



ITA No.3503 & 3504/Mum/2018
Birla Cotsyn (India) Limited
Assessment Years :2009-10 & 10-11

**आयकर अपीलिय अधिकरण “बी” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
“B” BENCH, MUMBAI**

**माननीय श्री सी. एन. प्रसाद, न्यायिक सदस्य एवं
माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।**

**BEFORE HON'BLE SHRI C.N. PRASAD, JM AND
HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM**

आयकर अपील सं./ I.T.A. No.3503/Mum/2018
(निर्धारण वर्ष / Assessment Year: 2009-10)

&

आयकर अपील सं./ I.T.A. No.3504/Mum/2018
(निर्धारण वर्ष / Assessment Year: 2010-11)

Birla Cotsyn (India) Limited C/o Samria & Co., CA 2E, Court Chambers 35, New Marine Lines Mumbai-400 020.	बनाम/ Vs.	Principal Commissioner of Income tax Central-2 Room No.1920 19 th Floor, Air India Building, Nariman Point, Mumbai-21
स्थायी लेखा सं./जी आइ आर सं./PAN/GIR No. AAACJ-1362-K		
(पीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

Assessee by	:	R.S. Samria- Ld. AR
Revenue by	:	H.N. Singh - Ld.CIT DR

सुनवाई की तारीख/ Date of Hearing	:	04/12/2018
घोषणा की तारीख / Date of Pronouncement	:	02/01/2019

आदेश / ORDER

Per Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid appeals by assessee for Assessment Years [AY] 2009-10 and 2010-11 contest invocation of revisional jurisdiction u/s 263 by appropriate authority. Since, common issues are involved and identical worded grounds have been raised in both the appeals, we proceed to



dispose-off the same by way of this common order for the sake of convenience & brevity. First, we take up ITA No. 3503/Mum/2018 for AY 2009-10 which contest the order of Ld. Pr. Commissioner of Income-Tax Central-2, Mumbai [Pr.CIT], dated 22/03/2018 in invoking jurisdiction u/s 263. The effective grounds raised by the assessee reads as under: -

Order u/s 263 dated 22/03/2018 setting aside the assessment order u/s. 153A dated 28/03/2016 and directing the AO to make a fresh assessment order

1. *On the facts and in the circumstances of the case and in law, the Id. Pr. Commissioner of Income-tax - Central 2, Mumbai (Pr. CIT) has erred in passing an order u/s.263 of the Income Tax Act, 1961, dated 22/03/2018, without giving proper, reasonable and appropriate opportunity of hearing to the assessee and without providing requisite details/information as asked and required by the assessee to enable it to make its submissions on merits of the case, which is against the principles of natural justice and equity and is illegal, unreasonable, arbitrary unjustified, irrational, legally and factually incorrect, bad in law and are liable to be and should be set aside.*

2. *On the facts and in the circumstances of the case and in law, the Id. Pr. Commissioner of Income-tax - Central 2, Mumbai (Pr. CIT) has erred in passing an order u/s.263 of the Income Tax Act 1961, dated 22/03/2018, setting aside the assessment order dated 28/03/2016 u/s. 153A passed by DCIT-CC-4(1), Mumbai, holding that the said assessment order is erroneous and prejudicial to the interest of revenue, in as much as, according to the Id. Pr. CIT, the assessee has made purchases from M/s. Utkantha Trading Pvt. Ltd. [PAN: AAACU6984E] to the tune of Rs.2,11,87,420/- and M/s. Realstone Exports Ltd. [PAN: AACCR8504K] to the tune of Rs. 12,47,51,521/- during the previous year 2008-09, relevant to assessment year 2009-10 who were allegedly indulging in providing accommodations entry/bogus bills etc., without considering assessee's request for providing details/information/documents related to the above mentioned purchase transactions which was unearthed during the survey proceedings and on the basis of which the Id. Pr, CIT has come to such conclusion, which is without any basis and factually and legally incorrect and therefore it is not a good/valid reason for invoking the provisions of section 263 of the Income Tax Act, 1961 and the order passed thereunder is therefore, illegal, unreasonable, arbitrary, unjustified, irrational, contrary to various judicial authorities, bad in law and is liable to be and should be set aside.*

