

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**ITA No.475 of 2015
Date of decision:14.3.2016**

M/s A.S. Precision Machines P. Limited

.....Appellant

**Commissioner of Income Tax, Aayakar Bhawan, Rishi Nagar,
Ludhiana, Punjab.**

.....Respondent

**CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL
HON'BLE MR. JUSTICE RAJ MOHAN SINGH**

सत्यमेव जयते

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not? **YES**
3. Whether the judgment should be reported in the Digest?

Present: Mr. S.K.Mukhi, Advocate with Mr. Rajiv Sharma, Advocate
for the appellant-assessee.

Ajay Kumar Mittal, J.

1. This order shall dispose of ITA Nos.454 and 475 of 2015 as according to the learned counsel for the appellant-assessee, the issues involved in both the appeals are identical. However, the facts are being

extracted from ITA No.475 of 2015.

2. ITA No.475 of 2015 has been preferred by the appellant- assessee under Section 260A of the Income Tax Act, 1961 (in short, “the Act”) against the order dated 3.8.2015, Annexure A.3 passed by the Income Tax Appellate Tribunal, Division Bench, Chandigarh (in short, “the Tribunal”) in ITA No.679/CHD/2013, for the assessment year 2009-10, claiming following substantial questions of law:-

A. Whether the requirement of sub section (2) of section 263 that “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” simply mean passing of the order and keeping it in the file”?

B. Whether the requirement of passing/making the order within the period of limitation means effectively passing/making the order so as to be beyond the control of the authority, for any possible change or modification therein”?

C. Whether on the facts and circumstances of the case and in law, the Tribunal was right in law in holding that order under section 263 was passed on 20.3.2013 though the same was dispatched on 4.4.2013 i.e. after the limitation which expired on 31.3.2013?

D. Whether on the facts and circumstances of the case, the ITAT was justified in law in upholding the action of the CIT under section 263 on the basis that the AO has allowed claim of assessee under section

80IB without making any enquiry or investigation without appreciating complete assessment record, the query letter Annexure A.6 and its reply Annexure A.7, order sheet entry Annexure A.11 and office note to assessment order Annexure A.12 and the material and evidences on record and the fact that AO had taken one possible and prevalent view at the time of making the original assessment in view of judgment of Hon'ble Supreme Court of India in the case of ***Malabar Industrial Co. Limited vs. CIT*** 243 ITR 83 (SC)?

E. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was justified in law in upholding the action of the CIT under section 263 in holding that the claim of the appellant under section 80IB of the Income Tax Act was wrongly allowed by blindly relying upon the judgment of this Hon'ble Court in the case of ***National Legguard Works vs. CIT and another***, 288 ITR 18 (P&H) which is distinguishable on facts itself and rather favours the present appellant's case?

F. Whether, under the facts and circumstances of the case, the findings of ITAT are perverse and unsustainable in law being against the evidences on record wherein it is a trite law that no action under section 263 of the Income Tax Act, 1961 lies in view of audit objection?

G. Whether, on the facts and circumstances of the case, the findings of ITAT are perverse and against the evidences on record thus unsustainable in law?"

3. A few facts relevant for the decision of the controversy involved as narrated in ITA No.475 of 2015 may be noticed. The appellant- assessee is a private limited company engaged in the business of manufacturing of rolling mill machinery and its parts based at Mandi Gobindgarh. Survey was conducted under section 133A of the Act in the appellant's case on 24.7.2008. The appellant company surrendered a sum of ₹ 06 crores on account of right off of business sundry creditors, outstanding since long due to some dispute with the said parties. The same were written back as income of the appellant for the year under appeal which were shown as business advances forfeited in the cash book as on 25.7.2008 and thereafter utilised in the business of manufacturing and on the income thereof, deduction under section 80IB of the Act was claimed as per the provisions of law. Return of income for the assessment year in question was filed declaring income of ₹ 7,02,02,910/-. Notice for scrutiny of assessment was issued to the appellant. The appellant appeared and its accounts were checked. Addition of ₹ 80,529/- was made under section 80IB of the Act on account of DEPB receipts of ₹ 2,68,430/- after scrutiny. The assessment was completed by the Assessing Officer under section 143 (3) of the Act on 29.10.2010, Annexure A.1. On 14.11.2012, notice was issued by the Commissioner of Income Tax, Ludhiana (CIT) under section 263 of the Act wherein it was observed that the assessee had been allowed deduction under section 80IB of the Act on various items. The appellant filed objections vide reply dated nil Annexure A.5 stating that the judgment in the case of *M/s Friends Castings* was not applicable to it since the assessment was made on 29.10.2010 when the impugned judgment was not

