IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCH "B", HYDERABAD

BEFORE SMT P. MADHAVI DEVI, JUDICIAL MEMBER
AND SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER

ITA Nos. 1344/Hyd/2015 and 282/Hyd/2017
Assessment Year: 2010-11

Jasper Industries Pvt. Ltd., Hyderabad	vs.	Dy. Commissioner of Income-tax, Circle – 2(1), Hyderabad.
PAN – AACJ5760H		
(Appellant)		(Respondent)

Assessee by	:	Shri P. Murali Mohan Rao
Revenue by	:	Shri K. Srinivas Reddy

Date of hearing	04/07/2018
Date of pronouncement	19/09/2018

O R D E R

PER P. MADHAVI DEVI, J.M.:

Both are assessee's appeals for AY 2010-11. ITA No. 1344/Hyd/15 is against the order of Pr. CIT (Central), Hyderabad dated 24/03/2015 while ITA No. 282/Hytd/2017 is against the order of CIT(A) – 5, Hyderabad dated 30/11/2016 confirming the assessment order passed u/s 143(3) r.w.s 263 of the IT Act.

2. First, we shall take up the appeal No. 1344/Hyd/2015 against the order u/s 263 of the act.

3. The assessee has raised the following grounds of appeal in this appeal:

> *"The order of the Ld. Pr. CIT(Central), Hyderabad is erroneous both on facts and in law of the case.*

2. The Ld. Pr. CIT(Central) before revising the assessment u/s 263 of the Act, ought to have followed the ratio laid down .by the honorable Supreme Court of India in the case of MALABAR INDUSTRIAL CO. LTD. Vs. COMMISSIONER OF INCOME TAX(2000)-243-ITR-0083-(SC).

3. The Ld. Pr. CIT(Central) before passing the revision order u/s 263 of the Act, ought to have appreciated that the opinion of the audit party cannot be regarded as new information or fact in his possession.

4. The Ld. Pr. CIT(Central) before invoking the provisions of section 263 of the Act based on audit objections, ought to have followed the ratio laid down by the Apex Court in case of Indian and Eastern News Paper Society Vs. CIT[(1979) 119 ITR 0996 (S.C)].

5. The Ld. Pro CIT(Central) ought to have appreciated that all the facts relating to the impugned issues are very much available with the AO at the time of passing order that is subjected to the revision.

6. The Ld. Pr. CIT(Central) erred in passing the order U Is 263 of the Act by forming mere change of opinion and without considering the fact that the original assessment had been completed u/s 143(3) of the Act, 1961 after careful verification of impugned issues.

7. Without prejudice to the other grounds, The Ld. Pr. CIT(Central), erred in invoking the provisions of Sec 263 of the Act when the appeal on the original assessment order passed u/s 143(3) of the Act, dated 27-03-2013 is pending in appeal.

8. Wiithout prejudice to the other grounds, The Ld. Pr. CIT(Central), ought to have appreciated that the mistake apparent from record (i.e. claim of depredation @30% instead 15%) can be rectified by an order u/s 154 of the Act instead of an order u/s 263 of the Act.

9. Without prejudice to the other grounds, The Ld. Pr. CIT(Central), erred in disallowing an amount of Rs.25,16,719/- u/s 14A of the Act, without appreciating that the assessee has made investment of Rs.8.5 crores from cumulative profits of Rs.23.29 crores.

10. Without prejudice to the other grounds, The Ld. Pr. CIT(Central), ought to have appreciated that the assessee also has enough of own funds, loan funds, liabilities to make investment on which no interest is payable.