3. *Any other grounds of appeal which your appellant may raise with the permission of the Hon'ble Income Tax Appellate Tribunal, Mumbai."*

2.1 Facts leading to the same are that the assessee being *resident corporate entity* stated to be engaged in the business of *yarn & oil* was assessed for impugned AY u/s 153A *read with Section 143(3)* on



28/03/2016 by Ld. Deputy Commissioner of Income Tax, Central Circle-4(1), Mumbai [AO]. The aforesaid assessment got triggered during the course of search action u/s 132 in the case of *Yashovardhan Birla group* of companies on 07/01/2014 wherein the assessee was subjected to survey u/s 133A and accordingly, notice u/s 153A was issued to the assessee. In response, the assessee offered returned loss of Rs.1147.53 Lacs under normal provisions and income of Rs.326.45 Lacs u/s 115JB which was duly accepted by the revenue. Since the returned income was accepted, apparently, no further appeal has been filed by the assessee against the same and therefore, the assessment had already attained finality. The original assessment was completed in scrutiny assessment u/s 143(3) on 15/11/2011 wherein the loss was determined at Rs.1147.95 Lacs.

2.2 Subsequently after perusal of case records, this order was subjected to revision u/s 263 by Ld. Pr.CIT vide order dated 22/03/2018 on the ground that certain information was received from DGIT (investigation) that the assessee made *alleged bogus purchases* for Rs.211.87 Lacs from an entity namely *M/s Utkantha Trading Pvt. Ltd.* & Rs.1247.51 Lacs from another entity namely *M/s Realstone Exports Limited*. The Ld. Pr. CIT, upon perusal of record, opined that AO did not examine the above issue and no verification was carried out with regard to above accommodation entries aggregating to Rs.1459.38 Lacs procured by the assessee which made the order erroneous as well as prejudicial to the interest of the revenue. Accordingly, a *show-cause* notice dated 28/02/2018 was issued to the assessee which was responded to by the assessee vide submissions dated 09/03/2018



wherein the assessee denied making any purchase from *M/s Realstone Exports Limited* whereas it was submitted that the transaction for Rs.211.87 Lacs stated to be carried out with *M/s Utkantha Trading Co.* was not correct / not matching. Keeping in view the said submissions, Ld. Pr. CIT directed the Ld. AO to conduct a detailed and thorough inquiry and pass a fresh order with regard to stated accommodation entries for Rs.1459.38 Lacs. Finally, finding the assessment order erroneous and prejudicial to the interest of the revenue within the meaning of Section 263 read with Explanation-2, the same was set aside with a direction to Ld. AO to reframe the same afresh after conducting necessary inquiries. Aggrieved by aforesaid directions, the assessee is under appeal before us.

3. The Ld. Authorized Representative for Assessee [AR], *Shri R.S.Samria*, by drawing our attention to the documents placed in the *paper-book*, assailed the revisional jurisdiction which has been controverted by Ld. CIT DR, *Shri H.N.Singh*.

4.1 We have carefully heard the rival contentions and perused relevant material on record including documents placed in the *paper-book* and judicial pronouncements cited before us. Our observation, findings and adjudication are given in the succeeding paragraphs.

4.2 At the outset, it is noted that the assessee was subjected to survey proceedings u/s 133A on 09/01/2014 as evidenced by order u/s 133A(3)(ia) dated 10/01/2014 as placed on record. As per record of survey proceedings, certain loose papers were impounded and computer data back-up was taken by the survey party. The aforesaid proceedings had triggered quantum assessment u/s 153A read with Section 143(3)



on 28/03/2016 which is the subject matter of revisional jurisdiction u/s 263. However, it is noted that Section 153A could apply only in cases where the assessee was subjected to search proceedings u/s 132 or documents were requisitioned u/s 132A, as the case may be. Nevertheless, the same is not the subject matter of the present appeal before us and hence not dealt with any further. However, having said so, the case laws relied upon by assessee for the submissions that since no incriminating material was found during search operations and therefore, the additions were not justified, do not apply to the fact of the present case and hence disregarded.