available. On the basis of subsequent judgment, the assessment could not be reopened under section 263 of the Act in view of the judgment of this Court in *CIT vs. Saluja Exim Limited*, (2010) 329 ITR 603. On merits, it was submitted that even during the course of search, nothing was recovered to show that the appellant was engaged in any other business or activity except manufacturing. Therefore, the income as surrendered on account of writing back off of business sundry creditors having utilized for normal business activities of the appellant was from manufacturing business only and also the job work activities carried on by the appellant company were entitled for the impugned deduction under section 80IB of the Act. Reliance was placed on judgment of this Court in *CIT vs. Vallabh Yarns (P) Limited*, (2011) 51 DTR 236 wherein deduction under section 80IB of the Act was allowed on job work. The CIT held that deduction under section 80IB of the Act was not allowable on the income surrendered/declared. It was further held that the Assessing Officer had not made any inquiry and had not disallowed the deduction under section 80IB of the Act on the aforesaid income. Aggrieved by the order, the appellant filed appeal before the Tribunal pleading that the revisional order was barred by limitation and the appellant was entitled to deduction under section 80IB of the Act on the surrendered income as well as on job work. The appeal was dismissed vide order dated 3.8.2015, Annexure A.3. According to the appellant, the order under section 263 of the Act was time barred having not been served on it within two years from the end of the financial year in which the impugned order was passed which expired on 31.3.2013 while the impugned order was issued on 4.4.2013 and received by the assessee on 06.04.2013. Hence the

instant appeals by the appellant-assessee.

4. We have heard learned counsel for the appellant-assessee.

5. The primary issues that arise for consideration as discernible from the questions claimed are:-

(i) whether the order passed under section 263 of the Act in view of sub section (2) thereof was within the period of limitation. Reliance was placed on judgment of the Kerala High Court in ***Cochin Plantations Limited vs. State of Kerala***, (1997) 227 ITR 38 (Kerala); and secondly

(ii) whether any enquiries were made at the time of assessment and therefore, there was no scope for exercising revisional jurisdiction under Section 263 of the Act. Relying upon judgment of the Apex Court in ***Malabar Industrial Co. Limited vs. Commissioner of Income Tax***, (2000) 243 ITR 83, initiation of proceedings under section 263 of the Act were assailed.

6. On perusal of the findings recorded by the Tribunal and after hearing learned counsel for the appellant, we find that the order under section 263 of the Act was required to be passed within two years from the end of the financial year in which the order sought to be revised was passed. It has been categorically recorded by the Tribunal that the order under section 263 of the Act in the case of the assessee was passed on 20.3.2013 which was required to be passed upto 31.3.2013. Thus, the order was within the period of limitation. There was no requirement to dispatch the order within the period of limitation itself. The relevant findings recorded by the Tribunal read thus:-

“8. The learned counsel for the assessee submitted that assessment order was passed on 29.10.2010 and the order

under section 263 has been passed on 20.3.2013. However, the impugned order was dispatched on 4.4.2013 and received by assessee on 6.4.2013. He has therefore submitted that revision order is barred by limitation. He has however admitted that the last date of passing of the revision order was 31.3.2013.

9. The learned DR contended that the only requirement of the law was to pass the revision order within two years which is passed by the learned Commissioner of Income Tax in this case. There is no requirement to dispatch the order within that period itself.

10. On consideration of the rival submissions, we are of the view, this ground of appeal of the assessee has no merit. Section 263(2) of the Act provides that no order shall be made under sub section (1) after expiry of two years from the end of the financial year in which the order sought to be revised was passed. In this case, the assessment order was passed on 29.10.2010 which was sought to be revised. Therefore, after end of the financial year, the order could have been passed upto 31.3.2013 which is also admitted by the learned counsel for the assessee. In the case of assessee, the order under section 263 of the Act has been passed on 20.3.2013, therefore, same is passed by the learned Commissioner of Income Tax within the period of limitation. There is no requirement under the law to dispatch the order within period of limitation itself. The Hon'ble Supreme Court in the case of ***R.K.Upadhyaya vs. Shanabhai P.Patel***, 166 ITR 163 held that “issue of notice under section 147 within the period of limitation. Service on assessee beyond period. Assessment valid.” This contention of learned counsel for the assessee has no merit and is accordingly rejected because service of the impugned order is not a condition precedent within the period so prescribed. The order shall have to be passed

within the period of limitation which is so in the case of the assessee. This ground of appeal of the assessee is accordingly rejected.”

