

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES "E" : DELHI

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND
SHRI O.P. KANT, ACCOUNTANT MEMBER

ITA.No.1987/Del./2018

AND

Stay Application No.261/Del./2018

Assessment Year 2015-2016

Mohd. Momineen Qureshi, 401, 4 th Floor, Vardhman City-2, Plaza Asaf Ali Road, New Delhi - 110 002. PAN AAGPQ2968R	VS	The ACIT, Circle-46(1), Delhi.
(Appellant)		(Respondent)

For Assessee :	Shri Anil Kakkar, C.A.
For Revenue	Ms Parmita M. Biswas, CIT-DR

Date of Hearing :	26.03.2019
Date of Pronouncement :	02.04.2019

ORDER

PER BHAVNESH SAINI, J.M.

ITA.No.1987/Del./2018 by Assessee has been directed against the Order of the Pr. CIT-16, New Delhi, Dated 23.02.2018, for the A.Y. 2015-2016 under section 263 of the Income Tax Act, 1961. The assessee also filed Stay Application No.261/Del./2018.

2. We have heard the Learned Representatives of both the parties and perused the material available on record.

3. Briefly the facts of the case are that original return of income was filed at Rs.20,66,940/- on 30th September 2015. The case was selected for a limited scrutiny under CASS for the reasons (1) unsecured loans (2) other expenses claimed in profit and loss account (3) low net profit or loss (4) loss from current year fluctuation. The Assessing Officer issued notice under section 143(2) on 30th October 2017. Further notice under section 142(1) was issued on 15th June 2017 calling for the details. The Learned Counsel for the Assessee appeared before Assessing Officer. The Assessing Officer discussed the matter with him. The Assessing Officer noted that as per the submissions of the assessee, the business of the assessee during relevant assessment year period was "*Trading in meat and meat products*". The Assessing Officer as per discussion with the Counsel for Assessee, accepted the

return of income and passed the assessment order under section 143(3) dated 6th December 2017.

3.1. The Learned Pr. CIT noted that proposal was received under section 263 of the Income Tax Act from the Assessing Officer for review of the assessment. The Pr. CIT, on examination of the assessment order and assessment record found that the assessment order under section 143(3) passed by the Assessing Officer dated 6th December 2017, is erroneous in so far as it is prejudicial to the interests of revenue. He has issued show cause notice to the assessee as to why the assessment order may not be set aside. The assessee filed reply to the show cause notice. The Learned Pr. CIT after considering the assessment record and material on record and explanation of the assessee, set aside the assessment order holding it to be erroneous in so far as prejudicial to the interests of revenue and restore the matter in issue to the file of Assessing Officer for passing the order afresh. The findings of the Pr. CIT in para-4 of the Order is reproduced as under :

“4. Examination of issue by PCIT-16 and conclusion:-

I have gone through assessment order and also through assessee's submission. It is found that during assessment no details were called regarding meat processing and purchase account by the AO. Details were called by AO only through notice dated 30.10.2017, in which he called details of only "other expenses" and "loss from currency fluctuation". Besides this only details of unsecured loans were called from balance sheet. No details other than mentioned above were called. No books of accounts were called. No further notice was issued and no details were called through order sheet.

Even though it was a case selected under CASS for limited scrutiny, one of the reason for selection was "low net profit or loss". But AO stopped at gathering details of only "other expenses" and did not gather any details on expenses shown in manufacturing

account namely "purchases" of Rs.191.34 crores, packing material expenses of Rs.1.29 crore, processing and freezing charges of Rs.5.31 crore. As a result genuineness and veracity of such expenses could not be examined. The AO also did not examine short fall in GP & NP both from 24.40 per cent (GP) and 6.33 per cent (NP) in A.Y. 2014-15 to 2.21 per cent (GP) and 0.07 per cent (NP). On a turnover of Rs.200 crore GP fall of 24.40 per cent would mean suppression of substantial amount of income. Even if turnover of two years is different, examination of short fall in gross profit and net profit was called for, but AO did not at all examine this issue.

Besides this the addition to sundry creditors of Rs.2.68 crores and advances from customers of Rs.2.57 crore also required examination as they were having direct bearing on gross profit, but no details on them were called by AO.

AO also did not notice during scrutiny that both opening and closing stock were shown at NIL,

which is an impossibility in a manufacturing/processing unit, where some meat will always be under process.