4.3 Proceeding further, we find that the Ld. AR has placed on record copy of information dated 13/07/2016 received by the revenue from the *Audit Wing* of the department which has, *prima-facie*, triggered the revisional jurisdiction u/s 263 by Ld. Pr.CIT. The said information has been supplied to the assessee upon assessee's application dated 12/10/2018 filed u/s 6 of the *Right to Information Act, 2005 [RTI]*. The same shall have material bearing while adjudicating the issue and therefore, extracted below: -

Subject: Bogus Purchases regarding

The Sales Tax Department of State of Maharashtra in the course of their investigation had found that hawala dealers were issuing invoice without actual sales/ purchase transaction. The Director General (DG), Investigation had obtained the details of all such assessee and had passed it to the respective Assessing Officer for re-opening the assessment of such hawala dealers and the beneficiaries to whom such bills were issued.

Shri Abishek S. Morarka, Director of Utkantha Trading Ltd had in his affidavit filed with the Maharashtra Sales tax Department stated that he along with Shri Sushil Morarka, Baikunthnath Chaturvedi and Shri Sharwan Trivedi had, through Utkanktha Trading Ltd and its sister concerns, that is, M/s. Realstone Exports Ltd, M/s Candy Filters (Bombay) Ltd, M/s. Duralloy Cutters Ltd., M/s. Siddhpad Trading P. Ltd and M/s Citybase Multitrade P Ltd, only issued Tax Invoices without any sale/ purchase.



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The payment was received through the banks and after retaining the commission the payments were made.

The assessee company had made the purchases from the above entry providers during AY 2009-10 to 2012-13 as was seen from cross check of the records of the entry providers made available to audit. The details were as under:

<i>Purchased from</i>	<i>AY</i>	<i>PAN</i>	<i>Amount of Purchases</i>
<i>M/s Utkantha Trading P Ltd</i>	<i>2009-10</i>	<i>AAACU6984E</i>	<i>48956100</i>
<i>M/s Utkantha Trading P. Ltd</i>	<i>2010-11</i>	<i>AAACU6984E</i>	<i>21187420</i>
<i>M/s Utkantha Trading P Ltd</i>	<i>2011-12</i>	<i>AAACU6984E</i>	<i>60501530</i>
<i>M/s Realstone Exports Ltd</i>	<i>2010-11</i>	<i>AACCR8504K</i>	<i>124751521</i>
<i>M/s Realstone Exports Ltd</i>	<i>2012-13</i>	<i>AACCR8504K</i>	<i>61323040</i>
<i>Siddhpad Trading P. Ltd</i>	<i>2012-13</i>	<i>AAMCS2192L</i>	<i>80606210</i>
<i>Total</i>			<i>348369721</i>

Department has not made any disallowance of purchase made from M/s Utkantha Trading P Ltd and M/s Realstone Exports Ltd. In the case of M/s Siddhpad Trading P Ltd the department made disallowance of the purchases of ₹ 715,18,375/- even though the sales shown by Siddhpad Trading P Ltd was ₹ 8,06,06,210/- did not tally which shows lack of coordination among department officials.

Failure to add back the bogus purchases made from all entry providers had resulted in loss to the exchequer to the extent of ₹ 109186726/- as annexed on differential bogus purchase of ₹ 27,68,51,346/- that remained to be disallowed.

The assessing officer assessing the entities issuing only tax invoices without any corresponding sale/ purchase as mentioned above did not communicate the details of the sales to the assessing officers assessing the assessee case, as a result of which the assessee was able to claim the bogus purchase as expenditure and reduce the taxable income.

The bank statement for the period AY 2009-10 to 2012-13 were not documented and communicated to the respective assessing officers of the beneficiary assessee. This lack of investigation and establishing of the paper trail and the money trail helped the beneficiaries (in absence of corroborative evidence of flow of funds back to the beneficiaries) as they were able to plead that the amounts have been paid through cheques and there was no flow back of money as a result of which they were able to get relief from the appellate authorities.

This is brought to the notice of the department.

