

A.F.R.**Reserved on 02.08.2019****Delivered on 14.08.2019****Court No. - 35****Case :-** INCOME TAX APPEAL No. - 223 of 2013**Appellant :-** M/S Meerut Roller Flour Mills Pvt. Ltd**Respondent :-** The Commissioner Of Income Tax And Another**Counsel for Appellant :-** Suyash Agarwal, Rakesh Ranjan Agrawal**Counsel for Respondent :-** C.S.C. Income Tax, Gaurav Mahajan**Hon'ble Bharati Sapru, J.****Hon'ble Rohit Ranjan Agarwal, J.****(Per Hon'ble Rohit Ranjan Agarwal, J.)**

1. This appeal under Section 260 A of the Income Tax Act, 1961 (hereinafter called as 'Act') has been filed assailing the order passed by the Income Tax Appellate Tribunal, Delhi Bench "E" New Delhi dated 02.04.2013 and Revisional order dated 09.02.2012, passed by Commissioner of Income Tax, Meerut, under Section 263 of the Act.

2. The appeal was admitted on 06.09.2013 on the following questions of law:-

"I. Whether on the facts and circumstances of the case the ITAT rightly held that the Commissioner of Income Tax, Meerut has correctly assumed jurisdiction under Section 263, in revising the assessment order dated 15.12.2009 passed under Section 143(3) of the Act for A.Y. 2007-08?

II. Whether the ITAT is right in upholding the order of CIT passed under Section 263 which has been passed without controverting the appellant's explanation/submissions dated 15.10.2009, 05.11.2009 and 04.12.2009 before the A.O. In compliance of his queries in relation to verification of loan creditors and trade creditors?"

3. The case relates to the assessment year 2007-2008. The

assessee filed return of income on 31.10.2007 declaring income of Rs. 10,59,560/-. The said return was processed under Section 143(1) of the Act. Case of the assessee was selected for scrutiny and notice under Section 143(2) of the Act was issued by the Assessing Officer on 26.09.2008, further notice under Section 142(1), dated 25.03.2009, along with questionnaire raising 28 queries was issued and served on the assessee. The assessee on 15.10.2009 filed his replies to the queries raised in notice dated 25.03.2009. It appears that Assessing Officer further required the assessee to furnish explanation, which was submitted by the assessee in form of written submission on 05.11.2009. On 15.12.2009, order under Section 143(2) of the Act was passed by the Assessing Officer, accepting the return of income of Rs.10,59,560/-.

4. Commissioner Income Tax, Meerut exercising power under Section 263 of the Act on 27.10.2010 issued notice to the assessee, a detailed objection in form of written submission was submitted by the assessee before him on 18.10.2011, stating that all the details and documentary evidence in regard to the investment in share capital, unsecured loans, creditors and expenses was submitted before the Assessing Officer by the assessee in reply to the 28 queries raised by the Assessing Officer.

5. On 09.02.2012, the Commissioner Income Tax, Meerut passed an order, partly accepting the objection of the assessee as far as the investment in share capital was concerned but, as regards unsecured loans and creditors were concerned, the case of the assessee was relegated back to

the Assessing Officer directing him to examine, call for requisite details, confirmations and examine them properly after affording assessee proper and reasonable opportunity to explain its case and verify the details with the help of documentary evidence.

6. The order passed by the Commissioner Income Tax, Meerut under Section 263 of the Act was challenged by the assessee before the Income Tax Appellate Tribunal (hereinafter called 'ITAT'). The ITAT dismissed the appeal of the assessee upholding the order passed by the Commissioner of Income Tax, Meerut.

7. Sri Suyash Agarwal, learned counsel appearing for the assessee/ appellant submitted that the Tribunal failed to consider that the Commissioner Income Tax was not justified in invoking the provisions of Section 263 of the Income Tax Act, as the order passed by the Assessing Officer was neither erroneous nor prejudicial to the interest of the revenue. It was further contended that after the case of the appellant was selected for scrutiny, the Assessing Officer had issued notice under Section 143(2) of the Act, raising 28 queries which were in regard to the investment in share capital, unsecured loans, creditors and expenses, which was replied by the assessee, furnishing the entire details along with the documentary evidence. It was also submitted that details of all unsecured loans was furnished to the Assessing Officer along with their PAN numbers and other details as required.

8. He further submitted that the Commissioner Income Tax

while exercising power under Section 263 as well as the ITAT dismissing the appeal had wrongly applied the law laid down by the Apex Court in case of ***Malabar Industrial Company vs. CIT (2000) 109 Taxman 66 (SC)***.