7. The Apex Court in *R.K.Upadhyaya vs. Shanabhai P.Patel*, (1987) 166 ITR 163 had held that where the Income Tax Officer issued a notice of reassessment under section 147(b) of the Act by registered post on March 31, 1970 and the notice was received by the assessee on April 3, 1970, the same was not barred by limitation and the Income Tax Officer had jurisdiction to proceed to complete the assessment. Thus, the order of the Tribunal on this issue cannot be faulted. The judgment relied upon by the learned counsel for the appellant in *Cochin Plantations Limited's* case (supra) would not come to the rescue of the appellant in view of the judgment of the Apex Court in *R.K.Upadhyaya's* case (supra).

8. With regard to the second issue regarding claim under section 80IB of the Act, it was recorded by the Tribunal that the Assessing Officer had passed the assessment order without making any enquiry and investigation and allowed claim under section 80IB of the Act. Thus, the order was held to be erroneous and prejudicial to the interest of the revenue. The CIT was held to be justified in setting aside the assessment order and directing the Assessing Officer to pass the assessment order afresh by giving opportunity of hearing to the assessee. The conclusion of the Tribunal is quoted below:-

“11. The learned counsel for the assessee submitted that assessee is eligible for deduction under section 80IB on surrendered income as well as on job work and Assessing Officer after making proper enquiry granted relief to the assessee at assessment stage. The learned counsel for the

assessee has, however, not been able to place on record any query letter issued by the Assessing Officer with regard to deduction under section 80IB or any reply filed before Assessing Officer in this regard. The learned counsel for the assessee ultimately submitted that the directions may be issued to the learned Commissioner of Income Tax to consider the plea of the assessee on merit. On the other hand, learned DR submitted that Assessing Officer has not made any enquiry on both the issues and no income is derived from any business or industrial undertaking on which surrender was made as well as job income was shown. Therefore, when Assessing Officer failed to make enquiry on both the aspects, learned Commissioner of Income Tax was justified in holding that assessment order to be erroneous and prejudicial to the interest of revenue.

12. The learned DR also submitted that learned Commissioner of Income Tax is bound by the judgment of Hon'ble Punjab and Haryana High Court in the case of *National Legguard Works* 288 ITR 18 directly applicable in this issue. The learned DR relied upon decision of the Hon'ble Punjab and Haryana High Court in the case of *Arun Luthra* 252 ITR 76 on the proposition of decision of the jurisdictional High Court are binding on all the subordinate authorities.

13. We have considered rival submissions. It is not in dispute that during the course of survey conducted in the premises of assessee on 24.7.2008, certain incriminating documents were found relating to loan and advances. The assessee surrendered a sum of ₹ 6 crore to cover up these discrepancies. The accounts of the assessee revealed that assessee had declared income of ₹ 6 crore as business advances written off. Hon'ble Punjab and Haryana High Court in the case of *National Legguard Works* (supra) held that the deduction under section 80HHC of the Act is

available on showing fulfilment of the conditions prescribed and that there could be no presumption that surrendered income on account of unexplained stocks represented export income. The assessee however claimed deduction under section 80IB on income of ₹ 6 crore so surrendered during the course of survey. It is interesting to note that despite it is a case of survey under section 133A conducted against the assessee and finding incriminating material against the assessee during the course of survey, the Assessing Officer has even failed to mention this fact in the assessment order that it is a case of survey and during the course of survey, incriminating material was found against the assessee. The Assessing Officer has not discussed anything in the assessment order if he has conducted any enquiry or investigation with regard to material found against the assessee during the course of survey. The Assessing Officer has also failed to make any enquiry or investigation with regard to claim of deduction under section 80IB made by assessee on surrendered income and income on job charges at the assessment stage. The learned counsel for the assessee has shown his inability to produce any query letter issued by the Assessing Officer at assessment stage for investigating or conducting any enquiry with regard to claim of deduction under section 80IB on surrendered income of ₹ 6 crore or on job charges. The learned counsel for the assessee has also shown inability to produce any reply filed before Assessing Officer of making claim of deduction under section 80IB on the surrendered income as well as on job charges by fulfilling conditions of Section 80IB. It would therefore reveal that Assessing Officer did not make any enquiry or investigation at assessment stage so as to qualify deduction under section 80IB of the Act to the assessee on surrendered income as well as on job charges. The accounts

of the assessee revealed that assessee declared income of ₹ 6 crores as business advances written off, therefore, it could not be said to have any nexus with the industrial undertaking of the assessee. The surrendered income was therefore undisclosed income from other sources and assessee failed to establish that source of unaccounted income invested in advances which were written off had any nexus with the industrial undertaking of the assessee. The assessee during the course of survey as well as assessment proceedings has not filed any documentary evidence to establish that income of ₹ 6 crore has been earned through manufacturing activities eligible for deduction under section 80IB of the Act. Thus, the Assessing Officer has failed to make any enquiry or investigation on claim of assessee of deduction under section 80IB at the assessment stage on the above surrendered income as well as on job charges. It is well settled law that failure by the Assessing Officer to make enquiry at assessment stage would render his order to be erroneous and prejudicial to the interest of revenue and jurisdiction under section 263 of the Act has been properly exercised by the learned Commissioner of Income Tax. We rely upon decision of the Delhi High Court in the case of ***Gee Vee Enterprises*** 99 ITR 375, decision of Gauhati High Court in the case of ***Tarzen Tea Company Pvt. Limited***, 205 ITR 45 and decision of Madras High Court in the case of ***K.A.Ramaswami Chettiar*** 220 ITR 657. The learned Commissioner of Income Tax also relied upon several decisions in the impugned order in support of his findings that failure to make enquiry by the Assessing Officer at assessment stage would render the assessment order to be erroneous and prejudicial to the interest of revenue. The decision of the Hon'ble Punjab and Haryana High Court in the case of ***National Legguard Workers*** (supra) squarely

applies against the assessee and the failure to consider decision of jurisdictional High Court itself would support the findings of the learned Commissioner of Income Tax that the order passed by the Assessing Officer was erroneous and prejudicial to the interest of revenue.

14. Considering the totality of the facts and circumstances, it is clear that Assessing Officer has passed the assessment order without conducting enquiry and investigation on the above issues and has allowed the claim of assessee under section 80IB of the Act without making any enquiry and investigation. Therefore, the order was correctly treated as erroneous and prejudicial to the interest of revenue. The learned CIT was, therefore, justified in setting aside the assessment order and directing the Assessing Officer to pass the assessment order afresh de novo by giving opportunity of being heard to the assessee. In this view of the matter, no further directions are required to the learned Commissioner of Income Tax in the matter as is argued by learned counsel for the assessee. The appeal of the assessee has thus no merit. The same is accordingly, dismissed.”

9. The proposition enunciated in ***Malabar Industrial Co. Limited's*** case (supra) is well settled that the Commissioner has to be satisfied of twin conditions namely (i) the order of the Assessing Officer sought to be revised is erroneous and (ii) it is prejudicial to the interests of the revenue. Each case has to be considered on its own facts. The factual position in the present case is different as noticed hereinbefore.

10. A Full Bench of Gauhati High Court in ***Commissioner of income tax vs. Shri Jawahar Bhattacharjee***, ITA No.2 of 2008 decided on 7.2.2012 considering the scope of jurisdiction under section 263 of the Act concluded as under:-

“23.....Jurisdiction under section 263 can be exercised whenever it is found that the order of assessment was erroneous and prejudicial to the interest of the revenue. Cases of assessment order passed on wrong assumption of facts, on incorrect application of law, without due application of mind or without following principles of natural justice are not beyond the scope of Section 263 of the Act.”

11. The findings recorded by the Tribunal are based on appreciation of evidence on record and consideration of relevant statutory provisions and the case law on the point. Learned counsel for the appellant-assessee has not been able to show any illegality or perversity in the said findings.

12. In view of the above, no substantial question of law arises. The appeals stand dismissed.

(Ajay Kumar Mittal)
Judge

March 14, 2016
'gs'

(Raj Mohan Singh)
Judge