opinion of the Pr.CIT/ CIT - the order is passed by the AO without making enquiries / verifications, which should have been made. Thus this case is squarely covered by these provisions, effective from 01.06.2015."

10. Thereafter, referring to the case law including Gee Vee Enterprises Vs. Addl. CIT 99 ITR 375, he directed that the

Assessment Order is set aside and AO is directed to make the assessment afresh.

11. Against this order, assessee has filed appeal before us.

12. We have here both the parties and perused the material on record. The Id. Counsel of the assessee submitted that the Id. PCIT observation that AO has not made any enquiry incorrect. She submitted that all enquiries were made by the Assessing Officer as it is evident from para 1 to 3 of the Assessment Order. Hence, she submitted that AO has given a categorical finding in the Assessment Order itself that the source of cash deposited in bank account was duly examined and verified. She, further, submitted that the Id. PCIT is himself observing that AO vide order sheet entry dated 10.04.2013 and 02.05.2013, the assessee was asked for explanation in this regard from the assessee and hence the Id. PCIT observation that no enquiry has been made itself contrary from his observations itself. She submitted that assessee has made all submission before the AO. She submitted following chart that issues raised by the Id. PCIT were already considered by the AO as under:

S. No. (as per para 4 of the PCIT order)	Issue raised by PCIT	Reply already filed before AO
a)	Cash deposit in the bank account and source thereof	Reply dt. 26/09/2013 explaining each and every entry of cash deposit in bank account
b)	Explanation for FDRs	Reply dt. 29/08/2013
c)	Advance to M/s Sant Ram Chand, M/s Basina ti House, Sh. Arjun Pandit, M/s Mansukh Securities	Reply dt. 26/09/2013

d)	Alleged short balance of Rs. 8L if both the saving bank and OD A/c considered together	<p>From perusal of the notice u/s 263 dt. 02/11/2015 itself it is clear that there is no short balance in OD a/c and saving bank account as on 21.04.2010. Balance in saving account is Rs. (+)6,01,178/- and balance in OD account is nil. Therefore, there is no negative balance.</p> <p>Otherwise also, the OD account is a loan account and the assessee is having OD limit of Rs. 25 lacs. Therefore, the appellant can have negative balance in its account upto Rs. 25 lacs.</p> <p>Therefore, this observation of Ld. PCIT is completely incorrect.</p> <p>Otherwise also, this issue also pertains to bank transactions which were duly explained before the deposits in bank which is already explained in point (a) above.</p>
e)	Deposit and withdrawal from the bank account	Same as point (a) above
f), g), h)	Certain observations regarding OD limit, cash deposit and business of the appellant	<p>These are just certain general observations that are not backed by any supporting document or material findings.</p> <p>Further, all the relevant facts and documents regarding these observations were also filed before the Ld. AO which were duly examined and verified by the Ld. AO.</p>

13. Accordingly, the Id. Counsel of the assessee submitted that AO has made proper and due enquiry. She referred to several case laws in this regard. She further submitted that Id. PCIT invoking Explanation-2 to Section 263 is not sustainable in as much as Explanation-2 to Section 263 is applicable for Assessment Orders passed for A.Y. 2015-16 onwards and the ITAT Delhi in several cases has so held and similar order of ITAT in the case of M/s Brahma Centre Development Pvt. Ltd.

was confirmed by the Hon'ble Delhi High Court. She further referred to several case laws in this regard.

14. Per contra, the Id. Departmental Representative relied upon the order of Id. PCIT. He further submitted that Explanation-2 to Section 263 was inserted by Finance Act, 2015 w.e.f. 01.06.2015 is applicable as much as the impugned order u/s 263 was passed on 28.03.2018. He further referred to several case laws.