9. The second limb of argument of the counsel for the assessee is that mere non-discussion and non-mentioning about the reply to the queries submitted by the assessee cannot lead to an assumption by the CIT as well as ITAT that Assessing Officer has not applied his mind, he relied upon the decision in case of ***CIT vs. Krishan Capbox Ltd. (2015) 372 ITR 310 (Allahabad)***.

10. It was further contended that the queries raised during assessment proceedings and the same not having been dealt in the assessment order would not lead to the conclusion that no enquiry was made and the Assessing Officer has not applied his mind. Reliance has been placed on the decision of ***CIT vs. Mahendra Kumar Bansal (2008) 297 ITR 99 (Allahabad)***. Another decision which has been relied on by the counsel for the assessee is in the case of ***CIT vs. Goyal Private Family Specific Trust (1988) 171 ITR 698 (Allahabad)***.

11. Per contra, Sri Gaurav Mahajan, learned counsel appearing for the Department submitted that the assessment order dated 15.12.2009 is totally silent in respect of unsecured loans and creditors and the Assessing Officer was bound to examine the identity of creditors, creditworthiness of creditors and genuineness of the transactions before any loan or cash

credit is accepted.

12. He further contended that the Commissioner of Income Tax had rightly exercised his power mandated, under Section 263 and, it was only after giving due opportunity of hearing to the assessee that the assessment order was set aside to certain extent with direction to the Assessing Officer to verify the details. Sri Mahajan lastly submitted that the Tribunal, being the last fact finding Authority, and it was after appreciating the evidence and material on record, came to the conclusion that the matter required no interference in the order passed under Section 263 of the Act. He has relied upon the decision in cases of *CIT vs. Anand Kumar Jain (2015) 231 Taxman 534 (Allahabad)*, *Malabar Industrial Company vs. CIT (2000) 109 Taxman 66 (SC)*, *Swarup Vegetable Products vs. CIT (1991) 54 Taxman 175 (Allahabad)* and *CIT vs. Bhagwan Das (2005) 142 Taxman 1 (Allahabad)*.

13. We have heard counsel for the parties and perused the material on record.

14. As it is undisputed, that Assessing Officer after the case was selected for scrutiny had issued notice under Section 143(2) of the Act and also notice under Section 142(1) with 28 queries to the assessee, which was replied by him along with the documentary evidence, and the Assessing Officer being satisfied passed the order under Section 143(3) of the Act on 15.12.2009. The CIT while exercising power under Section 263 of the Act, partially accepted the reply submitted by the assessee as regards the investment in share capital holding

that the outstanding unsecured loans of six persons to be adjusted against the share application money account, but as regards the unsecured loans and creditors, it directed the Assessing Officer to examine, call for requisite details, confirmations and examine them properly and relegated the matter back to him. While passing the said order the CIT relied upon the decision of the Apex Court in case of **Malabar Industrial Company Ltd.** (supra). Paragraph Nos. 6, 7, 8, 9 and 10 of the said judgment are extracted hereinasunder:-

“6. A bare reading of this provision makes it clear that the pre-requisite to exercise of jurisdiction by the Commissioner suo moto under it, is that the order of the ITO is erroneous insofar as it is prejudicial to the interests of the revenue. The Commissioner has to be satisfied with 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. If one of them is absent - if the order of the ITO is erroneous but is not prejudicial to the revenue or if it is not erroneous but is prejudicial to the revenue-recourse cannot be had to Section 263(1).

7. There can be no doubt that the provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer; it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind.

*The phrase 'prejudicial to the interests of the revenue' is not an expression of art and is not defined in the Act. Understood in its ordinary meaning, it is of wide import and is not confined to loss of tax. The High Court of Calcutta in **Dawjee Dadabhoy & Co. v. S.P. Jain [1957] 31 ITR 872**, the High Court of Karnataka in **CIT v. T. Narayana Pai [1975] 98 ITR 422**, the High Court of Bombay*

in CIT v. Gabriel India Ltd. [1993] 203 ITR 208 and the High Court of Gujarat in CIT v. Smt. Minalben S. Parikh [1995] 215 ITR 81/ 79 Taxman 184 treated loss of tax as prejudicial to the interests of the revenue.