These facts clearly prove that details which were necessary to examine the issue of "low net profit or loss" were not called, investigation was not made and mind was not applied by AO. No view was formed by AO on this issue. Failure on the part of the Assessing Officer to conduct necessary and required enquiries made the assessment order erroneous and prejudicial to the interest of revenue and Commissioner rightly exercised his revisionary power as held in case of CIT vs. Harsh I. Punjabi (2012) 345 ITR 451 (Del.). There was a clear case of substantial fall in net profit and it called for addition on that count and not making such addition has resulted in substantial loss of revenue. The fall in GP rate from 24.40% to 2.21% meant a fall in GP rate of 22.19% which comes to Rs.44.38 Cr. on a turnover of Rs.200 Cr. The fall in NP rate from 6.33% to 0.07% meant a fall in NP rate of 6.26% which comes to

Rs.12.52Cr. on a turnover of Rs.200 Cr. Even if a due discount is given in such GP and NP rate owing to difference in turnover of 2 yrs, yet lot of explanation is required by assessee to avoid such addition which may range from Rs.12.52 Cr. to Rs.44.38 Cr. If due to an erroneous order of the AO the revenue is losing tax lawfully payable by a person it would be certainly prejudicial to the interest of revenue as held in the case of CIT vs Leisure Wear Exports Ltd.(2012) 341 ITR 166 (Del.). In case of Malabar Industrial Co. Ltd vs. CIT (2000) 243 ITR 87 (SC) Hon'ble Apex court held that there was no material to support the claim of appellant and yet AO accepted the entry in the statement of account in absence of any supporting material and without making any inquiry. On these facts the conclusion that order of Income Tax Officer was erroneous is irresistible. It is incumbent on the officer to investigate the facts stated in the return. The order becomes erroneous if such an

enquiry has not been made as held, in case of Duggal & Co, vs. CIT (1996) 220 ITR 657 (Del.). If officer is expected to make an enquiry of a particular item of income and he does not make enquiry as expected, order passed by officer is erroneous and prejudicial to the interest of revenue, as held in case of K.A Ramaswamy Chettiar vs CIT (1996) 220 ITR 456 (Mad.)

In view of these facts and position of law, the assessment order is set aside as being both erroneous and prejudicial to the interest of the revenue. AO is directed to examine the issue of low net profit by calling details of purchases, packing material charges, processing and freezing charges, addition to sundry creditors, advances from customers. AO must also examine as to why opening and closing stock are NIL & why there is sharp fall in net profit rate and gross profit rate and after examination of such details and after making necessary enquiries and giving opportunity to

assessee of being heard, decide the issue on merits, as per law.”

4. Learned Counsel for the Assessee reiterated the submissions made before the authorities below and submitted that case was selected for a limited scrutiny and in case the department wanted to convert into full scrutiny, department could have done the same by initiating proceedings under section 148 of the Income Tax Act. He has submitted that the proposal sent by Assessing Officer for review of assessment order under section 263 of Income Tax Act is not valid. In support of the contention, he has relied upon the Order of the ITAT, Jaipur Bench in ITA.No.508/Jaipur/ 2013, dated 31st January, 2014 and Order of ITAT, Jaipur Bench in the case of Dharmendra Kumar Bansal vs. CIT 152 ITD 406 (Jaipur-Tribu.). Learned Counsel for the Assessee referred to the Office Note of the Assessing Officer (PB-2, Page-1) in which the Assessing Officer has mentioned that assessment is framed strictly as per limited scrutiny. He has referred to PB 2, Page-6, 12, 75, which are replies filed before Assessing Officer and

submitted that since Assessing Officer in the limited scrutiny assessment has completed assessment, after examining the details, therefore, Pr. CIT should not hold the assessment order to be erroneous in so far as prejudicial to the interests of revenue.

5. On the other hand, Learned Departmental Representative relied upon the impugned order of the Pr. CIT and submitted that the Assessing Officer did not make any inquiry on the items, on which, assessment was to be completed in limited scrutiny. The assessee did not produce books of account and no details were produced as required for scrutiny assessment. The Departmental Representative filed copy of the Order sheet of the Assessing Officer to show that Assessing Officer did not issue any specific notice on items to be examined and no books of account have been called/produced for verification of the Assessing Officer. She has submitted that Assessing Officer also did not make any enquiry into the matter which he ought to have made. The Departmental Representative referred to Explanation-2 to Section 263 of the Income Tax Act and submitted that since

assessment order is passed without making any enquiry or verification, which should have been made by the Assessing Officer, therefore, Explanation-2 to Section 263 of the Income Tax Act is clearly attracted in the case of the assessee. The Departmental Representative in support of the above proposition relied upon the following decisions :