It is noted that the aforesaid information is dated 13/07/2016 whereas the assessment order which was subjected to revisional jurisdiction was framed on 28/03/2016 i.e. prior to receipt of aforesaid information and therefore, there could be no occasion for Ld. AO to consider the same. However, the same was available before Ld. Pr.CIT at the time of exercise of revisional jurisdiction which gives rise to a pertinent question



as to whether the same constitute *record* within the meaning of Section 263 and could form the basis to trigger revisional jurisdiction u/s 263. To answer the same, we straightaway rely on the judgment of Hon'ble Apex Court rendered in *CIT Vs. Shree Manjunathesware Packing Products & Camphor Works [231 ITR 53 / 96 Taxman 1]* wherein the Hon'ble Apex Court had the occasion to consider the meaning of the expression *record* for the purpose of Section 263. The Hon'ble court, after considering the legislative history of amendment to Section 263 and catena of judicial pronouncements, held as under: -

7. Earlier section 263(1) did not contain any Explanation. It enables the Commissioner to call for and examine the record of any proceeding under the Act and 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, if he considers that any order passed by the Assessing Officer is erroneous insofar as it is prejudicial to the interests of the revenue. By the Taxation Laws (Amendment) Act, 1984, an Explanation was added to section 263(1) for removal of certain doubts but it is not necessary to refer to that Explanation as it related to the meaning of the expression 'order passed by the Assessing Officer' and, therefore, not relevant for the purpose of this case. By the Finance Act, 1988, the said Explanation was substituted with effect from 1-6-1988. The reason why the Legislature had to make that amendment is stated in the memorandum explaining the provisions in the Finance Bill, 1988. We will refer to only that part which is relevant for us. It was observed by the Legislature that the provision as it stood then, had given rise to judicial controversy in respect of the following:

"48. (a) On the interpretation of the term 'record': It has been held in some cases that the word 'record' in section 263(1) could not mean the record as it stood at the time of examination by the Commissioner but it meant the record as it stood at the time when the order was passed by the Assessing Officer. Such an interpretation is against the legislative intent and defeats the very objective sought to be achieved by such provisions, since the purpose is to revise the order on the basis of the record as is available to the Commissioner at the time of examination.

To eliminate litigation and to clarify the legislative intent in respect of the provisions in the three Direct Tax Acts, it is proposed to clarify the legal position in this regard in the Explanation to the relevant sections. The proposed amendments are intended to make it clear that 'record' would include all records relating to any proceedings under the concerned direct tax laws available at the time of examination by the Commissioner...."

The relevant part of the Explanation after its substitution read as follows:

"Explanation - For the removal of doubts, it is hereby declared that, for the purposes of this subsection, —

(a) *****

(b) *record'* includes all records relating to any proceeding under this Act, available at the time of examination by the Commissioner;"

9. Thus, by this amendment, definition of the term 'record' for the purpose of section 263, was provided by the Legislature. But a doubt regarding the meaning of the term 'record' still persisted and, therefore, a further amendment was made by the Legislature while enacting the Finance Act, 1989. The



memorandum explaining the provisions in the Finance Bill, 1989 makes that clear. Paragraph 28 of the said memorandum reads as under:

"28. Under the existing provisions of section 263 of the Income-tax Act and corresponding provisions of the Wealth-tax Act and the Gift-tax Act, the Commissioner of Income-tax is empowered to call for and examine the record of any proceeding and if he considers that the orders passed by the Assessing Officer is erroneous insofar as it is prejudicial to the interests of revenue, he may pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the same or directing a fresh assessment. By the Finance Act, 1988, an Explanation was substituted with effect from 1st June, 1988, to the relevant sections of the Income-tax Act, Wealth-tax Act and Gift-tax Act to clarify that the term 'record' would include all records relating to any proceeding available at the time of examination by the Commissioner. Further, it was also clarified that the Commissioner is competent to revise an order of assessment passed by the Assessing Officer on all matters except those which have been considered and decided in an appeal. The above Explanation was incorporated in the Finance Act, 1988, to clarify this legal position to have always been in existence. Some appellate authorities have, however, decided that the Explanation will apply only prospectively, i.e., only to those orders which are passed by the Commissioner after 1-6-1988. Such an interpretation is against the legislative intent and it is, therefore, proposed to amend section 263 of the Income-tax Act, so as to clarify that the provisions of the Explanation shall be deemed to have always been in existence.