15. We have gone through the submissions and case laws relied upon. Upon careful consideration, we note that Id. PCIT in order u/s 263 has itself noted that this case was selected for CASS for verifying the source of cash deposit. Thereafter, the Id. PCIT referred to order sheet entry from which AO sought explanation from the assessee regarding cash deposit. Despite noting the above and noting that assessee replied to the same, the Id. PCIT contradicted himself by the observation that no enquiry has been done on this issue and the AO simply accepted the version of the assessee. The above line mentions that firstly there is no enquiry and in the same breath it states that AO simply accepted the version of the assessee. There is no whisper as to what was the version of the assessee which according to Id. PCIT was to be further examined. Hence, it is amply clear that Id. PCIT invoked his jurisdiction u/s 263 without any application of mind. As noted by the Id. PCIT himself enquiries were made by the AO and due replies were given by the assessee. After duly considering the replies, AO found that assessee agreed to surrender the amount of Rs.3,20,000/- and the same was added. There is no whisper by the Id. PCIT as to why the explanation accepted by the AO is

not acceptable or wrong. In the paper book submitted before us, it has been submitted that AO has issued several notices to the assessee. We note that AO has made comprehensive enquiry regarding various aspects.

16. A copy of the notice dated 10.04.2013 submitted in paper book reads as under:

"In connection n with completion of assessment proceedings pending in your case for the A.Y. 2011-12, you are requested to please furnish the following information/evidence & statement of computation of total income along with copy of ITR.

- 1. Please intimate the exact nature of business activities carried out during the year under consideration.*
- 2. Furnish the confirmations of balances in bank accounts/financial institution with reconciliation. Also submit copies of bank account statement with narration.*
- 3. Please furnish details of loan & advances indicating name, address PAN, amount of loan/advance, nature of transaction giving rise to such loan/advance.*
- 4. Please give copies of ledger accounts of interest paid & interest received. Details of TDS deducted & evidence for deposit in Govt. account.*
- 5. Date wise copy of capital account should be filed & necessary evidence with regard to the source of addition & destination of drawing should be filed.*
- 6. Furnish complete details of withdrawals for household expenses giving details of all dependent family members & justify the withdrawals shown indicating expenses on education with name, class fee paid, vehicle charges,*

name of school/college and in electricity, telephone and function/marriage solemnized if any, during the year, separately under each head by you/family members.

- 7. Details of investment made in house property/loan, advances gift, shares, motor vehicle, jewellery & corresponding sales of immovable property/any other asset which give rise to capital gain, if any.*
- 8. Please furnish a list of concerns (firms, companies etc.) where you or your dependents have any accounts/shares deposit, debenture, investment or any other interest. A confirmed copy of such account from the concern should be filed along with particulars of income/loss from each concern.*
- 9. Please furnish details of bank account maintained by you & dependent family members.*
- 10. Regarding agriculture income, if any, please furnish full particulars of the agriculture land holding backed by copies of title deeds/Farad/Jamabandhi/Girdwari etc. & details of agriculture produce sold, expenses incurred in support of agriculture income 'shown: in the return of income.'*

17. Similarly, notice dated 06.08.2013 reads as under:

"In order to complete the assessment proceedings in your case for the A.Y. 2011-12, you are requested to furnish the following information/documents alongwith the complete books of account i.e. cash book, ledger, sale/purchase bill, vouchers for expenses claimed on the next date of hearing on 20.8.13 at 11.30AM.

- 1. In the reply filed on dated 02.05.13. You have shown doing business of handloom goods covered u/s*

44AF/44AD of the I.T. Act, whereas in the return of income, no such business activities are shown. Only salary & interest income has been shown in the- return. Please explain it.

- 2. Income from business & profession has been shown at Rs. 1,25,000/- u/s 44AD of the I.T. Act. Please furnish the basis of such income w.r.t. total amount of sales/purchases made during the year Sc copy of sale/purchase bills should be provided.*
- 3. In the computation of total income, salary & interest has been shown at Rs. 1,23,228/- & Rs. 93,237/- respectively. Please file the necessary details in this regard.*
- 4. During the year under consideration, you have purchased a residential plot from Shri Shammi Bansal for Rs. 10,50,000/- Please file the# source of investment in purchasing the plot. Please also file the conveyance deed also later on, this was sold to one Shri Ankit Garg for the same amount. Please file the copy of agreement entered between you & Shri Ankit Garg for sale of said plot. How much of the bayana/advance amount was received & accounted for in the bank account.*
- 5. There is cash deposit of above Rs. 10 lakh in saving bank account with Bank of India, Kama. Please explain the source of cash deposit as well as cash withdrawal with documentary evidence.*
- 6. You have also OD account term deposit with Bank of India. Please furnish the purpose for such account &*

source of meeting out interest liability on the OD account.