1.	Order of Hon'ble Supreme Court in the case of Daniel Merchants Pvt. Ltd., vs. ITO – Appeal No.2396 of 2017, dated 29.11.2017.
2.	BSES Rajdhani Power Ltd., vs. PCIT [2017] 399 ITR 228 (Del.) (HC)
3.	Surya Financial Services Ltd , vs. PCIT – Order of ITAT Delhi in ITA.No.2158/Del./2017.
4.	Malabar Industrial Co. Ltd , vs. CIT [2000] 243 ITR 83 (SC).
5.	Rajmandir Estates (P.) Ltd., vs. PCIT [2016] 386 ITR 162 (Calcutta) (HC)
6.	Rajmandir Estates (P.) Ltd., vs. PCIT [2017] 245 Taxman 127 (SC).
7.	Order of Hon'ble Supreme Court in the case of CIT, Mumbai vs. Amitabh Bachan – Civil Appeal No.5009 of 2016, Dated 11 th May, 2016.

5.1. The Departmental Representative further submitted that Assessing Officer did not enquire into the reasons for fall in GP and NP rate and no details with regard to purchases, sundry creditors etc., have been examined by the Assessing Officer, therefore, Pr. CIT was justified in

setting aside the assessment order under section 263 of the Income Tax Act. The Departmental Representative also submitted that there is no bar under section 263 of the Income Tax Act, 1961 if Pr. CIT may go through the proposal sent by the Assessing Officer for review of the assessment order, if the conditions of Section 263 of the Income Tax Act are satisfied in the matter.

6. We have considered the rival submissions. Section 263 of the Income Tax Act provides as under :

“263. Revision of orders prejudicial to revenue :

(1) The [Principal Commissioner or] Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the [Assessing] Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he, may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon

as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.

[Explanation-1] For the removal of doubts, it is hereby declared that, for the purposes of this subsection,

(a) an order passed [on or before or after the 1st day of June, 1988] by the Assessing Officer shall include-

(i) an order of assessment made by the Assistant Commissioner [or Deputy Commissioner] or the Income- tax Officer on the basis of the directions issued by the [Joint] Commissioner under section 144A;

(ii) an order made by the [Joint] Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred on, or assigned

to, him under the orders or directions issued by the Board or by the [Principal Chief Commissioner or] Chief Commissioner or [Principal Director General or] Director General or [Principal Commissioner or] Commissioner authorised by the Board in this behalf under section 120;

(b)" record" [shall include and shall be deemed always to have included] all records relating to any proceeding under this Act available at the time of examination by the [Principal Commissioner or] Commissioner;

(c) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal, [filed on or before or after the 1st day of June, 1988], the powers of the [Principal Commissioner or] Commissioner under this sub-section shall extend [and shall be deemed always to have extended] to such matters as had not been considered and decided in such appeal.]

[Explanation-2] For the purpose of this section, it is hereby declared that an order passed by the Assessing officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal Commissioner or Commissioner, -

- (a) The Order is passed without making inquiries or verification which should have been made;*
- (b) The order is passed allowing any relief without inquiring into the claim;*
- (c) The order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or*
- (d) The order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person.]*

[(2) No order shall be made under sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed.]

(3) Notwithstanding anything contained in sub-section (2), an order in revision under this section may be passed at any time in the case of an order which has been passed in consequence of, or to give effect to, any finding or direction contained in an order of the Appellate Tribunal, [National Tax Tribunal] the High Court or the Supreme Court.

Explanation. - In computing the period of limitation for the purposes of sub-section (2), the time taken in giving an opportunity to the assessee to be reheard under the proviso to section 129 and any period during which any proceeding under this section is stayed by an order or injunction of any court shall be excluded.”