Amendments on the above lines have been proposed in section 25 of the Wealth-tax Act and section 24 of the Gift-tax Act also."

10. After that amendment, the relevant part of the Explanation reads as under:

"Explanation - For the removal of doubts, it is hereby declared that, for the purposes of this sub-section, —

(a) *****

(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 Commissioner;"

11. After referring to the history of this provision, we will now refer to the decisions, which were relied upon by the learned counsel in support of the rival contentions with respect to the correct interpretation of the word 'record'. The Calcutta High court in *Ganga Properties'* case (*supra*) after observing that provision of section 263(1) has to be understood on its own language and in the context of the revisional jurisdiction of the Commissioner conferred by it and also the scheme of the Act, held as under :

"Whereas section 263(1) of the Act uses the words 'is erroneous' and not the words 'has become subsequently erroneous'. Under this section, the Commissioner may call for and examine 'the record' of the 'proceeding' in order to consider in his revisional jurisdiction as to whether the order in question by the ITO 'is erroneous'. Therefore, he is to call for the 'record' of the 'proceeding' which was before the ITO and examine it in order to consider whether on the basis of the material which were before the ITO and formed part of that record the order passed by the ITO is 'erroneous' and prejudicial to the interests of the revenue.

Therefore, the materials which were not in existence at the time the assessment was made but afterwards came into existence cannot form part of the record of the proceeding of the ITO at the time he passes the order and, accordingly, it cannot be taken into consideration by the Commissioner for the purposes of invoking his jurisdiction under this section, for he is not an appellate authority under this section and exercise only revisional jurisdiction and, hence, he can only take into consideration the record as it stood before the ITO and the materials in such record for the purposes of ascertaining whether the order in question was erroneous and prejudicial to the interests of the revenue.

In other words, any material which comes into existence later on cannot form part of the record of the ITO for the purposes of invoking the Commissioner's power under section 263(1) of the Act. And it is only after the proceeding is lawfully initiated by the Commissioner on the basis of the record of the ITO that the Commissioner can take into account any material which may come into



existence later on in view of the expression 'after making or causing to be made such enquiry as he deems necessary' used in the second limb of this section." (p. 452)

The Calcutta High Court interpreted the word 'record' under section 263(1) before it was amended by the Finance Acts, 1988 and 1989. Following that decision of the Kerala High Court in CIT v. M.A. Unneerikutty [1992] 194ITR 546, also took the same view. In that case attention of the Kerala High Court was drawn to the amendments made by the Finance Acts, 1988 and 1989. The High Court, however, did not consider the effect of the said amendments as it was of the view that there was no occasion for the Tribunal to consider the scope of the amended section because it came into force only in 1988, much later than the order disposing of the revision and, therefore, no such question arose out of the order of the Tribunal. It was submitted by the learned counsel for the respondent that section 263(1) was, thus, interpreted by the Calcutta and Kerala High Courts before it was amended in 1988 and 1989 and, therefore, that was the correct legal position till 1-6-1988. The learned counsel also drew our attention to the decision of the Allahabad High Court in CWT v. Raj Narain Pratap Narain (HUF) [1989] 177 ITR 34. In that case, in the wealth-tax proceedings for the assessment years 1978-79 and 1979-80, the Assessing Officer had determined the fair market value of an immovable property at Rs. 7,35,086 as on the two valuation dates relevant for the years in dispute. After the completion of those assessments, the Commissioner, on coming to know that the property was sold by the assessee on 18-8-1983 for a consideration of Rs. 36 lakhs, initiated proceeding under section 25(2) of the Wealth-tax Act, 1957 and subsequently passed an order holding the impugned assessment orders erroneous and prejudicial to the interests of the revenue. On appeal by the assessee, the Tribunal held that the "expression 'record' in section 25(2) cannot mean the record as it stands at the time when the action under that section is taken but it means the record as it stands when the assessment order was passed by the Assessing Officer". In support of this view, the Tribunal had relied upon the decision of the Calcutta High Court in Ganga Properties' case (supra). Against the order of the Tribunal, the Commissioner of wealth-tax had preferred two applications under section 27(3) of the Wealth-tax Act but they were rejected by the High Court. The view taken by the Allahabad High Court was that the question raised by the department was academic because the Tribunal had not passed its order entirely on the meaning of the expression 'record' and the other reasoning on which the decision of the Tribunal was based was a factual one and was equally fatal to the cause of revenue. This decision is, therefore, of not any help at all.

12. She further submitted that in a matter arising under the Wealth-tax Act, Gujarat High Court had also taken the same view and the department's special leave petition Nos. 8511-13 of 1984 – CWT v. Rajshree S. Parekh [1991] 191 ITR (St.) 76 - though were heard after the said two amendments, this Court dismissed them summarily and, thus, the view taken by the Gujarat High Court was upheld. In that case, the WTO had assessed the assessee's property as per the approved valuer's report. The Commissioner in suo motu revision directed valuation in accordance with the departmental valuer's report. The Tribunal allowed the assessee's appeal against the order passed by the Commissioner and also rejected the department's reference application. The High Court also rejected the reference application made by the department. Aggrieved by the view taken by the High Court the department had filed the said special leave petitions in this Court. It is true that the said special leave petitions were dismissed summarily but that would not mean that this Court approved the view that was taken by the High Court.

13. In a later decision in S.M. Oil Extraction (P.) Ltd.'s case (supra), the Calcutta High Court itself interpreted the word 'record' differently. In that case, the assessment was completed on 1-2-1983. The ITO before he completed the assessment had referred the matter of plant and machinery and electrical installation to the Valuation Officer (P & M). His report was not received by the ITO when the assessment was completed. It was received by him after the assessment proceeding was completed. The Commissioner took into consideration the said valuation report and found the assessment order erroneous. In that context, the question which had arisen for consideration was whether the Commissioner in exercise of jurisdiction under section 263(1) could have relied upon the valuation report which had come into the possession of the ITO subsequent to the completion of the assessment. The Calcutta High Court held that "the record contemplated in section 263(1) does not mean only the



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order of assessment but it comprises all proceedings on which the assessment is based. The Commissioner is entitled, for the purpose of exercising his revisional jurisdiction, to look into the whole evidence. The expression 'record' as used in section 263 is comprehensive enough to include the whole record of evidence on which the original assessment order was passed. The valuation proceeding is a part of the assessment proceeding. But once the valuation report was received by the ITO, although subsequent to the completion of the assessment, it forms part of the assessment year in question". It further held that 'where any proceeding is initiated in the course of the assessment proceeding having a relevant and material bearing on the assessment to be made and the result of such proceeding was not available with the ITO before the completion of the assessment, but the result came subsequently, the revising authority is entitled to look into such material as it forms part of the assessment records of the particular assessment year'. The Calcutta High Court took this view without referring to the definition of the word 'record' contained in the Explanation to section 263(1).

14. It, therefore, cannot be said, as contended by the learned counsel for the respondent, that the correct and settled legal position, with respect to the meaning of the word 'record' till 1-6-1988, was that it meant the record which was available to the ITO at the time of passing of the assessment order. Further, we do not think that such a narrow interpretation of the word 'record' was justified, in view of the object of the provision and the nature and scope of the power conferred upon the Commissioner. The revisional power conferred on the Commissioner under section 263 is of wide amplitude. It enables the Commissioner to call for and examine the record of any proceeding under the Act. It empowers the Commissioner to make or cause to be made such enquiry as he deems necessary in order to find out if any order passed by the Assessing Officer is erroneous insofar as it is prejudicial to the interests of the revenue. After examining the record and after making or causing to be made an enquiry if he considers the order to be erroneous then he can pass the order thereon as the circumstances of the case justify. Obviously, as a result of the enquiry, he may come in possession of new material and he would be entitled to take that new material into account. If the material, which was not available to the ITO when he made the assessment could, thus, be taken into consideration by the Commissioner after holding an enquiry, there is no reason why the material which had already come on record, though subsequently to the making of the assessment, cannot be taken into consideration by him. Moreover, in view of the clear words used in clause (c) of the Explanation to section 263(1), it has to be held that while calling for and examining the record of any proceeding under section 263(1) it is and it was open to the Commissioner not only to consider the record of that proceeding but also the record relating to that proceeding available to him at the time of examination.

