

**Neutral Citation No. - 2023:AHC:163882**

**RESERVED**

**Court No. - 5**

**Case :-** WRIT TAX No. - 638 of 2022

**Petitioner :-** M/S M.L. Chains

**Respondent :-** The Pr. Commissioner Of Income Tax - 1 and another

**Counsel for Petitioner :-** Amit Mahajan

**Counsel for Respondent :-** Gaurav Mahajan,Manu Ghildyal

**HON'BLE PIYUSH AGRAWAL,J.**

1. Heard Shri Amit Mahajan, learned counsel for the petitioner and Shri Manu Ghildyal, learned counsel for the respondents.
2. The instant writ petition has been filed challenging the order dated 31.03.2022 passed by the respondent no. 1 cancelling the assessment order dated 22.12.2019 being erroneous in so far as it is prejudicial to the interest of the Revenue.
3. The brief facts of the case are that the petitioner deals in the business of gold bars and gold ornaments. On 27.02.2019, a notice under section 142(1) of the Income Tax Act was issued to the petitioner. Thereafter, on 23.08.2019, a show cause notice under section 272-A(1)(d) of the Income Tax Act was issued. Thereafter, the petitioner, through its representative, appeared and submitted relevant documents before the authority and the respondent no. 2, after considering all the details, completed the assessment under section 143(3) of the Income Tax Act on a total return income of Rs. 53,91,630/-. On 27.03.2022, a notice under section 263 of the Act was issued to the petitioner by the respondent no. 1 on the ground that the income tax return for the Assessment Year 2017-18 was e-filed on 28.10.2017 declaring total income of Rs. 53,91,630/- and the case of the petitioner was selected for scrutiny under Computer Aided Scrutiny Selection (CASS). Thereafter, by the impugned order dated 31.03.2022, the

respondent no. 1 has cancelled the assessment order dated 22.12.2019 passed by the respondent no. 2 holding that the order passed by the Assessing Officer is erroneous in so far as it is prejudicial to the interest of the Revenue and directed the respondent no. 2 to pass a fresh order. Hence, this petition.

4. Learned counsel for the petitioner submits that the impugned proceedings are bad in law as the same have been initiated on the change of opinion. He further submits that the respondent no. 1, without giving any opportunity of hearing to the assessee, has passed the impugned order. He further submits that no inquiry as contemplated under section 263 of the Income Tax Act was conducted by the respondent no. 1 before passing the impugned order and the inquiry, if any, was conducted behind the back of the petitioner without any opportunity.
5. He further submits that the Department maintains online order sheet. The signature of the Advocate shown in the manual order sheet dated 30.03.2022 (Annexure No. CA-8) is entirely different from the signature in the adjournment application (Annexure No. 5 to the writ petition), on the basis of which the Department is claiming that the petitioner's Advocate appeared on 30.03.2022.
6. He further submits that in 2<sup>nd</sup> proviso to section 263 of the Income Tax Act, certain conditions have been enumerated for passing an order under section 263 of the Income Tax Act, but none of such conditions has been fulfilled before passing the impugned order. In the impugned order, no finding has been recorded as to how the original order is prejudicial to the interest of the Revenue.
7. He further submits that the notice under section 263 of the Income Tax Act was issued on 27.03.2022, which was uploaded on the website on 28.03.2022. The notice of the same was received by the petitioner in the morning, i.e., the date fixed for submitting

reply. Therefore, the petitioner moved an adjournment application praying for one week's time for submitting reply, but without considering the adjournment application, the impugned order has been passed on 31.03.2022; wherein, paragraph nos. 4 & 5 are self-contradictory.

8. Learned counsel for the petitioner further submits that the respondent maintains electronic order sheet (Annexure No. CA – 2); wherein, no date was fixed for 30.03.2022 and without there being any date fixed for 30.03.2022, assertion had been made by the respondent that the counsel appeared on 30.03.2022, that too on a manual order sheet cannot be accepted. He further submits that the respondent has not brought on record any material to show that on the adjournment application of the petitioner dated 29.03.2022, the date was fixed for 30.03.2022. He further submits that the impugned order has not been passed on 29.03.2022, the date which was fixed nowhere refers that the next date is fixed for 30.03.2022 or 31.03.2022, nor it refers that the matter is adjourned for 31.03.2022 and therefore, the impugned order has been passed in gross violation of the principles of natural justice. He prays for allowing the writ petition.
9. Per contra, learned Standing Counsel for the Department supports the impugned order by submitting that full opportunity was given to the petitioner and the notice was duly served and thereafter, the petitioner submitted its reply and after considering the reply, the impugned order has been passed. He further submits that on the date fixed, the reply was not submitted, but on the subsequent date the reply was submitted and after considering the same, the impugned order has been passed. In support of his contention, he has relied upon the manual order sheet maintained by the Department (Annexure No. CA – 8), where the signature of the counsel of the petitioner figures. He further submits that since the assessment order dated 22.12.2019 was prejudicial to the interest

of the Revenue, therefore, the proceedings have rightly been initiated under section 263 of the Income Tax Act and the impugned order has rightly been passed. He prays for dismissal of the writ petition.

10. After hearing the learned counsel for the parties, the Court has perused the record.
11. Admittedly, the notice under section 263 of the Income Tax Act dated 27.03.2022 was prepared and the same was got approved for uploading on the portal. The Office of the respondent sent the information to the petitioner on its portal on 28.03.2022. The petitioner came to know about the notice on 29.03.2022 in the morning and immediately thereafter, moved an adjournment application on 29.03.2022 itself. On the adjournment application, e-proceeding response acknowledgment no. 480299081300322 was generated (Annexure No. – 6 to the writ petition). The fact that the adjournment was moved has not been denied by the respondent. The order sheet of the proceedings under section 263 of the Income Tax Act have been filed. The copy of the computer generated order sheet has been brought on record as Annexure No. CA – 2 to the counter affidavit. On perusal of the same shows that no order was passed on 29.03.2022 either allowing the adjournment application or rejecting the same or fixing any other date. The order sheet only shows that an adjournment application was moved on 30.03.2022. Further, the order sheet shows that on 31.03.2022, the order has been passed. The impugned order does not reveal the fact that what happened on 29.03.2022, whether the date was fixed for 30.03.2022 or 31.03.2022 or the judgement was reserved on 29.03.2022. The impugned order is silent about this fact and the manual order sheet has been brought on record as Annexure No. CA – 8 to the counter affidavit, where handwritten order has been shown that the counsel for the petitioner appeared and his signature has been obtained thereon. No explanation has

been submitted in the impugned order or in the counter affidavit as to why and under what circumstances as well as under which law, two different order sheets are being maintained.

12. Learned counsel for the petitioner has specifically denied the signature on the manual order sheet and has relied on the signature on the adjournment application (Annexure No. 5 to the writ petition), on perusal of which creates a doubt on two count; firstly, the signature are different and secondly, there was no occasion for adopting two different modes of maintaining order sheet; one computer generated order sheet and other manual order sheet. This aspect creates a serious doubt about the functioning of the respondent – authority. Further, in paragraph no. 4 of the impugned order, following finding has been made:-

*“In response to the above Notice u/s 263, Shri Rajendra Sharma, Adv. Counsel of the assessee filed only adjournment application on dated 29.03.2022 requesting that one week time kindly be allowed to the assessee but did not file reply to the Notice u/s 263 of the Income Tax Act, 1961. **However, in response to the above Notice u/s 263 no reply has been submitted by the assessee to refute the findings as communicated vide Notice u/s 263 having DIN & Notice No. ITBA/REV/M/REV1/2021-22/1041859754(1) dated 27.03.2022”***

13. On perusal of the paragraph no. 4 of the impugned order, it clearly shows that the assessee has not submitted any reply in response to the notice under section 263 of the Income Tax Act dated 27.03.2022.
14. Further, in paragraph no. 5 of the impugned order, following finding has been recorded:-

*“5. The Assessee was issued Notice under Section 263 on 27.03.2022, **which was duly served**. In response, the Assessee has submitted its reply. The same was duly examined. Based on examination of the submission of the Assessee, facts of the case, documentary evidences produced, past assessment orders and material information available, the reply of the Assessee has been*

*found to be grossly unsatisfactory, not responding to the queries raised in the notice issued.”*

15. Perusal of paragraph no. 5 of the impugned order shows that the assessee has submitted its reply after due examination of the same and material on record, the impugned order has been passed.
16. From the perusal of the aforesaid paragraph nos. 4 & 5 of the impugned order, it clearly reveals that the same are self-contradictory. The respondent – authority is trying to blow hot & cold at the same time. Whereas, in paragraph no. 4 of the impugned order, it has been mentioned that no reply has been submitted by the petitioner, to the contrary, in paragraph no. 5 of the impugned order, it has been mentioned that the assessee has submitted its reply. Neither in the impugned order, nor in the counter affidavit filed before this Court, any reference of the reply submitted by the assessee, as alleged in the paragraph no. 5 of the impugned, has been made.
17. On the pointed query to the counsel for the respondent as to whether reply, as referred to in paragraph no. 5 of the impugned order, has been submitted, he categorically refers Annexure No. CA – 5 to the counter affidavit and submits that the reply has been submitted by the assessee in the proceedings under section 142(1) of the Income Tax Act, which was considered. The said submission, on the face of it, has no legs to stand on, as the instant proceedings and the impugned order have been passed pursuant to the notice under section 263 of the Income Tax Act. Once the respondent – authority himself records that no response has been filed in pursuance of the notice under section 263 of the Income Tax Act dated 27.03.2022, a contrary finding, as recorded in paragraph no. 5 of the impugned order, cannot be accepted in the eyes of law.
18. Further, the notice under section 263 dated 27.03.2022 was prepared and uploaded/sent on 28.03.2022 and the same was

received on the date fixed, i.e., 29.03.2022 and the impugned order dated 31.03.2022 has been passed in gross violation of the principles of natural justice.

19. Since there is an apparent violation of the principles of natural justice, as no opportunity was given to the petitioner for defending or presenting its case, the impugned order cannot be sustained in the eyes of law in view of the law laid down by the Apex Court in *Whirlpool Corporation v. Registrar of Trade Marks Mumbai* [(1998) 8 SCC 1].
20. Further, the impugned order does not refer any finding as enumerated in Explanation – II of section 263 of the Income Tax Act to suggest that the assessment order was prejudicial to the interest of the Revenue in view of the judgement of the Apex Court in *Malabar Industrial Co. Ltd. Vs. Commissioner of Income Tax*, (2000) 243 ITR 83 and therefore, on this count also, the impugned order cannot be sustained in the eyes of law.
21. In view of the above, the impugned order dated 31.03.2022 passed by the respondent no. 1 is hereby quashed.
22. The writ petition is allowed with a cost of Rs. 10,000/-, which shall be deposited by the respondent concerned with the Allahabad High Court Legal Services Committee, Allahabad within a period of one month from today.
23. The respondents are at liberty to recover the cost from the erring Officer.
24. List the matter after three months in Chamber, by which time an affidavit of compliance of deposit of cost shall be filed.

**Order Date :-16/08/2023**

*Amit Mishra*