> *11. Without prejudice to the other grounds, The Ld. Pro CIT(Central), ought to have appreciated that the capital work-in-progress of Rs. 1,00,18,000/- was out of the cash generated from operations during the year amounting to Rs. 1099.39 lakhs.*
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> *12. The Ld. CIT (Central) erred in passing the Order u/s 263 of the Act, without considering the contention of the appellant raised during the revision proceedings.*
>
> *13. The assessee may add, alter or modify or substitute any other point to the Grounds of appeal at any time before or at the time of hearing of the appeal."*

3.1 In addition to the above, assessee has also raised the following additional grounds of appeal vide letter dated 06/05/2016 and placed reliance on the decision of the Hon'ble Supreme Court in the case of National Thermal Power Co. Ltd. Vs. CIT [1998] 229 ITR 383 (SC) for admission of additional grounds of appeal:

> *14. Ld. CIT (Central) erred in initiating proceedings u/s 263 of the Act based on the proposal made by the AO without any independent application of mind which is against the provisions of the Act and established position of law.*
>
> *15. The Ld. CIT (Central) erred in directing the assessing officer to make disallowance of proportionate interest in the hands of the assessee u/s 14A of the Act without invoking Rule 8D of Income Tax Rules.*
>
> *16. The Ld. CIT (Central) ought to have appreciated the fact that proceedings u/s 263 of the Act cannot be initiated based on the Audit objection."*

4. Brief facts of the case are that assessee being a Tata Motors dealer, filed its return of income for AY 2010-11 electronically on 30/09/2010 declaring income of Rs. 4,18,57,810/-. The assessment was completed u/s 143(3) of the Act making certain additions and disallowances.

4.1 Thereafter, Pr. CIT perused the assessment records of the assessee u/s 263 of the Act and observed that i) the assessee claimed depreciation on trucks own usage @ 30% instead of 15% as entitled, ii) the assessee invested in equity shares at Rs. 8,05,35,000/- the proportionate interest of Rs. 25,16,719/- was required to be disallowed u/s 14A of the Act, but the AO has not examined this issue, and iii) as seen from the balance sheet, capital wok-in-progress shown at Rs. 1,00,18,000/- and the proportionate interest of Rs. 12,52,250/- was not capitalized. Observing that the AO has not examined these issues u/s 143(3), the Pr. CIT held the assessment order to be erroneous in so far as it is prejudicial to the interests of revenue and accordingly issued a show case notice to the assessee.

4.2 In reply to the show cause notice, the assessee accepted that the claim of depreciation @ 30% was made erroneously and accepted that allowable depreciation can only be of 15%. As far as investment u/s 14A is concerned, it was submitted that the assessee had its own funds, out of which, it has invested in equity shares and, therefore, provisions of section 14A are not applicable. As far as capitalization of interest towards the amount spent on capital work-in-progress is concerned, it was submitted that the capital work-in-progress is from internal accruals and, hence, capitalization of interest does not arise.

4.3 The Pr. CIT, after considering the above submissions of the assessee, held that there was a discrepancy regarding depreciation, disallowance u/s 14A and proportionate interest capitalization for AY 2010-11. Therefore, he held that the assessment was erroneous and prejudicial to the interests of revenue. He, therefore, directed the AO to examine all the issues specified in his order and directed him to re-do assessment on merits and in accordance with law.

4.4 Accordingly, the AO passed assessment order u/s 143(3) r.w.s. 263 of the Act.

5. Assessee is in appeal against both the orders u/s 263 as well as the order passed by the CIT(A) confirming the assessment order passed u/s 143(3) r.w.s. 263 of the Act.

6. As regards the order u/s 263, the ld. Counsel for the assessee submitted that during the course of assessment proceedings, the AO issued a detailed questionnaire and the assessee had submitted relevant details before the AO and the AO accepted one of the possible views, hence, the assessment order cannot be said to be erroneous. He has drawn our attention to the questionnaire issued by the AO during the assessment proceedings u/s 143(3) and also assessee's replies to such questionnaire. He further submitted that revision has been initiated only due to audit objection and in support of his contention that assessment order cannot be revised on the basis of audit objection, he placed reliance upon various case law.

7. The ld. DR, on the other hand, supported that the order of Pr. CIT and also placed reliance upon the judgment of the Hon'ble Supreme Court in the case of CIT Vs. Amitabh Bachchan reported in [2016] 384 ITR 200 (SC) for sustaining the 263 order.