7. *Please furnish the source of TD account No. 451,460 & 561 against which substantial amount shown credited in your name as on 31.03.11.*
8. *It further, revealed that loan has been availed from LIC of India & loan amount repaid during the year. Please furnish the details that how much of the loan was taken & repaid & the purpose for which loan was taken."*

18. Thereafter, the assessee response have also been submitted. The details of total cash deposited has also been submitted. The issue of interest on advances have also been addressed. The bank statement has also been submitted. We note that Assessing Officer has made due enquiry. Thereafter, upon receipt of assessee's response he has passed an order. There is no whisper in order of Id. PCIT as to why the explanation given by the assessee is not acceptable. Hence, his direction qua cash deposit to consider the issue afresh is erroneous and not liable to be sustained. In our considered opinion if two views possible and the AO has accepted the one, the Id. PCIT cannot assume jurisdiction u/s 263 of the Act. The observation by the Id. PCIT that he is invoking Explanation-2 to Section 263(1) for this Assessment Order i.e. Assessment Year 2011-12 is not sustainable as amendment is effective from 01.06.2015 and Hon'ble Delhi High Court has held that the same is not retrospective. The submission of the Id. CIT DR where he submits that the Explanation-2 to Section 263 is applicable even for A.Y. 2011-12 as Id. PCIT's order was passed on 28.03.2018 has no legal substance. The various case laws cited by the Id.

DR for no proper enquiry made by the AO or the AO's order being cryptic or that AO accepted the reply without any further enquiry are not at all applicable on the facts of the present case as already found by us. The observation of Id. PCIT that no enquiry was done by the AO is absolutely not sustainable as a proper enquiry has been done. Moreover, the amendment in this regard is not applicable in this assessment year. Further, the observation that AO accepted the reply without further enquiry has no substance as to what further enquiries were required is also not stated by Id. PCIT. There is no mention by Id. PCIT what was wrong in the explanation given by assessee and what more enquiries were required. It is a classic case of Id. PCIT directing for roving enquiries totally unsustainable in law. This is further amplified by the second notice by Id. PCIT dated 02.11.2015 after initial notice on 16.09.2015, which was issued after issue of notice about cash deposit. The said notice has already been reproduced by us hereinabove. Though the said notice is said to be in continuation of earlier notice, by no stretch of imagination it can be said to be in continuation of the earlier notice.

19. A reading of the same clearly shows that after having made a contradictory observation on issue of lack of enquiry of cash deposit aspect for which the assessment was taken up, the Id. PCIT went on virtually issue a notice u/s 143(2) and embark upon fishing and roving expedition. The Id. PCIT never mentioned in his order before issuing this second notice as to how the Assessment Order in this regard was erroneous so as to be prejudicial to the interest of the revenue. Hence, this part of the Id. PCIT's order wherein notice was issued *dehors* any

finding or even mention of the AO's order being erroneous or prejudicial to the interest of the revenue is not at all sustainable.

20. In this view of the matter, in our considered opinion the order of Id. PCIT is not at all sustainable in law. Hence, we set aside the order of Id. PCIT and decide the issue in favour of the assessee.

21. In the result, the appeal of the assessee is allowed.
Order Pronounced in the Open Court on 14/06/2022.

Sd/-

(Astha Chandra)
Judicial Member

Dated: 14/06/2022

Subodh Kumar, Sr. PS

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-

(Shamim Yahya)
Accountant Member

ASSISTANT REGISTRAR