8. Mr. Abraham relied on the judgment of the Division Bench of the High Court of Madras in **Venkatakrishna Rice Co. v. CIT [1987] 163 ITR 129** interpreting 'prejudicial to the interests of the revenue'. The High Court held, "In this context, it must be regarded as involving a conception of acts or orders which are subversive of the administration of revenue. There must be some grievous error in the Order passed by the ITO, which might set a bad trend or pattern for similar assessments, which on abroad reckoning, the Commissioner might think to be prejudicial to the interests of Revenue Administration". In our view, this interpretation is too narrow to merit acceptance. The scheme of the Act is to levy and collect tax in accordance with the provisions of the Act and this task is entrusted to the revenue. If due to an erroneous order of the ITO, the revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to the interests of the revenue.

9. The phrase 'prejudicial to the interests of the 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 Assessing Officer cannot be treated as prejudicial to the interests of the revenue, for example, when an ITO adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the ITO has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the revenue unless the view taken by the ITO is unsustainable in law. It has been held by this Court that where a sum not earned by a person is assessed as income in his hands on his so offering, the order passed by the Assessing Officer accepting the same as such will be erroneous and prejudicial to the interests of the revenue- **Rampyari Devi Saraogi v. CIT [1968] 67 ITR 84**

(SC) and in Smt. Tara Devi Aggarwal v. CIT, [1973] 88 ITR 323 (SC).

10. In the instant case, the Commissioner noted that the ITO passed the order of nil assessment without application of mind. Indeed, the High Court recorded the finding that the ITO failed to apply his mind to the case in all perspective and the order passed by him was erroneous. It appears that the resolution passed by the board of the appellant-company was not placed before the Assessing Officer. Thus, there was no material to support the claim of the appellant that the said amount represented compensation for loss of agricultural income. He accepted the entry in the statement of the account filed by the appellant in the absence of any supporting material and without making any inquiry. On these facts, the conclusion that the order of the ITO was erroneous is irresistible. We are, therefore, of the opinion that the High Court has rightly held that the exercise of the jurisdiction by the Commissioner under Section 263(1) was justified."

15. In the present case, the CIT himself while relying upon the reply submitted by the assessee had partially accepted the claim as far as investment in share capital was concerned but it did not accept the documentary evidence and reply submitted by the assessee before the Assessing Officer as far as unsecured loans and creditors are concerned. The reliance placed by the counsel for the Department on the aforesaid judgment is of no help to him as he has failed to point out how the order of the Assessing Officer was erroneous insofar as it is prejudicial to the interest of the revenue. While the counsel for the assessee relying upon Para No. 10 of the said judgment submitted that the order passed by the assessing authority was not without application of mind, as the same was passed after the replying upon the documentary evidence submitted by the assessee.

16. Similarly, this Court in case of **Anand Kumar Jain** (supra) while interpreting the language of Section 263 had held that where the Assessing Officer passes an order without application of mind or an incorrect statement of fact or incorrect application of law, then the order so passed would be erroneous. But in the present case, Assessing Officer after issuing notice and raising certain queries to the assessee passed the assessment order which cannot be called as erroneous.

17. Reliance has also been placed on the judgment of **Swarup Vegetable Products** (supra), wherein this Court while dealing with a case, where assessee received refund of excise duty and placed the said amount in suspense account and not in profit and loss account and claimed that this amount should not be included in his income, and stated before the Assessing Officer that large part of this amount was claimed by one Sugar Mill who had filed a suit and also a writ petition claiming the said amount and as such, this amount should not be included in his taxable income. This claim was accepted by the ITO. However, when the matter came to the notice of Commissioner, he exercising power under Section 263 held that the ITO had not made proper inquiries before accepting the claim of assessee, and the assessment order was set aside and fresh assessment was directed. This Court refused to interfere in the findings of the Commissioner as the order of the ITO was prejudicial to the revenue.

18. Similarly, the case relied upon by the Department in case of **Bhagwan Das** (supra) also is not applicable in the present

case, as in the case in hand the Assessing Officer after duly putting the assessee under notice and requiring him to produce all the relevant documents had passed the assessment order.

19. The argument of the counsel for the assessee that mere non-discussion and non-mentioning about the reply in the order of the assessing authority would not lead to an assumption that there was no application of mind and the order is erroneous. In **Krishna Capbox (P.) Ltd.** (supra), this Court held as under:-

*9. The Tribunal further considered the question whether discussion of queries and reply received from assessee, in assessment order, is necessary or not. Relying on two judgments of Delhi High Court in **CIT Vs. Vikash Polymers [2012] 341 ITR 537/ [2010] 194 Taxman 57** and **CIT v. Vodafone Essar South Ltd. [2012] 28 taxmann.com 273/ [2013] 212 Taxman 184 (Delhi)**, it held that once inquiry was made, a mere non discussion or non-mention thereof in assessment order cannot lead to assumption that Assessing Officer did not apply his mind or that he has not made inquiry on the subject and this would not justify interference by Commissioner by issuing notice under Section 263 of the Act.*

10. In **Vikash Polymers** (supra) relevant part of the observations in this regard read as under (page 548 of 341 ITR):

"This is for the reason that if a query was raised during the course of scrutiny by the Assessing Officer, which was answered to the satisfaction of the Assessing Officer, but neither the query nor the answer was reflected in the assessment order, that would not, by itself, lead to the conclusion that the order of the Assessing Officer called for interference and revision."