15. The view that we are taking receives support from the two decisions of this Court, though the point which is raised before us was not specifically raised in those two cases. In *CIT v. Shri Arbuda Mills Ltd.* [Tax Reference Case No. 11 of 1983], this Court after considering the effect of the amendment made in section 263(1) by the Finance Act, 1989 whereby clause (c) of the Explanation was also amended with retrospective effect from 1-6-1988, held that 'the consequence of the said amendment made with retrospective effect is that the powers under section 263 of the Commissioner shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in an appeal. Accordingly, even in respect of the aforesaid three items, the powers of the Commissioner under section 263 shall extend and shall be deemed always to have extended to them because those items had not been considered and decided in the appeal filed by the assessee'. In that case, the assessment was completed on 31-3-1978 and the ITO while computing loss and income of the assessee had accepted the claim of the assessee in respect of those three items. Obviously, in the appeals filed by the assessee those items were not the subject-matter of the appeals as the decision in respect thereof was in its favour. In respect of those three items, the Commissioner had exercised his power under section 263 and, therefore, the question which had arisen for consideration was 'whether on the facts and in the circumstances of the case, the order of assessment passed by the ITO under section 143(3) read with section 144B on 31-7-1978 had merged with that of the Commissioner (Appeals) dated (sic) in respect of the three items in dispute so as to exclude the jurisdiction of the Commissioner under section 263?' Thus, the amendment made in clause (c) was held applicable to the orders passed before 1-6-1988.



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16. In *South India Steel Rolling Mills v. CIT* 1997 (9) SCC 728, the Commissioner in exercise of his power under section 263 had withdrawn the development rebate granted for the years 1962-63, 1963-64, 1967-68 and 1968-69 on the ground that since the partnership stood dissolved on 3-3-1968 on the death of one of the two partners, before the expiry of eight years the assessee-firm was not entitled to the benefit of the development rebate under section 33(1)(a) of the Act. The said order passed by the Commissioner was challenged before the Tribunal but the assessee's appeal had failed. At its instance, the following question was referred to the Madras High Court:

"Whether, on the facts and in the circumstances of the case, the revision of assessment under section 263 by the Commissioner for withdrawing the development rebate granted for assessment years 1962-63, 1963-64, 1967-68 and 1968-69 is proper and justified?"

The High Court also decided against the assessee. In the appeal filed by the assessee the order of Commissioner was challenged, inter alia, on the ground that the power under section 263 could have been invoked on the basis of the record as it stood when the order was passed by the ITO and that it was not open to the Commissioner to take into account dissolution of the assessee-firm, which took place after passing of the assessment order because that circumstance was not disclosed by the record which was before the ITO. Rejecting this contention, this Court held 'As regards his taking into consideration an event which had occurred subsequent to the passing of the order by the ITO, it may be stated that in Explanation (b) in section 263 there is an express provision wherein it is prescribed that '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 Commissioner'. The death of one of the two partners resulting in the dissolution of the assessee-firm on account of such death took place prior to the passing of the order by the Commissioner and it could, therefore, be taken into consideration by him for the purpose of exercising his powers under section 263 of the Act. In that case also the amendment was held applicable to an order passed before 1-6-1988.

17. We, therefore, hold that it was open to the Commissioner to take into consideration all the records available at the time of examination by him and thus, to consider the valuation report submitted by the departmental valuation cell subsequent to the passing of the assessment order and, so the order passed by him was legal. The High Court was wrong in taking a contrary view. We, therefore, allow this appeal, set aside the judgment and order passed by the High Court and answer the question referred to the High Court in the negative, i.e. in favour of the revenue and against the assessee. In view of the facts and circumstances of the case there shall be no order as to costs.