8. Having regard to the rival contentions and material on record, we find that the assessment order was completed u/s 143(3) of the Act and the AO had called for certain details in his questionnaire, but the details with regard to the issues pointed out by the Pr. CIT in his order u/s 263 were not called for and verified by the AO. Assessee, in fact, in reply to the notice u/s 143(3) rws 263 had admitted that it had made an erroneous claim of depreciation @ 30% instead of 15%. Thus, it is clear that on this issue itself, the AO has not made any verification. Similarly, with regard to other issues also we do not find any verification made by the AO. Although the ld. Counsel for the assessee filed additional grounds of appeal and also argued that revision cannot be done on the basis of audit objection, there is no

material before us with regard to such audit objection on the basis of which revision has been made. In the case of CIT Vs. Amitabh Bachchan (supra), the Hon'ble Supreme Court held as under:

> *"Held, allowing the appeals, (i) that the Tribunal had not recorded any finding that in the Course of the suo motu revisional proceedings, opportunity of hearing was not afforded to the assessee or that the assessee was denied an opportunity to contest the facts on the basis of which the Commissioner had come to his conclusions as recorded in the order. Before holding the order to be legally unsustainable the Court would have to be satisfied that in the Course of the revisional proceeding the assessee, actually and really, did not have the opportunity to contest the facts on the basis of which the Commissioner had concluded that the order of the Assessing Officer was erroneous and prejudicial to the interests of the Revenue. In the course of the revisional exercise relevant facts, documents, and books of account which were overlooked in the assessment proceedings were considered. At each stage of the revisional proceeding the authorised representative of the assessee had appeared and had full opportunity to contest the basis on which the revisional authority was proceeding or had proceeded in the matter. If the revisional authority had come to its conclusions in the matter on the basis of the record of the assessment proceedings which was open for scrutiny by the assessee and available to his authorised representative at all times the requirement of giving of a reasonable opportunity of being heard as contemplated by section 263 of the Act could not be said to have been breached. The order of the Tribunal setting aside the revisional order on the ground that it went beyond the show cause notice was not sustainable. The High Court having failed to fully deal with the matter its order was not tenable.*
>
> *(ii) That the reasons cited by the Tribunal in so far as the first two issues were concerned did not justify a serious relook and hence did not need to be gone into.*
>
> *(iii) That in respect of the third issue, in view of the reasons stated by the Commissioner he rightly felt that the matter needed further inuestigation. Making a claim which would prima facie disclose that the expenses in respect of which deduction had been claimed had been incurred and thereafter withdrawing the claim gave rise to the necessity of further enquiry in the interests of the Revenue. The notice issued under section 69C of the Act could not have been simply dropped on the ground that the claim had been withdrawn. Therefore, the*

> *Commissioner was perfectly justified in coming to his conclusions in so far as the third issue was concerned and the Tribunal as well as the High Court ought not to have interfered with the conclusion."*

Therefore, we are inclined to accept the contentions of the ld. DR and uphold the order passed u/s 263 of the Act. Assessee's appeal is accordingly dismissed.

9. In ITA No. 282/Hyd/2017 against the additions and disallowances the assessment completed u/s 143(3) r.w.s. 263 of the IT Act, the assessee has raised the following grounds of appeal:

> *"1. The order of the Commissioner of Income Tax (Appeals) is erroneous both on facts and in law.*
>
> *2. The CIT(A) erred in confirming the order passed u/s 143(3) rws 263 of the Act, without appreciating that order has emanated on opinion of the audit party which is invalid.*
>
> *3. The CIT(A) erred in not adjudicating on ground no 3 raised with regard the audit objection.*
>
> *4. The CIT(A) ought to have appreciated that all the facts relating to the impugned issues were very much available with the AO at the time of passing the order that was subjected to the revision.*
>
> *5. The CIT(A) erred in confirming the order passed u] s 143(3) rws 263 of the Act by forming mere change of opinion and without appreciating the fact that the original assessment had been completed u/s 143 (3) of the Act,1961 after careful verification of the impugned issues.*
>
> *6. The Ld. Commissioner of Income-tax (Appeals) erred in confirming the disallowance of Rs.25,16,719/- made under section 14A of the Income Tax Act,1961 read with Rule 8D of the Income tax Rules, 1962.*
>
> *7. The CIT (A) ought to have appreciated the fact that the appellant has made investments during the year under consideration out of Free Reserves and Non-Interest Bearing Funds of the appellant company.*

8. The CIT(A) erred in confirming the disallowance made u/s 14A read with rule 8D of IT rules 1962 of the Act, without appreciating the fact that the investments have been made by the appellant company in view of business expediency.

9. The CIT(A) ought to have appreciated that no dividend income which is exempt has been received on the investment made during the year of account.

10. The CIT(A) ought to have appreciated the fact that no expenditure has been incurred directly or indirectly in connection with the investment, the income from which is exempt.

11. Without the prejudice to other grounds the CIT (A) ought to have appreciated that only the value of investment on which dividend income is earned has to be considered as average value of investment, for the purpose of calculation of disallowance u/s 14A of the Act.

12. Without prejudice to other grounds, the CIT (A) ought to have appreciated that the appellant has not received any dividend income on the investments made, and that the AO ought to have taken the average value of investments at Rs. Nil.

13. The CIT(A) ought to have appreciated that the loan on which interest expenditure is incurred has been sanctioned by the bank to be utilized for specific purpose and not for making the investments.

14. The CIT(A) ought to have appreciated that the capital work in progress of Rs.1,00,18,000/- was out of the cash generated from operations during the year amounting to Rs. 1099.39 lakhs.

15. The Appellant may add, alter or modify any other points to the grounds of appeal at any time before or at the time of hearing of the case."

10. As far as Ground Nos. 2 to 5 are concerned, they have no relevance, as they are against the order u/s 263 of the Act and since we have already confirmed the order u/s 263 vide the order even dated in ITA No. 1344/Hyd/2015, they are rejected.

11. As far as ground Nos. 6 to 12 are concerned, we find that the issue raised in these grounds is covered in favour of the assessee by the decisions of the coordinate benches of this Tribunal and also by the decision of The Hon'ble Delhi High Court in the case of Cheminvest Ltd., reported in (2015) 378 ITR 33 (Del.) wherein it has been held that section 14A will not apply where no exempt income is received or receivable during the relevant assessment year. Therefore, subject to verification that the assessee has not earned any exempt income during the relevant P.Y., ground Nos. 6 to 9 are treated as allowed and other grounds are not adjudicated as it would only be an academic exercise.

12. As regards ground Nos. 13 & 14 with regard to capitalization of interest is concerned, assessee has stated that it is out of cash generated from operations i.e. internal accruals and the AO has made the addition on the ground that the assessee has not furnished any evidence to substantiate its claim. Before the CIT(A), the assessee reiterated its contention, but, did not file any evidence. Ld. Counsel for the assessee submitted that interest expenditure debited to the P&L A/c is for the loan taken for specific purpose and not for the purpose for the capital work-in-progress, therefore, capitalization of interest is not called for. Assessee has filed financial statement and as seen from the schedule 20 thereof, assessee has paid interest on term loans and other interest of bank and finance charges. Assessee's contention that the interest paid is towards a particular loan, is not established. Ld. Counsel for the assessee submitted that this issue may be remanded to the AO for verification. In view of the same, we remand this issue to the file of AO with a direction to verify assessee's contention that capital work-n-progress of Rs. 1,00,18,000/- was from out of the cash generated from operations/internal accruals and not from interest bearing funds. Thus, Ground Nos. 13 & 14 are treated as allowed for statistical purposes.

13. In the result, appeal in ITA No. 1344/Hyd/2015 is dismissed and appeal in ITA No. 282/Hyd/2017 is partly allowed for statistical purposes.

Pronounced in the open Court on 19th September, 2018.

Sd/-	**Sd/-**
(S. RIFAUR RAHMAN)	**(P. MADHAVI DEVI)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Hyderabad, Dated: 19th September, 2018

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Copy to:-

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2) DCIT, Central Circle – 1(2), Hyderabad.
3) Pr. CIT (Central), Hyd.
4) CIT(A) – 5, Hyderabad.
5)Pr. CIT - 2, Hyd.
6) The Departmental Representative, I.T.A.T., Hyderabad.
7) Guard File