

IN THE HIGH COURT OF JHARKHAND AT RANCHI
Tax Appeal No. 7 of 2021

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The Principal Commissioner of Income Tax (Central), Patna, 3rd Floor,
Central Revenue Building, Birchand Patel Path, P.O & P.S. Patna Sectt.,
Patna. Appellant

Versus

Padma Kumar Jain, Resident of Ratanlal Surajmal Compound, Main
Road, P.O & P.S. G.T.O, District Ranchi. Respondent

CORAM: Hon'ble Mr. Justice Aparesh Kumar Singh
Hon'ble Mr. Justice Deepak Roshan

For the Appellant	:Ms. Amrita Sinha, Adv.
For the Respondent	: Mr. Biren Poddar, Sr. Adv., M/s Mahendra Kr. Choudhary, Devesh Poddar, Rakhi Sharma & Piyush Poddar, Adv.

13/11.10.2022 The instant appeal is directed against the order dated 08.07.2022 passed by learned Income Tax Appellate Tribunal, Ranchi Bench, Ranchi (hereinafter to be referred as ITAT) in appeal being I.T.A No. 289/Ran/2019 for the A.Y. 2012-13, preferred by the respondent herein whereby the learned ITAT has allowed the appeal of the respondent-Assessee and quashed the entire proceeding initiated under Section 263 of the Income Tax Act, 1961 (hereinafter to be referred as the Act)

2. The brief facts of the case are that a search and seizure operation was carried out in the business and residential premises of respondent-Assessee on 03.07.2014. After completion of search and seizure, a notice under Section 153A of the Act was issued to the Assessee on 09.02.2015. In response to the notice, the Assessee filed his return of income for the assessment year 2012-13 on 02.10.2016 declaring total income of

Rs.15,34,97,400/-. On 28.12.2016, Assessment Order under Section 153(A) read with Section 143(3) of the Act was passed.

Subsequently, the Principal Commissioner of Income Tax (Central), Patna (hereinafter referred to as PCIT) initiated a proceedings u/s 263 of the Act and passed an order on 29.12.2017 directing the Assessing Officer to pass a fresh order. Thereafter, on 3.12.2018, the A.O in compliance to the aforesaid order passed by the PCIT issued notice under Section 142(1) with letter of query and the Assessee filed a detailed reply on 18.12.2018 before the A.O. Subsequently, the second Assessment Order under Section 143(3) read with Section 263 was passed on 31.12.2018 by the A.O.

On 28.3.2019, though the 1st Assessment Order dated 28.12.2016 was already cancelled by PCIT vide order dated 29.12.2017, a proceeding u/s 263 of the Act was again initiated for the second time and 2nd order under Section 263 was passed by PCIT again cancelling the non-existent 1st Assessment Order with a direction to the Assessing Officer (AO) to pass a fresh order; however, the 2nd Assessment order dated 31.12.2018 was never cancelled and as such, it remained as a valid assessment order.

On 28.12.2019 an Email was sent by the respondent-Assessee to the A.O objecting to pass of fresh assessment order on the ground that aforesaid second assessment order dated 31.12.2018 has not been cancelled and therefore for one assessment year there cannot be two parallel assessment order and requested to drop the assessment proceeding but instead of dropping, the A.O passed 3rd Assessment Order under Section 263 r.w.s 143(3) of the Act.

On 30.12.2019, as the 3rd assessment proceeding was not dropped by the Assessing Officer, the respondent-Assessee filed an

appeal before ITAT against the order dated 28.03.2019 passed under Section 263 of the Act for the 2nd time. On 08.07.2020, learned ITAT quashed the aforesaid 2nd order under Section 263 dated 28.03.2019 and allowed the appeal of the respondent, which is impugned in the instant Appeal.

3. Ms. Amrita Sinha, learned counsel appearing for the revenue submits that pursuant to the second round of proceeding under Section 263 of the Act, an Assessment Order dated 28.12.2019 has already been passed on an assessed income of Rs.32,13,19,780/- and the said Assessment Order has not been challenged by the respondent Assessee. On the contrary, the respondent has challenged the order dated 28.3.2019 passed by the PCIT under Section 263 of the Act. She further submits that the Assessee duly participated in second round of proceeding under Section 263 as well as in an assessment proceeding which took place subsequent to second round of proceeding under Section 263. She contended that the Assessee never raised a plea of jurisdiction of authority with regard to invoking of revisional jurisdiction of PCIT u/s 263 of the Act for the second time.

Learned counsel referred to the judgment passed in the case of *Union of India Vs. Susaka Pvt. Ltd. & Ors.* reported in (2018) 2 SCC 182 wherein the Hon'ble Apex Court has held that "*if plea is available, whether on facts or law, it has to be raised by the party at an appropriate stage in accordance with law*". Since the plea of jurisdiction under Section 263 of the Act was not raised at an appropriate stage by the respondent-Assessee, the respondent was debarred from raising the said question of jurisdiction before the ITAT. The learned ITAT failed to consider while allowing the appeal filed by the Assessee that the said appeal challenging the order dated 28.03.2019 passed under Section 263

of the Act was preferred beyond limitation.

She lastly submits that Section 263 deals with calling for and examine the records of any proceeding under this Act. Thus, non-recording of the first round of proceeding under Section 263, in the second round of order under Section 263 is merely a technical error. The Hon'ble Apex Court time and again held that the entire assessment proceeding cannot be vitiated only on technical ground. She concluded her argument by submitting that during the first round proceeding under Section 263 of the Act, the issues raised therein are entirely different with the issue rose in second round of proceeding under Section 263 of the Act.

Relying upon the aforesaid submissions, she prayed that the instant application may be admitted on substantial questions of law and finally be allowed in favour of Revenue.

4. Learned sr. counsel for the respondent-Assessee submits that the order passed by the learned ITAT does not require any interference, inasmuch as, the PCIT has initiated proceedings u/s 263 of the Act for the second time and quashed the order of assessment proceeding which was already quashed earlier. In other words, though the first Assessment Order dated 28.12.2016 was already cancelled by the first round of 263 proceedings, but the second order under Section 263 was passed by the PCIT again cancelling the non-existent first Assessment Order with a direction to pass a fresh order. However, the second Assessment Order dated 31.12.2018 was never cancelled which was passed in pursuance to the 1st order of remand passed u/s 263 of the Act and as such it remained as a valid Assessment Order.

Since, the 3rd assessment proceeding was not dropped by the Assessing Officer on the plea raised by the Assessee, the respondent filed

the appeal before the ITAT against the order passed under Section 263 dated 28.3.2019 and the learned ITAT has rightly quashed the second order passed by PCIT under Section 263 of the Act dated 28.3.2019. As such since there is inherent mistake in the order passed by the PCIT under Section 263 of the Act. The learned Tribunal has rightly allowed the appeal of the Assessee; thus, the instant Appeal may be dismissed.

5. Having heard learned counsel for the parties and after going through the documents, it appears that on 28.12.2016 first Assessment Order under Section 153(A) read with Section 143(3) of the Act was passed. Thereafter, the PCIT initiated a proceedings u/s 263 of the Act and passed an order on 29.12.2017 directing the Assessing Officer to pass a fresh order.

Thereafter, the A.O in compliance to the aforesaid order passed by the PCIT u/s 263, issued notice under Section 142(1) with letter of query. Thereafter, the Assessee filed a detailed reply. Subsequently, the second Assessment Order under Section 143(3) read with Section 263 was passed on 31.12.2018. It appears that though the first Assessment Order dated 28.12.2016 was already cancelled by the order passed by PCIT under Section 263 of the Act on 29.12.2017, but the second order under Section 263 was also passed again cancelling the non-existent first assessment order dated 28.12.2016. Here lies the lacuna committed by the PCIT while passing the order under Section 263 of the Act.

It is true that there is no bar in law in initiating two proceeding under Section 263 of the Act for the same assessment year if proceedings are within the time limit as per Section 263(2) of the Act; however, in no case the PCIT is having jurisdiction to cancel the assessment order which was already cancelled during the first proceeding of 263. In other words, the 1st Assessment order dated 28.12.2016 (Annexure-C to the counter

affidavit) was already cancelled by Annexure-D to the counter affidavit but a 2nd Order under Section 263 was passed by PCIT again cancelling the non-existent 1st assessment order with a direction to pass a fresh order, however the 2nd assessment order dated 31.12.2018 (Annexure-G to the counter affidavit) was never cancelled and as such it remained as a valid assessment order.

The PCIT has exercised his jurisdiction second time under Section 263 of the Act mainly to examine the expenses/issues, which were already examined by the assessing officer while passing original assessment order under Section 153A/143(3) of the Act dated 28.12.2016 and while passing second assessment order under Section 143(3) read with Section 263 of the Act dated 31.12.2018 in pursuant of first 263 order.

6. The learned Tribunal has considered each and every aspects of the matter while allowing the appeal filed by the Assessee and held that in Assessee's case the loss and damage expenses of Rs.4 Crores has been examined by the Assessing Officer in the Original Assessment Order dated 28.12.2016, and the said expenditure has also been examined by the Assessing Officer in the second Assessment Order passed by the A.O under Section 143(3) read with Section 263 of the Act which was framed in pursuance to the direction given by the PCIT. Therefore, the said loss and damage expenses of Rs.4 Crores have been examined by the A.O twice. Again, in the Section 263 order, the PCIT has directed the A.O to examine the said loss and damage expenses of Rs.4 Crores, this means the A.O would examine 3rd time the said loss and damage expenses of Rs.4 Crores. Likewise, the sales incentive expenses of Rs.9,45,96,300/- has been examined by the A.O in the first Assessment Order and again he examined the same and pass a fresh assessment order pursuant to the

order passed by the PCIT in first round of 263, as such again in the second round of 263 the direction made by the PCIT is erroneous.

The learned Tribunal had further held that during the course of original assessment proceeding, the Assessee submitted books of accounts, balance sheet, profit and loss account etc. and the same was duly acknowledged by the A.O. Since all these expenses have already been scrutinized and examined by the A.O twice i.e., in the original assessment order dated 28.12.2016 and in the second assessment order passed after 263 order; thus, the order passed by the PCIT in the second round of 263 is virtually directing the A.O. to scrutinize the accounts 3rd time which is not permissible in the eye of law. In other words, the learned Tribunal has considered each and every facet of the matter and allowed the appeal of the Assessee holding the order passed by the PCIT under Section 263 is bad in law.

7. At this stage it is pertinent to mention here that PCIT by invoking his jurisdiction under Section 263 of the Act is giving another opportunity to the assessing officer which is not permissible. The law is now no more *res-integra* that once the issue is considered by the Assessing Officer, the remedy of the revenue could not lie in invoking the jurisdiction under Section 263 of the Act especially when the entire books of accounts and documents were produced by the Assessee before the Assessing Officer. However, in the instant case the Assessee was directed to produce 3rd time the same books of accounts.

In addition, interestingly the PCIT while passing the order under Section 263 for the 2nd time has quashed and set aside 1st Assessment Order passed under Section 153(A)/143(3) of the Act dated 28.12.2016, though the same was already cancelled by the first round of 263; which is not permissible in the eye of law and the second assessment order which

was passed after the first round of 263 was never cancelled and is still in existence.

8. At the cost of repetition, the learned Tribunal has taken notes of each and every feature of the case, both on facts and on law, especially the point of law that there cannot be any proceeding under Section 263 for change of opinion by subsequent officer. Admittedly, in the instant case the entire documents were produced in the original assessment proceeding as well as in the subsequent assessment proceeding which was conducted after the first 263 order; as such again in the second round of 263, the direction made by the PCIT is erroneous and has no legs to stand in the eye of law.

9. As a result, since no error has been found in the order passed by the learned ITAT, thus the same is hereby confirmed and the appeal filed by the Revenue is dismissed at the admission stage itself as no substantial question is involved in this case.

Consequently, we hold that the 3rd Assessment Order dated 28.12.2019 passed pursuant to the 2nd order under Section 263 dated 28.3.2019 passed by PCIT has no legal effect.

(Aparesh Kumar Singh, J.)

(Deepak Roshan, J.)