6.1. A bare reading of Section 263 of the Income Tax Act, 1961 makes it clear that the pre-requisite condition for exercise of jurisdiction by Pr. CIT is that the order of the Assessing Officer is erroneous in so far as it is prejudicial to the interests of revenue. The Pr. CIT may call for and examine the record of any proceedings under this Act and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such enquiry as deemed necessary pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment or cancelling the assessment and directing fresh assessment. Explanation-2 to Section 263 of the Income-Tax Act, 1961 has been inserted in the Statute by Finance Act, 2015 with effect from 1st June, 2015, which is applicable to the assessment year under appeal, which provides that for the purpose of this Section, the order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is

prejudicial to the interests of the revenue, if, in the opinion of the Pr. CIT, the order is passed without making inquiries or verification, which should have been made. Thus, the Pr. CIT has to be satisfied of two conditions namely (i) the order of the Assessing Officer sought to be revised is erroneous and (ii) it is prejudicial to the interest of revenue before invoking jurisdiction under section 263 of the I T. Act.

6.2. The Assessing Officer mentioned in the assessment order that the case was selected for limited scrutiny with reference to four items including low net profit or loss. The Assessing Officer, however, in the assessment order did not discuss anything of any of the items, for which, the case was selected for scrutiny. The Assessing Officer accepted the returned income as it is without making any enquiry or without verification of the return of income. The Departmental Representative filed the copy of the Order Sheet of the Assessing Officer which shows that the Assessing Officer did not call for the books of account of assessee and also did not ask for the explanation of assessee on the proposed items, including reasons for low

net profit. The Assessing Officer merely on three dates discussed the matter with the Representative of the Assessee and accepted the returned income. It is not in dispute that there is a sharp fall in gross profit and net profit rate as per the data noted in the impugned order. In the preceding assessment year 2014-2015 gross profit and net profit ratio was 24.40% and 6.33%. However, in the assessment year under appeal i.e., 2015-2016, the gross profit and net profit ratio is 2.21 % and. 0.07% respectively. The Pr. CIT on examination of the assessment order and assessment record found that assessment order is erroneous in so far as it is prejudicial to the interests of revenue and issued show cause notice to assessee calling for explanation of assessee with regard to fall in net profit rate, huge expenses claimed and huge sundry creditors claimed by the assessee. The Pr. CIT after examining the explanation of assessee and material on record found that during assessment proceedings, no details were called regarding meat processing and Purchases Account by the Assessing Officer. The details were called by the Assessing

Officer only through notice dated 30th October 2017, in which, Assessing Officer called details of only other expenses and loss from currency fluctuations. Besides this, only details of unsecured loans were called from the balance sheet. No details other than mentioned in the impugned order were called for. No books of account were called. No further notice was issued and no further details were called for. The Learned Pr. CIT also noted that during the scrutiny proceedings, the Assessing Officer did not notice that both opening and closing stock were shown at NIL, which is impossible in manufacturing processing unit. The Learned Counsel for the Assessee referred to replies filed by the assessee at the assessment stage, copies of which, are filed at PB-2 at Pages 6, 12, 75, which do not show any reply filed by assessee with regard to fall in gross profit/net profit or details submitted on expenses as is noted in the impugned order. Learned Counsel for the Assessee, during the course of hearing of the appeal, could not demonstrate if assessee produced any books of account or details required on this issue before Assessing Officer. The findings of fact

recorded by the Learned Pr. CIT have not been rebutted by the Learned Counsel for the Assessee through any evidence or material on record. The Order Sheet of the Assessing Officer clearly supports the finding of Pr. CIT that Assessing Officer did not enquire into any of the matter in issue at assessment stage. It would, therefore, clearly show that Assessing Officer passed the assessment order, without making any enquiry for verification with regard to low profit, huge expenses and sundry credits, which he should have made at assessment stage. Since, it is an admitted case of sharp fall in gross profit and net profit as compared to earlier year and that the case was selected for limited scrutiny on four items including unsecured loans, expenses and low net profit, therefore, it was the duty of the Assessing Officer to have examined the issues in detail before accepting the explanation of assessee. However, in the present case, the Assessing Officer did nothing in the matter and without enquiry or verification of the facts, accepted the returned income. Thus, there was no application of mind while passing assessment order.

Therefore, Explanation-2 to Section 263 of the Income Tax Act, 1961, would be clearly attracted in the case of the assessee. The Hon'ble Delhi High Court in the case of Gee Vee Enterprises vs., Addl. CIT, Delhi-1 And Others (1975) 99 ITR 375 (Del.) held as under :

“It is his duty to ascertain the truth of the facts stated in the return when the circumstances of the case are such as to provoke an inquiry. It is because it is incumbent on the Income-tax Officer to further investigate the facts stated in the return when circumstances would make such an inquiry prudent that the word “erroneous” in section 263 includes the failure to make such an enquiry. The order becomes erroneous because such an inquiry has not been made and not because there is anything wrong with the order if all the facts stated therein are assumed to be correct.”

6.3. The Hon'ble Kerala High Court in the case of Apollo Tyres Ltd., vs. DCIT [2014] 360 ITR 36 (ker.) held as under :

“According to the revisional authority, several issues raised in the order passed under section 263 of the Income-tax Act, 1961, were not explained properly. Therefore, the matter came to be remanded for fresh consideration by the Assessing Officer, on the ground that the order passed by the Assessing Officer was erroneous and prejudicial to the interests of the Revenue. The Tribunal confirmed the order of the revision. On appeal:

Held, dismissing the appeal, that the order of the Commissioner was a detailed order discussing each of the nine points raised by him. The Tribunal, after referring to the decision of the Bombay High Court analysed what exactly was meant by prejudice to the interests of the Revenue and how an authority exercising powers under section 263 had to proceed in the matter. Ultimately, following the decision of the Supreme Court the Tribunal confirmed the opinion of the

Commissioner that there was no application of mind while considering the assessment under section 143(3), and that therefore, it was not only erroneous but also prejudicial to the interests of the Revenue. Opining that the procedure adopted definitely would have implication on the tax computation which ultimately caused prejudice to the Revenue, the Tribunal confirmed the orders of the Commissioner. Therefore, the fresh consideration of the matter by the assessing authority in the light of the observations of the Commissioner was required.”

6.4. The decisions relied upon by the Learned Departmental Representative also supports the finding of fact of the Pr. CIT that Assessing Officer has completed the assessment without making any enquiry or verification of facts, which was required at the assessment stage. We, therefore, do not find any infirmity in the order of the Pr. CIT in invoking the jurisdiction under section 263 of the Income Tax Act, 1961.

6.5. The Learned Counsel for the Assessee relied upon Orders of the ITAT, Jaipur Bench referred to above on the proposition that Assessing Officer cannot make reference to the Pr. CIT for review of the order under section 263 of the Income Tax Act, 1961. In these orders also, it is observed that the Commissioner has been vests with the powers to call for the record of any proceeding under this Act and if he considers that any order passed therein by the Assessing Officer is erroneous and prejudicial to the interests of revenue, he can proceed under section 263 of the Income Tax Act. In the present case, the twin conditions of Section 263 of the Income Tax Act are satisfied because the Pr. CIT has examined the assessment order as well as assessment record and was satisfied that the order passed by the Assessing Officer is erroneous insofar as it is prejudicial to the interests of the revenue. Therefore, the satisfaction of the Pr. CIT is there before invoking jurisdiction under section 263 of the Income Tax Act and such fact is also mentioned in the show cause notice issued before taking action under section 263 of the Income Tax

Act, 1961. We may also note that there is no bar under section 263 of the Income Tax Act, if a reference is made by the Assessing Officer to the Pr. CIT to invoke jurisdiction under section 263 of the Income-Tax Act. The Pr. CIT may get information from any source, but, before proceeding under section 263 of the Income Tax Act, the Pr. CIT shall have to satisfy the conditions of Section 263 of the Income Tax Act before invoking jurisdiction. In the present case, as noted above, the Learned Pr. CIT has satisfied all the conditions of section 263 of the Income Tax Act, before taking action against the assessee under section 263 of the Income Tax Act, 1961. Therefore, no reliance could be placed upon Orders relied upon by the Learned Counsel for the Assessee. Considering the totality of the facts and circumstances of the case, we are of the view that the Pr. CIT was justified in invoking jurisdiction under section 263 of Income Tax Act. We do not find any merit in the appeal of assessee. The same is accordingly dismissed.

7. In the result appeal of assessee dismissed.

8. Since, we have dismissed the appeal of assessee, therefore, the stay application becomes infructuous and the same is also dismissed.

9. To sum-up, Appeal and Stay Application of assessee are dismissed.

Order pronounced in the open Court.

Sd/-
 (O.P. KANT)
 ACCOUNTANT MEMBER

Sd/-
 (BHAVNESH SAINI)
 JUDICIAL MEMBER

Delhi, Dated 02nd April, 2019.

VBP/-

Copy to

1.	The appellant
2.	The respondent
3.	CIT(A) concerned
4.	CIT concerned
5.	D.R. ITAT 'E' Bench, Delhi
6.	Guard File.

// BY Order //

Assistant Registrar : ITAT Delhi Benches :
 Delhi.