11. Further, the relevant observation made in

Vodafone Essar South Ltd. (*supra*) in this regard reads as under (page 531 of 1 ITR-OL):

"The lack of any discussion on this cannot lead to the assumption that the Assessing Officer did not apply his mind."

12. Learned counsel for the Department could not place any other authority before this Court wherein any otherwise view has been taken. On the contrary, learned counsel for assessee has placed before us a decision of Bombay High Court in **Income Tax Appeal No.296 of 2013 (CIT v. Fine Jewellery (India) Ltd.) [2015] 372 ITR 303/230 Taxman 641/55 taxmann.xom 514 (Bom.)** decided on February 3, 2015, wherein also Bombay High Court, following its earlier decision in **Idea Cellular Ltd. Vs. Dy. CIT [2008] 301 ITR 407 (Bom.)** has taken a similar view and said as under (page 307 of 372 ITR):

".....if a query is raised during assessment proceedings and responded to by the assessee, the mere fact that it is not dealt with in the Assessment Order would not lead to a conclusion that no mind had been applied to it."

20. In case of **Mahendra Kumar Bansal** (*supra*), this Court held that merely because the order of the ITO is not lengthy, it would not establish that the assessment order passed under Section 143(3) of the Act is erroneous and prejudicial to the interest of the revenue. Relevant Para Nos. 11,12 and 14 are extracted hereinasunder:-

"11. In the case of Goyal Private Family Specific Trust [1988] 171 ITR 698, this court has held that the order of the Income-tax Officer may be brief and cryptic, but that by itself is not sufficient reason to brand the assessment order as erroneous and prejudicial to the interests of the Revenue and it was for the Commissioner to point out as to what error was committed by the Income-tax Officer in having reached to its conclusion and in the absence of which

proceedings under Section 263 of the Act is not warranted.

12. *In the case of **Belal Nisa [1988] 171 ITR 643** the Patna High Court has held that where the Income-tax Officer had not carried out the necessary enquiry enjoined by section 143(1) of the Act the Commissioner is within his power in taking action in terms of Section 263(1) of the Act. Similar view has been taken in by the Patna High Court in the case of **Smt. Kaushalya Devi [1988] 171 ITR 686.***

14. *As held by this Court in the case of **Goyal Private Family Specific Trust [1988] 171 ITR 698**, we are of the considered opinion that merely because the Income- tax Officer had not written lengthy order it would not establish that the assessment order passed under Section 143(3)/148 of the Act is erroneous and prejudicial to the interests of the Revenue without bringing on record specific instances, which in the present case, the Commissioner of Income Tax has failed to do."*

21. It is clear that after the notice was issued by the Assessing Officer raising 28 queries from the assessee, which was also replied by him along with the documentary evidence in regard to each of the query, thus the assessment order passed under Section 143(3) of the Act would not render the same as erroneous and prejudicial to the interest of Revenue, unless the Commissioner exercising power under Section 263 brings on record to show that the order of the Assessing Officer is erroneous, as the same was passed without application of mind or the Assessing Officer had made an incorrect assessment of fact or incorrect application of law, but the same not being the case, and the CIT relying upon the reply and the documentary evidence submitted by the assessee granted partial relief, as such the order dated

09.02.2012 passed under Section 263 relegating back the matter to the Assessing Officer as regards unsecured loans and creditors is unsustainable.

22. Having examined the matter at length on facts as well as on the law, we are of the considered opinion that in the present case, it is abundantly clear that the order passed by the Assessing Officer was neither erroneous nor prejudicial to the interest of the Revenue.

23. In view of the above, the order dated 02.04.2013 passed by the Income Tax Appellate Tribunal, Delhi Bench "E" New Delhi and revisional order dated 09.02.2012 passed by Commissioner Income Tax, Meerut under Section 263 are set aside.

24. The question of law is therefore answered in favour of the assessee and against the Revenue. The appeal stands **allowed**.

25. However no order as to costs.

Order Date :- 14.08.2019
V.S.Singh