Similar is the ratio of decision of Hon'ble Gujarat High Court rendered in *CIT Vs. Vallabhdas Vithaldas* [56 Taxman.com 300]. Drawing strength for these decisions, we have no hesitation in holding that all the information / documents available with Ld. Pr.CIT at the time of invocation of revisional jurisdiction u/s 263 could form the basis to trigger the jurisdiction u/s 263.

4.3 In the above backdrop, proceeding further, we find that the assessee, during the course of assessment proceedings, had supplied the party-wise details of purchases and a copy of the same has been placed in the *paper-book*. Upon perusal of the same, it could be



gathered that the during impugned AY, the assessee had not made any purchase from *M/s Realstone Exports Limited* as wrongly noted by Ld. Pr.CIT. The said fact is also evidenced from the information provided by *Audit wing* & extracted in *para 4.3* wherein we find that the purchases from this entity are stated to be made during AY 2010-11 and not in 2009-10. Therefore, the assessment order, at least to that extent could not be termed as erroneous and prejudicial to the interest of the revenue from any angle and therefore, jurisdiction u/s 263, in this regard, could not be held to be valid. We order so.

4.4 Regarding purchases made from other entity, the Ld. AR has submitted that since complete details thereof were submitted during the course of assessment proceedings which were accepted by Ld. AO with due application of mind and therefore, proceedings u/s 263 were bad. However, we find that no discussion, whatsoever, on this aspect has been made in the assessment order. Nothing on record suggest that Ld. AO, during assessment proceedings, made further investigation, to verify the genuineness of the purchases made by the assessee from the aforesaid entity. This being the case, the submissions made by Ld. AR, in this regard, could not be accepted. The Ld. AR has relied on the case of Hon'ble Bombay High Court rendered in *Raja Bahadur Motilal (P) Ltd Vs ITO [183 ITR 80]* for the same. However, we find that this decision has been rendered in the context of reassessment proceedings u/s 147 and therefore, do not apply to the case in hand.

4.5 The Ld. AR has also submitted that no opportunity of being heard was provided to the assessee in violation of principle of natural justice. However, we find that a *show-cause* notice was issued to the assessee



and the same was duly replied to by the assessee wherein the assessee agitated the proposed proceedings and demanded further details from Ld. Pr.CIT without demonstrating as to how the figures were not matching. This being the case, we do not find any force in this argument raised by Ld. AR.

4.6 After considering the total factual matrix, we hold that the revisional jurisdiction u/s 263 invoked by Ld. Pr.CIT with respect to *alleged bogus purchases* made by assessee from *M/s. Utkantha Trading Pvt. Ltd.* were valid in law whereas the direction to verify the purchases made from *M/s. Realstone Exports Ltd.* were bad in law. The impugned order stand modified to that extent.

5. The assessee's appeal stands partly allowed in terms of our above order.

ITA No. 3504/Mum/2018

6. Similar are the facts in AY 2010-11 wherein Ld. Pr.CIT, under identical circumstances has invoked jurisdiction u/s 263 with respect to *alleged bogus purchases* stated to be made by the assessee from *Utkantha Trading Pvt. Ltd.* The assessee is under appeal with identical worded grounds of appeal. Facts and circumstances, being *pari-materia* the same, taking the same view, we uphold the revisional jurisdiction assumed by Ld. Pr.CIT u/s 263 with respect to this entity.

7. The assessee's appeal stands dismissed.

Conclusion

8. ITA No. 3503/Mum/2018 stands partly allowed whereas ITA No.3504/Mum/2018 stands dismissed.



ITA No.3503 & 3504/Mum/2018
Birla Cotsyn (India) Limited
Assessment Years :2009-10 & 10-11

Order pronounced in the open court on 02nd January, 2019.

Sd/-

(C.N. Prasad)

न्यायिक सदस्य / **Judicial Member**

Sd/-

(Manoj Kumar Aggarwal)

लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated : 02/01/2019
Sr.PS, Jaisy Varghese

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai.