INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "C": NEW DELHI
(THROUGH VIDEO CONFERENCING)

BEFORE
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 1479/Del/2017
Asstt. Year : 2011-12

JNS Instruments Ltd. GI-48, G.T. Karnal Road New Delhi. PAN AAACJ7034Q	Vs.	Pr. CIT Central -2, Jhandewalan New Delhi.
(Appellant)		**(Respondent)**

Assessee by:	Shri Shailesh Gupta, Adv.
Department by :	Ms. Sunita Singh, CIT (DR)
Date of Hearing	15/07/2021
Date of pronouncement	11/10/2021

O R D E R

PER SUDHANSHU SRIVASTAVA, JM:

This appeal is preferred by the assessee against the order dated 12.01.2017 passed by the Ld. Pr. CIT, Central -2, New Delhi (Ld. Principal Commissioner of Income Tax) u/s 263 and pertains to assessment year 2011-12.

2.0 The brief facts of the case are that the assessee earns income from business and profession. A search and seizure operation u/s 132(1) of the Income Tax Act, 1961 (hereinafter called "the Act")was carried out in JP Minda group of cases on 20.9.2013. The case of the assessee was also covered in the said search action. The case of the assessee was centralised along with other cases of the JP Minda group and notice u/s 153A of the Act was issued for furnishing return of income. In response the assessee filed NIL return of income. The Assessing Officer, vide order dated 30.3.2016, accepted the return of the assessee and completed the assessment u/s 143(3) read with section 153A of the Act.

2.1 Subsequently, on perusal of the records, it came to the knowledge of the Ld. Pr. CIT that the assessee had earlier filed its return on 26.11.2011 showing total income at Rs. NIL and that during the course of assessment proceedings, the then Assessing Officer had made a reference to the Transfer Pricing Officer (TPO) u/s 92CA of the Act vide letter dated 26.7.2013 to determine the Arms Length Price (ALP) of the international transactions with Associated Enterprises. The Ld. Pr. CIT also noted that the

search and seizure operation was conducted while the assessment was pending. It was further noted by the Ld. Pr. CIT that the assessment which was completed u/s 143(3) read with section 153A of the Act vide order dated 30.3.2016 was completed accepting the returned income of Rs. NIL without the report of the TPO. Ld. Pr. CIT observed that the assessment had been completed hurriedly and without waiting for the report of the TPO which was subsequently received by the AO vide order dated 28.10.2016 wherein an adjustment of Rs. 23.23 crores was proposed by him on account of adjustment to ALP of the international transaction. The Ld. Pr. CIT was, therefore, of the opinion that the assessment order passed by the AO vide order dated 30.3.2016, was erroneous and prejudicial to the interest of the revenue and, accordingly, proceedings u/s 263 of the Act were initiated and the assessee was issued a show cause notice requesting the assessee to explain as to why the assessment order not be set aside as it was erroneous and prejudicial to the interest of the revenue.

2.2 In response to the show cause notice, the assessee submitted before the Ld. Pr.CIT that the issue of the assessee

having entered into an international transaction was also a part of assessment and that the AO had accepted the return of income only after duly considering this aspect after going through the material on record and, therefore, the assessment order should not be revised u/s 263 of the Act.

2.3 However, the Ld. Pr. CIT did not accept the submission of the assessee and proceeded to hold that the assessment order dated 30.3.2016 was erroneous in so far as it was prejudicial to the interest of the revenue. The said assessment order was set aside and the AO was directed to reframe the assessment order after considering and taking into account the report of the TPO.

2.4 Against this order u/s 263 of the Act, the assessee has now approached this Tribunal and has raised the following grounds of appeal :-

1 "*That the learned Principal Commissioner of Income Tax has grossly erred in passing the impugned order under section 263 of the Act failed to satisfy the twin conditions as envisaged under the Act for invoking jurisdiction under section 263 of the Act as the order of assessment under section 153 A of the Act was neither erroneous nor prejudicial to the interest of the revenue and as such order so passed is without jurisdiction and deserves to be quashed as such.*

1.1 That the conclusion of the learned Principal Commissioner of Income Tax to set aside the order of assessment with a direction to cause sufficient enquiries and verifications by providing sufficient opportunity to assessee is highly contrary to law and has been arrived mechanically without satisfying the statutory provisions of law, thus unsustainable.

1.2 That moreover even the show cause notice dated 15.12.2016 issued by learned Principal Commissioner of Income Tax is based on legally misconceived assumption, therefore, the proceedings initiated under section 263 are illegal, invalid and unsustainable.

2 That the learned Principal Commissioner of Income Tax has erred both in law and on facts in directing upward adjustment to the international transaction entered by the assessee, while doing so, the learned PCIT has failed to appreciate that the learned assessing officer had regularly sent reminders to the learned TPO and in absence of any positive response for over 6 months passed the assessment order with due application of mind and not under any haste.

3. That the learned Principal Commissioner of Income Tax has further erred both in law and, on facts in directing assessing officer to make an adjustment of Rs. 23.23 crores on account of alleged understatement of arm's length price in respect of international transactions entered between the assessee company and its associated enterprises ("herein after referred to as AE")."

3.0 The Ld. AR submitted that it is undisputed that the fact of a reference having been made to the Transfer Pricing Officer was within the knowledge of the AO and, therefore, he would have

give a thoughtful consideration to the issue and would have passed the assessment order after duly considering that the Ld. AR further submitted that it was not a case of lack of inquiry and at most it could be said that there was an inadequate inquiry but such orders could not have been revised u/s 263 of the Act.

4.0 Per contra, Ld. CIT(DR) placed reliance on the observations and conclusions of the Ld. Pr. CIT and submitted that the assessment order has been rightly set aside by the Ld. Pr. CIT.

5.0 We have heard the rival submissions and have also perused the material on record. The facts in this case are undisputed. The undisputed fact remains that a reference had been made to the TPO to ascertain the arms length price of the international transaction entered into by the assessee during the course of earlier assessment proceedings as early as in July 2013 whereas the search and seizure operation was carried out in September, 2013. The AO, subsequently, completed the assessment u/s 143 (3) read with section 153A of the Act at the returned income without waiting for the report of the Transfer Pricing Officer. Although, it is the assessee's contention that the AO was aware of

the reference so made, however it is undisputed that the AO did not deem it necessary to wait for the said report while passing the Assessment Order. This Bench, during the course of hearing, specifically asked the Ld. AR, to demonstrate with the evidence if the AO had required the assessee to establish that the international transaction was at arms length before reaching the conclusion that no reference to the TPO was required. However, the Ld. AR expressed his inability to file any documents. In fact, Ld. AR was repeatedly asked by this Bench if he could substantiate the stand of the assessse that the AO had initiated inquiry into this aspect of the case and had, thereafter, accepted the return of the assessee only after going through the submissions and documents submitted by the assessee and after being duly satisfied that the returned income of the assessee was to be accepted. The assessee has also not bothered to file a paper book in this regard which could enable us to consider the entire factual matrix of the case on the line of argument of the Ld. AR. Thus, apparently from the records and as per the observations of the Ld. PR. CIT, coupled with the failure of the assessee to establish with evidence that the AO had inquired and considered

and, thereafter, adjudicated the issue, we are constrained to hold that this is a clear case of lack of inquiry by the AO. Even the assessment order is very cryptic in as much as it does not even mention as to what issues were before the AO. In such circumstances, we hold that the order passed by the Ld. Pr. CIT revising the assessment passed u/s 143(3) read with section 153A is completely in order and we uphold the same.

5.1 In the case of Gee Vee Enterprises (99 ITR 375) speaking for High Court of Delhi their lordships made a clear distinction between the cases of "inadequate inquiry" and "lack of inquiry" by also considering the ratio of the decision of Hon'ble Apex Court in the case of Rampyari Devi Sarogi vs CIT (671 ITR 8) and Tara Devi Aggarwal vs CIT (88 ITR 323) and held that it is incumbent upon the ITO to further investigate the facts stated in the return when circumstances would make such an inquiry prudent with the word "erroneous" in Section 263 includes failure to make such an inquiry. It was further held that 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 asummed to be correct. The relevant operative part of this decision reads as under:-

> *"In Rampyari Devi Saraogi* v. *Commissioner of Income -tax, the Income-tax Officer accepted the return of the assessee in respect of the initial capital, the gift received and the sale of jewellery, the income from business, etc., without any inquiry or evidence whatsoever. For this reason the Commissioner held the order to be erroneous. In revision, he cancelled the order and ordered the Income- tax Officer to make a fresh assessment. In his order the Commissioner had used certain new grounds which had not been disclosed to the assessee in the notice given to him to show cause why the order of the Income-tax Officer should not be revised. But, apart from these new grounds, the Supreme Court observed at page 88 of the report that:*
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> > *"There was ample material to show that the Income-tax Officer made the assessments in undue hurry ... the assessee made a declaration giving the facts regarding initial capital, the ornaments and presents received at the time of marriage, other gifts received from her father-in-law, etc., which should have put any Income-tax Officer on his guard. But the Income tax Officer without making any inquiries to satisfy himself passed the assessment order.... A short stereo-typed assessment order was made for each assessment year ... No evidence whatsoever was produced in respect of the money-lending business done ... No names were given as to the parties to whom the loans were advanced"*

5.2 In Tara Devi Aggarwal v. Commissioner of Income-tax (supra) also the Income-tax officer, Howrah**,** while remarking that the source of income of the assessee was income from speculation

and interest on investments stated that neither the assessee was able to produce the details and vouchers of the speculative transactions made during the accounting year nor was there evidence regarding the interest received by the assessee from different parties on her investments. Notwithstanding these defects the Income Tax Officer did not investigate into the various sources but assessed the assessee on a total income of Rs.9,037. The inquiries made by the Commissioner revealed that the assessee did not reside or carry on business at the address given in the return. The Commissioner was also of the view that the Income-tax Officer was not justified in accepting the initial capital, the sale of ornaments, the income from business, the investments etc., without any inquiry or evidence whatsoever and that the order of assessment was erroneous and prejudicial to the interests of the revenue. The High Court held that there were materials to justify the Commissioner's finding that the order of assessment was erroneous in so far as it was prejudicial to the interests of the revenue.

5.3 These two decisions show that it is not necessary for the Commissioner to make further inquiries before cancelling the

assessmen t order of the Income-tax Officer. The Commissioner can regard the order as erroneous on the ground that in the circumstances of the case the Income-tax Officer should have made further inquiries before accepting the statements made by the assessee in his return.The reason is obvious. The position and function of the Income Tax Officer is very different from that of a civil court. The statements made in a pleading proved by the minimum amount of evidence may be accepted by a civil court in the absence of any rebuttal. The civil court is neutral. It simply gives decision on the basis of the pleading and evidence which comes before it. The Income-tax Officer is not only an adjudicator but also an investigator. He cannot remain passive in the face of a return which is apparently in order but calls for further inquiry. 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. The meaning to be given to the word" erroneous" in section 263 emerges out of this context. 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 inquiry. 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.

5.4 In the case of CIT vs. Nagesh Knitwears (ITA 591/2008) Hon'ble Delhi High Court after considering the ratio of its earlier decisions including its decision in the case of ITO vs DG Housing Projects Ltd. 345 ITR 153 held as under:

> *"36. As far as Section 263 is concerned, we have examined the said Section in depth and detail in ITO Vs. D G Housing Projects Ltd. decided on 1st March, 2012, in ITA No. 179/2011 and observed as under:-*
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> > *"10. Revenue does not have any right to appeal to the first appellate authority against an order passed by the Assessing Officer. Section 263 has been enacted to empower the CIT to exercise power of revision and revise any order passed by the Assessing Officer, if two cumulative conditions are satisfied. Firstly, the order sought to be revised should be erroneous and secondly, it should be prejudicial to the interest of the Revenue. The expressiono.....prejudicial to the interest of the Revenue" is of wide import and is not confined to merely loss of tax. The term "erroneous" means a wrong/incorrect decision deviating from law. This expression postulates an error which makes an order unsustainable in law.*
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> > *11. The Assessing Officer is both an investigator and an adjudicator. If the Assessing Officer as an*

adjudicator decides a question or aspect and makes a wrong assessment which is unsustainable in law, it can be corrected by the Commissioner in exercise of revisionary power. As an investigator, it is incumbent upon the Assessing Officer to investigate the facts required to be examined and verified to compute the taxable income. If the Assessing Officer fails to conduct the said investigation, he commits an error and the word ''erroneous" includes failure to make the enquiry. In such cases, the order becomes erroneous because enquiry or verification has not been made and not because a wrong order has been passed on merits.

12. Delhi High Court in Gee Vee Enterprises v. Additional Commission of Income-Tax, Delhi-1, (1975) 99 ITR 375, has observed as under:-

> *"The reason is obvious. The position and function of the Income-tax Officer is very different from that of a civil court. The statements made in a pleading proved by the minimum amount of evidence may be accepted by a civil court in the absence of any rebuttal. 'The civil court is neutral. It simply gives decision on the basis of the pleading and evidence which comes before it. The Income- tax Officer is not only an adjudicator but also an investigator. He cannot remain passive in the face of ITA No. 591/2008 and connected matters 29 a return which is apparently in order but calls for further inquiry. 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. The meaning to be given to the word "erroneous'' in section 263 emerges out of this context. 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 inquiry. 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."

13. In the said judgment, Delhi High Court had referred to earlier decisions of the Supreme Court in Rampyari Devi Sarogiv. CIT (1968) 67 ITR 84 (SC) and Tara Devi Aggarwal v. *CIT (1973) 88 ITR 323 (SC), wherein it has been held that where Assessing Officer has accepted a particular contention/issue without any enquiry or evidence whatsoever, the order is erroneous and prejudicial to the interest of the Revenue. After reference to these two decisions, the Delhi High Court observed:-*

> *"These two decisions show that it is not necessary for the Commissioner to make further inquiries before cancelling the assessment order of the Income-tax Officer. The Commissioner can regard the order as erroneous on the ground that in the circumstances of the case the Income-tax Officer should have made further inquiries before accepting the statements made by the assessee in his return."*

14. The aforesaid observations have to be understood in the factual background and matrix involved in the said two cases before the Supreme Court. In the said cases, the Assessing Officer had not conducted any enquiry or examined evidence whatsoever. There was total absence of enquiry or verification. These cases have to be distinguished from other cases (i) where there is enquiry but the findings are incorrect/erroneous; and (ii) where there is failure to make proper or full verification or enquiry.

15. In the case of Commissioner of Income Tax **v.** *Sunbeam Auto Ltd. (2011) 332 ITR 167 (Del), Delhi High Court was considering the aspect, when there is no proper or full verification, and it was held as under:-*

"We have considered the rival submissions of the counsel on the other side and have gone through the records. The first issue that arises for our consideration is about the exercise of power by the Commissioner of Income-tax under section 263 of the Income-tax Act. As noted above, the submission of learned counsel for the Revenue was that while passing the assessment order, the Assessing Officer did not consider this aspect specifically whether the expenditure in question was revenue or capital expenditure. This argument predicates on the assessment order, which apparently does not give any reasons while allowing the entire expenditure as revenue expenditure. However, that by itself would not be indicative of the fact that the Assessing Officer had not applied his mind on the issue. There are judgments galore laying down the principle that the Assessing Officer in the assessment order is not required to give detailed reason in respect of each and every item of deduction, etc. Therefore, one has to see from the record as to whether there was application of mind before allowing the expenditure in question as revenue expenditure. Learned counsel for the assessee is right in his submission that one has to keep in mind the distinction between "lack of inquiry" and "inadequate inquiry". If there was any inquiry, even inadequate that would not by itself give occasion to the Commissioner to pass orders under section 263 of the Act, merely because he has a different opinion in the matter. It is only in cases of "lack of inquiry" that such a course of action would be open. In Gabriel India Ltd. [1993] 203 ITR 108 (Bom), law on this aspect was discussed in the following manner:-

"... From a rending of sub-section (1) of section 263, it is clear that the power of suo motu revision can be exercised by the Commissioner only if, on

examination of the records of any proceedings under this Act, he considers that any order passed therein by the Income-tax Officer is erroneous in so far as it is prejudicial to the interests of the Revenue". It is not an arbitrary or unchartered power, it can be exercised only on fulfilment of the requirements laid down in subsection (I). The consideration of the Commissioner as to whether an order is erroneous in so far as it is prejudicial to the interests of the Revenue, must be based on materials on the record of the proceedings called for by him. If there are no materials on record on the basis of which it can be said that the Commissioner acting in a reasonable manner could have come to such a conclusion, the very initiation of proceedings by him will be illegal and without jurisdiction. The Commissioner cannot initiate proceedings with a view to starting fishing and roving enquiries in matters or orders which are already concluded. Such action will be against the well-accepted policy of law that there must be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity. (See Parashuram Pottery Works Co. Ltd. v. 1TO [1977] 106 ITR I (SC) at page 10) ... From the aforesaid definitions it is clear that an order cannot be termed as erroneous unless it is not in accordance with law. If an Income-tax Officer acting in accordance with law makes a certain assessment, the same cannot be branded as erroneous by the Commissioner simply because, according to him, the order should have been written more elaborately. This section does not visualise a case of substitution of the judgment of the Commissioner for that of the Income-tax Officer, who passed the order unless the decision is held to be erroneous. Cases may be visualised

where the Income tax Officer while making an assessment examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determines the income either by accepting the accounts or by making some estimate himself. The Commissioner, on perusal of the records, may he of the opinion that the estimate made by the officer concerned was on the lower side and left to the Commissioner he would have estimated the income at a figure higher than the one determined by the Income-tax Officer. That would not vest the Commissioner with power to re-examine the accounts and determine the income himself at a higher figure. It is because the Income-tax Officer has exercised the quasi-judicial power vested in him in accordance with law and arrived at a conclusion and such a conclusion cannot be formed to be erroneous simply because the Commissioner does not feel satisfied with the conclusion ... There must be some prima facie material on record to show that tax which was lawfully exigible has not been imposed or that by the application of the relevant statute on an incorrect or incomplete interpretation a lesser tax than what was just has been imposed ... We may now examine the facts of the present case in the light of the powers of the Commissioner set out above. The Income-tax Officer in this case had made enquiries in regard to the nature of the expenditure incurred by the assessee. The assessee had given detailed explanation in that regard by a letter in writing. All these are part of the record of the case. Evidently, the claim was allowed by the Income-tax Officer on being satisfied with the explanation of the assessee. Such decision of the Income-tax Officer cannot be held to be ..erroneous" simply because in his order he did not make an elaborate discussion in that regard."

16. Thus, in cases of wrong opinion or finding on merits, the CIT has to come to the conclusion and himself decide that the order is erroneous, by conducting necessary enquiry, if required and necessary, before the order under Section 263 is passed. In such cases, the order of the Assessing Officer will be erroneous because the order passed is not sustainable in law and the said finding must be recorded. CIT cannot remand the matter to the Assessing Officer to decide whether the findings ITA No. 591/200S and connected matters 33 recorded are erroneous. In cases where there is inadequate enquiry but not lack of enquiry, again the CIT must give and record a finding that the order/inquiry made is erroneous. This can happen if an enquiry and verification is conducted by the Cl'T and he is able to establish and show the error or mistake made by the Assessing Officer, making the order unsustainable in Law. In some cases possibly thoitgh rarely, the CIT can also show and establish that the facts on record or inferences drawn from facts on record per se justified and mandated further enquiry or investigation but the Assessing Officer had erroneously not undertaken the same. However, the said finding must be clear, unambiguous and not debatable. The matter cannot be remitted for afresh decision to the Assessing Officer to conduct further enquiries without a finding that the order is erroneous. Finding that the order is erroneous is a condition or requirement which must be satisfied for exercise of jurisdiction under Section 263 of the Act. In such matters, to remand the matter/issue to the Assessing Officer would imply and mean the CIT has not examined and decided whether or not the order is erroneous but has directed the Assessing Officer to decide the aspect/question.

17. This distinction must be kept in mind by the CIT while exercising jurisdiction under Section 263 of the

Act and in the absence of the finding that the order is erroneous and prejudicial to the interest of Revenue, exercise of jurisdiction under the said section is not sustainable. In most cases of alleged "inadequate investigation", it will be difficult to hold that the order of the Assessing Officer, who had conducted enquiries and had acted as an investigator, is erroneous, without CIT conducting verification/inquiry. The order of the Assessing Officer may be or may not be wrong. CIT cannot direct reconsideration on this ground but only when the order is erroneous. An order of remit cannot be passed by the CIT to ask the Assessing Officer to decide whether the order was erroneous. This is not permissible. An order is not erroneous, unless the CIT hold and records reasons why it is erroneous. An order will not become erroneous because on remit, the Assessing Officer may decide that the order is erroneous. Therefore CIT must after recording reasons hold that the order is erroneous. The jurisdictional precondition stipulated is that the CIT must come to the conclusion that the order is erroneous and is unsustainable in law. We may notice that the material which the CIT can rely includes not only the record as it

stands at the time when the order in question was passed by the Assessing Officer but also the record as it stands at the time of examination by the CIT [see CIT v. *Shree Manjunathesware Packing Products, 231 ITR 53 (SC)]. Nothing bars/prohibits the CIT from collecting and relying upon new/additional material/evidence to show and state that the order of the Assessing Officer is erroneous.*

> *18. It is in this context that the Supreme Court in Malabar Industrial Co. Ltd.* v. *Commissioner of Income Tax, (2000) 243 ITR 83 (SC), had observed that the phrase „prejudicial to the interest of Revenue" has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of Revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interest of Revenue. Thus, when the Assessing Officer had adopted one of the courses permissible and available to him, and this has resulted in loss to Revenue; or two views were possible and the Assessing Officer has taken one view with which the CIT may not agree; the said orders cannot be treated as an erroneous order prejudicial to the interest of Revenue unless the view taken by the Assessing Officer is unsustainable in law. In such matters, the CIT must give a finding that the view taken by the Assessing Officer is unsustainable in law and, therefore, the order is erroneous. He must also show that prejudice is caused to the interest of the Revenue."*

5.5 Therefore, on the facts of the case and in view of the above discussion and the judicial precedents, we dismiss the grounds raised by the assessee.

6.0 In the final result the appeal of the assessee stands dismissed.

Order pronounced on 11th October, 2021.

sd/-	**sd/-**
(PRASHANT MAHARISHI)	**(SUDHANSHU SRIVASTAVA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 11/ 10 /2021

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Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi